

**Case C-473/19****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:**

12 June 2019

**Applicant:**

Föreningen Skydda Skogen

**Defendant:**

Länsstyrelsen i Västra Götalands län

B.A.B.

**The main proceedings**

An appeal by a not-for-profit organisation 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 92/43/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-population<sup>1</sup> 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 92/443/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Article 12 and Annexes 2, 4 and 5

<sup>1</sup> '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.

Directive 2009/147/ EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, Article 5 and Annexes 1 to 3

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 10 January 2006, *Commission v Germany*, C-98/03, EU:C:2006:3

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 1713-13

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 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*), willow tit (*Poecile montanus*), goldcrest (*Regulus regulus*) and coal tit (*Periparus ater*). 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 22 December 2016, the Föreningen Skydda Skogen (the Association Protect the Forest; 'the föreningen') 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 föreningen 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 föreningen appealed to the referring court against the länsstyrelsen's decision not to take any enforcement action. The föreningen's main claim is that the

referring court should revoke the länsstyrelsen's decision and order that planned forestry measures are not permitted because they contravene the prohibitions laid down in the ASF.

### **The main arguments put forward by the parties**

#### *The föreningen*

- 7 One important issue is whether the planned forestry measures, including the planned reforestation and planting activities, even with the precautionary measures recommended by the Skogsstyrelsen, may be carried out without there being a derogation from the ASF. The precautionary measures listed must be sufficient to maintain the continuous ecological function of all protected species' habitats and must not bring about any deterioration in that function. That is particularly important for species present in the area which do not have a favourable conservation status at national/local level, such as the lesser spotted woodpecker, European green woodpecker, western capercaillie, black grouse, European honey buzzard, northern goshawk, goldcrest and willow tit. For the purposes of that assessment, each species must be assessed and examined separately.
- 8 The assessment of whether an derogation is required (that is to say whether the measures fall within the scope of the prohibition) must assess the impact on the favourable conservation status of the local and regional population, as well as damage to or deterioration of the continuous ecological function of the habitat. Nor is a gradual deterioration permitted, which also applies to the continuous ecological function of an area. That means that it is also necessary to take into account the ongoing land-use practices in the area, such as forest plantations and management of growing forest stands. For example, if current land use, such as forestry measures, cause manifest damage to the habitats of a protected species and lead to a reduction in the population in the area, the Member State is obliged to prevent it. That assessment also requires consideration of cumulative effects and the use of the precautionary principle. The area must continue to maintain the continuous ecological function of all protected species. In addition, the Skogsvårdsstyrelsen's guidance does not impose any prohibition on the execution of forestry measures during birds' breeding seasons, despite the fact that Paragraph 4 of the ASF clearly does not allow it.
- 9 If the forest area is felled in accordance with the Skogsstyrelsen's guidance, the forest habitat disappears and part of the habitats of the protected species currently present in that area will also disappear. The crown cover and the forest's diversity, its clearings and the rich undergrowth of bilberry bushes disappear. The major important presence of broadleaf trees would also disappear and the area's continued rich production of dying trees and deadwood would cease. Cumulatively, that would have a seriously negative impact on species such as the lesser spotted woodpecker, black woodpecker, European green woodpecker,

western capercaillie, black grouse, European honey buzzard, northern goshawk, spotted nutcracker, willow tit, goldcrest coal tit and also the moor frog.

*Länsstyrelsen*

- 10 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.
- 11 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).
- 12 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 applying prohibitions cannot, as a rule, be implemented. For example, it has also been clarified in the judgment of 10 January, *Commission v Germany*, C-98/03, that forestry does not constitute a particular reason for derogation.
- 13 Before the necessary assessment of the impact of a measure on the conservation status of the species concerned becomes relevant in a particular case, it must first be found that the measure actually has an impact on the breeding sites and/or resting places of the species in the manner referred to in Paragraph 4(4) of the ASF.
- 14 The term 'deterioration' is not defined in Directive 92/43, but according to the guidance provided by the Commission, deterioration/damage is defined as a physical deterioration of a breeding site or a rest area. The Naturvårdsverket (Swedish Environmental Protection Agency) writes in its *Handbok för artskyddsförordningen* (Handbook to the Species Protection Ordinance) that 'It may be that a deterioration does not immediately result in the loss of a breeding

site or resting place, but has as a consequence the progressive deterioration of the quality of the functioning of the site.’

- 15 In order for progressive deterioration of or damage to the habitat of a species to be covered by the prohibition in Paragraph 4(4) of the ASF, there must be such deterioration from which the habitat cannot recover on its own, that is to say, a deterioration the negative effects of which are irreversible, and which relatively obviously, even if gradually, result in the habitat finally losing its continuous ecological function for the species in question. Logging can often result in some deterioration of species’ habitats, but it is not always the case that that deterioration is automatically prohibited. It is not possible to consider forest use as such progressive deterioration, so far as forestry in general is concerned. If a greater number of notifications of logging in a limited area would together result in a loss of the continuous ecological function of the habitat of a species, the authorities may intervene, even if the logging alone would not have that effect. However, such a cumulative assessment can be based only on what can actually be predicted, for example on the basis of the notifications of logging received.
- 16 In assessing the impact of an activity on a species, there are grounds to look at the impact of the activity not only within the relevant biogeographical region, but also locally. The manner in which the delimitation is to be made must be suitable for the species concerned. If the species in question is widespread and not vulnerable to individual habitat losses (not demanding as regards its habitat requirements), the species should be more resilient in the face of losses of the continuous ecological function at least in certain less-significant habitats. In contrast, rarer species with higher requirements for their habitats, and in particular if the habitats are uncommon, should be more sensitive (that is to say at a greater risk of their conservation status worsening) to losses of the continuous ecological function of a wider range of habitats. The same should be understood as applying to species which, due to their reproductive biology, are also sensitive to individual failed breeding seasons or individual losses, such as, for example, many birds of prey.
- 17 In summary, the prohibition in Paragraph 4(4) of the ASF applies when the continuous ecological function of the habitat of the species concerned is lost, either by damage, destruction or deterioration, directly or indirectly, alone or cumulatively, at the same time as there is a risk of adverse effects on the conservation status of the species.

#### **Brief summary of the reasons for the referral**

- 18 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).

- 19 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 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.
- 20 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.
- 21 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.
- 22 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.
- 23 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.
- 24 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.

- 25 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