

**GREAT CORMORANT:
Derogations under the article 9 of the Birds Directive**



Prepared with the support of the N₂K Group, EEIG

Draft Guidance document

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1. Introduction: purpose of the guidance

1.1. Background

As with all wild bird species naturally occurring in the European territory of the Member States, the Cormorant *Phalacrocorax carbo* is covered by a general protection scheme under Council Directive 79/409/EEC of the 2 April 1979 on the conservation of wild birds (the Birds Directive)¹. Its deliberate capture and killing, disturbance, destruction of its nest or taking of its eggs can only be allowed by Member States in accordance with the derogation system of the Directive (art. 9).

The subspecies *Phalacrocorax carbo sinensis* was originally listed in Annex I as a bird species to which special conservation measures applied. However, in 1997 it was deleted from this annex², as the state of the population had ceased to be critical. Indeed, in some parts of the EU, Great Cormorant populations have grown significantly over the last 20-30 years (mainly the subspecies *sinensis*) which has led to a rise in reported damages to commercial fisheries, aquaculture and sport-fishing.

On the basis of information provided to the Commission in the context of Member States derogation reports, it appears that the derogation system is already being widely used in different Member States in order to avoid serious damage from cormorants. The authorities issue licences to scare off cormorants or to control their populations. This involves methods such as shooting, oiling their eggs in the nests, or other means of disturbance. Tens of thousands of cormorants are thus eliminated every year throughout the EU.

However, there is some disparity in the way Member States address this problem, both in terms of the choice of sites where control actions are undertaken and on the methods used. Depending on the practice in each Member State, these licences are issued either individually (for each situation: small number of birds, or one colony), or as one single blanket derogation for a large number of birds within one country or region.

Moreover, some Member States use the derogation possibilities extensively whilst others do not control cormorant populations at all. As a result, measures taken in one country may be negated by rapid re-population from neighbouring countries (source-sink). Although the current legislation provides adequate means to address the issue of derogation, it is true that the position taken by different Member States is heterogeneous.

There is as yet no overview at EU level of the experiences of Member States using the derogation system of the Birds Directive to control cormorant populations, and, whilst the Commission has already produced a detailed guidance document on Article 9 of the Directive as regards hunting³, there is felt to be a need for further guidance specifically on cormorants in order to address the perceived lack of clarity amongst local authorities on certain aspects of the derogation system.

This request comes also from the European Parliament. In December 2008 it adopted resolution in which it:

- *“urges the Commission, in the interests of greater legal certainty and uniform interpretation, to provide without delay a clear definition of the term "serious damage" as used in Article 9(1)(a), third indent, of the Wild Birds Directive;*
- *calls on the Commission also to produce more generalised guidance on the nature of the derogations allowed under Article 9(1) of the Wild Birds Directive, including further clarification of the terminology where any ambiguity may exist”.*

¹ OJ L 103, 25.4.1979, p.1

² Commission Directive 97/49/EC, OJ L 223, 13.8.1997, p.9.

³ European Commission – 2008 - Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds” “The Birds Directive, 94 p.

Since then the Commission has held two meetings with Member States, and latterly with both Member States and stakeholders, to discuss the issue further. Three main decisions were taken following these meetings:

- to organise a technical platform to exchange information, improve the monitoring of the Cormorant population across the EU and disseminate its results;
- to exploit the results of the INTERCAFE's project⁴ especially concerning the alleviation of damage;
- to produce guidance on the interpretation of Article 9 of the Birds Directive as regards derogations which may be applied in the case of the Great Cormorant.

The present document addresses specifically this third point and fulfils the request of the European Parliament for further guidance on this issue.

1.2. Aim of the guidance document

The present document provides a clarification of key concepts within Article 9 of the Birds Directive as they relate to controlling cormorant populations and offers practical advice on how to implement these concepts. Ultimately, it is hoped that the guidance will improve the efficiency and correct application of the derogation system in this regard.

The guide is intended to be a useful aide for national authorities as well as other interested parties. It is bound by, and faithful, to the text of the Birds Directive but it is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such, this document reflects only the views of the Commission services and is not of a binding nature. Ultimately it rests with the EU Court of Justice to provide definitive interpretation of a Directive.

Also it should be noted that, in line with the subsidiarity principle, the implementation of the derogation system is the competence of the Member States. Those Member States who are opposed to using the derogation scheme to control Great Cormorant populations are under no obligation to start doing so as a result of this guidance document.

This decision remains entirely in the hands of each Member State. This reflects a general approach to Community environmental legislation, which is enshrined in the Treaty, whereby Member States retain a freedom to exceed the level of protection agreed by the Community

1.3. Scope of the guidelines

Having outlined the general principles governing the use of the derogation system under Article 9, the guidance document looks in particular at the following aspects:

- The notion of 'preventing serious damage' and what this might mean in practice for different sectors of activity;
- The notion of using derogations to 'protect fauna and flora';
- The need to demonstrate there is 'no other satisfactory solution';

It then examines the means and methods that can be used for applying the derogation system to cormorants and outlines the precautions that should be put in place when doing so. Finally, the respective roles of the Member States and the Commission, for instance in terms of reporting on derogations, are reviewed.

Below is the text of Article 9 of the Birds Directive, the parts that are in bold and underlined will be addressed in this document as they are most relevant for the great cormorant issue. The present guidance may also be useful for other damaging bird species (such as the *Corvidae*, *Columbidae*, *Sturnus vulgaris*, *Laridae*, *Anseridae*...). For guidance on other aspects of Article 9 it is recommended to consult the EC Guidance document on Sustainable Hunting. It has to be reminded that the Cormorant is not included in the lists of species whose hunting is permitted by the Wild Birds Directive (Annexes II.1 and II.2), regular hunting is therefore impossible.

⁴ <http://www.intercafeproject.net/>

- 1) Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is **no other satisfactory solution**, for the following reasons:
 - (a) — in the interests of public health and safety,
 - in the interests of air safety,
 - **to prevent serious damage to crops, livestock, forests, fisheries and water,**
 - **for the protection of flora and fauna;**
 - (b) for the purposes of research and teaching, of re-population, of reintroduction and for the breeding necessary for these purposes;
 - (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

- 2) The derogations must specify:
 - the species which are subject to the derogations,
 - **the means, arrangements or methods authorized for capture or killing,**
 - **the conditions of risk and the circumstances of time and place under which such derogations may be granted,**
 - **the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,**
 - **the controls which will be carried out.**

- 3) **Each year the Member States shall send a report to the Commission on the implementation of this Article.**

- 4) On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, **the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this Directive.** It shall take appropriate steps to this end.

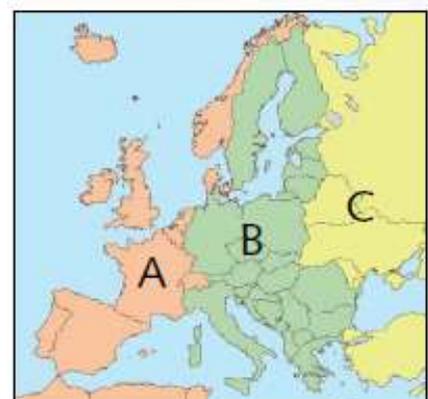
2. The Great Cormorant and the current use of art.9

2.1. The Great Cormorant in the EU

There are three species of Cormorant *Phalacrocoracidae* naturally occurring in the EU. The Pygmy Cormorant *Phalacrocorax pygmeus* and Shag *Phalacrocorax aristotelis* are both listed in annex I of the Birds Directive in view of their vulnerable conservation status. But the third species, the Great Cormorant *Phalacrocorax carbo* is now widespread. It consists of two sub-species: *Phalacrocorax carbo carbo* which is usually found on rocky coasts in more exposed, marine areas and *Phalacrocorax carbo sinensis* which occurs mostly inland and along coasts of non-tidal waters.

The population of Great Cormorant within the EU has increased significantly over the last 20-30 years and the species is now considered to be healthy (in favourable condition) in terms of overall population size and range.

Two pan European censuses were conducted in 2003 (wintering) and again in 2006 (breeding) by Wetlands International. They estimated a minimum of 372,300 breeding pairs and the total population is depending of the conversion factors used. This estimate is for the whole of the Western Palearctic Region which includes 47 countries such as Russia,



Map of Europe and beyond showing the major areas of occurrence of Cormorants

Ukraine, Turkey, Egypt, Libya etc as well as the EU-27⁵. The EU-27 population is not known but will necessarily be smaller.

As a generalist fish-eating bird, the Great Cormorant is increasingly being reported to be causing damage to commercial fisheries, aquaculture and sport-fishing. However, whilst relatively large losses of fish to cormorants have been recorded at individual fisheries in a number of countries, the precise economic significance of such damage has not been quantified in most cases.

This makes it very difficult to assess the real impact of the Cormorant population across the EU. The impacts may be very different from one site to another and from one country to another and is highly dependent on local circumstances. Problems are therefore best addressed on a case by case basis, using the derogation system available under the Birds Directive where appropriate. .

2.2. General principles regarding the use of the derogation system under art.9

The Birds Directive concerns 'the conservation of all species of naturally occurring birds in the wild state in the EU. It covers the protection, management and control of these species and lays down rules for their exploitation' (Article 1).

The overall objective is to 'maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level' (Article 2).

In this context, the Directive requires, amongst others, that Member States 'establish a general system of protection for all species present in Annex I' (Article 5).

This general protection regime should prohibit in particular:

- a) the deliberate killing or capture by any methods;
- b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
- c) taking of their eggs in the wild and keeping these eggs even if empty;
- d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- e) the keeping of birds of species the hunting and capture of which is prohibited.

The Directive nevertheless provides for exceptions to the general prohibitions set out in Article 5. Specifically, the hunting of species listed in annex II of the Directive is permitted under certain conditions. So is the trade in species listed in Annex III (again under certain conditions).

For all other species (including for the Great Cormorant) an exception to the prohibitions in Article 5 is only possible where the requirements of Article 9 are fulfilled. Article 9 allows Member States to derogate (i.e. depart) from the basic prohibitions in Article 5 provided three conditions are fulfilled:

- there is no other satisfactory solution ;
- one of the reasons listed in 9(1)(a),9(1)(b), or 9(1)(c) applies;
- and the technical requirements of Article 9(2) are fulfilled.

Member States do not need to consult the Commission before applying derogations but they are obliged to submit an annual report on all derogations issued under Article 9 to the European Commission. This is so that the latter can ensure that the consequences of these derogations are not incompatible with this Directive – ie that they do not undermine the conservation of the species for which derogations have been granted. These derogations must be justified in relation to the overall objectives of the Directive – ie they should not lead to a situation where the Great Cormorant population and range is reduced to such an extent that it becomes vulnerable or leads to an unfavourable conservation state.

⁵ Wetlands International – Cormorant Research Group is currently undertaking a updated European census to aim to get a better picture of the actual population size and distribution of the great cormorant in Europe – http://web.tiscali.it/sv2001/Cormorant_Counts_2003-2006_Summary.pdf

In the guidance document on hunting (EC, 2008), it is stipulated that “*derogations are ‘exceptions’ which allow for some flexibility in the application of a law*”. This sentence is particularly valid in the context of management and hunting. However this “exception concept” may be seen with more flexibility in the case of secured species making depredation at an unsustainable level, especially when taking into account cultural, economic and recreational requirements. However the conservation objective remains for these species. This means that both technical/scientific parameters and conceptual foundations and principles have to be set up.

In the case of Great Cormorant, conservation aim of the Birds directive imply that the population level in each member states has to correspond to ecological and scientific requirements. This is not clearly defined and does not correspond directly to the concept of favourable conservation status as defined in the Habitat Directive. However in analogy with the requirements for reporting according to Article 17 of the Habitats Directive, these requirements should integrate aspects related to population size and range and may include specific analysis for well-defined (flyway) populations and/or sub-species (ie. *carbo* and *sinensis*).

In the figure 5 of the Guide on Sustainable hunting (EC, 2008), the concept of very favourable conservation status was proposed to describe species that are very plentiful and have a favourable conservation status or ‘pest species’ that are widespread and relatively abundant and are considered to have a favourable conservation status.

Several criteria were proposed to determine “very favourable status” as the NON SPEC⁶ species that have a Secure European Threat Status⁷: no important declines in the breeding or wintering populations⁸ and/or very large population⁹.

Currently, the Great Cormorant can undoubtedly be considered to have such a “very favourable status” in all or almost all the Member states. As long as this status is maintained in a Member state, there is no reason to consider that derogations run counter to the conservation aim of the directive.

2.3. Current use of the derogation scheme (Birds Directive - Article 9)

For the purposes of this guidance document, an analysis was made of the use of the derogation system for Great Cormorant in different Member States during the period 2001-2006. This is based on the national derogation reports submitted to the Commission.

Altogether, 22 Member States have used the derogation system at least once for the Great Cormorant between 2001 and 2006 (n= 977, Bulgaria and Romania have not yet submitted derogation reports). The main reasons given: are the prevention of serious damage to crops, livestock, forests, fisheries and water (71,6 %, n=699) and the protection of flora and fauna (18,6 %, n=181). Other cases concerned research, public health and safety or to unknown motives (n=47). (see graph 1 and figure 1).

With only 15 cases recorded in the derogation reports, eggs culling and nest destroying seem to be used quite rarely in EU. However, the situation is probably more complex as demonstrated by the Danish case. In Denmark, the current management policy of the Ministry of Environment includes the prevention of new colonies and oiling of eggs in some of the existing ground nesting colonies (Carss et al. 2005). It seems that between 1994 and 2002, between 2,040 and 4,500 breeding adults were killed per year and 100 of nestlings were killed. In 2002, the management plan was revised and the objectives changed towards a more population control oriented management (Jepsen et al. 2005). Since 2002 egg oiling has been carried out in selected large colonies. Up to a third of all cormorant colonies and a fifth of all cormorant nests in Denmark have during a single year been

⁶ species of European conservation concern

⁷ Birds in Europe Their conservation status, BirdLife Conservation Series n°3, 1994

⁸ less than 10% of the national breeding populations declining more than 20% in size; less than 2% of the national breeding populations declining more than 50% in size; less than 10% of the national breeding populations declining more than 20% in range; less than 2% of the national breeding populations declining more than 50% in range; or less than 10% of the national wintering populations declining more than 20% in size; less than 2% of the national wintering populations declining more than 50% in size

⁹ > 1,000,000 pairs

exposed to one or more forms of management, especially egg oiling. The total number of nests to which the intervention measures were applied with the result that the nests or their contents were lost rose from a total of 7,500 nests in 1994–2001 to a total of 39,700 nests in 2002–2008. The highest number of nests subject to regulation by the Danish Forest and Nature Agency was in a single year approx. 7,200 nests in 2008, equivalent to a fifth of all cormorant nests in Denmark. Interventions have prevented further growth in the breeding population in specific areas and therefore are likely to have contributed to the decline in the total breeding population in Denmark in recent years (33.700 breeding pairs in 2009 versus 39,906 in 2005).

Some other cases are known from Poland (National Park "Mierzeja Wiślana") or Sweden but not with such a large extent.

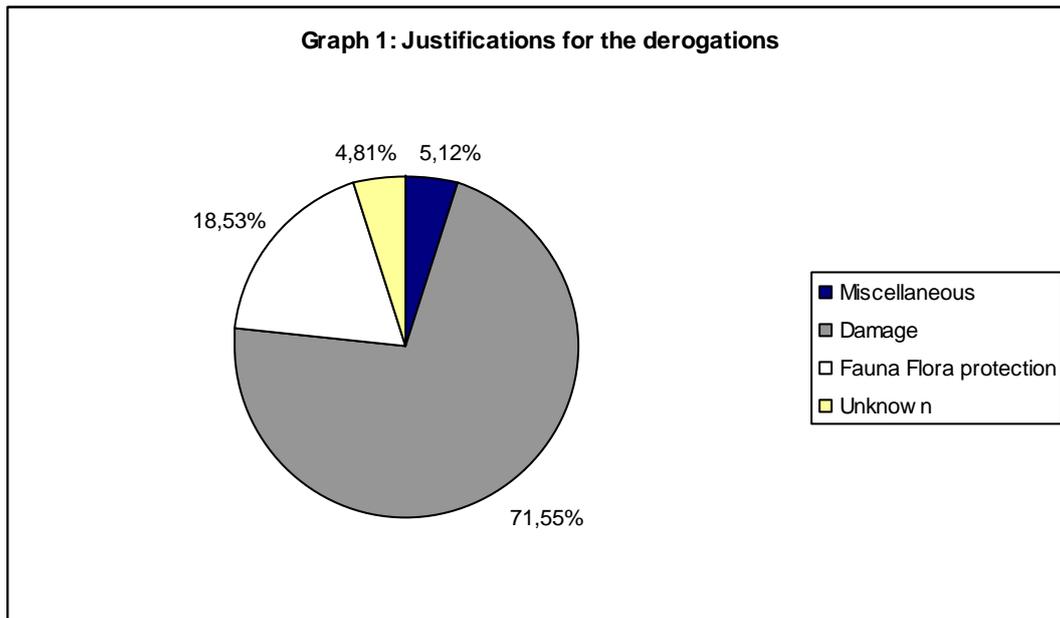
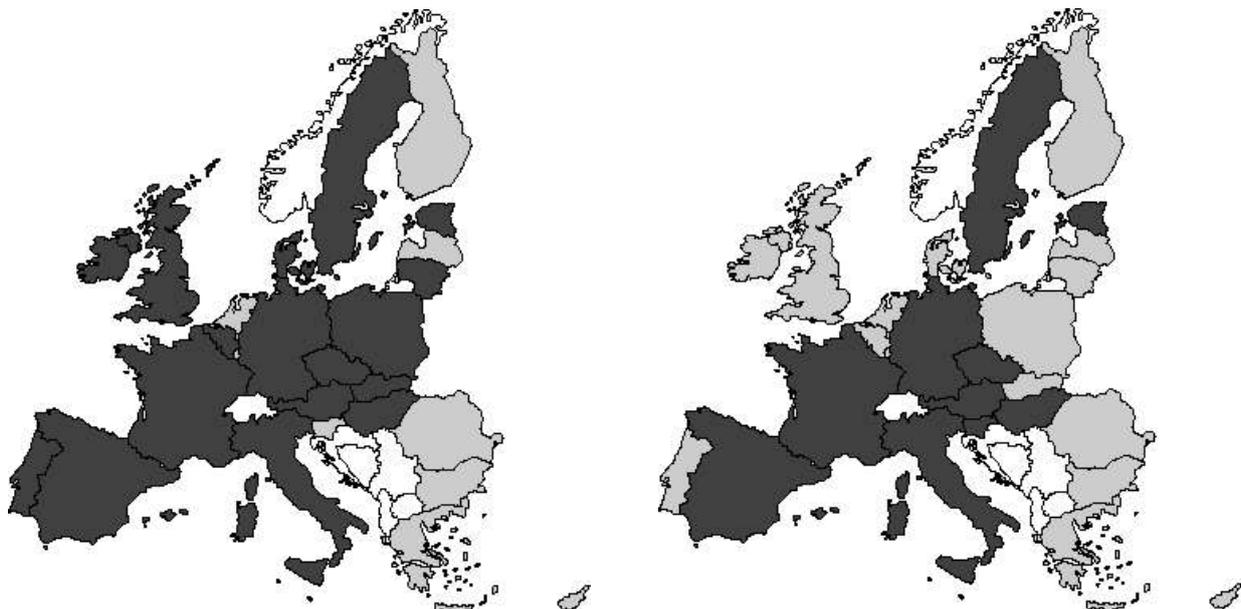


Figure 1: in dark grey, Member States using the derogation system because of serious damage (left) or protection of fauna and flora (right), the case of BG and RO is not significant (no report for these periods)



Outside the breeding season, a minimum of 235.000 Cormorants was killed in the EU between 2001 and 2006 on the basis of a derogation given to prevent serious damage or to protect fauna and flora¹⁰. 56,4% of these birds were killed in France. However, this figure has to be put into perspective because:

- There are not derogation reports yet from BG and RO but Great Cormorant was a hunted species for some time until 2002 in BG (more than 1000 adults killed in the non-breeding season).
- Numerous countries are sending reports only since 2004 (CZ, PL, HU...).
- It is not certain that all the reported killed birds were effectively killed: when it was possible only effective realisations and not targets were taken into consideration, however there is sometime a lack of precision. It is known in the case of France that only around 80% of the objectives were achieved¹¹ but some other countries (DE, HU, IT...) also gave derogations, which had no results.
- In at least 175 derogations where firearms were used (not only for scaring) to prevent damage or to protect fauna and flora, we have no data concerning the number of birds killed (no case for France). This includes some general authorisation under different conditions:
 - “not exceeding 5% of country-wide total stocks and/or 10% overall country-wide total stocks (Land Oberosterreich, AT),
 - maximum 10 % attendees in the locality (South Bohemia Region, CZ),
 - maximum numbers of taken cormorants (Central Bohemia Region, CZ).

Reasons	Killed Cormorants in EU (% total)	Killed Cormorants in France (% EU)
Prevent serious damage	167,773 (71,4%)	76,503 (45,6 %)
Protection of flora and fauna	62,664 (26,7 %)	55,885 (89,2 %)
Unknown reasons	4,500 (1,9%)	0
	234,937	132,388 (56,4%)
(Other reasons not reported)		

If we estimate the number of killed cormorants at 240.000 between 2001 and 2006, this would mean 40,000 individuals per year, more or less 3,3 % of the total population. This figure is coherent with the figure proposed by Carss (2003) with 41-43,000 birds killed.

The very massive use of derogation in France did not prevent the increase of wintering population from 14,000 birds in 1983 to 99.000 birds in 2007 (and the atomisation of roosts from 80 in 1983 to 870 in 2007). Referring to Marion (2008), there is no correlation between the evolution of the number of individuals at departmental level and the intensity of shooting.

3. Applying the provisions of art.9 in the case of the Great Cormorant

As stated in the previous chapter, the derogation system allows for exceptions to be made to a number of activities that are normally prohibited under the Birds Directive where particular problems or situations exist or may arise. These derogations must however fulfil three key conditions:

- there is no other satisfactory solution ;
- one of the reasons listed in 9(1)(a),9(1)(b), or 9(1)(c) applies;
- and the technical requirements of Article 9(2) are fulfilled.

Each of these conditions is examined below in relation to the Great Cormorant.

¹⁰ A few number of other Cormorants were killed for other reasons.

¹¹ It seems that French figures are based on birds effectively killed.

3.1. General principles for management schemes using the derogation system

Some Member States as Denmark and France have set up a national management scheme and this innovative approach is supported by the European Commission. As proposed by Wires *et al.* (2006), we need conservation strategies based on ecosystem health and process that recognise humans, fish and cormorants are three components of a complex system driven by many species and dynamic interactions.

In USA, some principles were used to guide the Double-Crested Cormorant management scheme (USFWS, 2003). The following five statements form the conceptual foundations on which Double-Crested Cormorant management is based. The text could be adapted to the Great Cormorant case as follow:

- Great Cormorants are an international migratory bird resource and as such they have inherent value regardless of their direct use to humans;
- While Great Cormorants have undergone recent range expansions, they are native to European Union;
- Great Cormorants are predators that, while a natural part of the ecosystem, can compete with humans for fisheries, with consequences of varying ecological and socio-economic significance;
- Great Cormorant populations have increased significantly in the past 25 years in Europe and this increase has led to both real and perceived resource conflicts;
- There are sound biological and socioeconomic rationales for developing a comprehensive Great Cormorant management strategy in the EU through the use of the article 9 derogation system by the Member States.

Furthermore the use of the derogation system and national management schemes should comply with the principles of the ecosystem approach as developed by the Conference of the Parties (COP Nairobi 2000), to the Convention on Biological Diversity (CBD)¹². This is “*an ecosystem-based strategy for the integrated management of land, water, and living resources that promotes conservation and their sustainable use in an equitable manner*”. The Ecosystem Approach calls for multidisciplinary thinking among a variety of actors to develop a collaborative vision of a desired future. The approach recognizes that humans, with their cultural diversity, are an integral component of many ecosystems. The Ecosystem Approach consists of 12 principles presented below with some key words underlined for the Great Cormorant case:

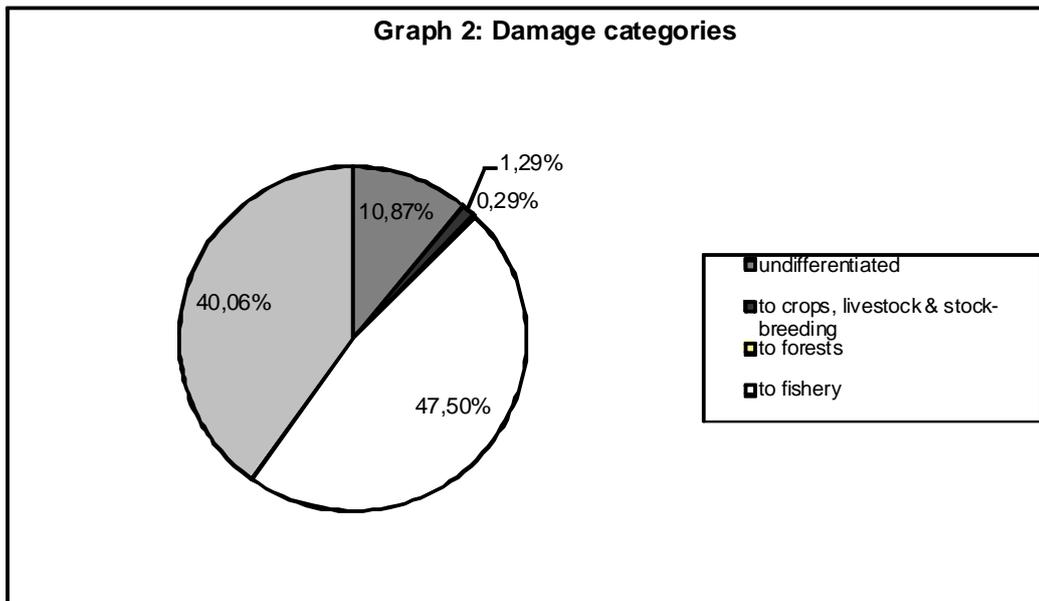
- Principle 1: The objectives of management of land, water and living resources are a matter of societal choice.
- Principle 2: Management should be decentralized to the lowest appropriate level.
- Principle 3: Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems.
- Principle 4: Recognizing potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context. Any such ecosystem-management programme should: (a) Reduce those market distortions that adversely affect biological diversity; (b) Align incentives to promote biodiversity conservation and sustainable use; (c) Internalize costs and benefits in the given ecosystem to the extent feasible.
- Principle 5: Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach.
- Principle 6: Ecosystems must be managed within the limits of their functioning.
- Principle 7: The ecosystem approach should be undertaken at the appropriate spatial and temporal scales.
- Principle 8: Recognizing the varying temporal scales and lag-effects that characterize ecosystem processes, objectives for ecosystem management should be set for the long term.
- Principle 9: Management must recognize that change is inevitable.
- Principle 10: The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity.

¹² Convention on Biological Diversity, (2002), <http://www.cbd.int/>

- Principle 11: The ecosystem approach should consider all forms of relevant information, including scientific and indigenous and local knowledge, innovations and practices.
- Principle 12: The ecosystem approach should involve all relevant sectors of society and scientific disciplines.

3.2. Prevent serious damage

17 Member States have used the derogation system at least once between 2001 and 2006 to prevent serious damage to crops, livestock, forests, fishery and water (n = 699, see graph 2).



Article 9 (1)(a) third indent allows for derogations to be applied ‘to prevent serious damage to crops, livestock, forests, fisheries and water’. This derogation, which is intended to help regulate ‘damage-causing birds’, is the one most commonly used for the Great Cormorant. It has a number of dimensions to it

Firstly, it clearly relates to economic interests: i.e. the damage caused by the Great Cormorant leads, or could lead, to a direct or indirect economic and/or financial loss or to the loss of production material. This implies that the damage represents a cost (extra expenses or loss of income) due to the interaction between the Great Cormorant and human-related economic activities, such as fisheries. It follows that the anticipated or realised damage to assets should also be measurable in monetary terms.

Secondly, the damage also has to be considered ‘serious’. In this regard the European Court in its ruling on Case 247/85 noted that ‘the aim of this provision of the Directive is not to prevent the threat of minor damage’¹³. In this context, two aspects may be noted: the likelihood and extent of damage. The chance that damage might occur does not suffice. If damage is not yet apparent, past experience should demonstrate a high probability of the occurrence of damage. Furthermore, it should concern serious damage to an economic interest, indicating that this does not cover mere nuisance and normal business risk.

This raises the issue of the difference between ‘damage’ and ‘conflict’. The difference between the two needs to be underlined, as only the former is covered under the derogation system.

The Great Cormorant is often perceived as a species that causes conflicts. ‘Conflict’ is a state of opposition between ideas or interests resulting in disagreement or controversy. This opposition

¹³ Ref see hunting guide

between simultaneous and incompatible wishes regularly lead to emotional tensions. The conflict is characterised by widespread stakeholder dissatisfaction with the current situation and by a fear of conservationists concerning the deterioration of the species conservation status.

Furthermore, consideration of ethics is part of the process as wildlife management is fundamentally a human, or social construct: biological carrying capacity differs from social carrying capacity (i.e. limits of human tolerance), especially for species seen as competitors with humans (Wires *et al.* 2006). Ecological processes determine the potential cormorant population but social processes play a large role in determining the actual cormorant population. Ecological systems function within the subjective boundaries set by men. (Van Bommel *et al.* 2003). Various stakeholder groups often hold different values and, consequently, have different preferences for the use of limited natural resources: conflict is thus often inevitable (Carss, 2003).

On the other hand, 'damage' can be defined as the loss of something desirable or injury or harm impairing the function or condition of a person or thing (Collins dictionary). This is a very broad definition but generally this is related to a cost or an expense (commercial or financial loss, material loss) or to a moral wrong.

3.2.1. Serious damage to commercial fisheries and aquaculture producers

Serious damage to fisheries is specifically referred to in Article 9(1)(a). It includes damage to the resource (including wounded fish) and damage to material such as fishing gear. The EC Communication on aquaculture¹⁴ also states that "*aquaculture facilities may suffer from predation by some protected wild species of birds and mammals. Predation may significantly reduce the profitability of an aquaculture enterprise and predator control is difficult, especially in large extensive ponds or lagoons. The efficacy of scaring devices is doubtful, because animals quickly become used to them*".

In this context, fisheries should include:

- The industry of catching, processing, and selling fish or the place where this is carried on.
- A place where fish are reared to be sold (aquaculture)

Recreational fisheries economies will be considered in another specific section, even if distinction between both categories is sometime difficult.

A derogation given to prevent serious damage to fisheries has a number of dimensions.

- Firstly, it clearly relates to economic interest and the definition proposed above is clearly related to the economy with turnovers and hopefully profits. Commercial fisheries and aquaculture can be encountered in freshwater, including fishpond system, in brackish water (coastal wetlands) and in saline areas (coastal areas).
- Secondly, it is intended to prevent damage; therefore it is not a response to already proven damage but of the strong likelihood that this will take place in the absence of action. Derogations could be issued for Cormorants when found committing or about to commit depredations to the resource (stocks) or to the production devices.
- Thirdly, there must be a basis for concluding that damage will be serious in the absence of action.

There is a kind of paradox between the fact that derogation can be issued for prevention and the fact that the damage has to be proved to be serious and not non-serious. Prevention means that we will never be sure that the damage would have been serious in the absence of action. Furthermore, Cormorants are a generalist predator whose diet varies considerably between seasons and locations and tends to reflect fish species composition and the present composition of cormorant diet appears to have been strongly influenced by human-induced changes in the natural balance of fish stocks (USFWS, 2003). Cormorant fishery conflicts are complex and detailed case studies indicate that unequivocally demonstrating 'cause' and 'effect' relations between cormorants and fish stocks/fisheries can be difficult. While the uncertainties mean that it is often difficult to provide

¹⁴ A strategy for the sustainable development of European aquaculture, Communication from the Commission to the Council and the European Parliament COM(2002) 511 final

unequivocal evidence that there is a real problem for fisheries, the absence of clear evidence of damage does not mean that it is not occurring.

Article 9.2 is not asking for specific information to demonstrate the size of damage but Member States have to be in position to demonstrate that derogation schemes are clearly related to the reason defined by article 9.1. (a) third indent. When granting derogations, the national authorities bear the burden of proof¹⁵ and must motivate their decisions in a clear and sufficient manner. According to the Court, "*in the respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Directive*"⁷⁶.

This also means that Member States have to adopt a reasoning that appropriate to the different locations (coastal lagoons, fish ponds...) and to the different economic sectors (fish pond aquaculture, coastal aquaculture...).

Because environmental and other conditions vary locally, the degree of damage by Cormorants will vary locally and several reasoning should be adopted for the different situations within the country (e.g. Cormorant impact is generally most significant in artificial, highly managed situations). In general, it can be stated that the use of these terms "serious damage" is situation-dependant. The reasoning has also to consider the fact that ecological effects on fish populations are not necessarily the same as effects on commercial catches, or vice versa.

It seems very difficult to connect the term "serious damage" to economical indicators i.e. a certain percent of turnover or profit. There is no evident threshold as 1% of turnover could be a high proportion of the profit. Furthermore there is a lack of data on the economy of fishing enterprise leading to the impossibility to determine general ratio.

The magnitude Cormorants-related economic impacts to the aquaculture industry depends on many different variables, including the value of the fish stock, the time of year the predation is taking place, and the number of depredating birds present. The frequency of occurrence of Cormorants at a given aquaculture facility can be a function of many interacting factors, including: (1) size of the regional cormorant population; (2) the number, size, and distribution of ponds; (3) the size distribution, density, health, and species composition of fish populations in the ponds; (4) the number, size, and distribution of "natural" wetlands in the immediate environs; (5) the size distribution, density, health, and species composition of "natural" fish populations in the surrounding landscape; (6) the number, size, and distribution of suitable roosting habitat; and (7) the variety, intensity, and distribution of local damage abatement activities (USFWS, 2003)

In this reasoning, Member states have also to demonstrate both the risk of damage and the seriousness of this damage. In this regard the European Court has noted that "*the aim of this provision of the Directive is not to prevent the threat of minor damage.*"¹⁶ Two aspects may be noted: the likelihood and extent of damage. The chance of the occurrence of damage does not suffice. If damage is not yet apparent, past experience should demonstrate a high probability of the occurrence of damage. As suggested in the European Parliament resolution explanatory statement, while production of 'scientific proof' of damage having occurred is often and keenly called for, it is not needed in every individual case and certainly not where damage has already occurred. Under the terms of the Directive it would be sufficient to have plausible indicators that the *danger* of serious damage existed.

¹⁵ See the case of spring hunting in Finland (judgment of 15 December 2005, Commission/Finland, ECR 2005, p.11033), where the Finnish Government has not provided evidence to support its assertions (e.g. paragraphs 35, 39 and 41).

¹⁶ "*The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive.*" (judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029paragraph 56).

Several Member States have studied two main parameters to assess the seriousness of the damage in monetary terms: turnover and revenue/profit. However, yields of both commercial and recreational fisheries are subject to substantial between-year fluctuations (Carss *et al.* 2005) making the assessments difficult.

Competent authorities nominated by Member states could encounter different situation:

- Very specific or local cases where the reasoning is directly connected to the case
- More general and global cases where the reasoning proposed have to be adapted to specific ecological and geographical features and to specific categories of commercial fisheries and aquaculture. In this case, description of damage that occurred in the past or results of specific studies may help to adapt the reasoning.

The results of phone interviews¹⁷ and some publications analyzed offer the possibilities to illustrate the diversity of damaging situation and the miscellaneous reasoning proposed with the examples below:

- In United Kingdom, for licensing purposes, it is accepted that proving damage by direct evidence alone is extremely difficult in many circumstances. If, on balance, it is reasonable to assume from the indirect or circumstantial evidence that cormorants are causing serious damage at a site then this is taken as basis for serious damage occurring. Serious damage is accepted to occur where: (a) significant numbers of cormorants are actively foraging at a site; and (b) the population structure and combination of fish species present at the site indicate that the foraging birds are preying on fish stocks worth protecting; and (c) other factors are not likely to be responsible for serious damage to the fish stocks worth protecting at the site. Given the difficulties of quantifying fish stock size and the requirement to prevent serious damage occurring¹⁸ a pragmatic approach to assessing serious damage (e.g. subjective evaluation by experts) is likely to be required. Damage may occur in a variety of ways, and assessments of whether such effects are serious will depend upon the value put on that aspect of the resource and on how 'the fishery' is categorised: e.g. at the ecosystem, resource or individual level. To the managers of private fisheries, damage is likely to be expressed at the 'enterprise level' in terms of the economic effect on their business.
- In Italy, where the problem is mainly on lagoon-pond aquaculture, damage was always considered as potentially serious due to abnormally high fish densities, artificial habitat etc, unless mitigation measures are applicable.
- In Denmark, damage to pound-nets fisheries is considered to be serious because this evidence was supported by local studies and attempts to improve the situation. Furthermore, a study has demonstrated that the cormorants eat half of the 'small' salmon on their way out of the Ringkøbing Fjord and this was considered serious.
- In Poland, according to the regional authorities which issue the derogations, in areas where aquaculture takes place in lakes the criteria for considering damages as serious are based on the information on the number of breeding and non-breeding birds per surface area of the water body and the type of the water body. In other regions where aquaculture is based on fish-ponds the seriousness of damages is considered based on the information on damages in terms of fish numbers/quantity, and the derogations are only issued where the damages are reaching double numbers in terms of percentage of fish eaten by cormorants (well above 10%).
- In Czech Republic only predation on fish stock is taken as damage and the interpretation of the "serious damage" for aquaculture is made on a case by case basis as follow: damage is compared with turn over of the operator and other conditions (type and size of fish stock, type of fishpond etc.),
- In France a specific definition was adopted for fish farms. A serious damage to aquaculture is a damage that results in a cut in the profit margin questioning the viability/profitability of the enterprise. An impact of 10-20% on the profit is considered as serious and this threshold could correspond to one Cormorant per hectare all along the winter.

¹⁷ Undertaken by Commission staff (DG ENV, nature and biodiversity unit) with representative of Member states authorities between December 2008 and January 2009

¹⁸ Experimental studies have shown that predation by cormorants can deplete a fish stock very rapidly, and there may be neither the time nor the opportunity to conduct detailed assessments of the impacts on stocks before serious damage is done

Several detailed studies were undertaken, e.g. in Mayenne, Maine-et-Loire, Brenne, Forez or Lorraine areas, to detail relation of cause and effect. It was demonstrated that the Cormorant was an essential factor in the abandonment of fish ponds with the following scheme: damage of Cormorant, reduction of profitability, demoralization that generate a bad management of the situation mainly because of budgetary reasons, abandonment of the activity resulting in the degradation of the ecological value of the pond and more generally of employment rate and, for specific fishponds territories, a loss cultural identity. Serious damage is not only related to economic criteria: there is an increasing current trend in the abandonment of fishponds (- 10 % of exploited areas last years) that are converted in hunting estates or after draining in maize fields. This is resulting in a loss of biodiversity value in some Natura 2000 areas mainly composed of nature-like fishponds¹⁹.

3.2.2. Serious damage to recreational fisheries economies

The Birds directive does not distinguish different categories of fisheries with commercial or recreational ones. Recreational fisheries correspond to leisure fishing grounds but also angling clubs, commercial put and take and more generally to a large economic sector including devices, clothes, tourism, warden staff etc.

It is considered that a derogation given to prevent serious damage to fisheries clearly relates to economic interest. Any profitable body with a turnover and a profit could be subject to an economical damage. However, a clear link between the damage and the economical activity has to be set up.

For private fishing ponds (or rivers stretch) and public fishing waters, the economic interest is very indirect and Kohl (EEA 2006) has considered that for traditional non profit oriented angling clubs money alone is not an adequate criterion and that it should be replaced by natural yield/sustainable use. In any case, reasoning for private estates and public waters should be different.

If there is no turnover for private resource as private lakes, ponds or river stretch, the estate has sometime a certain monetary value related to its use. The decrease of fish stocks could implicate a loss in the value of the estate (i.e. assets). However, in Guide on Sustainable hunting (EC, 2008), it is considered that damage to interests other than those mentioned, e.g. other forms of property or other damaging situations, is not covered. This means that the use of the damage criteria to provide derogation could be fragile.

At the individual level, perceptions that a cormorant 'problem' exists can be a powerful force in influencing amenity value. Thus fishing businesses can be impacted by the reluctance of anglers to visit a site affecting income to the fishery. It seems that such cases are local and could be demonstrated.

Concerning public waters, angling communities are frequently investing in not only restocking but also in the conservation of aquatic resources and they contribute to the implementation of the Water Framework Directive²⁰. This is generally a non profitable investment mainly related to their passion and sometime to the legal nature of fish (*res nullius*, with certain compensation through the licence paid or through the action of public interest undertaken²¹).

This non profitable investment is generally made both at local sites and at large geographical scale. In principle, it could be possible for Member states to justify the damage by a comparison of the non profitable investments made by angling communities and the reduction of catches due to Cormorant. However, there is in general a lack of solid information demonstrating a single "one-way" causal relationship as impact and reference situations are missing in the majority of regions. The reasoning has to be based on specific studies and for specific areas.

¹⁹ However, in Czech Republic where damage was compensated, production of aquaculture remains stable in the last 10 years and economical situation of the aquaculture operators was mainly influenced by competition on the market with fish product.

²⁰ Their action for threatened species will be studied with the case of derogation to protect fauna and flora.

²¹ Value differences may influence production of scientific data such as on damage (Behrens *et al.* 2008): for some stakeholders fish in water are not the property of anyone (*res nullius*), other ones have a different understanding of this, mainly fishers doing restocking or paying for permits.

In ecological terms the measure of damage may relate to the ecological importance of the species being affected (e.g. a rare or threatened species), but in this case we come back to the criteria “protection of fauna”.

The grayling case (*Thymallus thymallus*) could illustrate the issue, and if derogation has to be provided, competent authorities should determine if it is preferable to use the damage criteria or the criteria “protection of fauna”. Graylings have specific winter behaviour as they gather in deep stretches of alpine rivers, which allow the Cormorant to effectively hunt and reduce considerably the number of fishes, even in relatively natural river parts. That is the reason why in Switzerland there are some actions undertaken against the Cormorant. In Austria also, most conflicts are occurring related to grayling populations, which have been heavily declining in the last years. However, the sensitive situation of the grayling population is due to a combination of other stresses, and some stakeholders suggested also that the remarkable losses could be due to the stock management: the fish had no experience with Cormorants before they were released, and therefore not developed any fleeing behaviour, which makes them an easy prey. Graylings have no economical market value but are appreciated by sport fishers as diet for trout or Danube salmon. The economic loss rather comes from issuing less fishing licences, or the costs for re-stocking the grayling population. But the best option is probably to consider this species under the fourth reason for derogation under subsection (a) concerning the protection of fauna (see below) and not the damage. This could be the same for Czech Republic where the interpretation of the “serious damage” on the rivers (angling) concern only strong predation at so called “fish breeding sections”: parts of the watercourses where the trout fry is produced in semi-natural process.

3.2.3. Serious damage to forestry

Damage on vegetation and trees are reported from miscellaneous areas, e.g. in Poland where damage to trees in the Kały Rybackie colony (covering ca. 100 ha of Pine forest) has caused a conflict between cormorants and foresters. In Sweden also, derogations were already provided to prevent damage to forests.

Such damage occurs generally when there is a large colony or a permanent large dormitory in trees. This is due to acid faeces accumulated. The seriousness of the damage can be demonstrated when the use of trees for commercial purpose is threatened. It seems that the same could occur for crops (Austrian, Italian and Portuguese cases reported), however there is no precise data and it could be a mistake in the use of categories in the report on derogation prepared by Member States.

The case of damage to non commercial forests and vegetation is more difficult as there is no commercial activities that help to demonstrate the damage. However, there are other amenities or leisure activities that are related to the wood and its value (assets) could be degraded. If this is demonstrated, we could potentially consider that there is a risk of financial (and not commercial) loss. However the demonstration has to be clear and accurate, as the case should be uncommon.

3.2.4. Serious damage to water

Nine Member States have already used the derogation system at least once between 2001 and 2006 to prevent serious damage to water (n = 280). This category is largely used in Czech Republic, in France and in Hungary. However article 9.2 is not asking for specific information to explain this category of damage. That is the reason why the kind of damage to water considered by Member states is largely unclear: is it related to water quality (e.g. in relation with WFD) or because of conflicts with angling or other reasons? It has to be reminded

It has to be reminded that article 9.1 (a), first indent, could also be used when the interest of public health and safety is at stake. This could be the case for certain reservoir dedicated to drinkable water where concentration of Cormorant could occur.

The use of article 9.1 (a), third indent for water should only be used when the water body has a commercial purpose other than fisheries. This could be the case for certain leisure areas or other examples to be demonstrated.

3.3. Protection of fauna and flora

The fourth reason for derogation under subsection (a) concerns the protection of flora and fauna. As highlighted by the Guide on Sustainable Hunting (EC, 2008), the types of fauna or flora are not specified but would appear to be different from the flora and fauna of economic interest covered by other provisions of Article 9(1)(a). The case for using the derogation is likely to be strongest where it is linked to the maintenance of populations of species that are rare or threatened but is not limited to such species. Furthermore, there appears not to be a need in this case to demonstrate a likelihood of serious effect before applying the derogation.

10 Member States²² have used the derogation system at least once between 2001 and 2006 for the protection of fauna and flora (n = 181). However, this is massively used only in France. However, information reported does not define which species has to be protected (threatened species? angling-related species?).

Birds may affect flora and fauna by predation, grazing, demolition, trampling, accumulation of droppings etc. A relatively small number of species is allegedly blamed for this and are generally included in the Birds Directive annex 2 (e.g. Herring Gull *Larus argentatus*, Crow *Corvus corone*, Magpie *Pica pica*). However, the Cormorant *Phalacrocorax carbo* is not included in this annex 2 and is also blamed for this. Contrary to other predator bird species (birds of prey, herons...), the large increase of cormorant populations and the gregarious behaviour led to specific questions related to their impact on specific fauna species,

A long-term impact on other populations of flora and fauna is only likely when localised occurrences are involved. Each case should be considered thoroughly and decided on advice from the conservation authorities. Decisions should be made on best available scientific information on the long-term impact on the affected population(s) and only when it concern important biodiversity considerations

Protection of fauna and flora is a reason where the question of damage is not directly focused by the directive. However the need to protect fauna and flora from the Great Cormorant derives from potential damage to natural assets.

Recently a definition was given to environmental damage with the Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage. This environmental liability directive focuses environmental damage, and defines damage as “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”. This is a broad definition but the concept is restricted to protected species and natural habitats and any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. In its annex 1, this directive defines that the following does not have to be classified as significant damage:

- negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question,
- negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators,
- Damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

These restrictions are not determined as such by the Bird Directive that does not focus only the protected species in the fourth reason for derogation under subsection (a). However the principles established by environmental liability directive have a great interest and remain valid to guide the derogation process. It is suggested to distinguish three species categories for these guidelines:

- Species protected at EU level (annex II and/or IV in the Habitats Directive) with an unfavourable conservation status.
- Species of conservation concern focused by action plans or legislative measures at EU, national or regional level.

²² AT, CZ, DE, EE, FR, HU, IT, SI, SP, SW

- Other widespread species or species with a favourable conservation status at EU, national or regional level.

It appears that the species included in the third category do not need protection. In this context, a derogation to protect these species would be inaccurate and the predation made by the Great Cormorant has to be considered as a natural process.

For the two first categories, where the case for protection is supported by compelling elements, control could be considered. It would therefore appear that only in specific situations, to be determined by the conservation authorities or their agencies, could control of birds be an appropriate management measure, at the relevant geographical level, to effectively reduce the negative impact of certain bird species on vulnerable flora and fauna. The following examples are examples where the derogations seem to be legitimate;

- A FRAP study (Jepsen *et al.* 2006) used a combination of methods to estimate the effect of cormorant predation on fish populations in a large shallow Danish estuary (Ringkøbing Fjord). Results indicated that the Cormorants ate a significant part of the recruitment of several important species. Thus, micro-tagging experiments showed that 40–50 % of tagged eel were eaten in one year, 25–40 % of tagged salmon (*Salmo salar*) smolts were eaten during the smolt-migration in April/May. These results were based on certain assumptions and are subject to variation and uncertainty with rather wide statistical ranges, but they pointed that fish populations, already under significant pressure from fishing and habitat degradation, may decrease dramatically because of predation by large numbers of cormorants.
- The Council regulation n° 1100/2007 establishing measures for the recovery of the stock of European eel (*Anguilla anguilla*) are a key example corresponding to the second category. For each eel river basin, Member States shall prepare an Eel Management Plan with the objective to reduce anthropogenic mortalities so as to permit with high probability the escapement to the sea of at least 40 % of the silver eel biomass relative to the best estimate of escapement that would have existed if no anthropogenic influences had impacted the stock. An Eel Management Plan may contain miscellaneous measures including combating predators as suggesting by the regulation. However an interesting example may be found in the French management plan: the Great Cormorant issue is presented in general terms but there is one measure proposed concerning the Great Cormorant and a leaflet produced in the framework of this exercise is not considering the avian predation as an issue for the eel.
- In Italy, there is locally predation made by the Great Cormorant on the breeding sites of endangered Marble trout *Salmo marmoratus*, and especially where conservation actions are being taken for this species, the derogations issued to protect fauna seem to be legitimate. In Slovenia also, Marble trout is subject to restoration measures and this tend to be more successful without predators like cormorant.
- In some countries other fish species may be subject to conservation plan or actions as grayling (*Thymallus thymallus*), Danube Salmon (*Hucho hucho*), Salmon (*Salmo salar*) or in Spain, *Valencia hispanica* or *Aphanius iberius*. In this case, when the impact of Great Cormorant is demonstrated, a scheme for derogation may be prepared.
- In Hungary, damage to breeding bird colonies (heronries) by aggressive occupation by Cormorants of safe breeding islands was reported and because of specific conservation actions for this colonies, derogation to the Great Cormorant protection were issued

In France culling authorisations are given for rivers with supposed endangered “patrimonial” species, these are fishes that have both high conservation status and high value as quarry species (Carss, 2003). The notion of high value as quarry species is not related to conservation concern but to ecosystems services. The strict application of both the Ecosystem approach principles (see chapter 2.3) and the fourth reason for derogation under article 9 subsection (a), that is not restricted to species of concern, may give a margin of manoeuvre. As highlighted in the Guide on Sustainable Hunting (EC, 2008), the case for using the derogation is likely to be strongest where it is linked to the maintenance of populations of species that are rare or threatened but is not limited to such species. Furthermore, there appears not to be a need in this case to demonstrate a likelihood of serious effect before applying the derogation.

3.4. Showing there is “No other satisfactory solution”?

The inter-relationship between the issue of other satisfactory solutions and the reasons for the derogation has to be underlined. In practical terms (EC, 2008), there is little point in examining the issue of other solutions if the actions concerned by the derogation do not come within the scope of Article 9(1)(a) to (c). But this issue of other solutions is a mandatory approach for the damage made by Great Cormorant and protection of fauna and flora against Great Cormorant.

After the analysis of the problem or specific situation²³ that needs to be addressed (see previous chapters), there remain two parts that have to be analysed: are there other solutions? If so, will these resolve the problem or specific situation for which the derogation is sought? There are two steps: define other possible solutions and after that consider if they are satisfactory. Where another solution exists, any arguments that is not satisfactory will need to be strong and robust (EC, 2008). As highlighted in the Guide on Sustainable Hunting, it seems reasonable to state as a general proposition that any determination that another solution is unsatisfactory should be based on objectively verifiable factors, and that close attention needs to be paid to the scientific and technical evaluation of these. In the Advocate General's Opinion in Case C-10/96, objectively verifiable factors and scientific and technical considerations²⁴ are needed for derogations on the basis that there is no other satisfactory solution to a specific situation.

With regard to “other satisfactory solutions”, the extent to which predation is directly related to habitat loss, habitat deterioration or modification (e.g. loss of vegetation cover) or other environmental factors should be considered. Where such a direct relationship exists, it may be appropriate to consider predator control in combination with habitat restoration or better management of human activities. For example, predation of colonies of tern (*Sterna*) species by gull (*Larus*) species may be related to an overall increase in gull populations linked to increased food provided by poorly managed waste disposal sites.

Methods to alleviate damage mad by great Cormorants exist and they well explained in the results of the INTERCAFE's project²⁵. (Unfortunately, we still don't have access to the results, so impossible to go further in the explanations! With these results, it will be helpful to prepare a hierarchy as some scaring methods will also need derogation). Some of the proposed methods should be tested before issuing derogation. However all the methods have their limits especially when the cormorants get used to the measures implemented.

A key point is related to the cost-effectiveness of the measures implemented. This concept, that is part of the Water Framework Directive, was not developed as such in the Birds Directive. However, the word “satisfactory” may be seen not only as related to technical possibilities but also to this question of cost-effectiveness. Up to now the cost these alternative solutions is generally bearded by the commercial fisheries companies (in case of damage) or by public sector (conservation programmes to protect fauna and flora). This argument was already developed by Spanish authorities in the Case C-79/03 to support means of limed twigs compared to bird scarers. However this was not accepted by the Court because this was only developed in one province with a lack of consistency. The question of cost/effectiveness was not rejected itself but only the lack of consistency of this case (EC, 2008).

Sometimes, other solutions were not considered as satisfactory because of a need for coherence. These seems to be the case for Mullet farming where damage occurs on fisheries placed on huge areas, protected as Ramsar sites and SPAs. It was considered that scaring should not be performed in order to avoid disturbance to other species of waterbirds.

3.5. Conditions, means and methods

According to article 9.2, means, arrangements and methods for capture or killing shall be specified in the derogation. In Case C-118/94, *Associazione Italiana per il World Wildlife Fund and Others v.*

²³ The recitals to the Directive relate the possibility of derogations to “certain specific situations”.

²⁴ Opinion of Mr Advocate General Fennelly delivered on 7 November 1996, *Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne*, Case C-10/96, paragraph 39.

²⁵ <http://www.intercafeproject.net/>

Regione Veneto, the Court noted²⁶ that the use of Article 9 is subject to the following condition: "the derogation must comply with the precise formal conditions set out in Article 9.2, which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them." The Court rejected also a Belgian defence (Case C-247/85) that the legislation complied with Article 9 *inter alia* noting: "Furthermore, the derogations do not comply with the criteria and conditions of Article 9(2) in so far as they mention neither the circumstances of time and place in which they may be granted nor the controls which will be carried out."

The authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom.

During breeding season, culling eggs (oiling, replacement with dummies...) is the main method used. However, if several baltic countries are now using this method, other countries are still opposed to these kinds of action (e.g. the Netherlands) or face difficulties with NGOs as in the Constance Lake (Germany) in 2008. During migration or wintering time, firearms to kill or to scare the birds and scaring device (gas machines or other) are the main methods used.

Arrangements and circumstances of time and place are related to the limitations given to derogations. The number of birds killed or scared should be indicated and monitored through the derogation. This is sometime done with the limited number or permits, and/or the quotas proposed. In any these figures have to remain coherent with the main aim of the Bird Directive that is the conservation of birds. A derogation scheme is not elaborated to eliminate every individual in an area but just to reduce the number in proportion with the damage alleviation need or the conservation objectives to protect fauna and flora.

It is known in the case of France that only around 80% of the objectives provided by the derogations were achieved and some other countries (DE, HU, IT...) also gave derogations, which had no results. This demonstrates that monitoring is a key point to assess the efficiency of derogations.

Up to now, there have been various examples of restriction in term of space or time: e.g. shooting permits for certain areas (Sweden, Poland, Italy, Denmark, Germany, Austria), for certain periods (Romania, Estonia) or for fixed quotas (France, United Kingdom, Slovenia). The analysis of derogation granted for the Great Cormorant in EU between 2001 and 2006 provides the following examples:

- "not exceeding 5% of country-wide total stocks and/or 10% overall country-wide total stocks" (Land Oberösterreich, AT) ;
- maximum 10 % attendees in the locality (South Bohemia Region, CZ) ;
- Maximum numbers of taken Cormorants (Central Bohemia Region, CZ) ;
- A fixed quota per French department²⁷ for fish ponds on one side and open waters on the other side, quotas ranging from 0 to 4000 individuals in 2008/2009 with a total of 39.347 individuals.

It has to be reminded that any control method is vulnerable to the removed birds being replaced from elsewhere and shot birds will, after some time, be replaced by other birds. This is one of the main arguments developed against large culling schemes with seems always not to be efficient at large scale.

Limitation of time may include specific date but also stipulation as "only during daylight hours" or, as it is the case in France with the exclusion of certain period i.e the week the national wintering counts. It has to be reminded that is different from hunting, e.g. it may apply even out of the hunting season and hunting national legislation.

A question which arises (EC, 2008) is whether, in relation to pest control derogations under Article 9(1)(a) and (c), it is possible to satisfy the formal conditions of Article 9(2) by way of general authorisations, i.e. authorisations not given to specific individuals but rather to a general category of authorised person such as landowners and their agents. While the reference to "strictly supervised conditions" in Article 9(1)(c) suggests that this is not possible for derogations based on that provision, the wording of Article 9(2) does not appear to preclude such general authorisations for

²⁶ See paragraph 21 of the judgment.

²⁷ 95 departments in France

derogations based on Article 9(1)(a). Assuming of course that the derogation covers all the aspects referred to in Article 9(2), the judgement in Case 247/85 suggests that the reasons justifying the grant of a derogation to a wide category of person should be compelling and clearly specified in the derogation (EC, 2008).

With regard to derogations under Article 9(1) c it is also important to note the specific conditions that are mentioned in it. In this regard, specific conservation measures have to be developed to avoid adverse effects on threatened species (e.g. Pygmy Cormorant, protection of colonial birds...) especially within SPAs.

Article 9.2 fifth indent is asking a description of the controls which will be carried out. Large-scale control and local control have probably to be considered differently but in both cases a specific scheme has to be provided. The Court has provided useful clarification with regard to the effectiveness of the national control mechanisms of the decisions granting derogations. In Case C-60/05²⁸, the Court stressed that "*the relevant national procedural framework applicable must guarantee not only that the lawfulness of decisions granting authorisations derogating from the system of protection laid down by the Directive may be verified in a timely manner but also that the conditions attached to those decisions are complied with*". Based on the need to ensure the power of the competent national authorities to intervene in a timely and effective manner, the Court ruled that "*the administrative procedures provided for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner*".

4. Reporting by Member States and EC Role

Prior agreement is not required from the Commission although Member States must inform it *a posteriori* each year about the use and the application of the derogations.

Derogation data were studied at EU level for the period 2001-2006. Unfortunately, none of the defined parameters (number of derogation, of licence, of individuals...) are easy to use as the information is fragmentary in the derogation reports. Detailed information on alternative solution never exists as this is not mandatory to provide detailed information. The use of HABIDES²⁹, i.e. an electronic reporting tool now under development, is expected to improve the situation. It is clearly recommended to Member States to better monitor the derogations schemes and to maintain all the information in case of any demand from the EC.

As highlighted by Rauschmayer *et al.* (2008), shifting biodiversity conservation from strict protection to population management demands much more detailed information on the target species and its ecology and an improved handling of uncertainty and complexity. To this end, up-to-date, reliable data on the actual Cormorant populations are also needed,

As stipulated in article 9.4, "*On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this Directive. It shall take appropriate steps to this end.*" In cases where the Commission concludes that the use of derogations is not in conformity with the requirements of the directive it retains the right to take legal action against the Member State concerned. Up to now, no legal action was taken concerning derogations issued for the Great Cormorant even for large culling schemes as in Denmark or in France. However, specific information has already been asked to some Member States on their derogation scheme (e.g. Sweden or France).

²⁸ Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, mainly paragraphs 42-47.

²⁹ HABitats and Blrds directives DERogation System

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Written question from MEP to the Commission and answers by Mr Dimas on behalf of the Commission:

- N° E-1741/06 by Rolf Berend (PPE-DE), Albert Deß (PPE-DE), Jan Ehler (PPE-DE), Alfred Gomolka (PPE-DE) and Heinz Kindermann (PSE), Subject: Cormorant problem - scaring measures in Europe
- N° E-3206/07 by Iles Braghetto (PPE-DE), Subject: Predatory impact of cormorants in the Po Delta and Sardinia
- N° E-2056/08 by Marianne Mikko (PSE), Iles Braghetto (PPE-DE) and Ioannis Gklavakis (PPE-DE), Subject: Managing the population of cormorants in Europe
- N° E-0299/08 by Mikel Irujo Amezaga (Verts/ALE), Subject: Cormorant population