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Current habitats issues: mitigation, screening, appropriate assessment and discretion

(June 2019)

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Legislation

- **Council Directive 92/43/EEC on the Conservation of natural habitats & of wild fauna & flora**
  - Article 6(3)
  - Article 6(4)
  - Article 6(2) – see ***Grune Liga Sachsen eV v Freistaat Sachsen*** C-399/14 [2016] P.T.S.R. 1240
- **Conservation of Habitats & Species Regulations 2017 (& Conservation of Offshore Marine Habitats & Species Regulations 2017)**
- Critical to planning – regs. 61, 63 (transposes art 6(3)), 64 and 68 (transposes art. 6(4))
- Amendments -
  - Conservation of Habitats and Species and Planning (Various Amendments) (England and Wales) Regulations 2018/1307 to accommodate ***POW***
  - Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579

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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 Pleanála*** (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
- ***R (Mynydd y Gwynt Ltd) v. Secretary of State*** [2018] P.T.S.R. 1274
- ***Commission v. Poland (Białowieża Forest)*** 17.4.18, recent restatement at [80] to [193] the requirements for compliance with art. 6(3).

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

- See AG Sharpston in ***Sweetman*** at [49]-[50]
- 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 [scientific] 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"

Screening & mitigation pre 2018: 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. …"it would have been "ludicrous"... 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*** did not suggest a different approach.
- Legislation was based on this approach

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Orleans, People Over Wind and more besides

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

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- 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…"

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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 or that it may provide the certainty required under art 6(3). This is a recurring point.

People Over Wind & Sweetman v. Coillte Teoranta (C-323/17) [2018] PTSR 1668

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- 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. Note "built into the design" since often said that built in measures are not mitigation measures and can be used to screen out AA. See [25]-[40]

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People Over Wind

- “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.”
- “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.”

Grace & Sweetman

- Wind turbine proposals, impacting on SPA hen harrier habitat 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.
- 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."

Grace & Sweetman

- The CJEU repeated orthodox principles relating to the need for certainty in the AA. Appears to be a policy decision that certainty of measures cannot be achieved except through AA.
- It rejected the dynamic management of the habitat as appropriate for passing AA
- “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…”

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- "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

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]

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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.

Appropriate Assessment

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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 echoed by Dove J in ***Canterbury City Council***
- ***Holohan v An Bord Pleanála*** C-461/17 [2019] Env. L.R. 1 goes further than earlier CJEU discussions of AA – see [32]-[40]

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Holohan v An Bord Pleanála C-461/17

- Repeats in more detail the need for a thorough assessment and certainty in the conclusions:
  - "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"

Holohan v An Bord Pleanála C-461/17

- The scope of the AA which may have to extent 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"

Holohan v An Bord Pleanála C-461/17

- AG Kokott's Opinion contains useful guidance e.g.
- "28. … the effects on certain habitat types and species referred to in Annexes I and II to the Habitats Directive, and on migratory birds and birds referred to in Annex I to the Birds Directive, which are present on the protected site but are not covered by its conservation objectives do not, on the other hand, in principle, have to be assessed. However, this only applies if these occurrences are **so insignificant that they do not for the sake of completeness have to be included in the conservation objectives** of the area.
- 29. … the assessment provided for in the first sentence of Article 6(3) of the Habitats Directive must be free of lacunae. It must contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. Moreover, an assessment of the implications of a plan or project for the protected site's conservation objectives **is not 'appropriate', within the meaning of the first sentence of Article 6(3) of the Habitats Directive, where updated data concerning the protected habitats and species is lacking**."

Holohan v An Bord Pleanála C-461/17

- “30. The assessment must therefore **unequivocally demonstrate** why the protected habitat types and species are not adversely affected. In this regard, it may in certain cases be sufficient to find that only certain protected habitat types and species are present at the locations concerned, which is to say that other protected habitat types and species on the site are not present at those locations. **It must also be apparent from the assessment, however, that the works at the locations concerned are not capable of adversely affecting those other habitat types and species**, in so far as they are present **at other locations** on the site.
- 31. **Mere silence** in respect of certain habitat types or species, on the other hand, will not generally amount to complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works under assessment.”

Discretion and screening

- The Supreme Court in ***R (Champion) v North Norfolk DC*** [2015] 1 WLR 3710 at [54]-[65], applying ***Walton v Scottish Ministers*** [2013] PTSR 51 and ***Gemeinde Altrip v Land Rheinland-Pfalz*** (C-72/12) [2014] P.T.S.R. 311 the Court may exercise its discretion to refuse relief if the substance of the EU right has been complied with.
- In ***Canterbury CC & Crondall PC v Secretary of State*** [2019] EWHC 1211 (Admin) the appeals decisions had both proceeded on the basis of screening out AA based on mitigation. ***Crondall*** turned on an incorrected application of the tilted balance, but in ***Canterbury CC*** Dove J. refused to quash the decision at [92]-[100] underlining the importance of undertaking an AA [116]:
- "98 … I am satisfied that had the matter proceeded to the undertaking of an Appropriate Assessment the conclusion would have been the same. Firstly, as set out above, all European sites were considered, and in relation to all sites other than the Thanet Coast and Sandwich Bay SPA/Ramsar the conclusion which was reached was that there would be no likely significant effects without the need to examine any mitigation measures."

Discretion and screening

- "100 Not only therefore is the Canterbury case one where detailed and comprehensive information was provided, albeit not presented as an Appropriate Assessment, but the analysis having posed the questions required by both the first and second sentences of Article 6(3) of the Directive, reached a conclusion which was wholly uncontroversial so far as the material before the court discloses. There is no evidence to suggest, bearing in mind the extensive nature of the material produced in support of the application, that the public were deprived of any access to information about these issues or disadvantaged in their ability to participate in decision-taking in respect of it. I am satisfied therefore that whilst the error of law in this case was, in principle, significant, when the substance of the position is scrutinised it is clear that had that error of law not been made nonetheless the decision which the Defendant would have reached would have been the same. In effect in this case both of the questions required in the first and second sentence of Article 6(3) were answered in the material provided in the application, that material was subject to extensive consultation, and no party to that consultation sought to suggest that there was any error in the conclusion which had been reached in respect of the impacts on European sites."

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The National Reaction

National reaction

- ***R (Langton) v. Secretary of State*** [2019] Env. L.R. 9 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."

  "83 … 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".

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National reaction

- PINS Note 05/2018 9.5.18 to guide local plans inspectors

  "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 and ***PoW*** concerned built in design measures
- Do any "built-in" measures fall to be taken into account –
  - Landscaping?
  - Building location and design?
  - SANGS and SAMMS?

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Other changes

- NPPF 2019 [177]
- Conservation of Habitats and Species and Planning (Various Amendments) (England and Wales) Regulations 2018/1307 correcting assumptions based on the ***Hart DC*** approach for neighbourhood plans and a range of other orders in the Habitats Regulations – came into effect from 28.12.18.
- They now apply “the assessment provisions” - see reg. 61(1) of the 2017 Regulations, i.e. reg. 63 excluding reg. 64 - rather than the screening criterion. This allows for screening and AA but not the derogation provisions if an adverse effect on integrity is found.
- The legislative provisions which proceeded on the basis of the ***Hart DC*** mitigation and screening approach have been amended by the Amendments in Conservation of Habitats and Species and Planning (Various Amendments) (England and Wales) Regulations 2018/1307 to accommodate ***POW***

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The future - Brexit

- **Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019**
- These seek to retain the requirements of the 2017 Regulations but with adjustments for the UK's exit from the EU. Amended reg 3 will provide
  - "(10) For the purposes of these Regulations, and any guidance issued before exit day by the appropriate authority or the appropriate nature conservation body, relating to the application of these Regulations, on or after exit day, references to "Natura 2000" (other than in this regulation) are to be construed as references to the national site network.
  - (11) Paragraph (10) **does not affect the interpretation** of these Regulations as they had effect, or any guidance as it applied, **before exit day**."

The future – Brexit

Explanatory Memorandum:

"2. Purpose of the instrument

2.1 This instrument makes changes to the three existing instruments which transpose the Habitats and Wild Birds Directives so that they continue to work (are operable) upon the UK's exit from the European Union (EU). The existing instruments are: The Conservation of Habitats and Species Regulations 2017; The Conservation of Offshore Marine Habitats and Species Regulations 2017; and The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. This instrument also amends section 27 of the Wildlife and Countryside Act 1981 to ensure existing protections continue."

"Why is it being changed?

2.3 The 2017 and 2001 Regulations fulfil the objectives of the Nature Directives in the UK's terrestrial areas, inland waters and its inshore and offshore marine areas by ensuring that activities are carried out in a manner that is consistent with the Directives. This instrument provides changes to those parts of the 2017 and 2001 Regulations which would no longer work when the UK leaves the EU."

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Thank you for listening

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