

Case study on illegal killing, taking and trading of birds

CASE STUDY - ANSWERS

General remarks

It may come as surprise that hunting (sport) and killing for food are among the top 3 reasons for illegal trapping or killing birds in the EU. In this respect, the case study follows quite an ordinary scenario. On the other hand, you are very unlikely to find a place where the birds of the three abovementioned species would meet at the same moment (and eventually get shot). However, they represent different levels or regimes of legal protection and at the same time populations of a different size. Clearly, the *red-breasted goose* enjoys the highest level of protection from the group, being simultaneously protected under the Birds Directive (BD) also under the international and EU CITES protection.

The questions in the case study mostly target the legal regulation and practice in the particular Member States and the opinion of an individual judge or a prosecutor. Therefore the answers may vary across the participants, and as a general rule, none can be easily ruled out as *incorrect*. However, at least the EU Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law provides the common framework for all the Member States, determining the common playground for all further considerations.

The scope of the international and EU legislation

Article 3 of Directive 2008/99/EC stipulates that the Member States *shall ensure that several types of conduct constitute a criminal offence. Out of these, two are of a particular importance as regards the case study:*

(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species.

Please note that the directive covers only protected species. Definition of 'protected wild fauna and flora species' is provided by Art. 1 (b) of the Directive:

(i) for the purposes of Article 3(f), those listed in:

— Annex IV to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,

— Annex I to, and referred to in Article 4(2) of, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

(ii) for the purposes of Article 3(g), those listed in Annex A or B to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (3).

Obviously, all the Member States should have introduced national regulation which constitutes killing of the birds a crime (not merely an administrative offence). Only the *white-fronted goose* can be hunted under the Birds Directive. In this respect, it is important to determine whether these birds have been shot in compliance with the national law on hunting. Tania B. Did not kill the birds, but according to

the directive, mere possession of protected birds may constitute a crime. Moreover, her intention to trade some of the dead birds (protected in the CITES regime) may constitute a crime as well.

Existence of criminal liability

Some general aspects of criminal liability routinely considered by the national prosecutors and judges are completely omitted by the Directive. For example **Sasha F.** may not be (fully) criminally liable in all the Member States due to his age (19 years). The Directive does not even provide a definition of *intentional commitment or serious negligence*, but there does not seem to be any significant differences among the Member States in this respect.

Significantly, the Directive introduced thresholds for the offenses. Member States are obliged only to criminalise offenses involving non-negligible quantities of individuals protected species, or offenses with a non-negligible impact on the conservation status. The Directive does not provide any guidance as regards when the conduct concerns *a negligible quantity of such specimens and has a negligible impact on the conservation status of the species*. The answer falls within the assessment of the national authorities which have to respect scientific evidence and comply with the purpose of the directive.

What kind of penalty does the national law allow to be used in this case?

The Directive does not prescribe the penalty to be used. According to the studies, the situation on the Member States differs when it comes to the types of the penalty which can be used and also the maximum level of penalties (see for example https://www.eufje.org/images/docPDF/Study-on-the-implementation-of-Directive-2008_99_ENEC_SEO_BirdLife_May2016.pdf).¹

Furthermore, there are some practical differences: In some Member States, for example, confiscation of a gun or a fishing rod is more or less automatic in the situations similar to the case study. Confiscation of a car of the offender is not that frequent. Some Member States prefer *traditional* types of penalties such as imprisonment, some opt for combination of various types including for example withdrawal of the hunting permit.

Sanctioning – gravity factors

The Bern Convention, the CITES convention and the EU directives provide only vague requirements for prosecution, punishment and the actual sanctioning. The regulation must be effective which comes from the general obligations to implement and enforce international and EU law. The case law of the ECHR and CJEU concludes that principle of proportionality applies to sentencing including method of determining the sanction, taking account of the circumstances of the wrongful act and taking into account the nature and gravity of the breach of the duty for which the sanction is imposed (see for example cases *C-210/10* or *C-259/12*).

There is even some useful case law of the Court of Justice from the field of environmental protection which basically concludes that it is for the national court to determine, by taking into account all the factual and legal circumstances of the case before it, and, in particular, the risks which may be created by that infringement in the field of the protection of the environment and human health, whether the amount of the penalty does not go beyond what is necessary to attain the objectives of ensuring a high level of protection of the environment and human health (see case *C-487/14*).

¹ With the adoption of the Treaty on the Functioning of the European Union, the harmonisation of criminal sanctions for environmental crime at EU level has become possible. Art. 83 of the TFEU provides that, following a decision from the Council to extent harmonisation to a particular area with consent of the Parliament, the approximation of criminal sanctions can be implemented through a Directive or a Council Decision.

The Bern Convention Recommendation No. 177 provides a long list of gravity factors. Many of these can be taken into account in the case study. The use of standardised list of “gravity factors” may present a major step towards an effective and coordinated response against wild bird crimes. However, it is always for the national prosecutor or a judge to determine whether and how to apply the gravity factors. The case study does not provide a comprehensive information but at least it is possible to carry out a simple assessment of the impact of shooting birds on their population following the Appendix I of the Recommendation (conservation status of species, impact risk for ecosystem). The motivation of the offenders and the scale of offending is also rather obvious (commercial motivation, illegal gain/quantum, professional duty on defendant to avoid committing offence, scale of offending).

Please note that the Recommendation does not put much emphasis on the person of the offender and his or her personal background (it lists *history/recidivism* as one of the gravity factors, though). The case study provides some additional information which may or may not play a role in considerations of the prosecutor or the judge (for example the family status or health condition). In some jurisdiction, only previous criminal offenses would be taken into account, otherwise elsewhere, also administrative offenses in the field of nature protection would be considered. Furthermore, there is usually a certain time limit which prevents the judge to go too far into the criminal history of the offender.