

Allocation of Decision-Making Power under the Habitats Directive

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ABSTRACT

The provisions in the Habitats Directive relating to protection of sites establish a triumvirate of decision-makers: administrative authority, scientific advisor and judiciary. This article examines the relationship between these decision-makers as developed in recent case law, both at a European Union (EU) and national level. It argues that reference to the goal of environmental protection obscures the allocation of power among these actors, and that to truly understand the resulting system, we must acknowledge the differing norms which motivate each of these actors. In particular, it argues that we must consider the judiciary as an actor within the decision-making process, and should examine the role of the principles of judicial review and EU law in shaping this. It highlights that there are currently conflicts within the process, and that the principles of judicial review cannot provide a successful mechanism to manage these conflicts without an explicit consideration of the values 'hidden' therein.

KEYWORDS: habitats, precaution, judicial review, decision-making

1. INTRODUCTION

The Habitats Directive,¹ the benchmark of European nature conservation law, in regulating development of protected sites, produces a triumvirate. Power is divided between public decision-maker, scientific advisor (used generically to refer to those providing expert scientific evidence to the decision-maker) and court. To understand this interaction, we must acknowledge the varying norms shaping each actor's approach. Recent case law of the Court of Justice of the European Union (CJEU) and the English and Welsh national courts has profound implications for this allocation of decision-making power and illuminates the importance of recognising courts as conscious actors within this decision-making process. These decisions—*Sweetman v An Bord Pleanála*;² *Briels v Minister van Infrastructuur en Milieu*;³ *RSPB v Secretary of*

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1 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (Habitats Directive).

2 C-258/11 *Peter Sweetman and Others v An Bord Pleanála* [2013] ECR-0000; [2015] Env LR 18.

3 C-521/12 *TC Briels and Others v Minister van Infrastructuur en Milieu* (not yet published); [2014] P.T.S.R. 1120.

State for Environment, Food and Rural Affairs;⁴ *No Adastral New Town Ltd v Suffolk Coastal District Council*;⁵ *Smyth v Secretary of State for Communities and Local Government*;⁶ *Champion v North Norfolk DC*;⁷ and *Savage v Mansfield District Council*⁸—focus on the goal of environmental protection.⁹ By examining these recent cases, this article sets out a clear picture of the decision-making process which is developing in the courts. It will be seen that in each of these cases, the courts refer to the purpose of the Habitats Directive (specifically, the designation of sites for protection therein) in terms of the preservation of the conservation objectives of any particular site, such that the overall integrity of both that site and the overall Natura 2000 network are preserved.¹⁰ In highlighting the centrality of this goal, however, the courts in these cases fail to acknowledge the conscious or unconscious ‘positioning’ of key stakeholders which thereby emerges at various stages of the consent process.¹¹ Furthermore, for the English and Welsh courts, this ‘location’ of decision-making power is obscured (or modulated) by the principles of judicial review and the lack of commitment to a particular level of scrutiny in judicial review is highlighted by these cases.¹² In contrast, when considering the CJEU, such modulation comes from two competing directions. The first is from the meta-jurisdictional purpose of the EU and of the court as an actor within that; and the second is from the principles of subsidiarity, supremacy and the treaty-mandated environmental principles. Surrounding all of this are the difficulties of harmonisation, multilevel governance, linguistic complexity and ambiguity and, perhaps most importantly, the significant effects of utilising a result-orientated approach to the drafting of legal obligations in, what is inevitably, a highly process-driven context.

The aim of this article is to shine a light on the decision-making picture that emerges, and as a result, to illuminate two central outcomes of this recent case law. First, the allocation of decision-making power is not the same by the CJEU and the national courts, leaving a hidden conflict within the relevant governance structures. This emerges, at least in part, because of the different principles motivating the

4 [2015] EWCA Civ 227, [2015] Env LR 24.

5 [2015] EWCA Civ 88, [2015] Env LR 28.

6 [2015] EWCA Civ 174.

7 [2015] UKSC 52, [2015] 1 WLR 3710.

8 [2015] EWCA Civ 4.

9 For discussion of the purposive approach to interpretation, see, in relation to environmental law, Emma Lees *Interpreting Environmental Offences: The Need for Certainty* (Hart 2015) and, more generally, Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012).

10 The Natura 2000 network is the collection of protected sites across Europe, covering sites protected under both the Habitats Directive, and the Wild Birds Directive (Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds). It is designed to ‘to assure the long-term survival of Europe’s most valuable and threatened species and habitats’ (<http://ec.europa.eu/environment/nature/natura2000/index_en.htm> accessed 22 December 2015).

11 The terminology ‘development consent’ is appropriately used when referring to major infrastructure projects (Planning Act 2008 and Localism Act 2011). For ‘normal’ developments in the UK, the correct term would be planning permission (Planning and Compulsory Purchase Act 2004). Here, consent is used generically to refer to both.

12 Denis Edwards, ‘Judicial Review, the Precautionary Principle and the Protection of Habitats: Do we have a System of Administrative Law yet?’ in Gregory Jones (ed), *The Habitats Directive: A Developer’s Obstacle Course* (Hart 2012) 213–18.

CJEU and national courts and so to bring coherence to these decisions we must acknowledge, and account for, these divergences of constitutional context. Secondly, the mechanism of judicial review, when carried out in a field of scientific uncertainty and complexity in policy, does not provide for a coherent means to manage the tensions between EU law and national law. This results in a failure to articulate, or even a deliberate obfuscation of, the values that ought to be contested in each stage of a decision, and more importantly, as to who adjudges whether those values ought to be given weight. It also produces a situation where the most important actor in the process appears, often, to be the scientific advisor. While in a perfect world we may well want such decisions to be driven by science, the uncertainty therein, and the fact that these decisions are often about acceptable risk and balance, rather than the simple weighing of evidence, mean that hiding behind scientific evidence may undermine the rationality of the eventual decisions made.

This article reaches this conclusion, first, by outlining the decision-making process under the site protection provisions of the Habitats Directive. In parts three and four, it then examines the recent EU and national case law concerning the Directive. In part five, the article considers the relationship between the decision-making processes under the Habitats Directive and the principles of judicial review in national law. Similarly, part six examines the principles of action for the EU judiciary. This leads to an assessment, in part seven, of the nature of the judicial role within the triumvirate of decision-making in the Habitats Directive.

2. DECISION-MAKING UNDER THE HABITATS DIRECTIVE

The decision-making process giving consent to developments in the UK is a multilevel one. The preliminary stage is general. That is, local and national planning policy and plans are developed so as to produce a picture of generally acceptable and generally unacceptable development in each locality. For example, a local plan may state that 500 homes are to be built in a particular area, without specifying the exact site, size of homes, etc. The local and national plans are themselves subjected to review on the basis of the provisions in the Directive. This process hugely influences the likelihood of a development within, or influencing, a protected habitat being given consent. At this stage, the plan-maker, in assessing the plan for compliance with the Directive, will take account of scientific evidence as to the effects of the proposed general developments within the plan, as well as considering the social and economic benefits of so-doing. The scientific assessment and the different social and economic values in play will be considered simultaneously in shaping the overall plan even though these social and economic values are not explicitly referred to in the Habitats Directive. The holistic nature of the decision-making process means that these different values will be weighed against each other in formulating the final outcome.

Where a development is generally acceptable under local and national policy, and that local and national policy itself complies with the Directive, the development will then itself be assessed as to its effects on the protected site. Again, scientific evidence as to its effect on the site, its economic and social value, and other factors will all be taken into account when making this assessment. Therefore, since both local and national plans and individual projects will be subjected to review under the Directive,

both the preliminary stage, and the assessment of individual developments, will be assessed in light of article 6(3) and (4). These provisions state that:

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, 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, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Under this approach many, and most large-scale, developments, will therefore effectively be assessed twice: once in the 'plan-making stage', and then again in terms of consent for specific developments.

The process which has been developed, through the case law interpretation of these provisions of the Directive, involves three stages. First, there must be an assessment whether the development is 'likely to have a significant effect'¹³ on a protected site, either on its own or in combination with other existing or planned developments (subject to the 'first come, first served' approach¹⁴). Unlike the EIA Directive, this initial decision does not require the adoption of a formal process. It is not therefore strictly speaking a 'screening decision', although it is sometimes referred to as such.¹⁵

13 art 6(3), Habitats Directive (n 1).

14 In C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Waddenzee)* [2004] ECR I-07405, the Advocate General highlighted the importance of taking account of the in combination effects of the development. However, in *Smyth v Secretary of State for Communities and Local Government* (n 7), it was held that that when assessing the 'in combination' effects of a site, the relevant authority should, where high level plans have already been subjected to assessment under the Habitats Directive, leave assessment of such effects to subsequent developments, ([99]). This means that a project is more likely to be given approval if it is the 'first' development affecting a protected site. Later projects will be considered in combination with the earlier development. However, the caveat that the overall plan must already have been assessed, thus encompassing a wide range of planned developments, means that this is a more equitable approach than may appear at first glance.

15 The screening decision is the process which must be carried out under art 2(1) of the (recently amended) EIA (Environmental Impact Assessment) Directive, European Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1. An unofficial consolidated version of the Directive is available at, <http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf> accessed 5 August 2015 (page last updated 27 April 2015).

Secondly, where such significant effects are likely, there must then be an ‘appropriate assessment’¹⁶ to ascertain whether the development will ‘adversely affect the integrity of the site’.¹⁷ At this stage, mitigation measures, which are part and parcel of the development (eg the creation of parkland within a housing development), can be taken into account to assess whether or not there is such an adverse effect of the integrity of the site. The integrity of the site is judged according to the conservation objectives of the site.

Finally, if such an adverse effect is possible, the development cannot be permitted unless there are overriding reasons of the public interest,¹⁸ and only then, if appropriate compensatory measures are put in place (such as the creation of substitute habitat elsewhere).¹⁹ If the site is a priority site, a limited range of public interest considerations can be taken into account.²⁰

Each of these stages will involve the relevant decision-making authority, scientific advisors (Natural England,²¹ but also often a developer’s environmental consultant), and will be subject to the supervisory jurisdiction of the courts. Consultation with the public may also be appropriate.²² At each stage, if it can be shown on the basis of clear, objective, scientific evidence, with a high degree of certainty, that there will be no impact on the conservation objectives of the site,²³ the development can go ahead (at least, in terms of the Habitats Directive).

Described in this way, the process sounds relatively simple, but in practice it can be lengthy and expensive, with projects redesigned throughout to meet the concerns of Natural England, the local planning authority and key stakeholders involved in the project.²⁴ Thus, from the outset, it must be appreciated that the process is an iterative one: project, evidence and participants shift over time to produce an eventual decision. It is also a costly process, and so more guidance on how to produce a

16 art 6(3), Habitats Directive (n 1).

17 *ibid.*

18 See André Nollkamper, ‘Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests’ (1997) 9 JEL 271; Ludwig Krämer, ‘The European Commission’s Opinions under Article 6(4) of the Habitats Directive’ (2009) 21 JEL 59; Rebecca Clutton and Isabella Tafur, ‘Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception’ in Gregory Jones (ed), *The Habitats Directive: A Developer’s Obstacle Course* (Hart 2012); and more generally Christopher Rodgers, *The Law of Nature Conservation* (OUP 2013).

19 art 6(4), Habitats Directive (n 1).

20 *ibid.*

21 Natural England is the English nature conservation body, sponsored by the Department of the Environment, Food, and Rural Affairs, but independent from it, charged with acting as scientific advisor in decision-making under the Directive, as per regulations 5, 9 and 21 Conservation of Habitats and Species Regulations 2010 (SI 2010/490 as amended).

22 art 6(3), Habitats Directive (n 1). Consultation with the public will however be required if in addition to the Habitats Directive, an EIA process must be undertaken (n 15). Consultation may also be required under the planning permission process established by the Planning and Compulsory Purchase Act 2004.

23 This highly precautionary approach was developed in *Waddenzee* (n 14), and forms the foundation for the process across the Union.

24 Wil Zonneveld and Eric Louw, ‘From Transposition to Contextualization: the Co-evolution of EU Nature Conservation Directives and Urban Development in the Amsterdam Region’, paper delivered at AESOP Conference 2014, Utrecht, The Netherlands, Abstract available at <<http://congrexprojects.com/docs/default-source/abstract-book/aesop-abstract-book-v113031B061C12.pdf?sfvrsn=2>> accessed 3 September 2015.

decision, and, more importantly, what kinds of developments are likely to be successful, is always welcome.²⁵ As will be seen below, the three-step process outlined above is one which is in fact beset with uncertainty, not in terms of the steps which must be taken, but in terms of what precisely the standards to be met are, and more fundamentally, as to the role each of these three decision-makers has in the outcome. To demonstrate this uncertainty, it is important to examine the recent case law in detail.

3. RECENT EUROPEAN CASE LAW

3.1 *Sweetman v An Bord Pleanála*²⁶

The leading case on the Habitats Directive is *Waddenzee*.²⁷ This is not the place to repeat the extensive consideration of this case carried out elsewhere.²⁸ However, this case sets the benchmark for decisions under the Habitats Directive. It establishes a precautionary, science-driven, approach to the protection of sites,²⁹ and highlights that the Directive must be interpreted in light of its conservation objectives.³⁰ Recent case law however provides more detailed guidance on what this general approach means for the specific provisions of the Directive. The first case to consider is *Sweetman v An Bord Pleanála*.³¹ In this case, the ECJ provides guidance on the meaning of ‘adversely affect the integrity of the site’ (ie the second stage of the assessment under art 6(3)).³² In so-doing, it relies on *Waddenzee*,³³ but provides further guidance as to the operation of the Directive, and as to what decisions must be made, and by whom, in relation to plans or projects in or near protected sites.

The case was concerned with the planned development of the N6 Galway City Outer Bypass road scheme, a scheme which would threaten 1.5 hectares of lime pavement. However, this would leave hundreds of hectares of this habitat untouched within the SCI (Site of Community Importance—a site proposed to the Commission which may later become a Special Area of Conservation under the Habitats Directive). The question was whether total destruction of a very small part of the habitat constituted an adverse effect.

The ECJ, in line with *Waddenzee*,³⁴ and consistent with its approach to interpretation throughout EU environmental law,³⁵ adopted a purposive approach to

25 UK Environmental Law Association, King’s College London and Cardiff University’s ESRC Centre for Business Relationships, Accountability, Sustainability & Society, ‘The State of UK Environmental Law in 2011-2012: Is there a Case for Legislative Reform?’ (2012) 6. See also Gregory Jones (ed), *The Habitats Directive: A Developer’s Obstacle Course* (Hart 2012).

26 *Sweetman* (n 2).

27 *Waddenzee* (n 14).

28 Elen Stokes, ‘Liberalising the Threshold of Precaution - Cockle Fishing, the Habitats Directive, and Evidence of a New Understanding of “Scientific Uncertainty”’ (2005) 7 *Env L Rev* 206; Jonathan Verschuuren, ‘Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle’ (2005) 17 *JEL* 265.

29 *Waddenzee* (n 14) [61].

30 *ibid* [44].

31 *Sweetman* (n 2).

32 *ibid* [33]–[48].

33 *ibid* [41].

34 *ibid*.

35 Lees (n 9) 104–10.

interpretation of the relevant provisions. The Court directed that the meaning of article 6 must be 'construed as a coherent whole in the light of the conservation objectives pursued by the Directive'.³⁶ The Court therefore held that:

Authorisation for a plan or project . . . may therefore be given only on condition that the competent authorities - once all aspects of the plan or project have been identified . . . and in the light of the best scientific knowledge in the field - are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects.³⁷

The CJEU envisages the courts, relevant authorities and scientific advisors, as all having relevant decisions to make, but furthermore highlights that the assessment should be driven by 'objective' standards based upon scientific evidence. The Court's approach leaves little room for value-driven interpretation of either the conservation objectives (drafted by the relevant national authority, and based, in theory, on purely scientific criteria relating to the maintenance of a favourable conservation status on the site), or the acceptable levels of risk. Such value-driven interpretation would give the courts the ability to take account of the competing pressures in relation to a particular area, and would acknowledge the uncertainty in the underlying 'objective' science. Thus, not only would a value-driven approach allow for an assessment of the merits of the scientific approach, it would allow such merits to be weighed against other goals, including, for example, overall environmental improvements. Instead, the current approach vests decision-making power in the hands of the scientific advisers, and their characterisation of the levels uncertainty present and effectively leaves no room for other important considerations in the overall assessment.

The comments of the court are, however, brief, and more detailed guidance is to be found in the opinion of the Advocate General, guidance which the Court cites with approval albeit that the Advocate General's approach in such cases is not binding upon national courts.³⁸ Advocate General Sharpston deals, in detail, with the process which must be gone through in carrying out an assessment under article 6. The Advocate General begins by highlighting the importance of the purpose of the Directive in interpreting its provisions.³⁹ The first point of discretion which arises in making this assessment (for discretion it is, whether couched in precise scientific terms or not), therefore, is as to the specific conservation goals of the site. Although these will be specified at the time of designation,⁴⁰ the parameters of those goals are

36 *Sweetman* (n 2) [32].

37 *ibid* [40].

38 *ibid* [32] and [39].

39 *ibid* AG [37]–[40].

40 Conservation objectives are set by the designating authority in association with Natural England. Although the Habitats Directive does not call directly for the listing of conservation objectives at the time of designation, the Commission has made clear that such a site-specific list is required in order to comply with art 6. Guidance can be found in European Commission, 'Commission Note on Setting Conservation Objectives for Natura 2000 Sites' (2012), <http://ec.europa.eu/environment/nature/natura2000/management/docs/commission_note/commission_note2_EN.pdf> accessed 6 January 2016 (updated 23 November 2012).

inevitably a matter of some fluctuation and are themselves subject to interpretation in the assessment process.⁴¹ Furthermore, the goal is to ensure that the site, and its specific structures and functions in conservation terms are, 'likely to continue to exist for the foreseeable future'.⁴² This test is one, which, again, on its face, appears to be purely a matter of scientific judgment. However, it is clear that this decision, ie the likelihood of site retaining a favourable conservation status, is not susceptible to scientific inquiry alone. Rather, it is, in part, a matter of political decision-making in the sense that different values, including the desire to protect the environment and the social benefits of development must be weighed against each other, when assessing both what is meant by likelihood, and how far into the future the 'foreseeable future' extends. Thus, even when considering the broad purpose of the Habitats Directive, the complexity of the information and values which must be accounted for in putting that goal into practice, means that such a stage is far from straightforward.

Having considered the general aim of the Directive, the Advocate General goes on to consider the specific purpose of article 6, ie to, 'pre-empt damage being done to the site or . . . to minimise the damage'.⁴³ This purposive assessment is backed-up by a linguistic assessment. In particular, the French and German versions are contrasted with the English-language version of text such that the Advocate General concludes that the English version, and its suggestion of a degree of probability, did not meet the phraseology used in other languages.⁴⁴ Thus, the word 'likely' in English is interpreted in the sense of 'capability' through reliance on both the purpose of the Directive, and its different language versions.⁴⁵ Again, the 'possibility' (as much as the 'likelihood') of a plan or project having an effect is not capable of being assessed on a purely scientific basis. Rather some degree of political judgment is also required. Thus simply defining the word 'likely' does not, in itself, explain who makes the assessment as to whether the test of likelihood is met.

The Advocate General therefore highlights that not only must scientific expertise be taken into account, but that the public should also be invited to give their opinion.⁴⁶ Indeed she reasons that, 'their views may often provide valuable practical insights based on the local knowledge of the site in question and other relevant background information that might otherwise be unavailable'.⁴⁷ Therefore, the Advocate General recognises that both expert assessment and public engagement are necessary when assessing the likelihood of significant effects on the site. However, the Advocate General also makes clear that these contributions are merely evidential: it is for the competent national authority to reach their own decision.⁴⁸ The tensions between decision-maker, advisor, the public and the courts, are clear.

Similar guidance is given by the Advocate General in relation to the meaning of 'adverse effect on the integrity' of the site. Following a linguistic assessment, she

41 See discussion in *RSPB* (n 4), [9] and [20]–[21].

42 Emphasis in the original. *Sweetman* (n 2), AG [38].

43 *ibid* AG [43].

44 *ibid* AG [46].

45 *ibid* AG [47].

46 *ibid* AG [49].

47 *ibid*.

48 *ibid* AG [50].

concludes that, ‘the notion of “integrity” must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned’.⁴⁹ Again, we see that there is significant discretion for the local decision-maker here, but that such discretion is bounded within prior-determined assessments as to the meaning of integrity in the form of the conservation objectives. An impact will be ‘adverse’ to that integrity when the,

measures . . . involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated . . . The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally—and irreversibly—compromised.⁵⁰

In assessing the meaning of adverse effects on the site therefore, both the Court and the Advocate General, focus on the purpose of the Directive in general, and the specific conservation objectives of the site. In so-doing, they prioritise scientific evidence as the basis upon which decisions ought to be made. The Advocate General goes further than the Court, and makes a linguistic assessment of the provisions, comparing the different language versions in advocating a wide interpretation of the relevant terms. She acknowledges that this brings into play more than simply the relevant national authority, and requires the engagement of the public and scientific advisors.

Neither the court, nor the Advocate General, explicitly grapple with the relationship between these different actors, and nor do they openly consider the role of the court, leaving the precise interaction between the different decision-makers vague, and as can be seen in the UK case law below, often unpredictable. As we shall see, this unpredictability is problematic in that it causes delays, extra costs and can indeed hinder the environmental goals of the Directive itself. However, what is clear from this case, is that the court sees itself as not merely overseer of the reasonableness of decisions made in relation to the Habitats Directive and instead accords to itself an active role in policing the interaction between the scientific evidence concerning the effects of a development, and the social and economic values which have shaped and warranted such a project. Failing to take such an active role would not, in the eyes of the court, provide the high level of protection required by the prescriptive goals in the Directive. Furthermore, the Court in particular repeats the link it has drawn between precaution and scientific evidence, thus determining the way in which scientific evidence and the value of environmental protection interact.

3.2 *Briels v Minister van Infrastructuur en Milieu*⁵¹

The second case of note is *Briels v Minister van Infrastructuur en Milieu*.⁵² This case also concerned a roadway: in this case, the A2 Hertogenbosch–Eindhoven motorway. The plan to widen this road would impact upon an SAC—a molinia meadows habitat—due, mainly, to increased nitrogen deposits in the area. The CJEU was

49 *ibid* AG [54].

50 *ibid* AG [60].

51 *Briels* (n 3).

52 *ibid*.

required to assess whether compensatory measures, such as the creation of another area of such habitat in the vicinity, meant that it could be concluded that there was no significant adverse effect on the site. Thus, the relevant question was:

[W]hether Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project . . . which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site.⁵³

The Court emphasises that we must construe the Directive as ‘a coherent whole’.⁵⁴ Again, they rely on the conservation aims of the Directive as the driving force behind their interpretive approach.⁵⁵

The Court concluded that:

Protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).⁵⁶

This conclusion is based, not least, on the fact that it is very difficult to predict with accuracy the effects of providing new habitats.⁵⁷ The reliance that the Court places on scientific evidence to assist in making such decisions is clear, and the precautionary approach from *Sweetman*⁵⁸ and *Waddenzee*⁵⁹ is repeated here: ‘[t]he assessment carried out . . . cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt.’⁶⁰

As highlighted above, however, such scientific evidence is unlikely to exist, and at the very least discretion remains as to what constitutes reasonable doubt, and, most importantly, as to which decision-maker or stakeholder is tasked with assessing whether or not such doubt is reasonable. The conclusion that the creation of new habitat should be construed as a compensatory measure, is therefore, in part, a conclusion based on the limitations of the evidence available. Where such evidence is scant, or uncertain, seeing the creation of new habitats as compensatory (rather than mitigation), allows for a more robust and precise scientific assessment under article 6(3), with uncertainty, and therefore ‘values’ pushed into article 6(4). Furthermore, the approach of the Court shows that the evidence must also be a product of scientific consensus: whether such consensus has been reached or not, is however, itself a matter of judgment.⁶¹

53 *ibid* [18].

54 *ibid* [19].

55 *ibid* [19].

56 *ibid* [29].

57 *ibid* [32].

58 *Sweetman* (n 2).

59 *Waddenzee* (n 14).

60 *Briels* (n 3) [27].

61 For detailed discussion of the relationship between science and law (and scientific evidence in the courts) see Patrick Ky, ‘Qualifications, Weight of Opinion, Peer Review and Methodology: A Framework for

Such reliance on scientific evidence, and focus on consensus, or apparent consensus, is also to be found in the opinion of Advocate General Sharpston. She argues that, '[i]t is generally agreed among environmental specialists . . . that plans or projects likely to have an effect on the environment should be assessed in the light of a "mitigation hierarchy"'.⁶² Thus, in deciding which techniques such be considered as falling outside article 6(3) and into article 6(4), scientific consensus should be relied upon, and 'value-driven assessment', again, is seen as resting more appropriately in article 6(4).

From these two recent decisions, we can, therefore, discern three characteristic features. First, the Court and the Advocate General both insist that interpretation of the Directive should be driven by its purpose (purpose confined to environmental protection), and that decisions in relation to individual sites should be driven by maintaining their conservation objectives. In doing so, the Courts present this purpose, and these objectives, as objectively ascertainable standards which can act as a clear, static benchmark. Secondly, the Court indicates that scientific evidence, and particularly scientific consensus, should drive the assessment under the Directive. It assumes that both that evidence, and the existence of consensus, is, itself, straightforward. However, as Ky has argued, the presence of consensus and the interpretation of evidence is itself a value-laden process⁶³ and reliance on apparent consensus is in itself an exercise in weighing these different values. In focusing on scientific evidence in this way, the Court gives little guidance as to who ought to assess whether consensus exists, and whether the scientific evidence is sufficiently robust. The values hidden in the decision-making process are side-lined, and as a result, decision-making control rests with scientific advisors, even though the nature of the decisions means that they themselves will invoke their own judgment to assess the acceptable levels of risk. Finally, the Court, in interpreting the Directive as a 'coherent' whole, seems to relegate decisions which are *not* susceptible to a clear scientific answer (even on their own assessment), to being part of article 6(4). This will affect the types of considerations which are brought into play in article 6(3), thus limiting the scope of an administrative authority's gaze (in terms of the different factors taken into account) and therefore, potentially limiting both quality and innovation for environmentally beneficial, but seemingly uncertain, developments. Furthermore, it has the effect of encouraging developers to design 'safe' projects, which will meet the hurdle of article 6(3) so that no assessment under article 6(4) is required.⁶⁴ However, this may limit the overall social and environmental benefits of a development, which may not meet article 6(3), but which has such well-designed compensatory measures that overall it may be a 'better' development than one which can pass simply through article 6(3). This is ironic given that the Directive is specifically drafted in such a way as to prioritise the result of environmental protection, rather than the procedures designed to achieve that.

Understanding the Evaluation of Science in Merits Review' (2012) 24 JEL 207; John McEldowney and Sharon McEldowney, 'Science and Environmental Law: Collaboration Cross the Double Helix' (2011) 13 Env L Rev 169; Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Rethinking Judicial Review of Expert Agencies' (2015) 93 Texas L Rev 1681.

62 *Briels* (n 3) AG [30].

63 Ky (n 61).

64 Zonneveld and Louw (n 24).

4. RECENT CASE LAW OF THE UK COURTS

A somewhat different approach has often been apparent from the national courts. The English and Welsh courts have demonstrated an appreciation (or an acknowledgement) of the complexity of decision-making, and the value-assessments that are required, when balancing environmental protection against other social goods. The recent decisions discussed here demonstrate that trend, albeit one couched in the language of scientific evidence and precaution.

4.1 Adverse Effect on the Integrity of the Site

4.1.1 *RSPB v Secretary of State for Environment, Food and Rural Affairs*

In *RSPB v Secretary of State for Environment, Food and Rural Affairs*,⁶⁵ the Court of Appeal considered the test to be applied under article 6(3) for ‘adverse effects’ on the integrity of the site (the same question as had been addressed in *Sweetman*⁶⁶). In this case, the site concerned an area comprising the Ribble and Alt estuaries, breeding sites for, in particular, large gull species. Nearby to the site is a BAE systems aerodrome. Due to the fear of ‘birdstrike’,⁶⁷ BAE systems applied, and obtained consent for, a licence to cull. The question was whether the cull would adversely affect the integrity of the site.⁶⁸

The Court of Appeal highlighted, as had the CJEU and the Advocate General in *Sweetman*,⁶⁹ that the test of adverse effects depends upon the conservation objectives of the site.⁷⁰ In this particular case, however, at the first stage of the decision-making process in relation to the cull, the conservation objectives of the site were unclear.⁷¹ This lack of clarity meant that Natural England was required to draft the objectives of the site with a greater degree of precision, before it could be decided whether there was an adverse effect on the integrity of the site. The Court acknowledged that the objectives required interpretation, and Natural England’s role in this. However, strictly speaking, it was for the Secretary of State to interpret such objectives, and then to assess whether they were adversely affected by the cull.⁷² Some guidance is provided as to how to interpret such objectives:

The . . . conservation objectives are not enactments, and should not be construed as such. However . . . they mean what they say, and do not mean what the Secretary of State, or for that matter, Natural England or the RSPB, might wish that they had said. The conservation objectives must be read in a common sense way, and in context.⁷³

65 *RSPB* (n 4).

66 *Sweetman* (n 2).

67 ‘Birdstrike’ refers to the collision between an aircraft, and a bird. While being obviously dangerous to the bird, this can also cause the aircraft to malfunction.

68 *RSPB* (n 4) [4].

69 *Sweetman* (n 2) [39] and AG [56].

70 *RSPB* (n 4) [7].

71 *ibid* [9].

72 *ibid* [19].

73 *ibid* [21].

In highlighting that the objectives cannot be interpreted as precise, clear, standards, the court acknowledges the degree of political judgment present in this kind of question.

Turning to the specific proposals, the Court concluded that a deliberate drop in population numbers did not meet with the objective of maintaining population numbers at 75% above designation levels, subject to natural change (one of the conservation objectives in question).⁷⁴ That this was the correct interpretation of the objectives was made plainer to the Court by the fact that this was precisely the interpretation adopted by Natural England itself in its comments on the cull.⁷⁵ Thus, despite the acknowledgement of the difficulty of interpreting such objectives, the Court returned to the scientific judgment of Natural England. The relationship between the Court, Natural England and the Secretary of State here is therefore tangled, and an arguably circular one: the Court assesses whether the Secretary of State's decision was reasonable, but reasonableness was assessed here by reference to Natural England's own scientific advice, advice which had been taken into account by the Secretary of State.

4.2 What Processes are Required when Applying the Habitats Directive?

4.2.1 *No Adastral New Town Ltd v Suffolk Coastal District Council*⁷⁶

In *No Adastral New Town*,⁷⁷ the Court of Appeal considered the local council's Core Strategy (a 'plan' for the purposes of the Directive), and the proposed creation of 2,000 new homes near the Debden Estuary protected site. There was concern that the increase in housing would increase the recreational usage of the site. The Court of Appeal was required to assess two issues. First, the question arose as to the timing of the screening assessment for the purposes of the Habitats Directive.⁷⁸ Secondly, the question arose as to the extent to which mitigation measures should be assessed in detail at an early stage of the development of any plan.⁷⁹ Thus, this case, and those that follow, are concerned with the issues raised in *Briels*:⁸⁰ what processes must be undertaken in assessing a plan or project in line with the Habitats Directive, and where do design features which limit environmental damage fit into this overall picture?

In relation to the first issue, the question was whether a failure to carry out an early 'screening assessment'⁸¹ (ie to assess whether significant effects to the Special Protection Area (SPA—designated under the Wild Birds Directive) were likely⁸²) meant that the Council could not have explored other options, therefore making the

74 *ibid* [29] and [31].

75 *ibid* [26]–[29].

76 *No Adastral New Town* (n 5).

77 *ibid*.

78 *ibid* [61].

79 *ibid* [70].

80 *Briels* (n 3).

81 As noted above in n 14, the language of 'screening assessment' is more appropriately used to refer to the first stage of a EIA assessment. However, as in *No Adastral Town* (n 5), it is often used also to refer to the first stage of the decision-making process under the Habitats Directive.

82 art 6(3), Habitats Directive (n 1).

appropriate assessment (as to the adverse effects on the site), inappropriate.⁸³ The Court strongly disagreed with this.⁸⁴ Richards LJ highlighted that the Directive itself does not mention a screening assessment. Indeed, it may be so obvious that the plan will affect the SPA in some way or another that there is no need to make an initial screening decision to this effect. As Richards LJ reasoned:

In none of this material do I see even an obligation to carry out a screening assessment, let alone any rule as to when it should be carried out. If it is not obvious whether a plan or project is likely to have a significant effect on an SPA, it may be necessary in practice to carry out a screening assessment in order to ensure that the substantive requirements of the Directive are ultimately met. It may be prudent, and likely to reduce delay, to carry one out an early stage of the decision-making process. There is, however, no obligation to do so.⁸⁵

Therefore, there is no need to carry out an initial assessment early in the process since the whole point of the Directive is simply to avoid damage to the SPA: ‘the language of Article 6 focuses on the end result of avoiding damage to an SPA and the carrying out of an AA for that purpose.’⁸⁶ However, the Court recognises that there are significant cost and design implications for not carrying out an assessment early in the process. While the primary focus of the court’s interpretation is therefore in line with the purpose-based approach advocated by the CJEU, the national court is aware, if ultimately unmoved, by the potential costs advantages of carrying out an article 6(3) assessment early in the process.

In relation to mitigation measures, the question was whether, in assessing a plan, the decision-maker was entitled to leave questions of mitigation measures to individual development assessments.⁸⁷ The Court took a wholly practical approach, focusing not on what *could* be known at the plan-making stages, but what needed to be known, ie whether the plan would have an adverse effect on the integrity of the site.⁸⁸ The relevant test was therefore:

[W]hether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect.⁸⁹

Again, the court took a practical approach, but the tone in relation to precaution is somewhat different from that adopted by the CJEU which is explicit as to the need

83 *No Adastral New Town* (n 5) [61].

84 *ibid* [68].

85 *ibid*.

86 *ibid* [63].

87 *ibid* [70].

88 *ibid* [72].

89 *ibid* [72].

for clarity and certainty in the relevant evidence base. While this may simply be part and parcel of plan assessment (as the individual developments will still themselves require consent), the approach is not one demanding scientific certainty in regards to the possibility of the development having no adverse effect on the site. The cause of this may also be the different norms which the relevant courts consider as being applicable to them however, an issue which is discussed in more detail below, but it is significant that the UK courts, focussing on process, take a different approach to scientific proof than does the CJEU, which is focused on achieving the end goal of environmental protection.

4.2.2 *Smyth v Secretary of State for Communities and Local Government*⁹⁰

Similar questions were asked in *Smyth*.⁹¹ Again the main effect to be considered was increased recreational usage of the protected site due to more nearby residents. The developer proposed to create a public open space so as to mitigate against such effects. Natural England had initially advised that not all negative effects on the site would be avoided but changed its advice following subsequent policy changes in the local area. Based upon this, the local planning authority decided that approval should be given to the development.

In considering whether the right processes had been applied, the court commenced with detailed discussion of the CJEU decisions in *Waddenzee*⁹² and *Sweetman*,⁹³ and highlighted that a strict precautionary approach should be taken.⁹⁴ However, the scientific advice given, and the value judgment entered into by the local authority, were, the Court of Appeal highlights, to be given appropriate weight.⁹⁵ The scientific decision was not the only relevant factor.

However, the Court accepted that mitigation measures can be taken into account under article 6(3), as was confirmed in *Briels*,⁹⁶ and in doing so places much reliance on such scientific evidence.⁹⁷ This, when combined with a strict precautionary approach, highlights the importance of the way in which Natural England or ecological experts frame their findings in terms of both how they label environmental measures (as mitigation or compensation), and in and how 'bold' they are in terms of their own assessment as to certainty. This is further complicated by the potentially 'strategic' role that a developer's expert will play in presenting measures as being mitigation measures rather than as compensation. Furthermore, the interaction between this approach, and that taken in relation to the Core Strategy in *No Adastral Town*⁹⁸ above, is complex, since it requires the provision of precise scientific information late on in the overall development process. This leaves open the possibility that a project must be redesigned to meet the article 6(3) test in such a way that it no longer

90 *Smyth* (n 6).

91 *ibid*.

92 *Waddenzee* (n 14).

93 *Sweetman* (n 2).

94 *Smyth* (n 6) [61]–[62].

95 *ibid* [82]–[86].

96 *Briels* (n 3).

97 *Smyth* (n 6) [99].

98 *No Adastral New Town* (n 5).

complies with the Core Strategy. This highlights the risks of leaving such assessment late: the flipside of this is that early assessment inevitably reduces the value of the scientific evidence of the relevant effects on the site due to a lack of detail in the design process at the early stage.

The cost implications of assessing such mitigation measures, for both developer and local authority, were also highlighted by the court. There is a clear desire, both here and in *No Adastral Town*,⁹⁹ to reduce the costs of following procedures in the Habitats Directive. However, by leaving detailed assessment to individual development consent, rather than considering such detail at the plan-making stage, the risk of substantially higher costs in fact increases due to the need to redesign projects already in an advanced planning stage. This is however an inevitable consequence of making the assessment an outwardly objective one: in order to be sufficiently precise to meet the tests under article 6(3), the scientific evidence relied upon must be very clear. To achieve this level of clarity, the development must be in the detailed design stage. Thus the risk of high costs, and development stagnation, is a consequence of taking a highly precautionary approach which places so much stock on the scientific evidence.

Perhaps the most interesting part of the judgment comes, however, with the discussion of the standard of review to be applied by the national court in cases involving the Habitats Directive. As the court acknowledges, decisions under the Directive are, to a certain degree, subjective and:

Although the legal test under each limb of Article 6(3) is a demanding one, requiring a strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations.¹⁰⁰

This analysis of the approach to be taken in relation to the scientific evidence is sensible, and honest in that it does not pretend that a purely scientific approach to habitats protection is possible. It does however interact in a potentially problematic way with the CJEU case law, especially when, as discussed, all detailed assessment of the mitigation measures is left to individual developments.

The Court concluded that even though the Habitats Directive is EU in origin, the principles of judicial review nevertheless apply to assessments of public authority action.¹⁰¹ This takes away some control of decision-making from the courts and confers it onto the local authority by limiting the court to overseer, rather than allowing for merits review. This is in contrast, at least in tone, to the CJEU, where issues such as the robustness of scientific evidence in the context of the precautionary principle are seen as being matters for fresh assessment by the reviewing court. In short, the layers of decision-making power, of detail in assessment, and of control, are highly complex in *Smyth*.¹⁰² The decision oscillates between relying on scientific evidence,

⁹⁹ *ibid.*

¹⁰⁰ *Smyth* (n 6) [78].

¹⁰¹ *Smyth* (n 6) [80].

¹⁰² *ibid.*

and acknowledging the political values that must be taken into account. This oscillation however is understandable in a system of multilevel governance where there is a clash of legal principle.

4.2.3 *Champion v North Norfolk DC*¹⁰³

The recent Supreme Court decision in *Champion v North Norfolk DC*,¹⁰⁴ demonstrates the different approach that the national courts are taking to the Habitats Directive and the procedures involved despite the fact that Lord Carnwath is very explicit that he is following the European Court (and not, where there is divergence, the Advocate General).¹⁰⁵ In this case, the question was whether, in cases where it is clear that there is going to be either no likely significant effect or no adverse effect on the integrity of the site, it is nevertheless necessary to go through the ‘first stage’ of the decision-making process to ascertain formally whether there is no likely significant effect, or whether it is possible simply to conclude that there is no adverse effect.¹⁰⁶ This is an important issue since if an initial assessment is required, it may be that information about the potential environmental effects of a project comes to light that may not if no process has to be carried out in ‘clear-cut’ cases.

The Supreme Court concluded that the Habitats Directive (unlike the EIA Directive) is about substance, not form, and that as long as the relevant tests in article 6(3) are in fact met, the lack of a specific procedure to ensure this will not result in a flawed decision.¹⁰⁷ This means, for example, that there is no need, under the Habitats Directive, to have public consultation. The processes can be carried out on a purely scientific and technical basis,¹⁰⁸ but without any assessment, it is impossible to see how the scientific evidence could meet the standard of robust consensus required by *Waddenzee*.¹⁰⁹

4.3 Scientific Advice

4.3.1 *Savage v Mansfield DC*¹¹⁰

The final case to examine is *Savage v Mansfield DC*,¹¹¹ another decision of the Court of Appeal. The appeal concerned a 169 hectare development, to the south of which was a Site of Special Scientific Interest, which was not, but which may have been, a potential Special Protection Area (pSPA). Following the decision in *Commission v Spain*,¹¹² this meant that the site had to be given the same protection as if it had already been designated if it was indeed a pSPA. In consultation with Natural England, the local authority had requested information as to whether or not the site was a potential SPA. Natural England’s response was that it was *not* such a site, but

103 *Champion* (n 7).

104 *ibid.*

105 *ibid* [39].

106 *ibid* [34].

107 *ibid* [41].

108 *ibid* [41] and [42].

109 *Waddenzee* (n 14).

110 *Savage* (n 8).

111 *ibid.*

112 C-355/90 *Commission of the European Communities v Kingdom of Spain* [1993] ECR I-4221.

that they could not guarantee it would not become so, and that as such it would be preferable for the local authority to consider the consequences of designation anyway. They confirmed that the measures which the developer had proposed to put in place would, in their view, likely be insufficient if the site were to be designated.

The first question for the Court was whether a failure to follow this advice was problematic since it would involve the local authority departing from the advice of the statutory scientific advisor specifically tasked with the protection of habitats.¹¹³ This required some assessment as to the status of Natural England's advice.¹¹⁴ Lewison LJ reasoned that:

In the case of a pSPA the planning authority must consult Natural England and (I assume) must conduct a habitat assessment. But a site only becomes a pSPA one the government has initiated consultation. That has not happened in the case of Sherwood Forest. It follows in my judgment that the Council had no obligation to consult Natural England

No doubt Natural England had the power to give advice to the Council . . . and no doubt that advice, coming as it did from an expert body, would have been a material consideration. But I do not consider that it goes any further than that.¹¹⁵

In other words, where there is no legal obligation to obtain advice from the expert body, while that advice would be a material consideration, there is no obligation to follow it. This is an approach which fully reflects the principles of judicial review in that ultimately the decision-maker power (rather than advisory or reviewing power) rests with the administrative authority. As the Court highlights, '[a]n attack based on an allegation that the Council gave too little weight to advice received from one particular source is almost bound to fail',¹¹⁶ at least where the reviewing standard is one of *Wednesbury* unreasonableness.¹¹⁷ This approach, by its very nature, cannot assure that a particular outcome is reached (ie the goal of environmental protection), but considers instead process and reasonableness.

Finally, the Court considered what the local authority ought to have done in this circumstance, even if it did follow Natural England's advice to take a 'risk-based approach'¹¹⁸ (the risk being the risk of designation of the site). The Court was unimpressed with the argument that this would require the local authority to do as Natural England advised:

I found it very difficult to understand precisely what more the Council was supposed to do, even if it had followed Natural England's advice If all

113 *Savage* (n 8) [39].

114 *ibid* [39].

115 *ibid* [40].

116 *ibid* [41].

117 *Wednesbury* unreasonableness is defined by a decision which is so unreasonable that no reasonable decision-maker could have made it. The standard was articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

118 *Savage* (n 8) [43].

that the “risk based assessment” was to do was to incorporate Natural England’s suggestion of a 400 metre buffer zone, that would not have required any further assessment. All it would have required was the adoption of that suggestion.¹¹⁹

The Court here is clear in highlighting that the measures which must be adopted to prevent effects on the protected site, and the potential success of such measures, are matters for the local authority, not for Natural England. Furthermore, the approach is one which makes no reference to precaution: the uncertainty as to the success of the proposed measures, and the need to comply fully with Natural England’s advice if all scientific doubt is to be eliminated, are not addressed.

Thus, from the approach of the English courts, as with the European Court, we can see the emergence of key threads in the reasoning. Unlike the European Court however, the approach oscillates: the English courts waver between relying on a strict precautionary approach, and on the judicial review principles which require them to leave matters of judgment and value to an administrative decision-maker (in this case, local planning authorities). We see therefore, first, a clear desire to leave matters of interpretation of evidence, and of responsibility, to the relevant authority. This extends, in some cases, to the courts relying on local authority interpretation of both conservation objectives, and the scientific evidence in the case. Secondly, there is also a clear recognition by the English courts that the cost and complexity of the planning permission process in general are factors which ought to be taken into account when reviewing decision-making by local authorities.¹²⁰ A practical approach is adopted. In this context however, at the very least, following a settled procedure allows for the early redesigning of projects where such produces a better outcome in the long run. Finally, the court makes all of these assessments on the basis of judicial review principles, leaving decisions to be reasonable or unreasonable, rather than right or wrong, notwithstanding the European origin of the relevant rules, but the precise standard of judicial review to be applied is unclear.

It would overstate the position to say that there is a direct conflict between the CJEU and the national courts here: the characteristic decision-making styles of the different courts mean that there is no direct clash. What there is however is a different underlying approach to the two central issues: the locus of decision-making power and the treatment of scientific advice/evidence. These themes will be discussed in more detail below.

5. DECISION-MAKING ALLOCATION AND THE PRINCIPLES OF JUDICIAL REVIEW

What this review of the case law demonstrates is that while there is beginning to emerge a practical consensus as to how the Habitats Directive should operate, *in general*, the specific powers under the Directive remain hazy. The procedural steps that the local decision-maker must take are clear. What is less clear, however, is what the substance of that decision ought to be, and most importantly, where discretion lies

¹¹⁹ *ibid* [46].

¹²⁰ *Champion* (n 7).

in making such decisions. This is partly a result of the different roles of the UK and European Court: the CJEU seeks, as do the EU provisions, to achieve the outcome of environmental protection; the UK courts are more concerned about the procedural steps needed to achieve this end. However, without recognising this imbalance, the fuzziness which emerges in linking goal and process will continue. Indeed, the lack of clarity as to where discretion lies, and how that discretion is controlled, contributes to a lack of clarity over what is meant by the key terms in the Directive, such as 'likely', 'integrity' and 'significant'.¹²¹ While some guidance has been provided—'likely' is akin to 'possible';¹²² 'significant' means, in effect, any impact at all that exceeds a *de minimis* threshold;¹²³ and 'integrity' is a function of the conservation objectives of the site¹²⁴—without a thorough examination of the discretionary elements of these tests, the locus of decision-making power is obscured. The content of decisions is thereby rendered unpredictable. But this discretion, and therefore this unpredictability, goes beyond discretion in interpretation. Rather, the discretion exists in the drafting of the conservation objectives; the interpretation of the relevant scientific evidence; the relationship between the statutory terms and the factual context for each individual decision; and the justifications for the development.

The downsides of such unpredictability, resulting in delays to the decision-making process due to the need for lengthy judicial consideration, are expressed with some force by Lord Carnwath in *Champion*,¹²⁵ when he highlights that:

Although this development gave rise to proper environmental objections, which needed to be resolved, it also had support from those who welcomed its potential contribution to the economy of the area. It is unfortunate that those benefits have been delayed now for more than four years since those objections were . . . fully resolved.¹²⁶

This is a repetition of similar guidance given in 2003 in relation to the EIA Directive.¹²⁷ Over 10 years on, it is unfortunate that uncertainty caused by discretion, the drawn-out nature of litigation and the lack of clarity of the substantive content of decisions, is hindering both environmental protection and economic growth and development.¹²⁸ Whether or not development is desirable is a separate question from whether an appropriate barrier to such development is lengthy, costly processes which are unpredictable. It may not be the place of the courts to assess such overall benefits, but it would be regrettable if the judicial approach prevented a wider consideration the overall 'sustainability' of a project simply because uncertainty in the relevant legal obligations were to engender unwarranted caution. To take steps to remedy this, in addition to interpretive approaches being more 'considerate' of the

121 Lees (n 9) 75–93.

122 *Sweetman* (n 2).

123 *Verschuuren* (n 28).

124 *Sweetman* (n 2).

125 *Champion* (n 7).

126 *ibid* [64].

127 *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408.

128 See UK Environmental Law Association and others (n 25).

users of legislation like the Habitats Directive,¹²⁹ we also need to be clear as to who makes key decisions, what factors can influence them and how these decisions are controlled. To achieve this, we need to acknowledge that no such certainty can be achieved without an open consideration the principles of action motivating the different courts, and therefore of how the principles of judicial review interact with EU principles, including, but most not limited to, the precautionary principle.

To address this therefore, it is necessary to commence with some analysis of how judicial review operates in relation to the Habitats Directive. In the following section, the principles constraining decisions of the CJEU will be examined. In relation to judicial review, there are two areas of uncertainty: first, what is the distinction between questions of fact and questions of law in the environmental context; and secondly, what level of scrutiny is used in judicial review here.

The fact/law distinction is problematic, both as a predictable tool for allocating decision-making power and as an appropriate tool for so-doing.¹³⁰ It is a distinction designed to perform two roles in controlling public decision-making, two roles which do not often sit comfortably side by side. First, it must assist in interpretation of statutory provisions. Questions of law within a statute (sometimes referred to questions to which there can be only one right answer: 'a question of application of statutory language is a question of law when the law requires one answer to it'¹³¹) are matters for interpretation by the courts. The interpretation given forms the *ratio* of the case, giving it the force of precedent. Thus, the meaning of a key term within a statute is a question of law. The courts will review this on a correctness basis, ie they will determine whether a term has been correctly interpreted by a decision-maker, rather than assessing whether that decision-maker has adopted a reasonable interpretation of the term and will rely on previous judicial decisions to assist in doing so. Questions of fact in interpretation, in contrast, are generally terms for factual assessment by the administrative authority.

Secondly, the distinction is also used to control decision-making beyond questions of interpretation. However, to attempt to distinguish such decisions in this way is problematic, particularly in the environmental field, where statutory terms themselves are often value-based. For example, assessing meaning of the term 'significant' is interpretation of the statute and is, therefore, a question of law. Whether or not the facts in front of the public decision-maker demonstrate such significance, is a question of fact. However, it is not possible to assess what 'significant' means without some engagement with the context, and with the principles and justifications underpinning the statutory provision.¹³² Thus, judicial attempts to ascertain the meaning of the word 'significant' in the statutory provision (leaving the question as to whether the meaning is met in the facts) become problematic, and the courts, reluctant to

129 Lees (n 9) 10.

130 The difficulties with the fact/law distinction, and its application to 'modern' administrative standards which are value-laden, are discussed in Hanna Wilberg and Mark Elliot(eds), *The Scope and Intensity of Substantive Review* (Hart 2015). See, in particular, Hanna Wilberg, 'Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide', 263–96.

131 Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292, 292.

132 Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' available at <<http://plato.stanford.edu/entries/legal-reas-interpret/>> accessed 3 September 2015.

overstep their proper role, treat the meaning of the word as a question of fact, subject to a range of meanings depending upon context. The most pertinent use of the notion of questions of law is therefore to distribute decision-making power and responsibility since it becomes itself a value assessment as to whether to label a decision one of law or fact. It is thus, 'the standard device that common law systems have used to order relations between two decision-makers'.¹³³

Therefore, while this distinction is both comprehensible, and seemingly useful, in theory, the difficulty emerges, a difficulty particularly prevalent in environmental law, where the ascertaining of facts is a matter of value assessment, as well as legal or scientific precision, and where the meaning of key terms used within the statutory provisions cannot be understood without engagement with the facts. The meaning of terms such as 'likely' and 'significant', while definable in the abstract, require much extrapolation to apply to a particular fact scenario. The question emerges therefore, which of the stakeholders is responsible for this abstraction and how stringent the court will be in ascertaining whether this has been carried out in an appropriate way by the decision-maker. This either conscious or unconscious manipulation of the fact/law distinction is therefore one technique for allocation of power which can be derived from the principles of judicial review. This modulates the power balance struck on a 'straight' reading of the legislative provisions, since a court can either call power to itself by making the terms within articles 6(3) and 6(4) matters of law, or they can defer to the local authority by considering them as questions of fact.

Furthermore, an additional modulation of the power structures put in place by the Habitats Directive can be achieved through reliance on a variable, fluctuating standard of judicial review. The impact that the approach a court takes to judicial review can have on the way decisions are made is summarised by Edwards. In considering the US Supreme Court in *Chevron*,¹³⁴ he argues that:

First, where the statutory language or intent is clear, judicial review is available to ensure that the decision-maker has complied with the law. The test of the lawfulness of the challenged decision in this case is 'correctness' and no deference is called for. It is for the court to say what the law means. But where the statute is silent on the particular matter, of the statutory language is ambiguous or has left a lacuna, judicial review is limited. Deference is the watchword: only if the decision-maker has come to what a British lawyer would essentially understand as a *Wednesbury* unreasonable decision on the meaning or intent of the statute, should the court intervene.¹³⁵

He highlights that in the UK, and in particular in relation to environmental law, which of these approaches should be adopted—correctness review, or reasonableness assessment—is unclear.¹³⁶ Thus, 'we still do not have an established doctrine on the intensity of judicial review'.¹³⁷ This is an ambiguity which is clear

133 Endicott (n 131) 294.

134 *Chevron USA v Natural Resources Defence Council* 467 US 837 (1984).

135 Edwards (n 12) 210.

136 *ibid* 213–18.

137 *ibid* 211.

from the case law above where, for example, the national decisions demonstrate flexibility in the degree to which the administrative authority should feel bound by scientific advice. The outcome of this, as Edwards highlights, is that ‘the courts’ approach to the intensity of judicial review is unsystematic, lacks coherence, and importantly from litigants’ and their advisors’ point of view, is not predictable’.¹³⁸ However, it is suggested here that there is a further important consequence: by failing to grapple with the question as to the intensity of judicial review, we further fail to examine who should be making the relevant decision and why, and how the various principles which each body relies upon in making its decisions should be balanced. This, as Fisher has highlighted, is made especially difficult where the precautionary principle is one of those principles which must be factored into the process.¹³⁹

These distinctions however only relate to one potential power division—that between the courts and the public authority. There are more layers in the Habitats Directive. The relationship between Natural England and a local decision-maker is also one where the different levels of expertise of these bodies ‘pushes’ power into the hands of Natural England. However, the degree to which the local authority *should* rely on the advice of Natural England is a matter for the supervisory jurisdiction of the courts, requiring the courts to assess the reasonableness of Natural England’s advice. Furthermore, where an EIA is required in addition to assessment under the Habitats Directive, the public consultation elements of the procedure will add an additional voice. How much weight is and must be given to this voice in the final decision will also shift the locus of decision-making power. Simply stating that ‘adverse effect on the integrity’ relates to the conservation objectives tells us nothing about how these different voices should be balanced against one another, and whether it is the court, or the public authority, that ought to assess this balance.

This triumvirate: science, politics and democracy, and the judiciary—forms the axes within which decisions on habitats’ protection are located. To find a comfortable balance between them however, context is extremely important, as are the different principles of actions which dictate how each body behaves. Indeed, as will be argued below, one of the primary ways of reconciling these relationships comes from recognising the judiciary as independent actor, driven by its own culture of decision-making. In relation to UK courts, part of this culture is the culture of judicial review. By turning a light onto the principles of judicial review, we start to examine how the ‘points on the axes’ are selected. However, the variability shown by the courts in how to utilise the principles of judicial review, and the inherent vagueness in such principles, especially when addressing the discretion of local authorities, is made particularly difficult when the question is the amount of weight given to the advice of Natural England, and in assessing whether that advice is the product of a robust scientific consensus. The precautionary approach mandated by the CJEU makes this even more problematic.

138 *ibid.*

139 Elizabeth Fisher, ‘Is the Precautionary Principle Justiciable?’ (2001) 13 JEL 315.

6. PRINCIPLES OF EU LAW: SUBSIDIARY, AND HARMONISATION AND THE ENVIRONMENTAL PRINCIPLES

Thus, the UK courts are limited and controlled in their approach by the principles of judicial review—principles which reach beyond environmental law and are, for the most part, shaped in a different context. Similarly, the CJEU is governed by different limits to its own decision-making power. It is limited by the scope of the preliminary reference procedure,¹⁴⁰ and by the unique foundations that make up the Union legal system, both supreme over, and subsidiary, to, national law. Furthermore, the CJEU must also take account of the meta-principles of the Union,¹⁴¹ principles which, although often side-lined in an environmental context in favour of the environmental principles,¹⁴² nevertheless constrain what the Union can and should be attempting to achieve. When considering the role of the CJEU when compared with the national court, we must also be aware of the constitutional position within which that European Court finds itself, and the principles which dictate its actions. This consideration must step beyond the principles of environmental law, and must instead encompass the principles of EU law as a whole. In particular, the principles of subsidiarity (and the governance structures which this attempts to encapsulate), and the goal of harmonisation must also be accounted for.

The principle of subsidiarity, contained within article 5(3) expresses the idea that the EU should only intervene in an area where action on this matter can be best achieved at a EU, rather than a national or regional level.¹⁴³ This expresses a general principle, albeit obliquely, that local action is, generally speaking, to be preferred to national or international action on a matter. Subsidiarity as a meta-principle requires that the CJEU achieve two objectives by way of its decision-making: deference to local decision-makers where expertise demands; *and* a clear articulation of the need for European-wide action to justify CJEU control. The combination of these two factors results in a necessarily 'broad' approach to decisions in relation to habitats' protection. Where a decision is too narrow—focusing on the individual case, as would, for example, a UK common law court—the court highlights that it is not best placed to make the relevant decision beyond a restatement of the provisions of the Directive. Thus a 'broad' approach is adopted, but the outcome is guidance which is vague and unhelpful.

It is at this juncture that we can recognise how the other meta-principle of the Union, harmonisation, becomes relevant, since it provides the justification for the broad approach which allocates power to the Union decision-making organs (rather than the national or local decision-maker). Thus, if the two principles are combined, subsidiarity as a background principle demands that where local context is all, the decision should be made at a local level. To justify its own intervention on these

140 See Veerle Heyvaert, Justine Thornton and Richard Drabble 'With Reference to the Environment: the Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary' (2014) 130 LQR Review 413.

141 Conway (n 9) 2–3.

142 Lees (n 9) 109–10.

143 See generally, Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2015), ch 3, and in an environmental context, Nicholas de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy' (2012) 9 J Eur Environ Plann L 63.

grounds therefore, the CJEU is directed to make its comments, and its approach, relevant to the wider EU picture rather than seeing the decision as confined to a local or national dimension. This brings the goal of harmonisation into the picture. When this is added to the environmental principles, as discussed below, the constitutional place of the CJEU results in broad and vague decisions which very often provide less precise guidance than might be desired precisely because doing so would overstep the subsidiarity principle and limit the decisions' contribution to the overall goal of harmonisation.

The environmental principles, and in particular, the precautionary principle, obviously too have a role to play in policing decisions in this area. While the principles are supposed to direct all of the actors in the process—including the scientific advisors—they are particularly relevant for the court in judging whether a decision made by a local authority strays beyond an acceptable level of risk. What these principles also do, however, is turn the focus of decisions in this area onto environmental protection, to the detriment of the other necessary values, such as natural justice and equality.¹⁴⁴ While this is understandable—the pressures of rapid habitats' deterioration, combined with Union goals for enhanced biodiversity in Europe by 2020,¹⁴⁵ mean that action is both urgent, and a high priority—it results in a side-lining (at least in explicit terms) of the other meta-principles of the Union so that their influence is left hidden or, in some cases, overlooked altogether (we can see this in relation to the Union-wide principle of legal certainty).¹⁴⁶

Thus, the environmental principles and their premise that environmental protection is justified, is taken beyond this point to the point where environmental protection is not only justified, it is the *only* justifiable solution to an environmental problem, whether this is to the detriment of certainty, subsidiarity and the prioritisation of local decision-making, or to the relationship of the national and European courts.

7. THE JUDICIARY AS ACTOR IN THE DECISION-MAKING PROCESS

This analysis has demonstrated that while the recent decisions of national and EU courts have clarified the *processes* that must take place in relation to article 6 of the Habitats Directive, what is still less than clear is where the locus of power rests for decision-making under its provisions. This lack of clarity is the product of the context

144 Lees (n 9) 172–77 and N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 267.

145 See European Commission, 'Communication from the Commission to the European Parliament, the Council, The Economy and Social Committee and the Committee of the Regions: Our life insurance, our natural capital: an EU biodiversity strategy to 2020' (COM/2011/0244) and <<http://ec.europa.eu/environment/nature/biodiversity/comm2006/2020.htm>> accessed 3 September 2015.

146 The environmental law jurisprudence takes little account of the principle of legal certainty, Lees (n 9) 109–10. It is however a well-established principle of the EU legal order. See 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH* and *Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 00045, 52; C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* [2007] ECR I-10841, [38] and [67]; C-169/80 *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini* [1981] ECR 1931, [17]; C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* [2003] ECR I-05121; and C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* [2007] ECR I-05103.

within which the various courts operate. It is furthermore the product of the different goals of the legislative interventions in question: the Habitats Directive itself aims to prevent damage, and the UK legislation establishes the process by which such damage is prevented. This different legislative context itself results in tensions in the appropriate judicial role. The most important conflict of power however is between the local authority and the courts, and the shape of judicial review principles does nothing to clarify this further, especially where the alternative approach pursued by the CJEU adds an additional layer of norms within which each court must operate.

Distinguishing between questions of fact and law, and relying on the concepts of procedural fairness and reasonableness, do not determine who decides which questions are a matter for the discretion of a local authority, the precision of the courts, or indeed for the scientific judgement of Natural England¹⁴⁷ or other expert bodies. This tripartite tension cannot be resolved either by further pursuing questions of the standard of judicial review, nor by considering principles of decision-making in environmental law, such as the precautionary principle, in isolation. Rather, to reconcile these difficulties, focus is required as to the unique role which each actor plays in this process, and, most importantly, the principles which dictate the action of each. It is only by understanding the rationale of their approach that we can reconcile such approaches.

Thus, the English courts are motivated by the principles underpinning judicial review: a desire to supervise the exercise of public power in such a way which does not substitute judicial for political decision-making, but which gives all actors a fair hearing and which demands reasonableness, clear processes and the consideration of all relevant information. In contrast, the local decision-maker is motivated not to comply with the legal principles *per se*, nor, unlike Natural England, is it tasked with protecting the environment, rather, it ought to comply with the principles laid down in local and national policy recognising legitimate risk taking, the social and economics benefits of developments, and the national and local interest in protection of the environment. Such decision-makers are therefore motivated by balancing such varied and complex issues in a policy-focused way. Finally, Natural England is constrained by the goal of environmental protection, and most importantly by the principles of scientific decision-making, of robustness in method and evidence, and by the search for consensus (incorporating precaution into these approaches). Similar comments can be made about the constitutionally mandated goals dictating the approach of the CJEU. Their focus on subsidiarity, harmonisation and the environmental principles produces a distinctive style of response to questions of habitats' protection, one which is often at odds with that pursued at a national level. Furthermore, the 'goal-orientated' approach of the EU legislature, and European Court, encourages the CJEU to take a different approach to reasoning about the legal process than does the UK legislation for national courts.

This is in fact symptomatic of a wider tension present in the EU/national law relationship, which is represented by fundamentally different approaches to governance

147 Natural England is the designated scientific advisor for decisions under the Habitats Directive, as laid down in Conservation of Habitats and Species Regulations 2010, S.I. 2010/490, regulation 9(2)(e) and Natural Environment and Rural Communities Act 2006 (the Act which establishes Natural England).

in a public law context. The EU approach is often one which demands a particular outcome, but leaves discretion as to process. This is, in essence, the very nature of the Directive. In contrast, or perhaps as a result of this, much national legislation which implements EU law does so from a process-orientated focus, and seeks to manipulate the approach of the administrative authority given the task of implementation, rather than seeking to demand a particular outcome. Once this is twinned with the judicial review principles in a UK context, and the 'hands-off' approach this can represent in relation to administrative decision-making, it is perhaps inevitable that conflict emerges.

The purpose of this article has not been to demonstrate where power should lie, nor indeed, to show that it lies in any one place in any one decision. Rather, it has attempted to show that the case law is inconsistent on this point, and that, crucially, the European Court and the national courts appear to have diverged in terms of what they consider to be the appropriate role of a court in this area. What all the courts implicitly acknowledge, however, is that the judiciary is a unique voice within the habitats' protection systems, and should be treated as such. The courts are not able to mechanically apply the provisions to the facts before them: instead they will exercise discretion both in interpreting the provisions within the regimes and in considering whether a particular plan or project should have been authorised for development. How this discretion is exercised, and the principles upon which it takes place, are, as has been shown, sometimes unhelpful in this context. The principles of limitations of judicial power—deference, judicial review—do not helpfully operate within a system which relies so heavily on scientific information and where precaution is the appropriate standard. Furthermore, the environmental principles, in driving broader interpretation of statutory provisions, and causing a single-minded focus on protection of the environment, fail to engage with the wider questions raised by the Habitats Directive: questions of value, democratic judgment and risk.

While the courts are not necessarily best-placed to answer these questions, what these cases do is shine a light on the role of the court, and require us to consider more fully what we want to use the judiciary for in an environmental protection context. It is argued here, that the judiciary should be assigned roles which best accord with their skills, training and expertise. This means that they are neither well-equipped to review scientific evidence nor do they have the legitimacy to make political judgment about the balance of values within any particular local area. As Fisher, Pascual and Wagner note, this is not a grounds of criticism for the courts, it is both to be desired and is inherent in the nature of these different decision-makers:

Legal tests of validity are generated from judicial-review doctrines and legal interpretations of legislation (grounded in legal precedents concerning the approach to legislation). Scientific tests of robustness will also be grounded on an understanding of the legislative mandate but will be primarily drawn from understandings of good scientific practice as understood in a wider scientific community.¹⁴⁸

What this means however is that we ought to recognise the role of the court in shaping processes, without conferring on them scientific decision-making responsibility. Thus, what the courts are able to do is produce a body of case law, as is beginning to emerge in relation to the Habitats Directive, which, in a step-by-step and incremental fashion, utilises the common law method to clarify, provide consistency and to build up a corpus of decisions which form the bedrock of the process moving forward. Thus, in seeing their role as promoters of the rule of law, the courts do, and should, prioritise the production of such a set of case law. This will carve out for them a unique presence within the decision-making process, rather than placing them as rivals to local authorities.

In a national context this will mean embracing, rather than shunning, the virtues of the common law as a means by which statutory terms are given precision over time through the development of, and reliance on, well-established common law principles.¹⁴⁹ This will require engagement with more than the environmental principles. Indeed, it requires us to ask: what values ought a court to take into account when exercising its decision-making capabilities, and, even in an environmental context, do these go beyond or differ from, those values that we wish a public authority to take into account. It is argued here, that to think that these bodies should and do take account of the same values is unrealistic, and indeed, counterproductive. Rather, each should take account of the values unique to their own system, while also engaging with the values common to all. This is where the importance of the judicial review principles emerge, but judicial review does not provide a sufficiently nuanced picture where the governance relationships are as complex as they are in relation to habitats.

How do we resolve the tensions which emerge from the recent case law examined here? The first step to resolving the tensions is to acknowledge openly the difficulty of the interaction between the principles of judicial review expressed in English law (which, themselves, are contested in their use in relation to the terms used in the Directive) and the principles of EU law. Secondly, we must be open that the principles of EU law which are relevant here go beyond the precautionary principle, and indeed the environmental principles as a whole. They extend to include the meta-principles of the Union, including a drive to ensure harmonisation of economic standards across the union, subsidiarity and the principles of legal certainty which operate at Union level. These additional principles must be taken account of if we are to build a rich and open framework for allocating decision-making power within the Habitats Directive. Finally, we must recognise that the scientific evidence which forms the 'background' to many of these decisions is itself a product of both value-judgment, and the Habitats process which have been developed through the case law. Fisher, Pascual and Wagner note the beneficial development of approaches which recognise the benefits of open dialogue between such decision-makers, arguing that,

In overseeing scientific challenges, the courts appear to serve as a necessary irritant, encouraging the agency to develop much stronger administrative

governance and deliberative decisions on complex science-policy issues. Conversely, in developing stronger decision-making processes, the resulting agency efforts have a reciprocal, positive impact on the courts' own standards for review. The courts and agencies thus appear to work symbiotically through their mutual efforts on the establishment of rigorous analytical yardsticks to guide the decision process.¹⁵⁰

It is only by openly considering how these constitutional controls operate together than we can build up a clear, considered and coherent approach to the triumvirate of decision-making power in relation to habitats: court, local decision-making and scientific advisor.

150 Fisher, Pascual and Wagner (n 61) abstract.