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Training module

**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU NATURE PROTECTION LAW
FOCUS ON SPECIES PROTECTION**

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Article 9 of the Birds Directive



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Please feel free to interrupt



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Art. 6 of the Habitats Directive has been the subject of extensive jurisprudence by the CJEU. Therefore, many questions have already been clarified, but some points may still require a reference to Luxembourg.

On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view



This slide aims to illuminate the background of the author and original presenter of this presentation. There is no need for others to retain it.

Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations of the judgment.

Article 9(1) - reasons for derogation

“Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

- (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.”



Self-Explanatory

Article 9(2) - „formal“ conditions

“The derogations referred to in paragraph 1 must specify:

- (a) the species which are subject to the derogations;
- (b) the means, arrangements or methods authorised for capture or killing;
- (c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;
- (d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;
- (e) the controls which will be carried out.”



Self-Explanatory

Article 9(3) & (4) - COM Supervision

“3. Each year the Member States shall send a report to the Commission on the implementation of paragraphs 1 and 2.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of the derogations referred to in paragraph 1 are not incompatible with this Directive. It shall take appropriate steps to this end.”



Self-Explanatory

Overview

- Legal requirements of derogations under this provision
- CJEU case law
- EC Guidance documents



Content of the presentation

Overview (more specifically)

- Scope: which prohibitions can be derogated from?
- General requirements
- No other satisfactory solutions
- Reasons for derogation
- Conditions for transposition [Art. 9(2)]



Structure of the presentation

Article 9(1) - scope

“Member States may derogate from the provisions of Articles 5 to 8, ...”

- Art. 5 - general system of protection for all species of birds
- Art. 6 - prohibition of sale and related activities
- Art. 7 - species listed in Annex II may be hunted (under certain conditions)
- Art. 8 - prohibition of certain means of hunting, capture or killing



The option to derogate applies to specific provisions of the Birds Directive, listed on this slide.

Article 9(1) - scope

“Member States may derogate from the provisions of Articles 5 to 8, ...”, but not from

- Art. 4 - site protection >> see Art. 6 and 7 of the Habitats Directive + COM/France (Basses Corbières), EU:C:2000:670
- Art. 3 - general protection of bird habitats, cf. COM/Ireland (Owenduff-Nephin Beg Complex), EU:C:2002:366, para 15
- Art. 11 - introduction of new species of birds



However, there are other obligations of the Birds Directive, listed on the slide, that are not covered by Art. 9.

Article 9(1) - scope - Article 5 in particular

“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;
- (e) keeping birds of species the hunting and capture of which is prohibited.”



Art. 5 is the most important provision for derogation under Art. 9.

Article 9(1) - scope - Article 5 in particular

- All species of birds referred to in Art. 1 = naturally occurring birds in the wild state in the European territory of the Member States
- Deliberate killing, capture, destruction or disturbance?
 - Intentional action
 - The author of the action “accepted the possibility of” such an effect? Cf. COM/Spain (Snares), EU:C:2006:329, para 71



Art. 5 protects all European bird species, not only the imperial eagle, but also the dove, the crow or the sparrow.

The main prohibitions of Art. 5 all target deliberate actions. A natural reading of these prohibitions would be that only intentional effects are covered, e.g. hunting or measures to fight pests.

However, in the context of Art. 12 of the Habitats Directive that has very similar prohibitions the Court adopted a broader reading: accepting the possibility of a prohibited action, e.g. killing or disturbing, is sufficient to be considered deliberate. The case was about snares that were intended to hunt foxes, but could have caught strictly protected otters as well. The Commission lost because it was unlikely that otters were present in the area when the snares were allowed. Conversely, in the earlier first *caretta caretta* case (Commission v Greece, C-103/00, EU:C:2002:60, paras 36 and 39) 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.

There is no ECJ jurisprudence yet whether this finding can be transposed to Art. 5 of the Birds Directive, but the German courts already work on the basis of such a transposition. It is problematic because Art. 5 of the Birds Directive covers all European Birds, including very common species, while Art. 12 of the Habitats Directive is limited to very rare species.

Article 9(1) - scope - Article 7 in particular

“(1) Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. ...

(4) ... [Member States] shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. ...”



In the practice of the Court Art. 7 is also very important for derogation under Art. 9.

Certain species may be hunted under the Birds Directive, but hunting is subject to strict limits. Member States have tried to derogate from these limits to extend opportunities for hunting.

Article 9 - General Requirements

- The criteria that the Member States must meet in order to derogate from the prohibitions laid down in the directive must be reproduced in specific national provisions (Associazione Italiana per il WWF and Others, EU:C:1996:86, para 22)
- The authority taking the decision bears the burden of proving that those conditions are present for each derogation (WWF Italia and others, EU:C:2006:378, para 34)



These two requirements aim to ensure that in practice the conditions of a derogation are respected. They must all be laid down in the national implementing legislation and, moreover, it is clear that the competent authority must prove respect of these conditions.

Article 9(1) - where there is no other satisfactory solution

- With other words: Is the derogation necessary?
- E. g: No need to extend hunting periods if the birds are also present during the hunting periods foreseen (Ligue pour la protection des oiseaux and Others, EU:C:2003:558, para 16)
- E. g: Reduced, but still considerable numbers during hunting period do not justify extension (COM/Finland, EU:C:2005:770, paras 35 & 43)



The absence of alternatives is an important condition for any derogation. If there are other ways to address the objective in question that are less harmful to birds these must be employed instead.

The extension of hunting periods repeatedly was dealt with by the Court and it is only permissible if necessity can be demonstrated. There would be no necessity if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Art. 7 of the Directive.

Article 9(1) - where there is no other satisfactory solution

- More specifically: derogation only is possible “as it is strictly necessary and provided that the other objectives pursued by the Directive are not jeopardised” (COM/Malta, EU:C:2009:535, para 58)
- “derogation ... must be proportionate to the needs which justify it” (ibid, para 57) >> balancing (ibid, para 56)!



The absence of alternatives is not limited to a mere test of necessity. It must also be examined whether the objective of the derogation is more important than the impact on the objectives of the Directive.

For example, disturbing a very limited number of specimens of a very common bird, eg. the dove, for reasons of hygiene is probably justified, but killing a breeding specimen of a very rare species, eg. the imperial eagle, to obtain a trophy probably wouldn't be justified.

Article 9(1) - where there is no other satisfactory solution

Structure of examination

- What is the Objective of the Derogation?
- Possible Solutions? (Objective Scientific Facts!)
- Degree of Effectiveness? (Objective Scientific Facts!)
- Balancing of Objective with the Impact on the Objectives of the Directive, i.e. the conservation of bird populations



In practice it will be necessary to clearly identify the objective of the derogation, consider possible solutions, including the effectiveness of the different alternatives and finally balance the expected achievement of the objective with the impact on the objectives of the Directive, that is the conservation of bird populations.

The need to rely on objective scientific facts has repeatedly been highlighted by the Court (eg. WWF Italia and others, EU:C:2006:378, para 28). Moreover, it is a guiding principle of EU environmental policy (cf. Art. 191(3) TFEU).

Article 9(1) - grounds for derogation

No CJEU jurisprudence

- Public health and safety
- Air safety
- Protection of flora and fauna
- Research, teaching, re-population, re-introduction



Self-explanatory

Article 9(1)(a) 3rd indent - prevention of serious damage

- The aim of this provision is not to prevent the threat of minor damage, COM/Belgium, EU:C:1987:339, para 56
- Blanket exemptions are not allowed, COM/Poland, EU:C:2012:44, par 63: cormorant and herons not protected at ponds used to raise fish
- Exemptions must exactly target protected interests, ibid, paras 8, 48: serious economic damage to the economy? (poważnych szkód w gospodarce/dommages importants causés à une exploitation) >> too broad



With regard to serious damage to crops, livestock, forests, fisheries and water, there is some jurisprudence in the context of non-conformity of transposition.

Article 9(1)(c) - capture, keeping or other judicious use of certain birds

- Associazione Italiana per il WWF and Others, C-118/94, EU:C:1996:86, para 21: hunting of birds that are not subject to Art. 7
- Ligue pour la protection des oiseaux and Others, EU:C:2003:558, para 10: recreational hunting
- Ibid, paras 9, 16: Extension of hunting periods, but only if needed because otherwise hunting be practically impossible



Judicious use has mostly been debated with regard to recreational hunting. This objective can effectively justify derogations.

Article 9(1)(c) - on a selective basis ... in small numbers

- Ligue pour la protection des oiseaux and Others, EU:C:2003:558, para 17 (cf. 11th recital): quantity must ensure the maintenance of the population of the species concerned at a satisfactory level
- WWF Italia and Others, EU:C:2006:378, para 26 (based on ORNIS report): <1% of annual mortality for species that are can't be hunted under Art. 7, 1% for species that can be (not binding, but best available scientific proof)



As for “small numbers” and references to the ORNIS committee, this is a scientific committee set up under the original Birds Directive. A number that has been suggested by the committee to satisfy the condition 1 % of the annual mortality of the population concerned.

Naturally, this is not legally binding, but the Court has considered it an element of scientific proof.

When Malta contested this threshold for the very common species quail and turtle dove the Court did not address this issue (Cf. COM/Malta, EU:C:2009:535).

In any event, the practical application of this criterion requires scientific expertise. This must be integrated into the decision-making process, as the Court has highlighted in WWF Italia.

Article 9(1)(c) - under strictly supervised conditions

- WWF Italia and Others, EU:C:2006:378, para 43: effective controls during application of derogation required!
- Ibid paras 44 f: Effective, in particular timely, judicial control must also be possible >> a derogation under this head should not be granted in way that would only allow for ex post review, i.e. immediately before hunting permits become applicable



This derogation already integrates control and review. While this is at least implicit in the other derogations and taken up by Art. 9(2)(e) where control are mentioned, here it is spelled out and therefore implies stricter control and review.

Article 9(2) - „formal“ requirements

Applies to legislation creating the competence to derogate in specific cases, requires explicit specifications on

- species
- means
- conditions of risk + time and place
- competent authority
- controls



Art. 9(2) aims to guarantee that the power to derogate is only applied under the conditions set out in Art. 9(1) by requiring that Member State legislators specify these conditions with regard to the derogations they intend to enable. In a way, this provision facilitates review whether the conditions for derogation have been properly transposed and frees the Commission and the Court from interpreting Art. 9(1) with regard to the elements that require explicit transposition.

Further reading

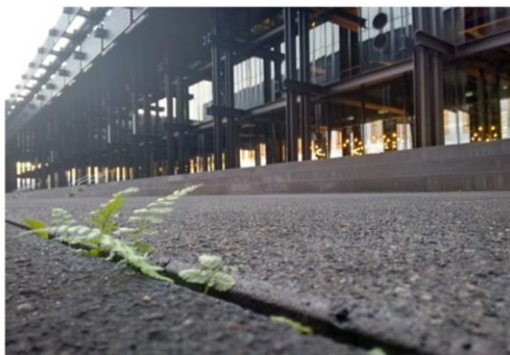
- EU Commission, Guide on hunting under the Birds Directive (updated in 2008), pp. 41 - 72, http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf



There is not really much jurisprudence yet on Art. 6(1) of the Habitats Directive though the pending case could help to improve our understanding.

I would expect that MS enjoy more discretion with regard to Art. 6(1) than under Art. 6(2) and (3) because the standard of reasonable doubt cannot be applied to active conservation measures. It is unlikely that any active conservation measure will be subject to reasonable doubt. Therefore, under this strict standard no conservation measure could be applied. However, there are many habitat types that depend on active conservation measures. (cf: Christoph Sobotta, The European Union legal boundaries for semi-natural habitats management in Natura 2000 sites, Journal of Nature Conservation (online 18.7.2017, doi: 10.1016/j.jnc.2017.07.003))

Thank you for your attention!



Case law: <http://curia.europa.eu/juris/recherche.jsf?language=en>
Guidance: http://ec.europa.eu/environment/nature/index_en.htm

