

Appropriate Assessment; Avoidance; Mitigation and Compensation

ALEX GOODMAN

Main Themes of Talk



- The scheme of article 6 to the HD
- The three stages under article 6(3)
- When and how does consideration of avoidance, mitigation and compensation come into the appropriate assessment process?
- Distinguish mitigation, avoidance and compensation..

Habitats Directive 92/43/EEC



- Adopted in 1992
- Aim of protecting seriously threatened species across Europe
- Complements Directive 79/409/EEC on Wild Birds.
- Together they provide the regulatory framework for what is known as the “Natura 2000” network of protected sites.

Article 6(1) of Council Directive 92/43/EEC



- 6(1):

“For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.”

Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC para 2.2 states article 6(1) provides for positive measures involving management plans etc. to achieve the general objects of the Directive. It is not mandatory to adopt such measures, as implied by the use of the phrase “if need be”.

Article 6(2)



6(2)

Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

Article 6(2)



- *Managing Natura 2000 sites* explains that article 6(2) takes as its starting point the “prevention principle”: Member states are required to “avoid” deterioration of natural habitats and disturbance of species.
- Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive’s objectives.
- It cannot be applicable concomitantly with Article 6(3): see “*Waddenzee*” [2004] EUECJ C-127/02 at § 38.

Article 6(3)



3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Three-stage process under article 6(3) $\frac{L}{C}$

- *Waddenzee* at § 66: Article 6(3) is directly effective
- three stage approach to approval of a project by a competent authority:
 - (i) consideration whether the risk (or “possibility”) of a project having an adverse effect on a European Site can be excluded;
 - (ii) if not then ‘appropriate assessment’ of whether the project will affect the integrity of the site;
 - (iii) approval of a project only where it has determined that it will not adversely affect the integrity of a European site.

Stage 1: Art 6(3) first half of first sentence: *Exclusion of significant effects*



- Procedural requirement that projects likely to have a significant effect on the management of a European Site be subject to an “appropriate assessment”:
- *Waddenzee at § 43-4:*

“the first sentence of Art 6(3) subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

In the light, in particular of the precautionary principle... such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site...”

Can Mitigation be considered at this stage? $\frac{L}{C}$

No?

- European Commission's *Methodological Guidance* para 2.6
- AG in *Waddenzee*: "In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment."

Can Mitigation be considered at this stage? $\frac{L}{C}$

Yes.

- Sullivan J rejected both in *R (Hart DC) v SSCLG* [2008] EWHC 1204 at § 76: “For all these reasons, I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information”
- Followed in *Alternative A5 Alliance's Application for Judicial Review* [2013] NIQB 30 see Maurici talk.

Difference between Mitigation and Avoidance



- Much discussed in the background to *Hart*, but not a distinction ultimately of interest to Sullivan J.
- Part of the variation in authority is attributable to a lack of differentiation between mitigation and avoidance.
- In truth *Hart* is concerned with *avoidance*. SANGS ensure that people do not go to the protected site at all. In such cases there is simply no impact from a development.
- Mitigation is about offsetting or reducing impacts: much harder to assess at the preliminary 'screening' stage.

Individually or in Combination



- At stage 1 the authority must consider the effects of the project “in combination” with other projects.
- Query can it consider beneficial aspects of other projects?
- In *Waddenzee* § 46: requirement for appropriate assessment in article 6(3) should be read together with the tenth recital to the Directive: “Whereas an appropriate assessment must be made of any plan or project likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future”
- Emphasis on the objective of designation of a site as a protected site is emphasised in *Sweetman* at § 45-6

Stage 2: AA

Article 6(3), first sentence, second half

- Habitats Directive does not define further what AA entails
- No particular method is prescribed for “appropriate assessment” (see eg. *Waddenzee* at § 52 and Case C-304/05 *Commission v Italy* [2007] ECR I-7495 § 57).
- But: second sentence of article 6(3) makes clear that it must be an assessment of a quality and rigour capable of satisfying the decision maker that there is no reasonable scientific doubt as to the potential for adverse effects from the project on the site. This is confirmed *Commission v Spain* [2011] EUECJ C-404/09 at § 100:
- Assessment cannot be regarded as ‘appropriate’ if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned (see, Case C-304/05 *Commission v Italy* [2007] ECR I-7495 § 69-73, and further *Sweetman*).

Stage 3: prohibition on approval Art 6(3) Second Sentence



- Substantive requirement that a competent authority must not agree to the project unless, it has “made certain that [the project] will not adversely affect the integrity of that site”.
- That is the case where “no reasonable scientific doubt remains as to the absence of such effects” (*Waddenzee* at § 58)
- See also *Solvay and Others* [2012] EUECJ C-182/10 at § 67 and for consideration in a domestic case see *Hart* [2008] at § 78.
- It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see *Commission v Portugal* [2007] Env LR D4, § 24; Case C-304/05 *Commission v Italy* [2007] ECR I-7495, § 72 and *Commission v Spain* [2011] EUECJ C-404/09 at § 104).

Cumulative Impacts and Mitigation Relevant at Stages 2 and 3?



Cumulative Impact: CJEU in *Waddenzee* at paragraph 53:

“Nevertheless according to the wording of that provision (Article 6(3)), an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.”

Mitigation etc: Reg 61(6) of the 2010 Regs:

“In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.”

Consideration of Positive Impacts



- If project A for which permission is sought has a negative effect (eg. discharge of sewage) can the benefits of project B be offset against it (eg. sewerage works by the statutory undertaker)?
- These were the facts of *R (Hughes) v Carmarthenshire CC* [2012] EWCA Civ 1509 and case implies that it is acceptable to trade the positive impacts of one project against the negative impacts of the project in question- even where the site does not enjoy favourable conservation area status and even where there was no direct nexus between them.
- Possibly not legitimate in order to avoid AA altogether
- Suggest- must be a nexus between project A and B- eg section 106/CIL as with SANGS

Relationship between Article 6(2) and 6(3)



- In *Waddenzee*, the ECJ addressed the relationship between the two articles at § 36 thus:
“Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2)”
- Art 6(1) and 6(2) concerned with day to day management, 6(3) and 6(4) concern plans or projects unconnected with that management: *Sweetman* at § 70.

Article 6(4)



4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Some Aspects of Art 6(4)



- Comes into play where it has been determined that a plan or project will be given further consideration despite a negative assessment of it (even taking into account mitigation measures).
- And in the “absence of alternative solutions”: alternatives must be eliminated
- Competent authority may permit the project for IROPI including those of a social and economic nature, but only if compensatory measures to protect the overall coherence of the European site are maintained.
- compensatory measures offset the negative impact of a project and provide compensation corresponding precisely to the negative effect of the project: *Managing Natura 2000 Sites*, section 5.4.1.

Summary of Art 6(4)



- The Directive permits account to be taken of social and economic factors in this context (see *Regina v Secretary of State for the Environment, ex parte RSPB* (Case C-44/95 [1997] 2 W.L.R. 123 at § 65), but it does not permit economic and social considerations to influence the obligations pursuant to article 6(3) at an earlier stage.
- IROPI can only be advanced in light of an appropriate assessment: *Commission v Spain* EUECJ C-404/09

Summary of Article 6:

R (Akester) v DEFRA and others [2010] EWHC 232

- 1. The Habitats Directive must be interpreted and applied by reference to the precautionary principle, which reflects the high level of protection pursued by Community policy on the environment – see *Waddenzee* paras 44 and 58;
- 2. A competent national authority may only authorise a plan or project after having determined that it will not adversely affect the integrity of the protected site in question – Article 6(3) and *Waddenzee* paras 56 and 57;
- 3. Unless the risk of significant adverse effects on the site in question can be excluded by the competent authority on the basis of objective information, the plan or project must be the subject of an appropriate assessment of its implications for the site;
- 4. If, following an appropriate assessment, doubt remains as to whether or not there will be significant adverse effects on the integrity of the site, the competent authority must refuse authorisation of the plan or project, unless Article 6(4) applies.
- 5. If in spite of a negative assessment of the implications for the site, and in the absence of alternative solutions, a plan or project must be carried out for imperative reasons overriding public interest (including those of a social or economic nature), the competent national authorities must “take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected”, and notify the Commission of such measures. (Article 6(4)).

The Conservation of Habitats and Species Regulations *2010*



- Implement the Habitats Directive as of 1 April 2010
- By regulation 3(3) terms not defined by the regulations which are used in the regulations and the Directive, bear the meaning they bear in the Directive. “Appropriate assessment” is one such term.
- By regulation 9(5) a competent authority must, in exercising any of its functions “have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.”

Implementation of Art 6

Reg 61



- Reg 61(1) implements first sentence of Art 6(3)
- Reg 61(5) (second sentence):

“In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).”

- Reg 62 seeks to implement art 6(4)

SANGS Theory



- By providing suitable alternative natural green spaces, visitors will be drawn to those alternatives for recreation and not to the SPA.
- Thames Basin Heaths SPA considered in *R (Hart District Council) v SSCLG and others* [2008] EWHC 1204: the mere hypothetical possibility of a SANG being provided is unlikely to be capable of allowing a conclusion that otherwise harmful effects of a development can be avoided or mitigated. Need to identify and provide actual sites, not just accumulate money.
- Can be provided through section 106 agreements or CIL- charging schedule. Affords relevant nexus between positive and negative
- Adaptable to other scenarios

Some Conclusions



- HD to be interpreted as a whole
- Application in a given context is to have regard to the specific reasons why a site was designated and its specific conservation objectives
- Current position is that Avoidance Mitigation and Cumulative Impacts should be considered at all three stages under article 6(3)
- Finer distinctions and analysis of these concepts yet to be resolved
- The difference and difference in thresholds between the “screening” (stage 1) and “appropriate assessment” (stage 2) remains very tricky (see eg AG in *Sweetman* at 70-1)

Appropriate Assessment; Avoidance; Mitigation and Compensation

ALEX GOODMAN