



## **BirdWatch Ireland Submission on the State-wide Declaration.**

**March 2023**

### **Introduction**

BirdWatch Ireland provides the following comments on the State-wide Declaration anticipated for 2022/2023. The State-wide Declaration 2022, and all past State-wide Declarations, are in breach of EU law, specifically Articles 5 and 9. We have communicated this every year, have participated in committees to address the inclusion of gulls in the list and have written numerous submissions.

The Irish State is failing to provide a strict level of protection for breeding birds and failing to undertake the strict tests required under Article 9.

Scientific evidence must be provided so that a comprehensive response to any proposed derogation in the State-Wide Declaration would demonstrate that the specific requirements of Article 9 have been met. No scientific evidence has been supplied to support previous declarations.

BirdWatch Ireland makes this submission in the dark on what may be proposed in the 2023 declaration but expecting that the State will continue in the same vein as previous years.

The process by which the state grants all derogations needs to be addressed. This is stated within the context of calls from some quarters for culls of Gulls, Cormorants amongst other species. This is major concern as these species try and withstand the impacts of human activities on their ability to feed, roost and breed.

Resources need to be allocated to public awareness raising opportunities of the ecological requirements of species and their behaviour and ways in which people can live with birds. In addition, funded research into the cause of specific problems and solutions in the locations where some communities are feeling the pressure, especially during the breeding season, from living with birds such as Gulls is urgently required.

The Gull Committee set up by the National Parks and Wildlife Service sought to address issues and a report with recommendations was sent to the Minister with responsibility. Aside from the commissioning of an urban gull survey, it would appear that none of the other recommendations have been carried out.

One of the actions of the Committee was the 2020 commissioning by NPWS of a review of the legality of the State wide Declaration which was carried out by Dr David Browne BL<sup>1</sup>. In his Review. He outlined that the State wide Declaration was in breach of EU law. Key points from this review include the following:

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<sup>1</sup> Legal review of the State Wide Declaration by Dr David Browne BL (2020)  
<https://birdwatchireland.ie/app/uploads/2023/03/Urban-Gull-Opinion-D-Browne-2020.pdf>

- the prescribed form of the species control in the Declaration (which was made pursuant to the 1986 Regulations) is not compatible with the restrictive criteria in Article 9 of the Birds Directive for the following reasons.
- It does not appear to me from looking at the face of the Declaration that there is any evidence that the Minister has excluded the possibility that there may be an alternative satisfactory solution (although I should say that I have only looked at the Declaration which is publicly available and not any of the background materials).
- Secondly, it is not immediately evident that the Declaration complies with the restrictions in Article 9(2) of the Birds Directive. While it does refer to the species which are subject to the derogation, it does not appear to specify (a) the conditions of risk and the circumstances of time and place under which such derogations may be granted or (b) 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; or (c) the controls which will be carried out.
- the prescribed form of the species control in the Declaration (which was made pursuant to the 1986 Regulations) is not compatible with the restrictive criteria in Article 9 of the Birds Directive for the following reasons.
- Reg.54 and Reg.55 of the 2011 Regulations are intended to be a transposition of Article 9 of the Birds Directive. Importantly, they also replicate the language from Article 9 and in particular the reference to ‘no other satisfactory solution’.
- In my view, there must be a significant doubt that the derogation regime in the 1986 Regulations, which were made pursuant to the Act, conforms with Article 9 of the Birds Directive, in the absence of an express and systematic requirement to demonstrate that there is no other satisfactory solution for a proposed derogation and where the specific criteria in Article 9(2) are not complied with or not required to be complied with.
- Given that reg.55 of the 2011 Regulations transposes Article 9 of the Birds Directive it seems to me that this is the appropriate procedure to follow when considering a derogation for a wild bird protected under the Birds Directive
- In my view regs.54 and 55 of the 2011 Regulations transpose faithfully Article 9 of the Birds Directive but would have to be construed in light of CJEU jurisprudence on the Birds Directive. EU law requires that the essential elements of Article 9 are transposed completely, clearly and unequivocally into the national rules. This is necessary to ensure that the derogations are applied in a strictly controlled and selective manner
- Although the provisions of Article 9 allow a fair degree of derogation from the general protective rules, they must nevertheless be applied precisely and specifically, in order to meet clearly defined conditions and specific situations.
- Section 5.45: In my view, Article 9 of the Birds Directive does not allow for a broad general derogation from the Directive but requires that each of the criteria therein are satisfied. I do not think the derogation can be open-ended.
- I am of the view that the derogation regime in the 1986 Regulations, which was used to make the Declaration for the Balbriggan area, is not in conformity with Article 9 of the Birds Directive.

**Despite being in possession of this legal opinion the Minister for Housing, Community and Local Government continues to issue an illegal declaration in breach of the Birds Directive. This reinforces the National Biodiversity Forum conclusion in 2021 that the State is the biggest transgressor of EU law<sup>2</sup>.**

The 2022 Declaration contained a change to previous declarations in that it stated that the reason for allowing the removal of gull eggs and nests was because of a ‘Threat to public health and safety’.

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<sup>2</sup> National Biodiversity Forum (2021) Biodiversity Impact Plan Section 3.1, available : <https://www.biodiversityimpactplan.ie/3-restore> [accessed 15/3/2023]

In the past the text read 'Threat to public safety'. The change is not in line with the communications received by the National Parks and Wildlife Service from the Health Service Executive in 2017 where they said "bottom line is that from the literature we don't think that there is an active public health risk from gulls"<sup>3</sup>. **We ask the Department of Housing and the National Parks and Wildlife Service on what scientific and legal basis are you making decisions?**

BirdWatch Ireland supports the implementation of Article 9 of the Birds Directive however it must be undertaken in a scientifically robust way, within the narrow focus in which it was intended and in compliance with European Court of Justice case law.

We call on the Minister for Housing to stop breaching the Birds Directive by issuing another illegal State wide declaration and to abide by Article 9 of the Birds Directive. We also call on the Minister to follow through on the recommendations of the Gull Committee.

### **1.0 The Three Tests of Article 9 of the Birds Directive - European Court of Justice Case Law**

The European Court of Justice (ECJ) has clarified that the possibility to derogate under Article 9 is subject to three conditions: First, the Member State must restrict the derogation to cases in which there is **no other satisfactory solution** as outlined in the first line of Article 9; secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c); thirdly, 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 European Commission to supervise them. A further condition that needs to be met, after the previous three have been met, is related to conservation status of the species concerned. Derogations should not be detrimental to the conservation of the species involved, which means that monitoring and assessment is needed for bird species as well. This latter point is outlined in Article 9(3) where it states ... '*the Commission shall at all times ensure that the consequences of the derogations referred to in paragraph 1 are not incompatible with this Directive*' which aims to ensure the conservation of wild bird species'.

The public consultation narrative outlines Article 9(1)(a) and the reasons for which a derogation may be granted. However, this cannot be undertaken in isolation from the first line of Article 9(1) or the subsequent subsections of Article 9. The first line of Article 9 states that *Member States may derogate from the provisions of Articles 5 to 8, **where there is no other satisfactory solution.***

Derogations can only be given out where no other satisfactory solution or alternative exists. It is clear though that to pass this test in a court that the information to inform the decision to derogate must be scientifically robust. The problem has to be identified and defined before an alternative method can be devised and a solution can be found. The problems and the solutions should have a scientific and evidenced-based underpinning. 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. **No information has been presented within the public consultation documents on what alternative solutions have been tried and tested in order to support past or future derogations for any of the species listed in the past yearly Declarations.**

In addition Article 9(2) lists the detail that the derogation must specify and this includes in Article 9(2)(c) that '*the conditions of risk and the circumstances of time and place under which such derogations may be granted.*' This means that the conditions of risk to public health, to public safety etc as outlined in Article 9(1)(a) must be specified. The word 'specify' means 'to identify clearly and

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<sup>3</sup> Email from the Health Service Executive to NPWS 2017  
<https://birdwatchireland.ie/app/uploads/2023/03/HSE-letter.pdf>

definitely' according to the Oxford English Dictionary<sup>4</sup>. In past Declarations the reasons for control are listed but the **conditions of the risk** are not. What is the level of threat to public health? What is the level of threat to public safety?

The European Court of Justice has adjudicated over numerous member state cases which were required clarification of the spirit and implementation of Article 9. BirdWatch Ireland lists several cases in the following paragraphs and these can be found on the European Court of Justice Curia website<sup>5</sup>.

**Case C-118/94 and Case C-159/99 provide precise wording on the requirements of governments under Article 9 on other satisfactory solutions. The Judgement of C-118/94 states:**

Article 9(1) of Directive 79/409 on the conservation of wild birds, which provides for the possibility for the Member to derogate from the general prohibition on hunting protected species laid down in Articles 5 and 7 of the Directive **where there is no other satisfactory solution and for one of the reasons listed exhaustively therein**, and Article 9(2), which **defines the precise formal conditions** for such derogations, must be interpreted as authorizing the Member States to grant those derogations only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2). In a sphere in which the management of the common heritage is entrusted to the Member States in their respective territories, faithful transposition of Directives becomes particularly important.

**Case C- 247/85 provides clarity on Article 9(1) and 9(2) and again specifies the requirement that the derogation must firstly comply with the test that there are no other satisfactory solutions and secondly outlines that the conditions of risk must be detailed and precise.**

**Court Judgement:** The removal or destruction of nests is necessary only in specific cases in which the higher-ranking interests of public health and security must override the protection of **birds** and their habitats. The Belgian rules provide for a derogation which is not sufficiently delimited in fact, the derogation is not limited to **specific situations in which there is no other satisfactory solution** than the destruction or removal of nests, **in fact, it cannot be maintained that all nests built against houses and adjoining buildings always represent a danger to health. Furthermore, the derogation does not comply with the formal requirements sets up by the Birds Directive that is it does not specify the conditions of risk** and the circumstances of time and place in which the derogations may be granted or the controls which will be carried out. The derogation provided for in the Belgian law does not comply with the prohibition contained in Article 5 of the Birds Directive and is too general in nature to be justified by Article 9 of the Birds Directive.

**Case C-10/96, Case: 236/85** also address the requirement that no other satisfactory solution is the precursor to allowing for derogations under Article 9.

**Case 262/85** outlines the legal obligation to specify the **conditions of risk and precise circumstances of time and place** under which a derogation may be granted.

**Court Judgement:** The Italian government has not put forward any evidence proving that it was necessary to include jay and magpie on the Italian list of **birds** which may be hunted in order to prevent serious damage to crops, livestock, forests, fisheries or water and that no other satisfactory solution existed. Neither has it indicated the reasons for which the listing of those species was, in its view, the only satisfactory solution to prevent serious damage. Finally, the provision in question does not specify

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<sup>4</sup> Oxford University Press (2023), Oxford Learner's Dictionaries, available <https://www.oxfordlearnersdictionaries.com/> [accessed 15/3/2023]

<sup>5</sup> Court of Justice of the European Union, (2023), homepage [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/) [accessed 15/3/2023]

the conditions of risk and the circumstances of time and place under which the derogation may be granted or the controls which will be carried out. Therefore, the inclusion of jay and magpie amongst the **birds** which may be hunted cannot be justified by the third indent of Article 9(1)(a) of the Directive.

## 2.0 Blanket Derogations

Past State-wide Declarations have included blanket derogation to allow the killing of species at any time of the year, by anyone, and anywhere. This goes against the specifics required under Article 9(2)(d) where the derogation must specify 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. **ECJ case law C-159/99** would call this into question that ‘Although Article 9 therefore authorises wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations’. In addition, the judgement in **C-247/85** also suggests that the reasons justifying the grant of a derogation to a broad category of people should be compelling and clearly specified in the derogation<sup>6</sup>.

## 3.0 2019/2020, 2020/2021, 2021/2022, 2022/2023 Declarations

In the **past** State-wide Declarations the opening paragraph of this Declaration states that the ‘Minister.... being of the opinion that the species referred to in Schedule 1 to this declaration represent a threat to public health or safety or are likely to cause serious damage to crops or to livestock or are likely to cause damage to fauna and being satisfied that no other satisfactory solution exists, hereby declares....’. There are two issues here: 1. The opinion that there is threat to public health and/or safety must be based on fact and supported by evidence of impacts, 2. The declaration lists ‘the likelihood’ that birds would cause damage. ‘Likelihood’ implies probability but this does not mean that it is definite. The impacts of the bird species listed should be ‘proven’ and based on scientific evidence. The ECJ Case Law on Article 9 clearly shows that derogations are granted for exceptions and must be underpinned by robust scientific evidence to determine if alternative solutions have been identified, tried and tested; that the derogation request complies clearly with one of the options under Article 9(1)(a); and if the conditions of risk and other requirements of Article 9(2) are complied with.

### 3.1 Inclusion of Gulls in previous declarations

BirdWatch Ireland was again alarmed by the inclusion of three Gull Species in the past 4 Declarations (since 2018). The Declaration allowed for the taking of the eggs and nests of these species in Balbriggan in North County Dublin due to a threat to public safety. The species in question are Herring Gull (*Larus argentatus*), Great Black-backed Gull (*Larus marinus*) and Lesser Black-backed Gull (*Larus fuscus*). Of particular concern is the inclusion of Herring Gull as the conservation status of this species short and long trend for this species is ‘decline’<sup>7</sup> according to the most recent available survey and it is for this reason that the species is Amber Listed as a Bird of Conservation Concern in Ireland<sup>8</sup>. However, BirdWatch Ireland is equally concerned that due process is undertaken to meet the specific and precise requirements of Article 9.

In relation to a previous declarations including gulls, the NPWS had sought information from the Health Service Executive (HSE) on whether there was any evidence of a potential threat to public health from gulls and the HSE stated that there was no scientific evidence to support this. The HSE

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<sup>6</sup> European Commission – 2008 - Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds” “The Birds Directive”.

<sup>7</sup> [http://cdr.eionet.europa.eu/Converters/run\\_conversion?file=/ie/eu/art12/envuvesya/IE\\_birds\\_reports-14328-144944.xml&conv=343&source=remote#A184\\_B](http://cdr.eionet.europa.eu/Converters/run_conversion?file=/ie/eu/art12/envuvesya/IE_birds_reports-14328-144944.xml&conv=343&source=remote#A184_B)

<sup>8</sup> Gilbert, G, Stanbury, A., Lewis, L., (2021) Birds of Conservation Concern in Ireland 4: 2020–2026 *Irish Birds* 43: 1–22.

also stated that there was potential for the gulls to cause a considerable nuisance and upset but there was no quantification of any impacts on public safety though the Derogation was for an impact on public safety. The proof of the conditions of risk as specified in Article 9(2)(c) are not provided for within past Declarations.

Therefore, BirdWatch Ireland is of the view that the granting of the derogation to take the eggs and nests of the three listed Gull species **does not satisfy the specific requirements of Article 9 of the Birds Directive and these species should be removed from the State-wide Declaration:**

- Article 9(1) : no evidence of alternative solutions to the derogation having been tried in a scientifically robust manner.
- Article 9 (2)(c) : The conditions of risk have not been explained or spelled out in the Derogation and the HSE letter states that there is no health risk and there is no mention of a risk to public safety.
- Article 9(2) (d) : The derogation order given to the Community groups is scant on detail on how many eggs or nests can be removed, what to do if there are chicks in the nest, what happens the eggs, or who should undertake the task. There is a request that the Community Groups must report back on their activities but there is no detail given on what kind of information this should include: numbers of nests, numbers of eggs, locations, species in question etc.

**In addition, while the state has published the findings of the National Urban Gull survey, it needs to undertake the required research to understand movements and behaviour of Herring Gulls in particular in Ireland. Also a science-supported campaign in relation to food waste and feeding gulls should be funded as well as other appropriate measures the Consultative Committee on Gulls recommended.**

### **3.2 Other Species on the past Declarations.**

#### **Hooded Crow (*Corvus corone*)**

Blanket and all-year derogation is questionable. The reason for control -that the species is a threat to public health and as a vector for the spread of animal diseases needs to be proven.

#### **Magpie (*Pica pica*)**

The conservation status for breeding Magpie populations is showing an 18% decline in the last 18 years according to the NPWS recently published report Countryside Bird Survey: Status and trends of Common and Widespread Breeding Birds 1998-2016<sup>9</sup>. BirdWatch Ireland questions the all year blanket derogation to allow the killing of Magpie for the reason of Threat to Public health and as a vector in the spread of animal diseases. All articles of Article 9 need to be adhered to and evidence supplied of the alternative solutions which have been tested under Article 9(1), the conditions of risk etc under Article 9(2)(c) and the specifications under Article 9(2)(d).

#### **Rook (*Corvus frugilegus*)**

BirdWatch Ireland is unclear of what the term livestock feedlots refers to. Also, we are unclear as to why there is one month of respite for this species in January. All articles of Article 9 need to be adhered to and evidence supplied of the alternative solutions which have been tested under Article 9(1), the conditions of risk etc under Article 9(2)(c) and the specifications under Article 9(2)(d).

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<sup>9</sup> Lewis, L. J., Coombes, D., Burke, B., O'Halloran, J., Walsh, A., Tierney, T. D. & Cummins, S. (2019) Countryside Bird Survey: Status and trends of common and widespread breeding birds 1998-2016. Irish Wildlife Manuals, No. 115. National Parks and Wildlife Service, Department of Culture, Heritage and the Gaeltacht, Ireland.

**Jackdaw (*Corvus monedula*)**

BirdWatch Ireland is unclear to what the term livestock feedlots refers in an Irish context. Also, we are unclear as to why there is one month of respite for this species in January. All articles of Article 9 need to be adhered to and evidence supplied of the alternative solutions which have been tested under Article 9(1), the conditions of risk etc under Article 9(2)(c) and the specifications under Article 9(2)(d).

**Wood Pigeon (*Columba palumbus*)**

BirdWatch Ireland has concerns that there is no respite from the derogation for the entire year for this species. We are also concerned that Wood Pigeon is a migratory species and ask if the state is in compliance with any requirements to ensure that EU populations of this species are satisfactory.

All articles of Article 9 need to be adhered to and evidence supplied of the alternative solutions which have been tested under Article 9(1), the conditions of risk etc under Article 9(2)(c) and the specifications under Article 9(2)(d).

**Collared Dove (*Streptopelia decaocto*)**

The stated reason for control as a Threat to public health needs to be quantified and presented along with any future declaration. All articles of Article 9 need to be adhered to and evidence supplied of the alternative solutions which have been tested under Article 9(1), the conditions of risk etc under Article 9(2)(c) and the specifications under Article 9(2)(d).

March 2023

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