Neutral Citation Number: [2019] EWHC 1069 (Admin)

Case No CO/3071/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/19

Before :

LORD JUSTICE HICKINBOTTOM

MR JUSTICE HOLGATE
and
MR JUSTICE MARCUS SMITH

- -

Between :

THE QUEEN ON THE APPLICATION OF
(1) HEATHROW HUB LIMITED
(2) RUNWAY INNOVATIONS LIMITED

Claimants

- and -

THE SECRETARY OF STATE FOR TRANSPORT

Defendant

- and -

(1) HEATHROW AIRPORT LIMITED
(2) ARORA HOLDINGS LIMITED

Interested Parties

- and -

THE SPEAKER OF THE HOUSE OF COMMONS

Intervener

- -

- -

Martin Kingston QC, Robert O'Donoghue QC, Satnam Choongh and **Emma Mockford** (instructed by **DAC Beachcroft LLP**) for **the Claimants**

Robert Palmer QC, Alan Bates, Richard Moules and **Andrew Byass** (instructed by **Government Legal Department**) for **the Secretary of State for Transport**

Michael Humphries QC, Gerry Facenna QC and **Richard Turney** (instructed by **Bryan Cave Leighton Paisner LLP**) for **Heathrow Airport Limited**

Charles Banner QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for **Arora Holdings Limited**

Sarah Hannett (instructed by **Office of the Speaker's Counsel in the House of Commons**) for **the Intervener**

Hearing dates: 20-22 March 2019
Further written submissions: 26-28 March 2019

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Approved Judgment

Lord Justice Hickinbottom, Mr Justice Holgate and Mr Justice Marcus Smith:

Introduction

1. This is one of several judicial reviews of the decision of the Secretary of State for Transport ("the Secretary of State"), made under section 5 of the Planning Act 2008 ("the PA 2008"), to designate "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" ("the ANPS"). In the other judicial reviews, heard immediately before this claim, several claimants have challenged the ANPS because it concluded that airport capacity in the South East of England should be increased and that increase should be provided by constructing a third runway at Heathrow Airport ("Heathrow") to the north west of the current runways ("the NWR Scheme"). They generally oppose such expansion. The claims are the subject of a separate judgment ([2019] EWHC 1070 (Admin)) ("the First Judgment").

2. In this judicial review, the Claimants, Heathrow Hub Limited ("HHL") and Runway Innovations Limited ("RIL"), support the expansion of Heathrow, but challenge the decision to expand the airport by way of the NWR Scheme. Although a number of other schemes for additional airport capacity have been considered, for present purposes only one alternative scheme is material. This alternative scheme – promoted by the Claimants, who own the intellectual property rights to it – involves an expansion of capacity at Heathrow by way of an extension of the current northern runway so that it can effectively operate as two separate runways. This scheme was known as the Extended Northern Runway Scheme ("the ENR Scheme").

The Parties

3. The Claimants are companies which have been engaged over several years in developing and promoting the ENR Scheme. As we have noted, they own the intellectual property rights in the scheme; and, although we express no opinion one way or the other about those rights, all of the parties proceeded on the basis that, if the ENR Scheme had been adopted in the ANPS as best satisfying the need for additional capacity, then, in order for the construction and operation of the scheme to go ahead, the Claimants' rights in respect of the scheme would have to be purchased or licensed by someone willing and able to implement it. The Claimants have never themselves had the intention of undertaking the development.

4. Before us, the Claimants were represented by Martin Kingston QC, Robert O'Donoghue QC, Satnam Choongh and Emma Mockford.

5. The Defendant is the Secretary of State who designated the ANPS. He was represented by Robert Palmer QC, Alan Bates, Richard Moules and Andrew Byass.

6. The Interested Parties are Heathrow Airport Limited ("HAL") and Arora Holdings Limited ("Arora"). HAL is the owner and current operator of Heathrow. HAL promoted the NWR Scheme. It was represented by Michael Humphries QC, Gerry Facenna QC and Richard Turney. Arora is part of the Arora Group, which owns a significant portion of the land within the geographic boundary of the NWR Scheme and supports the expansion of Heathrow by way of the NWR Scheme; but it proposes a different solution to the manner in which the scheme is to be implemented. Whereas

HAL proposes new terminal facilities related to the existing facilities which it operates, Arora proposes a distinct terminal which it will develop and operate. It was represented by Charles Banner QC.

7. The Speaker of the House of Commons intervened to object to various statements made to Parliament and Parliamentary Committees being admitted in evidence. He was represented by Sarah Hannett of Counsel, and Saira Salimi and Andrew Burrow of the Office of the Speaker's Counsel.

The Grounds

8. In contradistinction from the other judicial reviews of the ANPS, the Claimants do not challenge the ANPS insofar as it established that there is a need for new airport capacity in the South East of England and that that need is best met by expanding Heathrow. It is the conclusion that the need should be met by the NWR Scheme, rather than their own ENR Scheme, that is challenged. To this end, the Claimants contend that the reasons for preferring the NWR Scheme over the ENR Scheme given in the ANPS are "manifestly bogus"; and that the real reason for rejecting the ENR Scheme was that HAL "never formally guaranteed, in writing, to implement the ENR Scheme if selected by the Government as its preferred scheme for expansion of airport capacity" (paragraphs 5-7 of their Amended Statement of Facts and Grounds for Judicial Review ("the JR Grounds")). As a result, it is said that the Secretary of State "has strengthened, to an unimaginable and lasting degree, [HAL's] monopoly position in relation to the provision of airport services at Heathrow" (paragraph 8).

9. Consequently, the Claimants submit that the Secretary of State's decision to designate the ANPS was legally flawed and should be withdrawn and/or quashed on the five grounds set out in paragraph 10 of the JR Grounds. In summary, the grounds are as follows. In accepting the NWR Scheme and rejecting the ENR Scheme:

Ground 1

The Secretary of State breached European Union ("EU") law by insisting that HAL provides a guarantee or assurance that it would implement the Claimants' scheme if that scheme were selected by the Government as its preferred scheme for airport expansion; and making the provision of that guarantee or assurance an effective pre-condition to the selection of the ENR Scheme. This pre-condition was unlawful as a matter of EU law insofar as it breached articles 106(1) and 102 of the Treaty on the Functioning of the European Union ("TFEU").

Ground 2

The Secretary of State acted unlawfully in insisting on the provision of that guarantee or assurance, because to do so was (i) procedurally unfair and (ii) in breach of the Claimants' legitimate expectation that the Secretary of State would select the ENR Scheme if he found it to be "the most suitable scheme".

Ground 3

The Secretary of State had regard to an immaterial consideration, namely his factually incorrect assumption that the NWR Scheme provided greater capacity for air traffic

movements and more "respite" (i.e. the provision of respite from noise to the surrounding population); and/or failed to have regard to a material consideration, namely the evidence which demonstrated that the ENR Scheme provided for at least the same capacity in terms of air traffic movements as the NWR Scheme and that the NWR Scheme could not in practice deliver the levels of respite attributed to it.

Ground 4

In the alternative to Ground 3, the Secretary of State failed to provide any or any adequate/intelligible reasons for rejecting the Claimants' submissions that the ENR Scheme provided for the same capacity and respite as the NWR Scheme.

Ground 5

The Secretary of State acted unlawfully by taking into account concerns relating to the safety of the ENR Scheme, and the implications of this for deliverability, and failing to provide any or any intelligible details or explanation of what the safety concerns were or what those concerns were based upon. He also acted contrary to the Claimants' legitimate expectation that he would, before relying on a particular matter for rejecting their scheme, bring that matter to their attention and give them a reasonable opportunity to respond.

10. Following receipt of the Secretary of State's Detailed Grounds of Defence, Ground 3 was abandoned. In respect of the other grounds, by direction of Holgate J, the application for permission to proceed was listed before us as a rolled-up hearing, i.e. on the basis that we would deal with the application for permission and, if it should be granted, the substantive application in a single hearing. As a result, we heard full argument on all issues.

Structure of the Judgment

11. In this judgment, after some preliminary points, we describe the factual background of the decision-making process which culminated in the ANPS. The First Judgment sets out the background in some detail (see, especially, paragraphs 42 and following). We focus on the aspects of the process relating to the Secretary of State's designation of the NWR Scheme in preference to the ENR Scheme. Much of the overall decision-making process – which did not relate to this question – is immaterial for the purposes of the determination of this claim, and we have omitted it. We cover any additional evidence that specifically relates to a particular ground of challenge when we deal with that ground.

12. We then deal with the four remaining grounds. We consider first Grounds 4 and 5 (retaining the original numbering, despite the abandonment of Ground 3), which concern the reasons actually articulated in the ANPS for its adoption. We then consider Ground 2 followed by Ground 1, which each concern reasons for its adoption which (the Claimants submit) were not articulated in the ANPS. A critical element in each of these two grounds is the extent to which (if at all) the Secretary of State relied upon the absence of a guarantee or assurance by HAL that, if the ENR Scheme were selected by the Government as its preferred scheme, HAL would implement it.

The Evidence

13. As in the First Judgment, it will help if we identify, at this stage, the main witnesses to whose evidence we will refer.

    i) Caroline Low is a Senior Civil Servant at the Department for Transport ("DfT"), and has been the Director of the Airport Capacity Programme since 2015. She prepared three statements dated 29 November 2018 ("Low 1"), 9 January 2019 (amended 25 January 2019) ("Low 2") and 22 January 2019 ("Low 3").

    ii) Phil Graham has been a Senior Civil Servant with the DfT since 2006. He became Head of Airports Policy in 2012, and from 2012-15 was Head of the Airports Commission ("AC") Secretariat. He prepared a statement dated 29 November 2019 ("Graham").

    iii) Anthony Clake is the majority shareholder in each Claimant company. He prepared two statements dated 1 August 2018 ("Clake 1") and 20 December 2018 ("Clake 2").

    iv) John Holland-Kaye is the Chief Executive Officer of HAL. He prepared a statement dated 28 November 2018 ("Holland-Kaye").

14. Ms Hannett on behalf of the Speaker of the House of Commons took exception to certain statements of the Secretary of State being admitted in evidence as (she submitted) they were the subject of Parliamentary privilege under article 9 of the Bill of Rights, namely:

    i) The Secretary of States' response in the House of Commons to a question from Sir Gerald Howarth MP following his statement on 25 October 2016 announcing the Government's preference for the NWR Scheme (see paragraph 71 below).

    ii) The Secretary of State's response in the taking of evidence by the House of Commons Transport Committee on 7 February 2018 (see paragraph 74 below).

15. We heard that evidence *de bene esse*; and we refer to it during the course of our summary of the factual background. We deal with the Speaker's formal application to have that evidence not admitted in paragraphs 139-152 below.

Deliverability

16. Before we consider the relevant factual background, we should refer to the concept of "deliverability" in the planning context of this case, which is crucial to an understanding of the process that culminated in the ANPS.

17. "Deliverability" is the degree to which a development is viable and achievable. In a particular case, it may be dependent upon many variable constraints, including those of the environment, capacity, practicality and financeability. Some of these factors are "objective" in the sense that they are inherent in the development itself, e.g. environmental constraints. They are unaffected by who the developer might be. Others may effectively arise out of the identity of the promoter, e.g. availability of the site if the developer does not own or have control over it. These categories are not hermetically sealed: for example, financeability may depend upon the nature of the

development and/or the promoter. However, in the context of this claim, the distinction is of some use. Although we stress that none of these terms was used by any of the parties before us, we will refer to constraints on "objective" deliverability, that are inherent in the nature of the development, as "scheme-specific"; and those which are a consequence of the nature of the promoter as "promoter-specific".

18. The ENR Scheme had two particular constraints on deliverability upon which this claim focuses. First, the ENR Scheme was regarded as being a novel concept. It was without precedent – extending a runway to create two in-line runways had never been done before – which itself resulted in a deliverability risk, irrespective of who the promoter was. That was a scheme-specific factor. However, the ENR Scheme was the only short-listed scheme *not* being promoted by the owner/operator of the airport in question. That also led to a deliverability risk; but one that was not an inherent feature of the scheme. It was a promoter-specific factor.

The Statutory Scheme

19. The statutory scheme of which NPSs form part is considered in detail in paragraphs 20-41 of the First Judgment, which also considers a number of discrete issues arising out of that scheme including the meaning of "Government policy" in the PA 2008 (paragraphs 86-98), the meaning of "reasons for the policy" in section 5(7) (paragraphs 113-123), consultation requirements (paragraphs 124-137), the effect of section 13(1) of the PA 2008 (paragraphs 138-140), and the relevant standard of review (paragraphs 141-184).

20. In brief, as described in the First Judgment, the designation of NPSs is provided for in section 5 of the PA 2008. An NPS sets out national policy in relation to one or more specified descriptions of development (section 5); and may only be designated if various consultation and publicity requirements are met (section 7), and if the statement is laid before Parliament (section 9). NPSs do not themselves provide any form of development consent. Rather, they provide a broad policy statement for the consideration of subsequent applications for development consent. Such applications result in development consent orders ("DCOs"), which are themselves statutory instruments. An NPS may be challenged by way of judicial review (section 13).

The Factual Background

21. In September 2012, the Coalition Government established the AC, an independent body of experts chaired by Sir Howard Davies. The purpose of the Commission was to examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub, and to identify and evaluate how any need for additional capacity should be met in the short, medium and long term.

22. Mr Graham describes the approach to the brief for the AC in his statement. He confirms that the AC was asked to "examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important hub" (paragraph 10); but continues (paragraph 11):

> "The wording around the UK's role as Europe's most important aviation hub was carefully selected. The intention was to put the focus on maintaining the UK's connectivity and prominence in

> the international aviation market, without implying that only a 'hub airport' (such as [Heathrow]) could be the answer."

23. The approach of the AC was evidence-based: its assessment was to be objective, and its conclusions objectively reached and justified. It wished to consider the deliverability of schemes in the sense of whether they could be achieved with acceptable environmental and other consequences (see, e.g. paragraph 1.14 of the AC's Guidance Document 01: Submitted evidence and proposals to the [AC]), but which did not necessarily emanate from existing airport operators or from scheme sponsors who could actually deliver the scheme they were proposing. Thus, the AC considered proposals that were not going to be delivered by the scheme proposer, including the Claimants' ENR Scheme but also schemes that it put forward itself. The AC's Guidance Document 01 stated:

> "We are aware that a number of parties – including the owners of existing airports – have an interest in developing options for airport expansion or the construction of new airports. In some cases, parties clearly wish actively to promote options; in others, they might simply wish to explore and test them. We are prepared to co-operate with such parties wherever possible. We are also keen, however, to ensure that credible options which lack a properly funded sponsor are not neglected and receive sufficient development to allow them to be assessed fairly alongside the sponsored options."

24. Thus, the process of the AC was very much a "competition for ideas", some emanating from proposers who were themselves capable of delivering the scheme they were proposing and some not. It was an aim of the AC to consider all proposals fairly and to identify the proposals that were objectively the best. If the proposer of a scheme would not, or might not, itself be willing and able to deliver it, that of course might lead to a deliverability risk. However, the AC's brief and approach inevitably meant that, in its assessment, it would disregard the fact that the proposer of a given scheme might not itself intend (or be able) to deliver it. And, as the references relied on by the Claimants (see paragraph 22 of their written submissions) reflect, the AC clearly did disregard that promoter-specific factor.

25. It is therefore clear that the AC was, in its process, focusing on *objective* deliverability, that is to say on factors affecting a scheme's deliverability irrespective of *who* was delivering it. It therefore excluded from its consideration any promoter-specific deliverability risk that might arise from the fact that the Claimants did not own/operate Heathrow and would not in any event be willing or able to deliver the ENR Scheme themselves, being entirely reliant upon someone else to do so. In respect of the ENR Scheme, it was in fact clearly the Claimants' intention that HAL would deliver it, by purchasing the intellectual property rights in the scheme and then constructing and operating it. They made that intention known to the Secretary of State. There were no other runners.

26. The AC received 52, and (because of the options the AC itself raised) considered 58, different proposals for delivering additional airport capacity in London and the South East of England by 2030. On 17 December 2013, it published an interim report ("the AC Interim Report"), which concluded (i) there was a need for further airport capacity

by 2030, (ii) such capacity could not be delivered by the existing facilities, and (iii) there was a "clear case for one net additional runway in London and the South East, to come into operation by 2030" (Chapter 6: Summary, page 172). The report put forward three options, namely the NWR Scheme and the ENR Scheme (both at Heathrow), plus a scheme proposing a second runway at Gatwick Airport ("the Gatwick 2R Scheme"). For the purpose of this claim, the Gatwick 2R Scheme is largely irrelevant.

27. After considerable further work on these three short-listed options, on 1 July 2015, the AC published its final report ("the AC Final Report"). This concluded that there was a need for additional runway capacity in the South East of England by 2030, and that all three options described in its interim report were "credible". However, the report recommended – amongst other things, and with a number of measures intended to address environmental and community impacts – the NWR Scheme. That conclusion by the AC, on the evidence before it, has never been challenged.

28. The AC Final Report presumed that its advice would be considered by the Secretary of State as part of his consideration of a "national policy statement" ("NPS") under the PA 2008 (or, possibly, a hybrid Bill) in respect of the steps required to increase airport capacity.

29. After review by the DfT, including a Senior Review Panel, on 14 December 2015 the Secretary of State announced that the Government accepted the case for airport expansion; agreed with and would further consider the AC's short-list of options; and would use the mechanism of an NPS to establish the policy framework within which to consider an application by a developer for development consent.

30. As we have indicated, the AC was not concerned with the risks involved in the ENR Scheme as a result of the Claimants as promoters not being willing or able to deliver it themselves, being reliant upon someone else – in practice, HAL – to do so. Unsurprisingly, given the need to deliver additional runway capacity and in a timely manner, the Secretary of State was concerned by the fact that, in any event, the Claimants would not – indeed, could not – themselves deliver the scheme in terms of construction or operation. That issue was addressed by the Airport Capacity Directorate of the DfT in a submission to the Secretary of State dated 4 September 2015, which said:

> "1. [HHL's ENR Scheme] is intended to be delivered by [HAL], which is promoting its own scheme. Consequently, full engagement on delivery of the [ENR Scheme] is not possible while HAL's scheme is also being considered.
>
> **Recommendation**
>
> 2. Note that a decision to prefer HHL's scheme would require additional time of around two months, although this estimate is highly uncertain, while [the DfT] undertakes the engagement with HAL to bring the HHL scheme to the same level of certainty as the HAL and Gatwick Airport Limited (GAL) schemes.
>
> …

Considerations

> 5. HHL has never planned to act as the delivery agent for its scheme, the [ENR Scheme]. If selected as the Government's preferred scheme, then HHL's intention is that HAL, which is promoting its own scheme, would deliver the scheme as the airport owner.
>
> 6. The [DfT] has not engaged with HAL on delivery of HHL's scheme because to do so effectively would not be possible while simultaneously engaging with HAL on delivery of its own scheme. Engagement with HHL is largely limited to scheme design and, as such, the statement of principles ["SoP", explained at paragraph 33 and following below] with HHL will cover fewer areas and provide less certainty and clarity about delivery.
>
> 7. Selection of HHL's scheme (subject to conditions including assurance of delivery) will require an additional two months, although this estimate remains highly uncertain, to the current programme timetable while HHL negotiates with HAL to sell its intellectual property rights and the [DfT] then engages with HAL to bring the HHL [SoP] to the same level as the others. The [DfT] is likely to be able to rely on HAL's own [SoP] in some areas, but how HAL would engage with HHL remains uncertain.
>
> 8. The additional time required for engagement on HHL's scheme would impact the draft [ANPS] or command paper for consultation following quickly. We expect currently that consultation would start in spring 2016, assuming a decision on the preferred scheme is taken by October 2015.
>
> 9. The implications of engaging with HAL on delivery of a scheme other than its own do not form part of current considerations, but will be addressed if the Government chooses to prefer the HHL scheme."

31. The issue was also raised with the Claimants. Thus, by way of example, at a meeting between the DfT and the Claimants on 9 September 2015, the minutes record that the Claimants said discussions had taken place with HAL "up to the points the [AC's] Final Report was published and these need to be reactivated". Ms Low then:

> "…[e]xplained that [the DfT] has not been engaging with HAL on HHL's scheme and is looking to HHL to do this. [The DfT] cannot just take the promise from HHL that the package of recommendations from the [AC] are all accepted and assume, without information from HAL, that this is what would be delivered."

32. However, at a meeting a week later, on 16 September 2015, the Claimants explained to the DfT that that was, quite simply, unrealistic. Mr Clake is recorded as saying:

> "Discussed the relationship with HAL and that at this stage HAL does not want to endorse something that is not their own proposal as they are going through the engagement process themselves. Stated that HAL would engage eventually as the economic impacts for them would be positive. HHL feels that the [SoP, then in draft form] is currently unrealistic and attempts to put them in the position of operator. Explained that funding the private side of Heathrow is relatively straightforward, but demonstrating deliverability on the operational side is more complex."

The record of the meeting shows that the DfT did not, at that time, accept this statement of the position, and continued to press for more:

> "HHL's working relationship with HAL needs to be shown to understand how HHL intends to deliver its scheme."

33. However, by the time of the conclusion of the SoP as between the Claimants and the Secretary of State, it seems that the Secretary of State had understood the Claimants' position, namely that, although the Claimants had no intention of delivering the ENR Scheme, HAL (as the owner/operator of Heathrow) could implement the ENR Scheme but was proposing its own NWR Scheme which it preferred.

34. The Claimants appear to have been of the view that HAL had taken that position primarily as the result of the conflict of interest it (HAL) had because it was promoting the NWR Scheme rather than as the result of the respective merits of the schemes.

35. But, in his submissions on behalf of HAL, Mr Humphries stressed that HAL's preference for the NWR Scheme was not based on purely commercial self-interest: to the contrary, HAL (as an experienced operator of Heathrow) raised a series of technical and planning concerns about the ENR Scheme, which it made in its response to the AC's initial assessment in 2015 and with which it persisted. These concerns are described in the evidence (notably in Holland-Kaye, paragraph 14). They related in particular to the following planning issues.

i) Runway capacity: As described below in relation to Ground 4 (see paragraphs 87-102), HAL considered the capacity of the ENR Scheme to be less than that of the NWR Scheme.

ii) Respite: HAL considered that the NWR Scheme provided greater potential for real noise respite than the ENR Scheme.

iii) Air noise effects: HAL considered that the NWR Scheme would affect fewer people with its noise footprint than the ENR Scheme.

iv) Safety: HAL noted that the novelty of the ENR Scheme gave rise to extra safety risks, which the ENR Scheme "will struggle positively to address".

v) Deliverability: In its response to the AC's initial assessment, HAL said this at paragraph 5.25.1.2:

> "We agree with the [AC's] assertion that [the ENR Scheme] cannot be delivered by 2023. However, we believe that there are three compelling reasons why the opening date for the ENR runway will be considerably later than the date of 2026 that the [AC] have currently assessed. These are a) Commercial complexity, b) Consenting strategy and c) Construction schedule complexity…"

vi) Costs: HAL was concerned that the Claimants' costs for the ENR Scheme were understated.

36. Underlying many, if not all, of these concerns, was the fact that the ENR Scheme was a novel proposal. HAL's response to the AC's initial assessment stressed the difficulties that this caused in terms of objective deliverability. Thus, at paragraph 1.5.5, it stated (emphasis added):

> "We believe the [ENR Scheme] option presents some interesting development concepts. At the same time we can see real challenges for which the Commission's assessment needs to fully consider. In particular, the consultation documents over-estimate the ATM [i.e. "air traffic movements", in terms of total number of take-off and landings per unit of time] capacity and benefits of the [E]NR Scheme, and materially understate the costs. Significant issues of commercial delivery also need to be included. *Above all, the sustainability impacts of restrictions on noise respite need to be adequately assessed.*"

Mr Humphries explained that because of these concerns over the greater noise impact of the ENR scheme and the lesser respite provided for residents and businesses, combined with its lower ATM capacity, HAL assessed the ENR Scheme as being "less consentible", i.e. carrying a greater DCO risk, and also as having a greater risk of delay.

37. We understand, of course, that, when voicing these concerns, HAL was in the process of promoting its own scheme; and that the concerns cannot simply be accepted as well-founded. That must have been as obvious to the AC and the Secretary of State as it is to us. But neither can they simply be completely discounted. Indeed, as matters going to the objective deliverability of the ENR Scheme, HAL was clearly entitled and right to raise them: and we have no doubt that both the AC and the Secretary of State would be interested in, and concerned by, the technical and planning points made by HAL as an experienced airport operator at Heathrow. These concerns of HAL with the ENR Scheme persisted. They had not been resolved by the time the SoPs were concluded in June/July 2016. For example, in its response to the draft ANPS in May 2017, HAL submitted (at paragraph 2.9.4) that:

> "[T]hese inherent difficulties with the ENR mean that it is unsuitable to be selected as the Government's preferred runway option".

38. In any event, the Claimants considered that, until the Government had decided which was its preferred Heathrow scheme, HAL could not be expected to engage with the Claimants on the ENR Scheme to such an extent that the Secretary of State's concerns regarding the risk to deliverability would be assuaged; and there appears to have come a point when the Secretary of State agreed. It is not easy to date when the penny finally dropped in the DfT – nor does the precise date matter for the purposes of this claim – but the documents suggest that it was perhaps in September or October 2015. As we have indicated (see paragraph 33 above), the penny had certainly dropped by the time the Claimants entered into the SoP with the Secretary of State.

39. In anticipation of receiving the AC Final Report, the Aviation Capacity Directorate (later, the Airport Capacity Directorate) had been established within the DfT to support Government Ministers in their decisions about the report and its recommendations. It reviewed the AC Final Report, whilst in parallel engaging with the promoters of the three short-listed schemes. The output of this engagement was to record for each promoter "in [an SoP]… document certain clarifications in respect of each promoter's respective scheme, assurances about a suitable package of mitigations, future working relationships and delivery plans. More generally, this engagement acted to inform the Government's assessment of deliverability in the event a need for capacity was accepted and their scheme became the government's preferred scheme" (Low 1, paragraph 59). A separate SoP was concluded between the DfT and the proposer of each of the three schemes; although, for obvious reasons, this judgment will focus on the SoP concluded between the DfT and the Claimants in June/July 2016.

40. Ms Low (at Low 1, paragraph 115) describes the DfT's approach regarding these SoPs, which was to adopt "a consistent and fair approach with each promoter in developing its [SoP]. We did not discuss another promoter's solution with any other promoter, but focused solely on each promoter's own scheme and the development of its own [SoP]." However, because the Claimants would not be delivering the ENR Scheme in any event, as the submission presaged, the Claimants' SoP contained less about – and was less clear and certain about – delivery than the other SoPs.

41. In the Claimants' SoP, "HHL" was defined to include both Claimants. As set out in clause 1.4 of the Claimants' SoP, the purpose of the SoPs was "to inform the Government's policy on aviation capacity following the Government's consideration of the interim and final reports of the independent [AC]".

42. The SoP noted the substance of the Secretary of State's oral statement to Parliament on 14 December 2015 that the Government:

> "1.3.1 will undertake further work on environmental impacts and the best possible mitigation measures before deciding on its preferred scheme;
>
> 1.3.2 accepts the case for expansion (and therefore agrees with the [AC] that London and the south-east needs more runway capacity by 2030);
>
> 1.3.3 accepts the [AC's] short-list of options, which includes HHL's Scheme…; and

> 1.3.4 will begin work immediately on preparing the building blocks for an [ANPS] (in line with the [PA] 2008)."

43. Although the SoP is a formal document, clause 2.1 clearly – and, no doubt, deliberately – gave the Secretary of State flexibility. It provided:

> "This [SoP] is not intended to have any legal effect. In particular, HHL acknowledges that:
>
> 2.1.1 it does not create any legitimate expectation, whether substantive or procedural, in relation to the exercise of functions by Government and/or by the Civil Aviation Authority ('CAA');
>
> 2.1.2 the Secretary of State is required to exercise his functions in accordance with public law and this [SoP] cannot fetter his discretion to have regard to all the relevant circumstances in the exercise of those functions, including the introduction of appropriate policies from time to time; and
>
> 2.1.3 this [SoP] is not legally binding and it does not create, evidence or imply any partnership, contract, obligation to enter into a contract or obligation to carry out, terminate or omit to carry out any action, enter into any negotiations or cease from any discussions with any third parties."

44. Assuming it became the Government's preferred scheme (a concept considered further below), the ENR Scheme was defined in clause 2.3, which stated:

> "The Scheme which HHL confirms it intended to procure the development and implementation of at Heathrow Airport… *by [HAL]*… is set out at Appendices 1 (Airport Masterplan), 2 (Phasing and Cost) and 3 (Surface Access Strategy)…. The Scheme involves phasing, details of which are set out in Appendix 2 (Phasing and Cost)" (emphasis added).

The emphasised words in this quotation make clear that the Claimants were never themselves going to deliver the ENR Scheme, but rather intended that HAL should do so if their scheme were to be selected.

45. The SoP contained within it three important dates, namely the date of (i) the signing of the SoP, (ii) the selection of the preferred scheme and (iii) the dating of the SoP.

46. The date of the signing of the SoP: Although the version of the SoP before us is unsigned (and, of course, undated: see below), it is our understanding that the Claimants' SoP was signed in June/July 2016, well before any decision regarding preferred scheme had been made and announced (i.e. the October 2016 Preference Decision: see paragraph 70 below). Signing the SoP of course implied no commitment to the ENR Scheme on the part of the Government. As we have described, the SoP expressly did not create legal obligations/rights and expressly excluded any legitimate expectation. Clause 1.4 of the SoP provided:

> "At the date of signing this [SoP] (but not dating this [SoP]), the Government has not yet formed a view on the recommendations in the [AC's] Report as to how best to meet the need for more runway capacity in London and the south-east. The signing of this [SoP] does not imply that the Government has yet come to a conclusion on its preferred scheme or how best to mitigate the impacts on communities of expansion."

The point of signing the SoP was to have an identified and agreed set of commitments by both the Secretary of State and the Claimants – including in relation to commitments that the Claimants were to procure from HAL – that would be triggered in the event that the Claimants' scheme became the preferred scheme. The Secretary of State was ensuring that, if this contingency arose, everyone was clear as to what the next steps would be.

47. The selection of the preferred scheme: The second relevant date is the date on which, if at all, the ENR Scheme was chosen as the Government's preferred scheme. As to this:

i) Self-evidently, the SoP contained no guarantee that the ENR Scheme would be the preferred scheme. Indeed, it made that clear in terms. If the ENR Scheme were selected, clause 1.5 provided as follows:

> "If the Government concludes no later than 31 October 2016 (or such other date as may be agreed between the Secretary of State and HHL each acting reasonably) that HHL's Scheme is the preferred scheme, this [SoP] sets out the principles on which the Government and HHL intend to proceed, subject to the issue of a notice by the Secretary of State in accordance with paragraph 1 of Part 1 (Principles Relating to Key Areas of Scheme Development and Implementation)."

Thus, the Government's preference decision served as the trigger for the obligations contained in the SoP for the preferred scheme.

ii) Paragraph 1 of Part 1 to the SoP provided as follows:

> "The following Parts 2 (Key Principles – Scheme Design) to Part 3 (Key Principles to be included in the Agreement) set out the areas identified by the Secretary of State as key to the development and implementation of the Scheme and the principles, acknowledgments and/or statements which relate to them. Subject to paragraph 2.1 of the Introduction, they take effect only if the Government concludes that HHL's Scheme is the preferred scheme. In this case, such Parts take effect when communicated in writing to HHL by the Secretary of State stating that HHL's Scheme is the scheme it prefers. In the event that the Government concludes that HHL's Scheme is not the scheme it prefers such conclusion will be communicated in

> writing to HHL by the Secretary of State and this [SoP] and (except for this paragraph 1 of this Part 1 and paragraph 3.6 (Fundamental Principles) of the Introduction which shall continue to apply) the Parts herein will expire and not take effect from the date of receipt of such communication."

Thus, paragraph 1 of Part 1 depended upon a choice being made by the Government as to which scheme it preferred taking place before 31 October 2016, which preference would be communicated to the various scheme proposers. In the event that the preferred scheme was the ENR Scheme, that communication to the Claimants would trigger obligations under Parts 2 and 3 in their SoP. Nothing in the SoPs of course bound the Government to this date, as the express terms set out in paragraph 43 above make clear.

iii) Parts 2 and 3 to the SoP dealt with scheme design and the content of the agreement that the Claimants would reach with HAL. Part 2, in its entirety, provided as follows:

> "1.1 The Secretary of State and HHL acknowledge that the Scheme requires adoption by [HAL] and further elaboration and/or amendment and will also be subject to ongoing Government review, certain legal, regulatory and safety requirements, including requirements in relation to spatial planning and environmental effects.
>
> 1.2 The Secretary of State and HHL therefore recognise that HHL will, and subject to paragraphs 3.2 and 3.4 in the Introduction, will procure that [HAL] will, continue to elaborate and amend the Scheme.
>
> 1.3 HHL confirms that it will procure that [HAL] will confirm that it will further elaborate and/or amend the Scheme with a view to the runway coming into operation and in use by the public by 2030 or earlier."

The brevity of Part 2 again reflects the fact that the Claimants were never themselves going to deliver the ENR Scheme.

iv) Part 3 to the SoP provided as follows:

> "In accordance with paragraphs 3.2 and 3.4 in the Introduction, HHL acknowledges that it will in concluding the discussions referred to in paragraphs 3.2 and 3.4 in the Introduction endeavour to ensure that [HAL] agrees to include in the Agreement appropriate obligations to develop and implement the Scheme in accordance with the following key principles. HHL will endeavour to ensure that all detailed commitments necessary to satisfy these key principles are included and developed in the Agreement with [HAL]."

Part 3 refers to an "Agreement" with HAL. "Agreement" is a defined term in the SoP: in clause 3.2 (set out in (v) below), it is defined as an agreement between the Claimants and HAL "to take forward such development and implementation of the Scheme in accordance with this [SoP] (which may include, amongst other matters, the sale, licence or otherwise transfer of the intellectual property rights held by HHL in relation to the Scheme)". It is clear, however, from Part 3 that the Agreement would cover very much more than simply the acquisition, by HAL, of the Claimants' intellectual property rights. Thus, purely by way of example, the Claimants were obliged to endeavour to ensure that HAL agreed to the following "key delivery milestones", which are set out in paragraph 1.1 of Part 3:

> "HHL will, and will procure that [HAL] will, develop and implement the Scheme such that:
>
> 1.1.1 an application for development consent for the Scheme is submitted by September 2018;
>
> 1.1.2 a development consent order for the Scheme is secured by no later than 31 March 2020; and
>
> 1.1.3 the additional runway capacity is operational and in use by the public by 2030 or earlier.
>
> The matters set out in this paragraph 1.1 of this Part 3 are dependent on the timing of (i) any Government decision in relation to its preferred scheme by no later than 31 October 2016 (or such other date as the Secretary of State and HHL each acting reasonably agree) and (ii) securing [an NPS] free of challenge by no later than 31 July 2017 (or such other date as the Secretary of State and HHL each acting reasonably agree)."

v) In the event the ENR Scheme was the preferred scheme, the Claimants' obligations were described in more general terms in the SoP, as follows:

> "3.1 HHL is a private sector entity promoting a scheme to expand the Airport by extending the northern runway within the economic regulatory system for airport operators established by the Civil Aviation Act 2012 ['the CAA 2012'], as amended from time to time… Consequently, it is acknowledged by HHL that it would be for HHL to procure the development and implementation of its Scheme in the manner outlined in this [SoP].
>
> 3.2 The Secretary of State and HHL both acknowledge that in the event that the Secretary of State concludes that HHL's Scheme is the Government's preferred scheme, that the development and implementation of the Scheme is conditional on HHL reaching agreement with [HAL] to take forward such development and implementation of the

Scheme in accordance with this [SoP] (which may include, amongst other matters, the sale, licence or otherwise transfer of the intellectual property rights held by HHL in relation to the Scheme) ('Agreement').

3.3 HHL confirms that [HAL] and HHL have undertaken initial commercial discussions regarding a possible Agreement including in respect of a purchase price for the sale, licence or otherwise transfer of the intellectual property rights held by HHL referred to in paragraph 3.2 above. HHL further confirms that these discussions were paused following the [AC's] Report where [HAL's] own scheme (combined with a significant package of compensation and mitigation measures) was recommended by the AC. However, should the Government conclude that HHL's Scheme is the preferred scheme, then HHL is confident that commercial discussions regarding the Agreement would be resumed and satisfactorily concluded with [HAL] in relation to the sale, licence or otherwise transfer of appropriate rights and the development and implementation of the Scheme to ensure its successful delivery. It is acknowledged that the development and implementation of the Scheme would be conditional on [HAL] undertaking appropriate due diligence on the Scheme, some of which [HAL] would wish to conclude or commence as part of reaching the Agreement, which HHL has acknowledged may include but not be limited to the following:

3.3.1 continuing a due diligence exercise in relation to the intellectual property rights held by HHL;

3.3.2 continuing a due diligence exercise in relation to the technical aspects of the Scheme;

3.3.3 the structure, terms and documentation relating to the Scheme;

3.3.4 a due diligence exercise in respect of the financing;

3.3.5 all planning, regulatory and legal consents and approvals; and

3.3.6 continuing an assessment of the commercial merits of and capital cost for the Scheme.

3.4 Accordingly, HHL will use best endeavours to enter into the Agreement with [HAL] within thirty (30) days of, and in any event as soon as reasonably practicable after, receiving a notice from the Secretary of State in accordance with paragraph 1 of Part 1 (Principles Relating

to Key Areas of Scheme Development and Implementation) that its Scheme is the preferred scheme. HHL will confirm in writing that this has occurred and provide full details of such arrangements including certified copies of the Agreement signed by [HAL].

3.5 For the purposes of this [SoP] where HHL is to procure that [HAL] takes certain actions (including acknowledgements) in accordance with this [SoP], it is acknowledged by the Secretary of State and HHL that HHL will use best endeavours to procure that [HHL] takes such action (including acknowledgements).

3.6 It is acknowledged by HHL and HHL will procure such an acknowledgement letter from [HAL] at the time of entry into the Agreement in accordance with paragraph 3.4, that the costs of the Scheme, including all development, planning and capital costs and any costs incurred by HHL and/or [HAL] prior to and after the date of this [SoP] in relation to the development and implementation of the Scheme, are entirely financeable without Government financial support. Subject to paragraph 3 (Surface Access Strategy) of Part 3 (Key Principles to be included in the Agreement) HHL will, and will procure that [HAL] will, implement HHL's surface access proposal as set out in Appendix 3 (Surface Access Strategy).

3.7 In the event that the Scheme is the Government's preferred scheme, HHL will, and will procure that [HAL] will, develop a detailed and robust proposal for the entire funding of the Scheme and also elaborate and develop the Scheme in accordance with Parts 2 (Key Principles – Scheme Design) and 3 (Key Principles to be included in the Agreement).

3.8 Prior to entering into the Agreement with [HAL], HHL will continue to fund all necessary work in progressing the development of the Scheme in order to ensure that delivery of new runway capacity proceeds in line with Government requirements and timescales. On the assumption that the Scheme is the Government's preferred scheme…, this commitment by HHL continues until such time as the Agreement is entered into and is unconditional.

3.9 The Government's role in relation to expanding airport capacity is that of enabler through the exercise of its public functions and not, in this context, procurer of works, services and/or goods whether from HHL, [HAL] or otherwise. The Government also has a broader role which includes developing policy, promoting legislation and exercising public functions. HHL acknowledges and

> will procure such an acknowledgement from [HAL] that these roles are likely to include activities and decisions which affect the development and implementation of it Scheme from time to time."

It is clear from clause 3.4 that, if the ENR Scheme were to be selected and the Claimants' SoP triggered, the Claimants would be under substantial pressure to conclude the Agreement with HAL in short order: it provided that the Claimants would use best endeavours to enter into the Agreement with HAL within 30 days of, and in any event as soon as reasonably practicable after receiving a notice from the Secretary of State that their scheme was the preferred scheme.

48. The dating of the SoP: In the event, the SoP was never dated, because the ENR Scheme was never selected as the preferred scheme; but it is evident from the SoP itself that the dating of the SoP was potentially significant. By clause 4.1, the dating of the SoP would trigger certain additional obligations on the Claimants:

> "The principles relating to process in paragraphs 5 (General Standards) and 6 (General Behaviours) below take effect immediately on dating of this [SoP]."

Paragraphs 5 and 6 contain a series of obligations as to how the parties are to behave in implementing the ENR Scheme, should it be preferred. Although the SoP does not say when it was to be dated, it can be inferred from the content of paragraphs 5 and 6 that this was expected to occur shortly after the ENR Scheme had been identified as the preferred scheme. Thus, clause 5.1 provided:

> "HHL will, as soon as reasonably practicable, notify, or, subject to paragraphs 3.2 and 3.4 above, procure that [HAL] notifies, the Secretary of State's representative… in writing of any circumstances which are likely to prejudice the performance of such activities in accordance with this [SoP] and/or to develop and implement its Scheme whether temporarily or permanently."

49. It is important to note that none of the dates identified above is triggered by – or, indeed, affected by – any steps taken in relation to the ANPS. They are all independent of the ANPS and, indeed, precede it. That is self-evidently the case as regards the signing of the SoP. The time for the dating of the SoP is not defined, but is closely related to the Government's notification of the preferred scheme (see paragraph 47 above). The SoP envisaged that this would occur no later than 31 October 2016 (see clause 1.5 of the SoP, quoted in paragraph 47(i) above) – but, again, there was no commitment on the Government to reach a decision by this date.

50. Both Ms Low (see Low 1, paragraphs 69 and following) and Mr Clake (Clake 1, paragraph 23) describe the SoP in their statements. We prefer, however, to rely upon the terms of the SoP itself, as this is the best record of the manner in which the Secretary of State was engaging with the Claimants. Mr Clake also makes reference, in his statement, to certain assurances he claims he received from the DfT, along the lines that the Claimants would not be disadvantaged on the basis that they were not operators of Heathrow (or, indeed, any airport). Similarly, Ms Low references documents considering and understandings relating to the SoP before it was concluded (Low 1,

paragraphs 554 and 571). We have no reason to believe that these things did not occur – but we discount them as of any real evidential weight. The fact is that they are either confirmatory of what the SoP says (and so add nothing) or they depart from the SoP (and are to be disregarded for that reason).

51. Between the SoP and August 2016, the question of the interaction between the Claimants and HAL did not arise further, except in some limited references to the Claimants' patent protection in letters written by them to the DfT in February 2016. As Mr Kingston and Mr O'Donoghue said (see, e.g., paragraph 30(g)-(j) of their written submissions), during this period, the Claimants appear to have proceeded on the basis that HAL would focus on its own scheme (i.e. the NWR Scheme), and the commercial negotiations between the Claimants and HAL over the purchase of the relevant intellectual property rights in the ENR Scheme and the subsequent implementation of that scheme by HAL would not be taken forward substantively unless and until the ENR Scheme had been selected as the preferred scheme. But there was no reason why the Claimants could not have engaged with HAL, had they chosen to do so. Certainly, this was not *precluded* by the SoP. Indeed, the fact that (i) it was expected that HAL would be responsible for the implementation of the ENR Scheme, (ii) HAL had persisting technical concerns about the scheme and (iii) the SoP indicated that the Claimants would only have a short time to come to an agreement with HAL if the ENR Scheme were chosen as preferred might at least suggest that it was expected that some progress might be made between the Claimants and HAL prior to the announcement of a preferred scheme.

52. When the Rt Hon Theresa May MP became Prime Minister on 14 July 2016, there was a ministerial re-shuffle, resulting in the Rt Hon Chris Grayling MP replacing the Rt Hon Sir Patrick McLoughlin MP as Secretary of State. After familiarising himself with the Department and the subject matter in relation to proposals for airport expansion, the new Secretary of State met each of the three short-listed scheme promoters on 16 and 17 August 2016.

53. To this end, he was provided with a briefing note for his meeting with the Claimants on 17 August 2016. So far as relevant to this claim, the briefing note provided as follows (all emphasis as in original):

> **"3. BACKGROUND**
>
> **[HHL] will want to impress upon you the advantages and benefits of their scheme during your visit to the airport.**
>
> HHL are an independent company whose proposal for an extension to the existing northern runway at Heathrow Airport was short-listed by the [AC]. HHL are not part of [HAL] and are promoting a rival scheme to HAL's own.
>
> HHL believe that the [AC] was wrong to recommend HAL's scheme over theirs and have suggested that they may legally challenge a Government decision if not in their favour. HHL may seek to use comments you make to allege bias or technical failures in the decision making process.

> **We recommend that you use this meeting as a listening brief only. You will want to reassure HHL that we are committed to a fair and robust process but not get drawn into a debate on technical details or discuss the merits of other schemes.**
>
> **BACKGROUND POINTS**
>
> …
>
> ***HHL feel disadvantaged and treated differently***
>
> **HHL may suggest that they have felt disadvantaged and treated differently to the other two promoters as they are not airport operators.**
>
> Lines to take
>
> 1. I can assure you that running a fair and robust process to support the Government's position is very important to us.
>
> 2. I recognise that as an independent promoter you are in a different position to Heathrow or Gatwick airports and our engagement process has taken account of this fairly.
>
> 3. We have heard the wider points you have raised through engagement and in your submissions to the Department. We will take account of these as we do all relevant evidence.
>
> Background
>
> HHL are concerned that their status as an "independent" promoter may disadvantage them in the Government's decision-making process on the best runway scheme to take forward.
>
> By 'independent' we mean that HHL do not own or operate an airport and would not take forward and build their scheme themselves if selected, but are expected to seek to sell their idea to [HAL].
>
> As such HHL cannot give meaningful commitments on certain aspects of delivery or operation as they would not themselves be responsible for them. Instead our engagement with them so far has focused on increasing the clarity and understanding of the implications of their scheme."

54. At the meeting between the Secretary of State and the Claimants, the Secretary of State does not appear to have pursued the "lines" which it had been suggested he might take. Rather, the issue of HHL not owning, operating or otherwise controlling Heathrow arose. As to this, Mr Clake's evidence was as follows (Clake 1, paragraphs 35-36):

> "35. The [Secretary of State] also expressed his view that the [ENR Scheme] was an innovative idea to which he was attracted.

> As an adjunct to that, however, he said that in order for the Claimants' ENR Scheme to be chosen by the Government as the preferred scheme to be included in the ANPS he now believed it would be necessary for the Government to have a commitment in writing from HAL that there would be no impasse or delay in reaching an agreement on the implementation of the ENR Scheme. He asked us to enter immediate discussions with HAL to obtain such a commitment, without indicating any timescale or deadline for obtaining such a commitment or clarification as to any desired form or content. The [Secretary of State] also told us that he had met with [HAL] earlier that day and that he had made the same request directly of them.
>
> 36. In response to that request, I reiterated (at the meeting) our intention to work with HAL to speedily transfer the intellectual property on standard commercial terms for delivery and implementation. I then endeavoured to commence discussions with HAL immediately after the meeting to provide the written commitment the [Secretary of State] asked for."

We note that Mr Clake accepts that the Secretary of State sought the "commitment" in the context of what he saw as the innovative nature of the ENR scheme. That accords with the note prepared by the Secretary of State's Principal Private Secretary which states that: "He probed strongly, particularly on the issue of practicability given the novel nature of the scheme".

55. In her evidence, Ms Low comments on this. To the extent that Mr Clake was suggesting that a commitment from HAL was a "requirement" or even an "absolute requirement" of the Secretary of State, his evidence is disputed (Low 1, paragraphs 580-582). Nor does Ms Low agree exactly what language the Secretary of State had used. However, Ms Low accepts that the matter *was* raised by the Secretary of State and amounted to "a request to provide further confidence [that there would be no impasse or delay in HHL and HAL reaching agreement on the implementation of the ENR Scheme, if it were chosen] if it was available" (Low 1, paragraph 580). Ms Low does not comment at all on the point made by Mr Clake in the last sentence of Clake 1, paragraph 35 that the Secretary of State had made a similar request of HAL; nor does Mr Holland-Kaye in his statement. He does not address the point at all. In all the circumstances, we infer that such a request was made.

56. Some idea of how the request was viewed by the Secretary of State can be discerned from an email sent by the Secretary of State's Principal Private Secretary on 31 August 2016:

> "Many thanks for this submission. It – and wider airports issues – were discussed at last week's meeting between the [Secretary of State] and the team. Conclusions were as follows:
>
> …
>
> 5) The [Secretary of State] confirmed that we should follow up on his challenge to [HHL] to provide written support from

> HAL and its investors that they would take the [ENR Scheme] forward if that were the preferred scheme."

57. In the event, the matter of a "commitment" in this sense *was* raised by HHL with HAL, in circumstances that are described in detail in the witness statements of Mr Clake and Mr Holland-Kaye. For present purposes, it is necessary to note only that:

    i) The Secretary of State made no request for a "guarantee" from HAL, still less did he suggest that HAL would have a "veto" over the ENR Scheme or that that would be the effect of no commitment being received from HAL. This is a point that we consider further, in relation to Ground 2 (and, relatedly, Ground 1) (see paragraph 121-122 below).

    ii) No "commitment" from HAL was forthcoming and that therefore HHL could transmit no "comfort" to the Secretary of State.

58. It is noteworthy that the Claimants did not indicate at the time that the request ran contrary to a binding commitment by the Secretary of State that, in deciding upon a preferred scheme, he would not take into account the fact that the Claimants did not own/operate Heathrow and did not intend to deliver the scheme themselves. Far from it. They tried to obtain the comfort which the Secretary of State had requested.

59. On 20 September 2016, Mr Clake had a conversation with Mr Holland-Kaye of HAL. Both Mr Clake and Mr Holland-Kaye gave near-contemporaneous accounts of this conversation. In an email dated 20 September 2016, Mr Holland-Kaye said this:

> "I spoke to Anthony Clake and told him we would not be able to give him a letter of support on [the ENR Scheme]. I reiterated that if Government chooses [the ENR Scheme] we would talk with them in good faith and see whether we could make it work, but could not make or imply any commitment to build it.
>
> He pushed for different forms of words, but I said that while we could tell the Department what our position is, we could not put anything in writing.
>
> He asked me to keep trying and we agreed to keep in touch."

It is noteworthy that Mr Holland-Kaye does not refer to a "guarantee", but only to "a letter of support" for the ENR Scheme; and even that was refused. He merely said that HAL would work in good faith with the Claimants if the ENR Scheme were chosen. Given the reservations that HAL had about the ENR Scheme (see paragraph 35 above), it is difficult to see how HAL could have gone further than this.

60. Mr Clake's description of the conversation – contained in an email sent the following day (21 September 2016) – was as follows:

> "[Mr Holland-Kaye] phoned me last night to update me on the board decision. Despite he and Deighton being positive on our proposal and being happy to issue a letter of intent to instigate an extended runway, should it be chosen, the shareholders are not happy with this.

> His explanation is as follows:
>
> 1. The shareholders [are] worried that [HHL] could hold them to ransom – we agreed this was a non-point given that I had agreed a maximum price (5m GBP per year, which is negligible) and pledged to give my proceeds to charity.
>
> 2. The shareholders have invested a lot of time and money in [the NWR Scheme]. They feel they would lose face if they accept our scheme, despite it being quicker and cheaper.
>
> 3. They would make less money from our scheme as the RAB would move less.
>
> 4. Technically (and this is the only legitimate point) they feel that they need to do more due diligence to commit to the detail of our scheme. I reiterated that the 'scheme detail' was irrelevant – what Grayling wants to know is that they accept the concept of an extended runway.
>
> I said that this was extremely frustrating and that he should ask them to produce a letter saying that they don't accept our scheme and wish the Government to make a choice between [the ENR Scheme] and Gatwick. He chuckled and said they certainly didn't want to do that as he knows they will accept our extended runway in an instant when they get a call from ministers.
>
> What can we do? I feel political pressure is needed. At the moment, consumers will end up paying (via user charges) billions more and we will end up with a more complex solution, just to keep Ferrovial happy!"

We should make clear that it was not accepted by HAL that this painted a fair picture of the conversation. However, in our view, it is significant that even Mr Clake accepted that HAL had legitimate technical concerns with the ENR Scheme: "Technically (and this is the only legitimate point) they feel that they need to do more due diligence to commit to the detail of our scheme…".

61. On 25 October 2016, the question of new airport capacity came before the Cabinet Economic and Industrial Strategy (Airports) Sub-Committee ("the Cabinet Sub-Committee"). The paper submitted to the Cabinet Sub-Committee explained that the Government had "agreed the [AC's] case for airport expansion in the South East and its short-list of three schemes – two at Heathrow and one at Gatwick. It [i.e. the Government] decided to undertake further work, including on air quality and mitigating community impacts, before reaching a view on its preferred scheme" (paragraph 1). The purpose of the paper was to describe that further work.

62. The paper, unsurprisingly, covered a wide range of ground. It set out, in some detail, the pros and cons of each of the Heathrow schemes as follows:

"94. Most of the strategic considerations, and environmental and community impacts, are similar for the two Heathrow schemes.

95. There are however a number of areas where the two schemes differ. The [ENR Scheme] has two key advantages over the [NWR Scheme]. It has lower capital costs (£14.4bn compared with £17.6bn excluding surface access costs which the [AC] assumed to be £0.5bn greater for the [ENR Scheme]. [HHL] has continued to iterate its surface access plans to be broadly similar to those of [HAL]… and it results in significantly fewer houses being demolished (242 rather than 783) as well as avoiding impacts on commercial properties. This compares, for example, to around 340 homes lost for one phase of HS2.

96. Conversely, there are a number of advantages to the [NWR Scheme]. The [ENR Scheme] provides less potential for runway respite for local residents, whereas the [NWR Scheme] can provide runway respite for around one third of the operating day (approximately 6hrs). Alternating runways for landing and departure provides important breaks for aircraft noise for residents. The promoters of the [ENR Scheme] argue that they have airspace proposals which would mitigate this impact, but the [DfT's] assessment is that they do not reflect the complexity of airspace in the South east and the need to accommodate air traffic in other airports. We know that local communities value respite.

97. The [NWR Scheme] provides greater resilience because of the way the three separate runways can operate more flexibly when needed to reduce delays, and the less congested airfield. It delivers a higher level of capacity (estimated on a like for like basis by the [AC] at 740,000 flights departing and arriving – or annual [ATMs] – per annum compared to the [ENR Scheme] at 700,000 [ATMs] per annum) and accordingly higher economic benefits and a broader route network. It also provides greater space for commercial development, which could be used to enhance freight capacity.

98. The [ENR Scheme] has no direct global precedent. As such, there is greater uncertainty, as to what measures may be required to ensure that the airport can operate safely and what impact of those measures may be, including the restriction on runway capacity. However, the [AC] and the CAA both assessed the [ENR Scheme] to be deliverable.

99. The promoters of the [ENR Scheme] have not been able to secure assurance from the airport owners that its scheme would be taken forward if it were the Government's preferred option – although it seems likely that the owners would ultimately accept it were it to be the preferred scheme. It would be for the two

> promoters to enter a commercial negotiation, the outcome and timing of which could have a bearing on the publication and timing of the Government's draft NPS and subsequent consultation. Notwithstanding this, the Department does not believe this would delay the delivery of new runway capacity by 2030."

63. The paper therefore engaged with the merits of the two proposals, including the risks inherent in the novelty of the ENR Scheme; and downplayed the significance of the failure of the Claimants to obtain any assurance from HAL. Indeed, as can be seen, the conclusion was that any commercial negotiations between the two would not delay the 2030 target date for delivery of full capacity.

64. As reflected in that passage, the paper did not give any scheme any particular endorsement. Consistently with its approach of describing the advantages and disadvantages of each scheme, the paper concluded by asking the Committee to weigh up the relative pros and cons of each scheme, with a view to identifying a single preferred scheme.

65. A speaking note was prepared for the Secretary of State by his officials at the DfT. It said this:

> "[The ENR Scheme]
>
> Most of the benefits are similar to the [NWR Scheme].
>
> 1. But also requires less land take and houses.
>
> 2. However, it provides less opportunity for runway respite.
>
> 3. And I am clear that, regardless of what the promoter says, its operational uncertainty means there is less confidence it can provide the same capacity as the [NWR Scheme].
>
> 4. I have also had no certainty that the airport will deliver this scheme if we choose it."

66. Conventionally, the minutes of Cabinet and Cabinet Sub-Committee meetings are not made available in order to preserve collective responsibility. However, Ms Low says this (in Low 3, paragraphs 3-4):

> "3. The minutes of the [Cabinet] Sub-Committee meeting of 25 October 2016 were before me when drafting my first witness statement, and I confirm that the contents of paragraph 599 of my first statement are a complete and accurate record of the discussion about the [ENR Scheme] as recorded in the minutes of that meeting. I understand that the question of my attendance was raised at the PTR and I can further confirm that I observed the meeting.
>
> 4. I wrote my first witness statement based on the minutes of that meeting, as I do not have a detailed recollection or notes of

> the discussion. I am satisfied that the minutes accurately reflected both the content and extent of the discussion about the ENR."

67. In Low 1, paragraph 599, Ms Low says this:

> "At the 2016 Sub-Committee on 25 October 2016, the Secretary of State said in regard to the ENR Scheme:
>
> a) It would have lower land take and require fewer houses to be demolished than compared to HAL's NWR Scheme. The ENR Scheme was cheaper than the NWR Scheme (£14.4 billion compared to £17.6 billion);
>
> b) It would provide less respite because the same flightpaths would be constantly in use;
>
> c) It would provide lower capacity;
>
> d) Its biggest issue was deliverability;
>
> e) [The Claimants] had been challenged to provide written confirmation from HAL confirming that they would adopt the ENR Scheme should it be chosen. No such confirmation had been received; and
>
> f) No other commercial airport in the world operated the model that was being proposed by [the Claimants]. Using an untested approach at one of the world's busiest airports, Heathrow, would be risky."

It is not entirely clear what was meant by "deliverability" in point (d); but, in context, it appears to us that it refers to the necessity of HAL delivering the ENR Scheme, in circumstances where HAL had real reservations about it (see paragraph 35 above). It seems to us that point (e) contains no hint of criticism of HAL for failing to provide the confirmation sought, probably for precisely this reason; and point (f) identifies a good reason why HAL might have reservations.

68. In Low 1, Ms Low also stated:

> "600. In summary, the Secretary of State set out a number of reasons why the NWR Scheme was preferred over the ENR Scheme during the October 2016 Sub-Committee. He did so by providing a high-level summary of the matters which had been set out in more detail in the Sub-Committee paper.
>
> 601. Despite the constraints on Cabinet members' time, the October 2016 Sub-Committee overran, taking well over the allocated hour, with the Prime Minister concluding that the meeting had been a very good discussion."

69. Although Ms Low does not describe the outcome of the Cabinet Sub-Committee's meeting, because the Secretary of State made an announcement to this effect in the House of Commons that afternoon, it is an inevitable inference that the Sub-Committee agreed that the NWR Scheme should be the Government's preferred scheme.

70. On 25 October 2016, the Secretary of State made an announcement to Parliament that, based upon the recommendation of the AC, the Government's preferred option was the NWR Scheme ("the October 2016 Preference Decision"); and the Government would be bringing forward an NPS with that as the policy choice:

> "I have spent a considerable amount of this summer visiting the different schemes, talking to their promoters, and assessing their strengths and weaknesses. I have been genuinely impressed by the quality of choice available to us, and the detailed work that has been put into the 3 plans. Any one of them would bring benefits to this country.
>
> At the end of the work that the [AC] did, it made a clear and unanimous recommendation to the Government – that we should accept the proposal to build a new north west runway at Heathrow, subject to a package of measures to make expansion more acceptable to the airport's local community.
>
> Since the publication of that recommendation, my department has studied in detail both its report, but also new and supplementary information that has emerged about the different options since then.
>
> The Commission's report and that subsequent information formed the basis of the discussion that took place this morning at the Cabinet Sub-Committee.
>
> As a result of that discussion, the Government has decided to accept that recommendation. We believe that the expansion of Heathrow Airport and the [NWR Scheme] – in combination with a significant package of supporting measures of the scale recommended by the [AC] – offers the greatest level of benefit to passengers, business and to help us to deliver the broadest possible benefit to the whole of the UK.
>
> …
>
> Members will remember the saga of the planning process behind Terminal 5, which took years to resolve.
>
> Following that, the 'national policy statement' process was designed by the last Labour Government… to speed up major projects, but in an open and fair manner.
>
> By setting out now why we believe there is a need for new runway capacity along with the supporting evidence, we will

> fulfil our legal obligations to consult with the public and allow Members the opportunity to vote before it becomes national policy. That is what the law requires.
>
> This means Heathrow is able to bring forward a planning application, safe in the knowledge that the high-level arguments have been settled and won't be reopened.
>
> Today the Government has reached a view on its preferred scheme, and the 'national policy statement' we publish in the New Year will set out in more detail why we think it is the right one for the UK.
>
> It will also set out in more detail the conditions we wish to place on the development, including the supporting measures I outlined earlier.
>
> We want to make sure that we have considered all the evidence, and heard the voices of all those that may be affected, and all that could benefit as well.
>
> The consultation will start in the New Year. And I can announce today that I have appointed Sir Jeremy Sullivan, the former Senior President of Tribunals, to oversee the consultation process. This is an independent role, and Sir Jeremy will be responsible for holding Government to account and ensure best practice is upheld."

71. During the course of questions following this statement, the Secretary of State said this in response to a question from Sir Gerald Howarth MP:

> "I pay tribute to the promoters of the Heathrow hub scheme [i.e. the Claimants], having already paid tribute to the other promoters generally. The scheme was very innovative and very different, but for two prime reasons we felt unable to endorse it. First, it did not allow respite for the surrounding communities, because the same two corridors would be used for taking off and landing all the time. Secondly, the scheme's promoters could not ultimately provide the certainty that it would be built and adopted by [HAL], if we opted for it rather than for the main route. Those, to my mind, are two strong reasons. However, I pay tribute again to the promoters. It was a very innovative concept, and we gave it very serious thought. After visiting and listening to the promoters, I considered very carefully whether it was the best option. In the end, however, my judgment was that the north-west runway was the better one for Britain."

This is the first of two statements to which Ms Hannett on behalf of the Speaker of the House of Commons took exception as being the subject of Parliamentary privilege under article 9 of the Bill of Rights.

72. According to the HAL SoP, if the Government concluded no later than 31 October 2016 that HAL's NWR Scheme were the *sole* preferred scheme, then HAL would be obliged to take certain defined steps to develop and implement that scheme. Paragraph 1 of Part 3 of that SoP stated:

> "1.1 Based upon the assumption that a Government conclusion on the preferred scheme has been announced by no later than 31 October 2016, HAL intends to proceed with the Scheme on the basis of the indicative dates set out in paragraph 1.2 of this Part 3, targeting a construction start date of 2022 and the new runway capacity being operational and in use by the public by 2026. In any event, HAL intends to proceed with the Scheme to meet the [AC's] assessment that London and the South East needs more runway capacity by 2030.
>
> 1.2 On the basis of:
>
> 1.2.1 publication of a Government conclusion on the preferred scheme by no later than 31 October 2016; and
>
> 1.2.2 designation of a [NPS] by the Government on airport capacity which supports the development of the Scheme by no later than 31 July 2017,
>
> and otherwise on the basis of the assumptions for the Key Dependencies and Dependencies set out in this Part 3 (Key Principles – Key Delivery Milestones), HAL intends to submit an application for development consent by March 2020 with a view to:
>
> 1.2.3 securing a development consent order for the Scheme by September 2021 (subject to the progress of the application after submission, including any suspension or extension of the examination and any extension of the decision period) ('DCO Consent'); and
>
> 1.2.4 completing construction of additional airport capacity (including an additional runway)…".

73. On 31 January 2017, the draft ANPS was published. In February 2017, the Government launched a 16-week period of public consultation on the draft ANPS. A second consultation, on a revised draft ANPS, commenced in October 2017.

74. On 7 February 2018, the Secretary of State gave evidence before the House of Commons' Transport Committee ("the Transport Committee"). In answer to questions from Steve Double MP, the Secretary of State said:

> "I have to say that the extended runway proposal is a very innovative one. At the end of the day, as I have said before, I think the biggest issue for us was that the promoters of that scheme could not secure from Heathrow a written guarantee that

> if we picked it they would do it. That seemed to be a fairly fundamental problem for us. There were a number of other issues related to it; that was not the only one, but there was no guarantee that that would be something the owners of Heathrow would be willing to pursue. No guarantee could be secured on that front."
>
> "I explained why we had taken the view on the [ENR Scheme]. It [the ENR Scheme] did not deliver as much capacity, and it also had the simple complication that we did not have certainty that we could do it because [HAL] would not sign up to it."

This is the second of two statements to which Ms Hannett on behalf of the Speaker of the House of Commons took exception as being the subject of Parliamentary privilege.

75. On 23 March 2018, the Transport Committee published a report entitled "Airports National Policy Statement", which set out its considered views of the draft ANPS that was before it. Its first three conclusions and recommendations were as follows (with emphasis as in the original):

> "1. We accept that there is a case as set out in the [ANPS] for additional runway capacity, in particular hub capacity. This is on the premise that any expansion is sustainable, consistent with legal obligations and that suitable mitigations will be in place to offset impacts on local communities affected by noise, health and social impacts. *The Government should redraft its final NPS, in line with the recommendations set out in this report, to minimise any chance of a successful legal challenge*….
>
> 2. We conclude that the Government is right to pursue development at Heathrow and accept the arguments it has made in favour of its preferred scheme. We endorse its approach of using [an NPS] and the planning process outlined in the [PA] 2008. We conclude that there are valid concerns about the Government approach. *We recommend that both Houses of Parliament allow the planning process to move to the next stage by approving the [ANPS], provided that the concerns we have identified later in our Report are addressed by the Government in the final NPS it lays before Parliament. Without addressing the concerns the Committee has raised, we believe there is a risk of successful legal challenge*….
>
> 3. We agree with the Government that the [NWR Scheme] offers the greatest strategic benefits. The scheme will consolidate Heathrow's hub status, offering a greater number and variety of long-haul connections in the short-term, with a higher frequency than the other schemes considered by the [AC]. The scheme would deliver passenger growth that would not be realised without expansion. We accept the Government's analysis that the economic benefits are broadly comparable across the three schemes and that the [DfT's] forecasts show that

> the [NWR Scheme's] advantage is more marginal over the longer term. However, we conclude that in its comparative analysis of the three schemes, in Chapter 3 of the NPS, the Government should give more weight to environmental, health and community impacts. If Parliament is to make an informed decision on the designation of the NPS, members need to be confident that the final NPS reflects the weight of the evidence as it is presented in the supporting documents. *We recommend that more detail be provided in Chapter 3 of the NPS on the evidence on environmental, health and community impacts and that the [DfT's] comparative analysis be expanded to reflect more accurately the balance of impact across the three schemes it compares*…."

The Transport Committee clearly considered the draft ANPS with some care. Although – as we have described – the question of whether HAL would deliver the ENR Scheme was the subject of specific questioning, the point does not feature in the report, which focuses on the objective benefits of each scheme, as did the draft ANPS.

76. On 5 June 2018, the question of new airport capacity came back to the Cabinet Sub-Committee. The paper submitted to the Sub-Committee concluded (at paragraph 152) that the "[NWR Scheme] continues to deliver the greatest quantified benefits most quickly and has the strongest strategic case. The [DfT's] analysis demonstrates that expansion via the [NWR Scheme] can be delivered in line with air quality and climate change obligations, and the Department considers that sufficient assurances are in place at this stage in the process in relation to project delivery, financeability and affordability to proceed". The paper (at paragraph 153) invited Ministers to agree, "in light of the updated evidence, the consultation responses and the Transport Committee recommendations, that the [NWR Scheme] remains the Government's preferred scheme".

77. That conclusion was assented to, and it was agreed that (i) there remained a clear case for additional airport capacity in the South East, (ii) the NWR Scheme remained the Government's preferred scheme, and (iii) the proposed ANPS should be laid before Parliament for a vote (Low 1, paragraphs 274 and 282).

78. Although the paper presented to the Cabinet Sub-Committee described all three schemes, the emphasis was on the NWR Scheme and developments since the matter had last been before the Sub-Committee. The paper said nothing about the fact that the Claimants, as proposers of the ENR Scheme, would not themselves implement the scheme; or any risk arising from that.

79. The Secretary of State made a Statement to the House of Commons on the same day, 5 June 2018, describing the Government's position. The proposed ANPS, also dated 5 June 2018, was laid before Parliament pursuant to section 9(2) of the PA 2008 that day.

80. The proposed ANPS contained the following explanation as to why the NWR Scheme had been preferred over the ENR Scheme:

> "3.56 The [ENR Scheme] has two advantages over the [NWR Scheme]: lower capital costs (£14.4 billion for the [ENR

> Scheme] compared to £17.6 billion for the [NWR Scheme]), and significantly fewer houses being demolished (242 rather than 783), as well as avoiding impacts on a number of commercial properties.
>
> 3.57 However, the Government made a preference for the [NWR Scheme] based on a number of factors:
>
> Resilience;
>
> Respite from noise for local communities; and
>
> Deliverability.
>
> 3.58 The [NWR Scheme] would provide respite by altering the pattern of arrivals and departures across the runways over the course of the day to give communities breaks from noise. However, respite would decrease from one half to one third of the day. The [ENR Scheme] has much less potential for respite. It would use both runways for arrivals and departures for most of the day, although it may be able to "switch off" one runway for a short time during non-peak periods with a corresponding reduction in capacity.
>
> 3.59 The [NWR Scheme] should provide greater resilience than the [ENR Scheme] because of the way the three separate runways could operate more flexibly when needed to reduce delays, and the less congested airfield. It delivers greater capacity (estimated on a like for like basis by the [AC] at 740,000 flights departing and arriving per annum compared to the [ENR Scheme] at 700,000), accordingly higher economic benefits, and a broader route network. It also provides greater space for commercial development which could be used to enhance onsite freight capacity.
>
> 3.60 The [AC] assessed the [ENR Scheme] to be deliverable. However, the [ENR Scheme] has no direct global precedent. As such, there is greater uncertainty as to what measures may be required to ensure that the airport can operate safely, and what the impact of those measures may be, including the restriction on runway capacity."

81. "Deliverability" in that passage was clearly used to mean objective or scheme-specific deliverability. The draft ANPS did not say anything about the fact that the Claimants would not themselves implement the ENR scheme; or any risk arising from that. It was not referred to as any part of the reasons for the decision to select the NWR Scheme, and not the ENR Scheme. Rather, the proposed ANPS stressed:

    i) the importance of the findings of the AC; and

ii) the fact that the novelty of the ENR Scheme was a risk factor adversely affecting the objective deliverability of the Scheme.

In other words, the stated basis on which the NWR Scheme was preferred over the ENR Scheme was because it was objectively the better one: and that was so, *whoever* was promoting the ENR Scheme. The three deficiencies identified in the ANPS would have had just the same force had HAL been promoting this scheme.

82. We consider that in his various statements and comments regarding "deliverability" of the ENR Scheme, the Secretary of State was focusing on these objective or scheme-specific deficiencies, rather than on any difficulties that might arise because the Claimants – as promoters of the ENR Scheme – did not own or operate Heathrow Airport. Indeed, whilst the Secretary of State's paper to the Cabinet Sub-Committee set out the objective advantages and disadvantages of all three schemes, that issue was downplayed. The Secretary of State advised the Sub-Committee that "it seems likely that [HAL] would ultimately accept the [ENR Scheme] if it were to be the preferred scheme" (see paragraph 62 above). The Secretary of State's other remarks focused *not* on this point, but on the novelty of the ENR concept and on the objective issues to which that gave rise. That was the very point on which he had focused when he met Mr Clake on 17 August 2016, and became a continuing theme. Thus:

i) The Secretary of State's speaking note to the Sub-Committee referred to the ENR Scheme's "operational uncertainty" (see paragraph 65 above).

ii) The Secretary of State's answer to Sir Gerald Howarth MP (see paragraph 71 above) noted that the ENR Scheme was "very innovative" (twice, in a relatively short answer), and we consider that the Secretary of State's reference to the potential for non-deliverability, read in this light, was a reference to the objective deliverability issues that would have existed irrespective who was promoting the scheme.

iii) Again, the Secretary of State's answer to the Transport Committee (see paragraph 74 above) stressed the "innovative" nature of the proposal, and his suggestion that HAL might not itself deliver the ENR Scheme can only be a reference to the objective, inherent difficulties arising out of the novel nature of the scheme. Indeed, any other reading would be inconsistent with the point made in the paper to the Cabinet Sub-Committee that, if the ENR Scheme *were* preferred, HAL would try to build it. In other words, the real focus was upon whether the ENR Scheme should be preferred on its intrinsic merits (i.e. the scheme-specific factors), disregarding the fact that it was being promoted by a non-owner/operator.

Plainly, the Claimants' assertion that the reasons set out in paragraph 3.60 of the ANPS on the deliverability of the ENR scheme were "bogus", and failed to reveal the Secretary of State's true thinking on that subject, is unsustainable.

83. On 25 June 2018, after a debate, the House of Commons voted by a majority of 296 to approve the proposed ANPS. The Secretary of State designated the ANPS the following day, i.e. on 26 June 2018.

84. After the commencement of these judicial review proceedings, at an internal DfT meeting on 5 September 2018, the Secretary of State was asked about his thinking regarding the decision to designate the NWR Scheme in the ANPS. According to Ms Low (Low 2, paragraph 129):

> "The meeting was intended to explore the extent to which 'written confirmation/guarantee' was a factor in the Secretary of State's decision to designate the ANPS. It should not be seen as some kind of *post hoc* rationalisation. Instead, the meeting was held as a matter of good practice, to confirm the Secretary of State's precise thinking, before responding to [the Claimants'] application for judicial review, to ensure his views were accurately represented for the benefit of the Court and [the Claimants]."

85. The note of this meeting recorded as follows (all emphases in original):

> "Jack Goodwin [Deputy Director, Heathrow Expansion] asked about the extent to which a HAL guarantee/assurance was a factor in the [Secretary of State's] decision to designate the [ANPS], either linked in to the issue about safety or as a wider point.
>
> [Secretary of State]: I think you need to look at it the other way round. All the way through we always looked carefully at the issues, and we accepted the [AC's] recommendations. The decision to designate the [ANPS] was based on this. When I took over, we asked questions again. Has the [AC] got it right? Has anything changed? The drawbacks of the Gatwick and HHL schemes were amply set out in the AC recommendations. The question was: was there anything new? Was there anything to change that view?
>
> The issue about a guarantee was: is there something that requires us to move away from the AC points on safety and novelty [of the HHL scheme]. A big factor in preventing me moving away from the AC view was that, <u>even if</u> the AC had got it wrong, there was no guarantee it would be built.
>
> James Adutt [Deputy Director, DfT Legal] asked: So the main points were the AC points?
>
> [Secretary of State]: Yes. Nothing had changed. It was different with Gatwick – there [the updated forecasts for Gatwick strengthened its case which meant] that Government now had a harder decision to make. That's why I said Gatwick was a very difficult decision. <u>But with the HHL scheme, nothing emerged post the AC to change the view that the NWR scheme was preferred over the ENR based on a number of factors: respite, resilience and deliverability</u>. And <u>furthermore</u>, the lack of a guarantee made it even harder for them.

> James Adutt asked: So would it be right to describe the guarantee as a reinforcing reason?
>
> [Secretary of State]: Yes. For the Government to not accept the [recommendations of the expert and independent] AC I would need good reasons to think again. For the Gatwick scheme there were good reasons, for [the] HHL scheme there were not. The guarantee point was a further reason not to think again – I didn't even know they could build it. It was the biggest reason for not overturning the conclusions of the AC."

Mr Kingston sought to treat this note as amounting to no more than an *ex post facto* rationalisation. In our view, there is no force in that point because it is consistent with our analysis of the contemporary material (see, e.g., paragraph 82 above).

86. We consider what the Secretary of State took into account in preferring and designating the NWR Scheme further below in connection with Ground 2 (paragraphs 113-138).

Ground 4: Capacity

87. The ANPS explains, in paragraphs 3.56-3.60 (set out in paragraph 80 above), why the NWR Scheme was preferred over the ENR Scheme. Three reasons were articulated. One of those was that the NWR Scheme had greater capacity than the ENR Scheme: it assessed the capacity of the NWR Scheme at 740,000 ATMs per year, compared with the capacity of the ENR Scheme at 700,000 ATMs per year.

88. Mr Kingston for the Claimants submitted that the AC and the Secretary of State had made a manifest error in concluding that the NWR Scheme had a greater capacity than the ENR Scheme: the capacity of each scheme was the same.

89. However, in light of the evidence, it is clear that the Claimants' contention that the capacity of both schemes was the same and that there was no justification for concluding that the NWR Scheme had greater capacity is misconceived.

90. As Mr Graham explains, the figures for scheme capacity provided to the AC originally came from the promoters themselves, albeit that those figures were subject to assurance by experts retained by the AC (Graham, paragraph 139). In the case of capacity questions, the experts were Jacobs UK Limited ("Jacobs").

91. The capacity that each promoter suggested for its respective scheme was as follows (see Graham, paragraph 141):

Scheme	Additional capacity	Total capacity
Gatwick 2R Scheme	280,000	560,000
Claimants' ENR Scheme	220,000	700,000
HAL's NWR Scheme	260,000	740,000

92. The AC's assessment of the capacity of the three schemes is described in Graham, paragraphs 137-160. As Mr Graham makes clear, the figures for capacity were not measures of how many ATMs the scheme could, in theory, provide; but how many ATMs could be provided *consistently with the need for resilience*:

> "145. Jacobs' assurance of the capacity figures was designed to test whether the stated capacities could be delivered, consistent with the requirement that resilience at an expanded airport (i.e. levels of delay and cancellations) should be no worse than current levels at that airport and should ideally contain some prospect of improvement.
>
> 146. The resilience requirement stems from Module 14: Operational Efficiency of the Appraisal Framework. At paragraph 14.9, the Appraisal Framework says:
>
> > 'Schemes' assumptions of annual ATMs will be tested to ensure they are realistic considering airfield designs (stand and terminal capacity, runway configuration, mode of operation, and airside ground layout, e.g. the location of rapid access taxiways, runway crossing points, among others). The forecast usage will be tested to ensure that operations can be sustained in a resilient manner.'
>
> 147. 'In a resilient manner' was interpreted by the [AC] to mean 'no worse than current levels of performance, ideally with some potential for improvement' in the appraisal…".

93. Mr Graham explained the reason for the 40,000 ATM difference between the ENR Scheme and the NWR Scheme in Graham 1, paragraph 152:

> "The 40k ATM difference between the NWR and ENR Schemes can be explained by a number of factors. The two most critical are:
>
> - Even with the refreshed scheme design, the Heathrow ENR proposal presents congested taxiway infrastructure. While the new taxiways added south of the T5/T6 area gave Jacobs the confidence needed to approve the additional 220k estimate, they were not content to go further.
>
> - The respite/alternation proposals put forward by HHL as part of its scheme required the closure of one or more of

> the three runways provided by their scheme for part of each operating day. By contrast, the NWR Scheme saw all three runways in constant operation, albeit with an arrivals/departures/mixed alternation system. Essentially, the NWR Scheme provided respite by operating as two segregated and one mixed-mode runway, whereas the ENR Scheme operated in that way only at full stretch without respite, such that any respite needed to be provided by additional alternation measures. HHL proposed that their additional alternation system could be removed once the expanded airport approached full capacity. This would, however, have had very significant negative impacts on other areas of their appraisal."

94. As we have explained (under the heading "Ground 3" in paragraph 9 above), "respite" refers to providing respite from noise to the surrounding population. The capacity of the ENR Scheme to more respite is for the reasons given by Mr Graham more limited than that of the NWR Scheme.

95. In its report dated 18 June 2015, Jacobs made clear that capacity was measured in that way. The conclusion to the report stated:

> "The achievable annual throughput rates at Heathrow Airport are likely to be the circa 700,000 ATMs (ENR) and 740,000 ATMs (NWR) as stated by the promoters, within comparable and reasonable resilience and reliability parameters. For the same comparable and reasonable resilience and reliability parameters Gatwick Airport should achieve a higher throughput rate, circa 560,000 ATMs pa as stated by its promoter, given the different nature of the operation at Gatwick to that at Heathrow. The utilisation of theoretical capacity at Gatwick (circa 90%) is high, but is not considered unreasonable given the nature of the operation at Gatwick. It would not be reasonable to operate Heathrow at this level of utilisation of theoretical capacity, and the proposed usage, around 80%, is also considered reasonable.
>
> A comparison of the annual throughput rates achievable by the ENR and NWR schemes is more nuanced than the comparison between Gatwick and Heathrow airports. The promoter's stated annual rate for the ENR Scheme is in part constrained by the proposed alternation to increase noise respite. However, the ENR Scheme presents airfield constraints not reflected in the NWR Scheme. It is, therefore, reasonable to conclude that the NWR throughput rate is likely to be greater than that of the ENR Scheme with all other parameters held constant. At the assessed throughput rates both Heathrow Schemes would be expected to operate with a similar level of resilience. However, the lesser degree of flexibility available within the ENR taxiway and runway layout means that it would be more likely that it would be required to impinge upon its planned noise respite periods in order to maintain that level of resilience when operating at

> 700,000 ATMs, compared to an NWR Scheme operating at 740,000 ATMs."

96. In its Final Report, the AC concluded, at paragraph 12.11, as follows:

> "Of the two Heathrow schemes, the [NWR Scheme] offers the largest increase in capacity. This is due to lower anticipated congestion on taxiways and also simpler respite procedures associated with that scheme, which would keep all three runways in operation throughout the day, albeit with certain runways only used for arrivals or departures at certain times. The [ENR Scheme], by contrast, would be more susceptible to taxiway congestion and would not operate all three runways at certain times of the day to provide respite. While, in principle, the highest number of peak-hour movements is not significantly different between the schemes, it would be easier to schedule a larger number of movements over the course of the full operating day with the [NWR Scheme]."

97. The promoters of the schemes were all given an opportunity to challenge the AC's process and findings. The Claimants now seek to challenge the conclusions regarding the relative capacities of the ENR Scheme and the NWR Scheme. However, that challenge substantially misses the point. It is asserted by the Claimants that because the two schemes use three runways in the same configuration (one mixed mode and two segregated), the capacity of the schemes must be the same. Whilst in terms of *theoretical* capacity that may well be right, the Claimants' point is misconceived because it leaves out of account the considerations of resilience and respite which the AC and Jacobs explicitly took into account. They were clearly entitled to do so.

98. The Secretary of State, when considering the question of capacity, took as his starting point the work of the AC, and he was entirely justified in doing so. However, he did not accept the AC's conclusion blindly. As Ms Low describes (Low 1, paragraphs 641 and following), the DfT commissioned experts (York Aviation) to provide advice on, amongst other things, the capacity of the ENR Scheme. York Aviation's conclusion was that "it has not been demonstrated by HHL that the ENR Scheme could deliver an annual capacity in excess of 700,000 ATMs at an acceptable level of service and whilst maintaining periods of respite for the local population" (Low 1, paragraph 645). Indeed, York Aviation was doubtful as to whether the 700,000 ATMs suggested by the Claimants was in practice achievable.

99. We conclude that:

    i) The AC and the Secretary of State used sound and properly derived measures for the relative capacities of the ENR and NWR Schemes, and that the 40,000 ATM difference between the two schemes is objectively well-founded.

    ii) The criticism of the Claimants of the capacity figures used by the AC and the Secretary of State is misconceived, as it focuses on the theoretical capacity of the two schemes, whilst leaving out of account the real and relevant differences between the schemes in terms of their resilience and their ability to offer respite.

> It is these differences that drive the difference capacity figures for the two schemes.

100. Therefore, as a reasons challenge (which is the way in which it is put), this ground must fail. Paragraph 3.59 of the ANPS states that:

> "The [NWR Scheme] should provide greater resilience than the [ENR Scheme] because of the way the three separate runways could operate more flexibly when needed to reduce delays, and the less congested airfield. It delivers greater capacity (estimated on a like for like basis by the [AC] at 740,000 flights departing and arriving per annum compared to the [ENR Scheme] at 700,000…".

We consider that that clearly and adequately articulates the capacity reason why the NWR Scheme was preferable (and preferred) over the ENR Scheme.

101. However, although presented as a "reasons" challenge to the Secretary of State's decision, Mr Kingston's submission appeared to us to be, in effect, a rationality challenge. To the extent the ANPS was challenged on this basis, in our firm view, the analysis as to capacities was proper, and the conclusion in the ANPS is not arguably irrational or otherwise unlawful. Given that the question at issue is a matter of expert input and analysis, the courts ought to be slow to interfere in this regard (see R (Mott) v. Environment Agency [2016] EWCA Civ 564 at [63] and following per Beatson LJ).

102. For those reasons, Ground 4 fails. Indeed, we do not consider the ground arguable; and we refuse permission to proceed with it.

Ground 5: Safety

103. Paragraph 3.60 of the ANPS states:

> "The [AC] assessed the [ENR Scheme] to be deliverable. However, the [ENR Scheme] has no direct global precedent. As such, there is greater uncertainty as to what measures may be required to ensure that the airport can operate safely, and what the impact of those measures may be, including the restriction on runway capacity."

104. Mr Kingston submits that the ANPS improperly differentiated between the ENR Scheme and the NWR Scheme on the ground of safety, in that the ENR Scheme was said to be less safe than the NWR Scheme, because the former (unlike the latter) was unproven and unprecedented.

105. Mr Palmer's short answer to this point is that the contention is misconceived because it misreads paragraph 3.60 as differentiating between the schemes on the grounds of safety. It does not differentiate between the schemes on that basis. Both the AC and the Secretary of State accepted that safety was not a distinguishing factor between the schemes. The point that was being made in paragraph 3.60 was that, because the ENR Scheme was unproven and unprecedented, it was (both at the time of the AC Final Report, and when the ANPS was designated) not possible to identify exactly the

measures that might be needed for safe operation of the scheme; and those measures might include restrictions on runway capacity. In other words, whilst there was no doubt that the ENR Scheme could operate safely, the capacity restrictions that safe operation might entail might be more restrictive than those that would pertain in relation to the NWR Scheme – and were, because of its unproven nature, an unknown quantity.

106. That is exactly what paragraph 3.60 of the ANPS says; and, indeed, says with admirable succinctness. However, the point was made much more fully during the course of the AC's investigation and in the AC Final Report.

107. Thus, the CAA, in its "[AC] Short-listed Options Module 14: Operational Efficiency Preliminary Safety Review", stated:

> "1.9 In order to be licensed to operate, all aerodromes and associated Air Traffic Control (ATC) units are expected to meet safety standards or put in place mitigations addressing the risks that the standards intend to alleviate. Often the safety mitigations required will have an effect on other operational performance such as the likely capacity, noise footprint, or use of the aerodrome. The more well-established a procedure is at other airports or through the availability of international standards and recommended practices, the easier it will be to determine whether the mitigation is (a) suitable for the risk it is trying to address and (b) anticipate other impacts. Conversely, the more innovative a proposal, the greater the task of safety assurance (i.e. will the proposed mitigation address the risk) and the harder it will be to predict the suitability of any particular mitigation measure.
>
> 1.10 Safety assurance can only be accepted after the proposer approaches the approving authority (almost certainly to be the CAA) with a fully detailed concept of operations for how it intends to meet the various safety requirements placed on it by the applicable rules and regulations. Since these details may change, for example as a result of the conditions placed on an operator by planning consent, this can only happen following the [AC Final Report], the Government's publication of its [ANPS] and planning consent is granted. Also, some sign-offs might not be possible until the operation itself can demonstrate compliance – permission to operate can sometimes be given so that the operator can demonstrate that the concept works as intended (potentially with further mitigating action required to ensure the concept meets all the requirements)."
>
> "2.27 The design of the two in-line northern runways is a novel concept without any pre-existing standards or experience globally. The CAA is open minded to the proposal subject to appropriate safety assurance. Nevertheless, a particular safety concern that must be resolved and fully articulated by the proposer is the safety risk between missed approaches and departures. The CAA will need to review this argument and

> make a decision on the tolerability of the safety risk the operation generates. In the event that the safety risks cannot be mitigated sufficiently, it is expected that dependent operations could be conducted, but this would result in lower capacity and/or less operational flexibility."
>
> "2.43 Safety assurance can only be accepted after the proposer provides a fully detailed concept of operations (encompassing the entire operation) for how it intends to meet the various safety requirements placed on it by the applicable rules and regulations. This can only happen following planning consent and potentially after a permit to operate is in place. In this case, the scheme would have to be assessed against the requirements in place at the time."
>
> "2.45 The preliminary assessment of the short-listed options from an Aerodrome, Air Traffic Management and Airspace safety perspective illustrates that no outright showstoppers have been identified at this stage. However, there are a number of risks that may have impacts on cost, capacity or the environment."

108. In its Final Report, the AC concluded:

> "11.42 There is no direct precedent for the in-line runway proposal that forms part of the [ENR Scheme], although partial precedents can be found in diagonally-offset end-to-end runways, for instance at Madrid. On the basis of the available evidence, the Commission's view is that the proposed runway infrastructure could be operated in a safe manner. Confirming this finding, however, is likely to require years of work with both UK and international safety regulators. The processes involved are potentially protracted and would need to begin early in the implementation stage of the project if the estimated completion date of 2026 were not to be jeopardised. The scheme promoter has made a useful start to this process, but much of the necessary work could only be undertaken at a more detailed stage of development."
>
> "12.23 The CAA's Preliminary Safety Review of all three schemes found a number of issues for more detailed investigation and resolution. More work would be needed on all three schemes to resolve issues around missed approach procedures and obstacle limitation surfaces, which define the generally permitted height for structures in the vicinity of the runway, but this is not unusual for schemes at the assessed level of development and none of these issues should be considered 'show stoppers'.
>
> 12.24 The CAA did note the lack of precedent for the [ENR Scheme] and indicated that it would need more detailed

> development. It was emphasised, however, that the CAA remained open-minded on the concept and open to further engagement."

109. We conclude that:

i) The AC and the Secretary of State did not differentiate between the ENR Scheme and the NWR Scheme on the basis of safety. Both schemes were considered deliverable in terms of their safety.

ii) However, in the case of each scheme, further work needed to be done – and could only be done in the future – to establish precisely within which parameters the airport would have to operate in order to be compliant in terms of safety.

iii) In this regard, in terms of what measures would have to be in place to deliver a safe airport, there was a material difference between the ENR Scheme and the NWR Scheme. This was because the ENR Scheme was without precedent. Often the safety mitigations required will have an effect on an airport's operational performance, including as to capacity. The more well-established a procedure is, the easier it will be to determine what safety mitigations are appropriate. Conversely, the more innovative a proposal, the greater the task of safety assurance (i.e. will the proposed mitigation address the risk) and the harder it will be to predict the suitability of any particular mitigation measure.

iv) Accordingly, the Secretary of State was entitled to conclude in the ANPS that, as regards the ENR Scheme, there was greater uncertainty as to (i) what measures might be required to ensure that the airport could operate safely, and (ii) what the impact of those measures might be, including as regards runway capacity.

110. In our view, Mr Kingston's submissions were based on a misunderstanding of paragraph 3.60 of the ANPS. Contrary to his contentions, the ANPS does not improperly differentiate between the ENR Scheme and the NWR Scheme on the ground of safety.

111. As in the case of Ground 4, Ground 5 was on the face of it presented as a reasons challenge. We consider that paragraph 3.60 of the ANPS clearly and properly articulates the relevant reason why the NWR Scheme was preferred over the ENR Scheme. Again, in our view, Mr Kingston's submissions on occasion effectively presented as a rationality challenge. To the extent that they did so, again, we consider that the Secretary of State's conclusion in the ANPS on this issue was one to which he was entitled to come, and it is not arguably irrational or otherwise unlawful.

112. For the reasons we have given, Ground 5 fails. As with Ground 4, we do not consider this ground arguable; and thus we refuse permission to proceed with it.

Ground 2: Legitimate Expectation

The Ground of Challenge

113. Mr Kingston submitted that it was unfair and unlawful for the Secretary of State to have insisted that the Claimants obtain from HAL a "guarantee" in respect of the delivery of

the ENR Scheme, because the Claimants had a legitimate expectation that the selection of "the most suitable scheme" as the Government's preferred scheme would be made on the basis of the factors identified by the AC at the outset of their work (and only those factors) which did not include a requirement that, for the ENR Scheme to be "suitable", the Claimants must secure the support of HAL as the owner/operator of Heathrow whilst it (HAL) was promoting its own scheme. The AC gave various assurances that there would be equity of treatment between promoters (whether airport owners/operators or not) and transparency of process with identified, objective, criteria for "scoring" competitive schemes. The Secretary of State gave similar assurances, notably in the Claimants' SoP. Those assurances, looked at together, were sufficient to amount to a representation by the Secretary of State that he would not use the fact that they (the Claimants) neither owned nor operated Heathrow, and could not themselves deliver the ENR Scheme, as a reason for rejecting that scheme; and that representation led the Claimants to have a reasonable and legitimate expectation that the Secretary of State would not take that into account as a reason for rejecting the scheme. That gave the Claimants a right to have that assurance or promise of the Secretary of State honoured. The Secretary of State could not resile from that assurance or promise. Unfairly, and in breach of that legitimate expectation, the Secretary of State did use that fact as a reason for rejecting the scheme.

114. We did not understand Mr Kingston to be suggesting that they had a legitimate expectation that objective issues regarding the ENR Scheme could not be taken into account. Such issues – which arise irrespective of who the promoter is – were obviously material to the Secretary of State's decision, and we did not understand Mr Kingston to be suggesting that they had a legitimate expectation that such factors would be left out of account. Rather, he contends that the Claimants had a legitimate expectation that issues regarding deliverability arising out of the identity of the promoter of the ENR Scheme – what we have described as "promoter-specific" factors (see paragraphs 18-19 above) – would be left out of account.

115. We consider this ground is arguable, and grant leave to pursue it.

116. The Claimants' submissions require us to address three overarching questions, namely:

i) Was there a legitimate expectation which the Secretary of State was under some legal obligation to fulfil?

ii) If there was a legitimate expectation, could the Secretary of State resile from it?

iii) If there was a legitimate expectation from which the Secretary of State could not resile, did he act unlawfully by breaching or frustrating that expectation?

Preliminary questions

117. However, before dealing with those issues, it would be helpful to clear the decks.

118. First, it is important to note that Ground 2 is put on the basis of legitimate expectation, and only on that basis. In particular, Mr Kingston made clear that he was not relying on the submission that the deliverability risk inherent in the fact that the Claimants were not owner/operators of Heathrow and in any event would not themselves implement the ENR Scheme – and so were reliant upon some other person, namely HAL, to do so –

was irrelevant to the question of which scheme should be preferred (see, in particular, Mr Kingston's written speaking note on this point and the exchanges at Day 2, pages 21 and following). We consider that he was right in taking that stance.

119. In R v Somerset County Council ex parte Fewings [1995] 1 WLR 1037 at 1049, Simon Brown LJ identified three categories of consideration, as follows:

> "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however,… that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

120. Mr Palmer submitted – and Mr Kingston accepted – that the deliverability risk we have described fell within the third category, i.e. whilst the Secretary of State was not required to take it into account, he was not obliged to ignore it either. It was a matter for his discretion as to *whether* he took this relevant matter into account or not, and *when* he did so. Everything else being equal, whether and when the Secretary of State took it into account against the ENR Scheme – and, if so, the weight he gave to it – were matters for him to determine, challengeable on only traditional public law grounds (see, e.g., R (Khatun) v London Borough of Newham [2004] EWCA Civ 55 at [35] per Laws LJ). It is important to note that no-one disputed that had the Secretary of State preferred the ENR Scheme, so that the SoP between the Claimants and DfT became effective, then the Claimants were obliged in very short order to obtain real and extensive commitments from HAL to the ENR Scheme. In short, issues of "subjective" deliverability would have been raised and tested in the course of November and December 2016. The substance of Ground 2 turns much more on *when* the deliverability risk we have described became relevant rather than *whether* it was relevant, with the Claimants contending for a legitimate expectation that it would have been taken into account only *after* the preference decision had been made.

121. Second, Mr Kingston used the word "guarantee". However, that was a term never used by the Secretary of State in the period leading up to the October 2016 Preference Decision: the Secretary of State referred to a "challenge", or letter of "support", "comfort" or "commitment". More to the point, Mr Clake's evidence did not go so far either. Mr Clake says that, at the 17 August 2016 meeting, the Secretary of State requested that the Claimants obtain "a commitment in writing from HAL that there would be no impasse or delay in reaching an agreement on the implementation of the ENR Scheme" (Clake 1, paragraph 35, quoted at paragraph 54 above). Ms Low effectively agreed that that was the way the request was put (see paragraph 55 above).

122. Ms Low says that that was not made as an "absolute requirement" or indeed "requirement" in the sense that, if that comfort was not given, then the ENR Scheme would not be considered at all. We consider that to be correct. Looking at the request

in context, it was never intended that a failure to obtain the requested comfort would be a "show stopper" so far as the ENR Scheme was concerned. We particularly note that the Secretary of State continued to consider the other merits of the three short-listed schemes – and all parties including the Claimants, whilst attempting to obtain the requested comfort, continued to make representations on those merits. Nor did the Claimants ever act on the basis that it was requested as a pre-condition to being chosen as the preferred scheme. Indeed, by the end of the submissions on behalf of the Claimants, Mr Kingston and Mr O'Donoghue appeared all but to accept that that was not the intention of the request: but they submitted that the Secretary of State still intended to (and, in the event, did) take the absence of that comfort into account, against the ENR Scheme, in presenting the schemes to the Cabinet Sub-Committee, when deciding that the NWR Scheme was the sole preferred scheme and when designating the ANPS with the NWR Scheme as the sole preferred scheme.

123. Third, there are several ways in which a legitimate expectation may arise. However, the underlying rationale is that, where a public authority has given a promise or adopted a practice which represents how it is going to act in a given matter or area, in certain circumstances, the law may impose an obligation on the authority to honour that promise or practice unless there is good reason not to do so. An individual may then challenge a decision that breaches that promise, or fails to comply with that practice, even when he has no enforceable statutory, contractual or other legal right to call upon.

124. The promise or practice may relate to the way in which the authority deals with the individual. In R v Devon County Council, ex parte Baker [1995] 1 All ER 73 at pages 88e-89f, Simon Brown LJ identified a number of distinct categories of legitimate expectation, including (i) an expectation that the authority will act fairly towards him (his category (3)) and (ii) an expectation that a particular procedure, not otherwise required by the law in the protection of an interest, must be followed consequent upon some specific promise or practice (his category (4)). Whilst such categories cannot be seen as hermetically sealed or mutually exclusive, as we understand Mr Kingston's submission, the alleged legitimate expectation here falls into category (4). Given that, but for his assurance or promise that he would not do so, the Secretary of State could quite properly have taken into account the unique deliverability risks in respect of the ENR Scheme, the legitimate expectation arose as the result of particular assurances that he would deal with the selection of the preferred scheme in a particular way, i.e. by ignoring any deliverability risk that arises from the fact that the Claimants do not own/operate Heathrow and will not in any event implement the ENR Scheme themselves. The promise relied upon must be clear, unambiguous and devoid of any relevant qualification, but it is well-established that it need not be express. It can be derived from the circumstances of a particular matter.

125. As we have indicated (see paragraph 116 above), in respect of this claim, there are three questions for us to consider. We will consider them in turn.

Was there a legitimate expectation?

126. We turn to the first question with which we have to deal: was there here a legitimate expectation recognised by the law – and, if so, what was that expectation?

127. We start with the evidence. As we have described, the AC was not concerned with any additional (subjective) deliverability risk that arose as a result of the Claimants not

owning/operating Heathrow and/or not being willing or able to implement the scheme themselves. That was not within its brief, and certainly not taken into account by it. The AC was concerned with only objective deliverability. On the basis of the evidence before it, and its own expert analysis, it determined that, looking only at matters relevant to objective deliverability and leaving out of account any additional risks arising out of considerations of subjective deliverability, the NWR Scheme was preferable. That conclusion has never been challenged by any of the parties before us.

128. When the matter of airport capacity returned to the Secretary of State after the AC Final Report had been published, it is not correct to say (as Mr Kingston suggested) that the promoter-specific risks in the ENR Scheme, to which we have referred, were not raised. As we have described (see paragraphs 31-33 above), the issue was considered and raised with the Claimants. However, by the time of the SoP, the Secretary of State appears to have taken the stance that the risk involved in HHL not owning/operating Heathrow and not being prepared themselves to deliver the ENR Scheme would not be taken into account in determining the preferred scheme – but only afterwards, if chosen as the preferred scheme. That appears clear from the reference in the SoP to "the Agreement", i.e. an agreement between the Claimants and HAL "to take forward [the] development and implementation of the [ENR] Scheme in accordance with [the SoP]" which it was envisaged would be entered into after the announcement of the ENR Scheme as the preferred scheme. The SoP between the Claimants and DfT was finalised in June/July 2016. But the stance taken by the Secretary of State in it in relation to this risk was discussed and – after debate – appears to have been settled well before then, by about September/October 2015 (see, again, paragraphs 31-33 above).

129. Mr Kingston submitted that the Secretary of State's request for a commitment by HAL as described above, and/or taking into account the absence of such a commitment, amounted to a breach of the legitimate expectation that the Secretary of State would not take into account any deliverability risk arising from the fact that the Claimants neither owned nor operated Heathrow Airport, and were proposing that HAL deliver the ENR Scheme that they were proposing. We shall, as shorthand, refer to this as the "promoter-specific" factor (see paragraph 19 above, where we differentiate between "scheme-specific" and "promoter-specific" factors).

130. We are unpersuaded that any legitimate expectation arose for the following reasons.

i) There was no express promise. Instead, Mr Kingston relies upon "all of the assurances given by both the AC and [the Secretary of State] as set out in paragraphs 22 and 30(k) [of the JR Grounds]" (see paragraph 76 of the JR Grounds; and paragraph 31 of the Statement of Common Ground).

ii) Paragraph 22 of the JR Grounds refers to utterances of the AC in one form or another. We do not consider that statements of the AC can assist the Claimants in founding a legitimate expectation against the Secretary of State. First, as we have described (in paragraphs 22-25 above), the AC was undoubtedly not considering any promoter-specific factors arising out of the Claimants' subjective unwillingness/inability to deliver the ENR Scheme. The AC considered objective deliverability only. The AC had no interest in promoter-specific factors. Any statements that it made, must be considered in that light. Second and in any event, representations of the AC, a body independent of the DfT and the Secretary of State, are not the representations of the Secretary of

State and cannot be attributed to him. Representations of the AC cannot be used for the purpose of creating a legitimate expectation binding the Secretary of State. Third, the Secretary of State *did* consider the risks arising out of the fact that the Claimants, as promoters of the ENR Scheme, neither owned nor operated Heathrow Airport *after* the AC's Final Report had been published, as we have described. There was clearly no legitimate expectation that he would not do so before then.

iii) Paragraph 30(k) of the JR Grounds refers to the events of 17 August 2016, when the request for the commitment was actually made and the days shortly afterwards. But, in our view, it is impossible to see how the bare request for an assurance in relation to the Claimants' inability themselves to deliver the ENR Scheme could itself found the alleged or any legitimate expectation. The Claimants do not allege that there was any assurance by the Secretary of State, when seeking the "commitment" from HAL regarding the ENR Scheme, that he would not take the question of promoter-specific risk into account. More importantly, given the Claimants' assertion that a legitimate expectation that promoter-specific risk would not be taken into account *already existed*, it is telling that the Claimants did not question the legitimacy of the Secretary of State's request at the time it was made. At the time, the Claimants did not even suggest that, because of an earlier promise that he would not do so, the Secretary of State had acted unlawfully or even improperly in making the request that he did. Rather, they sought to comply with his request, without complaint.

iv) In his submissions, Mr Kingston also relied upon the SoP between the DfT and the Claimants to found the Claimants' legitimate expectation. The SoP was, of course, a memorandum of understanding based on the premise that the Secretary of State would not take into account the promoter-specific risk when choosing a preferred scheme. However, in the SoP the Claimants expressly acknowledged that:

a) the SoP did not create any legal obligation, including an obligation to "carry out any action" (paragraph 2.1.3);

b) the SoP did not fetter the Secretary of State's discretion to have regard to all the relevant circumstances in the exercise of the functions of Government (paragraph 2.1.2); and

c) the SoP "does not create any legitimate expectation, whether substantive or procedural, in relation to the exercise of functions of Government" (paragraph 2.1.1).

On the basis of these provisions in the SoP, the Claimants cannot have thought that any express or implied assurances in the SoP were legally enforceable. On the face of the SoP, they were clearly not.

v) Moreover, given the express exclusion of rights based on a legitimate expectation contained in the SoP, a formal and carefully negotiated document, the Claimants could not reasonably have considered that any of the less formal messages emanating from the Secretary of State could be relied on as creating or supporting a legally enforceable legitimate expectation as they contend.

131. We have considered all the materials before us: there is no evidential basis for the legitimate expectation alleged by the Claimants.

If there was a legitimate expectation, could the Secretary of State resile from it?

132. Even if, contrary to our firm view, the Secretary of State did cause the Claimants to have a legitimate expectation recognised by the law, as a public body he has a duty to act in the public interest and not to fetter his own discretion. Therefore, generally, he has a discretion to depart from a representation previously made, albeit that any such departure requires the exercise of discretion. In that exercise, the existence of a legitimate expectation is itself a relevant consideration which must be taken into account (see De Smith's Judicial Review, 8th edition (2018) at paragraph 12-045). Of course, the Secretary of State must also avoid procedural unfairness.

133. Whilst it is of course important that public authorities honour their assurances and promises, in this case, if (contrary to our view) a legitimate expectation had arisen as contended for by the Claimants, there are two important factors that would have militated in favour of the positive exercise of the discretion to depart from the legitimate expectation contended for by the Claimants.

134. First, over-and-above the reasons for preferring the NWR Scheme to the ENR Scheme given by the AC – which, as we have noted, considered only objective deliverability – the Secretary of State clearly considered the deliverability risk as a result in respect of the ENR Scheme to be high. It is equally clear that those concerns were not the result solely of HAL's lack of willingness to support a scheme competitor: HAL also had the technical concerns with that scheme as identified in paragraph 35 above. The Secretary of State was also clearly concerned with the additional risk with the ENR Scheme as the inevitable result of its novelty and the fact that it had not been worked up as much as the other two schemes. Given that the UK was falling back in the hub field – with competitors from not just Europe but also the Middle East – he considered bringing the new facility on stream quickly (by 2030) to be very important. It is noteworthy that the comfort requested was in terms of "a commitment in writing from HAL that there would be no impasse or delay in reaching an agreement on the implementation of the ENR Scheme", highlighting those particular concerns. He clearly considered that this aspect of the public interest should be addressed at the pre-NPS stage.

135. Second, whilst any departure from a legitimate expectation will be disappointing to the party having that expectation, it is difficult to see how, in this case, the dishonouring of any legitimate expectation would have resulted in any real detriment or unfairness to the Claimants in any legally relevant sense. To establish detriment or unfairness to the Claimants, Mr Kingston relied upon two matters:

    i) He submitted that, if the Claimants had known that their position as non-owners/operators of Heathrow were (as Mr Kingston put it) a "knock-out blow" to the ENR Scheme being preferred, they would not have expended the time and money they had spent on working up their scheme proposal. However, we do not consider that would be a good reason for the Secretary of State not departing from the legitimate expectation alleged by the Claimants if he considered it would be in the public interest to do so. In the first place, as we find in paragraphs 137 and following below, we do not consider that the promoter-specific risk involved in the Claimants not being the owner/operator of

Heathrow in fact bore on the Secretary of State's thinking when making the October 2016 Preference Decision. But, in any event, to describe the failure to obtain comfort from HAL as a "show-stopper" or effective "veto" over the ENR Scheme dramatically and unjustifiably overstates matters. It was never intended to be, nor taken as, any such thing. Second, there is no reliable evidence to suggest that, even if the Secretary of State was going to take that deliverability risk into account, the Claimants would not have expended the time, effort and money that they did in working up the merits of their proposal as they in fact did. Indeed, most of this time, effort and money would have been expended before the AC Final Report, and, as we have described, the AC did not consider that risk at all.

ii) Mr Kingston submitted that, if the preference decision had been made without regard to the promoter-specific deliverability risk in the Claimants not being the owners/operator of Heathrow, and the ENR Scheme had been preferred, that risk would have been reduced because, on rejection of the NWR Scheme, HAL would have been more amenable to cooperating with the Claimants to ensure that the ENR Scheme was delivered and implemented. However, this point entirely disregards the merits issues that HAL had with the ENR Scheme, which we have touched upon in paragraph 35 above. There can be no certainty that HAL would have come around to the merits of the ENR Scheme. Given that, even after the October 2016 Preference Decision had been made, the Claimants continued lobbying for their scheme (so that, as late as May 2017, HAL had to submit that "[t]hese inherent difficulties with the ENR mean that it is unsuitable to be selected as the Government's preferred runway option": paragraph 37 above), in our view the likelihood is that *had* the ENR Scheme been preferred, HAL would not have got behind the ENR Scheme but would have continued to highlight issues with the ENR Scheme whilst continuing to promote its own NWR Scheme.

136. We appreciate that this is a hypothetical question – because we have found that there was, here, no legitimate expectation – but, for the reasons we have given, had it been necessary to do so, in preferring the NWR Scheme, we would have found that the Secretary of State was entitled – and, indeed, that this would have been a proportionate response – to take into account the promoter-specific risk of the ENR Scheme involved in the Claimants not being owner/operators of Heathrow.

<u>If there was a legitimate expectation from which the Secretary of State could not resile, did he act unlawfully by breaching or frustrating that expectation?</u>

137. However, even if we were persuaded that the legitimate expectation was established and remained in place such that the Secretary of State could not properly dishonour it, there would remain the issue of whether the Secretary of State did, in fact, breach it. In relation to that question, we have concluded that promoter-specific risk was in fact immaterial to the Secretary of State's decision to prefer the NWR Scheme over the other schemes; and that therefore, even if there had been a continuing legitimate expectation as contended for by the Claimants, that expectation was not breached or frustrated.

138. In coming to that conclusion, we have in particular taken the following into account.

i) Our analysis of the contemporaneous evidence as set out in paragraphs 21-86 above.

ii) We have found that the approach of the DfT in the SoP was to consider the ENR Scheme on its objective merits *because* the Claimants could not give comfort on the subjective deliverability of the scheme. At no time did the Secretary of State seek to have the approach laid down in the SoP that his Department had agreed with the Claimants varied or re-considered; and, in our judgment, had he been shifting the goalposts, he would have made this clear. The Claimants did not suggest at the time that they thought that the goalposts had been moved as they now suggest.

iii) There are a number of possible reasons why the Secretary of State made his request, other than seeking an assurance which he must have known the Claimants could not provide. The Secretary of State was seeking to explore, or at least facilitate the exploration of, the nature and depth of HAL's objections to the ENR Scheme. As has been described, these objections were not simply commercial, because HAL wanted the scheme it was promoting to be chosen; but were based upon objective concerns regarding the ENR Scheme. We have described these concerns in paragraphs 35-37 above.

iv) Further, the Secretary of State was seeking to ensure that the Claimants were clearly focused on the importance of overcoming the promoter-specific risks in their not being the owner/operators of Heathrow, given the obligations they had assumed in the SoP they had agreed with DfT. In the event that the ENR Scheme was preferred, it was important that the Claimants had given careful thought *before* the preference decision was made as to how they would deal with HAL and deal with the risks involved in the fact that they neither owned nor operated Heathrow.

v) Further, the AC, having not taken the promoter-specific risks in the Claimants not being the owners/operators of Heathrow into account, had determined that the NWR Scheme was in any event preferable. The AC was an independent body of experts. Its recommendations were intrinsically technical, involving the assessment and synthesis of matters requiring expert input and analysis. As Mott (cited at paragraph 101 above) emphasises, where an expert body of people have been entrusted with a specialist task, it has a wide margin of judgment with which the courts will be slow to interfere. Whilst clearly the Secretary of State was alive to having to consider the recommendations of the AC with an open mind, it is clear from the contemporaneous documents that, understandably, he was minded to follow the AC's recommendations, subject to any material or representation that might suggest that it was ill-founded. He found no such material. There does not appear to have been any. The Secretary of State could not sensibly have bucked the recommendation of the AC unless he had good reason to do so. There was no such reason.

vi) That is entirely consistent with the Secretary of State's statement to Parliament on 25 October 2016, and with the after-the-event statement of his thinking. In both statements, the Secretary of State was considering whether there existed an objective reason for departing from the recommendation of the AC that the ENR Scheme was to be preferred. Such an objective reason might have been a change

in the objective merits of the three schemes. The fact is that the AC's recommendation was not departed from *because* there was no good reason to do so. As the Secretary of State pointed out, after the event, although the operator of Gatwick Airport had improved the objective merits of its Gatwick 2R Scheme, and thus required further, careful, consideration, the merits of the ENR Scheme had remained exactly the same. This is made clear in the note of the meeting on 5 September 2018 (see paragraph 85 above):

> "When I took over, we asked questions again: Has the Airports Commission got it right? Has anything changed? The drawbacks of the Gatwick and HHL Schemes were amply set out in the [AC] recommendations. The question was: was there anything new? Was there anything to change that view?"

Nothing had changed in the case of the ENR Scheme to cause it to be promoted above the NWR Scheme.

vii) Thus, we do not consider that the ENR Scheme was in any way prejudiced, in terms of how it was assessed, by the absence of any response from HAL to the request posed by the Secretary of State regarding its commitment to the ENR Scheme.

viii) Even if HAL had responded positively to the request, this would have made no difference to the outcome, because it could not have improved the objective merits of the ENR Scheme.

Use of Parliamentary Material

139. In these proceedings and in those the subject of the First Judgment, the Claimants relied upon extracts from Parliamentary proceedings. However, at an early stage, objections were made to the use being made of some of this material on the basis that, to admit the evidence, would or might be in breach of article 9 of the Bill of Rights, which provides:

> "That the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

140. Consequently, the court's order made on 4 October 2018 required papers to be served on the Speaker of the House of Commons and gave an opportunity for Speaker's Counsel to make written submissions on the application of article 9. Those submissions (dated 20 December 2018) set out a number of objections to the admissibility of some, but not all, of the Parliamentary material.

141. The order made at the pre-trial review on 15 January 2019 required the parties involved to co-operate to resolve any outstanding article 9 issues wherever possible, for example by producing evidence in an alternative form or by the agreement of admissions for inclusion in the agreed statement of common ground. Any remaining issues were left to be dealt with by submissions at the rolled-up hearings of the claims.

142. We are grateful to the parties concerned for the efforts they took to resolve the article 9 issues. As a result, there were no outstanding disputes on the admissibility of Parliamentary material in the judicial reviews the subject of the First Judgment; and, in these proceedings, the dispute has greatly narrowed. Objection is now taken to the admissibility of only two statements made by the Secretary of State in Parliament, namely:

    i) the answer of the Secretary of State in response to the question of Sir Gerald Howarth MP (see paragraph 71 above); and

    ii) the Secretary of State's evidence to the Transport Committee of the House of Commons (see paragraph 74 above).

143. The Claimants have sought to rely upon these statements in order to support their contention that the reason, or at least a substantial reason, for the October 2016 Preference Decision in favour of the NWR Scheme was the failure of the Claimants to obtain some form of commitment from HAL, as owners/operators of Heathrow, that they would implement the ENR scheme if it were to be chosen instead. The Secretary of State has disputed the interpretation that the Claimants seek to place upon his statements. He says that neither of them was intended to, or does in fact, support the Claimant's contention.

144. Ms Hannett submitted on behalf of the Speaker that it is not open to the court to determine a dispute as to the meaning and effect of statements made in Parliament. Indeed, she went so far as to submit that, although a court may admit evidence that something was said in Parliament as a matter of historical record, it could not admit evidence to show what was meant by the words used. Whilst Ms Hannett accepted that there might be difficult cases involving these issues, she submitted that this was not one of them; because there was here a clear and genuine dispute as to what the Secretary of State meant in the two statements in contention. Article 9, she submits, clearly and unequivocally applies; and the Speaker, supported by the Secretary of State, applies for an order that the statements be ruled inadmissible as evidence.

145. However, in view of the findings we have reached under Ground 1, in particular that the real focus of the decision made on 25 October 2016 (and of decision-making throughout the entire process leading up to the designation of the ANPS) was on the objective or scheme-specific merits and demerits of the ENR and that promoter-specific matters were immaterial (see, e.g., paragraphs 82, 134 and 137-138 above), it is unnecessary for us to determine these outstanding issues under article 9. Without straying into possibly forbidden territory, we consider that on any fair reading, the Secretary of State's remarks in Parliament were expressed in the context of the innovative nature of the ENR scheme and the implications of that for the assessment of relative scheme merits. Those statements were not only consistent with, but essentially to the same effect as, statements he made outside Parliament which are admissible and which as such formed the basis for our findings. Therefore, we do not need to resolve the dispute between the parties about whether the statements made in Parliament can be used in this case to indicate the relative weight attached to the matters to which they refer in the decision-making process.

146. As well as it being unnecessary to determine these issues, we are also firmly of the view that we should not decide them because the legal arguments put forward raise issues of

fundamental constitutional importance going to the separation of functions of Parliament and the courts and, given the wide range of the other matters which had to be covered during the hearings, it was not possible for the court to give as much time as would be needed to hear full submissions on the issues as they emerged. We will therefore confine ourselves to some limited observations.

147. In Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816 Lord Nicholls referred to the established practice of the courts to have regard to a ministerial statement in Parliament when dealing with the determination of an application for judicial review of a decision by that minister (paragraph [60]). Jonathan Sumption QC accepted on behalf of the Speaker of the House of Commons that a statement may be relevant to a legal challenge to what had been done by a minister if it provided evidence of why he had acted as he did (see [113]).

148. In Buchanan v Jennings [2004] UKPC 36; [2005] 1 AC 115 at [9] and [16], Lord Bingham referred to the UK Report of the Joint Committee on Parliamentary Privilege in the 1998-1999 Session (chaired by Lord Nicholls). Paragraph 49 of the report accepted that the use of ministerial statements in judicial review was unobjectionable and described it as having been treated by the courts as an established practice. For example, in several cases challenges have been made to the lawfulness of policy statements announced in Parliament on changes in the parole system.

> "In each case the court proceedings involved scrutinising the ministerial decisions and the explanations given by the minister in Parliament".

149. In Toussaint v Attorney General of Saint Vincent and the Grenadines [2007] UKPC 48; [2007] 1 WLR 2825, the Privy Council held that the claimant could rely upon a statement made by the Prime Minister in Parliament to show that a proposed order for expropriation had been made for an unlawful purpose. The meaning of those statements was an objective matter for the court (see [23]). Ms Hannett submitted that this decision did not examine the issues raised in the present case, and should in any event be viewed with some caution.

150. The parties' submissions mainly focused on the decision of Stanley Burton J in Office of Government Commerce v Information Commissioner [2008] EWHC 774 (Admin); [2010] QB 98 in which the Attorney General intervened on behalf of the Speaker of the House of Commons. The court identified (at [46]) two purposes or principles on which Parliamentary privilege rests, namely (i) the need to avoid any risk of interference with free speech in Parliament and (ii) the need for the executive and legislature on the one hand and the judiciary on the other to avoid interference with their respective functions. The judge considered that Toussaint correctly decided that it was permissible for a claimant to rely upon what was said by a Minister in Parliament to show what was the motivation for the executive's action outside Parliament. The claimant had not relied upon that material to criticise the accuracy of what the Minister had said. In that sense he had not "questioned" the statement in Parliament. Indeed, he relied upon it as being factually correct. Not surprisingly, the judge pointed out that a key issue for the court is to identify the purpose for which a statement in Parliament is being relied upon (see [45]).

151. From the limited arguments we have heard, we accept that there are issues as to how far these judicial statements of principle should be taken. The same may also be said for the submission by Ms Hannett that article 9 completely prohibits a court from determining the meaning and effect of a ministerial statement in Parliament. We note, for example, that it was decided in Pepper v Hart [1993] AC 593 that the court may under certain conditions have regard to a statement made in Parliament by a promoter of legislation as an aid to the construction of an ambiguous provision in that legislation, provided that (amongst other things) that statement is clear in dealing with the point in issue. That principle may involve the court in resolving a dispute between parties as to what was meant by a minister in order to determine whether it does provide the required clarity.

152. Where the line defining what amounts to "questioning" of a statement in Parliament should be drawn, or whether the interpretation of such a statement is impermissible, raise difficult questions of law and the answers are far from clear. For our part, we should say that we have some real reservations about the correctness of some of the submissions advanced by Ms Hannett, at least in their most extreme form and in the circumstances of this case. But the resolution of such issues should await full argument in a case where it is necessary for them to be decided.

Conclusion

153. We conclude that no legitimate expectation arose in this case. For that reason, Ground 2 fails.

154. However, even if we had concluded that there had been a legitimate expectation of the sort contended for by the Claimants, in our view, it would have been proportionate and lawful for the Secretary of State to resile from that legitimate expectation. In any event, in fact, the Secretary of State complied with the legitimate expectation alleged by the Claimants, in that he did not, when identifying the NWR Scheme as the preferred scheme, place any material reliance upon the promoter-specific risk that the Claimants were not owners/operators of Heathrow and would not in any event implement the ENR Scheme. Thus, had the legitimate expectation existed and the Secretary of State been proscribed from dishonouring it, the Secretary of State's conduct was, in fact, consistent with it. We emphasise that we are not finding that the Secretary of State was consciously acting in accordance with the legitimate expectation alleged by the Claimants, merely that his conduct happened not to be inconsistent with it.

155. Therefore, having granted permission to proceed, we dismiss the substantive challenge on Ground 2.

Ground 1: Breach of Articles 106(1) and 102 TFEU

Permission to Proceed

156. We grant permission to proceed with Ground 1.

TFEU: The Relevant Provisions

157. Article 102 TFEU provides as follows:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

158. Article 106(1) TFEU provides as follows:

> "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."

159. The inter-relationship between article 102 and article 106(1) TFEU is as follows.

i) Article 106(1) TFEU has no independent application but operates in conjunction with other provisions of the TFEU, in this instance article 102 TFEU.

ii) A Member State cannot, through the operation of article 106(1) TFEU, be held responsible for independent anti-competitive behaviour on the part of an undertaking merely because such conduct takes place within the jurisdiction of that Member State. There needs to be a causal link between the Member State's legislative or administrative intervention on the one hand and the anti-competitive behaviour of an undertaking or undertakings on the other.

iii) The mere creation of a dominant position by the grant, by a Member State, of exclusive rights does not infringe article 106(1) TFEU. However, the grant of such exclusive rights may support a conclusion that the undertaking in question is one that has been granted "special or exclusive" rights, within the meaning of article 106(1) TFEU.

iv) It is not necessary for the public undertaking or the undertaking granted special or exclusive rights *actually* to have infringed article 102 TFEU. It is sufficient for article 102 TFEU to be infringed for there to be a *risk* of or *potential* for an abuse and for the acts taken by the Member State to have brought about that

potential. In such a case, article 106(1) TFEU will be infringed if the Member State has adopted a measure that enables the public undertaking or undertaking granted special or exclusive rights to infringe article 102 TFEU.

160. In order to ascertain whether there has been an infringement of article 106(1) TFEU, the following issues fall to be determined:

i) Does the undertaking in question have a dominant position in a market and, if so, in which market or markets?

ii) Is the undertaking in question a "public undertaking" or an undertaking to which a Member State has granted "special or exclusive rights"?

iii) What is the nature of the measure, enacted or maintained in force by the Member State, that is said to enable the undertaking to infringe Article 102 TFEU? We shall refer to such a measure as the "State Measure".

iv) Has the undertaking in fact infringed Article 102 as a result of the State Measure?

Issue (i) arises out of article 102: issues (ii) and (iii) arise out of article 106(1); and issue (iv) arises out of both of those articles.

161. In practice, the last two issues – issues (iii) and (iv) – need to be considered together. For the purposes of article 106(1) TFEU, the State Measure must be a "measure *contrary to the rules contained in the Treaties*" (emphasis supplied). Thus, whilst in terms of their form, any number of acts could amount to a State Measure, whether such an act is, in fact, a State Measure infringing Article 106(1) TFEU can only be answered in the context of whether there has been or may be an infringement of article 102 TFEU as a result of the State Measure.

162. Before we consider these points of competition law, however, we should stress one fundamental point regarding Ground 1. This is a claim for judicial review and the Claimants are seeking (and seeking only) the quashing of the Secretary of State's decision to designate the ANPS. This is a public law ground and the remedy sought is a public law remedy. The Claimants have chosen to bring a competition law claim not as a self-standing claim, but within the framework of a claim for judicial review. We have found – in relation to Ground 2 – that the promoter-specific issues regarding the ENR Scheme played no material part in the decision to prefer the NWR Scheme over the ENR Scheme. For this reason alone, we consider that Ground 1 must also fail.

163. Had the Claimants' framed their case as a competition law challenge to the preference decision and sought to challenge that decision in late 2016, that point might not arise. However, for the reasons we now give, even if it had been so framed, that claim would not have succeeded.

Dominant Position

164. The first question for us to consider is this: Does the undertaking in question have a dominant position in a market and, if so, in which market or markets?

165. The undertaking in question is, of course, HAL. There is a dispute between the parties as to which is the relevant market for the purposes of assessing dominance. In his written submissions, Mr Palmer for the Secretary of State contended that the relevant market was the market for the supply of runway scheme designs. He accepted that there was a market for the provision of airport services, and that HAL "may" be dominant in that market).

166. In his oral submissions, Mr Palmer's arguments shifted somewhat – perhaps as a result of Mr Facenna for HAL leading on this issue. In the event, the argument that the market was for the supply of runway scheme designs was not pressed – although we will consider and decide the point, as it was not abandoned. The acceptance – limited though it was – of HAL's dominance was resiled from, and Mr Facenna contended that the Claimants had simply adduced no evidence in relation to market and HAL's dominance in that market and that, for this reason, Ground 1 must fail.

167. Mr O'Donoghue for the Claimants contended that HAL is in a position of dominance in the market for the provision of airport operation services (and related services) at Heathrow (see paragraph 38 of his written submissions). In this, he based himself in part on the CAA's determination under section 8 of the CAA 2012 that the relevant market for HAL is the provision of airport operation services limited to Heathrow. The "Notice of Determination" under section 8 was made for the purposes of imposing price controls over HAL, as we shall describe. As an alternative, Mr O'Donoghue suggested that there may also be "a market for the development of new airport capacity in the South East of England" (paragraph 44 of his written submissions).

168. We consider that the relevant market to be wider than simply the provision of airport operation services (and related services) *at Heathrow*. Although this was the conclusion of the CAA in paragraphs 4.28 and 4.30 of its Notice of Determination, the CAA was considering HAL's market power in relation to the market for the provision of services at Heathrow Airport for the purpose of imposing a price control. The question before us is a different and wider one, namely the provision of airport operation services (and related services) *in the South East of England*. That, we find, is the relevant market in the present case. We consider further below why the separate market, contended for by the Secretary of State, for the provision of runway scheme designs is, in our judgment, entirely irrelevant to a consideration of Ground 1 (see paragraph 197).

169. We do not consider that the development of *new* airport capacity in the South East of England can sensibly be differentiated from the existing market for airport capacity in the South East of England. The fact is that all markets can be the subject of change and development. In this case, the point of the ANPS was to commence the process of expanding this market. But the existence of the market as it stands at the moment and the manner in which that market might be developed in the future are questions that are actually inseparable: a present market includes future potentiality and we do not consider it appropriate to separate the two.

170. Mr Palmer suggested that, for the purposes of establishing an infringement of article 106(1) TFEU, it is significant that the Claimants and HAL are not competing *with each other* in any economic market (paragraphs 58 and following of his written submissions).

171. For the avoidance of doubt, we find that the Claimants are *not* competing in the market for the provision of airport operation services in the South East of England. But we find that to be an irrelevant question : the point about article 102 TFEU is that it protects *competition* not *competitors*. The question is not whether there is competition between two undertakings (the Claimants and HAL); but whether HAL is dominant in a market. That constitutes the first of the questions we have described at paragraph 160(i) above. It will, of course, be necessary to ascertain whether that dominance has been abused, but a market in which an undertaking is dominant cannot be forced out of consideration for the purposes of Ground 1 (or, indeed, for the purposes of determining whether article 102 TFEU has been infringed more generally) simply because it is asserted that the dominant undertaking is not competing with a specific other competitor in that market. To that extent, we accept Mr O'Donoghue's submission that the Secretary of State's argument has "an air of unreality about it, and looks at the wrong end of the telescope" (paragraph 37 of his written submissions).

172. The CAA's Notice of Determination concluded that HAL was dominant in the market for the provision of airport operation services (and related services) *at Heathrow*. However, a necessary part of that conclusion was that Heathrow Airport itself was a dominant provider of airport operation services in the South East of England. If – hypothetically speaking – there were another airport of the scale of Heathrow in the South East of England (or, possibly, in the UK) then this might constitute a substitute service capable of competing with Heathrow and so reduce the possibility of HAL's dominance *at* Heathrow.

173. Self-evidently, HAL's market power *at* Heathrow derives from two factors: (i) HAL's operative control of Heathrow, and (ii) the fact that Heathrow itself has no substitute. If the latter did not pertain, then users of Heathrow would simply be able to go elsewhere for their airport operation services. It is, therefore, unsurprising to find that the CAA considered this question with some care in its Notice of Determination:

> "*Geographic market – demand side analysis*
>
> 4.35 The key rationale for the CAA's decision with respect to demand side analysis as it relates to the geographic market is that:
>
> - Despite the apparent choices available to connecting passengers, based on the available evidence, the level of competition from other hub airports is insufficient to suggest a geographical market that is wider than Heathrow. The evidence that the CAA has obtained indicates that, at the airline level, there is likely to be a number of discrete markets for particular route pairs. These may involve connections over a number of hubs (and/or direct routes). While each of these hubs may compete with the other hubs providing such services to some degree, the level of competition falls short of the level of constraint necessary to suggest that such hubs constrain each other's pricing. The CAA does not therefore consider that there would be sufficient substitution to non-UK airports to make a SSNIP by HAL unprofitable…"

174. Pausing there, the CAA's reference to a "SSNIP" is a reference to the so-called SSNIP ("small but significant non-transitory increase in price") test for market dominance, which is described in the Notice of Determination at paragraph 4.7. That is a well-known test for establishing the existence of market dominance.

175. Continuing with the Notice of Determination:

> "…Evidence from based and inbound carriers suggests that Heathrow is a market in its own right, differentiated by brand and its hub status. This evidence also suggests that Heathrow is a preferred product to that offered at other UK airports. The switching that the CAA has observed also supports the view that Heathrow is a preferred product to Gatwick.
>
> - Airport operator evidence suggests that the geographic market for Heathrow may be wider than that indicated by the airline evidence. However, it also shows that Heathrow provides airlines with significant additional benefits over other airports. This is likely to increase the barriers of switching away from Heathrow for airlines currently operating from that airport.
>
> - While both catchment area analysis and passenger preference analysis have limitations, they suggest choice for surface passengers. However, the CAA does not consider that this evidence is conclusive for the purposes of geographic market definition. While it has not been able to carry out an appropriate price elasticity of demand analysis for passengers at Heathrow, the CAA has considered, on objective criteria, a critical loss analysis at the airline level which suggests that there would be insufficient switching from Heathrow as a result of a SSNIP.
>
> *Geographic market – supply side analysis*
>
> 4.36 The key rationale for the CAA's decision with respect to supply side analysis as it relates to the geographic market is that:
>
> - While both the supply side and passenger analysis suggests that all the London airports are potential substitutes (especially those with sufficient infrastructure to compete over the aircraft in the 75 to 100 tonne maximum take-off weight), and there is ample capacity at Stansted such that sufficient capacity could be switched from Heathrow, demand side analysis shows that service that HAL offers at Heathrow is highly differentiated from other services available at the other London airports which suggests a market that is limited to Heathrow."

176. We were invited by Mr Palmer and Mr Facenna to disregard the Notice of Determination as immaterial to the present case. They suggested that the CAA's analysis was for the purposes of the CAA 2012 alone, and that findings made by the CAA for a different purpose to the present case (namely, for the purpose of controlling prices of an airport having substantial market power for the purposes of the CAA 2012) could not be "read across" for the purposes of Ground 1.

177. Clearly, a court must be careful when considering an analysis or determination, made for a specific purpose, being deployed in a different context, not contemplated by the author of the analysis or determination. The appropriate course is to consider whether the material is probative for the purposes it is being used. In this case, the Notice of Determination clearly *is* probative: the Notice of Determination has been produced by the relevant sector regulator and deals with the question that is before us today, namely the definition of the market in which HAL is active and HAL's dominance in that market. We consider that it was appropriate for the Claimants to rely upon the Notice of Determination, and we note that – apart from contending that the Notice had been produced for a distinct and separate purpose – neither the Secretary of State nor HAL sought to criticise the CAA's reasoning in support of its Notice of Determination and its findings.

178. We conclude that HAL, as the owner and operator of Heathrow, is dominant in the market for the provision of airport operation services (and related services) in the South East of England.

Public or Privileged Undertaking

179. Mr O'Donoghue did not contend that HAL was a public undertaking within the meaning of article 106(1) TFEU; and we do not consider that it is to be so regarded. Although the term "public undertaking" is nowhere defined in the TFEU, the Commission has used the following definition (see Whish & Bailey, Competition Law, 9th edition (2018) at page 231):

> "…any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."

180. A "privileged undertaking" is one that has had granted to it, by a Member State, "special or exclusive rights". We use the term "privileged undertaking" in that sense. "Special" and "exclusive" rights are again undefined in the TFEU. However, in Case C-475/99, Ambulanz Glöckner v Landkreis Südwestpfalz [2002] 4 CMLR 21, the Advocate General provided the following definition (at [89]):

> "Special or exclusive rights within the meaning of Article [106(1) TFEU] are thus in my view rights granted by the authorities of a Member State to one undertaking or to a limited number of undertakings which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions."

181. Mr O'Donoghue submitted that HAL was a privileged undertaking, whereas the Mr Palmer and Mr Facenna denied that was so.

182. We conclude that HAL is a privileged undertaking for the following reasons.

i) Entirely unsurprisingly, the operation of airports (as well as other aspects of aviation) in the United Kingdom is highly regulated, major international airports such as Heathrow being subject to the European Aviation Safety Rules.

ii) Where an airport is, like Heathrow, a "dominant airport" within the meaning of the CAA 2012, it is prohibited from charging or requiring payment of charges in respect of airport operation services *unless* it is granted a licence under the 2012 Act. This enables the CAA to impose – where appropriate and in accordance with the provisions of the 2012 Act – price controls because of the substantial market power that a dominant airport has. In some sectors – notably the aviation and the telecommunications sectors – *ex ante* price controls may be imposed where "substantial market power" (in the case of aviation) or "significant market power" (in the case of telecommunications) exists. In each case, substantial or significant market power equates to a position of dominance in the relevant market. The purpose of such regulation is to control potential abuses *before they arise* (*ex ante* controls) rather than to stop and penalise then *after the event* (*ex post* controls).

iii) Mr O'Donoghue relies upon the provisions of the CAA 2012 in support of his contention that HAL is a privileged undertaking, whilst the Mr Palmer and Mr Facenna rely upon the same provisions in support of the opposite contention. The former emphasised the *negative* nature of the provisions of the CAA 2012, in that these provisions do not *confer* rights, but rather inhibit or constrain the ability of HAL to charge. Paragraph 39 of Mr Palmer's written submissions stated:

> "HAL is subject to economic regulation because, in its Market Power Determination which concluded in 2014, the CAA found that it is the operator of "airport areas" at Heathrow which have substantial market power" (i.e. are not sufficiently constrained by competition). The State has not conferred any special or exclusive rights on HAL; rather, the independent regulator has acted, pursuant to the procedures set out in the [CAA 2012] including through the grant of licences, to limit any adverse effects from HAL's market power."

iv) So far as it goes, we agree that these are indeed *constraints* on HAL rather than the grant of a special or exclusive right. However, we consider that it is necessary to ask *why* Heathrow and – through its ownership of Heathrow– HAL have this substantial market power. This power has *not* been accumulated in a competitive market. Rather:

a) Until the Airports Act 1986, Heathrow was publicly owned and operated by the British Airports Authority. The British Airports Authority was established by the Airport Authority Act 1965 to take responsibility for

four state-owned airports – Heathrow, Gatwick, Prestwick and Stansted. In the following years, other airports were added to that portfolio. The British Airports Authority was, in short, a public undertaking in the sense described in paragraph 179 above. Over its history, it accumulated many rights and a market position that other undertakings did not have and could not achieve.

b) Pursuant to the policy of privatisation articulated in the Airports Act 1986, all the property, rights and liabilities of the British Airports Authority – including Heathrow– were transferred to BAA plc, subsequently BAA Limited ("BAA"). BAA was then sold to the market by way of a public offering. Over the years, BAA divested itself of airports (to a variety of different owners, so as to induce competition) and Heathrow was sold to HAL.

c) We do not consider that the history of Heathrow and the fact that it was a part of a public undertaking can be disregarded for the purposes of article 106(1) TFEU. It was by virtue of being a part of this public undertaking that Heathrow attained its status as a dominant airport. The sale into private hands of such a public undertaking constituted the granting of special or exclusive rights first to BAA and then to HAL. The continued existence of special or exclusive rights is evidenced by the fact that controls such as those contained in the CAA 2012 continue to exist.

183. Mr O'Donoghue contended that HAL was also a privileged undertaking for various other reasons, which we reject.

i) It was suggested that HAL was a privileged undertaking because the price control to which it was subject was too generous, given its substantial market power. We have no hesitation in rejecting this contention, which is tantamount to second-guessing the decision of the sector regulator as to the controls necessary to protect the market from the substantial market power of an undertaking in that market. The fact is that controls have been imposed after careful consideration by the CAA. Inevitably, there is a margin of appreciation in the regulator as to what should be the appropriate *ex ante* control. The fact that such a margin of appreciation exists, and that the regulator might have imposed a different (even more onerous) control (as to which it would be inappropriate for us to comment in these proceedings) does not alter the fact that a price control is a *restriction* on HAL and not a special or exclusive right.

ii) It was suggested that various statutory rights or powers conferred on HAL – with regard, for instance, to compulsory acquisition – rendered HAL a privileged undertaking. We do not propose to parse the many legal provisions that apply to airports in the UK, with a view to establishing whether some or all render HAL a privileged undertaking distinct from other airports. We regard such legal provisions as part of the framework within which HAL operates, and so an aspect of the point we have considered in paragraph 182(i) above. We do not consider that such legal provisions *separately* render HAL a privileged undertaking.

iii) It was suggested that the State Measure conferred by the Secretary of State on HAL – which we consider further below – *by itself* rendered HAL a privileged undertaking. We are not attracted by this "bootstraps" argument and do not consider that, at least in this case, the Secretary of State's conduct in reaching the preference decision can, by itself, both constitute a State Measure and render HAL a privileged undertaking. In this case, article 106(1) TFEU precludes the Secretary of State from maintaining in force any measure contrary to the rules contained in the Treaties. However, that is only in the case of a privileged undertaking. If, absent the State Measure, an undertaking is not a privileged undertaking, it is difficult to see how article 106(1) can apply. Certainly in this case, we find it does not.

The State Measure and Infringement

184. In terms of what act can comprise a State Measure, EU law takes a generous approach. State Measure is given a wide meaning, and can includes all laws, regulations, administrative provisions, administrative practices, and all instruments issued from a public authority, including recommendations (see Whish & Bailey, *op cit* at pages 233-234 and the authorities there cited). We consider that even a "request" is capable of amounting to a State Measure within the meaning of article 106(1) TFEU.

185. That is not to say that anything and everything said or done by an emanation of the State is a State Measure. For the purposes of article 106(1) TFEU, the State Measure must be a "measure *contrary to the rules contained in the Treaties*". Thus, whilst in terms of their form, any number of acts *could* amount to a State Measure, whether such an act is, in fact, a State Measure can only be answered in the context of whether there has been or may be an infringement of article 102 TFEU as a result of the State Measure.

186. It is therefore necessary to consider whether the Treaties have been infringed. There are two, closely related, questions that must be determined. First, whether there has been an infringement of article 102 TFEU. We have already established that HAL holds a dominant position in the market for the provision of airport operation services (and related services) in the South East of England. The question now is whether HAL abused that dominant position. Second, whether the State Measure enabled that abuse.

187. In terms of an infringement, the following points need to be made at the outset.

i) There is nothing unlawful in an undertaking having a dominant position. What is prohibited is the *abuse* of a dominant position. Article 102 TFEU prevents a dominant undertaking from behaving in a certain way (i.e., where that behaviour is "abusive"), when it would *not* be so constrained were it not dominant. Article 102 TFEU thus bears on the individual behaviour of dominant undertakings.

ii) The notion of what constitutes and what does not constitute an abuse is not straightforward. Article 102 TFEU gives examples of conduct that is abusive – charging unfair prices, limiting production, discriminating between customers – but this list is not exhaustive.

iii) Intention is irrelevant. Article 102 TFEU is infringed where there is an abuse of a dominant position, irrespective of the intention of the infringing dominant undertaking. The same is true of article 106(1) TFEU.

iv) It is unnecessary for the "victim" of the abusive conduct to advance the allegation of an infringement of article 102 TFEU or even be specifically identifiable. Article 102 TFEU is concerned with the protection of the process of competition, not with the protection of specific competitors, although of course these two matters are linked. Self-evidently, where there is a private action for damages based upon article 102 TFEU, the claimant will have to show loss and damage in order to succeed. But that is a requirement of the statutory tort the claimant is alleging and not a requirement of article 102 TFEU.

v) It is a matter of controversy under EU law whether there is any *de minimis* doctrine under article 102 TFEU. It might be said that the law ought not to concern itself with trivial or insignificant effects on competition; but whether that is so in this context is something of an open question. We will proceed on the basis that even a *de minimis* effect is sufficient to constitute a breach of article 102 TFEU.

188. We turn to consider the State Measure in this case and whether there has been an infringement of the Treaties.

189. In paragraphs 121-122 above, in relation to Ground 2, we considered the nature of the Secretary of State's request for an assurance or guarantee from HAL regarding the ENR Scheme. We concluded that the request and any response to it was immaterial to the Secretary of State's October 2016 Preference Decision) (see paragraphs 137-138 above).

190. Given those conclusions, it is impossible to see how any abuse of a dominant position could arise on the part of HAL, or how the State Measure – the request of the Secretary of State – could in any way have enabled the abuse. This is an inevitable consequence of our finding that the request and the response to it had *no effect* on the preference decision. That is the case whatever HAL's state of mind when not providing the commitment requested by the Secretary of State and sought by the Claimants.

191. In reaching this conclusion, we have borne in mind that the question of whether an abuse exists extends to potential adverse anti-competitive consequences. In Case C-533/12P, European Commission v. Dimosia Epi Cheirisi Ilektrismou AE (DEI) [2014] 5 CMLR 19, the Court of Justice of the EU ("the CJEU") said this:

> "46. …[I]nfringement of [article 106(1) TFEU] in conjunction with [article 102 TFEU] may be established irrespective of whether any abuse actually exists. All that is necessary is for the Commission to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse.

> 47. In those circumstances, it follows that… it is sufficient to show that the potential or actual anti-competitive consequence is liable to result from the State measure at issue; it is not necessary to identify an abuse other than that which results from the situation brought about by the State measure at issue…".

192. The short point is that there is not even a potential anti-competitive consequence liable to result from the State Measure in this case.

193. For this reason also, we conclude that Ground 1 must fail.

194. However, out of respect to the arguments put to us on the basis of the premise that the absence of a guarantee or assurance from HAL was at the very least material to the preference decision of the Secretary of State, we consider that we should consider whether, even if this were to have been the case, the Secretary of State's request was capable of enabling HAL to infringe Article 102 TFEU.

195. On this basis:

i) if the commitment from HAL had been forthcoming, that would have been a material factor (in the Secretary of State's mind) *in favour* of the ENR Scheme; and

ii) if the commitment had *not* been forthcoming, that would have been a material factor (in the Secretary of State's mind) *against* the ENR Scheme.

196. Mr O'Donoghue submitted that the abuse in this case was HAL's use of the opportunity provided to it to influence the process of identifying the Government's preferred scheme from the three under consideration. In his written submissions at paragraph 20, he put the point in the following way:

> "… [The Secretary of State] failed to secure equality of opportunity because during the final stages of the competition, he asked HAL to "guarantee" the implementation of [the Claimants'] bid. In doing so, an unavoidable risk of conflict of interest was created. In particular, HAL was asked whether or not it was willing to commit to implementing [the Claimants'] scheme at a time when [the Secretary of State] had not yet expressed a preference for the decision and when it was obvious that, by withholding the guarantee, HAL could influence the outcome of that decision-making process in its own favour. At the time the request was made, HAL's principal commercial interest obviously lay in the promotion of its NWR Scheme. It had no incentive to facilitate the promotion of the ENR Scheme."

197. Mr Palmer's answer to this point is that there can be no abuse because HAL and the Claimants are not competing with each other in any economic market (see paragraphs 58 and following of his written submissions). However, in our view, that misunderstands the nature and purpose of article 102 TFEU: as we have described, article 102 TFEU is concerned with the protection of the process of competition, not with the protection of competitors. To take a simple example: a generally clear case of

abuse of dominance is where a dominant undertaking differentiates for no good reason between customers purchasing its product. The dominant undertaking, for no good reason, charges one customer £X and another customer £3X. That is an abuse of a dominant position and an infringement of article 102 TFEU even if neither customer is competing with the dominant undertaking.

198. We return to the Claimants' argument in this case.

i) As we have described, the AC concluded that there was a need for additional runway capacity in the south east of England, that all three options considered in its interim report – the NWR Scheme, the ENR Scheme and the Gatwick Airport scheme – were credible, but that its recommended option was the NWR Scheme. The Secretary of State – after due consideration – agreed with the case for airport expansion, and decided to further consider the three options short-listed by the AC. In order to do so, SoPs were agreed with the promoters of each scheme, and the Secretary of State proceeded to consider the merits of the three schemes. It was during this process that the "challenge" to the Claimants to obtain a commitment from HAL was made.

ii) As we have found, HAL, through its ownership of Heathrow, has a dominant position in the market for the provision of airport services (and related services) in the South East of England. For the reasons we have given, we consider that this market includes the development of new airport capacity, such as that under consideration by the Secretary of State.

iii) Self-evidently, the promoter of each scheme – HAL in the case of the NWR Scheme and the Claimants in the case of the ENR Scheme – had an interest in seeing "its" scheme adopted by the ANPS.

iv) If adopted by the ANPS, the ENR Scheme would only be possible if HAL was prepared to carry it out. The Claimants hold only the intellectual property rights over the ENR Scheme, and have no way themselves of taking it forward. HAL, promoting its own NWR Scheme, could have no real interest in furthering the rival ENR Scheme whilst its own scheme was still in the running.

v) If and to the extent that HAL's views were allowed to feed into the evaluation process of the three schemes under consideration, HAL would be able (to some degree) to influence the outcome of the process. That is why, as we have described, the DfT's process was to focus *solely* on each promoter's scheme and to develop each promoter's SoPs independently of the others. That is also why the Claimants' SoP only envisages negotiations between the Claimants and HAL and the conclusion of an agreement regarding the carrying out of the ENR Scheme *after* the ENR Scheme had become the Government's preferred scheme.

vi) Although, as we have found, the Secretary of State raised the question of HAL's commitment, we have also found that it had no effect on the preference decision. In those circumstances, there can have been no abuse by HAL (whatever HAL's state of mind or thinking) and the State Measure did not in any way enable an abuse of a dominant position.

vii) However, if we are wrong on this point, and the question of a guarantee or an assurance *was* material to the preference decision, then the State Measure interfered with the process of objective evaluation of the three schemes by permitting HAL to affect (in its response to the Secretary of State's request) the preference decision. When HAL declined to provide the commitment to the ENR Scheme sought by the Claimants and the Secretary of State, it had a material influence on the rival merits of the schemes, by depriving one of them of a material factor in its favour.

viii) It is clear that – on the basis of the assumption that we are making – in not giving the commitment sought by the Secretary of State and by the Claimants, HAL deprived the ENR Scheme of a material factor in favour of that scheme, and correspondingly advantaged the rival NWR Scheme in the making of the preference decision. In this way, HAL may have actually and certainly potentially affected the *preference decision* as between the three schemes.

199. Mr O'Donoghue relied upon the decision of the CJEU in Case C-475/99, Ambulanz Glöckner v Landkreis Südwestpfalz [2002] 4 CMLR 21. In that case, when authorising the provision of non-emergency ambulance transport services under German federal law, there was an obligation to consult public emergency ambulance transport service providers, who could also provide (and benefit from) non-emergency services. When consulted, these public providers indicated that they opposed the authorisation, because they had spare capacity themselves. The CJEU held at [43] that:

> "…it must be concluded that, in enacting Paragraph 18(3) of the REttDG 1991, the application of which involves prior consultation of the medical aid organisations in respect of any application for authorisation to provide non-emergency patient transport services submitted by an independent operator, the legislature of the Land of Rheinland-Pfalz gave an advantage to those organisations, which already had an exclusive right on the urgent transport market, by also allowing them to provide such services exclusively. The application of Paragraph 18(3) of the RettDG 1991 therefore has the effect of limiting "markets…to the prejudice of consumers within the meaning of [Article 102(b) TFEU]", by reserving to those medical aid organisations an ancillary transport activity which could be carried on by independent operators."

In Ambulanz Glöckner, the effect of the abuse was to exclude or potentially exclude competitors from the non-emergency ambulance transport market. But the focus of the CJEU was *not* on the harm to competitors, but on the harm to consumers (i.e. persons needing non-emergency ambulance services). This reinforces – or perhaps illustrates – our conclusion that the fact that the Claimants are not competitors of HAL in the provision of airport services is neither here nor there. The abuse is the fact that, by virtue of the measure, HAL has been able to affect the future development of the market within which it is dominant.

200. Accordingly, if we are wrong in our conclusion that the Secretary of State did not regard the provision of a guarantee or assurance by HAL as material to the preference decision, our conclusion would be that the *preference decision* was materially affected by the

Secretary of State's request and the response to it; that the Secretary of State's request was a State Measure; and that the State Measure gave HAL the opportunity materially to influence *the preference decision*.

201. It does not follow from this that there has been an abuse of a dominant position on the part of HAL. Nor does it follow that Ground 1 is made out, even on this basis. That is because influencing *the preference decision* and influencing the *designation of the ANPS* are two very different matters. The fact is that even if there had been an influence over the preference decision, that could not have amounted to an abuse of a dominant position because the preference decision in no way influenced the structure of the market or had the effect of weakening competition.

202. In Case 85/76, Hoffmann-La Roche v Commission EU:C:1979:36, the CJEU stated that an abuse of a dominant position was:

> "An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

203. The preference decision was part of an extended process. It was preceded by the work and reports of the AC and the work of the DfT in evaluating the AC's work and in framing and agreeing the SoPs. After the preference decision was made, there followed a process involving further work by the Department of Transport, as well as considerable Government, public and Parliamentary scrutiny and input, as we have described. The designation of the ANPS was the culmination of that process.

204. Only after this process is completed, could an application for a DCO be made and, if granted, the construction of a new runway and associated facilities begun. As Mr Banner for Arora made very clear in both his written and its oral submissions, the nature of this future development is itself very much going to be affected by rival plans for development consent relating to the NWR Scheme.

205. In these circumstances, we consider that it cannot sensibly be said that the failure on the part of HAL to provide a commitment or assurance to the Secretary of State regarding the ENR Scheme can have influenced the structure of or competition in the market for the provision of airport operation services (and related services) in the South East of England, even if the Secretary of State's preference decision was affected by HAL's failure to provide the commitment or assurance requested. That is all the more so, given that the market in which HAL operates is a *regulated* market, where the sector regulator has a range of tools to ensure that substantial market power is not abused.

206. The fact is that Ground 1 seeks to question something done by the Secretary of State in the course of preparing the ANPS, namely the preference decision, where that decision did not, even potentially, affect competition or market structure, whilst seeking to quash the designation of the ANPS. However, the designation of the ANPS was not affected

by the promoter-specific risk. In short, there is a disconnect between the breach of competition law alleged by the Claimants and the decision which section 13(1) of PA 2008 allows them to challenge (see also paragraph 162 above).

207. Therefore, even assuming (contrary to our finding) that the preference decision was materially affected by the Secretary of State's consideration of the promoter-specific risk, no breach of article 102 TFEU occurred, and (inevitably) none was caused by a State Measure under article 106(1) TFEU.

i) The preference decision was just one step towards the designation of the ANPS. By itself, it had no anti-competitive effect. The question of which scheme should be preferred had no competitive effects at all.

ii) In the period after the preference decision, the ANPS was drafted, consulted upon (twice), considered by the Transport Committee and the Cabinet Sub-Committee, laid before Parliament, debated and voted upon. Throughout this period, the Government was pressed to justify its choice, and it is quite clear that the relative merits of all three schemes continued to be debated. Indeed, as has been described, HAL was continuing to highlight the relative merits of and demerits of the ENR and NWR Schemes in May 2017 (see paragraph 37 above).

iii) When, after all this had taken place, the Secretary of State came to decide to designate the ANPS, he was designating an NPS that reflected the outcome of consultation and the input of Parliament.

iv) The reasons for preferring the NWR Scheme to the ENR Scheme, as they are stated in the ANPS, are set out in paragraph 80 above. Three reasons for preferring the NWR Scheme were given – resilience, respite and deliverability. Two of these reasons were challenged by way of the Ground 4 and Ground 5 challenges that we have already described and dealt with. The third reason was the subject of Ground 3, which is no longer pursued.

v) We note that the Claimants have suggested that the reasons articulated in the ANPS for the preference of the NWR Scheme over the ENR Scheme are "manifestly bogus" (see paragraph 8 above). In light of our conclusions in relation to Grounds 2, 4 and 5, and given the withdrawal of Ground 3, that point is self-evidently bad. To be fair to the Mr O'Donoghue, he did not press this argument hard; but it does seem to us important to note that the reasons contained in the ANPS for preferring the NWR Scheme over the ENR Scheme are sound and clearly not susceptible of challenge by way of judicial review.

In short, even if the preference decision was affected by HAL's failure to respond to the request for a "commitment", that is not sufficient to cause the designation of the ANPS to be undermined.

Conclusion

208. For the reasons given in paragraphs 162 and 189-193 above, Ground 1 must fail. However, even if we are wrong on the question of whether the failure on the part of HAL to provide a guarantee or assurance materially affected the Secretary of State's

preference decision, our conclusion remains the same, for the reasons we have given in paragraphs 194 and following.

209. Therefore, having given permission to proceed, we refuse the substantive claim on this ground.

Overall Conclusion

210. For the reasons we have given, all of the grounds fail.

211. As we have indicated, Ground 3 was abandoned. Formally, we refuse permission to proceed on Grounds 4 and 5; and grant permission in respect of Grounds 1 and 2, but, having done so, we refuse the substantive application.