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# Wildlife Conservation and Protected Areas: Politics, Procedure and the Performance of Failure under the EU Birds and Habitats Directives

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## 1. INTRODUCTION

Attentive students of international wildlife law and policy will have noted that the Birds and Habitats Directives of the European Union (EU) have lost a great deal of their former luster. Not too very long ago, when Simon Lyster was compiling the first compendium of international wildlife law,<sup>1</sup> the Birds Directive was the poster child of potentially effective international wildlife law and policy. Both it and the Habitats Directive, which came later but with which it is now usually bracketed, appeared to be toughly worded, mandatory rather than hortatory in the obligations they imposed on EU Member States, and equipped with explicit reporting and deadline requirements – the very models, in key respects, of effective international wildlife law.<sup>2</sup>

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<sup>1</sup> SIMON LYSTER, *INTERNATIONAL WILDLIFE LAW* (1985), at 67-74.

<sup>2</sup> The Directives still receive fairly sympathetic treatment in major texts. See e.g. J. HOLDER & M. LEE, *ENVIRONMENTAL PROTECTION, LAW AND POLICY: TEXT AND MATERIALS* (2d ed. 2007) at 627-669; and the reappraisal of Lyster's assessment at various points in M. BOWMAN, P. DAVIES & C. REDGWELL, *LYSTER'S INTERNATIONAL WILDLIFE LAW* (2d ed., 2010). Although, as a recent essay perceptively notes, when you look at the fine print: "The Habitats directive...stipulates a procedure for balancing species and habitat protection on one hand and potentially harmful human activities on the other. (But) the directive does *not* address how nature and human activities have to be balanced, where the deliberation should take place, whether it should be embedded in (existing mechanisms for) spatial planning or not, or which kind of rules and policies should be employed in the implementation. It only stipulates that valuable habitats require delineation and protection in EU member states, and that this protection needs to have consequences for human use [i.e. it ought to provoke an informed discussion whenever human use threatens to alter these high-quality habitats] {*emphasis added and references omitted*}." R. Beunen, K. Van Assche & M. Duineveld, *Performing Failure in Conservation Policy: The Implementation of European Directives in the Netherlands*, 31 *LAND USE POL'Y* 283 (2013).

A number of recent analyses, most notably a rather splendid book<sup>3</sup> that asks if the Directives are anything more than an obstacle course for developers, suggest however that the way the Directives are being implemented in EU member states leaves a great deal to be desired, at least in those states where some semblance of implementation actually exists.<sup>4</sup> More than that, the Directives may be giving the overall wildlife conservation enterprise a bad name.

Initially, the Birds and Habitats Directives promised better substantive results for wildlife conservation than the Council of Europe's Bern Convention,<sup>5</sup> out of which the Directives grew.<sup>6</sup> And the Directives have been held up repeatedly since the early 1990s as much better international legal instruments for the conservation of biodiversity, certainly in Europe and perhaps more broadly, than the more globally subscribed 1992 Convention on Biological Diversity (CBD).<sup>7</sup> The CBD was concluded as the EU Habitats Directive was also being finalized but the CBD is now fast becoming the poster child for how *not* to do international wildlife conservation, unless the Convention and the way it works are very substantially reformed.<sup>8</sup>

There remains a substantial group among observers and analysts of the EU Directives who persist in being optimistic about the impact these instruments might have. Indeed, at a recent conference convened by the Flemish Environmental Law Association to celebrate the 20<sup>th</sup> birthday of the Habitats Directive,<sup>9</sup> all sorts of positive possibilities were imagined and

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<sup>3</sup> THE HABITATS DIRECTIVE: A DEVELOPER'S OBSTACLE COURSE? (G. Jones, ed., 2012), hereinafter cited as THE HABITATS DIRECTIVE (2012). A consolidated text of the Directive and its annexes is appended to the book at 253-318.

<sup>4</sup> For a situation in which the semblance of implementation appears to be absent, see G. Kütting, *Nature Conservation Law in Context: The Limited Influence of European Union and Greek Designations on the Future of Cavo Sidero, Crete*, 15 J. INT'L WILDLIFE L. & POL'Y 60-79 (2012). It is important to note that EU Directives are implemented at the discretion of member states and in accordance with the domestic policies of each state. In those states, then, where there is no substantial body of well-established and well-observed rules and regulations governing land use planning and decision making, and especially governing the impacts of land development on habitats and species, implementation of the Directives is bound to be to some degree laggard. It is a hallmark of the literature on the Directives that it deals for the most part with member states where the implementation deficit is relatively modest, such as the Netherlands, Britain, Germany and France. This is, of course, useful, but a poor guide to the outcomes implementation produces in, say, Greece, Italy and even Ireland. See the sources cited in note 14, *infra*.

<sup>5</sup> Council of Europe, 1979. Convention on the Conservation of European Wildlife and Natural Heritage. Bern, Switzerland. European Treaty Series, No. 104. Available online at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/104.htm> (accessed 30 July 2013).

<sup>6</sup> The Bern Convention, its history and its relevance to the Birds and Habitats Directives are the subject of G. Jones, *The Bern Convention and the Origins of the Habitats Directive*, in THE HABITATS DIRECTIVE (2012), *supra* note 3, at 1-23.

<sup>7</sup> C. Mackenzie, *A Comparison of the Habitats Directive with the 1992 Convention on Biological Diversity*, *id.* at 25-41.

<sup>8</sup> Elisa Morgera, *CBD COP-10: Towards Post-2010 Implementation*, 40 ENVTL. POL'Y & L. 281-288 (2010); Elisa Morgera & Elsa Tsioumani, *Convention on Biological Diversity*, 22 Y.B. INT'L ENVTL. L. 263-332 (2011); T. Swanson & B. Groom, *Regulating Global Biodiversity: What is the Problem?* Working Paper 31, Fondazione Eni Enrico Mattei (Milan, 2012).

<sup>9</sup> Flemish Environmental Law Association (Vlaamse Vereniging voor Omgevingsrecht), 20 Years of (the) Habitats Directive: European Wildlife's Best Hope? International Conference, Antwerp, 12-13 December 2012. Papers online at <http://www.omgevingsrecht.be/event/international-conference-antwerp-12-13-december-2012> (accessed 30 July 2013).

discussed, including enlistment of the Directives in the vanguard of European efforts to combat climate change on behalf of wildlife values.

There is a strong tendency in these analyses, however, as in other cases where legal scholars succumb to the temptation to look intensely at the language within legal instruments themselves, and not so much at the contexts in which they work, to focus on what the instruments *might* do rather than on what they have *actually accomplished* in various concrete decision making arenas. These arenas extend beyond the courtroom to the state administrative and resource management agencies faced with permit applications for major developments, and to the wide variety of local jurisdictions where the vast majority of small-scale but cumulatively significant development proposals with material consequences for birds, other species, and their habitats are framed and evaluated on the ground, and where that same vast majority of proposals receive approval.<sup>10</sup>

Experience across these several political arenas suggests that whether attention is directed to the designation of protected areas<sup>11</sup> or to the assessment of projects and plans that might affect them<sup>12</sup> or to substantive issues of biodiversity conservation success – questions, for example, about whether the EU Directives are having a positive impact on wildlife above and beyond that attributable to domestic laws and policies<sup>13</sup> – the accumulating experience with the Directives is disappointing across the board,<sup>14</sup> and is getting worse rather than improving over time.

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<sup>10</sup> In the case of Britain, for example, *see* U.K., Department of Environment, Food and Rural Affairs, Report of the Habitats and Wild Birds Directives Implementation Review (London, March 2012), available online from <https://www.gov.uk/government/publications/report-of-the-habitats-and-wild-birds-directives-implementation-review> (accessed 30 July 2013).

<sup>11</sup> S. Bryan, *Contested Boundaries, Contested Places: The Natura 2000 Network in Ireland*, 28 J. RURAL STUD. 80-94 (2012).

<sup>12</sup> R. Beunen, W. van der Knaap & G. Biesbroek, *Implementation and Integration of EU Environmental Directives: Experiences from The Netherlands*, 19 ENVTL. POL'Y GOVERNANCE 57-69 (2009); S. Tromans, *The Meaning of 'Any Plan or Project' under Article 6(3)*, in THE HABITATS DIRECTIVE (2012), *supra* note 3, at 91-101.

<sup>13</sup> J. Fairbrass & A. Jordan, *European Union Environmental Policy and the U.K. Government: A Passive Observer or a Strategic Manager?* 10 ENVTL. POL. 1-21 (2001); J. Fairbrass & A. Jordan, *Protecting Biodiversity in the European Union: National Barriers and European Opportunities?* 8 J. EUR. PUB. POL'Y 499-518 (2001);

<sup>14</sup> In the thirteen chapters that make up THE HABITATS DIRECTIVE (2012) the disappointment is most palpable in Rebecca Clutton & Isabella Tafur, "Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception," in THE HABITATS DIRECTIVE (2012), *supra* note 3 at 167-182. But *see also* L. Ledoux et al., *Implementing EU Biodiversity Policy: UK Experiences*, 17 LAND USE POL'Y 257-268 (2000); P. Alphandéry & A. Fortier, *Can a Territorial Policy Be Based on Science Alone? The System for Creating the Natura 2000 Network in France*, 41 SOCIOLOGIA RURALIS 311-328 (2001); S. Stoll-Kleemann, *Opposition to the Designation of Protected Areas in Germany*, 44 J. ENVTL PLAN. MGMT. 109-128 (2001); J. Prazan, T. Ratering & V. Krumalova, *The Evolution of Nature Conservation Policy in the Czech Republic: Challenges of Europeanisation in the White Carpathians Protected Landscape Area*, 22 LAND USE POL'Y 235-243 (2005); T. Fidelis & D. Sumares, *Nature Conservation and Urban Development Control in the Portuguese Planning System: A New Impetus Against Old Praxis?* 18 EUR. ENV'T 298-311 (2008); B. Laffan & J. O'Mahony, *'Bringing Politics Back In: Domestic Conflict and the Negotiated Implementation of EU Nature Conservation Legislation in Ireland*, 10 J. ENVTL POL'Y PLAN. 175-197 (2008); E. Apostolopoulou & J. Pantis, *Conceptual Gaps in the National Strategy for the Implementation of the Natura 2000 Policy in Greece*, 142 BIOL. CONSV'N 221-237 (2009); E. Waage & K. Benediktsson, *Performing Expertise: Landscape, Governmentality and Conservation Planning in Iceland*, 12 J. ENVTL POL'Y PLAN. 1-22 (2009); F. Ferranti, R. Beunen & M. Speranza, *Natura 2000 Network: A Comparison of the Italian and Dutch Implementation Experiences*, 12 J. ENVTL POL'Y PLAN. 293-314 (2010); M. Grodzinska-Jurczak & J. Cent, *Expansion of Nature Conservation Areas: Problems with Natura 2000 Implementation in Poland*,

## 2. A PERFORMANCE OF FAILURE?

One ambitious theoretical attempt to understand and analyze this experience argues that the declensionist history of the Directives is best understood as a “performance of failure,”<sup>15</sup> a process whereby the procedural side of legal arguments about the Directives becomes much more important to the people who participate in the day to day business of wildlife conservation than legal enforcement of the substantive requirements the laws seek to impose. Unfortunately, this argument is only well-developed in the Dutch case and is wrapped in some Foucauldian assumptions and terminology that tend, as far as we are concerned, to get in the way of a straightforward appreciation of what has actually been happening to the Directives.

But, as we understand it, the central and interesting assertion about the Directives in plain language is that among practitioners of wildlife conservation in Europe, no matter whether their institutional location is judicial, legislative, executive, or in the NGO sector, procedural compliance tends to be elevated above substantive accomplishment. What people do – how they fulfill their various individual and institutional obligations to implement the legal language of the Directives – comes to be so dominated by a preoccupation with complex, even arcane, issues of procedural nicety that the substantive achievement of wildlife conservation slips out of view. A shared pre-occupation, if you will, with successfully negotiating the “obstacle course”<sup>16</sup> posed by shifting legal norms for how to work for wildlife conservation effectively eclipses the question of whether the Directives are reshaping development decisions so that conditions for wildlife in Europe actually improve.<sup>17</sup>

Thus, procedural success and substantive accomplishment, which in the legal architecture of the Directives were supposed to go hand in hand, become disconnected. In a shifting legal landscape of high uncertainty, a landscape to which both domestic and European courts have contributed, the impact assessments intended by the Directives to provoke informed discussion of how developments might affect high quality habitats, and how undesirable impacts could be avoided or mitigated, have increased in number and cost and have become, therefore, objects of political criticism, even rhetorical derision. What’s the point of incurring the high costs of doing well with these complex and uncertain impact assessment and project evaluation procedures if that success cannot be shown to equate with doing better for wildlife conservation?

And it is a short step from there, perhaps, to a stage in the story where the dominant political perception is that, unless the costs of compliance with the Directives can be reduced by introducing procedural simplification and greater “efficiency” into the assessment process, the

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47 ENVTL MGMT. 11-27 (2011); R. Morris, *The Application of the Habitats Directive in the UK: Compliance or Gold Plating?* 28 LAND USE POL’Y 361-369 (2011).

<sup>15</sup> Beunen, Van Assche & Duineveld (2013), *supra* note 2.

<sup>16</sup> A term used in *Hart District Council v Secretary of State for Communities and Local Government, Luckmore Ltd. & Barratt Homes Ltd* [2008] EWHC (England and Wales High Court) 1204 (Admin); [2008] P & CR 16; [2009] JPL 365.

<sup>17</sup> It is widely accepted that in recent decades and certainly since the EU Directives were adopted conditions for wildlife in Europe in the aggregate have not improved. The European Environment Agency portal into data on this topic is online at <http://www.eea.europa.eu/themes/biodiversity/where-we-stand/where-does-europe-stand-in-2010> (accessed 30 July 2013).

wildlife conservation enterprise is brought into disrepute. As a legal tool that wildlife advocates hoped would advance their substantive agenda the Directives, thus, become devices whereby the accepted role and influence of conservationists in established modes of development planning and decision making declines, and their right even to be major participants in those processes is called into question.

But how is this declensionist dynamic triggered, and by whom?

The factors at work to produce the Dutch story are clearly complex, and it is highly unlikely that their interaction will play out across the other member states of the EU in much the same way as it has in the Netherlands. Two key factors in the Dutch case, for example, are the longtime presence in the domestic political environment of a strong movement for nature conservation and well-established, flexible and well-regarded processes at the local level for land use planning and decision making. In some member states of the EU either or both of these factors would not be in play.

Moreover, while it is clear that in the Dutch case strategic choices made by major players in the story made a difference to the outcome, it is equally clear that they stemmed from a political opportunity structure that their counterparts in other countries are unlikely to face. The early and formative decision by Dutch wildlife advocates to seek judicial review of development proposals in the courts on the basis of the Directives, for example, presupposes both a mature domestic system of administrative law and a receptiveness to European jurisprudence that the judicial systems of many EU member states do not share with the Netherlands. Once the courts signaled that as a legal matter the Directives would have to be taken seriously, the Dutch government, political parties, the media, and the private sector all responded in ways that shaped what happened in the Dutch case. But the same responses would not appear in domestic political contexts where, for example, there are different traditions involving the representational base of parties and the composition of governing coalitions, or where there is a different history of entrenched attentiveness in ministries and legislatures to major economic actors, such as farmers and their unions.

In some accounts of the declensionist history of the Directives in specific countries the performance of failure is explained as the product of institutional misfit.<sup>18</sup> The EU Directives are seen, here, as the superimposition onto some pre-existing set of domestic arrangements of new but not very well thought out legal requirements for land use deliberation and decision making. The trigger is the adoption of the Directives in Brussels. The result is that settled institutional expectations about who should do what to balance the competing claims of conservation and development on the ground are disturbed, and the resource allocations that underwrite such balancing – the money and expert staff needed to write implementing regulations and to produce impact assessments and management plans for protected areas, for example – come to seem inadequate.

The story of the Directives is then essentially a revelation of how various institutions in the multi-level governance system of the EU, faced with the pressure to adapt, interactively work their way, or could work their way, to a new equilibrium in which wildlife may or may not fare

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<sup>18</sup> Ferranti, Beunen & Speranza (2010), *supra* note 14.

better than before. On this account, the performance of failure can be passed off as “the unintended [but adaptive and domestic] consequence of international policy implementation.”<sup>19</sup>

The liability of focusing narrowly on the institutional and administrative factors associated with compliance is that it neglects agency. There are clearly instances in which the deliberate and intense creation of a politics of compliance for the Directives by interested political actors has been such that compliance is unattainable through administrative adaptation alone. It requires, in addition, active and skillful political management and the taking of initiatives to bargain and negotiate potential veto players to a point where at least some sort of compliance with the Directives is possible because it meets with their agreement.<sup>20</sup>

In domestic situations, in other words, in which compliance with European wildlife law becomes highly politicized the declensionist dynamic is triggered by the self-conscious and self-interested political calculations and strategic choices of political actors who stand to gain from the Directives’ success, or demise. Here, the performance of failure, far from being the inadvertent outcome of institutional adaptation, something that no-one really wanted or intended, can be understood instead as the messy but calculated embodiment of political compromise. In this manifestation of negotiated and managed compliance with the Directives, the pre-occupation with procedure is largely a mask behind which interested parties continue to jockey for position in a struggle that is not really about procedure at all. It goes rather to the heart of basic issues about land use law and policy that have preoccupied people for centuries – who gets to decide how land is used, by whom, and for what?<sup>21</sup>

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<sup>19</sup> Beunen, Van Assche & Duineveld (2013), *supra* note 2, at 280.

<sup>20</sup> This thesis emerges from several strands of work on Europeanization and domestic political change and is masterfully applied to compliance with the Birds and Habitats Directives in Ireland in Laffan & O’Mahony (2008), *supra* note 14.

<sup>21</sup> The sense that beneath all the twists and turns of litigation, court decisions, administrative adaptations and interest group strategizing swirling around the Directives there lies a basic set of questions about power over land use which are enduring and may have no clear resolution emerges very clearly from the account of proposals for British port development in Morris (2011), *supra* note 14. Raoul Beunen and his colleagues are equally clear that in the Netherlands the preoccupation with procedural compliance has not led to substantive success for wildlife values. They point out that in the beginning compliance was treated as a mere formality, “because the Dutch conservation model was considered to be the model for the European directives.” Beunen, Van Assche & Duineveld (2013), *supra* note 2, at 283. This changed “after a small environmental NGO, Das en Boom, successfully used the Habitats directive to challenge in court the development of a new business park in Heerlen. Their legal victory stirred a lot of media attention. According to Das en Boom, the permitting process was incomplete since the impact studies required by the Habitats directive were not conducted. The judges agreed. After a string of court cases, many actors became aware of the potential impact of the Birds and Habitats directives. In the following years, more developments and activities were challenged [including] the extension of the A73 highway, the fishing rights for cockles in the Wadden Sea and the enlargement of the Port of Rotterdam.” *Id.* [citations omitted]. The victories conservationists seemed to be winning in court proved short-lived, however. “The other [developer] parties became more successful... after they learned that more substantial impact studies could be used to win a case and that in local coalitions, strong arguments could be formed to present a proposed project as an overriding public benefit. In other words, it slowly dawned on both conservationists and economic actors that the procedural side of the legal argument was much more important than the [substantive] side, and that both [substantive] and procedural sides could be manipulated to a certain extent. Furthermore,...conservation organizations realized that procedural battles over small sites and animals were eroding long-standing public support for nature conservation. They noticed that their role in policy making and planning was less and less accepted by other actors and by the general public, and that even their right to exist was questioned regularly.” *Id.* at 284 [citations omitted].

We can suppose, then, that the member states of the EU lie along a continuum where the Directives eventually yield either spontaneous institutional and largely administrative adaptation, on one end, or highly managed and negotiated political compliance, on the other end. There is a performance of failure all across the spectrum, because the outcome everywhere falls short of the high expectations that the legal plain language of the Directives embodies. But the different forms and degrees of failure can be distinguished along the continuum chiefly by the ingenuity and intensity with which in domestic political contexts various actors or agents have tried to use the Directives for political advantage.

This is an incisive and attractive way to think about how European wildlife law as it is transposed into domestic political contexts and implemented on the ground in Member States yields variable outcomes, except perhaps for one thing. What does it tell us about the courts? Courts are not, after all, generally regarded as agents of politicization. They deal only with issues that are brought before them by other actors in the political system, not with issues that they themselves put on the agenda. So, what contributions, if any, are the courts making to the performance of failure, and why, above and beyond the fact that they have repeatedly interpreted the plain language of the Directives to require more time and effort to be expended in the assessment of projects and plans than anyone first imagined?

### **3. BRINGING THE COURTS BACK IN**

For the most part, both the legal and non-legal scholarship about the Directives steers clear of this question. Courts are not subjected to the same kind of strategic analysis that scholars are comfortable applying to NGOs, departments of state government, and local authorities. It is one thing in the British context, say, to attribute political motives to the Royal Society for the Protection of Birds, or Natural England, or the UK Department of Environment, Food and Rural Affairs (Defra). But legal scholars are rarely comfortable attributing political motives to courts and judges who are supposed to be above politics. And non-legal scholars are rarely interested enough in the internal reasoning of judicial opinions to spend much time looking beyond *what* the courts have said to *why* they said it.

People who spend most of their time practicing law are more comfortable thinking strategically about courts and judges. It is, in large part, how they earn their livings. And the group of legal practitioners assembled in conference in 2011 to take an in depth look at the issues raised by the way the Directives have been treated in the British judicial system<sup>22</sup> reach some interesting conclusions about the degree to which courts and judges self-consciously play a role in giving meaning to the Directives, not just by saying what the law is but also by shaping its political impact. Introducing the book resulting from the conference, Gregory Jones gets straight to the point: “The courts in England and Wales have on occasion taken action against breaches of the Habitats Directive... But the courts have generally been cautious in quashing decisions that would actually imperil major infrastructure developments.”<sup>23</sup>

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<sup>22</sup> The conference, known as the first Kingsland Conference in honor of the late Christopher Kingsland Q.C., an eminent barrister and leading member of the environmental bar in Britain, was held at King’s College, London, in March, 2011.

<sup>23</sup> THE HABITATS DIRECTIVE (2012), *supra* note 3 at xii.



So, are the British courts being cautious with the Directives because they have policy preferences favoring development over conservation, at least in the case of big infrastructure projects, say, where government commitments are in play? Are the courts simply doing the best they can to give meaning to Directives which, upon close inspection and notwithstanding their good conservation intent, are rife with legal ambiguities and need to be implemented, therefore, with great circumspection? Or is the caution the courts express in their decided cases a symptom more than anything else of their deference to the political branches, of their constitutional unwillingness, even when given ample opportunity, to engage in review on the merits of decisions which elected officials and their appointees have made, often by relying on specialized expertise?

### 3.1 Cautious Courts and Preferences: Disturbance After *Morge*

On the basis of the analyses presented in *The Habitats Directive*, and from the rather large number of cases that are the raw material for them,<sup>24</sup> it is quite clear that courts do have preferences, and that different courts have different preferences. There runs through the substantial body of jurisprudence from European courts dealing with the Directives, for example, a consistent even dogged preference for interpretations of the Directives that uphold both the letter and the spirit of the original EU legislation. These interpretations do this, moreover, in a way that is fully consistent with important broader principles of European law, both those that stem from the EU treaties, such as proportionality, and those that are more narrowly environmental, such as the precautionary principle.<sup>25</sup>

It is equally clear that the British courts, overall, see things quite differently, most especially with reference to the precautionary principle.<sup>26</sup> Some British courts and judges have been quite happy to fall in with the sympathetic readings their European brethren have given to the Directives as enacted but, unsurprisingly perhaps, the British courts are less preoccupied with upholding the letter and the spirit of EU law than their counterparts at the European level.

This was the case, for example, in the *Morge* litigation, where Mrs. Vivienne Morge applied for judicial review of Hampshire County Council's decision as the local planning authority to approve the construction and operation of a rapid bus service between Fareham and Gosport in south-east Hampshire. Mrs. Morge, who lived nearby, objected on the grounds that the proposed roadway ran along an old railway line, which had become an ecological corridor for various flora and fauna, and most particularly for European protected bats.

While the High Court would have been happy to accept the European Commission's guidance that disturbance of a European protected species need only involve "a certain negative

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<sup>24</sup> The table of cases runs to nine pages in *id.*, at xxiii-xxxi, and includes decisions from courts in Canada, the European Union judiciary, Hong Kong, India, Ireland, the Netherlands, the United Kingdom, the United States, and the International Court of Justice. The bulk of the decisions directly germane to the Directives that are considered in detail are from European and British courts.

<sup>25</sup> The clearest account of how European jurisprudence on the Directives has evolved in relation to the mandate to protect species appears in Charles George & David Graham, "After *Morge*, Where Are We Now?: The Meaning of 'Disturbance' in the Habitats Directive," *id.* at 43-74.

<sup>26</sup> Denis Edwards, "Judicial Review, the Precautionary Principle and the Protection of Habitats: Do We Have a System of Administrative Law Yet?" in *id.* at 209-233.

impact likely to be detrimental,” which is close to a *de minimis* standard, the Court of Appeal disagreed, arguing that disturbance “must have a detrimental impact so as to affect the conservation status of the species at a population level.” The Supreme Court then offered its own take on what disturbance meant as a matter of law, rejecting the Court of Appeal’s test as too strict and arguing instead for a careful professional assessment on a species by species and case by case basis of what sorts of disturbance would be likely to occur, if the proposed development were allowed to proceed, and whether competent authorities might consider them harmful. The Court refused, in other words, to offer any bright line legal definition of what constitute the significant disturbances the Directives are intended to prohibit and instead threw the judgment back to local planning authorities. Those authorities may in cases where there is uncertainty that significant disturbance will result allow development proposals to proceed.<sup>27</sup>

Generalized preferences by courts and judges for the rigor and vigor with which the plain language and original intent of the Directives should be read are not the same thing, of course, as substantive preferences that more often than not favor development over conservation in particular cases. In the aggregate, however, legal practitioners have clearly understood that courts do have preferences and that the political prospects for “quashing decisions that would actually imperil...developments” on the basis of legal non-compliance with the Directives are much more favorable if a case can be successfully brought in or steered to a European forum than if litigation winds its way through the domestic courts.

Again, the British judicial system is not without courts and judges willing to give the Directives a sympathetic reading. But as the issues raised in the courts below are reconsidered on appeal broader institutional considerations quite clearly come into play. The way in which the substantive outcome of a particular case would advantage or disadvantage developers, or the interests of other parties to the case, thus, assumes much less importance for the higher courts than the consequences the case might have for settled institutional expectations.<sup>28</sup>

Indeed, the decision in *Morge* from the British Supreme Court sends a clear signal that on the basis of the Directives the British judiciary will be quite unwilling, absent some new initiative by Parliament, to disturb the roles that Natural England and local planning authorities have now played in Britain for several decades as the competent authorities under British law both for designating protected areas and for managing the pressures put on such areas by proposals to alter land uses within and without protected places.<sup>29</sup> This is a preference for settled institutional expectations so strong that the Court has blithely misconstrued the role that Natural England actually plays in enforcing criminal sanctions for non-compliance with British and European wildlife law,<sup>30</sup> and has effectively excused local planning authorities from making

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<sup>27</sup> *R (Morge) v Hampshire County Council* [2009] EWHC 2940 (Admin); [2010] EWCA Civ 608; [2011] UKSC 2.

<sup>28</sup> There is, of course, an argument to be made that courts’ concerns, especially at the higher levels of the judiciary, for settled institutional expectations, are very necessary and proper. This is the argument made in Andrew Waite, “The Principle of Equilibrium in Environmental Law: The Example of the Habitats Directive,” in *THE HABITATS DIRECTIVE* (2012), *supra* note 3 at 235-251. It leads Waite to the conclusion that environmental protection laws, such as the Directives, will only succeed if they can “accommodate proportionate economic growth.” *Id.* at 250. In contrast, the other contributors to the book prioritize wildlife protection over regard for settled economic and institutional expectations, and their view of the success of the Directives is much more subdued, even negative.

<sup>29</sup> This is the major concern of George & Graham, *supra* note 25.

<sup>30</sup> *Id.* at 58-62 and 66-70.

determinations about threats to protected areas that they really ought to make, and are well-placed to assess.<sup>31</sup>

### 3.2 Cautious Courts and Legal Ambiguities: Article 6(4) Exceptions

The growing body of case law about the Directives, both at the European level and in domestic contexts, such as in the British courts, now makes it essential to acknowledge that the Directives leave a great deal to be desired as exemplars of unambiguous legal expression.<sup>32</sup> Courts and judges have been kept busy for two decades imparting as much clarity and meaning as they think they can to the legal plain language of the laws. And it is a central lesson of practitioner analyses<sup>33</sup> that this process of judicial interpretation and elaboration should and will and must continue, even though the twists and turns of judicial opinions are a major source of the uncertainty that other actors in the wildlife conservation process must struggle to understand and accommodate.

An even more important but not widely appreciated lesson of the perspective legal practitioners bring to bear is that the courts are, moreover, complicit, along with other institutions, in the creation of legal ambiguity. And this point is worth exploring, drawing on what seems to us to be in some ways the most important provision of the Directive, namely the one anticipating the use of “imperative reasons of overriding public interest” (IROPI) such that development can be allowed to proceed even in the face of assessments showing that, if it does proceed, significant wildlife values will be damaged.<sup>34</sup>

In February 1991, even as the European Commission’s proposal for a Habitats Directive was being debated in Council, the European Court of Justice (now the Court of Justice of the European Union) decided in the *Leybucht Dykes* case<sup>35</sup> that Germany’s construction of a dyke in a Special Protection Area (SPA), an area of protected habitat for birds designated under the Birds Directive, could not be allowed to proceed merely because Germany asserted that the protection of people from flooding outweighed the public interest in protecting the integrity of the SPA. The power of Member States, the court wrote, to reduce the extent of an SPA can only be justified on exceptional grounds, grounds corresponding to a general interest superior to the

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<sup>31</sup> “The main effect of the ruling [in *Morge*] has been to weaken the UK’s system of protection for EPS [European protected species] by removing the obligations upon [local] planning authorities to satisfy themselves before granting permission that a protected species would either not be disturbed, or that its disturbance would be lawfully licensed; and by authorizing them to dispense with imposing a condition that the proposed activities be licensed before work can commence. ... It has [thus] removed what was previously a useful [local] mechanism for preventing harm to ... EPS, and has left only the criminal law [ostensibly but not effectively enforced by Natural England] to safeguard protected species from development.” *Id.* at 73-74.

<sup>32</sup> Again, this was most certainly not the case when the Directives were first adopted. In *THE HABITATS DIRECTIVE* (2012), *supra* note 3, the organization of the chapters makes it difficult to bring all the key ambiguities into focus quickly. It is much easier to do this, however, in the maritime context, where implementation of the various provisions remains minimal and, therefore, very much a work in progress. See the quick review across the board of the key relevant ambiguities in Richard Cadell, “The Maritime Dimensions of the Habitats Directive: Past Challenges and Future Opportunities,” in *id.* at 183-207.

<sup>33</sup> *THE HABITATS DIRECTIVE* (2012), *supra* note 3.

<sup>34</sup> Rebecca Clutton & Isabella Tafur, “Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception,” in *id.* at 167-182.

<sup>35</sup> Case C-57/89 *Commission v Germany* [1991] ECR I-883.

general interest the Birds Directive sought to protect. Economic and recreational requirements, such as taking into account the economic interests of fishermen, were incompatible in principle with the strict wildlife protection requirements of the Directive, a view that the Court subsequently endorsed in the *Santona Marshes* case.<sup>36</sup>

As Colin Reid observes,<sup>37</sup> Member States were unhappy with the political implications of this legal judgment, because it appeared to give almost absolute priority to conservation. The original language of the Birds Directive said that Member States had to maintain populations of protected species “at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements (Art. 2).” They were also obligated to “avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant (Art. 4(4)).”<sup>38</sup> When Simon Lyster looked at this language in 1985 he thought the words “while taking account of” merely qualified the duty to have foremost regard for ecological, scientific and cultural factors. “In the event of an irreconcilable conflict between economic and ecological needs,” Lyster declared, “Member States have a legal obligation to give priority to the latter.”<sup>39</sup>

Since *Leybucht Dykes* essentially accepted Lyster’s view, new language was drafted to make it clear that under both Directives there could be some balancing of what Lyster called ecological and economic needs. The amendment takes the form of Article 6(4) of the Habitats Directive adopted in 1992, replacing Article 4(4) of the Birds Directive, and now reads as follows:

If, in spite of a negative assessment of the implications for the [protected] 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 [the EU’s network of designated conservation sites] is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.<sup>40</sup>

Although Reid takes the view that under this revised Article 6(4) language it is now legal “to permit conservation concerns to be sacrificed *in limited circumstances* [emphasis added],”<sup>41</sup> Clutton and Tafur very properly counter that the circumstances where imperative non-conservation requirements can trump conservation values are really not very limited at all.<sup>42</sup> Indeed, there is now arguably a broader exception than ever existed before to the restriction in Article 6(3) that a plan or project “not adversely affect the integrity” of protected sites. It is now

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<sup>36</sup> Case C-355/90 *Commission v Spain* [1993] ECR I-4221.

<sup>37</sup> COLIN REID, *NATURE CONSERVATION LAW* (3d ed., 2009), at 5.2.7.

<sup>38</sup> Council Directive 79/409/EEC; O.J. Eur. Comm. (L 103) (25 Apr. 1979) 1.

<sup>39</sup> LYSTER (1985), *supra* note 1 at 68.

<sup>40</sup> Council Directive 92/43/EEC; O.J. Eur. Comm. (L 206) (22 Jul. 1992) 7.

<sup>41</sup> REID (2009), *supra* note 37.

<sup>42</sup> Clutton & Tafur, *supra* note 34 at 171.

entirely conceivable, they write, that exceptions can be granted on the basis of *any* imperative reasons of overriding public interest, so that there is now “more scope for Member States to derogate from the requirements to protect [sites than ever]...and a correspondingly lower degree of protection for those sites.”<sup>43</sup>

Since the courts signaled in *Leybucht Dykes* and *Santona Marshes* that exceptional reasons to override protection would be difficult to imagine and to entertain as a matter of law, they have been reluctant to reconsider the issue in the light of the amended language in Article 6(4). “Beyond the trite position that Article 6(4) and, consequently, IROPI are to be interpreted strictly, little guidance can be gleaned from the decisions of the ECJ as to the interpretation of the phrase imperative reasons of overriding public interest in the Habitats Directive.”<sup>44</sup>

Other Community institutions have also had little to say that is helpful.<sup>45</sup> And academic analysis of both the IROPI exception and its application<sup>46</sup> “leads to the conclusion that the Commission is prepared to accept that Article 6(4) offers a much broader exception to the general rule [of strict protection] in Article 6(3) [or in the earlier relevant and now superseded provisions of the Birds Directive] than is suggested by the Commission’s published guidance or by the wording of the Article itself.”<sup>47</sup> In Britain, “the decisions that have been reached by the national authorities (both the Courts and the Secretary of State) confirm the view that it appears relatively easy for developers to establish the existence of IROPI.”<sup>48</sup>

The dialogue in the European Union and its Member States about the ways in which the legal ambiguities of the Habitats Directive might and should be resolved – an ongoing dialogue in which the courts as well as administrative agencies, various planning bodies, conservation NGOs and private companies all take an active part – is far from over. The April 2013 European Court decision in the *Sweetman* litigation,<sup>49</sup> on reference from the Irish Supreme Court, for example, has on its face substantially strengthened the prohibition in Article 6(3) against plans or projects that adversely affect the integrity of protected sites, even if the threat involves only a minor portion or aspect of a protected site. It is not immediately apparent as a matter of law, the court has said, that the relief of traffic congestion in Galway, a major Irish city, should have

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<sup>43</sup> *Id.* at 172.

<sup>44</sup> *Id.* at 173. The strict interpretation dictum stems from Case C-304/05 *Commission v. Italian Republic* [2007] ECR I-7495.

<sup>45</sup> Clutton & Tafur, *supra* note 34 at 173-175.

<sup>46</sup> A. Nollkaemper, *Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests*, 9 J. ENVTL L. 271 (1997); L. Krämer, *Commission’s Opinions under Article 6(4)*, 21 J. ENVTL L. 59 (2009).

<sup>47</sup> Clutton & Tafur, *supra* note 34 at 176.

<sup>48</sup> *Id.* at 179.

<sup>49</sup> The *Sweetman* litigation stems from the grant of permission by the Irish Planning Board in 2008 for a road project, the Galway outer city bypass. Part of the project would by all accounts destroy about 1.5 hectares of limestone pavement to be protected in a proposed (candidate) addition to the Lough Corrib Special Area of Conservation. The case figures prominently in Gregory Jones, “Adverse Effects on the Integrity of a European Site: Some Unanswered Questions,” in *THE HABITATS DIRECTIVE* (2012), *supra* note 3, 151 at 158-166. The still “unpublished” decision from April 2013 can be read at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0258:EN:HTML> or <http://www.bailii.org/eu/cases/EUECJ/2013/C25811.html> (both accessed 12 September 2013). For brief helpful commentary, see <http://ukhumanrightsblog.com/2013/04/11/habitats-the-cjeus-judgment-in-sweetman/> (accessed 12 September 2013) and <http://www.lexology.com/library/detail.aspx?g=5391bdbe-3e42-43e6-970b-33ce1d6fdea8> (accessed 12 September 2013).

higher priority than the preservation of a piece of limestone pavement designated as having great conservation value. This still leaves the door open to arguments that the protected site at issue in *Sweetman* can be “sacrificed,” in Reid’s terms, on the IROPI grounds provided in Article 6(4). That issue now seems sure to arise and to be litigated, certainly in Ireland and probably elsewhere.

This will open up the possibility for still another round of inter-institutional dialogue. So, even as European judicial actors move to clarify one set of ambiguities, in this case about how hard it ought to be to affect adversely the integrity of protected sites, even at the margin, other actors will maneuver to exploit the flexibility the language of the Directive still clearly provides to assert at the national level the primacy of overriding interests. The resulting dynamic political interplay among legal uncertainties is at the heart of the performance of failure under the Directives. In the light of *Morge* and *Sweetman*, it seems likely to persist. And as more time and money are needed to keep up with the twists and turns of legal interpretation the perception that the Directives are a developer’s obstacle course will also persist.

### **3.3 Cautious Courts and Merits Review: Who Is Keeping Score?**

In Galway, as in many other cities in Ireland where improvements to the road system have failed to accommodate the growth of traffic, the level of public interest in a bypass scheme must be fairly robust. It seems equally reasonable to assume, absent any showing to the contrary, that the scheme has been thoughtfully designed and engineered by competent professionals, that various sensible alternatives have been canvassed and weighed, that a good deal of time and money has been spent to achieve the positive impacts the scheme will have whilst at the same time minimizing its negative consequences, that there has been a reasonable degree of public involvement in all of this work, and that wherever negative impacts cannot be avoided they will be mitigated or offset, if possible, by compensatory measures.

These are in very broad terms the public standards for development decision making that underlie the appropriate assessment process for wildlife and habitat values built into the Habitats Directive.<sup>50</sup> They are the standards which have also come into much more widespread, almost universal, use since 1970 to safeguard a fuller range of environmental values through appropriate assessment’s close legal cousin, the environmental impact assessment process.<sup>51</sup>

So, whatever scheme eventually brings relief from traffic congestion to the people of Galway, let’s say, ought to have won approval *on its merits*. And there will be a paper trail, if you like, required by law to document those merits and to permit a public accounting of the balance of considerations that went into the final decision to let a project move ahead.

But what happens if or more likely when, given the complexity of the entire assessment and decision making process and the associated political controversy, especially in relation to very large scale projects, something goes wrong?

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<sup>50</sup> Peter Scott, “Appropriate Assessment: A Paper Tiger,” in THE HABITATS DIRECTIVE (2012), *supra* note 3, 103-117.

<sup>51</sup> For the international and European background and history, see PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 799-825 (2d ed., 2003).

The checks and balances built into the process are twofold. The first is a requirement common to all modern administrative systems for reasoned analysis and decision making, whereby the competent authorities taking the lead in implementing the Directives rest their judgments about what to do, and why, on reasoned evidence that is publically available and subject to challenge. The assessors and the deciders put their claim to competence on the line. The second built-in check and balance is political. When the process is reasonably open and pluralistic the behavior and performance of ostensibly competent authorities can be monitored, criticized, and challenged along the way by other interested actors. And hopefully during this process of give and take the admixture of competence and pluralistic oversight will tend towards a public interest solution.

But suppose, further, that the built-in safeguards of institutional *competence* and political *pluralism* are not enough. Suppose plans and projects proceed without giving habitats and wildlife conservation values the full and careful consideration they deserve and that the law requires. Can and should the courts then step in and, in cases where consideration can be shown to be lacking, reverse? In principle, Denis Edwards argues, the answer to this question is yes.

[Any] properly functioning system of administrative law requires judicial review by *independent* judges of decision-makers exercising statutory or other public law powers. So much is *uncontroversial for any legal system committed to the rule of law and the separation of powers*. More difficult is the task of identifying how much judicial control there should be in different types of cases [*emphasis added*].<sup>52</sup>

Edwards goes on to say that as a practical matter the judiciary is most comfortable with procedural review. European courts will be willing to ask, for example, whether there was proper consultation, whether transparent reasons based on detailed evidence were used to justify a decision, and whether other procedural requirements were met.<sup>53</sup> This tends towards strict scrutiny of administrative decisions and accords with German administrative law where there is “far less of a ‘hang-up’”<sup>54</sup> about searching review than there is in other Member States.

In Britain, by contrast, the record of merit review is at best “mixed.”<sup>55</sup> The courts have followed a path in defending habitats against incursions that is “uncertain,” “unsystematic,” and, therefore, unpredictable.<sup>56</sup> The standard of review has been, at most, deferential to decision makers, with no inclination to state clearly whether deference is constitutionally required, to respect the separation of powers between the courts and the executive, or stems rather from the courts’ unwillingness in particular cases to second guess decisions based on specialized and expert knowledge.<sup>57</sup>

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<sup>52</sup> Edwards, *supra* note 26 at 232.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 231.

<sup>55</sup> *Id.* at 212.

<sup>56</sup> *Id.* at 211-212.

<sup>57</sup> *Id.* at 217. See also Elizabeth Fisher, *Is the Precautionary Principle Justiciable?* 13 J. ENVTL L. 315 (2001); Richard Clayton, *Judicial Deference and “Democratic Dialogue”: The Legitimacy of Judicial Intervention under the Human Rights Act 1998*, 2004 PUB. L. 33; T.R.S. Allan, *Human Rights and Judicial Review: A Critique of Due Deference*, 65 CAMBRIDGE L.J. 671 (2006).

The bottom line, in other words, is that courts have so far stayed well away from review on the merits of decisions in which substantive non-compliance with the Directives is alleged, and they are not, therefore, providing an “independent” check on whether implementation of the Directives is achieving the desired results. The willingness of courts to review whether decision making is sufficiently open and whether it has followed the proper procedures is welcome, of course. But except perhaps in the most unusual and egregious cases the remedy for a finding of procedural non-compliance is an order to repair and repeat the process, not an injunction to stop a plan or project from proceeding.<sup>58</sup>

So, is anyone keeping score on what the Directives are accomplishing? If, for whatever reason, courts are too cautious to hold decision makers’ feet to the fire, at least in individual cases, is there any other way to tell whether the Directives are giving habitats and wildlife conservation values the full and careful consideration they deserve and that the law requires?<sup>59</sup> At least one legal practitioner and close observer thinks not:

An underlying concern about habitats’ protection in the UK...is that no one appears to really know (or attempts to check) whether the appropriate assessments carried out are, in fact, effective. Not the developer, the competent authorities, Defra [the Department of Environment, Food and Rural Affairs], or the European Union. There is no systematic review, analysis, or monitoring requirement for the assessment. There appears to be no follow up to ensure that mitigation measures are being implemented. The assessments themselves are undertaken by a wide range of organisations many of whom will be ill-equipped and not competent to carry on what should involve highly specialist and complex analysis. The assessment will often refer to environmental statements prepared by the developer or its consultant as part of the planning application process; leaving a question as to the independence and integrity of any assessment.<sup>60</sup>

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<sup>58</sup> This accords with experience in the United States with procedural and substantive review under environmental impact assessment. See Daniel Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL L. REP. 10,640 (2009); Daniel Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 J. L. POL’Y 293 (2010).

<sup>59</sup> As Edwards notes, the provisions of the Habitats Directive are implemented in the context of European treaty law. Article 191(2) of the Treaty on the Functioning of the EU (TFEU) premises EU environmental policy on the need to provide a high level of protection for the environment, based in part on the precautionary principle and preventive action. These prescriptions, Edwards argues, ought to be binding on domestic courts, in which case they might facilitate substantive review. “Although Article 191(2) probably does not have direct effect, it is a prescriptive provision of the TFEU and, as such, is [binding on domestic courts]...This follows from Article 4(3) of the Treaty on European Union (TEU) (ex Article 10 of the EC Treaty). Further, the new provision in Article 19(1) of the TEU, requiring Member States to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law,’ arguably bolsters the established case under Article 4(3) TEU concerning the duties of domestic courts to ensure the full effectiveness of EU law even where EU law rules do not have direct effect [*citations omitted*].” Edwards, *supra* note 26 at 223-224.

<sup>60</sup> Paul Stookes, “The Habitats Directive: Nature and Law,” in *THE HABITATS DIRECTIVE* (2012), *supra* note 3 at 149-150. Precisely similar concerns lie behind Bradley Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903 (2002). Other disturbing aspects of enforcement are noted by Clutton and Tafur in their discussion of IROPI: “[I]n relation to all the cases in which IROPI has been justified, ...compensatory measures will be put in place...[But] there is nothing in Article 6(4), or in the Commission guidance of 2007 [about how to implement the Article] which requires the Commission to ensure that compensatory measures are actually taken. The Commission does not take action against Member States if they fail to implement the compensatory measures to which they have committed, even if a favorable opinion is given by



It is true that implementation of the Directives is subject to some review. Article 17 of the Habitats Directive requires Member States to make a report on implementation every six years, and the European Commission then makes a composite assessment of how well overall implementation is proceeding across the Union. The analysis by Waite of recent reports makes it clear, however, that these are political documents, designed by national governments to put the best possible face on the implementation record, consistent with their current policy preferences.<sup>61</sup>

The harder truth, then, is that there are no reliable metrics for gauging the impact the Directives are having. At the European level, courts and the Commission are prepared to push for full compliance with the law as written, but not at the expense of appearing to usurp the sovereignty of Member States. Domestic courts, at least in Britain, are sometimes willing to give the law a sympathetic reading, but not at the expense of appearing to decide political questions or raising constitutional issues about the separation of powers. The watchword is deference. And the result is a climate in which settled expectations, both for implementing agencies and business, remain largely undisturbed. The important question asked by the March 2012 implementation review of the Directives in Britain was whether they benefit the economy and the environment.<sup>62</sup> The government of the day made a judgment that they did and that, therefore, they were “working well.”<sup>63</sup> This is not at all the measure of success Simon Lyster had in mind some thirty years ago,<sup>64</sup> but it does appear to be a pretty accurate assessment of where things stand.

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the Commission on the basis of those measures being taken [citation omitted].” Clutten & Tafur, *supra* note 34 at 181.

<sup>61</sup> Waite, *supra* note 28 at 248-250.

<sup>62</sup> Defra, Report of the Habitats and Wild Birds Directives Implementation Review (London, March 2012), *supra* note 10.

<sup>63</sup> Waite, *supra* note 28 at 250.

<sup>64</sup> See text accompanying note 39, *supra*.