



Eurasian Sparrowhawk



License to kill

How EU Member States
abuse their power
to grant licenses
to kill millions of birds

NOVEMBER 2020



Derogations under the Birds Directive

The EU Birds Directive¹ aims to conserve wild birds including by protecting them, their eggs and their nests. It does this by regulating hunting and prohibiting non-selective and large-scale methods of killing. But it also foresees exceptions to these regulations, called derogations. In theory this is to prevent harm to people by birds and to allow for research and conservation.

This system of exceptions, derogations, is longstanding. It has evolved through rulings by the European Court of Justice (ECJ). This study looked at derogations reported between 2009 and 2017, under the HABIDES reporting tool, which was put in place to facilitate Member State reporting obligations.

The numbers are quite staggering. From 2009 to 2017 alone, Member States granted more than 84,000 derogations under the Birds Directive. More than 14 million birds were killed as a result. This level of killing is so extensive that, for example, it is likely to have had significant impact on the EU populations of a species like the Great Cormorant. Indeed, impacts on other species cannot be ruled out either.

Just as serious, these numbers are also likely to be a huge underestimate, as we have uncovered persistent problems with reporting, including with Member States sending no or incomplete reports.

Why does looking at how Member States report their derogations matter?

Because a derogation is an exception made to allow for special circumstances, when those exceptions are not properly documented and recorded, proper compliance and enforcement for violations becomes impossible. This cavalier approach to documentation makes a mockery of the rule of law and also of law-abiding citizens.

In the face of the well-documented collapse of biodiversity, effective policies and laws as a response must be enforced if this catastrophic trend is to be reversed. Good will and intentions fail as public policy.

¹ Our study covers the derogations system of the Bern Convention and the African-Eurasian Migratory Waterbird Agreement (AEWA). This briefing, however, will focus on the Birds Directive, the derogation reporting system put in place to respond to its requirements, and our recommendations to strengthen its implementation.



Our study

We reviewed ECJ rulings on the EU Birds Directive, and analysed all derogations in the European Commission's HABIDES system. We also carried out an in-depth analysis of the practice of derogations in 8 EU Member States: they are Bulgaria, Finland, France, Ireland, Italy, Malta, Poland and Spain.

Review of some rulings of the ECJ on derogations

As we noted, derogations to the rules of the Birds Directive must cover very specific situations: be limited in time and space, and should also be limited to what is strictly necessary.

Three conditions must be met before an EU Member State can give a derogation:

- i) There is no other satisfactory solution;
- ii) The derogation is based on public health and safety, including air safety; for the protection of flora and fauna; or to prevent serious damage to crops, livestock, forests, fisheries and water. In the latter case, the derogation granted must be proportionate. Member States must examine other satisfactory alternatives before granting derogations for damage prevention. Purported overriding public interest or local interests are not adequate for a derogation.
- iii) Derogations can also be granted for research, teaching, and reintroduction purposes or to "permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers". This "judicious use of certain birds" can be allowed, under strictly supervised conditions and if no other alternative solution is available. Derogations can also be issued to capture birds from the wild for recreation under an evolving "small numbers" exception, unless it is technically feasible to breed them in captivity, which would also be a fully satisfactory alternative. A range of other formal requirements including designating appropriate authorities for approvals, controls and killing/capturing methods are also stipulated.

The migratory movements of the birds must be studied before the 'small numbers' derogations are granted. Capture derogations invoking "small numbers" must ensure the maintenance of the population of the species concerned at a satisfactory level. If a population is declining or their trend is unknown, the derogation cannot be granted.

To qualify for "strictly supervised conditions", an adequate number of hunters, trappers etc. must be subject to on-the-spot checks by enforcement agencies. Transgressions of restrictions in time, space and catch limit must be very low, if the derogation is to be legal. The use of methods of capture of a non-selective nature (such as clapnets with bycatch, and limesticks) are not authorised.

Finally, the scope of 'deliberate', under the Birds Directive is yet to be clarified by the ECJ, but is likely to be related to other EU law referring to 'conditional intent'. In the case of birds, conditional intent means consciously killing, capturing or disturbing birds, or consciously destroying or damaging nests.



Derogations under the Birds Directive in HABIDES

Between 2009 and 2017², there were 84,867 unique derogations in the HABIDES³ database, based on reports. We also conducted an in-depth review of the legislation and practice of granting derogations in Bulgaria, Finland, France, Ireland, Italy, Malta, Poland and Spain, and identified some emerging patterns.

Member States are non-compliant with many provisions in the Birds Directive and case-law, ranging from the grossest non-submission of mandatory reports, to derogations that did not specify the species targeted, did not provide a legal justification, or omitted the numbers of birds, eggs or nests affected. In some cases, multiple legal justifications were given, making it very difficult to then assess the alternatives test. In others, details on types of controls put in place to ensure the legality of the derogations were not given. In the in-depth case studies, we found that derogations known to exist were missing from the HABIDES reports, or had geographical gaps. Furthermore, and in all countries, many reports were unavailable for download, missing, or unsubmitted.

Unexplained variation in number of derogations issued

There is a considerable variation in the number of derogations between the Member States, and across years. While it is of course understandable that Germany grants more derogations (7,147 over the period) than Luxembourg (20), owing to the size of the countries and the different human-wildlife conflicts, some other differences in results are difficult to explain. Romania's reports contained a maximum of 11 derogations, all of which were for air safety, raising questions of why other activities that require derogations in other places seem not to take place in Romania. There were very different numbers of average derogations issued per year between countries with relatively similar size and population, such as France (164 derogations issued per year, on average) and Germany (1,191 derogations issued per year, on average). Common sense and this analysis strongly suggest extremely widespread illegality across the EU.

Incompleteness of information reported

Our report indicates that 22% of derogations have evident shortcomings, including lacking any species information, lacking a start date or an end date, derogations without a legal justification, and derogations involving the killing or taking of birds or destruction of nests and eggs for which there was no information on numbers. For derogations involving the killing and taking of birds, it also lacks information on alternatives assessed or the controls carried out.

Concretely, 161 derogations had no species information at all and 400 derogations did not have any legal justification. Almost 20% of derogations submitted had so little information included in their fields that it was impossible to determine why they had been issued, with HABIDES 2.0 having almost a quarter of unclassifiable derogations.

² under the reporting tool HABIDES 1.0 (until 2014 or 2015) and 2.0 (until 2017), a tool that was put in place to facilitate Member States' reporting obligations.

³ As a precautionary measure 5,547 duplicate derogations were removed from the analysis as at least some of them seem to have been genuine submission errors.



Muddled reasons to issue derogations

We created a database of comparable terminology between the two HABIDES tools, as these had changed from one to the other, with in many cases a loss in detail available. We then developed a typology of derogations, described in detail in the full report. The most common types are derogations for: “ringing birds”, “construction works and maintenance”, “prevention of damage to crops”, and “prevention of damage to fisheries and aquaculture”. Several types of derogations were oddly limited to one country: derogations for trapping live-decoys were exclusively granted by Italy; and derogations for predator control for hunting was almost exclusively carried out in Finland.

Some Member States do issue derogations for conditional intent, such as for “construction and maintenance works”, and “operation of installations such as wind turbines”. However, no Member States appear to have introduced a requirement for derogations for what are arguably other cases of conditional intent, such as agricultural and forestry activities and bycatch of seabirds. Neither in the sampling nor in the in-depth reviews of 8 Member States were any such derogations found. This leads to paradoxical situations. For example, in some Member States felling a few trees in the city requires a derogation but felling hundreds of thousands of trees in forestry operations during the breeding season does not.

Giving multiple legal justifications is also a common practice, with in total 5,242 derogations citing more than one legal justification, which is problematic since it prevents the proper consideration of other satisfactory solutions.

Case study review

In in-depth case studies, we found that derogations known to exist were missing from the HABIDES reports, or had geographical gaps. In most countries, there was overlap between derogations and regular hunting, with species of corvids, gulls or geese having both hunting seasons and substantial derogations. Between 2009 and 2017 unlawful small numbers derogations were granted in most countries examined.

Finland and France have categories of “pest species” for which the legal protection is practically non-existent outside the breeding season. France, Italy, Spain and Malta heavily used small number derogations, although the use of these derogations for trapping songbirds in Spain and for hunting non-hunttable species and trapping live-decoys in Italy had stopped in 2017 following EU legal action. Bulgaria does not really use the derogation system, probably due to serious problems with governance. Out of all countries examined, Poland appears to have the most robust derogation system. The results of our report matches a similar analysis of derogations in Germany⁴, which also found incomplete reporting, presumably unlawful derogations and Cormorant regional regulations. The German derogation practice differed substantially between Bundesländers. In addition to the Great Cormorant, that report also highlighted potential impacts on wintering populations of Brent Goose (*Branta hrota*).

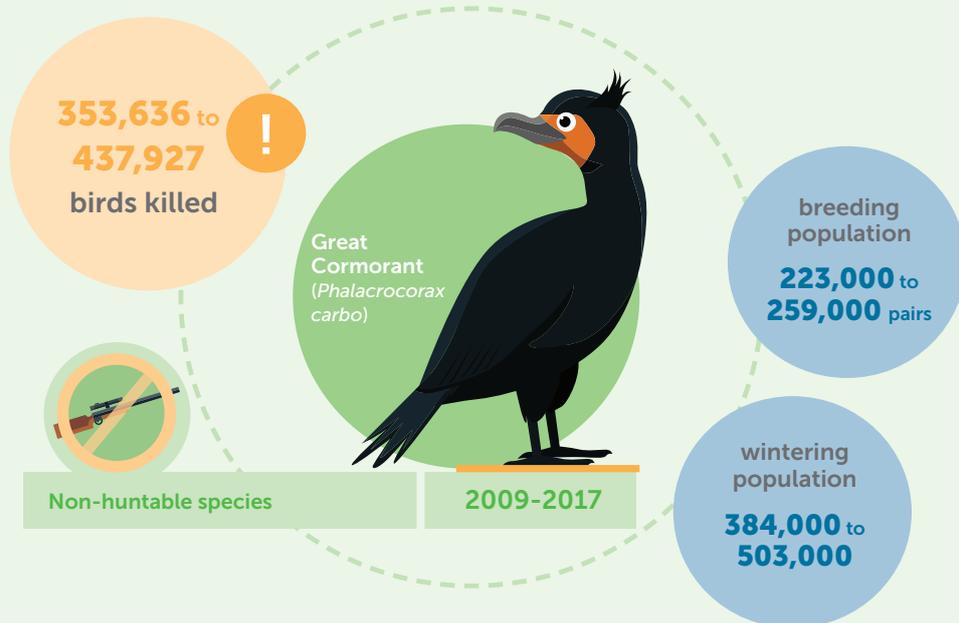
The BirdLife Partners from the eight countries interviewed have generally been actively working to counter illegal derogations nationally. Some of them have encountered problems with access to justice in their country, but the other Partners have been actively, and successfully, contesting derogations in national courts. The European Commission’s infringements and resulting rulings of the ECJ have played a key role in removing some egregious abuses.

⁴ Langhout W. (2019) Report on the derogations under the Birds Directive in Germany between 2011 and 2016. Langhout Ecologisch Advies, Rotterdam.

What does this mean for birds and their recovery?

In total, at least 14 million birds were reported as actually killed or taken, with 18 derogations each resulting in the death of more than 100,000 birds. This is at odds with the legal requirement that derogations should be limited in scope and limited to what is strictly necessary. Instead, the numbers suggest that authorities have opened hunting seasons or attempted population control.

One species stood out: The number of birds reported as killed under derogations is particularly high for the Great Cormorant (*Phalacrocorax carbo*), which is not a huntable species. Interpolation of numbers results in an estimated 353,636 to 437,927 birds killed between 2009 and 2017, compared to a breeding population of 223,000 to 259,000 pairs or wintering population of 384,000 to 503,000⁵.



⁵ On the basis of the EU population assessment under Article 12 of the Birds Directive: <https://nature-art12.eionet.europa.eu/article12/summary?period=1&subject=A391>
For more on the data see: European Environment Agency (2015). State of nature in the EU. EEA, Copenhagen.

Our recommendations – we need a system with teeth

BirdLife urges to ensure **complete and functional reporting** on derogations by the EU Member States, through an annual review of derogations. Failure to abide by the rules stipulated in the law should result in the European Commission initiating infringement procedures.

We also recommend **further improving the EC HABIDES system**, as its latest update HABIDES 2.0 has resulted in major shortfalls. The improved system should require a short description for derogations, more detailed information on controls and alternatives, and a mandatory estimation of the number of individuals affected for all derogations.

We recommend that the European Commission, Bern Convention and AEWA all regularly review and check reported information and follow up with responsible authorities where a derogation may have been authorised inappropriately, inadequate effort had been put into seeking alternative solutions or where there are unexplained gaps in reporting.

We support an **update of the European Commission Guidance on Species Protection**, in particular on the scope of activities subject to derogations and the interpretation of 'protection of flora and fauna' under the Birds Directive. The Commission should support more research, including by environmental NGOs and hunting federations, **on bird scaring methods and other non-lethal technical solutions**.

We recommend that the institutions in charge of implementing the Birds Directive – that is, the Member States and the European Commission – put in place the necessary measures to **investigate population impacts of derogations** and develop population models for selected species including the combined impacts of derogations, legal hunting and illegal killing and taking.

We also recommend the AEWA Secretariat and Bern Convention Secretariat ensure reporting on exemptions, in particular from the contracting parties outside the EU. BirdLife invites the Bern Convention Secretariat to look in detail at the spring hunting season in Belarus especially on those species that have an autumn hunting season.

With these actions, we may be able to resolve conflicts between humans and birds without the need for extensive derogations and large-scale killing. Greater clarity and compliance in reporting will inevitably strengthen the rule of law, the enhancement of biodiversity and the health of bird populations. **Commission President Ursula von der Leyen said the EU Green Deal would be Europe's 'man on the moon' moment. But when exceptions become the rule, Houston we have a problem.**

Table 1: Overview of number of unique derogations in HABIDES 1.0 and 2.0, and patchiness of reporting exercise.

	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total number of derogations	Total reports accessible	Average derogations issued/year
Austria	5*	76*	93	84	57	**	No report	No report	No report	317	5/9	63
Belgium	87	89	125	127	141	220	320	296	264	1669	9/9	185
Bulgaria	109	128	111	87	75	22	29	33	39	633	9/9	70
Croatia	Not a MS	Not a MS	Not a MS	Not a MS	10	72	84	96	101	363	5/5	73
Cyprus	2	No derog	1	2	4	4	4	2	2	21	9/9	2
Czech Republic	***	***			483	533	490	Locked	378	1884	6/9	314
Denmark	41	45	42	47	43	47	45	57	54	421	9/9	47
Estonia	4	4	5	5	5	5	4	4	4	40	9/9	4
Finland	1399	256	1671	1608	1542	1523	1598	1747	1772	13116	9/9	1457
France	Paper	Paper	Locked	254	89	148	**	**	No report	491	3/9	164
Germany	Paper	No report	893	1039	1138	1063	1972	1042	**	7147	6/9	1191
Greece	Paper	No report	0	0/9	0							
Hungary	221	255	252	269	269	289	277	323	343	2498	9/9	278
Ireland	***	***	53	50	191	200	309	263	216	1282	7/9	183
Italy	369	263	367	335	432	353	506	579	329	3533	9/9	393

* Multiple years in a single file.

** Inaccessible due to technical problems.

*** Other format than HABIDES.

No derog.: no derogations reported

Latvia	8	13	8	17	14	6	12	5	6	89	9/9	10
Lithuania	3	2	3	11	19	7	8	27	41	121	9/9	13
Luxembourg			2	2	2	5	3	3	3	20	7/9	3
Malta	Paper	130	126	234	300	230	155	199	13	1387	8/9	173
Netherlands	227	204	268	358	606	835	647	832	Locked	3977	8/9	497
Poland	142	281	429	705	798	775	3392	4552	6948	18022	9/9	2002
Portugal		117	107	89	137	165	No report	No report	No report	615	6/9	103
Romania	No report	No report	11	11	No report	No report	No report		8	30	4/9	8
Slovakia	23*	21*	12*	13*	25	37	75	18	20	244	9/9	27
Slovenia	22*	19*	7*	52*	6	27	21	19	No report	173	8/9	22
Spain	397	No report	937	1376	546	Locked	1903	2088	No report	7247	6/9	1208
Sweden	99*	172*	214	352	126	217	209	481	498	2369	9/9	263
United Kingdom	1515	1413	32	2229	2005	2359	2448	2498	2659	17158	9/9	1906
Total	4673	3488	5769	9356	9063	9142	14511	15164	13698	84867	205/248	
Total reports accessible	19/27	19/27	25/27	26/27	26/28	24/28	23/28	23/28	20/28	205/248	Total accessible	Average derogations issued/year



Partnership for
nature and people

www.birdlife.eu

Avenue de la Toison d'Or 67,
B-1060 Bruxelles, Belgium



Stichting BirdLife Europe gratefully acknowledges financial support from the European Commission. All content and opinions expressed on these pages are solely those of Stichting BirdLife Europe. The European Commission is not responsible for any use that may be made of the information it contains.