



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

2 July 2020 *

(Reference for a preliminary ruling — Conservation of natural habitats and of wild fauna and flora — Directive 92/43/EEC — Article 12(1) — System of strict protection for animal species — Annex IV — *Cricetus cricetus* (European hamster) — Resting places and breeding sites — Deterioration or destruction — Areas which have been abandoned)

In Case C-477/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria), made by decision of 12 June 2019, received at the Court on 21 June 2019, in the proceedings

IE

v

Magistrat der Stadt Wien,

THE COURT (Seventh Chamber),

composed of P.G. Xuereb, President of the Chamber, A. Arabadjiev (Rapporteur) and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- IE, by himself,
- the Czech Government, by M. Smolek, J. Vláčil and L. Dvořáková, acting as Agents,
- the European Commission, by C. Hermes and M. Noll-Ehlers, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 12(1)(d) of 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, ‘the Habitats Directive’).
- 2 The request has been made in proceedings between IE, an employee of a property developer, and Magistrat der Stadt Wien (City Council of Vienna, Austria) concerning the adoption by the latter of an administrative decision imposing on IE a fine and, in the event that that fine is not paid, a custodial sentence for having caused, in the course of a property redevelopment project, the deterioration or destruction of resting places or breeding sites of the *Cricetus cricetus* (European hamster) species, which is on the list of protected animal species set out in Annex IV(a) to the Habitats Directive.

Legal context

EU law

- 3 Article 2 of the Habitats Directive provides:

‘1. The aim of this Directive shall be to contribute towards ensuring biodiversity 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.’

- 4 Article 12(1) of that directive states:

‘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.’

- 5 The animal species ‘of Community interest in need of strict protection’, which are listed in Annex IV(a) to that directive, include, inter alia, the *Cricetus cricetus* (European hamster).

Austrian law

- 6 The Wiener Naturschutzgesetz (Vienna Law on Nature Conservation) of 31 August 1998 (LGBl. für Wien, 45/1998, ‘WNSchG’) transposes the Habitats Directive into national law for the region of Vienna (Austria).

- 7 Paragraph 10(3)(4) of the WNSchG reproduces the wording of Article 12(1)(d) of the Habitats Directive. It provides, inter alia, that the deterioration or destruction of breeding sites or resting places of strictly protected animals is prohibited.
- 8 The penalties laid down for infringement of Paragraph 10(3)(4) are set out in Paragraph 49(1)(5) of the WNSchG. According to that provision, any person who, in infringement of Paragraph 10(3) or (4) of the WNSchG, causes the deterioration or destruction of breeding sites or resting places of strictly protected animals is liable to a fine of up to EUR 21 000 or, if that fine is not paid, to a custodial sentence of up to four weeks and, if the infringement is repeated, to a fine of up to EUR 35 000 or, if that fine is not paid, to a custodial sentence of up to six weeks.
- 9 According to Paragraph 22(5) of the WNSchG, the competent authority may permit isolated cases of interference if the proposed measure, either individually or in combination with other measures that the competent authority is asked to grant, does not significantly undermine the objective of providing protection.
- 10 The annex to the WNSchG defines the *Cricetus cricetus* (European hamster) as a strictly protected animal species.

The main proceedings and the questions referred for a preliminary ruling

- 11 A property developer, which employs IE, instigated work for the construction of a building on land where the European hamster had settled. The owner of the land, who was aware of that fact, informed the property developer of the situation, which appointed an environmental expert before work commenced. The expert drew up a map of the entrances to the European hamster burrows and determined, in a specific zone, whether the burrows were inhabited.
- 12 Before the building work was carried out, the property developer had the topsoil removed, the construction site cleared and a pathway to the construction site built in the immediate vicinity of the entrances to the European hamster burrows ('the harmful measures'). In particular, the aim behind removing the topsoil was to cause the European hamster, which had settled in the areas where the building work was to be carried out, to relocate to areas which had been specially protected and reserved for it. However, prior authorisation for the harmful measures had not been sought from the competent authority and therefore had not been obtained before the work commenced. Moreover, at least two of the burrow entrances were destroyed.
- 13 The City Council of Vienna therefore took the view that IE, as an employee of the property developer, was responsible for the deterioration or destruction of resting places or breeding sites of the European hamster and, pursuant to Paragraph 10(3)(4) of the WNSchG, imposed on him a fine, which, if not paid, was liable to be converted to a custodial sentence.
- 14 IE brought an action before the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) challenging the imposition of the fine on the grounds that, inter alia, the European hamster burrows were not being used by the hamsters when the harmful measures were implemented and those measures did not lead to the deterioration or destruction of resting places or breeding sites of that animal species.
- 15 In that context, the referring court is uncertain as to the interpretation of Article 12(1)(d) of the Habitats Directive. It takes the view that it is necessary for the terms contained in that provision, such as 'resting places', 'breeding sites', 'deterioration' and 'destruction', to be clearly defined, given that infringement of the national provision which transposes Article 12(1)(d) of the Habitats Directive may give rise to criminal penalties. In particular, the referring court takes the view that the considerations

set out by the European Commission in its guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007) are imprecise and leave scope for considerable discretion as to how those terms are to be interpreted.

16 In those circumstances, the Verwaltungsgericht Wien (Administrative Court of Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is the term “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive to be interpreted as also including former resting places that have since been abandoned?

If the answer to that question is in the affirmative:

Is every former resting place that has since been abandoned a “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive?

If the answer to that question is in the negative:

Which factors determine whether a former resting place that has since been abandoned is a “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive?

- (2) Which factors determine whether a particular act or omission constitutes interference with a “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive?
- (3) Which factors determine whether a particular act or omission constitutes such serious interference with a “resting place”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “deterioration”, within the meaning of that provision, of that “resting place” is to be assumed?
- (4) Which factors determine whether a particular act or omission constitutes such serious interference with a “resting place”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “destruction”, within the meaning of that provision, of that “resting place” is to be assumed?
- (5) Is the term “breeding site”, within the meaning of Article 12(1)(d) of the Habitats Directive, to be interpreted as covering, first, only the precise identifiable location where regular mating in the strict sense or limited acts directly connected with reproduction (such as spawning) take place, and, second, in addition, all precisely identifiable locations essential for the development of young, such as nesting sites or certain parts of plants necessary for the larval or pupal stages?

If the answer to that question is in the negative:

How should the term “breeding site” within the meaning of Article 12(1)(d) of the Habitats Directive be understood, and how is a “breeding site” to be differentiated spatially from other locations?

- (6) Which factors determine whether a particular act or omission constitutes interference with a “breeding site” within the meaning of Article 12(1)(d) of the Habitats Directive?
- (7) Which factors determine whether a particular act or omission constitutes such serious interference with a “breeding site”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “deterioration”, within the meaning of that provision, of that “breeding site” is to be assumed?
- (8) Which factors determine whether a particular act or omission constitutes such serious interference with a “breeding site”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “destruction”, within the meaning of that provision, of that “breeding site” is to be assumed?

Consideration of the questions referred

The first question

- 17 By its first question, the referring court asks, in essence, whether Article 12(1)(d) of the Habitats Directive is to be interpreted as meaning that the term ‘resting place’ referred to in that provision also includes resting places which are no longer occupied by one of the protected animal species listed in Annex IV(a) to that directive, such as the *Cricetus cricetus* (European hamster).
- 18 As a preliminary observation, it should be noted that the aim of the Habitats Directive, pursuant to Article 2(1) thereof, is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States. Further, under Article 2(2) and (3) of that directive, the measures taken pursuant thereto are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of interest for the European Union, and are to take account of economic, social and cultural requirements and regional and local characteristics.
- 19 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.
- 20 In order to comply with that provision, the Member States are required not only to adopt a comprehensive legislative framework but also to 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 (see, to that effect, judgments of 9 June 2011, *Commission v France*, C-383/09, EU:C:2011:369, paragraphs 19 to 21, and of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola*, C-674/17, EU:C:2019:851, paragraph 27).
- 21 In addition, it should be noted that the *Cricetus cricetus* species, commonly known as the European hamster, is one of the animal species protected by the Habitats Directive.
- 22 It is in the light of those preliminary considerations that the first question referred is to be examined.
- 23 According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 21 November 2019, *Procureur-Generaal bij de Hoge Raad der Nederlanden*, C-678/18, EU:C:2019:998, paragraph 31 and the case-law cited).
- 24 As regards, first, the wording of Article 12 of the Habitats Directive, as stated in paragraphs 19 and 20 above, that article requires Member States to take the requisite measures to establish a system of strict protection for protected animal species in their natural range. In particular, paragraph 1(d) of that article requires Member States to take the requisite measures prohibiting the deterioration or destruction of breeding sites or resting places of those species.
- 25 Accordingly, it is clear that the wording of Article 12 of the Habitats Directive provides no indication as to how the term ‘resting places’ is to be defined.
- 26 As regards, second, the context in which the provision occurs, it should be noted that neither Article 1 of the Habitats Directive nor any other provision of that directive defines the term ‘resting places’.

- 27 Nevertheless, the Court has held that the acts referred to in Article 12(1)(d) of the Habitats Directive are not only intentional acts, but also include non-deliberate acts (see, to that effect, judgment of 20 October 2005, *Commission v United Kingdom*, C-6/04, EU:C:2005:626, paragraphs 77 to 79). By not limiting the prohibition laid down in Article 12(1)(d) of the directive to deliberate acts, which it has done in respect of the acts referred to in Article 12(1)(a) to (c), the EU legislature has demonstrated its intention to give breeding sites or resting places increased protection against acts causing their deterioration or destruction (judgment of 10 January 2006, *Commission v Germany*, C-98/03, EU:C:2006:3, paragraph 55).
- 28 Furthermore, unlike the acts referred to in Article 12(1)(a) to (c) of the Habitats Directive, the acts covered by the prohibition laid down in Article 12(1)(d) do not relate to animal species directly but seeks to protect significant parts of their habitats.
- 29 It follows that the aim of the strict protection offered by Article 12(1)(d) of the directive is to ensure that significant parts of the habitats of protected animal species are preserved so that those species can enjoy the conditions essential for, inter alia, resting in those habitats.
- 30 The same conclusion follows from a reading of the Commission guidance document referred to in paragraph 15 above, which states that resting places — defined as the areas essential to sustain an animal or group of animals when they are not active — ‘also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these ... places’.
- 31 Consequently, it is apparent from the context of Article 12(1)(d) of the Habitats Directive that resting places which are no longer occupied by a protected animal species must not be allowed to deteriorate or be destroyed since that species may return to such places.
- 32 As regards, third, the objective pursued by the Habitats Directive, it should be recalled that, as pointed out in paragraphs 18 to 20 above, the directive seeks to provide strict protection for animal species, in particular by means of the prohibitions laid down in Article 12(1) of the directive (see, to that effect, judgments of 10 May 2007, *Commission v Austria*, C-508/04, EU:C:2007:274, paragraphs 109 to 112, and of 15 March 2012, *Commission v Poland*, C-46/11, not published, EU:C:2012:146, paragraph 29).
- 33 Therefore, the scheme of protection laid down in Article 12 of the Habitats Directive must be sufficient effectively to prevent interference with protected animal species and, in particular, their habitats.
- 34 It would not be compatible with that objective to deny protection for resting places of a protected animal species where they are no longer occupied but where there is a sufficiently high probability that that species will return to such places, which is a matter for the referring court to determine.
- 35 Accordingly, the fact that a resting place is no longer occupied by a protected animal species does not mean that that place does not enjoy the protection offered by Article 12(1)(d) of the Habitats Directive.
- 36 In the light of the foregoing considerations, the answer to the first question is that Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the term ‘resting places’ referred to in that provision also includes resting places which are no longer occupied by one of the protected animal species listed in Annex IV(a) to that directive, such as the *Cricetus cricetus* (European hamster), where there is a sufficiently high probability that that species will return to such places, which is a matter for the referring court to determine.

The fifth question

- 37 By its fifth question, the referring court asks, in essence, whether Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the term ‘breeding sites’ referred to in that provision covers only the precisely identifiable location where mating or acts directly connected with the reproduction of the species concerned regularly take place, or whether the term also includes a location which is essential for the development of the young of that species.
- 38 The Commission takes the view that the order for reference does not explain the relevance of that question and that it is hypothetical.
- 39 In that regard, it should be recalled that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, *inter alia*, judgment of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 34 and the case-law cited).
- 40 It follows that questions on the interpretation of EU law referred by a national court in the legislative and factual context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 24 and the case-law cited).
- 41 In the present case, it should be noted that the request for a preliminary ruling does not provide any explanation as to why the term ‘breeding site’ is relevant to the resolution of the main proceedings.
- 42 First, it is apparent from the material before the Court that the resting places were undeniably affected by the harmful measures, and the referring court seeks to ascertain only whether such places may also be classified as ‘resting places’ for the purpose of the prohibition laid down in Article 12(1)(d) of the Habitats Directive where they are no longer occupied by the European hamster.
- 43 Second, the order for reference contains no matters of fact or law which make it possible to determine whether, and to what extent, in addition to classifying part of the European hamster’s natural habitat as a ‘resting place’, designating that habitat as a ‘breeding site’ would have any bearing on the outcome of the main proceedings.
- 44 Besides the fact that, in accordance with the case-law cited in paragraph 40 above, it is not for the Court to determine whether the factual background described by the referring court is accurate, it should be noted that, as Article 12(1)(d) of the Habitats Directive expressly states, the prohibition on all deterioration and destruction covers breeding sites and resting places of protected animal species and that prohibition applies regardless of the part of the natural habitat concerned.
- 45 It follows that the fifth question is inadmissible.

The second to fourth and sixth to eighth questions

- 46 By its second to fourth and sixth to eighth questions, which it is appropriate to consider together, the referring court raises questions concerning, in essence, the interpretation of the terms ‘deterioration’ and ‘destruction’ for the purposes of Article 12(1)(d) of the Habitats Directive.
- 47 According to the Commission, however, those questions are hypothetical.
- 48 In the present case, it is apparent from the request for a preliminary ruling that two entrances to the European hamster burrows were destroyed by the harmful measures, which suggests that, at the very least, the burrows were caused to deteriorate.
- 49 First, it should be noted that Article 12(1)(d) of the Habitats Directive covers both deterioration and destruction of breeding sites or resting places of protected animal species.
- 50 Second, that provision makes no distinction as regards the application of the prohibition on the deterioration or destruction of breeding sites or resting places depending on the nature of the interference with those sites or places. In that regard, it is not apparent from the material submitted to the Court that the decision of the national authorities to impose on IE a fine which, if not paid, is liable to be converted to a custodial sentence, would differ as to the severity of the penalty thus imposed according to whether there has been either deterioration or destruction of the breeding sites or resting places of the protected animal species.
- 51 Consequently, in the light of the case-law cited in paragraph 40 above there is no need to answer the second to fourth and sixth to eighth questions.

Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 12(1)(d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that the term ‘resting places’ referred to in that provision also includes resting places which are no longer occupied by one of the protected animal species listed in Annex IV(a) to that directive, such as the *Cricetus cricetus* (European hamster), where there is a sufficiently high probability that that species will return to such places, which is a matter for the referring court to determine.

[Signatures]