



Francis Taylor Building

## FTB Infrastructure Webinar

20 July 2020



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## “Close – but maybe still a Cigar” Section 35 – Jurisdiction, Practice and Challenge

20 July 2020

Andrew Fraser-Urquhart QC



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## The basic jurisdiction: section 35 PA 2008

(1) The Secretary of State may give a direction for development to be treated as development for which development consent is required.

This is subject to the following provisions of this section and section 35ZA.

(2) The Secretary of State may give a direction under subsection (1) only if—

(a) the development is or forms part of—

(i) a project (or proposed project) in the field of energy, transport, water, waste water or waste, or

(ii) a business or commercial project (or proposed project) of a prescribed description,

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(b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and

(c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with—

(i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;

(ii) in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii).

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## The business/commercial categories: (Inf Planning (Business or Commercial Projects) Regs 2013/3221)

“consists wholly or mainly...”

1. Office
2. Research and development of products or processes
3. An industrial process or processes.
4. Storage or distribution of goods.
5. Conferences.
6. Exhibitions.
7. Sport.
8. Leisure.
9. Tourism
10. Mining but not peat, coal, oil or gas AND no housing at all

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(4)The Secretary of State may give a direction under subsection (1) only with the consent of the Mayor of London if—

(a)all or part of the development is or will be in Greater London, and

(b)the development is or forms part of a business or commercial project (or proposed project) of a description prescribed under subsection (2)(a)(ii).

(5)Regulations under subsection (2)(a)(ii) may not prescribe a description of project which includes the construction of one or more dwellings.]

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## Section 35ZA: Procedure

- (1) The power ... to give a direction in a case within ... (projects in the field of energy etc) is exercisable only in response to a qualifying request if no application for a [PP or other] has been made in relation to the development to which the request relates.
- (2) The power in section 35(1) to give a direction ... within ... (business or commercial projects) is exercisable only in response to a qualifying request made by one or more of the following—
- (a) a person who proposes to carry out any of the development to which the request relates;
  - (b) a person who has applied, or proposes to apply, for a [PP or other consent] any of that development;
  - (c) a person who, if a direction under section 35(1) is given in relation to that development, proposes to apply for an order granting development consent for any of that development.

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- (3) If the Secretary of State gives a direction ... the Secretary of State may—
- (a) if an application for a consent or authorisation mentioned in section 33(1) or (2) has been made in relation to the development, direct the application to be treated as an application for an order granting development consent;
  - (b) if a person proposes to make an application for such a consent or authorisation in relation to the development, direct the proposed application to be treated as a proposed application for development consent.

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## The “modification” provisions

- (4) A direction under section 35(1), or subsection (3) of this section, may be given so as to apply for specified purposes or generally.
- (5) A direction under subsection (3) may provide for specified provisions of or made under this or any other Act—
- (a) to have effect in relation to the application, or proposed application, with any specified modifications, or
- (b) to be treated as having been complied with in relation to the application or proposed application.



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## Duties of relevant authorities (s35ZA (6-9))

- Relevant authority = authority to whom a PP app etc. made or intended to be made
- SofS can delay PP app while considering s35 request
- SofS can require info from relevant authority
- If direction made – relevant authority must refer app to SofS
- SofS must give reasons s35ZA(10)



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## Jurisdiction - takeaways

- For “infrastructure proper” TPs can apply but not if PP app already made
- For business /commercial promoters only
- Requirement of “national significance”
- Consent of Mayor required for direction re business/commercial in London
- No prescribed procedure
- Importance of “modification” provisions
- No housing at all permitted in this regime

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## Timetable: section 35A

- Primary deadline – 28 days after receipt of request
- SofS may request further info from requestor
- If R provides info within 14 days – 28 days for SofS after receipt of info
- NB no specific provision if not provided within 14 days

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## Practice: Guidance

Guidance November 2013: *Extension of the nationally significant infrastructure planning regime to business and commercial projects*

*“...the Secretary of State will consider all relevant matters, including:  
whether a project is likely to have a significant economic impact, or is important for driving growth in the economy;  
whether a project has an impact across an area wider than a single local authority area;  
whether a project is of a substantial physical size – further details are set out below; or  
whether a project is important to the delivery of a nationally significant infrastructure project or other significant development.”*

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## Guidance (2)

*“...the Secretary of State will also consider any matter which the Secretary of State considers relevant to whether a direction should be made. This will include:  
whether a project is likely to require multiple consents or authorisations, and which, in consequence, would benefit from the single authorisation process offered by the nationally significant infrastructure regime;*

*Although size in itself will not be the determining factor in whether a project is nationally significant or not, the Secretary of State would not normally expect to receive requests for directions in relation to projects not of that are not of a substantial size...”*

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## Procedure: points to note

- No set procedure – only simple letter required
- No set time at which application must be made but NB can only apply for infrastructure proper if no PP app already made
- No time limit for SofS reply if info not provided in time
- Limited ability for TPs to comment on request

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## Do you want it? Reasons to seek DCO route

- Need case often established by NPS – but are there NPSs for your project? NPPF changes “are” to “may be”
- Policy established in NPS often favourable eg landscape
- One consent/one decision maker
- Ability to apply for associated infrastructure – query housing?
- Higher profile, more engagement from statutory undertakers?
- Set timings

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## Applications – good practice points

- Early engagement with SofS - FAQ 29 says liaise directly with relevant SofS; If London, the Mayor too
- Description of development: flexibility vs certainty
- Respond to the Guidelines
- Make comprehensive case on national significance
- Think carefully about “modification” procedures
- Provide any requested info promptly

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## Challenges – potential angles for challenges

- Definitions in Regs – is the scheme within it?  
Application of Use Classes definitions?
- Correspondence of application for s35 to DCO actually sought
- Use of the “modification” provisions
- Consideration of TP reps if sought or offered
- Reasons – s35ZA(10)
- Exercise of the discretion!

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## Challenges

### Ross (Stop Stansted Expansion) v Sec of State Transport [2020] EWHC 226 (Admin)

- Challenge to decision NOT to regard Stansted expansion as NSIP
- Either by automatic qualification as NSIP or by exercise of discretion under section 35 PA 2008
- Scheme for creation of 2 taxiways, and 9 new aircraft stands
- Phase 3 of 3 stage expansion project
- App made to LPA, SSE said should be determined as NSIP
- Sec of State (for Transport) refused

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## Stansted

- Planning app said would increase mppa from 35 to 43 (8)
- NSIP threshold is “permitted” or “capable” 10 mppa (s23(1) PA 08)
- Argument focused on issue of whether “capable” meant what the new infrastructure would theoretically capable of accommodating OR realistic and likely usage
- Additional issue of whether taxiways part of runway

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## Stansted – Conclusions Ground 1

- Basis of judgement and/or material considerations
- Issue of capability requires judgement – *Wednesbury* grounds apply, with particular reference to difficulty of challenging expert driven view (*Mott*)
- Not theoretical or hypothetical but “an analysis based on how the infrastructure is likely to perform”
- Possibility of restrictions on night flights being lifted not supported by any evidence

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## Stansted – Ground 2 conclusions

- Broad discretion - “task of the Claimants... is daunting”
- Alleged failure to appreciate that part of a larger project not made out – alleged facts not known to Sec of State and did not bear forensic construction claimed by C
- Carbon emissions consideration already dealt with in national policy documents (Making Best Use document with NPS)
- No evidence economic effects more than regional

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## Stansted - Takeaways

- Re-affirmation of difficulty of challenge to judgements, especially where expert-driven and/or modelling
- Issue of what infrastructure is capable of.... based on actual likelihood not theoretical possibility
- A matter of judgement for Sec of State (see above!)
- Ability to disregard possible changes if not likely
- Broad nature of s35 discretion
- Ability to rely on matters already decided by national policy



## Andrew Fraser-Urquhart QC

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## National Policy Statements Challenges and Reviews

Craig Howell Williams QC & Michael Fry  
FTB Webinar - 20 July 2020

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### STRUCTURE

- The statutory scheme
- Designated NPSs
- Recent cases
- The need for review
- The scope for influence
- Concluding comments

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## THE STATUTORY SCHEME

### S5 Planning Act 2008

- (1) SoS may designate a “national policy statement” “in relation to...specified descriptions of development”
- (5) The policy may:
  - set out appropriate amount, type or size of development;
  - set out criteria to be applied in deciding whether a location is suitable (or potentially suitable);
  - set out the relative weight to be given to specified criteria;
  - identify one or more locations as suitable (or potentially suitable) or unsuitable for development;
  - identify statutory undertakers as appropriate persons to carry out development;
  - set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

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## Role in decision-making – S104 and NPS primacy

- S104(2): SoS must have regard to relevant NPS
- S104(3): SoS “must decide the application in accordance with any relevant national policy statement, except...”
- S104(4)-(8) exceptions where SoS satisfied that:
  - UK would breach international obligations
  - SoS would breach obligations under legislation
  - it would be unlawful by virtue of any enactment
  - the adverse impacts would outweigh benefits
  - any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

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## Role in decision-making – no question NPS merits

- S106(1)(b): SoS may disregard any representations (including evidence) if he considers that they “relate to the merits of policy set out in a national policy statement”
- S87(3): ExA may similarly disregard such representations
- S94(8): ExA may refuse to allow any such representations at the hearing.

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## Role in decision-making – no NPS

- S105: where s104 does not apply SoS “must have regard to”:
  - any local impact report
  - any prescribed matters relevant to the application
  - “any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision”
- An NPS may still be important and relevant even if not directly applicable (*R (David Gate) v SST*)
- An emerging NPS may be important and relevant (see National Infrastructure Planning web-site)

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## S5 – NPS designation

- (1) SoS may designate a statement as a NPS
- (3) SoS must carry out an appraisal of the sustainability of the policy before designation
- (4) Designation only if (s7) consultation and publicity requirements and (s9) parliamentary requirements complied with
- (5) What an NPS may set out
- (6) NPS must set out criteria to be taken into account in the design of that description of development
- (7) NPA must give reasons for the policy set out in the statement.
- (8) Reasons must include explanation of how the policy takes account of Govt policy relating to mitigation of, and adaptation to, climate change

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## S10 – sustainable development, climate change and good design

When exercising functions of designation or review

- (2) SoS must do so with the objective of contributing to the achievement of sustainable development
- (3) for the purposes of Ss(2) SoS must have regard to the desirability of—
  - (a) mitigating, and adapting to, climate change;
  - (b) achieving good design.

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## S6 – NPS reviews

- (1) SoS “must review each national policy statement whenever the Secretary of State thinks it appropriate to do so”
- (2) Review “may relate to all or part of a national policy statement”
- (3)(a)-(c) & (4)(a)-(c) In deciding when to review, all or part, SoS must consider whether:
  - “there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided”;
  - “the change was not anticipated” and
  - “if it had been anticipated, any of the policy would have been materially different”
- (5) SoS must amend NPS, withdraw it or leave it as it is
- (6) & (7) Similar requirements as per new NPSs re assessment of sustainability, publicity, consultation an Parliamentary process

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## S11 - NPS suspension

- Where SoS thinks that
  - “there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided”
  - “the change was not anticipated at that time”, and
  - “if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different”
- SoS “may suspend the operation of all or any part of the national policy statement until a review of the statement or the relevant part has been completed”
- NPS treated as withdrawn until review completed
- S108 – power to direct that a DCO examination be suspended pending review

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## S7 – consultation and publicity

- (2) SoS must carry out such consultation, and arrange for such publicity, as SoS “thinks appropriate”
- (4) SoS must consult such persons, and such descriptions of persons, as may be prescribed
- (5) If policy set out in the proposal identifies locations as suitable or potentially suitable for development, SoS must ensure “appropriate steps” are taken to publicise proposal
- (6) SoS must have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal.



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## S9 - Parliamentary procedure

- SoS must lay NPS/proposed amendment before Parliament
- If HL or HC make a resolution, or a committee of either house, makes recommendation SoS must lay before Parliament response to resolution/recommendation
- If any amendments to NPS, start period for Parliamentary review again.



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## S13 – challenges by judicial review within 6 weeks

- (1) challenge to an NPS or anything done, or omitted to be done, by SoS in preparing an NPS
- (2), (3) challenge to a decision of SoS not to carry out or to carry out a review
- (4) challenge to anything done, or omitted to be done, by SoS in the course of carrying out a review
- (5) challenge to anything done by SoS under s6(5) after completing a review
- (6) challenge to decision of SoS as to whether or not to suspend NPS or part

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## DESIGNATED NATIONAL POLICY STATEMENTS Status and Progress

National Policy Statement	Date Designated
EN-1 Overarching Energy	19 July 2011
EN-2 Fossil Fuels	19 July 2011
EN-3 Renewable Energy	19 July 2011
EN-4 Oil and Gas Supply and Storage	19 July 2011
EN-5 Electricity Networks	19 July 2011
EN-6 Nuclear Power	19 July 2011

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## Status and Progress of National Policy Statements

National Policy Statement	Date Designated
Ports	26 January 2012
National Networks	14 January 2015
Airports	26 June 2018
Hazardous Waste	6 June 2013
Waste Water	9 February 2012
Geological Disposal Infrastructure	17 October 2019



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## Status and Progress of National Policy Statements

- 12 designated NPSs
- Energy; Transport; Water, Waste Water and Waste
- Airports NPS – no update on Gov.uk or National Infrastructure Planning websites to reflect CoA judgment
- Emerging NPSs



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## Water Resources Draft NPS

- HC Environment, Food and Rural Affairs Committee terms of reference:
  - Will the draft NPS encourage the sustainable, resilient and safe infrastructure projects required to meet future challenges?
  - Are the assessment criteria that must be considered in development consent applications adequately set out?
  - What are the implications of streamlining the planning process, whereby a NSIP already included in a Water Resource Management Plan (WRMP) does not need to be revisited as part of a development consent?
  - How effectively has DEFRA consulted with relevant stakeholders, such as industry and other parts of Government, in the development of the draft NPS?
  - Are there any other issues that the Committee should consider when scrutinising the draft NPS?

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## New Nuclear NPS

- Announced at same time as geological disposal (of radioactive waste) NPS. GD NPS adopted 17 October 2019.
- Government has consulted, but not provided response to consultation.
- Stated ambition remains new NPS in 2020.

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## Future NPSs

- Housing?
  - Not in itself an NSIP under PA 2008
- Business and commercial projects?
  - Only two projects at pre-application stage - International Advanced Manufacturing Park Two and The London Resort
  - Infrastructure Planning (Business or Commercial Projects) Regulations 2013 BCP NPS case “is not strong” but “[t]he Government will keep this position under review”

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## RECENT CASE LAW

NPSs are becoming increasingly controversial:

- Airports NPS
- ClientEarth & Drax DCO
- Riverside Energy Park DCO
- Good Law

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## R (on app Plan B Earth) v SS Transport [2020] EWCA Civ 214

- Challenge to ANPS designation on various grounds
- Conclusion - Gov commitment to Paris Agreement constituted gov policy on climate change which pursuant to s.5(8) SoS had to take into account. Failure to do so was enough to vitiate his designation of the ANPS; obviously material to designation decision such that irrational not to have taken it into account.
- Remedy was a declaration that ANPS was unlawful and no legal effect until Gov review per ss6, 7 and 9.
- Onward to the Supreme Court

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## R (on app ClientEarth) v SS Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin)

- Challenge to DCO decision on basis of SoS interpretation of EN-1
- SoS correct to reject Panel's interpretation. EN-1 does not require a general quantitative assessment of need in DCO decisions. EN-1 says qualitative need for new development such that "substantial weight" to be given to project contribution
- When carrying out s.104(7) balance SoS was entitled to take into account "substantial weight" assessment she had made in relation to need under EN-1
- Nb confirmed principles from *Spurrier*:
  - Merits of NPSs not open to challenge
  - S104(7) cannot be used to circumvent s104(3)
  - Preclusive effect depends on NPS wording
  - Appropriate procedure for arguing policy is out of date is s6 review mechanism
- Drax has applied for permission to appeal to CA (grounds not known)
- Riverside Energy Park DCO decision - permission to apply for JR given

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## Good Law Project Energy NPS JR

- Claimants - Energy NPSs should be reviewed and/or are now unlawful as they have not been reviewed in accordance with up-to-date climate change policies
  - Climate Change Act 2008 (2050 Target Amendment) Order 2019
  - Govt declaration of climate emergency May 2019
  - Paris Agreement
- Govt position – challenge premature. No decision on whether to review the Energy NPSs until the Energy White Paper (EWP) is published (expected mid-2021 at the earliest). Covid-19 cited as one of the reasons for the delay of the EWP.
- Explicit that s6(1) PA 2008 decision will be made after publication of EWP

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## THE NEED FOR REVIEW

- Section 6(3)(a) PA 2008:
  - Significant change in circumstances
  - Change not anticipated
  - If the change had been anticipated, any of the policy would have been materially different.

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## Changes in circumstances

- Climate change / Net Zero
- Some NPSs are ageing (particularly Energy)
  - EN-6 - New Nuclear?
  - EN-3 – Tidal/wave/solar energy?
  - EN-1 – Policy support for coal-fired power plants?
- Covid-19?
- Common thread – lack of political will



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## Approach in DCO Applications

- Preparation
  - NPSs suspended at critical times?
  - NPS is declared unlawful?
  - Do you need to be prepared to challenge SoS decision?



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## Approach in DCO Applications

- Examination
  - Planning Balance – emphasise the positives
  - Weight – suspended, unlawful, emerging:
    - Manston Airport decision letter: “The Court of Appeal ruled on 27 February 2020 (i.e. after the close of the examination) that when designating the ANPS, which was backed by Parliament, the previous Government did not take account of the Paris Agreement, non-CO2 emissions and emissions post 2050. As part of its judgment, the Court also declared that the ANPS is of no legal effect unless and until the government carries out a review under the Planning Act 2008. Government had taken the decision not to appeal this judgment and accordingly the Secretary of State has afforded the ANPS no weight in his decision.”

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## Approach in DCO Applications

### Risk of challenge

- Be realistic – is NPS out of date?
- Mitigate risk during Examination – address issues head on
- Offer up suitable requirements
- If controversial, build challenge periods into scheme’s critical path

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## THE SCOPE FOR INFLUENCE

- Nb court references to statutory review scheme
- Representations to relevant SoS, lobbying by industries/expert bodies, lobbying of MPs to raise issues in Parliament
- S6 hurdles:
  - Must review whenever thinks “appropriate”
  - “significant” change in circumstances
  - “not anticipated”
  - “materially different”
- The Good Law Project claim



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## Publicity and Consultation

- Take advice from relevant experts
- Reasoned, helpful responses, evidence based
- Consider Government’s indications/direction of travel
- Consider Government’s response to consultation and reasons
- Seek Parliamentary allies – in either House.



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## CONCLUDING COMMENTS

- NPSs pivotal to PA 2008
- Role of NPSs – primacy in decision-making
- Tension between Ss104(7) and 104(3)
- NPSs remain effective until reviewed
- NPSs yellowing at the edges
- Statute based review system
- Reviews depend on political will
- Scope remains for influencing SoS

## SoS has a key role – avoid allegations of bias!





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## Thank you for listening

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