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Junior breakfast briefings:

Habitats Regulations Assessments

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Overview

1. Introduce HRAs (CoF)
2. Overview of the HD (CoF)
3. Article 6 of the HD (HW)
4. Distinguishing avoidance, mitigation and compensation (HW)
5. The role of Natural England (CoF)
6. Cumulative effects (CoF)
7. NPPF (CoF)
8. Guidance (CoF)





Introduction

- Habitats Directive (92/43/EEC) along with the Birds Directive (79/409/EEC) aim to (a) identify natural habitats and species of wild fauna and flora of Community Interest; and, (b) set out “*measures*” for the maintenance or restoration of those features of Community Interest.
- Perhaps the most important part is Article 6 which requires “*plans or projects*” to be (a) screened for likely significant effects; (b) subject to an “*appropriate assessment*” if necessary; and, (c) given consent only if there will be no adverse effect on site integrity (unless there are imperative reasons of overriding public interest).
- Different from environmental impact assessment and strategic environmental impact assessment — it is more focused in its scope
- Transposed into domestic law by Habitats and Species Regulations (2017/1012) and by Offshore Marine Habitats and Species Regulations (2017/1013).



What about Brexit?

- Domestic transposing regulations remain in force, with amendments made by 2019 (EU Exit) Regulations (2019/579) (n.b. these changes are largely tidying up loose ends)
- High Court now said that *“any legal question involving rights or obligations said to be derived from EU Law should now be approached in the first instance through the lens of domestic law”* ([2021] EWHC 289 (Admin))
- But there is still a role for EU law in this field, as per the European Union (Withdrawal Act) 2018 (e.g. direct effect of the Habitats Directive? status and force of case law? reference to the general principles as a guide to interpretation?)
- Probably unlikely to be a major change even as the dust settles because of the Trade and Cooperation Agreement (but watch this space).

Overview of the Habitats Directive

- Article 1: Definitions
- Article 2: Aims of the Directive (*“measures shall be designed to maintain or restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest”*)
- Article 3: Setting up a *“coherent European ecological network”* of SACs under the *“Natura 2000 title”*, composing of *“sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II”*
- Article 6: Ensure conservation measures are in place to appropriately manage SACs and ensure appropriate assessment of plans and projects likely to have a significant effect on the integrity of an SAC
- Articles 12 – 16: System of *“strict protection”* for protection of protected habitats and species
- Other Articles deal with e.g. general duties and with reporting and information obligations

Habitats Directive Aims (1)

- The Habitats Directive is “*intended to be an aid to effective environmental decision making, not a legal obstacle course*” (*R (Hart District Council) v SSCLG* [2008] 2 P & C.R. 16 at [72] per Sullivan J.

Article 2

“1. *The aim of this Directive shall be to **contribute towards ensuring biodiversity** through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.*

2. *Measures taken pursuant to this Directive shall be designed to maintain or restore, at **favourable conservation status**, natural habitats and species of wild fauna and flora of Community interest.*

3. *Measures taken pursuant to this Directive shall take account of **economic, social and cultural requirements and regional and local characteristics.***”

Habitats Directive Aims (2)

- Article 3:
 - *“A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of **sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II**, shall enable the natural habitat types and the species” habitats concerned to be maintained or, where appropriate, restored at a **favourable conservation status in their natural range.**”*
- So Natura 2000 includes habitats in Annex I and habitats of the species in Annex II.

Annex I: Natural habitat protected

- Lists *"natural habitat types of community interest whose conservation requires the designation of special areas of conservation"*
 - e.g. bog areas, open sea and tidal areas, atlantic and continental salt marshes etc.
- Includes 71 *"priority habitats"* (i.e. natural habitat types in danger of disappearance) (e.g. limestone pavements).
- (Interpretation Manual of European Commission guidance on interpreting Annex I European Union Habitats (April 2018)).



Annex II: Species whose habitat protected

- Lists *“animal and plant species of community interest whose conservation requires the designation of special areas of conservation”*
- It includes priority species
- Core areas of their habitat are designated for protection





Natura 2000 Network

- Every country has designated Natura 2000 sites to help conserve the rare habitats and species present in their territory.
- Sites range in size from less than 1 ha to over 5,000 km² depending on the species or habitats they aim to conserve; the majority are around 100–1,000 ha.
- UK has designated around 9% of its terrestrial area as SACs, this being one of the smallest of any EU nation (Slovenia, the greatest, has designated 38%).

Interaction with the Birds Directive

- Birds Directive 79/409/EEC was the earliest piece of EU environmental legislation – adopted April 1979.
- Designed to protect the habitat of endangered and migratory species of birds.
- Establishes a network of Special Protection Areas (SPAs) including all the most suitable territories for these species.
- These are included within the Natura 2000 network protected under the Habitats Directive (see Art 3(1))



- And see also Article 7 which replaces obligations under the Birds Directive



Article 6 of the Habitats Directive: Overview

- (Given effect in Regs 63-64 of the 2017 Regs)
- Ensure conservation measures are in place to appropriately manage SACs and SPAs (Art 6(1-2)).
- Ensure appropriate assessment of plans and projects likely to have a significant effect on the integrity of a SAC or SPA (Art 6(3)).
- Projects may still be permitted if there are no alternatives, and there are imperative reasons of overriding public interest (Art 6(4)).
- In such cases compensatory measures are necessary to ensure the overall coherence of the Natura 2000 network. (Art 6(4)).



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Article 6(3): Three-stage Process (Stage 1)

Three stage approach to approval:

(i) consideration whether the risk (or “*possibility*”) of a project having an adverse effect on a European Site can be excluded.

- Sometimes referred to as screening (like in EIA)
- A risk exists “*if it cannot be excluded on the basis of objective information that there will not be the significant effect*” (C-323/17 *People Over Wind* at [34])
- The requirement that the effect be “*significant*” lays down only a de minimis threshold – (AG Sharpston opinion in Case C-258/11 *Sweetman* at [48]).
- Cannot take into account mitigation measures at this stage (C-323/17 *People Over Wind* at [40]) unless integral to the scheme (*R. (Langton) v Secretary of State for Environment, Food and Rural Affairs* [2019] Env. L.R. 9):
- Langton: proposals for badger culling outside of breeding seasons + certain times: High Court held that these integral features can be taken into account in deciding no AA needed.
- N.b. on appeal, CoA did not need to determine whether the First Instance Judge was correct as the point had become academic (see para 59 – [2019] EWCA Civ 1562)



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Article 6(3): Three-stage Process (Stage 2)

(ii) if risk of adverse effect, carry out ‘*appropriate assessment*’ of whether the project will affect the integrity of the site;

- AA must catalogue the entirety of habitat types and species for which a site is protected (C-461/17 *Holohan* at 40).
- AA “*may not have lacunae and must contain complete precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the proposed works on the protected site concerned*” Case C-323/17 *People Over Wind v Coillte Teoranta* [2018] PTSR 1668 at [38]
- Common for AA to consider other designations: i.e. Site of Special Scientific Interest (SSSI) – protected under the Wildlife and Countryside Act 1981.
- Where appropriate consult the public. Requirement for consultation satisfied by consultation carried through planning process – see *Cron dall PC v SoS* [2019] JPL 1321.

Article 6(3): Three-stage Process (Stage 2 Continued)

- The appropriate assessment must “*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*” (C-127/02 *Waddenzee* [2005] 2 CMLR 31 at [53]).
- 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).
- Need for AA to give reasons when departing from expert scientific opinion capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned (C-461/17 *Holohan* at [52]).

Article 6(3): Three-stage Process (Stage 3)

(iii) approval of a project only where AA has made certain that it will not adversely affect the integrity of a European site (C-127/02 *Waddenzee* [2005] 2 CMLR 31 at [55])

- That is the case where “*no reasonable scientific doubt remains as to the absence of such effects*” (58).
- If AA concludes there may be adverse effect, can only approve under Art 6(4).



Article 6(4)

- Can only approve under 6(4) where there is no alternative to the proposals which would not have significant adverse effects on the SAC.
- Alternative must be suitable for achieving the aims of the project in question (AG Kokott in Case C-239/04 *Commission v. Portugal* [2006] ECR I-10183).
- That raises the difficult issue of different schemes being excluded from consideration because the aims of the project have been artificially narrowed to exclude them.
- See *Plan B Earth v SoS* [2020] PTSR 1446. DC and CoA held that what is suitable is a matter of planning judgement for the decision-maker
- The SoS entitled, as matter of planning judgment, to discount the NWR and Gatwick 2R schemes because they would not achieve the 'Hub objective' and so were not a true alternative to a 3rd Heathrow runway.



Article 6(4)

- Can options be discounted as alternatives where they may have adverse effects on a SAC/SPA?
- Also in issue in Plan B Earth v SoS.
- There was evidence that the SoS discounted G2R in part because of possible impacts on a nearby SAC which had a priority species. But those possible impacts could have been ruled out on further investigation.
- The Court found that the decisive factor was that G2R did not meet the 'hub objective' so did not make a ruling on whether it could have been 'screened out' based upon the possible adverse impact on a SAC
- *Obiter* remarks seems to suggest that SoS probably could not have discounted G2R purely on the basis of *possible* impacts on a SAC that could be ruled out on further investigation. see [2020] PTSR 240 at [370] and CoA comment at [2020] PTSR 1466 at [105].
- May be different if the adverse effects of the other option are likely rather than merely possible



Article 6(4)

- If no alternative, can grant consent if there are ‘imperative reasons of overriding public interest’ (IROPI).
- Can include social and economic reasons (i.e. need for additional airport capacity / housing etc.).
- Also there must be provision for compensatory measures to ensure the overall coherence of the Natura 2000 is protected.

Avoidance, Mitigation and Compensation (1)

- What do these terms mean?
- Take HS2 as an example



Avoidance, Mitigation and Compensation (2)

- Avoidance: designing the proposals to avoid an impact, i.e. planning the route to avoid protected areas
- Mitigation: measures to avoid or reduce negative impacts, i.e. bat bridges
- Compensation: measures to make up for the loss through re-providing lost features elsewhere, i.e. new tree planting to provide for replacement habitat



Avoidance, Mitigation and Compensation (3)

- Successful avoidance built into the scheme (see Langton) may mean there is no risk of any adverse effect on habitat, so no need to appropriately assess project under Art 6(3)
- BUT cannot take into account mitigation when deciding whether to appropriately assess (*People over Wind*).
- In an AA, can take into account mitigation measures only if the expected benefits of those measures are ‘certain at the time of [the] assessment’ (C-293/17 *C294/17 Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu* at [132]).

Avoidance, Mitigation and Compensation (4)

- Compensating measures can only be taken into account under Article 6(4), not Article 6(3) (C-387/15 *Hilde Orleans v VlaamsGewest* [2017] Env. L.R. 12 and C-164/17 *Grace v An Bord Pleanala*).
- So only where AA concludes (in light of avoidance/mitigation measures) *no* adverse effect, can you get permission without establishing IROPI.
- Can only rely on compensating measures as part of case for establishing IROPI.



Views of Natural England

- Natural England is the “*statutory nature conservation body*” (Regulation 5(1)). When a competent authority undertakes an appropriate assessment it “*must*” consult Natural England and “*have regard to any representations made by that body*” (Regulation 63(3))
- Approach to such advice set out in *Wealden v Secretary of State for Communities and Local Government* [2017] EWHC 351 (Admin) (at paragraph 44(viii):

*a decision-maker discharging its duties under the Habitats Directive and the Habitats Regulations should give the views of a **statutory consultee considerable weight [...]** however, that advice is **not binding** and it does **not have to be given such weight if cogent reasons can be given for departing from it [...]***

- Always try to get Natural England on your side!

Cumulative impacts (1)

- Appropriate assessment must consider the effect of the plan or project “*individually*” and “*in combination*” with other plans or projects — the reference to “*in combination*” is the source of the duty to take cumulative effects into account
- Easy to understand on a basic level: a project by itself might do no harm but when added together with lots of other projects that may lead to harm to a designated site (death by a thousand papercuts):

the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment (Case C–418/04)

- Need to consider alongside (a) already approved plans or projects; (b) approved but not yet implemented plans or projects; and, (c) proposed plans or projects. Scope for some judgement here (e.g. how far a plan or project is progressed and whether a plan or project likely to be implemented).

Cumulative impacts (2)

- Cumulative impacts are relevant at both the screening stage and the appropriate assessment stage
- This is often one of the most complex parts of the appropriate assessment. Issues often arise over the (a) correct identification of projects and plans; (b) provision of adequate information about those plans and projects; (c) screening out effects; and, (d) subsuming effects into the baseline (as a way to avoid the need for an assessment or to downplay harm)
- *Wealden v Secretary of State for Communities and Local Government* [2017] EWHC 351 (Admin) is a cautionary tale and shows the complexities of this area



NPPF

- Paragraph 177 disapplies the “*presumption in favour of sustainable development*” where the “*plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site*”.
- Paragraph 176 extends the protection given to “*habitat sites*” (i.e. SPAs / SACs) to other sites (e.g. proposed SAC / SPA / Ramsar sites and compensation sites)
- In a case where there is an adverse effect on site integrity, then that adverse effect can be a “*clear reason for refusing the development*” under paragraph 11 (i.e. it can disapply the tilted balance)
- **In practice, a matter of law — policy not too important.**

Further Guidance (not exhaustive!)

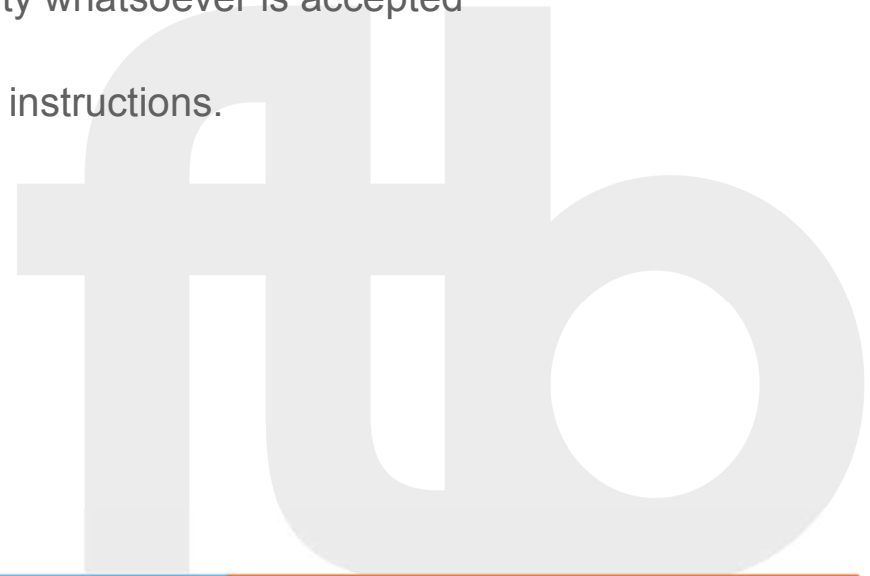
- There is lots of helpful guidance on the interpretation and implementation of the Habitats Directive and Regulations e.g.
 - [‘Managing Natura 2000 Sites: The Provision of Article 6 of the “Habitats” Directive 92/43/EEC’](#) (2018) European Commission
 - [‘Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites’](#) (2002) European Commission
 - [‘Guidance Document on Article 6\(4\) of the “Habitats Directive” 92/43/EEC’](#) (2007) European Commission
 - [‘Habitats Regulations Assessment Relevant to Nationally Significant Infrastructure Projects’](#) (2017) Planning Inspectorate



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