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OVERVIEW OF THE CJEU CASE LAW ON WILDLIFE CRIMES

Valerie Fogleman

**Consultant, Stevens & Bolton LLP; Professor of Law, Cardiff University
School of Law and Politics**

TOPICS

- CJEU case law on
 - Provisions of the Wildlife Trade Regulations (Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (Basic Regulation) and related Regulations)
 - Derogations and prohibitions under the Birds Directive (2009/147/EC, codified version)
 - Derogations and prohibitions under the Habitats Directive (92/43/EEC, consolidated version)

ENVIRONMENTAL CRIMES DIRECTIVE

- Note: Directive 2008/99/EC on the protection of the environment through criminal law (Environmental Crimes Directive), article 3 provides as follows
 - ‘Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence
 - ...
 - (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
 - (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
 - (h) any conduct which causes the significant deterioration of a habitat within a protected site’

WILDLIFE TRADE REGULATIONS

- Key applicable provisions
 - Article 8 of the Basic Regulation, entitled Provisions relating to the control of commercial activities
 1. ‘The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited

....

WILDLIFE TRADE REGULATIONS

- Article 8 (continued)
 3. In accordance with the requirements of other Community legislation on the conservation of wild fauna and flora, exemption from the prohibitions referred to in paragraph 1 may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens
 - (a) were acquired in, or were introduced into, the Community before the provisions relating to species listed in Appendix I to the Convention or in Annex C1 to Regulation (EEC) No 3626/82 or in Annex A became applicable to the specimens; or
 - (b) are *worked specimens that were acquired more than 50 years previously*; or
 - ...

WILDLIFE TRADE REGULATIONS

- Article 8 (continued)

(d) are captive-born and bred specimens of an animal species or artificially propagated specimens of a plant species or are parts or derivatives of such specimens; or

...

General derogations from the prohibitions referred to in paragraph 1 based on the conditions referred to in paragraph 3, as well as general derogations with regard to species listed in Annex A ... may be defined by the Commission. Any such derogations must be in accordance with the requirements of other Community legislation on the conservation of wild fauna and flora....

WILDLIFE TRADE REGULATIONS

- Article 8 (continued)
 5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens were acquired and, if they originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora (emphasis added)
- Annex A lists species in the Convention on International Trade in Endangered Species of Fauna and Flora that are threatened with extinction that are or may be affected by trade, plus other species considered threatened under EU law
- Annex B lists species subject to trade restrictions to protect them from becoming threatened

WILDLIFE TRADE REGULATIONS

- Article 2(t) of the Basic Regulation defines 'specimen' as:
 'any animal or plant, whether alive or dead, of the species listed in Annexes A to D, any part or derivative thereof, whether or not contained in other goods, as well as any other goods which appear from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be or to contain parts or derivatives of animals or plants of those species, unless such parts or derivatives are specifically exempted from the provisions of this Regulation or from the provisions relating to the Annex in which the species concerned is listed by means of an indication to that effect in the Annexes concerned.....'

WILDLIFE TRADE REGULATIONS

- Article 2(w) of the Basic Regulation defines ‘worked specimens that were acquired more than 50 years previously’ as:
 - ‘specimens that were significantly altered from their natural raw state for jewellery, adornment, art, utility, or musical instruments, more than 50 years before the entry into force of this Regulation and that have been, to the satisfaction of the management authority of the Member State concerned, acquired in such conditions. Such specimens shall be considered as worked only if they are clearly in one of the aforementioned categories and require no further carving, crafting or manufacture to effect their purpose’

WILDLIFE TRADE REGULATIONS

- *Jan Nilsson (C-154/02, 2003)*
 - Jan Nilsson was prosecuted for significantly altering specimens of protected species from their natural state in breach of the Basic Regulation and various articles of related Regulations
 - The prosecution alleged that:
 - in August 1988, Mr Nilsson had unlawfully and either intentionally or recklessly purchased mounted specimens of birds (owls, harriers, buzzards, cranes and eagles) listed in Annex A of the Basic Regulation
 - in July 1998, unlawfully and either intentionally or recklessly purchased a mounted brown bear listed in Annex A of the Basic Regulation

WILDLIFE TRADE REGULATIONS

- *Jan Nilsson* (continued)
 - The questions referred by the Swedish court to the CJEU for a preliminary ruling included the following:
 1. Are stuffed animals listed in Annex A of the Basic Regulation included in the definition of ‘worked specimens’?
 2. What is covered by the term ‘acquire’ in Article 8(3) of the Basic Regulation?
 3. Must the person who acquired a specimen more than 50 years previously be the present owner?

WILDLIFE TRADE REGULATIONS

- *Jan Nilsson* (continued)
 - The ECJ stated that the following four conditions must be satisfied for a stuffed animal to be considered as a worked specimen:
 1. 'it must be significantly altered from its natural raw state
 2. the purpose of that alteration must be the production of jewellery, items of adornment, art or utility, or musical instruments
 3. it must be clearly in one of those categories
 4. no further carving, crafting or manufacture must be needed for it to effect its purpose'

WILDLIFE TRADE REGULATIONS

- *Jan Nilsson* (continued)
 - The ECJ concluded that a stuffed animal satisfied the first condition because it was ‘worked’, that is, ‘significantly altered’, commenting that the term ‘significantly altered’ does not depend on the outer appearance of the relevant specimen, but rather on whether its general state has undergone alteration
 - The ECJ commented that conventional stuffing (consisting of stripping the hide and tanning and stuffing the pelt) and modern taxidermy methods both alter specimens in ‘a complete and profound manner’

WILDLIFE TRADE REGULATIONS

- *Jan Nilsson* (continued)
 - In respect of the other three conditions, the ECJ stated that the issue depended on the facts of each case including whether an animal was stuffed for jewellery, adornment, art, utility, or musical instruments, and whether no further carving, crafting or manufacture was needed for it to effect its purpose
 - Accordingly, the ECJ stated that the Swedish court should determine whether the three conditions were satisfied in this case

WILDLIFE TRADE REGULATIONS

- *Jan Nilsson* (continued)
 - The ECJ then considered whether the person who acquired the specimen over 50 years previously must be the present owner, commenting that the purpose of article 8(3)(b) of the Basic Regulation is to exclude worked specimens that were created before 3 March 1947 (more than 50 years before the entry into force of the Basic Regulation) from the scope of the prohibitions set out in article 8(1)
 - The Court concluded that article 8(3)(b) must be interpreted to mean that receiving specimens as a gift or inheriting them, or killing animals and then taking them into one's possession makes them 'acquired'

WILDLIFE TRADE REGULATIONS

- *Tomasz Rubach* (C-344/08, 2009)
 - Tomasz Rubach visited terrarium fairs and acquired exotic spiders (*Brachypelma Albopilosum*), a protected specimen that belongs to an animal species listed in Annex B of the Basic Regulation
 - Mr Rubach then began breeding the spiders in captivity and auctioned them on the internet between February and October 2006
 - Polish authorities brought criminal charges against him for 46 infringements of article 128(2)(d) of the Polish Law of nature protection, which transposed article 8(1) of the Basic Regulation
 - 26 October 2007: the District Court acquitted Mr Rubach, ruling that the action did not constitute the prohibited act in the indictment

WILDLIFE TRADE REGULATIONS

- *Rubach* (continued)
 - 2 April 2008: the appellate court overturned the judgment and referred the case back to the District Court for reconsideration
 - The District Court concluded that, under the appellate court's interpretation of the national law, Mr Rubach could avoid criminal liability only if he could establish the source of the spiders by producing a certificate of registration for the spiders sold by him to show they were lawfully acquired
 - Under Polish law, however, spiders are not subject to registration
 - The Polish court referred the case to the ECJ for a preliminary ruling on the issue of how, in view of the presumption of innocence, may a person who keeps animals listed in Annex B prove that the specimens were acquired in compliance with the legislation transposing the Basic Regulation

WILDLIFE TRADE REGULATIONS

- *Rubach* (continued)
 - The ECJ stated that the Basic Regulation authorises the commercial use of specimens of species listed in Annex B if the conditions in article 8(5) are satisfied
 - The ECJ further stated that the Basic Regulation does not specify the type of evidence required to establish that specimens have been lawfully acquired, in particular where they are born in captivity in the EU
 - The prosecution must prove that the accused used specimens of species listed in Annex B of the Basic Regulation for commercial purposes
 - In turn the defendant may submit any type of evidence accepted under a Member State's procedural law to establish that the specimens were lawfully acquired

WILDLIFE TRADE REGULATIONS

- *Sofia Zoo v Országos v Környezetvédelmi, Természetvédelmi és Vízügyi Főfelügyelőség (C-532/13, 2014)*
 - 17 January 2011: a border check was carried out on a man who was entering Hungary with a cargo of 17 specimens of wild animals originating from Tanzania including eagles, vultures, crows and ravens
 - All the species were listed in Annex B of the Basic Regulation
 - The man produced a copy of the CITES import permit issued by Bulgarian authorities to prove the origin of the animals
 - Accompanying documents showed that the animals were being transported from the Netherlands to Sofia Zoo in order to undergo quarantine and that they would subsequently be transported back to the Netherlands through Hungary

WILDLIFE TRADE REGULATIONS

- *Sofia Zoo* (continued)
 - The Hungarian environmental protection authority retained the cargo and consulted the European Commission and the Bulgarian administrative authority
 - The Commission considered that the specimens should be confiscated because, on 30 June 2009, the Scientific Review Group (SRG) had decided to suspend the import of two of the species and, on 11 September 2009, had established an obligation of prior consultation with the SRG in the case of two more species
 - The Bulgarian competent authority had not taken the above into account, with the result that the permits it had issued to Sofia Zoo had to be deemed void

WILDLIFE TRADE REGULATIONS

- *Sofia Zoo* (continued)
 - 9 February 2011: the Hungarian competent authority decided to seize most of the specimens in the cargo and requested the Sofia Zoo to submit documents to prove the lawfulness of the import, possession and trading of the specimens of the seized animals
 - When the Sofia Zoo failed to submit the requested documents by the specified deadline, the Hungarian competent authority confiscated the specimens and housed them in Hungarian zoos

WILDLIFE TRADE REGULATIONS

- *Sofia Zoo* (continued)
 - Sofia Zoo then brought an action to annul the confiscation order and to have the Hungarian Inspectorate General ordered to carry out a new procedure to request a partial or full annulment of the order
 - Sofia Zoo argued that the invalidity of the import permits could concern only the specimens of animals actually affected by the ground of invalidity and not other specimens that also came within the scope of the Basic Regulation

WILDLIFE TRADE REGULATIONS

- *Sofia Zoo* (continued)
 - The Hungarian court requested the ECJ to determine whether
 - under article 11(2)(a) of the Basic Regulation, permits and certificates should be deemed void only in respect of specimens actually affected by a ground of invalidity, or in respect also of the other specimens covered by the permit or certificate

WILDLIFE TRADE REGULATIONS

- Articles 11(1) and 11(2) of the Basic Regulation provide as follows
 - 11(1) 'Without prejudice to stricter measures which the Member States may adopt or maintain, permits and certificates issued by the competent authorities of the Member States in accordance with this Regulation shall be valid throughout the Community' ...
 - 11(2)(a) However, any such permit or certificate, as well as any permit or certificate issued on the basis of it, shall be deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met.
 - 11(2)(b) Specimens situated in the territory of a Member State and covered by such documents shall be seized by the competent authorities of that Member State and may be confiscated'

WILDLIFE TRADE REGULATIONS

- *Sofia Zoo* (continued)
 - The ECJ stated that the competent authority of a Member State where specimens concerned are located must ascertain whether the import permit in question is valid for each specimen
 - The assessment of each specimen should not, however, necessarily influence its assessment of another specimen
 - Thus, the part of the import permit that related to the specimens affected by the ground of invalidity was severable from the other parts of the permit; the other parts remained valid
 - That is, an import permit that does not comply with the conditions laid down in the Basic Regulation must be considered void only in respect of the specimens actually affected by the ground of invalidity of the import permit

BIRDS DIRECTIVE

BIRDS DIRECTIVE

- Article 9 of the Birds Directive provides as follows
 1. Member States may derogate from the provisions of Articles 5 to 8, *where there is no other satisfactory solution*, for the following reasons:
 - 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*.

BIRDS DIRECTIVE

- Article 9 (continued)
 2. The derogations referred to in paragraph 1 must specify:
 - a. the species which are subject to the derogations;
 - b. the means, arrangements or methods authorised for capture or killing;
 - c. the conditions of risk and the circumstances of time and place under which such derogations may be granted;
 - d. the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;
 - e. the controls which will be carried out....' (emphasis added)

BIRDS DIRECTIVE

- Article 5 sets out measures to protect all species of naturally occurring wild birds in the EU including the prohibition of the following
 - Any method of deliberate killing or capture
 - Deliberate destruction of, or damage to, their nests and eggs or removal of their nests
 - Taking of eggs in the wild and keeping of eggs even if empty
 - Deliberate disturbance of birds, especially during the breeding and rearing periods
 - Keeping birds for which the hunting and capture are prohibited by the Directive

BIRDS DIRECTIVE

- Article 6 prohibits the sale, transport for sale, keeping and offering for sale, of live or dead birds and any readily recognisable part or derivatives of them except for
 - Bird species (game birds) listed in Annex III, Part A, provided that the birds have been legally killed or captured or otherwise legally acquired
 - Bird species (game birds) listed in Annex III, Part B, with certain restrictions, provided again that the birds have been legally killed or captured or otherwise legally acquired

BIRDS DIRECTIVE

- Article 7 sets out controls to be taken by Member States on hunting bird species listed in Annex II (species of birds that may be hunted if national legislation of the Member State concerned permits it) including ensuring that the hunting does not jeopardise conservation efforts in their distribution area, and that hunting, including falconry, complies with the principles of wise use and ecologically balanced controls
 - Restrictions include prohibitions during the most vulnerable times, that is, the return from migration to nesting areas for reproduction and raising of young birds
- Annex II species: core areas of their habitat are designated as sites of Community importance (SCIs) and included in the Natura 2000 network. These sites must be managed in accordance with the ecological needs of the species.

BIRDS DIRECTIVE

- Article 8 directs Member States to prohibit the use of all means of large scale or non-selective capture of or killing of birds, particularly those listed in Annex IV((a) (including snares and poisoned bait) and modes of transportation listed in Annex IV(b) (aircraft, motor vehicles, and boats driven above specified speeds)
- Annex IV lists species of birds that may be hunted sustainably; Member States must prohibit all forms of non-selective and large scale killing of birds, especially the methods listed in this annex (see above)

BIRDS DIRECTIVE

- *Commission v Belgium* (C-247/85, 1987)
 - The ECJ ruled that although article 9 authorises Member States to derogate from the general prohibitions and the provisions concerning marketing and hunting it 'must be applied appropriately in order to deal with precise requirements and specific situations'
 - Three conditions apply
 1. The Member State must restrict the derogation to cases in which there is no other satisfactory solution
 2. The derogation must be based on at least one of the reasons listed in article 9(1)(a), (b) and (c)
 3. The derogation must comply with the precise formal conditions set out in article 9(2), the intent of which is to limit derogations to strictly necessary situations and to enable the Commission to supervise them

BIRDS DIRECTIVE

- *Commission v Italy* (C-159/99, 2001)
 - Italian law that permitted the capture and keeping of three species of birds for the use of decoys had not been formally amended, with the result that there was an ambiguity that made compliance with the prohibition on the capture and keeping of the birds uncertain
 - The ECJ concluded that Italy had not fulfilled its obligations under the Birds Directive, stating that
 - ‘the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty ... mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty’

BIRDS DIRECTIVE

- *Ligue pour la protection des oiseaux v Premier ministre, Ministre de l'Aménagement du territoire et de l'Environnement (C-182/02, 2003)*
 - Challenge by three environmental NGOs to the interpretation of provisions of a French Decree that transposed article 9(1)(c) of the Birds Directive
 - Article 2 of the Decree permitted derogations from prohibitions on hunting outside the hunting periods set by administrative authorities and during certain vulnerable periods for small numbers of geese, wood pigeons and thrush
 - An order of the Minister responsible for hunting had established the conditions in which such uses may be authorised and the procedures for implementing the controls including the maximum number of birds, by species, which could be taken

BIRDS DIRECTIVE

- *Ligue pour la protection des oiseaux* (continued)
 - The ECJ stated that article 9(1)(c) permits a Member State to derogate from the opening and closing dates for hunting, and that hunting wild birds, their capture and sale with a view to keeping them for use as live decoys, or using them for recreational purposes, are judicious uses provided that
 - The provision refers to the fact that the derogation can be granted only if there is no other satisfactory solution, and if the derogation is for hunting, it is permitted only if there is no other satisfactory solution, it is carried out under strictly supervised conditions and on a selective basis, and it applies only to small numbers of specified birds

BIRDS DIRECTIVE

- *Ligue pour la protection des oiseaux* (continued)
 - The ECJ further stated that
 - Such a condition is not met if, among other things, its sole purpose is to extend hunting periods for certain species of birds in territories in which they are already frequent during the permitted hunting periods
 - The derogation must ensure the maintenance of the population of the species concerned at a satisfactory level

BIRDS DIRECTIVE

- *Commission v Italy* (C-164/09, 2010)
 - The ECJ held that a derogation that fixed the number of birds that could be hunted at a level that was clearly higher than the limit fixed by the Birds Directive infringed article 9(1)(c) because it did not define the temporal limits or the species and the numbers covered by the derogation
 - In addition, it did not show that the derogation was required because there was no other satisfactory solution

BIRDS DIRECTIVE

- *Commission v Malta* (C-76/08, 2009)
 - The Commission alleged that, between 2004 and 2007, Malta had authorised the spring hunting of quails and turtle doves during their return to their rearing grounds but had failed to meet the conditions of article 9 for the derogation
 - Quails and turtle doves are listed in Annex II to the Birds Directive; therefore Malta was obliged to comply with the requirements of article 7(4), in particular, the prohibition on hunting migratory birds ‘during their period of reproduction or during their return to their rearing grounds’
- Article 7(4) provides, in pertinent part, that Member States shall ensure that hunting complies with the ‘principles of wise use and ecologically balanced control of the species of birds concerned’ and that ‘[t]hey shall see in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction’

BIRDS DIRECTIVE

- *Commission v Malta* (continued)
 - The ECJ reiterated its holding in *Ligue pour la protection des oiseaux*, that a Member State fails to comply with article 9(1) if the hunting season under a derogation coincides, without need, with periods for which the Birds Directive provides particular protection to birds
 - In particular, such a need is not met if the sole purpose of the derogation is to extend the hunting seasons for certain birds in territories in which they were already frequent during the hunting seasons
 - Accordingly, if the species are present in autumn in areas open for spring hunting, there is no need to extend the spring hunting season even if the numbers are considerably smaller than those in the spring

BIRDS DIRECTIVE

- *Commission v Malta* (continued)
 - The ECJ concluded that it was apparent in this case that quails and turtle doves are present in certain areas of Malta during the autumn hunting season
 - Even if the areas visited by them in the autumn hunting season are more limited than areas visited by them during the spring migration, the former areas were not far from the latter
 - The ECJ further concluded that the phrase ‘satisfactory solution’ in article 9(1) is intended to permit derogations ‘only so far as necessary, where hunting opportunities during those periods, in the present case in the autumn, are so limited as to upset the balance sought by the Directive between the protection of species and certain leisure activities’

BIRDS DIRECTIVE

- *Commission v Malta* (continued)
 - The ECJ further stated that it was not proportionate to objectives set out in the Birds Directive for conserving species by extending the hunting season for quails and turtle doves for approximately two months in the spring when they were returning to their rearing grounds because this resulted in a mortality rate three times higher (about 15,000 birds killed) for quails and eight times higher (about 32,000 birds killed) for turtle doves than during the autumn hunting season

BIRDS DIRECTIVE

- *Commission v Malta (C-557/15, 2018)*
 - When Malta acceded to the EU in 2004, it agreed to phase out trapping for finches over a five year period ending in 2009
 - In 2014, however, Malta re-introduced the trapping of seven species of wild finches (Linnet, Goldfinch, Greenfinch, Hawfinch, Serin, Chaffinch and Siskin) by applying a derogation
 - The measures authorised the use of traditional nets, called clap-nets

BIRDS DIRECTIVE

- *Commission v Malta* (continued)
 - The ECJ stated that
 - Although the Maltese legislation that set out the criteria for derogation was clear and precise, declarations issued in 2014 and 2015 that authorised the autumn trapping of finches did not refer to the absence of another satisfactory solution, the technical, legal and scientific reports submitted to the Ornithological Committee (the committee set up to assist the Commission in the implementation of the Birds Directive), or recommendations based on those reports
 - The declarations did not, therefore, constitute decisions that contained a clear and sufficient statement of reasons concerning the absence of another satisfactory solution

BIRDS DIRECTIVE

- *Commission v Malta* (continued)
 - The ECJ concluded that
 - Malta had not adduced sufficient evidence that its derogation regime for trapping the seven species of finches made it possible to ensure that their populations would be maintained at a satisfactory level

BIRDS DIRECTIVE

- *Commission v Malta* (continued)
 - The ECJ further stated that
 - Recreational trapping of the finches was not a judicious use because the condition that trapping protected species must involve only certain birds in small numbers had not been met
 - Trapping the finches by non-selective nets did not meet the conditions for the derogation
 - The trapping was not carried out under strictly controlled conditions as shown by evidence that only 23% of hunters had been subject to individual checks compared with over 4,000 licence holders and over 6,400 registered trapping stations, as well as trapping inside Natura 2000 areas (that is, sites protected under the Birds and Habitats Directives)

HABITATS DIRECTIVE

HABITATS DIRECTIVE

- Article 12 of the Habitats Directive provides as follows
 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'
(emphasis added)
- Annex IV lists animal and plant species of Community interest in need of strict protection

HABITATS DIRECTIVE

- Article 12 (continued)
 2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.
 3. The prohibition referred to in paragraph 1(a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies
 4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned'

HABITATS DIRECTIVE

- Article 15

‘In respect of the capture or killing of species of wild fauna listed in Annex V(a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI(a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI(b)’

HABITATS DIRECTIVE

- Annex V: lists species for which Member States must ensure that their exploitation and taking in the wild is compatible with maintaining them in a favourable conservation status
- Annex VI: lists prohibited methods and means of capture and killing and modes of transport

HABITATS DIRECTIVE

- Article 16
 1. 'Provided that there *is no satisfactory alternative* and the derogation is not *detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):
 - a) in the interest of protecting wild fauna and flora and conserving natural habitats;
 - 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;

HABITATS DIRECTIVE

- Article 16 (continued)

(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' (emphasis added)

HABITATS DIRECTIVE

- *Commission v United Kingdom* (C-6/04, 2005)
 - UK legislation listed all prohibited means of capturing animals protected by the Habitats Directive that were then recorded in the UK, with an obligation to keep the lists under review so they could be updated if necessary
 - The European Commission argued that the UK had failed to comply with article 15 of the Habitats Directive because the UK legislation did not contain a general prohibition on the use of all indiscriminate means capable of causing the local disappearance of, or serious disturbance to, populations of seals
 - In particular, the UK legislation did not preclude the emergence of means of indiscriminate capture and killing that were are yet unknown

HABITATS DIRECTIVE

- *Commission v United Kingdom* (continued)
 - The ECJ stated that article 15 imposes a general obligation that is designed to prohibit the use of all indiscriminate means of capture or killing of species of wild fauna
 - By prohibiting only the methods expressly listed in Annex VI(a) and (b) of the Habitats Directive, the UK failed to comply with article 15 because such a list was less effective than a general prohibition, as was the possibility of updating that list

HABITATS DIRECTIVE

- *Commission v Greece* (C-103/00, 2002)
 - The loggerhead sea turtle (*Caretta caretta*), which is listed in annexes II and IV of the Habitats Directive, breeds during the period from May to August by leaving the sea at night and moving to the driest area of the beach; it then digs a hole between 40 and 60 centimetres and lays an average of 120 eggs in that hole
 - Two months later, the baby turtles emerge from the sand and head towards the sea; many die
 - The most important breeding ground for the turtle in the Mediterranean is Laganas Bay on the island of Zakynthos
 - The beaches at the bay were, however, used for tourism-related activities, including the erection of illegal buildings, the use of mopeds on the beaches and other activities that had a negative affect on the turtles

HABITATS DIRECTIVE

- *Commission v Greece* (continued)
 - The ECJ ruled that Greece had failed to adopt a legal framework that was capable of ensuring strict protection to the turtle against any deliberate disturbance during its breeding period and against any deterioration or destruction of its breeding site in breach of article 12
 - Activities including use of mopeds was a deliberate disturbance

HABITATS DIRECTIVE

- *Commission v Spain* (C-221/04, 2006)
 - The ECJ referred to *Commission v Greece* (C-103/00) on the meaning of 'deliberate' to state that
 - 'For the condition as to "deliberate" action in Article 12(1)(a) of the [Habitats 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'

HABITATS DIRECTIVE

- *Commission v Greece* (C-600/12, 2014)
 - The ECJ ruled that Greece had failed to fulfil its obligations under the Habitats Directive by keeping in operation an overfull landfill site on the Island of Zakynthos that was not functioning properly and that did not comply with EU legislation
 - The landfill had had a serious impact on the natural habitat of *Caretta caretta*

HABITATS DIRECTIVE

- *Commission v Greece* (C-505/14, 2016)
 - 2006: Commission placed the Dunes of Kyparissia on a list of Sites of Community Importance, particularly because the *Caretta caretta* turtle was present at the site
 - 2011: the European Commission complained that Greece had failed to comply with its obligations to protect the turtle in the Bay of Kyparissia because various building projects including the construction of residences and roads had a significant effect on the turtle and its habitat
 - The Commission also alleged that the subsequent use of the buildings would have a significant effect on the turtle's natural habitat, especially due to noise, light, human presence, the operation of restaurants, hotels, shops and bars, as well as wild camping during egg-laying and the hatching of young turtles

HABITATS DIRECTIVE

- *Commission v Greece* (continued)
 - The ECJ agreed with the Commission that Greece had breached article 12 by failing to stop the disturbance of the turtle caused by the lights from restaurants, hotels and shops and other activities around the Kyparissia area
 - The ECJ concluded that the condition concerning deliberate action in article 12(1)(b) of the Habitats Directive was met because the people who were responsible for the ‘disturbances at least accepted the possibility of the ... turtle being disturbed during the breeding period’

HABITATS DIRECTIVE

- *Commission v Finland* (C-342/05, 2007)
 - The case involved whether a derogation may be granted even though the protected species (wolves) are in an unfavourable conservation status
 - Finnish law permitted the hunting of wolves with a permit as a derogation to the Habitats Directive
 - In order to obtain a permit, an application had to be made to the competent game management district stating the reasons for the application, the area to which it applied, and the number of wolves concerned
 - The district then determined whether the hunting would impede the maintenance of wolves at a favourable conservation level, whether another satisfactory solution was possible, and whether the conditions for a derogation under article 16(1) of the Habitats Directive had been satisfied

HABITATS DIRECTIVE

- *Commission v Finland* (continued)
 - In addition, the Ministry of Agriculture and Forestry established the maximum number of wolves that could be hunted in each district during the hunting season from 1 November until 31 March
 - The limits were set to ensure that the wolf population was not threatened in those districts, taking into account among other things, wolf mortality from road accidents and human activities

HABITATS DIRECTIVE

- *Commission v Finland* (continued)
 - As indicated above, article 16(1) of the Habitats Directive provides that derogations may be granted only if the populations of the species concerned are in a favourable conservation status in their natural range and there is no satisfactory alternative
 - Article 16(1)(b) sets out a derogation ‘to prevent serious damage, in particular to ... livestock ... and other types of property’
 - The Commission argued that shooting wolves that had not been specifically identified as causing serious damage was not permitted under article 16(1)(b)

HABITATS DIRECTIVE

- *Commission v Finland* (continued)
 - In its review of the administrative framework, the ECJ examined two situations in which the authorities had permitted the hunting of a fixed number of wolves in a well defined geographical area but for which they had not
 - Relied on an assessment of the conservation status of the species
 - Provided a clear and sufficient statement of reasons concerning the absence of a satisfactory alternative
 - Specifically identified the wolves that were causing serious damage and, thus, which could be killed

HABITATS DIRECTIVE

- *Commission v Finland* (continued)
 - The ECJ approved the Ministry of Agriculture and Forestry's policy provided it complied with article 16(1)(b)
 - Further, the ECJ noted that the Habitats Directive does not require serious damage to be sustained before derogating measures can be adopted

HABITATS DIRECTIVE

- *Commission v Finland* (continued)
 - The Court also stated that the Finnish Government had admitted that, as wolves generally live in packs, hunting permits could not always target the specimen(s) that cause serious damage
 - The Court concluded however that by authorising wolf hunting on a preventive basis, without establishing whether the hunting would prevent serious damage within the meaning of article 16(1)(b) of the Habitats Directive, Finland had failed to fulfil its obligations under articles 12(1) and 16(1)(b) of that Directive
 - The derogations must not worsen the unfavourable conservation status of the affected populations of wolves or prevent their restoration to favourable conservation status