

Technical Advice Note: Impact on projects associated with the “People over Wind” case

The recent European Court case “People over Wind & Sweetman v Coillte Teoranta” related to a wind farm proposal in Ireland, but this ruling has potentially significant implications for development projects in the UK that may affect Special Protection Areas, Special Areas for Conservation and Ramsar sites (collectively known as European sites). Specifically, it appears to reverse the judgement in the “Dilly Lane” case (R on the application of Hart DC) v Secretary of State for Communities and Local Government [2008] which has, for ten years, been at the heart of our approach to dealing with the potential effects of development on European sites.

In the Dilly Lane case, it was concluded that avoidance, mitigation or compensation measures that were part of the project could be taken into account at the screening (first) stage of HRA. If such measures were capable of avoiding or offsetting the effects on the European site, then a finding of “no significant effects” could be made at the screening stage, and a full HRA assessment would not be required. This has, for instance, allowed projects using Sustainable Alternative

Natural Green Space (SANGS) provision to proceed in the UK with only a screening assessment.

In the new judgement, the Court of Justice of the European Union (CJEU) concluded that mitigation measures could not be considered as part of the project, and thus that the screening stage of HRA should not take account of them. This will undoubtedly be tested further in the courts in coming months and years, but it seems that the issue is whether the mitigation measures proposed can genuinely be considered as part of the project, in that they would happen in any case, irrespective of the European site. If not, then they should be considered mitigation measures, considered at the appropriate assessment stage of HRA.

PINS has now stated that “the implication of the CJEU judgment is that competent authorities cannot take account of any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether the plan or project is likely to have an adverse effect on a European Site.”



This means that all SANGS projects would be likely in future to need to proceed to full appropriate assessment, as they would be unlikely to be able to demonstrate an absence of significant effect in the absence of the proposed SANGS provision. This would be the case even in the case of existing, established SPDs, if the individual site is going forward for consideration after 12 April 2018. In some cases, this would simply result in a need to carry out further assessment work – a full appropriate assessment. However, it could have implications for the success of schemes, since the “test” at the appropriate assessment stage is more stringent, being “no reasonable scientific doubt remains as to the absence of such effects” rather than the screening stage test “on the basis of objective information”. Even for established SPD schemes, such as the Thames Basin Heaths, this standard of proof of the complete effectiveness of avoidance proposals may be difficult to provide.

PINS have now issued advice to Inspectors setting out what further action is required for projects after 12 April 2018 (the date of the judgment).



For Development Plans

<u>Scenario</u>	<u>Action needed</u>
If the HRA report identifies that the plan is likely to have significant effects on European site(s) and their designated features and an appropriate assessment (AA) of the plan has been carried out.	No further action is required
If the HRA report includes information that concludes that there are no pathways for the policies/allocations in the plan to cause significant effects on European site(s) and their designated features	No further action is required

<u>Scenario</u>	<u>Action needed</u>
If the HRA report includes information that identifies likely significant effects on European site(s) and their designated features but concludes that they can be mitigated through avoidance or reduction measures (and does not go on to the AA stage)	<p>Examining Inspectors should:</p> <ul style="list-style-type: none"> • Ask the LPA to confirm the extent to which they consider their HRA report is legally compliant in light of the judgment and ask them to re-visit the screening assessment in doing so. • If the revised screening assessment concludes that an AA is required this should be carried out. • Consider whether the AA necessitates any main modifications (MM) to the plan. The extent to which MM are likely will decrease where adequate avoidance and reduction measures were already identified and secured. If the avoidance and reduction measures are adequate to exclude adverse effects on European site(s) integrity, the approach required is primarily a procedural one ensuring that the AA has been undertaken where required. Consider further consultation on any revised screening assessment or AA. The Habitats Regulations require the competent authority (the LPA in this instance) to consult the appropriate statutory nature conservation body (SNCB) and have regard to any representations made by that body.



For Development Projects

<u>Scenario</u>	<u>Action needed</u>
If it has been concluded that likely significant effects can be excluded because there are no pathways that could lead to such effects.	No further action is required.
If it is concluded that likely significant effects cannot be excluded and an AA has been undertaken	No further action is required.
If it is concluded that likely significant effects have been screened out on the basis of avoidance or reduction measures.	Either undertake an AA or ensure that the competent authority has the necessary evidence available to them to undertake an AA.

In conclusion, it would appear that proponents of current projects which have returned a “no significant effects” finding at screening stage based on the provision of mitigation measures (that they would not have put in place without the presence of a European site) might be well-advised to seek a legal review of their consenting strategy.

Tyler Grange would be happy to advise further should you require it.

Please do get in touch.



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