

**19th INTERNATIONAL
WILDLIFE LAW CONFERENCE**

(IWLC-19)

3-4 June 2019

Barcelona (Spain)

Presentation:

*“The effectiveness of wildlife protection in EU Law:
derogations and exceptions
under the birds and habitats directives”*

Dr. Angel M. Moreno,
Prof. of environmental Law
Carlos III University of Madrid
angelmanuel.moreno@uc3m.es

1.- INTRODUCTION: WILDLIFE PROTECTION AND NATURE PROTECTION: INTERACTIONS

2.- MAIN EU LEGAL RULES FOR THE PROTECTION OF NATURE/WILDLIFE

2.1.- The “wild birds” directive (WBD):

- Directive 79/409, on the conservation of wild birds
- Directive 2009/147 (codified version)

2.2.- The “habitats directive” (HD, 1992):

- Directive 92/43/ECC, on the conservation of natural habitats and of wild fauna and flora

2.3.- Basic content

- Setting up an ambitious and comprehensive system of wildlife protection
- Designation of “natural areas”
- Conservation of NA
- Improvement of NA
- Protection of wild species of flora and fauna
- Not disturbances
- Natura 2000

2.4.- Obligations of the MS vis-à-vis those rules

2.4.1.- Transposition

2.4.2.- Implementation

2.4.3.- Enforcement

2.4.4.- Long-standing and fertile case-law of the EJC:

- Ruling of the ECJ of 25.11.1999, *Commission v. France* (Case C-96/98) (*Marais de Poitevin*)
- Ruling of the ECJ of 30.1.2002, *Commission v. Hellenic Republic* (case C-103/00) (*Wild turtles case*)
- Ruling of the ECJ 30.1.2002, *Commission v. Greece*, (case C-103/00) (*Turtle Caretta*)
- Ruling of the ECJ 29.1.2004, *Commission v. Austria* (C-209/02) (*Crex, crex*)
- Ruling of the ECJ 9.12.2004, *Commission v. Spain* (C-79/03): Hunting with lime (*parany*)

- Ruling of the ECJ 9.6.2005, *Commission v. Spain* (C-135/04) (*pigeon hunting*)

3.- THE STANDARD OF PROTECTION OF THE EU RULES

3.1.- Absolute or relative standard?

3.2.- Protection open to “exceptions” and “derogations”

3.2.1.- “Derogations” under art. 9 WBD

3.2.2.- “Derogations” under art. 16 HD

3.2.3.- “Exceptional” permits in protected areas under art. 6.3-6.4 HD

- MS may authorise practices, activities or even economic or infrastructure “projects” within or in the vicinity of those protected areas
- Those projects may jeopardise the standard of protection for wildlife species in those areas
- Only possible for “*imperative reasons of overriding public interest*”: Case-law of the ECJ (*Commission v. Germany, Leybucht Bay*, etc)

3.2.5.- Who grants them

- The MS authorities
- Under the control of the Commission

3.2.6.- The question of the necessary compensation

3.2.7.- Spanish legislation: art. 45, Spanish Act of Biodiversity 42/2007

3.3.- Legal controversy: a flexibility mechanism?

4.- LEGAL QUESTIONS STEMMING FROM THIS “FLEXIBILITY” MECHANISM

4.1.- How flexible can it be? What interests or governmental objectives may be taken into consideration?

4.2.- Is the legal regime of derogations and exceptions sufficiently clear and restrictive so as to avoid extensive interpretations and practices by the MS?

4.3.- How have these derogations and exceptions been implemented by the several MS?

4.4.- The role of courts in controlling those governmental decisions

- National courts
- EU Courts
 - General Court
 - Cour of Justice: *Commission v. Finland* (C-342/05, wolf hunting)
- Access to justice questions

4.5.- The role of the Commission and of NGOs in ensuring the right application of such exemptions

4.6.- The practice so far:

- *Composite European Commission report on derogations in 2007-2008 according to art. 16 of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the habitats directive)*, July 2011.
- The Case of Spain: number and types of derogations under art. 16 HD

4.7.- Some interesting recent case-law on art. 6.4 HD:

- ECJ Ruling of 7.11.2018, *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu vs. College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland* (case C-293 and C-294/17)
 - The concept of “project”

- The concept of “adequate assessment”
- Comments

5.- CONCLUSIONS: A BALANCE

1.- Is there a real danger of a serious loophole in the whole system of wildlife protection in the Union?

2.- How effective the whole system is, in view of the exceptions?