

## CURRENT ISSUES IN THE LAW RELATING TO BIODIVERSITY

CHARLES GEORGE QC

1. There are at least two good reasons to include a paper on Biodiversity in today's seminar. The first is historical and celebratory. This subject, firmly based in the law of the European Union, derives in large measure from the Birds and Habitats Directives<sup>1</sup>. and 2009 marks the thirtieth anniversary of the Birds Directive. As was stated in a Press Release issued on the date of the anniversary:

“The Birds Directive is an excellent example of successful international co-operation. When it was adopted, the EU was composed of just nine Member States. Today co-operation is spread across the enlarged EU, with SPAs in all 27 countries. The same rules on bird protection apply throughout the EU and the Commission is rigorous in its implementation of these, pursuing Member States in the courts if necessary”<sup>2</sup>.

In the words of Environment Commissioner, Stavros Dimas:

“The Birds Directive...is a practical expression of our commitment to global biodiversity conservation. Birds are ...a priceless part of our heritage, they are also vital indicators of the health of the environment... The Birds Directive is as relevant today as it was 30 years ago, and has a key role to play in delivering our biodiversity policy for many years to come”.

It would be a strange “memory lapse” to let this occasion pass therefore without mentioning these Directives<sup>3</sup>.

2. Second, UK developers and planning authorities have been rather slow to adapt domestic planning practice to reflect the obligations on Member States under these two directives. The first educational priority or learning curve in EU environmental law – driven by a torrent of legal challenges in the courts in which today's Chairman played so prominent a part – was to accommodate the requirements of Environmental Impact Assessment<sup>4</sup>, where most of the difficult issues have now been decided, and, so one would hope, lessons learned. But understanding of the concurrent – and more demanding – requirements of appropriate assessment under Article 6(3) and (4) of the Habitats Directive – which affects not only as Special Areas of Conservation (SACs) under the Habitats Directive, but also Special Protection Areas (SPAs) under the Birds Directive<sup>5</sup> - has been slower to percolate, and the domestic case law on the subject has been considerably less extensive. As an example, the role of screening – strangely implicit rather than spelled out in the Habitats Regulations<sup>6</sup> –

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<sup>1</sup> 79/409 Conservation of Wild Birds Directive; 92/43 Conservation of Natural Habitats etc Directive

<sup>2</sup> IP/09/510 (31 March 2009)

<sup>3</sup> For an optimistic survey of where we stand, see *Dodd* “EU nature directives: rights, responsibilities and results – are we striking the right balance?” (2008) 20 ELM 237

<sup>4</sup> 85/337 Environmental Assessment Directive (as amended by Directive 97/11)

<sup>5</sup> see Art.7 of the Habitats Directive

<sup>6</sup> Conservation (Natural Habitats &c.) Regs 1994 reg.48(1)(a)

was not subjected to legal scrutiny by domestic courts until the *Hart DC* case in 2008<sup>7</sup>, though it had been referred to in the earlier marine dismantling case, *R (Friends of the Earth) v Environment Agency* five years earlier<sup>8</sup>. In this regard the *Hart DC* case is extremely important and massively eases the task of would-be developers, because mitigating works *can* be taken into account in appraising the likelihood of a significant effect. There remain various areas (in particular “alternative solutions” and “[necessary] compensation measures” under Article 6(4)) where our courts have still to adjudicate. This delayed reaction may be because most development projects are outside, and therefore unlikely to have a significant effect on, SPAs and SACs, but failure to appreciate the demanding tests in Articles 6(3) and (4) where appropriate assessment *is* called for can have disastrous consequences.

3. Recent cases, both in the ECJ and in our own courts, have also emphasised the extent of the protection afforded by the Birds and Habitats Directives to certain protected species, whether flora or fauna, regardless of whether they occur within an SPA or SAC. This is a matter I shall be considering by reference both to the decision in the recent bats case of *Woolley*<sup>9</sup>, and by reference to the Environmental Liability Directive<sup>10</sup>

4. There is an obvious, but important, point to make at the outset. We in the UK have been rather slow to appreciate that words with a relatively simple meaning in the English language can mean something quite different in EU law. To take an obvious example, if I say that it is likely to rain tomorrow, most people would interpret this as my judgment that it was more likely to rain tomorrow than not to rain. In other words that which is “likely” is that which has a probability of more than 50%. As I go to court, my Clerk says to me, “are you likely to win”, and if I say “yes”, it means that I am expecting to win. If I reply, “no, but there is at least a 40% plus chance of doing so”, that is correct use of language, and for me to reply, “yes, a 40% plus chance” would be incorrect. But that is not what the word “likely” means in Article 6(3) of the Habitats Directive (“likely to have a significant effect thereon”). In European law, a plan or project is likely to have a significant effect on an SPA or SAC “unless no reasonable scientific doubt remains as to the absence of such effects”. In other words significant effects are “likely” “unless the competent national authorities are certain that it will not have adverse effects”<sup>11</sup>. As Hickinbottom J said in *Miller*<sup>12</sup>, an EIA case decided this August:

“30... “Likely” was considered in a different European environmental context (namely EC Directive No 79/407, the “Birds Directive”) by Sullivan J in *R (Hart District Council) v The Secretary of State for Communities and Local Government* [2008] EWHC 1204. There he said (at [78]):

“To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish risk. ...the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof....”

<sup>7</sup> *R (Hart DC) v Secretary of State for CLG & ors* [2008] EWHC 1204 (Admin)

<sup>8</sup> [2003] EWHC 3193 (Admin)

<sup>9</sup> *R (Woolley) v East Cheshire Borough Council and Millennium Estates Ltd* [2009] EWHC 1227 (Admin)

<sup>10</sup> 2004/35/EC

<sup>11</sup> *Landelijke Vereniging tot Behoud Van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* Case C-127/02 paras 56 and 59 (“Waddenzee”).

<sup>12</sup> *R (Miller) v North Yorkshire County Council and Tarmac Ltd* [2009] EWHC 2172 (Admin)

Although concerned with a different directive, that at least confirms and explains that, in a European environmental context, “likely” does not necessarily mean “more probable than not”.

31. In the context of the EIA Directive and Regulations,..[f]or a development to be likely to have significant environmental effects, it is certainly not necessary for it to be more likely than not that development will have particular environmental consequences....As well as any inevitable environmental consequences that will flow from a development, the phrase requires consideration of future environmental hazards or risks. That in turn requires consideration of both the chance of an effect occurring, and also the consequences if it were to occur”<sup>13</sup>.

5. This paper addresses four topics. These are:

- 1) the definition of plans and projects for possible appropriate assessment under Article 6(3) of the Habitats Directive – and the light cast on this by two cases, one of the ECJ and one – very recently indeed - of our Court of Appeal
- 2) the role of alternatives both under Article 6(4) of the Habitats Directive, as a precondition to allowing plans to be adopted or projects to proceed where the appropriate assessment has been adverse and, in less familiar legal territory, in relation to derogations under Article 9(1) of the Birds Directive and Article 16(1) of the Habitats Directive
- 3) the protection of species and habitats outside protected areas at the planning stage, which is where I shall come back to the *Woolley* case
- 4) the provisions of the Environmental Liability Directive 2004, in the light of the Environmental Damage (Prevention and Remediation) Regulations 2009 which came into force here on 1 March 2009.

### **Plans and projects for the purposes of Article 6(3)**

6. Article 6(3) of the Habitats Directive, transposed in regulation 48(1) of the Habitats Regulations, provides for appropriate assessment before consent, permission or authorization is given for any plan or project not directly connected with or necessary to the management of the [SPA or SAC], which is] likely to have a significant effect thereon” .Taking first projects, we are all familiar with the lists of (mainly) construction projects in Schedule 1 and 2 to the EIA Directive. There is no similar assistance contained in the Habitats Directive, nor is there any assumption that it is only major projects which are likely to have significant effects on an SPA or SCA. The case law shows that would be wrong to assume that the only projects are those involving a considerable element of development or construction. The *FOE* case, for example, established that an application to modify conditions in a Waste Management Licence can constitute a “project” falling within Article 6(3). Furthermore the felling of trees is undoubtedly a project for the purposes of the Habitats Directive. The true position appears to be that projects under the Habitats Directive are confined to projects as defined in art.1(2) of Directive 85/337, which states that:

“”project” means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources”<sup>14</sup>.

<sup>13</sup> The same point was reiterated by Sullivan LJ in *Boggis v Natural England* [2009] EWCA Civ 1061 para 36: “Notwithstanding the word “likely” in Article 6.3 the precondition before there can be a requirement to carry out an appropriate assessment is not that significant effects are probable, a risk is sufficient”

<sup>14</sup> per Sullivan LJ in *Boggis* para 19, following *Waddenzee*

Thus “by no stretch of the imagination”, said Sullivan LJ in *Boggis*, could the notification or confirmation of an SSSI, whether or not it involved the erection of sea defences, be a project<sup>15</sup>.

7. The point that I wish to stress is, however, that the Habitats Directive (like the SEA Directive) applies to plans as well as projects, notwithstanding that it is development pursuant to a plan, rather than adoption of the plan itself, which actually causes primary damage to the protected area. It took the UK some while to appreciate that Article 6(3) of the Habitats Directive “bit” not merely on “projects” but on “plans” (though the wording of Article 6(3) could not be plainer). Thus possible application of appropriate assessment could not be left to those charged with development control, but rather “caught” as well the prior stage of what used in development control departments to be termed “forward-planning” – i.e. the formulation of development plans and development briefs<sup>16</sup>. The ECJ said<sup>17</sup> that development plans “may have considerable influence on development decisions and, as a result, on the sites concerned”.

8. There remains doubt as to the point at which a concept or proposal becomes sufficiently formulated to constitute a “plan” for the purpose of Article 6(3) – and also for the purposes of SEA under that directive. In this context insufficient attention has been given to *Commission v Italy*<sup>18</sup>. The complaint of the Commission was twofold. First that the municipality of Altamura and the Region of Apulia had altered an urban development plan by approving framework agreements with developers for approximately 100 industrial construction projects, many of which were in the Murgia Alta SPA which was also a proposed Site of Community Importance without going through the Article 6(3) procedure. Second, a number of construction permits had thereafter been issued, based on the approved framework agreements, and also without reference to Article 6(3). There was no evidence before the ECJ as to significant environmental effects, but equally no information was provided to demonstrate that the operations were not likely to have significant effects on the protected area. One might have supposed that, by an application of the precautionary principle, the Commission would have succeeded on both grounds. Not so. The ECJ rejected both complaints. First, it was the Commission’s obligation to furnish sufficient evidence that measures or works likely to have a significant effect on the SPA were at issue. Second, more was required to constitute a plan than the mere existence of framework agreements. Article 6(3) would only bite where there was:

“sufficient specific evidence to show that they are more than at the stage of preliminary administrative reflection and carry a degree of precision in the planning in question which calls for an environmental assessment of their effects”

9. The Court of Appeal has recently been grappling with a related issue in the *Boggis* case, truly David v the Goliath of Natural England<sup>19</sup>. English Nature, Natural England’s predecessor, decided to enlarge an SSSI without appropriate assessment of the implications of the extension upon a neighbouring SPA. At first instance, Blair J stated that:

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<sup>15</sup> para 20

<sup>16</sup> *Commission v UK* Case C-6/04

<sup>17</sup> *ibid.* para 55

<sup>18</sup> Case C-179/06, referred to and followed on the “sufficient evidence” point in *Boggis* para 37, see below

<sup>19</sup> *R (Boggis) v Natural England* [2009] EWCA Civ 1061

“For the purposes of art.6(3) of the Habitats Directive,...[a] “plan” is a formal statement of an intended course of future action in respect of the authorization of such interventions”<sup>20</sup>.

Whilst in his view notification of an SSSI would not “normally” be a plan or project, on the particular facts, because there was included a formal statement of an intended course of action, he held that it *was* a “plan”.<sup>21</sup>

10. The Court of Appeal last month reversed his decision. The qualification “normally” was unjustified. Matters such as notification of an SSSI, listing of historic buildings, scheduling ancient monuments, and designating conservation areas do not constitute “plans” for the purpose of potential appropriate assessment. As Sullivan LJ explained<sup>22</sup>:

“The common thread running through all of these provisions is that they “flag up” the special interest of the feature, and impose, or enable the imposition, of more stringent controls than would otherwise be imposed by the “normal” planning process over any activities which might harm it, thereby ensuring that before any plan or project that is likely to have an adverse impact upon it is authorized, full account will have been taken of that which is of special interest....such notifications are not themselves plans, they are a means of ensuring that land use and other plans take proper account of environmental features of special interest”.

11. Moreover, even if the SSI notification had been a plan, no appropriate assessment would have been called for. Using robust language, Sullivan LJ said<sup>23</sup>:

“...a breach of Article 6.3 is not established merely because, some time after the “plan or project” has been authorized, a third party alleges that there was a risk that it would have a significant effect on the site which should have been “excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned”....a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be “excluded on the basis of objective information”, must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered”.

Thus David’s first instance victory has been supplanted by a virtual “knock out” blow by Goliath. Only one crumb of comfort was offered by an unanimous Court of Appeal to Mr Boggis and other residents, faced by a “cliff face remorselessly approaching the boundaries of their properties”. They should seek planning permission and consent under section 16 of the Coast Protection Act 1949 “for the sacrificial sea defence”, when the problem could be looked at:

“in the round, giving due weight both to their rights under Article 8 of the ECHR, and to the special scientific interest of the SSSI, as two, among what are likely to be many other, material considerations”<sup>24</sup>.

<sup>20</sup> [2008] EWHC 2954 (Admin) para 100

<sup>21</sup> paras 101 and 121

<sup>22</sup> *Boggis* para 23

<sup>23</sup> para 37

<sup>24</sup> para 41

## The role of alternatives both under Article 6(4) of the Habitats Directive and in relation to derogations under Article 9(1) of the Birds Directive and Article 16(1) of the Habitats Directive.

12. Regulation 49(1) of the Habitats Regulations provides that:

“If they are satisfied that, *there being no alternative solutions*, the plan or project must be carried out for imperative reasons of overriding public interest...the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site.”

Here the leading ECJ case remains *Commission v Portugal*<sup>25</sup>. The ECJ clearly placed the burden on the promoter of a new motorway to show that all alternatives had been properly explored, holding that “the Portuguese authorities did not demonstrate the absence of alternative solutions”, even though these “were liable to present certain difficulties”. It is clear therefore that the requirement under the Habitats Directive to consider alternatives in a case of a negative assessment is a demanding one.

13. What may be less appreciated is that derogating licences permitting injury or disturbance to protected species or plants, *even outside a Special Area of Conservation or a Special Protection Area* (the two forms of European protected sites) can *only* be granted where the appropriate authority are satisfied, under regulation 44(3):

“(a) that there is no satisfactory alternative, and  
(b) that the action authorized will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range”.

The requirement to consider alternatives was given special consideration by the ECJ in the two recent hunting cases, *Commission v Finland* (wolves) and *Commission v Malta* (quails and turtle doves)<sup>26</sup>. It is worth emphasizing that the appropriate authority is obliged to address alternatives even in the case where regulation 44 (1)(e) is relied upon as the basis of the derogation. This refers to the purpose of:

“preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment”.

14. What is much less clear is whether *at the derogation/licence stage* the appropriate authority can decide that “do nothing” (i.e. preserve the status quo) is a satisfactory alternative, and therefore refuse a licence on that account. It is necessary to consider two situations. The first is where IROPI is made out (always remembering that in the case of derogations for protected species, even assuming a proper justification on grounds of IROPI, the imperative reason must *also* bring “beneficial consequences for the environment”<sup>27</sup>). Here the very fact that the purpose is an imperative one of overriding public importance suggests that “do nothing” would be incapable logically of providing a “satisfactory alternative”<sup>28</sup>.

<sup>25</sup> Case C-293/04

<sup>26</sup> Case C-344/03; Case C-76/08 (10 September 2009)

<sup>27</sup> *R (Newsum) v Welsh Assembly* [2005] JPL 935 para 19. This passage is arguably *obiter*.

<sup>28</sup> As was stated in *Newsum*, paras 16-17, *obiter* and conceded by Counsel for the Welsh Assembly at para 17

15. What, however, if IROPI (i.e. regulation 44(1)(e)) is not relied upon, but rather one of the other grounds in regulation 44(2)? In other areas of European Environmental Law where the question of alternatives arises, “do nothing” is considered an alternative<sup>29</sup>? For my part, I can see no logical reason why in such circumstances the appropriate authority should not “trump” the planning permission by saying that the alternative of “do nothing” is preferable and *is* therefore “a satisfactory alternative”. But in *Newsum*<sup>30</sup>, Waller LJ said:

“if the [appropriate authority] were considering whether to grant a licence based on the purpose of conserving [Great Crested News] under reg.44(2)(c), it would not seem open to them simply to take the view that there was “a satisfactory alternative” of not carrying out that which the Trustees had planning permission to do”.

This observation was *obiter*, and in my opinion wrong. The extent to which the issue of satisfactory alternatives has to be addressed as well at the earlier planning stage is central to the decision in *Woolley* to which I now turn.

### **The protection of species and habitats outside protected areas at the planning stage**

16. Prior to *Woolley*, little attention had been given to the guidance in para 116 of ODPM Circular 06/05:

When dealing with cases where a European protected species may be affected [note the precautionary use of the words “may be” rather than “is”], a planning authority...has a statutory duty under regulation 3(4) [of the Habitats Regulations] to have regard to the requirements of the Habitats Directive in the exercise of its functions...Planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions and this may potentially justify a refusal of planning permission<sup>31</sup>.

17. The factual background to the *Woolley* case (judgment delivered 5 June 2009) was that planning permission had been given to demolish a property and replace it with a larger building comprising three flats. There was a bat roost in the existing building, and a condition was imposed to secure a method statement concerning the mitigation of the bats, a previous public inquiry having found that the proposal would not give rise to significant harm to biodiversity interests in the light of a bat assessment and proposed mitigation measures.

18. In the light of regulation 3(4) of the Habitats Regulations, the Deputy High Court judge held as follows<sup>32</sup>:

“...the local authority should engage with the provisions of the Directive...that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given.

<sup>29</sup> see for example the Commission’s Report *On the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC)* COM(2009) 469 (14 September 2009) which records at para 3.5 that “All MS report that the ‘do-nothing’ alternative has to be included in the environmental report on a mandatory basis”

<sup>30</sup> paras 9-10 and 16-17, again *obiter*, and conceded by Counsel for the Welsh Assembly at para 10

<sup>31</sup> cited in *Woolley* para 24

<sup>32</sup> para 27

But it means that *if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable “other imperative reasons of overriding public interest” the authority should act upon that, and refuse permission.* On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground.” (emphasis added).

19. The effects are far-reaching. Moreover, I can see no reason why the effect of regulation 3(4) should be confined to development control decisions. It bites also on plans, so that whether or not effects on an SPA or SAC are possible, plans ought also to ensure that the presence of, and importance of protecting, European protected species is properly recognized. In simple terms, whenever European protected species may be adversely affected by developments, this needs to be taken into account at all stages of the planning process.

20. I personally have no doubt that *Woolley* correctly decides that planning authorities should strive to protect protected species, which requires considerably more than simple acknowledgment of their presence and that mitigating works are planned. Whether it is necessary for the planning authority to duplicate the task of the appropriate licensing authority is a far more contentious matter, and I feel confident that there will be subsequent case law in this matter.

21. Cases such as *Newsum* and *Woolley* were concerned with protected species *outside* SPAs and SACs. There is not time to consider the more general question of protection of habitats outside SPAs and SACs. Those interested in a robust castigation of Ireland’s inadequate protection of European Protected Species (the horseshoe bat, the natterjack toad and the Kerry slug) should read *Commission v Ireland (Habitats Directive)*<sup>33</sup>. Another of the many Irish cases which have gone to the ECJ, its Birds Directive case<sup>34</sup>, also deserves mention. The ECJ found that Ireland had failed to make sufficient efforts to avoid pollution or deterioration of habitats lying outside SPAs. Particularly in relation to the effect of agricultural practices on the habitats of cuckoos, skylarks, swallows and sand martins, Ireland had taken some measures, but these were “partial, isolated measures, only some of which promote conservation of the bird populations concerned, but which do not constitute a coherent whole”<sup>35</sup>. The ECJ reiterated that:

“Although the second sentence of Article 4(4) of the Birds Directive does not require that certain results be achieved, the Member States must nevertheless make a serious attempt at protecting those habitats which lie outside the SPAs. It is thus clear, in the present case, that Ireland must endeavour to take suitable steps to avoid pollution or disturbances of the habitats”<sup>36</sup>.

## The Environmental Liability Directive 2004

<sup>33</sup> Case C-183/05 (11 January 2007)

<sup>34</sup> *Commission v Ireland* Case C-418/04 (13 December 2007)

<sup>35</sup> paras 189 and 191

<sup>36</sup> para 179

22. This Directive is highly topical, in the light of the Environmental Damage (Prevention and Remediation) Regulations 2009 which came into force here on 1 March 2009, shortly before the ECJ upheld a Commission complaint that the UK, along with many other Member States, had failed to transpose the Directive within the specified time-scale (i.e. by 30 April 2007)<sup>37</sup>. This directive was the first EU legislation whose main objective included the polluter pays principle, derived from Article 174(2) of the EC Treaty. It establishes a framework for environmental liability with a view to preventing and remedying environmental damage.

23. What is particularly relevant for biodiversity is that one of the three categories of environmental damage in the directive is damage that has significant adverse effects on reaching or maintaining the favourable conservation status of habitats and species mentioned in the Birds or Habitats Directives, and, importantly, allowing Member States to provide similar prevention or remediation for “any habitat or species [not listed in those directives]” which the Member State designates for equivalent purposes as those laid down in those two directives. In the Regulations, the UK government has taken the opportunity to extend the scope of “environmental damage” beyond protected species or natural habitats to include all SSSIs<sup>38</sup>.

24. Of particular interest is that the regulations give persons who may be adversely affected by environmental damage (adjoining owners for example) and environmental protection organizations the right to ask the competent authority to act when environmental damage has occurred, and also when it is imminent<sup>39</sup>. On receipt of a “request for action” the competent authority does not have to take action, but it must, as soon as possible, inform the person requesting action of its decision to accede to or refuse the request<sup>40</sup>. Curiously the UK implementing regulations omit the requirement to give reasons for the decision, though the doctrine of direct effect would mean that a failure to give reasons would be held unlawful by the UK courts<sup>41</sup>. This is an area where we can expect some intriguing litigation in the next few years, and there is now a ready alternative to seeking an interim injunction against a developer who is causing or threatening to cause environmental damage. Further, in cases where it is a public body which is threatening a protected habitat or species, it is at any rate arguable that the Environmental Liability Directive and Regulations give rise to a further cause of action against that public body, thereby going somewhat beyond the procedural protections afforded in the *Woolley* case.

3 November 2009

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<sup>37</sup> *Commission v UK* Case C-417/08

<sup>38</sup> reg.4(1)(a)

<sup>39</sup> reg.29(1)

<sup>40</sup> reg.29(3)

<sup>41</sup> See [2009] JPL 823-4, and referring to the requirement to provide reasons under art.12(4) of the Directive. Extracts from the Explanatory Memorandum to the Regulations are in [2009] JPL 849ff.