Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 February 2020[1]

Case C-88/19

Asociația "Alianța pentru combaterea abuzurilor"
v
TM,
UN,
Asociația DMPA

(Request for a preliminary ruling
from the Judecătoria Zărnești (Court of First Instance, Zărnești, Romania))

(Reference for a preliminary ruling — Directive 92/43/EEC — Conservation of natural habitats and of wild fauna and flora — System of strict protection for the animal species listed in Annex IV(a) — Natural range — Capture of specimens of those species in the wild — Wolf (*Canis lupus*) — Specimens that leave their natural habitat — Derogations — Public safety — Penalties)

I. Introduction

1. The Habitats Directive[2] calls for the introduction of a system of strict protection for species, such as the wolf (*Canis lupus*), which are listed in Annex IV(a) thereto. However, must that system of protection also be applied in the case where a wolf plays with dogs in a village? That is the question that is put to the Court in these proceedings.

2. Even in its specific form, that question may be of greater practical importance than one might think.[3] The answer to it will be decisive above all, however, in determining whether the substantively extensive protection of species provided for in the Habitats Directive is primarily relevant to natural and semi-natural areas, that is to say, in particular, to activities such as agriculture, forestry and hunting, or whether it is to be taken into account without restriction in all human activities, such as the operation of roads.

1 Original language: German.

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

3 On a similar case, see Jans, N., *A Wolf Called Romeo*, Mariner Books, 2015, and Worrall, S., 'How a Wolf Named Romeo Won Hearts in an Alaska Suburb', *National Geographic*, 22 March 2015.

II. Legal framework

A. International law

1. Convention on the conservation of migratory species of wild animals

3. Article I(1) of the Convention on the conservation of migratory species of wild animals [4] defines the terms 'range' and 'taking':

'For the purpose of this Convention:

…

(f) "Range" means all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route; …

(i) "Taking" means taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct;

…'

2. Bern Convention

4. Article 6 of the Bern Convention [5] also contains provisions on the protection of species:

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

(a) all forms of deliberate capture and keeping and deliberate killing;

…'

5. The wolf (*Canis lupus*) is listed in Annex II to the Bern Convention as a strictly protected fauna species.

4 Council Decision 82/461/EEC of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (OJ 1982 L 210, p. 10).

5 Convention on the Conservation of European Wildlife and Natural Habitats, opened for signature in Bern on 19 September 1979 (OJ 1982 L 38, p. 3); ratified on behalf of the Community by Council Decision 82/72/EEC of 3 December 1981 (OJ 1982 L 38, p. 1).

B. EU law

1. The Habitats Directive

6. The first part of the fifteenth recital of the Habitats Directive concerns the protection of species:

'Whereas a general system of protection is required for certain species of flora and fauna to complement [the Birds Directive[6]]'.

7. Article 1(b), (f) and (i) of the Habitats Directive defines a number of terms:

'…

(b) *natural habitats* means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural;

…

(f) *habitat of a species* means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle;

…

(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

– population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

– the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

– there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

…'

8. Article 2(1) of the Habitats Directive describes its aim as follows:

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

6 The text applicable at the time of the facts in the main proceedings was Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) ('the Birds Directive').

9. Article 4(1) of the Habitats Directive governs how the Member States select the sites they will propose for protection:

'On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. …'

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

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

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

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding or resting places.

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

…'

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

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

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purposes of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

12. Annex IV(a) to the Habitats Directive lists, inter alia, the wolf:

'*Canis lupus* (except the Greek populations north of the 39th parallel; Estonian populations, Spanish populations north of the Duero; Bulgarian, Latvian, Lithuanian, Polish, Slovak populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)'.

2. The Birds Directive

13. Article 5 contains the general system of protection for birds:

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

(a) deliberate killing or capture by any method;

(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

(c) taking their eggs in the wild and taking their eggs even if empty;

(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as breeding would be significant having regard to the objectives of this Directive;

(e) keeping birds of species the hunting and capture of which is prohibited.'

C. National law

14. Article 4(14) of the Ordonanța de urgență a Guvernului nr. 57/2007 privind regimul ariilor naturale protejate, conservarea habitatelor naturale, a florei și faunei sălbatice (Government Emergency Ordinance No 57/2007 regulating nature reserves and the conservation of natural habitats and of wild fauna and flora; 'Emergency Ordinance No 57/2007') defines the term 'natural habitat' as follows:

'the sum of the natural physical/geographical, biological and biogenetic components, structures and processes, both aquatic and terrestrial, that sustain life and create the resources necessary to it'.

15. Article 33(1) of Emergency Ordinance No 57/2007 transposes Article 12(1) of the Habitats Directive:

'In relation to the terrestrial, aquatic and subterranean species of flora and fauna listed in Annexes No 4 A and 4 B, with the exception of species of birds living inside or outside nature reserves, the following shall be prohibited:

(a) all forms of collection, capture, killing and destruction of, or injury to, specimens in their natural habitat at any stage in their life cycle;

(b) deliberate disturbance during periods of breeding, rearing, hibernation and migration;

(c) deliberate damage to, and destruction and/or collection of, nests and/or of eggs in the wild;

(d) damage to, or destruction of, breeding sites or resting places;

(e) the picking of flowers and fruit and the collection, cutting, uprooting or deliberate destruction of such plants in their natural habitat, at any stage in their biological life cycle;

(f) the keeping, transport, sale or exchange for whatever purpose and the offering for exchange or sale of specimens taken from the wild, at any stage in their biological life cycle.'

16. Article 38 of Emergency Ordinance No 57/2007 governs derogations from the prohibitions laid down in Article 33(1). In accordance with Article 38(2), those derogations are to be issued by decision of the head of the central authority for environmental and forest protection, adopted following delivery of the opinion of the Academia Română (Romanian Academy).

17. In accordance with Article 52(d) of Emergency Ordinance No 57/2007, an infringement of the provisions of Article 33(1) thereof constitutes a criminal offence punishable by a custodial sentence of three months to one year or a fine.

III. Facts and request for a preliminary ruling

18. The Romanian village of Șimon, in the municipality of Bran in the county of Brașov, lies about one kilometre to the east of the border with the site of 'Bucegi', which the Commission, on a proposal from Romania, added to the list of sites of Community importance under code number ROSCI0013.[7] A further such site, 'Munții Făgăraș', bearing code number ROSCI0122, is situated some eight kilometres to the west of the village.[8] The standard data forms[9] record wolves as being present on both sites.

19. At around 19.00 on 6 November 2016, employees of the association 'Direcția pentru Monitorizarea și Protecția Animalelor' (Directorate for the Observation and Protection of Animals; 'the DMPA'), together with veterinary surgeon UN, acting under the direction of TM, made their way to Șimon. Their intention was to capture and relocate a wolf which had for several days been present on the property of a local resident, where it had been playing and eating with the family's dogs.

20. The wolf was anaesthetised with a projectile containing narcotic and psychotropic veterinary medicines and then tracked and picked up off the ground. It was carried by its tail and the scruff of its neck to a vehicle and placed, under sedation, in a cage for transporting dogs.

21. The DMPA employees then arranged for the wolf to be transported to the *Libearty* bear reserve, in the town of Zărnești in the province of Brașov, which has a fenced enclosure for housing wolves rescued from zoos keeping them in an environment inappropriate to the species. During that journey, however, the wolf managed to escape and disappear into the surrounding woods.

22. On 9 May 2017, the association 'Alianța pentru combaterea abuzurilor' (Alliance to Combat Abuse; 'the APCA') filed a complaint against:

– the defendant TM, who is employed by the DMPA;

– the defendant UN, a veterinary surgeon;

– the legal person DMPA and other persons in its employ.

7 Commission Decision 2009/91/EC of 12 December 2008 adopting, pursuant to Council Directive 92/43/EEC, a second updated list of sites of Community importance for the Alpine biogeographical region (OJ 2009 L 43, p. 21).

8 The village's location is shown in the Natura 2000 Network Viewer, https://natura2000.eea.europa.eu/.

9 Bucegi: http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ROSCI0013; Munții Făgăraș: http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ROSCI0122.

23. It is clear from the criminal complaint that no authorisation to capture and transport the wolf was obtained.

24. It was in the course of those proceedings that the Judecătoria Zărnești (Court of First Instance, Zărnești, Romania) referred the following question to the Court of Justice:

'Must Article 16 of [the Habitats Directive] be interpreted as requiring the Member States to lay down derogations from Articles 12, 13, 14 and 15(a) and (b) also in cases where the animals belonging to threatened species leave their natural habitat and are in its immediate vicinity or completely outside it?'

25. Written observations have been lodged by the APCA, Romania and the European Commission.

IV. Legal assessment

26. According to the request for a preliminary ruling, the purpose of the question referred is to determine whether the deliberate capture of wild wolves without a derogation under Article 16 of the Habitats Directive is permissible in the case where the animal is found on the outskirts of a village or enters the territory of a local authority. Such a derogation would be necessary only if the protective provisions are in principle applicable in such cases.

27. The specific question raised by the Judecătoria Zărnești (Court of First Instance, Zărnești) is based on a misunderstanding brought about by the Romanian transposition of the Habitats Directive. It does, however, express a legitimate question that warrants in-depth consideration.

28. The misunderstanding lies in the proposition that the protection of species is to apply only in the case where protected species are present in their natural habitat. This is the purport of the text of Article 33(1)(a) of Emergency Ordinance No 57/2007. There is, however, no basis for that proposition either in the text of the Habitats Directive — including the Romanian version thereof — or in the aim it pursues.

29. Natural habitats are defined in Article 1(b) of the Habitats Directive. In accordance with Articles 3 to 6 thereof, they are, as such, to be protected as part of the conservation areas comprising the Natura 2000 network. At the same time, however, that network includes the habitats of the species — defined separately in Article 1(f) — listed in Annex II. Since the wolf is listed in that annex, conservation areas must be made available for that species. So it was that the facts which gave rise to these proceedings took place in a village situated between two large conservation areas in which the wolf, among other animals, is protected.

30. The present case, however, is concerned not with the wolf's protection within the conservation area but with the protection of species under Article 12(1) of the Habitats Directive. According to that provision, Member States are to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a), and, therefore, for the wolf too, in their natural range. In accordance with Article 12(1)(a), that system prohibits all forms of deliberate capture or killing of specimens of those species in the wild.

31. In order to be able to provide the Judecătoria Zărnești (Court of First Instance, Zărnești) with a useful answer, it must therefore be examined whether, for the purposes of Article 12(1) of the Habitats Directive, human settlements form part of the wolf's *natural range*. It must also be considered, in the light of the situation in the main proceedings, whether the anaesthetisation of a wolf on a residential

property and its transportation by cage is to be regarded as the capture of a specimen *in the wild* within the meaning of Article 12(1)(a). It would also be useful to look briefly at the feasibility of a derogation under Article 16, and at the limits attendant under EU law upon any penalty for infringement of the system of strict protection provided for in Article 12.

A. Natural range within the meaning of Article 12 of the Habitats Directive

32. The biological term 'natural range' used in Article 12 of the Habitats Directive ('aire de répartition naturelle' in the French version and 'natürliches Verbreitungsgebiet' in the German version) is not defined in that directive.

33. One might infer from the use of the term 'natural' that the wolf at issue in the main proceedings was outside its natural range. After all, a human settlement is not prima facie a natural area. Furthermore, human settlements are not, according to general experience, the natural environment of wild wolves.

34. That general experience would, however, require scientific validation before it could trigger the application of the provisions on the protection of species.[10] Since such scientific evidence is factual in nature, it would, in the context of the cooperative relationship characterising a preliminary ruling procedure, fall to be established by the national court. It should nonetheless be noted that some species protected by EU law, such as certain bats, the hermit beetle (*Osmoderma eremita*) and the lesser kestrel (*Falco naumanni*),[11] unquestionably use habitats within human settlements. What is more, from a scientific point of view, there are indications that wolves too — rarely, it is true, but regularly nonetheless — appear in the vicinity of human settlements.[12]

35. Irrespective of the above scientific question, it would be incompatible not only with the purpose of the provisions on the protection of species but also with the wording and scheme of those provisions to exclude human settlements from their scope.

36. With regard first of all to the aim of the protective regime laid down in Article 12 of the Habitats Directive, it must be emphasised that this provides for the establishment of a system of *strict* protection. Such a system of strict protection must therefore be capable of actually preventing the acts detrimental to the listed animal species that are identified in Article 12(1).[13] It would not therefore be compatible [with the aforementioned provisions] for protection to be (automatically[14]) withdrawn from specimens of protected species if their habitats are located within human settlements or they accidentally stray into such settlements.

37. On closer examination, not even the literal meaning of the term 'natural range' [in German, 'natural distribution area'] precludes the inclusion of human settlements. That term, after all, refers to the area in which the species concerned is present or distributed in the course of its natural behaviour. If that term were meant to cover only the 'natural' habitats in which species are present, the qualifying adjective 'natural' would have been placed elsewhere, so as to indicate, for example, that the prohibitions laid down apply only in the natural areas in which the species is distributed.

10 See judgments of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraphs 45, 51, 66 and 71), and, to that effect, of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraphs 27 and 28).

11 Judgment of 28 June 2007, *Commission* v *Spain* (C-235/04, EU:C:2007:386).

12 See Boitani, L., *Action Plan for the conservation of the wolves* (Canis lupus) *in Europe*, Council of Europe, T-PVS (2000) 23, pp. 15 and 16; Large Carnivore Initiative for Europe (LCIE), *Management of bold wolves*, 1 March 2019, p. 2; and Reinhardt, I. et al., *Konzept zum Umgang mit Wölfen, die sich Menschen gegenüber auffällig verhalten*, BfN-Skripten 502 (2018), pp. 11 and 12.

13 See, to that effect, judgments of 9 June 2011, *Commission* v *France* (C-383/09, EU:C:2011:369, paragraph 21); of 15 March 2012, *Commission* v *Cyprus* (C-340/10, EU:C:2012:143, paragraph 62); and of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 231).

14 As regards possible exceptions, see point 56 et seq. below.

38. A similar meaning follows from the definition, cited by the Commission, that is contained in Article I(1)(f) of the Convention on the conservation of migratory species of wild animals. According to that definition, 'range' covers all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route. It is not restricted to natural areas. On the contrary, the crossing of areas of any type is expressly included in the 'range' of the species.

39. Although that definition is not decisive for the purposes of the present case, since it is not concerned with the application of that convention, it nonetheless illustrates the scientific understanding of the relevant biological term. It must therefore be taken into account in the interpretation of that term, a fact which is also reflected in a document which the Commission drew up in order to coordinate the application of the Habitats Directive within a working group comprising representatives of the Member States, [15] as well as, later, in its guidance document on the protection of species which it discussed with the Member States. [16]

40. Of greater importance from a legal point of view is another convention, the Bern Convention, Article 6(a) of which, read in conjunction with Annex II thereto, is transposed by Article 12 of the Habitats Directive. [17] This provides for the prohibition, in particular, of any form of deliberate capture of wolves. It does not lay down any geographical restrictions. On the contrary, the fact that that prohibition extends to *any* form of deliberate capture indicates that it is to be interpreted broadly.

41. The thrust of the fifteenth recital of the Habitats Directive is the same, inasmuch as this states that the protection of species under that directive is intended to complement the Birds Directive. The mention of the Birds Directive is a reference to the prohibition contained in Article 5 of that directive, which is largely identical to Article 12 of the Habitats Directive. Those prohibitions are not geographically restricted either. Against that background, the Court criticised the fact that a Member State had excluded grey herons (*Ardea cinerea*) and cormorants (*Phalacrocorax carbo*) present in fish ponds from protection under Article 5. [18]

42. The rules laid down in the Habitats Directive with respect to the protection of sites further show that the protection of species cannot be confined to the protected sites themselves, as those protected sites were not demarcated with the aim of encompassing the wolf's habitat in its entirety. Wolves are species of animals that exploit large habitats. [19] In the case of such species, the second sentence of Article 4(1) of the Habitats Directive provides that the protected sites are to be confined to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. Those rules thus recognise that the natural range of those species also includes sites situated outside the protected areas. In this regard, it should be recalled that the village of Șimon lies between two large conservation areas that count wolves among the species occurring there and it is therefore to be expected that wolves will migrate from one site to the other.

15 European Commission, Note to the Habitats Committee of 15 March 2005, *Assessment, monitoring and reporting of conservation status — Preparing the 2001-2007 report under Article 17 of the Habitats Directive* (DocHab-04-03/03 rev.3), Annex F.

16 European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, p. 11 and 12.

17 Report on the Convention on the Conservation of European Wildlife and Natural Habitats (1997–1998) (Article 9(2)) (presented by the European Commission), SEK(2001) 515 final. See, also, inter alia, the Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987, on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992) (OJ 1987 C 328, p. 1, point 5.1.6). The judgment of 13 February 2003, *Commission* v *Luxembourg* (C-75/01, EU:C:2003:95, paragraph 57), does not preclude that Convention from being taken into account, since, in that judgment, the Court held only that transposing that Convention is not sufficient for the purposes of transposing the Habitats Directive, in so far as that Convention falls short of the Directive.

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

19 Boitani, L., *Action Plan for the conservation of the wolves* (Canis lupus) *in Europe*, Council of Europe, T-PVS (2000) 23, p. 16.

43. Moreover, the Habitats Directive uses a different regulatory technique to establish a geographical demarcation of the protection for which it provides. As the entry for the wolf in Annex IV(a) shows, any sites excluded from protection would be clearly designated, as parts of certain Member States — Greece north of the 39th parallel, Spain north of the Duero and the reindeer conservation area in Finland — are.

44. The parties to the proceedings are therefore rightly opposed to excluding residential areas from the protection afforded by Article 12 of the Habitats Directive.

45. It must thus be concluded that the natural range of the wolf, and, therefore, the territorial scope of Article 12 of the Habitats Directive in relation to that species, can include human settlements.

B. Article 12(1)(a) of the Habitats Directive: 'in the wild'

46. It must further be examined whether the capture of a wolf within the vicinity of human settlements is caught by the prohibition laid down in Article 12(1)(a) of the Habitats Directive. According to that provision, Member States are to prohibit, in particular, all forms of deliberate capture of specimens of protected species — including, therefore, wolves — in the wild [rendered, in the German-language version of the Directive, as 'taken from the wild'].

47. The use of the expression 'taken from the wild' in the German version is probably a translation error here. On the one hand, it does not make sense to speak of the capture of specimens taken from the wild, since 'taking' includes capture.[20] On the other hand, most of the original language versions[21] refer to capture [literally] 'in nature', as, for example, the French — expressly so ('dans la nature') — and the English ('in the wild') do.

48. Irrespective of the foregoing translation issue, one might take the view that the capture of a wolf within the vicinity of a human settlement cannot be regarded as capture 'in nature' or in the wild.

49. Militating against that argument, however, are considerations relating to the scheme of the rules governing the protection of species and the purpose of that protection, which I took into account when interpreting the term 'natural range'.[22]

50. The Dutch version of the aforementioned provision, on the other hand, is enlightening. This refers to the capture of specimens living in the wild ('in het wild levende'). In this version at least, the reference to nature or the wild is intended to describe not the place of capture but the origin of the animal.

51. That understanding forms a suitable basis for attaining the objective of prohibiting the killing or capture of strictly protected species that is laid down in Article 12(1)(a) of the Habitats Directive. The intention is not to protect those species only in certain places but to protect specimens thereof that live 'in nature' or in the wild and thus have a function in natural ecosystems.

52. The parallel with Article 12(2) of the Habitats Directive, in accordance with which the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild are to be prohibited, confirms this. That prohibition does not apply to specimens which were legally taken from the wild before that directive became applicable.

20 Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 32).

21 Only the Greek and Portuguese versions appear to be similar to the German.

22 Point 36 et seq. of this Opinion.

53. In practice, such a prohibition would be all but impossible to implement if the place from which an animal was 'taken' had to be ascertained first. Just determining the time when the specimen in question was taken would probably be difficult enough. Moreover, a state of affairs whereby specimens of strictly protected species could permissibly be the subject of such acts provided that they were 'taken' while they had temporarily left the wild would be contrary to the objective of the system of strict protection.

54. However, even if the prohibition on capture and killing laid down in Article 12(1)(a) of the Habitats Directive were restricted to the wild, and residential areas were therefore excluded, this would not be possible in the context of the prohibition on disturbance laid down in Article 12(1)(b), since this provides that [in German] *any* deliberate disturbance of strictly protected species is to be prohibited, without territorial restriction. The capture and certainly the killing of a specimen of such species, however, would always have to be regarded, at least, as a disturbance too.

55. As the Commission also submits, the reference to nature (the wild) in Article 12(1)(a) of the Habitats Directive must therefore be interpreted as meaning that its protection does not just apply in certain places but also extends to all specimens of protected species that live 'in nature' or in the wild and thus have a function in natural ecosystems. Such specimens are not to be caught, killed, kept, transported, sold or exchanged. Those restrictions are not to apply, however, to specimens bred in captivity.

C. The derogations under Article 16 of the Habitats Directive

56. This does not mean, however, that one would have to accept in every case that strictly protected species visit and stay in residential areas. On the contrary, in the case in particular of species of animal which are inherently dangerous or are associated with certain risks, Article 16(1) of the Habitats Directive provides for some discretion to avert danger.

57. Thus, Article 16(1)(b) and (c) of the Habitats Directive permits measures to prevent serious damage, in particular to crops and livestock (point (b)), or 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 (point (c)).

58. The decision to allow such derogations must be made on the basis of strong scientific evidence [23] or the best scientific data. [24]

59. Such a risk should not prima facie be ruled out in the case of wolves or — even more obviously so, it would seem — in the case of another strictly protected species, bears (*Ursus arctos*), which, it appears, also occasionally stray into residential areas in Romania. [25]

60. It is true that the APCA takes the view that the issue of such a derogation is not justified because the wolf in question has not caused any damage. However, there is no need to wait until the damage occurs if, on the basis of the best scientific evidence available, it is safe to assume that there is a great enough risk of sufficiently serious damage.

23 Judgments of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraphs 45 and 71), and, to this effect, of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraphs 27 and 28).

24 Judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraphs 51 and 66).

25 The DMPA seems to deal with these cases too: https://dpmpa-bv.com/home/english-home/blog-translated/shooting-the-bear-cub-in-sibiu/.

61. Such a risk would have to be established by the competent domestic authorities and, if challenged, would have to be reviewed by the domestic courts. Nonetheless, a situation in which a wolf, over a period of several days, repeatedly gets to within less than 30 metres of people, is not something simply to be dismissed out of hand.[26] Since the wolf at issue is said to have spent a number of days on a local resident's property, playing and eating with the family's dogs there, the presence of such a risk in the main proceedings cannot be ruled out.

62. Derogations from the prohibitions laid down in Article 12(1) of the Habitats Directive might, therefore, in principle, have been justified under Article 16(1)(b) and (c). However, in addition to providing for the aforementioned grounds of exception, that provision expressly presupposes that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

63. As far as a satisfactory alternative is concerned, consideration would have to be given first and foremost to removing any incentives for the wolf to approach, such as food or unleashed dogs,[27] which would not require a derogation under Article 16 of the Habitats Directive and is therefore preferable.[28] Only if the wolf nonetheless continues to seek proximity to people, will so-called 'aversive conditioning' be an option, in the form of driving it away by firing rubber bullets at it, for example. The effectiveness of such methods is questionable, however.[29]

64. The Court has no evidence that any removal of incentives took place. In the event, the wolf's capture, which subsequently caused it to flee, appears to have had the effect of aversive conditioning.

65. However, it seems doubtful that the plan to move the wolf to an enclosure would have been recognised as a satisfactory solution. Moreover, there is nothing to indicate that any consideration was given to the effects that this course of action would have on the conservation status of the wolf population.

D. Proportionality of the penalty

66. In the case in the main proceedings, however, there are indications that the Judecătoria Zărnești (Court of First Instance, Zărnești) will not have to examine the conditions governing a derogation, not least on account of the fact, according to the information available, that the competent authorities did not approve the course of action at issue. As the APCA submits, that fact was also known to the defendants in the main proceedings. It is not inconceivable, therefore, that the conditions governing the imposition of a penalty under the Romanian transposition of the Habitats Directive are met.

67. It is to be noted in this regard that, in accordance with Article 49(3) of the Charter of Fundamental Rights of the European Union, that penalty must be proportionate, which is to say, in particular, appropriate.[30] It must therefore correspond to the seriousness of the offence and the circumstances of the particular case must be fully taken into account.[31]

68. Of significance in this regard in the present instance would be the fact that the damage caused appears to have been very minor, if it is indeed the case that the wolf in question escaped.

26 LCIE (footnote 12, pp. 2 and 3) and Reinhardt, I. et al. (footnote 12, pp. 18 et seq. and 23).

27 Reinhardt, I. et al. (footnote 12, in particular, pp. 13, 24 and 27) and LCIE (footnote 12, p. 5).

28 See the judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 48).

29 Reinhardt, I. et al. (footnote 12, p. 29 et seq.) and LCIE (footnote 12, pp. 1 and 5).

30 Judgment of 4 October 2018, *Link Logistik N&N* (C-384/17, EU:C:2018:810, paragraph 41).

31 Judgment of 4 October 2018, *Link Logistik N&N* (C-384/17, EU:C:2018:810, paragraphs 42 and 45).

69. According to the information available, moreover, Romanian law does not make it possible to take appropriate action in response to behaviour such as that of the wolf in question in quicker time, or to minimise the associated risks at an early stage. Neither does there appear to be any scientifically based regulations or guidelines in Romania on what such a response should look like.

70. The foregoing circumstances militate against the imposition of a strict penalty. However, it is also true in this regard that the examination of those circumstances and the consideration of all relevant factors is a matter for the national court.

V. Conclusion

71. I therefore propose that the Court's answer to the request for a preliminary ruling should be as follows:

(1) The natural range of the wolf (*Canis lupus*) and, therefore, the territorial application of Article 12 of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in relation to that species, may include human settlements.

(2) The reference to nature (the wild) in Article 12(1)(a) of Directive 92/43 is to be interpreted as meaning that its protection does not just apply in certain places but also extends to all specimens of protected species which live 'in nature' or in the wild and thus have a function in natural ecosystems.