

Case C-131/24

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

Date lodged:

16 February 2024

Referring court:

Bundesverwaltungsgericht (Austria)

Date of the order for reference:

15 February 2024

Complainants:

Umweltorganisation VIRUS – Verein Projektwerkstatt für Umwelt und Soziales

Bürgerinitiative 'Nein zur Spange Wörth'

A.H. and Others

Umweltorganisation Verein Lebenswertes Traisental

Umweltorganisation FG LANIUS – Forschungsgemeinschaft für regionale Faunistik und angewandten Naturschutz

Defendant authority:

Amt der Niederösterreichischen Landesregierung, Abteilung Landesstraßenplanung – ST3

Subject matter of the main proceedings

Interpretation of Article 5 of Directive 2009/147/EC – Effectiveness of measures aimed at the timely prevention of deliberate disturbances of certain woodland bird species in the context of a road construction project

Subject matter and legal basis of the request

Request for a preliminary ruling pursuant to Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 5 of Directive 2009/147/EC (Birds Directive) to be interpreted as meaning that a case of deliberate disturbance, as referred to under point (d) of that article, is not constituted if, notwithstanding the fact that individual specimens of certain species could be disturbed, any effect on the objective of Article 2 of that directive will be prevented by means of measures effectively implemented in a timely and appropriate manner?
2. If the first question is answered in the affirmative, must all scientific doubt concerning the effectiveness of the measures be excluded, as evidenced by a well-reasoned, professional appraisal of a court-appointed expert, or must there be objective scientific literature of successful practical experiences of those measures?

Provisions of European Union law relied on

Articles 2 and 5 of Directive 2009/147/EC

Provisions of national law relied on

Paragraph 18 of the Niederösterreichisches Naturschutzgesetz 2000 (Law of Lower Austria on Nature Protection 2000)

Succinct presentation of the facts and procedure in the main proceedings

- 1 By letter of 23 December 2014, the Land Niederösterreich (Province of Lower Austria, Austria), represented by a department of the Amt der Niederösterreichischen Landesregierung (Office of the Government of Lower Austria), requested approval for the project proposal ‘Landesstraße L 5181, Spange Wörth’ (‘state road L 5181, Spange Wörth’) under Paragraph 5 of the Umweltverträglichkeitsprüfungsgesetz 2000 (Law on Environmental Impact Assessments 2000; ‘UVP-G 2000’).
- 2 After carrying out an environmental impact assessment, the defendant authority issued the decision of 12 November 2019, by which it granted approval for the construction and operation of the project proposal (‘the contested decision’).
- 3 Complaints contesting that decision, which asserted, in particular, issues pertaining to the protection of species under Directive 2009/147/EC and Directive 92/43/EEC, were lodged in good time. The referring court was therefore required

to examine, inter alia, whether the adverse effects that – according to those complaints – the proposed project would have on birds are actually to be expected, and how those adverse effects would affect the project proposal’s suitability for approval.

- 4 Potential nesting sites of the ground-breeding bird species skylark, partridge and quail are located within the proposed project’s expected area of impact resulting from use of the land and from noise. It is also expected that noise will affect a significantly wider range of forest birds. Thirty-five species would be affected, including blackbirds, cuckoos and middle-spotted woodpeckers.
- 5 According to the expert opinion of a court-appointed, professional nature-conservation expert, it can be expected that the project plans to restrict the construction period to specific months and to implement habitat-enhancing measures in areas outside of the emissions area will be effective measures for the bird species concerned, which can be formulated as conditions.
- 6 In the present proceedings, a particular point of contention concerns the effectiveness of the measures proposed by the project applicant for improving the forest and protecting old trees located at a distance from the road of at least 300 m, and within a total area of 6.6 hectares, in order to benefit the middle-spotted woodpecker and other woodland bird species.
- 7 According to the expert opinions of both of the experts engaged to give evidence in the proceedings, implementation of the proposed measures would prevent, for the species concerned, any disturbing effects that might have a considerable impact on the aims of the Birds Directive. Although the measures would not be capable of alleviating the disturbing effect on individual species members located within the forest area specifically affected by the proposed project, the proposed measures would nevertheless protect the habitat and ensure the conditions for the occurrence of the species as breeding birds.
- 8 That opinion of the court-appointed experts is disputed by the complainants.
- 9 In the dispute before the referring court, an oral hearing took place over the course of several sittings.

The essential arguments of the parties in the main proceedings

Arguments of the project applicant:

- 10 Implementation of the project proposal would not lead to any direct use of areas encompassing territories of the middle-spotted woodpecker and hence there would be no loss of habitat. Due to the proximity of the planned route to their territories, it is to be assumed that there will be temporary disturbing effects on the main habitat within the inner forest areas, in which there would thus be a reduced level of habitat suitability.

- 11 The planned non-clearance of old trees would have immediate effect: the trees concerned could no longer be felled. They would therefore remain in the stand both as existing or potential breeding sites and as a source for foraging, and would thus be available for long-term use by the middle-spotted woodpecker. Breeding and food resources would thus be safeguarded over the long-term. In particular, forbearance to use old trees helps (often in conjunction with temporary artificial nesting aids) with the short-term provision of dwelling spaces and breeding sites. Non-utilisation would be effective within a short time frame, and thus suitable as a ‘CEF measure’, only if the forest stocks or individual trees could, due to their degree of maturity, be used for commercial forestry within the next three to five years, but were not so used as a result of the ‘CEF measure’. It would be possible in principle to fell the stand of old trees on the areas envisaged for the measures, since the forest areas would have reached their rotation time (80 to 120 years).
- 12 Middle-spotted woodpeckers would be able to build burrows in the old trees, especially in deadwood and dead branches. According to the project applicant, the requirements for the site where the measures are to be implemented (adequate distance from potential sources of disturbance or hazard, measures are located within the environment of existing territories of middle-spotted woodpeckers, measures are located within stands with a currently high habitat potential for the middle-spotted woodpecker, quality and quantity requirements of the old trees) and for temporal effectiveness are fulfilled. The necessary structures would be available within a short time frame. The forested areas would be available in a sufficient quantity and there would be a link with existing occurrences. Overall, there would be an improvement in the habitat suitability compared with the situation that would exist if the proposed project did not proceed.

Arguments of the complainants:

- 13 The complainants dispute the habitat quality of the areas envisaged for implementation of the measures, in terms of both the number of old trees that are present and the volume of necessary deadwood. First and foremost, however, they dispute the claim that the measure to refrain from clearing old trees and to guarantee the presence of deadwood will have immediate effect. With reference to scientific literature, they argue that the measures could be effective only over the medium term, that is to say within a period of five to ten years, and thus only a long time after commissioning of the road.
- 14 The most recent court-appointed expert assumes, on the condition that the measures will comply with certain parameters, that those measures will be fully effective at preventing disturbances. In that respect, he relies primarily on his own experience and guidelines issued by German authorities, which, according to his statements, take account of the literature cited by the complainants. The complainants contest that claim, arguing that those guidelines, which were drawn up on behalf of authorities involved in road construction, are merely expert opinions; they counter them with other expert opinions or their own interpretation of those opinions.

- 15 Responding to a question put to him by the court, the expert witness emphasised that there were no studies that refuted the suitability of the measures for the middle-spotted woodpecker, nor was there any evidence from the autecology of the middle-spotted woodpecker that would suggest that the measures were unlikely to be effective. According to the expert witness, there were therefore no sufficiently substantiated reasons to doubt that those measures would be effective. However, there was still a lack of comprehensive and professionally sound monitoring that would not only eliminate all doubt but also be capable of proving that the measures were effective. When asked by the court if there was a unique, reliably documented case in which the planned measures had prevented a project from disturbing the middle-spotted woodpecker, the expert witness replied that, despite conducting intensive research and exchanging experiences with colleagues, he had not found any studies that distinctly demonstrated that outcome.

Succinct presentation of the reasoning in the request for a preliminary reference

The first question referred:

- 16 In its judgment of 12 April 2018 (*People Over Wind and Others*, C-323/17, EU:C:2018:244) concerning the protection of a site under Directive 92/43/EEC (Habitats Directive), the Court, referring to its earlier case-law, held that Article 6(3) of that directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.
- 17 In its judgment of 17 April 2018 (*Commission v Poland*, C-441/17, EU:C:2018:255, paragraph 262 and 263), the Court held, in relation to the assessment of the prohibitions laid down under Article 5 of the Birds Directive, that the obligations to protect exist even before any reduction in the number of birds has been observed or before the risk of a protected species becoming extinct has materialised, and that those considerations, which concern the general system for protecting birds that is laid down in that provision [Article 4(4) of the Birds Directive], clearly apply all the more in the context of the specific protection provided for in Article 5(b) and (d) of the Birds Directive.
- 18 In the opinion of the referring court, there is no evidence to suggest that the Court's conclusions regarding the prohibition on taking into account measures intended to avoid or reduce harmful effects are transferable to the area of species protection. In that regard, the respective provisions differ significantly since, in the context of site protection, an approval (second sentence of Article 6(3) of the Habitats Directive) is preceded by an assessment of the implications for the site or a screening stage (concerning the necessity for carrying out such an assessment of the implications for the site) (first sentence of Article 6(3) of the Habitat

Directive). However, there is no comparable screening stage in the area of species protection.

- 19 If the Court holds that a full analysis – which would thus include measures intended to avoid or reduce harm – is to be carried out in the assessment phase, there is no reason to assume that, in the area of species protection, such measures to avoid or reduce harm cannot be taken into account during the assessment phase (that is to say the assessment of whether the prohibition is realised).
- 20 In its Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (C(2021) 7301 final, paragraphs 2-67 to 2-73) the European Commission proposes that measures used to ensure continued ecological functionality (referred to as ‘CEF measures’) are to be compliant with the requirements of Article 12(1)(d) of the Habitats Directive. According to that guidance, such measures are those aimed at minimising or even eliminating the negative impact of an activity on breeding sites or resting places of protected species. CEF measures may be an option when an activity might affect parts of a breeding site or resting place only. If the breeding site or resting place, as a result of CEF measures, will still remain at least the same size and retain the same quality for the species in question, there will be no deterioration in the function, quality or integrity of the site.
- 21 In the opinion of the referring court, there is no reason not to extend that principle so that it also covers the prohibition provided for under Article 5(d) of the Birds Directive. Such a view is also supported by the wording of the provision, which provides that only disturbances that would be significant having regard to the objective of the directive are to be prohibited. Other disturbances could not result in the need for a derogation under Article 9 of the Birds Directive.

The second question referred:

- 22 In relation to the approval of plans and programmes as provided for under the second sentence of Article 6(3) of the Habitats Directive, the Court applies the criteria that there must be no reasonable scientific doubt or no reasonable doubt from a scientific point of view. In accordance with the case-law, that assessment may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the site concerned (judgment of 15 June 2023, *Eco Advocacy CLG*, C-721/21, EU:C:2023:477, paragraphs 38 and 39 and the case-law cited therein).
- 23 There is no apparent case-law that addresses the required attributes of measures for avoiding or reducing harmful effects that are aimed at maintaining a continued ecological functionality in the context of species protection.
- 24 In the European Commission guidance referred to above, it is stated that the maintenance or improvement of ecological functionality linked to such measures for the species in question would of course have to be ‘clearly demonstrated’.

According to that guidance, such measures could be used only in situations where an authorisation or planning regime with formal procedures is in place, and where the competent authorities are able to assess whether the measures taken to preserve the ‘breeding’ or ‘resting’ functionality of a site are sufficient. For Article 12(1)(d) of the Habitats Directive to be complied with, there must be a high degree of assurance that the measures were sufficient to avoid any deterioration or destruction and that the measures were effectively implemented in a timely and appropriate manner.

- 25 The proposal set out by the European Commission in its guidance would – according to its wording – allow for the effectiveness of the respective measures to be assessed on the basis of appraisals carried out by experts commissioned by the relevant authority or court.
- 26 The situation would be different, however, if the Court were to apply the criterion for measures intended to avoid or reduce harm as contemplated under Article 6(3) of the Habitats Directive (see judgment of 15 June 2023, *Eco Advocacy CLG*, C-721/21, EU:C:2023:477, paragraphs 38 and 39 and the case-law cited therein).
- 27 In the opinion of the court, there is no prima facie reason not to apply that requirement of the Court also to CEF measures in the context of species protection. Both site and species protection are governed in the same directives and, in both cases, there are potential exceptions, which must be interpreted narrowly, within a strict protection system.
- 28 The formulations used by the Court in connection with that requirement suggest that mere expert appraisals will not be sufficient in order to avoid the prohibition. Instead, it seems necessary to impose the additional requirement that the prospects of a successful practical application of the measure are documented to a sufficient extent that there can be no scope for reasonable doubt as to the measure’s effectiveness. In that sense, the criterion of ‘no reasonable scientific doubt’ appears to approximate to the requirement for ‘best available techniques’ (BAT) under Article 3(10) of Directive 2010/75/EU on industrial emissions, according to which those techniques are ‘available’, that is to say that their effectiveness must have been tried and proven, which is guaranteed by the procedure referred to under Article 13 of that directive, by which the BAT conclusion is adopted.
- 29 In the instant case to be adjudicated, that would mean, however, that the measures proposed in respect of the middle-spotted woodpecker could not be regarded as a ‘CEF measure’ because there is no scientific literature on their effectiveness.