



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 10 September 2020¹

Joined Cases C-473/19 and C-474/19

Föreningen Skydda Skogen and Others

v

Länsstyrelsen i Västra Götalands län

(Request for a preliminary ruling
from the Vänersborgs tingsrätt, mark- och miljödomstolen (Property and Environmental Affairs
Chamber of the Court of First Instance of Vänersborg, Sweden))

(Request for a preliminary ruling – Directive 2009/147/EC – Conservation of wild birds – Directive
92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Prohibitions for the
conservation of protected species – Logging – Conservation status of species – Deliberateness)

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¹ Original language: German.

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I. Introduction

1. The Habitats Directive² and the Birds Directive³ contain provisions on protected sites, but also require the protection of certain animal and plant species, even outside protected sites.⁴ The systems of protection allow for derogations in each case under conditions that are to be interpreted strictly.

2. In this case, the Court is faced with questions regarding species protection which it has already encountered in a similar form in connection with the protection of sites. In the case of the protection of sites, attempts had been made – largely unsuccessfully – to use measures intended to compensate for the detriment caused to sites in order to exclude the application of the protection legislation. Such compensatory measures are, however, among the conditions for a derogation, which also requires a weighing up against the damage caused and an assessment of alternatives.⁵

2 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

3 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 193).

4 Most recently, judgment of 11 June 2020, *Alianța pentru combaterea abuzurilor* (C-88/19, EU:C:2020:458).

5 See judgments of 15 May 2014, *Briels and Others* (C-521/12, EU:C:2014:330); of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583); of 26 April 2017, *Commission v Germany* (C-142/16, EU:C:2017:301); and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882).

3. In the present case, the question now is whether the application of the prohibitions under the law on the protection of species can depend on the fact that the measure in question is detrimental to the conservation status of the species concerned. However, a good conservation status is an express condition for a derogation, at least in the Habitats Directive. Furthermore, derogations in that directive require specific reasons and an assessment of alternatives. The situation is similar for bird protection.

4. At the same time, however, it must be recognised that species protection, as interpreted by the Court, may require very far-reaching restrictions on human activities. There is therefore a legitimate interest in avoiding disproportionate restrictions.

5. The present case therefore offers a welcome opportunity to examine this tension in greater detail.

II. Legal framework

A. *The Bern Convention*

6. Article 6 of the Bern Convention⁶ contains fundamental prohibitions under the law on the protection of species:

‘Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Annex II. The following will in particular be prohibited for these species:

- (a) all forms of deliberate capture and keeping and deliberate killing;
- (b) the deliberate damage to or destruction of breeding or resting sites;
- (c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;
- (d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;
- (e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this Article.’

7. Derogations are governed in Article 9(1) of the Convention:

‘Each Contracting Party may make exceptions from the provisions of Articles 4, 5, 6, 7 and from the prohibition of the use of the means mentioned in Article 8 provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:

- for the protection of flora and fauna,
- to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property,
- in the interests of public health and safety, air safety or other overriding public interests,

⁶ Convention on the conservation of European wildlife and natural habitats, opened for signature in Bern on 19 September 1979 (OJ 1982 L 38, p. 3); approved on behalf of the Community by Council Decision 82/72/EEC of 3 December 1981 (OJ 1982 L 38, p. 1).

- for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding,
- to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.’

B. EU law

1. The Habitats Directive

8. Pursuant to Article 1(i) of the Habitats Directive, conservation status of a species describes ‘the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as “favourable” when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis’.

9. Article 1(m) of the Habitats Directive defines the term ‘specimen’ as ‘any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species’.

10. Article 2 of the Habitats Directive sets its fundamental aims:

‘1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

11. Article 12 of the Habitats Directive contains the basic obligations associated with the protection of species:

‘1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;

- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

...'

12. Article 16(1) of the Habitats Directive contains derogations from Article 12:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

13. Annex IV(a) to the Habitats Directive lists, inter alia, the moor frog (*Rana arvalis*) as an animal species of Community interest in need of strict protection.

2. *The Birds Directive*

14. Recital 10 of the Birds Directive requires, inter alia, that certain bird species be maintained at a 'satisfactory level'.

'Because of their high population level, geographical distribution and reproductive rate in the Community as a whole, certain species may be hunted, which constitutes acceptable exploitation where certain limits are established and respected, as such hunting must be compatible with maintenance of the population of these species at a satisfactory level.'

15. Article 1 of the Birds Directive governs its scope:

‘This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.’

16. Article 2 of the Birds Directive contains the basic obligation of the Member States as regards the maintenance of bird species:

‘Member States shall 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, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.’

17. For certain species listed in Annex I to the Birds Directive and for migratory birds, Article 4 provides for the establishment of special protection areas. According to the referring court, the western capercaillie (*Tetrao urogallus*) is covered by the species listed in Annex I. The Swedish populations of the lesser spotted woodpecker (*Dryobates minor*) and the goldcrest (*Regulus regulus*) could be regarded as migratory birds.

18. Article 5 of the Birds Directive contains prohibitions that are not dependent on a specific area:

‘Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

- (a) deliberate killing or capture by any method;
- (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
- (c) taking their eggs in the wild and keeping these eggs even if empty;
- (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- (e) ...’

19. Article 9(1) of the Birds Directive allows derogations from the prohibitions laid down in Article 5:

‘1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

- (a) – in the interests of public health and safety,
 - in the interests of air safety,
 - to prevent serious damage to crops, livestock, forests, fisheries and water,
 - for the protection of flora and fauna;
- (b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;
- (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.’

3. *Environmental Liability Directive*

20. Article 2(1)(a) of the Environmental Liability Directive⁷ defines the term ‘environmental damage’ in relation to protected species:

‘damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;

...’

21. Pursuant to Article 5(1) of the Environmental Liability Directive, environmental damage must be prevented:

‘Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures.’

C. *Swedish law*

22. “Paragraph 4 of the Artskyddsförordning (Species Protection Ordinance (2007:845), ‘the ASF’) transposes the prohibitions in Article 12 of the Habitats Directive and Article 5 of the Birds Directive.

‘The following are prohibited with regard to the wild birds as well as the wild animal species marked “N” or “n” in Annex 1 to this Ordinance:

1. deliberate capturing or killing of animals;
2. deliberate disturbance of animals particularly during the period of breeding, rearing, hibernation and migration;
3. deliberate destruction or taking of eggs in the wild, and
4. deterioration or destruction of breeding sites or resting places of animals.

Those prohibitions apply to all stages of life of the animals.

The first subparagraph does not apply to bird and mammal hunting. Such hunting is subject to the provisions with a similar content in Law No 259 of 1987 on hunting and Decree No 905 of 1987 on hunting. The first subparagraph also does not apply to fishing. Fishing is subject to the provisions with a similar content in Decree No 1716 of 1994 on fishery and aquaculture activities and the fisheries sector.’

23. Annex 1 to the ASF contains a list of all species listed in Annexes I to III to the Birds Directive and in Annexes II, IV and V to the Habitats Directive. Of the species mentioned in the present case, the western capercaillie (*Tetrao urogallus*) and the moor frog (*Rana arvalis*) are therefore named in that list.

⁷ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56), as amended by Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 (OJ 2013 L 178, p. 66).

24. In that annex to the ASF, the species listed in Annex IV to the Habitats Directive, such as the moor frog (*Rana arvalis*) mentioned in the present case, are marked with the letter ‘N’. A species marked with the letter ‘n’ requires strict protection based on a national assessment by Sweden or on an international commitment. Such a species is not listed in Annex IV to the Habitats Directive.

25. Under Paragraph 14 of the ASF, the Regional Administrative Board may, in individual cases, grant a derogation from the prohibitions in Paragraph 4.

III. Facts and request for a preliminary ruling

26. Both cases concern the notification of logging sent to the Forestry Agency for a forest area in the Swedish municipality of Härryda. The measures entail the removal of all trees in the areas concerned except for the limited number of trees which should be kept in accordance with the Forestry Agency’s guidelines.

27. The following bird species have their habitats in the forest area: lesser spotted woodpecker (*Dryobates minor* or *Dendrocopos minor*), western capercaillie (*Tetrao urogallus*), willow tit (*Poecile montanus* or *Parus montanus*), goldcrest (*Regulus regulus*) and coal tit (*Periparus ater* or *Parus ater*). The moor frog (*Rana arvalis*) can also be found in the area.

28. According to Sweden’s reports within the framework of the Birds Directive⁸ and the Habitats Directive,⁹ the conservation status of the moor frog is favourable in that Member State, and the populations of the lesser spotted woodpecker, the western capercaillie and the coal tit are stable. On the other hand, the populations of the goldcrest and the willow tit are in moderate decline.

29. 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.

30. The Forest Agency, in its capacity as the supervisory authority, provided specific guidelines on the precautionary measures to be taken and, provided that the guidelines were followed, considered that the logging did not contravene any of the prohibitions laid down in the Swedish ASF. The Forest Agency’s guidelines on the precautionary measures are not legally binding, but mere recommendations.

31. On 22 December 2016, the Föreningen Skydda Skogen (the Protect the Forest Association) and the Göteborgs Ornitologiska Förening (Gothenburg Ornithological Association) requested the Länsstyrelsen i Västra Götalands län (Regional Administrative Board of Västra Götaland) (which is the regional supervisory authority pursuant to the ASF) to act on the basis of the notification of logging and the Forest Agency’s specific guidance (Case C-473/19). On 17 January 2018, the Naturskyddsföreningen i Härryda (Association for the protection of nature in Härryda) and the Göteborgs Ornitologiska Förening (Gothenburg Ornithological Association) made a further such request to the Regional Administrative Board (Case C-474/19).

32. The associations take the view that, despite the guidance provided by the Forest Agency, the logging contravened the prohibitions laid down in the ASF.

⁸ <https://nature-art12.eionet.europa.eu/article12/summary>, visited on 30 July 2020.

⁹ https://circabc.europa.eu/sd/a/fad548dd-b8e0-4cc0-ae2f-266eb603671a/SE_Annex%20I%20Article%2017%20National%20Summary.docx, p. 12, visited on 30 July 2020.

33. The Regional Administrative Board takes the view that there was no need for a derogation assessment under the ASF. This means that the Regional Administrative Board takes the view that the measures did not contravene the prohibitions laid down in the ASF, provided that the precautionary measures specified in the specific guidelines were taken.

34. The associations appealed to the referring court against the Regional Administrative Board's decision not to take any enforcement action. The associations' main claim is that the referring court should revoke the Regional Administrative Board's decision and rule that the planned forest management measures are not permissible because they contravene prohibitions laid down in the ASF.

35. The court refers the following questions to the Court of Justice in Cases C-473/19 and C-474/19:

- (1) Is Article 5 of the Birds Directive to be interpreted as precluding a national practice whereby the prohibition covers only those species which were listed in Annex 1 to the directive, or are at some level at risk, or are suffering a long-term decline in population?
- (2) Are the terms “deliberate killing/disruption/destruction” in Article 5(a)-(d) of the Birds Directive and Article 12(a)-(c) of the Habitats Directive 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 the Birds Directive concerns the protection of all species of birds referred to in Article 1(1),
 - the manner in which Article 1(m) of the Habitats Directive 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 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 the Habitats Directive 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 in a single area, 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.⁷

36. The Court of Justice joined the two cases. The applicant environmental associations, the Czech Republic and the European Commission submitted written observations.

IV. Legal assessment

37. Article 5(a) to (d) of the Birds Directive and Article 12(1)(a) to (c) of the Habitats Directive require the Member States to establish systems of protection for the species covered which prohibit certain *deliberate* detriment. In particular, killing and capture ((a) in both directives), destruction or taking of eggs from the wild (Article 5(b) of the Birds Directive and Article 12(1)(c) of the Habitats Directive), destruction of, damage to, or removal of birds’ nests (Article 5(b) of the Birds Directive), taking birds’ eggs in the wild and keeping these eggs even if empty (Article 5(c) of the Birds Directive), and disturbance (Article 5(d) of the Birds Directive and Article 12(1)(b) of the Habitats Directive) must be prohibited. Only the prohibition of deterioration or destruction of breeding sites or resting places pursuant to Article 12(1)(d) of the Habitats Directive does not require the act to be deliberate.¹⁰

38. The request for a preliminary ruling ultimately asks whether it is permissible to make those prohibitions subject to the condition that the conservation status of the species concerned is unfavourable or would be deteriorated by the act in question. Although such conditions are derived from Swedish provisions and case-law, they have no basis in the texts of the Birds Directive and the Habitats Directive. They are therefore questionable, at least in some cases.

¹⁰ Judgments of 20 October 2005, *Commission v United Kingdom*, C-6/04, EU:C:2005:626, paragraphs 73 to 79, of 10 January 2006, *Commission v Germany* (C-98/03, EU:C:2006:3, paragraph 55); and of 2 July 2020, *Magistrat der Stadt Wien (European hamster)* (C-477/19, EU:C:2020:517, paragraph 48).

39. However, these conditions represent an attempt, which is justified to at least a certain extent, to prevent European species protection from unduly restricting human activities. The risk of such restrictions arises from the case-law of the Court of Justice, which has interpreted the concept of deliberateness to mean, at least in the context of the prohibitions laid down in the Habitats Directive, that it also includes acceptance of the possibility of the prohibited detriment. If this interpretation were to be applied to the Birds Directive without restriction, there would be a real risk of significant restrictions on human activities.

40. This is shown in particular by the answer to Question 1, for which it is necessary to clarify that species protection under the Birds Directive covers all European bird species (see A). On the other hand, the protection of breeding sites provided for in the Habitats Directive and addressed in Questions 4 and 5 appears to have somewhat less potential for conflict. That system of protection is the only one which, based simply on its wording, does not target deliberate detriment, yet it covers only the rarer species of the Habitats Directive (see B). The decisive factor, however, is the interpretation of the prohibitions of deliberate detriment, which is the subject of Question 2 (see C). Finally, in connection with Question 3, it is necessary to recall the findings on the assessment of the conservation status of a species that were recently made by the Court of Justice in the recent second judgment on the hunting of wolves (*Lupus lupus*) in Finland¹¹ (see D).

A. Species protected by Article 5 of the Birds Directive (Question 1):

41. By Question 1, the referring court seeks to ascertain whether Article 5 of the Birds Directive covers only those species which are listed in Annex I to the directive, or are at some level at risk, or are suffering a long-term decline in population. According to the request for a preliminary ruling, the referring court and the competent Swedish authorities consider that Sweden has transposed Article 5 of the Birds Directive only in respect of those species of birds.

42. However, as also assumed by the referring court, Article 5 of the Birds Directive is significantly more far-reaching. Pursuant to that provision, a system of protection for all species of birds referred to in Article 1 is required. These are all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies.¹²

43. Based on the wording of Article 5, it is irrelevant whether the species are listed in Annex I to the Birds Directive. Rather, pursuant to Article 4(1), the species in Annex I require *special*, that is to say additional, conservation measures concerning their habitat. In addition, the Birds Directive contains general protective provisions, such as Article 5, but also Articles 2 and 3, which cover all European bird species.

44. Similarly, the circumstance of whether the bird species concerned are at some level at risk or have a long-term decline in population is irrelevant for the purposes of Article 5 of the Birds Directive. On the contrary, the Czech Republic rightly recalls that the obligations of protection exist even before any reduction is observed in the number of birds or any risk of a protected bird species becoming extinct has materialised.¹³

¹¹ Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851).

¹² Judgments of 8 July 1987, *Commission v Belgium* (247/85, EU:C:1987:339, paragraphs 6 and 7), of 26 January 2012, *Commission v Poland* (C-192/11, not published, EU:C:2012:44, paragraph 33); and of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 251).

¹³ Judgments of 2 August 1993, *Commission v Spain (Santoña)* (C-355/90, EU:C:1993:331, paragraph 15), of 13 June 2002, *Commission v Ireland (Red Grouse)* (C-117/00, EU:C:2002:366, paragraph 15); and of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraphs 262 and 263).

45. The Court of Justice therefore ruled at a very early stage that it is incompatible with Article 5 of the Birds Directive to exclude certain species of birds from protection¹⁴ or to restrict protection to species forming part of the national biological heritage.¹⁵ Moreover, it has already applied that provision to various species that do not meet any of the Swedish conditions, such as crows (*Corvus corone corone* and *Corvus corone cornix*), starlings (*Sturnus vulgaris*) and blackbirds (*Turdus merula*),¹⁶ grey herons (*Ardea cinerea*) and cormorants (*Phalacrocorax carbo*),¹⁷ or various finch species.¹⁸

46. The answer to the first question must therefore be that, pursuant to Articles 1 and 5 of the Birds Directive, the Member States are required to adopt systems of protection for all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. Systems of protection that cover only those species which are listed in Annex I to the directive, or are at some level at risk or are suffering a long-term decline in population do not meet these requirements.

B. Breeding sites (Questions 4 and 5)

47. By Question 4, the referring court seeks to ascertain whether the prohibition on any deterioration or destruction of animals' breeding sites in Article 12(d) of the Habitats Directive is limited to cases where, in spite of precautionary measures, the continuous ecological functionality of the habitat of the species concerned is lost in a single area and, at the same time, the conservation status of the species concerned is likely to deteriorate. The referring court also asks whether the applicability of the prohibition is excluded if the species has a favourable conservation status. Question 5 seeks clarification as to the level at which the conservation status is to be assessed.

48. In the present proceedings, it is not necessary to clarify whether the prohibition applies only if the deterioration or destruction of breeding sites entails the loss of their continuing ecological functionality. The Commission developed this interpretation of the prohibition in Article 12(1)(d) of the Habitats Directive in its guidance document,¹⁹ but the Court has not yet expressed a view on it. Although it would appear that the referring court adopts that understanding, it is not material to the decision in this case, because the request for a preliminary ruling is based on the assumption that that condition is met in the main proceedings.

49. Rather, the sole decisive factor for the prohibition of the deterioration or destruction of breeding sites is the significance of the conservation status of the species. This is because the Swedish case-law set out in the request for a preliminary ruling applies that prohibition only if there is a risk that the conservation status of those species in the area will be affected.

50. Article 12(1)(d) of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive in their natural range, prohibiting the deterioration or destruction of breeding sites or resting places.

14 Judgments of 8 July 1987, *Commission v Belgium* (247/85, EU:C:1987:339, paragraphs 21 and 22), and of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202, paragraphs 10 and 11).

15 Judgments of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202, paragraph 15); of 12 July 2007, *Commission v Austria* (C-507/04, EU:C:2007:427, paragraphs 102 and 103); and of 26 January 2012, *Commission v Poland* (C-192/11, not published, EU:C:2012:44, paragraph 25).

16 Judgment of 12 July 2007, *Commission v Austria* (C-507/04, EU:C:2007:427, paragraph 332 et seq.); see also my Opinion in that case (C-507/04, EU:C:2007:8, points 119 and 120 and 141 and 142).

17 Judgment of 26 January 2012, *Commission v Poland* (C-192/11, not published, EU:C:2012:44, paragraph 63).

18 Judgment of 21 June 2018, *Commission v Malta (wild finches)* (C-557/15, EU:C:2018:477).

19 European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), Chapter 2, paragraphs 71 to 79 (pp. 47 to 49 of the English version).

51. In the case of that prohibition, by not prohibiting deliberate acts only, unlike in Article 12(1)(a) to (c) of the Habitats Directive, the EU legislature has demonstrated its intention to give breeding grounds or resting places *increased* protection against acts causing their deterioration or destruction.²⁰

52. In order to comply with that provision, the Member States must not only adopt a comprehensive legislative framework but also implement concrete and specific protection measures. Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature. Such a system of strict protection must therefore make it possible to prevent effectively the deterioration or destruction of breeding sites or resting places of the animal species listed in Annex IV(a) to the Habitats Directive.²¹

53. Based on the wording of the provision, this prohibition is not dependent on whether the detriment affects the conservation status of a population. Rather, the Court has already held that the stability of a population²² and its size²³ are not relevant to the effect of the prohibition.

54. In addition, the national court rightly emphasises that the conservation status is primarily relevant for the granting of a derogation pursuant to Article 16 of the Habitats Directive. The reason for this is that a derogation pursuant to Article 16 of the Habitats Directive requires 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. As argued by the Commission, it would therefore be contradictory to make the application of the prohibitions in Article 12(1) of the Habitats Directive conditional on the risk that the conservation status of the species concerned is likely to deteriorate. This would mean that a derogation would never be granted, rendering Article 16 devoid of any practical effect.

55. Therefore, the prohibition on the deterioration or destruction of breeding sites of animals listed in Annex IV(a) to the Habitats Directive, as laid down in Article 12(d) thereof, does not require that the conservation status of populations of the species concerned is likely to deteriorate as a result of the act in question. Nor does a favourable conservation status of the species concerned affect the prohibition.

56. It is therefore not necessary to answer Question 5, concerning the level at which conservation status must be assessed for the purposes of the application of Article 12(1)(d) of the Habitats Directive.

C. The prohibition of deliberate detriment (Question 2)

57. By Question 2, the referring court seeks to ascertain how the terms ‘deliberate killing/disturbance/destruction’ in Article 5(a) to (d) of the Birds Directive and in Article 12(1)(a) to (c) of the Habitats Directive are to be understood. In particular, the Court of Justice is to clarify whether 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

20 Judgments of 10 January 2006, *Commission v Germany* (C-98/03, EU:C:2006:3, paragraph 55), and of 2 July 2020, *Magistrat der Stadt Wien (European hamster)* (C-477/19, EU:C:2020:517, paragraph 27).

21 Judgments of 9 June 2011, *Commission v France (European Hamster)*, C-383/09, EU:C:2011:369, paragraphs 19 to 21; of 15 March 2012, *Commission v Cyprus* (Cypriot grass snake) (C-340/10, EU:C:2012:143, paragraphs 60 to 62); of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 231); and of 2 July 2020, *Magistrat der Stadt Wien (European Hamster)* (C-477/19, EU:C:2020:517, paragraph 20).

22 Judgments of 30 January 2002, *Commission v Greece (Caretta caretta)* (C-103/00, EU:C:2002:60, paragraph 31); of 16 March 2006, *Commission v Greece (Vipera schweizeri)* (C-518/04, not published, EU:C:2006:183, paragraph 21); and of 10 November 2016, *Commission v Greece (Kyparissia)* (C-504/14, EU:C:2016:847, paragraph 148).

23 Judgment of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 237).

be a risk, caused by the measures, of adverse effects on the conservation status of the species in order for the prohibitions to apply, is compatible with those terms. The referring court also asks whether the applicability of the prohibition is excluded if the species has a favourable conservation status. Question 3 seeks clarification as to the level at which the conservation status is to be assessed.

58. In answering these questions, a distinction must be made between killing and destruction on the one hand and disturbance on the other, and between the two directives in each case.

1. *The prohibitions on killing and destruction*

59. It is necessary to clarify whether the prohibitions on killing in Article 5(a) of the Birds Directive and Article 12(a) of the Habitats Directive and on the destruction of eggs (and birds' nests) in Article 5(b) of the Birds Directive and Article 12(c) of the Habitats Directive are conditional on the conservation status of the species concerned. The prohibition on the taking and keeping of eggs under Article 5(c) of the Birds Directive is of no relevance to the present case, however, and therefore does not require further discussion.

(a) *The Habitats Directive*

60. Pursuant to Article 12(1)(a) and (c) of the Habitats Directive, Member States are to prohibit all forms of deliberate killing of specimens of the protected species in the wild and any deliberate destruction of their eggs.

61. If, in the case of those prohibitions, the concept of deliberateness were to be understood as covering only intentional detriment to the protected species, there would be no need to elaborate on this question any further. This is because the present case concerns only measures that pursue a purpose that is manifestly different from the killing of species (or the destruction of their eggs).

62. However, as I have suggested previously,²⁴ as regards killing, the Court has held that the condition of 'deliberateness' can be met only if it is proven that the author of the act of killing intended the killing of a specimen belonging to a protected animal species *or, at the very least, accepted the possibility* of such killing.²⁵ Acts for which the possibility of detriment is accepted generally have purposes other than such detriment.

63. This is shown quite clearly in the cases in which this interpretation was developed. They concerned the question of whether hunting for foxes (*Vulpes vulpes*) using snares could violate the prohibitions intended to protect the otter (*Lutra lutra*),²⁶ and whether certain construction measures and recreational and fishing activities were to be regarded as deliberate disturbance of the sea turtle *Caretta caretta*.²⁷ This case-law ultimately has its roots in another judgment in which the Court of Justice contended that certain recreational activities would disturb the aforementioned sea turtle,²⁸ but it did not expressly address the concept of deliberateness.

64. Although this case-law concerns only the prohibitions on killing and disturbance under Article 12(1)(a) and (b) of the Habitats Directive, there is no reason to interpret the concept of deliberateness differently in relation to the destruction of eggs.

²⁴ Opinions in *Commission v Spain (otters)* (C-221/04, EU:C:2005:777, points 49 and 50) and *Commission v Greece (Kyparissia)* (C-504/14, EU:C:2016:105, point 126).

²⁵ Judgments of 18 May 2006, *Commission v Spain (otters)* (C-221/04, EU:C:2006:329, paragraph 71), and of 10 November 2016, *Commission v Greece (Kyparissia)* (C-504/14, EU:C:2016:847, paragraph 159).

²⁶ Judgment of 18 May 2006, *Commission v Spain (otters)* (C-221/04, EU:C:2006:329, paragraphs 72 and 73).

²⁷ Judgment of 10 November 2016, *Commission v Greece (Kyparissia)* (C-504/14, EU:C:2016:847, paragraphs 114, 157 and 158).

²⁸ Judgment of 30 January 2002, *Commission v Greece (Caretta caretta)* (C-103/00, EU:C:2002:60, paragraphs 36 and 39).

65. Consequently, the forestry measures that are the subject matter of the dispute may well infringe the prohibitions in Article 12(1)(a) and (c) of the Habitats Directive. It is therefore necessary to assess whether such an infringement may be made conditional on the conservation status of the species concerned.

66. As already stated in connection with the prohibition on the deterioration of breeding sites laid down in Article 12(1)(d) of the Habitats Directive, the conservation status of the species does not, based on the wording of that provision, affect the prohibition, but is relevant only in the context of derogations under Article 16. In principle,²⁹ this applies equally to the other prohibitions in Article 12(1), as has already been indirectly acknowledged by the Court in respect of the prohibition on killing pursuant to subparagraph (a).³⁰

67. As regards, in particular, the prohibition on the killing of specimens of species pursuant to Article 12(1)(a) of the Habitats Directive, this is confirmed by the fact that, according to the definition in Article 1(m), the term ‘specimen’ actually refers to each individual animal.

68. The prohibition on the destruction of eggs pursuant to Article 12(1)(c) of the Habitats Directive does not, however, refer expressly to individual specimens. By its very nature, however, such a prohibition could hardly be construed any differently if no threshold triggering the prohibition has been specified. Moreover, the derogation in Article 16(1)(e) of the Habitats Directive, which allows ‘the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers’ but lays down further conditions for doing so, militates against the assumption of a *de minimis* threshold for that prohibition. This derogation would be superfluous if the prohibition on the taking of eggs were not applicable in the case of small quantities.

69. Consequently, the prohibitions on killing and destruction pursuant to Article 12(1)(a) and (c) of the Habitats Directive do not presuppose a risk that the measure in question will have a negative effect on the conservation status of the animal species concerned. Nor does a favourable conservation status of the species concerned preclude the application of those prohibitions.

(b) The Birds Directive

– (aa) Conservation status of the species

70. At first glance, the situation with Article 5 of the Birds Directive is similar. Thus, as is the case with Article 12(1) of the Habitats Directive, there is nothing to indicate that the prohibitions on killing (subparagraph (a)) and on destruction of, or damage to, nests and eggs (subparagraph (b)) are linked to the conservation status. Rather, by their very nature, those prohibitions must relate to each individual specimen, as no threshold is specified.

71. A derogation laid down in Article 9(1)(c) of the Birds Directive likewise militates against the assumption of a *de minimis* threshold. It specifically permits the use of certain bird species in small numbers and likewise contains other conditions.

²⁹ Regarding the prohibition on disturbance, however, see point 101 et seq. below.

³⁰ Judgment of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraphs 231, 237 and 238).

72. Furthermore, the national court rightly refers, also in relation to Article 5 of the Birds Directive, to the consideration already relevant in the context of the Habitats Directive that all derogations to the prohibitions are conditional on the conservation status of the species concerned. Although there is no basis for this position in the text of Article 9 of the Birds Directive, it follows from recital 10 of that directive that derogations under Article 9 of the Birds Directive may be granted only if it is ensured that the population of the species concerned is maintained at a ‘satisfactory level’.³¹ Recently, the Court expressly saw a parallel between this and Article 16 of the Habitats Directive.³²

73. This outcome corresponds to Article 9 of the Bern Convention, which is implemented by Article 9 of the Birds Directive³³ and must therefore be taken into account in its interpretation.³⁴ This is because, under the convention, an exception from the comparable prohibitions of the convention must not be detrimental to the survival of the population concerned.

74. In principle³⁵ it would therefore, as for the Habitats Directive, also in the context of the Birds Directive be contradictory to take the risk of causing detriment to the conservation status of the species concerned into account as a condition for the application of the prohibitions in Article 5 of the directive and thus to make it practically impossible to apply the derogation.

– (bb) ‘Deliberateness’ within the meaning of the Birds Directive

75. In this regard too, however, the question arises as to whether the prohibitions actually cover measures that pursue a purpose that is manifestly different from the killing of species or destruction of their nests and eggs.

76. The answer to this question is less obvious than it is in relation to Article 12 of the Habitats Directive, because the Court has yet to make any express findings of a comparable nature in respect of the concept of deliberateness in Article 5 of the Birds Directive.

77. However, much as with the first case concerning the aforementioned sea turtle, the Court has already opposed the felling of damaged, dead or dying trees, in the judgment on the Białowieża Forest, because such acts had been identified in a management plan for the protected area concerned as a potential threat to certain bird species specifically protected there.³⁶ It therefore qualified this measure as deliberate destruction of, or damage to, nests and eggs and as removal of nests (Article 5(b) of the Birds Directive) and as deliberate disturbance particularly during the period of breeding and rearing (Article 5(d)).³⁷ It seems unlikely that the measures concerned were intended to cause such detriment to birds.

31 Judgments of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202, paragraph 28); of 16 October 2003, *Ligue pour la protection des oiseaux and Others* (C-182/02, EU:C:2003:558, paragraph 17); and of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 32).

32 Judgment of 23 April 2020, *Commission v Finland (Spring hunting of male common eiders)* (C-217/19, EU:C:2020:291, paragraph 84).

33 Report on the Convention on the Conservation of European Wildlife and Natural Habitats (1997-1998) (Article 9(2)) (presented by the European Commission), SEC(2001) 515 final.

34 See, in relation to other international conventions, judgments of 24 November 1992, *Poulsen and Diva Navigation* (C-286/90, EU:C:1992:453, paragraph 9); of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 291); of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 123); and of 11 July 2018, *Bosphorus Queen Shipping* (C-15/17, EU:C:2018:557, paragraph 44).

35 Regarding the prohibition on disturbance, however, see point 95 et seq. below.

36 Judgment of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraphs 253 and 254).

37 Judgment of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 259).

78. Since the Court does not therefore assume a narrow interpretation of the concept of deliberateness in Article 5 of the Birds Directive either, it appears necessary to transfer the interpretation of that concept in connection with the almost identical prohibitions in Article 12(1) of the Habitats Directive to Article 5 of the Birds Directive. Moreover, this is also in line with the view taken by the Commission in the present proceedings.

79. However, such an approach would have much wider implications than the corresponding interpretation of Article 12(1) of the Habitats Directive.

80. Species protection under the Habitats Directive is limited to a few, usually very rare species.³⁸ As these species are rare, it is necessary to provide strict protection for each individual specimen, as is clearly expressed in Article 12 of the Habitats Directive by the concept of a *system of strict protection*.³⁹ At the same time, the rarity of these species means that conflicts with them are not very frequent.

81. On the other hand, as already explained,⁴⁰ the prohibitions laid down in Article 5 of the Birds Directive apply to *all* European birds, thus also to common species encountered almost everywhere on a regular basis. It could hardly be maintained that the possibility of causing detriment to these species is not accepted by modern societies. Rather, it is known that these species are significantly affected by a wide range of human activities, such as building construction⁴¹ or road traffic.⁴²

82. When the Birds Directive was adopted, the legislature already made it clear accordingly that the directive was not intended to protect every single bird unconditionally. Rather, under Article 2 of the directive, the population of bird species is to be maintained at a level, or adapted to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.

83. However, the conservation of common species does not generally require prohibitions which take effect in cases where merely the possibility of detriment is accepted. Although there are species that depend on such prohibitions, the reason why common species are so abundant is because human activities do not threaten their survival.

84. In so far as the populations of certain species that were previously more abundant are nevertheless declining, it will often be more important to conserve their habitats and manage them appropriately. This is because such declines usually come about after changes in the human use of those habitats. On the other hand, allowing the prohibitions laid down in Article 5 of the Birds Directive to take effect in cases where merely the possibility of the forms of detriment listed in that provision is accepted would often be less suitable for preserving those populations and therefore not the least restrictive measure either.

85. These considerations are indeed established in the Birds Directive. Accordingly, Article 5 does not require a system of strict protection, but rather a *general system* of protection for all European birds. An additional obligation to protect the habitat of common species is laid down in Article 3.⁴³ Pursuant to Article 4 of the Birds Directive in conjunction with Articles 6 and 7 of the Habitats

38 However, Möckel, S., '35 Jahre Europäische Vogelschutzrichtlinie' (35 Years of the European Birds Directive), *Natur und Recht* (Nature and Law) 2014, p. 381 (387), correctly refers to the widespread bat species that are all subject to strict protection under the Habitats Directive.

39 See my Opinion in *Commission v Spain (otters)* (C-221/04, EU:C:2005:777, point 50).

40 See above, point 41 et seq.

41 See Machtans, C., Wedeles, C., and Bayne, E., 'A first estimate for Canada of the number of birds killed by colliding with building windows', *Avian Conservation and Ecology* 8.2 (2013), p. 5.

42 See, for instance, Slater, F.M., 'An assessment of wildlife road casualties – the potential discrepancy between numbers counted and numbers killed', *Web Ecology* 3.1 (2002), p. 33.

43 Judgment of 13 June 2002, *Commission v Ireland (Red Grouse)* (C-117/00, EU:C:2002:366, paragraph 15 et seq.).

Directive, the habitat of rare and particularly endangered species and of migratory birds is to benefit from increased protection, in particular through the establishment of special protection areas. If certain activities pose an actual risk to the conservation status of bird species, Article 5 and Article 2(1)(a) of the Environmental Liability Directive apply in addition.

86. Moreover, unlike the Habitats Directive, the Birds Directive does not contain a suitable derogation for balancing conflicting interests. While the former allows derogations for all conceivable reasons of overriding public interest (Article 16(1)(c)), the latter, aside from very specific reasons, allows only the judicious use of certain species of birds in small numbers, which must also be strictly supervised and on a selective basis (Article 9(1)(c)).

87. Therefore, I do not consider that it would be appropriate to transfer, without restriction, the interpretation of the concept of deliberateness given in the context of Article 12(1) of the Habitats Directive to the concept of deliberateness in Article 5 of the Birds Directive.

88. In view of the findings in the judgment concerning the Białowieża Forest,⁴⁴ however, it is also impossible to avoid that outcome by extending the prohibitions laid down in Article 5(a) and (b) of the Birds Directive exclusively to detriment caused to birds intentionally, while completely excluding cases where the possibility of detriment is merely accepted. This outcome would also be inappropriate in cases concerning rare, highly endangered species, since, for these rare species, the scope of the restrictions remains limited in practice, while the positive contribution to the conservation status of these species can be significant.

89. Rather, a reasonable balance between the activities concerned and the objectives of the directive would consist in including cases in which the possibility of detriment is accepted in those prohibitions only to the extent necessary in the light of the objective pursuant to Article 2 of the Birds Directive. It may therefore have to be accepted that the application of this interpretation is more complicated, since it does in fact require consideration of the conservation status of bird species. In any case, it ultimately corresponds to the broad application of the prohibitions in the aforementioned judgment concerning the Białowieża Forest, because that case concerned very rare bird species in an area designated for the special conservation of those species.⁴⁵

90. Consequently, the prohibitions on killing and destruction pursuant to Article 5(a) and (b) of the Birds Directive do not in principle presuppose a risk that the measure in question will have a negative effect on the conservation status of the animal species concerned. Nor does a favourable conservation status of the species concerned preclude the application of those prohibitions. However, in cases where the detriment to birds is not intended but only accepted as a possibility, the prohibitions under Article 5(a) and (b) of the Birds Directive apply only to the extent necessary to maintain the population of those species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2.

91. In addition, it should be recalled that prohibitions must be clearly worded, particularly if they are of a criminal nature.⁴⁶ When transposing the prohibitions in Article 5(a) and (b) of the Birds Directive into national law, the Member States are therefore obliged to express them with sufficient precision. Appropriate provisions must be adopted to achieve this. In addition, it is often necessary to set out precisely the types of conduct that are prohibited and the locations at which special care is required.

⁴⁴ See above, point 77.

⁴⁵ Judgment of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 18).

⁴⁶ See my Opinion in *Tronex* (C-624/17, EU:C:2019:150, points 51 and 52 and the case-law cited).

(c) *Interim conclusion*

92. Consequently, the prohibitions on killing and destruction pursuant to Article 5(a) and (b) of the Birds Directive and Article 12(1)(a) and (c) of the Habitats Directive do not presuppose a risk that the measure in question will have a negative effect on the conservation status of the animal species concerned. Nor does a favourable conservation status of the species concerned preclude the application of those prohibitions.

93. However, in cases where the detriment to birds is not intended but only accepted as a possibility, the prohibitions under Article 5(a) and (b) of the Birds Directive apply only to the extent necessary to maintain the population of those species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2.

2. *Prohibitions on disturbance*

94. The Birds Directive and the Habitats Directive appear to differ as regards the prohibition on disturbance. Ultimately, however, the two prohibitions are to be interpreted in a similar way, to the effect that the conservation status of the species concerned does play a role.

(a) *The Birds Directive*

95. Pursuant to Article 5(d) of the Birds Directive, the prohibition on the disturbance of bird species, particularly during the period of breeding and rearing, applies only in so far as such disturbance would be significant having regard to the objectives of the directive. Such a restriction is particularly necessary in relation to the disturbance of birds, since experience shows that people accept the possibility of such disturbance even when they are simply moving around within the habitats of birds, for example when they go for a walk, are on their way to work or are even just on their own balcony.

96. Pursuant to Article 1, the aim of the Birds Directive is to protect all European bird species. To that end, Member States are required, under Article 2, to maintain the population of those species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.

97. Although the Member States have a margin of discretion in this respect when weighing up the various interests,⁴⁷ subject to specific rules, recitals 3, 5, 7, 8 and above all 10 of the directive show that Member States should maintain the populations of all wild bird species in the Union at a 'satisfactory level'.⁴⁸

98. However, the conservation status is only one of the factors that are decisive in the assessment of disturbance. The very wording of Article 5(d) of the Birds Directive shows that disturbance during the period of breeding and rearing should be avoided in any event. This clarification makes sense because breeding and rearing are of central importance to the conservation status. However, even disturbances

⁴⁷ See judgments of 8 July 1987, *Commission v Belgium* (247/85, EU:C:1987:339, paragraph 8) and *Commission v Italy* (262/85, EU:C:1987:340, paragraph 8), and of 19 January 1994, *Association pour la protection des animaux sauvages and Others* (C-435/92, EU:C:1994:10, paragraph 20)

⁴⁸ See judgments of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202, paragraph 28); of 16 October 2003, *Ligue pour la protection des oiseaux and Others* (C-182/02, EU:C:2003:558, paragraph 17); and of 23 April 2020, *Commission v Finland (Spring hunting of male common eiders)* (C-217/19, EU:C:2020:291, paragraph 68); and the Opinion of Advocate General Geelhoed in *WWF Italia and Others* (C-60/05, EU:C:2006:116, point 50); and my Opinion in *Commission v Ireland* (C-418/04, EU:C:2006:569, points 111 and 112).

during these periods are prohibited only if they are significant. This can be assumed to be the case if, at the very least, the disturbance directly affects rare birds during breeding or rearing. Accordingly, the Court has already ruled that logging that adversely affects an important habitat for rare bird species can constitute a prohibited disturbance.⁴⁹

99. As the prohibition as such therefore already includes the effects on the conservation status of the species concerned, it is not necessary to analyse the nuances of the concept of deliberateness in respect of the Habitats Directive.

100. Consequently, under Article 5(d) of the Birds Directive, disturbances must be prohibited if they have a significant effect on the objective of maintaining populations of bird species at a satisfactory level or adapting them to that level, particularly if they are detrimental to rare birds when breeding or rearing.

(b) The Habitats Directive

101. The objectives in the Habitats Directive are worded in a similar way to those in the Birds Directive. Pursuant to Article 2(2) of the Habitats Directive, its aim is to maintain or restore, at favourable conservation status, species of wild fauna and flora of Community interest. At the same time, pursuant to Article 2(3), the measures taken pursuant to the directive are to take account of economic, social and cultural requirements and regional and local characteristics.

102. However, unlike Article 5(d) of the Birds Directive, the prohibition on disturbance under Article 12(1)(b) of the Habitats Directive is not expressly linked to the objectives of the directive and, in particular, to the conservation status of the species concerned. However, a parallel lies in the fact that the prohibition is to apply in particular during the period of breeding, rearing, hibernation and migration. These periods are considered to be especially sensitive to disturbance,⁵⁰ meaning that they are generally of particular importance to the conservation status of the species. It is also notable that the disturbance *of species* must be prohibited, whereas the prohibition on killing under Article 12(1)(a) and the definition in Article 1(m) of the Habitats Directive relate to *each individual specimen* of the protected species.

103. Accordingly, the Commission proposes, albeit not in the present proceedings but in its guidance document, that only a disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a disturbance.⁵¹

104. As in the case of the protection of birds, such a restriction is necessary to prevent the prohibition on disturbance from unduly restricting human activities without taking account of the economic, social and cultural requirements referred to in Article 2(3) of the Habitats Directive. Although the protected species listed in Annex IV(a) are encountered less frequently than widespread bird species, it would not appear to be either necessary or appropriate for people *always* to have to avoid these species as soon as they notice that they are in their vicinity in order to rule out the possibility of any disturbance. Such encounters can of course happen, particularly in the case of bats or certain amphibians and butterflies.

⁴⁹ Judgment of 17 April 2018 *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 251 et seq.).

⁵⁰ Commission guidance document (cited in footnote 19, Chapter 2, paragraph 41 (p. 38 of the English version)).

⁵¹ Cited in footnote 19, Chapter 2, paragraph 39 (p. 38 of the English version).

105. The existing case-law on the violation of the prohibition on disturbance can also be understood in this sense. It is true that the Court has also stressed, in relation to the prohibition on disturbance, that the stability of a population and the size of the populations concerned do not preclude the application of the prohibition. However, the respective cases on the *Caretta caretta* sea turtle concerned activities in protected areas that were established due to their great importance for the respective species,⁵² while the judgment on the Milos viper concerned an area essential for that species.⁵³ The judgment on the Cypriot grass snake concerned an area that should undisputedly have been placed under protection.⁵⁴ In such places, an enhanced duty of care is certainly appropriate in order to avoid disturbances.

106. However, aligning the prohibition on disturbance with the objective of the Habitats Directive does not only restrict its application with regard to isolated and ultimately insignificant disturbances of individual specimens. In turn, it also suggests that the prohibition on disturbance protects important habitats of the species irrespective of whether individual specimens are present, breeding and resting places are there or protected areas have been established there. The reason for this is that, particularly in the light of the objectives of the directive, causing detriment to or eliminating the habitat may cause significant disturbance to the relevant species irrespective of these factors.

107. Consequently, the prohibition on disturbance under Article 12(1)(b) of the Habitats Directive must be restricted to acts that are particularly likely to be detrimental to the conservation status of the protected species, in particular in places of particular importance to those species or where they would be adversely affected in terms of their breeding, rearing, hibernation and migration.

D. Level of assessment of the conservation status (Question 3)

108. Since the conservation status of the species concerned does play a role, at least in the case of the prohibitions on disturbance and to some extent also in the case of the other prohibitions in the Birds Directive, Question 3 on the level of assessment requires an answer.

109. The recent findings in the second judgment on the protection of the wolf in Finland are helpful for this issue. That case concerned the assessment of the conservation status of this species when granting a derogation under Article 16 of the Habitats Directive. If the findings made in that case are applied to the assessment of a detriment, that assessment must be based on criteria that ensure the long-term preservation of the dynamics and social stability of the species in question.⁵⁵

110. In so doing, it is necessary to take account of both the territory of the Member State and the biogeographical region in question in order to be able to determine, as a first step, the conservation status of the populations of the species in question and, in a second step, the geographical and demographic effects that the disturbances are capable of having on those.⁵⁶

111. In this context, the assessment of the impact of a detriment at the level of the territory of a local population is generally necessary in order to determine its impact on the conservation status of the population concerned on a larger scale. Moreover, the conservation status of a population at national or biogeographical level depends also on the cumulative impact of the various disturbances affecting local areas.⁵⁷

⁵² Judgment of 30 January 2002 *Commission v Greece (Caretta caretta)* (C-103/00, EU:C:2002:60, paragraph 17), and my Opinion in *Commission v Greece (Kyparissia)* (C-504/14, EU:C:2016:105, points 1 and 13).

⁵³ Judgment of 16 March 2006, *Commission v Greece (Vipera schweizeri)* (C-518/04, not published, EU:C:2006:183, paragraph 15).

⁵⁴ Judgment of 15 March 2012, *Commission v Cyprus (Natrix natrix cypriaca)* (C-340/10, EU:C:2012:143, paragraphs 16 and 18 and 63 to 65).

⁵⁵ Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 57).

⁵⁶ Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 58).

⁵⁷ Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 59).

112. Consequently, in so far as the conservation status of the populations of the species concerned is relevant to the application of the prohibitions under Article 5 of the Birds Directive and Article 12(1) of the Habitats Directive, that status must be assessed at the level of the territory of that Member State or, where the borders of that Member State straddle several biogeographical regions or if the natural range of the species so requires, at the level of the biogeographical region in question and, to the extent possible, at cross-border level.⁵⁸

V. Conclusion

113. I therefore propose that the Court of Justice give the following ruling:

- (1) Pursuant to Articles 1 and 5 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, Member States are required to adopt systems of protection for all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. Systems of protection that cover only those species which are listed in Annex I to the directive, or are at some level at risk or are suffering a long-term decline in population do not meet these requirements.
- (2) The prohibition on the deterioration or destruction of breeding sites of animals listed in Annex IV(a) to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as laid down in Article 12(d) thereof, does not require that the conservation status of populations of the species concerned is likely to deteriorate as a result of the act in question. Nor does a favourable conservation status of the species concerned affect the prohibition.
- (3) The prohibitions on killing and destruction under Article 5(a) and (b) of Directive 2009/147 and Article 12(1)(a) and (c) of Directive 92/43 do not presuppose a risk that the measure in question will have a negative effect on the conservation status of the animal species concerned. Nor does a favourable conservation status of the species concerned affect the prohibition.

However, in cases where the detriment to birds is not intended but only accepted as a possibility, the prohibitions under Article 5(a) and (b) of Directive 2009/147 apply only to the extent necessary to maintain the population of those species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2.

- (4) Under Article 5(d) of Directive 2009/147, disturbances must be prohibited if they have a significant effect on the objective of maintaining populations of bird species at a satisfactory level or adapting them to that level, particularly if they are detrimental to rare birds when breeding or rearing.

The prohibition on disturbance under Article 12(1)(b) of Directive 92/43 must be restricted to acts that are particularly likely to be detrimental to the conservation status of the protected species, in particular in places of particular importance to those species or where they would be adversely affected in terms of their breeding, rearing, hibernation and migration.

- (5) In so far as the conservation status of the populations of the species concerned is relevant to the application of the prohibitions under Article 5 of Directive 2009/147 and Article 12(1) of Directive 92/43, that status must be assessed at the level of the territory of that Member State or, where the

⁵⁸ Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 61).

borders of that Member State straddle several biogeographical regions or if the natural range of the species so requires, at the level of the biogeographical region in question and, to the extent possible, at cross-border level.