



Species protection under the Birds and Habitats Directives

Key provisions and surrounding case law

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species-based protection system = second pillar of the EU nature conservation regime

Brief recap on objectives of the Directives

Habitats Directive:

- To ensure that these species and habitat types are maintained at, or restored to, a '**favourable conservation status**' (Article 2).

Birds Directive:

- to maintain the populations of all wild bird species in the EU at a **level which corresponds to their ecological, scientific and cultural requirements**, or to adapt the population of these species to that level (Article 2)

Species protection under the Habitats Directive

Articles 12-16 of the Habitats Directive



When it comes to the species-based protection, both of these Directives have their respective specificities, but as with the site-based protection there is a desire from the CJEU to ensure aligned interpretation.

Context

- Logic- protection of identified species in the territory of the MS, including outside Natura 2000 sites.
- Of particular importance for those species whose main threats or pressures relate to exploitation (killing/capture/sale).

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the idea with the species-based protection is to ensure protection of these important species throughout the territory of the member states, including outside Natura 2000. -> this applies irrespective of the Natura 2000 of particular importance to those species whose main threats are related to exploitation, such as hunting, and may not be so relevant for habitat loss.

Guidance document
on the strict
protection of animal
species of
Community interest
under the Habitats
Directive

- very clear explanation of the strict species protection obligations under the Habitats Directive
- covers the derogation procedure under article 16, the case law, and
- gives some practical examples of best practices

Three types of provision



Prohibitions (Article 12 & 13)

Annex IV

Managed exploitation (Article 14)

Annex V

Derogations (Article 16)

6 Miron & Cashman, European Union Case Law on the Birds and Habitats Directive (2023)

3 types of provisions:

1. prohibitions which can be described as strict protection requirements under articles 12 (animal species and fauna species) and 13 (flora species) - we'll focus mostly on article 12 because I think that all the the considerations that are relevant for 13 are equally applicable to article 12

2. managed exploitation of species which are listed in Annex V → lower level of protection where the logic is sort of flipped: it's not about what's prohibited in a sense. It's about ensuring that what is permitted, which can include the hunting or killing or capture of a species, is in line with their maintenance at a favourable conservation status.

3. Derogations → limited circumstances in which you can derogate from articles 12, 13 and 14 of the Directive

Articles 12 & 13 Habitats Directive

Strict protection of species in Annex IV

Article 12: fauna

Article 13: flora

Case C-6/04, Commission v. UK

A coherent whole

112. Articles 12, 13 and 16 of the Habitats Directive form **a coherent body of provisions** intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16.

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if you breach article 12, you're also in breach of article 16 because you have not gone through the appropriate derogation procedure → they are mutually enforcing and are all part of one kind of homogenous system, let's say. So we'll look specifically

Article 12

- 1) ‘**establish a system of strict protection** for the animal species listed in Annex IV (a)’ ‘in their natural range’
 - (a) all forms of **deliberate capture or killing** of specimens of these species in the wild;
 - (b) **deliberate disturbance** of these species, particularly during the period **of breeding, rearing, hibernation and migration**;
 - (c) **deliberate destruction or taking of eggs** from the wild;
 - (d) **deterioration or destruction of breeding sites or resting places**.
- 2) For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.
- 3) The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply **to all stages of life** of the animals to which this Article applies.
- 4) Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

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list of prohibitions for species which are listed in Annex IV and should be protected from.

Article 12(3) clarifies that all of these protections apply at **all stages of life**. Article 12(4) mechanism covering incidental capture killing/non-deliberate capture or killing

Case C-504/14, Kyparissia

Both legal framework & concrete measures

140 The Court has already held that the transposition of [Article 12(1)(b) and (d)] requires the Member States **not only to adopt a comprehensive legislative framework but also to implement practical and specific protection measures** in that regard and that the system of strict protection presupposes the adoption of **coherent and coordinated measures of a preventive nature** (judgment of 15 March 2012, *Commission v Cyprus*, C-340/10, EU:C:2012:143, paragraphs 60 and 61 and the case-law cited).

141 **A collection of legal instruments does not constitute a comprehensive legislative and regulatory framework** [...] when the instruments must regularly be supplemented so that the protection required by Article 12 of the directive can be ensured.

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Case from Greece that related to the protection of sea turtles on a small Greek island:

- There was a problem with the use of mopeds and also some commercial activities that were being conducted on beaches.
- Beaches are very important for turtles as they come onto the land and they lay their eggs and they're in a very vulnerable position at that stage in their life lifecycle.
- The Commission intervened to ensure that there is a better management and protection of those species. They observed that there are sort of two elements to this:
 - 1. adopt a comprehensive legal framework
 - 2. have coherent measures of a preventive nature that actually lead to a change in behaviour

A collection of legal instruments does not constitute a comprehensive legislative framework.

Case C-441/17, Białowieża Forest A preventive system

231 In order to comply with that provision, the Member States must not only adopt a comprehensive legislative framework but also implement concrete and specific protection measures. Similarly, the system of strict protection **presupposes the adoption of coherent and coordinated measures of a preventive nature**. Such a system of strict protection must therefore **enable the actual avoidance of deliberate capture or killing** in the wild, and of deterioration or destruction of breeding sites or resting places, of the animal species listed in Annex IV(a) to the Habitats Directive (see, to that effect, judgment of 9 June 2011, Commission v France, C-383/09,

¹¹ EU:C:2011:369, paragraphs 19 to 21)

In a similar case, related to the *Białowieża* forest in Poland, there was found to be an obligation that there needs to be actual avoidance

→ where you have all of the laws in place but there are still deforestation occurring, that's still a breach of the law. It's not just about the efforts that are taken, it's about ensuring results in a sense.

Cases C-473/19 and 474/19, Skydda Skogen Relevance of conservation status

55 The fact remains that the definition of the 'conservation status of a species' under Article 1(i) of that directive refers expressly to 'abundance of ... populations [of a species]' and not to the particular situation of an individual member or specimen of that species, with the result that that **conservation status is determined or assessed in particular with regard to the populations of the species concerned.**

56 Furthermore, as regards Article 12(1)(b) of the Habitats Directive, which prohibits the deliberate disturbance of species, particularly during the period of breeding, rearing, hibernation and migration, it should be noted that, in so far as it seeks to stress the increased importance of that prohibition during periods in which specimens are particularly vulnerable, in particular in relation to their ability or success in breeding, and disregard of which is thus especially capable of adversely affecting the conservation status of the species concerned, that provision, in accordance with its very wording, does not preclude thereby the possibility that activities which do not bring about such a risk may, as appropriate, come within its scope.

57 **It follows that the implementation of the protection system laid down in Article 12(1)(a) to (c) of the Habitats Directive is not subject to the condition that a given activity causes a risk of an adverse effect on the conservation status of the animal species concerned.**

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Interestingly, with strict protection under Article 12 and the species that are listed in Annex IV, conservation status will be of no importance in terms of the protection status that is afforded to them. → even if a species is very abundant in a member state and it happens to be listed in Annex IV, that species will still be afforded that very strict level of protection under Article XII and so it does not need to give rise to a risk of an adverse effect on the conservation status of the animal concerned.

If it happens, if there is a killing or a capture, it doesn't matter what the impact is, it's still a breach of Article 12.

Case C-88/19, *Alianta pentru combaterea abuzurilor* Territorial scope

48 In addition, **it would be incompatible with that objective to deny protection to specimens of protected animal species systematically where their ‘natural range’ extends to areas of human settlement.**

49 However, an interpretation to the effect that the ‘natural range’ of such species, to which reference is made in Article 12(1) of the Habitats Directive, also includes areas located outside protected sites and that the resulting protection is therefore not restricted to those sites is such as to allow the objective of prohibiting the killing or capture of specimens of protected animal species to be achieved. **The aim is to protect such species not only in certain restrictively defined places but also the specimens of those species living in the wild or as wild animals and thus performing a function within the natural ecosystems.**

Annex IV regional exceptions for *Canis lupus* (wolf), *Lynx lynx*, *Castor fiber* (beaver), etc.

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In terms of the territorial scope, the CJEU has taken quite an expansive view on this.

case from Romania:

- an individual wolf that had started to integrate into a local dog population in the village and was playing with the dogs and feeding with them and the view was taken that it was not in its natural range and as a result they tranquilized the wolf and then moved it away and put it into captivity for a period, based on the fact that the Article 12 makes a reference to the natural range of the species
- CJEU: found Romania in breach for this, because **it would be incompatible with that objective to deny protection to specimens of protected animal species systematically where their ‘natural range’ extends to areas of human settlement**

Annex IV species: there are some regional exceptions to this: eg the wolf is strictly protected in the EU with the exception of certain member states for example Latvia and Estonia and even within certain member states there are some regional exceptions which you can see in Annex IV.

Case C-221/04, *Commission v. Spain* Deliberateness in Article 12(1)(a)-(c)

71 For the condition as to ‘deliberate’ action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species **or, at the very least, accepted the possibility of such capture or killing.**

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The court's taken quite a pragmatic approach here: deliberateness is not just about knowing and actively deciding to kill or capture a species, but at the very least, where an actor has accepted the possibility of such a capture or killing, that will be enough to amount to deliberateness within the meaning of Article 12.

Cases C-473/19 & C-474/19, Skydda Skogen Sectoral activities

52 In particular, the Court has categorised as deliberate disturbance, within the meaning of Article 12(1)(b) of the Habitats Directive, matters such as the use of mopeds on a beach notwithstanding warnings as to the presence of protected sea turtles' nests and the presence of pedalos and small boats in the sea area of the beaches concerned, and has held that a Member State fails to fulfil its obligations under Article 12(1)(b) of that directive in cases where it does not take all of the specific measures necessary to prevent the deliberate disturbance of the animal species concerned during its breeding period.

53 Consequently, **the prohibitions listed in Article 12(1)(a) to (c) of the Habitats Directive are capable of applying to an activity, such as forestry work or land development, the purpose of which is manifestly different from the capture or killing, disturbance of animal species or the deliberate destruction or taking of eggs.**

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When we think about a killing of a species within the meaning of Article 12(1)(a), you might think of a hunter going out with the gun and picking a specimen and shooting them. But it also relates to sectoral activities, which can cover forestry, work, or land development, which even though their purpose isn't to capture killing of a species, they are still subject to Article 12(1)(a) or (b) and (c).

Article 12(1)(d): deterioration or destruction of breeding or resting places

- Applies to the habitats of the species as opposed to the individuals, differing from Article 12(1)(a)-(c).
- Requires measures to be put in place which protect the physical space in which the species are found, as well as their ecological functionality.
- Also applies to **non-deliberate** deterioration or destruction.

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it covers non-deliberate deterioration destruction → wider scope if you will and it relates to the protection of a physical space for the for those species

Kind of like a site -based protection in some ways though less permanent, than the Natura 2000 network.

Breeding or resting places → questions because it is a vague term, species can rest in a lot of different places, that doesn't necessarily mean that it's important or should be subject to Article 12(1)(d).

Case C-477/19, Magistrat der Stadt Wien

Resting places

29 It follows that the aim of the strict protection offered by Article 12(1)(d) of the directive is to ensure that significant parts of the habitats of protected animal species are preserved so that those **species can enjoy the conditions essential for, inter alia, resting in those habitats.**

30 The same conclusion follows from a reading of the Commission guidance document referred to in paragraph 15 above, which states that resting places — defined as **the areas essential to sustain an animal or group of animals when they are not active** — ‘**also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these ... places**’.

31 Consequently, it is apparent from the context of Article 12(1)(d) of the Habitats Directive that resting places which are no longer occupied by a protected animal species must not be allowed to deteriorate or be destroyed since that species may return to such places.

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CJEU case, European Hamster:

- a developer wanted to or did build an apartment complex on an area where it was known that there were European hamster burrows, and he argued in the case that they weren't present in the burrows at the time that the construction occurred

- CJEU:

- when it comes to what a resting place is, it is an area in which species can enjoy the essential, have the conditions which are essential for resting in those habitats.

- these areas are still subject to that protection, even when they are not actively used, but where there's a reasonably high probability that the species could return to these places.

Article 12(4): Incidental capture or killing

- Incidental capture and killing of Annex IV species must be monitored.
- Based on that data, Member States must act in order to ensure that these incidental captures and killings do not have a significant negative impact.
- Case [C-308/08, Commission v. Spain](#), measures to prevent incidental killing of Iberian lynx following upgrading of a road.

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Eg vehicular collisions

there is still an impact potentially on the conservation status of the species → that has to be taken into account when you're looking at enforcing and implementing the Directive.

As a result Article 12(4) requires that the member states monitor these incidental killings and capturings of species and based on the information that they have from this monitoring exercise they must either conduct further research or take measures to address the incidental capture killing.

Spanish case related to the Iberian lynx:

- issue with Iberian lynx being hit by cars in a certain part of Spain
- some of the measures which they considered which would be appropriate would be
 - lowering the speed limit in the area or
 - including fencing along these roads.

Article 14

Sustainable use and management of species in Annex V



Article 14(1)

“If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, **they shall take measures to ensure that the taking in the wild of specimens of species** of wild fauna and flora listed in **Annex V** as well as their **exploitation is compatible with their being maintained at a favourable conservation status.**”

‘where an animal species has an unfavourable conservation status [...] the competent authority must [...] take measures within the meaning of Article 14 of the Habitats Directive in order to improve the conservation status of the species’

²⁰ Case [C-436/22, ASCEL](#), paragraph 70.

The language gives a lot of latitude to the Member States → I think that this is why a lot of people didn't pay too much attention to Article 14 because it's very hard to enforce as a result

CJEU: strong rulings regarding the objectives of the Directive → restrictive view of Article 14.

Article 14: surveillance

- '[Article 11] surveillance is essential in order to ensure compliance with the conditions laid down in Article 14...'

Case [C-436/22, ASCEL](#), paragraph 59.

- Surveillance must be 'undertaken systematically and on a permanent basis'

Case [C-6/04, Commission v. United Kingdom](#), paragraph 68.

- Precautionary principle: 'if [...] there remains uncertainty as to whether the exploitation of a species of Community interest is compatible with the maintenance of that species at a favourable conservation status. The Member State concerned must refrain

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→As a result, I think that the surveillance of conservation status becomes an extremely important element for the implementation of Article 14, where it isn't so important, perhaps, for the implementation of Article 12.

→And indeed the Court acknowledges that surveillance is absolutely essential for the implementation of Article 14, and must be conducted systematically and on a permanent basis

→precautionary principle

Article 14: there are certain types of measures that may be appropriate for ensuring the conservation status is maintained for those species in Annex V, eg 'hunting'.

Article 16

System for derogation from species protection requirements in the Habitats Directive



This has been the subject of also a lot of litigation.

Article 16: Three tests

1. Demonstration of at least one of the reasons listed in Article 16(1)(a)-(d), or the circumstance in (e);

2. Absence of a satisfactory alternative; and

3. The derogation must not be detrimental to the maintenance of populations at a favourable conservation status.

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There are three tests or three standards that need to be met if you want to avail yourself of the derogation and allow yourself to do something that would otherwise have been prohibited by either article 12, 13, or 14.

Case C-674/17, Tapiola Article 16 strictly applied

30 It must also be noted that Article 16(1) of the Habitats Directive, which defines in a precise and exhaustive manner the circumstances in which Member States may derogate from Articles 12 to 14 and Article 15(a) and (b) thereof, **constitutes an exception to the system of protection provided for by that directive, which must be interpreted restrictively** (see, to that effect, judgments of 20 October 2005, *Commission v United Kingdom*, C-6/04, EU:C:2005:626, paragraph 111 and of 10 May 2007, *Commission v Austria*, C-508/04, EU:C:2007:274, paragraphs 110 and 128) and **which imposes on the authority taking the decision the burden of proving that those conditions are present for each derogation** (see, by analogy, judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 34).

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Because it is a derogation from a system of protection it has to be applied strictly and the Court in its jurisprudence has reflected that these provisions should be read very restrictively in that they should ensure that there is alignment with the objectives of the Directive at all times.

→ burden of proof imposed on the authorities to show that each of the conditions are present for the derogation that is being requested.

Test 1: Article 16(1)(a-e)

Demonstrate one of the following:

- a) In the interest of protecting wild fauna and flora and conserving natural habitats;
- b) To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- c) In the interests of public health and public safety, or for **other imperative reasons of overriding public interest**, including those of a social or economic nature and beneficial consequences of primary importance to the environment;
- d) For the purpose of research and education, of repopulating and reintroducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants
- e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

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The language there is very, very strict, and that's to reflect the fact that this doesn't actually pursue any objective unlike sub-paragraphs a to d. It is a limited exception which doesn't require a stated objective but can nonetheless be qualified based on this very high standard of proof

Case C-342/05, Commission v. Finland Article 16(1)(b) Preventing serious damage

40 As regards the complaint by the Commission relating to the fact that hunting permits are issued on a preventive basis or, in any event, without any relationship with the particular wolves causing serious damage being duly established, it must be observed, as the Advocate General has also noted in point 29 of her Opinion, that Article 16(1) of the **Habitats Directive does not require serious damage to be sustained before derogating measures can be adopted.**

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CJEU: there doesn't need to have been sustained serious damage before the derogating measure can be adopted → there doesn't need to have been any damage incurred beforehand and it doesn't need to have been sustained for that matter either.

Case C-601/22, WWF Österreich

Article 16(1)(b) Preventing serious damage II

71 However, it is also necessary, as the Commission points out, in essence, in point 3-24 of its Guidance document, that, first, **that future damage is not purely hypothetical**, which **must be demonstrated by evidence**, and, second, it must be, **at least largely attributable to the animal species targeted by the derogation**.

72 In the present case, as has been stated in paragraph 68 of the present judgment, the category of damage set out by the referring court in the context of the third question does not relate to specific economic interests, but to possible long-term macroeconomic developments, with the result that it is more akin to an abstract risk, the high probability of occurrence of which has not been demonstrated.

73 Furthermore, **to accept that such damage, which is not attributable to the specimen of the wolf population** which is the subject of the derogation provided for in Article 16(1)(b) of the Habitats Directive and which may be caused by various and multiple causes, **may fall within the scope of that provision would be tantamount to disregarding the requirement**, referred to in paragraph 71 of the present judgment, **of a causal link between**, on the one hand, the grant of the derogation and, on the other hand, the damage caused by the animal species concerned by that derogation.

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Case referred from Austria: set limits on what serious damage can mean →

- it cannot be purely hypothetical,
- there must be some demonstrated evidence
- it must be at least largely attributable to the animal species that is targeted by the Directive
- → while there is no obligation so the damage has occurred, it can't be completely hypothetical, and it has to relate to the species at issue (causal link)
- Otherwise, it becomes very easy to circumvent the requirements of Article 12.

Case C-674/17, Tapiola

Article 12(1)(e)- stricter application

34 As regards, in the first place, the objective of a derogation granted under Article 16(1) of the Habitats Directive, it must be noted that, **whereas subparagraphs (a) to (d) of that provision set out the objectives of each derogation provided therein**, that is to say the interest of protecting wild fauna and flora and conserving natural habitats (point (a)), the prevention of serious damage (point (b)), the interest of public health and public safety and the overriding public interest (point (c)), research and education, repopulating and re-introducing species (point (d)), **that is not the case as regards subparagraph (e) of that provision, which does not set out an objective pursued by the corresponding derogation.**

35 Moreover, derogations based on Article 16(1)(e) of the Habitats Directive, as compared with those referred to in Article 16(1)(a) to (d) of that directive, **must satisfy additional conditions.** They allow, under **strictly supervised conditions**, on a **selective basis** and to a **limited extent**, the taking or keeping of certain specimens of the species listed in Annex IV to that directive in **limited and specified numbers.**

36 Therefore, **Article 16(1)(e) of the Habitats Directive cannot serve as a general legal basis** for granting derogations from Article 12(1) of that directive, **without depriving the other situations covered by Article 16(1) thereof as well as the system of strict protection of their effectiveness.**

37 Consequently, the objective of a derogation based on Article 16(1)(e) of the Habitats Directive cannot, in principle, be confused with the objectives of the derogations based on Article 16(1)(a) to (d) of that directive, with the result that the former provision can only serve as a basis for the grant of a derogation in cases where the latter provisions are not relevant.

38 In any event, **derogations granted under Article 16(1) of that directive must not, taken as a whole, produce effects that are contrary to the objectives pursued by that directive**, as set out in paragraph 25 of the present judgment.

28

there are additional criteria that need to be satisfied

this **cannot** serve as a general legal basis

→ All of these derogations must still then be in line with the objectives of the directive as a whole.

Test 2: Absence of a satisfactory alternative

Under this test, the Court has set out three questions that must be asked:

- **What is the problem or specific situation that needs to be addressed?**
- **Are there any other solutions?**
- **If so, will these solutions resolve the problem or specific situation?**

Employed by the Court for the purposes of Article 9 of the Birds Directive in Case [C-10/96, Ligue royale belge pour la protection des oiseaux ASBL](#)

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This requires a well-documented assessment of all possible available

Case C-674/17, Tapiola Obligation to state reasons

49 Further, it must be noted that Article 16(1) of the Habitats Directive requires the Member States **to provide a clear and sufficient statement of reasons as to the absence of a satisfactory alternative** by means of which the objectives relied upon in support of a derogation could be achieved (see, to that effect, judgment of 14 June 2007, *Commission v Finland*, C-342/05, EU:C:2007:341, paragraph 31).

50 That **obligation to provide a statement of reasons is not met when the derogation decision does not contain any reference to the absence of any other satisfactory solution or any reference to relevant technical, legal and scientific reports to that effect** (see, by analogy, judgments of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 14 and of 21 June 2018, *Commission v Malta*, C-557/15, EU:C:2018:477, paragraphs 50 and 51).

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obligation to state the reasons why you have picked a certain option as opposed to some other ones: must be a clear and sufficient statement of reasons as the absence of an alternative

!! quite crucial in terms of ensuring legal certainty and showing that the authority has made that effort and has satisfied its requirements under the 2nd test of Article 16

+ they should also make reference to technical, legal and scientific reports, so similar to this requirement that you use the best available science.

Test 3: Impact of the derogation on conservation status

- Two elements:
 - Assess the conservation status of the specific population in its natural range
 - Evaluate the potential impact of the derogation on the conservation status of the specific population

Case C-674/17, Tapiola

Level of assessment of status

59 Moreover, as the Advocate General observed in point 83 of his Opinion, the **assessment of the impact of a derogation at the level of the territory of a local population is generally necessary in order to determine its impact on the conservation status of the population concerned** on a larger scale. In so far as such a derogation must, in accordance with the observations set out in paragraph 41 of the present judgment, deal with specific requirements and specific situations, the **most direct effects of such a derogation** are generally felt in the local area to which it relates. Moreover, as can be seen from the documents before the ³² Court, the conservation status of a population at national or biogeographical level depends also on the cumulative impact of the

very controversial issue which has been before the court a few times → the level at which you conduct this assessment.

!! While a species can be considered a favourable conservation status at the European level,

Case C-674/17, Tapiola

Species in unfavourable conservation status

68 Secondly, as regards **the effect of an unfavourable conservation status** of a species on the possibility of authorising derogations under Article 16(1) of the Habitats Directive, the Court has already held that **the grant of such derogations remains possible by way of exception** where it is duly established that **they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration** at a favourable conservation status.

According to the Court, it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favourable conservation status in its natural range. **Such a derogation would therefore be neutral for the species** concerned (judgment of 14 June 2007, Commission v Finland, C-342/05, EU:C:2007:341, paragraph 29).

69 However, it must be noted that **the grant of such derogations by way of exception** must be assessed also **in the light of the precautionary principle**, as referred to in paragraph 66 of the present judgment.

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Species that are in unfavourable conservation status can be the subject of derogation.

CJEU: even where a species is in unfavorable conservation status there may be cases in which it is feasible and appropriate to allow for a derogation.

However, this can only happen by way of exception and it must be that it is not going to worsen the unfavorable conservation status of the population of the species which is subject to the derogation → it would be neutral for the species.

→ It is possible, by exception, and there can be no consequence for the conservation status of the species, always in light of the precautionary principle.

Species protection under the Birds Directive

Articles 5, 6, 7, 8, and 9 of the Birds Directive



Many of the considerations are the same with the Habitats Directive

Three types of provision



Prohibitions (Article 5)

Limited exceptions (Articles 6 & 7)

Derogations (Article 9)

35 Miron & Cashman, European Union Case Law on the Birds and Habitats Directive (2023)

Interestingly there isn't an Article 14 equivalent so there isn't a managed exploitation per se → instead → some limited exceptions which are provided for in Article 6 and 7

Article 5: prohibitions

Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a **general system of protection for all species of birds referred to in Article 1**, prohibiting in particular:

- (a) deliberate killing or capture by any method;
- (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
- (c) taking their eggs in the wild and keeping these eggs even if empty;
- (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- ³⁶ (e) keeping birds of species the hunting and capture of which is prohibited

Case C-473/19, Skydda Skogen Scope of Article 5

33 It should be noted, in the first place, that the actual wording of Article 5 of the Birds Directive states that, without prejudice to Articles 7 and 9 thereof, Member States are to take the requisite measures to establish a general system of protection for **all species of birds referred to in Article 1 of that directive**, including in particular the prohibitions set out in Article 5.

34 In the words of Article 1(1), the Birds Directive concerns ‘**the conservation of all species of naturally occurring birds in the wild state in the European territory** of the Member States to which the Treaty applies’.

³⁷

44 By contrast, as the Advocate General observed in point 44 of her

Case C-441/17, Białowieża Forest Effective compliance

251 Article 5 of the Birds Directive requires the Member States to adopt the requisite measures to **establish a general system of protection for all species of birds** referred to in Article 1 of that directive. That system is to include in particular, as provided in Article 5(b) and (d), prohibition of deliberate destruction of, or damage to, their nests and eggs or removal of their nests, and prohibition of deliberate disturbance of those birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of the directive.

252 Article 5 of the Birds Directive thus requires the Member States to **adopt a complete and effective legislative framework** (judgments of 12 July 2007, *Commission v Austria*, C-507/04, EU:C:2007:427, paragraphs 103 and 339, and of 26 January 2012, *Commission v Poland*, C-192/11, not published, EU:C:2012:44, paragraph 25), by the implementation, in the same manner as provided for by Article 12 of the Habitats Directive, of **concrete and specific protection measures** that must enable it to be ensured that the abovementioned prohibitions, intended in essence to protect the breeding sites and resting places of the birds covered by that directive, **are actually complied with**. In addition, those prohibitions **must apply without any limitation in time** (judgment of 27 April 1988, *Commission v France*, 252/85, EU:C:1988:202, paragraph 9).

Case C-441/17, Białowieża Forest Conservation status

262 In the second place, inasmuch as the Republic of Poland contends that the bird populations at issue have remained stable, or even that they have increased, it should be pointed out that the Court has already held that such a circumstance cannot call into question the existence of an infringement of Article 4(4) of the Birds Directive, which requires the Member States to take the necessary steps to avoid deterioration of habitats or any disturbances affecting the birds, as **the obligations to protect exist even before any reduction in the number of birds has been observed or before the risk of a protected species becoming extinct has materialised** (judgments of 14 January 2016, *Commission v Bulgaria*, C-141/14, EU:C:2016:8, paragraph 76, and of 24 November 2016, *Commission v Spain*, C-461/14, EU:C:2016:895, paragraph 83).

Article 7: huntable bird species

- Applies only to species in Annex II
- Cannot jeopardise conservation efforts in the distribution area of the species
- Article 7(4): Exclusion of rearing season and at 'the various stages of reproduction'.

Case C-157/89, Commission v. Italy Article 7(4) Vulnerable periods

14 In this connexion, it must be pointed out that the second and third sentences of **Article 7(4) of the Directive are designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat.** Consequently, protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements. It would be incompatible with the objectives of the Directive if, in situations characterized by prolonged dependence of the fledglings on the parents and early migration, part of the population of a given species

⁴¹ should fall outside the protection laid down.

Article 9: Three tests

1. The derogation must have been adopted for one of the six grounds specified in Article 9(1)(a-c);

2. Absence of a satisfactory alternative; and

3. *The derogation must not be detrimental to the maintenance of populations in line with their ecological requirements (FCS)*

Strict application of Article 9

- To be interpreted strictly:

“It must also be noted, with regard to a derogation system such as that provided for in Article 9 of the Birds Directive, which **must be interpreted strictly** and **impose on the authority taking the decision the burden of proving that those conditions are present** for each derogation, that Member States are required to ensure that all action affecting the protected species is **authorised only on the basis of decisions containing a clear and sufficient statement of reasons** which refers to the reasons, conditions and requirements laid down in that article.” C-217/19, *Commission v. Finland*, paragraph 66.

- Full respect of precautionary principle- [C-217/19, Commission v. Finland](#), paragraph 84

43

Test 1: Article 9(1)(a-c)

Demonstrate one of the following:

- a) — in the interests of public health and safety,
 - in the interests of air safety,
 - to prevent serious damage to crops, livestock, forests, fisheries and water,
 - for the protection of flora and fauna;
- b) For the purposes of research and teaching of re-population, of re-introduction and for the breeding necessary for these purposes;
- c) To permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

Case C-217/19, Commission v. Finland

The notion of ‘judicious use’

64 That provision allows for derogation from Articles 5 and 7 of the Birds Directive, for all bird species, where there is no ‘other satisfactory solution’ in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other ‘judicious use’ of certain birds ‘in small numbers’.

65 In that regard, it is important to note that the Court has already held that the hunting of wild birds for **recreational purposes during the periods mentioned in Article 7(4) of the Birds Directive may constitute ‘judicious use’** authorised by Article 9(1)(c) of the directive (see, to that effect, judgment of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 11 and the case-law cited).

69 In the present case, it is appropriate to examine whether the population of the species concerned is maintained at a ‘satisfactory level’, failing which, as recalled in the case-law mentioned in the preceding paragraph, the other conditions under Article 9(1) of the Birds Directive, in particular that relating to ‘judicious use’, cannot be fulfilled.

Case C-900/19, One Voice

Test 2: Alternative solution for traditional practice

35 In that regard, the Court has repeatedly held that the **preservation of traditional activities does not constitute an autonomous derogation** from the system of protection established by the Birds Directive (see, to that effect, judgments of 8 July 1987, *Commission v Belgium*, 247/85, EU:C:1987:339, paragraph 8; of 28 February 1991, *Commission v Germany*, C-57/89, EU:C:1991:89, paragraph 22; and of 23 April 2020, *Commission v Finland* (Spring hunting of male common eiders), C-217/19, EU:C:2020:291, paragraph 85).

36 Hunting methods often form part of local traditions or use, so that, if the aim of preserving them constituted a ground for an autonomous derogation, that would result in the authorisation of a large number of practices that are contrary to the requirements of Article 9 of the Birds Directive. Such an approach would run counter to the strict interpretation which must obtain in the case of that provision.

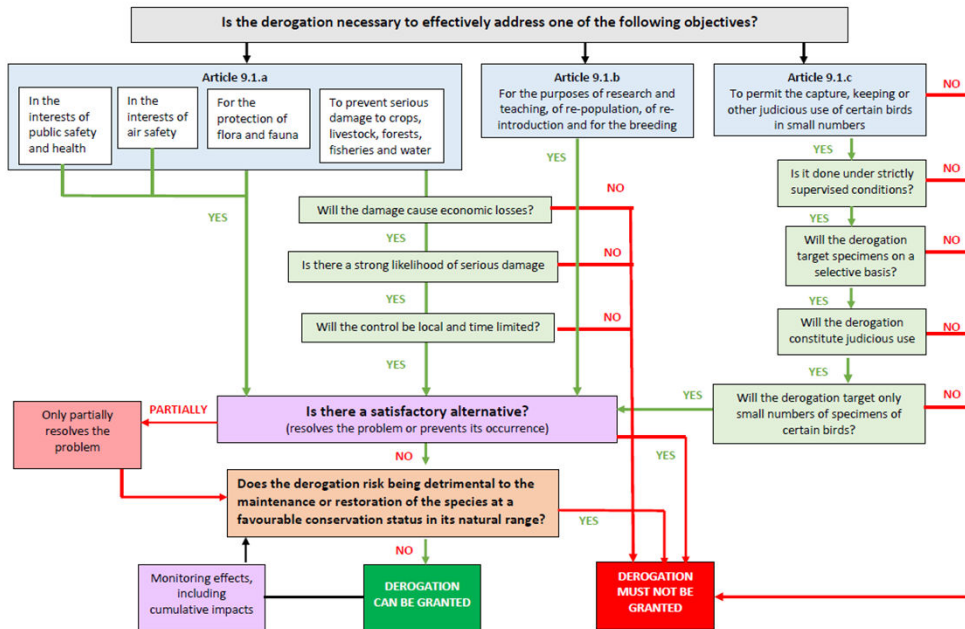
46

Test 3: No detriment to conservation status.

- No explicit requirement in the Directive.
- Read by reference to the overarching objectives of the Birds Directive (Article 2).
- Ecological requirements can be equated to favourable conservation status

‘Even if both directives are to be interpreted in a way that includes their **respective specific features**, that **interpretation cannot be regarded as diverging**, since, subject to their specific features, that interpretation contains **similar considerations** relating to, inter alia, their respective protection system’ ⁴⁷ [C-217/19, Commission v Finland](#), para 84

FLOW CHART FOR ISSUING A DEROGATION UNDER ARTICLE 9.1





Thank you!

Questions?

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Thank you



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