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JUDGMENT OF THE COURT (First Chamber)

23 April 2020 (*)

(Action for failure to fulfil obligations — Directive 2009/147/EC — Conservation of wild birds — Authorisations for spring hunting of male specimens of the 'common eider' bird species (*Somateria mollissima*) in the province of Åland (Finland) — Article 7(4) and Article 9(1)(c) — Concepts of 'judicious use' and 'small numbers')

In Case C-217/19,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 8 March 2019,

European Commission, represented by C. Hermes and E. Ljung Rasmussen, acting as Agents,

applicant,

v

Republic of Finland, represented by J. Heliskoski, acting as Agent, and by J. Bouckaert, D. Gillet and S. François, avocats,

defendant,

THE COURT (First Chamber),

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

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

By its application, the European Commission is seeking from the Court a declaration that, by recurrently granting authorisations for spring hunting of male common eiders (*Somateria mollissima*) in the province of Åland (Finland) since 2011, the Republic of Finland has failed to fulfil its obligations under Article 7(4) and Article 9(1)(c) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive').

Legal context

According to recitals 3 to 6 and 10 of the Birds Directive:

A large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, very rapidly in some cases. This decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby.

The species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species. Such species constitute a common heritage and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities.

The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the [European Union]'s objectives regarding the improvement of living conditions and sustainable development.

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

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

Article 1 of the Birds Directive is worded as follows:

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

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

Article 2 of that directive provides:

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

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

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

deliberate killing or capture by any method;

keeping birds of species the hunting and capture of which is prohibited.'

Article 7(1) and (4) of the Birds Directive states:

'1. Owing to their population level, geographical distribution and reproductive rate throughout the [European Union], the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.

...

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

They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction.

In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds.

...'

Under Article 9(1) and (2) of that directive:

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

...

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

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

the species which are subject to the derogations;

the means, arrangements or methods authorised for capture or killing;

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

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

the controls which will be carried out.'

Article 18 of the Birds Directive states 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 subsequent acts, is repealed. As stated in recital 1 of the Birds Directive, the latter codifies Directive 79/409.

Common eiders (*Somateria mollissima*) are listed in Part B of Annex II to the Birds Directive.

Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive') states:

'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):

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

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

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;

for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

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.'

Background to the dispute and pre-litigation procedure

Male common eiders have been traditionally hunted in the province of Åland (Finland) during the spring.

By its judgment of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770), the Court held that the spring hunting of male common eiders authorised in the province of Åland from 1998 to 2001 was not compatible with Directive 79/409. Following that judgment, the Government of the province of Åland granted no authorisation for spring hunting of male common eiders between 2006 and 2010.

In 2011, the Commission was informed that the authorities of that province had resumed granting authorisations for that spring hunting practice. Since then, those authorities have continued to grant authorisations annually ('the contested authorisations').

According to the Commission, the contested authorisations are not compatible with the Birds Directive, which prohibits spring hunting unless the conditions for derogation defined in that directive are met. In the present case, the

Commission argues that the Republic of Finland does not meet those conditions in so far as it has demonstrated neither that the contested authorisations permit 'judicious use' nor that the hunting quotas affect only 'small numbers' of birds within the meaning of Article 9(1)(c) of the Birds Directive.

On 22 November 2012, the Commission sent a letter of formal notice to the Republic of Finland pursuant to Article 258 TFEU, claiming that the opening of the 2011 and 2012 spring hunting seasons was inconsistent with Articles 7 and 9 of the Birds Directive.

By its reply of 21 January 2013, the Republic of Finland denied the infringement arguing that spring hunting was covered by the derogation set out in Article 9(1)(c) of the Birds Directive.

On 27 February 2015, the Commission sent the Republic of Finland an additional letter of formal notice, concerning the 2013 and 2014 spring hunting seasons as further examples of that unlawful practice. The Commission claimed, in particular, that the contested authorisations are not justified under Article 9(1)(c) of the directive.

By letter of 23 April 2015, the Republic of Finland replied to the additional letter of formal notice, rejecting the Commission's assertions.

On 9 December 2016, the Commission notified the Republic of Finland of a reasoned opinion in which it maintained its position.

The Republic of Finland replied on 9 February 2017, denying the infringement and submitting certain information on the population status of common eiders.

Meetings between representatives of the province of Åland and Commission officials took place in January and March 2017. By letter of 27 July 2017, the Member of the Commission responsible for environmental protection asked the Finnish authorities and those of the province of Åland to put an end to the infringement detected. The Government of the province of Åland replied on 22 August 2017, setting out a strategy on population management in respect of common eiders, including predator control and inventories, and refusing to discontinue common eider spring hunting. In its reply of 22 December 2017, the Member of the Commission responsible for environmental protection concluded that the infringement persisted.

On 8 March 2019, the Commission decided to bring the present action.

The action

Arguments of the parties

In its application, the Commission claims that the contested authorisations are (i) inconsistent with the third subparagraph of Article 7(4) of the Birds Directive and (ii) cannot be justified under Article 9(1)(c) thereof.

In the first place, the Commission submits that the contested authorisations are inconsistent with the third subparagraph of Article 7(4) of the Birds Directive. Under that provision, Member States, 'in the case of migratory species, ... shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction'.

It is uncontested in the present case — as was in the case that gave rise to the judgment of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770) — that the spring hunting season in the province of Åland, which lasts two to three weeks in May, coincides with the period of reproduction of common eiders.

The Commission claims that that information is confirmed by the work of the ORNIS Committee, which is the committee for Adaptation to Technical and Scientific Progress under the Birds Directive, instituted pursuant to Article 16 of that directive and consisting of Member State representatives, the scientific value of its work having already been recognised by the Court (judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraphs 26 and 27 and the case-law cited).

In the second place, the Commission claims that the Republic of Finland cannot justify the inconsistency of the contested authorisations with the third subparagraph of Article 7(4) of the Birds Directive under the derogation set out in Article 9(1)(c) thereof.

Not only has the Republic of Finland failed to establish that the contested authorisations constitute 'judicious use' but, moreover, it has failed to demonstrate that the spring hunting of common eiders affects only 'small numbers' of birds within the meaning of Article 9(1) of the Birds Directive.

With regard to the failure to establish 'judicious use', first, the Republic of Finland has not substantiated with sound scientific evidence that it is ensured that the population in question is maintained at a 'satisfactory level'. According to the Commission, the data on which the Republic of Finland relies stems from an incorrect and partial reading of certain documents. Those documents are not up to date, the oldest one dating back to 2004, or they are irrelevant in so far as they concern a population at global or European level, that is to say a larger population than that at issue in the present case. By contrast, four studies establish decreasing trends for that population between 2011 and 2015. With regard to subsequent years, a further three studies show that the situation continued to deteriorate and a fourth one shows that it is still a concern with the result that it is not possible to conclude that the population of the species concerned is maintained at a 'satisfactory level'.

Furthermore, the data reported under Article 12 of the Birds Directive by both the Republic of Finland and its neighbouring Member State, the Kingdom of Sweden, which is relevant for a migratory species, shows declining populations of common eiders in the short term and in the long term. The Commission acknowledges that there are multiple reasons for that decline. Nonetheless, it points out that the judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 32), and of 10 September 2009, *Commission v Malta* (C-76/08, EU:C:2009:535, paragraph 59), both concerning 'judicious use' within the meaning of Article 9(1) of the Birds Directive, exclude a derogation under Article 9(1)(c) thereof whenever it is not ensured that the population in question is maintained at a 'satisfactory level', irrespective of whether hunting contributes to the unfavourable conservation status of the

population or not. In the Commission's view it would be inappropriate to allow those populations to be hunted, even if hunting did not cause or even contribute to that unfavourable conservation status.

In addition, the Commission disputes the Republic of Finland's view that the grant of the contested authorisations is justified under Article 16(1) of the Habitats Directive in case of unfavourable conservation status and, in accordance with the judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, paragraph 29), 'remains possible by way of exception where it is duly established that [such authorisations] are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status'. Not only has the Court never applied that exception in the context of Article 9(1)(c) of the Birds Directive, which contains different conditions and is structured differently from Article 16(1) of the Habitats Directive, but, more importantly, the Republic of Finland has not duly established that the contested authorisations have only 'neutral' effects on the relevant common eider population. On the contrary, scientists observed, with regard to the effect of common eider hunting, that broken pair bonds contribute to the long-term reduction of the fecundity of female common eiders in a population where male common eiders are repeatedly removed due to spring hunting.

Secondly, the Republic of Finland has failed to demonstrate that spring hunting is necessary for predator control and therefore constitutes 'judicious use'. While that Member State had already argued, in the proceedings that gave rise to the judgment of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770), that spring hunting of common eiders was justified because hunters improved rearing conditions by eliminating small predators in the breeding areas, the Court, in paragraph 35 of that judgment, rejected that argument by pointing out that 'it is not apparent that [an environmental management] function can be fulfilled only if the common eider hunting season is open in the spring'.

With regard to the demonstration that hunting affects only 'small numbers', whereas the Republic of Finland used the Baltic/Wadden Sea flyway wintering population as the basis for its calculations, the Commission is of the opinion that it should have based them on the population breeding in the islands of the province of Åland. While it is undisputed that common eiders are migratory birds, the contested authorisations do not concern common eiders 'on migration' but those that have started breeding and, thus, are stationary. In addition, the contested authorisations are limited to those birds that are present in the islands of the province of Åland.

The Republic of Finland's choice of reference population leads to an over-estimation of the number of birds available for hunting at the moment in time and at the place to which those authorisations apply. Given the significant size of the entire Baltic/Wadden Sea flyway common eider wintering population, even a fraction of that population would not constitute a 'small number' of the population breeding in the islands of the province of Åland. Not all common eiders of the Baltic/Wadden Sea flyway wintering population migrate all the way to Finland.

Moreover, the Republic of Finland failed to take account of the cumulative effects of its method of calculation. Not only does no other Member State proceed to calculate in that way but, if each Member State were to do so, it would cease to constitute 'small numbers' for each of the populations concerned by the respective derogations but would amount to fractions that, when added, would necessarily be more significant. By failing to provide data on the population breeding in the islands of the province of Åland, the Republic of Finland failed to establish that the derogation affects only 'small numbers'.

In its defence, the Republic of Finland states at the outset that in its view the present case does not concern an endangered species or a species in the process of disappearing. It then proceeds to set out three preliminary observations.

First, the Republic of Finland contends that the common eider population is 'stable/fluctuating' and that the decline in that population established since the 1990s is mostly the result of natural progression. In its view, it is scientifically flawed to link the development of the common eider population to the time when it reached its peak, as a result of artificial conditions, including the eutrophication of the Baltic Sea and the Wadden Sea and the lack of predators. A declining species cannot therefore be automatically defined as having an unsatisfactory population level or an unfavourable conservation status. That is even more so when, as in the present case, spring hunting has nothing to do with any decline.

Secondly, the classification, in respect of the European Union, of the species concerned in the 'near threatened' category of the International Union for the Conservation of Nature and Natural Resources (IUCN) 'red list' for threatened species does not mean that that species is endangered or facing a high risk, in so far as that classification does not take account of the 'stable/fluctuating' trend mentioned.

Thirdly, with regard to the provisions of the Birds Directive, in particular Article 9(1)(c) thereof, the Commission was wrong to consider that spring hunting is in itself unreasonable.

With regard to the merits of the action, the Republic of Finland contends that the contested authorisations meet the conditions relating to 'judicious use' and 'small numbers'.

In the first place, with regard to the concept of 'judicious use', the Republic of Finland submits, first of all, by relying on the Court's case-law relating to Article 16(1) of the Habitats Directive, that maintenance of the population in question at a 'satisfactory level' is not a precondition for granting derogation under Article 9(1)(c) of the Birds Directive.

Next, even if maintenance of the population in question at a 'satisfactory level' were a precondition for granting that derogation, the Republic of Finland notes that it referred to five studies and is of the opinion that it relied on sound scientific evidence with a view to opening the spring hunting of male common eiders in the province of Åland.

Lastly, the Republic of Finland argues that the population levels established did not preclude spring hunting. The condition that the population be maintained at a 'satisfactory level' can be met if the derogation is not such as to worsen the population status or prevent the population status from being maintained at that level. Moreover, spring

hunting provides an incentive for hunting communities to participate in a management plan and take conservation measures.

Based on the Guide to sustainable hunting adopted in 2008 by the Commission under the Birds Directive ('the Guidance document'), the Republic of Finland takes the view that the Commission itself acknowledges the fact that species with an unfavourable conservation status may be hunted in so far as that could provide a strong incentive to manage habitats and address other factors contributing to a declining population, therefore contributing to the objective of restoring populations to a favourable conservation status. Furthermore, that is the reason why a management plan was adopted by the Government of the province of Åland in 2017 and 2018 in the context of the decision to allow spring hunting. The Republic of Finland states, in addition, that the hunting of 2 000 male common eiders was approved also for the 2019 spring hunting season.

In that regard, contrary to the Commission's assertions, the clarification in paragraph 35 of the judgment of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770), that 'although it is true that hunters perform a useful function in environmental management by hunting small predators in the spring so that the eider's rearing can produce better results, it is not apparent that that function can be fulfilled only if the eider hunting season is open in the spring' was made with regard to the concept of 'the absence of alternative solution' and the Court considered implicitly but surely that hunters would still have an incentive to carry out predator control.

In the second place, with regard to the condition relating to 'small numbers', it follows from the judgments of 9 December 2004, *Commission v Spain* (C-79/03, EU:C:2004:782, paragraph 36), and of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770, paragraph 53), that 'the population in question', with regard to migratory species, must be understood as 'the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application'. Since the Court formulated no reservations with regard to that definition, it is clear that the concept of 'migratory species' refers to the biological behaviour of the species concerned and does not imply that the species is 'on migration' and, therefore, moving at the time of the hunt. A bird species is either sedentary or migratory and it would not cease to be either one or the other solely because the birds of the species concerned are not 'on migration'.

Moreover, since no Member State other than the Republic of Finland authorises spring hunting of Baltic/Wadden Sea flyway male common eiders, no hunting practice coincides with spring hunting in the province of Åland and there is therefore no need to calculate any cumulative effects since, precisely, there are none.

In its reply, and with regard to 'judicious use', the Commission specifies, first, that the interpretation advocated by the Republic of Finland contravenes the Court's case-law arising from its judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 32), and of 10 September 2009, *Commission v Malta* (C-76/08, EU:C:2009:535, paragraph 59), according to which 'derogations under Article 9 of the [Birds] Directive may be granted only if it is ensured that the population of the species concerned is maintained at a satisfactory level. If that condition is not fulfilled, hunting of birds cannot, in any event, be considered [to be] judicious'. Secondly, the Commission insists on the fact that the derogation system set out in Article 9(1)(c) of the Birds Directive is more stringent than that in Article 16 of the Habitats Directive. By specifically limiting Article 9(1)(c) of the Birds Directive to cases of 'judicious use', the EU legislature intended to submit that derogation provision to a stricter requirement, which limits derogations to cases of bird populations at a satisfactory level. Thirdly, declining population trends of a given species are obviously a relevant factor for determining whether the population level is satisfactory or not. Moreover, to the extent that a Member State does not ensure that the population in question is maintained at a 'satisfactory level', spring hunting cannot constitute 'judicious use', irrespective of whether or not hunting is the primary cause of decline in that population.

With regard to the studies provided, those produced by the Republic of Finland are insufficient to contradict the evidence showing declining common eider population trends, which are an important indicator of an unsatisfactory population status.

Furthermore, the Republic of Finland puts forward arguments relating to predator control that are not legally relevant. First, the Court's case-law seeks to determine whether opening hunting seasons is necessary to perform the potentially useful function or whether that function can be fulfilled irrespective of hunting. In the present case, the Republic of Finland's defence provides no proof that the common eider population is better off, be it in the islands of the province of Åland, in Finland as a whole, in the Baltic Sea or on the Baltic/Wadden Sea flyway, as a result of spring hunting and predator control.

Secondly, the argument that scientific literature supports spring hunting of male common eiders because the population is male-dominated has no factual basis, since the literature recommends limiting hunting to mainly male common eiders during the winter. In particular, that argument contradicts the Court's case-law according to which a biological species is defined as the totality of all individual beings that form a reproducing community with the result that the species must be protected as a whole (judgment of 12 July 2007, *Commission v Austria*, C-507/04, EU:C:2007:427, paragraph 235).

In its rejoinder, the Republic of Finland sets out various preliminary observations. In particular, it states that it is surprised that the Commission has not expressed its position on the running management plan in place in Finland since 2017.

With regard to the concept of 'judicious use', the Republic of Finland reiterates its claim that maintenance at a 'satisfactory level' is not a precondition under Article 9(1)(c) of the Birds Directive. Moreover, the Republic of Finland submits that its line of arguments does not consist in transposing the regime under Article 16(1) of the Habitats Directive to the Birds Directive but, rather, in pleading in favour of a converging interpretation of the derogations

contained in both directives. It also reasserts the need for a distinction between a declining species and a species with an unfavourable conservation status.

In addition to disputing the Commission's analysis of the studies, the Republic of Finland puts forward a statement of 29 July 2019 from one of the lead scientists specialised in common eider research in Finland, in which he takes the view that the management strategy set up on the islands of the province of Åland is both justified and well founded as well as firmly linked to the local situation. He also considers that the management plan referred to in paragraph 52 above and the actions taken in that respect have a larger positive effect on the common eider population of the province Åland than the negative effect induced by reducing the reproductive output of a limited number of females.

With regard to predator control, the Republic of Finland argues, first of all, that the local hunting community would lose any interest in carrying out predator control if spring hunting of common eiders was banned. No spring hunting in the province of Åland would therefore mean no hunting at all. Next, the Republic of Finland submits that the involvement of local communities in conservation programmes must be encouraged. According to the Republic of Finland, the Commission aims to exclude the largest stakeholder group in the future conservation of common eiders by removing their sole incentive to participate in such programmes. The Republic of Finland concludes that the ban on spring hunting required by the Commission is disproportionate in that it takes no account of either the fact that such hunting has in no way contributed to the decline in the population of the species concerned or the positive role played by the local hunting community in the conservation of that population.

Findings of the Court

By its action, the Commission is seeking from the Court a declaration that the Republic of Finland has failed to fulfil its obligations under Article 7(4) and Article 9(1)(c) of the Birds Directive by recurrently granting authorisations for spring hunting of male common eiders in the province of Åland since 2011.

It is important to note that, in its defence, the Republic of Finland states that those types of authorisations were granted at least until the 2019 spring hunting season.

If the question of whether a Member State has failed to fulfil its obligations is determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the subject matter of an action for failure to fulfil obligations may extend to events which took place after the reasoned opinion, provided that they are of the same kind as the events to which the opinion referred and constitute the same conduct (see, to that effect, judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, EU:C:2017:267, paragraphs 40 and 43 and the case-law cited).

It follows that the merits of the present action should be examined for the period from 2011 to 2019.

Article 7(4) of the Birds Directive requires Member States to ensure, in particular, that the bird species listed in Annex II thereto are not hunted during their period of reproduction.

In the present case, common eiders are one of the species listed in Part B of Annex II to the Birds Directive. It is undisputed that the spring hunting season for that species in the province of Åland coincides with the period of reproduction thereof.

Consequently, that season forms part of the periods during which Article 7(4) of the directive prohibits, in principle, all hunting of common eiders (see, to that effect, judgment of 12 July 2007, *Commission v Austria*, C-507/04, EU:C:2007:427, paragraph 195).

However, the Republic of Finland considers that the contested authorisations are justified under Article 9(1)(c) of the directive.

That provision allows for derogation from Articles 5 and 7 of the Birds Directive, for all bird species, where there is no 'other satisfactory solution' in order to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other 'judicious use' of certain birds 'in small numbers'.

In that regard, it is important to note that the Court has already held that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the Birds Directive may constitute 'judicious use' authorised by Article 9(1)(c) of the directive (see, to that effect, judgment of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 11 and the case-law cited).

It must also be noted, with regard to a derogation system such as that provided for in Article 9 of the Birds Directive, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions are present for each derogation, that Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down 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).

The condition relating to 'judicious use'

It is apparent from the provisions of Article 9 of the Birds Directive, which refer to the strictly supervised conditions for the derogation set out therein and to the selective basis on which birds are captured, and, moreover, from the general principle of proportionality, that the derogation of which a Member State intends to make use must be proportionate to the needs which justify it (judgment of 10 September 2009, *Commission v Malta*, C-76/08, EU:C:2009:535, paragraph 57).

The Court thus held that derogations under Article 9 of the Birds Directive may be granted only if it is ensured that the population of the species concerned is maintained at a 'satisfactory level' and, if that condition is not fulfilled, hunting of birds cannot, in any event, be considered to be judicious and, accordingly, acceptable (see, to that effect, judgments of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 32, and of 10 September 2009, *Commission v Malta*, C-76/08, EU:C:2009:535, paragraph 59).

In the present case, it is appropriate to examine whether the population of the species concerned is maintained at a 'satisfactory level', failing which, as recalled in the case-law mentioned in the preceding paragraph, the other conditions under Article 9(1) of the Birds Directive, in particular that relating to 'judicious use', cannot be fulfilled.

In that regard, it is important to note that the evidence that the conditions to be met to derogate from the system of protection of that directive must be based on well-established scientific knowledge (see, to that effect, judgment of 15 December 2005, *Commission v Finland*, C-344/03, EU:C:2005:770, paragraph 54 and the case-law cited). The Court has already held that the best relevant knowledge must be available to the authorities at the time they grant the authorisations (see, with regard to protected species covered by the Habitats Directive, judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraphs 52 and 61, and of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola*, C-674/17, EU:C:2019:851, paragraph 51). Those considerations apply also with regard to Article 9(2) of the Birds Directive.

In the present case, the table on which the Republic of Finland relies includes five documents, namely (i) the 2015 IUCN classification, at a global level, of the species concerned in the 'least concern' category; (ii) a 2004 report by the non-governmental organisation BirdLife International conferring common eiders a 'favourable conservation status' at pan-European level; (iii) the Guidance document; (iv) the 2015 classification, established by the non-governmental organisation Wetlands International, of the Baltic/Wadden Sea flyway population in the 'least concern' category; and (v) the 2010 Finnish 'red list' classification of common eiders in the 'near threatened' category in Finland.

It need only be pointed out, first, that the first and fourth documents are from 2015 and therefore cannot justify the contested authorisations from 2011 to 2014. Moreover, if the first of those documents, concerning the global classification of the species concerned, admittedly listed the species concerned in the 'least concern' category globally, that same organisation, by contrast, placed that species amongst the 'endangered' species at EU level for that same year.

Next, the second and third documents date back to 2004 and 2008, respectively. In respect of those studies, the Republic of Finland considers that the Commission has not established that they were out of date.

In that regard, first, it cannot be maintained that a Member State has the best scientific knowledge when, at the time the competent authority adopts its decision, the latter relies on a study published seven years prior with the result that, unless evidence to the contrary, it is permissible to consider that a subsequent study, which analyses data from more recent years, contains more up-to-date data and, therefore, is significantly more accurate and relevant.

Secondly, while it is not clear, contrary to the Commission's assertions, whether or not the Guidance document from 2008 was out of date, and even if it should be pointed out that it had been published in the context of Directive 79/409, the conclusions the Republic of Finland draws from that document are nevertheless the result of a partial reading thereof. While the Guidance document admittedly lists common eiders as a 'huntable' species, it establishes primarily that that species is among those with an 'unfavourable' conservation status.

It follows that the Republic of Finland cannot successfully rely on the first four documents referred to in paragraph 71 above to demonstrate that the authority that granted the contested authorisations had well-established scientific knowledge that permitted the inference that the population of the species concerned was maintained at a 'satisfactory level' for the period from 2011 to 2014.

That being said, the Finnish 'red list' established in 2010, which concerned a recent analysis of the conservation status of the bird species on its territory, was available to the Republic of Finland.

In that regard, the Republic of Finland considers that the fact that the Finnish 'red list' classified in 2010 common eiders in the 'near threatened' category does not diminish but, rather, supports, its argument that the contested authorisations for the period from 2011 to 2015 were based on sound scientific evidence.

Clearly, that line of argument reflects neither the heading nor the definition given to that category. The said category is defined as follows: 'a taxon is "near threatened" when it has been evaluated against the criteria [relating to population size and evolution, geographical range and a quantitative analysis] but does not qualify for "critically endangered", "endangered" or "vulnerable" now, but is close to qualifying for or is likely to qualify for a "threatened" category in the near future'.

In addition, it is also important to stress that, if the Republic of Finland recalls that, in terms of risk, the 'near threatened' category ranks second in the nomenclature of that list, the headings of the higher ranking categories, entitled 'vulnerable', 'endangered', 'critically endangered', 'extinct in the wild' and 'extinct', show that the inclusion of that species in those categories does not prove the favourable status of that species or that it is exempt from concern.

Furthermore, the Commission cites various studies, the majority of which, in essence, contradict the Republic of Finland's assertion that it was in a position to ensure that the Baltic/Wadden Sea flyway population would be maintained at a 'satisfactory level' at the time of the opening of the spring hunting seasons for the period from 2011 to 2015.

For subsequent years, it is common ground that the IUCN, BirdLife International, Wetlands International and the Finnish 'red list' referred to in paragraph 71 above all reclassified common eiders in higher risk categories.

In addition, it is true that a declining population trend in respect of the species concerned is not sufficient, in itself, to establish the unsatisfactory conservation status of that population. However, when no supplementary evidence goes to show that, for other reasons, the situation should nevertheless be regarded as favourable, such a declining trend does not permit the inference that the population is maintained at a 'satisfactory level'.

It must also be added, with regard to the interpretation of the Birds Directive and of the Habitats Directive that while the Court's case-law has recognised, for the latter, the possibility of granting derogations in cases of unfavourable conservation status, first, the grant of such derogations occurs by way of exception only and, secondly, such a grant must be assessed in the light of the precautionary principle (see, to that effect, with regard to the Habitats Directive,

judgment of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola*, C-674/17, EU:C:2019:851, paragraphs 68 and 69 and the case-law cited). It follows that, even if both directives are to be interpreted in a way that includes their respective specific features, that interpretation cannot be regarded as diverging since, subject to their specific features, that interpretation contains similar considerations relating to, inter alia, their respective protection system.

With regard to the management plans adopted and implemented in Finland in 2017 and 2018, which allegedly have their basis in the Guidance document, it is important to note that if that document has no binding legal force it may be used by the Court as a baseline. The Guidance document specifies that plans that may be put in place have no 'separate legal status' for the purposes of the Birds Directive. In that regard, it should also be noted that the Court has repeatedly found that while economic and recreational requirements are referred to in Article 2 of the directive, that provision does not constitute an autonomous derogation from the general system of protection established by the Birds Directive (judgments of 8 July 1987, *Commission v Belgium*, 247/85, EU:C:1987:339, paragraph 8; of 8 July 1987, *Commission v Italy*, 262/85, EU:C:1987:340, paragraph 8; and of 28 February 1991, *Commission v Germany*, C-57/89, EU:C:1991:89, paragraph 22).

Lastly, if, in the context of the examination of the condition relating to the absence of another satisfactory solution, set out in Article 9(1)(c) of the Birds Directive, the Court recognised, in paragraph 35 of the judgment of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770), that, 'although it is true that hunters perform a useful function in environmental management, by hunting small predators in the spring so that the eider's rearing can produce better results, it is not apparent that that function can be fulfilled only if the eider hunting season is open in the spring', that consideration applies so long as, as noted by the Commission, a Member State does not ensure that the population in question is maintained at a 'satisfactory level'. Moreover, even if it were established that the positive effects on the population of a protected species resulting from a management plan counteract the negative effects introduced by hunting that population, Member States are required, as is apparent from recital 6 of the Birds Directive, to take measures that apply to the various factors which may affect the numbers of birds of the species concerned.

It follows that the arguments put forward by the parties to the proceedings as well as the scientific evidence adduced in support do not demonstrate, which was a matter for the Republic of Finland to prove, that at the time the contested authorisations were granted the national authorities had well-established scientific knowledge showing that the population of the species concerned was maintained at a 'satisfactory level', and, accordingly, that the exploitation may be considered to be 'judicious'.

It also follows that the condition relating to 'judicious use' within the meaning of Article 9(1)(c) of the Birds Directive is not met.

The condition relating to 'small numbers'

With regard to that condition, it is appropriate to note that it is apparent from the Court's case-law that, if the hunting of birds authorised by way of derogation does not ensure that the population of the species concerned is maintained at a satisfactory level, that condition cannot be considered to be met (see, to that effect, judgment of 21 June 2018, *Commission v Malta*, C-557/15, EU:C:2018:477, paragraph 66).

Furthermore, it is important to recall that the Court has already held that 'it must be considered that, on the basis of current scientific knowledge, "small numbers", within the meaning of Article 9(1)(c) of the [Birds Directive], should be understood as ... a sample in the order of 1% for those species which may be hunted, and "population in question" is to be understood, with regard to migratory species, as the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application' (judgment of 21 June 2018, *Commission v Malta*, C-557/15, EU:C:2018:477, paragraph 63 and the case-law cited).

In that regard, it is important to note, first, that in its judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477), the Court insisted on 'the region to which the derogation applies during its period of application'. Secondly, the contested authorisations do not concern the protected species on migration but, rather, the birds from that species at the time they start to breed and, thus, at a time when they are stationary. In that regard, Article 1(2) of the Birds Directive specifies that the latter 'shall apply to birds, their eggs, nests and habitats'. Thirdly, EU legislation on the conservation of wild birds must be interpreted in the light of the precautionary principle, which is one of the foundations of the high level of protection aimed at by EU policy on the environment, as provided for in the first paragraph of Article 191(2) TFUE (order of the President of the Court of 10 December 2009, *Commission v Italy*, C-573/08 R, not published, EU:C:2009:775, paragraph 24 and the case-law cited, and order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraphs 42 and 61). Consequently, that principle requires avoiding an overestimation of the number of birds available for exploitation and using calculation methods that make it possible with certainty to stay below the threshold in the order of 1%.

It follows that, in so far as migratory species are stationary during their period of reproduction, they should, during that period and for the purpose of interpreting the exception set out in Article 9(1)(c) of the Birds Directive, be treated in the same way as sedentary species.

In addition, the simple fact that a Member State is the only one to authorise a certain practice provides no ground for inferring that it may take over the entire quota available. For that reason, it is appropriate to contemplate hypothetically which other Member States might wish to use that quota and to reserve a relative portion thereof for each of them.

In the present case, instead of basing its calculation on the entire Baltic/Wadden Sea flyway population, the Republic of Finland should have used the population of the relevant species breeding in the islands of the province of Åland as a baseline.

It follows that, at the relevant date, the authorities of the province of Åland did not have the data to calculate correctly the number of birds of the population in question for hunting.

In those circumstances, it can be inferred that the Republic of Finland has failed to observe the condition relating to 'small numbers' set out in Article 9(1)(c) of the Birds Directive.

In the light of the foregoing, it is appropriate to find that, by recurrently granting authorisations for spring hunting of male common eiders in the province of Åland since 2011 and up to and including 2019, the Republic of Finland has failed to fulfil its obligations under Article 7(4) and Article 9(1)(c) of the Birds Directive.

Costs

Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs, the Republic of Finland, which has been unsuccessful, must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

Declares that, by recurrently granting authorisations for spring hunting of male common eiders (*Somateria mollissima*) in the province of Åland since 2011 and up to and including 2019, the Republic of Finland failed to fulfil its obligations under Article 7(4) and Article 9(1)(c) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds;
Orders the Republic of Finland to pay the costs.

Bonichot Silva de Lapuerta Safjan

Bay Larsen Toader

Delivered in open court in Luxembourg on 23 April 2020.

A. Calot Escobar J.-C. Bonichot

Registrar President of the First Chamber

* Language of the case: English.