

Habitats issues following
*People Over Wind & Sweetman v. Coillte
Teoranta (C-323/17)*
(and other cases)

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Commission website: Natura 2000

In a nutshell

Stretching over 18 % of the EU's land area and almost 6 % of its marine territory, it is the largest coordinated network of protected areas in the world. It offers a haven to Europe's most valuable and threatened species and habitats.

In practice

Natura 2000 is a network of core breeding and resting sites for rare and threatened species, and some rare natural habitat types which are protected in their own right. It stretches across all 28 EU countries, both on land and at sea. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats, listed under both the Birds Directive and the Habitats Directive.

Council Directive 92/43/EEC on the Conservation of natural habitats & of wild fauna & flora

- **Article 6(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.*

Council Directive 92/43/EEC on the Conservation of natural habitats & of wild fauna & flora

- **Article 6(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.*

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

Article 6(2)

- Do not forget art. 6(2) -
 - “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.”
- ***Grune Liga Sachsen eV v Freistaat Sachsen*** C-399/14 [2016] P.T.S.R. 1240 may require a review under art. 6(2) even where outside the 2017 review provisions applying an approach derived from art. 6(3), although acknowledging there is a discretion.

Conservation of Habitats & Species Regulations 2017

- Critical to planning – regs. 61, 63 (transposes art 6(3)), 64 and 68 (transposes art. 6(4))
- Reg 61 includes variations to consents
- See also Conservation of Offshore Marine Habitats and Species Regulations 2017, especially regs. 27-32, 36 and 37
- No express reference to variations

Conservation of Habitats & Species Regulations 2017

- other relevant provisions in Part 6 governing the application of habitats provisions (including not only consent for projects or plans etc but also review of existing consents):
 - Regs. 70-74 – planning permission
 - Regs. 75-78 - General development orders
 - Reg. 79 - Special development orders
 - Reg. 80 - Local development orders
 - Reg. 81 - Neighbourhood development orders
 - Regs. 82-83 - Simplified planning zones and enterprise zones
 - Regs. 84-85 - Development consent orders under the Planning Act 2008

General approach

- ***Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij*** (C-127/02) [2005] 2 C.M.L.R. 31
- ***Sweetman v An Bord Pleanala*** (C-258/11) [2014] P.T.S.R. 1092
- ***Briels v. Minister van Infrastructuur en Milieu*** (C-521/12) [2014] PTSR 1120
- ***R. (Champion) v North Norfolk DC*** [2015] 1 W.L.R. 3710
- ***Commission v Poland (Białowieża Forest)*** C-441/17, 17.4.18, recent restatement at [80] to [193] the requirements for compliance with art. 6(3).

2 stages under art. 6(3) and reg. [63]

- **Screening** – precautionary approach, any risk of significant effects requires AA, a de minimis threshold to exclude cases where there is clearly no risk of adverse effect - the “should we bother to check” test
- **Appropriate Assessment** – a detailed assessment of the effect of the proposals on the integrity of the site in the light of the best scientific knowledge. Must produce certainty “beyond all reasonable doubt” – see e.g. *Commission v Poland* at [120] and also at [118]
 - “A less stringent authorisation criterion could not ensure as effectively the fulfilment of the objective of site protection intended under that provision”

Differences between the 2 stages

- AG Sharpston in *Sweetman* considers 2 stages in detail including –
 - “49. The threshold at the first stage of article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the court has termed “the best scientific knowledge in the field”. ...
 - 50. The test which that expert assessment must determine is whether the plan or project in question has “an adverse effect on the integrity of the site”... The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not “should we bother to check?” (the question at the first stage) but rather “what will happen to the site if this plan or project goes ahead; and is that consistent with ‘maintaining or restoring the favourable conservation status’ of the habitat or species concerned?” ...”

Screening and mitigation: national courts

- ***R (Hart DC) v SSCLG*** [2008] 2 P. & C.R. 16 Sullivan J at [72]:
 - “72. I am satisfied that there is no legal requirement that a screening assessment under reg.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 (see *Waddenzee* above).”

Screening and mitigation

- Indeed Sullivan J held that “it would have been “ludicrous” for her to disaggregate the different elements of the package and require an appropriate assessment...” and noted “the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course...”
- **Hart DC was** approved on several occasions. See e.g.
 - Richards L.J. in **No Adastral New Town Ltd v Suffolk Coastal DC** [2015] Env. L.R. 28 at [72]-[74]
 - Sales L.J. in **Smyth v SSCLG** [2015] P.T.S.R. 1417 at [68] to [75] referred to **Hart DC** as “compelling and clearly correct” [74]
 - **Champion** does not suggest a different approach.
- Legislation was based on this approach (see below)
- Then



**The bad omens (*Orleans*),
the decision (*People Over Wind*)
and the aftermath**

Orleans v. Vlaams Gewest C-387/15 [2017] Env. L.R. 12

- Antwerp Regional Development Implementation Plan
- works would involve the destruction of habitats within SAC
- Flemish Government argued that -
 - the Plan’s rules meant the development of affected areas would become possible only after the sustainable establishment of habitats and habitats of species in “ecological core areas” had been confirmed as successful and that the ecological core areas would already contribute to the integrity of the site in question
 - the use of those ecological core areas in the RDIP was not a compensatory measure, but rather a conservation measure
- Rejected by the CJEU in terms that foreshadowed **PoW** and in terms which mark a general feature of these cases – a refusal to accept that mitigation measures can be certain in their outcome

Orleans v. Vlaams Gewest C-387/15

- “48 ... it must, in the first place, be recalled that, in [29] of the judgment ... in *Briels and Others (C-521/12)*, the Court held that protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in art.6(3).”
- “51 ... the appropriate assessment of the implications of the plan or project for the site concerned that must be carried out pursuant to art.6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field...”
- “52 ... as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future...”

Orleans v. Vlaams Gewest C-387/15

- “57 ... as noted in [33] above, that the wording of art.6 of the Habitats Directive contains no reference to any concept of “mitigating measure.”
- “58 In this connection, as the Court has already observed, the effectiveness of the protective measures provided for in art. of Directive 92/43 is intended to avoid a situation where competent national authorities allow so-called “mitigating” measures — which are in reality compensatory measures — in order to circumvent the specific procedures provided for in art.6(3) and authorise projects which adversely affect the integrity of the site concerned...”
- “59 It follows that the negative implications of a plan or project not directly connected with or necessary to the management of a special area of conservation and affecting its integrity do not fall within the scope of art.6(3) of the Habitats Directive.”
- No consideration of the possibility that a screening assessment might not be there for avoidance purposes in that it may in any event provide the certainty required under art 6(3). This is a recurring point.

People Over Wind & Sweetman v. Coillte Teoranta (C-323/17)

- Challenge to cable connection to a (permitted) wind farm from the electricity grid.
- Question whether river pollutants resulting from the laying of the cable, would have a harmful effect on the designated River Nore pearl mussel
- The application was screened out on the basis of expert advice –
 - “This conclusion was reached on the basis of the distance between the proposed Cullenagh grid connection and the European sites, and the protective measures that have been built into the works design of the project.”
- CJEU held that this was in breach of art 6(3) since the proposals should not have been screened out having regard to the measures built into the design

People Over Wind

- “25. ... Article 6 ... divides measures into three categories, namely conservation measures, preventive measures and compensatory measures, provided for in Article 6(1), (2) and (4) respectively. It is clear from the wording of Article 6 of the Habitats Directive that that provision contains no reference to any concept of ‘mitigating measure’..”
- “35. ... the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.”

People Over Wind

- “36. That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.”
- “37. Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.”

People Over Wind

- “39. It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment ...”
- “40. ... the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.”

Grace & Sweetman

- Wind turbine proposals, impacting on hen harrier habitat designated as SPA and proposals for “dynamic” management of the habitat
- Not so much as issue with regard to screening but the extent to which mitigation can be taken into account even at the AA stage (picked up in the **Dutch Nitrogen** cases). This appears to sound the death-knell for adaptive mitigation measures in the context of AA and habitats.
- AG Tanchev –
 - “23. According to the schedule , the hen harrier population of the SPA will depend increasingly on the presence of unplanted bog and heath and pre-thicket second rotation forest. It seems that the area of bog and heath will remain fairly constant, but the extent of the pre-thicket second rotation forest will vary. Consequently, the physical footprint of the hen harriers’ foraging area within the SPA is dynamic rather than static in nature as it constantly changes through active forest management which is currently undertaken. A failure to actively manage the forest plantations would in itself lead to the loss of foraging habitat.”

Grace & Sweetman

- AG Tanchev - measures proposed
 - “28. The schedule outlines the measures proposed by the SHMP to alter the management regime presently in place and address the potential impacts of the wind farm on hen harriers. First, the SHMP would restore 3 currently planted areas to blanket bog prior to the construction of the wind farm, involving a total of 41.2 hectares, of which 14.2 hectares of this total is located within 250 metres of a turbine.
 - 29. Second, over the lifetime of the project, the SHMP would subject 137.3 hectares of second rotation forest to ‘sensitive’ management. This ‘sensitive’ management foresees felling and replacing of the current closed canopy forest so as to ensure that there would be 137.3 hectares of perpetually open canopy forest as foraging habitat, with a view to providing continuous foraging habitat and an ecological corridor between two areas of open bog. This would be done on a phased basis starting a year prior to construction.”

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- The CJEU repeated orthodox principles relating to the need for certainty in the AA
- It rejected the dynamic management of the habitat as being appropriate to fall within an AA and considered them to be compensation under art 6(4)
 - “51. It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out ...
 - 52. As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future...”

- “53. It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires ‘dynamic’ management that is the cause of uncertainty. In fact, **such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat** and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, **are only potential, as the measures have not yet been implemented**. Accordingly, and subject to verifications to be carried out by the referring court, **it was not possible for those benefits to be foreseen with the requisite degree of certainty** when the authorities approved the contested development

Grace & Sweetman

- “57. ... where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced **may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.**”

Dutch Nitrogen Cases

- ***Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*** Case C-293/17, C-294/17 CJEU 7.11.18
- Relevant to multiple projects relying on a high level AA (e.g. under a local plan) or whether there can be a single AA for multiple projects
- The meaning of “project” was considered and the CJEU held that whilst EIA projects would all fall within art. 6(3), the wider approach to “projects” under art. 6(3) means that there may be “projects” which are not within the EIA definition
- High level (there a statutory scheme), or single AA for multiple projects, will only be effective and applicable if “only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain” [109, 114]

Dutch Nitrogen Cases

- In terms of the efficacy of mitigation at the AA stage –
 - “126 Moreover, according to the Court's case-law, it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment'... ”
 - “130 The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.”

Dutch Nitrogen Cases

- CJEU's ruling on issue 6:
 - “Article 6(3) of Directive 92/43 must be interpreted as meaning that an 'appropriate assessment' within the meaning of that provision may not take into account the existence of 'conservation measures' within the meaning of paragraph 1 of that article, 'preventive measures' within the meaning of paragraph 2 of that article, measures specifically adopted for a programme such as that at issue in the main proceedings or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment.”
- Implication of [130] and Ruling 6 for local plans where mitigation is through policy? Especially since policy requirements are subject to s. 38(6) and other material considerations and are not mandatory.

The National Reaction

National reaction

- ***R (Langton) v. Secretary of State*** [2018] EWHC 2190 (Admin), Sir Ross Cranston rejected the contention that the licence conditions for badger culling infringed the approach in ***PoW***:
 - “157 In my view the licence conditions which Natural England attached to the licences in Areas 16 and 17 are not the mitigating or protective measures which featured in the People Over Wind ruling. They are properly characterised as integral features of the project which Natural England needed to assess under the Habitats Regulations. I accept Natural England's submission that it would be contrary to common sense for Natural England to have to assume that culling was going to take place at times and places where the applicants did not propose to do so.”
- He noted at [83] that
 - “Each of the assessments stated that following informal advice from Natural England, and in view of the site's conservation objectives, applicants "had accepted and incorporated the following mitigation measures into the proposal", and that "[c]omplying with the mitigation measures will ensure there is no significant likely effect alone".

National reaction

- PINS Note 05/2018 9.5.18 to guide inspectors examining local plans
 - “11. It should be noted that there is no authoritative definition of what constitutes an integrated or additional avoidance or reduction measure and this should be considered on a case by case basis. If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation. It may be helpful to consider whether a proposal could be considered integral to a plan or whether it is a measure to avoid harm....”
- **Langton** provides some support for “integral” measures but this is a tricky line to follow if even “built in” measures have been added specifically to avoided impact on a designated site
- Do any “built-in” measures fall to be taken into account –
 - Landscaping?
 - Building location and design?
 - SANGS and SAMMS?

NPPF 2018

- NPPF 2018 [177] did not take account of PoW (though Orleans predated it by a year) and so it precluded the operation of the presumption in [11] if the application could not be screened out
- Plainly based on the earlier national authorities and no longer correct
- Technical Consultation paper of 26.10.18 proposes a new version of [177] which does take PoW into account and which reapplies [11] in any event if an AA demonstrates to harm to integrity
- In any event 177 is not development plan policy nor legislation and this and para 11 cannot avoid the application of the 2017 Regulations and any development plan policy which requires protection of habitats. If there is a positive AA which means the development accords with the statutory DP then it is difficult to see on what rational basis permission could be refused simply because of the presence of out of date para. 177.
- The draft replacement is plainly based on a correct understanding of the law and should be considered in any event

Implications for legislation

- A number of legislative provisions proceed on the basis that they can only be applied/relied upon if the proposal can be screened out i.e. they, like the original version of NPPF 2018 para 177 proceed on an incorrect understanding of the law with regard to mitigation. See e.g. reg. 79
 - “(1) A special development order may not grant planning permission for development which—
 - (a) is **likely to have a significant effect** on a European site (either alone or in combination with other plans or projects); and
 - (b) is not directly connected with or necessary to the management of the site.
 - (2) A special development order may not grant planning permission for development which is likely to have a significant effect on a European offshore marine site (either alone or in combination with other plans or projects)...”
- Contrast the provisions for DCOs (reg. 84) and for permitted development under general development orders (regs. 75-78) which do allow for AA.

Implications for legislation

- Provisions which appear to depend on being able to screen out as in the case of SDOs include –
 - Reg. 80 - Local development orders
 - Reg. 81 - Neighbourhood development orders
 - Regs. 82-83 - Simplified planning zones and enterprise zones
 - the habitats general condition for neighbourhood plans (see para 8 of Sched 4B to the TCPA 1990 in para. 1 of Sch 2 to the Neighbourhood Planning (General) Regulations 2012 (given effect by reg. 32) -
 - “... The making of the neighbourhood development plan **is not likely to have a significant effect on a European site** (as defined in the Conservation of Habitats and Species Regulations 2017) or a European offshore marine site (as defined in the Conservation of Offshore Marine Habitats and Species Regulations 2017) (either alone or in combination with other plans or projects).”

Appropriate Assessment

What is an appropriate assessment?

- **PoW** echoing many other cases –
 - “the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned”
- Note that the importance of public consultation, not referred to in art. 6 is specifically referred to in **PoW** at [39]
- Lord Carnwath in **Champion** – no specific format for AA
- **Holohan v An Bord Pleanála** C-461/17 7.11.18 goes further than earlier CJEU discussions of AA – see [32]-[40]

What is an appropriate assessment?

- Repeats in more detail the need for a thorough assessment and a certain conclusion:
 - “37. ... all aspects which might affect those objectives must be identified and since the assessment carried out must contain complete, precise and definitive findings in that regard, it must be held that all the habitats and species for which the site is protected must be catalogued. A failure, in that assessment, to identify the entirety of the habitats and species for which the site has been listed would be to disregard the abovementioned requirements and, therefore, as observed, in essence, by the Advocate General in point 31 of her Opinion, would not be sufficient to dispel all reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected site”

What is an appropriate assessment?

- Introduces a scope for AA which may go beyond designated habitats and the species for which the habitat has been listed -
 - “40 ... an ‘appropriate assessment’ must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project **for the species present on that site, and for which that site has not been listed**, and the implications for **habitat types and species to be found outside the boundaries of that site**, provided that those implications are liable to affect the conservation objectives of the site”