

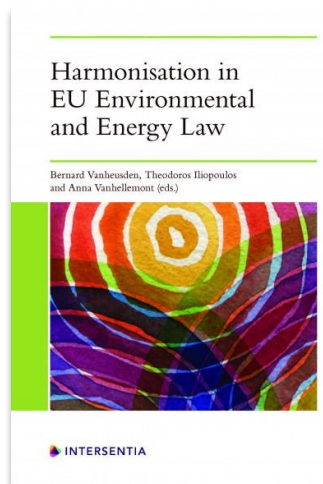
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LIST OF CONTRIBUTORS

Daniel Benrath

Postdoctoral Assistant in Energy Law, Ruhr University Bochum, Germany

Nicolas de Sadeleer

Professor of EU law, Saint Louis University, United States

Costanza Di Francesco Maesa

Professor of Law and Biotechnology at the University of Siena, teaching assistant, under the direction of Professor Massimiliano Montini, in Advanced European Law and Sustainable Development Law at the University of Siena and post-doctoral researcher at the University of Florence

Michael Faure

Professor of Comparative and International Environmental Law, Maastricht University, and Professor of Comparative Private Law and Economics, Erasmus School of Law Rotterdam, the Netherlands

Matteo Fermeglia

Assistant Professor of International and European Environmental Law, University of Hasselt, Belgium

Susann Handke

Independent Researcher, specialised in energy and climate law and governance, the Netherlands

Alison Hough

Senior Lecturer, Faculty of Business and Hospitality, Midlands Campus, Technological University of the Shannon (TUS), Athlone, County Westmeath, Ireland

Theodoros G. Iliopoulos

Postdoctoral researcher in Energy and Environmental Law, Hasselt University, Belgium

Valentina Jacometti

Associate Professor of Comparative Private Law, University of Insubria, Italy

Georgios Kalogerakis

Doctoral Candidate in Civil Law, National and Kapodistrian University of Athens, Greece

Ludwig Krämer

Head of unit of the Environmental Department of the European Commission
(retired)

Anna Vanhellemont

Doctoral researcher in Environmental Law at Hasselt University, Belgium

Elieen Verniers

Doctoral Candidate in Environmental Law, specialising in Animal Law, Ghent
University, Belgium

TOWARDS MORE HARMONISATION IN THE TREATMENT OF WILD ANIMALS IN THE EU?

Elieen VERNIERS*

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* Doctoral Candidate in Environmental Law, specialising in Animal Law, Ghent University, Belgium.

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1. INTRODUCTION

‘The Fox and the Crow’, one of the famous fables of Aesop, tells the story of a vain crow and a toady fox. The devious fox steals the crow’s cheese. Yet, under European species protection law, it is the other way around: the fox is robbed of almost any protection and, compared to the treatment of the fox, the crow enjoys a much more favourable legal status.

This chapter will explore to what extent wild animals in the EU are differently treated, by analysing the legal regimes and case law (Section 3). Subsequently, the underlying motivations for the different treatment will be discussed, with a historical as well as a political explanation being presented (Section 4). The impact of different treatment cannot be ignored; therefore, this will be addressed, not only from a legal, but also from a policy-making point of view (Section 5). This chapter concludes with a section devoted to the ‘issue of harmonisation’, proceeding from a two-fold approach (i.e. animal welfare and species protection) (Section 6). Before delving into these topics, this chapter will set out the problem-setting and scope of this article (Section 2).

This research extends previous insights, by devoting attention to the differences between the birds directive and the habitats directive. This paper is also unique in that it links the harmonisation of species protection to the harmonisation of animal welfare. Consequently, the different treatment of wild animals in the EU will be tackled, both from an animal welfare perspective and from a species protection perspective.

2. PROBLEM-SETTING AND THE SCOPE OF THIS CHAPTER

2.1. THE DIFFERENT TREATMENT OF WILD ANIMALS IN THE EU

Two areas interfere with the treatment of wild animals at the European level: species protection and animal welfare.

2.1.1. *Species Protection*

Species protection, as part of nature conservation, is governed by several EU legal instruments, including the birds directive,¹ the habitats directive,² the Regulation on Invasive Alien Species³ and the CITES Regulation.⁴ Certain species protection instruments are inspired by animal welfare considerations, such as the directive concerning the importation into Member States of skins of certain seal pups and products derived from them⁵ and the regulation on trade in seal products.^{6,7} This can result in a web of legislation regarding the treatment of wild animals in the EU. For instance, the birds directive applies to almost

¹ Council Directive 79/409/EEC on the conservation of wild birds, OJ 1979 L 103/1. *Consolidated version*: European Parliament and Council Directive 2009/147/EC on the conservation of wild birds, OJ 2010 L 20/7.

² Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7.

³ European Parliament and Council Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species, OJ 2014 L 317/35.

⁴ Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ 1997 L 61/1.

⁵ Council Directive 83/129/EEC on the importation into Member States of skins of certain seal pups and products derived therefrom, OJ 1983 L 91/30; Council Directive 85/444/EEC amending Council Directive 83/129/EEC on the importation into Member States of skins of certain seal pups and products derived therefrom, OJ 1985 L 259/70; Council Directive 89/370/EEC amending Directive 83/129/EEC on the importation into Member States of skins of certain seal pups and products derived therefrom, OJ 1989 L 163/37.

⁶ Recitals 1 and 9 European Parliament and Council Regulation (EC) No 1007/2009 on trade in seal products, OJ 2009 L 286/36.

⁷ G. Van Hoorick, *Internationaal en Europees Natuurbehoudsrecht*, 1997, pp. 257–258.

all wild bird species, while the habitats directive applies to a select number of wild animals (non-bird species) and the animal welfare regulations apply, in an extremely fragmented manner,⁸ to wild animals.

The cornerstones of the EU's nature conservation legislation are the Birds Directive and the habitats directive. Therefore, the jumping-off point of this chapter will, in particular, be an examination of the extent to which both directives can converge even more closely.

The current legal basis for species protection in the Treaty on the Functioning of the European Union (TFEU)⁹ is Title XX 'Environment' (Article 191 TFEU).

The Birds Directive will celebrate its 40th anniversary this year. While the original treaty from four decades ago establishing the European Economic Community (EEC Treaty) contained no provision to act in the area of environmental policy, the Birds Directive was adopted on the basis of Article 235 of the EEC Treaty.¹⁰ This chapter allows for unanimous intervention by the Council 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers'.¹¹

However, when adopting the habitats directive, the EEC Treaty did contain a specific legal basis for environmental legislation (Articles 130 R-T) due to an amendment by the Single European Act.¹² The Habitats Directive was adopted on the basis of Article 130 S.¹³

2.1.2. *Animal Welfare*

In the field of animal welfare, certain legislative instruments exist which intervene in animal welfare aspects at the EU level – for example, the regulation on the protection of animals during transport and related operations,¹⁴ the regulation on the protection of animals at the time of killing,¹⁵ and the directive on animals used for scientific purposes.¹⁶ European animal welfare law mainly

⁸ A. Nurse & D. Ryland, *Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market*, *European Energy and Environmental Law Review* 2013 (June), pp. 101, 104.

⁹ Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

¹⁰ First recital of the preamble of the Birds Directive (non-consolidated version).

¹¹ W. Wils, *The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive*, *Journal of Environmental Law* 1994 (6)2, pp. 219, 223.

¹² Single European Act, OJ 1987 L 169/1.

¹³ Wils, *supra* note 11 at p. 224; Van Hoorick, *supra* note 7 at p. 26.

¹⁴ Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, OJ 2005 L 3/1.

¹⁵ Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing, OJ 2009 L 303/1.

¹⁶ European Parliament and Council Directive 2010/63/EU on the protection of animals used for scientific purposes, OJ 2010 L 276/33 (recitals 1, 2, 6 and 12).

targets domesticated animals; but, to a limited extent, wild animals¹⁷ are also covered.¹⁸

Unlike species protection, animal welfare still lacks a specific legal basis. Since the Lisbon Treaty,¹⁹ animal welfare has been mentioned in the context of Article 13 of the TFEU. Nonetheless, this article is a mere integration clause, where animal welfare must be taken into account when ‘formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies’.²⁰ European animal welfare legislation is based on secondary EU legislation, which, in addition to an animal welfare objective, primarily has another objective (e.g. Article 4 TFEU, Article 192 TFEU).²¹

2.2. TOWARDS MORE HARMONISATION

The term ‘harmonisation’ covers a wide range of connotations. In terms of a general interpretation, it means to encourage unification of legislation. However, at the EU level, harmonisation in legal jargon is also used as a specific term to indicate the degree of policy freedom that Member States retain when transposing European directives.^{22,23} For example, regarding the birds directive, the European Court of Justice (ECJ) clarifies that ‘With regard to Article 36 of the Treaty [...] a directive providing for full harmonization of national legislation deprives a Member State of recourse to that Article’²⁴ and ‘As regards the degree of harmonization brought about by Directive 79/409 [...]. The Directive has therefore regulated exhaustively the Member States’ powers with regard to the conservation of wild birds’.²⁵

¹⁷ Council Regulation (EEC) No 348/81 on common rules for imports of whales or other cetacean products, OJ 1981 L 39/1; Council Directive 83/129/EEC on the importation into Member States of skins of certain seal pups and products derived therefrom, OJ 1983 L 91/30; Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ 1991 L 308/1.

¹⁸ *N. De Sadeleer*, EU Environmental law and the internal market, 2014, p. 294; *Van Hoorick*, *supra* note 7 at pp. 257–259.

¹⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007 C 306/1.

²⁰ *E. Verniers*, Geen Europees biologisch logo voor ritueel geslacht vlees: Dierenwelzijn in de Europese Unie, NJW 2019, to publish (No. 407 – September 2019).

²¹ *De Sadeleer*, *supra* note 18 at p. 136; *Nurse & Ryland*, *supra* note 8 at pp. 103–104.

²² Article 288 TFEU: A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

²³ *De Sadeleer*, *supra* note 18 at pp. 231–232; *L. Lavrysen*, Handboek milieurecht, 2016, p. 109.

²⁴ Case C-169/89, *Gourmetterie Van den Burg* [1990] ECR I-2143, para. 8.

²⁵ *Ibid.* at para. 9.

Any reference in this paper to the objective of more harmonisation is intended to unify European legislation. This harmonisation can take two forms: on the one hand, more harmonisation between animal welfare and species protection; and on the other hand, more harmonisation within species protection. The core of this chapter mainly concerns the elimination of the differences between the Birds Directive and the habitats directive.

3. IDENTIFICATION OF THE DIFFERENT TREATMENT

To demonstrate the different treatment of wild animals in the EU, the applicable legislation as well as some case law will be examined.

3.1. LEGAL REGIMES: THE SCOPE OF APPLICATION

Depending on the type of animal, the Birds Directive applies to wild bird species, while the habitats directive applies to wild animal species.

3.1.1. *Birds Directive*

Article 1 (1) of the Birds 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.’ Thus, in principle, the Birds Directive seeks to apply to all bird species,²⁶ including ‘rare mutants’.²⁷ Nevertheless, the ‘general system of protection’ (Article 5 Birds Directive) is being mitigated by Articles 6 (marketing), 7 (hunting) and 9 (derogations) of the Birds Directive. In addition, ECJ case law has also had an impact on the scope of the application of the Birds Directive. In the *van der Feesten* case, the ECJ clarified that ‘the Directive applies to bird subspecies which occur naturally in the wild only outside the European territory of the Member States if the species to which they belong or other subspecies of that species occur naturally in the wild within the territory in question’.²⁸ The *Vergy* case, on the one hand confirmed the *van der Feesten* case law,²⁹ while leading to a narrowing of the scope of the Birds Directive. The ECJ ruled that ‘the Directive is not applicable to specimens of birds born and reared in captivity’.³⁰ When birds born and reared in captivity

²⁶ Case C-247/85, *Commission v. Belgium* [1987] ECR 3029, paras. 18–22.

²⁷ *Ibid.* at paras. 51–52.

²⁸ Case C-202/94, *van der Feesten* [1996] ECR I-355, para. 18.

²⁹ Case C-149/94, *Vergy* [1996] ECR I-299, paras. 16–18.

³⁰ *Ibid.* at paras. 14–15.

are reintroduced into the wild, they once again fall with the scope of the Birds Directive.³¹

The broad scope of the Birds Directive results in protection for 'opportunistic'³² bird species (e.g. Eurasian jay, Eurasian magpie, carrion crow), similar to the protection of other (more significant) bird species (e.g. little bustard, garganey).³³ Articles 2, 3, 5, 6, 10 and 13 of the Birds Directive apply to all birds, regardless of whether they are listed in Annex I.³⁴

The criticism concerning the extensive protection of opportunistic (bird) species is that it is at the expense of the protection of more critical species.³⁵ The problem is, after all, that energy is wasted by using resources and personnel to secure opportunistic species, whereas this would be better spent on species that really need protection. Similarly, national courts³⁶ and the ECJ³⁷ have already had to deal with numerous cases concerning opportunistic species.

3.1.2. *Habitats Directive*

As an overall objective, Article 2 (1) habitats directive refers to 'ensuring biodiversity 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'. Nevertheless, this objective must be tempered because the tangible measures are limited to the 'species of wild fauna'³⁸ of Community interest', as referred to in Article 2 (2) of the Habitats Directive.³⁹

³¹ N. De Sadeleer, Bilan d'une décennie d'efforts législatifs en droit communautaire de la protection de la nature, in: P. Van Pelt (ed.) *Recente ontwikkelingen in het Europees Milieurecht*, 1995, pp. 199, 216.

³² *Opportunistic species* are species that do not depend on a particular habitat, adapt well to the changed living conditions caused by human intervention in the environment and are therefore able to expand considerably.

³³ J. Bouckaert, Artikel 9 van de Vogelrichtlijn, 1989, pp. 26–27.

³⁴ Van Hoorick, *supra* note 7 at p. 193.

³⁵ Bouckaert, *supra* note 33.

³⁶ For example: Court of Appeal (Antwerp, Belgium) [17 December 1982], note A. Vandeplas, *De verdelging van houtduiven*, RW 1983–84, pp. 1407–1409; Council of State (Belgium), Case n° 29.327 [12 February 1988], *Amén. 1988/2*, pp. 61–62; Council of State (the Netherlands), Case n° A-31 3865 (1981)/S1151 [7 August 1981], *Milieu en Recht* 1982, pp. 129–130; Council of State (the Netherlands), Case n° A-1.0511 (1982) [6 March 1986], *Milieu en Recht* 1987, pp. 16–19; Supreme Court (the Netherlands), Case n° 14122 [15 February 1991], ECLI:NL:HR:1991:ZC0150.

³⁷ Case C-247/85, *Commission v. Belgium* [1987] ECR 3029, paras. 10–11, 30–31; Case C-262/85, *Commission v. Italy* [1987] ECR 3073, para. 11; Case C-236/85, *Commission v. the Netherlands* [1987] ECR 3989, para. 7; Case C-339/87, *Commission v. the Netherlands* [1990] ECR I-851, paras. 9–10.

³⁸ NB: the text of the Habitats Directive refers to 'fauna and flora', but since this contribution is exclusively about animals, the reference is always confined to the 'animal species of Community interest'.

³⁹ Article 2 (2) Habitats Directive: '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.'

An initial discrepancy arises: while the birds directive aims to preserve ‘all species of naturally occurring wild birds in the European territory’, is the scope of the Habitats Directive *in concreto* limited to the conservation of ‘wild fauna species of Community interest’? These species of community interest are defined by Article 1 (g) of the Habitats Directive, which refers to species that are endangered, vulnerable, rare or endemic. These species are (or may be) listed in Annexes II⁴⁰ and/or IV⁴¹ or V.^{42,43}

A second difference between the two directives relates to the specific species protection measures, in particular, the difference between Article 5 of the birds directive and Article 12 of the Habitats Directive. Contrary to Article 5 of the birds directive, Article 12 of the Habitats Directive does not provide a general system of protection, but *a priori* limited the protection of wild animal species to those set out in Annex IV (a). The strict protection regime of Article 12 of the Habitats Directive (the ‘second pillar’)⁴⁴ therefore only applies to a small number of animal species.

Finally, the difference in scope means that the problem concerning opportunistic species does not occur here, precisely because of the limited scope of the Habitats Directive. After all, no opportunistic animal species has been included in Annex II (a), IV (a) or V (a) of the Habitats Directive. This results in a difference in treatment between, for example, the crow and the fox. While the Birds Directive does apply to crows, the Habitats Directive does not apply to foxes; yet, both animals are considered ‘opportunistic’ species.

3.1.3. *The Different Treatment in Legislation*

An initial difference that emerges from the legal framework above is the scope of application. While the Birds Directive establishes a general system of protection for all bird species on European territory (as referred to in Article 1), the Habitats Directive is limited to animal species of Community interest, listed in Annexes II (a), IV (a) and V (a). This means that all animals not listed in those annexes are the responsibility of the Member State itself and subject to national legislation. For example, keeping a certain mammal is only prohibited if prohibited by the national legislation of a Member State (with the exception of the animals listed on Annex IV (a) Habitats Directive).

⁴⁰ Annex II (a): Animal species of community interest whose conservation requires the designation of special areas of conservation.

⁴¹ Annex IV (a): Animal species of community interest in need of strict protection.

⁴² Annex V (a): Animal species of community interest whose taking in the wild and exploitation may be subject to management measures.

⁴³ Article 1 (g), last subparagraph.

⁴⁴ H. Schoukens & K. Bastmeijer, Species Protection in the European Union: How Strict Is Strict?, in: A. Cliquet, C-H. Born, D. Misonne, G. Van Hoorick & H. Schoukens (eds.) *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?*, 2014, pp. 1, 3, 11.

3.2. CASE LAW

The different treatment for animals can also be demonstrated by case law. I will discuss three cases, all of which relate to the import ban on certain animal species.

3.2.1. *Gourmetterie Van den Burg Case*⁴⁵

Gourmetterie Van den Burg was the defendant in a Dutch criminal case involving the red grouse. He was prosecuted and convicted for infringing Article 7 of the Dutch Law on Birds (the Vogelwet), which precluded the bird in question from being bought or sold on the domestic (Dutch) market. Van den Burg argued that he could not be convicted for violating this law, since the confiscated red grouse had been lawfully killed in the UK, in accordance with the Birds Directive.^{46,47}

The Dutch Supreme Court ('Hoge Raad') accordingly referred to the ECJ for a preliminary ruling on the compatibility of the import ban of the red grouse, with regard to Articles 30 and 36 of the EEC Treaty.⁴⁸

The ECJ observed that the red grouse is a species which does not occur within the Netherlands.⁴⁹ Additionally, the ECJ noted that it was indisputable that the national measure in question was in the nature of a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EEC Treaty, which may be justified on the basis of protecting the health and life of animals (Article 36 EEC Treaty).

However, the ECJ recollected that set case law held that a directive providing for full harmonisation of national legislation deprives a Member State of recourse to Article 36 of the EEC Treaty. Consequently, regarding the degree of harmonisation brought about by the Birds Directive, it should be noted that the directive exhaustively regulated Member States' powers concerning the conservation of wild birds. As a result, Member States can solely invoke Article 14 of the Birds Directive to justify stricter protective measures.⁵⁰

The ECJ limits the scope of Article 14 to migratory species, endangered species listed in Annex I of the Birds Directive, and endangered species within the meaning of the CITES convention. In terms of the other bird species covered by the Birds Directive, Member States are not authorised to adopt stricter

⁴⁵ Case C-169/89, *Gourmetterie Van den Burg* [1990] ECR I-2143.

⁴⁶ The red grouse (*Lagopus lagopus scoticus*) is listed on Annex III/1 to the Birds Directive and therefore constitutes an exception to the fundamental prohibition of trade in Article 6 (1) Birds Directive, in accordance with Article 6 (2) Birds Directive.

⁴⁷ Case C-169/89, *Gourmetterie Van den Burg* [1990] ECR I-2143, paras. 1–2.

⁴⁸ *Ibid.* at paras. 3–4.

⁴⁹ *Ibid.* at para. 7.

⁵⁰ *Ibid.* at paras. 8–9.

protective measures than those provided for under the directive, except in the case of species occurring within their territory.⁵¹

From the foregoing, it follows that the Netherlands was not empowered to afford the red grouse more protection than that provided for by the Birds Directive, because the red grouse is neither a migratory species nor a seriously endangered species set out in Annex I of the Birds Directive or the CITES.⁵²

3.2.2. *German Crayfish Case*⁵³

The German crayfish case concerned a German import restriction on imports of live European freshwater crayfish from Member States or from non-member countries in free circulation in other Member States. The German Federal Regulation on the Protection of Species ('Bundersartenschutzverordnung') made the importation of such crayfish subject to the grant of a licence. The underlying idea was to stop the crayfish plague caused by the importation of infected crayfish from North America, resulting in the virtual disappearance of wild native crayfish from European waters.⁵⁴

The Commission appealed and found that the German rules in question were incompatible with Articles 30 and 36 of the EEC Treaty, on the grounds that the rules went beyond what was needed for the effective protection of native species of crayfish against disease and the risks of faunal distortion.⁵⁵

The German government contends that the quantitative restriction is justified under Article 36 of the EEC Treaty on the basis of the protection of the health and life of animals (preventing epizootic disease).⁵⁶

The ECJ assessed that it was not disputed that the purpose of the national measure in question is to protect the health and life of native crayfish, meaning that the measure is accordingly covered by the exception provided for in Article 36 of the Treaty. However, rules restricting intra-community trade are compatible with the Treaty, only insofar as they are indispensable for the purposes of providing effective protection for the health and life of animals.⁵⁷

In this case, the German restrictions did not satisfy the principle of proportionality, because the objective could have been achieved by measures having less restrictive effects on intra-community trade. For example, instead of simply prohibiting imports of all species of live freshwater crayfish, Germany could have confined itself to health checks and only carrying out checks by sample.⁵⁸

⁵¹ Ibid. at paras. 10–14.

⁵² Ibid. at paras. 15–16.

⁵³ Case C-131/93, Commission v. Germany [1994] ECR I-3303.

⁵⁴ Ibid. at paras. 1–3.

⁵⁵ Ibid. at para. 5.

⁵⁶ Ibid. at para. 6.

⁵⁷ Ibid. at paras. 17–18.

⁵⁸ Ibid. at paras. 19–25.

3.2.3. *Bluhme Case*⁵⁹

In the *Bluhme* case, a preliminary ruling was referred to the ECJ in the context of criminal proceedings against *Bluhme*. *Bluhme* was tried for infringement of Danish legislation ('lov om biavl') prohibiting the keeping of bees on the island of Læsø, other than those of the Læsø brown bee subspecies (*Apis mellifera mellifera*).⁶⁰

By analogy with the previous cases, the central question was whether the Danish national legislation did or did not infringe Article 30 of the EEC Treaty.⁶¹

The prohibition was motivated by the desire to protect the Læsø brown bee from extinction. It was also noted that the geographical scope of the prohibition was limited to Læsø and some neighbouring islands.⁶²

Contrary to the previous cases, the ECJ accepted the import ban. When verifying the proportionality test, the ECJ held that the limitation of the geographical scope of the prohibition did not alter the fact that the Danish restriction constitutes a measure having an effect equivalent to a quantitative restriction.⁶³ Nevertheless, the limited geographical scope was compared to the recognised method of establishing areas in which a population can enjoy special protection (i.e. the SPA and SAC of the Birds and Habitats Directive).⁶⁴ With regard to the disappearance of the Læsø brown bee, the ECJ considered this risk to be undeniably genuine, in the event of mating with golden bees, due to the recessive nature of the genes of the brown bee.⁶⁵

Subsequently, the ECJ arrived at the conclusion that the Danish legislative measure must be regarded as justified, under Article 36 of the Treaty, on the basis of the protection of the health and life of animals.⁶⁶

3.2.4. *The Different Treatment in Case Law*

The discussed cases illustrate that, depending on whether the case concerns a bird or another animal, a different judgement is obtained. The explanation for these disparities is due to the difference in the scope for policymaking entrusted to Member States in the case of bird species on the one hand and other animal species on the other.⁶⁷

⁵⁹ Case C-67/97, *Bluhme* [1998] ECR I-8033.

⁶⁰ *Ibid.* at para. 2.

⁶¹ *Ibid.* at para. 8.

⁶² *Ibid.* at paras. 6–7.

⁶³ *Ibid.* at paras. 17–20.

⁶⁴ *Ibid.* at para. 36.

⁶⁵ *Ibid.* at para. 37.

⁶⁶ *Ibid.* at para. 38.

⁶⁷ *Supra* para. 10.

Articles 30 and 36 of the EEC Treaty have been invoked in all three court cases. The defence in each case was the ‘protection of the health and life of animals.’

In the *Gourmetterie Van den Burg* case, invoking Article 36 was not allowed due to full harmonisation (i.e., Member States are deprived of any margin of policymaking) of the Birds Directive.⁶⁸

By contrast, the invocation of Article 36 of the EEC Treaty was accepted in the German crayfish and *Bluhme* cases because the argument of ‘full’ harmonisation does not play a part in the Habitats Directive, which necessitated recourse to the classic provisions regarding the free movement of goods. For example, the strict protection regime of Article 12 of the Habitats Directive only applies to animals listed in Annex IV (a), while other animal species fall under the policy freedom of Member States. Since neither crayfish nor brown bees were covered by Annex IV (a) of the Habitats Directive, this resulted in these animals being dependent on a possible protection status provided by a Member State. It was this German and Danish protection status for the crayfish, *casu quo* the Læsø brown bee, that was challenged on the basis of Articles 30 and 36 of the E(E)C Treaty.

Both the German crayfish and the *Bluhme* cases were about fauna falsification, yet only in the *Bluhme* case was the import ban accepted. While the Danish ban was necessary and proportionate in relation to its aim of protection and therefore in conformity with Article 36 of the EC Treaty, the German ban did not meet the test of proportionality because it could be replaced by less restrictive measures.

The previous judgements reveal that, with regard to non-bird species, a case-by-case approach is used, because the Habitats Directive does not cover all animals, while the Birds Directive does cover all birds.

4. EXPLAINING THE DIFFERENCE IN TREATMENT

As indicated above, there exists a difference in treatment for wild animals in the EU. This section will examine the reasons for this difference and whether the *prima facies* major differences between the Birds Directive and Habitats Directive do have a logical explanation.

4.1. A HISTORICAL EXPLANATION

An initial explanation can be found in the historical course of international law. While the focus on wild animals (non-bird species) only began to emerge at the

⁶⁸ Case C-169/89, *Gourmetterie Van den Burg* [1990] ECR I-2143, paras. 8–9.

end of the 20th century,⁶⁹ this was already the case for bird species at the very beginning of that century.⁷⁰ Historically, therefore, the attention given to birds has always been stronger than for other animal species.

The general principle of protection, as found in Article 1 of the Birds Directive, was first introduced by the Paris Convention of 1950.⁷¹ Previously, the scope of application was limited to a specific category of bird species,⁷² whereas Article 1 of the 1950 Paris Convention aimed at the protection of *all* wild bird species.⁷³

The Habitats Directive, on the other hand, is based on the Bern Convention^{74,75}

Article 2 of the Habitats Directive is modelled on Article 1 of the Bern Convention.⁷⁶ Both instruments provide for the conservation of wildlife as a general objective, but limit concrete measures to specific species.⁷⁷ However, the Habitats Directive does not completely follow the example of the Bern Convention, as the species lists of the latter are much more extensive and have only been adopted to a limited extent by the Habitats Directive. Appendix 2 of the Bern Convention has a much greater species coverage (approximately 120 animals more) than Annex IV (a) of the Habitats Directive.

The different predecessors of the directives explain the different protection status between birds and other animals. Whereas the Paris Convention of 1950 provided for a general protection status, the Bern Convention operated with a specific protection status that depended on the enumeration of a certain animal in the appendices.

⁶⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, in force 1 July 1975, 993 UNTS 243; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 ILM (1980), Cmnd 7888; Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, UKTS No 56 (1982), Cmnd 8738.

⁷⁰ Convention for the Protection of Birds Useful to Agriculture, Paris, 19 March 1902, in force 6 December 1905, 191 CTS 91; International Convention for the Protection of Birds, Paris, 18 October 1950, in force 17 January 1963, 9134 UNTS 187; Benelux Convention on the Hunting and Protection of Birds, Brussels, 10 June 1970, in force 1 July 1972, 1214 UNTS 325.

⁷¹ International Convention for the Protection of Birds, Paris, 18 October 1950, in force 17 January 1963, 9134 UNTS 187.

⁷² For instance, the 1902 Paris Convention on the protection of *birds useful to agriculture*.

⁷³ See also the Preamble: 'Considering that, in the interests of science, the protection of nature and the economy of each nation, *all* birds should as a matter of principle be protected;'

⁷⁴ Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, UKTS No 56 (1982), Cmnd 8738.

⁷⁵ *Schoukens & Bastmeijer, supra* note 44 at pp. 12–13; *Van Hoorick, supra* note 7 at pp. 142, 224.

⁷⁶ Article 1 (1) Convention on the Conservation of European Wildlife and Natural Habitats: 'The aims of this Convention are to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation.'

⁷⁷ Article 1 (2). Convention on the Conservation of European Wildlife and Natural Habitats: 'Particular emphasis is given to endangered and vulnerable species, including endangered and vulnerable migratory species.'

4.2. A POLITICAL EXPLANATION

A second explanation for the differences between the Birds Directive and the Habitats Directive relates to the point in time when each directive was drawn up.

While the Habitats Directive has been in place since 1992, the Birds Directive dates back to 1979. The starting point of the Birds Directive was to offer the broadest protection possible to all birds (covered in Article 1, Birds Directive). This optimism was reflected in a strict policy with the result that opportunistic species, such as the European herring gull and the carrion crow, were also protected.

The legal cases (national and European) in the context of opportunistic species caused Member States to show reluctance in pursuing a 'gold-plating' approach *avant la lettre* to the adoption of the Habitats Directive.⁷⁸ Thus, when drafting the Habitats Directive, Member States (and political decision-makers) were much more cautious and did not wish to duplicate the far-reaching implications of the Birds Directive. The legal doctrine also criticised the extensive protection of opportunistic species.⁷⁹

This was therefore anticipated by limiting the scope to the species of community interest. Instead of either following the example of the Birds Directive, on the one hand, or copying the extensive appendixes of the Bern Convention, on the other, policy-makers decided to create new (and more limited) species lists and classifications (i.e. Annex IV (a)).

5. THE SIGNIFICANCE OF THE DIFFERENT TREATMENT

So far, the existence of differences in treatment for wildlife in the EU has been demonstrated, and explanations for these differences have been explained. The following section examines whether these differences cause specific problems, addressing both policy and legal obstacles.

The key question concerns the EU's ambiguous attitude, whereby Europe does not trust Member States with regard to wild bird species and, for example, strictly regulates the protection of opportunistic bird species, while, with regard to the Habitats Directive, the EU places full confidence in Member States and allows them to regulate the protection of non-bird species with quasi-freedom.

5.1. POLICY BOTTLENECKS

Why Europe sets the bar so high for birds and so low for mammals, reptiles and fish is incomprehensible from a policy point of view. From the point of view of

⁷⁸ *Supra* para. 15.

⁷⁹ Bouckaert, *supra* note 33.

nature conservation, it is just as important to protect wild non-bird species as it is to protect wild bird species.

The safe conduct for Member States in respect of non-bird species does not benefit wild fauna in Europe. Various scientific studies have highlighted the decline in animal species occurring in the EU, but which fall outside the protection of the Habitats Directive. For example, a report by the European Environment Agency reveals an almost 50 per cent decline in 17 European grassland butterfly populations.⁸⁰ Butterflies examined in the report include the common blue,⁸¹ which has declined significantly,⁸² but the small heath,⁸³ the wall brown,⁸⁴ the small copper,⁸⁵ the meadow brown⁸⁶ and the dingy skipper⁸⁷ are also regressing.⁸⁸ None of them is listed in the annexes of the Habitats Directive. Another study regarding bee species in the EU finds that 9.1 per cent of EU bee species are threatened with extinction and a further 5.4 per cent of bees are considered to be 'near threatened'.⁸⁹ Furthermore, cross-border cooperation between Belgium and France reveals that, in addition to an absence of European legal protection, there is also a lack of national legal protection for bees.⁹⁰ A non-exhaustive list of examples of mammals that fall outside the scope of the Habitats Directive includes the Bavarian pile vole⁹¹ (critically endangered), the broom hare⁹² (vulnerable), the Corsican hare⁹³ (vulnerable) and the Cretan white-toothed shrew⁹⁴ (vulnerable).⁹⁵ Not only rare species, but also more common animal species are susceptible. For instance, while the garden dormouse⁹⁶ is not yet threatened,⁹⁷ this species declined more than almost any other rodent in Europe and may have disappeared from 50 per cent of its former ranges during the last 30 years.⁹⁸

⁸⁰ C. van Swaay *et al.*, The European Grassland Butterfly Indicator: 1990–2011, 2013, p. 19.

⁸¹ *Polyommatus icarus*.

⁸² C. van Swaay *et al.*, *supra* note 80 at p. 17.

⁸³ *Coenonympha pamphilus*.

⁸⁴ *Lasiommata megera*.

⁸⁵ *Lycaena phlaeas*.

⁸⁶ *Maniola jurtina*.

⁸⁷ *Erynnis tages*.

⁸⁸ C. van Swaay *et al.*, *supra* note 80 at p. 15.

⁸⁹ A. Nieto *et al.*, European Red List of Bees, 2014, pp. viii, ix, 10 *et seq.*

⁹⁰ M. Folschweiller *et al.*, Grensoverschrijdend actieplan voor wilde bestuivers. Interreg V SAPOLL project – Sauvons nos pollinisateurs-Samenwerken voor pollinators, 2019, p. 26.

⁹¹ *Microtus bavaricus*.

⁹² *Lepus castroviejoi*.

⁹³ *Lepus corsicanus*.

⁹⁴ *Crocidura zimmermanni*.

⁹⁵ A. Terry & H. J. Temple, The Status and Distribution of European Mammals, 2007, pp. ix, 10, 12.

⁹⁶ *Eliomys quercinus*.

⁹⁷ IUCN Red List of Threatened Species classification = near threatened; S. Bertolino *et al.*, *Eliomys quercinus*. The IUCN Red List of Threatened Species, 2008, <https://www.iucnredlist.org/species/7618/12835766>.

⁹⁸ Terry & Temple, *supra* note 95 at p. 18.

From a nature conservation point of view, there is no genuine justification for treating wild bird species differently from wild mammals and other species.

5.2. LEGAL BOTTLENECKS

The difference in treatment resulting from the directives constitutes a policy rather than a legal problem. Few cases reach the level of the ECJ. The Bluhme and German crayfish cases have already been discussed above.

The distinction in the scope and level of harmonisation (in a strict legal sense) between the two directives implies uncertainty about an analogous application of the Vergy and Gourmetherie Van den Burg cases to the Habitats Directive.

The protection of mammals and other non-bird species is regulated by national legislation, because the EU did not provide a similar level of harmonisation (scope for policymaking) for the Habitats Directive as is the case for the Birds Directive. As mentioned above, this needs to be nuanced with regard to the animal species listed in Annex IV (a), which are subject to the strict protection regime of Article 12 of the Habitats Directive.⁹⁹ Consequently, only these animals (the majority of which are reptiles) are subject to harmonisation.

In practice, the different protection status of the directives does not cause any problems, because Member States in fact provide protection status for animal species that do not fall within the scope of the Habitats Directive.

For example, Germany protects all mammals with the exception of certain mice, rats, the mink (*Mustela vison*), the coypu, the raccoon dog, the muskrat and the raccoon.¹⁰⁰ In the Flemish Region, the species decree provides for the protection of 15 mammals.¹⁰¹ The Netherlands, similar to Belgium, have a list of specific animals that are protected. The Dutch list consists of 33 mammals, including the fox, the wild boar and the badger.¹⁰² Opportunists often, but not always, fall outside the scope of protection.¹⁰³

⁹⁹ *Supra* para. 32.

¹⁰⁰ Annex 1 (concerning §1) to the Decree on the Protection of Wild Species of Animals and Plants (Germany), [Verordnung zum Schutz wild lebender Tier- und Pflanzenarten, BArtSchV], https://www.gesetze-im-internet.de/bartschv_2005/anlage_1.html.

¹⁰¹ Article N1 Decree of the Flemish Government on species protection and species management (Belgium), [Besluit van de Vlaamse Regering met betrekking tot soortenbescherming en soortenbeheer, het Soortenbesluit], <http://www.ejustice.just.fgov.be/eli/besluit/2009/05/15/2009035724/justel>.

¹⁰² Annex to Article 3.10 Act on the protection of nature (the Netherlands), [Wet houdende regels ter bescherming van de natuur, Wet natuurbescherming], <https://wetten.overheid.nl/BWBR0037552/2019-01-01>.

¹⁰³ For example, the common vole is not protected in Germany and the Flemish Region, but it is protected in the Netherlands. On the other hand, the mole, for example, is protected in Germany, but not in the Netherlands or the Flemish Region.

Additional scientific research is required to clarify the differences in national species protection between Member States and whether these differences give rise to legal problems, but this falls outside the scope of this research. The general trend, however, is that the room for manoeuvre given to Member States is indeed being used, but to different extents.

In an oversimplified sense, both guidelines intend to achieve the same goal, but with a disparate approach. The aim of both directives is to protect as many bird and non-bird species as possible, which are in need of a protection regime.

The Birds Directive explicitly declared Article 1 of the Birds Directive applicable to all bird species in the European territory, while, at the same time, catching the opportunistic species by having them listed in Annex II ('huntable bird species').¹⁰⁴

The Habitats Directive establishes a different method by including only a limited number of animal species in the strict protection regime and leaves the protection of the other animals to the discretion of Member States. With this method, opportunistic species once again fall outside the scope of any protection, but this time implicitly in the sense that, contrary to the Birds Directive, they were never *a priori* protected.

Admittedly, the working method of the Habitats Directive can be blamed for a lack of uniformity, because an exact protection status differs from one Member State to another, and from one animal to another. In Poland, for example, in a move to tackle an epidemic of African swine fever, the wild boar is hunted on a massive scale (outside the hunting season), whereas, in the Netherlands and Germany, the wild boar is protected outside the hunting season.¹⁰⁵ Even within the same Member State, there are inequalities, for example, the Brussels-Capital Region provides a general protection for the fox, while, in the Flemish Region, one third of the fox population is shot each year.¹⁰⁶ Applying Articles 7 and 9 of the Birds Directive by analogy could temper this.

Nevertheless, this lack of uniformity can be balanced by the principle of subsidiarity, which is respected. The principle of subsidiarity is reflected in the fact that the Habitats Directive, on the one hand, designates species of community interest and, on the other hand, allows Member States to provide for their own species protection which meets their respective needs and characteristics.

¹⁰⁴ See Article 7, Birds Directive.

¹⁰⁵ S. Walker, Planned wild boar cull in Poland angers conservationists, The Guardian, 11 January 2019, <https://www.theguardian.com/environment/2019/jan/11/planned-wild-boar-cull-in-poland-angers-conservationists>.

¹⁰⁶ Question n°222 Q&A Flemish Parliament (Belgium) [Vr. en antw. Vl. Parl., vr. nr. 222, 14 December 2015 (P. DE BRUYN, antw. J. SCHAUVLIEGE)], <https://www.vlaamsparlement.be/parlementaire-documenten/schriftelijke-vragen/1022172>.

5.3. ANIMAL WELFARE BOTTLENECKS

The impact of the difference in treatment was discussed above from a nature conservation point of view. The conclusion was that, although species protection status for (bird) species is provided for in law, the differentiation in protection is difficult to justify, especially from a nature conservation point of view.

It has already been mentioned¹⁰⁷ that European animal welfare legislation applies to wild animals in a very restrictive and fragmentary manner. This is because animal welfare does not have an independent European legal basis and is therefore predominantly a competence for Member States, with varying standards of animal welfare as a result.¹⁰⁸

National animal welfare legislation pervades European species protection.¹⁰⁹ In case C-100/08, the Belgian State justified the limit on trade in wild birds to birds having a metallic ring on imperative requirements concerning both biodiversity and animal welfare.¹¹⁰

Another striking example where animal welfare interferes with species protection concerns 'positive lists'. These are national lists, drawn up based on animal welfare considerations that enumerate which animals may be kept. If an animal is not on the list, it may not be kept due to animal welfare considerations, even though it may be kept on the basis of species protection law. An example is the Belgian positive list for mammals,¹¹¹ which allows only 42 mammals to be kept in Belgium. Recently, the Flemish government has also ratified a positive list for reptiles. This list was entered into force on 1 October 2019 and contains 422 reptiles.¹¹² The Netherlands also has a positive list for mammals based on animal welfare.¹¹³

In the past, such a positive list has already led to a preliminary ruling before the ECJ.¹¹⁴ Animal breeders and animal keepers often disagree with the national

¹⁰⁷ *Supra* para. 6.

¹⁰⁸ *Nurse & Ryland*, *supra* note 8 at p. 104 et seq.

¹⁰⁹ *De Sadeleer*, *supra* note 20.

¹¹⁰ Case C-100/08, *Commission v. Belgium* [2009] ECR I-140, paras. 91–93.

¹¹¹ Royal Decree establishing a list of mammals not kept for production purposes that may be kept (Belgium), [Koninklijk besluit tot vaststelling van de lijst van niet voor productiedoeleinden gehouden zoogdieren die gehouden mogen worden], <http://www.ejustice.just.fgov.be/eli/bsluit/2009/07/16/2009024254/justel>.

¹¹² Decree of the Flemish Government establishing the list of reptiles that may be kept (Belgium), [Besluit van de Vlaamse Regering tot vaststelling van de lijst van reptielen die gehouden mogen worden], <http://www.ejustice.just.fgov.be/eli/bsluit/2019/03/22/2019030349/staatsblad>.

¹¹³ Article 2.2 Act on an integral framework for keeping animals and related subjects (the Netherlands), [Wet houdende een integraal kader voor regels over gehouden dieren en daaraan gerelateerde onderwerpen, Wet dieren], <https://wetten.overheid.nl/BWBR0030250/2019-01-01#Hoofdstuk2> and Article 1.4 Decree establishing regulations with regard to animal keepers (the Netherlands), [Besluit houdende regels met betrekking tot houders van dieren, Besluit houders van dieren], <https://wetten.overheid.nl/BWBR0035217/2018-07-01#Hoofdstuk1>.

¹¹⁴ Case C-219/07, *Andibel and others* [2008] ECR I-4475.

lists and do everything in their power to undermine them.¹¹⁵ This was the scenario in the *Andibel* case, where it was argued that the Belgian positive list for mammals would disproportionately hinder intra-community trade.¹¹⁶ The ECJ first accepted the existence of a positive list based on animal welfare,¹¹⁷ insofar as it complies with various conditions listed in the judgement.¹¹⁸ *In casu*, the *Andibel* case resulted in the Belgian positive list being amended to comply with the criteria listed by the court.

It remains to be seen whether these national lists will continue to give rise to new court cases requiring European intervention.

Finally, it should be noted that European species protection law has an impact on animal welfare. The limited scope of the Habitats Directive leaves the protection of foxes, for instance, to Member States. While the Brussels capital region actually protects the fox, this is not the case in Flanders, where the fox is hunted to such an extreme degree that the typical lifespan of the fox is reduced to only one year.¹¹⁹ Note that the young and inexperienced fox population subsequently causes more damage than older one.¹²⁰ The welfare of the fox as a wild species is therefore not achieved in the Flemish Region, because a fox should normally be able to live much longer in the wild (approximately up to four years old).¹²¹

6. IS (MORE) HARMONISATION THE PREFERRED SOLUTION AND HOW SHOULD THIS LOOK?

Successively, the different treatment of wild animals in the EU is identified; some explanations for, as well as the impact of, the difference in treatment were discussed. In this last part, (more) harmonisation is considered as a possible solution.

As stipulated,¹²² harmonisation in this case should be understood as bringing legislation closer together in order to bridge differences. With regard to the treatment of wild animals in Europe, this issue can relate to harmonisation between two domains (i.e. harmonisation between animal welfare and species

¹¹⁵ For instance, a petition (e.g. ‘Tegen Positieflijst’ Platform Verantwoord Huisdierenbezit, the Netherlands) or legal cases (e.g. *Andibel* Case, Belgium) against positive lists.

¹¹⁶ Case C-219/07, *Andibel and others* [2008] ECR I-4475, para. 10.

¹¹⁷ *Ibid.* at para. 24.

¹¹⁸ *Ibid.* at paras. 33–36.

¹¹⁹ K. *Van den Berghe*, *De vos vulpes vulpes in Vlaanderen: inventarisatie en synthese van de belangrijkste knelpunten*, 1995, pp. 1–30.

¹²⁰ *Ibid.* at pp. 11–12.

¹²¹ S. *Harris*, *Age determination in the Red fox (Vulpes vulpes) – an evaluation of technique efficiency as applied to a sample of suburban foxes*, *Journal of Zoology* 2009 (184), pp. 91, 92 et seq.

¹²² *Supra* para. 10–11.

protection), on the one hand, and harmonisation within the same domain (i.e., harmonisation between the Birds Directive and the Habitats Directive), on the other.

Although the emphasis of this chapter is on harmonisation within the area of species protection, the need for harmonisation between animal welfare and species protection is also briefly outlined below.

6.1. HARMONISATION BETWEEN ANIMAL WELFARE AND SPECIES PROTECTION

The interaction between the two domains has been demonstrated above. Questions can be raised about the feasibility of regulating wild animals from two different angles. For instance, from the species protection point of view, many animal species are protected, yet derogations are granted with regard to a number of animals that may be kept. In addition, animal welfare provides for an additional level by indicating, via positive lists, which animals can be kept from an animal welfare point of view, and does so without any deviation.

A mode of reasoning to avoid overlap and contradiction would be the integration and harmonisation of both domains, as both function as communicating vessels. Currently, the EU lacks a legal basis to harmonise on the basis of animal welfare. Nevertheless, this line of thought is an interesting area for further research.

6.2. HARMONISATION BETWEEN THE BIRDS DIRECTIVE AND HABITATS DIRECTIVE

6.2.1. *Current Status of Harmonisation of the Birds and the Habitats Directives*

As a preliminary remark, it should be noted that the ECJ consistently holds that EU rules do not seek to effect complete harmonisation in the area of the environment.¹²³

6.2.1.1. Birds Directive

Article 14 of the Birds Directive allows, at first sight, stricter measures, but the ECJ has clarified, in the *Gourmetterie Van den Burg* case, that the Birds

¹²³ Case C-318/98, *Fornasar and others* [2000] ECR I-4785, para. 46; Case C-6/03, *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, para. 27; Case C-2/10 *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl* [2011] ECR I-6561, para. 48.

Directive is almost completely harmonised, and therefore the possibility to apply stricter measures is limited to migratory bird species, as well as endangered bird species listed in Annex I of the Birds Directive or within the meaning of the CITES convention. With regard to other bird species, only the Member State where the bird naturally occurs can apply those stricter measures provided for in Article 14 of the Birds Directive.

6.2.1.2. Habitats Directive

There is no provision in the Habitats Directive that is equivalent to Article 14 of the Birds Directive. Nevertheless, since that directive was adopted based on Article 130 S,¹²⁴ it should be noted that Article 130 T¹²⁵ allows for Member States to adopt more stringent protective measures. Under that provision, all that is required is for such measures to be compatible with the TFEU and notified to the commission.

In practice, this means that stricter measures are possible for 'harmonised species' (Annex IV (a) Habitats Directive). This prompts the question about to what extent the *Gourmetteria Van den Burg* and the *Vergy* cases can be applied by analogy to the Habitats Directive. This would mean that the stricter measures would have to be limited to the Member State's own territory, *casu quo* that the Habitats Directive would not be applicable to animal species born and reared in captivity.

6.2.2. *The Aim of More Harmonisation*

More harmonisation could help to eliminate the difference in the treatment of wild animals in the EU. This part examines the arguments in favour and those against more harmonisation.

6.2.2.1. Arguments in Favour of More Harmonisation

6.2.2.1.1. SOLVE DISCREPANCIES BETWEEN THE BIRDS AND THE HABITATS DIRECTIVES

The problem concerning opportunistic species is a striking example of when a uniform approach would be more appropriate. As mentioned above, the Birds Directive, in theory, protects all birds. In order to resolve the aforementioned problem, political lobbying ensured that more and more of these 'harmful' birds were placed on Annex II. This allowed them to be hunted and tackled.

¹²⁴ Currently Article 192 TFEU.

¹²⁵ Currently Article 193 TFEU.

The Habitats Directive has *a priori* responded to such a problem by limiting itself to the protection of only a few species worthy of protection. The general principle of protection, as formulated in Article 1 of the Birds Directive, has therefore not been adopted by the Habitats Directive.

6.2.2.1.2. SOLVE DISCREPANCIES UNDER THE HABITATS DIRECTIVE

Another issue that harmonisation could resolve is the ECJ's casuistic approach to cases that fall within the scope of Habitats Directive. For example, in the German crayfish case, an import ban was not accepted, whereas, in the Bluhme case, an import ban was permitted; the decision in each case was based on the doctrine of quantitative restrictions (i.e., Article 36 TFEU).

Harmonisation in the strictly legal sense is therefore an argument in supporting harmonisation as a general objective (which was previously referred to).¹²⁶

6.2.2.1.3. TRANSPOSE *DE FACTO* HARMONISATION INTO *DE JURE* HARMONISATION

Since the protection of the Habitats Directive is limited to Annex IV (a) on wild species, this creates a web of national legislation regarding other animal species. As a result, each Member State enacts national legislation protecting certain animal species. It may be advisable to regulate this at the EU level and thus transpose *de facto* harmonisation into *de jure* harmonisation. In Belgium, Annex I of the Species Decree contains a list of protected species. The species belonging to Category I are the only species protected from a Flemish point of view. Such a national list also exists in the Netherlands and many other countries. It is striking, for example, that the Dutch list contains 33 mammals, while the Flemish list contains 15 mammals. This results, once again, in different treatment.

6.2.2.2. Arguments against More Harmonisation. Main Argument: Principle of Subsidiarity

The objective of harmonisation must always be weighed against the principle of subsidiarity, so that it becomes clear when harmonisation should take precedence over subsidiarity.

The internal market and the environment are shared competences.¹²⁷ A shared competence implies that both the EU and Member States can legislate and

¹²⁶ *Supra* para. 10–11.

¹²⁷ Article 4 (2) (a) & (e) TFEU.

adopt legally binding acts in this area. The principle of subsidiarity determines the level (European or national) at which action must be taken.¹²⁸ The primacy of EU law prevents Member States from taking measures that deviate from those adopted by the EU. However, as long as no EU measures exist, Member States are free to pursue their own policies.

As mentioned above, the protection mechanism used by the Habitats Directive can be considered as a good example that expresses the principle of subsidiarity. It provides for uniform action for species of community interest in need of strict protection, as per Annex IV (a), while, at the same time, allowing for Member States themselves to take measures against other animal species.

An additional counterargument is that animal welfare is already delegated to Member States. Harmonisation of species protection for both bird and non-bird species does not prevent national differences, precisely because animal welfare legislation interferes with species protection. Therefore, in order to be fully unified, species protection cannot be harmonised at the European level without also tackling animal welfare. However, the EU has no legal basis for harmonising animal welfare.

6.2.3. *What, in Practical Terms, can Harmonisation Consist of?*

They are primarily two possibilities: choosing the improvement or the deterioration of the current situation.

6.2.3.1. The Path to Enhanced Protection: The Habitats Directive Following the Example of the Birds Directive

This approach is supported from a nature conservation point of view. As discussed above, there is no reason for nature conservation to treat bird species differently from other animal species. Raising species protection under the Habitats Directive to the same level as the Birds Directive will only benefit nature conservation.

In practice, this would mean that the scope of the Habitats Directive should be broadened by analogy with Article 1 of the Birds Directive. The Habitats Directive should institute a general protection status for all wild animal species on the territory of the EU. Article 12 of the Habitats Directive must also be amended to match Article 5 of the Birds Directive. Similar to the practice regarding the Birds Directive, certain animal species can be removed from the scope of the directive (cf. Annex II Birds Directive).

¹²⁸ Article 5 TEU.

6.2.3.2. The Path to Reduced Protection: The Birds Directive Following the Example of the Habitats Directive

Taking the wrong path, the Birds Directive could be amended in line with the Habitats Directive. In reality, this would be a retrograde step for bird protection and might conflict with the standstill principle in Article 13 of the Birds Directive.

Some politicians will certainly welcome this option, because they no longer have to endure a cumbersome procedure if they want to tackle a certain opportunistic bird species. However, from a scientific point of view, this is not the recommended way forward. Above, reference has already been made to the decline in various animal species. Weakening the current protection status of birds would create a negative spiral with unprecedented repercussions for (European) nature conservation.

7. CONCLUSION

This paper examined the treatment of wild animals at the EU level. In particular, the differences between the Birds Directive and the Habitats Directive were investigated. Although, at first glance, the differences appear to be arbitrary, it was shown that they take a logical historical course. Moreover, they appear to have only limited legal implications. In the end, the issue of harmonisation, for which there are both pro and contra arguments, was tackled. The overall conclusion is that, although not necessary from a strict legal point of view, harmonisation can be encouraged from a nature conservation point of view.