

An evaluation, in light of Brexit, of the extent that the EU has been responsible for improving the habitat conservation regime in England and Wales

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Conservation efforts in Britain originated in the nineteenth century; when Wordsworth described the Lake District as “a national property in which every man has a right and interest who has an eye to perceive and a heart to enjoy.”¹ Since, an abundance of national and international legislation has been passed intending to protect the natural environment and the species inside it. This essay will explore the current habitat conservation regime of England and Wales, evaluating the extent to which the European Union has enhanced the current system. In doing so, this paper shall first outline the international framework before analysing the evolution of the current regime of Sites of Special Scientific Interest. I will then evaluate the Natura 2000 network in order to assess the effect that the EU has had on the domestic habitat conservation system. This discussion will ultimately conclude that whilst the EU has had a positive impact, the system is not doomed to fail following Brexit if the UK government avoid the disparagement of conservational measures.

International Habitat Conservation Framework

The leading international agreement concerning habitats and wildlife is the Bern Convention;² an international treaty in the field of nature conservation aimed at the protection of the natural heritage in the European continent³. This is achieved by awarding certain protection to flora and fauna species, prohibiting actions which would otherwise be detrimental to their conservation status, such as deliberate capture and killing of the wildlife⁴. The Convention has a Standing Committee, highlighting progression from earlier wildlife Conventions⁵.

Another important obligation that the Bern Convention imposes is the duty to “take appropriate and necessary legislative measures to ensure the conservation of the habitats of the wild flora

¹ K. Oosthoek, 'The Origins Of Nature Conservation In Britain – A Short Introduction' (Environmental History, 2015) Resources<<https://www.eh-resources.org/origins-nature-conservation-in-britain/>> accessed 5 May 2020

² The Convention of European Wildlife and Natural Habitats (EC) [1979]

³ Carolina Diaz, ' The Bern Convention : 30 Years of Nature Conservation in Europe' [2010] 1(1) Review of European Community & International Environmental Law,

⁴ The Convention of European Wildlife and Natural Habitats (EC) [1979] Art 6

⁵ Lyster's International Wildlife Law [2010] 2nd edn, Cambridge University Press 2010) p298

and fauna species”⁶ under Article 4. This has been deemed “innovative” by Carolina Diaz due to the traditional approach of international conservation efforts being to protect individual species rather than habitats⁷.

The United Kingdom ratified this treaty in 1982, having already transposed the obligations under Part I and Part II of the WCA 1981. Furthermore, the SSSI system under s28 WCA which will soon be discussed, transposed the duties arising from Article 4.

Controversially, the EU are signatory to the Bern Convention, transposing their obligations through Directives. They have done this through the Wild Birds Directive and the Habitats Directive⁸. However, a Naturopa report describes a “tension” between the EU and the Bern Convention⁹. Supporting this, Epstein believes “the increased size and competence of the EU has led to the result that no action can be taken without their consent as they always represent the majority of the votes in the Convention’s governing body”.¹⁰ Also, “as the EU’s environmental competence has expanded, the ability of the Bern Convention to function without the financial support of the EU has floundered.”¹¹ Epstein believes that the Bern Convention’s ‘dependence’ on the EU has meant that the Convention has altered its policies to be more in line with the practices of the Habitats Directive¹². Therefore, there has been a substantial shift in focus from species protection to habitat protection.

This policy shift will only strengthen the habitat protection regime in England and Wales. However, Arie Trouburst claims that “deliberate killing” has been “and to date remains, the prevailing human impact on large European carnivore populations”¹³- suggesting there should be a greater emphasis on direct species protection rather than that of habitat preservation. Conversely, the Council of Europe claim that “at least as important as actions taken to protect

⁶ The Convention of European Wildlife and Natural Habitats (EC) [1979] Art 4

⁷ Carolina Diaz, ' The Bern Convention : 30 Years of Nature Conservation in Europe' [2010] 1(1) Review of European Community & International Environmental Law,

⁸ Directive (EC) 92/43 EEC on the conservation of natural habitats and of wild fauna and flora [1992]

⁹ Catherine Roth, 'The 25 years of the Bern Convention ' [2004] Naturopa

¹⁰ Epstein, Yaffa, 'The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law', [2013] Georgetown International Environmental Law Review (GIELR), 26(4)

¹¹ Ibid

¹² Ibid

¹³ Arie Trouburst, 'Managing the Carnivore Comeback: International and EU Species Protection Law and the Return of Lynx, Wolf and Bear to Western Europe' [2011] 22(3) Journal of Environmental Law

wild fauna and flora species is to take care of the natural habitats where those species thrive¹⁴.” This is the justification for the Natura 2000; a network set up under the Habitats Directive which will be discussed later in the report. However, before evaluating the extent to which this European framework has improved the system of habitat conservation in England and Wales, it is important to first analyse the evolution of the domestic legislation intended to augment habitat conservation efforts.

Sites of Special Scientific Interest from 1949-1981: Revolutionary but ineffective?

The principal way that habitats containing endangered species of flora and fauna are awarded domestic protection in England and Wales is by designating them as a Site of Special Scientific Interest (SSSI)¹⁵. Introduced by the National Parks and Access to the Countryside Act 1949¹⁶ the SSSI system is one of the earliest examples in the environmental field of such a regime¹⁷. Intending to protect sites from damaging developments¹⁸, John Potter claims the system was “remarkable” and “ground-breaking”¹⁹ as it allowed for the special interest of the site to be taken into consideration when deciding planning applications.

The pioneering feature of the 1949 Act was the introduction of management agreements. This involved the council entering into arrangements with every owner, lessee, or occupier of any land to be managed as a nature reserve²⁰ when the aforementioned person’s exercise of the land would be detrimental to the scientific interest that it hosts. However, these agreements were voluntary and therefore ineffective, given that by 1980 there had only been 70 agreements made, compared to 1997 where under the Wildlife and Countryside Act 1981 (WCA), there were 3842.²¹ Therefore, the habitat conservation system prior to 1981 was weak with Adams

¹⁴ Rm.coe.int. (2007). *Questions and answers of the Bern Convention*. [online] Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680479eb9> [Accessed 5 Feb. 2020].

¹⁵ Laura Cottam, 'SSSI definition: what is it and what does it mean for conservation and development?' (*Woodland Trust*, 2019) <<https://www.woodlandtrust.org.uk/blog/2019/03/ssi-definition/>> accessed 12 April 2020

¹⁶ National Parks and Access to the Countryside Act [1949]

¹⁷ Last Kathryn, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' [1999] 11(1) *Journal of Environmental Law*

¹⁸ *Ibid*

¹⁹ Potter John, 'SSSI- Three S's but still one missing'[2001] 91(1) *The Environmentalist*

²⁰ 'Sites of Special Scientific Interest: Encouraging Positive Partnerships' (*DEFRA*, 2003) <https://www.ribblesvalley.gov.uk/download/downloads/id/9236/defra_ssi_code_of_guidance.pdf> accessed 06 May 2020

²¹ Last Kathryn, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' [1999] 11(1) *Journal of Environmental Law*

ultimately contending that an SSSI designation “did not confer much protection²².” Note that by 1981 the EU had not imposed any conservational obligation on England and Wales.

SSSI’s under the Wildlife and Countryside Act 1981: Still Struggling but Slowly Improving?

Subsequently, significant legislative changes were made²³ to the framework by the WCA 1981²⁴. Section 28 of the Act²⁵ enhanced management agreements by allowing the Nature Conservancy Council to provide financial incentives via compensation to prevent the owner from carrying out a potentially damaging operation (PDO²⁶). This system designated SSSIs by reason of the flora, fauna or geological or physiological features that the site hosts.²⁷

Kathryn Last explains how the main stimulus for the introduction of the WCA was the need to comply with the requirements²⁸ of the EU’s 1979 Birds Directive²⁹. This sought to protect all European bird species through the establishment of Special Protection Areas (SPAs) whereby States are required to take steps to avoid the deterioration of sites which hosted European protected species of birds.³⁰ Therefore, it may be argued that although the SSSIs involve the domestic protection of scientific sites, the EU are partly responsible for the strengthening of the legislative measures seen by the WCA.

However, this system was still heavily criticized. Karren Morrow discusses how SSSIs were afforded only very limited protection.³¹ Morrow explains that one of the extended obligations to the occupier under s28 was that they were now required to notify English Nature that they intended to carry out a PDO³². Following notification, a four month period of negotiating a management agreement would commence; however, should an agreement not be made, the occupier was free to carry out the operation.³³ Therefore, the regime under the 1981 Act was

²² William Adams, 'Sites of Special Scientific Interest and Habitat Protection: Implications of the Wildlife and Countryside Act 1981' [1984] 16(4) *The Royal Geographical Society*

²³ *Ibid*

²⁴ Wildlife and Countryside Act [1981]

²⁵ Wildlife and Countryside Act [1981] s28

²⁶ Last Kathryn, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' [1999] 11(1) *Journal of Environmental Law*

²⁷ Wildlife and Countryside Act [1981] s28(1)

²⁸ Last Kathryn, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' [1999] 11(1) *Journal of Environmental Law*

²⁹ Directive (EC) 79/409/EEC on the conservation of wild birds [1979]

³⁰ Directive (EC) 79/409/EEC on the conservation of wild birds [1979] Art 4

³¹ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) *National Italian American Bar Association Law Journal*

³² *Ibid*

³³ *Ibid*

deemed ‘toothless’ by Mr Breed during a parliamentary debate of 1999³⁴. He supported his claim by exemplifying how “a landowner wanted to plough through an SSSI to grow flax”; and all that English Nature could do was try to persuade him not to.³⁵ Though without powers of enforcement, “all that EN could do was to sit by and watch another SSSI being raped for commercial interest”³⁶ when the landowner progressed to ignore the advice of English Nature.

Mr Breed also discussed how SSSIs were not protected from third party damage, for example, fly tipping³⁷. However, Last claims that damage to SSSIs under the 1949 Act occurred at 13% of the sites, compared to the period of 1984-1997 whereby this statistic decreased to 3.7%³⁸. Thus, illustrating a strengthened level of protection to these areas following the WCA; potentially due to the EU’s Directive.

Ultimately, the effect that the WCA had on the SSSI system is polarising. Whilst some criticise the lack of enforcement options available for English Nature, others would contend that this is “unjustified.”³⁹ With regards to the EU, the RSPB contend that the changes made under the WCA, “driven by the Birds Directive, led to a marked improvement;⁴⁰” as by the 1990s, the area of SSSI lost per year had fallen below 0.005% and the area subject to short term damage to 2-3% per year.⁴¹ Nonetheless, Potter still contended in 2001 that “much greater commitment⁴²” was required.

An advanced SSSI system: Countryside and Rights of Way Act 2000

Many of the aforementioned defects of the SSSI network were reversed by the Countryside and Rights of Way Act 2000⁴³ (CRoW). A 2001 parliamentary debate saw Robert Ainsworth discuss how this Act “substantially strengthened powers to protect and manage SSSIs.⁴⁴”

³⁴ HL DEB [14 April 1999] vol 329

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Last Kathryn, 'Habitat Protection: Has the Wildlife and Countryside Act 1981 Made a Difference?' [1999] 11(1) *Journal of Environmental Law*

³⁹ Ibid

⁴⁰ RSPB, *Defend Nature: How the EU Directives Help Restore Our Environment* [2015] p16

⁴¹ Ibid

⁴² Potter John, ‘SSSI- Three S’s but still one missing’ [2001] 91(1) *The Environmentalist*

⁴³ *Countryside and Rights of Way Act* [2000]

⁴⁴ HL DEB [01 March 2001] Vol 363 CC724-5W

CRoW significantly enhanced s28 WCA 1981. One change was that although previously English Nature (now Natural England⁴⁵) did not have the right to prevent a landowner from carrying out a PDO, s28E now obligated Natural England to consent to these operations before they could be undertaken⁴⁶, attracting a fine of up to £20,000 if contravened (s28P⁴⁷). However, although some would deem this a legislative improvement, Morrow refers to these measures as “draconian”⁴⁸; questioning the extent that nature conservation law should come into conflict with private property rights⁴⁹.

For example, in *R (Fisher) v English Nature*⁵⁰, “the claimants, who owned a large private estate, sought judicial review in respect of English Nature’s change of policy leading to the imposition of an SSSI designation on intensely farmed arable land in order to protect a migratory species.”⁵¹ The claimants argued an alleged devaluation in their land through the loss of freedom of action. They argued that the SSSI designation “was an interference in their private property rights”⁵²; although this failed because the control imposed by the designation was not disproportionate. However, Morrow re-iterates that whilst “the changes appear marked, in practice their impact is likely to be ameliorated by the fact DEFRA and Natural England take the view that voluntary managements should be used as a matter of preference”⁵³ over compulsive restriction.

Another improvement to the regime is the ability to be convicted of causing third party damage to an SSSI. Under s28P(6)⁵⁴, this provision makes it an offence to intentionally or recklessly destroy, damage or disturb any of the flora, fauna, or geographical feature by which the land is of special interest, when knowing that what he destroyed, damaged or disturbed was within a site of special scientific interest. If the person commits the same level of damage but is unaware that what they destroyed was protected as an SSSI, then they are only subject to a fine not exceeding Level 4 on the Standard Scale, opposed to the more severe punitive measures which will be taken when the offender was aware of the land’s protected status. (s28P(6A) WCA).

⁴⁵ Natural Environment and Rural Communities Act [2006]

⁴⁶ Wildlife and Countryside Act [1981] s28E

⁴⁷ Wildlife and Countryside Act [1981] s28P

⁴⁸ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal

⁴⁹ Ibid

⁵⁰ *R (Fisher) v English Nature* [2004] EWCA Civ 663

⁵¹ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal

⁵² Ibid

⁵³ Ibid

⁵⁴ Wildlife and Countryside Act [1981] s28P(6)

This has relevance when assessing the results of a study conducted by Booth, Gaston and Armsworth⁵⁵. This research involved the questioning of visitors at various SSSIs on whether or not they were aware of the site's protected status.⁵⁶ Less than one third of participants were aware that they were within an SSSI⁵⁷. This means that when damage is committed, it is more likely that the offenders will face a smaller fine because the majority of the population will be unaware that the land damaged was subject to protection. Furthermore, this supports the need for the government and conservation bodies to promote much more education into the legislative regime protecting wildlife as the majority of the UK are clearly oblivious to the law; raising the question of how effective it can possibly be. Supporting this, a study by Bradley et al highlighted a positive correlation between environmental education and pro-environmental attitudes amongst students⁵⁸; implying that by promoting the importance of conservation and teaching the population of the law currently in place, the nation will become more environmentally conscious which could enhance wildlife and habitat conservation.

Regardless, the system does appear to have resulted in improvement. According to Christie, he claims that "although biodiversity is declining (generally), there are some success stories. For example, in England and Wales conservation policies relating to SSSIs have successfully improved the condition of key habitats over the last decade."⁵⁹ He claims that concerted conservation efforts have increased the proportion of SSSI area in England in a 'favourable' condition from 57% in 2003 to 95% in 2010⁶⁰.

Therefore, this section highlights how many of the flaws of the old SSSI have been amended without EU involvement. However, Christie does claim that "around three quarters of the SSSI system are also subject to higher international designations."⁶¹ Consequently, the next section shall analyse the extent that these international designations are responsible for the improvements.

⁵⁵ Booth, Gaston, Armsworth, 'Public Understanding of Protected Area Designation', [2009] *Journal of Biological Conservation*

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ Bradley, Waliczek and Zajicek, 'Relationships between environmental knowledge and environmental attitude of high school students' [1999] 30(3) *The Journal of Environmental Education* 17-21

⁵⁹ Mike Christie, 'An economic assessment of the ecosystem service benefits derived from the SSSI biodiversity conservation policy in England and Wales' [2012] 1(1) *Ecosystem Services*

⁶⁰ *Ibid*

⁶¹ *Ibid*

The Habitats Directive: Natura 2000

Regarded as “a proven safety net for nature⁶²”, the Habitats Directive is a “sophisticated”⁶³ response to the EUs obligations arising from the Bern Convention. Although criticised for being “costly and insufficient”,⁶⁴ it is widely accepted that that the Directive has enhanced nature conservation in Europe⁶⁵.

Importantly, Article 3 compels States to create Special Areas of Conservation (SACs)⁶⁶; combining this with the SPAs established under the Birds Directive to create a system of Areas of Special Conservation Interest: the Natura 2000. Mockel defines this as an important conservation tool for European biodiversity; due to the high heritage values seen in the exceptional flora and fauna they contain⁶⁷. In 2017, this included over 27,500 sites, accumulating 18% of EUs total land area⁶⁸

The Conservation of Habitats and Species Regulations 2017⁶⁹ transpose these obligations domestically; with regulation 12(1) outlining the procedure of establishing a list of sites of Community Importance⁷⁰. These sites must be selected on the basis of them hosting natural habitat types of Annex I to the Habitats Directive, or protected species of Annex II. Furthermore, Regulation 13 outlines how following the establishment of this list, the sites are to be designated as SACs within six years⁷¹. However, this implementation system has been criticized by Trochet and Schmeller for being too “complex”⁷²; meaning the responsibilities of

⁶² RSPB, Defend Nature: How the EU Directives Help Restore Our Environment [2015]

⁶³ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal

⁶⁴ Publications.parliament.uk. (2000). *House of Commons - Environment, Transport and Regional Affairs - Memoranda to Report*. [online] Available at: <https://publications.parliament.uk/pa/cm199900/cmselect/cmenvtra/441/441m10.htm> [Accessed 9 Dec. 2019].

⁶⁵ Bettina Kleining, 'Biodiversity protection under the habitats directive: Is habitats banking our new hope?' [2017] 19(2) Environmental Law Review

⁶⁶ Directive (EC) 92/43 EEC on the conservation of natural habitats and of wild fauna and flora [1992] Art 3

⁶⁷ Mockel Stefan, 'The European ecological network “Natura 2000” and the appropriate assessment for projects and plans under Article 6(3) of the Habitats Directive' [2017] 23(1) Nature Conservation

⁶⁸ Ibid

⁶⁹ The Conservation of Habitats and Species Regulations [2017]

⁷⁰ The Conservation of Habitats and Species Regulations [2017] reg 12(1)

⁷¹ The Conservation of Habitats and Species Regulations [2017] reg 13

⁷² Audrey Trochet and Dirk Schmeller, 'Effectiveness of the Natura 2000 network to cover threatened species' [2013] 1(1) Nature Conservation

member states is “unclear”, and therefore the system lacks a “standardized framework”⁷³. Therefore, the implementation system may require revision to allow for simplicity and clarity.

Legislatively, Article 6 is “one of the most important Articles”⁷⁴ of the Natura 2000 and establishes the ways in which sites protected under the Directive are to be managed and conserved. Under Article 6(1), management plans are to be arranged between the Appropriate Authorities and anyone occupying land on a European Site, imposing restrictions on the way they are to use the land if such activities were detrimental to the sites ecological status⁷⁵. This reflects the aforementioned obligations of Natural England regarding SSSIs management; meaning the Habitats Directive re-enforces the respected principles of habitat preservation.

Article 6(3) is “the central statutory instrument for the protection of sites”⁷⁶ according to Mockel. This provision relates to: any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, which shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment the plan shall only be agreed to if it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.⁷⁷

A case exemplifying the compulsion to undertake an appropriate assessment is *Commission v Germany*⁷⁸. Here, the CJEU declared that by permitting the construction of the Moorburg coal fired power plant without conducting an appropriate assessment of its implications, Germany had failed to fulfil this provision's obligations. This case exemplifies the stringency of the EU, thus supporting Ageypong-Parsons view that one of the substantial strengths of the EU is their “enforcement machinery”⁷⁹ and this European strictness may be deemed an improvement to the habitat conservation regime of England and Wales .

⁷³Ibid

⁷⁴ European commission, 'Management of Natura 200 sites' (*European Commission Website, Environment*, 06/05/2020) <https://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm> accessed May 2020

⁷⁵ Directive (EC) 92/43 EEC on the conservation of natural habitats and of wild fauna and flora [1992] Article 6(1)

⁷⁶ Mockel Stefan, 'The European ecological network “Natura 2000” and the appropriate assessment for projects and plans under Article 6(3) of the Habitats Directive' [2017] 23(1) *Nature Conservation*

⁷⁷ Directive (EC) 92/43 EEC on the conservation of natural habitats and of wild fauna and flora [1992] Article 6(3)

⁷⁸ Case C 142/16 *Commission v Germany* [2017]

⁷⁹ Ageypong-Parsons J, 'Could Brexit Undermine The Birds And Habitats Directives?' (*Endsreport.com*, 2020) <<https://www.endsreport.com/article/1672350/brexit-undermine-birds-habitats-directives>> accessed 7 April 2020

Furthermore, *Wealden DC v Secretary of State for Communities and Local Government*⁸⁰, held that a judge had rightfully quashed a planning inspector's grant of permission for a housing development close to a SAC⁸¹. The inspector's conclusion that an "appropriate assessment" as required by the reg 61 of the 2017 Regulations⁸² was unnecessary because mitigation measures outweighed the harm likely to be caused by the development was flawed and insufficiently reasoned.⁸³ Morrow explains how this requirement upholds "the integrity of the site"⁸⁴; consequently, one fundamental strength of the EU's network is that through conserving sites in this way, "the needs of migratory species"⁸⁵ are upheld.

However, development plans may still go ahead upon negative assessment. According to Article 6(4) of the Directive: a plan or project may still be carried out for imperative reasons of overriding public interest, including those of a social or economic nature. In permitting such activity, states are required to take all compensatory measures necessary to uphold the integrity of the Natura 2000.⁸⁶ According to Kleining, this provision is "weak" and is a contributing reason for the "deterioration of biodiversity across Europe"⁸⁷. This completely opposes the view of Warren who claims that European protected sites are widely thought to have been crucial in limiting the decline in biodiversity.⁸⁸ Ultimately, the Directive and provision must not be too detrimental given that the RSPB claim: "our species and habitats are in a better position than they would be without the Directives"⁸⁹; which is illustrated through scientific data and statistics

Does the domestic habitat conservation regime need the EU?

⁸⁰ *Wealden DC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 39

⁸¹ *Ibid*

⁸² Conservation of Habitat and Species Regulations [2017] reg 61

⁸³ *Wealden DC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 39

⁸⁴ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal

⁸⁵ *Ibid*

⁸⁶ Directive (EC) 92/43 EEC on the conservation of natural habitats and of wild fauna and flora [1992] Article 6(4)

⁸⁷ Bettina Kleining, 'Biodiversity protection under the habitats directive: Is habitats banking our new hope?' [2017] 19(2) Environmental Law Review

⁸⁸ Lynda Warren, 'New Approaches to Nature Conservation in the UK' [2012] 14(1) Environmental Law Review

⁸⁹ RSPB, *Defend Nature: How the EU Directives Help Restore Our Environment* [2015]

In England and Wales, the Natura 2000 sites are significantly protected domestically as SSSIs.⁹⁰ Therefore, the majority of the SSSIs are subject to the aforementioned protections seen under Article 6 of the Habitats Directive.

Currently, although the SSSI regime has improved markedly since 1949, the RSPB believe it is not strong enough without the additional protections offered by the Directives. Their 2015 report states that “the standard of protection for sites only subject to national protection remains lower than that afforded to Natura 2000 sites.”⁹¹ Furthermore, “damaging developments to non-Natura 2000 SSSIs continue to be consented to in circumstances that would not have met legal requirements⁹²” under the Habitats Directive. This therefore implies that the habitat protection system is legislatively strengthened by the EU.

However, other considerations must be measured in assessing the EU’s value. For example, the Chancellor in 2012 described the Habitats Directive as ‘a ridiculous cost on British businesses.’⁹³ This was criticised by the RSPB for being an “outdated economic outlook”⁹⁴. Furthermore, despite the Habitats Directive potentially being a ‘burden on business⁹⁵’, Morrow explains how the EU provide significant funding to domestic habitat protection⁹⁶. Morrow explains how the LIFE scheme was introduced in 1992 and funded the protection of habitats⁹⁷. The benefits of this scheme were discussed during a House of Lords debate of 2003 whereby it was stated that LIFE had “enabled improvements to be made to many Heathland SSSIs⁹⁸”. Therefore, the EU’s financial assistance has improved the habitat preservation regime.

However, Lynda Warren explains how recently, there has been a “move towards a more holistic approach in which the conservation of special sites and the protection of threatened species are just part of a wider agenda for managing biodiversity”⁹⁹ through a desire to provide “ecosystems goods and services”¹⁰⁰. Therefore, Warren is implying that UK legislatures are

⁹⁰ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal

⁹¹ RSPB, Defend Nature: How the EU Directives Help Restore Our Environment [2015]

⁹² Ibid

⁹³ https://www.clientearth.org/uk_implementation_of_the_habitats_directive_no_light_hearted_matter/

⁹⁴ RSPB, Defend Nature: How the EU Directives Help Restore Our Environment [2015]

⁹⁵ Lynda Warren, 'New Approaches to Nature Conservation in the UK' [2012] 14(1) Environmental Law Review

⁹⁶ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal

⁹⁷ Ibid

⁹⁸ HL DEB [10 Feb 2003] Vol 644 cc60-1WA

⁹⁹ Lynda Warren, 'New Approaches to Nature Conservation in the UK' [2012] 14(1) Environmental Law Review

¹⁰⁰ Ibid

only concerned with improving the habitat protection regime if it has positive financial impacts. Consequently, whilst the “small but vociferous minority¹⁰¹” call for reform due to the potential “blocked growth” given the Directive’s costs, the RSPB claim that “the nature Directives are good for business” and therefore reform is not necessary.¹⁰² Conversely, whilst the pecuniary impacts associated with the EU are polarising, one aspect of the international regime less debated was discussed by Douglas Evans; he stated that “as well as the site network, work towards the Natura 2000 has also had other benefits, not least increased scientific study of the habitats and species”.¹⁰³

As It has been established that the legislative regime has ultimately been strengthened by the EU nature Directives, the next section of this report shall discuss ways in which Brexit may impact the current domestic habitat conservation system, and suggest ways in which the system may be reformed in order to address these impacts.

Reforms in light of Brexit

The implications of Brexit are unclear. James Ageypong-Parsons claims that Brexit may “lead to a dilution of the Birds and Habitats Directives and a weakening of environmental enforcement.”¹⁰⁴ Conversely Kleining suggests retaining the Natura 2000; discussing how leaving the EU provides an opportunity to “evolve it to tackle some of its flaws.”¹⁰⁵ The RSPB believe bringing the Directives to full effectiveness through a “progressive approach” of their implementation is paramount.¹⁰⁶

However, according the Conservation of Habitats and Species (EU EXIT) (Amendment) Regulations 2019¹⁰⁷ which will amend the 2017 regulations upon Brexit finalisation, this appears to retain the Natura 2000, which reforms the regulations under Amendment 3A stating: that the Habitats Directive is to be construed for the purpose of these regulations as if any reference to the European territory to which the treaty applies included a reference to the United

¹⁰¹ RSPB, Defend Nature: How the EU Directives Help Restore Our Environment [2015]

¹⁰² Ibid

¹⁰³ Douglas Evans, 'Building the European Union's Natura 2000 network' [2012] 11(26) Nature Conservation

¹⁰⁴ Ageypong-Parsons J, 'Could Brexit Undermine The Birds And Habitats Directives?' (*Endsreport.com*, 2020) <<https://www.endsreport.com/article/1672350/brexit-undermine-birds-habitats-directives>> accessed 7 April 2020

¹⁰⁵ Bettina Kleining, 'The Future of the Natura 2000 network in Post-Brexit Britain', [2019] *Aberdeen Student Law Review*, vol 9

¹⁰⁶ RSPB, Defend Nature: How the EU Directives Help Restore Our Environment [2015]

¹⁰⁷ Conservation of Habitats and Species (EU EXIT) (Amendment) Regulations [2019]

Kingdom.¹⁰⁸ This provision shows that the UK still intend to follow the legislative measures enacted via the Habitats Directive and therefore the legislative protections under Article 6 will still be in place, ultimately retaining the strengthened levels of protections to SSSIs and European sites; accordingly, this proposal will be welcomed by the RSPB.

Furthermore, Trochet and Schmeller claimed that a large proportion of threatened species are “poorly covered by the Natura 2000.”¹⁰⁹ Therefore, following Brexit, another positive reform being implemented by the 2019 Regulations awards the Secretary of State the discretion to amend the Schedules in order to enable the correct protections to all species based off reliable data specific to England and Wales.

However, a potential reform would be to address legislative overlaps (as discussed in the Law Commission’s report)¹¹⁰, this may have been dealt with by passing a consolidating act. Wildlife and Countryside Link in 2005 suggested that England and Wales “incorporate amendments to the Wildlife and Countryside Act and the provisions of the Habitats Regulations.”¹¹¹ This would provide clarity to the law and would suffice the desire of Elliot Morley to “establish a clear understanding of the basic legislative regime for protecting and enhancing SSSIs.”¹¹²

Finally, leaving the European Union means that internationally, we are only bound by the “toothless” Bern Convention which “lacks the enforcement machinery” of the European Union as discussed above¹¹³. Therefore, the success of the habitat conservation regime after Brexit is dependent on how seriously the government are willing to prioritise habitat protection. This links to the economic debate too; Warren claims that there needs to be a “step change in our approach to wildlife conservation, from trying to hold on to what we have, to one of large scale habitat restoration.”¹¹⁴ For example, this may be achieved in a similar way to the USA; Trochet and Schmeller discuss how “in the US, bird protection has been recently modified and

¹⁰⁸ Conservation of Habitats and Species (EU EXIT) (Amendment) Regulations [2019] Amendment 3A

¹⁰⁹ Audrey Trochet and Dirk Schmeller, 'Effectiveness of the Natura 2000 network to cover threatened species' [2013] 1(1) Nature Conservation

¹¹⁰ Law Commission, Wildlife Law (Law Com No 362, 2015) para 1.8 p3

¹¹¹ Wcl.org.uk. (2005). *Review of Part 1 of the Wildlife and Countryside Act Response to the consultation document.* [online] Available at: https://www.wcl.org.uk/docs/Link_response_consultation_WCA_Part1_Review_23Mar05.pdf [Accessed 12 Feb. 2020].

¹¹² HL DEB [08 May 2003] vol 404 c37 ws

¹¹³ Agyepong-Parsons J, 'Could Brexit Undermine The Birds And Habitats Directives?' (*Endsreport.com*, 2020) <<https://www.endsreport.com/article/1672350/brexit-undermine-birds-habitats-directives>> accessed 7 April 2020

¹¹⁴ Lynda Warren, 'New Approaches to Nature Conservation in the UK' [2012] 14(1) Environmental Law Review

improved by crediting landowners who have adapted their land to cater for migratory and threatened species.”¹¹⁵

Conclusion

Overall, the effect that the EU has had on the current habitat regime is disputed, with Morrow ultimately claiming that “despite its almost thirty years existence, the full implications of the EU’s involvement in nature conservation have yet to be fully worked out.”¹¹⁶ Contrastingly, this paper has illustrated that whilst the SSSI system was previously flawed under the 1949 and 1981 Statutes and therefore required development, many of these detriments were addressed by the Countryside and Rights of Way Act 2000. This Act provided the conservation bodies with more enforcement powers with regard to the management of land. However, it must be contended that the Habitats Directive and Natura 2000 have provided additional and stronger protections to the designated sites. Also, the level of power contained in the EU has led to a pan-European policy shift towards focusing on habitats preservation, which has only improved the domestic regime, though whether the focus should be on protecting habitats or individual endangered species is a different matter. Finally, the extent of the EU’s stringency and enforcement has also resulted in the integrity of sites being upheld. Therefore, whilst the EU is not responsible directly for improving the previous flaws in the SSSI network, it did strengthen the legislative protections to these sites and enforce them severely. Ultimately, the success of the post-Brexit habitat conservation regime will depend on the government’s willingness to prioritise the system. If enforcement is strengthened and education is increased, then there is no reason why the framework should not thrive.

¹¹⁵ Audrey Trochet and Dirk Schmeller, 'Effectiveness of the Natura 2000 network to cover threatened species' [2013] 1(1) Nature Conservation

¹¹⁶ Karren Morrow, 'European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE' [2009] 17(13) National Italian American Bar Association Law Journal