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'Have we all gone bats?' - The Strict Protection of Wildlife under the Habitats Directive and Tourism Development: Some Lessons from Ireland

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gerechtfertigt, wo sich Interessen (wie beispielsweise im Artenschutzrecht) nicht sinnvoll als Ausdruck individueller Betroffenheit abbilden lassen.[133]

Die Möglichkeiten, den subjektiven Umweltrechtsschutz zu effektuieren, sind bislang keineswegs ausgeschöpft. Daher wäre es wünschenswert, künftig die betroffene Umweltöffentlichkeit auch in ihren individuellen Rechtsschutzinteressen ernst zu nehmen. Die bisherige Renitenz des Gesetzgebers, der die seinerzeit bereits von einer überwältigenden wissenschaftlichen Phalanx kritisierten Regelungen des Umweltrechtsbehelfsgesetzes wortlautidentisch in den letztlich gescheiterten UGB-Entwurf übernommen hat,[134] gibt hierbei freilich wenig Anlass zu Optimismus, dass dies aus freien Stücken geschieht. Ein Machtwort des EuGH zu den hier dargestellten Umsetzungsdefiziten der Öffentlichkeitsbeteiligungsrichtlinie ist zweifellos in Bälde zu erwarten und hoffentlich Impulsgeber für eine planvollere Reform.

132 Zu gewisser Vorsicht mahnt auch von Danwitz, Fn. 16, S. 274.

133 Ähnlich Ekardt, Information, Fn. 29, S. 103, der darauf verweist, dass „die Bindung individueller Klagen an irgendeine Form von subjektivem Recht unhintergehbar" sei. Immerhin wäre es nicht undenkbar, Klagerechte auch zur Durchsetzung rein ideeller Interessen Einzelner zu begründen (in diese Richtung auch Franzius, Objektive Rechtskontrolle statt subjektiver Rechtsschutz?, NuR 2009, S. 384 ff.), und zwar gerade dann, wenn man auch Verbände (zutreffend) nicht als originäre Entitäten, sondern als aggregierte Individualinteressen ansieht (Ekardt, ebd., S. 107). Die Begrenzung von Klagerechten auf bestimmte Verbände bedarf gleichwohl auch hier einer Rechtfertigung, da ausschließliche Rechte zu einer Ungleichbehandlung führen, die sich auf Gründe von hinreichendem Gewicht stützen lassen muss. Die Anerkennung von Verbänden im Vorabverfahren dient letztlich dazu, abstrakt die Ernsthaftigkeit und Gemeinwohlverträglichkeit der jeweiligen Nichtregierungsorganisation zu prüfen, um das Risiko eines Missbrauchs von Klagerechten in einem sozialverträglichen Rahmen zu halten. Auf anerkannte Verbände begrenzte Klagen reduzieren daher (im Vergleich zu einer offenen Popularklage) in erster Linie die Prozessrisiken der betroffenen Dritten. Dies ist sicherlich ein legitimer Grund, der aber zugleich dazu anhält, auch das Institut nicht beliebig auszudehnen. Verhältnismäßigkeit und Gleichheitssatz begrenzen daher die Gestaltungsspielräume des Gesetzgebers.

134 Mit Recht kritisch Calliess, Fn. 54, S. 351. Paralleles gilt für das Umweltschadensgesetz (USchadG) vom 10.5.2007 (BGBl. I 2007, S. 666), das zuletzt durch Art. 14 des Gesetzes vom 31.7.2009 (BGBl. I 2009, S. 2585) geändert worden ist. § 11 Abs. 1 USchadG verweist auf § 2 UmwRG (siehe hierzu Schrader/Hellenbroich, Verbandsklage nach dem Umweltschadensgesetz, ZUR 2007, S. 289 ff.), sodass sich die aufgezeigten Fehler hier perpetuieren.

*Marc McDonald**

'Have we all gone bats?' – The Strict Protection of Wildlife under the Habitats Directive and Tourism Development: Some Lessons from Ireland

Der Autor analysiert am Beispiel des Schutzes von Fledermäusen den Konflikt zwischen dem strengen Artenschutzregime der FFH-Richtlinie und der Entwicklung des Tourismus in Irland. Im Anschluss an eine Einführung (I.) werden im zweiten Teil des Aufsatzes die unionsrechtlichen Vorgaben für den Schutz wildlebender Tierarten beschrieben, die sich insbesondere aus Art. 12 der FFH-Richtlinie ergeben (II.). Die im Einzelfall schwierige Umsetzung dieses Schutzregimes in Irland ist Gegenstand des dritten Teils. Der Autor berichtet dort exemplarisch über zwei Tourismusprojekte (Lough Rynn Estate und Lough Key), deren Realisierung wegen ihrer nachteiligen Wirkungen auf Fledermauspopulationen an den artenschutzrechtlichen Verboten der FFH-Richtline (bislang) gescheitert ist (III.). Die Möglichkeiten, unter denen nach Art. 16 der Richtlinie eine Ausnahme von den Verboten erteilt werden kann, werden im vierten Teil des Aufsatzes untersucht (IV.). Der Beitrag schließt mit einer Zusammenfassung und der Empfehlung, bei der Planung von Tourismusprojekten frühzeitig naturschutzfachlichen Sachverstand einzubeziehen und den jeweiligen Projektstandort auch unter dem Gesichtspunkt des Artenschutzes sorgfältiger auszuwählen (V.).

I. Introduction

The legal protection of species of wildlife under EU law is or should have an increasing impact on tourism developments. It should typically force project modification, relocation or even in some cases project abandonment. Tourism developers are learning about these impacts rather slowly for a variety of reasons. The aim of this article is to provide legal guidance on the likely impact of the protection of species on tourism developments by examining the Irish legal experience of the protection of bats.

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This experience was not initially a happy one with both law-makers and planners lacking the requisite awareness of the legal implications of wildlife protection on tourism developments. While this is slowly changing and the scale of threats to bats may have eased with the current economic downturn, the enduring appeal of tourism developments especially in environmentally sensitive areas which are often also tourist attractions, means there will generally be some degree of threat to protected species.

Bats are a useful exemplar of the conflict between tourism and species protection. They are an endangered[1] species[2] of small animals with a distinct reputation.[3] They avoid humans, are disturbed by human activity, especially noise and also by lighting especially street or public lighting. They nest in buildings and places often abandoned by humans who then seek to displace them when some contemporary, often tourism, use is found for the building or place. For instance, a tourism developer might want to turn a large old country mansion (which is often also a legally protected structure) into a hotel or resort with golf course and other facilities, or use a cave or forested or open space for visitor purposes. Preparatory site clearance and construction work can threaten bat habitats in various ways by disturbing or destroying roosts, breeding and hibernation sites, flight corridors and foraging places.[4] Conflict then arises between the economic and social benefits of tourism and the protection of bats and the maintaining of bio-diversity.

Part II of this article will, firstly, describe the legal framework at EU and to a lesser extent at Irish level under which wildlife species of European importance is protected. The main provision to be described is Article 12 (1) of the Habitats Directive. Reference will also be made to case-law of the European Court of Justice (ECJ) to demonstrate the relevance of EU wildlife law to tourism activities. Part III will examine the Irish experience of bat protection through two cases of tourism projects which were foreseen to have negative impacts on bat populations. Part IV will examine the possibility of obtaining a derogation from the obligation to strictly protect bats under Article 16 of the Habitats Directive. Part V will finish with a short summary and some concluding remarks. The broad thrust of the conclusion will be that affected stakeholders (the state, developers and conservationists) are still on a learning curve regarding the significance of the legal protection of bats.

II. Legal Framework

The relevant framework under European Union (EU) law is contained in Directive 92/43/EEC[5] on the conservation of natural habitats and wild fauna and flora (Habitats Directive). The Habitats Directive was principally transposed in Ireland by the EC (Natural Habitats) Regulations 1997 (1997 Regulations).[6] As will be seen both the transposition and implementation of the Habitats Directive in Ireland has been the subject of adverse rulings by the ECJ. The aim of the Directive, as set out in Article 2 (1), is to 'contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora [...]'.

1. Taking account of tourism

Under Article 2 (3) measures taken pursuant to the aim in Article 2 (1) 'shall take account of economic, social and cultural requirements and regional characteristics [...]' According to ECJ case law on an equivalent provision in Directive 79/409 on the conservation of wild birds (Birds Directive)[7], one of these requirements is recreation.[8] Owing to the similarity with Article 2 (3) of the Habitats Directive, the latter provision is likely to also be treated as require account to be taken of the requirements of recreation and, indeed, tourism as well. It is, however, unclear if this allows much leeway to be accorded to tourism projects which conflict with bat protection.[9] Although there is no limit in Article 2 (3) on the types of measures which must take account of recreational requirements, the Habitats Directive is so prescriptive about its mechanisms for protecting habitats and species it seems that there is little room for member-state discretion on this matter. It would seem the main allowance for economic and social requirements would be when granting of derogations under Article 16, discussed later.

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1 In Europe 'bat populations have declined over the last century [and] remain at risk', Kelleher & Marnell (2006), Bat Mitigation Guidelines for Ireland, Irish Wildlife Manuals, No 25, NPWS, Department of the Environment, Heritage and Local Government, Dublin, Ireland, p 9.

2 Of the estimated 1,100 types of bats worldwide, there are 10 known types in Ireland, various pipistrelle bats, Leisler's bat, Natterer's bat, Whiskered bat, Brandt's bat, brown long-eared bat, lesser horseshoe bat; Kelleher & Marnell, p 20.

3 As an accessory in horror films. Additionally from a utilitarian perspective the reaction of this writers mother seems not untypical 'What good are bats?'.

4 See generally Department of the Environment, Heritage and Local Government, Threat Response Plan – Vesper Bats, Dublin, 2009, p 39-54.

5 Directive 92/43/EEC, OJ L 206/7, 22.7.1992.

6 SI 94/1997 as amended by EC (Natural Habitats) (Amendment) Regulations SI 233/1998 and SI 378/2005. Due to be updated and consolidated shortly. Text of new draft regulations available at http://www.environ.ie/en/Legislation/Heritage/NatureConservation/FileDownLoad,23675,en.pdf accessed 25.9.2010. The governmental unit responsible for the Directive in Ireland is the National Parks and Wildlife Service (NPWS), part of the Department of the Environment, Heritage and Local Government.

7 OJ L 103/1, 25.4.1979 as amended.

8 Commission v Belgium C-247/85, [1987] ECR 3029, para 8.

9 According to R v Secretary of State C-44/95 [1996] ECR I-3805 an equivalent provision in the Birds Directive 79/409 was held not to allow economic considerations to be taken into account when a member state designates an SPA and defines its boundaries, although as with the Habitats Directive economic considerations could be taken into account when granting a derogation.

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2. Bats and the Habitats Directive

Except for the lesser horseshoe bat which is listed in Annex II, Irish bat species are listed in Annex IV (a) of the Habitats Directive. Annex IV is titled 'Animals and Plants of Community interest in need of strict protection'. Listing means they are within the protection of Article 12 (1) of the Directive. The lesser horseshoe bat is the only Irish bat listed in Annex II, titled 'Animal and Plant Species of Community Interest whose Conservation requires the Designation of Special Areas of Conservation' (SAC's). Under Article 3 (1) of the Directive SAC's must be designated for Annex II species.

Of the two principal mechanism used by the Directive to protect habitats and species – the creation of 'special area of conservation' (SAC) and the protection of species independently of an SAC – the primary focus of this article is on the latter, though there is some discussion of SAC's where this is relevant to the protection of bats and other species. While there are approximately 40 bat SAC's in Ireland,[10] they are not perceived to be under threat[11] and it is perhaps in areas not specifically protected as SAC's that threats to bats are greatest.

3. Article 12 (1)

The legal protection of species is set out in Article 12 (1) of the Habitats Directive[12] which obliges EU member states to establish 'a system of strict protection' for listed species. This general obligation is filled out to a certain extent by a number of specific prohibitions in the same provision. Article 12 (1) states:

'Member States must take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;
(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;[13]
(c) deliberate destruction or taking of eggs from the wild;
(d) deterioration or destruction of breeding sites or resting places.'[14]

Clearly 'strict' and 'system' are key terms. 'Strict' suggest little or no scope for excuses for allowing damage to protected species and their habitats, although there is a disconnect between 'strict' and the fact that three of the four prohibitions require proof of deliberate behaviour rather imposing liability irrespective of the quality of behaviour. Only the deterioration or destruction of breeding site and resting places in Article 12 (1) (d) does not require proof of deliberate behaviour. The ECJ has held[15] that this latter prohibition does not breach the proportionality principle which, perhaps, suggests that had the other prohibitions been cast in similar terms they too might have been deemed proportionate ways of achieving the Directive's Article 2 aim of ensuring biodiversity.

The ECJ has commented on how 'deliberate' should be interpreted and this gives rise to the interesting possibility in certain situations that states and their consent-giving authorities could unexpectedly find themselves in breach of Article 12 (1). The ECJ has stated: 'For the condition of 'deliberate' action [...] to be meet, it must be proved that the author of the act intended the capture or killing of a specimen [...] or, at the very least, accepted the possibility of such capture or killing taking place [...]'[16]. Following this, if a planning authority gives planning permission knowing of the probable risk of bats on-site or nearby being deliberately interfered with in any of the ways listed in Article 12 (1), then (subject to how the criminal law interprets causation) the theoretical possibility exists that the planning authority could be regarded as either a principal or accessory in infringing the prohibition.

4. Killing/capturing and disturbing

The prohibitions on killing in Article 12 (1) (a) and disturbing in Article 12 (1) (b) are different. It might be that this difference is important for tourism and other developers who encounter bats. The prohibition on deliberate killing applies to 'specimens', that is, individual members of the species, whereas the prohibition on disturbing refers to 'species'. The ECJ has not ruled on whether this difference is significant. Case-law in one member state, the UK,[17] has, however, used the difference to hold that disturbing or accidentally killing a few bats might not amount to a 'disturbance' to 'species' if otherwise the bat population remains in a healthy state of conservation. In R (Morge) v Hampshire CC in 2010 the disturbance concerned the felling of trees of potential value as bat roosts and the loss of

10 Such as Pouladatig Cave, Site Code 000037 and Old Farm Buildings, Site Code 002245, both in County Clare. Details and list of Irish SAC's for the lesser horseshoe bat under its technical name rhinolophus hipposideros can be filtered from http://www.npws.ie/en/media/Media, 5198,en.xls accessed 25.9.2010.

11 See fn 77 below. For the list of notifiable activities for bat SAC's see http://www.npws.ie/en/media/Media,4900,en.doc accessed 32.8.2010.

12 Implemented by Article 23 of the 1997 Regulations.

13 '[B]ats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources', Commission, Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007, para 37.

14 The prohibition in (d) above is wider than the other ones in that non-deliberate behaviour is also prohibited – see Commission v UK C-6/04, para 79.

15 Commission v Germany C-98/03, [2006] ECR I-53, para 55.

16 Commission v Spain C-221/04, [2006] ECR I-4515, para 71.

17 [2010] EWCA Civ 608.

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bat foraging cover in order to allow the conversion of an overgrown abandoned railway line into a bus route. No roosts were identified but bats could use them as they often change roosts.

If the UK court's reasoning is correct it means on-site or nearby bats can in some cases be non-deliberately destroyed without infringing Article 12 (1) and, further, without any need for a derogation licence. Whether the UK court's emphasis on the difference between 'species' and 'specimen' is correct may be open to question. A purposive interpretation of the general context of the Habitats Directive might not permit the drawing of such sharp distinctions. Further, the value of the UK decision as a precedent is reduced by the fact that the case contains no discussion or application of the precautionary principle (discussed below), one of the core principles of EU environment policy which, broadly speaking, requires a refusal of permission for possibly damaging activities if there is a reasonable scientific doubt whether prohibited acts would occur. An ECJ ruling on this would, however, be welcome given the obvious potential of this reasoning to give scope to developers to kill and disturb bats and claim it was an accident. Proving deliberate behaviour in criminal proceedings can be difficult when the accused claims it was accidental.

5. A system of protection

Under Article 12 (1) it is not the system which must be strict, it is the protection which must be strict. It is object orientated, not system orientated which means a more onerous implementation obligation on member states. Nonetheless, along with Article 11 which says states 'shall undertake surveillance of the conservation status' of protected species, the use of 'system' implies the creation and operation of an entire process of protection. Member states must, not only properly transpose the Directive, they must also correctly operate it. In proceedings against Finland for infringing Article 12 as regards the protection of wolves, the ECJ stated: 'A failure to fulfil obligations may arise due to an administrative practise which infringes Community law, even if the applicable national legislation itself complies with that law.'[18] Administrative practises must include not only continuously enforcing the list of prohibitions in Article 12 (1), but also operating an entire process of information gathering, species monitoring, risk anticipation and, where necessary, intervention by means of species action plans. According to the ECJ: in another case: 'the system of strict protection presupposes the adoption of coherent measures of a preventative nature'.[19] Further, 'the surveillance obligation [in Article 11] is fundamental to the effectiveness of the Habitats Directive.'[20]

All this means there is in fact a wide range of ways a state can fail to comply with its obligations under Article 12 (1) for the protection of species. It can fail to properly transpose the Directive's legal framework.[21] It can fail to properly implement the framework by not gathering the necessary information,[22] or by not taking appropriate measures to prevent damage,[23] or – where a decision is involved – by not considering alternatives,[24] or by not applying the precautionary principle.

This principle which is a basic principle of EU environmental policy and is mentioned now in Article 193 (2) of the Treaty on the functioning of the European Union,[25] has been interpreted by the ECJ as requiring, where there is a reasonable scientific doubt whether species will be adversely affected by a project, that a consent application must be refused.[26] In LVBW v Secretary of State[27] (Waddenzee) there was scientific uncertainty about the effect on bird feeding and resting sites of a consent to mechanical cockle fishing in a Dutch SPA. The ECJ stated[28]:

> 'It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned [...] So, where a doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.'

While this rule was articulated by the ECJ in the context of damage to an SPA used by birds for resting and feeding, it clearly also applies to operations affecting protected species such as bats under the Habitats Directive and outside an SAC. Its significance here is to force developers before making an application to pay close attention to the scientific study of bat presence on the proposed site.

Ireland has infringed its implementation obligations under Article 12 (1) as regards protection of most of its bat species. In Commission v Ireland[29] in 2007 the ECJ found Ireland to be in breach of its obligation in a number of ways, included lack of species action plans, lack of information about bat breeding sites and resting places and threats to them, and lack of administrative resources to carry out its obligation.[30] In the words of the Commission's complaint Ireland's efforts were 'disparate and patchy'.[31] One

18 Commission v Finland C-342/05, [2007] ECR I-4713, para 22. The infringing practise must, however, to some degree be of a consistent and general character, para 33.

19 Commission v Ireland C-183/05, [2007] ECR I-137, para 30.

20 Commission v UK C-6/04, [2005] ECR I-9017, para 65.

21 Ibid.

22 Commission v Ireland, supra.

23 Commission v Greece C-103/00, [2002] ECR I-1147.

24 Commission v Finland, supra.

25 OJ C 83/132, 30.3.2010.

26 C-127/02, [2004] ECR I-7405.

27 Ibid.

28 Supra, para 56.

29 C-183/05, [2007] ECR I-137.

30 Supra, para 13-33.

31 Supra, para 13.

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noteworthy implication of this decision for the later discussion of this case and tourism is that the lack of information about bats can mean that a public body operating a control system over tourism projects which could affect bats would be in a position of some ignorance when deciding a consent application.

6. Control Systems

The Habitats Directive does not, as such, require the establishment of a control system over human activities which cause harm to protected species like bats.[32] Creating a system of almost absolute prohibitions suggests little room for granting licences to permit prohibited acts. However, there is a need for a state to be able to determine in advance whether a project is likely to have adverse effects on a protected species conservation status. Further, establishing a control system to allow exceptional harm to bats is implicit from the requirement in Article 12 (1) to create prohibitions and in Article 16 to grant derogations from those prohibitions. Similar reasoning applies to Article 6 (3) and (4) as regards SAC's.

The sequential steps to be followed in giving any consent for a derogation are largely laid down in Article 16 and, if any are lacking, such steps as are laid down in Article 6 (3) and (4) when derogating as regards SAC's would seem applicable since both provisions appear to be equally based on the precautionary principle.

Ireland operates two control systems to control impacts on protected species. Firstly, if an activity in or affecting an SAC amounts to 'development' under the Planning and Development 2000 Act as amended (typically alterations to land/buildings) planning permission must be sought from the (usually local) planning authority. Also, although not explicit in the 2000 Act any decision by the planning authority must take account of species protection under the Habitats Directive regardless of where the impact may occur. This duty on the planning authority arises because, as an organ of the state, a planning authority is within the obligation on member states to ensure the application of all EU laws within its sphere of competence.[33]

Once granted, planning permission for development on a site which bats are known to use only authorises that development and does not authorise acts which are illegal under the Irish transposition of Article 12 (1). Planning and wildlife laws are distinct codes. Each code can only authorise what it is competent to deals with. If a developer unexpectedly encounters bat roost and bats, planning permission does not authorise their killing or disturbance even if the grant of planning permission foresaw the destruction or demolition of buildings or felling of trees. This gives rise to the need for a second control system.

Secondly, if an activity falls short of 'development', like cutting grass or bushes or in some cases felling trees, it is called in Irish wildlife law an 'operation or activity'[34] and a licence must be obtained from the Minister for the Environment, Heritage and Local Government.

7. Relevance to tourism

Two decisions of the ECJ illustrate the relevance of the protection of species under the Habitats Directive and its companion directive, the Birds Directive, to tourism developments – Commission v Greece in 2002 (sea turtle case) and Commission v Austria in 2004 (corncrake case), the latter a birds case involving damage to an SPA, the bird equivalent of an SAC.

– Sea Turtle Case

The impact of the obligation to operate a system of the strict protection of protected species under Article 12 (1) on tourism can be seen from the one case so far before the ECJ, Commission v Greece[35] in 2002. This case involved tourism pressure, not on bats, but on sea turtles another species protected by the Habitats Directive. The Court of Justice found Greece to be in breach of its obligations under Article 12 (1) for failing to implement a system of strict protection of sea turtles at various beaches and sea areas on the island of Zakinthos. According to the Court sand beaches and adjacent sea areas are important for sea turtles for the following reasons:

> 'the sea turtle Caretta carettta only lays egos every two years. In Greece the laying season starts at the end of May and finishes at the end of August. The turtle leaves the sea at night and moves towards the driest area of the beach, where it digs a hole of 40 to 60 centimetres in which it lays an average of 120 eggs. The Commission explains that two months later the eggs hatch and the baby turtles then crawl onto the sand and head towards the sea. The baby turtles are very vulnerable and a large number of them die.'[36]

Despite this vulnerability access routes to various beaches in Zakinthos used by breeding sea turtles access routes for tourists had been increased. This resulted in illegal building on some beaches, significant use of beach umbrellas and deck chairs, greater noise levels, particularly from the use of mopeds on some beaches and the use of pedalos and boats in adjoining sea areas. Because of this the Court declared:[37]

> '[Greece] did not take [...] all the requisite specific measures to prevent the deliberate disturbance of the sea

32 As an exception Article 14 (2) does envisage a control system for the taking of certain wild species.

33 Germany v Commission C-8/88, [1990] ECR I-2321.

34 Under Article 14 EC (Natural Habitats) Regulations SI 94/1997 as amended.

35 C-103/00, [2002] ECR I-1147.

36 Supra, para 16.

37 Supra, para 39.

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turtle [...] during its breeding period and the deterioration or destruction of its breeding sites.'

– the corncrake case

The second case, Commission v Austria[38] in 2004 was not an Article 12 (1) case. Rather it concerned a complaint that a development consent given by the competent Austrian authority for a two hole extension to a golf course in an SPA did not comply with Article 6 (3) and (4), not Article 12 (1), of the Habitats Directive. The case is of interest to the present discussion because the complaint related to damage to the resting places of protected bird species, the corncrake. While the legal steps to be followed before a decision can be taken under Article 6 (3) are more explicit under Article 6 (3) than under Article 12 (1), the case is still instructive because, no matter the Directive or article, the object of both Directives is the same, the prevention of deterioration to the resting places of protected species.

The Austrian authority did as was required before giving consent. They foresaw the project might have significant adverse effects on the site. They ensured an assessment was made of the implications of the project for the site. It was only when giving consent with conditions attached that the difficulty arose. The assessment had concluded that giving consent 'could well threaten the continued existence of the corncrake population' in the SPA.[39] The assessment also considered possible mitigating conditions, advised they might be insufficient to address the threat and recommended alternative locations for the golf course extension. Despite this consent was still given. The ECJ held that in this substantive aspect of the case Austria had breached Article 6 (3). It stated:

> 'Having regard to the content of those expert's reports and in the absence of evidence to the contrary, the inevitable conclusion is that [...] the Austrian authorities were not justified in considering that the planned extension of the golf course [...] coupled with the measures prescribed [...] was not such as significantly to disturb the corncrake population in the [...] SPA [...]'.[40]

The Austrian authorities (like the Irish authorities in the Lough Rynn case discussed in the next part) had also not applied the derogation provisions of Article 6 (4) whose equivalent for species is Article 16.

The lesson from this case for tourism projects affecting bat species is that when a prior assessment is undertaken, any negative conclusions should, if possible, be faithfully reflected in the consent decision. Otherwise consent should be refused.

III. Irish Legal Experience regarding Bats and Tourism Developments

Irish legal experience in relation to Article 12 (1) and the protection of bats against threats posed by tourism developments derives more from planning law than from wildlife law, that is, from experience of developers seeking planning permission for projects than from experience in seeking derogation licences to capture/disturb bats.

Two particular planning cases highlight the contrasting Irish experience – Lough Rynn Estate[41] which was cited by the ECJ in Commission v Ireland in 2007[42] as an example of non-compliance with Article 12 (1) and Lough Key[43] which went only as far as the national planning appeals board (ABP).

1. Lough Rynn Estate

Lough Rynn Estate was an intact 19th century country estate located in a sparsely populated rural area in the north-west midlands comprising an empty but not derelict demesne house, ornate walled gardens and ancillary farm buildings, some lakes and tracts of woodland, parkland and pastureland. The developer proposed the renovation, restoration and conversion of the house and adjacent buildings into a hotel complex, the creation of an 18 hole golf course, business, equitation and leisure centres, some housing, holiday apartments and car parks. Planning permission with conditions was granted in December 2000 by the local planning authority. An appeal against this decision was made to ABP. As is normal the appeal necessitated the preparation of a report by an inspector of ABP for the board of ABP.[44] While the planning application raised a host of complex planning issues relating to landscape, architectural and other matters, for present purposes only bat impacts will be considered.

The planning application included an environmental impact statement which as regards bats noted their presence on the project site but did not contain enough information to enable bat impacts to be properly assessed. The report of the ABP inspector stated as follows:

> 'There are also the points made by An Taisce [environmental NGO] in their appeal that the EIS is inadequate in other respects, that the European EIA Directives are contravened and that the full information should be available on the presence or otherwise on the site of bats, before any decision is made. I do agree that the prodiuction of the original and the revised EISs over at least a six month period should have allowed sufficient time for appropriate survey work to have been done.

38 C-209/02, [2004] ECR I-1211.

39 Supra, para 24.

40 Supra, para 26.

41 PL 12. 127172, ABP decision 20.9.2002.

42 C-183/05, [2007] ECR I-137.

43 PL 20.215543, ABP decision 25.5.2006.

44 The ABP inspector's report functions somewhat like an Advocate General's Opinion for the Court of Justice, but is perhaps of greater value because the Board decision is typically brief.

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> Indeed further time has elapsed with the lodging of the appeal. In any event however the bat question will need to be resolved properly before the development can go ahead and the pragmatic approach would now be to deal with this by way of condition.'[45]

ABP accepted the recommendation and the project was approved with the following condition attached:

> 'Prior to commencement of development, the developer shall carry out a comprehensive survey of bat populations at the site. Appropriate mitigation measures to minimise disturbance shall be agreed with the planning authority.'[46]

However, it does not appear that this is what happened. According to the Opinion of the Advocate-General in the subsequent proceedings before the Court of Justice:

> 'The documents in the case file show that the development was approved by the Board in 2002, whereas the survey demonstrating negative impacts on bats was completed only in 2004 and works commenced in 2003.'[47]

In fact the survey showed major negative impacts for bats habitats:

> 'That survey, which was completed after planning permission was granted, demonstrated that the renovation of certain buildings and the removal of certain trees would lead to the total disappearance of those habitats as breeding sites and resting places. It also noted that noise and lighting as a result of human occupation would have a significant impact on bat species.'[48]

Not surprisingly, this was relied on by the Commission as an example of a failure by Ireland to properly implement Article 12 (1). Reciting the Commission's view the ECJ stated:

> 'the Commission [...] submits that a proposed hotel development on the Lough Rynn Estate was the subject of an EIA which showed negative impacts on bat populations. In spite of this, the Irish authorities did not request any further information before granting consent and failed to make any reference to the need for the conditions set out in Article 16 of the Habitats Directive [the formal derogation procedure] to be observed.'

The Irish defence was essentially that all legal requirements had been observed and that, if work had been carried out prior to the survey being completed and assessed, that was an issue of non-compliance by the developer with planning conditions rather than a failure by Ireland to properly implement the Directive. The ECJ disagreed and held that Ireland had not properly implemented the Habitats Directive. According to the Court:

> 'the authorisation of a project prior to the environmental impact assessment concluding that the project would have negative impacts on the environment [...] shows that the species listed in Annex IV (a) to [the Habitats] Directive [...] and their breeding sites and resting places are subject to disturbances and to threats which the Irish rules do not make it possible to prevent [...] Consequently it cannot be concluded that all measures have been taken to implement effectively the system of strict protection.'[49]

The Court's reasoning was a significant criticism of how the Irish planning authorities understood and applied Article 12 (1). However, it could be claimed that the planning authorities were only partly to blame for this. An EIS is not necessarily a reliable source of wildlife information and a planning authority cannot always gauge the accuracy of what the be EIS says because it does not have, as a system of strict protection might imply at least in some cases, prior access to independently obtained data from the competent national body on bat populations in its area and their conservation status. The ECJ did not, and had no need to, say this, but information should ideally be collected and disseminated by the state body responsible for complying with Article 12 (1).

One cannot speculate, had the necessary bat data been available to the planning authorities in the Lough Rynn Estate case, what decision would have been made. From personal research it seems bats roosts were located in roof spaces in courtyard buildings attached to the main building. The woodland and lakeside areas were also probably used by bats. Moving them would, as previously indicated, have probably been the developer's preferred option for dealing with the bats, but was not in the gift of the planning authorities and would have required a derogation licence from the Minister for the Environment, Heritage and Local Government, as would the felling of trees which was required to facilitate the laying out of the golf course and the construction of the housing element of the project. While it is conceivable a licence would have been granted by the Minister, what is not clear is whether the impact of the licence or any conditions attached to it would have rendered the project or parts of it uneconomic.

2. Lough Key

Lough Key[50] is planning case in which bat protection was a significant central legal concern. And because due atten-

45 See fn 40, supra.

46 Supra, Condition 14 of Order of ABP, 20.9.2002

47 Opinion of AG Leger, C-183/05, [2007] ECR I-137, para 59.

48 Ibid.

49 Supra, para 36 et seq.

50 PL 20.215543. Inspectors Report, April 2006. ABP decision 25.5.2006. This was one of three related developments proposed for the same area, all of which raised issues of possible impacts on bats and all of which were refused, partly or mainly, for those reasons, PL 20.213841, ABP decision 20.1.2006 – 78 holiday homes; PL 215423, ABP decision 23.5.2006, 199 holiday cottages, 18 hole golf course, clubhouse, tennis courts, car parking.

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tion was paid to the legal requirements, it did not go beyond ABP and is a more pertinent illustration of the effect of species protection on tourism developments.

Lough Key, also in the north-west midland of Ireland, is itself a large inland lake surrounded by much woodland and is an established recreational and leisure area. The site in question, which was some distance from the public areas, was largely 'shrub land overgrown with semi-natural woodland' with some grassland, but was bordered by agricultural land, woodlands and a lake. The proposed project involved the demolition of some buildings, as well the construction of 72 clustered holiday houses, small leisure and conference centres, a lounge/bar and restaurant, a shop and car parking. The EIS noted bat roost on buildings on the site, but no bats were found, although the survey had not been carried out at the best time to gauge bat activity. The ABP inspector's report noted, however, that the site fitted into a larger area likely to contain bat and other protected species and their habitats. He concluded that in the absence of precise information showing the absence of adverse impacts of the project on the bat habitat, permission should be refused. The board of ABP agreed and consent was refused.

Central to the recommendation of the ABP inspector was the precautionary principle of EU environmental policy. The inspector cited the ECJ decision in Waddenzee in a lengthy passage in his report which merits extended reproduction here. He stated:[51]

> 'The site forms part of the wider Lough Key area which accommodates high quality habitats including habitats for protected species, bats, pine martin and red squirrel. The EIS notes that no protected species were recorded within the site during the flora and fauna survey carried out as part of the EIA. It is acknowledged in the EIS that the survey which is carried out in August would have seasonality limitations. The document states that 'the ecological survey in August will reveal evidence of mammal activity, and some breeding birds can be observed, however winter is the optimal time for the mammal survey and spring is the optimal time for surveying breeding birds'. The EIA recorded a pine martin to the immediate north of the site and bat roots were recorded on the existing buildings within the site. An Otter spraint was recorded at the north eastern boundary of the site. I do not consider that the proposed development will result in a significant level of habitat loss by way of the physical removal of woodland. I reiterate that I consider that the applicants' contention that approximately 6 % of woodland would be removed as a result of the proposed development would not seem unreasonable. It is clear however that the site forms part of a largescale woodland surrounding a lake and there is a significant and diverse ecology including the protected species in the general area. Just because the EIS did not record any protected species on site does not imply that no such species frequent or rely on the woodland as part of their natural habitat. The seasonal limitations of the survey may not have revealed the importance of this habitat for protected species. The proposed development will be restricted in the main to the western and northern areas of the site. The substantial area of woodland adjoining the existing NHA will remain for the most part undisturbed. Notwithstanding this the proposal will result in a very significant intensification of human activity in an area which heretofore has seen little activity other than that associated with the lake shore I would have particular concerns in relation to the lesser horseshoe bat which is an internationally important species and one of the most sensitive to disturbance. According to the Red Data Book, the loss of suitable summer sites and disturbance during hibernation are the major threats facing this species. The EIS identified several summer roosts probably associated with Pipistrelle, Brown Longeared, Daubentons and Leislers, these are likewise protected species and are listed in the Habitats Directive. It is stated that other bat species are potentially using the woodlands but the nature of the bat roosts and the bat activity makes a complete survey of the woods extremely difficult and time consuming. The EIS is not determined therefore whether there were other roosts of bats in the area and whether the woodlands were being availed for breeding purposes. The Board therefore cannot be sure that the proposed development would not impact on the fragile horseshoe bat which is very sensitive to changes in the environment. The proposed development will result in some removal of habitats, particularly woodland, but perhaps more importantly is the increased disturbance of habitats by people, vehicles and machinery. Habitat fragmentation may also occur with the removal of and perhaps more importantly interference with, vital wildlife corridors and the increased disturbance resulting from man made corridors. Habitats may also be altered through the introduction of artificial lighting and areas of hardstanding.

The extent of the potential adverse implications is not apparent as results of a less than comprehensive survey. The proposal could likewise have an adverse impact on populations of pine martin and red squirrel for the same reasons. Locating holiday homes outside the forest park and within existing settlements would be more advantageous from a nature point of view.

Finally in relation to the ecological impact the Board should have regard to the Waddenzee Judgement (Case C-127/02) where it was ruled that where development is proposed in or which may effect a nature conservation site, authorisation can be granted only when the consent authority is convinced beyond reasonable scientific doubt that the proposal will not adversely affect the integrity of the site unless there are imperative reasons of overriding

51 Supra, pp 23-25.

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public interest. I would consider the above Judgement to be relevant in this instance, having regard to the close proximity of a pNHA and the wider area including the site area forms part of a continuity of woodland habitats which contain a mosaic of important habitat types along the lake shore. I do not consider that the case put forward on behalf of the applicant can convince beyond reasonable doubt that the proposal will not have a negative impact on protected species.'

Three important points stand out from the passage:

- post-construction impacts, such as lighting and human noise and activity (which are always associated with tourism developments) which can impact negatively on bats can justify a refusal of consent just as much as site clearance and construction impacts;
- the importance of relevant, timely and comprehensive scientific data which removes reasonable doubts one way or the other regarding likely adverse impacts on protected species. Had the developer been able to show the absence of real doubt about negative impact on bats this would not have been a ground of objection. This means a considerable onus rests on a developer to do the science first, that is, before settling on a site, to produce robust credible scientific evidence as part of the planning application to show the absence of reasonable scientific doubt. If this cannot be done either a different site should be sought or a derogation licence sought;
- the ABP inspector did not cite any legislation which required the planning authority to treat the likely presence of bats as legally relevant to the planning assessment. Presumably, he did this because, unlike impacts on SAC's which are expressly dealt with,[52] Irish planning law contains no express provision requiring a planning authority to take account of the legal protection of species under the Habitats Directive when dealing with an application for planning permission. No doubt this gap will in due course be filled.[53] One might surmise that the inspector and ABP acted under the more general legal obligation imposed on member states currently by Article 4 (3) of the Treaty on European Union[54] to ensure in effect that organs of the state, such as a planning authority, observe the application of all EU laws within its sphere of competence.[55]

The effect of the Lough Key decision is to set a high threshold for tourism developers to cross before permission can be granted. If all planning authorities applied the law as applied in Lough Key all the time (and this could be a questionable assumption), tourism developers in rural areas with wooded and wetland features will encounter significant problems in future in making use of old buildings or open or underground areas which are rich in bats or other protected species. When the threshold is not meet and adverse impacts will occur the option of seeking a derogation under Article 16 will arise. For whatever reason this did not arise in either the Lough Rynn or Lough Key cases. Whether they might have been able to obtain a derogation is briefly considered in Part IV.

3. Since 2007

Ireland responded to the ECJ criticisms of its Article 12 (1) failings in Commission v Ireland in various ways. It issued a Circular Letter[56] to planning authorities reminding them of the nature and importance of the legal protection of species under wildlife law, as well as planning law. The Letter did not, as perhaps it might have, caution planning authorities against using consent conditions like the one used by ABP in Lough Rynn.

Two major ECJ complaints – failing to adequately monitor and survey bat populations[57] – were and are being addressed by a series of research initiatives designed to build up knowledge of bat populations and their conservation status.[58] One target is to '[m]aintain database of records of all known bat roosts and [make them] available to local authorities and developers as appropriate.'[59] Another is to enhance the capacity of planning authorities '[t]o ensure that consideration of the roosting requirements of bats are included in the planning process [and] training will be provided [...] to the planning sections of Local Authorities to An Bord Pleanala and to the OPW [state property agency].'[60] However, there is no claim in the official documentation that by mid-2010 planning authorities will have access to data on bat populations in their areas. This is not surprising when 'gaps in distribution are still evident for all species, and even for our more common species.'[61]

IV. Derogations

Pragmatically, the Habitats Directive recognises that for good reasons derogations from the system of strict

52 In s.34 (2) of the Planning and Development Act 2000 as amended.

53 In the UK Regulation 3 (4) of the Conservation (Natural Habitats) Regulations 1994 requires a planning authority to 'have regard to the requirements of the Habitats Directive [...]' Discussed in R (Woolley) v Cheshire East Borough Council [2009] EWHC 1227 (Admin) where a permission was quashed because the authority did not have regard to the Directive's requirements as regards the protection of bats.

54 OJ C 83/18, 30.3.2010.

55 Germany v Commission C-8/88, [1990] ECR I-2321.

56 Guidance on Compliance with Regulation 23 of the Habitats Regulations 1997 – strict protection of certain species/applications for derogation licences, NPWS 2/07, 16.5.2007.

57 Commission v Ireland C-103/85, [2007] ECJ I-137, para 19-25.

58 See NPWS (2007), All Ireland Species Action Plan – Bats, Draft for Public Consultation, Dublin. Also Department of Environment, Heritage and Local Government (2009), Threat Response Plan – Vesper Bats, Dublin.

59 Supra, para 5.2.4.

60 Threat Response Plan, supra, at p 44.

61 Supra, p 32.

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protection may be justified, but in order to limit abuse and ensure consistency the Directive creates in Article 16[62] a formal procedure with precisely defined grounds which must be followed before a derogation can be lawfully granted.[63] Thus, while any destruction of bats roosts or their deliberate capture and removal to other places in order to facilitate a tourism project are, as we have seen, prohibited acts under Article 12 (1),[64] such acts can potentially be permitted if Article 16 (1) is observed. A prerequisite to a derogation is obviously the committing of a prohibited act and if, as noted earlier, non-deliberately killing a few bats during site clearance or construction does not amount to a prohibited act (if the species remains in a healthy state of conservation), then a derogation will not be needed. Derogations in Ireland are granted by the NPWS (in the name of the Minister) as regards species and by local planning authorities as regards SACs.

Of the various situations where derogations are allowed under Article 16 (1) just two seem relevance to tourism projects. Before looking at these some preliminary comments about derogations are necessary. These concern:

- Ireland's limited experience in granting derogations;
- the starting point or basic premise from which to view applications for derogations;
- the proviso to Article 16 (1);
- attaching conditions to derogations.

1. Ireland's limited experience

Until recently Ireland had limited experience operating the Article 16 derogation system. It only started operating it in 2003, not 1996, two years after the end of the transposition period.[65] To date Ireland has sent one report under Article 16 (2) to the Commission covering the years 2003-2006 and is nearing completion of a second for 2007-2008.[66] Reading the report together with a study of planning applications it is possible to conclude that there are tourism projects which have benefited from derogations.[67] There do not appear to be any Irish court decisions so far on the Irish transposition of Article 16 and particularly whether a project satisfies the 'imperative reason of overriding public interest' test. While the European Commission has issued guidance on the matter,[68] ECJ decisions so far on Article 16 have dealt more with transpositions and the effects of derogations on conservation status rather than on the grounds for granting derogation. The current economic downturn in Ireland probably means there will be less demand from tourism developers for derogations. When activity resumes derogations are likely to be central to larger tourism projects in areas containing bats. Developers can be expected to seek derogations to remove bats from buildings or areas and relocate them to bat boxes or a purpose built bat houses.

2. The starting point

The starting point in any consideration of a derogation application must be the overall aim of the Habitats Directive, viz., to 'contribute toward ensuring bio-diversity through the conservation of natural habitats and wild fauna and flora' in the European part of the Community – Article 2. Two particular principles of interpretation of EU environmental law then guide how derogations can interact with this aim.

Firstly, there is a principle of interpretation of EU law which requires that a derogation from a principle or policy in a Directive must be construed strictly or narrowly and not be allowed go further than is warranted by the wording of the Directive. According to the ECJ: 'Article 16 [...] defines in a precise manner the circumstances in which the Member States may derogate from Articles 12 [...] so that Article 16 must be interpreted restrictively.'[69]

Secondly, the principle of legal certainty and adequate reasoning requires that decisions taken under EU law contain sufficient statement of the facts on which the decision is taken and of the reasons by which the conclusion was reached so that affected parties can fully understand the decision and consider their options. Here, there is an added element, the fact that the decision will derogate from the principle of strict protection. Thus, according to the ECJ: 'Member States are required to ensure that all actions affecting the protection of species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 16 (1) [...]'[70].

62 Transposed in Ireland by Regulation 25 of the EC (Natural Habitats) Regulations 1997 as amended.

63 See generally, Commission, Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, final version, February 2007.

64 And its Irish transposition, supra, Regulation 23 (1) and (2).

65 Ireland operated a parallel set of domestic legal provisions which were more generous than Article 12 (1) and wrongly obviated the need for developers to seek derogations, Commission v Ireland C-183/05, [2007] ECR I-137 para 44-49. Irish advice on the operation of Article 16 derogations is available in Kelleher C & Marnell F (2006), Bat Mitigation Guidelines for Ireland, Irish Wildlife Manuals, No 25, NPWS, Department of the Environment, Heritage and Local Government, Dublin, Ireland, p 13.

66 Information obtained from phone and email communications with NPWS officials. It seems on average 50/60 derogations are granted annually and cover works on various projects including roads, bridges and derelict buildings.

67 See Article 16 (2) report sent to European Commission for years 2003-2006, supra.

68 Guidance Document, supra, Chapter III, pp 51-66.

69 Commission v UK C-6/04, [2005] ECR I-9017, para 111. See also Commission v Finland C-342/05, [2007] ECR I-4713, para 24.

70 Commission v Finland, supra, para 25.

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3. The proviso

The opening clause in Article 16 (1) imposes two pre-conditions to any grant of a derogation. It states: 'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range [...]' The latter condition requires that the competent national body must, before making a decision, form an opinion on the impact of granting a derogation on the favourable conservation status of the population concerned. According to the ECJ: 'Article 16 (1) of the directive makes the favourable conservation status of the populations of the species concerned in their natural range a necessary precondition in order for the derogation [...] to be granted.'[71]

The necessary opinion must, it seems when killing is involved, relate to the population which will remain after the derogation is granted. This seems evident from the fact that if killing is authorised by a derogation favourable conservation status has to refer to population of the species after the killing. Also, the fact that the conservation status is unfavourable before a decision is made does not, perhaps surprisingly, automatically mean a derogation must be refused. It depends whether the derogation will or will not worsen that status. According to the ECJ: 'None the less, the grant of such derogations remains possible by way of exception where it is established that they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration [...]'[72].

The former conditions, the absence of any satisfactory alternative, appears to refer to the risk which will be faced by the species from the proposal and not directly to risks faced from an alternative location for the proposal, although any review of alternatives of lower or no risk will often involve looking at alternative locations since risk can be related to location.

Read together the proviso conditions and the precise list of derogations (discussed below) in Article 16 (1) provide a double lock for bat protection. To put it in plain language – you can't say there are plenty of bats, killing a few won't matter if none of the derogations apply. Nor can you say it's a derogation situation, we can kill the bats, if killing them will weaken an already vulnerable population.

4. Attaching mitigation conditions to a derogation

Article 16 (and its Irish transposition) do not provide for the attaching of conditions to a derogation from the system of strict protection required under Article 12 (1).[73] This appears surprising given (the level of detail involved, say, in capturing bats and sustainably moving bats to a new location). Any derogation will have to be fine-tuned with much detail to comply with the requirement in Article 16 (1) that 'the derogation is not detrimental to the maintenance of the population of the species concerned at a favourable conservation status'.

The absence of a power to attach conditions is perhaps not so significant because, it could be argued, since all deliberate capturing and moving of bats are prohibited acts, all matters of necessary detail can be properly included in a derogation without any conditions. Further, the difficulty of no condition-power (if there is one) can be overcome by the competent authority requiring during pre-application discussions that the application be presented so that it already encompasses the necessary conditions.

Despite the absence of a condition-power, derogation licences issued under Article 16 (1) it appears the Irish authorities do attach them. Typical conditions currently used for projects affecting bats can, for example, require a new hotel to operate various mitigation measures such as constructing a bat house or bat boxes at a defined locations, incorporating bat access points into a new/refurbished building, limiting the times when construction/use of wood treatment chemicals/bat removal can take place, screening of lighting to minimise disturbance to bats and on-going monitoring of bats to determine their conservation status.

5. Grounds for granting derogations

The two grounds for granting derogations listed in Article 16 (1) which seem relevant to tourism projects are where the derogation is:

- 'in the interest of protecting wild fauna and flora and conserving natural habitats' – Article 16 (1) (a);
- 'in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment' – Article 16 (1) (c).

The interpretation of these grounds is clearly critical to the impact of bat protection on tourism projects. The use of overly general phrases like 'public interest' means that contextual and case-by-case analysis is required. A purely legal interpretation suggests such phrases should be strictly construed but in administrative practise this might not be the case.

On first impression, neither ground seems applicable to tourism projects. In the latter case if a project is private

71 Commission v Finland, supra, para 28. See also Commission v UK C-6/04, para 106/7.

72 Supra, para 29.

73 Under Regulation 52 (2) of the new draft consolidating Irish regulations – see fn 6 above – such a power will be created.

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and commercial, as most tourism projects are likely to be, it will not normally satisfy the requirement of 'public interest'. According to the Commission[74] 'projects that are entirely in the interest of companies or individuals would generally not be considered as covered.' It is conceivable if a large scale resort or casino or conference centre project was proposed for an economically depressed area or if it would be a major addition to an area, it could fit within the words in Article 16 (1) (c). Of the two Irish cases discussed earlier, Lough Rynn and Lough Key, it is pure conjecture to speculate whether a derogation would have bee granted if applied for. Both were private projects which due to their relative scale could have had significant economic and social impacts locally. However, the generally favourable state of the national economy at the time might have meant they would still not amount to 'imperative reasons of overriding public interest'. In another hotel resort project – involving the restoration and refurbishment of a castle, Kilronan Castle in Co. Roscommon in 2006 (not too far from Lough Rynn) for which planning permission was granted on appeal[75] – the possible use of parts of the surrounding land for bat roots was noted in the EIS. The applicant in this instance successfully applied for a derogation licence authorising the 'disturbance and damage or destruction of breeding sites or resting places' of all species of bats in 2006.[76]

Derogations on grounds of public health are also potentially relevant to tourism. While it does not seem that any have been granted so far in Ireland relevant to tourism, it is conceivable if large number of bats entered tourist accommodation, such as a bed-and-breakfast or guesthouse in the summer during the bat breeding season, there might be a risk to 'public health' in the sense that such premises by welcoming the public are public places where health risks are public and not private.

Decisions by the ECJ on how the grounds for granting derogations should be interpreted are still awaited, although there are some opinions from the Commission under the equivalent provision for derogations affecting SAC's hosting priority habitats or species – Article 6 (4) of the Habitats Directive. These require in limited cases an opinion from the Commission.[77] While most projects in this limited category are truly public in the sense of airports, railways, autoroutes, ports and dams there is a precedent of the Commission considering a private non-tourism commercial project (enlarging an existing industrial plant in order to complete production of new passenger aircraft) to be of sufficient economic and strategic importance to be in the public interest.[78]

The former reason in Article 16 (1) (a) might have some surprising relevance to tourism projects and anecdotally may have been applied in Ireland. The reasoning is as follows.

While bats often use derelict or abandoned buildings such usage over time becomes less attractive for them. Too much dereliction means the building no longer suits their requirements. If bats are found in a derelict building which a tourism developer wants to knock down or convert, the developer can claim that it is actually in the interests of the bats to move them to a different location because in time the existing one will deteriorate. If the developer also offers to build bat boxes or a bat house for the bats in the new location as part of a tourism project and the new carefully chosen location otherwise suits the bats needs, that might bring the situation within Article 16 (1) (a).

It is not clear, however, whether replacing an existing natural habitat with one that does not yet exist or is untried and unused amounts to 'conserving a natural habitat' as required by the proviso to Article 16 (1). On the other hand, if bats are already present in the new location and it is able to sustain such an increase in bat population, Article 16 (1) (a) could be satisfied.

Claiming that Article 16 (1) (a) applies also involves assuming, even if bats are living satisfactorily now in a derelict building, that the unknown possibility of the bats not living satisfactorily in that building at some uncertain point in the future, perhaps five or ten years hence, supports a legal conclusion that their removal in the near future is 'in the interests of protecting wild fauna'. Whether such reasoning would survive judicial scrutiny remains to be seen. Certainly, if accepted it would make it easier for tourism developers to overcome the inconvenient presence of bats on project sites. Fewer projects would be seriously impacted. Developers would quickly learn to always offer to relocate any bats found.

The granting of planning permission for a project which if acted on (without other permissions) would result in damage to bats and their habitats is unlikely in itself to amount to such a threat as to require the granting of a derogation under Article 16 (1) (a). The reason is simple. If it did it would mean a developer could always effectively force the granting of a derogation simply by obtaining planning permission.

6. Relocating bats under a derogation

Currently when developments affecting bats are proposed derogation licences (if granted) typically allow 'capture; disturbance; transport and damage or destruction of breeding sites or resting places'.[79] Where capture is authorised in such circumstances, relocation is typically involved.

74 Guidance Document, supra, p 55.

75 PL 213950, decision signed 9.5.2006.

76 Licence No 000036/2006 mentioned in Article 16 (2) Report to Commission, see fn 66 supra.

77 Kramer L (2008), The European Commission's Opinions under Art. 6 (4) of the Habitats Directive, Journal of Environmental Law 59.

78 Supra, p 69.

79 Taken from Article 16 (2) report sent to European Commission for years 2003-2006, see fn 66 above.

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When the possibility of relocating bats arises two legal questions must be considered before the derogation can be granted – will the bats take to their new location so that favourable conservation status is maintained, or it is in the bats interest to move them, as the case may be, and also how far can the bats be moved?

Regarding the latter, there are two possibilities. One is that they can only be moved within the natural range of the bats as they are at present. The other is that it is not so limited and only requires that wherever they are moved to must contain all the conditions necessary for a healthy conservation status within their natural range of movement. Bearing in mind the purpose of Article 2 of the Habitats Directive of maintaining favourable conservation status and also of how this is defined in Article 1, it would seem bats could be moved over a greater distance as long as the science suggests the Directive's aim will be furthered.

The second question essentially concerns whether the relocation will work. Any Article 16 derogation permitting the capture and moving of bats to facilitate a tourism development pre-suppose an initial judgement that the bats will take to their new location and survive in a favourable state of conservation. Whether this will happen will vary with each case. The assessment of whether to grant a derogation with conditions attached will have to rely, not only on current scientific knowledge and data on how well the precise type of relocation measure works, but also on a significant element of prognosis, that is, in estimating the impact of foreseeable future influences on the bats, whether specific or general threats, positive or negative, medium or long-term. Current scientific knowledge on the effectiveness of relocation measures is not as strong as developers might wish.

> 'At present there are few data about the conservation value of large crevice-type bat-boxes intended for use as maternity roosts, such as the 'bat-houses' developed in the USA [...] so that these cannot be considered adequate replacements for significant maternity roosts of any species'[80].

If the bats do not take to the new location there is obviously no going back and telling the developer to return them to their original location. It will be too late. For the bats and for biodiversity the stakes are high in this kind of assessment. Whether any such doubts can be a reason for refusing a derogation licence even when the other conditions in Article 16 (1) are present does not appear to have been decided at ECJ level. The answer to the question turns on how the phrase 'the maintenance of the populations of the species concerned' in the proviso is interpreted. While one cannot be confident of the answer it is quite possible that it will be interpreted as referring to the generality of the populations of the species in the territory of the member-state, rather than as referring to the population of the specimens of the species potentially affected by the project.

V. Summary and Conclusion

The legal protection of bats under the Habitats Directive and its national transpositions have serious implications for tourism projects in areas where bats are present or suspected of being present. States must operate a system which ensures the strict protection of bats and other protected species of wildlife. ECJ case-law has clarified some the wide range of obligations involved in operating a system of strict protection, though there remains some uncertainty about the degree of killing and disturbing of bats which is not banned by Article 12 (1). Further uncertainty affects the interpretation of the grounds under Article 16 (1) derogations can be granted and whether benefits need to be local, regional or national before a derogation can be granted. The possibility of obtaining a derogation for tourism projects under Article 16 in theory appears quite slim, though as with any rule which requires a case-by-case assessment, much can depend on the facts at the time, including the conservation status of the bats. This could see tourism projects which arguably promote only local benefits being held to satisfy the Article 16 (1) test. Tourism developers are still ill-advised if they regard derogations as just another hurdle to be overcome in a pragmatic fashion.

Ireland has been slow to accord to bats the level of strict protection required by the Habitats Directive and was judged by the ECJ to have failed to fulfil its obligations. While they lasted Ireland's failings probably benefited tourism projects in the sense that bat impacts were either ignored or downplayed, though this does not seem to have affected the favourable conservation status of bats in Ireland.[81] Even the national planning appeals board did not seem as aware as it should have been of the priorities required by the system of strict protection, as in the Lough Rynn Estate case, although this has changed, as in the Lough Key case. Ireland appears now to be putting resources into monitoring bats and gathering the bat information and is currently operating a bat species action plan.

As the current action plan is worked out planning authorities and developers will gain greater understanding of the requirements of a system of strict protection of wildlife. The negative implications for tourism projects will become more apparent. Developers will find their projects increasingly affected. Projects may have to be modified, even sometimes abandoned. Obtaining specialist wildlife advice and selecting sites more carefully will become increasingly essential. All stakeholders, it would seem, are on an unduly long learning curve whose apex may still not have been reached.

80 Kelleher & Marnell, supra, p 59. The 'first purpose-built bat house in Ireland and the most modern in Europe' with 'state-of-the-art design and monitoring equipment' (built as part of a new road scheme near Ennis in southwest Ireland) was reported after two years to have not attracted a single bat – Irish Times, 7.8.2007.

81 'All nine vesper bat species are considered to be in a favourable conservation status in Ireland' – Department of Environment, Heritage and Local Government (2009), Threat Response Plan – Vesper Bats, Dublin, p 9.