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The Birds, Habitats, and Environmental Liability Directives to the Rescue of Wildlife under Threat

*Nicolas de Sadeleer**

I. Introduction

The term biodiversity was not coined until the 1980s, when it was popularized by the eminent Harvard biologist, Wilson. Biodiversity entails at the macro level ecosystemic diversity (ecosystems and landscapes), specific diversity (the species of plants, animals and micro-organisms that surround us), and at the micro level it includes genetic diversity.

In a previous chapter published in volume 5 of the *Yearbook*, I have described the EC rules dedicated to the habitats of species and wild fauna and flora.¹ The aim of the present chapter is to supplement this first study in examining those EC provisions relating to the protection of species, including in particular the regulation of hunting, capture, disturbances, picking, and trade.² In addition, I analyse in a third section the role of Directive 2004/35 on Environmental Liability with Regard to Prevention and Remedying of Environmental Damage (Environmental Liability Directive)³ in fostering conservation regimes for both ecosystemic and systemic diversity.

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¹ N. de Sadeleer, 'Habitats Conservation in EC Law: From Nature Sanctuaries to Ecological Networks' (2005) 5 *Yearbook of European Environmental Law*, 215–53.

² The reader will find an exhaustive commentary on those directives in N. de Sadeleer and C.-H. Born, *Droit international et communautaire de la biodiversité* (Paris: Dalloz, 2005), 481–62. For other commentaries, see A. García-Ureta, *Protección de Especies de Flora y Fauna en el Derecho Comunitario Europeo* (Bilbao: Instituto Vasco de Administración pública, 1997); D. Owen, 'The Application of the Wild Bird Directive beyond the Territorial Sea of European Community Member States' (2001) 13(1) *Journal of Environmental Law*, 38–78; W. Wils, 'The Birds Directive 15 Years Later: a Survey of the Case-law and a Comparison with the Habitats Directive' (1994) 6 *Journal of Environmental Law*, 219; K. Riechenberg, 'La directiva sobre la protección de las aves salvajes: un hito en la política comunitaria del medio ambiente' (1990) 17(2) *Revista de Instituciones Europeas*, 369; J. Ebbesson, 'Lex Pernis apivorus: An Experiment of Environmental Law Methodology' (2003) 15(2) *Journal of Environmental Law*, 153–74; J. Verschuuren, 'Effectiveness of Nature Protection Legislation in the EU and the US: The Birds and Habitats Directives and the Endangered Species Act' (2004) 3 *Yearbook of European Environmental Law*, 305–28.

³ [2004] OJ L143/56.

Although less marked than on other continents, Europe's systemic diversity displays a number of particular characteristics.⁴ 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, many wild fauna and flora species today are passing through a period of major crisis. As most natural or semi-natural, continental, and coastal ecosystems are now undergoing significant modifications as a result of human activity (fragmentation, isolation, intensification), animal and plant species are suffering an unprecedented rate 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).⁵ Lastly, on a more global scale, global warming and the depletion of the ozone layer risk precipitating much more profound changes to the distribution, structure, and functions of European ecosystems.

Scientists expect that these disruptions will cause an unprecedented drop in the wealth of specific and genetic diversity in Europe. The number of species deemed by the IUCN to be under threat in Europe runs into the hundreds; 42 per cent of mammal species (out of a total of 250), 43 per cent of bird species (total 520), 30 per cent of amphibian species (total 75), 45 per cent of reptile species (total 120), 41 per cent of freshwater fish species (total 190), 12 per cent of butterfly species (total 575), and about 21 per cent of plant species (total 12,500) are now considered to be under threat.⁶ In particular, a quarter of bird species have undergone a substantial decline in numbers over the last 20 years.⁷ In particular, whereas the 1994 Birdlife Conservation Assessment asserted that 38 per cent of the European avifauna had an unfavourable conservation status, the second assessment carried out ten years later showed that that appalling figure now reaches 43 per cent.⁸

This issue has been identified as a pressing concern by the EC institutions. Amongst the main priorities of the Sixth Community action programme for the environment⁹ is a declaration aspiring to put an end to the depletion of biodiversity

⁴ The most tangible manifestations of biodiversity are the species of plants, animals and micro-organisms that surround us. However biodiversity means more than just species diversity. At the micro level it includes the genetic material that makes up the species, whilst at the macro level it covers natural communities, ecosystems, and landscapes.

⁵ Illegal hunting entails for instance a threat for several protected raptor species such as Booted Eagle (*Hieraaetus pennatus*) or the Crane (*Grus grus*), e.g. G. M. Tucker and M. F. 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), 144–5.

⁶ See IUCN Species Survival Commission, *2002 IUCN Red List of threatened species*.

⁷ European Commission, Report on the Application of Dir. 79/409/EEC on the Conservation of Wild Birds (COM (2000)180, para. (2)2).

⁸ BirdLife International, *Birds in Europe. Populations Estimates, Trends and Conservation Status*, BirdLife Conservation Series no 3 (Cambridge: BirdLife International, 2004).

⁹ European Parliament and Council Dec. 1600/2002/EC laying down the Sixth Community Environment Action Programme, [2002] OJ L242/1.

by 2010 in accordance with international commitments as well as 'protecting, conserving, restoring and developing the functioning of natural systems, natural habitats, wild flora and fauna with the aim of halting desertification and the loss of biodiversity, including diversity of genetic resources, both in the European Union and on a global scale'.¹⁰ In order to implement the Convention on Biological Diversity, to which the European Community is party¹¹ and more specifically its Article 6 (development of strategies, plans, and programmes designed to ensure the conservation and the sustainable use of biological diversity and the integration of conservation and sustainable use of biodiversity into sectoral programmes, plans, and policies), the European Commission adopted, in February 1998, a Communication on a Community Biodiversity Strategy,¹² which was approved by the Council in June 1998 and by the European Parliament (EP) in October of the same year.¹³ 'Aiming to anticipate, prevent and combat at source the marked reduction or loss of biodiversity', this strategy is structured around four principal themes: the conservation and sustainable use of biological diversity; the sharing of the benefits flowing from the exploitation of genetic resources; research into, and identification, monitoring and exchange of biodiversity; and finally education, training, and sensitization. In particular, the strategy envisages the development of action programmes for the relevant sectoral activities, which in turn must set out specific measures for fulfilling, in each sector, the particular objectives. The first action programme to be drawn up aimed to promote biological diversity in the area of natural resource conservation and was passed on 27 March 2001.¹⁴ This plan was designed for the protection of wild flora and fauna as well as ecosystems and habitats on the basis of existing legal arrangements (Directive 79/409/EEC on the Conservation of Wild Birds (Birds Directive),¹⁵ Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive),¹⁶ and Regulation (EC) No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade therein (CITES Regulation)¹⁷).

Given the importance of the threats and the political commitments of the EC institutions, it is necessary to address the issues of conservation of wild species. In addition, those issues are of importance for many environmental legal practitioners in Europe. Although the Birds Directive entered into force in 1981, French administrative case law is still rife with judgments addressing the opening and closing of the hunting season of migratory birds.¹⁸ Besides, new Member

¹⁰ EP and Council Dec., n. 9 above, Art. 2(2)(ii).

¹¹ Council Dec. 93/626/EEC concerning the conclusion of the Convention on Biological Diversity, [1993] OJ L309/1.

¹² Communication of the European Commission to the Council and European Parliament on a European Community Biodiversity Strategy COM (1998), 42.

¹³ Council Conclusions of 21 June 1998 and Parliament resolution A4-0347/98.

¹⁴ Communication of the European Commission of 27 March 2001 to the Council and European Parliament, COM (2001) 162 final, vol. II.

¹⁶ [1992] OJ L206/7.

¹⁷ [1997] OJ L61/1. CITES Convention.

¹⁵ [1979] OJ L103/1.

¹⁸ See the French report of S. Belier highlighting the importance of the issues related to the conservation of wild birds, in N. de Sadeleer (ed.), *Access to Justice in Environmental Matters and the Role of NGOs. Empirical Findings and Legal Appraisal* (Groningen: Europa Law Publishing, 2005).

States (Cyprus, Malta) allowing traditional hunting will soon face a spate of litigations. What is more, provisions of the Birds and Habitats Directives dealing with the conservation of nesting and resting areas could significantly impinge upon development projects.

To begin with, I will draw a distinction between the rules provided for under the Birds Directive and those contained in the Habitats Directive. However, lack of space prevents any discussion of the obligations laid down in other Regulations and Directives dealing with wildlife protection.¹⁹ Furthermore, no attempt will be made to review exhaustively the hundreds of judgments handed down by national courts as regards the direct effect of several provisions of these two Directives. Finally, the closing section will include a brief discussion of the scope of application of the Environmental Liability Directive which covers damage to protected species and their habitats.

II. The Protection and Regulation of the Exploitation of Bird Species

Initial efforts on the part of the European Community led to the protection of avifauna with the adoption in 1979 of the Birds Directive. In line with the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention),²⁰ the Birds Directive distinguishes between the protection of the habitats of bird species (Articles 3 and 4) and the protection of bird species as such by the regulation of their capture and trade (Articles 5–9). This chapter discusses only those provisions relating to the protection of bird species.

Due to often passionate reactions from the hunting lobby and bad faith on the part of most Member States in the implementation of their obligations relating to the protection of avifauna, various disputes have been brought before the European Court of Justice (ECJ). The vast majority of the ECJ's judgments relate to proceedings instigated by the European Commission charging Member States with incomplete or incorrect implementation of the Directive's provisions.²¹

¹⁹ E.g. Dir. 83/129/EEC concerning the Importation into the Member States of Skins of certain Seal Pups and Products Derived Therefrom [1983 OJ L9130, Reg. (EEC) No. 348/81 On Common Rules for imports a whale or other cetacean products [1981] OJ L39/1 of 20 Jan. 1981 on Common Rules for imports of whale or other Cetacean Products, Reg. (EC) No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein (CITES Reg.) [1997] OJ L61/1 (amended by Reg.(EC) No. 834/2004 [2004] OJ L127/4), Dec. 1999/337/EC on the Signature by the European Community to the Agreement on the International Dolphin Conservation Programme [1999] OJ L132/1 of 26 Apr. 1999 on the signature by the European Community to the agreement on the International Dolphin Conservation Programme. For further analysis of this legislation, see e.g. de Sadeleer and Born, n. 2 above.

²⁰ Bern (Switzerland), 19 Sept. 1979 (entered into force 1 June 1982).

²¹ This chapter will refer in particular to the following judgments: Case C-247/85 *Commission v. Belgium* [1987] ECR I3029; Case C-262/85 *Commission v. Italy* [1987] ECR I3073; Case C-412/85 *Commission v. Germany* [1987] ECR I3503; Case C-236/85 *Commission v. Netherlands* [1987] ECR

It should also be noted that various judgments have been delivered pursuant to preliminary references, which offer additional clarifications on the scope of the Directive.²² This chapter will use this now substantial case law (with which even EC environmental law specialists are not particularly familiar) to illustrate the scope of application of the various obligations pertaining to the protection of wild bird species.

A. Objectives and Field of Application of the Birds Directive

i. Objectives

According to its preamble and first article, the objective of the Birds Directive 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.²³

This conservationist objective manifests itself in an obligation for 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'.²⁴ This objective places Member States under a result-based obligation. Despite the general wording of Article 2, its various legal implications may be fleshed out in some detail.

It is clear on reading this provision that 'ecological, scientific and cultural requirements' take precedence over 'economic and recreational requirements', the latter playing only an ancillary role. This means that avifauna must be protected as such, on account of its ecological, scientific, and cultural interest.

It is settled case law that, 'while taking account of economic and recreational requirements', the terms set out in Article 2 do not constitute an additional derogation from the general requirement of protection. The ECJ has taken the view

13989; Case C-252/85 *Commission v. France* [1988] ECR I2243; Case C-339/87 *Commission v. Netherlands* [1990] ECR I-851; Case C-157/89 *Commission v. Italy* [1991] ECR I-57; Case C-83/97 *Commission v. Germany* [1997] ECR I-7191; Case C-38/99 *Commission v. France* [2000] ECR I-4007; Case C-159/99 *Commission v. Italy* [2000] ECR I-4007; Case C-135/04 *Commission v. Spain*, judgment of 9 June 2005, not yet reported.

²² See the following judgments: Case C-169/89 *Gourmetterie Van den Burg* [1990] ECR I2143; Case C-435/92 *Association pour la protection des animaux sauvages et Préfet de Maine-et-Loire et Préfet de la Loire-Atlantique* [1994] ECR I-67; Case C-202/94 Criminal proceedings against *Godefridus van der Feesten* [1996] ECR I-355; Case C-149/94 *Didier Vergy* [1996] ECR I-299; Case C-118/94, *Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto* [1996] ECR I-1223; Case C-10/96 *Ligue royale belge pour la protection des oiseaux ASBL and Others v. Région wallonne* [1996] ECR I-6775; Case C-182/02 *Ligue pour la protection des oiseaux and Others v. Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement* [2003] ECR I-12105; Case C-480/03 *Hugo Clemens, b.v.b.a. Valkaniersgilde v. Walloon region, Council of Ministers*, judgment of 1 Oct. 2004, not yet reported.

²³ N. 15 above, Preamble, 8th recital.

²⁴ Art. 2, *ibid.*

that the function of Article 2 is to define the *ratio legis* of the Directive, providing basic inspiration for its various provisions, including in particular the framework of derogations provided for under Article 9.²⁵ This means that Member States may not invoke Article 2 in order to circumvent the obligations imposed by the other provisions of the Directive.

Moreover, as will be shown below, Article 2 is likely to have an impact on the interpretation of the other provisions of the Directive: For example, derogations from the obligations to protect avifauna must be interpreted narrowly since the Directive's objective is primarily one of ecological protection, rather than providing support to recreational purposes (e.g. hunting).

Again it is necessary to specify the level of protection which populations of wild bird species must enjoy. The range of interests listed in Article 2 certainly does not simplify the task of the authorities responsible for the implementation of the Directive.

First of all, Article 2 indicates that Member States are required at the very least to take all steps to avoid the disappearance of an endangered species. This obligation also extends to all populations of wild bird species. Measures to safeguard species threatened with extinction can differ widely (protection of sensitive habitats, migratory stops). In addition to protective measures in the strict sense, proactive conservation measures must also be taken in respect of other species threatened with extinction (including the acquisition of land, restoration of damaged biotopes). Within this context, programmes for the reintroduction of birds reared at artificial reproduction sites may be implemented with a view to maintaining, or even increasing—albeit artificially—the population of the endangered birds.

Secondly, the Directive's objective requires Member States to ensure, where a particular bird species whose population is still significant but falls into decline (as is the case today for various species dependent on agricultural ecosystems), that it should not fall below a critical threshold below which it could be considered to be endangered. National authorities must take all necessary measures to maintain the stability of these species populations.

ii. Extent of Application Ratione Materiae et Loci

Ratione loci, the Directive applies 'to the European territory of the Member States to which the Treaty applies', with the exception of Greenland.²⁶ As a matter of course, the conservation regime provided for under the Birds Directive is not limited only to the territorial seas, as it extends also to Exclusive Economic Zone (EEZ) as well as continental shelf.²⁷ *Ratione materiae*, the extent of its application proves to be more complex, and it is appropriate to distinguish between several variants.

²⁵ Case C-247/85 *Commission v. Belgium* [1987] ECR I3029; Case C- 262/85 *Commission v. Italy*, n. 21 above.

²⁶ N. 15 above, Art. 1(2).

²⁷ D. Owen, 'The Application of the Wild Bird Directive beyond the Territorial Sea of EC Member States' (2001) 13(1) *Journal of Environmental Law*, 38–78.

Species naturally occurring in the wild state

Ratione materiae, the Directive guarantees the protection of 'all species of naturally occurring birds in the wild state' as well as their nests, eggs, and habitats.²⁸ The extent of the Directive's application accordingly turns on the notion of species. However, in contrast to the established trend within international law, the notion of species has not been defined by Community lawmakers.²⁹ Nonetheless, the concept of species must be understood in a taxonomic sense.³⁰ Accordingly, the principal characteristic of a species is that its members have acquired a stable set of characteristics which form part of the genetic heritage of specimens and are transmitted from generation to generation. Animals created through cross-breeding between different species are generally sterile, whilst those born of mating between specimens belonging to the different subspecies of the same species are fertile.

National regulations must faithfully implement the obligation to preserve all species of naturally occurring birds in the wild state within the European territory of the Member States. National legislatures may not limit the extent of this protection only to those species present on the national territory³¹ or to those forming part of the 'national biological heritage'.³²

Species populations living naturally in the wild state

A central question relates to whether the Article 2 obligation applies to populations of bird species considered in their entirety or alternatively to each population fragment present on each Member State's territory. Indeed, a species may disappear from the territory of one or more Member States without its survival being compromised on the other Member States' territories or on the Community territory as a whole.

Where a bird species is made up of a group of distinct populations more or less independent from one another, it is 'the populations' of bird species and not their global population that must be maintained at a level corresponding to the requirements set out in Article 2. This view is confirmed by other provisions of the Directive requiring Member States to ensure that particular activities do not affect local

²⁸ N. 15 above, Art. 1(1).

²⁹ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, D.C. (United States), 3 Mar. 1973; (1973) 12 *International Legal Materials* 5, 1085, provides a definition of species which covers 'any species, sub-species, or geographically separate population thereof'. Furthermore, the Convention on the Conservation of Migratory Species of Wild Animals provides another definition of 'migratory species', defining them as 'the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries'. Those two definitions are extremely broad as they encompass lower taxa.

³⁰ Case C-202/94, Criminal proceedings against *Godefridus van der Feesten* [1996] ECR I-355, paras. 10 and 14; see also para. 15 of AG Fennelly's Opinion, delivered on 26 Oct. 1995.

³¹ Case C-247/85 *Commission v. Belgium* [1987] ECR I3029, para. 22.

³² Case C-252/85 *Commission v. France* [1988] ECR I2243, para. 15.

species populations.³³ As a result, Member States must avoid regression of a species population within its territory, even when this species is not endangered on the territory of other States. This issue is of particular importance in the determination of the 'small numbers' of birds that may be captured within the context of the derogations granted under Article 9 of the Directive (see below, section II. B. *vi.*). In this respect, a Member State may not authorize excessive capture of a bird species at the risk of undermining its local population on the grounds that this species remains common throughout the territory of the other Member States.

Sub-species of European species not occurring naturally in the wild state in Europe

Although the Directive is silent as to whether the term 'species' in Article 1 necessarily covers all sub-species of protected species, including the birds of a sub-species which do not naturally occur in the wild state in Europe (for example, the sub-species of the grey-headed goldfinch, *Carduelis carduelis caniceps*), the ECJ held in the *van der Feesten* case that the Directive applied to all sub-species of those naturally occurring in the wild state within the European territory of the Member States to which the treaty applies.³⁴ The ECJ found two reasons for this expansive interpretation of the concept of species. In the first place, given the difficulties in distinguishing between sub-species naturally occurring in the wild state in Europe from other sub-species naturally occurring in the wild state on other continents, it would be difficult to protect a species if the rules governing this protection were not extended to all other sub-species. A framework allowing Member States to protect some sub-species and not others would lead to a non-uniform application of the Directive throughout the European Community (EC), which would run counter to the objective of an effective protection of avifauna, and could also give rise to distortions of competition within the Community. The ECJ also recognized the risk of hybridization, or even of 'genetic pollution', that indigenous sub-species present in Europe would run in the event of the release of exotic sub-species into the wild.³⁵

This case law allows national authorities to prosecute importers of bird specimens captured in Asia on the grounds that their presence in the wild state in Europe brings them within the ambit of national rules implementing the Birds Directive.³⁶

³³ In the same vein, Art. 11 prohibits the introduction of exotic species which could pose a threat to local populations.

³⁴ Case C-202/94 Criminal proceedings against *Godefridus van der Feesten* [1996] ECR I-355, n. 22 above, para. 12.

³⁵ *Ibid.*, paras. 16–17.

³⁶ The Antwerp ECJ of Appeal has found, in line with the *van der Feesten* ruling, that both the Community Directive and regional regulations applied to the million sparrows (*Passer montanus montanus*) illegally imported from China, which had been discovered in a container deposited in the port of Antwerp. Reported in (1998) 15 *Tijdschrift voor Milieurecht*, 454–7. The same reasoning was followed by the Dutch Supreme Court regarding the illegal importation of the Oriental sub-species of the Tree Sparrow (*Passer montanus montanus*) (Hoge Raad, 1 Feb. 2000). That case was commented upon by Verschuuren, n. 2 above, 319.

Specimens of wild species born and bred in captivity

Since only 'bird species occurring naturally in the wild state' are covered by Article 1, any specimens of wild species born and bred in captivity fall outside the conservation regime provided for under the Directive. In fact, the extension of the protection regime to such specimens would do nothing to serve the objective of the conservation of birds in their natural habitat.³⁷ Of course, it is necessary that the specimens have been lawfully bred in captivity, which is only the case for a limited number of species.

Whereas the Birds Directive is not applicable to specimens born and reared in captivity, there is nothing to prevent a Member State from applying the protection regime for wild birds to these specimens of wild species,³⁸ provided that such national rules do not disproportionately impinge upon the principle of free movement of goods.³⁹ Indeed, the Member State's willingness to extend the EC wild birds protection regime to specimens born and reared in captivity is tantamount to a measure equivalent to a quantitative restriction on imports within the meaning of Article 28 EC. Accordingly, the assessment to be made of the proportionality of the Member State prohibition of trading in specimens born and reared in captivity, in particular whether the objective sought could be achieved by measures having less effect on intra-Community trade, requires 'a specific analysis on the basis of scientific studies and of the factual circumstances' of the case at stake.⁴⁰ It is indeed for the national court to make that analysis.

By way of illustration, in the wake of the *Hugo Clemens* judgment, the Belgian Cour d'arbitrage found the prohibition to trade in specimens of wild birds born and reared in captivity which validity was assessed by the ECJ, to be 'necessary to ensure an effective protection of protected bird species, and in particular the most endangered species, in their natural habitat', in particular against poaching and the theft of eggs. The Cour d'arbitrage went on to find that other measures which would have a lower impact on intra-Community trade (such as *a posteriori* genetic tests on birds, ringing, or the implantation of micro-chips) would not provide the same level of protection for the wild avifauna. Since the ban on commercialization was proportionate to the objective of nature conservation, it was justified under Article 30 EC.⁴¹

Species reintroduced into their natural habitat

Various national administrations, in collaboration with scientific institutes and environmental protection associations, have tried to halt the decline of different wild bird species through the reintroduction of specimens born in captivity. Once they have been released into the environment, these birds live naturally in the wild

³⁷ Case C-149/94 *Didier Vergy*, n. 22 above, paras. 12 and 13.

³⁸ *Ibid.*, para. 20; Case C-480/03 *Hugo Clemens*, n. 22 above, para. 17.

³⁹ *Ibid.*, para. 19.

⁴⁰ *Ibid.* The ECJ referred to para. 58 of its judgment of 23 Oct. 2001 in Case C-510/99 *Xavier Tridon* [2001] ECR I-7777.

⁴¹ C.A., No. 28/2005 of 9 Feb. 2005, B.9.

state and accordingly fall under the ambit of the Directive. Indeed, they are indistinguishable from wild specimens of the same species.

B. The Protection and Exploitation of Wild Birds

i. Protection Regime for Bird Species (Articles 5–8)

The Directive lays down a general prohibition on the killing, capture, and keeping of bird species, disturbances to and trade in them, as well as the destruction of, damage to, or removal of their nests and eggs.⁴² In addition, the Directive outlaws all means or arrangements of large-scale or non-selective capture or killing (Article 8).

These rules are not, however, watertight, and allow for a range of exceptions covering trade (Article 6), hunting (Article 7), and capture (Article 9). In particular, the Directive provides for specific derogations from the general prohibitions concerning hunting and the trade in gamebirds (Articles 6 and 7). Where, however, the conditions set out in these provisions are not fulfilled, the general prohibitions (Article 5) remain fully applicable. In addition, a general scheme of derogations from the prohibitions is provided for (Article 9).

Although the Birds Directive 'covers the protection, management, and control of these species and lays down rules for their exploitation' (Article 1), it should nonetheless be noted that the 'effective protection' of avifauna takes precedence over its 'management' and 'control'.⁴³ Moreover, the structure of the Directive reflects this ranking of priorities. In fact, the protection of avifauna is guaranteed by a range of prohibitions (Article 5) whilst the 'management' of bird populations may not be carried out through hunting (Article 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 (Article 9).

ii. Protection Regime for Nesting Areas (Article 5(b) and (d))

As suggested above, the protection of habitats approach overlaps with the issue of the protection of species. In particular, pursuant to Article 5(b) and (d), Member States shall prohibit 'the deliberate destruction of, or damage to, their nests as and eggs ...' as well as the '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'. Given the scope of ambit of the Directive, these prohibitions could impinge significantly upon land planning and development projects. Obviously, any project entailing the removal of nests and eggs or the deliberate disturbance of the birds during their breeding and rearing periods has to be stopped. Attention should be drawn to the fact that such projects could not be exempted on the ground that there is 'an overriding public interest of

⁴² N. 15 above, Arts. 5 and 6(1).

⁴³ Case C-202/94, Criminal proceedings against *Godefridus van der Feesten* [1996] ECR I-355, n. 22 above, para. 10.

socio-economic nature' (Article 16(1)(c) of the Habitats Directive). Only the reasons listed under Article 9 of the Birds Directive, which are subject to strict interpretation, can be invoked by the national authorities (see II. B. *vi.* below). In practice this means that a development project which is likely to disturb significantly a population of an endangered species must be postponed, even although the area has not been designated as a Special Protection Area (SPA).

iii. Hunting (Article 7)

Game species (Article 7(1)–(3))

The part which hunting plays in nature conservation is at the very least ambivalent: whilst it may contribute to the preservation of some natural habitats, it can also have a regressive effect on some wild bird species where the capture rate is excessive. Although Member States retain jurisdiction over hunting, they must nonetheless abide by the applicable provisions of the European Convention on Human Rights,⁴⁴ as well as the various requirements stipulated in Article 7 of the Birds Directive, which has hatched a whole string of disputes.

Until the Directive's entry into force, most hunting regulations permitted the hunting of any species, with the exception of those expressly protected. The Directive thus constitutes a decisive turning point in the regulation of hunting activities, setting out in Annex II an exhaustive list of those species which in the light of population levels, geographical distribution and rate of reproduction may be hunted under national legislation. Given the broad scope of Article 5, it is forbidden to hunt species not expressly included in Annex II. The inversion of the default position has accordingly allowed for the protection of all bird species not included in the list of protected species due to their only occasional appearance on the national territory.

The first three paragraphs of Article 7 run as follows:

- 1) Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation
- 2) The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this directive applies.
- 3) The species referred to in Annex II/2 may be hunted only in the Member States in respect of which they are indicated.

The first part of Annex II includes twenty-four bird species which may be hunted throughout the territory where the Directive applies. In practice however, not all

⁴⁴ See the judgments of the European Court of Human Rights handed down on: 23 Sept. 1998, *Steele v. UK* (absence of interference to the freedom of expression of an opponent to the hunting of the red grouse); 29 Apr. 1999, *Chassagnou v. France* (interference in private property rights due to the obligation on small landholders to make their land available to hunting associations); 20 May 1999, *Bladet Tromsø and Stensaas v. Norway* (violation of the right to freedom of the press in relation to the hunting of seals).

of these species are necessarily hunted, with some Member States protecting them by exercising their right under Article 176 EC to adopt more stringent rules, or alternatively because some species are simply absent from their territory.⁴⁵

The second part of the Annex covers 57 species which may only be hunted in the territory of the States for which they are indicated. The fact of a species' inclusion in Annex II only gives Member States the ability to authorize its hunting. Some States seem to have benefited from preferential treatment. France is authorized to hunt on average two to three times as many species as other European States, namely 41, as against only 12 for Belgium.

Water birds and gamebirds are the main quarry species listed under Annex II, comprising 71 per cent of all the species listed under that annex. The remaining categories are species of gulls (7 per cent), pigeons (6 per cent), and passerines (15 per cent).⁴⁶

In *Commission v. Belgium* the ECJ took the opportunity to specify which species could be subject to hunting. Belgian law qualified certain species as 'gamebirds', and thus in principle capable of being hunted, despite their non-inclusion in Annex II of the Directive. The Belgian government argued that in practice the majority of these species had not been hunted. The ECJ, however, did not endorse this line of argument on the grounds that 'the national legislation must guarantee that the species of birds not listed in Annex II may not be hunted'.⁴⁷

There is a question as to whether it is possible for a Member State to allow for hunting in respect of species not included in Annex II of the Directive by instigating a permanent regime of derogations under Article 9. The ECJ has clarified that this would only be possible where the national rules satisfied in a clear and precise manner the criteria required under Article 9, which in any case make no reference to hunting activities and should be interpreted narrowly.⁴⁸ The extension of hunting to species other than those included in Annex II may accordingly only be authorized for the reasons expressly set out in Article 9. Although the hunting of a protected species might be justified for reasons of aerial security (gulls can present a specific threat for aeroplanes landing or taking off), this could only apply to a geographical space markedly smaller than that which would be allocated on the grounds of the protection of agriculture.⁴⁹

⁴⁵ However, the ability of Member States to invoke Art. 14 with a view to endorsing a stricter conservation approach is restricted by the principle of free movement of goods. See below the discussion of Case C-169/89 *Gourmetterie Van den Burg*, n. 22 above.

⁴⁶ European Commission, Guidance Document on Hunting under Council Dir. 79/409/EEC on the Conservation of Wild Birds (Aug. 2004), 17.

⁴⁷ Case C-247/85 *Commission v. Belgium*, n. 21 above, para. 14.

⁴⁸ Case C-118/94 *Associazione Italiana per il WWF*, n. 22 above para. 25; Case C-159/99 *Commission v. Italy*, n. 21 above.

⁴⁹ Opinion of AG Fennelly in *Associazione Italiana per il WWF*, n. 22 above, para. 36.

Principles governing hunting (Article 7(1))

In an attempt to reconcile ecological and hunting interests, the Directive regulates the latter according to the principles of 'wise use and ecologically balanced control of the species of birds concerned' with a view to guaranteeing optimum protection for gamebirds (Article 7(4)). In addition, hunting must not prejudice the maintenance of a bird population at a satisfactory level as required under Article 2.

Since 'wise use' is not defined under the Directive, guidance may be sought from the definition contained in the Convention on Biological Diversity, which runs as follows: 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity'. It follows that the concept of wise use is similar to the concept of sustainable use. As a result, hunting must be considered within the broader context of the sustainable use of resources. Wise use entails, *inter alia*, the maintenance of the bird population at a favourable conservation status, proper management of the habitats of the hunted species, game management, and moratoria on the hunting of species with an unfavourable conservation status.⁵⁰

Hunting seasons (Article 7(4))

In an attempt to adapt hunting activities to the biological cycles of the species hunted, Article 7(4) regulates the periods during which hunting may be authorized. This provision envisages a broad delegation of competence to the Member States, which are charged with fixing the dates for the opening and closure of the hunting season, in accordance with the conservation objectives required under Community law. Subsection 2 of the provision is worded as follows:

They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member States shall send the Commission all relevant information on the practical application of their hunting regulations.

The main difficulty arising in connection with this paragraph is caused by the fact that periods of reproduction and pre-mating migration vary not only from species to species, but also within each individual species. The start, the end, and the length of pre-mating migration are all conditioned by a number of biological, geographical, and methodological factors. For instance, not all individuals of a species wintering in the same region commence their migration at the same time. Besides individual differences, different populations of birds of the same species might have different annual cycles. As a result, the return of a species to its breeding site may be spread out in time, with some individuals arriving at the end of Winter, and others in Spring.

⁵⁰ European Commission, *Guidance Document*, n. 46 above, 15-3.

With the exception of particular countries such as Italy and France, Member States authorize the hunting of wild birds from the end of Summer or the start of the Autumn, with closure at the latest on 31 January. The common opinion amongst scientists is that this marks the median date for the start of pre-mating migration for the vast majority of gamebird species. Member States wishing to extend the hunting season may have to grapple with the following dilemma: either they carry it on until too late, or they allow for too early a start.

Where hunting starts too early (i.e. at the end of Winter), part of the population of any given species may already have embarked upon its pre-mating migration at a relatively early date in relation to the average migratory fluxes. Any migratory birds which have already started their migration would still be hunted, even though they should be protected under Article 7(4) of the Directive in order to guarantee the success of their reproduction.

Where hunting goes on too long (i.e. until or beyond the end of Summer), some young birds may still remain in the nest or in a state of food dependence until a date later than the average for reproduction. The opening of the hunting season thus overlaps with the nesting period or the period of dependence during which hunting should be forbidden.

The carrying on of hunting either too early or too late in principle contravenes Article 7(4). In fact, the excessive prolongation of hunting activities is likely to have a negative effect not only on the species that are subject to hunting, but also, due to the disturbances caused to other species which, though not hunted, nonetheless frequent the same natural habitat. As will be shown below, the practice of some States attempting to extend the hunting seasons has been repeatedly condemned by the ECJ. The case law in this area is summarized in the following paragraphs.⁵¹

The ECJ's thinking has been guided by the observation that 'Article 7(4)(i)–(ii) of the directive is intended to guarantee a complete protection regime during the periods in which the survival of the wild birds is particularly threatened'.⁵² Therefore, fixing the closing date for hunting in the period during which migratory activity reached peak levels would be incompatible with objectives of the Directive.⁵³ It could not in fact be demonstrated that 'in situations marked by a

⁵¹ The ECJ has been invited to rule upon the scope of Article 7(4) three times. The first judgment was rendered in default proceedings against Italy (Case C-157/89, n. 21 above). The second case was decided in relation to a reference by the administrative court of Nantes in the context of a range of actions brought by environmental protection associations challenging the prefectural decision determining the closing date of the hunting season (Case C-435/92, n. 22 above). Finally, the last case, involving default proceedings brought by the Commission against France, reinforces the previous development in the case law (Case C-38/99, n. 21 above). See further on this the commentary of L. Krämer, *EC Casebook on Environmental Law* (Oxford: Hart, 2002), 325–30. See also the Opinion of Advocate General Geelhoed in Case C-135/04 *Commission v. Spain*, n. 21 above.

⁵² Case C-157/89 *Commission v. Italy*, n. 21 above, para. 14; Case C-262/85 *Commission v. Italy*, n. 21 above, para. 12.

⁵³ *Ibid.*, paras. 13 and 14; Case C-435/92 *Association pour la protection des animaux sauvages*, n. 22 above, para. 10.

prolonged dependence of the fledglings during early migration, part of the population of a species will be deprived of the protection provided for' by the Directive.⁵⁴ Accordingly, 'the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees the complete protection of those species during the period of pre-mating migration'.⁵⁵

Another issue is whether it is possible to stagger closing dates in line with the species concerned. The ECJ has identified two drawbacks inherent in such an approach, however. The first relates to disturbances caused by hunting activities to other bird species for which hunting has already ceased (increased vigilance to the detriment of feeding and resting, lack of food resources, longer flights to undisturbed sites). Those impacts could impinge negatively on the energetic physiology of migrating birds.⁵⁶ The second problem relates to the risk of some bird species, the hunting of which has already ceased, being subject to being taken due to confusion with species which may still be hunted (for example, where it is difficult accurately to determine the species at a distance or in poor lighting conditions).⁵⁷

Accordingly, the ECJ has held that the fixing of one single date for all the hunted species, which is equivalent to that fixed for the species which is the earliest to migrate, guarantees that the objective laid down in Article 7(4)(3) be realized.⁵⁸

However, the ECJ in that judgment did not exclude the possibility of a Member State being able to prove, on the basis of the appropriate scientific and technical data for a given case, that a staggering of closing dates for hunting was not incompatible with the complete protection of any bird species likely to be affected by such staging. This means that the Directive does not allow national authorities to fix the closing dates for hunting by staggering them on the basis of the migratory behaviour of the various bird species, unless the particular Member State can prove, on the basis of appropriate scientific and technical data for that particular case, that a staggering of the dates for the closure of hunting does not hinder the complete protection of any bird species likely to be affected by this staging.⁵⁹ Furthermore, if it appears that pre-mating migration begins at different times in different parts of the Member State's territory, that State is permitted to set different closing dates for hunting.⁶⁰ Finally, in *Commission v. France* the ECJ found against a French law providing for a staged closure of the hunting of migratory birds on the grounds that it constituted a mistaken application of Article 7(4) of the Directive.⁶¹

⁵⁴ Case C-262/85 *Commission v. Italy*, n. 21 above; Case C-435/92 *Association pour la protection des animaux sauvages*, n. 22 above, para. 12.

⁵⁵ *Ibid.*, para 13.

⁵⁶ *Ibid.*, paras. 16 and 17.

⁵⁷ *Ibid.*, para. 18.

⁵⁸ *Ibid.*, para. 21.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, para. 25.

⁶¹ Case C-38/99 *Commission v. France*, n. 21 above. The ECJ in fact confirmed that the French regulations did not allow for the preservation of wild birds considered as a whole 'over the period in which their survival is particularly threatened' (para. 27). For a commentary on this judgment, see Krämer, n. 51 above, 321–30; A. García-Ureta, 'Nature Conservation' (2003) 3 *Yearbook of European Environmental Law*, 416–19. In the wake of that judgment, the Council of State of France held that

In the wake of these judgments, the European Commission has offered some clarification regarding those factors which are decisive in identifying the beginning and end of the period of reproduction and pre-mating migration.⁶²

It is also important to consider whether it is possible for a Member State to extend the hunting season by means of a permanent derogation under Article 9. As will be seen, there must be compelling reasons to justify a derogation in this respect. Accordingly, Member States cannot grant a derogation for the sole purpose of extending the hunting season.⁶³

iv. Trade in Gamebirds (Article 6)

Rules governing trade

In order to prevent commercial interests increasing taking of birds from the wild state, EC law prohibits the trade in either live or dead birds (Article 6(1)). This prohibition covers the activities of sale, transportation with a view to sale, as well as the placing 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 general prohibition is subject however to various derogations, which apply to species where their biological status permits, taking into account the particular conditions in the various regions of the Community. The rules on trade provided for under the Directive can be summarized as follows.

On the one hand, trade in the seven species listed in part 1 of Annex III of the Directive is permitted, provided that the birds have been killed, captured, or otherwise lawfully acquired (Article 6(2)).

On the other hand, Member States may authorize within their territory trade in the eighteen species listed in part 2 of Annex III, 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,

the hunting should not start before 1 Sept. and should not continue after 31 Jan. (CE, 13 June 1997, Association pour la protection des animaux sauvages; 12 June 1998, Fédération départementale des chasseurs de la Gironde). However, the Council of State later on took the view that, according to proper scientific evidence, it should be possible to fix the starting dates for hunting shorebirds by staging them. As a result, knots (*Calidris canutus*) could be hunted as early as 8th August on the grounds that this bird species could not be confused with other sandpipers migrating at a later stage (CE, 4 Aug. 2003, ASPAS, req. n° 258778). Inversely, that reasoning does not apply to different duck and goose species because they could be confused with other protected species likely to be affected by this staging (CE, 23 May 2003, ROC, req. n° 249072). Furthermore, as regards the closure of the hunting period, the Council of State of France took the view that 22 species of ducks (*anatidae*) and rails (*rallidae*) as well as 16 species of shorebirds could not be hunted after 31 Jan., whereas five species of pigeons and the woodcock (*Scolopax rusticola*) could be hunted until mid-February (CE, 20 Dec. 2002, Ligue pour la préservation de la vie sauvage et la défense des non-chasseurs, req. n° 250255). E.g. V. Gervasoni, 'Panorama de la jurisprudence administrative-chasse' (2004) 4 *R.J.E.*, 456–61.

⁶² European Commission, *Key Concepts of Article 7(4) of Directive 79/409/EEC: Period of Reproduction and Prenuptial Migration of Annex II Bird Species in the EU*, Sept. 2001, 15–23.

⁶³ Case C-182/02 *L.P.O.*, n. 22 above, paras. 12 and 16. See García-Ureta, n. 61 above, 377–8. See also Case C-135/04 *Commission v. Spain*, n. 21 above, para. 19.

geographical distribution or reproductive rate throughout the Community. 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. If the Commission on the other hand deems no such risk to exist, it informs the Member State accordingly that it is authorized to engage in such trade (Article 6(3)).

Where a species is not listed in Annex II (82 species and sub-species are listed), a derogation from the Article 5 prohibitions is only possible where the strict requirements laid down in Article 9 are fulfilled.

Free movement of game

Gamebirds are to be considered goods, since they are objects capable of being transported across borders and giving rise to commercial transactions.⁶⁴

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 allowed Member States to adopt more stringent measures on the trade in gamebirds. The ECJ addressed this issue in the *Van den Burg* case, concerning a preliminary reference from the Dutch High ECJ (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 measure equivalent to a quantitative restriction under Article 28 EC.⁶⁵ 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 ECJ held that Article 14 of the Directive allowing Member States to implement protective measures more stringent than the Community provisions, did not permit them to go beyond the protective measures required for species for which the rules governing trade had already been comprehensively harmonized, however. According to the ECJ, Member States' ability to adopt more stringent protective measures (under Article 176 EC) 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

⁶⁴ Case C-169/89 *Gourmetterie Van den Burg*, n. 22 above; Advocate General Fennelly's Opinion in C-202/94 *Van der Festen*, n. 22 above, para. 55.

⁶⁵ For a commentary on this judgment, see L. Krämer, *EU Environmental Law—Casebook* (London: Sweet & Maxwell, 1993), 152.

(b) are neither migratory species forming part of the common heritage of the EC nor endangered species listed in Annex I of the Directive.

The ECJ 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 be noted, however, that in this case the ECJ did not equate the game in question with goods in general. In fact, it 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.

Finally, specimens belonging to a bird species not included in Annex II may be placed on the market, unless the species does not live naturally in the wild state within the territory of the EU. This is the case for example for the Canada goose (*Branta canadensis minima*), a species which does not originate in Europe and does not fall within the ambit of Regulation (EC) No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade therein (CITES Regulation).⁶⁶

v. Regulation of Means for Capture (Article 8)

Means, arrangements, and methods for capture or killing

The use of particular means of capture can lead to excessive takings which could undermine the obligation to preserve populations at a satisfactory level (Article 2). Accordingly, Member States must 'prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV (A)' (i.e. snares, limes, hooks, mutilated live birds, tape recorders, electrocuting devices, artificial light sources, mirrors, explosives, nets, and traps) as well as 'any hunting from the modes of transport and under the conditions mentioned in Annex IV (B)'.

In *Commission v. Italy* the ECJ condemned the use of migratory species as live mutilated decoys for hunting, as such use was precluded under Article 8 of the Directive.⁶⁷ Similarly, the ECJ found against the Netherlands for not having forbidden all methods of capture listed in Annex IV of the Directive.⁶⁸ By contrast, in *Commission v. France* the ECJ refrained from condemning the capture of particular bird species through the use of limes or so-called horizontal nets, known as 'pantes' or 'matoles' (arrangements forbidden under Annex IV of the Directive) on the grounds that such arrangements were designed for capture satisfying the conditions set out in Article 9 of the Directive.⁶⁹ Finally, the ECJ declared that, by allowing hunting using limed twigs in the Community of Valencia, Spain has failed to fulfil its obligations under Articles 8(1) and 9(1) of the Birds Directive.⁷⁰

⁶⁶ [1997] OJ L61/1. CITES Convention; Case C-149/94 *Didier Vergy*, n. 22 above, para. 10.

⁶⁷ Case C-262/85 *Commission v. Italy*, n. 21 above.

⁶⁸ Case C-339/87 *Commission v. Netherlands*, n. 21 above.

⁶⁹ Case C-252/85 *Commission v. France*, n. 21 above.

⁷⁰ Case C-79/03 *Commission v. Spain* [2004] ECR I-11619.

vi. Derogations (Article 9)

'Because of the importance which may be attached to certain specific situations', the Birds Directive allows Member States to derogate from the general prohibitions as well as from the provisions on trade and hunting (Article 9).⁷¹ Any derogations from Articles 5, 6, 7, and 8 must satisfy both procedural and substantive conditions, however. Moreover, it is incumbent upon Member States to provide evidence showing that the prerequisites for the derogation have been satisfied.⁷²

Substantive conditions (Article 9 (1))

Two substantive requirements must be fulfilled. First, the derogation must be justified by at least one of the standard reasons listed exhaustively in Article 9(1). Subsections (a) and (b) of that provision list several reasons (public health and safety, air safety, prevention of serious damage to crops, livestock, forests, fisheries, and water) upon which a derogation could be granted.

The derogation 'permit[ing], under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers' (subsection (c)) has for its part given rise to a great deal of litigation, where particular Member States (including Belgium, France, Spain, Italy, Malta, Cyprus) have attempted to maintain their 'traditional hunts', most of which entail the capture of birds without rifles, by invoking this head of derogation. According to the ECJ, 'the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned'.⁷³ However, this condition cannot be satisfied where a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level.⁷⁴

According to the work of the ORNIS Committee, 'small numbers' should be understood as any sample of less than 1 per cent of the total annual mortality of the population in question (average value) for those species which are not to be hunted and in the order of 1 per cent for those species which may be hunted, and 'population in question' is to be understood, with regard to migratory species, as the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application.⁷⁵

Although it is true that the criterion to small numbers as defined by the ORNIS Committee is not legally binding on the Member States, the ECJ has been using that criterion as a basis of reference for assessing whether the derogation granted under Article 9(1)(c) of the Directive fulfils the condition that the capture of the

⁷¹ N. 15 above, 13th recital to the preamble.

⁷² Case C-247/85 *Commission v. Belgium*, n. 21 above, para. 34.

⁷³ Case C-252/85 *Commission v. France*, n. 21 above.

⁷⁴ Case C-182/02, *Ligue royale belge pour la protection des oiseaux ASBL and Others v. Premier ministre and Ministre de L'Aménagement du territoire et de Environnement* [2003] ECR I-12105 para. 17.

⁷⁵ Second Report of the Commission on the Application of Birds Directive (COM(93)572 final), 24 Nov. 1993.

birds in question should be carried out in small numbers. With regard to hunting of several thrush species by means of the 'parany' in Valencia, the ECJ took the view that the number of thrushes for which hunting was authorized (hundreds of thousands) greatly exceeded the threshold of small numbers as defined above by the ORNIS Committee (thousands of specimens).⁷⁶

Secondly, the Member State must limit the derogation to cases in which there is no other satisfactory solution. The fact that the bird species is not endangered does not preclude the Member State from complying with that first requirement.⁷⁷

L.R.B.P.O. provides interesting insights into this first condition. This case involved a challenge brought by a bird protection NGO to a regional Belgian regulation permitting the capture, under specific circumstances, of protected wild birds.⁷⁸ The regulation was justified under Article 9 on the grounds that there was no satisfactory alternative to allowing the capture of the wild birds. Breeders found it difficult to ensure successful reproduction of the birds in captivity without the possibility of breeding them with birds caught in the wild. That difficulty was compounded by the fact that there was a lack of genetic diversity in the breeding stocks in captivity. The case was referred to the ECJ for a preliminary ruling. The ECJ observed that, in the specific circumstances of the case, there was an alternative solution to the capture of the wild birds, namely the breeding exclusively of birds already in captivity. Moreover, such a solution could be considered satisfactory.⁷⁹ In particular, the ECJ took the view that the 'fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale... is not in itself such as to cast doubt on the satisfactory nature of the alternative solution to capturing birds in the wild'.⁸⁰

As a result, derogations can only be permitted under Article 9 as a last resort.⁸¹

In a case relating to the extension of hunting periods for pre-mating migratory birds, the ECJ considered that the condition stipulating that derogations may only be possible in cases where there is no other satisfactory solution. This cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection. There would be no such need if the sole purpose of the derogation authorizing hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive.⁸²

⁷⁶ Case C-79/03 *Commission v. Spain*, n. 70 above, para. 40.

⁷⁷ Case C-135/04 *Commission v. Spain*, n. 21 above, paras. 25–6.

⁷⁸ Case C-10/96, *Ligue royale belge pour la protection des oiseaux ASBL and Others v. Région Wallonne* [1996] ECR I-6775

⁷⁹ *Ibid.*, paras. 17–22 and 25.

⁸⁰ *Ibid.*, para. 21.

⁸¹ *Ibid.*, AG Fennelly's Opinion, para. 39.

⁸² Case C-182/02, *Ligue pour la protection des oiseaux and Others v. Premier ministre de L'Aménagement du territoire et de L'Environnement* [2003] ECR I-12105, para. 16. It should be noted in this respect that an action was brought on 4 Aug. 2003 by the Commission against the Republic of Finland on the grounds that it has not correctly applied the Art. 9(1) derogation to the case of the spring hunting of certain water birds, in particular regarding the application of the criteria 'no other satisfactory solution' and 'small numbers'. Specifically, the Commission submits that the 'no other satisfactory solution' criterion in the Directive is not satisfied if Autumn hunting of the same species is possible.

Reasoning along the same lines, the ECJ took the view that the fact that the woodpigeon (*Columba palumbus*) is not present in particularly large concentrations during the hunting season within a particular territory cannot justify the granting of a derogation to hunt that species during the pre-mating migratory period, during which the species migrates in very large numbers along the coast of the province of Guipuzcoa in Spain.⁸³ In fact, nothing prevented the hunting of the woodpigeons during the regular hunting season nearby the sites which were not frequented by these birds during their migration in October and November.⁸⁴

Procedural conditions (Article 9(2))

The derogation must satisfy procedural requirements, which are intended to limit the use of derogations to that which is strictly necessary, as well as to allow for monitoring by the Commission. This means that any derogation must mention the species it applies to, as well as the methods and conditions relating to their capture. Derogations must also specify the monitoring authority and specify which controls it will carry out.⁸⁵ Finally, the Commission must be informed of any derogations in order that it can establish that their consequences are not incompatible with the Directive.

Implementation

In an effort to guarantee the useful effect of the Directive, the ECJ has adopted a strict stance on attempts to invoke derogations under Article 9. Although it does allow for a broad range of derogations from the general framework for protection, Article 9 of the Directive only grants authorizations where their application is appropriate in order to deal with precise requirements and specific situations.⁸⁶ These conditions are not only cumulative, but must also be interpreted strictly.⁸⁷

In *Commission v. Belgium*, the ECJ held that the useful effect of the Directive could only be attained through a restrictive and timely application of the scheme of derogations.⁸⁸ It has in particular found against a Belgian regulation on traps and snares, on the grounds that it did not satisfy several conditions required by Article 9 (capture limited to small numbers, limited duration of period of capture, absence of any other satisfactory solution). The ECJ has also rejected an Italian law conferring on regions the power to permit the capture by any method and the

⁸³ Case C-135/04 *Commission v. Spain*, n. 21 above, paras. 18–23. ⁸⁴ *Ibid.*, para. 21.

⁸⁵ Case C-118/94 *Assoziane Italina per il World Wildlife Fund and Others v. Regione Veneto* [1996] ECR I-1223; Case C-10/96, *Ligue royale belge pour la protection des oiseaux ASBL and Others v. Région Wallone* [1996] ECR I-6775, para. 19.

⁸⁶ Case C-262/85 *Commission v. Italy*, n. 21 above, para. 7; Case C-247/85 *Commission v. Belgium*, n. 21 above, para. 7; Case C-118/98 *Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto* [1996] ECR I-1223, para. 21. In Case C-159/99 *Commission v. Italy*, n. 22 above, the ECJ took the view that Italian law could not 'in any way' justify a derogation from Articles 5 and 7 and Annex II of the Directive, by permitting the general and permanent capture of protected species.

⁸⁷ Para. 30 of Advocate General Fennelly's Opinion in Case C-118/94 *Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto* [1996] ECR I-1223.

⁸⁸ Case C-247/85 *Commission v. Belgium*, n. 21 above, para. 41.

sale of migratory birds, even where this occurred outside the hunting season, on the basis that this framework was too general.⁸⁹

On the other hand, the ECJ has exercised greater leniency in relation to particular traditional French hunts. Invited to rule on the use of limes and horizontal nets for the capture of thrushes and skylarks, the ECJ held that the departmental by-laws permitting such captures could be justified under Article 9(1)(c) of the Directive.⁹⁰ The ECJ's reasoning was guided in particular by the strict conditions placed on capture permits, the limited impact on the species involved and the good will of the French Government in attempting to reach an agreement with the Commission. This reasoning has invited only criticism.⁹¹ It should be noted that, in contrast with previous judgments, the ECJ did not consider whether it was possible to resort to other solutions more satisfactory than the capture of birds by means of limes and nets. Finally, it did not consider the non-selective character of some of the methods of capture which permitted the capture of species other than those whose capture was allowed. On the contrary, in its judgment on the hunt of thrushes in Valencia,⁹² the ECJ endorsed a much stricter approach in 2004 by judging that the Spanish methods did not comply with the obligation to limit the capture to a 'small number' of birds.

Following this judgment, the ECJ has censured two other Member States for having maintained derogatory frameworks which did not respect the criteria laid down in Article 9 of the Directive. A German law—providing that the general prohibitions set out in Article 5 of the Directive should not apply where the relevant acts were carried out during normal exploitation of the land as well as during farming, forestry, or fishing activities, or in the context of the enhancement of products derived from these activities—was condemned on the grounds that such a regime promoted agricultural interests ahead of those relating to the protection of wild birds in a sweeping general manner and not on a case-by-case basis. Finally, the ECJ has found against the Netherlands for having allowed the collecting of lapwing (*Vanellus vanellus*) eggs in the Friesland region without having respected the conditions required under Article 9 of the Directive.⁹³

Furthermore, the ECJ has accepted that the following practices may be compatible with requirements flowing from Article 9, in particular that relating to 'judicious use' under Article 9(1)(c):

- the capture of protected wild birds destined for recreational purposes (exhibition of specimens in fairs or markets, procurement for aviaries).⁹⁴
- Moreover, the capture of birds from the wild may be permitted in order to

⁸⁹ *Ibid.*, para. 39.

⁹⁰ Case C-252/85 *Commission v. France*, n. 21 above.

⁹¹ Krämer, n. 51 above, 176.

⁹² Case C-79/03 *Commission v. Spain*, n. 70 above.

⁹³ Case C-236/85 *Commission v. Netherlands*, n. 21 above; Case C-83/97 *Commission v. Germany* n. 21 above.

⁹⁴ Case 262/85 *Commission v. Italy*, n. 21 above, para. 38; Case C-10/96, *Ligue royale belge pour la protection des oiseaux ASBL and Others v. Région Wallone* [1996] ECR I-6775, para. 16.

ensure the genetic diversity of birds in captivity, 'subject always to observance of the maximum limit of small numbers';⁹⁵

- the hunting of species not listed in Annex II;⁹⁶
- the extension of the hunting season.⁹⁷

vii. Other Provisions (Articles 10–14)

Prohibition on the introduction of non-naturally occurring bird species (Article 11)

On the grounds that non-native species compete with wild native species (Nile goose, Canada goose, exotic parakeets) or might even hybridize (threat posed by the North American ruddy duck *Oxyura jamaicensis* to the endangered native European white-headed duck *Oxyura leucocephala*), the Directive prohibits the introduction of bird species which do not occur naturally in the wild state in Europe.

The stand-still clause (Article 13)

Article 13 of the Directive provides that 'application of the measures taken pursuant to this directive may not lead to deterioration in the present situation as regards the conservation of species of birds referred to in Article 1'. This provision amounts to a stand-still clause. Interpreting this provision, the Belgian Council of State held that it is not sufficient that there be an increase in the quantity of bird specimens permitted to be captured (or even that there be the likelihood of such an increase) in order for there to be a prohibited deterioration within the meaning of this provision.⁹⁸ In other words, the fact that the government authorizes the capture of a greater number of birds does not in itself indicate a deterioration of the population in question. This reasoning is at first sight logical, because where the increase in captures is based on relevant scientific criteria, this does not necessarily entail a deterioration in the status of the species. Nonetheless, this reasoning could be criticized in light of the precautionary principle, according to which science is not in a position to foresee all of the consequences of an action, and that it is therefore preferable, in case of doubt, to refrain from carrying out the action.

Harmonization of minimum standards (Article 14)

Since the Directive's legal basis permits such action (former Article 235 EC), the Member States may adopt more stringent measures for the protection of avifauna (Article 14), a right now expressly enshrined in the EC Treaty (Article 176 EC). Whilst this provision does not cause any problems for the imposition of restrictions on the hunting season or on huntable species, *Gourmetterie Van den Burg*

⁹⁵ Case C-10-96, *Ligue royale belge pour la protection des oiseaux ASBL and Others v. Région Wallone* [1996] ECR I-6775, paras. 23–7.

⁹⁶ Case C-118/94 *Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto* [1996] ECR I-1223, para. 21.

⁹⁷ Case C-182/02 *Ligue pour la protection des oiseaux and Others v. Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement* [2003] ECR I-12105, para. 12.

⁹⁸ C.E., *LRBPO*, no 31.573 of 9 Dec. 1988, *Amén.-Env.*, 1989, 20.

makes it clear that this right is by no means absolute as far as the marketing of game is concerned.⁹⁹

Scientific research (Article 10)

Member States are required to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1. Particular attention must be paid to research under Annex V of the Directive, which in particular includes the establishment of national lists of species in danger of extinction, taking into account particular circumstances (geographical distribution, influence of methods of taking wild birds on population levels).¹⁰⁰

Species action plans

The development of management plans for selected threatened species is one of the objectives pursued by the 1998 EC Biodiversity Strategy. In spite of the lack of any legal basis in the Directive, the Commission has since 1993 supported the development of action plans for the most endangered species and sub-species of birds listed in Annex I of the Directive.¹⁰¹ To date, plans for 47 of Europe's most endangered birds have been finalized and are being implemented with the support of EU funds, in particular from the LIFE programme.

C. Requirements Relating to the Implementation of Provisions Applicable to Species

In litigation flowing from the implementation of the provisions regulating the protection of bird species, the ECJ clarified the authority charged with implementing the provisions, the nature of acts carrying out the implementation, and the degree of precision necessary for ensuring implementation in conformity with the requirements of the Directive. It is hence important to analyse the provisions of the Birds Directive in the light of the ECJ's findings in these judgments. In addition, for a number of years now, several national courts have invoked the direct effect of particular provisions of the Directive in order to rule on disputes concerning in particular huntable species and hunting seasons. Given the focus of the present chapter, these national decisions will not be analysed in spite of their importance.¹⁰²

⁹⁹ Case C-169/89 *Gourmetterie Van den Burg*, n. 22 above.

¹⁰⁰ The case law underscores the importance of using the best available scientific information as a basis for implementing the directive. See for instance Case C-157/89 *Commission v. Italy*, n. 21 above, para. 15.

¹⁰¹ The plans are intended as tools to identify priority measures for the conservation action to halt and restore the populations of Europe's most endangered bird species. They provide information about status, ecology, threats and current conservation measures for each species. This enables the clear definition of priority objectives and a programme of prioritized actions for each species.

¹⁰² On the historical development of the jurisprudence of the French administrative courts, see J. Boudant, 'La préservation communautaire des oiseaux et la chasse en France: le temps des recours'

The ECJ has acknowledged that Member States may delegate implementation of the Directive to subordinate authorities (such as regional governments or local authorities), including in particular the power to determine the date after which migratory birds can no longer be hunted, provided that the States are able to guarantee, through the enactment of general and lasting rules, that these authorities will exercise their powers in such a manner as to ensure the complete protection of bird species.¹⁰³ In other words, the distribution of competence within the Member State does not relieve it of the obligation to ensure that the Directive's provisions are accurately transposed into national law.¹⁰⁴ The ECJ has also taken the opportunity to stress that 'it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts'.¹⁰⁵

Whilst the ECJ has accepted that implementation of a directive into national law does not necessarily require a formal rendition to the letter of its provisions in an express legal provision specifically enacted to that end, and can rather be done from the general perspective of the legal system as a whole,¹⁰⁶ it does however place particular importance on precise implementation in cases such as the Birds Directive, where the management of common heritage is entrusted to the Member State of the relevant territory.¹⁰⁷ In this case the Directive must be implemented with incontestable binding force.¹⁰⁸ The ECJ has accordingly held that the regulation of captures and hunting by mere administrative practices 'which by their nature are alterable at will by the authorities and are not given the appropriate publicity' was insufficient to implement the provisions of the Directive into national law, even though these practices fully satisfied the requirements of Community law.¹⁰⁹

The ECJ has also emphasized the importance of precision of national provisions implementing the Directive. In fact, as it has consistently reiterated in its

(1990) 185 *Revue de droit rural*, 373; R. Romi, 'Droit européen et chasse: l'inévitable scène de ménage?' (1991) 9 28 *Feb. D.*, 113-16; R. de Silguy, 'Les oiseaux migrateurs et l'Europe' (1993) 30 26-28 *Sept. Gazette du Palais*, 30; P. Lagrange, 'Chasse aux oiseaux migrateurs: la France dans l'impasse' (2001) 1 *R.J.E.*, 5-30.

¹⁰³ Case C-435/92 *Association pour la protection des oiseaux sauvages et Préfet de Maine-et-Loire, Préfet de Loire-Atlantique*, n. 22 above, paras. 26-7.

¹⁰⁴ Case 247/85 *Commission v. Belgium*, n. 21 above, para. 9.

¹⁰⁵ Case C-365/93 *Commission v. Greece* [1995] ECR I-499, para. 9.

¹⁰⁶ Case C-252/85 *Commission v. France*, n. 21 above, para. 5; Case C-29/84 *Commission v. Germany* [1985] ECR I1661 para. 23.

¹⁰⁷ Case C-247/85 *Commission v. Belgium*, n. 21 above, para. 9.

¹⁰⁸ Case C-339/87 *Commission v. Netherlands*, n. 21 above.

¹⁰⁹ Case C-168/85 *Commission v. Italy* [1986] ECR I2945, para. 13; Case C-236/85 *Commission v. Netherlands*, n. 21 above, para. 18; Case C-339/87 *Commission v. Netherlands*, n. 21 above, para. 36; Case C-315/98 *Commission v. Italy* [1999] ECR I-8001, para. 10. See also Case C-429/85 *Commission v. Italy* [1988] ECR I843, para. 12; Case C-116/86 *Commission v. Italy* [1988] ECR I1323, para. 15; Case C-159/99 *Commission v. Italy*, n. 22 above, para. 32.

case law, it considers that the more precise the result required, the less is the margin of discretion reserved to the addressee Member States: 'the accuracy of the implementation is particularly important in cases such as the present one where the management of the common heritage is entrusted to the Member States in line with their respective territories'.¹¹⁰ The objective of the conservation of wild birds present on the territory of the EC would not be achieved if too much room for manoeuvre were left to Member States, in particular regarding their ability to derogate from the framework for protection. In order to satisfy the requirement of legal certainty, the Directive must in this case be implemented with clarity and precision. Accordingly, the ECJ has handed down numerous rulings against ambiguities in national rules, and has in particular rejected the argument according to which the inexistence of a practice prohibited by the Directive was sufficient to ensure requirements of full implementation. The ECJ has therefore censured the maintenance of species which should be protected on lists of huntable species,¹¹¹ the possibility of granting derogations in the absence of full satisfaction of the Article 9 criteria¹¹² as well as the absence of provisions prohibiting hunting from planes even though this method is expressly forbidden under Article 8 of the Directive.¹¹³

III. The Protection and Regulation of the Exploitation of Indigenous Species other than Birds

In 1992, Community lawmakers enacted Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive).¹¹⁴ Following the example of the Bern Convention, 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 (Articles 3–11), whilst also having to protect the species as such by regulating their capture or hunting (Articles 12–16).

Due to a delay in the implementation of the Directive in most Member States, few decisions have been handed down by the ECJ concerning the scope of its provisions on the protection of species.¹¹⁵

¹¹⁰ Case C-182/89 *Commission v. France* [1990] ECR I-4337, para. 5; Case C-315/98 *Commission v. Italy*, n. 109 above.

¹¹¹ Case C-247/85 *Commission v. Belgium*, n. 21 above, para. 16.

¹¹² Case C-262/85 *Commission v. Italy*, n. 21 above, para. 39.

¹¹³ Case C-339/87 *Commission v. Netherlands*, n. 21 above, para. 30.

¹¹⁴ [1992] OJ L206/7.

¹¹⁵ Various judgments have already been handed down on the obligation to classify SACs. See further, de Sadeleer, n. 1 above. On the issue of species protection, see the following cases: Case C-324/01 *Commission v. Belgium* [2002] ECR I-11197; Case C-434/01, *Commission v. United Kingdom* [2003]

A. Objectives and Scope of Application

i. Objective: Conservation of Biodiversity (Article 2)

According to Article 2(2): 'Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status... species of wild fauna and flora of Community interest.'

Whilst Member States must maintain their bird populations at a 'satisfactory level' which corresponds to various requirements, they must either maintain or restore, natural habitats and species of wild fauna and flora of Community interest 'at favourable conservation status'. The conservation status of a species is considered not to be favourable where a series of conditions is not complied with (e.g. reduction of the area of distribution, reduction in population).¹¹⁶

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.

Such precision can therefore facilitate a precise determination in scientific terms of the objectives which Member States are obliged to fulfil in the area of nature conservation. Nonetheless, Article 2(3) states that 'measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics', an obligation which does not constitute an additional derogation from the framework for protection set out in the Directive, as is clear from the jurisprudence of the ECJ on this provision.

ii. Scope of Application

Ratione loci, the extent of the application of the Habitats Directive is the same as that of the Birds Directive. For instance, cetaceans listed under Annex IV are protected both in the territorial seas and EEZ.¹¹⁷

Ratione materiae, in contrast with the Birds Directive, the obligation to maintain species at a favourable conservation status does not apply to the whole spectrum of

ECR I- 3239; Case C-75/01, *Commission v. Luxembourg* [2003] ECR I-1585; Case C-72/02, *Commission v. Portugal* [2003] ECR I- 6597; Case C-6/04, *Commission v. United Kingdom* [2005] ECR I-9017.

¹¹⁶ Art. 1(i), n. 114 above.

¹¹⁷ Written Question E-3039 by C. Lucas (2003) OJ C110E/155.

biological diversity, as such a task would indubitably be too ambitious. Thus Article 2(2) provides that 'measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status... species of wild fauna and flora of Community interest', and not *all* species of wild fauna and flora. The so-called 'species of Community interest' are species which, on the European territory of the Member States, are deemed to be endangered, vulnerable, rare, or endemic.¹¹⁸

This means that the scope of application of the Habitats Directive is restricted to the so-called species 'of Community interest which are in need of strict protection' as set out in Annex IV, the adoption of which is decided by a qualified majority vote of the Council of Ministers acting on a proposal of the Commission.¹¹⁹ In addition to invertebrates and plant species, vertebrates which fall under this category include threatened or vulnerable species of mammals, reptiles, amphibians, and fish.¹²⁰ This contrasts with the position for the Birds Directive which applies to all Community avifauna.

B. Framework for Protection and Exploitation

i. Species Requiring Strict Protection (Articles 12 and 13)

Animal and plant species included in Annex IV (large carnivores, cetaceans, land turtles) enjoy strict protection.¹²¹ This framework extends, for animal species, to prohibitions on the capture, killing, trade, or deliberate disturbance of these species, as well as the prohibition on the deterioration of breeding sites or resting places.¹²²

Prohibited activities also include the keeping, transport, or sale of specimens of these species taken from the wild.¹²³ The picking, destruction, and trade of plant species is also prohibited.¹²⁴ Provided that they have standing, nature conservation NGOs can avail themselves of these provisions in so far as they have direct effect.¹²⁵

¹¹⁸ Art. 1(g), n. 114 above. ¹¹⁹ Art. 19, *ibid.*

¹²⁰ According to some scientists, a number of species have not been included in this Annex, and some groups are particularly under-represented. See for example P. Bouchet, G. Falkner, M.B. Seddon, 'Lists of Protected Land and Freshwater Molluscs in the Bern Convention and the European Habitats Directive: Are They Relevant to Conservation?' (1999) 90 *Biological Conservation*, 21.

¹²¹ Arts. 12 and 13, n. 114 above.

¹²² Art. 12(1), *ibid.* Member States are required to expressly prohibit disturbance during the migration period. Case C-75/01, *Commission v. Luxembourg* [2003] ECR-I-1585, not yet reported.

¹²³ Art. 12(2), n. 114 above. ¹²⁴ Art. 13, *ibid.*

¹²⁵ In contrast with the provisions of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) which do not have direct effect (Bern (Switzerland), 19 Sept. 1979, entered into force 1 June 1982). (C.E., 30 Dec. 1998, *Ass. Artus*, req. n° 184.310), the Council of State of France has acknowledged the direct effect of Art. 12 of the Habitats Directive, in particular regarding the protection of wolves (C.E., 30 Dec. 1998, *Chambre d'agriculture des Alpes-Maritimes et Centre départemental des jeunes agriculteurs des Alpes-Maritimes*, req. no. 188.159; 8 Nov. 2000, *commune de Breil-sur-Roya*, req. no 204756). See the report of P. Billet (2000) 2 *R.J.E.*

ii. *The Protection of the Habitats of Strictly Protected Species*

As discussed above, provisions related to the conservation of breeding or rearing sites deserve specific attention in as much as they can stop development projects.

It is important to stress in this context that the Habitats Directive requires Member States to set up a 'system of strict protection' of the species listed in Annex IV A, prohibiting, in addition to particular activities (capture, killing, deliberate disturbance), 'the deterioration or destruction of breeding sites or resting places'.¹²⁶ In contrast to the classification mechanism of species habitats provided for under Article 6(2)–(4) of the Directive creating the Natura 2000 network, this is an 'automatic' protection mechanism for the species habitat (or more precisely a part of it, namely breeding and resting sites) which applies over the entire geographical extent of the Directive.¹²⁷

A recent judgment clarified the importance of this provision for the conservation of endangered species.¹²⁸ After having noted that the Bay of Laganas in Greece 'is a vital breeding region' for a marine turtle species, the ECJ went on to find that the area was a 'breeding site' thus requiring protection under Article 12(1)(d) of the Directive.¹²⁹ The ECJ held that the Member State had to take 'all the requisite specific measures to prevent the deliberate disturbance of the sea turtle *Caretta caretta* during its breeding period and the deterioration or destruction of its breeding sites'. In finding against Greece, the ECJ based its reasoning principally on the report of the Greek Council of State, attesting to the inefficiency of the protection regime for the Bay of Laganas. In addition, the ECJ went into the merits of a range of contested activities, finding the presence of boats in the vicinity of beaches and of mopeds on beaches where turtles come to lay their eggs constitute a 'disturbance' within the meaning of Article 12 of the Directive. The ECJ established the 'deliberate' nature of the disturbances in dispute by pointing to a failure to respect the Directive's prohibitions. Finally, the maintenance of illegal constructions, 'on a breeding beach . . . is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive'.¹³⁰

In the light of the result-based obligation placed on Member States—namely to avoid the destruction of breeding and resting sites and disturbances to

¹²⁶ Art. 12(1)(a)–(d), n. 114 above. The ECJ held the view that the criminal offence provided for by United Kingdom domestic law, which punishes acts consisting in damaging or destroying a site, is a strict liability offence not in any way requiring the damage or destruction to be deliberate or intentional. Case C-6/04, *Commission v. United Kingdom* [2005] ECR I-9017, para. 77.

¹²⁷ This mechanism is not provided for under the Birds Dir., which only contains one prohibition on the deliberate destruction of causing of damage to bird nests (Art. 5(b)), and does not cover their resting, feeding, or breeding sites, n. 15 above.

¹²⁸ Case C-103/00 *Commission v. Greece* [2002] ECR I-1147. e.g. A. García-Ureta, 'Nature Conservation' (2004) 4 *Yearbook of European Environmental Law*, 421–3. See also the action brought by the EC Commission against Greece Case C-518/04, *Commission v. Greece* [2006] ECR I-42 due to the lack of an effective system of protection of a viper species listed under Annex IV (*Vipera schweizeri*).

¹²⁹ Case C-103/00 *Commission v. Greece*, n. 128 above, para. 27.

¹³⁰ *Ibid.*, para. 38.

species—the ‘system of strict protection’ of species provided for under Article 12(1)(b) and (d) thus mirrors the Article 6(2) protection regime of habitats and species present in Natura 2000 sites, since it must be adaptable to the requirements of the species covered by it.

It should be noted that according to Article 12(1)(b) and (d) of the Directive, species listed both in Annex II (species requiring the creation of a special areas of conservation (SAC)) and in Annex IV (species requiring strict protection) thus enjoy throughout the territory of the European Community a protection nearly equivalent to that applicable within Natura 2000 sites under Article 6(2) of the same Directive. This means that Member States must ensure for instance that cetaceans included in Annex IV are not deliberately disturbed not only in the SACs created for that species, but also in all sites frequented by it outwith these SACs¹³¹ or that forestry activities in Finland do not impinge upon breeding or resting habitats of the flying squirrel.¹³²

iii. The Protection of Species the Taking of which is Likely to be Regulated (Articles 14 and 15)

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 good will 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.’¹³³ 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 quota systems and hunting rules) are listed in a non-exhaustive manner;¹³⁴ 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’.¹³⁵ The ECJ 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’.¹³⁶

¹³¹ High Court, 5 Nov. 1999, *The Queen v. Secretary of State for Trade and Industry, Ex Parte Greenpeace*. The ECJ however found, on the facts, that there had not been ‘a deliberate disturbance’ by oil exploration companies within the meaning of Art. 12(1)(b) of the Habitats Directive, n. 16 above.

¹³² The EC Commission contended with dam projects in Portugal having negative impact on the Iberian lynx (*Lynx pardina*). e.g. A. García-Ureta, ‘Nature Conservation’ (2005) 5 *Yearbook of European Environmental Law*, 391–2.

¹³⁴ Art. 14(2), *ibid.*

¹³⁵ Art. 15, *ibid.*

¹³³ Art. 14(1), n. 114 above.

¹³⁶ Case C-6/04 *Commission v. United Kingdom* [2005] ECR I-9017, para. 94.

iv. Derogations (Article 16)

Various derogations have been incorporated into the protectory framework for animal and plant species.¹³⁷ Inspired by Article 9 of the Birds Directive, derogations must not only be interpreted restrictively,¹³⁸ but must also satisfy various substantive requirements.

In the first place, derogations must be limited to cases in which there are no other satisfactory solutions. In proceedings against the UK, the European Commission charged the British government with having breached the obligation to verify the existence of a satisfactory solution prior to the granting of a derogation relating to the development of urban areas in sites hosting the great crested newt (*Triturus cristatus*). Specifically, the Commission objected to the granting of the building permit before the lodging of a request for derogation, which had the effect of preventing the competent authorities with a *fait accompli*, since no other alternative could then be considered. The ECJ dismissed the action on the grounds that the Commission had not established that the administrative practice in dispute had undermined the strict protection regime for the animal species listed in Annex IV A of the Directive.¹³⁹

Secondly, the exemptions can only be granted when the permitted takings do not compromise the stability of the species population concerned. Finally, they must be justified under at least one of the five grounds listed exhaustively in the Directive (see also the grounds for derogation provided for by Article 9 of the Bern Convention):

- 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 breeding 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.

¹³⁷ As a result of this, various national rules providing for general and permanent derogations from the provisions of the Directive cannot in any way fall under Art. 14 of the Directive. Similarly, Art. 2 of the Habitats Dir. does not constitute a free-standing derogation from the general protection regime; by contrast, its *ratio legis* is to define the general orientation of the Directive by providing a conceptual foundation for its various provisions. The ECJ's jurisprudence on the same type of provision in the Birds Dir can, by analogy, provide useful guidance on the interpretation of this provision.

¹³⁸ Case C-6/04, *Commission v. United Kingdom* [2005] ECR I-9017, para. 111.

¹³⁹ Case C-434/01 *Commission v. United Kingdom* [2003] ECR I-13239, para. 22.

It should be stressed that the scope of several of those reasons is much wider than the scope of similar grounds for exemption listed under Article 9 of the Birds Directive. For instance, 'imperative reasons of overriding public interest' as well as the protection of 'other types of property' have been added by the framers of the Habitats Directive. As a result, projects justified by 'imperative reasons of overriding public interest' could be allowed in spite of their detrimental effects on resting and breeding sites.

Just as under the Birds Directive, every two years Member States must send the European Commission a report on their derogations.¹⁴⁰

v. Information and Research (Articles 12(4), 17, and 18)

Our stock of accumulated knowledge relating to fauna and flora is still largely due to the work of amateur naturalists, and in some Member States information on the status of species or habitats in need of protection remains fragmentary and incomplete. It is thus implicit in the implementation of this Directive, which is very scientific in nature, that the Commission and Member States should promote scientific research in this area. The Habitats Directive also puts in place a system for the reciprocal exchange of information between the Commission and Member States. Besides this, a system to monitor the incidental capture and killing of protected species must be established.¹⁴¹

vi. Minimum Harmonization

The possibility of adopting more stringent measures regulating the import or export of dead or live specimens from Annex IV, leading to a situation in which their commercial exploitation would be illegal in one Member State but permitted in another, must be evaluated in the light of the principle of free movement of goods.

IV. The Complementary Role of the Environmental Liability Directive as regards Damage Caused to Protected Species and Habitats

A. Ecological Damage

After fifteen years of delays and setbacks—during which a draft directive on civil responsibility for damage caused by waste, a green paper, and also a white paper on environmental responsibility were released—the EP and Council of Ministers on 21 April 2004 managed to adopt the Environmental Liability Directive.¹⁴² This

¹⁴⁰ Art. 16(2)–(3), n. 114 above.

¹⁴¹ Art. 12(4), *ibid.* Case C-75/01, *Commission v. Luxembourg* [2003] ECR I-1585, not yet reported, para. 65; Case C-6/04 *Commission v. United Kingdom* [2005] ECR I-9017, paras. 86–9.

¹⁴² N. 3 above. For a first commentary on this Directive, see e.g. P. Steichen, 'La directive 2004/35 sur la responsabilité environnementale en ce qui concerne la prévention et la réparation des dommages

Directive encompasses both civil and administrative law, containing concepts particular to both fields.

Although it has already been subject to numerous commentaries in this *Yearbook*, the authors have in the past only rarely teased out the full implications of the provisions of this Directive for nature conservation.¹⁴³ This third section will be restricted to a description of the benefits of this new framework to nature conservation.

The Environmental Liability Directive is founded on a presumption of responsibility on the part of the operator, if not of the state authorities, and focuses on the causal origin of the damage (high-risk activities, classified installations, transport of dangerous substances) as well as on the actual nature of the ecological damage (damage to species and protected areas, damage to waters and soils). It is furthermore important to draw a distinction between ecological damage and activities likely to cause such damage.

On the basis of the presumption that they represent a danger to biodiversity, waters or soils, a range of activities (the majority of which are already subject to Community regulation) are listed in Annex III of the Directive. The following activities may be cited as examples:

- accidentally discarded genetically modified organisms (points 10 and 11);
- pollutants transmitted by atmospheric emissions by classified installations (point 1);
- the release of phytoparmaceutical substances or biocides (point 7);
- waste management operations (point 2).

The Directive also provides for both preventive and remedial action for damage caused to the environment itself, without however requiring that private law interests thereby be prejudiced.

Environmental damage develops in a similar way to Russian matrioska dolls. Nonetheless, the drafters of the Directive thought fit to specify that damage was envisioned as 'a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly'.¹⁴⁴ Both direct and indirectly caused damages is therefore covered.¹⁴⁵

environnementaux. Un droit de compromis pour une responsabilité nouvelle' (2004) *Aménagement-Environnement*, 109–27; N. de Sadeleer, 'La directive 2004/35 sur la responsabilité environnementale: avancée ou recul pour le droit de l'environnement des Etats membres?' in B. Dubuisson and G. Viney (eds.), *Les responsabilités environnementales* (Brussels & Paris: Bruylant, L.G.D.J., 2005).

¹⁴³ L. Bergkamp, 'The Proposed Environmental Liability Directive' [2002] *European Environment Law Review*, 327–41; G. Betlem and H.P. Brans, 'The Future Role of Civil Liability for Environmental Damage in the EU' (2002) 2 *Yearbook of European Environmental Law*, 183–22. P. Wennerås, 'Permit Defences in Environmental Liability Regimes—Subsidizing Environmental Damage in the EC?' (2005) 4 *Yearbook of European Environmental Law*, 149–81.

¹⁴⁴ Art 2(2), n. 3 above.

¹⁴⁵ Fourth recital to the preamble, n. 3 above.

Damage is characterized by either the adverse change to a 'natural resource' or the impairment of a 'service'. Whilst 'resources' refers exclusively to 'protected species and natural habitats, waters and land',¹⁴⁶ the term 'services' embraces all functions guaranteed by the species and protected natural habitats, including waters and soils, for the benefit of another natural or public resource. The difficulty stems from the fact that the Directive does not cover economic damage, although both marine and land ecosystems (protected habitats and soils) offer considerable economic and social advantages, which are not particularly easy to quantify. This would be the case, for example, for 'services' provided by an estuary (salts, aquaculture, fishing, hunting, recreational activities)¹⁴⁷ or by a forest (lumber production, hunting, prevention of erosion, recreational activities). Moreover, it is important to add that ecosystems also provide non-quantifiable advantages from an economic point of view (landscaping in forests, and the fact for instance that an estuary is a breeding or feeding site for various wild species).

The icing on the cake is EC law's use of the technique of referential legislation for determining more specifically what is meant by damage to waters, species, and natural habitats. Accordingly, various categories of damages must be determined with reference to the relevant provisions of other applicable legal frameworks, whether under national¹⁴⁸ or Community law.¹⁴⁹

It is important to ascertain carefully the fulfilment of these criteria in order to determine whether damage has been caused.

B. Damage Caused to Natural Habitats and Protected Species

i. General Observations

Aware of the rarity of wild species and the decline in natural spaces, the drafters of the Environmental Liability Directive emphasize the growing risks threatening biodiversity over the past few decades. Moreover, this situation is expected to worsen if no new protective regimes are enacted.¹⁵⁰

Although entire strata of biodiversity suffer from the intensification of the means of production, the increase in transport routes, and the sprawl of urbanization, the Directive's drafters have opted for a limitation of the protective and remedial frameworks to habitats and protected species alone. Environmental liability therefore only extends to a limited number of species and natural or semi-natural areas.

In addition, the definition of damage caused to species and habitats depends on a range of concepts (including, for example, conservation status and population stability) and techniques (inclusion of an endangered species in a specific list) derived both from the Birds and Habitats Directives.

¹⁴⁶ Art. 2(12), *ibid.*

¹⁴⁷ D. McLusky and M. Elliot, *The Estuarine Ecosystem* (Oxford: OUP, 2004).

¹⁴⁸ Art. 2(3)(c), n. 3 above, ¹⁴⁹ Art. 2(3)(a), *ibid.*

¹⁵⁰ First recital to the preamble, *ibid.*

A key distinction is to be drawn between damage caused to natural habitats and that caused to their species.

ii. Damage Caused to Protected Natural Habitats

For the first category of damage, five different categories of habitats are to be distinguished:

- i. habitats of particular species of wild birds: these include the habitats of rare, endangered or vulnerable species listed in Annex I of the Birds Directive, or alternatively those of migratory species¹⁵¹ irrespective of whether they have been classified as SPAs by Member States;
- ii. habitats of fauna or flora species,¹⁵² other than birds, falling under Annex II of the Habitats Directive, irrespective of whether they have been classified as SACs under this Directive;
- iii. natural habitats listed in Annex I of the Habitats Directive,¹⁵³ irrespective of whether they have been classified as SACs under this Directive;
- iv. breeding sites and resting areas of rare species listed in Annex IV of the Habitats Directive, which may not fall within a classificatory framework and hence may be located outwith Natura 2000 areas;¹⁵⁴
- v. habitats classified by Member States for equivalent purposes (including nature reserves, national parks, forest reserves, protected biotopes).

Some national governments consider that damage to biodiversity is limited to damage caused to habitats which have been classified as SPAs (Birds Directive), or as SACs (Habitats Directive). Outside these areas, so the argument runs, the Directive is not applicable. This interpretation is mistaken. A literal interpretation of Article 6(3) of the Environmental Liability Directive clearly indicates that the Directive's scope of application is not limited to damage caused within the two categories of areas making up the Natura 2000 network (SPAs, SACs). This means that any damage caused to sites hosting a sufficiently important number of specimens of a species protected under an Annex either of the Birds or Habitats Directives falls within the ambit of the Environmental Liability Directive, provided the damage has a negative impact on the conservation status of the protected species.¹⁵⁵

¹⁵¹ Member States are obliged under Art. 4 of the Birds Dir. to designate as Special Protection Areas 'the most suitable territories in number and size' for the conservation of the species listed in Annex I. See de Sadeleer, n. 1 above.

¹⁵² See above, section II.
¹⁵³ Art. 4 of the Habitats Dir. obliges Member States to designate Special Areas of Conservation. See de Sadeleer, n. 1 above.

¹⁵⁴ See above, section II, B, ii.
¹⁵⁵ C. Pirotte, 'La directive 2004/35/CE du 21 avril 2004 sur la responsabilité environnementale: premiers commentaires', and N. de Sadeleer, 'La directive 2004/35/CE relative à la responsabilité environnementale: avancée ou recul pour le droit de l'environnement des Etats membres?' in Dubuisson and Viney (eds.), *Les responsabilités environnementales*, n. 142 above.

By way of illustration, the pollution by an oil leakage of a river hosting a substantial population of otters (*Lutra lutra*), a species listed under Annex II of the Habitats Directive, is likely to fall within the scope of the Environmental Liability Directive, no matter whether that river has been designated as an SAC.

Since the efficacy of the Directive is not dependent on administrative structures requiring highly specific land management decisions (consisting in the classification, in line with scientific criteria, of part of the territory for nature conservation purposes), the scope of its application—as regards damage caused to natural habitats protected at Community level—appears to be extremely broad. On the contrary, damage caused to natural habitats protected at the national level must be dealt with rather differently. The habitats concerned must be determined in accordance with the protection laws passed by national parliaments.

A further difficulty is worthy of note. The dividing line between damage caused to lakeside or coastal habitats and damage to waters is difficult to draw. Damage caused to aquatic resources may be regarded either as damage to a habitat under Article 2(1)(a), or alternatively as damage to waters under Article 2(1)(b). In fact, the respective fields of application overlap: on the one hand, the Habitats Directive requires Member States to protect a range of coastal and lakeside habitats listed in Annex II¹⁵⁶ whilst, on the other hand, Article 3 of Directive 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy (Water Framework Directive)¹⁵⁷ requires, from 2015, Member States to avoid a deterioration of their water and attain a good quality level. Within this context, more stringent measures will be taken in order to protect ecologically sensitive areas which must be identified by national authorities in a protected area register.¹⁵⁸

Is all damage caused to natural areas hosting protected habitats subject to preventive and remedial regulations? Community lawmakers have exercised restraint on this issue, providing that the operator's responsibility should only be activated following the passing of a qualitative threshold: the damage must have a serious effect on the constitution or maintenance of a favourable conservation status of the habitats.

The concept of conservation status is defined in Article 2(4), which mirrors the definition of conservation status contained in the Habitats Directive in Article 1(e).

¹⁵⁶ Damage caused to water (Art. 2(1)(b)) may also extend to a protected habitat, thus falling under the regime for damage caused to natural habitats (Art. 2(1)(a)). Accordingly, Annex III of the Habitats Dir. covers several freshwater habitats which consequently enjoy its protection regime (for example, oligotrophic waters with few minerals of the sandy Atlantic plains with amphibious vegetation, belonging to the *Lobelia*, *Littorelia* et *Isoetes* orders, oligo-mesotrophic waters with benthic vegetation of chara, or also mediterranean temperate seas).

¹⁵⁷ [2000] OJ L327/1.
¹⁵⁸ Framework Dir. 2000/60/EC establishing a Framework for Community Action in the Field of Water Policy (Water Framework Dir.) [2000] OJ L327/1 provides that areas requiring 'special protection under specific Community legislation for the protection of their surface water and groundwater or for the conservation of habitats and species directly depending on water' must be identified, for every hydrological district, and included in a national register (Art. 6(1)). For these protected areas, Member States must guarantee compliance with all of its provisions and objectives no later than fifteen years after the entry into force of the Directive, unless the contrary has been provided for in Community legislation on the basis of which different protected areas have been established (Art. 4(1)(c)).

The conservation status of a natural habitat is defined as 'the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2'. The conservation status will be 'favourable' when the following criteria are satisfied:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i).

Moreover, Annex I of the Environmental Liability Directive provides that 'the significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration'.

The concept of conservation status makes it possible to determine, by means of scientific data, the appropriate means to be implemented in order to guarantee the maintenance of the habitat. Therefore, in order to establish when the conservation status has become less favourable, it is necessary to demonstrate that the damage has caused a reduction in the natural area of distribution of the habitat, that the conservation status of the species has become less favourable (reduction in population), and that particular essential functions have disappeared. It is not always easy to bring proof in support of this.

There is a question as to the relevance of the threshold imposed by Community law. It should be noted that the concept of conservation status has been introduced only recently both in international law¹⁵⁹ and Community law.¹⁶⁰ This concept is placed in the context of an ecosystemic approach which must be implemented in order to maintain the quality of habitats or their species on a long-term basis. Although this concept can provide a strong basis for the establishment of management plans for nature reserves or national parks, this by no means indicates that it is relevant as a threshold for the intervention of public authorities. In fact, damage caused by industrial activity may well be the cause of considerable harm (such as the large-scale poisoning of fish) without, however, undermining the conservation status of the habitat or species. Indeed, most damage caused by economic activities, such as industries, has a relatively limited spatial impact (pollution of watercourses or aquifers), whilst when natural habitats suffer deterioration this is generally due to a range of factors (urbanization, intensification of farming and forestry, soaring tourism, hunting pressures). As a result, a massive

¹⁵⁹ Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979, which came into force on 1 Nov. 1983), published on the Internet at: <http://www.cms.int/>.

¹⁶⁰ The concept of 'favourable conservation' was introduced for the first time in 1992 in the Habitats Dir.

pollution of a lake could fall outside the ambit of the Directive on the ground that the conservation status of the species suffering from the pollution is not jeopardized.

There is also another considerable difficulty. Most habitats and species listed in the Annexes of the Habitats and Birds Directives are protected on account of their conservation status, which is deemed to be unfavourable. There are, however, fears that the implementation of the Natura 2000 network will not be able to halt the deterioration, as the factors negatively impinging upon their conservation status are heterogeneous and difficult to combat. So, even though it is right to determine whether the conditions for intervention have been met, it may well be the case that the polluted habitat's conservation status is already unfavourable. In other words, the damage will only increase the pressure on the protected habitat.

Finally, one might ask whether it is necessary to analyse the conservation status on a local, regional, national or biogeographical level (Alpine, Boreal, Atlantic, Continental, and Mediterranean), or alternatively on a Community-wide basis. In spite of the decisive role of the spatial dimension—the conservation status can in fact vary significantly according to spatial criteria determined by experts—Annex I of the Directive does not throw any light on this question.¹⁶¹

iii. Damage Caused to Protected Species

It should be noted at the outset that only a certain number of species are protected, under either the Habitats or Birds Directives.

As far as winged creatures are concerned, the scope of the liability regime is narrower than the conservation regime. Indeed, whereas under the Birds Directive all species are protected, only vulnerable, endangered or endemic species (included in Annex I) along with migratory species fall within the ambit of the Environmental Liability Directive. Species which do not migrate or which are not included in Annex I cannot therefore benefit from the prevention and remedial frameworks, unless the Member State decides otherwise.¹⁶²

As regards species covered by the Habitats Directive, these are so-called species of 'Community interest', that is to say, species which are, as indicated above, endangered, vulnerable, or endemic.¹⁶³

Having said this, according to Article 176 EC, Member States may decide to broaden the notion of damage caused to protected species by including in it those species not listed in the Annexes of either the Birds or Habitats Directives. A variety of reasons can justify such a choice. It is first of all possible that the Community lists might not be in line with the scientific consensus. Alternatively, a species considered to be endangered at a national level may still be widespread in other parts of the

¹⁶¹ In relation to the criteria laid down in Art. 2(1)(a), Annex I cites 'the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation, the rarity of the species or habitat (assessed at local, regional and higher level including at Community level)', without however specifying the extent of the relevant spatial area. The flexible geographical application of this definition strengthens administrative authorities' margin of appreciation.

¹⁶² Art. 2(3)(c), n. 3 above.

¹⁶³ Art. 1(g), *ibid.*

territory of the EC, and this may justify it being subject to an enhanced level of protection within the territory of the Member State.

The field of application *ratione loci* of this framework is extremely broad, as a large number of protected species, such as cetaceans (whales and dolphins) and marine birds (alcids, larids) are present in the Exclusive Economic Zones of the Member States. It should therefore be noted that the scope of application of the Habitats and Birds Directives is much broader than that of the Water Framework Directive which, pursuant to Article 1(1), is restricted to the coastal waters.

Once again, according to Article 2(1)(a) of the Environmental Liability Directive, preventive and remedial frameworks can only be invoked when the damage caused to the protected species has a serious impact on the constitution or maintenance of its favourable conservation status, and the importance of the effects of such damage is evaluated with reference to the initial status. The criteria for determining the favourable conservation status of a species have been outlined above.

Moreover, the three criteria of Article 2(1)(a) of the Directive—which are identical to criteria contained in Article 1(i) of the Habitats Directive—are complemented by the parameters (population's capacity for propagation), set out in Annex I of the Environmental Liability Directive.

As has been emphasized above, the concept of conservation status, even though defined with reference to the scientific criteria set out in Article 2(4) of the Directive, is a concept whose merits have yet to be put to the test. It is not certain that this concept will prove to be relevant for the setting-up of administrative policing regimes of a preventive or remedial nature.

C. Limitation of Responsibility for Damage Caused to Natural Habitats and Protected Species

Several exceptions, both explicit and implied, are provided for.

First of all, damage caused by activities expressly authorized by public authorities in terms of Article 6(2)–(3) of the Habitats Directive or as a result of permitted hunting activities (Article 9 of the Birds Directive and Article 16 of the Habitats Directive)¹⁶⁴ are expressly excluded from damages actions.¹⁶⁵ In practice, however, it is not always easy to distinguish between authorized and illegal activities within protected areas. In fact, in rural areas and woodlands of sometimes considerable dimensions, a range of agricultural, grazing, and forestry activities are not specifically regulated.

Furthermore, according to Article 4(2), the Environmental Liability Directive does not apply to environmental damage covered by international conventions listed in Annex IV, which includes several international conventions on civil

¹⁶⁴ For an analysis of the conditions which must be satisfied in order to activate these derogations, see e.g. de Sadeleer and Born, n. 2 above, 522–32, 554–7 and 560–1.

¹⁶⁵ Art. 2(2), n. 3 above.

responsibility for damage flowing from marine pollution by hydrocarbons. However, most damage caused to marine birds results from the accidental or deliberate release of hydrocarbons into the sea. It is possible that the Article 4(2) exclusion will allow Member States to avoid applying the preventive and remedial measures provided for under the Directive when the damage caused to marine bird species is due to the spillage of hydrocarbons.

However, it is submitted that such damage falls within the ambit of the Directive, since the Convention referred to does not specifically cover damage caused to species of fauna. This means that the preventive and remedial regimes will remain applicable to any ecosystems and wild marine species which are polluted by hydrocarbons.

V. Conclusions

Given that specific diversity is under threat in Europe, EC law has been enriched since the end of the 1970s by a raft of directives and regulations intended to put a stop to this deterioration of the living world. Although the scope of ambit of those acts is highly diversified—ranging from the protection of cetaceans to the regulation of the trade in endangered species—we paid heed to three categories of rules: obligations aiming at protecting all native bird species (Birds Directive), obligations related to the protection of other taxa (Habitats Directive), and a complementary liability regime (Environmental Liability Directive).

However, the existence of these three regimes should not lull us into thinking that species are entirely protected. The acid test for EC nature conservation law lies in its application, which is incumbent upon Member States. First, survival of species depends mostly upon the willingness of Member States to safeguard their habitats through the implementation of the Natura 2000 network. Secondly, the protective regimes are rife with exemptions that could undermine their effectiveness. In this respect, the numerous finding against Member States by the ECJ make up only the tip of the iceberg. Moreover, the absence of political will, outdated criminal regimes, the lack of standing for many non-governmental organizations (NGOs), the ambiguity of the applicable provisions all undermine the harmonization process and its objectives. It comes as no surprise that despite the quality and the ambitious character of the EC directives, these steps are falling short of halting the loss of biodiversity.