

Bircham Dyson Bell

# IPC Briefing

## New regime for approval of major transport projects set to 'switch on'

The Planning Act 2008 (the **Act**) introduces a new regime designed to speed up the planning and, in turn, the delivery of infrastructure projects of national significance. For transport projects, it is one of the most important pieces of legislation in recent years. The new procedure will have to be used for any third runway at Heathrow, amongst other high-profile projects.

On 1 March 2010 the regime will 'switch-on' for transport projects. Despite what might seem like a relatively generous implementation period, the Government has had its work cut out as it has endeavoured to flesh out the bare bones laid down in the Act. With a General Election looming there has been a strong desire to install confidence in the changes whilst the Conservatives have adopted a relatively hostile response, albeit that this appears to be dissipating, in part if not in whole. This article looks at progress with implementation of the new system and looks forward to the benefits it promises to bring to the transport sector.



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### The New Regime

The Act lays down a basic framework for a 'unified consent regime' for nationally significant infrastructure projects (**NSIPs**) in England and Wales. In the transport sector, NSIPs include new harbours, roads, railways, rail freight interchanges and airports, where they meet the thresholds set down in the Act. For example, a new airport would be an NSIP if it is expected to be able to handle 10 million passengers, or 10,000 air cargo movements per year, whilst a new railway would be an NSIP if it can't be built using permitted development rights and is intended to form part of an approved operator's network, essentially Network Rail's network.

The framework consists of three key elements. First, it provides for the designation of a series of National Policy Statements (**NPSs**) setting out national policy on particular areas of national infrastructure. Secondly, it introduces a new type of planning consent, the Development Consent Order (**DCO**), which is designed to replace the current myriad of consents required for major infrastructure projects. Thirdly, it makes provision for the creation of a new independent decision-making body, the Infrastructure Planning Commission (**IPC**), which will examine applications and normally decide whether to grant a DCO.



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#### Policies of national significance?

The IPC regime is designed to speed up decision-making. It does this by relieving Ministers of their decision-making responsibilities and avoiding policy debates when applications are being considered. The designation of an NPS provides democratic legitimacy to this approach. The NPS consists of a single accessible document which sets out national policy, stating to a greater or lesser degree what infrastructure is needed, sometimes where it should go, sometimes who should build it, and sometimes what it should look like.

The aim of separating policy-making from decision-taking is generally accepted to be a good one. Even the Conservatives have indicated that they would retain NPSs but strengthen them by allowing Parliament to approve them in formal votes.

Twelve NPSs will be designated across a range of sectors. For transport, statements dealing with ports, national networks (covering the strategic road and rail network and rail freight sites) and airports will be produced. However, progress has been slow. Many NPSs have been delayed and the Government has indicated that drafting the statements has proved trickier than anticipated as it often requires pulling together various, not necessarily consistent, strands of policy. Only the draft Ports NPS and Energy NPSs have been published although the draft National Networks NPS is expected in 'spring 2010', thought to be in late March alongside the High Speed Rail White Paper. The Airports NPS is expected 'by 2011'.

Before 'designating' an NPS the Government will consider representations made during the consultation, any Select Committee recommendations and any resolutions of either House of Parliament. It must then lay before Parliament a statement setting out the response to the resolution / recommendations before amending the NPS as appropriate.

The Transport Select Committee has been scrutinising the draft Ports NPS and will produce its report by the end of March 2010. The draft NPS will also be debated in the House of Lords on 4 March 2010.

So far, the national debate on the draft NPSs has been rather disappointing. Whilst the more obvious stakeholders have made representations, on the whole there appears to have been little grasp of their significance. In particular statements are being treated akin to White Papers rather than policy which, as a matter of law, will have to form the basis upon which the unelected IPC will make important decisions on individual projects.

Based on events to date, there may be some merit in the Conservatives' view that each NPS should be subject to a vote in Parliament. Not only would this add democratic accountability, but it would better protect designated NPSs against judicial review.

NPSs can be challenged in the courts although the Act seeks to restrict the opportunity for challenges quite severely. It remains to be seen if the courts will try to escape this strait-jacket but the Government has already suffered defeat in the courts in relation to its previous consultations on energy policy, and will need to observe due process meticulously if it is to avoid or at least fend off future challenges.

### Devil in the detail

Progress with development of NPSs may have been rather slow but the Government has been working extremely hard in order to flesh out the procedural details of the new system.

Secondary legislation and supporting guidance setting out precisely how the system will work has been published. We have seen regulations dealing with the provisions of a DCO, content of applications, pre-application procedure, environmental impact assessment, appropriate assessment, the IPC's examination procedure, compulsory purchase, on making representations, on prescribed matters to which the IPC must have regard, on application fees and on the type of consents which can be included in a DCO.

Whilst recognising that the department (CLG) has had its work cut out, with no fewer than 10 sets of rules and regulations and a plethora of supporting materials, the implementing package feels overly (and unnecessarily) complex. 'Less is more', usually, but CLG just hasn't had enough time to produce fewer regulations.

### The IPC

Everything about the IPC is designed to speed up decision-making. It is tasked with determining applications within fairly fixed timescales and is to be guided by the relevant NPS to avoid the need for policy debate. Oral examination of applications is discouraged and applicants will have to undertake considerable pre-application consultation and then produce written representations instead.

As the Bill made its way through Parliament, the Government had a tricky task of balancing efficiency (by minimising Ministerial decision-making) with a 'democratic deficit' (by giving too many powers to an unelected body). Critics consider that the end result erred too much towards democratic deficit and the IPC bore the brunt of this criticism.



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Whilst its role is one of the more controversial aspects of the regime, the IPC is now smoothly up and running. Sir Michael Pitt was appointed Chair in March 2009 and it is proposed, in time, to appoint around 35 commissioners. Based in Bristol, the IPC officially opened for business on 1 October 2009 and has since been busy advising promoters on prospective applications. All of the full time commissioners have now been appointed by CLG.

### The IPC 'switches on' but what will be the benefits?

From 1 March 2010, promoters of transport NSIPs must submit a DCO application to the IPC irrespective of whether or not the relevant NPS has been designated, ie they can't choose to go down the old procedures instead. If there is still no relevant 'designated' NPS when an application reaches decision stage, the IPC will make a recommendation to the Secretary of State instead of making the decision itself.

The new process is designed to reduce the cost and uncertainty of the planning system. With more certainty over decision timescales and a shorter more efficient examination stage, the new system is to be welcomed and should lead to greater speed and certainty. However, until the NPSs are designated, this benefit is unlikely to be realised as the IPC cannot make decisions and it may also be unable to avoid policy debates. Whilst NPSs are based on existing policies, these are not set down conveniently in a single statement but instead have to be drawn together and analysed. As is evidenced by the delayed production of NPSs, this is no easy feat. In the case of airports, there may be a two year delay before the NPS is designated and it seems unlikely that the IPC could deal speedily with any airport application meantime.

Another benefit of the new system is that the DCO is designed to provide a single authorisation in place of a raft of consents. DCOs can authorise a range of matters including the operation of a transport system, the compulsory purchase of land, the creation of harbour authorities, the stopping up of highways and the charging of tolls. However, there are quite a few things that a DCO cannot do, such as a power to make byelaws and impose criminal offences, and so the new system is far from being the 'one stop shop' it is claimed to be.

The switch on of the new regime should be welcomed by the transport sector. However, its full benefits will not be realised until the NPSs have been designated and until the uncertainties surrounding the Conservatives' intentions to change elements of the new regime have been resolved.

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