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Gloss to the judgment of the Supreme Administrative Court (Poland) of 10 October 2023 (Case no. III OSK 861/22)¹

Abstract: Species protection is a heterogeneous form of nature conservation. The European hamster is covered by strict species protection in EU member states pursuant to Article 12 and Annex IV of the Habitats Directive, implemented in Poland by the Act of 2004 on the Protection of Nature (the 'PNA'). In derogating from the protection of this species on the basis of Article 56(4)(6) PNA, the Polish nature-protection authority is accordingly obliged to follow Article 16 of the Directive (prerequisites of derogation) and the *acquis* of the CJEU, which should be taken into account in the review exercised by Polish administrative courts. The purpose of this gloss is to call attention to the need for the Director General of Environmental Protection and Regional Director of Environmental Protection to apply, in such proceedings, a Union-sympathetic legal interpretation of two interlinked issues – the determination of the 'natural reach' of the European hamster within the 'favourable conservation status of the species' requirement, and the precautionary principle.

Keywords: strict species protection, favourable conservation status, Habitats Directive, environmental protection law, precautionary principle

Thesis:

The Association failed to demonstrate (...) that the [philogeographic] line [of the European hamster] existing on the site of the anticipated road investment incorporates such as number of specimens as to warrant the assertion that the derogation from the prohibition imposed by the disputed decision will have a significant impact on the existing population. (...) [T]he derogation applies not to the intentional killing of representatives of the species but to their relocation. The court of first instance, therefore, was correct in concurring with the [administrative] authorities' position that the number of specimens requiring relocation is relatively insignificant and the impact of the implementation of the contemplated activities on the population of the

¹ The co-authors' contribution to a study in the scope of a concept, assumptions and methods used in the preparation: G. Mikusiński 50% (financial support: Swedish Research Council – Project VR 2020-04973), K. Karpus 50%.

European hamster will not be significant. The destruction of fragments of the hamster's habitat in connection with the investment at hand, in turn, will not have a significant impact on the habitats of that species in Małopolskie Voivodeship.

1. Introduction

Species protection is a heterogeneous form of nature conservation (Article 6(1) (10) of the Act of 16 April 2004 on the Protection of Nature).² The heterogeneity is owed, among others, to its having been shaped in reflection of the Polish state's obligations arising from international³ and EU law. The current challenges linked to the progressive Europeization⁴ of Polish nature-protection law in this regard can be illustrated on the example of the European hamster (*Cricetus cricetus*) species concerned in the case decided by the titular judgment of the Supreme Administrative Court. From this perspective, the essence of the case can be identified in the correct application of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora⁵ by Polish nature-protection authorities when deciding on the admissibility of a derogation from species protection. In respect of the European hamster, that meant the interpretation of Article 56 PNA in a manner consistent with Article 12 (strict protection) and Article 16 (derogations from prohibitions protecting species named, among others, in Annex IV) of the Habitats Directive,⁶ with the inclusion of the *acquis* of the Court of Justice of the European Union.

The Union character of the case pending before the SAC was appreciated in a sufficient degree neither in the administrative proceedings nor at the stage of the judicial review of the legality of the derogation. The purpose of this critical gloss is, therefore, to signal two main currents arising from the Union law of nature protection that are of primary importance in granting derogations from species protection. The glossed judgment fails to reflect the proper consideration of such basic points as:

² Polish Journal of Laws: Dz.U.2024.1478, as amended, hereinafter the PNA.

³ For example, the European hamster is subject to strict species protection in Poland also on the basis of Article 6 (in conjunction with Annex II) of the Bern Convention, i.e. Convention on the Conservation of European Wildlife and Natural Habitats, made in Bern on 19 September 1979; Polish Journal of Laws: Dz.U. 1996.58.263; the species is also featured on the IUCN Red List with a global 'critically endangered' (CR) status: A. Banaszek *et al.*, *Cricetus cricetus*. *The IUCN Red List of Threatened Species* 2020: e.T5529A111875852, <https://dx.doi.org/10.2305/IUCN.UK.2020-2.RLTS.T5529A111875852.en> (accessed: 3 March 2025).

⁴ B. Iwańska, *Europeizacja prawa ochrony środowiska (wybrane zagadnienia)*, [in:] R. Hauser, Z. Niewiadomski and A. Wróbel (eds.), *System prawa administracyjnego*, vol. 3, *Europeizacja prawa administracyjnego*, Warszawa 2014, 726–727.

⁵ OJ UE L 206 of 22 July 1992, pp. 7–50, as amended; hereinafter the 'Habitats Directive'.

⁶ According to the CJEU, 'The effectiveness of Directive 92/43 and its aim (...) require that (...) the national courts be able to take that directive into consideration as an element of EU law' – CJEU, C-243/15, *Lesoochránárske zoskupenie VLK II*, judgment of 8 November 2016, ECLI:EU:C:2016:838, para. 44.

– correct interpretation of the ‘natural reach’ category within the concept of ‘favourable conservation status of the species’ (Article 5(24) PNA⁷; Article 1(i) of the Habitats Directive) in concurrence with Article 56(4) PNA and Article 16(1) of the Habitats Directive;

– consequences arising from the precautionary principle for the organs of the EU member state in the absence of scientific certainty (e.g. as to the conservation status) with regard to evidentiary proceedings and the presumption of *in dubio pro natura*.

The circumstances of the case before the SAC were as follows. In December 2019, pursuant to Article 56(2)(2) and Articles 56(4)(3) and 56(4)(6) PNA in conjunction with §§ 6(1)(2), 6(1)(4), 6(1)(7), 6(1)(8) and 6(1)(12) and 6(2) of the Regulation of the Minister of Justice of 16 December 2016 concerning the species protection of animals,⁸ the Regional Director of Environmental Protection in Cracow⁹ granted a derogation from the protection of the European hamster (‘intentional capture, destruction of habitats or stepping stones serving as breeding, rearing, resting or feeding sites, as well as intentional relocation from places of regular presence to other sites or startling or disturbing’ of approximately 60 specimens, as requested by the investor in connection with the construction of an expressway in Małopolskie Voivodeship. The decision was given immediate enforceability in March 2020. Having considered the appeal lodged by an ecological organization, the Director General of Environmental Protection¹⁰ quashed the Regional Director’s decision in 2021, simultaneously with granting the derogation (pursuant to Article 56(4) PNA). Ruling in the same year, the Voivodeship Administrative Court in Warsaw¹¹ dismissed the petition for judicial review of the Director General’s decision lodged by the ecological organization. The appeal-in-cassation subsequently brought before the SAC was also dismissed in 2023 by the titular judgment. At the same time, the derogation concerning the European hamster had been granted despite the existence of objective scientific data confirming the ‘unfavourable’ conservation status of the species (reporting periods: 2013–2018¹²

⁷ In accordance with Article 5(24) PNA: The ‘favourable conservation status’ accordingly means the ‘the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the country or within the member states of the European Union, or the species’s natural reach, where the population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis’.

⁸ Dz.U.2183, as amended; Dz.U.2022.2380.

⁹ Source: card no. 1710/2019, <https://wykaz.ekoportal.pl> (accessed: 3 March 2025); hereinafter the ‘Regional Director’s decision’.

¹⁰ Source: card no. 338/2024, <https://wykaz.ekoportal.pl> (accessed: 3 March 2025); hereinafter the ‘Director General’s decision’.

¹¹ Voivodeship Administrative Court in Warsaw, IV SA 1283/21, judgment of 15 December 2021, CBOSA.

¹² The data are also available in: M. Makomaska-Juchiewicz *et al.*, *Stan ochrony gatunków zwierząt w Polsce w latach 2013–2018*, 1 Biuletyn Monitoringu Przyrody 2021 (European hamster – see p. 130), <https://siedliska.gios.gov.pl/publikacje-menu/inne-publikacje/biuletyn-monitoringu-przyrody?view=article&id=420> (accessed: 3 March 2025).

and 2007–2012) in biogeographical and continental region – territory of the European Union¹³ and Poland.¹⁴

2. ‘Unfavourable’ conservation status of the species within its ‘natural reach’ and Article 56 of the Act on the Protection of Nature

As noted above, the European hamster is a species included in Annex IV of the Habitats Directive and thus covered by strict protection in Poland also on the basis of EU law. Accordingly, granting a derogation from the protection in this case requires the Union-sympathetic interpretation¹⁵ of Article 56 PNA in conjunction with Article 16 of the directive and with it necessarily also its Article 12 (strict protection of a species – prohibitions). This is defined by settled systemic principles reflecting the so-called autonomy of Union law,¹⁶ and, in consequence, allowing the challenge of a lack of cohesion between Union law and the national law of a member state in areas covered by Union competence to be overcome. One of the fundamental obligations of the national organs of an EU member state in this case is to verify the prerequisite that is the ‘favourable conservation status of a species within its natural reach’.

The reflection of supranational aspects of species protection in the Act on the Protection of Nature presents the Polish legislature with discernible difficulties, as can be noted already on the level of the legal language, including Article 56 PNA in this case. At present, the article counts a total of almost 30 sections, which has a self-evident negative impact already on the process of linguistic interpretation and, as part of a feedback loop, presents significant difficulties in the event of a need for Union-sympathetic interpretation in the scope concerned. In an attempt, however, to compare the language of Article 16(1) *ab initio* of the Habitats Directive with Article 56(4) *ab initio* PNA, one can observe that the main difference is the lack of the ‘favourable conservation status [of species] in their natural reach’ language in the latter provision. Deceptively, it could appear that the Polish drafter, unlike the EU lawmaker, simply assumed the sufficiency of the use of the term ‘favourable conservation status’, which, in the definition provided in Article 5(24) PNA, refers also to a species’s ‘natural reach’.¹⁷ In practice – discernible also in the case resolved

¹³ see: Species assessments at EU biogeographical level – *Cricetus cricetus* – 2013–2018, <https://nature-art17.eionet.europa.eu/article17/species/progress/?period=5&group=Mammals&conclusion=overall+assessment> (accessed: 3 March 2025).

¹⁴ See: Poland – species assessments at Member State level – 2013–2018, <https://nature-art17.eionet.europa.eu/article17/species/report/?period=5&group=Mammals&country=PL®ion=#> (accessed: 3 March 2025); Monitoring of species and natural habitats, Report for the European Commission, 2019, <https://siedliska.gios.gov.pl/projekt-raportow-do-ke-menu/sprawozdania-do-ke/2019> (accessed: 3 March 2025).

¹⁵ A. Kalisz, *Zasada interpretacji prawa krajowego zgodnie z prawem unijnym jako element wykładni systemowej*, [in:] L. Leszczyński (ed.), *System prawa Unii Europejskiej*, vol. 3, Wykładnia prawa Warszawa 2019, 166–171.

¹⁶ D. Miąsik, *Zasady i prawa podstawowe, System prawa Unii Europejskiej*, vol. 2, Warszawa 2022, 24–25.

¹⁷ Concerning the interpretation of the term ‘natural reach’ from the perspective of the Habitats Directive – see e.g. Y. Epstein, J.V. López-Bao, G. Chapron, *A Legal-Ecological Understanding of Favorable Conservation. Status for Species in Europe*, 2 (9) Conservation Letters 2016, 81–88.

by the SAC through the titular judgment – this key criterion of admissibility of a derogation from the species protection of animals from Annex IV of the Directive in an EU member state has been distorted. This is because, at present, Polish nature-protection authorities identify the ‘natural reach’ exclusively with the local or regional perspective, ignoring the national level, let alone the realistic natural reach of the population, including its cross-border dimension (Union territory or even all of Europe). As a result, the derogation under Article 56 PNA is granted even though the population of European hamster (continental bioregion) has continuously for many years been characterized by an ‘unfavourable’ conservation status in Poland.

By contrast, for almost two decades now the CJEU has held the position that ‘Article 16(1) of the directive makes the favourable conservation status of the populations of the species concerned in their natural range a necessary precondition in order for the derogations for which it provides to be granted’.¹⁸ At the same time, the momentous and deliberate nature of the repetition of the term ‘natural reach’ in Article 16(1) *ab initio* of the Habitats Directive has been reiterated in the CJEU’s recent cases. For example, in 2019, the CJEU’s determinations included the following: ‘(...) when assessing the grant of a derogation based on Article 16(1), it is for the competent national authority to determine, in particular at national level or, where applicable, at the level of the biogeographical region in question where the borders of that Member State straddle several biogeographical regions or if the natural range of the species so requires and, to the extent possible, at a cross-border level, as a first step, the conservation status of the populations of the species in question and, in a second step, the geographical and demographic effects that the envisaged derogations are capable of having on those’.¹⁹

Moreover, concerning the protection of the species from Annex IV to the Directive, the CJEU examines not only the spatial (‘natural reach’) but also the temporal dimension of the presence of specimens of a species in a given area. Accordingly, in direct respect of the European hamster in the context of the prohibition against the deterioration of the condition of, or destruction of, breeding grounds or resting places under Article 12(1)(d) of the Habitats Directive, the CJEU has so far indicated the need for the protection of:

- ‘breeding sites which are no longer occupied where there is a sufficiently high probability that that animal species will return to those sites’²⁰;
- resting places, ‘where there is a sufficiently high probability that that species will return to such places, which is a matter for the referring court to determine’²¹.

In the judgment of November 2011 in the French case (European hamsters in Alsace), the CJEU held: ‘The transposition of that provision requires the Member

¹⁸ CJEU, C-342/05 *Commission of the European Communities v. the Republic of Finland*, judgment of 14 June 2007, ECLI:EU:C:2007:341, para. 28.

¹⁹ CJEU, C-674/17 *Tapiola*, judgment of 10 October 2019, ECLI:EU:C:2019:851, para. 58.

²⁰ CJEU, C-357/20, *Magistrat der Stadt Wien-II*, judgment of 28 October 2021, ECLI:EU:C:2021:881, para. 43.

²¹ CJEU, C-477/19, *Magistrat der Stadt Wien-I*, judgment of 2 July 2020, ECLI:EU:C:2020:517, para. 36.

States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (...). Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (...). Such a system of strict protection must therefore enable the effective avoidance of deterioration or destruction of breeding sites or resting places of the animal species listed in Annex IV(a) to the Habitats Directive (...).'²²

This illustrates the scale and complexity of the requisite findings the Polish nature-protection authority is obliged to make whenever determining the admissibility of a derogation from the prohibitions arising from Article 12(1) of the Directive – on the basis of its Article 16(1) and thus, in Polish law, the grant of a permit pursuant to Article 56(4)(6) PNA in conjunction with Article 52 PNA. Because the case covered by the titular judgment of the SAC was initiated in 2019, only part of the CJEU's views may be regarded as binding on Polish authorities due to their being known as at the time of the making of the determinations. Nevertheless, at the very least, the CJEU judgments of 2011 (the French case) and October 2019 (*Tapioila*) ought to have been taken into account by the Director General when handing down the reformatory decision in 2021. Interestingly, the analysis of the rationale shows that, in respect of the strict species protection of the European hamster in Poland, the authority did notice the importance of the CJEU *acquis* but dealt with it only in a selective manner. Thus, concerning the 'overriding public interest' ground specified in Article 56(4)(6) PNA, the Director General invoked the judgment in C-182/10²³ (Article 16(1)(c)). By contrast, for reasons unknown, it failed to see the corresponding need in the context of the determination of favourable conservation status in its spatial dimension (the 'natural reach'), i.e. Article 12(1)(d) in conjunction with Article 16(1)(c) of the Habitats Directive. As a result, the Director General mistakenly narrowed the spatial aspect of the existence of the European hamster solely to the territory of Małopolskie Voivodeship.

3. The precautionary principle and Article 56 of the Action on the Protection of Nature

Another fundamental problem in the case resolved by the titular judgment of the SAC is the complete omission, in respect of the Article 56 PNA permit, equally by the authorities as by both of the courts, of the precautionary principle and the multidimensional consequences arising from it. This value is expressly proclaimed in Article 6(2) of the Act of 27 April 2001 – Environmental Protection Law,²⁴ whereby: 'Whoever undertakes an activity whereof the negative environmental impact has not yet been fully discerned shall, being guided by caution, undertake any and all possible preventing measures.' Characteristically for this legal area, the

²² CJEU, C-383/09 *Commission v. France*, judgment of 9 June 2011, ECLI:EU:C:2011:369, para 18–21.

²³ CJEU, C-182/10 *Solvay and Ors.*, judgment of 16 February 2012, ECLI:EU:C:2012:82; see also the Director General's decision, 26.

²⁴ Polish Journal of Laws: Dz.U.2024.54, as amended.

discernment process of the principle in question in Polish law took place under the unquestionable influence of international cooperation on environmental protection.²⁵ The precautionary principle is also mentioned by Article 191(2) CJEU,²⁶ and thus as a general principle of the Union environmental-protection law.

There is no possibility here of rendering a holistic account of the discernment process of this value in the legal protection of the environment (including nature),²⁷ its reception into Polish law²⁸ or the still-existing difficulties with the determination of the undisputed scope of its subject-matter. From the perspective of the analysis of the titular SAC judgment, it will be the most important to focus, for this part of the gloss, on the perception of the precautionary principle in EU law. A communique of the Commission from 2000²⁹ will be of assistance here; among other things, the Commission noted: 'Although the precautionary principle is not explicitly mentioned in the Treaty except in the environmental field, its scope is far wider and covers those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection'. Similarly, according to the Court of the European Union, 'the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests'.³⁰ The above formulates the presumption

²⁵ See also the so-called Principle 15 of the Rio Declaration: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'; *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, CONF.151/26/Rev.1 (Vol. 1), <https://www.un.org/esa/dsd/agenda21/Agenda%2021.pdf> (accessed: 3 March 2025), 6.

²⁶ Treaty on the Functioning of the European Union, Polish Journal of Laws: Dz.U.2004.90.864/2; hereinafter the 'TFEU'.

²⁷ See e.g.: W.Th. Douma, *The precautionary principle in the European Union*, 2 (9) Review of European, Comparative and International Environmental Law 2000, 132–143; E. Fisher, *Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community*, 1 (9) Maastricht Journal of European and Comparative Law 2002, 7–28; R.V. Percival, *Who's Afraid of the Precautionary Principle*, 1 (23) Pace Environmental Law Review 2005, 21–82; D. Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States*, Princeton University Press 2012.

²⁸ For example, it can be noted that, in his typology of principles of environmental protection, Piotr Korzeniowski proposes to include the precautionary principle among the 'principles of preventive environmental protection', placing this value in the context of, among others, the proper rectification of damage at the source and the assessment of environmental impact, *Zasady prawne ochrony środowiska*, Łódź 2010, 397–409.

²⁹ Communication from the Commission on the precautionary principle, COM(2000) 1 final, Brussels, 2 February 2000, 9–10.

³⁰ Court of First Instance, combined cases T-74/00, T-76/00, from T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan*, judgment of 26 November 2002, ECLI:EU:T:2002:283, para. 184.

of *in dubio pro natura*, whereby a persistent lack of scientific certainty is a negative premise in the legal assessment of the admissibility of human intervention in the environment.

Both quotations illustrate the process of transformation of this value from a general principle of Union environmental-protection law towards a general principle of European Union law.³¹ Consequently, according to the latter status can lead to the conclusion that the precautionary principle is the legality test for acts of derivative Union law, as well as actions of the public authorities of a member state within an area of EU competence.³² Irrespective of any difficulties concerning the placement of this principle within the system of Union law, it is certainly an undisputed conclusion at present that it constitutes a general principle of the Union law of environmental protection (including the protection of nature), binding upon the national public administrative authorities and courts of every EU member state in the process of application of Union law to cases in this field.

It should be noted that the precautionary principle in the Union law of nature protection has been the subject of the CJEU's determinations primarily in the context of environmental-impact assessments, especially for the purposes of Nature 2000 areas (Articles (6(3) and 6(4) of the Habitats Directive).³³ Nevertheless, in the last decade one can observe an increasing number of cases in which this value has been analysed in connection with species protection and thus in the context of Articles 12–16 of the Directive.³⁴ Here, one could once again quote from the CJEU's judgment in *Tapiola*, of 2019, where the Court emphasized: 'in accordance with the precautionary principle enshrined in Article 191(2) TFEU, if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation'.³⁵

In the context of the application of the above findings to the case in which the titular judgment came down, the following question must be asked: Why did neither the Director General in the reformatory decision in 2021 nor the administrative courts of both instances on judicial review make any direct reference to the

³¹ N. de Sadeleer, *Environmental Principles*, Oxford University Press 2020, 140–141.

³² P. Craig, *EU Administrative Law*, Oxford University Press 2012, 642–646.

³³ See e.g. CJEU, C-441/17, *Commission v. Poland*, ECLI:EU:C:2018:255, judgment of 17 April 2018, hereinafter 'C-441/17'; concerning the academic dispute over the management of this forest ecosystem see e.g. G. Mikusiński et al., *Is the impact of loggings in the last primeval lowland forest in Europe underestimated? The conservation issues of Białowieża Forest*, (227) *Biological Conservation* 2018, 266–274; K. Niedziałkowski et al., *Effective mitigation of conservation conflicts and participatory governance: reflections on Kuboń et al.*, 4 (33) *Conservation Biology* 2019, 962–965.

³⁴ See e.g. H. Schoukens, *Common Hamsters in and Outside the City: Some Reflections on Urban Biodiversity, Species Recovery and the EU Habitats Directive*, 3 (19) *Journal for European Environmental & Planning Law* 2022, 180–221; R. Jennings, *The Use of Scientific Evidence in Precautionary Decision-Making in EU Environmental Law*, 1 (24) *European Journal of Law Reform* 2022, 19.

³⁵ The aforementioned case of C-674/17, *Tapiola*, para. 66.

precautionary principle? There was, after all, in this case, a multidimensional scientific uncertainty that can be described as follows. Firstly, according to data from the report for 2013–2018 (as quoted above) submitted by Polish authorities in accordance with Article 17 of the Habitats Directive (outcome of the supervision of the conservation status of environmental habitats and species), the entire population of the European hamster in Poland exhibited an ‘unfavourable’ conservation status. Despite that, Polish nature-protection authorities in their evidentiary proceedings conducted on the basis of Article 77(1) of the Code of Administrative Procedure,³⁶ paid no regard whatsoever to the above data. Thus, they failed to explain why – in their assessment – the conservation status of this species in Poland was ‘favourable’ (for which reason the derogation was granted), even though just the year prior the Polish state had reported, as part of its Union obligations, that throughout the entire territory under its jurisdiction the status had already been ‘unfavourable’ for many years. It cannot be excluded that some counter-evidence had existed to establish such a sudden improvement in the conservation status of the European hamster in Poland having arisen in such a short time, including in the territory of Małopolskie Voivodeship, based on the current ‘best available scientific data’, in contrast to the data for 2013–2018. The analysis of the contents of both of the decisions, however, does not confirm such a possibility. For example, the list of 18 documents analysed by the Director General in 2021 does not include Poland’s report for the period, nor more recent data. It is also interesting that in the part of the rationale for the Director General’s decision including the summary of the conservation status of the species, the authority did not resort to the ‘favourable’ or ‘unfavourable’ qualification even once. For an unknown reason, the Director General instead relied on a criterion of ‘lack of significant impact on the population’,³⁷ which does not find support in Article 16(1) of the Habitats Directive or Article 56(4) PNA. Secondly, in the derogation proceedings under Article 56(4) PNA, the lack of scientific certainty may arise not only at the stage of determination of the species’s conservation status but also in the later part of the analysis of the issue, i.e. assessment of the risk arising from the proposed derogation for a species covered by strict protection. Accordingly, in the case resolved by the titular judgment of the SAC, the Director General’s omission of the precautionary principle from the verification of the prerequisite emanated negatively on such consequent points.

In summary, as occurs from the above-cited CJEU judgment of 2019 in *Tapiola*, and – in the background – also its 2018 judgment in the Polish case,³⁸ failure to eliminate such multidimensional scientific uncertainty should have led to the national authority’s handing down of a decision in line with the presumption of *in dubio pro natura*, which, in the realities of Article 56(4)(6) PNA, would have led to the derogation being refused.

³⁶ Act of 14 June 1960 – Code of Administrative Procedure, Polish Journal of Laws: Dz.U.2024.572.

³⁷ The Director General’s decision, 25.

³⁸ See C-441/17, paras. 117 and 179.

4. Summary

Neither of the two key legal points arising for species protection from the Habitats Directive (the prerequisite and the precautionary principle) was duly taken into account in the case at the stage of administrative proceedings. In 2021, as a reformatory decision, the Director General granted a derogation through the permit under Article 56(4)(6), even though in the case of the European hamster – covered by strict species protection in Poland pursuant to Article 12 of the Habitats Directive and its Annex IV – there existed ‘best available scientific data’ (such as the report for 2013–2018) confirming the ‘unfavourable’ conservation status of the entire population (and thus all philogeographic lines of the *Cricetus cricetus*) in the territory of the Polish state. At the same time, it had been for the Director General and not the ecological organization to carry out an exhaustive and legally compliant (including the adequate *acquis* of the CJEU) determination of this ‘necessary prerequisite’. By contrast, contrary to Article 56(4) *ab initio* PNA and Article 16(1) *ab initio* of the Habitats Directive, the authority did not show precisely and persuasively in its rationale for the derogation the ‘best available scientific data’ on the basis of which it had made the determination of ‘favourable/unfavourable’ conservation status of the species in its properly understood ‘natural reach’. Furthermore, the Director General relied on a category of ‘lack of significant impact on the population’, which is not contemplated by the law, and did so also in the context of the prohibition against the deterioration or destruction of breeding sites or resting places (Article 12(1)(d) of the Directive).

Despite the Director General’s failure, in the granting of the derogation under Article 56(4) PNA, to comply with these basic obligation incumbent on it as the authority of a European Union member state applying the Habitats Directive, the courts of both instances – in their legality review – did not find the situation to produce a defect in the proceedings or in the decision itself. By contrast, in their review of the derogation from species protection under Article 56 PNA and Article 16 of the Habitats Directive, the Polish administrative courts of both instances were obliged to evaluate the evidentiary proceedings, the limits of discretion in the decision of the administrative case, and the quality of the rationale – in the context of the precautionary principle (‘best available scientific data’, *in dubio pro natura* presumption). As noted above, the Director General, in granting the derogation under Article 56 PNA in 2021, did not act consistently with the standard reflecting the essence of this legal value.

The omission of both of these key aspects from the titular SAC judgment with the resulting conclusion that the Director General’s derogation was correct, must be viewed in a critical light. This is because it means that the Habitats Directive (its Articles 12 and 16 in conjunction with Articles 52 and 56 PNA) was not properly applied in the case at hand either by the Director General as the nature-protection authority nor by both of the administrative courts on review.

___ KRONIKA / CHRONICLES ___

