

Duty of diligence, the Principle of proportionality, the precautionary principle and the Unionlist on invasive alien species

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Duty of diligence

The most important criteria for the listing of species on the Unionlist of invasive alien species are implemented in article 4(3) and article 5(1).

However, even more important than the regulation itself is the interpretation of the EU-treaty principles by the Court of Justice. The most important principles are the duty of diligence, the principle of proportionality and the correct appliance of the precautionary principle.

In case T-333/10, The Court rules that the Commission had not fulfilled the requirements of the duty of diligence by prohibiting the import of birds from all third countries because there was no evidence of presence of avian influenza in certain parts of the world:

85 In that connection, it has already been held that a scientific risk assessment carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures (Pfizer Animal Health v Council, paragraph 64 above, paragraph 172). Consequently, it has been found that the first ground under Article 18(1) of Directive 91/496 was likely to be made out when new information significantly alters the perception of the danger represented by the disease (see, to that effect and by analogy, Case C-346/09 Denkvit Nederland and Others [2011] ECR I-5517, paragraph 51 and the case-law cited).

86 In the present case, the inevitable conclusion is that since the legal basis relied on by the Commission was the first ground under Article 18(1) of Directive 91/496, which expressly referred to the occurrence or spread of 'a zoonosis or other disease or phenomenon liable to present a serious threat to animal or human health ... in the territory of a third country', it was required to demonstrate that the protective measures taken were sufficiently directly linked to 'all or part of the third country concerned', that is to say to third countries where cases of avian influenza had occurred, 'and where appropriate ... third countr[ies] of transit'. The Commission was required to discharge that burden of proof and comply with the obligation to give reasons all the more so because, in recital 2 of Decision 2005/760, it clearly referred to the need 'to suspend imports of these birds from certain areas at risk'.

Thus, when these considerations in the T-333/10-case are applied in method of listing species on the Unionlist, there should be a direct link between the restrictions (to intentionally bring the species into the EU, keep, breed and transport them, to placed on the market, to use or exchange the, to permitted to reproduce, grown or cultivated them, or released into the environment) and the risk of damage that it causes in Member States that is so significant that it justifies the adoption of dedicated measures applicable across the Union which is proven by scientific evidence.

The measure to restrict the release of the species considered in the wild seems appropriate but the other restrictions can only be considered to fulfill the requirements if research proves there's a link between the introduction of the species and the restricting measures.

For example, the Asian hornet was never intentionally brought into the EU, kept, breed or transported, places on the market or even released into the environment. Thus, there's no link whatsoever between the restrictions and the fact that this species causes significant damage in the Member States. The same goes for the House Crow. These species should not be listed in the

Unionist of invasive alien species of Union Concern. Not because they're not invasive but because there's no link between the restrictions and the spread of the species in the EU. So, in words of the regulation itself: it has to be likely that the inclusion on the Union list will effectively prevent, minimize or mitigate their adverse impact (article 4(3(e))).

Principle of proportionality

Not only the duty of diligence is an important principle, the principle of proportionality is as well. This principle is clearly applied in the aforementioned Case T-333/10:

98 The Court recalls that the principle of proportionality, which is among the general principles of EU law and is referred to in Article 5(4) TEU, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. However, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Case C-343/09 Afton Chemical [2010] ECR I-7027, paragraph 45 and the case-law cited).

Thus, the restriction of article 7 of the Regulation on invasive alien species should never exceed what's appropriate and necessary in order to prevent, minimize and mitigate the adverse impact on biodiversity of the introduction and spread of invasive alien species within the Union.

This means that the introduction of species should be directly linked to the restrictions. However, in many cases the introduction of a species in the environment is directly linked to specific incidents or circumstances that can be prevented by restrictions with a far less infringing character. This is for example the case with the sacred ibises, where all introduction are directly linked to escapes from zoo's. It's even mentioned in the species sheet of the Invasive Species Compendium:

All the introductions of T. aethiopicus are linked to escape from zoos. The history of the spread and breeding of the species is briefly presented here (For more details and other populations see Yésou and Clergeau (2005) and Clergeau and Yésou (2006)).

In Italy, T. aethiopicus has bred in the upper Po valley (Piedmont) since 1989, having escaped from a zoo near Turin. There were 26 pairs and about 100 individuals in 2000. In 2003, breeding was observed at another site in the same area, with possibly up to 25-30 pairs, and a few more pairs were found at a third colony in 2004. Since these dates there has been neither a co-ordinated count of the breeding sites nor an updated estimate of the population size.

In Western France, after 20 birds were imported from Kenya, a breeding colony soon became established at Branféré zoological garden in southern Brittany. There were 150 pairs in the zoo in 1990. The young were left free to fly and rapidly moved beyond the zoo, mostly visiting the nearby wetlands but also wandering hundreds of kilometres away along the Atlantic coast. Breeding in the wild was first noted in 1993 at both the Golfe du Morbihan, 25 km from the introduction site, and the Lac de Grand-Lieu, 70 km away. Breeding has not occurred at Branféré zoo since 1997. Colonies later occurred at various sites along the French Atlantic seaboard: in Brière marshes (up to about 100 nests), in the Golfe du Morbihan and on a marine island nearby (up to about 100 nests), with a few more nests up to 350 km south of Branféré at Brouage marshes and near Arcachon. The largest colony was discovered in 2004 on an artificial island in the estuary of the Loire River; in 2005 this attracted at least 820 pairs. The French Atlantic population was a little over 1000 breeding pairs and about 3000 individuals in 2004-2005 (based on a roost census). There were about 1400 to 1800 pairs in 2007 with more than 5000 individuals. Culling was tested in 2007 and has been carried out at a large scale from 2008; 3000 birds were shot that year, leading to a remaining total of 2500 individuals in February 2009 and a breeding population of about 900 pairs that year.

*In Southern France, *T. aethiopicus* was acclimatized in 1982 within the “African Reserve” at Sigean. They were left free to fly by 1989 and a pair bred in 1991. Observations in natural surroundings became regular from 1995, and in 2000 the species bred in a colony of 8 nests in the wild at Etang de Bages. This colony held 75 pairs in 2004 and about 300 individuals in 2007. Population limitation began in 2007 and fewer than 30 birds remained in the wild in February 2009.*

Risk of Introduction

The risk of introduction is completely linked to zoos. Sometimes individuals escape from captivity, but in general, the birds are allowed to fly freely and can move out of the zoo limits and form feral populations. The use of pinioning or of large aviaries seems indispensable to prevent this.

It would be proportioned to restrict free flight in zoos with this species but all other restrictions are, considering the risk of introduction and the results of research on the cause of introductions into the environment, not necessary and inappropriate for the pursuit of the objective.

Another example of a species for which the introduction seems not to be related to the restrictions of article 7 of the Regulation is the Javan Mongoose for which the introduction pathways to new locations is described as:

biological control: Introduced for biological control of rats and snakes in agricultural habitats, from which the animals spread throughout local areas within decades. (Global Invasive Species Database)

It has been deliberately introduced for this purpose in Croatia and this is the only introduction pathway for this species¹. Therefore, any other restriction than the restriction to release them into the environment is disproportionate.

Precautionary principle

One of the considerations of the Regulations concerns the listing of possibly invasive species that are not yet present in the Union:

(15) Prevention is generally more environmentally desirable and cost-effective than reaction after the fact, and should be prioritized. Therefore, priority should be given to the listing of invasive alien species that are not yet present in the Union or are at an early stage of invasion and of invasive alien species that are likely to have the most significant adverse impact. As new invasive alien species can be introduced continuously into the Union and alien species present are spreading and expanding their range, it is necessary to ensure that the Union list is constantly reviewed and kept up-to-date.

This type of listing means an application of the precautionary principle. The precautionary principle can be applied but only if, after research that fulfills all the requirements of the duty of diligence have been met and the result is inconclusive but nevertheless there's a real risk of serious consequences for the objective. And even then the principle of proportionality should always be respected.

So, for each species that is listed based on the precautionary principle, the criteria of article 4, paragraph 3 must have been met. A species cannot be listed on the mere fact that it could be introduced and might be able to form a population and could be invasive. There should always be sufficient scientific evidence that there's a real risk the species is introduced into the environment and that it will have a very significant adverse impact which cannot be prevented by any other means than the application of all restrictions of article 7 of the Regulation.

¹ A TICKING TIME-BOMB? THE SMALL INDIAN MONGOOSE IN EUROPE, Arijana Barun and Daniel Simberloff, Department of Ecology and Evolutionary Biology, University of Tennessee

Information on the species concerned

Consideration 28 of the Regulation states that:

A system to address invasive alien species should be underpinned by a centralised information system collating the existing information on alien species in the Union and allowing access to information on the presence of species, their spread, their ecology, invasion history and all other information necessary to underpin policy and management decisions and allowing also the exchange of best practices.

For now, there's a information website hosted by the EU which contains certain information on the species on the concept-Unionlist, however, it is very unclear what information was used for this list as many Member-States have initiated their own research for certain species and this information is not accessible. It's therefore very uncertain what information or research leads has led to the listing of the species on this concept-Union list.

In this article the information used for the species examples was accessed through the EU-website on invasive alien species.

Conclusion

For many of the species listed on the concept- Unionlist, the criteria of the duty of diligence, the principle of proportionality and the criteria for the application of the precautionary principle have not been met. Furthermore, there's no coherent basis for the application of the criteria of article 4(3) and the risk assessment of article 5(1) because there's a lack of uniform information on the species concerned.

It would be in the best interest of a effective approach towards the threat invasive species cause to reconsider the concept-list and only list the species that fulfill all criteria. Any appeal on the Unionlist to be void is now very likely and should be seriously considered if the current concept-Unionlist is accepted.