

Recent CJEU Jurisprudence on species protection: when law meet emotions and science?

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I. OUTLINE

Europe is rapidly losing its biodiversity and wildlife habitats



100% 100% 100%

By [Mark Hughes](#)



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Europe is rapidly losing out on a wide range of natural habitats and biodiversity. From ancient woodlands to mountain meadows, the continent's natural heritage is being lost at an alarming rate.

- **Regulatory and policy challenges** in the context of biodiversity decline in the EU
- **Overview and contextualisation** of the system of strict species protection (art. 12-16 Habitats Directive)
- Most **relevant rulings** regarding the major legal concepts and building blocks regarding strict species protection
 - Decisions of the CJEU between 2005-2020
 - Focus on Habitats Directive (similar provisions present in Birds Directive)

Focal points



II. INTRODUCTION

World's rarest wild hamster is now critically endangered

Scientists say the critically endangered golden hamster is now critically endangered

By BBC News



Le grand hamster d'Alsace, une espèce menacée par une autoroute

10/10



Flanders' wild hamster threatened with extinction

By BBC News

COMMENT

The hamster population has plummeted to a critically endangered level



'E-Limburg' baait van heilige hamster

By BBC News

By BBC News

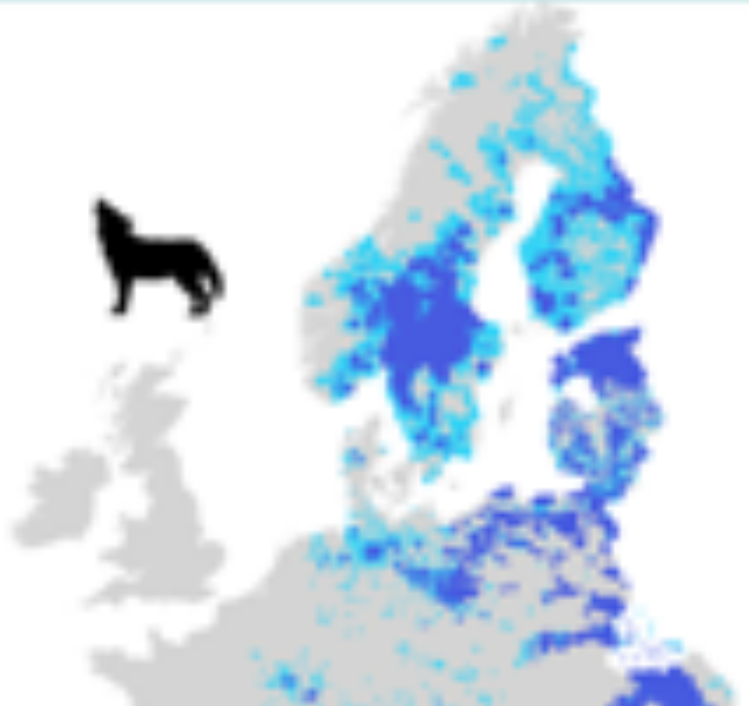
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De hamster is een van de meest populaire huisdieren in Nederland. Maar de wildhamster, die vooral in Limburg voorkomt, wordt bedreigd door de aanleg van een autoroute. De provincie heeft daarom een actieplan opgesteld om de populatie te behouden.

De provincie heeft daarom een actieplan opgesteld om de populatie te behouden. Dit plan omvat onder andere het aanleggen van speciale oversteekplaatsen voor hamsters en het plaatsen van beschermende netten langs de autoroute. Het is belangrijk om de wildhamster te beschermen, omdat het een belangrijk onderdeel is van de lokale biodiversiteit.

Who will **miss** the wild hamster?



Recovery of large carnivores in Europe's modern human-dominated landscapes

Large carnivores are keystone species in many ecosystems, but their populations have declined significantly in Europe's modern human-dominated landscapes. A study published in *Science* in 2018 found that large carnivores are recovering in these landscapes, but their recovery is being hindered by human activities. The study found that large carnivores are recovering in Europe's modern human-dominated landscapes, but their recovery is being hindered by human activities. The study found that large carnivores are recovering in Europe's modern human-dominated landscapes, but their recovery is being hindered by human activities.



Who is **afraid** of the big bad wolf?

Protected newt stops builders in their tracks



They are amphibians – creatures swimming close to death at night, but for the Environment Agency the frantic quest is one of its biggest problems.

After years, the hard reality of Britain has stretched the tight planning regulations companies need to build over a nation of green-headed newts, which are protected under both British and European law.

News

Pad en hagedis zitten circuit Zandvoort in de weg



• Newt Fencing •

Our specialist, trained team offer professional, high quality installation for all newt fencing projects.

Toads and newts *versus* the economy?



II. LEGAL PROTECTION



EU Habitats Directive (1992)

Protection of species

Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:
 - (a) all forms of deliberate capture or killing of specimens of these species in the wild;
 - (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
 - (c) deliberate destruction or taking of eggs from the wild;
 - (d) deterioration or destruction of breeding sites or resting places.
2. For those species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.
3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.
4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

Strict protection

Article 16

1. 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.

Derogations?



III. RECENT CASE-LAW DEVELOPMENTS BEFORE THE CJEU



(1) Law in books vs law on the ground

- **law in books vs on the ground:** ‘The Court has already held that the transposition of that provision requires the Member States not only to adopt a **comprehensive legislative framework** but also to implement practical and specific protection measures in that regard and that the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature’
- **effective protection:** ‘A collection of legal instruments does not constitute a comprehensive legislative and regulatory framework **when those instruments do not prevent** breaches of the prohibition on deterioration laid down in Article 6(2) of Directive 92/43 or when the instruments must regularly be supplemented so that the protection required by Article 12 of the directive can be ensured’
- **wide scope:** construction of houses – development of access routes – failure to prohibit wild camping – failure to restrict the operation of beach bars – failure to implement fishing restrictions

Case C-504/14 COM/GRE



(2) Deliberate and non-deliberate acts

- **Deliberate disturbance:** ‘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’
- **Deliberate capture:** ‘For the condition as to ‘deliberate’ action in Article 12(1)(a) of the 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’

Cases C-133/00 COM/GRE and C-221/04 COM/SPA

- **Destruction and deterioration of breeding sites:** ‘By not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts.’

Cases C-98/03 COM V GER



(3) Abandoned resting places

- **rationale:** ‘ It follows that the aim of the strict protection offered by Article 12(1)(d) of the directive is to ensure that significant parts of the habitats of protected animal species are preserved so that those species can enjoy the conditions essential for, inter alia, resting in those habitats.’
- **permanent (conditional) protection:** ‘Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the term ‘resting places’ referred to in that provision also includes resting places which are no longer occupied by one of the protected animal species listed in Annex IV(a) to that directive, such as the *Cricetus cricetus* (European hamster), where there is a sufficiently high probability that that species will return to such places’

Case C-477/19 IE v Magistrat der Stadt Wien



(4) Wild wolves in urban settlements

- **natural range:** the concept of ‘natural range’ is greater than the geographical space that contains the essential physical space in which the animals species concerned is present
- **no boundaries:** the protection provided for in Article 12(1) of the Habitats Directive does not comprise any limits of borders, with the result that a specimen of a protected species which strays close to or into human settlements, cannot be regarded as an animal that has left its natural range.
- **adaptive species:** the human impact on the habitats of species results in these species adapting to new conditions

Case C-88/19 Alianța pentru combaterea abuzurilor v TM e.a.



(5) Mitigation and population-based protection

- **Mitigation:** ‘it must be held that the 2016 appendix and Decision No 51, (...) do not contain **concrete and specific protection measures** that would both enable deliberate interference affecting the life and habitat of those birds to be excluded from their scope and make it possible to ensure actual observance of the prohibitions on deliberate destruction of, or damage to, their nests and eggs or removal of their nests and on deliberate disturbance of the birds particularly during the period of breeding and rearing’.
- **Population:** ‘inasmuch as the Republic of Poland contends that the **bird populations at issue have remained stable, or even that they have increased**, it should be pointed out that the Court has already held that such a circumstance cannot call into question the existence of an infringement of Article 4(4) of the Birds Directive’ (...)

Case C-441/17 COM/POL



Högsta förvaltningsdomstolen stoppar inte licensjakten efter varg

Stämningen pågår i Högsta förvaltningsdomstolen. Högsta förvaltningsdomstolen har utsett ett lagman som ska utreda om det finns skäl att återinföra licensjakten efter varg. Beslutningen kommer att vara avgörande för licensjakten och återinförandet av licensjakten efter varg.

2014-04-04

(6) Tolerance hunting

- **Science-based:** hunting derogations must define the objectives which they pursue in a clear, precise and substantiated manner, and establish, on the basis of **rigorous scientific data**, that they are appropriate with a view to achieving that objective. In the present case, the Court finds that combating poaching may be relied on as an objective covered by the directive, but the authorisation must be **actually capable of reducing illegal hunting** and do so to such an extent that it would have a **net positive effect** on the conservation status of the wolf population.’
- **Alternatives assessment:** ‘it must be shown, in a precise and appropriate manner, that the **objective pursued cannot be attained by means of a satisfactory alternative**. On that point, the Court notes that the mere existence of an illegal activity such as poaching or difficulties with which its monitoring can be associated cannot constitute sufficient evidence in that regard. On the contrary, **priority must be given to strict and effective monitoring of that illegal activity.**’

Case C-674/17 Luonnonsuojeluyhdistys *Tapiola Pohjois-Savo*



(7) Derogations

- **Preventing live-stock damage:** Article 16(1)(b) of the Habitats Directive is aimed at the prevention of damage. It would be manifestly **disproportionate** to require that it is necessary to first wait for damage to be sustained before measures are taken.
- **Negative impact:** it is possible that the killing of a limited number of specimens may **have no effect** on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favourable conservation status in its natural range
- **Public safety:** conflicts can be tackled by applying Article 16(1)(c) of the Habitats Directive

Case C-342/05 COM/FIN



(8) Restoration and active measures

- **Favourable conservation status:** ‘between 2001 and 2007, the number of burrows of the European hamster in the ‘main areas’ fell from more than 1 160 to less than 180. Furthermore, according to the result of the counts for 2009, there were no populations of the species in Alsace which reached its minimum viable population threshold, which is estimated at 1 500 individuals spread over an area of contiguous suitable land of 600 hectares’.
- **Recovery-based:** ‘the measures intended to remedy this situation include, inter alia, the creation of three PAAs, which are areas where any changes of use of land, other than those connected with agriculture, have been abandoned and for which an objective of 22% of crops favourable to the European hamster, namely 2% of lucerne and 20% of standing cereals, has been established with a view to achieving, eventually, a viable population of approximately 1 200 to 1 500 specimens per area.’

Case C-383/09 COM/FRA



(9) Species action plans

- **Concrete and effective action plans:** ‘In the present case, the existence of a network of full-time rangers and officers responsible for monitoring and protecting species does not, in itself, demonstrate effective implementation of the system of strict protection for all of the species listed in Annex IV(a) to Directive 92/43 that occur in Ireland. As pointed out by the Advocate General, those species are not covered by an appropriate monitoring system, with the exception of the horseshoe bat, the natterjack toad and the leatherback turtle, given the limited numbers of the latter species in Irish waters. Such is the case for the otter, the Kerry slug, various species of bats other than the horseshoe bat, and cetaceans, as is apparent from paragraphs 20 to 24 of this judgment’.

Case C-183/05 COM/IRE



**(10) Effective legal protection
before national courts**

- **Effective legal protection before national courts:** ‘It follows that, in so far as concerns a **species protected by EU law**, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the **objectives laid down in Article 9(3) of the Aarhus Convention.**’

Cases C-240/09 and C-243/15

Lesoochránárske zoskupenie VLK



IV. TAKE HOME MESSAGES

- **Effective application:** not only focus on translation of strict protection in the national legal framework but also application on the ground;
- **Wide scope:** liberal interpretation of the prohibition resulting in increasing relevance for other socio-economic activities (planning permits, ongoing uses,...)
- **Strict interpretation of derogation clauses:** in theory derogations are possible, yet strict substantive scrutiny by national courts
- **Restoration-based approach:** maintaining the status quo is not sufficient when species is in unfavourable conservation status
- **Science at the forefront:** rather than focusing on moral discussions, the CJEU pushes for decision-making based on comprehensive scientific studies
- **Enforcement:** both by the EC as well as the national courts and eNGOs

Thank you!

