

Case C-477/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

21 June 2019

Referring court:

Verwaltungsgericht Wien (Austria)

Date of the decision to refer:

12 June 2019

Applicant:

IE

Defendant:

Magistrat der Stadt Wien (City Council of Vienna, Austria)

Subject matter of the case in the main proceedings

Construction project — Nature conservation — Breeding sites and resting places — Interference, deterioration or destruction

Subject matter and legal basis of the reference

Interpretation of Directive 92/43/EEC ('the Habitats Directive'), Article 267 TFEU

Questions referred

1. Is the term 'resting place' within the meaning of Article [12(1)(d)] of the Habitats Directive to be interpreted as also including former resting places that have since been abandoned?

If the answer to that question is in the affirmative:

Is every former resting place that has since been abandoned a ‘resting place’ within the meaning of Article [12(1)(d)] of the Habitats Directive?

If the answer to that question is in the negative:

Which factors determine whether a former resting place that has since been abandoned is a ‘resting place’ within the meaning of Article [12(1)(d)] of the Habitats Directive?

2. Which factors determine whether a particular act or omission constitutes interference with a ‘resting place’ within the meaning of Article [12(1)(d)] of the Habitats Directive?
3. Which factors determine whether a particular act or omission constitutes such serious interference with a ‘resting place’, within the meaning of Article [12(1)(d)] of the Habitats Directive, that ‘deterioration’, within the meaning of that provision, of that ‘resting place’ is to be assumed?
4. Which factors determine whether a particular act or omission constitutes such serious interference with a ‘resting place’, within the meaning of Article [12(1)(d)] of the Habitats Directive, that ‘destruction’, within the meaning of that provision, of that ‘resting place’ is to be assumed?
5. Is the term ‘breeding site’, within the meaning of Article [12(1)(d)] of the Habitats Directive, to be interpreted as covering, first, only the precise identifiable location where regular mating in the strict sense or limited acts directly connected with reproduction (such as spawning) take place, and, second, in addition, all precisely identifiable locations essential for the development of young, such as nesting sites or certain parts of plants necessary for the larval or pupal stages?

If the answer to that question is in the negative:

How should the term ‘breeding site’ within the meaning of Article [12(1)(d)] of the Habitats Directive be understood, and how is a ‘breeding site’ to be differentiated spatially from other locations?

6. Which factors determine whether a particular act or omission constitutes interference with a ‘breeding site’ within the meaning of Article [12(1)(d)] of the Habitats Directive?
7. Which factors determine whether a particular act or omission constitutes such serious interference with a ‘breeding site’, within the meaning of Article [12(1)(d)] of the Habitats Directive, that ‘deterioration’, within the meaning of that provision, of that ‘breeding site’ is to be assumed?
8. Which factors determine whether a particular act or omission constitutes such serious interference with a ‘breeding site’, within the meaning of

Article [12(1)(d)] of the Habitats Directive, that ‘destruction’, within the meaning of that provision, of that ‘breeding site’ is to be assumed?

Provisions of EU law cited

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (‘the Habitats Directive’), Articles 2, 12, 16 and 23 and Annex IV

National legislation cited

Wiener Naturschutzgesetz (Vienna Law on Nature Conservation), Paragraphs 4, 5, 7, 9, 10 and 49 and Annex

Brief summary of the facts and procedure

- 1 The Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) is hearing an appeal against a financial penalty imposed by an administrative penal authority.
- 2 The applicant is an employee of a property developer, that is to say, of a company tasked with planning and organising construction work through third party companies. Due to his particularly senior position in the company, the applicant is to be held criminally liable for any infringements by that company of the provisions of the Vienna Law on Nature Conservation if he is unable to demonstrate satisfactorily that he did everything in his capacity to prevent the infringements.
- 3 The applicant is accused of the destruction or deterioration of a resting place and/or breeding site of field hamsters, contrary to Paragraph 10(3).4 of the Vienna Law on Nature Conservation. That provision transposes Article 12(1)(d) of the Habitats Directive. The terms ‘resting place’, ‘breeding site’, ‘deterioration’ and ‘destruction’ in the Vienna Law on Nature Conservation therefore have the same meaning as the corresponding terms in the Habitats Directive. The interpretation of those terms of Article 12(1)(d) of the Habitats Directive will therefore predetermine the outcome of the main proceedings.

Principal arguments of the parties in the main proceedings

- 4 The applicant is accused of being responsible for the property developer having appointed a construction company to carry out works that caused destruction or deterioration of a resting place and/or breeding site of field hamsters, thereby infringing the prohibition provision set out in Paragraph 10(3).4 of the Vienna Law on Nature Conservation.

- 5 The applicant disputes that a resting place and/or breeding site of field hamsters has been destroyed or deteriorated.

Brief summary of the basis for the reference

- 6 Clarification is sought on how to interpret in particular the terms ‘resting place’, ‘breeding site’, ‘deterioration’ and ‘destruction’ in Article 12(1)(d) of the Habitats Directive.

Resting place

- 7 The resting place in the present case is the hamster burrow. The issue is whether it is necessary that the resting place is actively being used as such at the time of the destruction or deterioration, or whether it is sufficient that it is an abandoned resting place with a high likelihood of being reinhabited.
- 8 The referring court considers that the term resting place should be interpreted broadly so that any abandoned resting place (independently of the likelihood of it being reinhabited) is also to be classified as a resting place within the meaning of Article [12(1)(d)] of the Habitats Directive. This is to ensure that the competent authority is alerted before the destruction of such a resting place.

Breeding site

- 9 The issue is whether this term covers only the location of the actual reproductive activity or whether — in accordance with the European Commission’s understanding — it includes the place of mating and birth as well as unused breeding sites. As regards the place of mating, it is then unclear as to whether that is also understood to cover the area of courtship.
- 10 The referring court rejects the Commission’s broad interpretation of the term, as it would give rise to a restriction on activity that is too wide. Accordingly, a breeding site is understood to mean only a spatially delimited area that is either associated only with reproductive activity in the strict sense, or, in addition, also includes sites that are directly necessary for the development of young.

Deterioration

- 11 One of the issues which arises is the distinction between interference and deterioration. It is necessary to determine at what point interference becomes so serious as to constitute deterioration. However, it is also necessary to clarify whether a failure to act can fulfil the criteria for deterioration or destruction.
- 12 Having regard to the objective of Article 2 of the Habitats Directive, the referring court considers that deterioration of a resting place or breeding site is to be assumed if the aim of ‘maintenance and restoration’ of the strictly protected

animal species — thus, in the present case, the maintenance of the animals which (may potentially) use that resting place or breeding site — is undermined to a significant extent by the particular act or omission.

- 13 It follows that any act or omission which seriously endangers the survival of an animal belonging to a protected species or significantly shortens its lifespan must be classified as deterioration of a resting place.
- 14 Accordingly, any act or omission which reduces the reproductive success of an animal belonging to a protected species to a demonstrably significant extent must be classified as deterioration of a breeding site.

Destruction

- 15 In particular, it is necessary to clarify the distinction between deterioration and destruction.
- 16 The referring court considers that destruction of a resting place or breeding site is to be assumed if the result of an act or omission is that the resting place or breeding site will in the future no longer be used as such (or cannot be used as such).

WORKING DOCUMENT