



# Great cormorant

*Applying derogations  
under Article 9 of the Birds Directive  
2009/147/EC*

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## 1. Introduction:

As with all wild bird species naturally occurring in the European territory of the Member States, the Great Cormorant *Phalacrocorax carbo* is covered by the general protection scheme under Directive 2009/147/EC on the conservation of wild birds (the Birds Directive)<sup>1</sup>. Its deliberate capture and killing, disturbance, destruction of its nests or taking of its eggs can only be allowed by Member States in accordance with the derogation system of the Directive (art. 9).

As a result to successful conservation efforts, the population of the Great Cormorant has significantly increased in several parts of the EU, while increased damages to fisheries and aquaculture have also been reported. In December 2008, the European Parliament adopted a resolution<sup>2</sup> which, *inter alia*:

- *“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”.*

This document aims at clarifying the key concepts under Article 9 of the Birds Directive as they relate to preventing serious damage by cormorants or protecting flora and fauna, and offers practical advice on how to implement these concepts. The guide is intended to be of assistance to authorities as well as other interested parties. 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 the views of the Commission services only. Ultimately it rests with the EU Court of Justice to provide definitive interpretation of a Directive.

Under these circumstances, those Member States who do not wish to apply derogations in their territories are under no obligation to start doing so as a result of this guidance document as, in line with the principle of subsidiarity, the implementation of the derogation system is the competence of the Member States.

This guidance document focuses on the following aspects:

- the meaning of ‘preventing serious damage’ to different economic sectors, particularly fisheries;
- the notion of using derogations to ‘protect fauna and flora’; and
- the need to demonstrate that there is ‘no other satisfactory solution” before applying derogations.

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<sup>1</sup> OJ L 20, 26.1.2010, p.7 (codified version replacing Directive 79/409/EEC).

<sup>2</sup> European Parliament Resolution on the adoption of a European Cormorant Management Plan to minimise the increasing impact of cormorants on fish stock, fishing and aquaculture (n° 2008/2177(INI), 4th of December 2008, A6-0434/2008),

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, reporting aspects are reviewed.

**Text of Article 9 of the Birds Directive.** Parts in bold are the most relevant to the Great Cormorant.

- 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 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 the Shag *Phalacrocorax aristotelis* are both listed in Annex I of the Birds Directive in view of their vulnerable conservation status. 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 the Great Cormorant within the EU has increased significantly over the last 20-30 years and the species is now considered to be a healthy state in terms of overall population size and range.

Two pan-European censuses were conducted in 2003 (wintering populations) and again in 2006 (breeding populations) by Wetlands International. They estimated a minimum of 372,300 breeding pairs. This estimate is for the whole of the Western Palearctic Region which includes 41 countries such as Greenland, Iceland, Norway, Switzerland, the successor states of former Yugoslavia, Albania, Belarus, parts of western Russia, Ukraine, Georgia and Turkey, as well as the EU-27 Member States<sup>3</sup>. However, it is recognised that more accurate estimates of the total population of cormorant require taking into account both breeding and non-breeding birds. Under these circumstances, the estimated numbers of birds will typically depend on how the respective models incorporate estimates of reproductive output, as well as annual mortality, for different age birds.

As a generalist fish-eating bird, the Great Cormorant is being reported to be causing damage to commercial fisheries, aquaculture and sport-fishing. However, whilst losses of fish to cormorants have been recorded at individual fisheries in a number of countries, the economic significance of such damage has not been quantified in most cases. Furthermore, there is no evidence to suggest that the Great Cormorant is causing damage to all commercial fisheries, aquaculture, or sport-fishing activities.

### **2.2. Legal requirements concerning the use of the derogation system**

The Birds Directive relates to '*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 of the directive 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*

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<sup>3</sup> 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](http://web.tiscali.it/sv2001/Cormorant%20Counts%202003-2006%20Summary.pdf)

*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 shall '*establish a general system of protection for all species of birds referred to in Article 1'* (Article 5).

The 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 of 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 the Great Cormorant) exceptions to the prohibitions in Article 5 are 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 if 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 met.

Member States do not need to consult the Commission before applying derogations. Applying the derogations, like any other decision related to the implementation of European Legislation, is an internal matter of the Member States. However, and as a minimal tool for coordination and as a feedback mechanism, they are obliged to submit an annual report on all derogations issued under Article 9 to the European Commission. Within the reports the derogations must be justified in relation to the requirements of the Directive which, in practical terms, means that the use of the derogations must not lead to a situation where the Great Cormorant population and range is reduced to such an extent that it becomes unviable, or not maintained at a satisfactory level.

### **3. Applying the provisions of Art. 9 in the case of the Great Cormorant**

The derogation system allows for exceptions to be made for a number of activities that are generally prohibited under the Birds Directive. These derogations must cumulatively fulfil three key conditions:

- there is no other satisfactory solution ;
- one of the reasons listed in paragraphs 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.

#### **3.1. “No other satisfactory solution”, Art. 9 (1)**

In order to fulfil the requirements of Art 9, it is essential that an authority first proves that there is “no other satisfactory solution”. The derogation scheme only applies if there is no other satisfactory solution. Two requirements have then to be analysed, and proved, in order to justify any derogation:

- Are there other solutions (that is, solutions, which are not prohibited by Articles 5, 6, 7 or 8)?
- If so, will these resolve the problem or specific situation for which the derogation is sought?

To address this issue there are two sequential procedural steps: first identify and define other possible solutions and then consider if they are satisfactory.

The Guide on Sustainable Hunting (EC, 2008) states that “Where another potential solution exists, any arguments that this is not satisfactory will need to be strong and robust” and that “it is 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 them”.

With regard to “other satisfactory solutions”, the extent to which habitat modification (e.g. loss of vegetation cover, for example) is directly attributable to cormorant's predation or, alternatively, can be due to other factors should be considered before granting derogations. In cases where such a direct relationship between cormorants and other interacting factors leading to the identified damage exists, it may be appropriate to consider predator control, or prevention, in combination with habitat restoration before granting derogations.

Methods potentially useful to alleviate damage made by Great Cormorants exist and they are well explained in the results of the INTERCAFE's project<sup>4</sup>.

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<sup>4</sup> <http://www.intercafeproject.net/>



Some Member States such as Denmark and France have set up national management schemes fitting the needs of their particular conditions, However, while having an overarching plan, or policy, may be desirable to deal with this issue at a broader level, there is likely to be a wide variability in the conflicts, and the potential solutions, at different sites within a Member State. So, when dealing with this issue it is always important not to lose sight of the potential need for a local case-by-case appraisal of individual conflicts.

### **3.2. Reason for derogation, Art 9 (1)(a)-(c)**

#### **3.2.1. Prevent serious damage to fisheries**

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.

The Birds Directive does not distinguish different categories of fisheries e.g. commercial or recreational. However, in the present context, the concept of 'fisheries' covers:

- 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

The concept of recreational fisheries in particular corresponds not only to leisure fishing grounds but also angling clubs, commercial put and take and, more generally, to a large economic sector including fishing gear, clothes, tourism, warden staff etc.

In that regard the following considerations can be made:

- It is acknowledged that balancing fisheries and conservation interests is not an easy task. It is difficult to assess the relative importance of species protection against a socio-economic demand as the two are not usually directly comparable.
- Since cormorant-fishery conflicts are complex, it can be difficult to define precisely the perceived conflictive interaction in quantitative terms as to constitute a well-defined ecological problem, or a proven limiting factor for the viability of the businesses concerned.
- While the uncertainties mean that it is often difficult to provide unequivocal evidence that there is a real problem for fisheries, the absence of clear quantitative evidence of serious damage does not mean that it is not occurring.
- When it occurs, damage may arise in a variety of ways, and the assessments of whether such effects are serious, or just the result of a misled perception, will mostly depend upon the value put on that aspect of the resource and on the spatial dimension at which the fishery is categorised: e.g. at the ecosystem, resource, individual, or socio-economic level.
- 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), or the magnitude of the predation.

- For managers of private fisheries, damage is likely to be expressed at the 'enterprise level' in terms of the economic effect on their specific business.
- At a local level, the more or less justified perceptions that a cormorant 'problem' exists can influence significantly people's opinions. Furthermore, the consideration of other cultural or socio-economic factors often adds an extra level of complexity to the basic ecological fish/cormorant interaction.
- From the above, it follows that **the general concept of 'serious damage' caused by cormorant populations is relative and, as such, should be evaluated on a case-by-case basis, where, and when, a conflict occurs.**
- Further, it is not possible to provide any fixed, standardised thresholds in terms of population numbers, proportions or rates of fish stock removed, that could serve as a reference to assess the occurrence of 'serious damage'.
- It is also accepted that proving damage by direct evidence alone is extremely difficult in many water-bodies. Nevertheless, an assessment of cormorant's presence as well as other factors influencing fish stocks based on facts is always necessary to justify derogations.
- Thus, the mere presence, and fishing, of a certain number of Great Cormorant in the vicinity of a water-body, even if it is known that they consume a large quantity of fish/day, cannot be automatically considered as leading to a situation of 'serious damage' to the fishery.

On that basis, the aim of this chapter is to clarify the concept so that it can be applied in a large variety of situations, where it is considered necessary by particular stakeholders.

As a general rule, 'serious damage' is accepted to occur where:

- (a) significant numbers of cormorants are actively foraging at a site;
- (b) the population structure and combination of fish species present at the site indicate that the foraging birds preying on fish stocks are the most likely cause of reduced fish catches, or injuries to fish, leading to verifiable situation of 'serious damage' to the fishery; and
- (c) other factors are not likely to be responsible for serious damage to the fish stocks worth protecting at the site.

All the above three conditions (a, b, and c) have to be met at the same time. None of them, taken in isolation, is sufficient to suggest 'serious damage' due to Great Cormorants.

Given the practical difficulties of quantifying fish stock size, and taking into account that predation by cormorants can deplete a fish stock very rapidly (which precludes carrying out detailed studies before acting), a pragmatic approach to assessing serious damage may be required, e.g. involving subjective evaluation by independent experts. However, when expert opinion is used to justify a derogation, such expertise still requires a solid and scientifically sound justification built on factual grounds and circumstances backing its conclusions.

In all cases, the concept of 'serious damage' as used in the Birds Directive, and interpreted on the basis of the above, involves the following:

- a) Firstly, **it clearly relates to economic damage to fisheries and/or also economic damage to a fisheries-related recreational interests.** The concept of 'damage to fisheries' is clearly related to the economy of turnovers and expected profits (such as in

commercial fisheries and aquaculture), as well as to verifiable economic damage to economically relevant recreational or leisure fisheries-related activities occurring, or being developed, in freshwater, including fishpond systems, brackish water (coastal wetlands), and marine areas (coastal areas).

In relation to fisheries, serious damage relates to specific interests, i.e. it leads, or could lead, to a direct or indirect economic and/or financial loss, or loss of property value, or to the loss of production material. Recreational interests are only taken into account if they are related to an economically relevant activity and not just as a spontaneous leisure activity or interest *per se*.

This implies that the damage represents a cost (extra expenses, or loss of income or property value), or a serious economic impact to a leisure or recreational activity. It follows that the anticipated, or occurred, damage to assets should be factually demonstrable and, secondly, that 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'<sup>5</sup>.

In this context, two additional aspects have also to be taken into account: the likelihood and the extent of damage, as the chance that damage might occur does not suffice. However, if damage is not yet apparent, or evident, past experience should demonstrate a high probability of the occurrence of damage. Additionally, it should concern serious damage to an economic interest, indicating that this does not cover mere nuisance or normal business risk.

- b) Secondly, derogations issued under Article 9 of the Birds Directive **are intended to prevent serious damage**; therefore it is not only a response to already proven damage but also to the strong likelihood that this will take place in the absence of action. But, the chance that damage might occur does not suffice as, if damage is not yet evident, past experience should demonstrate a high probability of its future occurrence.
- c) Thirdly, there must be a basis for concluding that **damage will be serious** in the absence of action.

Furthermore, serious damage to fisheries as specifically referred to in Article 9(1)(a) also includes damage to the resource (including wounded fish) and damage to material such as fishing gear. The EC Communication on aquaculture<sup>6</sup> 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*".

However, when granting derogations, the national authorities bear the burden of proof<sup>7</sup> 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*"

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<sup>5</sup> European Commission – 2008 - Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds" "The Birds Directive, 94 p.

<sup>6</sup> A strategy for the sustainable development of European aquaculture, Communication from the Commission to the Council and the European Parliament COM(2002) 511 final

<sup>7</sup> 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).

*statement of reasons* which refers to the reasons, conditions and requirements laid down in Articles 9(1) and (2) of the Directive".

This also means that Member States have to adopt a reasoning that is appropriate to the different locations (coastal lagoons, fish ponds...) and to the different economic sectors (fish pond aquaculture, coastal aquaculture, recreational fisheries, etc). Thus, when granting derogations Member States have to be in position to demonstrate that derogation schemes are clearly related to the reasons defined by article 9.1. (a), third indent (to prevent serious damage to crops, livestock, forests, fisheries and water), as well as Article 9.2 (information on the species affected as well as methods and conditions of the derogation).

In natural fisheries the measure of damage may also relate to the ecological importance of the species being affected (e.g. a rare or threatened species) as much as to any fishery impact. Thus, the reason "protection of fauna" sometimes may be also relevant to address cormorant's impacts on some not strictly commercial fisheries.

### **3.2.2. Serious damage to forestry**

Damage to vegetation and trees is 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 have already been provided to prevent damage to forests.

Such damage generally occurs when there is a large colony or a permanent large roost in trees and is due to acid faeces accumulating. 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).

The case of damage to non-commercial forests and vegetation is more difficult as there are no commercial activities that help to demonstrate the damage.

### **3.2.3. 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.

The use of article 9.1 (a), third indent for water should only be used when Cormorants would damage a commercial purpose of the water body other than fisheries. This could be the case for certain leisure areas or other examples to be demonstrated. If the subject of the derogation is related to angling activities it should be reported as 'damage to fisheries', and not as 'damage to water'.

If a concentration of Great Cormorants could affect drinking water in certain reservoirs, then article 9.1 (a), first indent, should be used when the public health and safety is at stake.

### 3.2.4. Protection of fauna and flora

The fourth reason for derogations undertaken under subsection (a) of Art 9(1), 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.

Ten Member States have used the derogation system at least once between 2001 and 2006 for the protection of fauna and flora. However, information reported does not define which species were to be protected (threatened species? angling-related species?).

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

A probably helpful definition of environmental damage is provided for the Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (the Environmental Liability Directive – ELD). This 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 I, the ELD 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 specifically determined as such by the Birds Directive. However the principles established by the ELD are valid to guide the derogation process. Under these circumstances, and for the extrapolation of these principles to the present guidelines, it is suggested to distinguish three specific categories of species classified according to their level of protection:

- 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.

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

For the two first categories, where the case for protection is supported by compelling evidence, control could be considered. The following are examples where the derogations seem to be legitimate:

- A FRAP study (Jepsen *et al.* 2006) reported results of a micro-tagging experiment to estimate the effect of cormorant predation on fish populations in a large shallow Danish estuary (Ringkøbing Fjord) whose results showed that Cormorants had eaten as much as 40–50 % of tagged eel, as well as 25–40 % of tagged salmon in one year. .
- The Council Regulation n° 1100/2007 establishing measures for the recovery of the stock of European eel (*Anguilla anguilla*) provides a useful example of a case corresponding to the second category. In effect, given that under this regulation Member States shall prepare an Eel Management Plan for each river basin as to permit with high probability that the escapement to the sea would be of at least 40 % of the silver eel biomass relative to the best estimate if no anthropogenic influences had impacted the stock, an Eel Management Plan containing miscellaneous measures including combating predators seems then, and as suggested by the regulation, reasonable.
- In Italy, derogations issued to prevent predation by the Great Cormorant on the breeding sites of endangered Marbled trout *Salmo marmoratus* seem to be legitimate under the scope of protecting fauna.
- In some countries other fish species may be subject to conservation plans or actions e.g. grayling (*Thymallus thymallus*), Danube Salmon (*Hucho hucho*), Salmon (*Salmo salar*) or, in Spain, *Valencia hispanica* or *Aphanius iberius*. In these cases, when the impact of Great Cormorant is demonstrated, a scheme for derogation may be appropriated.
- In Hungary, derogations to the protection of the Great Cormorant were issued to prevent damage to breeding bird colonies (heronries) by aggressive occupation by Cormorants.
- In France, culling authorisations are given for rivers with supposed endangered “patrimonial” species, which are fish species that have both high conservation status and high value as quarry species (Carss, 2003) based on their relevance to ecosystem services.

### **3.3. 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. Regione Veneto*, the Court noted<sup>8</sup> 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*

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<sup>8</sup> See paragraph 21 of the judgment.

*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 competent authority is empowered to declare that the required conditions are fulfilled and to decide what means, arrangements or methods may be used, within what limits, and by whom. In that regard, a variety of particular arrangements and circumstances of time and place are related to the limitations given to derogations are possible. Yet, the number of birds killed, or scared (which is a situation particularly relevant during the breeding season), should be indicated and monitored through the derogation in all cases. This is sometimes done by limiting the number of permits, and/or imposing national or regional quotas. In any event, these figures have to remain coherent with the main aim of the Bird Directive, that is the conservation of birds.

Thus, it has to be kept in mind that a derogation scheme is not intended to reduce the population, but just to prevent serious damage or to protect fauna and flora. It cannot be aimed at eliminating every individual in an area, but just to reduce the number in proportion with the damage alleviation needed or the conservation objectives to protect fauna and flora. However, this does not exclude measures aiming at removing or preventing breeding colonies or night roosts in specified parts of a larger area, as it does not exclude the occurrence of individual birds. For example, the Danish national cormorant management plan of 2002 and 2010<sup>9</sup> give the Forest and Nature Agency mandate to allow the regulation of breeding colonies in order to avoid new colonies being established, or to limit the number of nests in an existing colony, or to eliminate existing colonies, which are provisions are not in conflict with the Birds Directive.

During the breeding season, culling eggs (oiling, replacement with dummies...) is the main method used to control the reproduction of Great Cormorants. However, while several Baltic countries are now using this method, this is not the case in many other countries. During migration or wintering time, firearms to kill or to scare the birds and scaring devices (gas guns or other) are the main methods used.

A question that arises, then, is whether in Great Cormorant's derogations issued under Article 9(1)(a), 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 persons such as landowners and their agents. In fact, the requirement for "strictly supervised conditions" contained in Article 9(1)(c) strongly suggests that this is not possible for derogations based on that provision. However, as indicated in the Guide to Sustainable Hunting, the wording of Article 9(2) does not appear to preclude such general authorisations for derogations based on Article 9(1)(a). In that regard, as also stated in the Guide to Sustainable Hunting under the Birds Directive, assuming of course that the derogation covers all the aspects referred to in Article 9(2), it is expected that the reasons justifying the granting of derogations to a wide category of person should be compelling and clearly specified in the derogation.

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<sup>9</sup> Forvaltningsplan for skarv i Danmark, version September 2010  
<http://www.naturstyrelsen.dk/NR/ronlyres/39274753-9BE0-4E94-AD5E-69A108776DFF/111916/Forvaltningsplanforskarvseptember2010.pdf>

During the period 2001-2006, there have been various examples of restriction in terms of space or time: e.g. shooting permits for certain areas (Sweden, Poland, Italy, Denmark, Germany, Austria), for certain periods (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 % of cormorants resting in the locality (South Bohemia Region, CZ) ;
- Maximum numbers of taken Cormorants (Central Bohemia Region, CZ) ;
- A fixed quota per French department<sup>10</sup> 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.

Restrictions on the timing of derogated activities may include within specific dates, “only during daylight hours” or, as is the case in France and Denmark, through the exclusion of certain periods i.e. the week of the national wintering counts

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 Special Protection Areas.

Since Article 9.2 fifth indent is asking for 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.

## **4. Reporting**

Prior agreement is not required from the European 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 derogations, of licences, of individuals...) are easy to use as the information is fragmentary in the derogation reports. Detailed information on alternative solutions never exists as it is not mandatory. The use of HABIDES<sup>11</sup>, i.e. an electronic reporting tool now in place, is expected to improve the situation. It is then recommended to Member States to better monitor the derogation schemes and to maintain all the information in case of any request from the EC as well as to systematically use the HABIDES system.

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<sup>10</sup> 95 departments in France

<sup>11</sup> HABitats and Blrds directives DERogation System



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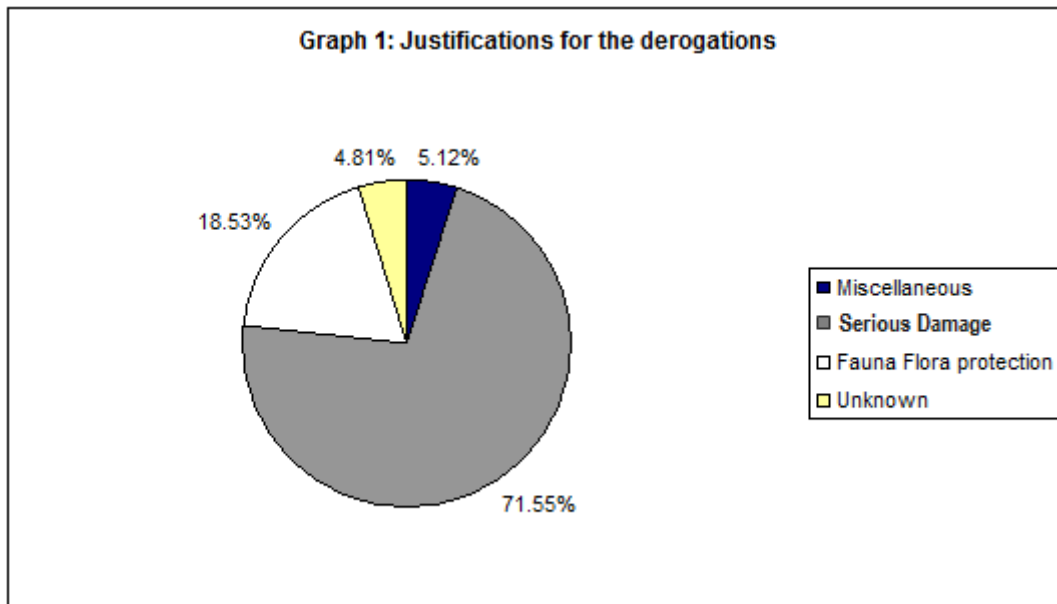
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## ANNEX

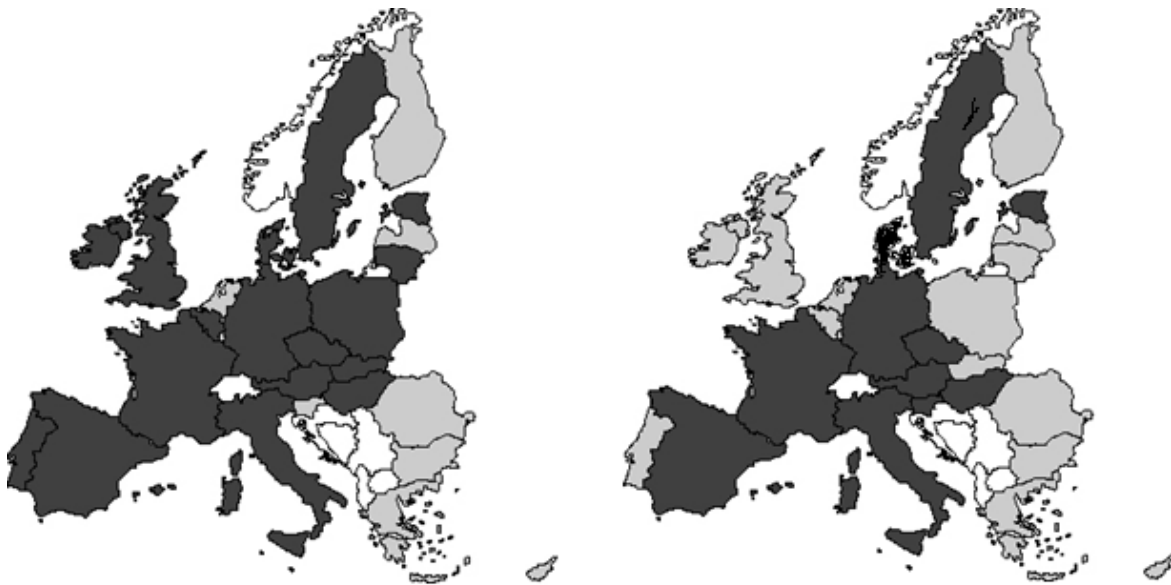
### Current use of the derogation scheme

An analysis of the national reports submitted to the Commission concerning the use of the derogation system for Great Cormorants in Member States during the period 2001-2006 reveals that the situation is the following. Sample size ('n') refers to the number of derogations issued.

Altogether, 22 Member States have used the derogation system at least once between 2001 and 2006 (n= 977, Bulgaria and Romania did not have to submit derogation reports). During this period, the main reasons for granting derogations were: 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 unknown motives (n=47, (see graph 1 and figure 1).



**Figure 1:** Member States (in dark grey) using the derogation system between 2001 and 2006 because of serious damage (left), or to protect fauna and flora (right). Not applicable for BG and RO, as no report for these periods were produced.



To put these figures into perspective it has, however, to be noticed that:

- No derogation reports have been delivered 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, i.e. date of their accession to the EU (e.g. CZ, PL, HU).

### **Using the derogation scheme by the killing of birds**

Given the general lack of information on the outcome of the granted derogations, there is some uncertainty about the actual number of birds killed under their provisions.

In the case of France, for example, it is estimated that around 80% of the granted derogations were actually carried out. Other countries (e.g. DE, HU, IT) also gave derogations that allegedly were not fully carried out.

However, from the available information, it is estimated that the number of birds killed under 175 derogations granted between 2001 and 2006 was approximately the following:

**Table 1:** Number of Cormorants (and percentages of the total in each category) killed using derogations between 2001 and 2006.

Reasons	Killed Cormorants in EU (% total)
Prevent serious damage	167,773 (71,4%)
Protection of flora and fauna	62,664 (26,7 %)
Unknown reasons	4,500 (1,9%)
Total	234,937

Thus, as suggested from Table 1, the number of cormorants killed between 2001 and 2006 was about 235,000, which would mean around 40,000 individuals per year, which is an estimation that is in line with the previous assessments of Carss (2003)<sup>12</sup> of 41-43,000 birds killed<sup>13</sup> per year.

### Using the derogation scheme by preventing reproduction

With only 15 cases reported, eggs culling and nest destroying appears as a rarely used technique to control the negative impacts of large Great Cormorant's colonies in the EU. However, despite their limited adoption in most other Member States, these management tools have been extensively applied in Denmark and Sweden.

In Denmark, the policy of the Ministry of Environment has included actions to prevent the establishment of new colonies since 1994, and oiling of eggs on ground nesting colonies since 2002 (Bregnballe et al. 2003<sup>14</sup>, Bregnballe & Eskildsen 2009<sup>15</sup>, Carss & Marzano, 2005<sup>16</sup>). In 2002, the national management plan was revised as to concentrate action in specific geographic areas where conflicts with other activities were particularly intense (Jepsen et al. 2005). In that context, up to a third of all cormorant colonies and a fifth of all

<sup>12</sup> Carss, D. N. (ed) – 2003 - Reducing the conflict between cormorants and fisheries on a pan- European scale: REDCAFE. Final Report to the EU, contract No. Q5CA-2000-31387, pp 169.

<sup>13</sup> It has to be stressed that assumptions are based on incomplete figures. However the real number is not, by default, significantly higher (unless we consider also potential poaching).

<sup>14</sup> Bregnballe, T., Engström, H., Knief, W., van Eerden, M.R., van Rijn, S., & Eskildsen, J. – 2003 - Development of the breeding population of great cormorants in The Netherlands, Germany, Denmark and Sweden during the 1990s. - Die Vogelwelt 124: 15-26.

<sup>15</sup> Bregnballe T, Eskildsen J. – 2009 - Forvaltende indgreb i danske skarvkolonier i Danmark 1994-2008: Omfang og effekter af oliering af æg, bortskræmning og beskydning. Scientific Report no. 249. Danmarks Miljøundersøgelser, Aarhus Universitet, page 46.

<sup>16</sup> Carss, D. N. & Marzano, M. (editors) – 2005 - Reducing the conflict between cormorants and fisheries on a pan- European scale: REDCAFE. Summary & National overviews contract No. Q5CA-2000-31387, pp 374.

cormorant nests during any single year had been exposed to one or more forms of management, especially egg oiling, during several years (Bregnballe & Eskildsen 2009<sup>17</sup>). In the process, the total number of nests onto which the intervention measures were applied rose from 7,500 nests between 1994 and 2001 to 39,700 during the period 2002–2008 (Bregnballe & Eskildsen 2009<sup>18</sup>). The largest number of nest subject to action in a single year was approximately 7.200 in 2008. It is considered that as result of the interventions, combined and interacting with other factors, the population of cormorants breeding in Denmark was reduced from 40,000 breeding pairs in 2005 to 25,000 in 2011 (Bregnballe et al. 2011)<sup>19</sup>.

However, attributing the previously mentioned decline in the Danish breeding population of Great Cormorants to the effect of the human intervention measures alone would be misleading. According to the Danish authorities, the decline of the Great Cormorant population in their territory seems to be due not only to targeted intervention on the reproductive process, but rather the result of a more complex combination of interacting natural factors including: shortage of food following from eutrophication of foraging areas for the Great Cormorants in the shallow coastal waters, predation from an increased population of white tailed eagles (several pairs have established their nests close to large Great Cormorant colonies), as well as a number of unusually cold winters throughout Europe during recent years. For that reason, the results of the 2012 survey showing a slight increase in the Danish population of Great Cormorant should not be considered surprising but just the confirmation of the complex array of ecological factors interacting to determine the size of the Great Cormorant population at any place, and at any given year.

### **Other management measures than killing and preventing reproduction**

In addition to killing and prevention of reproduction, there are numerous other non-lethal management measures, or tools, available which are being currently used to limit the predatory effect of cormorants feeding on natural, as well as unprotected commercial premises, fisheries occurring within their natural range. Among them, the following are the most relevant examples:

- Techniques that scare cormorants away from a fishery, such as various audible and visual deterrents.
- Measures that help to directly protect the fish by preventing cormorants from reaching them (e.g. using nets and overhead wires).
- Measures that alter the availability of fish to cormorants by making a fishery less attractive as a foraging site (e.g. removing roosts or introducing artificial refuges for fish), or other measures to reduce overall cormorant numbers in a wider region by preventing the establishment of new roosts or colonies through a variety of actions.

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<sup>17</sup> Ibid 15

<sup>18</sup> Ibid 15

<sup>19</sup> Bregnballe, T., Rasmussen, J.S. & Therkildsen, O.R. – 2011 - Danmarks ynglebestand af skarver i 2011. Newsletter by The Danish Centre for Environment and Energy, Aarhus University.

It has to be highlighted that although stakeholders often apply a variety of non-lethal measures to protect fisheries or to reduce cormorant impact, the fact that all of them are in potential conflict with the provisions of Article 5 and/or 8 of the Birds Directive makes that their legal use still requires the previous authorisation from the national competent authorities through specific derogations issued according to the requirements of Article 9 of the Birds Directive.



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