

Case C-27/24

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:

15 January 2024

Referring court:

Tribunale Regionale di Giustizia Amministrativa della Regione autonoma Trentino – Alto Adige/Südtirol (Italy)

Date of the decision to refer:

20 December 2023

Appellants:

Lega Anti Vivisezione (LAV)

Lega per l'Abolizione della Caccia (LAC)

Respondents:

Provincia autonoma di Trento

Istituto Superiore per la Protezione e la Ricerca Ambientale (ISPRA)

Ministero dell'ambiente e della sicurezza energetica

Subject matter of the main proceedings

The proceedings concern a series of appeals brought by various environmental/animal welfare associations against certain measures pursuant to which, after a female brown bear had killed a person, the President of the Provincia autonoma di Trento (Autonomous Province of Trento, 'the PAT'), authorised the bear's disposal by killing.

Subject matter and legal basis of the request

By its reference for a preliminary ruling under Article 267 TFEU, the referring court asks, in essence, whether Article 16 of the Habitats Directive (Directive 92/43), which allows an authority to derogate from the prohibition of the deliberate capture or killing of specimens of species protected in the wild, provides for an order of priority between, on the one hand, the permanent captivity of the dangerous animal (that is to say, capturing it in order to place it in permanent captivity) and, on the other hand, its killing.

Question referred for a preliminary ruling

[1.] On the basis of the provisions of Article 16 of Directive 92/43/EEC, once it has been established that one of the situations expressly referred to in points (a) to (e) of Article 16(1) exists and that the condition that ‘the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range’ has been satisfied, for the purpose of granting authorisation to derogate from the prohibition of ‘all forms of deliberate capture or killing of specimens of these species in the wild’, laid down in Article 12(a) of that directive, must the further condition that ‘there is no satisfactory alternative’ be interpreted as meaning that the competent authority must show that there is no satisfactory alternative that would prevent the animal from being removed from its natural range, from which follows the possibility of a reasoned choice concerning the measure to be taken in practice, consisting either in capturing the animal and keeping it in permanent captivity or in killing it, those measures being placed on an equal footing?

or

[2.] On the basis of the provisions of Article 16 of Directive 92/43/EEC, once it has been established that one of the situations expressly referred to in points (a) to (e) of Article 16(1) exists and that the condition that ‘the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range’ has been satisfied, for the purpose of granting authorisation to derogate from the prohibition of ‘all forms of deliberate capture or killing of specimens of these species in the wild’, laid down in Article 12(a) of that directive, must the further condition, that ‘there is no satisfactory alternative’, be interpreted as imposing on the competent authority an obligation to choose, as the preferred option, capture for the purposes of keeping the animal in captivity (permanent captivity), and that only where that solution is objectively and not temporarily impossible does it permit the disposal of the animal by killing, so that there is a strict hierarchy between such measures?

Provisions of European Union law and case-law relied on

Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Articles 2, 12 and 16 ('the directive');

Judgments of 20 October 2005, *Commission v United Kingdom*, C-6/04; of 10 May 2007, *Commission v Austria*, C-508/04; of 14 June 2007, *Commission v Finland*, C-342/05, (paragraphs 31 and 45); of 17 April 2018, *Commission v Poland*, C-441/17; of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola*, C-674/17, (paragraphs 27, 28, 29, 32, 38, 41, 49, 51, 59, 66 and 68); of 11 June 2020, *Asociația 'Alianța pentru combaterea abuzurilor'*, Case C-88/19, (paragraphs 25, 44 and 49); and of 2 March 2023, *Commission v Republic of Poland*, C-432/21

Provisions of national law relied on

Decreto del Presidente della Provincia Autonoma di Trento n. 10 del 27 aprile 2023 (Decree No 10 of 27 April 2023 of the President of the Autonomous Province of Trento);

Legge provinciale 11 luglio 2018, n. 9 – Attuazione dell'articolo 16 della direttiva 92/43/CEE del Consiglio, del 21 maggio 1992, relativa alla conservazione degli habitat naturali e seminaturali e della flora e della fauna selvatiche: tutela del sistema alpicolturale ("L. prov. n. 9/2018") (Provincial Law No 9 of 11 July 2018 – Implementation of Article 16 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora: protection of the alpine farming system; 'Provincial Law No 9/2018')

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 5 April 2023, in the municipality of Caldes (province of Trento), a 26-year-old man was found dead in a forest, with injuries later attributed to a female brown bear specimen, named JJ4. On 8 and 13 April 2023 the President of the PAT issued two urgent orders, for the purpose of protecting public safety, for the killing of the specimen, orders that he subsequently declared null and void after the animal had been captured. The bear is currently being kept in a protected location (the Casteller centre). On 27 April 2023 the President of the PAT issued Decree No 10 ('the contested decree') authorising the disposal of the animal by killing, pursuant to Provincial Law No 9/2018 (transposing Article 16 of the directive).
- 2 The appellants ('the associations') challenged the decree, arguing, inter alia, that: (a) the order to kill the bear was disproportionate because the bear had been captured and the order to kill it was issued only because the PAT did not wish to expend resources on arranging for its transfer; (b) the order to kill was the result of an assertion that the animal was dangerous, but no explanation was given in the

contested decree for that assertion, since, in order to evaluate whether there is real danger, and therefore the most appropriate measure, an analysis of the interactions between man and the bear is an absolute necessity to assess whether, in the context of a chance meeting, they may develop into more or less aggressive behaviour on the part of the bear, as a natural consequence of the danger which he perceives as a result of the close presence of humans; (c) on the occasion of an earlier incident, it was clear from the opinions requested that there was no clear evidence of the dynamics of the facts; (d) the establishment of the facts was vitiated by shortcomings in the investigation; (e) the attack was not the result of the bear being intrinsically dangerous, but of the fact that she defended her cubs from what she considered to be an imminent danger represented by the extreme proximity of people. The same also applies, in the appellants' view, to previous incidents involving the same specimen; (f) for the purposes of choosing the most appropriate measure, some technical reports recommend for bears that are only potentially dangerous, as JJ4 might be, measures other than killing; (g) although the President of the PAT also refers in his reasoning to the 'Guidelines for the implementation of Provincial Law No 9/2018 and of Article 16 of the Habitats Directive' ('the Guidelines'), according to which the measure of killing is preferable for the most dangerous bears, that statement should be seen in context, in so far as the same Guidelines consider the transfer of the dangerous specimen to another location as an alternative to killing it, but that was not considered by the PAT; (h) the PAT's argument that bear JJ4 must be put down to leave more space for the other bear accommodated in the facility must be rejected, because one specimen cannot be put down for the sole purpose of making space for another. Moreover, the Casteller facility is inadequate because a bear cannot and should not be kept for a long time in a cramped space incompatible with its characteristics, and therefore permanent captivity is an outdated and unlawful measure.

- 3 In an action on additional grounds, the associations challenged the Guidelines, arguing, *inter alia*, that: (a) the Guidelines did not take sufficient account of the fact that there are alternatives to killing, such as sterilisation, using a radio-collar, permanent captivity or transfer to another location, and do not take account of the need for adequate investigation, in particular with regard to the reconstruction of the dynamics of the incidents; (b) the Guidelines provide for the measure of capture and release for the purpose of relocation and/or radio-tagging, but only for the monitoring of animals and not for dealing with critical cases; (c) the Guidelines state that, in the most serious cases, the specimen should be removed in the absence of satisfactory alternatives, which means either keeping it in permanent captivity or killing it, while the Istituto Superiore per la Protezione e la Ricerca ambientale (Italian Institute for Environmental Protection and Research; 'ISPRA') has set out in its defence the most appropriate measures in the present case, which include intensification of monitoring; capture for relocation and radio-tagging; and capture, sterilisation and reintroduction of the bear into the wild; (d) the Guidelines provide indiscriminately for the killing of bears in critical cases without considering the alternatives and without analysing the history of the individual specimen and the dynamics of the incident, contradicting the

documents cited in those Guidelines, which state that it is only for high-risk bears that removal is immediately suggested, whereas it suggests, for specimens that are potentially dangerous, a careful assessment of each individual case, intensive monitoring, as well as preventive and deterrent measures.

- 4 By Order No 35/2023, the referring court held that the claims were unfounded, in particular on the following grounds: **(I)** the fact that the bear was captured is not sufficient to justify a finding that the measure of killing is disproportionate, because that measure was ordered pursuant to Provincial Law No 9/2018, according to which the President of the PAT may authorise killing on condition that there is no satisfactory alternative and that the taking is not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range. Moreover, the contested decree adequately sets out the absence of viable alternatives to killing; **(II)** the factual framework had in fact been adequately reconstructed in the light of the analyses and autopsy performed, which clearly demonstrated that bear JJ4 was responsible for the event; **(III)** the fact that the bear had had cubs with her could not automatically lead to a conclusion that the attack was the result of her instinct to protect them. Furthermore, in the opinion of ISPRA, the bear's behaviour, according to the Interregional Action Plan for the Conservation of the Brown Bear in the Central and Eastern Alps ('PACOBACE'), corresponded to the highest level of danger and the bear fell into the 'high risk' category, for which immediate removal is recommended; **(IV)** the previous episodes of aggression by the same bear, referred to by ISPRA, together with the lethal attack on 5 April 2023, are more than sufficient grounds for the animal to be classified as a high-risk bear, irrespective of the reasons for the individual attacks; **(V)** it is apparent from the contested decree that alternatives to killing were properly considered, but that the President of the PAT, following the relevant provincial Guidelines, did not consider such measures to be appropriate to address the dangerousness of the bear, since capturing it and fitting a radio-collar would not protect human safety. The Guidelines specify that the PAT has temporary or permanent captivity facilities, such as the Casteller centre, which, however, can accommodate a maximum of three specimens and is the only facility in the Alpine area authorised to keep problem bears. The Guidelines state that in European States where bears are present, dangerous animals should usually be killed, rather than kept in captivity for life, because: (a) bears born in the wild and accustomed to ranging over areas of hundreds of square kilometres cannot enjoy the same conditions in a restricted area; (b) bears can live much longer in captivity than in the wild and keeping them entails significant demands in view of the potential number of specimens to be kept and the associated work involved in the construction and management of facilities; (c) the management of wild bears in confined spaces may lead to problems of interaction between them, such as attacks, injury and killing; (d) specimens in captivity cannot be released back into the wild, given the degree to which they have become habituated to humans. In addition, the Casteller centre has three sectors, one of which is already occupied by another bear, which needs as much space as possible, and one by JJ4, while space needs to be left free for the placement of other specimens, in emergencies; **(VI)** the criticism of the contested

decree in so far as it states that it is necessary to ensure that the other bear accommodated at the Casteller centre needs as much space as possible in order to give it the best living conditions is unfounded, since it merely supports the choice made by the President of the PAT in the contested decree, in so far as the associations themselves admit that a bear cannot and should not be kept for a long time in a cramped space incompatible with the ethological characteristics of animals that range over kilometres in a single day.

- 5 By subsequent interim order No 51/23, the referring court also dismissed the action on additional grounds, arguing, inter alia, that: **(I)** the Guidelines set out the reasons for the ineffectiveness and impracticability of alternatives to killing, which the referring court agrees with, at least in the case of high-risk specimens; **(II)** the suitability of measures such as ‘capture and release for the purpose of relocation and/or radio-tagging’ or ‘sterilisation’ is not supported by adequate evidence; **(III)** the ‘lighter-touch’ measures suggested by the associations are manifestly incapable of dealing with the dangerous situation arising from the free movement of a bear, which, after the fatal attack, falls squarely within the high-risk category.
- 6 In its Order No 2915/2023 the Council of State amended in part the abovementioned Orders Nos 35/2023 and 39/2023 of the referring court and suspended the order for the killing of specimen JJ4, thereby keeping the bear alive, in captivity, to protect public safety.

Legal background

- 7 The brown bear is protected internationally by the Bern Convention of 19 September 1979.
- 8 At EU level, Articles 12 and 16 of the directive concern prohibitions of the capture or killing of specimens of protected species in the wild and possible derogations from those prohibitions. Article 16 was transposed into the PAT’s legal order by Article 1 of Provincial Law No 9/2018. The text in force at the time the contested decree was adopted provided that, in order to preserve the alpine farming system of the province’s mountain territory, and in particular to conserve natural habitats, ensure the interest of public health and safety or for other imperative reasons of public interest, the President of the PAT was empowered to authorise the taking, capture or killing of bears and wolves, provided that there was no satisfactory alternative and that the taking was not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range. That article was amended by Provincial Law No 59 of 8 August 2023, which exempts the President of the PAT from the obligation to seek the opinion of ISPRA in certain circumstances, and provides that the President must always order the killing of the specimen under certain conditions, such as when the specimen attacks using physical contact, deliberately

follows people or tries to enter homes. The referring court considers that change to be irrelevant, since it is not retroactive.

The essential arguments of the parties in the main proceedings

- 9 According to the referring court's case-law, Provincial Law No 9/2018 and PACOBACE do not define an order of priority between permanent captivity and killing for dangerous bears, and the measures of taking, capture and killing are equivalent in the sense that they produce the same effect of having an impact on the conservation of natural habitats by excluding the dangerous specimen from its habitat.
- 10 The Council of State (in Order No 2915/2023) took a different view, stating that, according to the Court of Justice, the directive requires Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures, including preventive measures, that enable the actual avoidance of the deliberate capture or killing in the wild of protected specimens (judgment in Case C-441/17.) Although Article 16 of the directive authorises the Member States to derogate, that derogation is subject to the condition that there is no satisfactory alternative and that the derogation is not detrimental to the maintenance of the species concerned at a favourable conservation status in its natural range (judgment in Case C-674/17). Article 16(1) must be interpreted restrictively (judgment in Case C-508/04).
- 11 According to the Council of State, the matter is governed by the principle of proportionality. A derogation is only possible according to a rationale that sets out an order of priority and complies with that principle. In order to be proportionate, it is not sufficient for the measure to be appropriate for the purpose, but it must be the only one possible, so as not to represent an excessive sacrifice of the benefit that is deemed to be lesser when the opposing interests are weighed against each other. Contrary to the submission by the referring court, the Council of State affirms that the measures that the authority may take must be adopted in line with an order of priority, with the result that recourse may be had to the most serious measure only where it is established that it would be impossible to adopt the less cruel measure.
- 12 The Council of State concluded that an animal may only be killed in the extreme and rare case that it is objectively, rather than temporarily and subjectively, impossible to have recourse to less cruel actions. It held that the contested decree exceeded those limits, in so far as it ordered the animal to be killed without having adequately assessed the effectiveness of intermediate measures capable of safeguarding public safety without sacrificing the animal's life, and that the contested measure is logically flawed. The absence of adequate facilities for accommodating the bear cannot, in the view of the Council of State, justify a measure that violates the principle of proportionality and risks authorising indiscriminate use of the extreme measure of killing. The public alarm prompted

by recent tragic episodes should not affect assessments made by the administration, which must continue to be strictly guided by legal criteria. Precisely by virtue of the structural deficiencies and the emergency situation, the administration had a duty to assess every intermediate measure between releasing the animal and killing it, and, therefore, it should also have assessed the possibility of transferring it to a facility other than those belonging to the PAT, possibly outside the national territory.

- 13 The Council of State thus took the view, in the orders mentioned above, that the contested decree, in so far as it ordered the killing of the animal, was disproportionate and inconsistent with supranational and national legislation requiring the appropriate assessment of intermediate measures.

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

- 14 The referring court limits the scope of the question referred for a preliminary ruling by observing that, in the present case, contrary to the submissions of the applicant associations, it is not relevant to assess the manner in which the competent administration ensures the protection, in advance, of the animal species subject to protection: the present case concerns an individual measure ordering the removal of an animal that posed a danger to public safety. Accordingly, the question referred for a preliminary ruling seeks only to ascertain the correct interpretation of the EU law applicable to the contested measure authorising a derogation from the prohibition of killing. In particular, the referring court considers that, for the purposes of assessing the lawfulness of the contested decree, it is not necessary to ascertain whether or not the PAT had put in place appropriate measures to prevent events such as that which led to the adoption of the decree.
- 15 The referring court observes that, when interpreting a provision of EU law, account must also be taken of its context and of the objectives pursued by the legislation of which it forms part. The aim pursued by the directive, namely the protection of biodiversity through the conservation of wild fauna of Community interest and their natural habitats, is therefore of decisive importance.
- 16 The referring court explains that, in its judgment in Case C-88/19, the Court of Justice clarified the purpose of the directive, making it clear that the terms ‘natural range’ and ‘the wild’ extend to areas outside specifically protected sites and also include areas of human settlement. The Court of Justice also clarified that ‘the protection ... applies not only in specific places, but covers all specimens of the protected animal species living in the wild or as wild animals and thus performing a function within natural ecosystems, without necessarily applying to those specimens which are being lawfully held in captivity’ (paragraph 44), and that ‘an interpretation to the effect that the “natural range” ... also includes areas located outside protected sites and that the resulting protection is therefore not restricted to those sites is such as to allow the objective of prohibiting the killing or capture

of specimens of protected animal species to be achieved. The aim is to protect such species not only in certain restrictively defined places but also the specimens of those species living in the wild or as wild animals and thus performing a function within the natural ecosystems' (paragraph 49). It may thus be concluded, in line with the objective of protection pursued by the directive, that the wording of Article 12 aims to achieve such protection, and not merely to protect the life of an individual specimen belonging to a protected species, irrespective of all circumstances.

- 17 The referring court points out that the Court of Justice has held: that the burden of proving the existence of the conditions for derogation pursuant to Article 16 rests on the authority adopting the relevant decision (judgment in Case C-6/04); that the national authorities must establish that the three conditions laid down in that article are present (judgment in Case C-342/05); that the Member States must ensure that the cumulative effects of the derogations do not produce impacts contrary to the objectives of Article 12 or of the directive as a whole, and must adopt the precautionary principle if the scientific data leave uncertainty as to whether or not a derogation will be detrimental to the maintenance of an endangered species at a favourable conservation status; that the fulfilment of those conditions must be duly substantiated by reference to specific and concrete situations (judgment in Case C-674/17).
- 18 The referring court states that it is familiar with the case-law of the Council of State contained in the abovementioned interim Orders No 2915/23 concerning the scope of the principle of proportionality, but criticises the Council of State for failing, in that order, to adopt a position on the precise reasons set out on that point by the referring court, which repeatedly reaffirmed the principle that the measures of taking, capture and killing are equivalent measures, in the sense that they produce the same effect of having an impact on the conservation of natural habitats inhabited by bears, by excluding the dangerous specimen from its natural habitat.
- 19 Ultimately, the referring court takes the view that Article 16 of the directive – which permits derogation from the prohibition of the deliberate capture or killing of protected specimens under strict conditions, including the need to protect public safety – does not state that keeping an animal in permanent captivity is to be preferred to killing it. Therefore, where such a need has been established, as well as the condition that the removal is not detrimental to the maintenance of the species concerned at a favourable conservation status in its natural range, the remaining condition, namely that 'there is no satisfactory alternative', must be interpreted in the light of the directive's overall objective, which is the conservation of biodiversity. It is true that the Court of Justice requires 'a clear and sufficient statement of reasons as to the absence of a satisfactory alternative' capable of achieving the objectives relied on in order to justify the derogation in question (judgment in Case C-342/05, paragraph 31), but it does not require a specific statement of reasons as to the order of priority between capture and killing.

- 20 The referring court considers that ascertaining that there is no satisfactory alternative refers to ascertaining that there is no alternative solution that would enable the animal to be kept in the wild, and would avoid its removal. But if that is the purpose of the directive, then capture and killing are entirely equivalent measures, because both produce the same effect, which is to remove the animal from the wild and stop it from living as a wild animal. Thus, the competent authority's assessment does not concern the choice between killing the animal or keeping it in permanent captivity, but rather whether or not to remove the animal from the wild and stop it from living as a wild animal, with a view to the protection of the protected species which is the purpose of the directive.
- 21 The referring court notes that the absence of any order of priority between keeping in captivity and killing is confirmed by the placement of the prohibition of capture or killing, which is to be found in Article 12 of the directive and not in Article 16, which concerns the conditions for derogation. Nowhere does the text of Article 12 state that capture is to be preferred to killing. On the contrary, even in the case of a derogation provided for in Article 16(1)(e) [(‘to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens (...)] where only capture or keeping is intended, the Court of Justice itself has held that killing is equivalent to capture for the purposes of Article 16, stating that ‘the concept of “taking” within the meaning of Article 16(1) (...) must be understood as including both the capture and killing of specimens (...) so that that provision can (...) serve as basis for granting derogations’ (judgment in Case C-674/17, paragraph 32). The argument that the principle of proportionality provides for an order of priority between the two measures is thus disproved.
- 22 The referring court considers that its reasoning is consistent with the other condition set out in Article 16, under which the derogation must not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status. In the referring court's view, capture and killing are entirely equivalent measures, as both remove the specimen from its natural range. Merely keeping the specimen alive, but within a facility, does not demonstrate that there is no detriment to the species.
- 23 The referring court considers that the interpretation given by the Council of State is unreasonable because it excludes the possibility for the competent authority to justify the choice of killing an animal that poses a danger to public safety (instead of keeping it in captivity). If permanent captivity were to take priority over killing, the authority would have to demonstrate the rare circumstance that it is objectively, rather than temporarily and subjectively, impossible to keep the animal in permanent captivity (not only in facilities under its own responsibility, but also in other States). That would, however, constitute a *probatio diabolica*, which eliminates the relevance of other justifications relating to the individual case, in the context of the balancing of interests, concerning the welfare of the animal, which is used to living in the wild, the possible absence of any place

where it might be accommodated, the costs and the safety of the operators, and so forth.

- 24 The referring court therefore reiterates that the rules laid down by Provincial Law No 9/2018 comply with Article 16 of the directive, but nevertheless considers it necessary, in order to clarify the interpretation of the applicable EU law, to stay the proceedings and transmit the documents to the Court of Justice.

WORKING DOCUMENT