

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

28 October 2021 (*)

(Reference for a preliminary ruling – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 12(1) – System of strict protection for animal species – Annex IV(a) – European hamster (*Cricetus cricetus*) – Resting places and breeding sites – Deterioration or destruction)

In Case C-357/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria), made by decision of 10 July 2020, received at the Court on 31 July 2020, in the proceedings

IE

v

Magistrat der Stadt Wien,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the First Chamber, acting as President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Czech Government, by M. Smolek, J. Vláčil and L. Dvořáková, acting as Agents,
- the European Commission, by C. Hermes and M. Noll-Ehlers, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 12(1)(d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, ‘the Habitats Directive’).
- 2 The request has been made in proceedings between IE, an employee of a property developer, and Magistrat der Stadt Wien (City Council of Vienna, Austria) concerning the adoption by the latter of an

administrative decision imposing on IE a fine in respect of a criminal offence and, in the event that that fine is not paid, a custodial sentence for having caused, in the course of building works, the deterioration or destruction of resting places or breeding sites of the European hamster (*Cricetus cricetus*), which is on the list of protected animal species set out in Annex IV(a) to the Habitats Directive. That dispute has previously given rise to a request for a preliminary ruling, on which the Court ruled in the judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)* (C-477/19, EU:C:2020:517).

Legal context

EU law

3 Article 2 of the Habitats Directive provides:

‘1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the [FEU] Treaty applies.

2. 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 [interest for the European Union].

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

4 Article 12(1) of that directive 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.’

5 The animal species ‘of [interest for the European Union] in need of strict protection’, which are listed in Annex IV(a) to that directive, include, inter alia, the European hamster (*Cricetus cricetus*).

Austrian law

6 The Wiener Naturschutzgesetz (Law on Nature Conservation of the Province of Vienna) of 31 August 1998 (LGBl. für Wien, 45/1998), in the version in force at the material time (‘the WNSchG’), transposes the Habitats Directive into national law for the region of Vienna (Austria).

7 Paragraph 10(3)(4) of the WNSchG reproduces the wording of Article 12(1)(d) of that directive. It provides, inter alia, that the deterioration or destruction of breeding sites or resting places of strictly protected animals is prohibited.

8 The penalties laid down for infringement of Paragraph 10(3)(4) of the WNSchG are set out in Paragraph 49(1)(5) thereof. According to that provision, any person who, in breach of Paragraph 10(3)(4) of the WNSchG, causes the deterioration or destruction of breeding sites or resting places of strictly protected animals is liable to a fine of up to EUR 21 000 or, if that fine is not paid, to a custodial sentence

of up to four weeks and, if the infringement is repeated, to a fine of up to EUR 35 000 or, if that fine is not paid, to a custodial sentence of up to six weeks.

- 9 According to Paragraph 22(5) of the WNSchG, the competent authority may permit isolated cases of interference if the proposed measure, either individually or in combination with other measures that the competent authority is asked to grant, does not significantly undermine the objective of providing protection.
- 10 The annex to the Wiener Naturschutzverordnung (Order on Nature Conservation of the Province of Vienna) defines the European hamster (*Cricetus cricetus*) as a strictly protected animal species.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 11 A property developer, which employs IE, instigated work for the construction of a building on land where the European hamster (*Cricetus cricetus*) had settled. The owner of the land, who was aware of that fact, informed the property developer of the situation, which appointed an environmental expert before work commenced. The expert drew up a map of the entrances to the European hamster (*Cricetus cricetus*) burrows and determined, in a specific area, whether the burrows were occupied.
- 12 Before the building work was carried out, the property developer had the topsoil removed, the construction site cleared, a construction site access road laid and a carpark built in the immediate vicinity of the entrances to the European hamster (*Cricetus cricetus*) burrows ('the harmful measures'). In particular, the purpose of removing the topsoil was to cause the European hamster (*Cricetus cricetus*), 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 that animal species. However, prior authorisation for the harmful measures had not been sought from the competent authority and therefore had not been obtained before the work commenced. Moreover, at least two of the burrow entrances were destroyed.
- 13 The City Council of Vienna therefore took the view that IE, as an employee of the property developer, was responsible for the deterioration or destruction of resting places or breeding sites of the European hamster (*Cricetus cricetus*) and, pursuant to Paragraph 10(3)(4) of the WNSchG, imposed on him a fine, which, if not paid, was liable to be converted to a custodial sentence.
- 14 IE brought an action before the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) challenging the imposition of the fine on the grounds that the burrows of the European hamster (*Cricetus cricetus*) were not inhabited when the harmful measures were implemented and that, moreover, those measures did not lead to the deterioration or destruction of resting places or breeding sites of that animal species.
- 15 In that context, that court, by a first request for a preliminary ruling, dated 12 June 2019, referred to the Court a series of questions concerning the interpretation of Article 12(1)(d) of the Habitats Directive, in order to obtain clarification as to what the concepts of 'resting place', 'breeding site', 'deterioration' and 'destruction', within the meaning of that provision, entailed. By judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)* (C-477/19, EU:C:2020:517), the Court answered the first of those questions by ruling that that provision must be interpreted as meaning that the term 'resting places' also includes resting places which are no longer occupied by the European hamster (*Cricetus cricetus*) where there is a sufficiently high probability that that species will return to those resting places, which it was for the referring court to verify. In addition, by that judgment, the Court declared the other questions inadmissible on account of the inadequacies of the request for a preliminary ruling in the definition of the factual and national legal context concerned and the lack of any explanation for the precise reasons why the interpretation of EU law sought was necessary for the referring court for the purposes of resolving the dispute in the main proceedings.

- 16 It is in that context that the referring court refers a new request for a preliminary ruling to the Court of Justice, setting out a more detailed account of the facts and stating that the ‘deterioration of a resting place’, the ‘destruction of a resting place’, the ‘deterioration of a breeding site’ and the ‘destruction of a breeding site’ constitute, under national legislation, four separate offences which must be punished independently. It therefore considers it necessary, in order to resolve the dispute in the main proceedings, to determine the scope, in both place and time, of the concept of ‘breeding site’ and the criteria for distinguishing between ‘deterioration’ and ‘destruction’ of a breeding site and/or a resting place.
- 17 In particular, the referring court seeks to ascertain whether the protection afforded by Article 12(1)(d) of the Habitats Directive extends only to the actual occupation of the burrows of the European hamster (*Cricetus cricetus*) or whether it also extends to the surroundings of those burrows. Furthermore, in view of the differences between the opinion of the private expert appointed by IE and that of the experts appointed by the City Council of Vienna, that court deems it necessary to clarify the question whether only the actual and specific period of occupation of the burrows by the European hamster (*Cricetus cricetus*) and of the development of the offspring of that animal species must be taken into account for the purposes of temporally defining a site as a breeding site or whether it is also necessary to take account of the period of pregnancy and rearing of that species.
- 18 In those circumstances, the Verwaltungsgericht Wien (Administrative Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) How is the term “breeding site” within the meaning of Article [12(1)(d)] of the [Habitats Directive] to be understood, and how is a “breeding site” to be differentiated spatially from other locations?
 - (2) Which factors determine whether, and, if so, for how long, the existence of a breeding site is limited in time?
 - (3) Which factors determine whether deterioration or destruction of a breeding site has been caused by a particular act or omission?
 - (4) Which factors determine whether a “resting place” within the meaning of Article [12(1)(d)] of the [Habitats Directive] has been caused to deteriorate or to be destroyed?’

Consideration of the questions referred

The first question

- 19 By its first question, the referring court asks, in essence, whether Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the term ‘breeding site’, referred to in that provision, covers only the burrows of the European hamster (*Cricetus cricetus*) or whether it also extends to the surroundings of the entrances to the burrows of that protected animal species.
- 20 According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)*, C-477/19, EU:C:2020:517, paragraph 23 and the case-law cited).
- 21 First of all, it must be noted that, under the very wording of Article 12(1)(d) of the Habitats Directive, Member States are required to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting deterioration or destruction of breeding sites or resting places.
- 22 However, the wording of that provision does not, as such, make it possible to determine whether the protection offered by that provision to the breeding sites of a protected animal species also extends to the

surroundings of those sites.

- 23 Secondly, as regards the context of which Article 12(1)(d) of the Habitats Directive forms part, although the Habitats Directive does not contain a definition of the term ‘breeding site’, the Court has noted that the prohibition laid down in that provision does not relate to animal species directly, but seeks to protect significant parts of their habitat (judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)*, C-477/19, EU:C:2020:517, paragraph 28).
- 24 It follows that the aim of the strict protection offered by Article 12(1)(d) of the Habitats 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, reproducing in those habitats (see, by analogy, judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)*, C-477/19, EU:C:2020:517, paragraph 29).
- 25 It should be noted that an interpretation of the term ‘breeding site’ in Article 12(1)(d) of the Habitats Directive, as advocated by the applicant in the main proceedings, which seeks to limit the scope of that concept to only the burrows of the European hamster (*Cricetus cricetus*), is liable to exclude from that protection areas necessary for the reproduction and birth of the offspring of that protected animal species, which areas may be located in the vicinity of those burrows. Such an interpretation would not ensure that significant parts of the habitat of that animal species are preserved in such a way as to enable it to benefit from the conditions required for, inter alia, reproduction.
- 26 In that regard, in the guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007), the Commission states that Article 12(1)(d) of the Habitats Directive is to be understood as aiming to safeguard the ecological functionality of breeding sites and, moreover, that those sites may include the areas required for courtship, mating, nest construction or selection of egg-laying or parturition site, the place of egg development and egg hatching, and the nest or parturition site when occupied by young dependent on that site.
- 27 Thus, it is apparent from the context of which Article 12(1)(d) of the Habitats Directive forms part that the concept of ‘breeding site’ must be understood as referring to all the areas necessary for the animal species concerned to reproduce successfully, including the surroundings of the breeding site, that interpretation being also supported by the objectives of that directive.
- 28 Thirdly, it should be noted, as the Court pointed out in paragraph 18 of its judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)* (C-477/19, EU:C:2020:517), that, according to Article 2(1) of the Habitats Directive, ‘the aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States’. Further, under Article 2(2) and (3) of that directive, the measures taken pursuant thereto are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of interest for the European Union, and are to take account of economic, social and cultural requirements and regional and local characteristics.
- 29 Moreover, the Habitats Directive seeks to provide strict protection for animal species, in particular by means of the prohibitions laid down in Article 12(1) thereof, so that the system of protection laid down in that provision must be capable of actually preventing damage to the habitat of protected animal species (see, to that effect, judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)*, C-477/19, EU:C:2020:517, paragraph 20 and the case-law cited).
- 30 Therefore, the protection of the breeding sites of a protected animal species, provided for in Article 12(1)(d) of the Habitats Directive, must make it possible to ensure that those sites contribute to the maintenance or restoration of a favourable conservation status of that animal species, in the sense that that protection ensures the continued ecological functionality of the sites.
- 31 It would not be compatible with that objective to deprive the surroundings of the breeding sites of a protected animal species of protection as those surroundings may prove necessary to enable that animal

species to reproduce successfully.

32 In the present case, it is not disputed that the harmful measures consisted of the removal of the topsoil from the surroundings of the entrances to the European hamster (*Cricetus cricetus*) burrows, the clearance of the construction site, the laying of a construction site access road and the construction of a car park in the immediate vicinity of the entrances to the burrows.

33 In those circumstances, and as is apparent both from the context of Article 12(1)(d) of the Habitats Directive and from its objectives, it must be held that the protection of a protected animal species' breeding site, as required by that provision, would be deprived of practical effect if human activities carried out in the vicinity of that site had the aim or effect of that animal species no longer frequenting the breeding site concerned, which it is for the referring court to determine.

34 In the light of the foregoing, the answer to the first question is that Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the term 'breeding site', referred to in that provision, also includes the surroundings of that site where those surroundings are necessary for the protected animal species listed in Annex IV(a) to that directive, such as the European hamster (*Cricetus cricetus*), to reproduce successfully.

The second question

35 By its second question, the referring court asks, in essence, whether Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the protection of the breeding sites of a protected animal species provided by that provision is limited in time.

36 It is apparent from the documents before the Court that the referring court seeks, more specifically, to ascertain whether that protection covers only the actual and specific period of occupation of the burrows by the European hamster (*Cricetus cricetus*) and of the development of the offspring of that protected animal species, or whether it also applies to the entirety of the gestation period and of the possible rearing period of that species.

37 In order to answer that question, it should be noted that the Court was called upon, in the judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)* (C-477/19, EU:C:2020:517), to clarify the scope of the term 'resting place' within the meaning of Article 12(1)(d) of the Habitats Directive. It thus adopted, following a literal, systematic and teleological interpretation of that provision, a broad interpretation of the temporal scope of that concept, entailing that the protection of resting places of the animal species concerned also covers resting places which are no longer occupied by that animal species where there is a sufficiently high probability that that animal species will return to those resting places.

38 In the light of the considerations set out in paragraphs 24, 29 and 30 of the present judgment concerning the strict protection offered by Article 12(1)(d) of the Habitats Directive, that broad interpretation must also be adopted as regards the temporal scope of the protection of breeding sites, to which that provision refers.

39 It follows that, in order to ensure the strict protection provided by that provision, the breeding sites of a protected animal species must enjoy protection for as long as is necessary in order for that animal species to reproduce successfully, so that that protection also extends to breeding sites which are no longer occupied, where there is a sufficiently high probability that that animal species will return to those sites, which it is for the referring court to determine.

40 That conclusion is, moreover, supported by the guidance document, referred to in paragraph 26 above, in which the Commission states that breeding sites are crucial for the life cycle of a protected animal species and constitute very significant parts of its entire habitat necessary for its survival, so that they must be protected even when not occupied, where there is a high probability that the animal species concerned will return to those sites.

- 41 Accordingly, it must be held that Article 12(1)(d) of the Habitats Directive cannot be interpreted as meaning that the protection of the breeding sites of a protected animal species, for which that provision provides, is limited to the actual and specific period of occupation or to the gestation period and possible rearing period of that animal species.
- 42 For the purposes of implementing the protection scheme laid down in that provision, it will therefore be for the referring court to examine, in particular, with a view to safeguarding the ecological functionality of the breeding sites of the European hamster (*Cricetus cricetus*), whether there is a sufficiently high probability that, outside the periods mentioned in the previous paragraph, that protected animal species will return to those sites in order to reproduce there.
- 43 In the light of the foregoing, the answer to the second question is that Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the breeding sites of a protected animal species must enjoy protection for as long as is necessary in order for that animal species successfully to reproduce, as a result of which that protection also extends to breeding sites which are no longer occupied where there is a sufficiently high probability that that animal species will return to those sites.

The third and fourth questions

- 44 By its third and fourth questions, which it is appropriate to consider together, the referring court raises questions concerning, in essence, the interpretation of the terms ‘deterioration’ and ‘destruction’ for the purposes of Article 12(1)(d) of the Habitats Directive.
- 45 In particular, the referring court seeks to determine whether the harmful measures constitute a ‘deterioration’ or ‘destruction’ of a breeding site and/or a resting place, within the meaning of that provision.
- 46 In that regard, it should be noted that the Habitats Directive does not contain a definition of those concepts, which must therefore must be interpreted in accordance with the usual meaning of their words in everyday language, whilst also taking into account the legislative context in which they occur and the purposes of the rules of which they are part (see, to that effect, judgment of 1 October 2020, *Staatssecretaris van Financiën (Reduced rate of VAT for aphrodisiacs)*, C-331/19, EU:C:2020:786, paragraph 24 and the case-law cited).
- 47 As regards, first of all, the usual meaning in everyday language of the terms ‘deterioration’ and ‘destruction’, it should be noted that those words refer, respectively, to the action of getting or making worse, including the action of weakening gradually, and the action of demolition.
- 48 As regards, next, the context of which Article 12(1)(d) of the Habitats Directive forms part, it is apparent from the Commission guidance document, referred to in paragraph 26 of the present judgment, that deterioration may be defined as a physical degradation affecting a habitat, a breeding site or a resting place which, unlike destruction, may occur slowly and gradually reduce the ecological functionality of the site or place concerned, so that such deterioration may not immediately lead to a loss of functionality, but would affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss.
- 49 In addition, it should be noted that the prohibition of acts causing the deterioration or destruction of breeding sites or resting places laid down in that provision is not restricted to deliberate acts, contrary to what is provided for in respect of the acts referred to in Article 12(1)(a) to (c) of that directive (see, to that effect, judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)*, C-477/19, EU:C:2020:517, paragraph 27 and the case-law cited).
- 50 Finally, as regards the objective pursued by the Habitats Directive, it must also be borne in mind that, as stated in paragraph 29 of the present judgment, that objective is to ensure strict protection for animal species, by means, in particular, of the prohibitions laid down in Article 12(1).

- 51 In view of that system of strict protection, it must be held that the degree of harm to the ecological functionality of the breeding site or resting place, whether intentional or not, is the decisive criterion for establishing a distinction between, on the one hand, an act causing a deterioration of that breeding site or that resting place and, on the other, an act causing its destruction.
- 52 It is necessary, in particular, to ensure that breeding sites and resting places of a protected animal species are not damaged or destroyed by human activity, so that they may continue to provide the necessary conditions for that animal species to be able to rest or to reproduce there successfully. Such an assessment must take account of the ecological requirements specific to each animal species concerned, to which the individual in question belongs, and of the situation at individual level of the members of that animal species occupying the breeding site or resting place concerned.
- 53 In the present case, for the purposes of applying Article 12(1)(d) of the Habitats Directive, it will be for the referring court to examine whether the harmful measures were such as to reduce progressively or to eliminate completely the ecological functionality of those habitats.
- 54 In the light of the foregoing, the answer to the third and fourth questions is that Article 12(1)(d) of the Habitats Directive must be interpreted as meaning that the concepts of ‘deterioration’ and ‘destruction’, referred to in that provision, must be interpreted as meaning, respectively, the progressive reduction of the ecological functionality of a breeding site or resting place of a protected animal species and the total loss of that functionality, irrespective of whether or not such harm is intentional.

Costs

- 55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 12(1)(d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that the term ‘breeding site’, referred to in that provision, also includes the surroundings of that site where those surroundings are necessary for the protected animal species listed in Annex IV(a) to that directive, such as the European hamster (*Cricetus cricetus*), to reproduce successfully.**
2. **Article 12(1)(d) of Directive 92/43 must be interpreted as meaning that the breeding sites of a protected animal species must enjoy protection for as long as is necessary in order for that animal species successfully to reproduce, as a result of which that protection also extends to breeding sites which are no longer occupied where there is a sufficiently high probability that that animal species will return to those sites.**
3. **Article 12(1)(d) of Directive 92/43 must be interpreted as meaning that the concepts of ‘deterioration’ and ‘destruction’, referred to in that provision, must be interpreted as meaning, respectively, the progressive reduction of the ecological functionality of a breeding site or resting place of a protected animal species and the total loss of that functionality, irrespective of whether or not such harm is intentional.**

[Signatures]

* Language of the case: German.