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UK National Report

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I. General Background to Legislation: UK Legislation

UK law has a wide and diverse array of laws relating to the control, exploitation, protection and conservation of non-domestic species. Note that, in the UK, such laws are often referred to as 'wildlife' laws. In relation to species *protection* under Birds Directive and Habitats Directive, there are two key laws – the Wildlife and Countryside Act 1981 (inter alia, implementing the Birds Directive and CITES) and Conservation of Habitats and Species Regulations 2010 ('Habitats and Species Regulations', implementing primarily the Habitats Directive). In addition, there is a vast array of wildlife legislation, some going back to the C19. There is often overlap between the various regimes, and some duplication. Some laws relate to individual species – e.g. Protection of Badgers Act 1992, Deer Act 1991, Conservation of Seals Act 1970. In general, wildlife law is devolved with separate laws in Scotland, Northern Ireland, and to a more limited extent Wales (which is largely in line with English law). This report focuses on the law in England and Wales.

The Law Commission (an official body charged with reviewing the state of the law generally, and looking to codification and reform where appropriate) published a review of Wildlife Law and England and Wales in 2015. The Commission felt that wildlife law had developed over two centuries in a piecemeal fashion and was now unnecessarily complex and inconsistent. There was little in the way of homogeneous purpose or theme, though it could detect four principal strands:

(a) Laws providing a framework in which wildlife was controlled so that it does not unduly interfere with social or economic interests (e.g. control of agricultural pests, invasive non-native species, protection of animals and plants from human development)

(b) Laws allowing for the exploitation of wild animals for economic or leisure interests (e.g. hunting laws)

(c) Laws protecting individual wild animals from harm in certain contexts (e.g. close seasons for hunting, prohibition of animal suffering, or certain methods of killings). Some of these were inextricably tied to conservation purposes.

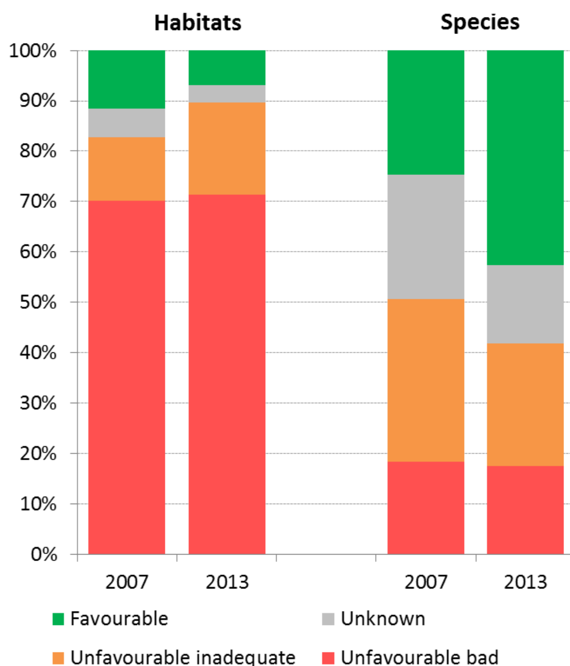
(d) Laws designed for conservation of wild animals and plants for conservation purposes, and currently strongly influenced by EU Birds and Habitats Directive, and a number of international conventions.

The Law Commission recommended a large-scale consolidation of UK Wildlife Law, and published draft legislation. One of its concerns was that many of the individual laws contained little flexibility to update and review: *"As the conservation status of wild species, their migratory patterns and reproductive habits may change over time as a result of direct human activities or changes to climatic conditions, a regulatory regime is only effective if it is capable of being regularly updated and reviewed to ensure that the law adequately responds to current threats and political preferences"*

The Government has put on hold any response to the Law Commission until the conclusion of Brexit.

II Current trends and risks

The European Commission 2017 Implementation Review of the UK[1] concluded that continuous degradation of biodiversity was an ongoing trend in the UK as it was in many parts of the EU. The state of Habitats was considerably worse compared to the EU average (inadequate 18% (EU average 47%), bad 71% (EU average 30%)). Species protection was considerably better that the EU average (43% assessment favourable, EU average 23%).



The UK has a large number of independent nature conservation and wildlife NGOs. The 'State of Nature Report' was first launched in 2013, and pools data from more than 50

[1] Com (2017) 63 final

nature conservation bodies and research organizations. The 2016 report[2] noted that it had quantitative assessments of the change in population or occupancy for 3,816 terrestrial and freshwater species over the long term (1970-2013), and 3,794 over the short term (2001-2013). Over the long term, 40% showed strong or moderate declines, 31% showed little change, and 29% showed strong or moderate increases. Over the short term, 41% showed strong or moderate declines, 25% showed little change, and 34% showed strong or moderate increases.

There were fewer measures of change for marine species, but it was estimated that over the long and the short term, 38% of the marine species assessed declined and 62% increased.

Many factors were considered to have caused changes, but policy-drive agricultural change was considered by far the most significant driver of decline. Agricultural changes included abandonment of mixed farming systems, switch from spring to autumn sowing reducing food and habitat for many species (but of benefit to some species eating autumn grown crops), intensification of grazing, increased use of pesticides and fertilizers, and loss of marginal habitats. Climate change was also a significant driver of change, some detrimental and some beneficial (e.g. increased winter survival of species, northward expansion of species).

III Principles of Species Protection

There are 4 main techniques of species protection in English law. The predominant mode of protecting species is through criminal offences for harming, taking, or trading in specified protected species and/or licensing regimes that allow the limited exploitation of particular species. The common use of licensing regimes means that species protection law is often administrative in nature. These laws and techniques are the focus of this report. Second, species are protected through laws that protect their habitats more broadly, particularly through the operation of the Habitats Directive but also through legislation establishing national parks, local nature reserves, sites of special scientific interest and so on. Third, species protection is integrated into other decision-making frameworks, such as the planning system and environmental assessment in particular. Fourth, voluntary measures and organisations, as mentioned above, have a strong tradition in monitoring, protecting and advocating for species in the UK – the Royal Society for the Protection of Birds and its work being the most prominent example.

III Directive 92/43

1. Surveillance of conservation status – (art 11, art. 14 HD)

[2] *State of Nature 2016* (Royal Society for Protection of Birds, 2016)

As a result of the CJEU decision in C-6/04, which concerned infraction proceedings against the UK, the UK regulations implementing the Habitats Directive were amended to include express provisions requiring the Government to make arrangements for the regular surveillance of the conservation status of natural habitats of Community interest and species of Community interest. In line with Art 14(1) HD, the Habitats and Species Regulations now provide that the Government, on the basis of the surveillance information, must ensure that measures are taken to ensure that the capture of specimens of Annex 5 species and the exploitation of such species are compatible with the maintenance of that species at a favourable conservation status. The national Habitats and Species Regulations now include provisions for monitoring of the incidental capture and killing of animals in Annex 4 of HD, and for additional conservation measures to be taken to ensure such capture and killing does not have a significant negative impact on the species.

The Joint Nature Conservation Committee (JNCC) has developed a system of Common Standards Monitoring to assist relevant authorities in carrying out surveillance and monitoring to common methodologies relating to protected habitats and their species. The JNCC also helps coordination of wider surveillance schemes relating to specific species including birds, bats, butterflies and plants. Voluntary groups play a strong role in assisting with monitoring.

The Wild Birds Directive does not include specific provisions on monitoring and surveillance, though regular implementation reports have to be sent to the Commission. There are therefore no national regulations requiring surveillance relaying to wild birds under the Directive. In its 2015 report, the Law Commission concluded that, while even if there is strictly no transposition failure, there is no reason why the surveillance framework for species of Community interest should not be extended to wild birds of concern.

2. **Conservations of species (art. 12 -16)**

2.1. Art. 12-13 HD - system of strict protection for animal and plant species

When the UK originally implemented the Habitats Directive, it did so by giving specific powers to the various nature protection bodies, and then imposing a general duty on them to exercise those powers so as to secure compliance with the Directive. The use of such general duties failed lawfully to transpose the Directive, as held in Commission v United Kingdom (C-6/04).

As a result of that case, the relevant regulations were amended in 2010 to reflect the more detailed requirements of the Directive – see further above on surveillance and monitoring, etc. Much of the 2010 Habitats and Species Regulations are concerned with the protection of habitats but a specific section deals with the protection of European protected species. The core provisions make it a criminal offence to deliberately disturb, capture, injure, or kill protected animal species, and a criminal offence to employ specified methods of capturing and killing wild animals of species listed. There are similar provisions relating to the protection of European protected species of wild plants. Although there are provisions concerning the restoration of

protected habitats, there do not appear to be any specific provisions concerning restoration of species outside protected habitats. Animals and plants now fall exclusively within the 2010 Habitats and Species Regulations but the protection of wild birds remains largely under the Wildlife and Countryside Act 1981 (inter alia implementing the Birds Directive), causing some duplication and complexity.

The concepts of 'deliberate' and 'disturbance have caused particular problems in UK law and given rise to reform suggestions and decided cases.

'Deliberate'

There is a particular challenge in reflecting the concept of 'deliberate' acts in UK national law since it is a term rarely used in UK criminal law, which more often relies on concepts of 'intentional' or 'reckless' acts.

The term 'deliberate' as used in Art 5 Birds Directive has been transposed into the relevant provisions of Wildlife and Countryside Act as 'intentional' – a familiar concept in UK criminal law – but is clearly narrower than 'deliberate'. The Habitats and Species Regulations (transposing art 12 and 13 HD) use the term 'deliberate', which is simply defined as having the same meaning as the Directive. This simple copy-out is equally problematical because it is not a term normally used in national criminal law and so creates uncertainties, particularly as the ordinary English meaning of 'deliberate' is rather narrower than the CJEU interpretation. 'Reckless' (implying you don't care about the consequences) is again familiar in UK criminal law, but the Law Commission concluded that the term was rather wider than the way 'deliberate' was interpreted by the CJEU, which is closer to the concept of '*dolis eventualis'* (i.e. being aware of the risk, and consciously accepting the consequences of one's action).

The Law Commission recommended the UK offences be redrafted in a way that better reflects the concept of 'deliberate' as developed by the CJEU.

'Disturbance'

The 'disturbance' provisions in the Birds Directive (i.e. disturbance which is significant having regard to the object and purpose of the Directive) and the Habitats Directive (i.e. disturbance of protected species) differ, and have been transposed differently in English law. The Wildlife and Countryside Act 1981 creates an offence of intentionally disturbing wild birds within a specially protected area, while a bird is building a nest or is in, on or near a nest containing eggs or young, or intentionally disturbing the dependent young of such a bird (s 3). No further elaboration of the meaning of disturbance has is provided.

In contrast, the Conservation of Habitats and Species Regulations 2010, implementing the Habitats Directive, give further detail by providing that 'disturbance' is to be taken to include activity which is likely to affect a species' ability to survive, to breed or reproduce, or to rear or nurture their young, or (in the case of animals of a hibernating or migratory species) to hibernate or migrate; disturbance, in addition, includes activities which may affect significantly the local

distribution or abundance of the species.

. There was an important decision of the Supreme Court in 2011 on the meaning disturbance within context of Habitats Directive: **Morge v Hampshire County Council** [2011] UKSC 2 (UK Supreme Court).

In this case, a local authority planned to convert a discussed railway line into a rapid bus-way. The disused line was used by several protected bat species for foraging. A study indicated there were no roosts in the area, and the development would have some adverse effects on the bats for about nine years but a declining impact thereafter. The specialist nature regulatory body at the time, English Nature, did not object and planning permission was granted. An objector challenged the decision on the grounds that the planning authority had wrongly decided there was no 'disturbance' within the meaning of Art 12(1)(b) Habitats Directive.

The Court of Appeal had held that disturbance meant some detrimental impact so as to affect the conservation status of the species concerned. The Supreme Court held this was too narrow an interpretation. It took careful note of the Guidance issued by the European Commission in 2007, which gave a number of illustrations across the spectrum, from affecting the conservation status to scaring a wolf away from a sheep enclosure.

The Supreme Court noted: "*Certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from article 12(1)(b) – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected species" – that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.*"

Essentially the Court agreed with the Commission Guidance that a case-by-case approach has to be taken, taking into account the specific characteristics of the species concerned. The Court was tempted to make a reference to the CJEU but did not feel it would provide any greater assistance.

2.2 Art. 14 HD – measures to control taking of and the exploitation of certain animal and plant species of Community interest.

Hunting

Close seasons for hunting are prescribed under various laws relating to particular animals – eg Game Act 1831 (game birds such as pheasants), Conservation of Seals Act 1970 (grey seals), Deer Act 1991 (deers), Wildlife and Countryside Act 1981 (specified wild birds). The Law Commission considered that the current legislation was too inflexible and did not reflect sufficiently the species and conservation goals underpinning the Habitats Directive. Except for birds (where close seasons can be changed by regulations), the other examples would require changes to the primary legislation to respond to these goals. A more flexible regime has been proposed – one that would be more clearly informed by the surveillance and monitoring information now being obtained, and one where new species, applicability to specific areas, and changes to seasons could more readily be added or made by secondary regulations.

Differences in species

The Habitats and Species Regulations make it a criminal offence to be in possession of or sell any live or dead animal or part of it for species listed in Annex IV(a) of the Habitats Directive, and taken from the wild in any part of the European territory to which the TFEU applies. But there is an express defence where the animal in question belongs to species specified as excluded populations of certain species which relate to the definitions in Annex IV. These are highly detailed.[3]

2.3 Art 15 HD – prohibition of all indiscriminate means of killing

a. Is there a general prohibition on using all indiscriminate means of killing or the specific list of such means?

Both. The Conservation of Habitats and Species Regulations 2010 lists a number of prohibited methods but also includes a general prohibition of any *"means of capturing or killing which is indiscriminate and capable of causing the local disappearance of, or serious disturbance to, a population of any species of animal listed in schedule 4 or any European protected species of animal".* This reference to indiscriminate killing was introduced as a result of the CJEU's ruling in C-6/04 Commission v UK. However, in relation to the equivalent provision in the Birds Directive, the current provisions in the Wildlife and Countryside Act 1981 do not

[3] for example Grey Wolf from Bulgaria, Estonia, Greece north of the 39th parallel, Latvia, Lithuania, Poland, Slovakia, Spain north of the River Duero, and the reindeer management area in Finland as defined in paragraph 2 of Finnish Act No. 848/90 of 14th September 1990 on reindeer management. The regulations even note that a copy of the Finnish Act can be obtained from Dept of Environment, Food and Rural Affairs.

expressly transpose it. Rather, the Wildlife and Countryside Act lists specified prohibited methods of killing or taking.

2.4 Art. 16 HD - derogation from the provisions of Articles 12, 13, 14 and 15 HD

For wild birds, a licence system is operated under Wildlife and Countryside Act 1981 by Natural England (the nature conservation regulator). There are three types of licence:

1) General Licence – no specific licence application is needed so these are equivalent to general binding rules. 13 types of birds are covered (common birds), and there are four core reasons that bring otherwise illegal action within the scope of a general licence: to prevent spread of disease, to stop serious damage to crops, livestock etc., to preserve public health and safety, and to conserve other wild birds. General licences may only be relied upon where the authorized person is satisfied that other methods of solving the problem are ineffective or impracticable.
2) Class licences cover certain activities such as catching wild birds near airports. The person must register and report to Natural England, but otherwise is automatically granted a licence.
3) Individual licences may be granted where the wild bird problem is too complex to resolve using a general or class licence. To obtain such a licence it must be shown that other solutions such as non-lethal methods will not work. There is no right of appeal against refusal of such a licence, other than by way of judicial review for illegality of the administrative process: see the 2015 case of *McMorn* below where Natural England was held to have acted unlawfully in refusing a licence to kill buzzards.

The definition of wild birds under the Wildlife and Countryside Act 1981 applies to birds that are 'ordinarily resident' or a 'visitor'. The Law Commission considered that the application of the Wild Birds Directive to "all species of naturally occurring birds in the wild state in the European territory of the Member States" was intended to refer only to species indigenous to the relevant territory. The current definition in the British legislation would include any species however established, including non-native species such as paraqueets for which there is no conservation reason to protect. The Law Commission recommended the definition be amended to refer to "naturally occurring" species.

As to the system of general licences, these have been developed administratively, and some consider that the law should prescribe more clearly when they can be employed by the licencing authority. Currently they are used for low risk activity, but there is some doubt whether they meet the requirements of strict protection under Art 12 Habitats Directive.

A similar licencing system operates under the Habitats and Species Regulations (implementing the Habitats Directive) for other species, but the purposes for which they may be granted are more restrictive, reflecting the Directive. A licence may only be granted if the authority is satisfied there is no reasonable alternative, and "*that the*

action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range" (reg 59).

There are no compensation measures for the refusal of a licence.

2.5 Art. 22 HD: Non-Native Species

There are almost 1750 non-native species established in England and Wales (1300 plants, 300 invertebrates, and 50 vertebrates) with around 15% considered to have a negative impact. Around six new non-native species are established each year.

It is an offence under s 14 Wildlife and Countryside Act 1981 to release or allow to escape into the wild any animal not normally resident or a regular visitor to the UK or included in the Schedule to the Act. This Schedule lists animal both native and non-native which should not be released. The Act goes on to make in an offence to plant or grow any plant included in the Schedule. The Habitats and Species Regulations introduced a new offence of introducing a new species from a ship. Various other Act deals with particular types of species.

The Law Commission had concerns about current legislation in England and Wales relating to non-native species. For instance, it contained no emergency provisions relating to established non-native species, or requirements of landowners to provide data. Permission of the landowner is required for those carrying out control programmes. Scottish legislation introduced in 2011 has gone some way to meet these criticisms, including the power to require notification where people are aware of non-native species.

IV Case Illustrating Articles 5-9 of the Birds Directive

See Eaton v Natural England and RWE Npower Ltd [2012] EWHC 2401 – below section VI.

V Enforcement

Enforcement bodies

Specialist nature regulators: Natural England (England); Natural Resources Wales (Wales); Scottish Natural Heritage (Scotland); Depart of the Environment (Northern Ireland). For Marine Conservation Areas in England, there is also the Marine Management Organization (new body set up in 2009).

'Wildlife crime' (covering poaching, killing or disturbing protected species, and illegal trading in endangered species): enforcement is led by the police, but with support and advice from specialist nature regulators, and wildlife non-governmental organization. The police established a National Wildlife Crime Unit in 2006 with funding from government - http://www.nwcu.police.uk/ - coupled with a specialized CITES team with UK border Forces at Heathrow Airport. In England, the Government has set up a 'Partnership for Action

against Wildlife Crime' involving the police, non-governmental organizations and specialist government agencies to help tackle wildlife crime. Equivalent bodies have been set up in the other regions of the UK.

A report from the European Parliament in 2016 – Wildlife Crime in the UK (IP/A/ENVI/2015-10, April 2016) – commended the capacity building and other networks established by the government (including international linkages) as good practice which could be followed in other EU Member States. Despite this, a Parliamentary committee in 2012 concluded that wildlife protection law was in a mess, making it difficult to prosecute, and badly needed consolidation and clearer sentencing guidelines.

Sanctions

As indicated at the outset of the paper, UK species protection law mainly establishes criminal offences. From 2014, guidelines for a range of environmental offences (water pollution, waste etc.) issued by the Sentencing Council have had a dramatic offence on increasing fines especially against larger companies (in March a £20 million fine imposed on a water company for pollution incidents) but no equivalent fines have yet been issued for species or wildlife protection. Where criminal operators are clearly involved in illegal trade of species, there are a fair number of prison sentences imposed, but generally fines for species disturbance are fairly low, reflecting the nature and means of the perpetrators.

Civil penalties as an alternative to a criminal prosecution (that is, financial penalties imposed directly by the regulator, enforcement undertakings, various administrative orders etc – so-call 'Macrory' penalties) have been made available to Natural England in relation to a number of offences relating to the protection of SSSIs (sites of special scientific interest), but not consistently across the body of wildlife offences. The Law Commission recommended that these civil sanctions should been extended generally across wildlife law, allowing the criminal law to continue to be used for the most serious transgressors.

Monitoring of Incidental Capture

The core monitoring obligations under the Habitats Directive have been transposed in Conservation of Habitats and Species Regulations 2010 – see "s 50. — (1) The appropriate authority must make arrangements in accordance with paragraphs (4) to (6) to establish a system to monitor the incidental capture or killing of animals of the species listed in Annex IV(a) to the Habitats Directive." Monitoring is carried out by the relevant nature conservation bodies in each UK jurisdiction (England, Wales, Scotland and Northern Ireland) but there is a Joint UK Standing Committee coordinated by the Joint Nature Conservation Council to review best practice and review arrangements across the UK.

Interestingly a recent freedom of information request to the Highways Agency (responsible for motorways and main roads in England and Wales) listed all the road kills of animals and birds over the last year, by individual road and individual type of animal. There were 2213 in all, the highest number being deer (611) followed by badgers (534) : https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/610467/FOI_Animals_on_the_Network.pdf

Two Key Legal cases

McMorn v Natural England and Department of Environment, Food and Rural Affairs (2015] EWHC 3297 (Administrative Division, High Court): How far is public opinion relevant to the granting of licences to kill birds?

A gamekeeper running pheasant shoots applied for a licence under Wildlife and Countryside Act from Natural England to kill a small number of common buzzards to protect the pheasants. The common buzzard is a common and widespread species in the UK. Government general policy is that wildlife should not be killed, and that where there are problems, non-lethal methods should preferably be used. Licences may be issued where non-lethal methods are not possible, but the licenced action must be effective and proportionate. Natural England is required to set a prudent upper limit to ensure that licenced removals do not irreversibly affect the conservation status of the species.

The gamekeeper was refused a licence. Natural England appeared to apply a much stricter approach to the killing of raptor birds such as buzzards than other birds, even when a non-endangered species, and indeed had never granted such a licence. The main factor influencing the licence refusal concerned 'cultural and political reasons', i.e. public opinion against the killing of raptors for the protection of game birds that would later be shot anyway.

The court considered the Wild Birds Directive and CJEU decisions in Commission v Finland and Commission v Malta. The court stated: "*The Directive provides a broad and general protection, sufficiently broad to require derogations in a wide variety of interests so as to create the desired balance between wild life and human interests. There is no warrant for requiring the principal derogations to be construed narrowly; they should be construed with proportionality and the balance of the objectives in the Directive in mind.*"

The transposing regulations had not made any special exception for raptors, and the court held that Natural England were in effect applying an undisclosed policy not to grant licences for raptors because of fear of upsetting public opinion, and this was inconsistent with their approach to other licencing. Conservation status rather than public opinion should be the key factor in the courts judgment, "*although there are differences between buzzards and other species, and careful scrutiny of the applications was justified, the difference in the application of policy was so inconsistent as to be unlawful*".

Morge v Hampshire County Council [2011] UKSC 2 (Supreme Court) (meaning of disturbance under Habitats Directive – see above section II).

Environmental Liability Directive (ELD)

The regulations implementing the Directive (The Environmental Damage (Prevention and Remediation) Regulations 2009) repeat its definitions of environmental damage etc with specific reference to protected species. Annex I of the English regulations repeats the criteria for species damage in Annex I of ELD almost word for word, although with some differences in structure. Rarity of the species assessed at a "Local, regional or higher level"

in the Directive is transposed as “local, regional, or Community-wide”. The reference to negative variations that do not have to be classified as significant in Annex I (smaller than natural variations etc.) have not been transposed into the UK regulations.

The other main feature of all UK ELD regulations is that they have been extended beyond European designated habitats to cover all national Sites of Special Scientific Interest – a rare example of the UK ‘gold-plating’, which was due to Parliamentary pressure that it would be absurd to have a liability regime for some protected sites and not others.

According to the UK Government’s review of implementation of the Directive, between 2009 and 2012, 19 instances of environmental damage have been reported. 12 were confirmed cases of environmental damage (9 damage to land, 1 damage to water, and 21 damage to biodiversity). 7 cases were of imminent threat of damage (five to biodiversity, and 2 of land damage). The report notes that some cases where action was not possible included damage to species not considered to be an EU protected species and the habitat not a national SSSI so fell outside the definition of environmental damage.

VI SEA, EIA, Appropriate Impact Assessment and Species Protection

The relevant UK regulations dealing with SEA (in England, The Environmental Assessment of Plans and Programmes Regulations 2004) generally expressly require information for environmental reports to include any existing environmental problems, including those relating to designated areas under the Birds Directive and the Habitats Directive. Information on likely effects include biodiversity, fauna, and flora, although ‘species’ not expressly mentioned.

The Habitats and Species Regulations require distinctive assessment procedures for any plan or project likely to have a significant effect on a European protected site.

For projects subject to the Environmental Assessment Directive, the transposing regulations (in England, The Town and Country Planning (Environmental Impact Assessment) Regulations 2017) require that, inter alia, the assessment must describe and assess the direct and indirect significant effects of the proposed development on, inter alia, *“biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC”.* Environmental assessments will therefore investigate potential risks of damage to protected species (e.g. in relation to proposed windfarm operations). Furthermore, Natural England (the specialist nature conservation body) must be consulted by planning authorities on a range of defined planning applications, including where they are likely to affect national or European protected sites. Interestingly, there is no statutory requirement for planning authorities to consult Natural England where a development likely to harm a protected species or habitat (see further the discussion of *Morge* below). However, Natural England has issued thirteen sets of standing advice with respect to individual species, and these are material considerations to which planning authorities must have regard when considering a planning application – individual guidance has been issued on bats, great crested newts, badgers, dormice, water voles,

otters, wild birds, reptiles, protected plants, crayfish, invertebrates, freshwater fish, natterjack toads, and ancient woodland. A special Interim Note has been issued on bats and on-shore windfarms (2012). This follows the Eurobats Agreement under the Bonn Agreement urging all parties to develop guidance on bat surveys and risk assessment. It recommends a minimum 50m stand-off distance between blade tips of the turbine and any feature such as hedges or woods. This is less than the Eurobats guideline of 200m because evidence in Britain was that most bats stay close to habitat features. However, the note acknowledges that "*The information currently available on bat behaviour in the UK is not sufficient to assess the threat that wind turbines may pose to populations*."

The advice of Natural England when consulted is not legally binding on planning authorities, although ignoring it could make the planning decision vulnerable to legal challenge. The Habitats and Species Regulations contain a general requirement that all competent authorities must have regard to the requirements of the Habitats Directive. In Morge v Hampshire County Council noted above, the Supreme Court considered whether this implied that a local planning authority itself had to address the issue of species conservation where Natural England had stated they were content with the proposal. By a majority, the Court decided the planning authority could rely on the judgment on Natural England.

Eaton v Natural England and RWE Power Renewables [2012, High Court] (wind farm operation inevitably causing some deaths – a criminal offence?)

Planning permission for a 10 turbine windfarm was sought. The environmental assessment had considered the risk of collision to bats and birds, and the specialist nature conservation body was consulted. It was decided that any risks were negligible, and planning permission granted.

A local objector claimed that the operators knew that the operation of windfarm would inevitably involve some deaths or birds and bats. In relation to bats, the Habitats and Species Regulations implementing Art 12 Habitats Directive would apply.

The objector's argument was essentially that any single species death would in effect amount to an offence. The court looked at the European Commission Guidance, and the European Case law on intent etc. It accepted that the relevant offences referred to the deliberate killing of any bird or bat and this would clearly apply to deliberate targeting such as unauthorized hunting: "*But once one leaves that very clear territory there must be limits to criminal liability where it is alleged in relation to some entirely different activity but with knowledge of a certain risk".*

The fact that the Habitats Directive contained provisions on monitoring incidental killing (and the need to take measures if the species threatened) suggested that the Habitats Directive accepted that some forms of incidental capture or killing are not illegal under Art 12. In this case, all the evidence was that the risks were negligible, and the challenge failed. But the court accepted that "*There will come a point where the level of risk in terms*

of probabilities and numbers affected could, if known, lay the foundation for criminal liability".

Great Crested Newts and Development

The Great Crested Newt has become something of a cause celebre in UK planning cases, and was mentioned a number of times in the debate on Brexit as an example of over intrusive European nature protection law. It is one of the European Protected Species under the Habitats Directive, rare in Europe generally but locally common in the UK.

The original regulations concerned species protection implementing the Habitats Regulations contained a general defence of incidental damage arising from lawful operations. As a result of the CJEU decision in C-6/04 Commission v United Kingdom, this general defence was removed. A consequence of this was that where a development proposal found the presence of a protected species on the site, a licence would have to be obtained from Natural England, in addition to any planning permission needed, and an environmental assessment would be required before the grant of planning permission including counting and removal of every individual animal. One building firm claimed to have spent £1m capturing and relocating 150 great crested newts, delaying the development by over a year. It was even rumoured that objectors trying to delay a project could buy great crested newts to place in the locality.

Following a three year trial programme in one area, Natural England are now rolling out nationally a new strategy designed to protect great crested newts while streamlining the licencing process. This involves surveying areas where great created newts are most prevalent using new DNA techniques, and providing a far more strategic approach to ensuring compensatory measures where development is concerned. The overall aim is avoid a rigid and reactive way of protecting species focusing on individual sites by taking a more proactive strategic approach focussing on the overall conservation status of the protected species. Potential developers are encouraged to participate and contribute towards overall surveys. The new approach has been welcomed by both developers and conservation bodies.

https://www.gov.uk/government/news/national-roll-out-of-new-approach-to-great-crested-newt-licensing

a. what about the activity not restricted by individual decision (e.g. sport event in the protected area, cutting trees by the owners of the land not for economic activities)

Under Natural Environment and Rural Communities 2006, "*Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity."* Guidance has been issued to local authorities and other public bodies by central government on the implementation of this duty. According to government, the aim of the duty is "*to help stimulate a culture change so that biodiversity issues become a natural part of decision-making right across the public sector'".*

A review of the actual impact of the duty was carried out in 2010 by independent consultants commissioned by government.[4] It found that many public authorities were carrying out a wide range of work relating to biodiversity though it is not easy to determine how far this was driven by the duty or other factors. But there were many opportunities to improve work in conserving biodiversity, and it was critical in promoting this work that there was a clearly designated officer with biodiversity responsibilities.

VII Agricultural or Forestry Activities with a Foreseeable Impact on Protected Species

The UK has been an enthusiastic promotor of voluntary environmental schemes for farmers, providing financial rewards in return for environmental beneficial action, and various agri-environment schemes have been developed since 1987. They have ranged from simple 'entry level' schemes involving very basic measures (and covering the majority of farms in England) to higher level schemes involving wildlife conservation, maintaining landscape quality and conserving natural resources, and promoting public access to the countryside. In 2014, the total area of land in higher-level or targeted agri-environment agreements in the UK was just over 3.1 million hectares. In the individual countries farms with agri-environment schemes account for 15 per cent of farm area in England; 12 per cent in Wales; 22 per cent in Scotland; and 36 per cent in Northern Ireland.

The latest – the Countryside Stewardship Scheme launched in England in 2014 – is operated by Natural England and the Forestry Commission. In respect of farms, it adopts a 'whole farm' approach towards farmland biodiversity. Five year contractual agreements are made, providing grants for specified activities. The new system is based on a 'bidding' model, allowing farmers to offer various undertakings against a point target set by Natural England relating to its points size. The purpose is to target financial grants to projects offering the best environmental benefits.

At a one-off Parliament Committee inquiry session held on 21 March 2017, senior officers from Natural England and the Government's Rural payments Agency were heavily criticized for problems (including late payments) in introducing the new system, which was made more challenging by new control measures required by the European Commission.

There is now a lot of discussion about how agri-environmental schemes will be developed post-Brexit, whether there will be more or less funding available from Government, and whether procedures can be simplified.

VIII What are the Roles of Citizens and NGOs in Species Protection?

SEA, Environmental Assessment, and planning procedures for development all generally provide considerable legal rights for the public representation to be made concerning any

[4] Entec Review of the Biodiversity Duty contained in s 40 NERC Act 2006 DEFRA, 2010

relevant matters, including how certain species might be affected by a proposed development.

The licence procedures set out above for derogation from wildlife offences contain no legal provision for public participation.

As indicated at the outset, the UK has strong nature protection and species NGOs. NGOs participate in the Government's Partnership for Action against Wildlife Crime. Groups and many volunteers participate in various monitoring schemes coordinated by Joint Nature Conservation Committee and other official bodies – for example, the 2013 the Breeding Bird Survey covering some 3600 km^2 involved nearly 3000 volunteers.

IX Direct Applicability

Are EU provisions on species protection directly applied in case of improper transposition?

In practice, the courts to date appear unconcerned with the niceties of direct effect etc., and often refer directly to the relevant Directive.