Landmark Chambers

HABITATS UPDATE

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Legislation

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- Council Directive 92/43/EEC on the Conservation of natural habitats & of wild fauna & flora – **the Habitats Directive**
- Conservation of Habitats & Species Regulations 2017
- Conservation of Offshore Marine Habitats and Species Regulations 2017
- Conservation of Habitats and Species and Planning (Various Amendments) (England and Wales) Regulations 2018/1307 to accommodate ***People Over Wind***
- Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019, coming into force on exit day
- European Union (Withdrawal) Act 2018

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.”

- Text and approach in Habitats Regulations not altered by Brexit Regulations.

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.”

- Text and approach in Habitats Regulations not altered by Brexit Regulations.

European Union (Withdrawal) Act 2018

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Explanatory Notes §§ 2, 10:

- "The Act ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union …
- The principal purpose of the Act is to provide a functioning statute book on the day the UK leaves the EU".
- See in particular ss. 2-8 and Schedule 1. Subject to amendments which come into force on exit day, the Habitats Regulations remain in force and subject to the same legal approach as currently they are.

European Union (Withdrawal) Act 2018

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- **Definitions ss. 20, 21 and Sched. 1 para. 5**
  - "**exit day**" is 31 October 2019 at 23.00, unless the day or time at which the Treaties cease applying to the UK is different to that date, in which case a Minister may amend its meaning [i.e. will become the new exit day under the latest extension]
  - References to the principle of supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law, or the rule in ***Frankovich*** are references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day

European Union (Withdrawal) Act 2018

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EU-derived domestic legislation (s. 2)

- s. 2(1) "EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day."
- s. 2(2) "EU-derived domestic legislation" means any enactment so far as -
  - made under s. 2(2) or Sched. 2, para. 1A ECA;
  - passed, made, or operating for a purpose mentioned in s. 2(2)(a) or (b) ECA;
  - relating to anything falling within s. 2(2)(a)(b) or to which ss. 3(1) (incorporation of direct EU legislation) or 4(1) (savings for rights under s. 2(1) ECA) applies; or
  - relating otherwise to the EU or EEA.

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Direct EU legislation (s. 3)

- s. 3(1) “Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”
- s. 3(2) “direct EU legislation” means (broadly) -
  - any EU regulation, decision or tertiary legislation
  - any Annex to the EEA agreement and insofar as it refers to or contains adaptations of anything contained in paragraph (a)
  - Protocol 1 to the EEA agreement
- as they have effect in EU law immediately before exit day

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Rights under s. 2(1) ECA 1972 (s. 4)

- s. 4(1) "(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day" are —
  - recognised and available in domestic law by virtue of s. 2(1) ECA 1972, and
  - enforced, allowed and followed accordingly,
- "continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."
- s. 4(2) this does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures caught by s. 3 or which arise under an EU directive and are not of a kind recognised by any EU or UK court before exit day

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Principle of supremacy of EU Law (s. 5(1)-(3))

- "(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
- (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.
- (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification."

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Interpretation of retained EU law (s. 6)

- s. 6(1) a court or tribunal is not bound by any principles or decisions made on or after exit day by the CJEU, and may no longer make a reference to them
- s. 6(2) nonetheless, it may still “have regard” to post exit-day decisions of the CJEU, other EU entities, or the EU insofar as relevant to the matter before it
- s. 6(3) any question as to the validity, meaning or effect of retained EU law is to be decided, insofar as that law is unmodified after exit day and insofar as is relevant, in accordance with any retained case law and general principles, and having regard to the principles of EU competencies
- s. 6(4) and (5) the Supreme Court is not bound by retained EU case law, but to depart must apply the same test as it would before departing from one of its own decisions

Recent authorities

- ***Commission v Poland*** (***Białowieża Forest***) C-441/17 (17.4.18)
- ***Orleans v Vlaams Gewest*** (C-387/15) [2017] Env. L.R. 12
- ***People Over Wind & Sweetman v Coillte Teoranta*** [2018] PTSR 1668
- ***Grace and Sweetman v An Bord Pleanála*** (C-164/17) [2019] P.T.S.R. 266
- ***Cooperatie Mobilisation for the Environment & Vereniging Leefmilieu*** (C-293/17, C294/17) [2019] Env. L.R. 27 ("*Dutch Nitrogen*")
- ***Holohan v An Bord Pleanála*** (C-461/17) [2019] P.T.S.R. 1054
- ***R. (Langton) v Secretary of State*** [2019] EWCA Civ 1562
- ***Canterbury CC v Secretary of State*** [2019] EWHC 1211 (Admin)
- ***Gladman Developments Ltd v Secretary of State*** [2019] EWHC 2001 (Admin)
- ***R (Wingfield) v Canterbury CC*** [2019]
- ***Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*** (C-411/17) 29.7.19

“Project” for article 6(3) purposes

- ***Inter-Environnement Wallonie*** (Case C-411/17) at [145] the CJEU held that legislative measures extending the life of two nuclear power plants, which required the re-starting of one and modernization works, constituted one “project” and required an appropriate assessment before they were adopted by the legislator. This was so, notwithstanding that the implementation of the measures involved subsequent acts such as the issue of individual authorisations. The CJEU’s approach was similar to that for a multi-stage planning consent process: [142]-[144]
- The CJEU noted that “project” was not defined but “account should be taken of the definition of ‘project’ in Article 1(2)(a) of the EIA Directive” [122] and “if an activity is regarded as a ‘project’ within the meaning of the EIA Directive, it may constitute a ‘project’ within the meaning of the Habitats Directive” [124]. When considering potentially separate works “it must be determined whether, having regard in particular to the regularity or nature of some activities or the conditions under which they are carried out, they must be regarded as constituting a single operation, and can be considered to be one and the same project for the purposes of Article 6(3)”.

“Project” for article 6(3) purposes

- A project would not be regarded as a “single operation” “having regard in particular to the regularity or nature of some activities or the conditions under which they are carried out” and would be distinct if “where there is no continuity in the activity, inter alia when the location and conditions in which it is carried out are not the same” [128-129]
- The projects were distinct here even though there was some continuity in the operation of the plants since the legislative position was modified by the relevant measure so that one power plant had to be restarted and “upon implementation of those measures, industrial production at those two power stations will not be carried out under operational conditions identical to those initially authorised, if only due to scientific developments and new safety standards...” [130-131]
- Contrast ***Brussels Hoofdstedelijk Gewest v Vlaams Gewest*** (C-275/09) [2011] Env L.R. 26 (under EIA) which concerned only the renewal of a permit to operate an airport which was found not to involve works or interventions in the natural environment which would alter the physical aspect of the site.”

Mitigation, screening and built-in measures

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- ***Langton*** in the Court of Appeal did not resolve or discuss the issue since the case had been overtaken on the facts by new assessments.
- The issue of the extent to which built in measures, i.e. measures forming part of the project itself, are subject to the approach in ***People Over Wind*** has yet to be resolved
  - in ***People Over Wind*** itself, the mitigation measures did form part of the project
  - in Langton in the High Court limitations in the grant of the licence as to the operation of the licences were held not to fall within the requirements of ***People Over Wind***
  - Obvious attempt to bolt on mitigation in planning applications to avoid appropriate assessment seem likely to fail but there are likely to be more difficult examples

Mitigation at appropriate assessment stage

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- Rejection of uncertain future measures even at appropriate assessment stage emphasized – ***Orleans*** [52], ***Grace & Sweetman*** and ***Cooperatie Mobilisation***.
- The key principle under art. 6(3), often repeated, here in ***Commission v Poland -***

  "117. Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities have become certain that the plan or project will not have lasting adverse effects on the integrity of the site concerned. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see to that effect, inter alia, judgments of 11 April 2013, *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 40, and of 8 November 2016, *Lesoochranárske zoskupenie* VLK, C-243/15, EU:C:2016:838, paragraph 42)."
- Detailed summary of the case law and general approach to Article 6 at [106]-[193]

Grace & Sweetman

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Dynamic habitat management and creation/recreation -

- "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 ...
- 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."

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Cooperatie Mobilisation (Dutch Nitrogen)

- CJEU at [126] and [130] –

  "126 … 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."

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Uncertain future measures - issues

- How far do these principles extent to exclude mitigation measures at AA stage when they are just unimplemented future proposals?
- Potentially wide-reaching effects, though the application of the certainty principle that has been part of the CJEU case law for some time
- Dynamic habitat creation measures appear to be ruled out at the art 6(3) stage
- What about local plan proposals for e.g. SANGS where the land to be used has yet to be identified and the works to make it suitable have not been undertaken? Does this impact on the soundness of the plan?
- Implications for habitat improvement or creation and biodiversity offsetting where measures are yet to be implemented
- Does this push more projects into the art 6(4) provisions with its strict requirements?

Derogation under article 6(4)

- Art.6(4) permits consent to be given (subject to provision of ecological compensation) where -
  - "in the absence of alternative solutions" and
  - "notwithstanding a negative assessment of the implications for the site"
  - consent or authorisation etc., may be granted for the project but only "for imperative reasons of overriding public interest" ("IROPI")
  - See also reg. 64(1)
- in ***Inter-Environnement Wallonie*** (C-411/17) - legislative measures extending the life of two nuclear power plants. The question was whether the objective of ensuring the security of a Member State's electricity supply constituted an imperative reason of overriding public interest

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Inter-Environnement Wallonie (C-411/17)

- Rigorous approach to art. 6(4) taken by the CJEU at [159], having explained at [150]-[158] the need for detailed assessment and information. The reasons used for IROPI must be both "public" and "overriding", that, in respect of art. 6(4) –

  "155 As regards the question whether the objective of ensuring the security of a Member State's electricity supply constitutes an imperative reason of overriding public interest within the meaning of the first subparagraph of Article 6(4) of the Habitats Directive, it should be noted that an interest capable of justifying proceeding with a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed against that directive's objective of the conservation of natural habitats and wild fauna, including birds, and flora"

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Inter-Environnement Wallonie (C-411/17)

"157 Furthermore, and in any event, the objective of ensuring the security of electricity supply in a Member State at all times fulfils the conditions specified in paragraph 155 of the present judgment.

158 However, if a protected site likely to be affected by a project hosts a priority natural habitat type or species, within the meaning of the Habitats Directive... the only ground capable of constituting a public security ground for the purposes of the second subparagraph of Article 6(4) of that directive that would justify proceeding with the project is the need to nullify a genuine and serious threat of rupture of that Member State's electricity supply."

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Errors and the discretion not to quash

- ***R (Champion) v North Norfolk District Council*** [2015] 1 WLR 3710, [58]-[61] (Supreme Court) on the exercise of discretion in EIA and Habitats cases
- ***Canterbury CC v SoS*** [2019] – 2 cases where decisions had failed to apply ***POW***. Dove J in the first case refused to quash as an exercise of discretion since the screening report and ES were detailed and there was no information not before the decision maker which an AA would have generated and there was therefore no basis for considering an AA would have made any difference to the decision. The second decision (***Crondall PC***) was quashed but that resulted from a material error in applying policy so there was no basis for considering exercising discretion
- ***R (Wingfield) v Canterbury CC*** [2019] Lang J. exercised the court's discretion despite the fact that a permission on which a RMA was based failed to take account of ***POW*** but the outline grant preceded the judgment in ***POW*** and she found the error could be cured at RMA stage. Likely to be exceptional.