

ERA – Access to justice in environmental matters

Workshop for Judges and Prosecutors. Budapest, 04–06 December 2024

Case Study on the role of a judge when dealing with environmental cases at the national level – preliminary ruling.

Working Groups – Mock Trial – Discussion of Findings

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1. Facts

1.1. Mr. White and Mr. Red are discovered by Tizio, an officer of the Local Police, in a Regional Natural Park during a general hunting ban. White is found in possession of firearms without reducers (prohibited equipment).

- **White** has four aquatic birds of the species *Garganey* (*Anas querquedula*), and a small roe deer, which he admits he has killed.
- **Red** is carrying a bird-trapping net, four dead finches, and one live finch. Upon a visual inspection of Red's nearby parked car, Tizio discovers two more nets and a dozen of dead finches.

1.2. Police officer Tizio is specialized in wildlife protection and was alerted by Mrs. Sempronia, a local resident and member of the association "United for the Environment".

1.3. The two men claim they know each other only casually and declare that they coincidentally ended up at the same location, having arrived separately by different means. They insist they hunted independently.

1.4. When questioned by the police officer, White claims he was unaware that the area was a Regional Park, due to the lack of signs. He states he did not know the hunting season's restrictions or the species of the birds he had killed. Tizio seizes White's firearm and the game he hunted and confirms that White possesses a hunting license.

1.5. The officer determines that Red has a hunting license. When questioned, he admits that he was aware of the boundaries of the Regional Park.

1.6. The seizures are validated by the judge.

1.7. Police investigations reveal that the mayor of the municipality in which the Regional Park is located had issued an *extra ordinem* ordinance permitting bird-trapping with nets as a method linked to local traditions during the relevant period. It is also discovered that a sign indicating the perimeter of the Regional Park exists

near the location where the suspects were found, but it is slightly faded and partially obscured by branches.

1.8. The association "United for the Environment" announces in a local newspaper its intention to join the case as a civil party, as does the informant, Mrs. Sempronia, in her own capacity. Additionally, Mrs. Martina, who does not reside near the protected area but is a member of the same association, also declares her intent to participate as a civil party in her own capacity.

1.9. Neither the State nor the Regional Park Authority intervene in the trial or ask for damages or other forms of restoration.

2. Charges Against Mr. White, Mr. Yellow, and Mr. Red

Working individually, workshop participants formulate the charges, identifying potentially applicable criminal offenses.

3. Working Groups in Preparation for the Mock Trial

Participants are divided into working groups:

- **Group 1 (Prosecutors):** Development of the prosecutorial strategy, assessment of relevant facts and legal issues, and preparation for possible trial examination.
- **Group 2 (Defense for the Accused):** Development of the defense strategy, assessment of relevant facts and legal issues, and preparation for possible trial examination.
- **Group 3 (Civil Parties):** Special focus on the legitimacy and interests of the association and individuals involved; preparation for possible trial examination.

4. Mock Trial

During the mock trial, attention is also given to evaluating the compliance of domestic legislation and practices with European law and case law. Participants assume the roles of trial parties or potential witnesses in a first-instance proceeding.

5. Plenary Discussion of the Results

Participants discuss the outcomes of the mock trial, focusing on the main legal issues, including those potentially relevant under European Union law and case

law, with special reference to preliminary ruling and judicial review by individuals and NGOs (concerning the civil parties of the trial). Together, they draft the reasoning framework of the first-instance judgment.

Annex 1

Ordinance of the Mayor of the Municipality of XXX, pursuant to Article 50, paragraph 5, of Legislative Decree No. 267 of 2000

Given the current crisis in the agri-food sector, due to economic and commercial circumstances linked to unpredictable market contraction phenomena;
considering that the onset of damage to crops caused by natural or biological phenomena significantly contributes to the crisis in the agricultural sector;
noting that, in particular, agricultural crops in areas adjacent to the YYY Regional Park, within the municipal territory, are damaged by the passage of wild animals, including deer and wild boar, and, to a greater extent, by the overpopulation of avian fauna;
noting that, regarding the latter, the ban on traditional activities typical of the local reality, such as bird trapping, has had the effect of preventing human control over the balanced protection of agricultural habitats, while respecting biodiversity;
noting that discussions with the Region and other competent bodies and administrations have not led to prompt solutions to the urgent need to protect agricultural crops;
considering the favorable technical opinion from the competent department and having consulted the producers' associations and the populations of the affected areas;
believing that urgent measures are needed, in derogation of current provisions, to contain the damage to agriculture caused by birds;
considering that selective hunting through traditional capture techniques is the most effective method for this purpose.

The Mayor orders

In derogation to the current legislation – in particular, Articles 3, 4, and 30 of Law No. 157 of 1992 – and in compliance with constitutional principles, general principles of the legal system, and European Union law (Article 9, paragraph 1, letter a, and paragraph 2, of Directive 2009/147/EC);

for the purpose of achieving more effective protection of the agricultural environment;

it is authorized, for the following periods of the year (xxx-yyy, www-zzz), the trapping of bird species normally hunted, in accordance with Article 18 of Law No. 157 of 1992, using traditional techniques known as "Roccolo," "Paretaio," and "Prodina," (hunting nets, ordinarily prohibited) with a limit of 25 specimens per day and 4 days per month.

Municipal police officers shall monitor the implementation of this order, specifically concerning the species actually hunted, adherence to traditional techniques, and the specified periods; they will also report the results of the checks to the relevant regional and national authorities.

The Mayor
Fulano

➤ **Relevant Italian Case Law (abstracts):**

- **Hunting theft:**

- **Cass. Section IV, no 13506 of March 04, 2020, Rv. 279135-01:** The crime of aggravated theft of wildlife to the detriment of the State's unavailable assets is applicable, despite the regulation of hunting activities by Law No. 157 of February 11, 1992, if the capture or even the mere killing of wildlife is committed by a person who is not in possession of a hunting license;
- **Cass. Section V, no 16981 of February 18, 2020, Rv. 279254-01:** The crime of aggravated theft of wildlife to the detriment of the State's unavailable assets is still applicable, even after the enactment of Law No. 157 of February 11, 1992, which regulates hunting activities, if the capture or even the mere killing of wildlife is committed by a person who does not possess a hunting license. (Case concerning bird trapping);
- **Cass. Section V, no 48680 of June 06, 2014, Rv. 261436-01:** The crime of aggravated theft of wildlife to the detriment of the State's unavailable assets is applicable, despite the regulation of hunting activities by Law No. 157 of February 11, 1992, if the capture or mere killing of wildlife is committed by a person who does not possess a hunting license;
- **Cass, Section IV, no. 34352 of May 24, 2004, Rv. 229083-01:** The crime of aggravated theft of wildlife to the detriment of the State's unavailable assets is still applicable under Law No. 157 of 1992 in cases where the capture or simple killing of wildlife is carried out by a person who does not possess a hunting license.

- **Signposting of regional protected areas:**

- **Cass. Section III, no 13357 of February 27, 2020, Rv. 279378-01:** Hunting in an area designated as a nature reserve constitutes a violation of Article 30, first paragraph, letter d), of Law No. 157 of February 11, 1992, when an additional provision to the criminal provision, contained in a regional law or in a regional administrative order, has properly included the area in question within a regional nature reserve, a protection oasis, or a regional repopulation zone, and has consequently qualified it as an area where hunting is prohibited;
 - **Cass. Section III, no 35195 of March 30, 2017, Rv. 270681-01:** Hunting restrictions and the prohibition of entry with weapons in a protected area located within a regional park are effective and enforceable against private individuals, provided that the area is delimited by appropriate signage that makes its

boundaries visible, or that, if the signage is missing or unclear, the prosecution demonstrates that the offender was aware of the ban within the area, as such awareness cannot be presumed. (In the reasoning, the Court clarified that the regulations set forth in Article 10 of Law No. 394 of December 6, 1991, for Regional parks, being of a derogatory nature with respect to the general principle, are not applicable to regional parks or other protected areas under regional jurisdiction; in this case, it concerned the Partenio Regional Park, established by the Campania Region's Giunta resolutions No. 780 of November 6, 2002, and No. 1405 of April 12, 2002);

- **Cass. Section III, no 17102 of March 08, 2016, Rv. 266638-01:** In the context of hunting, the prohibition of hunting activity in regionally protected natural areas is presumed to be known if the areas are marked with proper signage, so that the offender, except in exceptional cases, cannot claim ignorance of the prohibition as a defense. However, the absence or inadequacy of signage does not automatically prevent the offense under Articles 21 and 30 of Law No. 157 of 1992 from being established, placing the burden of proof on the prosecution to demonstrate that, despite the lack of signs, the offender was still aware of the prohibition.

- **Legitimacy of environmental associations to join as civil parties in criminal proceedings related to hunting or animals:**

- **Cass. Section II, no 10215 of December 10, 2018, (dep. 2019), Rv. 276500 – 01:** An association has the legitimacy to join as a civil party and claim compensation "iure proprio" for damages, both pecuniary and non-pecuniary, resulting from a crime that harms the interest, as per its statutory provisions, which constitutes the fundamental reason for its existence. However, the recognition of the right to compensation is subject to the demonstration, by the entity, following ordinary civil law rules, of the actual existence of the damage and its derivation from the alleged unlawful act. (This case concerns attempted extortion, where the Court upheld the decision of the appellate judge to annul the compensation orders made by the trial court, which were based on an abstract consideration of the potential impact of the defendant's conduct in the area where the association operated);

- **Cass. Section VI, no 3606 of October 20, 2016, (dep. 2017), Rv. 269349 – 01:** Environmental associations are entitled to join as civil parties – "iure" proprio – in proceedings for environmental crimes, both as holders of a personal right connected to the pursuit of statutory objectives and as entities representing the right to environmental protection. This applies even to crimes

committed in connection with or with the aim of violating regulations aimed at protecting the environment and the territory. (In applying this principle, the Court recognized the legitimacy of the W.W.F. to join as a civil party and, consequently, to appeal to the Court of Cassation for civil purposes, in a case concerning the crime of illegal land subdivision, carried out through the issuance of a building permit obtained through corruption);

- **Cass. Section III, no 52031 of October 4, 2016; Rv. 268777 – 01:** In the context of crimes committed against animals, Article 7 of Law No. 189 of July 20, 2004, by attributing "ope legis" to associations and entities identified by the decree of the Minister of Health of November 2, 2006 – for the custody of animals subject to seizure or confiscation orders – with the aim of protecting the interests harmed by the crimes covered by the same law, does not exclude the right of other associations, even if unrecognized, pursuing the same objective, to join as civil parties, provided they claim to have suffered direct harm from the crime;

- **Cass. Joined Sections, no 38343 of April 24, 2014 , Rv. 261110 – 01:** The constitution of a civil party by an association, even if unrecognized, is admissible if it asserts, "iure proprio," a claim for compensation, alleging to have suffered a patrimonial or non-patrimonial harm as a result of the crime. This harm consists in the offense to the interest pursued by the association, which is stated in its statute as the institutional reason for its existence and actions, meaning that any attack on this interest is considered a violation of a subjective right inherent to the personality or identity of the entity. (In this case, the Court recognized the legitimacy of the association "Medicina Democratica - Movimento per la salute - Onlus" to join as a civil party, which statutorily aims to protect workers' health in the workplace, in a case regarding the death of employees due to the violation of accident prevention regulations).

- In the field of environmental protection, the legal standing *ex lege* of nationally recognized environmental protection associations does not require verification, while the standing of other associations must be ascertained on a case-by-case basis, with regard to the existence of three conditions: the statutory pursuit of environmental protection goals not being occasional, possession of adequate representativeness and stability, and focus on an area linked to the affected zone. This is established by the **Council of State, Section V, ruling No. 3885 of May 17, 2022.**

- **Confiscation of hunting rifles:**

- **Cass. Section III, no 34944 of July 09, 2015; Rv. 264453 – 01:** In matters of hunting, the confiscation of firearms used to commit hunting-related

offenses can only be ordered in the case of a conviction for the offenses referred to in Article 28, paragraph 2, Law No. 157 of 1992, excluding all other hypotheses. (In this case, the Court considered the confiscation of a rifle following a conviction under Article 30, letter h), to be unlawful, as it was not covered by the aforementioned Article 28).

➤ **Relevant CJEU Case Law (abstract):**

Case C-900/19

**One
and**

Voice

Ligue pour la protection des oiseaux

v

Ministre de la Transition écologique et solidaire

(Request for a preliminary ruling from the Conseil d'État (France))

Judgment of the Court (First Chamber), 17 March 2021

(Reference for a preliminary ruling – Environment – Directive 2009/147/EC – Conservation of wild birds – Articles 5 and 8 – Prohibition of the use of any method of capture of birds – Article 9(1) – Authorisation to use, by way of derogation, a traditional method of capture of birds – Conditions – No other satisfactory solution – Preservation of that traditional method as the sole justification for the absence of an 'other satisfactory solution' – Selectivity of catches – National legislation authorising the capture of birds using limes)

1. *Environment – Conservation of wild birds – Directive 2009/147 – Implementation by Member States – Derogations from the prohibition of the killing or capturing of protected species – Conditions – No other satisfactory solution – Requirement to provide a detailed statement of reasons based on the best relevant scientific knowledge*

(European Parliament and Council Directive 2009/147, Art. 9(1) and (2))

(see paragraphs 29-32)

2. *Environment – Conservation of wild birds – Directive 2009/147 – Implementation by Member States – Derogations from the prohibition of the killing or capturing of protected species – Conditions – No other satisfactory solution – Traditional nature of a method of capture of birds insufficient, in itself, to establish that there is no other satisfactory solution*

(European Parliament and Council Directive 2009/147, Art. 9(1) and (2))

(see paragraphs 35-44, operative part 1)

3. *Environment – Conservation of wild birds – Directive 2009/147 – Implementation by Member States – Derogations from the prohibition of the killing or capturing of protected species – Conditions – Judicious use of certain birds in small numbers – Requirement of the selectivity of catches – Non-lethal method of capture – Criteria – By-catch, of a limited size and for a limited period, released without sustaining harm other than negligible harm*

(European Parliament and Council Directive 2009/147, Art. 9(1)(c))

(see paragraphs 52-71, operative part 2)

Résumé

A Member State may not authorise a method of capture of birds leading to by-catch where that by-catch is likely to cause harm other than negligible harm to the species concerned

The fact that a method of capture of birds, such as the method of hunting using limes, is traditional is not, in itself, sufficient to establish that another satisfactory solution cannot be used instead

The associations One Voice and the Ligue pour la protection des oiseaux (League for the Protection of Birds) oppose the use of limes for the purpose of capturing birds. They have challenged, before the Conseil d'État (Council of State, France), the legislation authorising the use of limes in certain French departments. (1) In support of their actions, the two associations have alleged infringement of provisions of the Birds Directive (2), in particular, Article 9 thereof, which lays down the requirements and conditions under which the competent authorities may derogate, inter alia, from the prohibition of hunting using limes, which is laid down in Article 8 and in point (a) of Annex IV to that directive.

In those circumstances, the Conseil d'État (Council of State) has referred questions to the Court of Justice about the interpretation of those provisions of the Birds Directive. In its judgment, the Court provides clarification on the possibility for the competent authorities to derogate from the prohibition, laid down in Article 8 of that directive, of certain methods of capture of protected birds in the context of hunting activities.

Findings of the Court

In the first place, the Court holds that Article 9(1) and (2) of the Birds Directive must be interpreted as meaning that the fact that a method of capture of birds is traditional is not, in itself, sufficient to establish that another satisfactory solution, within the meaning of that provision, cannot be substituted for that method.

In its judgment, it notes, first of all, that, when applying the derogating provisions, the Member States are required to ensure that all action affecting protected

species is authorised solely on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Birds Directive. In that regard, it is stated that national legislation making use of a derogation does not fulfil the conditions relating to the obligation to state reasons where it merely states that there is no other satisfactory solution, that statement not being supported by a detailed statement of reasons based on the best relevant scientific knowledge.

Next, the Court notes that, although traditional methods of hunting may constitute 'judicious use' authorised by the Birds Directive, the preservation of traditional activities cannot, however, constitute an autonomous derogation from the system of protection established by that directive.

Lastly, the Court notes that, when determining that there are no other satisfactory solutions, the competent authority must compare the various solutions that fulfil the conditions of the derogation in order to determine the solution that appears to be the most satisfactory. For that purpose, since, in formulating and implementing the European Union's policies in certain areas, the European Union and the Member States are, pursuant to Article 13 TFEU, to pay full regard to the welfare requirements of animals, the satisfactory nature of the alternative solutions must be assessed in the light of the reasonable options and the best available techniques. The Court points out that such solutions appear to exist. It has already held that the breeding and reproduction of protected species in captivity may, if they prove to be possible, constitute another satisfactory solution and that the transport of birds which have been lawfully captured or kept also constitutes judicious use. In that regard, the fact that the breeding and reproduction of the species concerned in captivity are not yet feasible on a large scale by reason of the national legislation is not, in itself, capable of calling into question the relevance of those solutions.

In the second place, the Court holds that Article 9(1)(c) of the Birds Directive must be interpreted as precluding national legislation which authorises, by way of derogation from Article 8 of that directive, a method of capture leading to by-catch where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.

The Court notes that the Member States may derogate from the prohibition of certain methods of hunting, provided, *inter alia*, that those methods permit the capture of certain birds on a selective basis. In that regard, it states that, for the purpose of assessing the selectivity of a method, it is necessary to consider not only the details of that method and the size of the catch that it entails for the non-

target birds, but also its possible consequences for the species captured in terms of the harm caused to the birds captured.

Accordingly, in the context of a non-lethal method of capture leading to by-catch, the condition of selectivity cannot be satisfied unless that by-catch is limited in size, that is to say, it concerns only a very small number of specimens captured accidentally for a limited period, and they can be released without sustaining harm other than negligible harm. However, the Court states that it is highly likely, subject to the findings ultimately made by the Conseil d'État (Council of State), that, despite being cleaned, the birds captured sustain irreparable harm, since limes are capable, by their very nature, of damaging the feathers of any bird captured.

[1](#) That legislation concerns five decrees of 24 September 2018 on the use of limes for the capture of thrushes and blackbirds intended for use as decoys during hunting seasons in certain French departments (JORF of 27 September 2018, texts Nos 10 to 13 and 15) and a decree of 17 August 1989 on the same subject matter (JORF of 13 September 1989, p. 11560).

[2](#) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive').