

CONSUMER, HEALTH & ENVIRONMENT

APRIL 1, 2026

Op-Ed: “Projects Significantly Disturbing Wild Birds: Mitigating the Prohibition Through Preventive Measures: VIRUS (C-131/24)”

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Wild birds are sensitive to environmental and climate change. Indeed, many species are declining sharply in number. According to the European Environmental Agency, between 1990 and 2023, common farmland birds decreased by 15%, while common forest birds decreased by 4.5%. Caused by increasing anthropogenic pressures, this major decline represents a serious threat to the conservation of the natural environment. Could Noah’s ark avoid being capsized, thanks to secondary law, in particular the Birds and Habitats Directives?

The Birds Directive ([2009/147/EC](#)) lays down several prohibitions that apply regardless of the possible location of the bird species. It prohibits the deliberate killing or capture of European bird species, as well as the deliberate destruction, or damage to, their nests and eggs (Articles 5(a) to (c)). In addition, it prohibits the deliberate disturbance of birds, particularly during the period of breeding and rearing. In contrast to the prohibition of killing, capture, and deliberate destruction, the deliberate disturbance is prohibited insofar as the ‘disturbance would be significant having regard to the objectives of that Directive’ (Article 5(d)). In other words, Article 5(d) prohibits only significant disturbances, having regard to the objectives of that Directive.

In *VIRUS (C-131/24)*, the dispute which gave rise to the Court’s judgment related to a road construction project in Austria, the question arose as to whether the disturbances caused by the infrastructure fell within the scope of Article 5(d), even in the case where its subsequent

effects on the habitat of birds (corncrake, middle-spotted woodpecker, skylark) were diminished by an improvement of their habitats.

The answer to this question is important, as it determines whether Article 5(d) prohibition applies or is excluded. The Austrian authorities and the project applicant argued that where preventive measures prevent a project from disturbing birds, the prohibition on disturbance laid down in Article 5(d) is not applicable on the ground that there is no disturbance. Likewise, where those measures succeed in reducing the disturbance, it is possible that the disturbance may not be significant having regard to the objectives of the Birds Directive ([Advocate General's Opinion](#), point 34).

Given that Article 5(d) does not expressly provide for the implementation of preventive measures to be considered in the environmental assessment, the Court of Justice had to strike a delicate balance between the Directive's protective objective and the mitigation of the negative impacts of projects that hinder bird habitats. Four separated, albeit related, issues must be distinguished.

First, in line with a previous case (*Voore Mets* ([C-784/23](#))), the Court stresses that the term 'deliberate' in Article 5 does not only cover human activities with the purpose to harm (kill/damage/disturb), but also those measures for which the possibility of such harm is not intended ('indirect harm'). Accordingly, although not intended to harm birds, a road construction project may fall within the scope of Article 5(d) (para. 39).

Secondly, given that the Directive aims at maintaining or restoring to a sufficient level the population of all species of wild birds (Article 2), the Court of Justice takes the view that the disturbance to be assessed by the project applicant relates to the population of bird species, and not to specimens. Considering exclusively the impact of the project on the 'population' rather than on individual specimens has the effect of narrowing the scope of Article 5(d). In effect, a project is less likely to negatively affect the population of a species than the individual specimens on or near the site. However, the Court of Justice does not define the concept of 'population,' which is highly variable. Many wild bird species in Europe have extremely broad distributions, often spanning several bioregions of the Palearctic. Should local populations,

the population within the concerned Member State, the various populations across the EU, or the species' entire range—potentially extending far beyond EU territory—be considered? **This, of course, raises highly complex taxonomic questions.**

Given that the populations of many species are dwindling due to the intensification and fragmentation of their habitats, the question arises as to whether the impacts of the disturbance on the specimens, rather than on the population, should be assessed in their own right. The Court of Justice held that where 'the population of a given wild bird species is numerically reduced to such an extent that the disturbance of isolated specimens of that species is such as to jeopardise its conservation,' the assessment must take into consideration the specimens (para. 41). This reasoning must be approved. Indeed, in many Member States, a significant number of bird species (notably raptors, bustards, gallinaceous, and rails) number only a few hundred or even a few dozen individuals. As a result, the loss of even a few specimens due to disturbance could have catastrophic consequences for the population.

Third, the prohibition applies only if the disturbance is significant—a very flexible legal standard. By way of illustration, whilst many wader species are significantly affected by poorly regulated hunting, the conservation status of woodpecker species is not affected by hunting. Endorsing a textual and a contextual interpretation of Article 5(d), the Court held that 'if appropriate preventive measures effectively prevent a project from disturbing wild birds or are effectively capable of reducing that disturbance such that it does not have significant effects on the objectives of the Birds Directive,' that provision is not applicable. In other words, the existence of preventive measures, the implementation of which is provided for by the project, must therefore be taken into consideration in assessing whether the prohibition on disturbance of wild birds laid down in Article 5(d) of the Birds Directive precludes the project (para. 44). The preventive measures must thus be understood as a component of the regulatory structure of Article 5(d) of the Birds Directive.

The question arose as to the nature and the effects of the preventive measures considered by the project applicant. Anyone trying to abstract the quintessential nature of prevention is likely to quickly

become lost in the maze of legal mechanisms that this notion gives rise to. By way of illustration, regarding road works, there are numerous preventive measures, such as: work bans during the breeding season, reductions in noise or visual disturbances, speed limits, or buffer areas. In her Opinion, Advocate General Kokott addressed the possibility for the applicant to invoke compensatory measures (habitat restoration, breeding programs, etc.) with a view to maintaining the populations of the affected bird species at a satisfactory level. However, Article 5(d) of the Birds Directive does not provide for compensatory measures to be taken into account (Opinion, para. 44). In addition, these measures have no impact on the disturbance caused by the road infrastructure. Accordingly, the Court of Justice deals only with the effects of preventive measures and, consequently, does not rule on the issue of compensatory measures.

Fourthly, from a procedural point of view, the approach to be adopted regarding the disturbance of wild birds is distinct from that applicable to the appropriate assessment of plans and projects on habitats under the Habitats Directive ([92/43/EEC](#)). This requires a word of explanation. Whereas under Article 6(3) of the Habitats Directive compensatory measures cannot be considered in the course of the screening of a plan or project in order to determine the need for a formal assessment of its implications for protected sites (*People Over Wind*, [C-323/17](#), Article 5(d) does not preclude that the disturbing effects of a project on wild bird species be assessed independently of the accompanying measures. It cannot be applied by analogy (para. 46).

Last but not least, a particular point of contention was the effectiveness of measures proposed by the project applicant for improving the forest habitats. The question arose as to how the effectiveness of improvement measures should be assessed before being implemented. This can be a tall order given that the 'restoration of a satisfactory population level' may be compromised by numerous anthropogenic factors (poaching, air or water pollution, noise, etc.), as well as biological (species' resilience or adaptability) and ecological factors (food availability, shelters, climatic events), which could be either favourable or unfavourable. As a matter of course, it is difficult to assess the various factors at play over both the medium and long term.

For migratory wild birds, several years are often necessary to properly assess population trends. Uncertainty thus remains significant.

Given that Article 5 does not specify the evidence that the applicant should provide, the principle of procedural autonomy of the Member States applies to these evidential matters. In the case of the prohibition on disturbance, the principle of effectiveness means that it must not be made unreasonably difficult to prove the existence of significant effects on the objectives of the Birds Directive (Opinion, para. 88; judgment, para. 53). Furthermore, pursuant to the principle of sound administration, the administrative authorities are called on to 'conduct a diligent and impartial examination of all the relevant matters' and they must have at their disposal the most complete and reliable information possible (judgment, para. 55). In accordance with the precautionary principle, the environmental risk assessment, must 'take account of the most reliable scientific data available and the most recent results of international research (para. 57). However, the Court of Justice categorically rejects the idea that the scientific evidence gathered by the expert proves the effectiveness of the preventive measures envisaged.

In conclusion, the licensing authority must be able to demonstrate, by means of sound scientific evidence, that the preventive measures proposed by the project's applicant will enable the population of the wild bird species affected by the project to be maintained at a satisfactory level.

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