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JUDGMENT OF THE COURT (first chamber)

April 23, 2020 (*)

(Failure of a Member State to fulfill obligations - Directive 2009/147 / EC - Conservation of wild birds - Authorizations for spring hunting of male specimens of the species of woodcock bird (*Scolopax rusticola*) in the Land of Lower Austria (Austria) - Article 7 (4) and Article 9 (1) (c) - Absence of "other satisfactory solution" - Concept of "small quantities" ' In Case C - 161/19,

ACTION under Article 258 TFEU for failure to fulfill obligations, brought on 22 February 2019, **European Commission**, represented by MM. C. Hermes and M. Noll-Ehlers, acting as Agents,

applicant,

against

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Republic of Austria, represented by J. Schmoll, acting as Agent,

defendant,

THE COURT (first bedroom),

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composed of Mr. J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice President of the Court, Mr. Mr. Safjan, L. Bay Larsen and M C. Toader (Rapporteur), Judges,

Ms.

Advocate General: E. Sharpston,

clerk: M. A. Calot Escobar,

having regard to the written procedure,

having regard to the decision taken, the Advocate General heard, to try the case without conclusions,

makes the present

Stop

By its application, the European Commission requests the Court to find that, by authorizing the spring hunting of the woodcock (*Scolopax rusticola*) in the Land of Lower Austria (Austria), the Republic of Austria has failed to fulfill its obligations incumbent on it under Article 7 (4) 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 , hereinafter the "Birds Directive").

The legal framework

The right of the ' Union

Under recitals 3 and 5 of the Birds Directive:

"In the European territory of the Member States, a large number of bird species naturally living in the wild are experiencing a population decline, very rapid in some cases, and this decline constitutes a serious danger for the conservation of the natural environment, particularly because of the threats it poses to biological balance.

[...]

"The conservation of species of birds naturally living in the wild on the European territory of the Member States is necessary to achieve the objectives of the [European Union] in the fields of improving living conditions and of sustainable development. "

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Section 1 , paragraph 1 of that directive is worded as follows:

"This Directive concerns the conservation of all species of birds naturally living in the wild on the European territory of the Member States to which the Treaty is applicable. Its purpose is the protection, management and regulation of these species and regulates their exploitation. "

Article 2 of that directive provides:

"Member States shall take all necessary measures to maintain or adjust the population of all species of birds referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural, taking account of economic and recreational . "

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Article 5 (a) and (e) of the Birds Directive is worded as follows:

"Without prejudice to Articles 7 and 9, Member States shall take the necessary measures to establish a general system of protection for all species of birds referred to in Article 1 and prohibiting in particular: intentionally kill or capture them, regardless of the method used; [...]

deep birds of species whose hunting and capture are not permitted. "

Article 7 (1) and (4) of that directive provides:
"1. Due to their population level, geographic distribution and reproductive rate throughout the [Union], the species listed in Annex II may be hunted within the framework of national legislation. Member States shall ensure that hunting of these species does not jeopardize the conservation efforts undertaken in their area of distribution.

[...]
4. Member States shall ensure that the practice of hunting, including falconry where appropriate, as it results from the application of the national measures in force, respects the principles of wise use and of balanced regulation from the ecological point of view of the bird species concerned, and that this practice be compatible, as regards the population of these species, in particular migratory species, with the provisions deriving from Article 2.

They ensure in particular that the species to which hunting legislation applies are not hunted during the nesting period or during the various stages of reproduction and dependence.
In the case of migratory species, they ensure in particular that the species to which hunting legislation applies are not hunted during their breeding period and during their return journey to their nesting place.

[...] "
Article 9 (1) and (2) of that directive provides:

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

[...]
allow, under strictly controlled conditions and on a selective basis, the capture, keeping or other judicious exploitation of certain birds in small quantities.

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

≥ species which are the subject of derogations;
authorized means, installations or methods of capture or killing;
risk conditions and the circumstances of time and place in which these derogations may be taken;
authority empowered to declare that the required conditions have been met, to decide what means, installations or methods may be used, within what limits and by which persons;
controls that will be carried out. "

Article 18 of the Birds Directive provides that Council Directive 79/409 / EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended by of subsequent acts, is repealed. As stated in recital 1 of the Birds Directive, the latter codifies Directive 79/409.

The woodcock (*Scolopax rusticola*) is listed in Part A of Annex II to the Birds Directive.

Austrian law

The niederösterreichisches Jagdgesetz 1974 (Hunting Act 1974 of the Land of Lower Austria) (LGBl. 76/1974), in its version subsequent to its twentieth amendment dated July 19, 2012 (LGBl. 69/2012), provides, in Article 3 (3) that the woodcock is a species of game birds which can be hunted. In accordance with Article 3 (5) (2) of that law, "the prohibition of any intentional disturbance, in particular during the periods of reproduction, nesting and dependence" applies to game birds, including woodcock. Article 3 (6) of that law transposes Article 9 (1) of the Birds Directive.

Under Article 3 (6) of the same law, on 26 February 2008 the government of the Land of Lower Austria adopted the niederösterreichisches Waldschnepfenverordnung (regulation on the woodcock in Lower Austria) (LGBl 32/2008, hereinafter the "woodcock regulation").

Section 1 of the Regulation on the woodcock, entitled "Scope and purpose", provides:

"(1) This Regulation applies to the woodcock (*Scolopax rusticola*) rooster, a species of game birds that can be hunted.
(2) The purpose of this Regulation is to selectively and reasonably exploit the species of game birds referred to in the preceding paragraph, in small quantities and under strictly controlled conditions. "

Article 2 of that regulation, relating to the periods and types of exploitation, provides:

"(1) The Cock woodcock can be slaughtered from 1 March to 15 April, during the period of courtship, within the limits set out in Article 3.

(2) The shooting of the woodcock is done using the appropriate lead. The provisions on the law of hunting are respected. The use of hunting dogs before shooting is prohibited as well as capture. "

Article 3 of that regulation, in its version in force on the expiry date of the period provided for in the reasoned opinion of the Commission, that is to say on 29 July 2015, fixed at 1,410 woodcock the maximum number of birds of this species can be slaughtered and has distributed this number among the different districts of the Land of Lower Austria.

On 21 February 2017, the government of the Land of Lower Austria amended this provision, reducing to 759 the maximum number of birds of this species that can be slaughtered. This change took effect on February 28, 2017.

The pre-litigation procedure

On 26 September 2013, the Commission opened infringement proceedings against the Republic of Austria by a letter of formal notice which exclusively targeted the niederösterreichische Beutegreiferverordnung (regulation of the Land of

Lower Austria on predators) (LGBl. 95a / 2008).

On 28 March 2014, following a procedure initiated under the EU-Pilot mechanism relating to the spring woodcock hunting in Austria, the Commission sent the Austrian authorities a further letter of formal notice, arguing that this practice in the Austrian Länder of Burgenland, Salzburg and Lower Austria constituted a breach of Article 7 (4) of the Birds Directive and that it found no justification in the Article 9 (1) (c) of that directive.

The regulation of the Land of Lower Austria on predators expired in 2014 and is no longer the subject of these infringement proceedings.

On 28 May 2014, the Republic of Austria replied to the said further letter of formal notice by claiming that the spring hunting of the woodcock in Austria did not constitute a breach of Article 7 (4) of the directive 'Birds' and that the conditions referred to in Article 9 (1) (c) of that directive were met. In that regard, it stated, first, that autumn hunting did not constitute 'another satisfactory solution' within the meaning of Article 9 (1) of that directive, since the selective hunting desired for male woodcock during courtship was only possible in the spring. Second, it claimed that it complied with the requirement relating to 'small quantities' provided for in Article 9 (1) (c) of the same directive.

On 29 May 2015, the Commission notified the Republic of Austria of a reasoned opinion in which it maintained that that Member State violated Article 7 (4) of the Birds Directive and explained the reasons why that State member did not fulfill the conditions referred to in Article 9 (1) (c) of that directive. The deadline set in this reasoned opinion, within which the Republic of Austria was invited to take the measures necessary to comply with the said opinion, expired on 29 July 2015.

The Republic of Austria replied to the Commission's reasoned opinion by letter of 28 July 2015, in which it continued to contest the Commission's complaints.

On 20 May 2016, the Republic of Austria informed the Commission that the spring hunting of the woodcock has not been authorized since January 2016 in the Austrian Länder of Burgenland and Salzburg.

The infringement proceedings opened against the Republic of Austria are therefore now limited to the authorization, still in force, of the spring woodcock hunting in Lower Austria.

On February 14, 2017, the Land of Lower Austria reduced, from February 28, 2017, the number of specimens for which the taking was authorized, from 1 368 to 759 units.

By letter of 27 July 2017, the member of the Commission responsible for environmental protection informed the President of the Land of Lower Austria that the reduction in the hunting quota and the study presented by the Republic of Austria in 2016, relating to the origin and age structure of the woodcock killed in the spring hunting season in Lower Austria (hereinafter the "2016 study"), were not such as to set aside the Commission's complaints. At the request of the Austrian authorities, dated 30 August 2017, the competent director of the Commission's Directorate-General for the Environment communicated, by letter of 21 December 2017, an analysis of the 2016 study. On 22 December 2017, the Member of the Commission responsible for environmental protection once again invited the President of the Land of Lower Austria to end the spring woodcock hunting. By letters of 31 January and 22 February 2018, the Austrian authorities provided the Commission with an additional note to the 2016 study.

On 22 February 2019, the Commission decided to bring the present action.

The action

Arguments of the parties

The Commission considers that the Republic of Austria does not dispute the infringement of the third subparagraph of Article 7 (4) of the Birds Directive, but merely claims that the Austrian rules comply with the provisions of Article 9 of this directive.

According to that institution, the Republic of Austria has not established that there is no 'other satisfactory solution' within the meaning of the introductory sentence of Article 9 (1) of that directive, and whereas the maximum number of specimens which is allowed to hunt corresponds to the requirement of 'small quantities' referred to in Article 9 (1) (c) of the same directive.

As regards the absence of 'other satisfactory solution', the Republic of Austria has not shown that the woodcock was absent or present in negligible quantities during the autumn in the spring hunting areas in Lower Austria. Moreover, the fact that this fall woodcock hunting is authorized in the Austrian Länder bordering Lower Austria, namely Burgenland, Upper Austria and Styria, as well as in Carinthia and Vorarlberg, and in other Central European Member States, would indicate that it could be considered as "another satisfactory solution".

Furthermore, if spring hunting during the courtship period permitted a more selective removal of woodcock from male woodcocks than autumn hunting, which concerns male and female birds almost equally, the Commission nevertheless disputes the assertion of the Republic of Austria according to which the more selective taking during the spring hunting of male woodcock is less trying for the populations of the species than the autumn hunting and this one, which falls on the burden of proof, does not would not have provided convincing evidence to support this claim.

Moreover, the Commission is of the opinion that there is no solid scientific basis to support the thesis of the Republic of Austria according to which spring hunting has less trying effects than autumn hunting on populations of the species. In addition, this selective removal would have a particular impact on dominant males, which would have negative effects on the level of reproduction of the species.

As regards 'small quantities', within the meaning of Article 9 (1) (c) of the Birds Directive, that institution considers that the Republic of Austria admits that the maximum number of 1,410 woodcock timber which can be felled, fixed by Austrian law in its version in force on the expiry date of the period provided for in the reasoned opinion of the Commission, namely 29 July 2015, was based on incorrect calculations due to the taking into account erroneous reference populations and was therefore reduced to 759 birds in 2017. Thus, that Member State would recognize the violation, on the reference date, of the requirement of 'small quantities'.

The Republic of Austria considers, in essence, that the woodcock regulation meets the requirements of Article 9 (1) (c) of the Birds Directive, so that the conditions for derogating in Article 7 (4) of that directive are fulfilled.

In the first place, the fall hunt does not constitute "another satisfactory solution". In fact, the woodcock being a polygynous species, the males of which mate with several females without participating in the brooding or rearing of the young, the survival of the hens would be more important for the survival of the population than that of the roosters.

In this case, spring hunting would allow the selective removal of woodcock exclusively male.

However, insofar as scientific publications recommend concentrating hunting on females to reduce the population in a particularly effective way, the concentration of hunting on roosters, and therefore the increase in the survival rate of hens, would the effect of making the population grow significantly larger than if the hens were also hunted.

Thus, a selective removal of the woodcock cockerels would constitute another less trying hunting option for the population of the species concerned in Lower Austria.

Furthermore, the Republic of Austria disputes that there are dominant males in the woodcock and considers that the possible "dominance" of the males should rather be understood as "aerial sovereignty".

In its rejoinder, the Republic of Austria adds that a selective spring hunting exclusively targeting male woodcock in small quantities would be preferable to an unlimited hunting of specimens of both sexes in autumn.

Second, the Republic of Austria maintains, first, that it correctly defined 'small quantities' taking as a reference all the scientific data and studies available at the time. Next, according to that Member State, the reference population for the calculation of these 'small quantities' includes not only the local breeding population, but also those of the countries of origin. Finally, the local breeding population would not be excessively affected by the selective hunting of woodcock in the spring.

Findings of the Court

By its action, the Commission requests the Court to find that the Republic of Austria has failed to fulfill its obligations under Article 7 (4) of the Birds Directive by authorizing spring hunting with male woodcock in the Land of Lower Austria.

In the present case, the woodcock is a species listed in Annex II, Part A, to the Birds Directive.

Article 2 (1) of the woodcock regulation expressly authorizes the hunting of male woodcock during the courtship period in these terms, namely "the woodcock cock may be slaughtered 1st March to 15 April, during the period of courtship [...]."

Consequently, this period is one of those during which Article 7 (4) of that directive prohibits, in principle, any hunting of the woodcock (see, to that effect, judgment of 12 July 2007, Commission / Austria, C - 507/04, EU: C: 2007: 427, point 195).

However, the Republic of Austria considers that Article 9 (1) (c) of the Birds Directive justifies the authorizations granted.

Indeed, this provision authorizes, for all species of birds, and if there is no 'other satisfactory solution', a derogation from Articles 5 and 7 of that directive to allow, under strictly controlled conditions and selectively, the capture, keeping or other "judicious exploitation" of certain birds "in small quantities".

In this regard, it should be pointed out that the Court has already held as a right that hunting wild birds practiced for leisure purposes during the periods indicated in Article 7 (4) of the Birds Directive is liable constitute "judicious exploitation" authorized by Article 9 (1) (c) of that directive (see, to that effect, judgment of 16 October 2003, League for the Protection of Birds and Others, C - 182/02 , EU: C: 2003: 558, point 11 as well as the case-law cited).

It should also be emphasized, in the case of a derogatory regime such as that provided for in Article 9 of the Birds Directive, which must be strictly interpreted and impose the burden of proof of the existence of the conditions required for each derogation from the decision-making authority, that the Member States are required to guarantee that any intervention relating to protected species is only authorized on the basis of decisions containing precise and adequate reasons referring to grounds, conditions and requirements provided for in that article (see, to that effect, judgment of 8 June 2006, WWF Italia and Others, C - 60/05, EU: C: 2006: 378, paragraph 34).

Among the conditions which must be fulfilled in order for the Member States to be able to make use of that derogating regime, there is, in Article 9 (1) of that directive, the absence of 'other satisfactory solution'. By using this expression, the Union legislature intended to allow this provision to be waived, to the only extent necessary, since the hunting possibilities offered at other times are so limited that the balance sought by that directive between the protection of species and certain leisure activities is broken (see, to this effect, judgment 10 September 2009, Commission / Malta, C - 76/08, EU: C: 2009: 535, paragraph 56).

It follows from the provisions of Article 9 of the Birds Directive, which refer to the strict control of that derogation and the selective nature of catches, as indeed does the general principle of proportionality, that the derogation, one of which a Member State intends to make use of it must be proportionate to the needs which justify it (judgment of 10 September 2009, Commission / Malta, C - 76/08, EU: C: 2009: 535, paragraph 57).

In the first place, as regards the absence of 'other satisfactory solution' within the meaning of Article 9 (1) of the Birds Directive, it must first be noted that it is undisputed that woodcock are also present in autumn on the territories in which they are hunted and that, in accordance with article 7 of this directive, they can be hunted during this period.

Next, the argument developed by the Republic of Austria according to which, in comparison with autumn hunting, the selective removal of only male woodcock during the breeding period constitutes a less trying mode of hunting for the population of the species concerned in Lower Austria is mainly based on a contrario reading of a study on hunting deer cited by the Commission.

Notwithstanding the fact that the arguments of that Member State are based on work relating to a deer, that argument proceeds from the assumption that, if scientific publications recommend concentrating hunting on females in the event that reduction is desired of the population of a species concerned, conversely, the concentration of hunting on roosters would increase the population.

However, that assumption cannot be accepted, since, even reduced to roosters, the authorization of hunting inevitably involves the taking of part of the population of the species concerned, which, as well as the Court has already judged, defines itself as the set of all individuals which constitute a breeding community (judgment of 12 July 2007, Commission / Austria, C - 507/04, EU: C: 2007: 427, paragraph 235).

It follows that, under Article 7 (4) of the Birds Directive, the protection of wild birds during nesting periods and the different stages of reproduction is aimed at both males and females in their whole. Consequently, it cannot be considered that the change in the balance between males and females due to a selective sampling which concerns only males can comply with the requirements of Article 7 of the Birds Directive.

Furthermore, in response to the argument of the Republic of Austria that a selective spring hunt exclusively targeting male woodcock in small quantities would be preferable to an unlimited hunt of specimens of both sexes in autumn, it is important to note that Article 7 (4), first subparagraph, of the Birds Directive provides that "Member States shall ensure that the practice of hunting ... respects the principles of wise use and of regulation balanced from the ecological point of view of the bird species concerned, and that this practice is compatible, as regards the population of these species, in particular migratory species, with the provisions deriving from Article 2 [of this directive] ". An authorization to hunt outside the periods referred to in article 7,

Consequently, the Republic of Austria has not provided evidence that spring hunting of roosters would be less demanding than autumn hunting for the population of the species concerned in Lower Austria and that it does not exist, therefore, "other satisfactory solution" within the meaning of Article 9 (1) of the Birds Directive.

Secondly, with regard to the condition relating to 'small quantities' provided for in Article 9 (1) (c) of the Birds Directive, it is important to recall that, according to settled case-law, the the existence of a default must be assessed in the light of the situation in the Member State as it stood at the end of the period fixed in the reasoned opinion and that the changes which have taken place subsequently cannot be taken into account by the Court (judgment of 16 July 2015, Commission / Slovenia, C - 140/14, unpublished, EU: C: 2015: 501, point 63 and the case-law cited).

In the present case, it is common ground that the number of woodcock, valid on 29 July 2015, that is to say at the end of the period fixed in the reasoned opinion, was based on calculations that this number was subsequently reduced for this reason.

This downward revision, on the initiative of the authorities of the Land of Lower Austria, in order to correct the number of woodcockes on the basis of which the quantity of these birds that could be taken was incorrectly calculated, is sufficient to demonstrate that , on the reference date, these authorities did not have data capable of constituting well-established knowledge such that the Republic of Austria was not able to comply with the requirement of "small quantities", referred to in Article 9 (1) (c) of the Birds Directive.

It follows that the requirement relating to the absence of 'other satisfactory solution' and that relating to 'small quantities' are not met in the present case and that the Republic of Austria cannot therefore usefully support that the national regulations are in accordance with Article 9 (1) (c) of the Birds Directive.

In the light of all the foregoing considerations, it must be observed that, by authorizing the spring hunting of male woodcock in the Land of Lower Austria, the Republic of Austria has failed to fulfill its obligations fall under Article 7 (4) of the Birds Directive.

Costs

Under Article 138 (1) of the Rules of Procedure of the Court, any unsuccessful party is to be ordered to pay the costs, if they have been asked for. Since the Commission has ordered the Republic of Austria to be ordered to pay and the latter has been unsuccessful, it must be ordered to pay the costs.

For these reasons, the Court (First Chamber) declares and decides:

By authorizing the spring hunting of the woodcock (*S colopax rusticola*) male in the Land of Lower Austria (Austria), the Republic of Austria has failed to fulfill its obligations under Article 7, paragraph 4, of Directive 2009/147 / EC of the European Parliament and of the Council, of November 30, 2009, concerning the conservation of wild birds.

The Republic of Austria is ordered to pay the costs.

Signatures

* Language of the case: German.