Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 6 February 2025 [1]

**Case C-784/23**

**Voore Mets and Others**

(Request for a preliminary ruling from the Riigikohus (Supreme Court, Estonia))

(Reference for a preliminary ruling – Conservation of wild birds – Directive 2009/147/EC – Article 5 – Prohibitions on the deliberate killing of birds, deliberate destruction of, or damage to, their nests and eggs or removal of their nests and the deliberate disturbance of bird species – Concept of 'deliberateness' – Felling during the breeding season of birds – Article 2 – Level of species which corresponds to ecological, scientific and cultural requirements, taking account of economic and recreational requirements – Article 9 – Derogations from the prohibitions – Prevention of serious damage to forests – Charter of Fundamental Rights – Article 16 – Freedom to conduct a business – Article 17 – Right to property)

## I. Introduction

1. Both the Birds Directive [2] and the Habitats Directive [3] require Member States to prohibit certain types of deliberate harm to protected animal species, such as the killing of specimens. As regards the prohibitions laid down in the Habitats Directive, the Court interprets the concept of 'deliberateness' as including harm which the author of the act has intended or, *at the very least, accepted as a possible result of the act.* [4] That interpretation of the concept of 'deliberateness' also applies, in some Member States, to the prohibitions laid down in the Birds Directive. [5] The Republic of Estonia also subscribes to it in the present proceedings. Nevertheless, the Court has not yet expressly confirmed that interpretation.

1 Original language: German.

2 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 Regulation (EU) 2019/1010 of the European Parliament and of the Council of 5 June 2019 on the alignment of reporting obligations in the field of legislation related to the environment, and amending Regulations (EC) No 166/2006 and (EU) No 995/2010 of the European Parliament and of the Council, Directives 2002/49/EC, 2004/35/EC, 2007/2/EC, 2009/147/EC and 2010/63/EU of the European Parliament and of the Council, Council Regulations (EC) No 338/97 and (EC) No 2173/2005, and Council Directive 86/278/EEC (OJ 2019 L 170, p. 115).

3 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).

4 Judgments of 18 May 2006, *Commission* v *Spain (Otters)* (C-221/04, EU:C:2006:329, paragraph 71); of 10 November 2016, *Commission* v *Greece (Kyparissia)* (C-504/14, EU:C:2016:847, paragraph 159); and of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2021:166, paragraph 51).

5 See Paragraph 44 of the German Bundesnaturschutzgesetz (Federal Law on nature conservation), which transposes the prohibitions without the criterion of deliberateness, the *Avis* of the Conseil d'État (Council of State, France) of 9 December 2022 (463563, FR:CESEC:2022:463563.20221209) on a wind-power project and the order of the Bundesverwaltungsgericht (Federal Administrative Court, Austria) of 15 February 2024 (W104 2227635-1/149Z) on the request for a preliminary ruling in Case C-131/24, *VIRUS*, relating to a road-building project.

2. In my Opinion in *Föreningen Skydda Skogen*, however, I have already examined the interpretation of the concept of 'deliberateness' in the prohibitions in the Birds Directive and warned against transferring, without restriction, the interpretation given in the context of the Habitats Directive to the Birds Directive. [6] The Riigikohus (Supreme Court, Estonia) now asks the Court to clarify this question on the basis of a dispute concerning the permissibility of felling during the breeding season for birds. In the event of direct applicability of the case-law on the Habitats Directive to the Birds Directive, it also asks whether a derogation under Article 9 of the Birds Directive might permit the work to be carried out. If no derogation applies, it wishes to know whether the prohibitions in the Birds Directive thus interpreted are compatible with freedom to conduct a business and the fundamental right to property.

## II. Legal framework

### *A. Bern Convention*

3. In international law, the Bern Convention on the Conservation of European Wildlife and Natural Habitats [7] is of particular importance. The European Economic Community ratified that convention in 1982. [8] In Estonia, the Convention entered into force on 1 December 1992. [9]

4. Article 6 of the Bern Convention contains fundamental prohibitions for the protection of wild fauna 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 Appendix II. The following will in particular be prohibited for these species:

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

(b) the deliberate damage to or destruction of breeding or resting sites;

(c) the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;

(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;

(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this article.'

6 Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, points 79 to 90).

7 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) ('the Bern Convention').

8 Council Decision 82/72/EEC of 3 December 1981 (OJ 1982 L 38, p. 1).

9 https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum= 104.

5. Exceptions are regulated in Article 9(1) of the Convention:

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

– for the protection of flora and fauna,

– to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property,

– in the interests of public health and safety, air safety or other overriding public interests,

– for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding,

– to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.'

## *B. European Union law*

### *1. The Birds Directive*

6. According to recital 6 of the Birds Directive, the stringency of protective measures should be adapted to the particular situation of the various species:

'The measures to be taken must apply to the various factors which may affect the numbers of birds, namely the repercussions of man's activities and in particular the destruction and pollution of their habitats, capture and killing by man and the trade resulting from such practices; the stringency of such measures should be adapted to the particular situation of the various species within the framework of a conservation policy.'

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

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

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

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

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

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

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

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

(a) deliberate killing or capture by any method;

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

(c) …;

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

(e) …'

11. Article 7 of the Birds Directive, by contrast, expressly authorises the hunting of certain bird species:

'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. Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.

2. …

…

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2.

…'

12. Article 9 of the Birds Directive allows derogations from the prohibitions laid down in Article 5:

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

(a) – in the interests of health and public safety,

– in the interests of air safety,

– to prevent serious damage to crops, livestock, forests, fisheries and water,

– for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations referred to in paragraph 1 must specify:

(a) the species which are subject to the derogations;

(b) the means, arrangements or methods authorised for capture or killing;

(c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

(e) the controls which will be carried out.'

*2. The Habitats Directive*

13. Article 12(1) of the Habitats Directive requires the enactment of certain prohibitions:

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

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

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

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

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

2. …’

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

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

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

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

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

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the [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.’

### *C. Estonian law*

15. Estonia transposed the relevant provisions of the Birds Directive by means of the Looduskaitseseadus (Law on nature conservation; ‘the LKS’). Under Paragraph 55(6[1])(1) of the LKS, the deliberate destruction of, or damage to, bird nests and eggs or removal of bird nests are prohibited, and under point 2 of that subparagraph the deliberate disturbance of birds is prohibited, in particular during the breeding and rearing season. Paragraph 55(3)(4) and Paragraph 55(6[1]) of the LKS permit the killing of specimens of species in certain protection categories, including birds, as well as the disturbance of birds and, in exceptional cases, damage to nests and eggs, if necessary to avert damage to important agricultural crops or livestock, fish farms or other important assets.

## III. Facts and request for a preliminary ruling

16. The request for a preliminary ruling arises from actions brought by two undertakings, OÜ Voore Mets and AS Lemeks Põlva, which the Keskkonnaamet (Environmental Board, Estonia) had prohibited from felling trees in certain forest plots during the breeding season for birds.

17. Voore Mets intended to carry out clear-cutting in accordance with forestry declarations, that is to say, felling in which, in principle, all the trees on the forest plot are felled in the course of the year, with the exception of seed trees and reserve trees necessary to ensure diversity of flora and fauna. Lemeks Põlva also intended to carry out mainly clear-cutting, as well as shelterwood cutting in one zone. Shelterwood cutting is carried out to raise the economic value of the forest,

regulate its density and composition, and enable the wood of trees which will fall in the near future to be used. Only some of the trees are felled, in a proportion corresponding to the quantity set by ordinance by the competent minister.

18. In both cases, the Keskkonnaamet (Environmental Board) initially ordered the suspension of felling operations in May 2021 on the ground that scientific evidence shows that there is at least one pair of breeding birds per hectare of each forest, and that to continue the felling operation would entail a real danger of disturbing the nesting and rearing of birds and destroying or damaging nests. Following site inspections, it ordered that felling work be suspended until 15 July 2021 (Lemeks Põlva) and 31 July 2021 (Voore Mets).

19. On the plot where Lemeks Põlva was working, an observation session established that it was certain that the great spotted woodpecker (*Dendrocopos major*, syn. *Picoides major*) and the chaffinch (*Fringillsa coelebs*) were present, it was probable that the great tit (*Parus major*) and the jay (*Garrulus glandarius*) were present, and it was possible that the chiffchaff (*Phylloscopus collybita*), the wood warbler (*Phylloscopus sibilatrix*), the garden warbler (*Sylvia borin*), the wren (*Troglodytes troglodytes*), the dunnock (*Prunella modularis*) and the robin (*Erithacus rubecula*) were present.

20. On the Voore Mets plot, birds were also observed which were highly likely to be nesting in the area, namely wood warbler, wren, blackbird (*Turdus merula*), song thrush (*Turdus philomelos*) and chaffinch. In addition, two probable broods had been found: a nuthatch (*Sitta europaea*) nest had been discovered in a woodpecker's hole, and the activity of a pair of bullfinches (*Pyrrhula pyrrhula*) had been observed. The plot of land concerned contained numerous hollow trees in which birds could be nesting, although they were not observed to be doing so during the site inspection. The felling operation was suspended until 31 July 2021 in order to ensure the protection of late-breeding birds, such as the wood warbler, as well as the willow warbler (*Phylloscopus trochilus*) and the red-breasted flycatcher (*Ficedula parva*), which probably occur there too.

21. Voore Mets then brought an action seeking compensation in the amount of EUR 2 403.52 for the damage resulting from the suspension of felling work, while Lemeks Põlva brought actions seeking a declaration that the orders of the Keskkonnaamet (Environmental Board) were unlawful.

22. At first instance, each of the administrative courts found the second order, which suspended the felling until 15 and 31 July 2021 respectively, to be disproportionate, but the actions were dismissed in their entirety by the courts of second instance.

23. In both cases, an appeal on a point of law is currently pending before the Riigikohus (Supreme Court), which has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Can Article 5(a), (b) and (d) of [the Birds Directive] be interpreted as meaning that the prohibitions laid down in it apply only in so far as is necessary to maintain the population of the species concerned at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2, provided that the killing or disturbance of birds or the destruction of, or damage to, their nests or eggs is not the aim of the action?

(2) Must Article 5(a), (b) and (d) of [the Birds Directive], read in conjunction with Article 2 of that directive, be interpreted as meaning that the actions prohibited under those provisions during the breeding season of birds are deliberate, inter alia, where it can be assumed, on the basis of scientific data and observation of individual birds, that approximately [10] pairs of birds per hectare are nesting in a forest which is to be completely cleared (clear-cutting) without it having been established that individuals of bird species which are in an unfavourable condition are nesting in the felling area?

(3) Must Article 5(a), (b) and (d) of [the Birds Directive], read in conjunction with Article 2 of that directive, be interpreted as meaning that the actions prohibited under those provisions during the breeding season of birds are deliberate, inter alia, where it can be assumed, on the basis of scientific data and observation of individual birds, that approximately [10] pairs of birds per hectare are nesting in a forest where only some of the trees are to be felled (shelterwood cutting), without there being any reason to believe that individuals of bird species which are in an unfavourable condition are nesting in the felling area?

(4) Can the third indent of Article 9(1)(a) of [the Birds Directive], read in conjunction with Article 2 of that directive, be interpreted as meaning that a Member State's legislation is compatible with it which permits derogations from the prohibitions governed by Article 5(a), (b) and (d) of that directive so that clear-cutting can be carried out during the breeding and rearing season of birds in order to prevent serious damage to forest as property?

(5) Can the third indent of Article 9(1)(a) of [the Birds Directive], read in conjunction with Article 2 of that directive, be interpreted as meaning that a Member State's legislation is compatible with it which permits derogations from the prohibitions governed by Article 5(a), (b) and (d) of that directive so that shelterwood cutting can be carried out during the breeding and rearing season of birds in order to prevent serious damage to forest as property?

(6) If [the Birds Directive] does not permit clear-cutting during the breeding and rearing season of birds which is intended to prevent serious damage to forests as property, is such a regime compatible with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union and does it apply even if the felling does not cause harm to bird species which are in an unfavourable condition?

(7) If [the Birds Directive] does not permit shelterwood cutting during the breeding and rearing season of birds which is intended to prevent serious damage to forests as property, is such a regime compatible with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union and does it apply even if the felling does not cause harm to bird species which are in an unfavourable condition?'

24. OÜ Voore Mets, AS Lemeks Põlva, Estonia, the Republic of Finland, the Kingdom of Sweden, the European Commission, the European Parliament and the Council of the European Union made submissions in writing and at the hearing of 11 December 2024.

## IV. Legal assessment

25. Article 5(a), (b) and (d) of the Birds Directive requires Member States to prohibit the killing or disturbance of birds or the destruction of, or damage to, nests and eggs where such actions are 'deliberate'. The Court interprets similar prohibitions in Article 12 of the Habitats Directive as also covering harm which is not the aim of a harmful act but is accepted as a possibility. [10]

26. The intention of the present request for a preliminary ruling is therefore to clarify whether felling in the context of forestry operations is subject to the aforementioned prohibitions, even though its purpose is not to harm birds (see Section A below). If the prohibitions are applicable, the Riigikohus (Supreme Court) asks whether derogations under Article 9 of the Birds Directive may permit felling operations (see Section B) and whether the prohibitions are precluded by fundamental rights (see Section C). First of all, however, an observation must be made on the admissibility of the request for a preliminary ruling.

27. Voore Mets and Lemeks Põlva consider that the request for a preliminary ruling is inadmissible on the ground that the referring court could resolve the dispute on the basis of my Opinion in *Föreningen Skydda Skogen*. [11] However, a request for a preliminary ruling is admissible even if the Court has already ruled on the questions at issue. [12] Accordingly, proposals for a decision in an Opinion cannot, a fortiori, call into question the admissibility of a request for a preliminary ruling.

### *A. Questions 1 to 3 – interpretation of the prohibitions laid down in Article 5 of the Birds Directive*

28. The starting point for the first three questions is the case-law cited above on Article 12 of the Habitats Directive, which specifies that the prohibitions on deliberate harm to protected species also cover harm which the author of the act accepts as a possibility. If that case-law were applied to Article 5 of the Birds Directive, that provision could, in particular during the breeding season, preclude forestry felling operations.

29. As the Riigikohus (Supreme Court) convincingly states, 'there can be no reasonable doubt that clear-cutting which takes place during the breeding season of birds is more or less certain to cause the destruction of nests and eggs, the death of hatchlings and the disturbance of birds if there is reason to believe that birds are nesting in significant numbers on a forest plot. If a nesting tree is felled – unknowingly or knowingly – during clear-cutting, that inevitably leads to the destruction of the nest. Even if the nesting tree is preserved, the nesting birds are endangered not only by the disturbing noise but also by the loss of their previous habitat.' Estonia backs up this assessment on the basis of scientific studies, explaining that even shelterwood cutting can have significant adverse effects on breeding birds, as there is a risk that birds, by reason of disturbance alone, will stay away from their nests for too long or even abandon them.

[10] Judgments of 18 May 2006, *Commission* v *Spain (Otters)* (C-221/04, EU:C:2006:329, paragraph 71); of 10 November 2016, *Commission* v *Greece (Kyparissia)* (C-504/14, EU:C:2016:847, paragraph 159); and of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2021:166, paragraph 51).

[11] Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699).

[12] Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 37).

30. The first question is therefore based on the assumption that, in the case of felling during the breeding season, while harm to birds is not the aim of the activity, the possibility of such harm is accepted and that it must, in principle, be prohibited under Article 5(a), (b) and (d) of the Birds Directive. On the basis of that assumption, the Riigikohus (Supreme Court) asks whether the scope of the prohibitions is so limited that they apply only in so far as they are necessary to maintain the population of the species concerned at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2 of that directive. The second question focuses on this point specifically in relation to clear-cutting and the third to shelterwood cutting, the Riigikohus (Supreme Court) assuming, in both cases, that no individuals of any bird species with an unfavourable conservation status are nesting in the area concerned.

31. The answers to those questions depend on the interpretation of the concept of 'deliberateness', which is associated with the harmful acts to be prohibited under Article 5 of the Birds Directive. There are indications that those prohibitions encompass harm which the author of a harmful act merely accepts as a possibility (see Section 1 below). However, there are also good reasons to reject that interpretation (see Section 2). That is why I have already argued for the limitation of that interpretation addressed by the Riigikohus (Supreme Court) (see Section 3). The limitation of the prohibitions which I propose is set out, at the very least, in the text of the provision prohibiting disturbance (see Section 4). Subsequent intervening developments do not fundamentally call my view into question (see Section 5). Lastly, one more observation must be made on the scientific reasons for the necessary findings (see Section 6).

### *1. Grounds for a broad interpretation of the concept of deliberateness in Article 5 of the Birds Directive*

32. The broad interpretation of the concept of deliberateness advocated by the Commission and – to a more limited extent – by Estonia could be supported by the case-law relating to the Habitats Directive, since the protection system of the Birds Directive must, in principle, be interpreted in a similar manner.[13] As I have already stated, Article 12 of the Habitats Directive lays down similar prohibitions on deliberate harm. With regard to those prohibitions, the Court has already ruled that the condition of deliberateness is satisfied where it is established that the author of the act intended, *or at the very least accepted as a possible result of the act*, the killing of a specimen of a protected animal species[14] or the disturbance of such species or the destruction of their eggs.[15]

33. The Court has already tacitly extended that case-law to the Birds Directive in the judgment concerning the Białowieża Forest. That case concerned the felling and removal of damaged, dead or dying trees, an operation which a management plan for the special protection area concerned identified as a potential danger to certain species of birds which are particularly protected there.[16] The Court therefore classed that measure as deliberate destruction of, or damage to,

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

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

[15] Judgment of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2021:166, paragraph 51).

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

their nests and eggs or removal of their nests (Article 5(b) of the Birds Directive) and as deliberate disturbance of these birds particularly during the period of breeding and rearing (Article 5(d)),[17] although the harm caused to them was not the purpose of the measures.

34. According to the Commission, the broad interpretation of the concept of deliberateness can also be supported by the Bern Convention, which the European Union implements by means of the Birds Directive[18] and which must therefore be taken into account in the interpretation of that directive.[19] Article 6 of that convention lays down similar prohibitions to those in Article 5 of the Birds Directive and Article 12 of the Habitats Directive, which likewise relate to deliberate[20] harm. The Standing Committee to the Bern Convention decided that deliberate damage or destruction of breeding or resting sites is to be interpreted in such a way that it also encompasses actions which are not carried out with the aim of damaging or destroying breeding or resting sites but simply in the knowledge that they will probably lead to such damage or destruction.[21]

35. Consequently, the prohibitions laid down in Article 5 of the Birds Directive apply in various Member States to harm inflicted on birds which is not the purpose of the activity in question but which is accepted as a possible result of that activity.[22]

*2. Grounds for a stricter interpretation of the concept of deliberateness within the meaning of Article 5 of the Birds Directive*

36. Nevertheless, in my Opinion in *Föreningen Skydda Skogen*,[23] I warned against the unrestricted transfer of the broad interpretation of the concept of deliberateness in Article 12 of the Habitats Directive to Article 5 of the Birds Directive. The Court did not address that point in the judgment preceded by my Opinion, but dealt exclusively in that regard with Article 12 of the Habitats Directive.[24] The present request for a preliminary ruling, however, invokes that Opinion, and the two undertakings concerned in the main proceedings propose that it be followed.

37. My view is essentially based on the fact that interpreting the concept of deliberateness broadly when applying Article 5 of the Birds Directive would have implications which go far beyond those resulting from the application of Article 12 of the Habitats Directive (see Section (a) below). Moreover, the prohibition, thus understood, would not be necessary in order to achieve the objectives of the Birds Directive (see Section (b)). It would therefore lead to structural inconsistencies in the system of the Birds Directive (see Section (c)).

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

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

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

20 The two authentic language versions use the terms 'intentionelle' (French) and 'deliberate' (English). The non-binding German translation, on the other hand, uses both the term 'Absicht' (deliberateness, intent – Article 6(a)) and – incorrectly, in my view – the term 'mutwillig' (deliberately, wilfully – Article 6(b), (c) and (d)).

21 Point 3(b) of Resolution No 1 (1989) of 9 June 1989. See, in that regard, my Opinion in *Commission* v *Spain (Otters)* (C-221/04, EU:C:2005:777, point 39).

22 See references in footnote 5.

23 Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, points 79 to 90).

24 Judgment of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2021:166, paragraph 48).

*(a) Consequences of broad interpretation of the concept of deliberateness*

38. Species protection under the Habitats Directive is limited to a few, usually [25] very rare, species. As these species are rare, it is necessary to provide strict protection for each individual specimen, as is clearly expressed in Article 12 of the Habitats Directive by the concept of a *system of strict protection*. [26] At the same time, the rarity of these species means that conflicts with them are not very frequent. [27]

39. On the other hand, the prohibitions laid down in Article 5 of the Birds Directive apply to *all* European birds, including common species that are encountered almost everywhere on a regular basis. It could hardly be maintained that the possibility of harm to those species is not accepted by modern societies. On the contrary, it is well known that considerable risks to such species are posed by the widest possible range of human activities, such as building construction [28] and road traffic. [29] [30] Voore Mets also emphasises the losses caused by domestic cats and agriculture.

40. If the prohibitions laid down in Article 5 of the Birds Directive were to apply without restriction in the event of mere acceptance of the possibility of such harm, that would therefore give rise to considerable conflicts with fundamental rights, which the Riigikohus (Supreme Court) addresses in questions 6 and 7. [31]

*(b) Need for the prohibition regime in order to achieve the objectives of the Birds Directive*

41. The legislature, therefore, has already made it clear, when adopting the Birds Directive, that the purpose of that directive is not to protect each individual bird unconditionally. Rather, under Article 2 of that directive, the population of bird species is to be maintained at a level, or adapted to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements. [32] It is true that Member States have a margin of discretion in that regard, subject to specific rules. [33] However, as recitals 3, 5, 7, 8 and, in particular, recital 10 of that directive state, that is to be understood as maintenance of populations

[25] Möckel, S., '35 Jahre Europäische Vogelschutzrichtlinie', *Natur und Recht*, 2014, p. 381 (387), rightly refers, however, to the widespread population of bats, all species of which are subject to strict protection under the Habitats Directive.

[26] See my Opinion in *Commission* v *Spain (Otters)* (C-221/04, EU:C:2005:777, point 50).

[27] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 80).

[28] See, for example, Machtans, C.S., Wedeles, C.H.R. and Bayne, E.M., 'A first estimate for Canada of the number of birds killed by colliding with building windows', *Avian Conservation and Ecology* 8.2 (2013), p. 5.

[29] See, for example, Slater, F.M., 'An assessment of wildlife road casualties – The potential discrepancy between numbers counted and numbers killed', *Web Ecology* 3.1 (2002), p. 33.

[30] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 81).

[31] In that regard, see point 92 et seq. below.

[32] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 82).

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

of all wild bird species at a 'satisfactory level',[34][35] Notwithstanding cultural, economic and recreational requirements, the level of a species can only be 'satisfactory' if it ensures that the populations continue to inhabit their natural area of distribution.[36]

42. However, the satisfactory conservation of common species does not normally require prohibitions which take effect in cases where the possibility of harm is accepted. Even if particular species depend on such prohibitions, the same does not apply to common species, which are so abundant precisely because human activities do not threaten, or at least have not hitherto threatened, their population.[37]

43. In so far as the populations of certain species that were previously more abundant are nevertheless declining, it will often be more important to conserve their habitats and manage them appropriately. This is because such declines usually come about after changes in the human use of those habitats. The Birds Directive already embodies this idea, since Article 3 requires Member States to protect the habitats of all bird species.[38] Article 4(7) and Article 5(5) of the Nature Restoration Law[39] now flesh out that obligation.

44. By contrast, the prohibitions in Article 5 of the Birds Directive are primarily intended to protect individual specimens and serve at most indirectly to protect habitats. Allowing them to take effect in cases where merely the possibility of the forms of detriment listed in that provision is accepted would often be less suitable for preserving those populations and would therefore not be the least restrictive measure either.[40]

45. Consequently, unlike Article 12 of the Habitats Directive, Article 5 of the Birds Directive does not require a system of strict protection, but a *general system of protection* for all European birds. According to recital 6 of the Birds Directive, the stringency of measures in that system should be adapted to the particular situation of the various bird species.

### *(c) Structural inconsistencies in the system of the Birds Directive*

46. That divergence is accompanied by another conceptual difference between the systems of protection under Article 5 of the Birds Directive and Article 12 of the Habitats Directive. Since Article 5 applies to all European bird species, there is no possibility of totally excluding particular species from that system of protection. Article 19 of the Habitats Directive, by contrast, permits amendment of its Annex IV, which lists the species protected under Article 12.

47. An unrestricted broad interpretation of the concept of deliberateness and of the accompanying strict protection of European birds, moreover, would lead to inconsistency within the Birds Directive. That is because Article 7, by way of derogation from the provisions

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

[35] See my Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 97).

[36] See my Opinion in *Eesti Suurkisjad* (C-629/23, EU:C:2024:1029, points 70 to 83).

[37] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 83).

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

[39] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 (OJ L 2024/1991).

[40] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 84).

prohibiting the killing and capture of birds, permits the hunting of particular species of birds listed in Annex II which are otherwise subject to the prohibitions laid down in Article 5. It is not clear, however, why the deliberate harm to those species caused by hunting, in other words by what is essentially a leisure activity of very little economic significance, should be given preferential treatment over all other human activities in which harm to those species is not the aim but only accepted as a possible result of those activities. The validity of that point is reinforced by the fact that some of those other activities are of essential importance to our society. One need only think of the construction of roads, buildings or wind turbines.

48. Even the derogations in Article 9 of the Birds Directive could only remedy the broad interpretation, without restriction, of Article 5 to a very limited extent by striking a balance between competing interests. While Article 16(1)(c) of the Habitats Directive permits derogations for numerous reasons of overriding public interest, the derogations in Article 9(1) of the Birds Directive are defined far more specifically.

49. As questions 4 and 5 from the Riigikohus (Supreme Court) show, it is not entirely impossible to subsume at least the economic use of forests under the third indent of Article 9(1)(a) of the Birds Directive, which permits measures to prevent serious damage to forests. Such an interpretation, however, would be difficult to reconcile with settled case-law, under which Article 9, as a derogating provision, must, in principle, be interpreted strictly. [41]

50. In the meantime, moreover, the EU legislature has decided that renewable energy projects serve the interests of public health and safety within the meaning of Article 9(1)(a) of the Birds Directive. [42] Such projects are plainly of great public interest but can scarcely be identified with the aims of public health and public safety, even if those terms are liberally interpreted. That legislative intervention therefore emphasises that the derogations in Article 9 are formulated too restrictively to give sufficient weight to overriding public interests.

### *3. Interpretation of Article 5 of the Birds Directive in conformity with fundamental rights*

51. For all the reasons set out above, the Court should not transfer, without restriction, the interpretation of the concept of deliberateness given in the context of Article 12(1) of the Habitats Directive to the concept of deliberateness in Article 5 of the Birds Directive. [43]

52. In view of the findings in the judgment concerning the Białowieża Forest, [44] however, it is impossible to extend the prohibitions laid down in Article 5 of the Birds Directive exclusively to harm caused to birds that is the aim of the activity in question. On the contrary, the Court showed in that judgment that there may be cases where the possibility of harm is merely accepted. That application is appropriate where rare or endangered species are concerned. As far

[41] See, in that regard, points 77 et seq. below.

[42] Article 3 of Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy (OJ 2022 L 335, p. 36), as amended by Council Regulation (EU) 2024/223 of 22 December 2023 (OJ L 2024/223) and Article 16f of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82), as amended by Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (OJ L 2023/2413).

[43] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 87).

[44] See point 33 above.

as those species are concerned, the scope of the restrictions remains limited in practice, simply because they are very rarely applied. At the same time, they can contribute significantly to the conservation of those species. [45]

53. Accordingly, a fair balance, which respects the fundamental rights of the persons concerned, between the relevant activities and the objectives of the directive involves including within the scope of those prohibitions harm which is accepted as a possible result of those activities but only in so far as such inclusion is necessary in the light of Article 2 of the Birds Directive. Admittedly, that interpretation makes it more complicated to apply the prohibitions, since it requires consideration of the conservation status of bird species. Be that as it may, it ultimately corresponds to the broad application of the prohibitions in the aforementioned judgment on the Białowieża Forest, as that case concerned very rare bird species in an area designated for their special protection. [46]

54. That interpretation also eliminates the aforementioned inconsistency with the provisions relating to hunting. [47] Under Article 7(1) of the Birds Directive, hunting is authorised only by reason of the population level of the species concerned, their geographical distribution and their reproductive rate. Furthermore, Article 7(4) requires Member States to ensure that hunting practice is compatible with Article 2. It is not, therefore, a matter of rare or endangered species which require protection through a broad interpretation of the prohibitions on deliberate harm.

55. The prohibitions laid down in Article 5 of the Birds Directive therefore cover harm which the author of an act accepts as a possibility but only if it relates to especially rare or endangered bird species. That is because, in that case, application of the prohibitions is necessary to maintain the population of those species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, within the meaning of Article 2, while taking account of economic and recreational requirements. [48]

### *4. The prohibition on disturbance set out in Article 5(d) of the Birds Directive*

56. The interpretation of the concept of deliberate harm which has been developed above would, first and foremost, prevent disproportionate application of the provisions prohibiting deliberate killing and deliberate destruction of, or damage to, nests and eggs set out in Article 5(a) and (b) of the Birds Directive.

57. On the other hand, as regards the prohibition on deliberate disturbance laid down in Article 5(d) of the Birds Directive, the wording already provides expressly for such a restriction. Under that provision, the prohibition on deliberate disturbance of bird species, particularly during the period of breeding and rearing, applies only in so far as such disturbance would be significant having regard to the objectives of that directive. Disturbance must therefore be prohibited only if it has a significant effect on the objective of maintaining populations of bird species at a satisfactory level or bringing them to that level and hence particularly if it harms rare or endangered birds during breeding or rearing. [49]

[45] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 88).

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

[47] See point 47 above.

[48] My Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, point 90).

[49] For further details, see my Opinion in Joined Cases *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2020:699, points 96 to 100).

58. An *argumentum e contrario* could be drawn from that provision in the absence of an express limitation to that effect in the other prohibitions. In a similar way, the Court has already declined to apply the prohibitions in their entirety, that is to say including the prohibitions on harm that is the aim of activities, only to bird species which are endangered. [50]

59. The interpretation of Article 5 of the Birds Directive proposed here, however, is not intended to exclude particular species from its scope or to narrow the scope of the prohibitions for all species. On the contrary, prohibitions on harm that is the aim of the activities should benefit all species without restriction.

60. In fact, my proposed interpretation recalls the aims of the Birds Directive which are contained in the provision prohibiting disturbance. It is intended to prevent any limitation of fundamental rights which is not necessary for the achievement of those objectives. Such limitation is to be feared if the prohibitions are extended without restriction to cover harm to birds which is not the aim but merely accepted as a possible result of an activity in cases where the application of those prohibitions is not necessary for the conservation of the species concerned.

### *5. Recent developments*

61. Since the delivery of my Opinion in *Föreningen Skydda Skogen*, there have been further developments, although they do not necessitate a fundamental reassessment of the legal situation.

62. A subsequent judgment in infringement proceedings against Poland could be understood as transferring the concept of deliberateness in Article 12 of the Habitats Directive to Article 5 of the Birds Directive. In that judgment, the Court reiterates the rulings regarding interpretation of the concept of deliberateness in Article 12 and goes on to find that both provisions have been infringed. [51] However, the sole implication of that finding might also be that the broad national derogation at issue from the prohibitions to be applied on the basis of the two provisions, regardless of whether the activity matches the definition of deliberate harm, constitutes an infringement. The national derogation, in fact, applied to any 'forest management implemented in accordance with the requirements of good forest management practice' [52] and so potentially permitted even harm to birds that was the aim of an activity.

63. More significantly, by adopting rules to facilitate the authorisation of projects for the use of renewable energy sources, such as wind power, the EU legislature appears to assume that Article 12 of the Habitats Directive and Article 5 of the Birds Directive are aligned, and thus that the concept of deliberateness has been extended to the latter. I have already referred to the presumption that those projects serve public health and safety within the meaning of Article 9(1)(a) of the Birds Directive. [53] That is accompanied by another presumption, namely that such projects are of overriding public interest within the meaning of Article 16 of the Habitats Directive, and by other means of facilitating the justification of measures which infringe prohibitions for the protection of species. In addition, such projects are, under certain conditions, exempt from the species protection requirements laid down in Article 5 of the Birds

[50] Judgment of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2021:166, paragraphs 36 and 44).

[51] Judgment of 2 March 2023, *Commission* v *Poland (Forest management and good practice)* (C-432/21, EU:C:2023:139, paragraphs 77 to 79).

[52] See the reproduction of Article 14b(3) of the Polish Law on forests in the judgment of 2 March 2023, *Commission* v *Poland (Forest management and good practice)* (C-432/21, EU:C:2023:139, paragraph 15).

[53] See point 50 above.

Directive.[54] Recital 37 of Directive 2023/2413 explains that exemption by stating that the occasional killing or disturbance of birds resulting from the construction and operation of renewable energy plants should not be considered to be deliberate if appropriate mitigation measures are taken and monitored.

64. Such legally complex rules would not be necessary, however, if the prohibitions laid down in Article 5 of the Birds Directive applied only to acts aiming to harm birds. Renewable energy projects may endanger birds, but that is not their purpose; at most, such endangerment is accepted as a possible consequence.

65. However, the importance of those provisions must not be overstated either. The EU legislature did not expressly rule there that the criterion of deliberateness within the meaning of Article 5 of the Birds Directive is already fulfilled if the prohibited harm is merely accepted as a possible result of an activity. On the contrary, the new rules are primarily a response to the *fear* that, on the basis of a broad interpretation of the concept of deliberateness, the aim of protecting species could unduly hamper the development of renewable energy.

66. There is still scope, moreover, for the application of the newly created derogations if, as I have proposed, the application of the broad concept of deliberateness with regard to the protection of birds depends on the conservation status of the species, since, at least in the case of rare or endangered species, the prohibitions apply – subject to the special rules for renewable energy – even if harm is merely accepted as a possible result of an activity.

67. The intervening developments thus do not preclude an interpretation of the concept of deliberateness within the meaning of Article 5 of the Birds Directive whereby harm which the author of the act accepts as a possible result of the act is prohibited only if it relates to particularly rare or endangered bird species.

### *6. Scientific foundation for the necessary findings*

68. The second and third questions relate, inter alia, to the means of establishing that a given measure poses a threat to birds. It must be clarified whether, for the applicability of the prohibitions laid down in Article 5 of the Birds Directive to felling operations, it can be assumed, on the basis of scientific data and observation of individual birds, that approximately 10 pairs of birds per hectare are nesting in the forest in question without there being any reason to suspect that individuals of bird species which are in an unfavourable condition are nesting in the felling area.

69. According to the interpretation of Article 5 of the Birds Directive proposed here and the information provided on the bird populations concerned, that element of the questions seems unlikely to be essential to the resolution of the cases in the main proceedings.

70. It should therefore be noted, only for the sake of completeness, that the findings required to determine whether the prohibitions preclude an activity must be reached by the competent authorities on the basis of the best available scientific knowledge.[55]

[54] Article 6 of Regulation (EU) 2022/2577 (cited in footnote 42) and Article 15c(1), Article 15e(2) and (4) and Article 16a(5) of Directive (EU) 2018/2001, as amended by Directive (EU) 2023/2413 (cited in footnote 42).

[55] See judgments of 17 April 2018, *Commission* v *Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 113); of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux* (C-900/19, EU:C:2021:211, paragraph 30); and of 29 July 2024, *ASCEL* (C-436/22, EU:C:2024:656, paragraphs 65 and 74).

71. That means, in particular, that the competent authorities must determine, on the basis of that information, the 'satisfactory level' at which the population of the species concerned [56] must be maintained. However, they must also take account of scientific studies which provide evidence as to whether, in the context of certain activities, a particular species requires protection in the event of mere acceptance of the possibility of harm.

72. Since, under Article 4(1) of the Birds Directive, Annex I to that directive is to list particularly rare or highly endangered species, the fact that such a species is exposed to the accepted risk of harm is an indication of the need to apply the prohibitions laid down in Article 5. Such an indication, however, may be refuted on the basis of the best available scientific information. Accordingly, it cannot be discounted from the outset that the red-breasted flycatcher (*Ficedula parva*) mentioned in connection with the injunction against Voore Mets may not require special protection, at least in Estonia, even though that species is listed in Annex I, as Voore Mets argued at the hearing by invoking the criteria of the International Union for Conservation of Nature (IUCN).

73. The aforementioned obligations are incumbent on the Member States. Private parties, by contrast, cannot be expected to base their behaviour wholly and entirely on the best scientific information relating to the protection of birds. Rather, they are entitled to assume that they may engage in activities which are essentially lawful, provided that they exercise due care when doing so. Private parties must, however, heed warnings and obey instructions issued by the competent authorities on the basis of a determination of dangers which are incompatible with Article 5 of the Birds Directive. [57]

74. The system in use, according to Estonia, for overseeing felling operations during the breeding season appears to match that approach. After it had become apparent that bird populations in that Member State were declining, especially in old forest stands, the Keskkonnaamet (Environmental Board), as a first step, assessed the risks to birds on the basis of habitat types and the age of each stand and, on that basis, divided all forest areas into three risk categories. It published that information online to enable forest owners to factor it into their planning. In a second step, after receiving notification of felling operations, the Keskkonnaamet (Environmental Board) inspects the situation on the ground and prohibits any operations which entail particular risks for birds. At the hearing, Estonia stated that, following 2 500 such inspection visits, felling operations were prohibited in 32 cases in 2023.

### *7. Interim conclusion*

75. To sum up, it must therefore be found that the prohibitions laid down in Article 5 of the Birds Directive do not cover harm merely accepted by the author of an act as a possible result of the act unless it relates to bird species which are particularly rare or, in the light of the best available scientific knowledge, particularly endangered. That is because, in those cases, an application of the prohibitions is necessary to maintain the population of those species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2.

[56] See point 41 above.

[57] See my Opinion in *Commission* v *Spain (Otters)* (C-221/04, EU:C:2005:777, point 52).

76. For the sake of completeness, it should be added that, under Article 193 TFEU and Article 14 of the Birds Directive, Member States are, of course, free to adopt stricter measures to protect birds. [58]

### *B. Questions 4 and 5 – property rights as justification for derogations under Article 9 of the Birds Directive*

77. With questions 4 and 5, the Riigikohus (Supreme Court) seeks to ascertain whether the third indent of Article 9(1)(a) of the Birds Directive, read in conjunction with Article 2 of that directive, permits derogations from the prohibitions laid down in Article 5 for clear-cutting or shelterwood cutting in order to prevent serious damage to forest as property.

78. It is clear that those questions are being raised in the event that the felling envisaged in the cases in the main proceedings amounts to deliberate killing of birds as prohibited by Article 5(a) of the Birds Directive, to deliberate destruction of, or damage to, nests as prohibited by Article 5(b) and to deliberate disturbance of birds as prohibited by Article 5(d). If the Court were to follow the interpretation of Article 5 which I propose here, however, it seems unlikely that those prohibitions would apply on the basis of the available information on the bird species concerned, which would render it unnecessary to answer those questions.

79. On the other hand, the Commission's argument that the questions are hypothetical if only because Voore Mets and Lemeks Põlva have not requested a derogation from the prohibitions laid down in Article 5 of the Birds Directive is unconvincing. It depends, in fact, on national law whether such a request was necessary or whether the public authority had to examine *proprio motu* the possibility of derogation.

80. In any case, it makes sense to analyse the applicability of the derogation, for that will reveal that it is scarcely capable of preventing the unreasonable consequences of a broad interpretation of the concept of deliberateness.

81. The Court has already ruled that, although Article 9 of the Birds Directive authorises wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations. [59] It has also ruled that the provision in question, as an exceptional arrangement, must be interpreted strictly and impose on the authority taking the decision the burden of proving that the requisite conditions are present for each derogation. [60]

82. The additional requirements of Article 9(2) highlighted by Estonia underline the exceptional nature of a derogation, because, under that provision, the derogation must, in particular, specify the bird species concerned and the circumstances in which a derogation may be granted. It is also necessary to specify the checks which will be carried out and the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom.

[58] See judgment of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (C-2/10, EU:C:2011:502, paragraphs 49 and 50).

[59] Judgments of 8 July 1987, *Commission* v *Belgium* (247/85, EU:C:1987:339, paragraph 7); of 7 March 1996, *Associazione Italiana per il WWF and Others* (C-118/94, EU:C:1996:86, paragraph 21); and of 11 November 2010, *Commission* v *Italy* (C-164/09, not published, EU:C:2010:672, paragraph 28).

[60] Judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 34), and of 23 April 2020, *Commission* v *Finland (Spring hunting of male common eiders)* (C-217/19, EU:C:2020:291, paragraph 66).

83. Assuming that the requisite legal conditions for a derogation in favour of felling are satisfied in Estonia, the third indent of Article 9(1)(a) of the Birds Directive allows that Member State to derogate from Article 5 in order to prevent serious damage to crops, livestock, forests, fisheries and water where there is no other satisfactory solution.

84. The protection of forests relates not only to forests as a habitat and their ecological functions but also to their value as an economic asset. That is evident from the third indent of Article 9(1)(a) of the Birds Directive, which also authorises measures to protect crops, livestock and fisheries. Those assets are not primarily ecological in nature but are characterised by their economic uses.

85. As the Riigikohus (Supreme Court) rightly points out, the economic function of forest protection is even more clearly evident in the Bern Convention. The second indent of Article 9(1)(a) of the Convention permits exceptions from the prohibitions to prevent serious damage to crops, livestock, forests, fisheries, water *and other forms of property*. The protection of forests, then, is cited in the Convention only as an example of the protection of property. As an element of property, forests are primarily assigned the function of an economic asset.

86. By contrast, protecting forests as a habitat is the primary protective purpose of the fourth indent of Article 9(1)(a) of the Birds Directive, which authorises derogations for the protection of flora and fauna.

87. However, the third indent of Article 9(1)(a) of the Birds Directive is not intended directly to permit or to promote the economic use of the listed protected assets, including forests. What it actually permits are measures to prevent serious damage, which means that the damage must reach a particular level.[61] Lemeks Põlva cites, by way of example, bark beetle infestation.

88. On the other hand, it is apparent from the request for a preliminary ruling that the interest of the undertakings concerned in felling during the breeding season lies mainly in being able to use their resources efficiently during that period too. The consequences of a temporal restriction on the economic exploitation of a forest or on non-urgent maintenance measures, such as shelterwood cutting, can hardly be regarded, on the basis of a strict interpretation of that provision, as serious damage to forests.

89. Even from the point of view of magnitude, the damages of EUR 2 403.52 claimed by Voore Mets are well within the bounds of reasonableness. But although that interest is therefore legitimate, it cannot automatically prevail over the protection of birds, for in that case almost any restriction on the economic exploitation of the protected property referred to in the third indent of Article 9(1)(a) of the Birds Directive would constitute sufficient damage to benefit from the derogation. The exception would thus become the rule.

90. Furthermore, a derogation under Article 9 of the Birds Directive is allowed only where there is no other satisfactory solution. The felling operations at issue, however, could also be conducted outside the breeding season. Felling in winter, indeed, is said to be particularly beneficial. The Bayerische Staatsforsten (Bavarian State Forest Enterprise) in the Free State of Bavaria (Germany) cites as reasons for that assessment soil protection, lower water content in timber, a lower risk of insect or fungal infestation and, in deciduous forest, occupational safety, as sight of the crown is not obscured by foliage.[62] And if timber harvesting is organised in such a way that

[61] Judgment of 8 July 1987, *Commission* v *Belgium*, 247/85, EU:C:1987:339, paragraph 56.

[62] Bayerische Staatsforsten, 'Je kälter und trockener, desto besser', available at https://www.baysf.de/de/medienraum/themenspecials/forstwirtschaft-im-winterwald.html.

sufficient stock is harvested in winter to satisfy demand in the following year, it is also unnecessary, contrary to what the two undertakings maintain, to import timber during the summer.

91. However, a far more liberal interpretation of the conditions for a derogation would be necessary in order to avoid infringements of fundamental rights if the prohibitions laid down in Article 5 of the Birds Directive also applied in the event of acceptance of the possibility of harm to species which do not require such protection, for the legitimate interest in the protection of those birds by those prohibitions is minimal, whereas the cases in the main proceedings show that the restrictions are at least palpable for the undertakings concerned.

### *C. Questions 6 and 7 – compatibility of the prohibition regime with fundamental rights*

92. In the event that, even if Article 9 of the Birds Directive is taken into account, Article 5 of that directive does not permit clear-cutting or shelterwood cutting during the bird breeding and rearing season, even though the felling does not cause harm to bird species which are in an unfavourable condition, the Riigikohus (Supreme Court) seeks to ascertain whether such legislation is consistent with Articles 16 and 17 of the Charter of Fundamental Rights. Those fundamental rights protect freedom to conduct a business and to own, use and dispose of property.

93. It is clear from the wording of those questions that there is no need to answer those questions if the Court adopts the interpretation of Article 5 of the Birds Directive which is proposed in this Opinion [63] or, failing that, at least liberally interprets the third indent of Article 9(1)(a) of the Birds Directive. [64]

94. If the Court, however, were to find that the prohibitions laid down in Article 5 of the Birds Directive applied to all European bird species where harm was merely accepted as a possible result of an activity and that, at the same time, the derogation for which the third indent of Article 9(1)(a) provides did not permit felling during the breeding season for birds, the question would indeed arise whether that regime is compatible with the aforementioned fundamental rights. It would thus be a relevant question, contrary to the views of the Council and the Commission.

95. This is because the prohibition of felling during the breeding season for birds restricts both freedom to conduct a business and the use of the forest concerned as property. Voore Mets and Lemeks Põlva even submit that, because of those restrictions, they had to dismiss some of their employees temporarily.

96. It is true that Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of the rights enshrined by the Charter, as long as those limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the

[63] See point 75 above.

[64] See point 91 above.

European Union or the need to protect the rights and freedoms of others. Accordingly, those restrictions must not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. [65]

97. Protection of the environment, [66] and hence also protection of birds, [67] is, in this sense, an objective of general interest, all the more so since wild birds form part of the common heritage of the Member States. [68]

98. It is doubtful, however, whether the protection of birds can justify the restriction of the aforementioned fundamental rights by a broad interpretation of the prohibitions laid down in Article 5 of the Birds Directive and by a strict interpretation of the derogations governed by Article 9.

99. That interpretation, it is true, would serve to promote the protection of birds. Moreover, there are no indications of less restrictive measures which would achieve a similar level of protection.

100. However, the level of protection achieved would be higher than that envisaged by the EU legislature through the Birds Directive since, under Article 2 of the Birds Directive, Member States are to maintain the populations of bird species at a level which corresponds to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

101. It is therefore unnecessary to restrict fundamental rights by applying the prohibitions laid down in Article 5 of the Birds Directive to species which are at that level even without those prohibitions. That restriction, therefore, cannot be justified by the objective of the Birds Directive. On the other hand, it would be avoided by the interpretation in conformity with fundamental rights which I propose.

## V. Conclusion

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

The prohibitions laid down in Article 5 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds cover harm which the author of a harmful act accepts as a possibility only if that harm relates to bird species which are particularly rare or, in the light of the best available scientific knowledge, are particularly endangered. In those cases, the application of the prohibitions is necessary in order to maintain the species concerned at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt it to that level, within the meaning of Article 2 of that directive.

[65] Judgments of 13 December 1979, *Hauer* (44/79, EU:C:1979:290, paragraph 23); of 14 December 2004, *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 72); and of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 70).

[66] Judgments of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 114); of 13 February 2014, *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 70); and of 27 January 2022, *Sātiņi-S* (C-234/20, EU:C:2022:56, paragraphs 64 and 65).

[67] Judgment of 8 September 2022, *Ministerstvo životního prostředí (Hyacinth macaws)* (C-659/20, EU:C:2022:642, paragraph 64).

[68] Recital 7 of the Birds Directive as well as judgments of 8 July 1987, *Commission* v *Belgium* (247/85, EU:C:1987:339, paragraph 9); of 7 March 1996, *Associazione Italiana per il WWF and Others* (C-118/94, EU:C:1996:86, paragraph 20); of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 24); and of 2 March 2023, *Commission* v *Poland (Forest management and good practice)* (C-432/21, EU:C:2023:139, paragraph 73).