

2021-10-01

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<http://hdl.handle.net/10026.1/17590>

Environmental Law and Management

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Case Commentary

Habitats, hamsters and ‘vacant possession’

C-477/19, *IE v Magistrat der Stadt Wien*, CJEU, 2 July 2020

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Introduction

The case required the court to interpret the limits of the reach of a certain provision of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (The Habitats Directive).¹ Briefly, and as elaborated further below, the measure in question related to the deterioration or destruction of breeding sites or resting places of a species listed in the Annexes to the Habitats directive. Obviously the presence and maintenance of such sites is as important, if not more so, than the protections created for individual specimens. While there may be sites which are clearly and obviously continuously occupied over considerable time periods, such as bat roosts or badger setts, other sites might be used on a less permanent or more transitory basis. Without the presence of the protected species on site, or indeed a certainty that it will return, there is an obviously tension created should that area become the subject of a development or development proposal, which would set it against the purpose and the measures directed towards the provision of a strict system of protection as contemplated by the Habitats Directive. The instant case, a preliminary reference requested in the course of administrative proceedings in Austria, provides clarification of this important point.

The legal context and domestic proceedings

The Habitats Directive is the EU’s principal measure to conserve biodiversity within the member states’ territories. It requires them through transposition to undertake effective steps in their legal systems necessary to ensure the conservation objectives.² Recitals 5 and 6 to the Habitats Directive respectively identify specific purposes of adopting a focus on priority habitats and species for early implementation of protection: that system of protection to be delivered by the Member States’ the designation of ‘...special areas of conservation in order

¹ Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206/7).

² Habitats Directive, Recital 3 clarifies this.

to create a coherent European ecological network a special areas of conservation in order to create a coherent European ecological network'.³

The purpose of the Habitats directive is clearly stated in art. 2, which notes the biodiversity imperatives for habitats and species arising in the Member States; that Members States' measure adopted are designed to further the objectives by maintaining or restoring a favourable conservation status to the protected features; and that other factors including those of a socio-economic character are taken into account. ⁴

Article 12 of the Habitats Directive specifically concerns species protection. It states '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.'

It is against this context that domestic proceedings were brought against 'IE' an employee of a property developer, by the Vienna City Council, which resulted in a fine – with a threat of a custodial sentence were the fine not to be paid. The proceedings were commenced on the basis that IE had '...caused, in the course of a property redevelopment project, the deterioration or destruction of resting places or breeding sites of the *Cricetus cricetus* (European hamster) species, which is on the list of protected animal species set out in Annex IV(a) to the Habitats Directive'.⁵

Austrian law transposed the Habitats Directive in 1998 and it has full application in the Vienna region. Article 12(1)(d) is effectively reproduced in the Austrian legislation and provides for a range of penalties upon conviction for any person who causes the deterioration or destruction of breeding sites or resting places of strictly protected animals: the European hamster is included in its annexes. The entry level fine is up to EUR 21 000 or, if that fine is not paid, to a custodial sentence of up to four weeks; and repeat offenders facing an increased penalty of up to EUR 35 000 or, a six week custodial sentence should the fine be unpaid. The implementing Austrian law provides that in limited circumstances a competent authority may permit isolated cases of interference if the proposed

³ Habitats Directive Recital 6.

⁴ Habitat's directive Article 2(1-3).

⁵ Judgment, paragraph 2.

measures *does not significantly undermine the objective of providing protection.*

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Facts

IE's employer commenced work for building construction on a site where there was evidence of European hamster settlement. The property developer had been made aware of this by the landowner. The developer then engaged an environmental expert, before work commenced, who drew up a map of the entrances to the European hamster burrows and determined, in a specific zone, whether the burrows were inhabited. Prior to the building work being carried out, earth works including removal of topsoil and construction of a means of access to the site had been undertaken. The access route was in the immediate vicinity of the entrances to the European hamster burrows (which the CJEU termed 'the harmful measures'). It was explained that, the 'aim behind removing the topsoil was to cause the European hamster, which had settled in the areas where the building work was to be carried out, to relocate to areas which had been specially protected and reserved for it'. The harmful measures had not been the subject of prior approval from the competent authority and so were not in place when the. To compound matters at least two of the hamsters' burrow entrances were destroyed.

It was held by the Vienna City Council that IE as an employee of the property developer had breached the law insofar as he was responsible for the deterioration or destruction of resting places or breeding sites of the European hamster and, imposed a fine, which as noted above could be turned into a custodial sentence if not paid. IE subsequently brought an action before the Austrian Administrative court on the basis that a fine should not be imposed for reasons including that at the material time the burrows were not in use and thus the law did not apply as the action taken ad not led to the deterioration or destruction of resting places or breeding sites of the hamsters.

The Administrative Court had issues in respect of the clarity of the meaning of Article 12(1)(d) of the Habitats Directive, particularly given the resulting criminal penalties. It sought assistance from the guidance provided by the Commission in 2007, although took the view that the guidance was imprecise and left considerable scope for interpretation of some of the key terminology.⁷ It then referred certain questions to the CJEU for clarity.

The questions referred

⁶ Judgment, paragraph 9 (emphasis added).

⁷ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, EU Commission (Final), 2007, https://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf (accessed August 2020).

As above, the request for a preliminary ruling related to the interpretation of Article 12(1)(d) of the Habitats Directive – specifically:

‘(1) Is the term “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive to be interpreted as also including former resting places that have since been abandoned?’

If the answer to that question is in the affirmative:

Is every former resting place that has since been abandoned a “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive?

If the answer to that question is in the negative:

Which factors determine whether a former resting place that has since been abandoned is a “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive?

(2) Which factors determine whether a particular act or omission constitutes interference with a “resting place” within the meaning of Article 12(1)(d) of the Habitats Directive?

(3) Which factors determine whether a particular act or omission constitutes such serious interference with a “resting place”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “deterioration”, within the meaning of that provision, of that “resting place” is to be assumed?

(4) Which factors determine whether a particular act or omission constitutes such serious interference with a “resting place”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “destruction”, within the meaning of that provision, of that “resting place” is to be assumed?

The fifth question, relating to specific interpretations of the term “breeding site”, within the meaning of Article 12(1)(d) of the Habitats Directive, was successfully argued as inadmissible on the grounds of it being a hypothetical point.

(6) Which factors determine whether a particular act or omission constitutes interference with a “breeding site” within the meaning of Article 12(1)(d) of the Habitats Directive?

(7) Which factors determine whether a particular act or omission constitutes such serious interference with a “breeding site”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “deterioration”, within the meaning of that provision, of that “breeding site” is to be assumed?

(8) Which factors determine whether a particular act or omission constitutes such serious interference with a “breeding site”, within the meaning of Article 12(1)(d) of the Habitats Directive, that “destruction”, within the meaning of that provision, of that “breeding site” is to be assumed?’

Judgment

The CJEU noted that the first question was essentially asking whether Article 12(d)(1) of the Habitats Directive should be interpreted to include resting places that were not occupied by one of the protected species to which the article refers. Recounting the basic purpose of the Habitats Directive and the contribution of Article 12, it noted that Member States should adopt both a comprehensive legislative framework and should also implement specific protection measures.⁸ The Court observed that when interpreting a measure of EU law it is both the wording and the context – itself a product of the objectives the law is to secure – should be taken into account.⁹ On the question of the meaning of ‘resting places’ there was, according to the CJEU, no definition provided within the Habitats Directive: in terms of the direct words or either the context.¹⁰

Previous case law had provided some indication as to the framing of the offences by reference to the state of mind of the perpetrator and the CJUE provided examples of cases against both the UK and Germany in respect of Article 12(1)(a-c) – and not limiting them by a requirement of deliberateness - as being demonstrative of the EU legislature’s ‘...intention to give breeding sites or resting places increased protection against acts causing their deterioration or destruction’.¹¹

In addition, at paragraph 29 of the judgment the CJEU confirmed that that ‘the aim of the strict protection offered by Article 12(1)(d) of the directive is to ensure that significant parts of the habitats of protected animal species are preserved so that those species can enjoy the conditions essential for, inter alia, resting in those habitats’.¹² The Court pointed to the Commission’s guidance which notes ‘...strict protection because they are crucial to the lifecycle of animals and are very important parts of a species’ entire habitat, needed to ensure its survival’.¹³ The guidance heavily emphasises that the protection should be understood as *aiming to safeguard the ecological functionality* (emphasis added) of breeding sites and resting places. Paragraph 54 of the guidance was central to the CJEU’s reasoning on the point. The document, giving the example of a cave regularly used by a bat colony, ‘that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places’.¹⁴

According to the Court this meant that it was clear from the context of Article 12(1)(d) that resting places which are no longer occupied by a protected animal species must not be allowed to deteriorate or be destroyed since that species

⁸ Judgment, paragraph 20.

⁹ Judgment, paragraph 23.

¹⁰ Judgment, paragraphs 24-26.

¹¹ Judgment, paragraph 26: in particular, Case C-6/04 *Commission v United Kingdom*, EU:C:2005:626; and Case C-98/03 *Commission v Germany*, EU:C:2006:3.

¹² Judgment, paragraph 29.

¹³ Note 7, paragraph 53.

¹⁴ *Ibid*, paragraph 54.

may return to such places. The guidance offers a more specific definition ‘...as the areas essential to sustain an animal or group of animals when they are not active. For species that have a sessile stage, a resting place is defined as the site of attachment. Resting places will include structures created by animals to function as resting places. *Resting places that are used regularly, either within or between years, must be protected even when not occupied*’.¹⁵ The guidance at paragraph 60 also specifically notes burrows, and while *cricketus cricketus* does not appear as a case-study example it is clear that the general point applies.

It would not be compatible to deny protection for resting places of a protected animal species where they are no longer occupied but where there is a sufficiently high probability that that species will return to such places. That second question was a matter of evidence for the domestic court to determine. On that basis the CJEU was of the view that the fact that a resting place is no longer occupied by a protected animal species does not mean that that place does not enjoy the protection offered by Article 12(1)(d) of the Habitats Directive.¹⁶ On the first question the CJEU concluded that ‘Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the term ‘resting places’ referred to in that provision also includes resting places which are no longer occupied by one of the protected animal species listed in Annex IV(a) to that directive, such as the *Cricetus cricetus* (European hamster), where there is a sufficiently high probability that that species will return to such places, which is a matter for the referring court to determine’.¹⁷

The CJEU then agreed with the Commission’s submission that the fifth question on the specifics of the precision required to define ‘breeding sites’ was not adequately framed in terms of relevance and so should be viewed as hypothetical. On that basis it was not addressed, save to note that, the referring Court had material indicative of damage caused to a resting place by the harmful measures. Whether or not a resting place was also a ‘breeding site’ was immaterial to the outcome and so the question’s hypothetical basis made it inadmissible.¹⁸

The remaining questions (second to fourth and sixth to eighth) were taken together. Effectively, the questions were related to the interpretation of the terms ‘deterioration’ and ‘destruction’ in the context of Article 12(1)(d) of the Habitats Directive. Once again the Commission’s view was that these were hypothetical. The CJEU noted that in the instant case there was no dispute that two burrow entrances were destroyed by the harmful measures, ‘...which suggests that, at the very least, the burrows were caused to deteriorate’.¹⁹ Article 12(1)(d) covers both destruction and deterioration and does not distinguish between them in different contexts of behaviour/interference with the protected area feature. There was no indication from the referring court that there would be any germane

¹⁵ Ibid paragraph 59, *emphasis added*.

¹⁶ Judgment, paragraph 35.

¹⁷ Judgment, paragraph 36.

¹⁸ Judgment, paragraphs 42-45.

¹⁹ Judgment, paragraph 48.

differential to sentencing relevant to either destruction or deterioration and thus the CJEU did not feel the need to address these additional questions.²⁰

Commentary

A case concerning the potential for homeless hamsters must tug at the heartstrings of even the most cynical, but going beyond the case facts there is some useful direction from the Court of Justice. On the issue of the characterisation of an area as a resting place, the decision is clear and in step with the Commission's guidance: that the frequency, intensity and likelihood of future use would all be relevant factors to determine the extent to which it would be classed as a 'resting place' and therefore subject to the protection of Article 12(1)(d) regardless of whether there was a current occupant or that the area was for the time being unoccupied.

The reluctance to get involved in a discussion of the specificity of the terms relating to breeding sites and resting places, reflects the Commission's approach in its guidance on the issue. In that guidance it is noted that it is '...is not possible to provide a rigid definition of "breeding site" and "resting places" that will apply to all taxa. Any interpretation of the terms "breeding sites" and "resting places" must therefore take into account this variety and reflect different prevailing conditions'.²¹ What is clear from the guidance though is that a 'resting place' '...used regularly, either within or between years, must be protected even when not occupied; and those which are essential for survival may include burrows.'²² As is often the case with EU measures, particularly those dealing with such a broad palette as the species listed on Annex IV of the Habitats Directive, the preference is to adopt a wide as opposed to narrow interpretation: on a case-by-case or species-by-species approach. On this point the Commission's guidance concludes that 'the prudent approach of the Court seems due to the fact that it is difficult to establish a general definition of "breeding sites" and "resting places" because of the wide range of differences in the ecological characteristics of species'.²³

Obviously the UK's exit from the European Union (and the lack of *cricketus cricketus* currently in residence)²⁴ may have a bearing on the application of the CJEU's interpretation of these key aspects of terminology. This might be particularly so given the competing concepts of biodiversity net gain in planning and conservation matters and a Government still – publically at least – hostile to natural obstacles to regeneration and development as seen in the Prime

²⁰ Judgment, paragraph 51.

²¹ Note 7, paragraph 55.

²² Ibid, paragraphs 59-60.

²³ Ibid, paragraph 55, referring to Case C-504/14 *Commission v Hellenic Republic* ECLI:EU:C:2016:847

²⁴ See for example its range available from the EU's information sheet, available at, <https://ec.europa.eu/environment/nature/natura2000/management/docs/Cricetus%20cricketus%20factsheet%20-%20SWIFI.pdf>

Minister's ill-informed musing that "Newt counting delays are a massive drag on the prosperity of this country".²⁵ Interesting times ahead.

²⁵ See for example, Patrick Greenfield 'Boris Johnson says newts are a drag on the UK's economy. Here's why he's wrong', *The Guardian*, 10th July 2020 available at <https://www.theguardian.com/environment/2020/jul/10/is-boris-johnson-right-to-blame-newts-for-slowing-britains-recovery-aoe> (accessed August 2020).