

Summer loggings and bird protection: On regulation and derogations

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Forest loggings during the nesting season are increasing in Finland. The aim of this article is to evaluate how current regulation applies to summer loggings, paying special attention to the protection of birds. The Birds Directive and the Finnish Nature Conservation Act prohibit the deliberate killing and disturbance of birds. Regardless, it seems that in practice, none of these rules is applied to birds and summer loggings as forestry is not considered ‘deliberate’ killing or disturbance even if thousands of birds are killed in summer loggings every year. European biodiversity targets and the principle of minimizing harms would emphasize implementing and monitoring existing national law and soft law more actively than currently is the case.

1 INTRODUCTION

Summer logging is an issue that strikes a chord with many people who worry about nestlings. Every spring and summer there are newspaper articles and letters to the editor about summer loggings in Finland, and the situation seems similar in other countries with large boreal forests.¹ Yet, there are economic reasons for year-round loggings. It is better for the forest industry to gather fresh wood steadily all through the year without the need for storage.² It is also more profitable for harvester entrepreneurs to use their expensive harvesters without breaks. The forest industry, once vital for the Finnish economy, still is good for 20 percent of net exports.³

Summer loggings began in Finland in the 1960s, and have become increasingly common in Southern Finland, where one-thirds of loggings already take place from May to October, keeping in mind that April-August is the main breeding season for most birds. There are some reductions in logging during the most intense nesting months, but the figures are still relatively high.⁴

In addition to ecological consequences, summer loggings were the main reason for the spread of butt rot into Finnish forests in the first place.⁵ Butt rot is a mycosis that spreads mainly during warm months⁶ and leads to €50 million in losses for Finnish forest owners annually. Therefore, summer loggings are less profitable for forest owners, however, the forest industry and logging entrepreneurs nonetheless benefit from year-round loggings. Contemporary

¹ KA Hobson et al, ‘An Estimate of Nest Loss in Canada Due to Industrial Forestry Operations’ (2013) 8 *Avian Conservation and Ecology* 5. See also e.g. J McPhee, ‘Harvesting Toll on Nests Raises Bird Loss Worries’ (Truro News, 4 Jan 2018) <<https://www.trurodaily.com/news/harvesting-toll-on-nests-raises-bird-loss-worries-174383/>>.

² T Tanskanen, ‘Metsäyhtiöt innostuivat kesähakkuista – “Kaikki kalusto on käytössä”’ (YLE news, 21 July 2015) <<https://yle.fi/uutiset/3-8171391>>.

³ Metsäteollisuus ry, ‘Metsäteollisuus Suomen kansantaloudessa’ (13 July 2018) <<https://www.metsateollisuus.fi/tilastot/metsateollisuus/>>. The exact share of net exports in 2017 is 20.2 percent.

⁴ Ministry of Agriculture and Forestry, ‘Kesähakkuutyöryhmä, Työryhmämuistio’, MMM 2000:8 (2000) Annex 1; Natural Resources Institute Finland, ‘Teollisuuspuun hakkuut kuukausittain (Monthly loggings of industrial wood)’ (2018) <<http://statdb.luke.fi/PXWeb/sq/e688c5fd-bc09-4b88-a390-c3868911e930>>.

⁵ Hallituksen esitys eduskunnalle laeiksi kestävän metsätalouden määräaikaisten rahoituslain, metsätuhojen torjunnasta annetun lain ja riistavahinkolain muuttamisesta (Government Bill on Changing the Temporary Act on the Financing of Sustainable Forestry), HE 133/2015 vp, 4.

⁶ T Möykkynen and T Pukkala, ‘Juurikäävän leviäminen Etelä-Suomen kuusikoissa ja kuusi-mänty-sekametsissä mekanistisen mallin mukaan’ (2007) 1 *Metsätieteen aikakauskirja* 5, 6.

harvester machines can automatically carry out butt rot prevention, but in 25 percent of loggings this is ineffective and butt rot keeps spreading further.⁷

An old national forest strategy from 1999 aimed at reducing summer loggings for the sake of forest health and bird nesting.⁸ In 1999, a ministerial working group was established to review summer loggings. The report refers to a master's thesis – the only national research on the topic – stating that the loggings taking place between May and July result in about 35,000 bird nests being destroyed annually.⁹ There are no estimates on its effects on bird population in Finland. It may have detrimental effect on rare species but not on common species.¹⁰ Further, there are other factors such as cats, collisions with windows, vehicles and transmission lines that cause most of the human-related mortality among bird species.¹¹

Nevertheless, according to the recommendations of the working group, loggings should be avoided in May and June in groves, heathland forests dominated by deciduous trees, hardwood-spruce swamps and forests near shores as well as in the habitats of special importance protected by the Forest Act.¹² There should be no loggings near the nests of large birds of prey in April-June. The working group further suggested that this issue could be regulated by soft law.¹³ In the current National Forest Strategy 2025, there is no longer a statement about the need to avoid summer loggings.¹⁴

According to the latest Red List of Finnish Bird Species¹⁵, out of 82 forest bird species, 11 species are threatened (i.e. endangered) and 2 near-threatened. There are relatively more endangered bird species in other habitats than forests. Yet, the trend in the numbers of bird species have been declining and the decline has been more significant for species that prefer old forests than for species that prefer bushes and open spaces such as clear-cut areas. Forest changes are the causes of threat for 11 bird species, disturbance for 14 species, and drainage and peat excavation for 5 species (drainage is often related to forest management). A rise in the extent of logging poses a threat for bird species as it increases the amount of young forests and leaves remaining mature forests fragmented.¹⁶

The aim of this article is to examine the regulation of summer loggings from the view point of species protection, especially birds. The article studies the state of current regulation (*de lege lata*) and analyses efficiency in species protection. Regulation will be analysed both from the point of view of (i) effectiveness in species protection and (ii) requirements of the Birds Directive.¹⁷ Effectiveness is evaluated by analysing how well Finnish regulation protects bird nesting from logging during nesting time.

⁷ Metsäkeskus (The Finnish Forest Centre), 'Laadukas kantokäsittely tärkeää kesäaikaisissa harvennushakkuissa – laho romahduttaa puukauppatilin' (Metsäkeskus, 25 January 2016) <<https://www.metsakeskus.fi/uutiset/laadukas-kantokasittely-tarkeaa-kesaiaisissa-harvennushakkuissa-laho-romahduttaa>>.

⁸ Ministry of Agriculture and Forestry, 'Kansallinen metsäohjelma 2010' (1999) 20.

⁹ *ibid* 10.

¹⁰ *ibid* 10, 27. See also Hobson et al (n 1).

¹¹ AM Calvert, 'A Synthesis of Human-related Avian Mortality in Canada' (2013) 8 *Avian Conservation and Ecology*.

¹² Forest Act (1093/1996) Section 10.

¹³ Ministry of Agriculture and Forestry (n 8) 37.

¹⁴ Ministry of Agriculture and Forestry, 'National Forest Strategy 2025 – Government Resolution of 12 February 2015'.

¹⁵ J Tiainen et al, 'Suomen lintujen uhanalaisuus 2015 – The 2015 Red List of Finnish Bird Species' (Ministry of Environment and Finnish Environment Institute 2016) 17.

¹⁶ *ibid* 19–21.

¹⁷ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7 (Birds Directive).

The article first explains Finnish regulation on forest management and species protection to provide a better understanding of how birds and other species are generally protected in Finland. This is followed by an analysis of current regulation concerning the relationship between (bird) species protection and (summer) loggings.

2 REGULATION OF FOREST MANAGEMENT AND SPECIES PROTECTION

The main restrictions on loggings found in the Forest Act are the stipulations on the habitats of special importance and the obligation to ensure regeneration after logging operations.¹⁸ Otherwise, the forest owner is free to perform loggings when and where one wants to or also free to do nothing. There are no age or size limitations, nor are there spatial limitations on loggings, but since the forest ownership is very fragmented, clear-cut areas are usually less than 2 hectares (ha) on average.

In Finnish forest governance, legislation sets the framework, and then soft law, i.e. the best practice guidelines of the Forestry Development Centre Tapio,¹⁹ the Programme for the Endorsement of Forest Certification (PEFC)²⁰ and Forest Stewardship Council (FSC)²¹ forest certification standards, suggest more detailed recommendations on forest management. PEFC certificates cover about 85 percent of Finnish forests – i.e. 17,784,457 ha.²² In addition, there are 1,576,000 ha of FSC-certified forests in Finland.²³ There is also the Environmental Guide of Metsähallitus, an administrative government enterprise that oversees and steers the use of State-owned forests.²⁴

The standards set by national and transnational (i.e. forest certification schemes) soft law have become generally accepted among forest professionals in Finland.²⁵ The high acceptability of soft law, especially PEFC certification and the guidelines of Tapio, enhances the protection of biodiversity.²⁶ Residual trees are an example of how biodiversity can be protected through soft law: legislation does not require that, for instance, dead and decaying or other groups of trees should be left on logging sites, but Tapio's guidelines and forest certification schemes have made it a regular practice. At the same time, established professional forestry practices can become an inflexible norm, defining both the minimum and maximum of voluntary biodiversity protection. This may prevent the flexible, case-by-case application of biodiversity protection. In the practice of forest management, a certain standard interpretation of soft law has become the minimum standard and higher ecological standards are rarely applied. Partly this is due to the lack of information; the forest harvester has normally no

¹⁸ Forest Act (n 12) Sections 10 and 8 respectively.

¹⁹ O Äijälä et al (eds), *Metsänhoidon Suositukset. (Recommendations for Forest Management)* (Tapio 2014).

²⁰ PEFC Finland, 'Criteria for PEFC Forest Certification' (2014) <http://pefc.fi/wp-content/uploads/2016/09/PEFC_FI_1002_2014_Criteria_for_Forest_Certification_20141027.pdf>.

²¹ FSC, 'FSC standard for Finland V1-1' (21 January 2011) <<https://fi.fsc.org/fi-fi/sertifiointi/metssertifiointi/suomen-fsc-standardi>>.

²² PEFC, 'Certified Forest Area by Country' (2017) <https://www.scribd.com/document/147379606/PEFC-Global-Certificates#fullscreen&from_embed>.

²³ FSC, 'FSC numeroin (FSC in numbers)' (5 March 2018) <<https://fi.fsc.org/fi-fi/tietoa-fscst/fsc-numeroina>>.

²⁴ J Päivinen et al (eds), *Metsähallituksen Metsätalouden Ympäristöopas (Environmental Guide of Metsähallitus)* (Metsähallitus 2011).

²⁵ E Primmer, 'Biodiversiteetin turvaamisen asema organisaatioiden strategioissa ja toiminnassa – normit, rakenteet ja osaaminen' (2006) 2 *Metsätieteen aikakauskirja* 305, 311–312.

²⁶ K Kokko, 'A Legal Method and Tools for Evaluating the Effectiveness of Regulation: Safeguarding Forest Biodiversity in Finland' (2009) *Nordic Environmental Law Journal* 57, 75. See also M Pappila, 'Forestry and No Net Loss Principle: The Possibilities and Need to Implement NNL in Forest Management in Finland' (2018) *Nordic Environmental Law Journal* 55, 61.

knowledge of the preferences of the forest owner and to be on the safe side, he minimizes the biodiversity benefits to maximize profits.²⁷

In Finland, the species protection system consists of a combination of international (e.g. Convention on International Trade in Endangered Species of Fauna and Flora,²⁸ Bern Convention²⁹), European Union (EU) (Habitats Directive³⁰ and Birds Directive) and national requirements involving a myriad of species categories within the national legislation. Species can belong to different categories and the level and form of protection depends on these classifications. The species of Annex IV(a) of the Habitats Directive ('directive species') and 'specially protected species' of the Finnish Nature Conservation Act (NCA)³¹ include the most strictly protected species in Finland.

The basic category of protection is that of 'protected species'. All birds and mammals that do not fall within the scope of the Hunting Act are protected by the NCA.³² Other animals and vascular plants and moss can be protected by adding them to the list of the Nature Conservation Decree (NCD).³³ The deliberate killing and capture, as well as the deliberate disturbance of protected animals, particularly during mating season and in important resting places during migration, is prohibited according to the NCA.³⁴ However, the habitats of these protected species are not guarded by the NCA, and there is no special procedure related to the protection of protected species. The only exception is that any appropriately marked tree hosting the nest of a protected bird species and any tree hosting a large bird of prey is protected if the bird in question nests in it on a regular basis and the nest is clearly visible.³⁵

In addition to this, there are threatened (endangered) species that are listed in Annex 4 of the NCD. There are currently 55 bird species that have been declared threatened. There is no special protection regime regarding threatened species. The NCA stipulates simply that: 'Any naturally occurring species whose survival in the wild is at risk in Finland can be declared a threatened species by decree', the monitoring of which falls under the purview of the Ministry of Environment.³⁶

²⁷ L Saaristo et al, 'Talousmetsien luonnonhoidon tehokkaat ratkaisut Monimetsä-hankkeen selvitys' (Tapio 2017) 40.

²⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

²⁹ Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 1 June 1982) 1284 UNTS 209.

³⁰ Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/7 (Habitats Directive).

³¹ Nature Conservation Act (1096/1996) (NCA). Some endangered species are specially protected species according to NCA Section 47. Currently, there are 680 specially protected animal and plant species. Their habitats are protected against forest logging and other deterioration after the regional environmental authority has delineated them. By 2016, the ELY Centres (Centres for Economic Development, Transport and the Environment are regional governmental bodies that enforce, for instance, the NCA) had made 225 such decisions. I Ikonen, 'Kiireellisesti ja erityisesti suojeltavat lajit – turvaamistoimia ja rajauspäätökset' Centre for Economic Development, Traffic and Environment', presentation (14 December 2016) <https://www.ely-keskus.fi/documents/10191/20407199/Erityissuojelulajit_iiroIkonen_191216.pdf/06415d22-1610-418e-89a4-92a9a8562474>.

³² *ibid* Section 38. See Pappila (n 26) 66–73 (about forest species protection in Finland).

³³ Nature Conservation Decree 160/1997 (NCD).

³⁴ NCA (n 31) Section 39(1).

³⁵ *ibid* 39(2).

³⁶ *ibid* Section 46. When a species is 'only' threatened, without any other status (protected species, specially protected species or 'directive species'), the forest owner is not legally required to do anything, i.e. the protection of the habitat and even individuals is voluntary. There are numerous species of moss, fungi, polypores, insects and vascular plants that are only listed as threatened but not protected. However, all birds and mammals are automatically protected by the NCA, unless otherwise stipulated in the Hunting Act 657/1993.

This article concentrates on the relation of summer loggings and the protection of bird species as the protection of habitats of ‘directive species’ (Habitats Directive) and specially protected species is more regulated. For example, the habitats of ‘directive species’ and specially protected species (when their habitats are delineated by authorities) are always protected from forest loggings to a certain extent according to the NCA.

3 ANALYSIS OF LEGISLATION AND PRACTICE

3.1 The Birds Directive and summer loggings

The Birds Directive relates to the conservation of all species of naturally occurring birds.³⁷ Article 2 requires the protection of all wild bird species, and Article 5 specifies the requirement:

*Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular: a) deliberate killing or capture by any method; b) deliberate destruction of, or damage to, their nests and eggs ... and d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive*³⁸

Therefore, we need to take a closer look at the concepts of ‘deliberate’ and ‘significant disturbance’. The CJEU has made several rulings on the interpretation of the Birds Directive, especially on hunting, but none of them concern directly forest logging. The Commission has published a guidance document on hunting under the Birds Directive.³⁹ There is no general interpretation guide for the Birds Directive, while there is one for the Habitats Directive.⁴⁰ The guide for the Habitats Directive can be applied in some relevant respects to the Birds Directive, too.⁴¹ In the guide on the Habitats Directive, the Commission reiterates the duty to put into effect the obligations resulting from the acts of the EU.⁴² In addition, the Commission emphasizes that no matter which kind of regulatory instruments Member States want to use for regulating forestry to implement Article 12(1)(a)-(d) of the Habitats Directive – e.g. planning procedures, regulations or best practice codes – ‘Member States have to ensure that the strict protection requirements are adequately met’.⁴³ So even soft law measures could be adequate as long as they are effective. But often, confirming the effectiveness of the chosen regulatory instrument requires monitoring and supervision.

3.2 Loggings and the protection of birds in the NCA

³⁷ Birds Directive (n 17) art 1.

³⁸ *ibid* art 5.

³⁹ Commission (EU), ‘Guidance Document on Hunting under Council Directive 79/409/EEC on the Conservation of Wild Birds “The Birds Directive”’ (2008).

⁴⁰ Commission (EU), ‘Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC’ (2007).

⁴¹ Vice versa, the Commission refers to the case law of the CJEU concerning the derogation clause of the Birds Directive while interpreting the derogation clause of the Habitats Directive. See, e.g., Commission (n 40) 7: ‘The legal instrument most closely related to the Habitats Directive is the Birds Directive of 1979, which shares not only common objectives (for birds in this case) and a similar conceptual structure, but also common provisions in relation to the network of protected sites (Natura 2000). Furthermore, Articles 5 to 9 of the Birds Directive contain similar provisions regarding species protection.’

⁴² Commission (n 40) 19. See Consolidated Version of the Treaty of European Union [2012] OJ C326/13 art 4(3).

⁴³ Commission (n 40) 31.

If a threatened species is also a protected species – as most of the bird species are – the general protection obligations (e.g. no *deliberate* killing or disturbing)⁴⁴ of Section 39 of the NCA apply to them. This does not include the actual protection of their habitats, but as the nesting and eggs are protected, and deliberate disturbance during mating season is prohibited, this means that their nesting area should be protected during the breeding time.

The NCA contains, however, derogations from the abovementioned protection.⁴⁵ There is a general derogation concerning agriculture, forestry and development (the so-called ‘agriculture derogation’), but the precondition is that steps should be taken to *avoid* harming or disturbing protected plants and animals, insofar as this is feasible without incurring additional substantial expenses. Therefore, easily avoided protected (threatened or not) species should be left alone. For example, a small, known habitat of a protected plant species should be left unlogged as there would not be any substantial expense for the landowner. Further, as Suvantola suggests,⁴⁶ it is mostly possible to log wood outside of the nesting season.

Due to the agriculture, forestry and development derogation, it could seem, at first look, that there are few actions that are actually forbidden by the disturbance prohibition of the NCA. According to the Red Data Book of Finnish Birds, disturbance is the reason for the threat that 14 bird species face. Disturbance is not about killing the birds or egg collecting – egg collecting is rare nowadays and threatens only few species. In practice, moving around in nature and keeping dogs loose illegally during breeding times is the main noticeable cause of disturbance.⁴⁷

Yet there is a provision in the NCA concerning species protected by EU directives. On derogations, it states that:

*In special cases, the centre for economic development, transport and the environment is authorised to grant derogations ... from the prohibitions referred to in Section 39, ... concerning animal and plant species referred to in paragraph 2 of this Section, on grounds set forth in Article 16(1) of the Habitats Directive. A derogation can correspondingly be granted for birds referred to in Article 1 of the Birds Directive on grounds set forth in Article 9 of said Directive.*⁴⁸

Thus, derogations from the protection provisions concerning birds should be granted according to the Birds Directive, instead of the general agriculture derogation. The question remains: why is the derogation clause of Section 49(3) not applied to forestry in Finland? *Prima facie*, it seems that the agriculture derogation is applied instead.

Even some Finnish courts used to assume that the general derogation clause⁴⁹ would apply to the disturbance of birds. The Supreme Administrative Court (KHO) referred to this interpretation in case KHO 2015:3 concerning peat production and the protection of the nests

⁴⁴ NCA (n 31) Section 39(1).

⁴⁵ *ibid* Section 48(1). It is unclear whether this general ‘agriculture derogation’ means that agriculture and forestry are in principle considered to be the cause of deliberate killing and disturbance, thus requiring derogation, or whether the derogation hints at the ‘fact’ that forestry cannot be considered to be causing deliberate harm. The government bill on NCA does not state anything on this issue. Hallituksen esitys eduskunnalle luonnonsuojelulainsäädännön uudistamiseksi (A Government Bill on Reforming the Legislation on Nature Protection), HE 79/1996 vp, 40.

⁴⁶ L Suvantola, ‘Lupa tappaa – poikkeaminen luonnonsuojelulain säännöksistä (Licence to kill – derogation from the provisions of the Nature Conservation Act)’ (2003) 4 *Defensor Legis* 668, 677.

⁴⁷ Tiainen et al (n 15) 20–21.

⁴⁸ NCA (n 31) Section 49(3) (emphasis added).

⁴⁹ *ibid* Section 48(2).

of the birds of prey (Section 39(2) of the NCA). The court stated that '[p]eat production on an industrial scale was also not such use of the area for agricultural, forestry or construction activities as referred to in Section 48.1 of the NCA that would be permitted without prejudice to Section 39'.⁵⁰ In other words, the court considered whether peat production should fall within the agriculture derogation even if the derogation rules of the Birds Directive should have been applied.

In a later case, the Supreme Administrative Court reiterated that derogation should be based on Section 49(3) of the NCA, which entails the application of the strict derogation clause of the Birds Directive. Based on this, the court concluded that there are no grounds for receiving a derogation from the protection of nesting of eagles.⁵¹

The derogation from Article 5 of the Birds Directive is possible only on certain grounds mentioned in Article 9: there is no other satisfactory solution and one of the listed conditions (e.g. in the interests of public health and safety) is met. The CJEU has specifically concluded that, for instance, national heritage is not a sufficient reason for granting derogations.⁵² In addition, according to Wils, 'The reasons for which derogations may be granted, do not include agricultural, forestry or fishing purposes in general, nor historical or cultural traditions'.⁵³ In general, the CJEU has maintained a strict stance towards national derogations.⁵⁴ Therefore, it is evident that the interest of forest industry would not suffice as a reason for derogation under the Birds Directive.⁵⁵ Finnish summer loggings would not pass the test if this derogation would be applied to them.

3.3 National soft law and summer loggings

Spring and summer loggings create a distinct problem for protection. Protected birds and mammals are usually able to leave the logging area when the harvester machine arrives, however, eggs and the young are not able to flee. One could therefore assume that forestry operations would be prohibited during breeding time, as it is possible to conduct loggings in autumn and winter time or at least in less bird-rich forests. However, the obligation to minimize harm does not apply to birds as the agriculture derogation of Section 48 of the NCA itself does not apply to birds, and there is no explicit obligation to minimize harms in Finnish nature conservation legislation, even though it does exist in the Environmental Protection Act⁵⁶ and the Water Act.⁵⁷

Nevertheless, one could claim that, the internal coherence of Finnish environmental regulation requires that the principle of minimization applies to nature protection, too, even if it is not mentioned as a general principle or obligation in NCA.⁵⁸ Also, the general goal of achieving the favourable conservation status of species of the Habitats Directive and the NCA, and the general obligation of the Habitats Directive to implement a strict protection regime for species, all imply the need to minimize harm. Currently, only soft law includes regulations for minimizing the harm of summer loggings.

⁵⁰ KHO 2015:3.

⁵¹ KHO 2015:124. See also case KHO 19.3.2018 T 1197.

⁵² Case C-507/04, *Commission v Austria*, ECLI:EU:C:2007:427 para 339.

⁵³ WPJ Wils, 'The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive' (1994) 6 *Journal of Environmental Law* 219, 238.

⁵⁴ PGG Davies, *European Union Environmental Law. An Introduction to Key Selected Issues* (Ashgate 2004).

⁵⁵ Birds Directive (n 17) art 9.

⁵⁶ Environmental Protection Act 527/2014.

⁵⁷ The Water Act 587/2011.

⁵⁸ L Suvantola, 'Kun maailma ei riitä – luonnon monimuotoisuudelle aiheutettavien haittojen kompensointi' (2005) 3–4 *Ympäristöjuridiikka* 30, 46.

Several soft law instruments encourage the avoidance of summer loggings in certain areas. Tapio's best practice guidelines recommend that loggings in hardwood-spruce swamps and herb-rich forests do not take place in May and June.⁵⁹ The Environmental Guide of Metsähallitus, which manages State-owned forests, also recommends the avoidance of logging during the nesting of birds, in May and June, especially in lush areas, areas dominated by deciduous trees, forests on the shore and in hardwood-spruce swamps.⁶⁰

The Finnish FSC forest certification standard has a similar stance on summer loggings: it prohibits summer loggings in important bird areas (near the nests of eagles and ospreys, IBA⁶¹ and FINIBA⁶² areas or capercaillie leks). In addition, loggings should be avoided in April–July in broad-leaf dominated herb-rich forests, near the nest trees of raptorial birds and in water protection zones.⁶³ The Finnish PEFC standard does not restrict the conduct of summer loggings. It merely requires that the prevention of butt rot must be performed in risk areas (Southern and Middle Finland) if there are loggings during May–November.⁶⁴

There is no monitoring of the regulation on summer logging, nor are there any statistics from the Finnish Forest Centre (Finland's supervisory authority in forestry matters) about how well these recommendations are being followed.⁶⁵ The Forest Centre follows the quality of forest management annually through random and selected samples. It collects information extensively, for instance, about the preservation of protected habitats (both based on the Forest Act and soft law), the number of residual trees (requirements in soft law only) and the quality of water protection (mainly soft law). Not all aspects of soft law are surveyed, and the timing of summer loggings is one of the issues for which no data is collected. In addition to the obligations of the Forest Act, the Forest Centre's quality survey mainly covers the requirements of the PEFC certification, but not of the FSC or of Tapio's best practice recommendations.⁶⁶

3.4 Interpreting 'deliberate'

In practice, the current Finnish interpretation of Finnish and EU law means that loggings can go on during breeding times. Is Finland correct in interpreting that forest loggings are not deliberate disturbance and killing?

The CJEU has defined 'deliberate' in some of its verdicts. It did so most clearly in Cases C-103/00 (*Commission v Greece*)⁶⁷ and C-221/04 (*Commission v Kingdom of Spain*),⁶⁸ but in relation to Article 12 of the Habitats Directive and not the Birds Directive. The same interpretation, however, could apply to the Birds Directive as well, as the directives are closely interlinked and the context – the protection of bird species and their breeding places – is very similar. The biggest difference is that Article 12 of the Habitats Directive applies only to certain

⁵⁹ Äijälä et al (n 19) 80, 96, 122, 132, 134.

⁶⁰ Päivinen et al (n 24) 46.

⁶¹ Important Bird and Biodiversity Areas (IBAs) are internationally important bird areas identified by BirdLife International. See <<https://www.birdlife.org/worldwide/programme-additional-info/important-bird-and-biodiversity-areas-ibas>>.

⁶² Nationally important bird areas in Finland (FINIBA) have been identified by BirdLife Finland. See <<https://www.birdlife.fi/suojelu/alueet/finiba/finiba-rajaukset/>>.

⁶³ FSC (n 21) indicators 6.2.3.S and 6.2.4.S.

⁶⁴ PEFC (n 20) criterion 6.

⁶⁵ J Partanen, Head of Finance and Surveillance, Finnish Forest Centre, personal communication (2 March 2018).

⁶⁶ Metsäkeskus (The Finnish Forest Centre), 'Talousmetsien luonnonhoidon laadunseuranta – Raportti 2016' (2016) <https://www.metsakeskus.fi/sites/default/files/luontolaadun_raportti_2016_koko_maa.pdf>.

⁶⁷ Case C-103/00, *Commission v Greece*, ECLI:EU:C:2002:60. See also H Schoukens, K Bastmeijer, 'Species Protection in the European Union: How Strict is Strict?' in CH Born et al (eds), *The Habitats Directive in its EU Environmental Law Context. European Nature's Best Hope?* (Routledge 2015) 121, 134–135.

⁶⁸ Case C-221/04, *Commission v Kingdom of Spain*, ECLI:EU:C:2005:777.

species, whereas Article 5 of the Birds Directive concerns all bird species. The Finnish Supreme Administrative Court refers to the Commission's guidance regarding the Habitats Directive in interpreting the Birds Directive,⁶⁹ while German courts also assume that the interpretation of the CJEU on the term 'deliberate' of the Habitats Directive applies to the Birds Directive as well.⁷⁰

In *Commission v Kingdom of Spain*, the CJEU stated that '[f]or 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*'.⁷¹ In addition, the Commission writes that 'the term "deliberate" has to be interpreted as going beyond "direct" intention'. A person who is reasonably expected to know that his action will most likely lead to an offence against a species, whether they intend the offence or, if not, at least accepts the results of their action, commits an offence. Clear information and guidance by the competent authorities seem an appropriate way of implementing these provisions.⁷²

Further, the Finnish Supreme Administrative Court stated that 'deliberate' does not mean that there should be an intention to disturb a species. The Court noted that when peat production may cause disturbance (with adverse effects on the nesting of the golden eagle), then peat production must be considered deliberate disturbance, even if disturbance is not be the aim of the activity.⁷³

There is no case law on forest management and the Birds Directive or on the general protection regime of the NCA.⁷⁴ Nevertheless, the Commission states in its guidance document that 'the [Habitats] Directive does nevertheless apply to these sectors [referring to agriculture and forestry] and Member States do therefore have to meet their obligations to protect the species concerned'.⁷⁵ Additionally, the Commission emphasizes that 'independently of the option chosen to apply Article 12 to ongoing activities (creation of a new mechanism or adaptation of existing mechanisms), Member States have to ensure that the strict protection requirements are adequately met'.⁷⁶

Summer loggings do not make a distinction between which species' nests, eggs and young offspring are destroyed. Rather, the cumulative effects of summer logging operations must be taken into account as 'one' effect that recurs every year, leading to significant disturbance. The probability of disturbance and damage is also high – in fact certain – and disturbance is higher in forests with higher bird density (e.g. herb-rich forests) and in old-growth forests (a potentially higher density of threatened species). The types of effects that summer loggings have on bird nesting would most likely not be accepted from land use-changing projects such as wind farms. There are in many respect different environmental rules for ongoing land use such as forestry and agriculture.

Based on these interpretations, we are able to consider whether the protection requirements are met effectively enough in Finnish forestry. It is clear that during forest loggings, the forest harvester accepts that one will disturb birds during the period of breeding and rearing and accepts the high probability that one will also kill young birds and destroy eggs. Harvesting is, however, not against the current national interpretation of the Finnish

⁶⁹ KHO 2015:124 (n 51).

⁷⁰ C Sobotta, 'The Impact of Species Protection on Land Use Planning via the Environmental Assessment: Towards a More Proactive Approach?' in Born et al (n 67) 146, 149.

⁷¹ Case C-221/04 (n 68) para 71.

⁷² Commission (EU) (n 40) 37.

⁷³ KHO 2015:124 (n 51). In the verdict the Court referred to Case C-103/00 (n 67).

⁷⁴ NCA (n 31) Section 39(1).

⁷⁵ Commission (EU) (n 40) 37.

⁷⁶ *ibid* 31.

NCA, even if it seems to run counter to the Birds Directive, taking into account the interpretation of the term ‘deliberate’ by the CJEU.

4 CONCLUSIONS

Even if the aim of the national legislation has been to apply strict protection and derogation to birds, the result has been the opposite, because the strict derogation of Section 49(3) of the NCA is not in practice applied to forestry and the obligation to minimize effects in Section 48(1) does not apply either.⁷⁷ In fact, it is questionable whether the protection regulations of Section 39 in practice apply to forestry at all, as forestry does not seem to be currently considered to cause *deliberate* killing and disturbance of birds.

The annual destruction of about 35,000 bird nests could be considered deliberate and the cause of significant disturbance if we look at forestry as a whole and not only at single forestry operations. The effects of diffuse pollution as well as diffuse nature destruction should be evaluated as a whole and not based on a single operation only. The regulation of diffuse pollution and its cumulative effects is often ineffective if the detrimental effects are not considered, for example, on a water basin level, but on a project level. The same applies to the destruction of birds’ habitats or disturbance of nesting: one case is rarely significant, but repeated thousands of times within a country, disturbance may become significant for certain species. Yet, as there is very little research on this topic, it is difficult to say how significant the effect is on the conservation status of bird species. Nevertheless, following the precautionary principle and the aim to maintain or restore the favourable conservation status of bird species, restrictions on summer loggings would be justified and more in accordance with the Birds Directive, unlike the current Finnish practices.

Member States have an obligation to implement directives in an effective way. As mentioned above, the European Commission emphasizes both the freedom of choice in implementing species protection and the obligation to make protection effective. So even soft law measures are suitable as long as they are effective.

Finland is mostly reliant on best practices and other soft law when it comes to the protection of birds from killing and disturbance during wood harvesting during the nesting season. It might potentially function well, but there is no information about how effective the soft law is in this case. It seems obvious that the obligation to meet strict protection requirements includes some kind of monitoring of how soft law is applied in practice.

The European Commission admits that forestry and agriculture are special cases where case-by-case decisions, such as permits, are difficult to make.⁷⁸ Yet, the issue of summer loggings is not a question of administration and permission but a timing-related problem: it would be technically relatively easy to restrict when summer loggings occur; however, there should be enough political will to amend the law or to emphasize the soft law requirements more than is currently the case.

There seems to be a consensus on the need to restrict summer loggings in certain forests, as the recommendations of both Tapio and Metsähallitus, as well as the FSC criteria, emphasize this issue. Further, EU biodiversity targets emphasize the no net loss of biodiversity target and urge an increase in the contribution of forestry to biodiversity protection.⁷⁹ The no net loss of biodiversity target requires applying a mitigation hierarchy – including minimizing negative

⁷⁷ NCA (n 31).

⁷⁸ Commission (EU) (n 40) 30.

⁷⁹ Commission (EU), ‘Our Life Insurance, Our Natural Capital: An EU Biodiversity Strategy to 2020’ (Communication) COM(2011) 244 final, 3 May 2011, 5.

effects – to biodiversity protection.⁸⁰ Finnish nature conservation legislation does not include any general obligation to minimize adverse impacts, which is a clear shortfall from the point of view of biodiversity protection.

Efficient implementation of existing soft law would not mean the total prohibition of summer loggings, but would require more careful planning of forestry operations. The Finnish forest industry could – as a part of their corporate social responsibility policies – play a significant role in redirecting summer loggings and requiring that best practice recommendations would be implemented efficiently. The pressure on Finnish forest biodiversity is growing due to increasing loggings for the demands of forest industry and bioenergy. Keeping in mind the Commission's words – '(w)here however an ongoing land use (due to changes of practices, intensification, etc.) is clearly damaging to a species, leading to decreases in its population in the area, a Member State is required to find ways to avoid this' – Finland should pay special attention to the effects of the intensified forestry.⁸¹

Even if summer loggings may have a detrimental effect on rare bird species,⁸² forestry practices in general are the chief concern for all species.⁸³ Therefore, for example, the protection of rare habitats and old-growth forests as well as ensuring an abundance of decaying and dead wood should be guaranteed. All in all, it is unfortunate that legislation mainly tries to tackle the issues of single habitats and species while the structural changes in forests and the lack of old-growth-forests are the major ecological problems resulting from current forest management in Finland.⁸⁴

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⁸⁰ See, e.g., B McKenney and JM Kiesecker, 'Policy Development for Biodiversity Offsets: A Review of Offset Frameworks' (2010) 45 *Environmental Management* 165.

⁸¹ Commission (EU) (n 40) 31.

⁸² Hobson et al (n 1).

⁸³ Tiainen et al (n 15) 19–21.

⁸⁴ P Rassi et al (eds), *The 2010 Red List of Finnish Species* (Ministry of Environment and Finnish Environment Institute 2010) 49.