Planning policy and case law developments for the renewables sector

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This briefing is intended as an update on three key policy and case law developments that have taken place over the summer.

1 New European Court ruling – 'Sweetman II'

On 25 July 2018, the Court of Justice of the European Union (the Court) delivered its ruling in the case of Edel Grace and Peter Sweetman v An Bord Pleanala, or 'Sweetman II' (also known by some in the industry as 'People over Wind II'.) The judgment developed the position taken in People Over Wind and Peter Sweetman v Coillte Teoranta ('Sweetman I'), delivered in April this year.

The Court again focused on the interpretation of Article 6 of the Habitats Directive, which concerns the need for an appropriate assessment where a project is likely to have a significant effect on a site (onshore or offshore) designated as a special protection area or a special area of conservation (SPAs and SACs) The key question for the Court was at what point in the assessment under this Directive should mitigation measures be taken into account.

Current practice relating to appropriate assessment is based on a four-stage approach. Briefly, these stages are:

(i) Screening to establish whether a likely significant effect may exist on the integrity of a designated site. If it does, the developer will need to undertake;

(ii) The appropriate assessment

(iii) Assessment of alternatives; if it cannot be ascertained that the project will not adversely affect the integrity of a site, then the developer must consider if there are conditions or restrictions (mitigation) that can be imposed to render the project acceptable. If that is not possible, alternative solutions should be considered.

(iv) 'IROPI': if there are no alternative solutions, the proposed development must demonstrate imperative reasons of overriding public interest ('IROPI'). The developer will need to demonstrate that there are reasons of economic, social, human health, public safety or important environmental benefits as to why the project should be carried out. The developer must also consider appropriate compensatory measures that may be introduced when granting consent.

The case

Sweetman II concerned the proposed development of an onshore wind farm which would be partially located within an SPA identified as a habitat of hen harriers, a protected bird under the Birds Directive. The development included a Species and Habitat Management Plan, which detailed measures to address the potential effects of the wind farm on the hen harrier's foraging habitat. The An Bord Pleanala (the planning authority in Ireland) gave permission for the development on 22 July 2014 on the grounds that it would not adversely affect the integrity of the SPA. Ms Grace and Mr Sweetman challenged this, arguing that the Species and Habitat Management Plan constituted compensatory measures, and so the An Bord ought to have considered the criteria laid out in Article 6(4) of the Habitat Directive when making their decision (IROPI).

The ruling

The Court concluded that 'the fact that a project includes measures to ensure…the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.'

What next?

The ruling in Sweetman I effectively moved all mitigation apart from 'embedded' mitigation from the screening stage down to the appropriate assessment stage. Sweetman II expands this, pushing certain forms mitigation down one stage further, to the IROPI stage or 'test' (Article 6(4)). In addition, the ruling means that for mitigation to be included at the appropriate assessment stage, it must either form part of the project or be a protective measure which the developer can show is completely scientifically proven to not affect the integrity of the conservation area. This increases the likelihood of a negative appropriate assessment for future projects. As a result, developers are now more likely to need to show imperative reasons of overriding public interest as to why the project should be allowed.

On 15 August 2018, the implications of the ruling in Sweetman I were considered by Sir Ross Cranston, in the case of R (Langton) vs Secretary of State for Environment, Food and Rural Affairs and Natural England. The claimant was seeking judicial review of Natural England's decision to license for the culling of badgers in 11 different areas, some of which were in the vicinity of SPAs. Part of the claimant's argument in this case was that the conditions that Natural England had attached to the culling licenses, which included limits on the location and timing of the culling, should not have been taken into account at the screening stage, in light of the Sweetman I decision. However, Sir Ross Cranston held that the conditions were 'integral features' of the project, which Natural England needed to assess under the Habitats Regulations' (i.e. it was effectively embedded mitigation) and so dismissed the claim that Sweetman I was relevant.

1 The revised National Planning Policy Framework

On 24 July 2018, the Government published the revised National Planning Policy Framework ('NPPF2'). NPPF2 contains several significant references to the renewables sector.

The draft version of NPPF2, published in March 2018, included controversial wording from a Written Ministerial Statement made the then Secretary of State for Communities and Local Government, Greg Clarke, in 2015. In his statement, Clarke announced that onshore wind developments should only be permissible where they have been included in a Local Plan and, following consultation, any impacts caused by the development have been addressed and have backing of the local community.

Many industry bodies responded to the draft NPPF2 with serious concerns over the inclusion of this wording, highlighting its contradiction with the framework's wider emphasis on the need for 'radical reductions in greenhouse gas emissions'. Subsequently, the final version of NPPF2 retains the wording but includes the following exception:

> Except for applications for the repowering of existing wind turbines, a proposed wind energy development involving one or more turbines should not be considered acceptable unless it is in an area identified as suitable for wind energy development in the development plan; and, following consultation, it can be demonstrated that the planning impacts identified by the affected local community have been fully addressed and the proposal has their backing. (Footnote 48)

This exception has been received with some relief by the industry, and hailed as the first step, however small, to moving onshore wind policy forward since the 2015 Statement.

Another important inclusion in NPPF2 is specific reference to the need to take a 'proactive approach' to planning to adapt for climate change 'in line with the objectives and provisions of the Climate Change Act 2008'. This reaffirms the Government's commitment to ensuring an 80% cut in emissions of greenhouse gases by 2050. This specific reference was reinstated following an omission in the March draft.

A notable omission in NPPF2 came at paragraph 177, concerning appropriate assessment, which remained unchanged despite the aforementioned ECJ ruling in Sweetman I. NPPF2 retains the position that the presumption in favour of sustainable development does not apply where appropriate assessment is required. Whilst it had been hoped it had been hoped that the Government would use the NPPF2 to clarify this position for developers, it now seems likely that this will continue to be area of contention until further guidance is issued.

1 The National Infrastructure Assessment

The National Infrastructure Commission (the Commission) published the first National Infrastructure Assessment (the NIA) on 10 July 2018. The NIA sets out the Commission's recommendations in the short, medium and long term for the government to meet the country's infrastructure needs. The government has committed to laying the NIA before parliament and to respond to its recommendations within six months, with a final deadline of a year.

One of the six key areas on which the Commission made recommendations was the switch to low carbon energy by 2050. The Commission's recommendations are a vote of confidence in renewables as the energy source of the future. The NIA acknowledges that reducing emissions through renewables has been seen as 'costly and difficult', but asserts that this is no longer accurate and that we must act now in moving away from fossils fuels and towards a low carbon future. Research conducted by the Commission and detailed in the NIA finds that renewable energy is both safer and more cost competitive than nuclear power stations. International trends indicate that the cost associated with the expansion of nuclear energy is less likely to fall due to, for example, improvements in technology, than in the renewable sector.

The Commission therefore concludes that 'Given the balance of cost and risk, a renewables based system looks like a safer bet at present than constructing multiple new nuclear power plants'. It is recommended that a 'one by one' approach to new nuclear plants, rather than a 'fleet', is adopted and that the Government should not agree support for more than one nuclear power station beyond Hinkley Point C before 2025.

The Commission favours the use of existing market mechanisms – Contracts for Difference and the capacity market – 'where possible, to avoid creating more uncertainty, but incremental improvements could be made'. It is recommended that the distribution of technologies is revised between 'pot one' and 'pot two' for CfDs and reinstating a pipeline of pot 1 auctions, in order to enable the lowest cost renewable generation mix to be brought forward in the 2020s. This would mean that onshore wind, which would still be subject to planning restrictions in England (although note NPPF2). On the other hand, projects in Wales and Scotland 'would no longer be held back'. Pot 2 auctions could then be used to allocate small amounts of support to emerging technologies. In this regard, the Commission considers that tidal power should not receive any 'special treatment' through bilaterally agreed contracts, however it should compete on an equal basis with other technologies.

In the near term, the Assessment recommends that a 50 per cent renewable generation by 2050 and highlights offshore wind as an example of a renewable technology which has recently become cost competitive.

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