

10 Trading in wildlife under the Habitats and Birds Directives

Restricted movement of species v
free movement of goods

*Nicolas de Sadeleer**

Introduction

Although less marked than on other continents, Europe's systemic diversity displays a number of particular characteristics. More specifically, Western and Central Europe hosts 514 bird species, 62 amphibian species, 127 reptile species, 358 fish species, 576 butterfly species, 187 mammal species, and around 12,500 plant species. However, Europeans should seriously fear for the future of their wildlife. Indeed, as natural and semi-natural, continental and coastal ecosystems are undergoing significant modifications as a result of human activity (fragmentation, isolation, intensification of agricultural and forestry practices etc), animal and plant species are suffering unprecedented rates of extinction. To make matters worse, this negative trend is compounded by an array of additional threats (poaching, excessive hunting, disturbance inflicted by tourism, collision of birds with power-lines, etc).¹ As a result, the number of species deemed by the IUCN to be under threat in Europe runs into the hundreds: 15 per cent of mammals, 13 per cent of birds, 9 per cent of reptiles, 23 per cent of amphibians, 37 per cent of freshwater fish, 44 per cent of freshwater molluscs, and 9 per cent of butterflies are threatened with extinction at a continental scale.² In particular, a quarter of bird species have undergone a substantial decline in numbers over those last 20 years.³ Whereas the 1994 Birdlife conservation assessment asserted that 38 per cent of the European avifauna had an unfavourable conservation status, by the time of the

* Professor at Saint-Louis University, Jean Monnet Chair, Guest Professor UCL.

1 Illegal hunting for instance poses a threat to several protected raptor species such as the booted eagle (*Hieraaetus pennatus*) and the crane (*Grus grus*). E.g. GM Tucker and MF Heath, *Birds in Europe. Their Conservation Status* BirdLife Conservation Series No 3 (Cambridge, BirdLife International, 1994) 182; D Stanners and P Bourdeau (eds), *Europe's Environment. The Dobris Assessment* (Copenhagen, EEA, 1995) 227; IFEN, *L'environnement en France* (Paris, La Découverte/IFEN, 2002) 144–145.

2 IUCN Red List of Threatened Species. Regional Assessment (Newbury, Information Press, 2007).

3 European Commission, Report on the Application of Directive 79/409/EEC on the conservation of wild birds (COM (2000)180, para (2)3).

second assessment, carried out 10 years later, that appalling figure had reached 43 per cent.⁴ Since birds generally cope well with environmental changes, it is to be feared that their decline mirrors what is happening to many animal or plant groups: a pronounced deterioration in biodiversity in Europe, both in the distribution and the abundance of species. Last but not least, according to the EEA 2009 report on the 2010 biodiversity target, 40 to 70 per cent of species of European interest in the terrestrial biogeographical regions remain in an unfavourable conservation status.⁵

Given the enormity of the threats, it is necessary to address the impact of trading in wild species on their conservation status. Given that wildlife trade is big business in the EU,⁶ international trade has been identified as a contributory factor in the threat status of many species.

To begin with, I will draw a distinction between the rules regulating trade in wildlife provided for under the Birds Directive and those contained in the Habitats Directive. That being said, lack of space prevents any discussion of the obligations laid down in other Regulations and Directives dealing with wildlife protection.⁷ The chapter is then concerned with the conditions to enact more stringent national trading measures under Article 193 TFEU. It is to the issue of the possibility to enact wildlife conservation measures hindering free trade that the chapter then turns. Last but not least, a Member State may wish to preserve certain natural resources by limiting its imports of wildlife from third states. As a matter of fact, these are measures having equivalent effect to import restrictions. Where their object is to protect interests that could be regarded, by their nature, as common to all Member States, can they nonetheless be justified? This issue shall also be addressed.

4 Birdlife International, *Birds in Europe. Populations Estimates, Trends and Conservation Status* BirdLife Conservation Series No 3 (Cambridge, BirdLife International, 2004).

5 EEA, Progress towards the European 2010 biodiversity target (Copenhagen, 2009) 17.

6 For instance, the EU is the world's major importer of wild birds. During 2002–03, over 3 million wild CITES-listed birds were traded globally, with over 90 per cent imported to the EU. E.g. Birdlife International Position Statement on the Importation of Wild Birds into the EU (April 2006).

7 E.g. Directive 83/129/EEC of 28 March 1983 concerning the importation into the Member States of skins of certain seal pups and products derived therefrom; Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whale or other cetacean products, Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein; Commission Regulation (EC) No 865/2006 laying down detailed rules; Decision 1999/337/EC of 26 April 1999 on the signature by the European Community to the agreement on the International Dolphin Conservation Programme. See also Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] not reported. That case arose from a challenge brought by native Inuit hunters and trappers associations as well as Inuit individuals who were seeking the annulment of Regulation (EC) No 1007/2009 of the European Parliament and the Council on trade in seal products, the purpose of which, according to Art 1 thereof, is to establish harmonized rules concerning the placing on the market of seal products. For further analysis of this legislation, see e.g. N de Sadeleer and C-H Born, *Droit communautaire et international de la biodiversité* (Paris, Dalloz, 2004) 562–568.

Habitats and Birds Directives rules on trading in wildlife

Introductory remarks

Distortions to competition caused by divergent national policies may be more easily combated through the adoption of rules harmonized for the whole Union. In fact, by reining in the power of the Member States to adopt autonomous policy measures, the uniform rules would guarantee better the free movement of goods than the provisions of Treaty law taken alone. Accordingly, the Birds Directive and the Habitats Directive alike regulate trading in a number of wild species of animals and plants.

Trading in wild birds

Directive 2009/147/EU of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the codified version of Directive 79/409/EEC, as amended) is the EU's oldest piece of nature legislation.⁸ The directive creates a comprehensive scheme of protection for all wild bird species naturally occurring in the Union. According to its preamble and first article, its objective is to ensure the conservation of all species of naturally occurring birds in the wild state in Europe on the grounds that wild birds represent a shared heritage of the Member States, the effective protection of which is typically a transfrontier problem entailing common responsibilities (preamble, 8th recital). This conservationist objective manifests itself in an obligation on the Member States to 'take the requisite measures to maintain the population of [bird] species at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements' (Art 2). This objective places Member States under a result-based obligation.

Although the Birds Directive 'covers the protection, management and control of these species and lays down rules for their exploitation' (Art 1), it should nonetheless be noted that the 'effective protection' of avifauna takes precedence over its 'management' and 'control'.⁹ The structure of the directive reflects this ranking of priorities. In fact, the protection of avifauna is guaranteed by a range of prohibitions (Art 5) whilst the 'management' of bird populations may not be carried out through hunting (Art 7), and their 'control' with a view to limiting unwanted populations may only be carried out within the context of the strict framework of derogations (Art 9).

Amidst different conservation obligations, the directive lays down a general prohibition on the trading and keeping of bird species (Art 6(1)). This prohibition covers the activities of sale, transportation with a view to sale as well as the placing

⁸ OJ L27, 26 January 2010.

⁹ Case C-202/94 *Godefridus van der Feesten* [1996] ECR I-355, para 10.

on the market of live or dead birds, including any part or product derived from a bird and which is easily identifiable as such. This prohibition is not however watertight, and allows for a range of exceptions. Where however the conditions set out in these articles are not fulfilled, the general prohibition remains fully applicable.

The rules on trade provided for under the directive can be summarized as follows.

On the one hand, trade in the 24 species listed in part A of Annex III of the directive – several *anatidae* such as the mallard (*Anas platyrhynchos*), several *Tetraonidae* such as ptarmigans (*Lagopus lagopus lagopus*, *scoticus* and *hibernicus*), the grey partridge (*Perdix perdix*), the pheasant (*Phasianus colchicus*), the wood pigeon (*Columba palumbus*), and the snipe (*Gallinago gallinago*) – is permitted throughout the EU, provided that the birds have been killed, captured or otherwise acquired lawfully (Art 6(2)).

On the other hand, Member States may authorize within their territory trade in the 58 species listed in part B of Annex III – different species of waterfowl (*Anseriformes*), gallinaceous (*Galliformes*) and waders (*Charadriiformes*) – provided that they consult the European Commission in advance. The Commission must consider whether the marketing of the particular species would risk endangering its ‘population level, geographical distribution or reproductive rate’ throughout the EU. If it is evident from this examination that the granting of the authorization in question might entail the risk of one of the above-mentioned threats manifesting itself, the Commission replies to the Member State with a ‘reasoned recommendation’ opposing the marketing of the species in question. One is left with no guidance as to the action the Commission should take where the Member State has not taken into consideration its recommendation. Our view is that if a Member State fails to comply with the recommendation or fails to seek such a recommendation, the Commission may lodge infringement proceedings pursuant to Article 258 TFEU. If the Commission on the other hand deems no such risk to exist, it informs the Member State that it is accordingly authorized to engage in such trade (Art 6(3)).

Where a species is not listed in Annex II, a derogation from the Article 5 and 6 prohibitions is only possible where the strict requirements laid down in Article 9 are fulfilled. Though this provision is subject to a strict interpretation, it has been interpreted quite widely, permitting the sale of birds for recreational use in fairs and markets.¹⁰

As a result, whereas several bird species are hunted and traded in some Member States, they are fully protected in the other Member States. It goes without saying that the prohibition on importing game lawfully placed on the market in another Member State is likely to hinder the free movement of goods.

Trading in other indigenous species than birds

In 1992, the Community enacted Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).¹¹ Following

10 Case C-10/96 *LRBPO* [1996] ECR I-6775.

11 OJ L206, 22 July 1992.

the example of the Bern Convention on the conservation of European wildlife and natural habitats, the Habitats Directive was intended to ensure, other than for winged creatures, the maintenance of biological diversity by requiring the conservation of particular natural habitats as well as certain species of wild fauna and flora. Along the same lines as the Birds Directive, the drafters of the Habitats Directive thus adopted a twin-track approach. Member States must on the one hand ensure the conservation of natural habitats and species habitats (Arts 3–11), whilst on the other protecting the species as such by regulating their capture, their trade or hunting (Arts 12–16).

Member States are called on, according to Article 2(2), ‘to maintain or restore, at favourable conservation status . . . species of wild fauna and flora of Community interest’. In contrast to the Birds Directive, the material scope of the Habitats Directive is restricted to a restricted number of species that are deemed to be of special interest. That being said, the concept of ‘conservation status’ has the merit of being much more precise than that of a ‘level which corresponds to different requirements’ contained in Article 2 of the Birds Directive. The state of conservation of a species is considered favourable when the following conditions are satisfied:

- 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.

Needless to say that restrictions placed on hunting as well as on trade are playing a key role in improving vulnerable population dynamics. Last, a distinction is drawn between the most vulnerable or threatened species requiring strict protection and less threatened species the taking of which is likely to be regulated.

Species requiring strict protection (Arts 12 and 13)

Animal and plant species included in Annex IV (large carnivores, cetaceans, land turtles) enjoy strict protection (Art 12 for animals and Art 13 for plants).¹² This framework extends, for plant and animal species, to prohibitions on ‘the

¹² Where nature protection associations wish to challenge a decision of a Member State to derogate from a system of environmental protection for a species mentioned in Annex IV such as the brown bear, standing rules have to be compatible with the letter and the spirit of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Remarkably the Court of Justice itself has indicated that national courts should try to render Art 9(3) of the Århus Convention applicable ‘to the fullest extent possible’. See Case C-240/09 *Lesoochranské zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255, para 50.

keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild' (Arts 12(2) and 13(2)). It must be noted that several strictly protected species are also covered by CITES Council Regulation (EC) No 338/97. Accordingly, the purchase of mounted brown bears – a species that is included in Annex A of this regulation – is likely to be prohibited under CITES.¹³

The protection of species the taking of which is likely to be regulated (Arts 14 and 15)

Articles 14 and 15 require controlled exploitation of Annex V species and prohibit indiscriminate means of killing or taking these animals and those on Annex IV.

For the less endangered animal and plant species listed in Annex V (marten, genet, ibex, chamois), the directive provides for a system of managed takings which is largely dependent on the goodwill of Member States: 'If . . . Member States deem it necessary they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status' (Art 14(1)). In other words, these species can be exploited so long as their conservation status does not suffer from their taking. The directive nonetheless provides for the fulfilment of particular criteria where these species are exploited. Some measures (including regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens) are listed in a non-exhaustive manner (Art 14(2)). Other measures are binding on Member States, which must prohibit 'the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of [a] species' (Art 15). The Court of Justice took the view that this provision lays down a general prohibition 'designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned'.¹⁴

National measures more stringent than the Habitats and the Birds Directives rules on trading in wildlife pursuant to Article 193 TFEU

Introductory remarks

In contrast to other environmental rules having as their object the establishment and the functioning of the internal market and adopted pursuant to Article 114

13 Case C-154/02 *Jan Nilsson* [2003] ECR I-12733. In the context of criminal proceedings brought against a person accused of having infringed a sale prohibition, any type of evidence accepted under the procedural law of the Member State concerned in similar proceedings is in principle admissible for the purpose of establishing whether specimens of animal species were lawfully acquired. In the light also of the principle of the presumption of innocence, the convicted person may adduce any such evidence to prove that those specimens came lawfully into his possession. See Case C-344/08 *Tomasz Rubach* [2009] ECR I-7033.

14 Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, para 94.

TFEU,¹⁵ the Habitats and the Birds Directives were adopted on the basis of former Article 130s EC (now Article 192 TFEU).

Pursuant to Article 17 of the Birds Directive, the Member States may introduce stricter measures than those provided for under this directive. In contrast, the Habitats Directive is silent on this matter. The Member States' right to enact more stringent rules than the EU wildlife standards is not subject to the granting of a specific authorization by the European Commission. In effect, Article 193 TFEU enshrines this right in general terms, which consisted in a specific application of the principle of subsidiarity.¹⁶ This provision reads as follows: 'The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission'. Accordingly, this right enables the Member States to retain a certain degree of autonomy in departing from the minimum harmonization pursued at EU level. To sum up, pursuant to Article 193 TFEU, any Member State may at any time freely decide to maintain or adopt more stringent standards than those provided for under the act adopted on the basis of Article 192 TFEU.

With respect to wildlife management, the importance of Article 193 TFEU can be illustrated by the following example. CITES regulation, which has been adopted pursuant to Article 192 TFEU, is not preventing any Member State from maintaining or introducing more stringent protective measures, which must be compatible with the Treaty.¹⁷ Accordingly, the refusal to recognize CITES certificates validly issued by foreign authorities in order to obtain an exception for the prohibition on the marketing specimens of wild animals born and bred in captivity amounts to a more stringent protective measure within the meaning of Article 193 TFEU.¹⁸

However, the adoption of 'more stringent protective measures' must comply with the relevant substantive and formal conditions.

Material scope of Article 193 TFEU

Stricter national measures pursuant to Article 193 TFEU may only be adopted with reference to the EU harmonization rule enacted under Article 192 TFEU. Member States are thus precluded from invoking Article 193 TFEU with a view to departing from standards laid down by a directive dealing with the functioning of the internal market.

The question must be raised as to whether all the nature protection measures likely to fall within the scope of ambit of the Article 192 TFEU based

15 N de Sadeleer, 'Les dérogations nationales à l'harmonisation du marché intérieur examen au regard de l'article 114, paragraphes 4-7 TFUE' [2013] *RDUE* 1-35.

16 Opinion AG Cosmas in Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, para 35.

17 Case C-510/99 *Tridon* [2001] ECR I-7777, para 45.

18 Case C-100/08 *Commission v Belgium* [2009] ECR I-140, para 60.

directive must be enacted pursuant to Article 193 TFEU. The following distinction must be made: first, since the Birds Directive 2009/147/EC protects all bird populations of every species of wild birds found in Europe,¹⁹ any stricter national measures governing the protection of game must fall within the ambit of Article 193 TFEU; secondly, since the Habitats Directive 92/43/EC only protects a limited number of wild species, any measures taken in relation to species not falling under the scope of this directive will not be covered by Article 193 TFEU.²⁰ That would be the case of positive lists of species of animal which could be kept by individuals in captivity, while prohibiting the keeping of other species.²¹

Substantive conditions

The power of the Member States to adopt more stringent measures is not however absolute. The expression ‘more stringent measures’ implies that these measures may not be different from those decided on Union level, but they must consist in the extension of the harmonization rule by pursuing a greater level of protection.²² In other words, the objectives of the national measure must coincide with those stated in the Birds and Habitats Directives. This means that the Member States may neither lower the level of protection (e.g. trading in protected species) nor change the arrangements for implementing secondary law.²³ Likewise, the adoption of more stringent arrangements under Article 193 TFEU cannot release the Member States from the obligation to transpose these directives.²⁴

The definition of the extent of the protection to be achieved is left to the Member States.²⁵ Indeed, it is a matter for the later to examine whether it is appropriate to extend the wildlife trade prohibition to other taxa, to introduce more stringent procedural arrangements, to list additional species to be regulated, or to remove exceptions.

Moreover, reliance on Article 193 TFEU is subject to two further limits, first that the relevant measures respect secondary law where there has been complete harmonization in the area, and secondly that they be compatible with the Treaty law. These two restrictions require more detailed discussion.

19 Case C-202/94 *Godefridus van der Feesten*, above n 9, paras 16–17.

20 See for instance C-249/07 *Commission v Netherlands* [2008] ECR I-174, paras 31–37.

21 Cases C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel* [2008] ECR I-4475; C-100/08 *Commission v Belgium*, above n 18.

22 N de Sadeleer, ‘The principle of a high level of environmental protection in EU law: policy principle or general principle of law?’ in L Gipperth and C Zetterberg (ed), *Miljörettsliga perspektiv och tankeväндor. Vänbok till Jan Darpö og Gabriel Michanek* (Uppsala, Iustus Förlag 2013) 447–465.

23 Case C-194/01 *Commission v Austria* [2004] ECR I-4579, para 39.

24 Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267.

25 Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, para 61.

Complete harmonization

As far as secondary law is concerned, the exhaustive nature of the Union measure, even if it consists in a minimum standard, has the effect of preventing the Member States from justifying more stringent protective measures by relying on Article 36 TFEU.

An example may be drawn from the case law. As regards the protection of domestic animals, an issue closely related to nature protection law, the Court of Justice has held that a Member State cannot object to the exportation of veal calves on the grounds that the directive laying down minimum standards for the protection of calves ‘regulated exhaustively the Member States’ powers’.²⁶ However, neither the Birds nor Habitats Directives adopted on the basis of Article 192 TFEU result in complete harmonization. Accordingly, the Member States enjoy fairly broad room for manoeuvre while implementing these acts.

Compatibility with Treaty law

We now turn to the second limit, consisting in the requirement for the more stringent protective measure to be compatible with Treaty law.²⁷

The interpretation of the expression ‘in accordance with the Treaty’ is complex because a distinction must be drawn between two situations: where the more stringent protective measure does not affect trade between the Member States, and where it impinges upon the free movement of goods.

This first situation concerns a measure which does not undermine the principle of the free movement of goods. In *Deponiezweckverband Eiterköpfe*, the Court of Justice has provided the following clarifications regarding the conformity of this type of national measure taken pursuant to Article 193 TFEU. In particular, the Court took the view that:

the Community principle of proportionality demands that measures of domestic law should be appropriate and necessary in relation to the objectives pursued . . . inasmuch as other provisions of the Treaty are not involved, that principle is no longer applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article [193 TFEU] and going beyond the minimum requirements laid down by the Directive.²⁸

In this connection, a case in point would be *Azienda Agro-Zootecnica Franchini*. Regarding the proportionality of nature protection measures, the Court ruled that:

26 Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* [1998] ECR I-1251, paras 65 to 68.

27 J. Jans, ‘Minimum Harmonization and the Role of the Principle of Proportionality’ in M. Führ, R. Wahl and P. von Wilmsdorf (eds), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Rehlinger* (Erich Schmidt Verlag, 2007) 705–717; N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB, 2010) 422–428.

28 Case C-6/03 *Deponiezweckverband Eiterköpfe*, above n 25, paras 62 and 63.

'In view of its limited scope', an environmental protection measure prohibiting the location of new wind turbines in Natura 2000 sites is not liable to jeopardize the European Union of developing new and renewable forms of energy, as established for EU policy by Article 194(1)(c) TFEU.²⁹

Therefore, as long as other provisions of the Treaty are not undermined, the general principle of proportionality will not apply to a national measure providing for a stricter regime than the one contained in secondary law.³⁰ In other words, the intention expressed by the national authorities to go beyond the minimum requirements contained in the harmonization instrument cancels the requirement to carry out a proportionality test. The justification of the restriction made to the application of a general principle of law without doubt lies in the fact that, as far as the application of Article 193 TFEU is concerned, 'it falls to the Member States to define the extent of protection to be achieved'.³¹

On the other hand, it may be the case that other provisions of the Treaty, such as the ones enshrining the principle of the free movement of goods, are called into question through the exercise of more stringent regulatory powers. In particular, even where it is permitted both under Treaty law as well as under secondary law, a protective measure regulating trade in wildlife that goes beyond the EU harmonization standards must respect the principle of the free movement of goods or other EU general principles of law. In other words, Article 193 TFEU does not therefore give the Member States *carte blanche* to determine their protection thresholds where those thresholds are likely to give rise to conflicts with other Treaty provisions. As a result, where they are likely to obstruct trade between the Member States, national measures which go beyond the minimal EU environmental standards must pass the necessity and proportionality tests.

The following case illustrates the extent of the proportionality test as applied by the Court of Justice. Even though it amounted to a more stringent protective measure, the Belgian regulation preventing the marketing of indigenous European birds born and bred in captivity, which were legally marketed on the territory of other Member States, amounted to a measure having equivalent effect to a quantitative restriction (MEE) within the meaning of Article 34 TFEU.³² As a

29 Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl, Eolica di Altamura Srl v Regione Puglia* [2011] ECR I-6561, para 57.

30 Case C-6/03 *Deponiezweckverband Eiterköpfe*, above n 25, paras 63 and 64. In contrast, the principle of proportionality applies to more stringent national measures in the area of fisheries. In *Karanikolas*, the Court ruled that the national prohibition of the use of certain types of fishing net that goes beyond the minimum requirements of an EU fisheries regulation, and which was adopted before that entry into force of that regulation, is valid provided that 'that prohibition is in conformity with the common fisheries policy, that it does not go beyond what is necessary to achieve the objective pursued and that it is not contrary to the principle of equal treatment, those being matters which it is for the national court to determine'. See Case C-453/08 *Karanikolas and Others* [2010] ECR I-7895, para 58.

31 Case C-6/03 *Deponiezweckverband Eiterköpfe*, above n 25, para 61.

32 Case C-100/08 *Commission v Belgium*, above n 18, para 94 et seq.

result, the measure at issue must have a causal link to the wildlife protection objective pursued and be appropriate for achieving it.

This analysis can be taken a little bit further. It would appear that when the national authorities pursue a level of protection greater than that imposed under secondary law within the framework of the acts adopted on the basis of Article 192 TFEU, the national courts should view them in a favourable light. In effect, such measures generally aim to optimize environmental protection on the basis of circumstances specific to the Member State such as the vulnerability of ecosystems, the dynamics of vulnerable populations, the difficulties encountered during inspection missions, the role played by criminal networks, etc. Though they are likely to impact free trade, these measures often prove to be necessary in order to guarantee the effectiveness of national legislation implementing environmental secondary law. It follows that these measures should not be struck down unless they have a significant disproportionate effect on the free movement of goods between the Member States.

Formal conditions

As far as formal requirements are concerned, the exercise of the right enshrined in Article 193 TFEU is subject to a specific formality consisting in the notification of the measure to the Commission.³³ Requested for information purposes, this notification is not part of an authorization regime. Moreover, no time limit is specified for the notification of the national regulation. The implementation of the system for notification however requires the Commission and the Member States to cooperate in good faith. It is necessary for the latter to notify their provisions as soon as possible in order to enable the Commission to carry out its review effectively.³⁴ However, the failure by the Member States to comply with their notification obligation under Article 193 TFEU does not in itself render unlawful the more stringent protective measures thus adopted.³⁵

Free movement of goods, restricted movement of game

State of question

Because of the preference given to free movement of goods in the framework of the internal market, pursuant to Articles 3(3) TEU and 26 TFEU, two provisions of the TFEU are of considerable importance within the EU legal order. Member States cannot adopt or maintain any ‘measures having equivalent effect’ (MEE) to

33 By virtue of the Birds and Habitats Directives, Member States are required to communicate to the Commission their measures falling within the scope of ambit of these directives. See Art 17 Birds Directive; Art 23(1) Habitats Directive.

34 Reasoning by analogy, see Case C-319/97 *Kortas* [1999] ECR I-3143, para 35.

35 Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl, Eolica di Altamura Srl v Regione Puglia*, above n 29, para 53.

‘quantitative restrictions’ on imports (Art 34 TFEU) as well as on exports (Art 35 TFEU). If the wording of Articles 34 and 35 TFEU is concise, the meaning and therefore the scope of these two provisions have given rise to questions of interpretation in particular in the environmental field.

We shall briefly examine the characteristics of this regime before underlining the practical difficulties shown by the case law of the Court of Justice.

Two criteria are used to define the scope of Articles 34 and 35 TFEU, namely the nature of the ‘goods’ meant to move freely within the internal market, and the nature of the barriers concerning these goods. In the absence of Treaty definitions of ‘goods’, ‘quantitative restrictions’ and ‘measures having equivalent effect’, one must refer to the Court of Justice’s case law to determine the scope of these provisions.

Nowhere in the Treaty is the concept of ‘goods’ defined. Both Article 34 and Article 35 TFEU use respectively the terms ‘imports’ and ‘exports’ rather than ‘goods’ or ‘products’. Concerning all ‘goods taken across a frontier for the purposes of commercial transactions . . . whatever the nature of those transactions’,³⁶ the concept of ‘goods’ is interpreted broadly and can thus cover specimens of wild animals caught and marketed.³⁷ In other words, game species are to be considered goods since they are objects capable of being transported across borders and giving rise to commercial transactions.³⁸

What is more, Articles 34 and 35 TFEU only apply if one can establish the existence of a quantitative restriction or a MEE. Given that it is unlikely to face quantitative restrictions, the definition of a MEE is therefore essential in the Court of Justice case law, which, through a broad interpretation of free movement of goods, puts more store in the effect of the measure than in its legal nature.

Since its *Dassonville* judgment of 11 July 1974, the Court of Justice has broadly interpreted the concept of MEE. According to the wording of the judgment, ‘all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions’.³⁹ Repeated on countless of occasions, this formula is still regularly cited in judgments.

36 Case C-324/93 *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith* [1995] ECR I-563, para 20.

37 This is the case of different taxonomic groups: British grouse (*Lagopus lagopus scotius*) in Case C-169/89 *Gourmetterie Van den Burg* [1990] ECR I-2143; Canadian goose (*Branta canadensis*) in Case C-149/94 *Vergy* [1996] ECR I-299; bees (*Apis mellifera*) in Case C-67/97 *Bluhme* [1998] ECR I-8033; goldfinch (*Carduelis carduelis*) in Case C-202/94 *Godefridus van der Feesten*, above n 9; macaw (*Ara macao*) in Case C-510/99 *Tridon*, above n 17; and wild mammals in Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, above n 21.

38 Case C-169/89 *Gourmetterie Van den Burg*, above n 37; Opinion AG Fennelly in C-202/94, *Godefridus van der Feesten*, above n 9, para 55.

39 Case C-8/74 *Dassonville* [1974] ECR 837.

Its striking feature is its sheer breadth.⁴⁰ For a MEE to be prohibited, it needs not necessarily apply to imports or exports; it is sufficient that it be applicable to them. Nor is it necessary that the measure has a direct and appreciable effect on interstate trade.⁴¹ Furthermore, the measure need not intervene at the moment of the crossing of borders; its effects may only be felt later, inside the importing country.⁴² Finally, to be prohibited, the measure need not render import or export impossible. It is sufficient for these operations to be rendered more difficult, for there to be a MEE.⁴³

In *Cassis de Dijon*, the Court clarified that MEEs, not limited to measures directly affecting imports, were encompassing measures that are ‘applicable without distinction’ to foreign and domestic goods, as a foreign producer may find it more difficult to respect these rules than the national producer. According to settled case law, ‘in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods’ constitute MEEs prohibited by Article 34 TFEU.⁴⁴ The condition that the goods were ‘lawfully manufactured and marketed in another Member State’ reflects ‘the obligation to comply with the principle of mutual recognition of products’.⁴⁵ Mutual recognition can be defined as ‘a principle whereby the sale of goods lawfully produced and marketed in one Member State may not be restricted in another Member State without good cause’.⁴⁶ It follows that the importer can reckon upon a single regulation by the home State (e.g. lawful keeping of the species) instead of having to overcome the hurdle to cope with both the home state and the domestic regulation (keeping of the species is subject to an authorization).

The incorporation under former Article 28 EC (new Art 34 TFEU) of national measures which are indistinctly applicable has in any case permitted a considerable extension of the control of obstacles to trade between the Member States, which in turn gave rise to difficulties regarding the justification of national environmental measures. By way of illustration, a ‘positive list’ of wild mammals ‘is liable – since it is applied to specimens from another Member State – to restrict inter-State trade for the purposes of [Art 34 TFEU]’.⁴⁷ By the same token, in

40 P Oliver, ‘Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurting in a New Direction?’ [2011] 33–4 *Fordham Int’l LJ* 1423–1471.

41 Case C-16/83 *Prantl* [1984] ECR I-1299, para 20.

42 Case C-222/82 *Apple and Pear Development Council* [1983] ECR I-4083.

43 Cases C-8/74 *Dassonville*, above n 39, and C-128/89 *Commission v Italy* [1990] ECR I-3239.

44 Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

45 Case C-110/05 *Commission v Italy* [2009] ECR I-519, para 34 and the case law cited; Case C-108/09 *Ker-Optika* [2010] ECR I-12213, para 48, noted by N de Sadeleer [2011] 2 *EJCL* 435–444.

46 Case C-120/78 *Cassis de Dijon*, above n 44, para 14.

47 Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, above n 21, para 26.

dissuading trade in mammals and oysters, thanks to systems of a ‘positive’ list and of licences granted by administrative authorities, the Member State hinders inter-state trade.⁴⁸

Last but not least, there is a general view, reflected in the Court’s consistent case law, that there is not even a *de minimis* exception to Article 34 TFEU. As is clearly illustrated in *Bluhme*, a MEE may constitute a restriction on a very small fraction of imports of beehives. One of the arguments put forward by the Danish authorities was that the prohibition fell outside Article 34 TFEU as being *de minimis*, since it covered only 0.3 per cent of Danish territory. Advocate General Fennelly dismissed that argument on the grounds that ‘the slight effect of the decision, in volume terms, cannot, in itself, prevent the application of Article [34] of the Treaty’.⁴⁹ The judgment of the Court of Justice was completely in line with that line of reasoning.

The protection of ‘health and life of humans, animals or plants’ as an exception to the prohibition of MEEs

Articles 34 and 35 TFEU do not enshrine a general freedom to trade, or the right to the unhindered pursuit of one’s commercial activities.⁵⁰ Accordingly, the scope of these provisions has certain limits. One set of exceptions can be found in Article 36 TFEU. ‘As long as full harmonization of national rules has not been achieved’,⁵¹ Member States may rely upon Article 36 TFEU that allows Member States to adopt or to maintain quantitative restrictions or MEEs, inasmuch as the latter are justified, among others, by the protection of ‘health and life of humans, animals or plants’.

As a result, the ground of justification linked to the ‘protection of health and life animals or plants’ is the cornerstone of national legislation on the protection of species of wild fauna and flora. In this connection, two examples will suffice.

Regarding the species covered by the Habitats Directive, in providing for measures aimed at protecting native species of fish against invasive species, the Netherlands do not aim to protect endangered species under the scope of that directive and may therefore invoke Article 36 TFEU.⁵² What is more, the threat

48 Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, above n 21, paras 21–22.

49 Opinion AG Fennelly in Case C-67/97 *Bluhme*, above n 37, para 16.

50 Case C-292/92 *Hünernund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787.

51 This means that the Member States are prevented from further relying on Art 36 TFEU or a rule of reason in order to circumvent their obligations under secondary law. See Cases C-215/87 *Schumacher v Hauptzollamt Frankfurt am Main-Ost* [1989] ECR 617, para 15; C-369/88 *Delattre* [1991] ECR I-1487, para 48; C-347/89 *Freistaat Bayern v Eurim-Pharm* [1991] ECR I-1747, para 26; C-62/90 *Commission v Germany* [1992] ECR I-2575, para 10; C-320/93 *Ortscheit v Eurim-Pharm* [1994] ECR I-5243, para 14, and C-350/97 *Monsees* [1999] ECR I-2921, para 27.

52 Case C-249/07 *Commission v Netherlands*, above n 20, paras 42 to 43.

of extinction of indigenous species of crayfish or of subspecies of wild bees by the introduction of invasive species that are not listed under the Annexes of the Directive was found to be justified pursuant to Article 36 TFEU.⁵³ In particular, In *Bluhme*, the Court of Justice considered that ‘measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population’.⁵⁴ The Court used this reasoning to consider that ‘the establishment . . . of a protection area within which the keeping of bees other than Laesø brown bees is prohibited’, by reason of the recessive character of the latter’s genes, ‘therefore constitutes an appropriate measure in relation to the aim’ of biodiversity conservation. In addition, the population of bees at risk must not face an immediate danger of extinction for the exception to be justified. Similarly, a national regulation under which it is prohibited to trade in mammals belonging to species other than those expressly referred to in that legislation can be justified on grounds, inter alia, of the protection of the health and life of humans or animals.⁵⁵

We turn now to the issue of bird conservation. Given that the Birds Directive is aiming at protecting bird populations present in their natural, the protective regime is not extended to specimens of wild birds born and reared in captivity⁵⁶ or exotic species. This is for example the case for the Canada goose (*Branta canadensis minima*), a species which does not originate in Europe and does not fall within the ambit of the CITES regulation.⁵⁷ The Court of Justice took the view that such an extension would serve ‘neither the need for the conservation of the natural environment . . . nor the objective of long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe’.⁵⁸ As a result, Member States remain competent to regulate the trade in specimens of species falling out with the scope of ambit of the directive, provided that their measures are justified in accordance with Article 36 TFEU.

The principle of proportionality

To prevent the principle of free movement of goods from becoming nugatory, the Court of Justice has been putting in place a series of criteria to assess the proportionality of the measures justified under the aforementioned exceptions. The principle of proportionality allows one to assess means used – ban, prohibition,

53 Cases C-131/93 *Commission v Germany (German crayfish)* [1994] ECR I-3303, and C-67/97 *Bluhme (Laesø bees)*, above n 37.

54 Case C-67/97 *Bluhme*, above n 37, para 33.

55 Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, above n 21, para 28.

56 Case C-149/94 *Vergy*, above n 37, para 15.

57 *Ibid*, para 10.

58 Cases C-149/94 *Vergy*, above n 37, para 13; C-100/08 *Commission v Belgium*, above n 18, para 106.

approval, authorization, restriction on use, etc – with reference to the objectives pursued (wildlife conservation) to best take into account the legitimate interests of undertakings in freely trading their goods. It must be noted that the principle of proportionality implies a comparison of measures likely to attain the desired result and the selection of the one with the least disadvantages. If it appears that an alternative measure would meet the target while hindering to a lesser degree interstate trade, the contested measure is no longer necessary and must be deemed disproportionate. The national measure must therefore be necessary in attaining the objective pursued. To the convenience of representation, we have chosen but a few cases that are illustrative of the ways in which the Court of Justice assesses the proportionality of wildlife measures.

- The prohibition on importing exotic crayfish to German territory must be proportionate to the aim pursued, the protection of indigenous crayfish.⁵⁹
- Inasmuch as the scope of the Birds Directive does not apply to captive born and bred specimens, Member States may adopt legislation on trade of the latter in conformity with the principle of proportionality.⁶⁰ Nonetheless, to assess the possibility of attaining the objective with less restrictive rules, one must resort to a specific analysis, through the use of scientific studies.⁶¹
- The fact of limiting in Belgium the trade in wild birds to birds having a metallic ring impeded the import of birds that have plastic rings or microchips, methods that are authorized in other Member States. The Court held that such an obligation was disproportionate to the aim pursued, namely the fight against fraud.⁶²
- Regarding measures prohibiting trade of captive born and bred parrots, the Court stated that it could not assess the proportionality of the measure in the absence of a scientific study that the national court had to order.⁶³

That being said, EU law cannot be insulated from international law. As secondary law may reinforce the necessity of national measures hindering trade, so may provisions of international law act as grounds for necessity. In this connection, a few examples will suffice.

- The conservation of an indigenous animal species through protective measures hindering trade is recognized both in international law and in secondary law, and its validity must be deemed to stem from Article 36 TFEU.⁶⁴

59 Case C-131/93 *Commission v Germany*, above n 53.

60 Cases C-149/94 *Vérgy*, above n 37, para 15; C-480/03 *Hugo Clerens* [2004] not reported, para 17.

61 Case C-480/03 *Hugo Clerens*, above n 60, para 19.

62 Case C-100/08 *Commission v Belgium*, above n 18, paras 103–105.

63 Case C-510/99 *Tridon*, above n 17, para 58.

64 Case C-67/97 *Bluhme*, above n 37, paras 36 and 38.

- A national regulation under which it is prohibited to trade in mammals belonging to species other than those expressly referred to in that legislation can be justified if animal welfare pursues a legitimate objective, namely the welfare of animals, the importance of which was reflected, in particular, in the adoption by the Member States of the Protocol on the protection and welfare of animals, annexed to the TEC.⁶⁵

Table 1 summarizes the conditions to be fulfilled to admit MEEs.

Table 1 Conditions to be fulfilled to admit measures hindering inter-state trade

No complete harmonization at EU level.	Secondary legislation entailing complete harmonization precludes Member States to justify their measures under Article 36 TFEU. Habitats and Birds Directives are not fully harmonizing nature protection rules.
Legitimate objective of public interest under Article 36 TFEU.	The measure must pursue a legitimate objective of public interest, such as the protection of 'health and life of humans, animals or plants'.
Non-economic nature of the measures.	Member States cannot invoke Article 36 TFEU for economic reasons.
Respect for the principle of non-discrimination.	Nature protection measures can apply with distinction to domestic and foreign products.
Necessity and proportionality.	The nature protection measure must have a causal link to the objective pursued and be appropriate for achieving it.

Restrictions on imports justified by extra-territorial considerations

The Birds Directive had the effect of harmonizing the rules on the trade in game with regard to avifauna. One might wonder whether this harmonization still allows Member States to adopt more stringent measures on the trade in gamebirds. The Court of Justice addressed this issue in the *Van den Burg* case, concerning a preliminary reference from the Dutch High Court (*Hoge Raad*), questioning whether the prohibition on the importation of a particular 'gamebird' species, the trade in which was authorized throughout the territory of the Community by the Birds directive, constituted a MEE.⁶⁶ The dispute concerned an endemic species, the Scottish red grouse (*Lagopus scoticus*), a bird which may be hunted in Britain and which was being traded in a 'gourmetterie' in the Netherlands. The Court held that Article 14 of the directive allowing Member States to implement protective measures more stringent than the Community provisions, did not however permit

65 Cases C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, above n 21, para 27; C-100/08 *Commission v Belgium*, above n 18, para 91.

66 For a commentary on this judgment, see L Krämer, *European Environmental Law – Casebook* (London, Sweet & Maxwell, 1993) 152.

them to go beyond the protective measures required for species for which the rules governing trade had already been comprehensively harmonized. According to the Court, Member States' ability to adopt more stringent protective measures (under Art 176 of the EC Treaty, now Art 193 TFEU) only applied in respect of species living on the territory of that state and, as far as species not living on their territory are concerned, only to migratory species forming part of the common heritage of the European Community and endangered species listed in Annex I of the directive. According to this judgment, it must be possible to trade by freely importing or exporting all bird species which either: (a) do not live on the territory of a particular Member State but do live on the territory of another Member State in which their hunting is allowed either under the provisions of the directive or according to the latter's national rules; or (b) are neither migratory species forming part of the common heritage of the European Community nor endangered species listed in Annex I of the Directive.

The Court held that the birds in question fell within the category of tradable birds. This means that a national rule prohibiting the importation and marketing of all game species would fall foul of the principle of free movement of goods. It should however be noted that in this case the Court did not equiparate the game in question with goods in general. It in fact recognized that particular species of European fauna – namely migratory and endangered species – represented an interest of such a nature as to moderate the principle of free movement.

Conclusions

As has been seen, the interactions between wildlife protection measures in restricting their trade and the freedom of movement of goods, enshrined by the TFEU, occur in such a way that the two are at odds with one another. However, a change of emphasis is underway. This development is imposed on the one hand by the deterioration of the situation, and on the other hand by the fact that a margin for manoeuvre appears to be indispensable where the states must combat new risks without having to rely on the sluggishness of the Union's decision making process.

Let us finally turn to two more fundamental questions that arise here.

First, the obligation on the authorities to provide evidence of a risk through scientific proof must be relaxed in accordance with the precautionary principle enshrined in Article 191 TFEU. When confronted with uncertainty, the precautionary principle authorizes the national authorities to take action even where they have not attained complete certainty.

Secondly, the national courts need not review the proportionality of enhanced protection measures adopted on the basis of Article 193 TFEU when they do not limit the economic freedoms enshrined by the Treaty. Where this is not the case, the need for these national measures must be considered in a favourable light because they are consistent with the expansion of a minimal level of harmonization, which is by its very essence unsatisfactory.

