



## Reports of Cases

### JUDGMENT OF THE COURT (Second Chamber)

4 March 2021\*

(Reference for a preliminary ruling – Environment – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Article 12(1) – Directive 2009/147/EC – Conservation of wild birds – Article 5 – Forestry – Prohibitions intended to ensure the conservation of protected species – Plan for final felling of trees – Site hosting protected species)

In Joined Cases C-473/19 and C-474/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Vänersborgs tingsrätt, mark- och miljödomstolen (Vänersborg District Court, Land and Environment Court, Sweden), made by decisions of 12 and 13 June 2019, received at the Court on 18 June 2019, in the proceedings

**Föreningen Skydda Skogen** (C-473/19)

**Naturskyddsföreningen i Härryda,**

**Göteborgs Ornitologiska Förening** (C-474/19)

v

**Länsstyrelsen i Västra Götalands län,**

**B.A.B.** (C-473/19),

**U.T.B.** (C-474/19),

THE COURT (Second Chamber),

composed of A. Arabadjieva (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Second Chamber, A. Kumin, T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Föreningen Skydda Skogen, by E. Götmark,
- the Naturskyddsföreningen i Härryda, by J. Hort,

\* Language of the cases: Swedish.

- the Czech Government, by M. Smolek, J. Vláčil and L. Dvořáková, acting as Agents,
  - the European Commission, by K. Simonsson, C. Hermes and E. Ljung Rasmussen, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 10 September 2020,  
gives the following

### **Judgment**

- <sup>1</sup> These requests for a preliminary ruling concern the interpretation of Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; ‘the Habitats Directive’) and of 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 (OJ 2010 L 20, p. 7; ‘the Birds Directive’).
- <sup>2</sup> The requests have been made in the course of proceedings between, on the one hand, the Föreningen Skydda Skogen (Protect the Forest Association), the Naturskyddsföreningen i Härryda (Association for the protection of nature in Härryda) and the Göteborgs Ornitologiska Förening (Gothenburg Ornithological Association), and, on the other hand, the Länsstyrelsen i Västra Götalands län (Regional Administrative Board of Västra Götaland, Sweden), B.A.B. and U.T.B. concerning a decision by the Regional Administrative Board of Västra Götaland to take no action against a notification of tree felling relating to an area of forest in the municipality of Härryda (Sweden).

### **Legal context**

#### ***EU law***

##### ***The Habitats Directive***

- <sup>3</sup> The third, fourth and sixth recitals of the Habitats Directive are worded as follows:

‘... the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; ... the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;

... in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; ... given that the threatened habitats and species form part of the Community’s natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

...

... in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable’.

4 Under Article 1(i) and (m) of that directive:

‘For the purpose of this Directive:

...

(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;

...

(m) *specimen* means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species’.

5 Article 2 of that directive provides:

1. 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.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

6 Article 12(1) of that directive reads as follows:

‘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.’

7 Article 16(1) of the Habitats Directive is worded as follows:

‘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.’

8 Annex IV(a) to the Habitats Directive mentions, inter alia, *Rana arvalis*, commonly known as the moor frog, as an animal species of Community interest which must be strictly protected.

### *The Birds Directive*

9 Recitals 3 to 5 of the Birds Directive are worded as follows:

- ‘(3) A large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, very rapidly in some cases. This decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby.
- (4) The species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species. Such species constitute a common heritage and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities.
- (5) The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community’s objectives regarding the improvement of living conditions and sustainable development.’

10 Article 1 of that directive provides:

‘1. 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.

2. It shall apply to birds, their eggs, nests and habitats.’

11 Article 2 of that directive states:

‘Member States shall take all 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.’

12 Article 3 of that directive provides:

‘1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

- (a) creation of protected areas;
- (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
- (c) re-establishment of destroyed biotopes;
- (d) creation of biotopes.’

13 According to Article 4 of the Birds Directive:

‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

...

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.

...

4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.’

14 Article 5 of that directive provides:

‘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) taking their eggs in the wild and keeping these eggs even if empty;

- (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;

...'

- 15 Article 9(1) of that directive provides:

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

- (a) -- in the interests of public health and 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.'

- 16 Article 14 of the Birds Directive is worded as follows:

'Member States may introduce stricter protective measures than those provided for under this Directive.'

### ***Swedish law***

- 17 The first subparagraph of Paragraph 4 of the Artskyddsförordningen (2007:845) (Species Protection Ordinance (2007:845); 'the ASF'), which was adopted on the basis of Paragraph 1 of Chapter 8 of the Miljöbalken, lag (1998:808) (Law establishing an Environmental Code (1998:808)) in order to transpose into Swedish law Article 5 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), the terms of which were reproduced in Article 5 of the Birds Directive, which repealed and replaced Directive 79/409, and Article 12 of the Habitats Directive, provides:

'The following are prohibited with regard to the wild birds as well as the wild animal species marked "N" or "n" in Annex 1 to this Ordinance:

1. deliberate capturing or killing of animals;
2. deliberate disturbance of animals, particularly during the period of breeding, rearing, hibernation and migration;
3. deliberate destruction or taking of eggs in the wild, and
4. deterioration or destruction of breeding sites or resting places of animals.

Those prohibitions shall apply to all stages of life of the animals.

...

- 18 Points 1 to 3 of the first subparagraph of Paragraph 4 of the ASF thus transpose the deliberate acts prohibited by Article 5(a) to (d) of the Birds Directive and by Article 12(1)(a) to (c) of the Habitats Directive. As for point 4 of the first subparagraph of Paragraph 4 of the ASF, it transposes Article 12(1)(d) of the Habitats Directive.
- 19 Annex 1 to the ASF contains a list of all the species set out in Annexes I to III to the Birds Directive and in Annexes II, IV and V to the Habitats Directive.
- 20 Under Paragraph 30 of the Skogsvårdslagen (1979:429) (Law on forestry (1979:429)) the government or the administrative authority which it designates may issue instructions, in particular, on the taking into account of natural habitats, which is to be applied in forest management.

### **The disputes in the main proceedings and the questions referred for a preliminary ruling**

- 21 A notification of tree felling in respect of a forest area in the municipality of Härryda was submitted to the Skogsstyrelsen (Forest Agency, Sweden). That notification concerns final felling, which means that almost all of the trees are removed.
- 22 The Forest Agency issued guidance on the precautionary measures recommended in this particular case and took the view that, on condition that its guidance was followed, the activity described in that notification would not be in contravention of any of the prohibitions laid down in the ASF.
- 23 As is apparent from the requests for a preliminary ruling, the forest area covered by the notification at issue is the natural habitat of species which are protected by the ASF. However, the planned forestry work in that area will lead to specimens of those protected species being disturbed or killed. In addition, the eggs of those species present in that zone will be destroyed.
- 24 On 22 December 2016 and 17 January 2018, the applicants in the main proceedings therefore requested that the Regional Administrative Board of Västra Götaland, which is responsible for supervising the protection of species in that region, take action against the notification of felling and the Forest Agency's guidance. They are of the opinion that the planned felling contravenes the prohibitions laid down in the ASF and they have requested, in particular, that the Regional Administrative Board carry out its task of supervising the application of the ASF.
- 25 The Regional Administrative Board of Västra Götaland decided that it was not necessary to assess the need for a derogation from the application of the ASF, which presupposes that the planned activity, provided that it takes account of the precautionary measures recommended in the Forest Agency's guidance, as referred to in paragraph 22 above, does not contravene any of the prohibitions in question. The applicants in the main proceedings then brought an action before the referring court against that decision of the Regional Administrative Board of Västra Götaland not to take any supervision measures.
- 26 The referring court notes, first, that Paragraph 4 of the ASF implements both Article 5 of the Birds Directive and Article 12 of the Habitats Directive, with the result that the ASF, as regards the scope of the prohibitions, does not make any distinction between the species covered by either of those directives and the prohibition on the deterioration or destruction of breeding sites or resting places laid down by the Habitats Directive extends also, under national law, to birds. According to the referring court, that transposition is uncontroversial given that the Birds Directive is a minimum harmonisation directive adopted on the basis of Article 175(1) EC.

27 Secondly, the referring court adds that the cases on which it is required to adjudicate concern the impact of the forestry work at issue in the main proceedings on a number of species of birds coming within the scope of the Birds Directive, several of which are covered by Annex I to that directive, as well as on the *Rana arvalis* species, commonly known as the moor frog, covered by Annex IV(a) to the Habitats Directive, which enjoys the strict protection provided by that directive and is present in the felling area at issue. In that regard, the referring court notes that it is highly probable that those species use the area concerned as breeding sites. However, those sites will be destroyed or damaged by the planned felling.

28 The referring court is thus of the opinion that the interpretation of certain concepts in the Birds and Habitats Directives is necessary to enable it to resolve the questions raised before it and to determine, in that context, the compatibility with those directives of national case-law which requires that, in the case where an activity pursues an objective other than that covered by the prohibitions set out in those directives, that activity must give rise to a risk of adverse effects on the conservation status of the species concerned in order for those prohibitions to apply to it.

29 In those circumstances, the Vänersborgs tingsrätt, mark- och miljödomstolen (Vänersborg District Court, Land and Environment Court, Sweden) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, those questions being worded identically in both Case C-473/19 and Case C-474/19:

- ‘(1) Is Article 5 of the [Birds] Directive to be interpreted as precluding a national practice whereby the prohibition covers only those species which were listed in Annex I to that directive, or are at some level at risk, or are suffering a long-term decline in population?
- (2) Are the terms “deliberate killing/disturbance/destruction” in Article 5(a) to (d) of the Birds Directive and in Article 12(1)(a) to (c) of the Habitats Directive to be interpreted as precluding a national practice whereby, should the purpose of the measures be manifestly different from the killing or disturbance of species (for example, forestry measures or land development), there must be a risk of adverse effects on the conservation status of the species caused by the measures in order to apply the prohibitions?

The first and second questions are posed in the light, *inter alia*, of:

- the fact that Article 5 of the Birds Directive concerns the protection of all species of birds referred to in Article 1(1),
  - the manner in which Article 1(m) of the Habitats Directive defines “specimens”;
  - the fact that the question of the conservation status of the species is regarded as relevant mainly in the context of the derogation in Article 16 of the Habitats Directive (the derogation requires that there be no satisfactory alternative and that the derogation be not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range) or Article 9 of the Birds Directive (the derogation may not be incompatible with that directive which, in Article 2, requires Member States to take all 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).
- (3) If the answer to any part of the second question is that harm at a level other than the individual level is to be assessed in order for the prohibition to apply, is the assessment therefore to be carried out on any of the following scales or at any of these levels:
  - (a) a certain geographically restricted part of the population as defined under (a), for example within the boundaries of the region, the Member State or the European Union;
  - (b) the local population concerned (biologically isolated from other populations of the species);

- (c) the meta-population concerned;
  - (d) the whole population of the species within the relevant biogeographical regional section of the species' range?
- (4) Is the expression "deterioration/destruction" as regards the animals' breeding range in Article 12(1)(d) of the Habitats Directive to be interpreted as excluding a national practice which means that, in spite of precautionary measures, the continuous ecological functionality ... of the habitat of the species concerned is lost in a single area, whether by harm, destruction or deterioration, directly or indirectly, individually or cumulatively, so that the prohibition is applied only if the conservation status of the species concerned, at one of the levels referred to in the third question, is likely to deteriorate?
- (5) If the answer to any part of the fourth question is negative, that is to say that harm of a level other than one leading to the habitat in the individual area being assessed in order for the prohibition to be applied, is the assessment thus to be made on any of the following scales or at any of these levels:  
(a) a certain geographically restricted part of the population as defined under (a), for example within the boundaries of the region, the Member State or the European Union;  
(b) the local population concerned (biologically isolated from other populations of the species);  
(c) the meta-population concerned;  
(d) the whole population of the species within the relevant biogeographical regional section of the species' range?

The second and fourth questions ... include the question of whether the strict protection in the [Birds and Habitats] Directives ceases to be applicable to species for which the objective of the [Habitats] Directive (favourable conservation status) has been achieved.'

30 By decision of the President of the Court of 22 July 2019, Cases C-473/19 and C-474/19 were joined for the purposes of the written and oral parts of the procedure and the judgment.

## Consideration of the questions referred

### *The first question*

- 31 By its first question, the referring court asks whether Article 5 of the Birds Directive must be interpreted as precluding a national practice whereby the prohibitions laid down in that provision cover only the species which are listed in Annex I to that directive, those which are at some level at risk or those which are suffering a long-term decline in population.
- 32 According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 2 July 2020, *Magistrat der Stadt Wien (European hamster)*, C-477/19, EU:C:2020:517, paragraph 23 and the case-law cited).
- 33 It should be noted, in the first place, that the actual wording of Article 5 of the Birds Directive states that, without prejudice to Articles 7 and 9 thereof, Member States are to take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1 of that directive, including in particular the prohibitions set out in Article 5.
- 34 In the words of Article 1(1), the Birds Directive concerns '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'.

- 35 Article 5 of the Birds Directive thus requires the Member States to adopt a complete and effective legislative framework by the implementation, in the same manner as provided for by Article 12 of the Habitats Directive, of concrete and specific protection measures that must ensure effective compliance with the prohibitions set out in Article 5 of the Birds Directive, intended, in essence, to protect the species, breeding sites and resting places of the birds covered by that directive (see, to that effect, judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 252).
- 36 It therefore follows from the clear and unambiguous wording of Article 5 of the Birds Directive that the application of the prohibitions referred to in that provision is in no way restricted to the species which are listed in Annex I to that directive, or which are at some level at risk or are suffering a long-term decline in population.
- 37 It should be noted, in the second place, that neither the context of Article 5 of the Birds Directive nor the object and purpose of that directive make it possible to limit its scope to the three categories of bird species thus referred to by the referring court in its first question.
- 38 It is important, in this regard, to bear in mind that, under Article 191(2) TFEU, EU policy on the environment is required to aim at a high level of protection. Furthermore, it is to be based in particular on the precautionary principle and on the principles that preventive action should be taken and that environmental damage should as a priority be rectified at source.
- 39 As is apparent from recitals 3 to 5 of the Birds Directive, a large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, which represents a serious threat to the conservation of the natural environment. Consequently, the conservation of such species of birds, which are mainly migratory species and which thus constitute a common heritage, is necessary in order to attain the European Union's objectives in terms of sustainable development and improvement of living conditions.
- 40 The Court has also already observed that the Birds Directive, which covers all species of birds naturally occurring in the wild in the European territory of the Member States to which the Treaty applies, provides, in Article 2, that the Member States are to take all necessary measures to maintain or adapt the population of all those species of birds at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements (see, to that effect, judgment of 11 July 1996, *Royal Society for the Protection of Birds*, C-44/95, EU:C:1996:297, paragraph 3).
- 41 In addition, Article 3 of the Birds Directive imposes on the Member States obligations of a general character, consisting in ensuring a sufficient diversity and area of habitats concerning, as does Article 5 of that directive, all the species of birds referred to in Article 1 of that directive, namely all species of birds occurring naturally in the wild state in the European territory of the Member States to which the Treaty applies.
- 42 The establishment of that field of application is linked to the importance of complete and effective protection of wild birds throughout the European Union, irrespective of the areas they stay in or pass through and thus independently of national legislation which delimits the protection of wild birds by reference to the concept of national heritage (see, to that effect, judgment of 27 April 1988, *Commission v France*, 252/85, EU:C:1988:202, paragraph 15).
- 43 As for Article 4 of the Birds Directive, it lays down a protection regime which is specifically targeted and reinforced, which involves particular obligations with regard in particular to the species of birds listed in Annex I to that directive (see, to that effect, judgment of 11 July 1996, *Royal Society for the Protection of Birds*, C-44/95, EU:C:1996:297, paragraphs 19 and 23), consisting in taking special conservation measures concerning their habitat in order to ensure their survival and reproduction in

their area of distribution. Member States are to classify in particular the most suitable territories in number and size as special protection areas for the conservation of the species listed in Annex I to that directive in the geographical sea and land area to which that directive applies.

- 44 By contrast, as the Advocate General observed in point 44 of her Opinion, it is irrelevant, for the purposes of Article 5 of the Birds Directive, that the bird species concerned are included in Annex I to that directive, are at some level at risk, or have a long-term decline in population.
- 45 Having regard to the foregoing considerations, the answer to the first question is that Article 5 of the Birds Directive must be interpreted as precluding a national practice whereby the prohibitions laid down in that provision cover only the species which are listed in Annex I to that directive, those which are at some level at risk or those which are suffering a long-term decline in population.

### ***The second question***

- 46 As a preliminary point, it should be noted that it is apparent from the requests for a preliminary ruling that the ASF, as regards the scope of the prohibitions on the deliberate capture or killing and disturbance of animal species and the deliberate destruction or taking of eggs, which are set out in Paragraph 4 of the ASF, makes no distinction between the species covered by the Habitats Directive and those covered by the Birds Directive. The referring court observes, in particular, that points 1 to 3 of the first subparagraph of Paragraph 4 of the ASF transpose the deliberate acts thus prohibited in Article 5(a) to (d) of the Birds Directive and in Article 12(1)(a) to (c) of the Habitats Directive.
- 47 In that regard, it must be borne in mind that, under Article 14 of the Birds Directive, Member States may introduce stricter protective measures than those provided for under that directive (judgment of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, C-2/10, EU:C:2011:502, paragraph 49).
- 48 Consequently, and since the referring court notes that it follows from the ASF that the prohibitions laid down in Article 12(1)(a) to (c) of the Habitats Directive cover birds, it is appropriate to limit consideration of the second question to an interpretation of that provision.
- 49 In those circumstances, it must be held that, by its second question, the referring court asks, in essence, whether Article 12(1)(a) to (c) of the Habitats Directive must be interpreted as precluding a national practice whereby, first, should the purpose of a human activity, such as forestry work or land development, be manifestly different from the killing or disturbance of animal species, the prohibitions laid down in that provision apply only in the event of a risk of adverse effects on the conservation status of the species concerned and, secondly, the protection provided by that provision ceases to apply to species which have achieved a favourable conservation status.
- 50 It is important, first of all, to recall that Article 12(1)(a) to (c) of the Habitats Directive requires the Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting the deliberate capture or killing of specimens of those species, their deliberate disturbance and the deliberate destruction or taking of their eggs.
- 51 The Court has held that, for the condition as to deliberate action in Article 12(1)(a) of the Habitats Directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing (judgment of 18 May 2006, *Commission v Spain*, C-221/04, EU:C:2006:329, paragraph 71). The same finding is applicable to the prohibitions set out in Article 12(1)(b) and (c) of that directive.

- 52 In particular, the Court has categorised as deliberate disturbance, within the meaning of Article 12(1)(b) of the Habitats Directive, matters such as the use of mopeds on a beach notwithstanding warnings as to the presence of protected sea turtles' nests and the presence of pedalos and small boats in the sea area of the beaches concerned, and has held that a Member State fails to fulfil its obligations under Article 12(1)(b) of that directive in cases where it does not take all of the specific measures necessary to prevent the deliberate disturbance of the animal species concerned during its breeding period (see, to that effect, judgment of 18 May 2006, *Commission v Spain*, C-221/04, EU:C:2006:329, paragraph 70 and the case-law cited).
- 53 Consequently, the prohibitions listed in Article 12(1)(a) to (c) of the Habitats Directive are capable of applying to an activity, such as forestry work or land development, the purpose of which is manifestly different from the capture or killing, disturbance of animal species or the deliberate destruction or taking of eggs.
- 54 As regards the relevance of the conservation status of an animal species in the context of Article 12(1)(a) and (c) of the Habitats Directive, it must be observed that the need to carry out an assessment of the situation at the level of individual members of the species concerned flows from the very wording of that provision, which requires the Member States to prohibit certain acts affecting 'specimens' or 'eggs' of the animal species.
- 55 The fact remains that the definition of the 'conservation status of a species' under Article 1(i) of that directive refers expressly to 'abundance of ... populations [of a species]' and not to the particular situation of an individual member or specimen of that species, with the result that that conservation status is determined or assessed in particular with regard to the populations of the species concerned.
- 56 Furthermore, as regards Article 12(1)(b) of the Habitats Directive, which prohibits the deliberate disturbance of species, particularly during the period of breeding, rearing, hibernation and migration, it should be noted that, in so far as it seeks to stress the increased importance of that prohibition during periods in which specimens are particularly vulnerable, in particular in relation to their ability or success in breeding, and disregard of which is thus especially capable of adversely affecting the conservation status of the species concerned, that provision, in accordance with its very wording, does not preclude thereby the possibility that activities which do not bring about such a risk may, as appropriate, come within its scope.
- 57 It follows that the implementation of the protection system laid down in Article 12(1)(a) to (c) of the Habitats Directive is not subject to the condition that a given activity causes a risk of an adverse effect on the conservation status of the animal species concerned.
- 58 As regards, next, the context of that provision, it must be noted that the assessment of the effect of an activity on the conservation status of the animal species concerned is, by contrast, relevant in connection with derogations adopted under Article 16 of the Habitats Directive.
- 59 It is, indeed, in the course of examining those derogations that an assessment is carried out, both of the effect of the activity at issue on the conservation status of the populations of the species concerned and of the need for that activity, as well of the alternative solutions for achieving the objective relied on in support of the derogation sought.
- 60 However, to make the applicability of the prohibitions laid down in Article 12(1)(a) to (c) of the Habitats Directive conditional on the risk that the activity at issue may have an adverse effect on the conservation status of the species concerned would be liable to lead to a circumvention of the examination laid down in Article 16 of that directive and would, accordingly, have the effect of depriving that article, as well as the derogating provisions and the restrictive conditions resulting therefrom, of their practical effect. Such an interpretation cannot be regarded as being consistent with

the precautionary principle and the principle of preventive action referred to in paragraph 38 above or with the increased level of protection for the specimens of the animal species and eggs covered by Article 12(1)(a) to (c) of the Habitats Directive.

- 61 Accordingly, both the wording and the context of that provision preclude making the applicability of the prohibitions referred to in that provision to an activity, such as forestry work or land development, conditional on the risk of an adverse effect on the conservation status of the animal species concerned, that interpretation also being supported by the objectives of the Habitats Directive.
- 62 In that regard, the third recital of the Habitats Directive states that, as its main aim is to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, the directive makes a contribution to the general objective of sustainable development.
- 63 In that context, the sixth recital of the Habitats Directive states that, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable.
- 64 It is important, furthermore, to note that, pursuant to Article 2(1) of the Habitats Directive, the aim of that directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States. In addition, under Article 2(2) of that directive, the measures taken to that end are to be designed to ‘maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest’.
- 65 It therefore also follows from those objectives that, since the Habitats Directive seeks as well to ‘maintain’ a favourable conservation status, the view has to be taken that the species which have achieved such a conservation status must be protected against any deterioration of that status.
- 66 Consequently, it must be held that Article 12(1) of the Habitats Directive cannot be interpreted as meaning that the protection which that provision affords ceases to apply to species which have achieved a favourable conservation status.
- 67 For the purposes of applying Article 12(1)(a) to (c) of that directive, it is thus a matter for the referring court to assess, in particular, whether the animal species covered by that directive, as mentioned in the requests for a preliminary ruling, are present in the tree felling area at issue in the main proceedings.
- 68 In that regard, it must be noted that the *Rana arvalis* species, commonly known as the moor frog, probably has, as stated by the referring court, as its natural habitat the area covered by the felling notification at issue in the main proceedings. That species is one of the animal species protected by the Habitats Directive which are subject to strict protection under Article 12 thereof.
- 69 Furthermore, the referring court indicates that the area at issue in the main proceedings is the natural habitat of, at the very least, the species *Tetrao urogallus*, commonly known as the western capercaillie, *Pernis apivorus*, commonly known as the honey buzzard, and *Accipiter gentilis*, commonly called the Northern goshawk, all of which are included in Annex I to the Birds Directive and which are thus among the most endangered bird species.
- 70 It will also be for the referring court to assess whether the conditions in which the felling at issue in the main proceedings is to be carried out adhere to preventive and sustainable forestry practices compatible with the conservation requirements flowing from the Habitats Directive.

- 71 That court notes, in particular, that it will have to determine to what extent the precautions recommended by the Forest Agency may contribute to reducing the risk of damage to a level such that the activity at issue in the main proceedings is no longer caught by the prohibitions laid down in Paragraph 4 of the ASF and whether additional precautionary measures are required in order to avoid the application of those prohibitions.
- 72 It is apparent, in that regard, from the documents before the Court that no voluntary forestry plan has been assessed by the Forestry Agency in the context of processing the felling notification at issue in the main proceedings. Furthermore, the national authorities have not examined whether that felling can be carried out in full compliance with the prohibitions laid down by the ASF.
- 73 Moreover, the Forest Agency's guidance is not binding on the landowner and no criminal penalty is provided for in the event of failure to comply with the considerations laid down in that guidance. According to the applicants in the main proceedings, that guidance does not, in any event, contain any information as to whether the protected species live in the area covered by the felling, even though they had drawn the attention of that agency to their presence in the area in question. As regards the notice of felling at issue in the main proceedings, it does not specify the time of year when that felling will be carried out.
- 74 The Protect the Forest Association states, moreover, that, if the forest area at issue in the main proceedings is felled in compliance with the guidance issued by the Forest Agency, the forest environment will disappear, which will also lead to the disappearance of part of the natural habitats of the protected species present there and will thus threaten their survival in the long term.
- 75 In those circumstances, it should be borne in mind that, in order to comply with Article 12(1)(a) to (c) of the Habitats Directive the Member States must not only adopt a comprehensive legislative framework, but also implement concrete and specific protection measures. Similarly, such a system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature. That system of strict protection must therefore make it possible actually to avoid harm to the protected animal species as set out in that provision (see, to that effect, judgment of 11 June 2020, *Alianța pentru combaterea abuzurilor*, C-88/19, EU:C:2020:458, paragraph 23 and the case-law cited).
- 76 Thus it is important, for the purpose of attaining the objectives of the Habitats Directive, that the competent authorities should be in a position to anticipate which activities could be harmful to the species protected by that directive, it being immaterial in that regard whether or not the purpose of the activity at issue consists in the killing or disturbance of those species.
- 77 It will therefore be for the referring court to determine whether forestry work such as that at issue in the main proceedings is based on a preventive approach which takes account of the conservation needs of the species concerned and whether it is planned and carried out in such a way as not to infringe the prohibitions resulting from Article 12(1)(a) to (c) of the Habitats Directive, while taking into consideration, as follows from Article 2(3) of that directive, the economic, social, cultural, regional and local requirements.
- 78 Having regard to all of the foregoing considerations, the answer to the second question is that Article 12(1)(a) to (c) of the Habitats Directive must be interpreted as meaning that, first, it precludes a national practice whereby, should the purpose of a human activity, such as forestry work or land development, be manifestly different from the killing or disturbance of animal species, the prohibitions laid down in that provision apply only in the event of a risk of adverse effects on the conservation status of the species concerned and, secondly, the protection afforded by that provision does not cease to apply to species which have attained a favourable conservation status.

### ***The fourth question***

- 79 By its fourth question, the referring court asks, in essence, whether Article 12(1)(d) of the Habitats Directive must be interpreted as precluding a national practice whereby, if the continuous ecological functionality of the natural habitat of the species concerned in a particular area is, in spite of precautionary measures, lost by harm, destruction or deterioration, whether directly or indirectly, by the effect of the activity at issue, taken individually or cumulatively with others, the prohibition laid down in that provision is applied only if the conservation status of the species concerned is likely to deteriorate.
- 80 That question is based on the dual premiss of the referring court, which it will have to confirm, first, that the protected bird species and the moor frog use the notified area as breeding sites which will be destroyed or damaged by the felling at issue in the main proceedings and, secondly, that the continuous ecological functionality in the natural habitat of the species concerned will be lost following that felling of trees.
- 81 In order to answer that question, it should be borne in mind at the outset that, under Article 12(1)(d) of the Habitats Directive, the strict protection laid down in that provision seeks to prohibit ‘deterioration or destruction of breeding sites or resting places’.
- 82 It is in the light of that system of strict protection that the Court has already held that the acts referred to in that provision are not only intentional acts, but also include non-deliberate acts. By not limiting the prohibition laid down in Article 12(1)(d) of the Habitats Directive to deliberate acts, unlike what it has done in respect of the acts referred to in Article 12(1)(a) to (c) of that directive, the EU legislature has demonstrated its intention to give breeding sites or resting places increased protection against acts causing their deterioration or destruction (judgment of 2 July 2020, *Magistrat der Stadt Wien (European hamster)*, C-477/19, EU:C:2020:517, paragraph 27 and the case-law cited).
- 83 In addition, the Court has stated that the strict protection laid down in Article 12(1)(d) of the Habitats Directive applies regardless of the number of specimens of the species concerned that are present in the area in question (judgment of 17 April 2018, *Commission v Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 237).
- 84 Consequently, it must be held that, since the implementation of the system of protection laid down in Article 12(1)(d) of that directive is not dependent on the number of specimens of the species concerned, it cannot be dependent, as the Advocate General observed in points 53 and 55 of her Opinion, on the risk of an adverse effect on the conservation status of that species.
- 85 It should be added that the considerations set out in paragraphs 58 to 77 above apply by analogy with regard to the prohibitions laid down in Article 12(1)(d) of the Habitats Directive.
- 86 It follows from the foregoing that the answer to the fourth question is that Article 12(1)(d) of the Habitats Directive must be interpreted as precluding a national practice whereby, if the continuous ecological functionality of the natural habitat of the species concerned in a particular area is, in spite of precautionary measures, lost by harm, destruction or deterioration, whether directly or indirectly, by the effect of the activity at issue, taken individually or cumulatively with others, the prohibition laid down in that provision is applied only if the conservation status of the species concerned is likely to deteriorate.

### ***The third and fifth questions***

- 87 In view of the answers given to the second and fourth questions, there is no need to answer the third and fifth questions.

## Costs

- 88 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. 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 must be interpreted as precluding a national practice whereby the prohibitions laid down in that provision cover only the species which are listed in Annex I to that directive, those which are at some level at risk or those which are suffering a long-term decline in population.
2. Article 12(1)(a) to (c) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, first, it precludes a national practice whereby, should the purpose of a human activity, such as forestry work or land development, be manifestly different from the killing or disturbance of animal species, the prohibitions laid down in that provision apply only in the event of a risk of adverse effects on the conservation status of the species concerned and, secondly, the protection afforded by that provision does not cease to apply to species which have achieved a favourable conservation status.
3. Article 12(1)(d) of Directive 92/43 must be interpreted as precluding a national practice whereby, if the continuous ecological functionality of the natural habitat of the species concerned in a particular area is, in spite of precautionary measures, lost by harm, destruction or deterioration, whether directly or indirectly, by the effect of the activity at issue, taken individually or cumulatively with others, the prohibition laid down in that provision is applied only if the conservation status of the species concerned is likely to deteriorate.

[Signatures]