

Case C-474/19

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:

18 June 2019

Referring court:

Vänersborgs tingsrätt, mark- och miljödomstolen (Sweden)

Date of the decision to refer:

13 June 2019

Applicant:

Naturskyddsföreningen i Härryda
Göteborgs Ornitologiska Förening

Defendant:

Länsstyrelsen i Västra Götalands län
U.T.B.

The main proceedings

An appeal by two not-for-profit organisations against the decision of the länsstyrelsen (Regional Administrative Board) not to take any enforcement measures in connection with a notification of logging in a forest area that contains the habitats of a number of animal species protected under Directive 92/443/EEC and Directive 2009/147/EC.

Factual and legal context of the reference for a preliminary ruling

Reference for a preliminary ruling under Article 267 TFEU concerning the interpretation of Article 12 of Directive 93/43 and Article 5 of Directive 2009/147.

The reference for a preliminary ruling

1. Is Article 5 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds to be interpreted as precluding a national practice whereby the prohibition covers only those species which were listed in Annex 1 to Directive 2009/147, or are at some level at risk, or are suffering a long-term decline in population?
2. Are the terms ‘intentional killing/disruption/destruction’ in Article 5(a)-(d) of Directive 2009/147 and of Article 12(a)-(c) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora to be interpreted as precluding a national practice whereby, should the purpose of the measures be manifestly different from the killing or disturbance of species (for example, forestry measures or land development), there must be a risk of adverse effects on the conservation status of the species caused by the measures to apply the prohibitions?

The first and second questions are posed in the light, *inter alia*, of:

- the fact that Article 5 of Directive 2009/147 concerns the protection of all species of birds referred to in Article 1(1), the manner in which Article 1(m) of Directive 92/43 defines ‘specimens’;
 - the fact that the question of the conservation status of the species is regarded as relevant mainly in the context of the derogation in Article 16 of Directive 92/43 (the derogation requires that there be no satisfactory alternative and that the derogation be not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range) or Article 9 of Directive 2009/147 (the derogation may not be incompatible with that directive which, in Article 2, requires Member States to take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements).
3. If the answer to any part of the second question is that harm at a level other than the individual level is to be assessed in order for the prohibition to apply, is the assessment therefore to be carried out on any of the following scales or at any of these levels:
 - a. a certain geographically restricted part of the population as defined under (a), for example within the boundaries of the region, the Member State or the European Union;
 - b. the local population concerned (biologically isolated from other populations of the species);

- c. the meta-population¹ concerned;
 - d. the whole population of the species within the relevant biogeographical regional section of the species' range?
4. Is the expression 'deterioration or destruction' as regards the animals' breeding range in Article 12(d) of Directive 92/43 to be interpreted as excluding a national practice which means that, in spite of precautionary measures, the continuous ecological functionality (CEF) of the habitat of the species concerned is lost, whether by harm, destruction or deterioration, directly or indirectly, individually or cumulatively, so that the prohibition is applied only if the conservation status of the species concerned, at one of the levels referred to in question 3, is likely to deteriorate?
5. If the answer to the fourth question is negative, that is to say that harm of a level other than one leading to the habitat in the individual area being assessed in order for the prohibition to be applied, is the assessment thus to be made on any of the following scales or at any of these levels:
- a. a certain geographically restricted part of the population as defined under (a), for example within the boundaries of the region, the Member State or the European Union;
 - b. the local population concerned (biologically isolated from other populations of the species);
 - c. the meta-population concerned;
 - d. the whole population of the species within the relevant biogeographical regional section of the species' range?

Questions 2 and 4 posed by the mark- och miljödomstolen (Land and Environment Court, Sweden) include the question of whether the strict protection in the directives ceases to be applicable to species for which the directive's objective (favourable conservation status) has been achieved.

Provisions of EU law and case-law of the Court of Justice relied upon

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L206, 22.7.1992, p.7).

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7).

¹ 'Meta-population' means a collection of sub-populations with weak contact, in which certain sub-populations become extinct and others are strengthened over time, and sites of extinct sub-populations can be re-colonised from adjacent sub-populations.

European Commission Guidance document on the strict protection of animal species of Community interest under Directive 92/43 (final version, February 2007)

Judgment of 30 January 2002, *Commission v Greece*, C-103/00, EU:C:2002:60

Judgment of 18 May 2006, *Commission v Spain*, C-221/04, EU:C:2006:329

Judgment of 14 June 2007, *Commission v Finland*, C-342/05, EU:C:2007:341

Judgment of 9 June 2011, *Commission v France*, C-383/09, EU:C:2011:369

Judgment of 10 November 2016, *Commission v Greece*, C-504/14, EU:C:2016:847

Judgment of 17 April 2018, *Commission v Poland*, C-441/17, EU:C:2018:255, paragraph 237

Opinion in Case C-6/04, *Commission v United Kingdom*, EU:C:2005:372

Opinion in Case C-221/04, *Commission v Spain*, EU:C:2005:777

Provisions of national law and the case-law of national courts relied upon

Skogsvårdslag (1979:429) (Law (1979:429) on forestry)

Miljöbalk (1998:809) (Environmental Code (1998:809)), Chapter 8, Paragraph 1

Artskyddsförordning (2007:845) (Species Protection Ordinance (2007:845)), Paragraph 4, Annex 1

Skogsstyrelsens föreskrifter och allmänna råd (SKFS 2011:7) (Forestry Agency's regulations and general guidance (SKFS 2011:7)), as worded in accordance with SKSFS 2013:2

Naturvårdsverkets "Handbok för artskyddsförordningen", 2009:2 (Environmental Protection Agency's 'Handbook to the Species Protection Ordinance', 2009:2), First edition, April 2009

Judgment of the mark- och miljööverdomstolen (Land and Environmental Court of Appeal) in case M 11317-14

Judgment of the mark- och miljööverdomstolen (Land and Environmental Court of Appeal) in case M 9914-15

Judgment of the mark- och miljööverdomstolen (Land and Environmental Court of Appeal) in case M 10104-17

Brief summary of the facts and the procedure in the main proceedings

- 1 The case concerns a notification of logging to the Skogsstyrelsen (Swedish Forest Agency) in respect of a forest area in the municipality of Härryda. The notification relates to final felling, which means that all trees are removed except for the limited number of trees which should be kept in accordance with the Skogsstyrelsen's guidelines.
- 2 In the forest area, the following bird species have their habitats: lesser spotted woodpecker (*Dryobates minor*), western capercaillie (*Tetrao urogallus*), honey buzzard (*Pernis apivorus*), Northern goshawk (*Accipiter gentilis*), and goldcrest (*Regulus regulus*). The moor frog (*Rana arvalis*) may also be found in the area. It is most probable that those species use the area for their reproduction and, depending on when in the life cycle of each species the logging occurs, it will cause specimens of the species to be disturbed or killed. Any eggs present in the area at the time of the logging will be destroyed.
- 3 The Skogsstyrelsen (Forest Agency), in its capacity as the supervisory authority, provided specific guidance on the precautionary measures to be taken and, provided that the guidance was followed, considered that the logging did not contravene any of the prohibitions laid down in the artskyddsförordningen (Species Protection Ordinance; 'the ASF'), which is the act transposing the strict species protection in Directive 92/43 and Directive 2009/147 into Swedish law. The precautionary measures prescribed by the Skogsstyrelsen are not legally binding, but mere recommendations.
- 4 On 17 January 2018, the Naturskyddsföreningen i Härryda (Association for the protection of nature in Härryda) and Göteborgs Ornitologiska Förening (Gothenburg Ornithological Association) (together 'the föreningarna') requested the Länsstyrelsen i Västra Götalands län (Regional Administrative Board of Västra Götaland) (which is the regional supervisory authority pursuant to the ASF; 'the Länsstyrelsen') to act on the basis of the notification of logging and the Skogsstyrelsen's specific guidance. The föreningarna stated that, despite the guidance provided by the Skogsstyrelsen, the logging contravened the prohibitions laid down in the ASF.
- 5 The länsstyrelsen found that there was no need for a derogation assessment under the ASF. This means that the länsstyrelsen took the view that the measures did not contravene the prohibitions in the ASF, provided that the precautionary measures specified in the specific guidelines were taken.
- 6 The föreningarna appealed to the referring court against the länsstyrelsen's decision not to take any enforcement action. The föreningarna's main claim is that the referring court should revoke the länsstyrelsen's decision.

The main arguments put forward by the parties

The föreningarna:

- 7 The basis for examinations and assessments of activities which affect protected species must be the need of the species for habitats, food, protection and contact with other specimens of the species. The total effect of various activities and the cumulative effects must be taken into account in the examinations and assessments.
- 8 In the area of the logging there is a great number of protected species. It is clear that forestry is not exempted from species protection. That follows from both national case-law (the judgment of the mark- och miljööverdomstolen (Land and Environment Court of Appeal, Sweden) in Case M 9914-15 and from the case-law of the Court of Justice of the European Union (judgment of 17 April 2018, *Commission v Poland*, C-441/17) concerning forestry and the presence of bird species which are prioritised under Directive 2009/147. Intentional destruction or harm to the breeding sites, nests and eggs of bird species specially designated under Directive 2009/147 is not permitted. Nor may those birds be disturbed during their breeding and rearing periods.
- 9 Six different types of habitat have been documented in the surrounding area, including forest type western taiga (9010) which indicates that it is an area of very high natural value. Western taiga has unfavourable conservation status and the trend for that type of natural environment is negative according to the latest reports on the basis of Article 17 of Directive 92/43. The patch clear cutting carried out today has a serious impact on the habitats and conditions of the protected species. Increased patch clear cutting will reduce the habitats for a great number of protected species.
- 10 As part of the assessment for a derogation, the measures' impact on the local and regional populations' favourable conservation status must be taken into account, as must harm to or deterioration of a habitat's continuous ecological function. It should be noted that gradual deterioration is not permitted either. That applies also to a habitat's continuous ecological function. Cumulative effects must also be taken into account in the assessment and the precautionary principle must be applied. In addition, the species' habitats are protected even when they are not being used by the species and, as stated above, when making assessments on species protection, assessments and examinations are to be carried out for each species individually.
- 11 The Skogsstyrelsen's guidance does not contain any information on the presence of protected species inside the logging area or details of any restrictions on the period during which forestry measures may be undertaken.

Länsstyrelsen

- 12 On the basis of what appears to be generally accepted, in the case of wild birds, only species which are designated by B in Annex 1 to the ASF and thus are of such EU interest that special protection and conservation areas are to be established, red-listed species and species whose population has fallen by more than 50% over the last 30 years (or three generations), according to the Swedish breeding birds census, are covered by the prohibitions in the ASF.
- 13 If the purpose of the measure is clearly not to kill or disturb species, for example by carrying out forestry measures, it is reasonable that there should be a risk of adversely affecting the conservation status of the species for the prohibitions to be applicable (see, inter alia, the judgment of the mark- och miljööverdomstolen (Land and Environment Court of Appeal) in Case M 11317-14).
- 14 With regard to the prohibition of causing damage to or the destruction of the breeding or rest areas of the fauna, there is no requirement that the damage or destruction be intentional. The prohibition applies only if the conservation status of the species concerned is at risk of deterioration. Support for that interpretation can be found, inter alia, in the judgment of the mark- och miljööverdomstolen (Land and Environment Court of Appeal) in Case M 11317-14 in which, according to the länsstyrelsen, that court attaches great importance to the fact that the impact affected an area important to the species ('core area'). An application that does not take into account the risk of impact on conservation status would in many cases go beyond what is necessary to achieve the objective of protection of species. The background to that is the strict conditions for the granting of derogations (see, inter alia, the judgment of the mark- och miljööverdomstolen in Case M 1713-13 and the Commission's guidance note 5), which mean that measures that fall within the scope of the prohibitions cannot, as a rule, be implemented.
- 15 The länsstyrelsen's overall assessment of when the prohibition under Paragraph 4(4) of the ASF is to apply is when a loss (through damage, destruction or deterioration) of the continuous ecological function in the habitat of the species concerned constitutes harm or destruction such as is referred to in the provision. It is, however, necessary at the same time that there be a risk of adverse effects on the species' conservation status for the prohibition to be applied.

Brief summary of the reasons for the referral

- 16 Paragraph 4(1) and 2(p) of the ASF transpose the prohibitions in Article 12 of Directive 92/43 and Article 5 of Directive 2009/147. Under Paragraph 14 of the ASF, the länsstyrelsen may, in individual cases, grant a derogation from the prohibitions in Paragraph 4. In the present case, the länsstyrelsen has found that the logging in question did not require a derogation, which means that the länsstyrelsen is of the view that the prohibitions in Paragraph 4 of the ASF do not

apply. In that regard, the länsstyrelsen has relied on decisions of the mark- och miljööverdomstolen (Land and Environment Court of Appeal).

- 17 In its judgment in case M 11317-14, the mark- och miljööverdomstolen (Land and Environment Court of Appeal) found that it is reasonable to require that there be a risk of affecting the conservation status of the protected species in the area in order for the prohibitions in Paragraph 4(1) and (2) of the ASF to be applicable, when it is clear that the purpose of the activity is not to kill or disturb animal species. The mark- och miljööverdomstolen (Land and Environment Court of Appeal) considers that the impact of the activity on the conservation status of the species concerned should be assessed not only within the relevant biogeographical region, but also locally. The delimitation of that assessment must, in the view of the mark- och miljööverdomstolen, be made having regard to the species concerned. In the case before the mark- och miljööverdomstolen, the activity in question would lead to reproduction sites of individuals of species strictly protected under Directive 92/43 being destroyed. The mark- och miljööverdomstolen gave authorisation for the activity and made it subject to protective measures in the form of the creation of sites for the reproduction of the species in question in the area of the population of the species in the northern part of Gotland. The mark- och miljööverdomstolen found that the protective measures meant that the prohibitions in Paragraph 4 of the ASF did not apply.
- 18 The principal question of the referring court is whether the strict protection under Directive 92/43 ceases to apply in respect of species for which the directive's objective of a favourable conservation status has been achieved.
- 19 In the light of the foregoing and taking into account the facts of the case, the referring court has then posed a number of questions concerning the compatibility with EU law of national practice concerning the assessment of the objective of the measures and their impact on the conservation status of protected species.
- 20 The referring court asks first whether it is compatible with Directive 2009/147 to require, in accordance with national case-law, that a species be listed in Annex 1 to that directive in order to be covered by the prohibitions laid down in Article 5 of that directive or that the species concerned be under threat at any level or have a long-term decline in population in order to be covered by those prohibitions.
- 21 Second, the referring court asks whether it is compatible with Article 12 of Directive 92/43 and Article 5 of Directive 2009/147 to lay down a requirement in national practice that there must be a risk of adverse effects on the conservation status of the species in order for a measure, the purpose of which is clearly not to kill or disturb specimens of protected species or to destroy eggs of such species, to be contrary to the prohibitions in Paragraph 4 of the ASF.
- 22 Third, the referring court asks whether it is compatible with Article 12(d) of Directive 92/43 that, in accordance with national practice, there must be a risk that the conservation status of a protected species will be worsened for the prohibition

in Paragraph 4 of the ASF to apply, when the continuous ecological function of the habitat of the species concerned in a single area, despite precautionary measures having been taken, is lost. That loss of continuous ecological function may be caused by damage, destruction or deterioration, which may be either direct or indirect and may occur alone or cumulatively.

- 23 Last, the referring court is doubtful as to the level at which the impact assessment is to be made, if it is not to be made on an individual level.

WORKING DOCUMENT