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Planning and Environmental Law Committee response to Defra document "Habitats Directive: consultation on draft guidance on the application of Article 6(4)"

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the Defra document "Habitats Directive (consultation on draft guidance on the application of Article 6(4))" has been prepared by the CLLS Planning & Environmental Law Committee

Overview

The Habitats Directive is a complex piece of European legislation, made even more complex by the dual regulatory process created by its implementation in the UK via the Habitats Regulations. This combination creates a difficult decision making process when faced with potential legal challenge. As such, any attempt to provide clear guidance on the matter is fully supported.

In the main, we are agree that the draft guidance sets out the factors that must be taken into consideration when investigating a potential derogation under Article 6(4) of the Habitats Directive to enable development to proceed on protected sites.

European Law

There is an array of existing European law, supported by accompanying guidance that has created precedent in this area. We have intentionally avoided cross-referencing that law or guidance in this report but are willing to do so if thought helpful. With this in mind, our general concern is that the proposed guidance demonstrates little concern for the European regime – the very regime that provides the "core" for the interpretation of Article 6(4) of the Regulations.

Annex 1

A list of European sites that host a priority habitat or species is very useful from a practical perspective. However, it does pose a risk if the information becomes out-dated by becoming practically and legally misleading.

Examples

We are of the opinion that examples – by their very nature being limited to a particular scenario – can be misleading and when applied to a particular case, confusing. It is our recommendation that they are removed from the guidance in their entirety as we believe they limit the value and scope of the text.

We have, however, also considered whether some form of generic guidance might be useful, such as a schedule of the type of projects that may fall within the remit of the Directive. In our view, however, similar concerns arise to those aired above and we fear that any attempt to circumscribe the type of development that falls within the scope of the Directive carries the risk of introducing a defined schedule of categories – misleading by exclusion. The revised guidance on "Alternative Development" under the Planning Act 2008 is faced with similar issues.

In conclusion we believe that the most helpful form of guidance in this complex area of law is plain text with clear guidance as to practical interpretation.

Question 1 – The draft guidance sets out the circumstances in which Article 6(4) may apply. Do you agree with this overall approach?

Terminology – With regard to the text as currently drafted we would recommend a degree of care and caution. We believe that there are serious difficulties in the interpretation of the Habitats Directive due to the way it has been drafted. As an example, at paragraph 7 of the draft guidance it is suggested that alternatives must be "feasible", that the judgement of alternatives must be on the basis of what is "reasonable" and that alternative should include the option of "do-nothing". Such terminology, with references to the project being "feasible" or "reasonable", does not appear in the Directive. The guidance will inevitably be given a certain "weight" and so their use should be justified and specifically explained. For example, is "feasible" the same as "viable" or "attainable" and does "reasonable" mean "credible" or "practicable" – or both?

The "do-nothing" option – This option needs to emphasise the link between "alternative solutions" and IROPI.

Paragraph 10 states that consideration of alternatives is to be "limited to solutions which would deliver the same overall objective as the original proposal". Thus, for example, when considering a wind farm, only alternative wind farms, by reference to the Guidance, would need to be considered as alternatives. We question whether this is actually correct in law. The "do-nothing" approach does not deliver the same overall objective – it delivers nothing. Yet, according to the draft guidance, it is a valid alternative. Whilst understanding the practical and perhaps political reasoning behind the assertion, we are concerned that it has no legal basis in terms of the strict interpretation of the Directive, thereby leaving the terminology employed and application open to challenge.

The tests – The fundamental question is whether the Directive requires the assessment of alternative solutions to the plan or project or alternative solutions to the IROPI. There will usually be an alternative solution to a plan or project but the justification for derogation from the Directive is that it must be required "here and now" – hence the use of the word "must" in the Directive.

It follows, therefore, that the more narrow the definition of the purpose of the project, the easier it will be to reject alternatives. For example, if a project is defined as "to deliver at least 500 MW of electricity generation" it is susceptible to a large pool of alternatives – coal, gas, nuclear or England, Wales, Scotland. However, if the objective is narrower – "to deliver a coal power station of at least 500 MW" – it significantly decreases the alternatives by specifying the fuel source.

In light of these concerns, it is suggested that further clarification should be provided as to why alternatives should be limited to those delivering the same objective. This will assist applicants, competent authorities and decision makers, reducing the likelihood of inconsistency and confusion.

It is important to note that we are conscious that these practical difficulties present themselves in the Habitats Directive itself. A further example would be the requirement that the project does not damage the "integrity" of the site and the derogation itself if there are "imperative reasons of overriding public importance". In most circumstances a regulator would be required to make subjective decisions based on the evidence at hand. Any attempt to deal with such concepts by policy and practice guidance alone fails to consider the unique nature of each site. The test should be not just whether a site will deliver on the first day but whether it will continue to be delivering in the next decade. Incidentally, this point is touched upon in paragraph 26 of the draft guidance but we believe it deserves further emphasis.

Our concerns are made more acute due to the Directive's approach of prescribing outcomes as opposed to procedures. The outcome – refusal of consent for a project which has an adverse effect on integrity, unless there are no alternatives and IOPRI applies – is made more onerous by the European Court of Justice's broad interpretation of "adverse effects" which are presumed unless no reasonable scientific doubt as to the absence of the effects remains. As such, a Directive that dictates outcomes is restrictive as a result of:

a) the presumption of adverse effects;

b) the vagueness surrounding the interpretation of "integrity";

c) the additional vagueness of the meaning of "alternatives"; and

d) the difficulty in ascertaining what constitutes an imperative reason of overriding public importance.

As a further point, we are also concerned about the undue separation and ordering of the "tests". We feel that they should be considered on a more coherently linked basis and led by the demonstration of IROPI. This is discussed in more detail below.

The overall concern is that, in trying to keep the guidance within manageable proportions, it does not make the most of the opportunity to provide practical and helpful guidance. It is our recommendation that the guidance needs to be more comprehensive.

Question 2 – Do you agree that the approach linking alternatives and IROPI as set out in the guidance is sensible?

We feel that the overarching message is a positive step forward but have reservations about the specific approach. The current understanding of the wording in the Directive, as indicated in the draft guidance, requires that the tests be individually satisfied despite the fact that they are intrinsically linked – failure to do so would likely lead to legal challenge.

Combining the two tests in what we believe to be an overly simplistic way, has the potential to cause confusion amongst applicants and decision makers. For example, paragraph 19 of the draft guidance recommends the consideration of the two in parallel because the objective of the project may mean that it could never meet the IROPI test. The statement may be correct but there should be reference made to the alternatives.

Any derogation must be justified on the basis that:

a) the plan or project is required "here and now";

b) as a consequence the "do-nothing" option is unacceptable;

c) the plan or project cannot be delivered elsewhere in order to meet the need; and

d) in circumstances where any adverse effects are compensated so that the integrity of the Natura 200 network is not compromised.

On a more specific point, paragraph 6 of the draft guidance refers to "less damaging" solutions to the integrity of the European site. The Directive makes no reference to this concept, instead referring to the "absence of alternative solutions". As both concepts are key to the competent authority's determination, we believe that they should be defined and explained in the guidance but, if not, the guidance should rely on the terminology provided by the Directive itself.

Question 3 – Do you agree with the guidance on IROPI?

Whether or not a project has satisfied the test of IROPI can ultimately only be determined by the Courts. We agree that the suggested wording is on the right lines but believe it is necessary to incorporate an approach which coherently links the consideration of alternative solutions and the provision of compensatory measures to the IROPI factors.

With reference to the first bullet point of paragraph 15, we question whether the introduction to the concept of "adverse effect" is necessary. As it stands, we feel the wording is a little ambiguous.

In paragraph 18, while we are not suggesting a schedule of relevant plans – which would be open to the same criticism as highlighted with regard to Annex A – we do question whether undue emphasis has been given to plans at a strategic and national level – in that local plans, emerging development plans, port master plans and so on will all be of relevance and may also be determinative of IROPI.

An obvious danger that we believe you have correctly identified is that the concepts of "alternatives" and "IROPI" are dealt with individually, in isolation. In our view, we do not believe that this is the correct approach in law. The Directive is quite possibly deliberately ambiguous on the issue but we do not believe that one necessarily comes before the other. Therefore, while we agree with the majority of paragraph 19 we are not convinced that the last sentence is correct in that if a project cannot be justified on the basis of IROPI, the question of alternatives will not arise.

Question 4 – Do you agree with the guidance on compensatory measures?

We generally agree, but there are a few specific issues that we would like to highlight:

a) Where compensation is provided which may be some "distance from the site" regulatory bodies occasionally simply multiply the area of compensation required to replace the site lost by a given ratio, depending on the distance from the damage being caused to the conservation site. We feel this approach is incorrect and that the phrase "judgment must be based solely on the contribution of the compensatory measures" could be usefully emphasised. In addition, we query whether the first sentence in the bullet point should be amended to read "the provision of compensation close to the original site is always the preferred option".

b) In our view paragraph 24 is insufficiently clear. Whilst the first sentence is definitive, the rest of the paragraph actually points to the fact that in "securing" the compensation, Government is only looking to its legal provision, not its actual provision. The use of the word "normally" in that paragraph is entirely incorrect. There should be a clear statement - to achieve full compliance with the Directive - that compensation must be provided before the adverse effect is created and that compensation, as well as being provided, must be seen to be effective in terms of its conservation objectives before the project is allowed to commence.

c) In the context of the issues highlighted above, we are not convinced that the wording of paragraph 25 is correct. Whilst we agree the example of woodland, it must be the case that all of the woodland must have been provided – even if it will take time to become fully functional. Because of the inherit danger of this area we believe that the wording requires further clarity.

d) On a practical level, the guidance would benefit from differentiating "mitigation" and "compensation".

Do you have any other comments on the draft guidance?

Our opening remarks refer.

Roles

In the context of the roles of the various participating bodies, we would add that it might be useful to emphasise the need for the developer to detail its environmental proposals as part of the originating application process. This is an essential part of the process which should be fully considered prior to the application being submitted and, in addition, there is a need to ensure that such proposals are fully advertised and all stakeholders are aware of the project proposals. On that basis it is recommended that you consider a separate paragraph entitled "third parties/the general public".

The essential point is that information on IROPI, alternatives and compensation must be transparent – and be seen to be transparent.

Extant Guidance

It is our recommendation that you consider providing a schedule of extant guidance on this topic, both EU (in terms of the Commission) and UK based – for example, in this country, the guidance offered by the Marine Management organisation.

Appropriate Authority

It is suggested that paragraph 34 be amended with the addition of "on the other hand" after "If" at the beginning of the second sentence. We believe that this would provide greater clarification.

Conclusion

We hope that the comments offered on the draft guidance will be of assistance but are concerned that the opportunity has not been taken to provide definitive and practical guidance, supported by extant European case law and guidance. It is our view, subject to the comments of others, that the draft should be comprehensively reviewed.

30 October 2012

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