

Birds Biting Back: A Study of Deliberateness and Species Protection Under the Birds Directive After *Voore Mets*

OT00BG63 Re-Examining the Foundations of EU Law

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This thesis examines the impact of the *Voore Mets* judgment on the interpretation of ‘deliberate’ harm under the EU Birds and Habitats Directives and evaluates what this development reveals about the Birds Directive as a part of EU biodiversity regulation framework. In *Voore Mets* the Court of Justice of the European Union defined what ‘deliberate’ harm means under the Birds Directive when tree felling during bird breeding season was considered.

The thesis outlines the relevant background of the Nature Directives and their species protection regimes and locates them within their broader global and European context. The definition of ‘deliberateness’ and its role in the Birds Directive is analysed through a doctrinal legal method grounded in the text of the Directives and the case-law of the Court. The study also applies a law-in-context approach by examining the regulatory background of the Birds Directive and the wider structure of EU environmental law in order to situate the discussed concepts and the judgment within their legislative framework.

The thesis traces the evolution of ‘deliberate’ under the case-law of Article 12 of the Habitats Directive and Article 5 of the Birds Directive, the provisions on species protection of animal and bird species. It is demonstrated that *Voore Mets* confirms a harmonised, knowledge-based minimum threshold of deliberateness, according to which deliberateness is fulfilled when an actor was aware of and accepted the possibility of harming protected species, regardless of whether the act was purposefully intended to cause harm. The judgment also affirms that the prohibitions in the Birds Directive regarding deliberate killing, capture or destruction of eggs or nests apply no matter the population level of the species, extending equally to common and rare species. This is argued to be a convincing interpretation in light of the text and structure of the Birds Directive and previous case-law.

The thesis also presents critical observations regarding the judgment. It is argued that *Voore Mets* demonstrates the relative strictness of the Birds Directive, and that it reveals the weakness of the Directive’s derogation system, as economic interests are not expressly recognised in the derogation grounds of Article 9. The judgment may lead to a situation in which the balancing of economic rights cannot be carried out directly when applying the Directive, thus requiring the invocation of the EU Charter of Fundamental Rights. The thesis also notes that the judgment may lead to significant administrative obligations for forestry operators.

The thesis concludes that *Voore Mets* strengthens the preventive nature of environmental protection under the Birds Directive’s species protection regime. This marks it as relatively strong from an environmental perspective when contrasted with the discourse surrounding other environmental instruments.

Key words: EU environmental law, Birds Directive, Habitats Directive, deliberate, *Voore Mets*, species protection, derogation.

Tutkielma

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Tässä tutkielmassa tarkastellaan *Voore Mets* -tuomion vaikutusta EU:n lintu- ja luontodirektiivien mukaisen ”tahallisen” vahingoittamisen tulkintaan, sekä arvioidaan, mitä tämä kehitys paljastaa lintudirektiivistä osana EU:n biodiversiteettisääntelyä. *Voore Mets* -tuomiossa Euroopan Unionin tuomioistuin määritteli, mitä ”tahallinen” vahinko tarkoittaa lintudirektiivin nojalla silloin, kun metsähakkuita harjoitetaan lintujen pesimäaikana.

Tutkielma esittelee direktiivien taustaa ja niiden lajiensuojelujärjestelmiä sekä sijoittaa ne laajempaan globaaliin ja eurooppalaiseen kontekstiin. Tahallisuuden merkitystä ja sen roolia lintudirektiivissä analysoidaan oikeusdogmaattisesti, perustuen direktiivien tekstiin ja unionin tuomioistuimen oikeuskäytäntöön. Tutkimuksessa oikeutta tarkastellaan kontekstuaalisesti analysoimalla lintudirektiivin sääntelytaustaa ja EU:n ympäristöoikeuden rakenteita, mikä mahdollistaa käsitteiden sekä kyseisen tuomion merkityksen sijoittamisen niiden oikeudelliseen viitekehykseen.

Tutkielmassa jäsennetään tahallisuuden käsitteen kehitystä eläin- ja lintulajien suojelua koskevien säännösten eli luontodirektiivin 12 artiklan ja lintudirektiivin 5 artiklan oikeuskäytännössä. Analyysi osoittaa, että *Voore Mets* vahvistaa harmonisoidun, tekijän tietoisuuteen ja riskin hyväksymiseen perustuvan tahallisuuden vähimmäistason, jonka mukaan tahallisuus täyttyy, kun toimija on ollut tietoinen vahingon mahdollisuudesta ja on hyväksynyt sen, riippumatta teon varsinaisesta tarkoituksesta. Tuomio vahvistaa myös, että lintudirektiivin kiellot, jotka koskevat tahallista tappamista, pyydystämistä sekä munien tai pesien tuhoamista soveltuvat riippumatta kyseisen lajin populaatiotasosta, eli ne ulottuvat yhtä lailla sekä yleisiin että harvinaisiin lajeihin. Tätä pidetään vakuuttavana tulkintana lintudirektiivin sanamuodon ja rakenteen sekä aiemman oikeuskäytännön valossa.

Tutkielmassa esitetään myös kriittisiä huomioita tuomiosta. Tutkielmassa argumentoidaan, että *Voore Mets* osoittaa lintudirektiivin olevan suhteellisen tiukka, ja että sen poikkeusjärjestelmässä on heikkouksia, sillä taloudellisia etuja ei ole nimenomaisesti tunnustettu 9 artiklan poikkeusperusteissa. Tuomio voi johtaa tilanteeseen, jossa taloudellisten oikeuksien punninta ei ole mahdollista suoraan direktiiviä sovellettaessa, vaan edellyttää vetoamista EU:n perusoikeuskirjaan. Tutkielmassa todetaan myös, että tuomio voi johtaa merkittäviin hallinnollisiin velvoitteisiin metsätalouden toimijoille.

Tutkielma päättyy siihen, että *Voore Mets* vahvistaa lintudirektiivin lajiensuojelujärjestelmän ennaltaehkäisevää luonnetta. Tämän seurauksena direktiivi näyttäytyy ympäristönäkökulmasta suhteellisen vahvana verrattuna keskusteluun muista ympäristöoikeudellisista sääntelyvälineistä.

Key words: EU-ympäristöoikeus, lintudirektiivi, luontodirektiivi, tahallisuus, *Voore Mets*, lajiensuojelu, poikkeaminen.

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List of Abbreviations

| | |
|------|---|
| AEWA | Agreement on the Conservation of African-Eurasian Migratory Waterbirds |
| CBD | Convention on Biological Diversity |
| EC | European Community |
| ECJ | European Court of Justice |
| EEA | European Environment Agency |
| EEC | European Economic Community |
| EIA | Environmental Impact Assessment |
| EU | European Union |
| SCA | Special Area of Conservation |
| SEA | Single European Act |
| SPA | Special Protection Area |
| TFEU | Treaty on the Functioning of the European Union |

1 Introduction

1.1 Background

In 2009, the accelerating rate of biodiversity loss was identified as one of the planetary boundaries that had transgressed into the danger zone.¹ Although the characterization of the biodiversity crisis as the Sixth Mass Extinction remains debated, there is compelling scientific evidence that human actions have driven hundreds of species to extinction.² Over the past 40 decades, global wildlife populations have declined by 60 % from anthropogenic pressures.³ The crisis is evident in Europe, as highlighted by the European Environmental Agency (EEA), which reports that Europe's biodiversity is increasingly deteriorating under human pressure.⁴ The biodiversity decline is not only a threat to wildlife, but also humans, contributing to food insecurity, health risks and the acceleration of climate change.⁵

The heart of EU's biodiversity protection lies with the 'Nature Directives': The Birds Directive 2009/147/EC⁶ and the Habitats Directive 92/43/EEC⁷. While these directives have not fully achieved their specific objectives of habitat and species protection, evidence suggest that the status of bird species and species and habitats of Community interest would be 'significantly worse' in their absence.⁸ Studies indicate that the measures have produced benefits for species' conservation status.⁹ Nevertheless, data from the 2013-2018 reporting period reveal that 81% of habitats, 39% of birds, and 63% of non-bird species of Community interest remain in poor or bad condition, with most continuing to decline.¹⁰

For these reasons, the effective implementation of the Nature Directives is of critical importance. They are also established to be at the core of EU's biodiversity strategy for

¹ Rockström et al. 2009, p. 12–13.

² See for example Barnosky et al. 2011; Ceballos et al. 2015; Wiens – Saban 2025.

³ WWF 2018, p. 7.

⁴ European Environment Agency 2025, p. 63–64.

⁵ World Economic Forum 2020, p. 47–49.

⁶ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

⁸ European Commission 2016, p. 87–88.

⁹ Princé et al. 2021, p. 7; Abellán et al. 2011 p. 988–990.

¹⁰ European Commission 2020b, p. 2, 6–7. (The report from the reporting period of 2019–2024 will be published in 2026 (European Environment Agency 2025, p. 63)).

2030.¹¹ A key part of the implementation of these directives is the extensive case-law developed by the Court of Justice of the European Union (hereinafter ‘the Court’).¹²

In August 2025, the Court delivered a judgment concerning a question arising under Article 5 of the Birds Directive. Article 5 contains the species protection structure, under which deliberate acts of harm, such as the killing of birds and the destruction of their eggs and nests, are prohibited. The judgment *Voore Mets* concerned the meaning of ‘deliberate’ harm. In its judgment, the Court departed from the view expressed by Advocate General Kokott in her opinion and held that the felling of trees during bird breeding and rearing periods may be prohibited as deliberate killing and destruction of eggs and nests under the Birds Directive.¹³

In essence, *Voore Mets* establishes that a site may be protected from commonly practiced industry activities, such as spring logging, solely due to the breeding season of a widespread bird species, even when that species does not have an unfavourable conservation status. This is all while other means of biodiversity conservation lack enforceability, even in cases involving rare or endangered species.¹⁴ The implications of this judgment for interpreting the concept of ‘deliberate’ under the Birds and Habitats Directives, as well as the broader insights it offers into the state of biodiversity regulation within the EU, warrant further research.

1.2 Research problem

1.2.1 Objective

The objective of this thesis is to examine how *Voore Mets* influences the species protection provisions of the Nature Directives. To achieve this, the thesis seeks to clarify the meaning of deliberate harm under species protection, trace its development in case law, and assess the current scope of legal protection that bird species have from deliberate harm under the light of *Voore Mets*.

Since *Voore Mets* in essence harmonized the meaning of ‘deliberate’ under both Nature Directives, a question about deliberateness under the Birds Directive must also consider the

¹¹ European Commission 2020a, p. 15.

¹² See Miron – Cashman 2023, p 51.

¹³ Case C-784/23, paragraph 69; Opinion of Advocate General Kokott on Case C-784/23, paragraph 102.

¹⁴ See for example Amos 2021, p. 372.

relevant provisions and case law of the Habitats Directive. It is thus necessary to also consider the similarities and differences between the protection schemes of the two directives.

The analysis will also examine the reasoning of the Court in comparison with the arguments provided by Advocate General Kokott in her differing opinion, taking into account the protentional implications she warned might result from the interpretation ultimately adopted by the Court. In addition, other possible implications of the judgment will be examined.

Finally, the conclusion will bring together the findings of the analysis and adopt a broader perspective to assess the role of *Voore Mets* and the current species protection frameworks under the Birds and Habitats Directives within the wider context of EU biodiversity regulation.

1.2.2 Research questions and methods

Thus, the research question of the thesis is posed as follows:

- *What impact does Voore Mets have on the interpretation of ‘deliberate’ harm under the Nature Directives, and what does this reveal about the structural nature and current framework of the Birds Directive within EU biodiversity regulation?*

First, the background of the Nature Directives and the adoption of the Birds Directive and its structure specifically has to be given to the extent that is necessary to proceed to the detailed analysis of deliberateness. Second, the concept of ‘deliberate’ must be interpreted under both the Birds Directive and the Habitats Directive. This will be done through legal doctrinal methods. The analysis will identify, interpret and evaluate the notion of ‘deliberate’ within its legal context by deriving its meaning from primary EU legal sources, by systematising it within the broader structure of the Nature Directives, and by taking into account relevant academic literature. The understanding of deliberate harm under Article 5 of the Birds Directive is then assessed through a detailed examination of Advocate General Kokott’s Opinion in *Voore Mets* and the Court’s judgment, with particular attention to the implications of a broad interpretation of deliberateness for the application of Article 5.

To situate this analysis within the broader framework of EU biodiversity regulation, the background of species protection legislation is first described at the start of the thesis and returned to in the conclusion once *Voore Mets* has been fully analysed. This approach reflects the ‘law in context’ method, understood here as analysing legal rules in relation to the broader

political, institutional and regulatory environment in which they operate, rather than treating the law as an isolated system.¹⁵ It therefore connects doctrinal interpretation with the real-world framework in which EU species protection functions, taking into account the criticisms highlighted by academic discussion relating to environmental legislation in the EU.

1.2.3 Research gap

Both the Nature Directives and their related case law have been studied extensively and have generated much academic discussion.¹⁶ Therefore, it is unnecessary to reassess the previously studied fundamental concepts of the Nature Directives. Instead, this thesis will briefly outline the essential background, drawing on primary legal sources and relevant academic literature, to provide context for the core analysis of recent case law that has not yet been explored. The assessment of the regime in light of the new judgment is necessary, as it offers needed guidance for previously uncertain legal principles. Understanding these principles is also essential for situating them within the broader structure of species protection and its regulatory framework.

1.2.4 Limitations

The thesis examines species protection under the Nature Directives, focusing primarily on Article 5 of the Birds Directive and Articles 12 and 13 of the Habitats Directive, which govern the protection of animal and plant species respectively. Measures related to habitat protection that are not directly connected to species protection, like the Natura 2000 network and the prohibition of habitat deterioration, will not be addressed in detail. Moreover, within species protection, the analysis concentrates on prohibitions against ‘deliberate’ harm, such as killing, capture and disturbance. Harm that is prohibited regardless of deliberateness falls outside of the core focus.

The thesis draws on criminal law terminology in order to assess deliberateness. However, this is not intended to equate the species protection regimes of the Nature Directives with criminal law, nor to make conclusions of different levels of *mens rea*.

¹⁵ See for example “Law in Context” (At <https://www.cambridge.org/core/series/law-in-context/387EA14AA111E65AB0120DA893AFAFCB>, accessed 31 March 2026).

¹⁶ See for example Schoukens 2017, Jackson 2023, Miron – Cashman 2023.

This thesis also considers fundamental rights insofar as they become relevant when assessing the implications of the *Voore Mets* judgment for specific rights. A detailed constitutional analysis is not undertaken, and fundamental rights are addressed only to the extent necessary to contextualise the legal effects of the judgment.

In conclusion, the doctrinal legal analysis is centred on the concept of deliberate harm as articulated in the Nature Directives. The law-in-context approach complements this by drawing on the adoption setting of the Birds Directive as well the broader global and EU biodiversity law framework and the criticism of which identified in academic literature. This combined approach provides a more comprehensive understanding of how the notion of deliberate harm operates both within the legal system and within the wider ecological and regulatory context.

1.2.5 Use of AI

M365 Copilot has been used to assist in the preparation of this thesis. The website feature Copilot Chat, a GPT-5-based AI language model, has been used to check some of the author's text for linguistic purposes, including correcting grammatical errors and improving readability and coherence. The AI was used only to refine the author's existing writing and all thoughts, arguments, citations and analysis of source material has been produced by the author.

1.3 Structure

Following the introduction, Chapter 2 provides the necessary legal and contextual background to the Nature Directives. It outlines the circumstances leading to their adoption, the current EU biodiversity framework in which they operate, and the role of the Court of Justice in shaping their interpretation. The chapter presents the species protection schemes of both the Birds Directive and the Habitats Directive, with particular attention to the structure and scope of Article 5 of the Birds Directive and Articles 12 and 13 of the Habitats Directive. The purpose of this chapter is to establish the setting against which later case-law analysis can be understood.

Chapter 3 examines the development of the concept of deliberate harm in the Court's earlier case-law under the Habitats Directive and the Birds Directive. It analyses the key judgments in which the Court has clarified the threshold for deliberateness. This chapter identifies the

Court's approach to intention, awareness and acceptance of risk, alongside the Advocate Generals Opinions when relevant.

Chapter 4 handles *Voore Mets*. It first examines Advocate General Kokott's Opinion in detail and then analyses the Court's judgment, highlighting the points of divergence between the two. It also addresses the implications for derogation procedures, the potential conflicts with economic interests and fundamental rights and gives notes on the national implementation of the judgment.

Chapter 5 concludes the thesis. It first identifies and reflects upon structural blind spots in EU biodiversity legislation. It then positions the Birds Directive, in light of *Voore Mets*, within this wider EU environmental framework, considering what the judgment signals for the future of EU species protection. Finally, it provides overall concluding remarks on how the interpretation of deliberate harm now stands, how it alters the balance between environmental and economic interests, and what this may mean for the continued evolution of EU biodiversity regulation

2 Nature Directives' Species Protection in its EU law framework

2.1 Background of the Nature Directives

2.1.1 Introduction

Understanding the legal background of the Birds and Habitats Directives is necessary for comprehending the rationale behind the Directives and the formulation of specific articles. However, for the purpose of this thesis, it's not necessary to give exhaustive analysis of the global judicial background of biodiversity conservation. Instead, this chapter offers a brief overview of the essential framework behind the Nature Directives in regards with species protection. A more detailed examination is given for example by Nina Claudia Miron and Liam Cashman in their 2023 book 'European Union Case Law on the Birds and Habitats Directives'.¹⁷

2.1.2 Global background

Alongside the environmental protests and the subsequent wave of environmental legislation that emerged in the United States at the turn of the 1970s, citizens and policymakers in Europe also began to recognise the harmful effects of industrialisation on the environment. As many European countries adopted national environmental programmes and enacted new environmental laws, Members of the European Parliament likewise pressed for action at the European level.¹⁸

The first United Nations Conference on the Human Environment in 1972 took place in Stockholm, Sweden, and produced the Stockholm Declaration.¹⁹ The Declaration called on Governments to 'enact conventions and treaties to protect species inhabiting international waters or those which migrate from one country to another'.²⁰

Subsequently, the EU presented its first action programme on the environment in 1973.²¹ In the absence of any specific environmental competence in the Treaty Establishing the European Economic Community (the EEC Treaty) at this time, the action was based on

¹⁷ Miron – Cashman 2023

¹⁸ European Parliamentary Research Service 2024, p. 1–3.

¹⁹ "United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm" (At <https://www.un.org/en/conferences/environment/stockholm1972>, accessed 5 April 2026).

²⁰ Stockholm Conference 1972, Chapter II, Recommendation 32.

²¹ The Council 1973.

Article 235 of the EEC. The competence thus derived from being ‘necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers’.²² The programme called for the protection of birds and certain animal species threatened with extinction and promoted the harmonisation of national rules on species protection, particularly with regard to migratory birds. This laid the groundwork for the later adoption of the Birds Directive.²³ The explicit environmental legal base was only included in the treaty by the Single European Act (SEA) in 1987.²⁴

The Bern and Bonn Conventions also play an important role in shaping the species protection provisions of the Nature Directives. In 1979, the Council of Europe adopted the Bern Convention on the Conservation of European Wildlife and Natural Habitats²⁵, with the EU joining as a contracting party in 1982²⁶. Like the Nature Directives, it aims to protect both habitats²⁷ and species²⁸. The Bern Convention has been appraised for paving the way for a common approach European conservation policy and, more specifically, paving the way for the Habitats Directive.²⁹ The Bonn Convention on Migratory Species, signed in 1979³⁰ is a parent convention to the African-Eurasian Migratory Waterbird Agreement (AEWA).³¹ The EU has been a contracting party of AEWA since 2005.³² It is a complementary instrument to the Birds Directive, regulating the conservation and management of migratory waterbirds.³³

There is also separate regulation on trade of endangered species, governed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)³⁴ signed in

²² Treaty Establishing the European Economic Community 1957, Article 235; Haagsma 1988 p. 315–317.

²³ The Council 1973, Part II Title II B (f).

²⁴ Single European Act, Article 130r.

²⁵ Convention on the Conservation of European Wildlife and Natural Habitats (The Bern Convention).

²⁶ Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats.

²⁷ Convention on the Conservation of European Wildlife and Natural Habitats (The Bern Convention), Chapter II.

²⁸ *Ibid.* Chapters III-IV

²⁹ Miron – Cashman 2023, p. 39–40; See also Miron – Cashman 2023, footnote 62 (*citing* Eladio Fernández-Galiano. A Laboratory of Ideas: The 25 Years of the Bern Convention, Naturopa, 101/2004).

³⁰ Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention).

³¹ Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

³² Council Decision 2006/871/EC of 18 July 2005 on the Conclusion on Behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

³³ Miron – Cashman 2023, p. 41.

³⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora.

1973. CITES is implemented in the EU³⁵ resulting in some overlap with the Nature Directives.³⁶

Since its adoption at the Rio Earth Summit in 1992, the United Nations' Convention on Biological Diversity (*CBD*)³⁷ has provided the principal framework for addressing biodiversity concerns at the global level.³⁸ It was ratified by the EU in 1993.³⁹ The Convention provides a conservation scheme aiming to protect at least 30 % of areas important for biodiversity and ecosystem services.⁴⁰ Along with implementing the before-mentioned Bern Convention by the Council of Europe, The Nature Directives also implement the CBD.⁴¹

The apparent shift in pushing multiple environmental conventions at the global level can be understood as an outcome of the environmental movement.⁴² It can also be seen as part of the broader background in which EU environmental legislation began to take shape. The international biodiversity law framework is multilayered and comprises of multiple instruments with overlapping provisions, which is reflected in EU law as well. Within this context, the EU has consistently been an active party in ratifying the international biodiversity regulation. Most notably this can be seen through the Nature Directives' Natura 2000 network, which is recognized as being 'the largest coordinated network of protected areas in the world'.⁴³ This highlights the significance of the Nature Directives, of how they are not only a cornerstone of EU environmental law but also hold importance within the international environmental law context.

On the other hand, this background also highlights the gap between the high ambitions of environmental rules on paper and their effectiveness in practice. Despite the extensiveness and the ambitions of these multiple treaties and conventions, they have been criticised for lacking teeth and have clearly not stopped the impending environmental crisis.⁴⁴ This begs the

³⁵ Council Regulation (EC) No 338/97 of 9 December 1996 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein.

³⁶ Miron – Cashman 2023, p. 30.

³⁷ Convention on Biological Diversity.

³⁸ Miron – Cashman 2023, p. 41– 42.

³⁹ Council Decision 93/626/EEC of 25 October 1993 Concerning the Conclusion of the Convention on Biological Diversity.

⁴⁰ Kunming-Montreal Global Biodiversity Framework, targets 2 and 3 (p. 9).

⁴¹ European Parliament 2021, p. 38.

⁴² Selheim – Schumacher 2022, p. 367– 368.

⁴³ "The Natura 2000 Protected Areas Network." (At <https://www.eea.europa.eu/themes/biodiversity/natura-2000/the-natura-2000-protected-areas-network>, accessed November 25, 2025).

⁴⁴ See for example Selheim – Schumacher 2022, p. 379–380; Harrop – Pritchard 2011, p. 478–479.

question of why these are ineffective, and what would make an effective environmental protection regime.

2.1.3 Background of the Nature Directives at the EU level

Due to the ongoing environmental crisis, the EU has greatly expanded on its nature legislations after the adoption of the Nature Directives. In 2020 the EU launched the EU Biodiversity Strategy for 2030: *Bringing nature back into our lives*, as part of the European Green Deal.⁴⁵ The goal of the strategy is to improve the state of biodiversity in Europe in keeping with the objectives of the Paris Agreement on Climate Change. The Strategy contains ambitious actions to reverse biodiversity loss, basing itself not only on environmental reasons, but also highlighting that things like economy and medicine are also victims of declining ecosystems.⁴⁶ Among other goals, the strategy underlines the importance of proper implementation and enforcement of the Nature Directives.⁴⁷ The strategy has driven some progress already: the new Nature Restoration Regulation passed in 2024 with the goal of protecting at least 20 % of the EU's land areas and 20 % of its sea areas by 2030.⁴⁸

The Nature Directives are also influenced by many other pieces of EU legislation.⁴⁹ Though not examined here, the most notable include for example the Environmental Impact Assessment (EIA) Directive⁵⁰.

The European Commission has the responsibility of making sure that Member States follow their obligations under EU Directives, which has led to the Commission bringing a number of case on the Nature Directives.⁵¹ While the Commission is primarily responsible for ensuring that Member States comply with their obligations under secondary EU law, the Court plays a central role in determining whether an infringement has occurred when cases are brought before it. The Court's role also consists of interpreting EU law when requested by national

⁴⁵ European Commission 2020a.

⁴⁶ *Ibid.*, p. 1–3.

⁴⁷ *Ibid.*, p. 15–16.

⁴⁸ Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869.

⁴⁹ Miron – Cashman 2023 p 45-46.

⁵⁰ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

⁵¹ Lang 2023, p. 34.

courts under the preliminary reference procedure.⁵² Judgments have limited harmful projects and plans and therefore supported nature protection.⁵³

The case-law relating to the Nature Directive is numerous both in the number of judgments and in the different points of law that they address. Despite this far-reaching extent of case-law, Miron and Cashman suggest that the previously noted implementation gaps demonstrate that the case-law remains insufficient.⁵⁴ Additionally, it is important to note how EU environmental law is often criticised for its persistent challenges with access to justice.⁵⁵

2.2 Birds Directive

2.2.1 Adoption and developments

In the 1960s and 1970s, bird hunting became a source of public controversy and moral concern across Europe. The issue gained attention in the wider context of growing environmental awareness, influenced in part by works such as Rachel Carson's *Silent Spring* gained attention and was further fuelled when countries such as Italy relaxed their hunting rules, prompting public criticism. Several activist Members of the European Parliament recognised the political momentum created by this surge of public concern and used it to push bird conservation onto the European policy agenda in close cooperation with European bird conservation groups. Through this opportunity, they were able to advance comprehensive nature conservation measures as part of Europe's emerging environmental policy.⁵⁶

This campaigning resulted in the Birds Directive, originally adopted in 1979⁵⁷, intended to combat the decline in bird life and loss of wetlands and other major bird habitats, marking it as one of the first environmental laws at the European level.⁵⁸ Like explained before, in 1979 the EEC Treaty lacked environmental powers, but the developments were deemed necessary based on article 235 of the Treaty as being necessary to attain for Community objectives.⁵⁹

⁵² Mostly the judgments regarding the Nature Directives come from the Court of Justice, though some judgments have been given by the General Court (See Miron – Cashman 2023, p. 49–50).

⁵³ Miron – Cashman 2023, p. 50.

⁵⁴ *Ibid.*, p. 51.

⁵⁵ The threshold for obtaining standing is exceptionally difficult to meet in environmental cases, as demonstrated by Case C-565/19 P; See also Hadjiyianni 2020.

⁵⁶ European Parliamentary Research Service 2024, p. 6, 9–10.

⁵⁷ Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds.

⁵⁸ Publications Office of the European Union 2019, p. 6.

⁵⁹ Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds, preamble.

The Directive sought to protect migratory species that were understood as part of the ‘common heritage’, as it was established that the protection of these should entail transboundary efforts.⁶⁰ Conservation of wild birds was deemed to be necessary for improving living conditions, developing economic activities and balancing expansion.⁶¹ The need for community action in order to protect birds has been further repeated by the Court in its first judgments concerning the Birds Directive.⁶²

The enlargement of the EU has caused some technical adaptations in the Birds Directive.⁶³ Additionally, the scope of the Birds Directive has been amended by adding and subtracting certain bird species from the Directives annexes.⁶⁴ The Habitats Directive amended the Birds Directive when it was adopted in 1992 by regulating the special protection areas (SPAs) designated by article 4(4) of the Birds Directive, and added the SPA network to the new Natura 2000 network.⁶⁵

In 1994, The Commission proposed amendments to the Birds Directive introducing greater flexibility in its hunting provisions.⁶⁶ The proposal sought to counter the Court’s narrow interpretation of permissible hunting season dates.⁶⁷ However, the proposal was rejected by the European Parliament and thus withdrawn.⁶⁸ This implies that the political support for the bird directive was still strong enough among the Member States.⁶⁹

The Birds Directive was fully recodified in 2009 resulting in Directive 2009/147/EC. The recodified version was expressly based on environmental grounds, referencing article 175(1) of the EC Treaty⁷⁰, now the equivalent of article 192 of TFEU⁷¹.

In 2016, the Commission’s ‘fitness check’ on the Nature Directives revealed that the directives serve their purpose, but their implementation remains lacking. Interestingly, the

⁶⁰ *Ibid.*, recital 3.

⁶¹ *Ibid.*, recital 6.

⁶² Case 247/85 paragraph 6; Case 262/85, paragraph 9 (as explored by Wils 1994, p. 224).

⁶³ Miron – Cashman 2023, p. 44; Wils 1994, p. 220 footnote 10.

⁶⁴ Commission Directive 85/411/EEC of 25 July 1985 Amending Council Directive 79/409/EEC on the Conservation of Wild Birds (1985); Commission Directive 91/244/EEC of 6 March 1991 Amending Council Directive 79/409/EEC on the Conservation of Wild Birds (1991).

⁶⁵ Article 3 of the Habitats Directive.

⁶⁶ European Commission 1994.

⁶⁷ Economic and Social Committee 1994, p. 91; Case C-435/92.

⁶⁸ Briain 2023, Chapter 2.

⁶⁹ Miron – Cashman 2023, p. 44.

⁷⁰ Treaty establishing the European Community (Nice consolidated version).

⁷¹ Treaty on the Functioning of the European Union.

public consultation showed firm support for the Nature Directives and resistance to changing them.⁷²

2.2.2 Scope and general principle

The scope of the Birds Directive is remarkably extensive, applying to over 460 wild bird species naturally occurring in the EU.⁷³ The fourth recital of the Birds Directive sets out that migratory species ‘constitute a common heritage’. According to Article 1(1) of the Birds Directive, the 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’.⁷⁴

This suggests that the directive does not, for example, apply to actions taking place in the overseas territories of the Member States.⁷⁵ It also implies that the directive applies uniformly to all Member States, meaning that if a wild bird species is naturally occurring in any Member State’s European territory, it must be protected in the same manner across the continent.⁷⁶ The Court has enforced this interpretation by denouncing Belgian legislation for only applying to wild bird species living in the Benelux countries and by condemning France for restricting protection to what it deemed as ‘national biological heritage’.⁷⁷

As was explained, the main motivation behind the Directive was that migratory birds should be protected at the EU level because the protection of migrating birds require transboundary efforts.⁷⁸ While this provides a clear rationale for EU-level intervention in the case of migratory species, it also raises questions about why similarly centralised protection is extended to all species of naturally occurring birds, including non-migratory or regionally limited species.

The core of the directive is described in Article 2. It states that ‘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

⁷² European Commission 2016, p. 96, 110–111 (*as explored by* Miron – Cashman 2023, p. 45).

⁷³ Miron – Cashman 2023, p. 35.

⁷⁴ Emphasis added.

⁷⁵ Wils 1994, p. 225 (footnote 50 *citing* Conseil d'Etat (France), Judgment of 24 February 1989 in Case 94330 *Rassemblement des Opposants k la Chassel Ministre de l'Environnement* (unpublished)).

⁷⁶ See for example Wils 1994, p. 225.

⁷⁷ Case 247/85 paragraphs 18–23; Case 252/85 paragraphs 13–16 (*as explored by* Wils 1994, p. 225).

⁷⁸ Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds, recital 3.

species to that level'. Whether Article 2 has an independent legal effect and could be invoked on its own to argue an infringement is uncertain, but as explored by Wouter P. J. Wils, the possibility of such cannot be excluded. Nevertheless, the specific and detailed provisions of the rest of directive could be construed as entailing the full scope of 'requisite measures'.⁷⁹

Note must be given to the fact that Article 2 appoints the ecological, scientific and cultural requirements as primary objectives of the directive, while economic and recreational requirements are only to be taken account of.⁸⁰ In its interpretations, the Court has held that Article 2 takes into consideration these other requirements along with effective environmental protection.⁸¹ Nonetheless the economic and recreational objectives cannot be applied as restricting the other articles of the directive which are reasonably clear on their own. Such has been the case with Article 9 concerning the derogation procedure, as Article 2 cannot be used as enabling national legislation that goes beyond the derogations of Article 9.⁸² Thus, Article 2 has its limitations but can provide helpful guidance for interpretations.

2.2.3 Protection Schemes

The Birds Directive includes two types of protection: firstly, the protection of habitats of wild birds and secondly, the protection of wild bird species.

Habitat protection includes the designation of Special Protection Areas (SPAs) and their protection measures.⁸³ Habitats must be conserved to protect particularly threatened species, but also migratory species.⁸⁴ The conservation obligations of the SPAs have been consistently enforced by the Court.⁸⁵ Outside of SPAs the Members States 'shall also strive to avoid pollution or deterioration of habitats'.⁸⁶

Species protection aims to 'establish a general system of protection' for all species of birds referred to in Article 1.⁸⁷ In other words, species protection intends to protect wild birds from 'direct threats'⁸⁸, such as killing or capture, destruction of their nests and eggs, unlawful sale

⁷⁹ Wils 1994, p. 225–226.

⁸⁰ Wils 1994, p. 226.

⁸¹ See e.g. Case 247/85, paragraph 8.

⁸² Case 247/85 paragraph 8; Case 262/85, paragraphs 8; Wils 1994, p. 226– 227 and footnote 55.

⁸³ Articles 3 and 4 of the Birds Directive.

⁸⁴ Articles 4(1) and 4(2) of the Birds Directive.

⁸⁵ Case C-355/90; Case C-44/95; Amos 2021, p. 368.

⁸⁶ Article 4(4) of the Birds Directive.

⁸⁷ Article 5 of the Birds Directive.

⁸⁸ Miron – Cashman 2023, p. 36.

of birds and unlawful hunting.⁸⁹ The exceptions to these protection measures are handled under the derogation procedure.⁹⁰

According to Article 1 of the Birds Directive, the species that the directive applies to are ‘all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies’, including birds, their eggs, nests and habitats.

The species protection of the directive consists of three types of prohibitions, found in Articles 5, 6 and 8. This thesis will not cover Articles 6 and 8, but in essence Article 6 concerns the prohibition of marketing of wild birds, their parts and derivatives, while Article 8 is a prohibition on using non-selective hunting means.

Along with prohibitions, the Birds Directive includes provisions that allow activities that would infringe the already noted prohibitions. These include Article 7, which permits hunting of species that are listed in Annex II. All the prohibitions can be derogated from under the derogation procedure under Article 9 if strict conditions are met. All the species protection provisions apply across the European territory of the Member States and are not restricted to the boundaries of the SPAs.⁹¹

The Birds Directive contains five annexes that classify different groups of bird species according to the type of protection they require. Annex I lists species that are threatened or vulnerable to habitat loss and therefore require special conservation measures under Article 4. Annexes II to IV list species that are subject to different rules regarding sale, hunting and the use of non-selective hunting methods, as governed by Articles 6 to 8 of the directive.

2.2.4 System of protection under Article 5 of the Birds Directive

Article 5 reads 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:

(a) deliberate killing or capture by any method;

⁸⁹ Articles 5, 6, 7 and 8 of the Birds Directive.

⁹⁰ Article 9 of the Birds Directive.

⁹¹ Miron – Cashman 2023, p. 226.

(b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;

(c) taking their eggs in the wild and keeping these eggs even if empty;

(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;

(e) keeping birds of species the hunting and capture of which is prohibited.

In other words, Member States must protect all species of birds, along with their eggs, nests, and habitats, naturally occurring in the wild state in their respective territory from the deliberate harmful acts presented in Article 5(a) to (d).

Article 5 has been interpreted numerous times in the Court and guidelines for its application have been clarified.⁹² The protection warranted under article 5 must apply uninterrupted throughout the year, without limitations in time.⁹³ The protection cannot be limited to certain bird species nor can bird species be excluded for certain periods.⁹⁴ Additionally, prohibitions on species protection cannot be confined to a particular region.⁹⁵ A previously unanswered question concerned the meaning of ‘deliberate’, which has since been clarified in *Voore Mets*.

2.3 Habitats Directive

2.3.1 Adoption and scope

The Single European Act⁹⁶ of 1986 added Title VII dealing with the environment to the EEC. The objectives laid out in Article 130r included the preservation, protection and improvement of the quality of environment. Article 130r served as the base for the adoption of the Habitats Directive⁹⁷ in 1992, along with the EEC’s fourth environmental action programme calling for measures conserving nature and natural resources.⁹⁸ The action programme had declared that the Community needed an instrument that protected ‘not just birds but all species of fauna and

⁹² The case-law of species protection in the Birds Directive up to 2023 is thoroughly analysed by Miron – Cashman (2023) in Chapter 4.02.

⁹³ Case 252/85, paragraph 9.

⁹⁴ *Ibid.*, paragraphs 15–16; Case 247/85 paragraph 22; Case C-507/04 paragraphs 114–115.

⁹⁵ Opinion of Advocate General Kokott on Case C-88/19, paragraph 41.

⁹⁶ Single European Act.

⁹⁷ The Habitats Directive recital 1.

⁹⁸ *Ibid.*, recital 2; European Commission 1986, p. 30–32.

flora; and not just the habitats of birds, but the habitat of wildlife – animals and plants – more generally’.⁹⁹ The action programme also drew attention to the fact that nature protection policy should take account of the fact that ‘immediate economic interests will only rarely be served by such actions’.¹⁰⁰

According to Article 2 of the Habitats Directive, the aim of the directive is to ‘contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies’. In practice, the Habitats Directive does cover an extensive range of organisms and ecosystems, including over a 1000 animal and plant species and approximately 230 different habitats.¹⁰¹

However, Article 2(2) declares that ‘Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of *Community interest*’.¹⁰² The condition of Community interest signifies that for the Habitats Directive to apply to, for example, species, they must be endangered, vulnerable, rare, or endemic to Europe.¹⁰³ This is a significant difference from the Birds Directive, which, as beforementioned, offers universal protection to all naturally occurring and wild species of Birds in European territory.¹⁰⁴

2.3.2 Protection Schemes

Like the Birds Directive, the Habitats Directive includes two types of protection schemes, habitat protection and species protection.

The Habitats Directive’s habitat protection structure is made up of the Natura 2000 provisions. The Directive created the Natura 2000 network, ‘a coherent European ecological network of special areas of conservation [SACs]’ and the SPAs designated by the Birds Directive.¹⁰⁵ Natura 2000 protection includes provisions regarding the establishment and conservation of said areas, containing protection from deterioration, mandatory assessment of plans and projects likely to significantly affect the sites, and the framework for the derogation

⁹⁹ *Ibid.*, p. 31 paragraph 5.1.4.

¹⁰⁰ *Ibid.*, p. 32 paragraph 5.1.8.

¹⁰¹ Annexes I, II, IV and V of the Habitats Directive (Kingston – Heyvaert – Čavoški 2017, p. 417–418).

¹⁰² Emphasis added.

¹⁰³ Article 1(g) of the Habitats Directive. Article 1(c) includes similar criteria concerning natural habitat types of community interest.

¹⁰⁴ Amos 2021, p. 369.

¹⁰⁵ Article 3(1) of the Habitats Directive.

procedure.¹⁰⁶ There is also a provision designed to improve the ecological coherence of the Natura 2000 network.¹⁰⁷

The species of protection of the Habitats Directive comprises of a strict protection framework for the animals and plants listed in Annex IV (a) and (b) and a less strict protection framework for animals and plants listed in Annex V.¹⁰⁸ The strict protection regime concerns about 400 species and prohibits similar direct threats in line with Article 5 of the Birds Directive, including deliberate capture, killing or disturbance of wild animals and deliberate picking, collecting, cutting, uprooting or destruction of wild plants.¹⁰⁹ The less strict regime applying to around 90 species prescribes that the exploitation of these species must be compatible with maintaining their favourable conservation status.¹¹⁰ The Habitats Directive also contains a prohibition on indiscriminate means of capture and killing of wild animals.¹¹¹ The derogation procedure regarding the possibility of permitting the prohibited activities is established in Article 16.

As far as species are concerned, the relevant annexes of the Habitats Directive are Annexes II, IV and V. Annex II lists endangered, vulnerable, rare and endemic species (i.e. species of community interest) whose conservation requires the designation of Special Areas of Conservation. Annex IV identifies animal and plant species of Community interest that require strict protection across their natural range. Annex V contains species of Community interest whose taking in the wild and exploitation may be subject to management measures.

2.3.3 Species Protection under Article 12 and 13 of the Habitats Directive

2.3.3.1 Articles 12 and 13 of the Habitats Directive

The Habitats Directives strict species protection can thus be found in Articles 12 (fauna) and 13 (flora).

Article 12(1) reads as follows:

¹⁰⁶ Article 6 of the Habitats Directive.

¹⁰⁷ Article 10 of the Habitats Directive.

¹⁰⁸ Articles 12 and 13; Article 14 of the Habitats Directive.

¹⁰⁹ Articles 12 and 13 of the Habitats Directive.

¹¹⁰ Article 14 of the Habitats Directive, also taking account of article 15.

¹¹¹ Article 15 of the Habitats Directive.

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

While Article 13(1) reads as follows:

1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

In essence, Member States must protect animal and plant species of community interest, that is endangered, vulnerable, rare and endemic species in the European territory of the Member States, from the deliberate harmful acts presented in Articles 12(1)(a-d) and 13(1)(a-b).¹¹² The prohibitions apply regardless of the life stage of the animal or plant.¹¹³ There is also a Commission guidance document on the application of strict species protection for animal species, last updated in 2021, which has been formally endorsed by the College of Commissioners and referred to by the Court.¹¹⁴

Unlike the prohibitions set by the Birds Directive, that by default protect all naturally occurring wild birds unless the species is explicitly exempted from the prohibition, the

¹¹² With animals, as per to the wording of Article 12 of the Habitats Directive, the protection system applies to animal species ‘in their natural range’ (see Miron – Cashman 2023, p. 270–272).

¹¹³ Habitats Directive Article 12(3) and 13(2).

¹¹⁴ European Commission 2021; Miron – Cashman 2023, p. 268.

Habitat Directive's species protection rules apply only to animal and plant species of Community interest needing strict protection.¹¹⁵ Articles 12 and 13 do apply to specimens regardless of if they are within a Natura 2000 area.¹¹⁶

2.3.3.2 Case-law of Article 12

Article 12, the provision regarding the protection of animals, has been assessed by the Court multiple times and has produced many landmark cases concerning species protection in the EU. The cases encompass a variety of marine and terrestrial species and relate to an array of societal activities, like agriculture, forestry and extraction of natural resources.¹¹⁷ By contrast, there has not been any cases brought for infringements of Article 13, concerning the protection of plant species.¹¹⁸

The Court has pronounced that Article 12 must be faithfully transposed, since threatened habitats and species are a part of the 'natural heritage' of the European Community, similar in vain to the mention of 'common heritage' in the 3rd recital of the Birds Directive.¹¹⁹ This means that the prohibition has to fully encompass the essence of the Article. For example, the Court found that Luxembourg's transposition of Article 12 was incomplete because it failed to expressly mention the disturbance during the migration period.¹²⁰ The transposition has to be clear, precise and strict 'with respect to all forms of deliberate capture and killing of specimens'.¹²¹

The article not only imposes negative obligations to the Member States, the obligation to prohibit the deliberate harmful acts, but also a positive obligation of implementing and effective system of protection. This includes implementing a coherent and coordinated preventive legal framework that restores or maintains the populations of the protected species through concrete and specific protection measures.¹²² The effective system of protection entails that there is sufficient information collected of the protected species.¹²³ If the protected

¹¹⁵ See for example Kingston – Heyvaert – Čavoški 2017, p. 418.

¹¹⁶ See Miron – Cashman 2023, p. 269–270 for relevant case-law of the overlap with Natura 2000 provisions.

¹¹⁷ Miron – Cashman 2023 p. 274–275.

¹¹⁸ Amos 2021 p. 376.

¹¹⁹ Case C-6/04, paragraph 25.

¹²⁰ Case C-75/01, paragraph 53.

¹²¹ Case C-98/03, paragraph 78.

¹²² Case C-103/00, paragraph 30 (irrespective of whether the number of nests of that species has decreased, paragraph 31); Case C-518/04, paragraph 16 (*citing* Opinion of Mr Advocate General Léger Delivered on Case C-103/00 paragraphs 43–44); Case C-183/05, paragraphs 29–30. See also Case C-383/09, paragraph 20; Case C-340/10, paragraph 60–61; Case C-504/14, paragraph 140.

¹²³ Case C-183/05, paragraphs 31–32.

species is present at an area, the prohibitions must be effective and appropriately applied or the derogation procedure fulfilled.¹²⁴ Information must also be collected of threats of illegal activities, and the illegal activities have to be effectively mitigated.¹²⁵

In essence, the actions taken under Article 12 should serve Article 2(2) of the Habitats Directive, meaning that the adopted measures ‘shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest’.¹²⁶ By result, an unfavourable conservation status may create more overarching obligations for the Member State in regard with species protection.¹²⁷

This enhances to the earlier mentioned contrast between the scopes of the Birds and the Habitats Directives. The scope of the Habitats Directive’s species protection is only limited to endangered, vulnerable, rare and endemic species, and within these categories, the most at-risk species attain the most protection. Yet the Birds Directive concerns all naturally occurring wild bird species generally without restrictions based on population status.

Article 12(1)(d) stands out from Articles 12(1)(a-c), since it does not directly relate to animal species nor does it require deliberateness; rather it prohibits the deterioration or destruction of breeding sites or resting places. The Court has interpreted the concept of protected resting sites broadly, confirming that it also covers locations where a protected species used to be present, even if the animals no longer occupy those areas.¹²⁸

2.4 Concluding remarks on the nature and evolution of species protection under the Nature Directives

Built on the wave of the environmental movement, the Birds Directive marked the first major step in European environmental legislation. It was soon followed by the Habitats Directive, which expanded the scope of EU conservation efforts beyond birds to a wider range of habitats, animals and plants. Together these two directives enact international environmental law and are the cornerstone of European species protection and biodiversity policy, while also constituting an important of global conservation legislation. The EU environmental legislative

¹²⁴ Case C-183/05, paragraphs 34–37; C-383/09 paragraphs 26–37.

¹²⁵ C-674/17, paragraph 48; Case C-103/00, paragraphs 37–39.

¹²⁶ Miron –Cashman 2023, p. 281.

¹²⁷ Opinion of Advocate General Kokott on Case C-383/09, paragraph 37.

¹²⁸ Case C-477/19, paragraph 31.

network of which the Nature Directives are a part of is extensive, containing a wide range of instruments.

The species protection regimes of the Birds and Habitats Directives are largely similar in their legal structure. Both of them contain negative obligations that prohibit harmful actions such as killing, capturing or disturbance, as well as positive obligations requiring Member States to establish effective conservation systems. These parallels have naturally led the Court of Justice to adopt aligned interpretative approaches in order to ensure a uniform approach.

The most significant difference between the directives species protection regimes lies in the scope of the protection they provide. The Birds Directive applies universally to all naturally occurring wild bird species in the EU, regardless of their conservation status. By contrast, the Habitats Directive affords strict protection only to species of Community interest, meaning species that are endangered, vulnerable, rare or endemic.

In conclusion, species protection under the Nature Directives has evolved into a system that is unified in purpose and basic structure yet differentiated in its scope. The framework reflects the political and historical context in which the directives were adopted, while the Court has harmonised many features of their species protection regimes through its case-law. This development is essential for understanding how the notion of ‘deliberate’ harm has been shaped and why its clarification matters for the functioning of the species protection system as a whole. The following section therefore examines in greater detail the case-law concerning deliberate harm, which forms the doctrinal foundation for analysing *Voore Mets* and answering the research question of this thesis.

3 Deliberateness in case-law prior to *Voore Mets*

3.1 Introduction to the concept of deliberateness

This chapter examines how the Court has interpreted the concept of ‘deliberate’ under case-law prior to *Voore Mets* under the Nature Directives. In practice, the cases had only focused on deliberateness Article 12 of the Habitats Directive in explicitly. Key judgments are analysed in chronological order to trace how the Court has selected among the possible interpretations on deliberateness. *Föreningen Skydda Skogen* is of particular importance as it handles forestry operations and later served as the basis for Kokott’s Opinion and the Court’s judgment of *Voore Mets*. In addition, the chapter evaluates whether the Court’s reasoning offers a coherent and workable threshold for deliberateness.

Before examining the case-law, it is useful point out the possible meanings of ‘deliberate’ that the Court could rely on. In an infringement of Articles 5 of the Birds Directive or Articles 12 and 13 of the Habitats Directive, the *actus reus* is the act of killing or capturing or destruction of eggs, for example. The *mens rea* element of the provision is that the act must be ‘deliberate’, meaning that the consequence element of death, capture or destruction has to be deliberately achieved.¹²⁹

According to a general definition, the word ‘deliberate’ is commonly associated with acting consciously or with awareness of one’s actions and their possible consequences. By contrast, the notion of ‘intentional’ is typically linked to acting with the purpose of bringing about a specific result.¹³⁰ Although the Nature Directives concern administrative and civil obligations rather than criminal liability, it is still useful to draw a comparison with typical criminal law standards of *mens rea*. Criminal codes usually distinguish between different mental states that include elements akin to purpose, knowledge, recklessness, and negligence.¹³¹ The question that the Court’s case-law essentially must answer is where the concept of deliberateness under the Nature Directives is situated along this spectrum of possible mental states.

Without attempting to follow strict criminal law terminology, the possible interpretations of deliberateness in the context of killing or capturing an animal can, at a general level, be

¹²⁹ For terminology, see for example “Explaining Actus Reus and Mens Rea in UK Law”, (At <https://www.holbornadams.com/post/explaining-actus-reus-and-mens-rea-in-uk-law>, accessed 4 April 2026); “Consequence element” (At <https://lawprof.co/definition/consequence-element/>, accessed 4 April 2026).

¹³⁰ ”intentional” (At <https://www.merriam-webster.com/thesaurus/intentional>, accessed 2 April 2026).

¹³¹ See for example Simester 2021, Chapter 3.4.

understood as follows. Firstly, if deliberateness were understood as acting with purpose, the actor would need to aim at causing the killing or capture of a specimen. Secondly, if deliberateness were interpreted as acting knowingly, it would require that the actor is aware that their conduct (or, perhaps, omission) will, with practical certainty, result in the death or capture of the animal. Thirdly, deliberateness fulfilled by recklessness would mean that the actor consciously accepts an unjustifiable risk that their conduct may lead to the outcome that the animal dies or is captured. Under a negligence standard, deliberateness would be met whenever the actor should have been aware of the risk that their conduct could cause the death or capture of a specimen.¹³² At the opposite end of the spectrum lies strict liability, where an infringement occurs regardless of the actor's mental state.¹³³ The subsequent case-law shows how the Court has positioned itself among these possibilities and how its choices have shaped the preventive function of the Directive.

3.2 Early forming of the concept of deliberate: *Commission v Greece (2002)* and deliberate disturbance

The case *Commission v Greece (2002)* concerned the Greek sea turtle, *Caretta caretta*, listed in Annex IV(a) of the Habitats Directive. The case addressed the notion of 'deliberate disturbance' in relation to the protection of the species' breeding sites on Greek beaches. This case is relevant because it contains the Court's first explicit interpretation of 'deliberate' under Article 12(1)(b).

The Commission brought infringement proceedings against the Hellenic Republic for failing to fulfil the obligations under Article 12(1)(b) of the Habitats Directive on the basis that they had not established a legislative framework capable of ensuring the strict protection of the *C. caretta* sea turtle from deliberate disturbance during its breeding period.¹³⁴ Sea turtle populations are dependent on undisturbed beaches, since the baby turtles hatch on the beach before crawling to the sea. The site concerned was considered a vital breeding region for the *C. caretta*.¹³⁵

¹³² Dubber – Hörnle 2014, p. 444 (based on the American Model Penal Code that provides a helpful English language background on the terminology, but it is not meant as a reflection of EU law in itself).

¹³³ "strict liability" (At https://www.law.cornell.edu/wex/strict_liability, accessed April 4 2026).

¹³⁴ Case C-103/00, paragraph 18.

¹³⁵ Case C-103/00, paragraphs 16–17, 27.

The Commission had found that that protective measures of the sea turtle were inadequate. It observed that the nesting beaches lacked supervision and notices, there were p dalos and boats where their use is prohibited, there were numerous beach umbrellas and deck-chairs on several beaches, and that illegal buildings and construction work were present on the beach.¹³⁶

Advocate General L ger noted that the *C. caretta* and its egg-laying, incubation, hatching and journey to the sea is particularly disturbed by noise and artificial light in vicinity of the breeding sites. L ger defined that the use of sunbeds, umbrellas and mopeds notwithstanding the warnings about the existence of turtle nests ‘constitute deliberate acts such as might disturb the species’ during the period of breeding, which is specifically protected in Article 12(1)(b).¹³⁷

The Court sided with Advocate General L ger. It found that driving mopeds on beaches used by *C. caretta* during their breeding is prone to disturb the species, especially because of the noise they generate, which can affect the laying and hatching of the eggs and the turtle’s journey to the sea. The Court also noted that the presence of small boats close to these breeding beaches were dangerous to the turtles’ lives and health.¹³⁸

The Court claimed that the use of mopeds in the area was prohibited and the prohibitions were indicated in erected notices.¹³⁹ Consequently, the use of mopeds on the beach and the presence of p dalos and small boats in the sea, notwithstanding specific and visible prohibitions, were equated to *deliberate* disturbance of the species during its breeding as is meant by Article 12(1)(b) of the Habitats Directive.¹⁴⁰ However, there is some ambiguity in the reasoning as to when the Court or Advocate General L ger are referring to the behaviour of individual beach users and when they are attributing responsibility to the Greek authorities acting as the Member State.

If one views the Greek authorities as the actor representing the government, it can be concluded that they breached the Habitats Directive through a failure to take sufficient action, despite knowing with practical certainty that their omission would result in disturbance. In other words, the Court’s standard in this case means that Greece was held responsible because it was aware of the risk and was nevertheless regarded as allowing conditions that resulted in

¹³⁶ Case C-103/00, paragraphs 8, 11–13.

¹³⁷ Opinion of Mr Advocate General L ger Delivered on Case C-103/00, paragraphs 56–57.

¹³⁸ Case C-103/00, paragraph 34.

¹³⁹ Case C-103/00, paragraph 35.

¹⁴⁰ Case C-103/00, paragraph 36 (emphasis added).

disturbance to the turtles. This places the level of deliberateness at least at the knowledge stage of intention, since it cannot reasonably be argued that Greece aimed to disturb the turtles. The fact that this omission was itself regarded as an infringement can be linked to the point noted earlier that, in this and subsequent case-law, the Court has consistently held that Article 12 imposes not only prohibitions on harmful acts but also a positive obligation on Member States to establish an effective system of protection.¹⁴¹

It has to be pointed out that Greece's infringement was not a simple absence of action, but an absence to act sufficiently. It had adopted prohibitions and posted notices, which indicates an effort to regulate harmful behaviour on the nesting beaches.¹⁴² The real issue is identifying the point at which a Member State's measures become effective enough to satisfy Article 12(1)(b). The Court took the continued presence of mopeds, *pédalos* and boats as proof that the measures were inadequate, yet it did not explain how much the authorities were expected to do to secure compliance. This makes it difficult to determine when a Member State has acted sufficiently, particularly when individuals ignore the rules.

From another perspective, where the conduct of individuals is considered, the reasoning becomes more complex. Léger seemed to imply that individuals who used mopeds and boats deliberately disturbed the turtles because they acted despite the presence of visible warnings.¹⁴³ This is the angle later questioned by Advocate General Kokott for focusing incorrectly on the individuals.¹⁴⁴ Kokott argued that this interpretation risks attributing deliberateness based on the mere existence of warnings, without clear evidence of the individual's actual awareness. Under such a reading, the concept of deliberateness and thus liability could drift towards a negligent standard.¹⁴⁵ Since the proceedings concern an infringement by Greece, it is more appropriate to follow Kokott's approach and assess the inadequacy of the Greek authorities' measures as the relevant basis for establishing deliberateness, although the judgment appears to mix the analysis of individual behaviour with that of state responsibility.

To conclude, this case contributes to the overall interpretation of deliberateness by showing that continued behaviour in the face of clear warnings can amount to acceptance of risk. At

¹⁴¹ Case C-103/00, paragraphs 8, 11–13.

¹⁴² Case C-103/00, paragraph 35.

¹⁴³ Opinion of Mr Advocate General Léger Delivered on Case C-103/00, paragraph 57.

¹⁴⁴ Opinion of Advocate General Kokott on Case C-221/04, paragraph 45.

¹⁴⁵ Opinion of Advocate General Kokott on Case C-221/04, paragraph 48.

the same time, it reveals the tension between individual conduct and state responsibility and highlights the difficulty of determining where deliberateness should be attributed. The case therefore provides an initial point of clarification but ultimately raises more questions than it resolves.

3.3 Minimum threshold for deliberateness: *Commission v Spain (2006)* and *Białowieża Forest*

3.3.1 *Commission v Spain (2006)* – Advocate General Kokott’s opinion

Commission v Spain (2006) concerned the interpretation of the ‘deliberate capture or killing’. The case handled the use of stopped snares for fox-hunting and whether the use of such would constitute a deliberate capture or killing of the otter *Lutra lutra* listed in Annex IV(a) as meant by Article 12(1)(a) of the Habitats Directive. The Commission initiated the procedure against Spain for claiming that a hunting permit that had allowed the use of stopped snares for fox-hunting also entailed the deliberate capture or killing of the protected otters.¹⁴⁶ This case is central because it directly addressed the relationship between intention, awareness, and risk acceptance within Article 12(1)(a).

Advocate General Kokott explored the question from a comparative criminal law perspective.¹⁴⁷ Kokott considered that the linguistic, criminal law interpretation, in which deliberateness requires both ‘awareness and intent’, would result in prohibiting only a narrow set of actions that are expressly directed at harming protected fauna, such as hunting or cruelty to animals.¹⁴⁸ Along the terms laid out earlier in this chapter, this would signify the *purpose* level of intention, where the end result is the objective of the action. Kokott maintained that a narrow interpretation of deliberateness would undermine the strict protection system in Article 12(1) of the Habitats Directive. She claimed that a system that only bans actions that are purposely intended to harm species while tolerating risks knowingly accepted in many other actions cannot be considered ‘strict’.¹⁴⁹

Additionally, under the Bern Convention, a broader interpretation of the term ‘deliberate’ had been adopted. According to a resolution from 1989, under the provision 6b of the Bern

¹⁴⁶ Case C-221/04 paragraph 43.

¹⁴⁷ Opinion of Advocate General Kokott on Case C-221/04, paragraph 37.

¹⁴⁸ *Ibid.*, paragraph 38.

¹⁴⁹ *Ibid.*, paragraph 50.

Convention concerning deliberate damage to or destruction of breeding or resting sites, the word ‘deliberate’ includes act committed without the intention to cause damage or destruction, provided that the act was committed in the knowledge that it would probably lead to such damage.¹⁵⁰

Advocate General Kokott also referenced the Greek sea turtle case, *Commission v Greece (2002)*.¹⁵¹ Advocate General Léger’s argument was primarily based on the fact that activities such as driving mopeds on the beaches and placing sunbeds and umbrellas amounted to intentional human actions likely to disturb the species at a time when it requires particular protection.¹⁵² Kokott argues that this signifies that Léger considered deliberateness in relation to the offender’s conduct rather than the damage inflicted on the animals.¹⁵³ The Court had declared that since the mopeds and sunbed were used regardless of the erected warnings, the disturbance was deliberate.¹⁵⁴ As stated earlier, according to Kokott, the Court’s interpretation may imply that deliberateness extends to circumstances where the offender ‘should have known’ that their actions were threatening a protected species; in other words, that mere negligence is treated as an equivalent to deliberateness.¹⁵⁵

Consequently, Advocate General Kokott suggested that the Court did not intend to extend the notion of deliberateness to the point where the actor’s intention would become irrelevant. Kokott claimed that in *Commission v Greece (2002)* the knowledge was to be concluded from the warning signs and that this knowledge amounts to the acceptance of the possibility of harm being caused. She concluded that: ‘The criterion for deliberateness is therefore whether the risk to the protected species was realised and nevertheless accepted’.¹⁵⁶ Unlike the interpretation that focuses on the omission by the Greek authorities, Kokott’s approach still seems to place the emphasis on the conduct of the individuals, but it does so by asserting that they were in fact aware of the risk, rather than relying on a ‘should have known’ standard

¹⁵⁰ Convention on the Conservation of European Wildlife and Natural Habitats - Resolution No. 1 (1989) of the Standing Committee on the Provisions Relating to the Conservation of Habitats, 3b; Opinion of Advocate General Kokott on Case C-221/04 paragraph 39.

¹⁵¹ Opinion of Advocate General Kokott on Case C-221/04, paragraphs 43–47.

¹⁵² Opinion of Mr Advocate General Léger on Case C-103/00, paragraph 57.

¹⁵³ Opinion of Advocate General Kokott on Case C-221/04, paragraph 45.

¹⁵⁴ Case C-103/00, paragraph 36

¹⁵⁵ Opinion of Advocate General Kokott on Case C-221/04, paragraph 48.

¹⁵⁶ *Ibid.*, paragraph 49. She also develops these arguments by examining how negligent conduct is treated under the Habitats Directive in comparison with the Environmental Liability Directive (Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage), see *Ibid.*, paragraphs 51–53.

Kokott concluded that deliberate harm under Article 12(1) of the Habitats Directive requires awareness of the risk and acceptance of that risk.¹⁵⁷ Since it was not established that the hunters knew that otters were present, for example through warning signs, the harm to otters from snare hunting could not be classified as deliberate.¹⁵⁸ On this basis, she argued that the minimum threshold for deliberateness under the Habitats Directive is not that an offender “should have known,” but that it must be established that the risk was actually known through some concrete means.

Kokott’s interpretation differs from the narrow criminal law conception of deliberateness because she does not require proof of a direct intention to harm. Under a strict criminal law approach, deliberateness means the person is aware of the outcome their act will cause and acts with the purpose of bringing it about. Kokott rejects this threshold as too restrictive for a system of strict species protection. Instead of requiring intent in the traditional criminal law sense, she adopts a standard based on awareness of a risk and *acceptance* of that risk. This, again, aligns the standard from intention understood as *purpose* to intention understood as *knowledge*.

3.3.2 *Commission v Spain (2006)* – The Judgment

Firstly, the Court clarified that the condition of ‘deliberate’ applies to ‘both the capture and killing of the protected animals’.¹⁵⁹ Secondly, the Court assumed the following interpretation of the relationship between the concepts of deliberateness and intentionality: ‘For the condition as to ‘deliberate’ action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act *intended* the capture or killing of a specimen belonging to a protected animal species or, at the very least, *accepted the possibility* of such capture or killing’.¹⁶⁰

Thus, The Court establishes that ‘acceptance of the possibility’ of the harm in question constitutes the minimum threshold for deliberateness under Article 12(1) of the Habitats Directive. In line with Kokott’s opinion, the Court concluded that in this case it was clear that

¹⁵⁷ *Ibid.*, paragraph 54.

¹⁵⁸ *Ibid.*, paragraph 56–59.

¹⁵⁹ Case C-221/04, paragraph 69. In the French translation the word 'deliberate' had inaccurately only related to killing (See Opinion of Advocate General Kokott on Case C-221/04, paragraph 34).

¹⁶⁰ Case C-221/04, paragraph 71 (emphasis added).

the contested permit *intended*, i.e. had the *purpose*, to hunt foxes, not otters.¹⁶¹ Therefore the question was whether Spain had *accepted the possibility* of capturing or killing otters.

The Court thus distinctly shifted from the actions of the individuals to the acts of the authorities. In *Commission v Spain (2006)*, the relevant intent is that of the Spanish authorities, because the infringement concerned the legality of the permit they issued, rather than the intentions of individual hunters. The Court examined whether the authorities, when authorising the use of stopped snares for fox hunting, accepted the possibility that otters might be captured or killed. The question of deliberateness therefore depended on whether the authorities knew that otters were present in the area and nevertheless chose to permit a hunting method that posed a risk to the species. This, again, highlights that, since infringement proceedings address the compliance of the Member State, it is generally more appropriate for the analysis to focus on the authorities and on what they knew and tolerated when determining whether the requirement of deliberateness is met.

The Court's judgment leaves the question remaining as to the threshold for establishing 'acceptance of possibility'. In this case, the key issue was whether the protected species was present in the area. The Court indicated that if the presence of otters had been 'formally proven', the Spanish authorities' knowledge would have been established, and the risk would then have been knowingly taken and accepted. Because the Court found that there was not enough evidence to prove that otters were actually present, it could not be shown that the authorities knowingly exposed the species to danger.¹⁶² Although the Court adopted a more balanced approach by explicitly requiring actual knowledge of risk, the judgment leaves open practical questions about how such knowledge must be demonstrated.

This case refines the notion of deliberateness by establishing that intention based on knowledge of a real risk and acceptance of that risk is sufficient. It rejects the narrow requirement of direct purpose and distinguishes deliberateness from negligence by insisting on actual awareness rather than a mere 'should have known' standard. The Court's reasoning here establishes the core doctrinal approach applied in later judgments.

¹⁶¹ *Ibid.*, paragraph 72.

¹⁶² *Ibid.*, paragraph 73.

3.3.3 Białowieża Forest

In the Case *Białowieża Forest* the Court found that Poland breached Article 12(1)(a). Logging operations that included the felling of spruces colonized by beetle species listed in Annex IV(a) affected their breeding and resting places in breach of Article 12(1)(d), which was consequently construed as proving a breach of a form of deliberate killing of these specimens in the wild in breach of Article 12(1)(a).¹⁶³ The case provides insight into how the ‘risk’ in ‘awareness and acceptance of risk’ is to be understood.

The threshold for establishing acceptance of the risk of killing the protected beetle species according to this judgment can be defined in the following manner: Once the species’ presence in the trees is formally proven by an adopted management plan governing the site’s conservation, it follows that the killing of the specimens is an ‘*inevitable*’ consequence of the felling of those trees.¹⁶⁴

In this judgment, the Court also opposed the forestry operations, since management plan posed a threat to protected bird species. The felling of the trees in this case therefore qualified as deliberate destruction of, or damage to, nests and eggs and as removal of nests under Article 5 of the Birds Directive, but the Court did not assess this in detail.¹⁶⁵

The Court’s reasoning appears to clarify the idea of ‘acceptance of risk’ as including situations in which harm is not intended yet is effectively unavoidable. This gives information of the interpretation of knowledge and acceptance as a form of deliberateness. It suggests that, in this context, the management plans put in place were sufficient to demonstrate the existence of awareness. The judgment also establishes that the practical certainty of an unavoidable harmful outcome, once the risk is known, can amount to the acceptance of that risk. This interpretation appears persuasive because it preserves the preventive character and environmental aims of the directive, although a challenge remains in determining when certain harmful outcomes should be regarded as unavoidable.

¹⁶³ Case C-441/17, paragraphs 230–238.

¹⁶⁴ *Ibid.*, paragraphs 233–236, emphasis added. See also Opinion of Advocate General Bot on Case C-441/17, paragraphs 94–97.

¹⁶⁵ As explained in the Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraphs 77 (*citing* Case C-441/17 paragraphs 253–259).

3.4 Deliberateness and tree felling under the Habitats Directive: *Föreningen Skydda Skogen*

3.4.1 Introduction

The *Föreningen Skydda Skogen* judgment concerned the interpretation of Article 12(1) of Habitats Directive with regards to tree felling.¹⁶⁶ The forest site at hand was a natural habitat of the species covered by article 5 of the Birds Directive and article 12 of the Habitats Directive. The planned tree cutting was claimed to result in specimens of protected species being disturbed or killed. Furthermore, the eggs of those species located within that area would be destroyed.¹⁶⁷ *Föreningen Skydda Skogen* therefore raises central questions about how Article 12 applies to land-use activities that pursue mixed purposes, such as forestry operations that both utilise natural resources and affect protected species.

3.4.2 First question: scope of Article 5

Firstly, the Swedish Court asked whether it is permissible for the prohibitions of Article 5 only to apply to species listed in Annex I of the Birds Directive, or to species that are at risk or suffering from ‘a long-term decline in population’.¹⁶⁸

Advocate General Kokott concluded in her opinion that a favourable conservation status does not preclude the application of the prohibitions of the Habitats Directive. She also acknowledged that Article 5 of the Birds Directive is similar to Article 12 of the Habitats Directive. Kokott pointed out that likewise to Article 12 of the Habitats Directive, Article 5 of the Birds Directive does not indicate that the prohibition of killing, destruction, and damage to nests and eggs is dependent on a specific conservation status, and it is also subject to a derogation procedure under Article 9, which application is dependent on the conservation status of the bird species. Kokott recognised that ‘in principle’ it would be inconsistent in the framework of the Birds Directive to make the risk of harming a species’ conservation status a condition for applying the prohibitions in Article 5, since doing so would in practice render the derogation mechanism unusable.¹⁶⁹

¹⁶⁶ Joined Cases C-473/19 and C-474/19.

¹⁶⁷ Joined Cases C-473/19 and C-474/19, paragraph 23.

¹⁶⁸ Joined Cases C-473/19 and C-474/19, paragraph 31.

¹⁶⁹ Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraphs 69–74. Kokott also states that article 9 of the Birds Directive implements the Bern Convention (*citing* Report on the Convention on

The Court's judgment aligned with Kokott's opinion on deliberateness under Habitats Directive Article 12. The Court clarified that the prohibitions of Article 5 of the Birds Directive cover the whole scope of the Birds Directive, i.e. 'all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies'.¹⁷⁰ The Court argued that neither the Article 5 nor the general purpose of the directive permitted limitations to its scope.¹⁷¹

Furthermore, the Court referenced the EU's environmental competence provision of Article 191(2) TFEU, and claimed that EU environmental policy must 'aim at a high level of protection' and be based on the precautionary principle and the prioritize of preventive action.¹⁷² The Court continued to state that many bird species covered by the Directive, which, being mostly migratory species, form part of the common heritage of the EU, have declining populations, making it necessary to improve their living conditions to achieve the Union's sustainability goals.¹⁷³

The Court also considered Articles 2, 3 and 4 of the Birds Directive in determining the permissible limitations of Article 5.¹⁷⁴ Article 2 sets out that all necessary measures must be taken by the Member State to maintain or protect the population of *all* bird species covered by the directive.¹⁷⁵ Article 3 contains general obligations of preserving sufficient diversity and area of, again, *all* bird species covered by the directive. The scope of the application is deemed by the Court to be linked to the objective of ensuring comprehensive and effective protection of wild birds throughout the European Union. The Court claims that this protection applies irrespective of the territories in which these birds reside or migrate and is therefore independent of national legislation that limits such protection by invoking the concept of national heritage.¹⁷⁶

A comparison of Kokott's opinion and the Court's judgment reveals differing emphases in how the Directive and its aim are understood. Like the Court, Advocate General Kokott used Article 2 as a basis for her argumentation. The Court argued that Article 2, explicitly

the Conservation of European Wildlife and Natural Habitats (1997-1998) (Article 9(2)) (presented by the European Commission), SEC(2001) 515 final).

¹⁷⁰ Joined Cases C-473/19 and C-474/19, paragraphs 34–36.

¹⁷¹ *Ibid.*, paragraph 37.

¹⁷² *Ibid.*, paragraph 38.

¹⁷³ *Ibid.*, paragraph 39.

¹⁷⁴ *Ibid.*, paragraph 40–43.

¹⁷⁵ Joined Cases C-473/19 and C-474/19, paragraph 40 (*citing* Case C-44/95, paragraph 3).

¹⁷⁶ Joined Cases C-473/19 and C-474/19, paragraph 42 (*citing* Case C-252/85, paragraph 15).

protecting the population of *all* species of birds, supports that bird species cannot be precluded in the prohibitions of Article 5 of the Birds Directive.¹⁷⁷ In contrast, Kokott drew attention to the fact that Article 2 makes it clear that it does not protect all bird species unconditionally, but rather drives for the population of bird species to be ‘to be maintained at a level, or adapted to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements’.¹⁷⁸

Article 4 contains the protection regime with particular obligations of ensuring the conservation of bird species listed in Annex I, the endangered and rare species. By contrast, as accentuated by Advocate General Kokott in her opinion, it is ‘irrelevant, for the purposes of Article 5 of the Birds Directive, that the bird species concerned are included in Annex I to that directive, are at some level at risk, or have a long-term decline in population’.¹⁷⁹ In other words, the obligations of protection exist even before any reduction is observed in the number of birds or any risk of a protected bird species becoming extinct has materialised.

Due to the aforementioned considerations, the Court concluded that Article 5 of the Birds Directive prohibits national practices that limit its protections only to Annex I species, those at risk, or those in long-term decline.¹⁸⁰

3.4.3 Second question: meaning of deliberate killing, disturbance and destruction under Article 12 of the Habitats Directive

3.4.3.1 *Opinion of Advocate General Kokott*

In its second question, the Swedish court asked how the concept of deliberate killing, disturbance or destruction should be understood under both Article 5 of the Birds Directive and Article 12 of the Habitats Directive. It inquired whether deliberateness should be interpreted in such a way that, where national practices pursue purposes other than harming protected species, the prohibitions would apply only if the activities caused serious effects on the conservation status of the species.¹⁸¹

¹⁷⁷ Joined Cases C-473/19 and C-474/19, paragraphs 40 and 45.

¹⁷⁸ Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 82.

¹⁷⁹ Joined Cases C-473/19 and C-474/19, paragraphs 43–44 (*citing* Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 44, which in turn cited the Czech Republic’s written observations for the case).

¹⁸⁰ Joined Cases C-473/19 and C-474/19, paragraph 45.

¹⁸¹ Joined Cases C-473/19 and C-474/19, paragraph 2.

On the one hand, as regards the concept of deliberateness under the Habitats Directive, Kokott aligned herself with the Court's earlier case-law.¹⁸² She agreed that the prohibitions on killing and destruction in Articles 12(1)(a) and (c) do not require that the conduct produce a negative effect on the conservation status of the species and that a favourable conservation status does not prevent these prohibitions from applying.¹⁸³

On the other hand, Kokott disagreed with applying the same meaning of 'deliberate' to Article 5 of the Birds Directive. This is regardless of the Courts interpretation in the judgment of *Białowieża Forest*, where the Court classified that the felling of trees equated the deliberate destruction of or damage to nests and eggs, as well as the removal of nests pursuant to Article 5(b) of the Birds Directive. Arguably the felling of trees in *Białowieża Forest* would not be considered to have the intention of harming birds, as Kokott also observed.¹⁸⁴

Kokott argued that a stricter interpretation of the term 'deliberate' would not contradict the *Białowieża Forest* judgment, since that case concerned very rare species in an area specifically designated for their protection. She specified that the prohibitions on killing birds and destroying their nests or eggs in Article 5(a) and (b) do not generally require proof that the activity will harm the conservation status of the species. A favourable conservation status also does not prevent these prohibitions from applying. However, she viewed that where harm is not intended but only accepted as a possible outcome, the prohibitions in Article 5(a) and (b) apply only to the extent needed to keep the population of the species at the level required by Article 2.¹⁸⁵

That is to say that in *Föreningen Skydda Skogen* Kokott considered that the population level of a bird species becomes relevant only when the acts at issue cannot be regarded as aiming to harm the species. So, although Kokott recognised in her opinion that it is questionable to argue that prohibitions should apply only when the species has unfavourable conservation status or would suffer deterioration due to the act, she nevertheless agrees with the fundamental motivation behind these such claims. Kokott thus contends already in *Föreningen Skydda Skogen* that the Court's interpretation of deliberateness, if transferred to

¹⁸² Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 63.

¹⁸³ Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 69.

¹⁸⁴ As explained in the Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 77 (*citing* Case C-441/17, paragraphs 253-259).

¹⁸⁵ *Ibid.*, paragraph 89–90 (*citing* Case C-441/17, paragraph 18).

the Birds Directive, creates a risk of unduly restricting human activities.¹⁸⁶ In essence, Kokott argues that the notion of deliberateness is not interchangeable between the Habitats Directive and Birds Directive.¹⁸⁷

According to this interpretation, deliberateness under Article 5 of the Birds Directive would be fulfilled through a knowledge-based mental state, meaning awareness and acceptance of risk, only when the conduct threatens the population level of the species. In other situations, deliberateness would require a purposeful intention directed at harming birds, which would align the concept with the traditional criminal law understanding of intention.

3.4.3.2 *The judgment*

However, despite the fact that the referring court framed the question by reference to both directives, the Court ultimately limited its assessment to Article 12(1)(a) to (c) of the Habitats Directive, because the national transposing legislation did not distinguish between the two.¹⁸⁸ Consequently, the Court examined the meaning of deliberate killing, disturbance or destruction exclusively within the context of Article 12 of the Habitats Directive. The essential issue was whether the interpretation of that provision precludes a national practice where the prohibitions apply ‘only in the event of a risk of adverse effects on the conservation status of the species concerned and, secondly, the protection provided by that provision ceases to apply to species which have achieved a favourable conservation status’, when the national practice has a different purpose from the killing or disturbance of species, like in forestry.¹⁸⁹

The Court reiterated *Commission v Spain (2006)* by clarifying that deliberateness under the Habitats Directive is established where an individual is aware of, and nonetheless accepts, the possibility that capture or killing of protected species may occur. On that basis, the Court reaffirmed that the scope of the prohibitions extends to activities, such as forestry, whose primary aim is unrelated to capturing, killing, disturbing species, or destroying their eggs, yet still carry the accepted risk of such outcomes.¹⁹⁰

¹⁸⁶ Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraphs 38–39.

¹⁸⁷ *Ibid.*, paragraph 87.

¹⁸⁸ Joined Cases C-473/19 and C-474/19, paragraphs 46–48.

¹⁸⁹ *Ibid.*, paragraph 49.

¹⁹⁰ *Ibid.*, paragraphs 51–53.

The Court also declared that the protection system of Article 12 is not dependent upon the risk of an adverse effect on the conservation status of the animal species concerned.¹⁹¹ Essentially, The Court reasoned that, because the prohibitions on deliberate capture, killing or destruction in Article 12 do not contain any requirement relating to the species' conservation status, whereas such a condition is expressly included in other provisions, the Directive cannot be interpreted as imposing such a requirement in this context.¹⁹² This means that the relevant awareness and acceptance of risk relate only to the prohibited acts themselves, such as deliberate killing or capture, and do not extend to an awareness or acceptance of any deterioration in the species' overall conservation status.

This reinforces the understanding that a knowledge-based mental state constitutes the lower threshold for deliberateness, and that the prohibitions cannot be limited based on effects on the species' population level. Yet the judgment did not address Kokott's view that, in some circumstances under the Birds Directive, only a purpose-based mental state should suffice.

Later, in *Poland v Commission (2023)*, the Court found that the Polish forest regulation created a general permission to derogate from Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive by allowing forest management to proceed according to what was defined as good forest management practice.¹⁹³ This was considered to infringe the species protection provisions of both directives and therefore harmonised them to some extent, but it did not clarify whether the concept of deliberateness was transferred from *Föreningen Skydda Skogen* in its full form or only to the limited extent necessary to align the prohibition of actions that aim to harm birds.¹⁹⁴

Föreningen Skydda Skogen confirms that the notion of knowledge-based deliberateness can apply to land-use activities such as forestry, which is a necessary development because limiting the concept to actions directly aimed at protected species would leave large areas of land management outside the scope of Article 12. This outcome is desirable in preventing overly narrow interpretations that would weaken species protection.

¹⁹¹ *Ibid.*, paragraph 57.

¹⁹² *Ibid.*, paragraphs 56–66.

¹⁹³ Case C-432/21, paragraphs 77–79.

¹⁹⁴ Opinion of Advocate General Kokott on Case C-784/23, paragraph 62.

3.5 Conclusion of previous case-law on deliberateness

This chapter has examined how the Court of Justice has interpreted the notion of ‘deliberate’ and how that interpretation has developed through key judgments prior to *Voore Mets*. The analysis shows that the Court has consistently rejected a narrow, purpose-based criminal law understanding of deliberateness. Instead, it has adopted a broader approach in which the lower limit for deliberateness is fulfilled when the actor knew of a real possibility that protected species would be harmed and proceeded regardless.

In *Commission v Greece (2002)*, the Court linked deliberateness to the continuing disturbance of sea turtles despite visible warnings, although the reasoning focused heavily on the conduct of individuals rather than directly on the state’s acceptance of risk. In *Commission v Spain (2006)* ruled that deliberateness is established when the actor accepts the possibility of harm, provided that the risk is actually known, while also setting the focus on the state’s deliberate conduct rather than that of the individuals. *Białowieża Forest* further expanded the doctrine by treating inevitable harmful outcomes as situations in which acceptance of risk must be inferred. Together, these judgments indicate that actual knowledge and acceptance constitute the minimum threshold for deliberateness under the Habitats Directive. The judgment *Föreningen Skydda Skogen* marks an important extension of this approach to land-use activities such as forestry. This development is crucial because it closes a potential gap in species protection: without applying deliberateness to land-use, a significant proportion of harmful activities would fall outside the prohibitions of Article 12.

From a critical perspective, the case-law reveals both strengths and weaknesses. The Court has succeeded in giving practical effect to the protective aims of the Directive by adopting a preventive notion of deliberateness. At the same time, the judgments provide limited guidance on the precise level of sufficient action that satisfies the fact that the risk would not be accepted, particularly where Member States have taken some steps but not succeeded in eliminating all prohibited actions. Additionally, this chapter interprets the Court’s interpretation of risk taking as reflecting knowledge of risk, where that risk is considered inevitable, as in *Białowieża Forest*. However, drawing a clear line between an inevitable risk, a recklessness-level of risk that is consciously accepted despite being unjustifiable, and a negligence-level of risk that merely should have been known, is inherently difficult. This thesis does not undertake a deeper examination of the precise risk threshold applicable in

these situations. It should nevertheless be noted that this may create challenges in ensuring that liability remains justified and does not gradually drift toward a form of strict liability.

The Commission guidance from 2021 fleshes out the concept of deliberateness from *Commission v Greece (2002)* and *Commission v Spain (2006)* as:

*“In other words, the provision applies not only to a person who fully intends to capture or kill a specimen of a protected species but also to a person who is sufficiently informed and aware of the consequences his or her action will most likely have and nevertheless still performs the action, which leads to the capturing or killing of specimens (e.g. as an unwanted but accepted side-effect) (conditional intent).”*¹⁹⁵

Overall, the case-law demonstrates a clear trajectory: the Court interprets deliberateness as a concept grounded in awareness of risk and acceptance of that risk, rather than intention to harm. This places the Court’s approach in the interpretation of deliberateness that includes both to a purpose-based mental state but also to a knowledge-based mental state.

¹⁹⁵ European Commission 2021, p. 25. Conditional intent in this context must be distinguished from the use of the same term to describe conditional *purpose*, where an actor intends to perform an act only if a specific condition is met. Here, “conditional intent” refers instead to a situation in which the actor’s liability depends, i.e. is *conditional* upon, on their awareness, and the actor’s actual will or desire regarding the outcome is irrelevant (On conditional intent as it is conditional purpose see Dubber – Hörnle 2014, p. 445).

4 *Voore Mets*: deliberateness under the Birds Directive

4.1 Introduction

Voore Mets was the first case in which the Court was required to address the Birds Directive's notion of deliberateness directly. This chapter examines the case and the interpretation of deliberateness under the Birds Directive in a chronological manner. It begins by analysing Advocate General Kokott's Opinion, with particular attention to her warnings about a broad interpretation of deliberateness. Building on Kokott's reasoning, the chapter then dives deeper into the derogation procedure and examines it as a point of structural weakness that would arise from a broad understanding of deliberateness. The analysis subsequently addresses the content and outcome of the Court's judgment. The chapter concludes with observations on the national implementation of the judgment and concluding remarks on the case as a whole.

Voore Mets concerned a request for a preliminary ruling from Estonia, that handled the interpretation Article 5(a), (b) and (d) and the third indent of Article 9(1)(a) of the Birds Directive.¹⁹⁶ The dispute regarded two forest felling projects in the spring of 2021. The two forestry operations had been suspended by injunctions given by the Estonian Environmental Board. The injunctions were based on evidence showing that there were pairs of breeding birds present at the site and that continued felling would create a genuine risk of disturbing these birds during the breeding and rearing season, as well as of destroying or damaging their nests.¹⁹⁷

The forestry operators appealed to the Supreme Court of Estonia which relayed the questions to the Court. One question concerned whether the concept of deliberateness under Article 5 of the Birds Directive would be understood in the same way as Article 12 of the Habitats Directive, meaning that it also applies to situations where the perpetrator at the very least accepts the possibility of such killing, disturbance, destroying or damaging.¹⁹⁸

Both Sweden and Finland submitted written observations before the judgment. The Swedish Government argued that the Birds Directive requires a population-level assessment rather than protection of individual birds when an action is not purposefully intended to harm them.¹⁹⁹

¹⁹⁶ Case C-784/23, paragraph 1.

¹⁹⁷ *Ibid.*, paragraphs 17–20.

¹⁹⁸ *Ibid.*, paragraph 25.

¹⁹⁹ Skriftlig yttrande C-784/23 (Sweden), paragraph 15.

The Swedish Government therefore concluded that Article 5 should only apply when an action has qualified negative impact on the relevant bird population.²⁰⁰ The Finnish government made similar arguments, essentially maintaining that forestry operations should not be regarded as deliberately harming birds.²⁰¹ For countries such as Sweden and Finland, where forestry operations form a major part of the national economy²⁰², this position is driven by the fear that an individual-level protection standard would oblige forestry operators to halt or modify common practices whenever individual nests or birds are present, resulting in economic and operational consequences.

Thus, for the first time in *Voore Mets*, The Court got to analyse the concept of deliberateness specifically under the Birds Directive.²⁰³ The central question was whether the Court would continue harmonising the meaning of ‘deliberate’ across the Birds and Habitats Directives, or whether it would take heed of Advocate General Kokott’s concerns expressed in her Opinions in *Föreningen Skydda Skogen* and *Voore Mets*.

4.2 Analysis of Advocate General Kokott’s opinion in *Voore Mets*

4.2.1 Introduction

Kokott acknowledged in her opinion that the previous case-law, that has been dived into in Chapter 3 this thesis, support the application of the same concept of deliberateness to the Birds directive as it is under the Habitats Directive.²⁰⁴ Moreover, the judgment *Białowieża Forest* had already ‘tacitly’ expanded the concept to the Birds directive.²⁰⁵ Beyond that, the Bern Convention contains a similar rule on deliberate harm, and this rule is implemented by the Birds Directive. The Standing Committee of the Bern Convention view that the rule applies even when the action is not carried out with the purpose of harm. It is enough that the actor knows the action will probably lead to such harm.²⁰⁶

²⁰⁰ Skriftlig yttrande C-784/23 (Sweden), paragraphs 13–16.

²⁰¹ Kirjalliset huomautukset Asiassa C-784/23 (Finland).

²⁰² “Swedish forest management” (At <https://www.forestindustries.se/forest-industry/forest-management/forestry/>, accessed 5 April 2026); “Forestry in Finland” (At <https://mmm.fi/en/forests/forestry>, accessed 5 April 2026).

²⁰³ It had not been assessed in the Court before, as highlighted in the Opinion of Advocate General Kokott on Case C-784/23, paragraph 1; Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 76.

²⁰⁴ Opinion of Advocate General Kokott on Case C-784/23, paragraph 32.

²⁰⁵ *Ibid.*, paragraph 33.

²⁰⁶ *Ibid.* paragraph 34 (citing Report on the Convention on the Conservation of European Wildlife and Natural Habitats (1997-1998) (Article 9(2)) (presented by the European Commission), SEC(2001) 515 final);

Kokott reiterated her interpretation from *Föreningen Skydda Skogen*. She argued that in situations where harm is not intended but only accepted as a possible outcome, the prohibitions in Article 5(a) and (b) should only apply to the extent necessary to maintain the population of the species at the level required by Article 2.²⁰⁷ She maintained that interpreting the concept of deliberateness as the Court has done with the Habitats Directive, would have far-reaching implications, would not be necessary for the objective of the Birds Directive, and would lead structural inconsistencies within the framework of the Birds Directive.²⁰⁸

Applied to spring logging, which does not aim to harm birds, this would mean that such activity would be prohibited under the Birds Directive only when it harms a bird species to the extent that it affects the objective of keeping the species' population at a level corresponding to ecological, scientific and cultural requirements, while also taking account of economic and recreational requirements, or to restore the population to that level, as required by Article 2.

4.2.2 The role of species protection in fulfilling the objectives of the Birds Directive

Kokott argued that common species generally do not require protection against activities that only pose a potential risk, because their high numbers indicate that human actions do not endanger their survival.²⁰⁹ However, a study published in 2021, found that in Europe rare species are not the only ones in need of protection, because declines in common and widespread bird species have been shown to be even more severe and may have greater ecological consequences. This conclusion is consistent with earlier research.²¹⁰ Though, in the context of forestry operations relevant to *Voore Mets*, it should be noted that the same study reported that woodland specialist bird species maintained stable population trends, while the more concerning figures mainly related to farmland birds. This finding was also consistent with recent research.²¹¹

Convention on the Conservation of European Wildlife and Natural Habitats - Resolution No. 1 (1989) of the Standing Committee on the Provisions Relating to the Conservation of Habitats, 3(b). See also Kokott's notion on the language versions of the Bern Convention in the Opinion of Advocate General Kokott on Case C-784/23, footnote 20.

²⁰⁷ Opinion of Advocate General Kokott on Case C-784/23, paragraph 102.

²⁰⁸ *Ibid.*, paragraph 37.

²⁰⁹ *Ibid.*, paragraph 42. She also made the same point in her opinion in *Föreningen Skydda Skogen* (Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 83).

²¹⁰ Princé et al. 2021, p. 2; Inger et al. 2015; Gaston 2010.

²¹¹ Princé et al. 2021, p. 5; Gregory et al. 2019.

Kokott also made the claim that declining bird populations can be better protected through the conservation of their habitats, and that this idea is already embodied in Article 3 of the Birds Directive, which obliges Member States to establish SPAs. She referred to *Commission v Ireland (2002)*, which in turn relies on *Commission v Spain (1993)*, to affirm that Article 3 is essential for the preservation, maintenance or restoration of biodiversity and applies before any reductions are observed in the number of birds protected.²¹² In *Föreningen Skydda Skogen*, Kokott had already stated that when previously common species begin to decline, protecting their habitats is more important than relying on the prohibitions against deliberate harm to individual birds under Article 5. She argued that this is because population declines usually result from humans changing habitats, while the protection granted by Article 5 would be ‘less suitable for preserving those populations’.²¹³

However, it could also be argued that the Birds Directive does not necessarily embody such a hierarchy between habitat protection and species protection. Neither the text of the Directive nor its objectives indicate that one type of protection is more valuable than the other for achieving its purpose. The two approaches may instead be understood as complementary protection regimes. Moreover, the case-law cited by Kokott merely confirms that habitat protection forms an essential part of the Directive and its aims. It does not indicate that habitat protection should be given greater normative weight over species protection.

Furthermore, even if it were undisputed that habitat protection is more important for declining species, it would not necessarily follow that the content of Article 5 should be adjusted solely because it might not be as effective in achieving the Directive’s objectives under Article 2. As established, only Article 5(d) expressly refers to the objectives of the Directive by providing that deliberate disturbance is prohibited only when it would be significant for achieving those objectives. The Directive can therefore be interpreted as not making the prohibitions in Article 5(a) and (b) contingent on their significance for the objectives set out in Article 2, as this not clearly expressed like it is in Article 5(d).

Naturally, the objectives of the Directive should be taken into account, as is consistent with the Court’s preferred teleological method of interpretation. However, this does not necessarily mean that only the most effective measures should be regarded as supporting the directive’s

²¹² Opinion of Advocate General Kokott on Case C-784/23, paragraphs 43–44; Case C-117/00, paragraph 15; Case C-355/90, paragraph 15.

²¹³ Opinion of Advocate General Kokott on Case C-784/23, paragraph 84.

aims. Even if habitat protection is more effective in a particular instance, species protection can still contribute meaningfully to the realisation of the directive's objectives. When the Directive's original aim of protecting migratory birds at EU level is considered, it becomes evident that the scope of the Directive must also sufficiently extend beyond designated protected habitats, as migratory bird species move across different regions and habitats.²¹⁴

This is to say that provisions should not be given reduced normative weight merely because they provide a smaller contribution in quantitative terms to the objectives, unless the text of the directive clearly supports such a distinction. Moreover, recital 6 of the Birds Directive treats both habitat protection and species protection as important. It states that measures must address factors that may affect bird numbers, and it lists 'in particular' both the destruction of habitats and the capture and killing of birds by humans.

4.2.3 Scope of the Nature Directives

Kokott argued both in *Voore Mets* and *Föreningen Skydda Skogen* that transferring the Habitats Directive's interpretation of the concept of deliberate to the Birds Directive would have far-reaching consequences, since the Habitats Directive covers only rarer species while the Birds Directive covers all European bird species. While coming into contact with the species covered by the Habitats Directive is rare, it is much more common to encounter the birds covered by the Birds Directive. Common bird species are encountered far more often in areas where things like construction and transport take place. Kokott argues that adapting the broad interpretation of deliberateness would create considerable conflicts in relation to fundamental rights.²¹⁵

However, this does not necessarily imply that the scope of Article 5 of the Birds Directive is excessively broad. From an ecological perspective, which is one of the protected interests of Article 2, one could instead argue that if a provision is frequently needed and has far-reaching environmental benefits, this strengthens rather than weakens the case for its strict

²¹⁴ Recital 4 of the Birds Directive (2009).

²¹⁵ Opinion of Advocate General Kokott on Case C-784/23, paragraph 38–40; Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraphs 79–81 (citing Machtans, C., Wedeles, C., and Bayne, E., 'A first estimate for Canada of the number of birds killed by colliding with building windows', *Avian Conservation and Ecology* 8.2 (2013), p. 5. and Slater, F.M., 'An assessment of wildlife road casualties – the potential discrepancy between numbers counted and numbers killed', *Web Ecology* 3.1 (2002), p. 33.).

enforcement. Admittedly, this does make the scope of the Birds Directive more strict and less flexible than that of the Habitats Directive.

4.2.4 Hunting

Kokott also identified a possible inconsistency within the Birds Directive in relation to Article 7, which permits hunting in certain situations. Article 7 allows for the hunting of bird species listed in Annex II which would otherwise fall within the scope of the prohibitions laid down in Article 5, provided that the population level of the species is not put at risk.

Kokott argued that it is difficult to justify why deliberate harm to protected species caused by hunting, a leisure activity with not much economic importance, should receive more permissive treatment than other human activities in which harm is only tolerated as a potential side effect. She noted that this inconsistency stands out because many of those other activities, such as the construction of roads, buildings and wind turbines, are of fundamental societal importance.²¹⁶

She further examined Article 7 together with Article 2.²¹⁷ Article 7 effectively authorises the deliberate killing of birds in specific situations, and Article 7(4) requires that hunting practices comply with the principles of ecologically balanced control of species and the measures resulting from Article 2. This illustrates that Article 2, and more broadly, the nature of the Birds directive does not categorically prohibit all conduct that falls within the scope of Article 5.

As has been established, Article 2 also protects recreational and economic interests. Thus, the directive grants exceptions to its objective of environmental protection by allowing certain activities, when the grounds for the exception can expressly be derived from the text of the directive, like hunting as recreational activity in Article 7. In essence, as reflected in Article 7(4), Article 2 can mean that a recreational interest can have a higher value than an environmental interest.

However, this does not appear to provide a basis for adopting a more relaxed interpretation of Article 5 and its concept of deliberateness. In the case of hunting, regardless of whether it has little societal importance, the directive expressly provides an exception under specified

²¹⁶ *Ibid.*, paragraph 47.

²¹⁷ *Ibid.*, paragraph 54.

circumstances. By contrast, for other interests such as those listed by Kokott, including the construction of roads, buildings and wind turbines, the directive contains no explicit exception. This supports the conclusion that any exceptions to the prohibitions in Article 5 should, in principle, be sought through the derogation procedure specifically established in Article 9.

The difficulty, as further discussed below, lies in the fact that economic requirements are not clearly reflected in the list of permissible derogation grounds. Nevertheless, the derogation procedure remains the primary mechanism through which such interests should be taken into account. In some cases of paramount societal importance other sector-specific legislation will provide for exceptions that are not expressly mentioned in the Birds Directive, as will be examined later in relation to renewable energy and critical-materials projects.

4.2.5 Fundamental rights and Article 2 of the Birds Directive

4.2.5.1 On Articles 16 and 17

By its fourth to seventh questions, the referring court sought clarification of Article 5 of the Birds Directive, read together with Articles 9 and 2 of the directive and with Articles 16 and 17 of the Charter of Fundamental Rights.²¹⁸ These provisions of the Charter protect the freedom to conduct a business and the right to own, use and dispose of property. However, the Court did not answer this question, as it was deemed to be hypothetical and thus inadmissible. The applicants had not asked the Estonian authorities for permission to derogate from Article 5(a), (b) and (d) of the Birds Directive.²¹⁹

Nevertheless, Advocate General Kokott considered the fundamental rights aspect in her opinion. She noted that the conservation of birds as part of protection for the environment constitutes an objective of general interest, particularly since wild birds are a part of the common heritage of the Member States.²²⁰ She expressed doubt that the objective of protecting birds could legitimately restrict the aforementioned fundamental rights if the restrictions are applied through the broad interpretation of the prohibitions of Article 5 and strict interpretation of Article 9.²²¹

²¹⁸ Charter of Fundamental Rights of the European Union.

²¹⁹ Case C-784/23 paragraphs 63–68.

²²⁰ Opinion of Advocate General Kokott on Case C-784/23, paragraph 97 and cited case-law.

²²¹ Opinion of Advocate General Kokott on Case C-784/23, paragraph 98.

She further considered that the strict interpretation would result in a higher level of protection than Article 2 requires. The fundamental right restrictions would thus be unnecessary in order to achieve those objectives of maintaining the populations of bird species at a level which corresponds 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.²²²

The role of economic interests and the fundamental rights connected to them must be assessed in each case individually. This approach allows an evaluation of whether, in the specific circumstances, the extent of the harm and the objective of protecting bird species outweigh the importance of the fundamental right at issue, or vice versa. In my view, the assessment should, in principle, be carried out through the derogation procedure established in Article 9, which is specifically designed for case-by-case analysis and ensures that the necessary due diligence is done. Establishing a broad interpretation of the term deliberate in Article 5, meaning that prohibited conduct remains prohibited even when its aim cannot be proven, ensures that Article 5 is not applied too rarely. At the same time, it recognises that Article 5 cannot be applied without limits.

Arguing that fundamental rights, combined with Article 2 of the Birds Directive, justify interpreting Article 5 as a general rule that applies fully only to endangered or rare species is open to doubt. The route for taking other interests, like an economic interest, and the fundamental rights that it represents into account, as the Court implicitly indicated in its judgment, is through the derogation procedure. To avoid weakening the prohibitions in Article 5 and broadening exemptions too far, it is necessary to apply Article 9 where appropriate, rather than limiting Article 5 so significantly pre-emptively, like Kokott proposes in her interpretation. Restricting the prohibitions in Article 5 only to rare or endangered species in situations where the purpose of the prohibited act cannot be demonstrated could create significant practical problems. In many cases it would be challenging to establish the intention behind an action, such as determining whether a killing was deliberate.²²³

For this reason, and consistent with the Court's approach, Article 2 should not be regarded as a provision that limits the scope of Article 5. Article 2 places primary emphasis on ecological,

²²² *Ibid.*, paragraphs 100–101.

²²³ This was also highlighted by Kokott many years earlier in Opinion of Advocate General Kokott on Case C-221/04, paragraph 37.

scientific and cultural considerations, while economic and recreational requirements are taken into account only in a secondary manner. Although these secondary interests remain relevant, particularly where the Charter applies, they do not justify narrowing the principal application of Article 5.

Had the applicants pursued a derogation under Article 9, the Court could perhaps have examined Article 9 in greater depth in conjunction with Article 2 and, through Article 2's reference to economic requirements, also in relation to Articles 16 and 17 of the Charter. Article 2 requires economic needs to be taken into account, yet economic considerations are only very limitedly reflected in the list of permissible derogation grounds in Article 9. This inconsistency can be regarded as more significant within the structure of the Birds Directive than the possible inconsistency between Articles 5 and 2.

A future case examining whether a rejected derogation application under Article 9 for forestry operations, like spring logging, could amount to a restriction of Articles 16 and 17 of the Charter would be highly valuable. Such a case would clarify the extent to which the secondary economic considerations set out in Article 2 of the Birds Directive should be considered.

Whether Article 2 should influence the analysis is not straightforward. Article 9's exhaustive nature means that the grounds for derogation cannot be expanded by relying on Article 2. However, it cannot be excluded that in a specific case the factual circumstances may require attention to the considerations reflected in Article 2, if, for example, the necessity and proportionality of a refused derogation under Article 9 is assessed. In such situations, Article 2 may justifiably guide the interpretation applied within the Article 9 framework.

4.2.5.2 On Article 37

Neither Kokott's Opinion nor the judgment addressed Article 37 of the Charter, which sets out the Union's environmental protection principle²²⁴ nor the potential collision of rights situation between that provision and Articles 16 and 17. Article 37 reads as follows:

Environmental protection

²²⁴ Rather a principle than 'right', as explained by Krommendijk 2025.

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

The fact that this was not analysed is expected, since the Court does not often rely on the Charter in environmental matters and has explicitly mentioned Article 37 only rarely.²²⁵ In judgments such as *Ilva* and *Commission v Austria (2011)*, Article 37 of the Charter gained relevance primarily through its connection to Article 35 on the right to health, with the Court recognising that a protected environment is an essential precondition for ensuring a high level of human health.²²⁶ Although Article 37 has not yet played a major role, Krommendijk notes that the Court may make more regular use of it when interpreting both primary and secondary EU law, since the opportunities for such an approach have increased in recent years.²²⁷

This raises the further question of whether Article 37 could reinforce the protective scope of Article 5 of the Birds Directive when it is interpreted in the light of Articles 16 and 17 of the Charter. In sectors such as forestry, where strict conservation duties intersect with significant economic interests, the balance between these provisions becomes especially complex. While bird protection may be difficult to link directly to other rights such as the right to a high level of health, Article 37 should not be treated as dependent on other articles to begin with. Instead, it warrants consideration as an autonomous constitutional principle. This tension calls for further clarification by the Court, as well as deeper academic analysis.

4.3 Article 9 and its derogation procedure as a structural inconsistency

Derogation procedure

The foregoing analysis suggests that the structural tension identified by Kokott the Birds Directive and activities of broader societal importance is best understood as a question of where the directive permits other interests to outweigh species protection. It was argued that neither the text nor the objectives of the Birds Directive establish a hierarchy where habitat protection automatically prevails over species protection, and Article 5 cannot be limited on that basis alone. However, the strictness of the scope of the Birds Directive is evident.

²²⁵ In fact, only 5 times between 1 December 2009 and 31 December 2022 as found by Krommendijk –Sanderink 2023, p. 618 Table 1.

²²⁶ Case C-626/22, paragraphs 71–72; Case C-28/09 paragraphs 121–123.

²²⁷ Krommendijk 2025.

The inconsistency between the prohibitions in Article 5, the hunting permission in Article 7, and other activities of societal importance can be explained by the fact that such interests must be expressly provided for in the directive. Primarily only when they are explicitly recognised, either directly in the text or through the derogation mechanism in Article 9, can these interests be afforded greater weight than the directive's primary environmental objective. This interpretation aligns with the Court's previous approach to the concept of deliberate in Article 12 of the Habitats Directive.

It is suggested that the economic interests of Article 2 are not in conflict with Article 5, even when its prohibitions are applied strictly through a broad interpretation of the concept of deliberateness. The appropriate mechanism for addressing potential tensions between the prohibitions in Article 5 and the exercise of economic interests as they are fundamental rights is the derogation procedure in Article 9. This framework provides the means to consider individual circumstances without altering the main prohibition in Article 5 or departing from the interpretation established in the Court's case-law.

In this analysis, Article 9 therefore serves as the central mechanism for balancing the Birds Directive's environmental objectives with other competing interests. Despite the fact that the broad scope of deliberateness has received support in this analysis, it should be borne in mind that the directive should still consider economic requirements according to Article 2. These considerations hold importance to Member States.²²⁸

Furthermore, according to recital 6, the stringency of the measures adopted under the directive should be adapted to the particular situation of the various species within the framework of a conservation policy.²²⁹ With these factors in mind, assessing the interpretation and the legitimacy of the Birds Directive's overall structure requires careful consideration when evaluating how economic interests are taken into account. Article 9, as well as its limitations, therefore, warrants examination.

²²⁸ Skriftlig yttrande C-784/23, paragraphs 8–11.

²²⁹ This is also mentioned by Kokott, though she does not explore this further (Opinion of Advocate General Kokott on Case C-784/23, paragraph 45).

4.3.1 Background of the derogation procedures of the Nature Directives

To give this analysis brief context, the Member States may derogate from Articles 5-8 of the Birds Directive, if there are no other satisfactory solutions and the derogation is under the interests listed in 9(1a-c). The interests recognized by Article 9(a-c) read as follows:

- (a) — *in the interests of public health and safety,*
- *in the interests of air safety,*
- *to prevent serious damage to crops, livestock, forests, fisheries and water,*
- *for the protection of flora and fauna;*
- (b) *for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;*
- (c) *to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.*

Article 9(2) specifies the formal conditions of the derogation, which are intended to ‘limit derogations to what is strictly necessary and to enable the Commission to supervise them’.²³⁰ Articles 9(3-4) set the Member States’ reporting obligations concerning the derogations, and the Commission’s obligation of being the watchdog of the derogation procedure.

The prohibitions cannot be overruled by transposing legislation that permits the prohibited actions by ‘the normal use of the land for agricultural, forestry or fishing purposes’ or ‘the exploitation of the products obtained from such activities’.²³¹ This further enhances that derogations from the protection under article 5 must thus follow the derogation procedure of case-by-case analysis under Article 9, and no general permissive exceptions to the prohibitions are allowed.

Poland had transposed Article 9(1) by including a derogation ground for actions considered to be of overriding public interest, including those of social and economic nature, effectively borrowing from the derogation regime of the Habitats Directive. In *Commission v Poland (2012)*, this approach was held to constitute an incorrect transposition, since Member States

²³⁰ Case 247/85, paragraph 7.

²³¹ Case 412/85, paragraphs 8–10, 19.

may not rely on grounds for derogation that are not expressly provided for in Article 9 of the Birds Directive. The derogation grounds set out in Article 9 are exhaustive and must be interpreted strictly.²³² The derogation grounds cannot be expanded through national legislation.²³³

For example, In *Commission v Belgium* the general ground of “local interest” was not accepted as a valid basis for derogation, since it does not appear in the exhaustive list of permissible derogation grounds set out in Article 9.²³⁴ The prevention of serious damage to crops and orchards was, in principle, accepted as a legitimate ground for derogation under Article 9. However, the specific derogation at issue was considered too general in practice, because it applied to a broad category of people and operated in a permanent manner. The Court held that such a far-reaching measure was not necessary to prevent the alleged damage and therefore did not comply with the strict requirements of Article 9.²³⁵ Similarly, in *Commission v Spain (2004)*, serious damage to crops was relied upon as the ground for derogation. The Court found, however, that the measure was in reality linked to a community tradition rather than to the prevention of serious damage, and the derogation was not allowed.²³⁶

The Habitats Directive derogation provision found in Article 16 is similar to that of the Birds Directive. The derogation can only be granted if there is no satisfactory alternative, the ‘derogation must not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range’.

Additionally, at least one of the interests established in Article 16(1a-e) is met. The applicable interests read as follows:

Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

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

²³² Case C-192/11, paragraphs 36–37, 39; See also Case C-60/05, paragraph 34.

²³³ The strictness of the derogation grounds is also stressed by Miron – Cashman 2023, p. 243.

²³⁴ Case 247/85 paragraphs 54, 58.

²³⁵ *Ibid.*, paragraph 34.

²³⁶ Case C-79/03, paragraph 27; See also Miron – Cashman 2023, p. 252–253.

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

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

Like Article 9 of the Birds Directive, Article 16 of the Habitats Directive must be interpreted strictly.²³⁷ The Court has also held that even where a species has an unfavourable conservation status, derogation may still be permissible, if the derogation would be neutral to the species concerned.²³⁸

It can be observed that the public interests capable of justifying derogations under the Habitats Directive differ from those of the Birds Directive. In addition to the grounds of public health and public safety, which feature in both directives, the derogation clause in the Habitats Directive also accepts ‘other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment’. Most of the case-law concerning the permissible reasons for derogations concern Article 16(1)(e).²³⁹

However, there is more extensive case-law concerning the analogous derogation clause on the approvable imperative reasons for overriding public interest under Article 6 of the Habitats Directive, which governs derogations for SACs designated under that directive. The Commission has also issued opinions under the regime of Article 6(4) on economic interests as overriding public interests. Such approval is required where the site concerned hosts a

²³⁷ Case C-342/05, paragraph 25; Case C-674/17 paragraph 30.

²³⁸ Case C-342/05, paragraph 29; Case C-674/17, paragraph 68 (*citing* Commission guidance paragraphs 47 to 51 of Section III of its Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007)).

²³⁹ Miron – Cashman 2023, p. 303.

priority natural habitat type and/or a priority species, and the derogation is sought for public interests other than those relating to human health, public safety or beneficial environmental consequences.

The case-law has stipulated, for example, that under the derogation procedure for SACs, public health interests could be recognised in situations involving the protection of drinking water supplies.²⁴⁰ By contrast, irrigation is more likely to be classified as an economic interest or an interest of primary importance for the environment.²⁴¹

With regard to overriding public interests under the Habitats Directive, the Court emphasized in *Solvay* that an interest must be both ‘public’ and ‘overriding’ in order to satisfy the derogation requirements.²⁴² The Court further ruled that an economic interest may qualify as an overriding public interest even where the project is carried out by a private entity, provided that the project is of a nature that creates an economic and social context capable of outweighing the conservation objective. However, the mere construction of a management centre for a private company was not regarded as meeting this standard and therefore did not constitute an overriding public interest.²⁴³

In the Commission’s opinions, the threshold for establishing an overriding economic interest has been treated less strictly than might be expected and, in some cases, in a way that may not have withstood scrutiny by the Court.²⁴⁴ It should, however, be borne in mind that this procedure is used relatively rarely. The Commission has issued 27 opinions on derogations granted for overriding public economic interests in areas hosting a priority natural habitat type and/or a priority species.²⁴⁵ Twenty-six of these opinions were favourable, with only one resulting in a refusal.²⁴⁶

The interests regarded as overriding economic interests in these opinions have included projects aimed at improving transport connections. The Commission has justified such projects on several grounds, including the enhanced integration of the area with neighbouring

²⁴⁰ Case C-43/10, paragraph 126.

²⁴¹ Case C-43/10, paragraphs 121–122, 125.

²⁴² Case C-182/10, paragraph 75.

²⁴³ Case C-182/10, paragraphs 75–78.

²⁴⁴ Krämer 2009, s. 84.

²⁴⁵ The opinions are published at https://circabc.europa.eu/ui/group/3f466d71-92a7-49eb-9c63-6cb0fadf29dc/library/311ea7e6-0a6d-4d79-9338-bc0a993910b4?p=1&n=10&sort=modified_DESC, accessed 30 March 2026.

²⁴⁶ European Commission opinion Art 6(4) HD Trupbach Siegen Germany, 2003; See also Möckel 2017.

regions, improved economic viability and the reduction of air pollution and noise emissions.²⁴⁷ The Commission has also considered the public interest requirement satisfied in cases where railway projects or port terminals were assessed as fulfilling objectives laid down in the applicable EU legislation on transport networks.²⁴⁸ The assessments in these opinions rarely involve a detailed weighing of competing interests.²⁴⁹

4.3.2 Analysis of the Derogation Procedures and Their Effect on the Legitimacy of the Birds Directive's Structure

The derogation procedure under the Habitats Directive can therefore be regarded as less strict than the one in the Birds Directive, especially when keeping in mind that the directive applies only to species that are already in an unfavourable conservation status. It is evident that in practice, particularly through the Commission's opinion procedure, social and economic interests are more readily taken into account.

The forming of the derogation provision in the Habitats Directive with such a distinct difference to otherwise similar Birds Directive has been interpreted as a political response to Member State frustrations with the strict framework of the Birds Directive.²⁵⁰ At first sight this interpretation appears to conflict with the fact that the 1994 proposal to amend the Birds Directive was withdrawn, and that the 2016 fitness check revealed no strong incentives to modify the directive.²⁵¹ This tension may be understood by distinguishing between the concerns of national administrations that sought more flexibility and the broader political and societal support for maintaining the Directive's strong protective structure.

Kokott also addressed the derogation clause found in Article 9 of the Birds Directive. Her analysis mirrors the approach she took in *Föreningen Skydda Skogen*.²⁵² She claimed that Article 9(1) could only remedy the board interpretation of Article 5 to a very limited extent,

²⁴⁷ For example European Commission opinion Art 6(4) HD Germany/Baden-Württemberg, 2022; European Commission opinion Art 6(4) HD Germany/Baden-Württemberg, 2018.

²⁴⁸ European Commission opinion Art 6(4) HD Kaunas railway node Lithuania, 2024; European Commission opinion Art 6(4) HD Świnoujście (Poland), 2024; See also the TEN-T regulation, no longer in force since 17 July 2024: Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU.

²⁴⁹ This view has also been supported, for example, by Belinskij 2018; Salokannel 2019; Krämer 2009.

²⁵⁰ Amos 2021, p. 372 (citing Colin Reid, *Nature Conservation Law* (3rd edn, Thomson Reuters 2009), 189).

²⁵¹ Miron – Cashman 2023, p. 44; European Commission 2016, p. 96, 110–111 (as explored by Miron and Cashman 2023, p. 45).

²⁵² Opinion of Advocate General Kokott on Joined Cases C-473/19 and C-474/19, paragraph 86.

only striking the balance between very specific public interests.²⁵³ By contrast, in Article 16(1)(c) of the Habitats Directive, the overriding public interest that can limit the application of the prohibitions to species protection can, as explicitly mentioned, be of an economic nature while being of beneficial consequences of a primary importance for the environment.

Article 9(1) of the Birds Directive does not explicitly recognise economic interests as grounds that may be balanced against the prohibitions in Article 5. The derogation ground in Article 9(1)(a), which permits measures ‘to prevent serious damage to crops, livestock, forests, fisheries and water’, can nonetheless be understood as indirectly protecting economic interests, since its purpose is arguably to safeguard the economic use of these assets.²⁵⁴ Kokott also cited the Bern Convention, since Article 9(1)(a) of the Convention allows exceptions from the prohibitions in order to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of *property*.²⁵⁵ This suggests that the third indent of Article 9(1)(a) of the Birds Directive was intended primarily to protect crops, livestock, forests, fisheries and water as *property*, an economic asset, rather than, for example, for their environmental value.

Preventing logging during the breeding season would have economic consequences for the forestry operators as it would increase costs. Year-round logging reduces expenses because timber does not need to be stored in the same way, and employed harvesters are not left idle.²⁵⁶

However, as Kokott noted, Article 9(1)(a)’s third indent does not protect economic assets merely for the sake of their economic value. The derogation is available only to prevent serious damage to these assets.²⁵⁷ This implies that a simple loss of revenue, such as the above-mentioned profit loss due to a prohibition on tree felling, would not constitute serious damage to a forest as property. Rather, there likely must be a risk of harm that would significantly impair the use or viability of the asset, beyond the ordinary economic consequences that may arise from compliance with conservation obligations.²⁵⁸

²⁵³ Opinion of Advocate General Kokott on Case C-784/23, paragraph 48.

²⁵⁴ *Ibid.*, paragraph 84.

²⁵⁵ *Ibid.*, paragraph 85 (emphasis added).

²⁵⁶ “Metsäyhtiöt innostuivat kesähakkuista - ”Kaikki kalusto on käytössä” (At <https://yle.fi/a/3-8171391>, accessed 6 April 2026). (cited by Pappila 2019, p. 210).

²⁵⁷ Opinion of Advocate General Kokott on Case C-784/23, paragraph 87.

²⁵⁸ The cases that handle the clause ‘serious damage to crops’ question the strictness and nature of the derogations, but the nature of the consequence to crops, i.e. as to what constitutes ‘serious damage’, has not been assessed (See for example Miron – Cashman 2023, p. 189–191).

As the derogation procedure must be interpreted strictly, Kokott's argument that the derogation provision in the Birds Directive is stricter than the one in the Habitats Directive and may be too strict in its literal interpretation to allow for a fair and legitimate balance of interests, appears plausible.²⁵⁹ As Kokott noted, a literal interpretation of Article 9 and its derogation clauses, interpreted in a manner that does not give effect to Article 2 and its reference to economic interests, could lead to a situation in which the derogation mechanism is rarely 'capable of preventing the unreasonable consequences of a broad interpretation of the concept of deliberateness'.²⁶⁰

I take the view that whether or not Article 9 is fully adequate in achieving its objective of balancing the prohibitions with other interests, it does not imply that Article 5 and its prohibitions should be applied less strictly. Rather, it suggests that Article 9 and its derogation mechanism should be open to be interpreted in light of the economic interests referred to in Article 2 and through the fundamental rights protected by the Charter. While Article 2 cannot create new grounds for derogation in the directive's transposition, it could be argued that the ground of preventing 'serious damage to crops, livestock, forests, fisheries and water' might be interpreted more liberally by the Court. However, for the reasons outlined above, including the Court's consistently strict approach to the derogation procedure, this argument remains relatively weak and such an outcome appears unlikely.

This means that where a strict literal interpretation of Article 9 would lead to outcomes inconsistent with the Charter, the Charter rights may have to be given effect over the Directive, and the derogation framework could thus be applied in a manner that gives effect to those fundamental rights. This approach preserves the strict interpretation of Article 5, allowing it to continue serving its central function of protecting bird species, while ensuring that the directive remains coherent with the wider system of EU law.

It is therefore more plausible that economic interests would need to be addressed through arguments based on fundamental rights. In the 1970s, the Court held that the general principles of law, which later formed the basis of EU fundamental rights, could take precedence over Community measures. However, it was also made clear that rights to property or to conduct a trade or profession were not overriding when assessed in light of the

²⁵⁹ Case C-192/11, paragraphs 36–37, 39; Case C-342/05, paragraph 25; Opinion of Advocate General Kokott on C-784/23, paragraph 49.

²⁶⁰ Opinion of Advocate General Kokott on Case C-784/23, paragraph 80.

objectives of the European Union.²⁶¹ This trend has been significant in cases concerning property and economic rights.²⁶²

For example, the Court has held that within the Community legal order it was legitimate for such rights to be subject to limits justified by the overall objectives pursued by the Community, provided that the ‘substance’ of those rights remained intact.²⁶³ The restrictions on fundamental rights cannot constitute, considering the pursued aim, a ‘disproportionate and intolerable interference, impairing the very substance of those rights’.²⁶⁴

In that context, the interference with the property right regarding the prohibited forestry operations under the Birds Directive would have to be sufficiently serious to demonstrate a breach of the core of the property right before it could influence the application of the Birds Directive. In *DEB Deutsche Energiehandels*, a judgment concerning access to legal aid for legal persons, the Court held that national rules based on EU legislation on legal aid must be interpreted in light of Article 47 of the Charter, which guarantees the right to effective judicial protection.²⁶⁵ It is thus not unheard of, but could prove quite difficult.

4.3.3 Relaxation of the derogation limits through legislation

There is some indication that limited flexibility exists within the otherwise strict scope of Article 9 of the Birds Directive, even if this has not been granted by the Court. Such flexibility has been introduced through later EU legislation aimed at supporting the development of renewable energy and the extraction of critical minerals, as reflected in the Renewable Energy Directive (RED III)²⁶⁶ and the Critical Raw Materials Act (CRMA)²⁶⁷.

According to recital 37 of the RED III Directive, the construction and operation of renewable energy plants that result in ‘occasional killing or disturbance of birds and other species’ protected by the Birds and Habitats Directives is not to be considered deliberate, if

²⁶¹ Craig – De Búrca 2024, p. 430.

²⁶² Craig – De Búrca 2024, p. 430 (*citing for example* Joined Cases C-37/02 and C-38/02, ECLI:EU:C:2004:443 and Joined cases C-453/03, C-11/04, C-12/04 and C-194/04, ECLI:EU:C:2005:741).

²⁶³ Case 4-73, paragraphs 13–14.

²⁶⁴ Joined Cases C-20/00 and C-64/00, paragraph 68 and cited case-law.

²⁶⁵ Case C-279/09, paragraphs 59–62.

²⁶⁶ Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

²⁶⁷ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020.

appropriate mitigation measures to avoid such killing is provided. Additionally, according to Article 16f of the RED III Directive, the permit-granting procedure, the planning, construction and operation of renewable energy plants, the connection of such plants to the grid, the related grid itself, and storage assets are presumed to serve public health and safety. Similarly, Article 10 of the CRMA provides that strategic projects concerning critical raw materials are to be regarded as serving public health and safety.

Kokott contended that although renewable energy projects are undoubtedly of public interest, they cannot realistically be classified as serving public health and safety. In her view, this legislative development highlights that the derogation grounds in Article 9 are drafted too narrowly and do not sufficiently accommodate overriding public interests.²⁶⁸ She also observes that EU legislature seems to presume that the concept of deliberateness is alike in the Habitats Directive and the Birds Directive. Kokott stated, however, that the legally complex mechanisms that must be introduced in the renewable energy legislation in order to address this presumption would not be necessary if the scope of deliberateness under the Birds Directive were not interpreted so broadly.²⁶⁹

On the other hand, while these new rules can be viewed as a response to concerns that species protection requirements might unduly restrict the development of renewable energy²⁷⁰, they also demonstrate that the prohibitions and the derogation system are capable of being adapted to meet modern needs in other ways than Court interpretations.

The conclusion is that economic interests and the fundamental rights they reflect should be taken into account through a specific, case-by-case assessment balancing the competing interests at stake. This assessment should be carried out through the derogation procedure in Article 9 and, where Article 9 proves insufficient, with reference to the Charter. The arguments presented in this chapter support the view that the concept of deliberate in Article 5 must be interpreted strictly, while also addressing the concerns identified by Kokott by ensuring that such concerns can be resolved when a case involves significant economic interests.

²⁶⁸ Opinion of Advocate General Kokott on Case C-784/23, paragraph 50.

²⁶⁹ *Ibid.*, paragraphs 63–64.

²⁷⁰ *Ibid.*, paragraph 65.

4.4 Voore Mets Judgment

The question that the Court answered was posed as whether Article 5(a), (b) and (d) of the Birds Directive must mean that when a human activity pursues a purpose other than capturing or killing birds, disturbing them, or destroying or damaging their nests or eggs, the prohibitions apply only to the extent necessary to maintain the population of the species at the level required by ecological, scientific and cultural considerations, while taking economic and recreational interests into account, or to restore the population to that level as described in Article 2.²⁷¹

The Court clarified, as previously explored, that the Birds Directive and its Article 5 apply to ‘all species of naturally occurring birds in the wild state in the European territory of the Member States to which the treaty apply’.²⁷²

The Court then diverged from Advocate General Kokott’s opinion and applied the concept of deliberateness laid down in the judgments of *Föreningen Skydda Skogen* and *Commission v Spain (2006)*.²⁷³ According to the judgment, the threshold for deliberateness is met when ‘the author of the act intended the capture or killing or disturbance of specimens of those species or the destruction of their eggs, or, at the very least, accepted the possibility of such capture or killing, disturbance or destruction’.²⁷⁴

The Court argued that ‘deliberateness’ under Article 5 of the Birds Directive has to be given the same meaning as it is given under Article 12 of the Habitats Directive, in order to fulfil requirements of unity and consistency in the EU legal order.²⁷⁵ In essence, The Court set out clearly that the prohibited actions do not manifestly have to have the prohibited purpose but the acceptance of such a possibility suffices.²⁷⁶ This shows that the Court continued to apply a harmonised knowledge-based minimum threshold for deliberateness, regardless of the conservation status of the species concerned, in line with the arguments made in this thesis.

²⁷¹ Case C-784/23, paragraph 43.

²⁷² *Ibid.*, paragraph 45 (citing Joined Cases C-473/19 and C-474/19, paragraphs 36–37 and 45).

²⁷³ Opinion of Advocate General Kokott on Case C-784/23, paragraph 102.

²⁷⁴ Case C-784/23 paragraph 46 (citing Joined Cases C-473/19 and C-474/19, paragraph 51 and the case-law cited).

²⁷⁵ Case C-784/23 paragraph 47; Case C-7/23, paragraph 35; Case C-103/00 paragraphs 34–26; Case C-221/04 paragraph 71.

²⁷⁶ Case C-784/23 paragraph 49.

The question also concerned whether, when the purpose of an activity is clearly different from the prohibited action, the prohibition applies only to the extent necessary to maintain the population of the species concerned within the meaning of Article 2 of the directive, or to adjust that population to a level that meets ecological, scientific and cultural needs while also taking account of economic and recreational interests. The Court made a clear distinction in this regard. It concluded that since only Article 5(d) of the Birds Directive expressly applies only in so far as the disturbance being significant to the objectives of the directive, this requirement does not extend to the prohibitions of deliberate killing or capture or destruction of, or damage to, the bird's nests and eggs or removal of their nests, provided for in Article 5(a) and (b).²⁷⁷

In conclusion, *Voore Mets* provides two major interpretations for the concept of deliberateness under the Birds Directive. Firstly, the purpose of conduct is irrelevant if the author of the act is deemed to have been aware of and accepted the possibility of the capture, killing or disturbance of birds or the destruction of, or damage to, their nests and eggs. Secondly, the initial population level of the harmed bird species as well as the possible effects the action has on the population level of the species are irrelevant for the application of Article 5(a) and (b).

The remainder of the judgment examined whether the evidentiary threshold for establishing the presence of birds in the area had been met. The Court found that the presence of approximately ten pairs of nesting birds per hectare was sufficient to trigger the applicability of the prohibitions set out in Article 5(a), (b) and (d) of the Birds Directive.²⁷⁸ The questions left unanswered concerned the derogation procedure under Article 9 and the application of fundamental rights. However, as previously explained, these issues do not appear to contradict the Court's strict interpretation of deliberateness in *Voore Mets*. Instead, they are matters that the Court may need to take into account in future cases to ensure that other fundamental rights are not disproportionately affected.

²⁷⁷ *Ibid.*, paragraphs 50–54.

²⁷⁸ *Ibid.*, paragraph 62.

4.5 Notes on national implementation

Voore Mets invites reconsideration of forestry regulations, particularly regarding the need to account for bird breeding seasons. In Finland, the government has proposed legislative amendments reflecting the Court's interpretation.²⁷⁹

According to the proposed Article 10c on restrictions relating to forest management and use, a forest operator would be required, prior to logging, to assess the birdlife of the area on the basis of forest type, forest age and other available information. Based on the assessment, the operator must implement appropriate preventive measures intended to avoid the death of individual birds, prevent the destruction of nests, and prevent disturbance that could affect the species levels of birds. The proposal also contains seasonal restrictions on certain forest types, where during the breeding season forests logging is prohibited. Transporting harvested timber through such areas would be permitted only along previously used routes. If an active nest is discovered either during planning or during forest operations, measures must be carried out in a way that avoids damaging the nest. Forest management and use would also be prohibited near the nests of rare birds of prey if such activities risk causing disturbance that would lead to the interruption of breeding, unless a derogation has been granted.²⁸⁰

Under the proposed Finnish approach, if a forest operator has assessed the area's birdlife, adopted appropriate preventive measures, complied with seasonal logging restrictions and avoided damage to known nests, the operator would not be considered to have accepted the risk of killing or disturbing birds or damaging nests.²⁸¹

The Finnish proposal illustrates the practical administrative implications of *Voore Mets*. Firstly, the draft legislation shows that considerable work is required at the national level if Member States wish to avoid infringement proceedings such as in *Commission v Greece (2002)* and be able demonstrate that the directive has been faithfully transposed. Secondly, the judgment means that significant emphasis is placed on awareness and acceptance of risk as the threshold for deliberateness can be fulfilled by knowledge of inevitable outcomes as opposed to purposeful intention to harm. This means that forestry operators and other land-use actors may face complex legal expectations regarding when they can be regarded as

²⁷⁹ Hallituksen esitys MMM/2026/59 (At <https://valtioneuvosto.fi/paatokset/paatokset?decisionId=5953>, accessed 31 March 2026).

²⁸⁰ HE 30/2026 vp., p. 82–83.

²⁸¹ HE 30/2026 vp., p. 67, 83.

aware of a risk and when they can be regarded as having accepted it. Compliance depends on demonstrating that all reasonable preventive steps were taken, and that the operator did not disregard or tolerate known risks.

This illustrates the concerns that Sweden and Finland had raised prior to the judgment. It shows how the judgment shifts responsibility onto forestry operators, who may need to conduct time-consuming and financially burdensome assessments, maintain documentation, and undertake targeted preventive measures in order to demonstrate that they have not accepted the risk of harming birds. The practical effect is that operators must be able to show that they have done everything reasonably possible to avoid causing harm, if prohibited harm has occurred. Whether one views this development as justified or unjustified depends partly on perspective: from an environmental standpoint, diligence is essential, whereas from an economic standpoint the increased burden may be difficult to justify, particularly for smaller operators.

Regardless, these developments raise difficult questions about how awareness and acceptance of risk will be interpreted in practice, and about how liabilities may arise in cases where information was incomplete or where nests were not detected despite reasonable efforts. It will therefore be important to follow how Finland ultimately enacts these reforms and whether similar approaches are adopted elsewhere in the European Union.

4.6 Concluding remarks on *Voore Mets*

The judgment in *Voore Mets* confirms a strict and preventive interpretation of the prohibitions set out in Article 5 of the Birds Directive. In my view, the Court's approach is persuasive. Its understanding of deliberateness, which sets a minimum threshold based on actual awareness and acceptance of risk regardless of the species' population level, is consistent with earlier case-law, with the broader trend of harmonisation between the Nature Directives, and with the wording and structure of the Birds Directive itself. By contrast, a two-tier system including both purpose-based deliberateness and knowledge-based deliberateness, like the one proposed by Advocate General Kokott, would introduce ambiguity and would weaken the Directive's preventive protective regime, since in practice it would limit much of its applicability to situations where the conduct is expressly aimed at harming birds.

The structure of the Birds Directive itself supports the Court's interpretation. Article 2 identifies ecological, scientific and cultural requirements as primary objectives, while

economic and recreational requirements are secondary and must only be taken into account. Article 5 establishes species protection for all naturally occurring wild birds with a reference to population status only in Article 5(d). Article 7 shows that when the legislature intended to provide exceptions, such as for hunting, it did so expressly. Read together, these provisions indicate that the Directive does not allow Member States to reduce the scope of Article 5(a) and (b) on the basis of broad balancing of interests. The approach taken in *Voore Mets* therefore reflects the internal logic of the Directive's design.

The most significant structural weakness lies in the derogation procedure of Article 9. As Kokott has highlighted, the derogation grounds are narrow and do not expressly include economic interests, even though Article 2 recognises that such interests must be considered. This creates tension where land-use activities with societal and economic importance come into conflict with species protection. I suggest that such conflicts should be resolved through the Charter, which requires that restrictions on property rights and the freedom to conduct a business must not impair the core substance of those rights. It is therefore possible that, in exceptional cases, the Charter could require a more flexible application of Article 9. Whether this becomes necessary is a matter that future case-law must clarify.

From an environmental perspective, the Court's interpretation strengthens the protective function of the Birds Directive and aligns with its preventive purpose. However, the judgment also exposes potential national implementation challenges. Finland's legislative proposal shows that forestry operators may need to undertake burdensome assessments to avoid being regarded as having accepted the risk of deliberate harm. This creates administrative burdens, particularly for smaller operators. Close attention should be paid to Finland's final implementation of these reforms and to whether similar solutions are adopted in other Member States.

The judgment affirms that the Birds Directive gives priority to preventive species protection, while other interests must be addressed through carefully constrained exceptions. This can be understood as adjacent to the increasing emphasis the Court has placed on the precautionary principle in recent years when interpreting the Nature Directives.²⁸² Although the judgment explicitly referred to the precautionary principle only in the context of evaluating the scientific evidence needed to establish the presence of birds, its spirit can also be seen in the

²⁸² Epstein – López-Bao – Chapron 2023, p. 210.

Court's approach to determining deliberateness.²⁸³ *Voore Mets* can therefore be regarded as part of a broader trend in which the precautionary principle plays an increasingly central role in European environmental law.²⁸⁴ Thus, *Voore Mets* confirms the strict protective nature of the Birds Directive while its future legitimacy depends on the continued ability of Article 9 and the Charter to accommodate competing interests in exceptional cases.

²⁸³ Case C-784/23 paragraph 62.

²⁸⁴ Krämer 2018, p. 264 (cited by Epstein – López-Bao – Chapron 2023, p. 210).

5 Conclusion

5.1 Introduction

This chapter brings together the key insights of the thesis. It begins by discussing some blind spots that in academic discussions have been identified within the EU's environmental legislation. It then examines how *Voore Mets* repositions the Birds Directive within this wider landscape, highlighting the judgment's implications for the balance between ecological objectives and competing economic interests. Finally, the chapter offers concluding observations on what these developments may mean for the evolution of EU biodiversity law.

5.2 Discussion on the blind spots of EU environmental legislation

Sceptics of the Sixth Mass Extinction have used the IUCN Red List²⁸⁵ data to argue that extinction rates have not substantially risen.²⁸⁶ However, as Cowie, Bouchet and Fontaine point out, the Red List numbers assess a minute fraction of species highly concentrating on non-marine vertebrates, particularly mammals and birds.²⁸⁷ This imbalance is evident not only in public discourse but also within scientific datasets themselves.²⁸⁸

A similar pattern can be observed within the Habitats Directive. The Habitats Directive is set to protect the habitats of wild species of both fauna and flora.²⁸⁹ Contradictorily its case-law includes, for example, five cases concerning the wolf (*Canis lupus*)²⁹⁰ and three cases concerning the European hamster (*Cricetus cricetus*)²⁹¹, while not a single case has been about the failure to protect a specific plant species under Article 13 of the Habitats Directive. Moreover, there's the Commission Guidance document on the strict protection of animal species under the Habitats Directive, while there's not one for plant species.²⁹² Although the limited volume of case-law does not allow empirical conclusions, and judicial decisions

²⁸⁵ "Red List Index (RLI)" (At <https://www.iucnredlist.org/assessment/red-list-index> accessed 5 April 2026).

²⁸⁶ Loehle – Eschenbach 2012 (cited by Cowie – Bouchet – Fontaine 2022, p. 644).

²⁸⁷ Cowie – Bouchet – Fontaine 2022, p. 644.

²⁸⁸ For example Ceballos et al. 2015 (cited by Cowie – Bouchet – Fontaine 2022, p. 644).

²⁸⁹ Article 2(1) of the Habitats Directive.

²⁹⁰ Case C-629/23; Case C-436/22; Case C-601/22; Case C-88/19; Case C-674/19.

²⁹¹ Case C-357/20; Case C-477/19; Case C-383/09.

²⁹² European Commission 2021; Amos 2021, p. 376. (After Amos made this observation, there has been a case concerning the transposition of several provisions of the Habitats Directive, in which the Court found Poland's forest management regulation to be insufficient including with respect of the transposition of Article 13(1)(a). This case likewise did not address the protection of any individual plant species, unlike the cases that focused exclusively on a particular animal species (Case C-432/21, paragraphs 113–114)).

capture only a small portion of environmental protection efforts that occur at other levels, the available case-law nonetheless show a concentration on certain mammals.

This is not to suggest that either the Court or the Commission is necessarily biased. As Amos explains, several factors may account for the pattern observed. National actors may not be submitting complaints to the Commission regarding breaches of plant conservation obligations. This could be because of inactive stakeholders and/or limited resources available to conservation organisations and other bodies.²⁹³ Arguably, according to Amos’s findings, the explanation is unlikely to be that plant species are simply thriving and therefore do not require the same level of conservation effort, since many of the supposedly protected plant species are in practice threatened and deteriorating.²⁹⁴

Additionally, the third kingdom of the natural world, fungi, is not mentioned in Article 2(1) of the Habitats Directive, which refers only to natural habitats and wild fauna and flora.²⁹⁵ Yet, fungi form an essential part of terrestrial ecosystems, representing a significant share of overall species diversity and playing a central role in many ecological processes.²⁹⁶ Although some fungi receive indirect protection as components of particular habitat types²⁹⁷, their absence from species-specific conservation legislation is arguably a blind spot within the EU’s environmental protection framework. This gap may be linked to limited scientific knowledge and awareness of fungal diversity and its ecological significance.²⁹⁸

The Environmental Impact Assessment (EIA) Directive can also be criticised for its lack of force when an environmental impact assessment proves negative.²⁹⁹ According to its Article 8, the information must only be ‘taken into consideration’, rather than creating an obligation to adjust the project.³⁰⁰

Furthermore, the derogation procedure under the Habitats Directive has been criticised for allowing the Commission to approve socioeconomic projects too readily at the expense of environmental interests.³⁰¹ The EEC’s fourth environmental action programme, which laid the

²⁹³ Amos 2021, p. 376, footnote 79.

²⁹⁴ Amos 2021.

²⁹⁵ Amos 2021, p. 370.

²⁹⁶ Dahlberg – Genney – Heilmann-Clausen 2010, p. 50–51.

²⁹⁷ “Joint Network for wild Fungi (JoNeF)” (At <https://www.impel.eu/en/topic/nature-protection/conservation/projects/joint-network-for-wild-fungi-jonef/related-files>, accessed 5 April 2026).

²⁹⁸ Oyanedel, et al. 2022, p. 5; Dahlberg – Genney – Heilmann-Clausen 2010, p. 50.

²⁹⁹ Holder 2006, p. 235–238; Amos 2021, p. 373.

³⁰⁰ Amos 2021, p. 373.

³⁰¹ Krämer 2009, p. 84.

groundwork for the Habitats Directive, noted that environmental protection measures rarely align with immediate economic interests.³⁰² This critique forms part of a broader discussion in which the Sustainable Development Goals have been challenged for placing disproportionate emphasis on socioeconomic priorities over environmental protection.³⁰³

A 2020 study by BirdLife International showed that, in practice, the use of derogations under both the Birds Directive and the Habitats Directive can be quite permissive. The study examined how the derogations were applied and what effects they had on bird species and on nature. Based on a sample of 783 derogations recorded between 2009 and 2017, the authors estimated that about 22 %³⁰⁴ had ‘evident shortcomings’. These shortcomings included missing information about the species concerned, missing start or end dates, a lack of legal justification, and cases involving the killing or taking of birds or the destruction of nests and eggs without any data on numbers. For derogations that involved killing or taking birds, the problems also included missing information about alternatives that had been assessed or about the controls that had been carried out.³⁰⁵

Moreover, critique has also been given about the fact that the Commission continued not to act on the issue of Sweden’s wolf management even though Sweden’s approach appeared to contradict the Commission’s own interpretation of EU law. This situation persisted until the annexes of the Habitats Directive were amended, which removed the legal basis for pursuing the matter. This suggests that although the EU continues to expand its environmental policy into new areas, this expansion does not necessarily translate into strong or consistent enforcement in practice.³⁰⁶

5.3 Repositioning the Birds Directive in its EU law framework

The previous discussion provides the background already touched upon in Chapter 2 of this thesis. Both global, as mentioned in Chapter 2, and as examined above, EU environmental legislation have been criticised for lacking sufficient strength to halt biodiversity loss. The

³⁰² European Commission 1986, p. 30–32.

³⁰³ Eisenmenger et al. 2020, p. 1108; Kotzé – French 2018 (*cited by* Amos 2018, p. 374).

³⁰⁴ 95% Confidence Interval 19.7 % - 24.5 %.

³⁰⁵ BirdLife International 2020, p. 18.

³⁰⁶ Epstein 2018, p. 512; “European Commission doubts Sweden’s reporting on wolves is science-based” (At <https://www.brusselstimes.com/1880048/european-commission-doubts-swedens-reporting-on-wolves-is-science-based> accessed, 5 April 2026).

Nature Restoration Regulation may eventually address this gap by promoting a more holistic, ecosystem-based approach, but its effectiveness remains to be seen.

However, as Chapters 3 and 4 of this thesis demonstrate, the species protection scheme of the Birds Directive operates differently. Its broad scope applies to even the most common bird species, and its interpretation of deliberateness extends to all activities, regardless of their purpose, whenever there can be proven awareness and acceptance that the activity may result in the killing or capture of even a single specimen.

A similar notion has been pointed out by Amos, who has argued that the early approach under the Birds Directive reflects an ecologically sustainable trade-off between economic and environmental interests.³⁰⁷ The judgment *Voore Mets* appears to confirm that this role of the Birds Directive has continued, establishing it as legislation that affords comparatively less weight to economic interests and places stronger emphasis on ecological protection. When considered alongside the tension identified between the environmental ambitions of the early action programmes and the more economically accommodating structure of the Habitats Directive, it may be suggested that the Birds Directive is better positioned to achieve its environmental aims precisely because it does not attempt to serve economic objectives to the same extent.³⁰⁸

Understanding why the Directive has evolved into its current form requires recalling the political and historical context outlined in Chapter 1. Adopted in the late 1970s, at a time when the environmental movement was gaining momentum and the number of Member States was smaller, the Directive was shaped in an era when ambitious conservation measures were politically more feasible. This early context partly explains why the Birds Directive remains one of the EU's strictest environmental instruments, giving comparatively little weight to economic considerations.

This raises the question of what kind of trend *Voore Mets* represents and what it may signal for the EU environmental legislation as a whole. One possible reading is that it reflects a strengthening of environmental protection within the EU legal order, potentially even under other pieces of legislation, if it is taken as a sign that the Court is adopting a more assertive stance toward biodiversity obligations. Even if the same ecological spirit does not extend to

³⁰⁷ Amos 2018, p. 374.

³⁰⁸ See also Kingston – Heyvaert – Čavoški 2017, p. 418.

future judgments under other environmental legislation, the fact that bird protection receives concrete effectiveness can still translate into stronger protection for many bird species and also other species reliant on forests.³⁰⁹ This is because activities such as forestry operations and other environmentally impactful sectors are affected as a whole when they must comply with Article 5 of the Birds Directive.

5.4 Concluding remarks

The research question of this thesis was formulated as follows:

- *What impact does Voore Mets have on the interpretation of ‘deliberate’ harm under the Nature Directives, and what does this reveal about the structural nature and current framework of the Birds Directive within EU biodiversity regulation?*

Voore Mets confirms the trend set by the Court’s previous case-law by establishing that deliberateness is fulfilled whenever the actor is aware of, and accepts, the possibility that harmful consequences may occur, regardless of whether the aimed to harm birds. Under both Nature Directives, the concept of “deliberate” therefore covers not only actions that are purposely intended at harming protected species, but also actions where the offender knowingly accepts the risk that harm will occur. This situates the minimum threshold of deliberateness at a knowledge-based level of intention. Additionally, *Voore Mets* affirms that prohibitions in the Birds Directive regarding deliberate killing, capture or destruction of eggs or nests apply independently of population-level considerations and extend equally to common and rare species. The judgment thus supports a strict reading of species protection obligations, reflecting the Directive’s design as a preventive protective tool that emphasises the ecological objectives identified in Article 2.

Voore Mets reveals that the Birds Directive continues to operate as one of the EU’s more stringent environmental instruments and that its framework is less accommodating of economic interests than later environmental legislation. The judgment strengthens the mandatory character of species protection obligations as it confirms that environmental objectives cannot be set aside by broad appeals to economic convenience. As such, the case highlights the Directive’s preventive nature, as activities like spring logging cannot displace

³⁰⁹ Tiainen et al. 2016, p. 19–21 (cited by Pappila 2019, p. 211).

environmental obligations simply because they are economically beneficial or common practice in some Member States.

The judgment exposes the limitations of Article 9's derogation procedure, which contains only narrow grounds and does not explicitly recognise economic interests. This strictness, combined with the Directive's universal scope, positions Article 5 as a provision with real force in regulating land-use activities. Read strictly, *Voore Mets* could lead to a situation in which the Court interprets the Birds Directive as allowing economic considerations to be taken into account only when a potential breach of the Charter is at issue, possibly shifting the balancing of competing rights into the Charter framework rather than into the Directive itself.

This could also represent a shift in the balance between economic rights and environmental protection. Economic interests have traditionally been afforded greater weight, which has been reflected in the Commissions opinions on Article 6(4) of the Habitats Directive.³¹⁰ From an environmental perspective, this might be welcomed. From a stricter fundamental-rights perspective, however, such a shift could raise concerns about disproportionate or unjustified constraints on individuals and companies engaging in activities that carry benefits but are difficult to categorise as anything other than economic in nature.

A further concern relates to national implementation. The Finnish legislative proposal suggests that the *Voore Mets* judgment may require Member States to introduce complex compliance frameworks in response to the Court's interpretation. Such frameworks could place significant operational responsibilities on forestry operators, and potentially on a broader range of land-use actors in the future, who would be required to demonstrate that they have taken all reasonable preventive measures in order to avoid being considered liable for having accepted the risk of deliberate harm.

On another note, *Voore Mets* may indicate a broader recognition of protections for wild animals as individual specimens. This possibility is highlighted by the fact that bird species do not have to be endangered to receive protection, and Article 5 applies even to a single specimen. This points toward a more individualised conception of protection rather than one oriented solely toward safeguarding endangered populations.³¹¹

³¹⁰ See Chapter 4.3.1.

³¹¹ See more by Di Concetto 2024.

Interestingly, this development appears to emerge from the Birds Directive, a legislative instrument from the late 1970s, while newer environmental legislation is often criticised for lacking effectiveness, even though in many aspects, the environmental crisis is escalating at a faster pace.³¹² This may be due to the political circumstances of the 1970s: with fewer Member States, limited experience in EU environmental litigation, and strong momentum from the environmental movement, adopting a strict directive was more feasible. In today's political context, Member States may express strong environmental ambitions rhetorically but show less willingness to support measures that could hinder economic activity.

The case thus illustrates how older, more ambitious conservation legislation can deliver strong biodiversity protection today. From a critical perspective, *Voore Mets* thus highlights a tension. The Court appears willing to give teeth to earlier, more ambitious conservation instruments, while Member States display hesitation in adopting or implementing newer, equally strict rules.

However, these points are raised to open a discussion rather than to offer definitive conclusions, as it is still too early to determine the consequences. In *Voore Mets*, spring logging was not in those specific circumstances permitted at the expense of the Birds Directive's environmental objectives. How future cases frame the relationship between environmental protection and the economic rights under the Nature Directives will determine the ultimate direction of this development. *Voore Mets* illustrates that EU environmental protection rules can retain significant force.

³¹² IPBES 2019, p. XV–XVI.