The Habitats Directive and the Licensing Act 2003

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"*If the person you are talking to doesn't appear to be listening, be patient. It may simply be that he has a small piece of fluff in his ear."*

"You can't stay in your corner of the Forest waiting for others to come to you. You have to go to them sometimes."

— A.A. Milne, Winnie-the-Pooh

Introduction

There is perhaps some irony in the fact that as Britain negotiates its departure from the European Union, the number of licensing cases in which points of EU law are raised have been increasing. Whilst most licensing decisions can, of course, be taken within the parameters of the Licensing Act 2003 itself, EU law imposes an over-arching duty on a public authority – which includes a Council's licensing committee and licensing sub-committees - to have regard to its requirements. Heretical as it may sound, EU law is capable of requiring a licensing sub-committee to have regard to matters going well beyond the licensing objectives when deciding whether to grant a premises licence (or other authorisation) under the Licensing Act 2003.

The environmental example considered in this article, namely the impact of the Habitats Directive on the Licensing Act 2003, is not simply of academic or hypothetical interest. It has already impacted on the licensing approach taken by one licensing authority seeking to reduce air-pollution levels around Ashdown Forest. The Forest, with its spectacular views of the Sussex countryside, is known the world over as the home of Winnie the Pooh.

Although unusual and, in some quarters, possibly unwelcome, the application of EU law to licensing is not an entirely novel concept. There are other instances where licensing decisions and legislation will be subject to considerations of EU law. One example is the requirement that licence application fees have to comply with the Provision of Services Regulations 2009 which gave effect to EU Directive 2006/123: *R(Hemming (t/a Simply Pleasure Ltd) v Westminster City Council [2015] UKSC 25*. Another is the Scottish legislation imposing

minimum pricing for alcohol which must be considered in light of articles 34 and 36 of the Treaty on the Functioning of the European Union to ensure trade is not unfairly restricted. Neither of these requirements appear in the Licensing Act 2003, yet they must still be complied with in the licensing context.

Air-pollution around the Ashdown Forest

Ashdown Forest lies within Wealden District Council's borders. The forest is designated under the Habitats Directive as what is known as a "Special Area of Conservation" ('**SAC'**) and under the Birds Directive as a "Special Protection Area" ('**SPA**'). These are designations which afford very high levels of environmental protection to particular species of flora and fauna (in the case of the Ashdown Forest, Nightjar and Dartford Warbler birds as well as the lowland heath and rich invertebrate assembly).

The Council's planning department had conducted Air Quality Monitoring and Modelling using the UK Air Pollution Information System which provides data on nitrogen pollution and its environmental impacts. This enabled the Council to determine the level of pollution at or above the level which current scientific knowledge suggests will cause harm to specific habitats (known as 'critical load').

The Council's planning department had also commissioned a new district wide transport model to assist with its emerging strategic planning policy. This model identified the increase in annual average daily traffic on roads crossing the Ashdown Forest from development within the Wealden district and development outside the district boundaries. Importantly, the model showed that planning permissions already granted were exceeding the critical load.

As a result, in a planning context, the Council had determined that until necessary compensation/mitigation measures are in place, developments throughout the district (and indeed potentially in other districts) could only proceed where it is shown that they will have no impact on the Ashdown Forest SAC (i.e. they will not generate additional vehicle trips on affected roads).

The Council had even taken the matter to the High Court. In *Wealden DC v Secretary of State CLG* [2017] EWHC 351 (Admin), Jay J held that a cumulative assessment of the effect of traffic movements from neighbouring authorities had not been properly carried out in advance of

those authorities adopting their strategic planning policies and as a result quashed those policies.

Since it was clear that vehicle emissions contributed to unacceptable air-pollution levels around the protected forest, and certain licensed premises and music festivals were likely to attract more polluting vehicles into the affected area, this question arises: should licensing decisions also take into account the pollution issues and, in particular, the terms of the Habitats Directive? The answer, it turns out, is 'yes'.

The impact of the Habitats Directive

The protection afforded by the Habitats and Birds Directives (which are materially identical) is strict.

Article 6(3) of the Habitats Directive states,

> *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect there on, 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, having obtained the opinion of the general public."*

This is transposed into English law by regulation 61 of the Habitats Regulations. This places competent authorities under a duty to carry out an appropriate assessment before deciding to undertake, or to give any consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on an SAC or SPA.

Regulation 7 of the Habitats Regulations defines "competent authority" to include a public body of any description or a person holding a public office. Importantly, this includes Councils acting in their role as licensing authorities under the Licensing Act 2003.

There is a substantial body of case law regarding Article 6(3) which is familiar to environmental lawyers, but possibly less so to licensing sub-committees. In essence, where there is a risk of significant adverse effects to a protected site then there must be an "appropriate assessment" of the environmental effects. Such a risk exists "if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned". In case of doubt as to the absence of significant effects, such an assessment must be carried out. It would usually be expected to be carried out by experts instructed by the applicant for the relevant permission, licence or other authorisation. A written report will follow.

The word "appropriate" is not a technical term and simply means that the assessment should be appropriate to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned, to a "high standard of investigation". This issue is a matter of judgement for the authority.

The competent authority (i.e licensing authority) must be certain that the plan or project in question will not adversely affect the integrity of the site concerned. There should be "no reasonable scientific doubt" remaining as to the absence of such effects. This involves a "strict" precautionary approach. The appropriate assessment cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. However, a third party alleging that there was a risk that cannot be excluded on the basis of objective information must produce credible evidence that there was a real as opposed to hypothetical risk that must have been considered.

As regards what constitutes a plan or project, this has been broadly interpreted. In *Waddenzee* [2005] Env LR 14 the Court of Justice of the European Union (CJEU) held that having regard to the high level of protection afforded to the environment under EU law, and the precautionary approach that must be taken to that environmental protection, any intervention in the natural surroundings and landscape constituted a plan or project.

Any application for a premises licence, club premises certificate, temporary event notice or other authorisation which could potentially have an impact on the environment will therefore constitute a plan or project for the purposes of Article 6(3) of the Habitats Directive as defined in *R (Akester) v DEFRA* [2010] EWHC 232 (Admin) and, as regulation 7 of the Habitats

Regulations makes clear, any public authority is a competent authority for the purposes of the Habitats Regulations and is thus under a duty to comply with the requirements of Article 6(3) of the Habitats Directive. This will therefore include:

a. A licensing committee, sub-committee or officer with delegated powers making a determination under the Licensing Act 2003.

b. The licensing authority, planning authority, or environmental health authority acting as a responsible authority under s 13 of the Licensing Act 2003.

Any of the above must therefore exercise their powers to secure compliance with EU law, including the Habitats Directive, and refrain from actions which would prejudice the fulfilment of the obligations it imposes (see Art 4(3) of the Treaty on European Union and case C-103/88 *Costanzo*).

As a competent authority, when determining licensing applications, the Council is under two key duties pursuant to Art 6(3) of the Habitats Directive. Firstly, where it appears that to grant an authorisation under the 2003 Act *may* have a significant effect on an SAC or SPA (i.e. such an effect cannot be excluded on the basis of best available scientific knowledge) then the Council *must* require an appropriate assessment be carried out by the applicant. Secondly, if, on the basis of that assessment, a significant effect on the integrity of the SAC/ SPA cannot be ruled out, the Council *must* refuse to grant the authorisation.

It may of course be that an appropriate assessment has already been carried out as a result of an application for planning permission. In such circumstances it need not be repeated. However, where no appropriate assessment exists the licensing authority must require it. There are sufficient powers for the licensing authority to request such information under regulations 7(d) and 17 of the Licensing Act 2003 (Hearings) Regulations 2005 (see *R (Murco Petroleum Ltd) v Bristol City Council* [2010] EWHC 1992.

If the appropriate assessment demonstrates that the effect of granting the licence or other authorisation would be an increase in vehicle trips likely to significantly affect the integrity of the SAC or SPA, then licence or authorisation must be refused.

Conclusion

The potential consequences are extremely significant. A great number of festivals are held in rural locations throughout the country each year. Their temporary nature means that many do not require planning permission. The significant number of vehicle movements created by such festivals nevertheless has the potential to impact upon SAC and SPA. When determining such applications, Licensing Committees must therefore be alert to their obligations in EU law. Where this issue is likely to arise Licensing Authorities should consider amending their Statements of Licensing Policy so that prospective applicants know the duties on them to satisfy a licensing authority that their premises or event will not fall foul of the Habitats Directive.