

# Proportionality grounds for exemption from national species protection provisions

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## National legal provisions

### *Sarcosoma globosum* case

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In February 2017 the Land and Environment Court of Appeal determined a case regarding exemption from national provisions to protect the fungus species *Sarcosoma globosum*. The case has since been subject to interesting and varying interpretations by land owners, authorities and law practitioners.

## National legal provisions

The Ordinance on Species Protection (2007:845) prohibits picking, removing or in any other way damaging specimens of the fungus *Sarcosoma globosum*. The provisions applicable to *Sarcosoma globosum* derive from Chapter 8 of the Environmental Code. Other provisions in the same ordinance implement EU Directives 92/43/EC and 2009/147/EG.<sup>(1)</sup> The provisions are all subject to general exemptions provided in the ordinance. In addition, the local County Administrative Board may allow individual exemptions under specific circumstances also provided in the ordinance.

Before the current ordinance came into force in January 2008, the previous version provided that undue interference with appropriate use of the land could constitute grounds for exemption. After 2008 this was no longer the case. The ordinance does not include or refer to any provision regarding compensation for persons who incur costs or losses because of protective measures.

## *Sarcosoma globosum* case

In this case, a real property owner had applied for an exemption from the ordinance in order to clear cut a 1.5 hectare forest area which was known to be a habitat of *Sarcosoma globosum*. The court had determined that clear cutting would negatively affect the conservation status of *Sarcosoma globosum* in the area (ie, the fungi would likely not survive or return to the area). The same criterion has been used in previous case law to determine whether actions which do not aim to harm a protected species, but would inevitably have harmful effects on individual specimens thereof, may be permitted (for further details please see "[Wind power – deliberate killing of wild birds?](#)"). From this starting point, the court had to determine whether an exemption was possible where the grounds stated in the ordinance clearly did not apply.

The court clearly indicated that the effects of the protective measures (ie, lack of proportionality) could constitute grounds for exemption. Because this consideration meant that further investigation into actual and financial effects that the decision would have for the applicant was required, the court decided to remit the case to the County Administrative Board for retrial.

## Proportionality arguments

The parties each introduced proportionality arguments. The applicant argued that the effects of the prohibition would be far reaching and that there was no "financially defensible" alternative to clear

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cutting the forest. The applicant emphasised that if his application was denied it would also affect the use of any other parts of his property where *Sarcosoma globosum* grows. The board stated that the applicant may still clear cut other areas within his real property unit, of which the designated area was a minor part, and fell individual trees even in areas affected by species protection. The board further noted that the applicant had not accounted for his property and finances (ie, full grounds to assess the proportionality of prohibition).

The parties discussed that the authorities could alternatively ensure preservation of a protected species' habitat by designating it a protected area. Area protection, unlike prohibitions based on protection of a particular species, would trigger a right to compensation for costs and losses. Further, case law concerning other environmental measures indicates that compensation claims can be considered regardless of the existence (or non-existence) of explicit provisions on compensation. With this in mind, two dissidents held that if the environmental protection interest was strong, the exemption application could be refused, meaning that the applicant could file a compensation claim. However, the majority did not share that view.

After the ruling, it was debated whether similar exemptions with reference to proportionality should or even could be possible from prohibitions which derive from EU directives. In light of EU case law (eg, Cases C-98/03, C-6/04, C-383-09, C-185-05 and C-192/11) this is doubtful, at least according to the competent authorities. There are pending court cases regarding prohibitions on clear cuttings which would negatively affect populations of the Siberian jay, which will be determined with reference to EU Directive 2009/147. Meanwhile, exemptions (although with limitations) have been given in some of the remitted *Sarcosoma globosum* cases.

## **Comment**

The court reaffirmed the importance of proportionality assessments of prohibitions and other measures to protect the environment. It also clarified that if the prohibition in this case was found to have disproportionate effects for the land owner, an exemption should be granted. Rather than uphold the prohibition and rely on potential unregulated compensation rights, if the environmental protection interest cannot be satisfied through less, the court indicated that the authorities should consider alternatives (eg, area protection) which explicitly allow for compensation to the land owner and thus may be more far reaching, but still be proportionate. While the ruling provides some nuance and clarification, the scope of the new (or renewed) grounds for exemption to avoid disproportionate outcomes – even within the framework of the ordinance – was quickly interpreted very differently by organisations and authorities. Later analyses have pointed out that the development in case law of exemptions wholly separate from the wording of the ordinance is making it increasingly difficult to simply read and understand the scope of the protection. The former issue may become resolved through case law as early as Autumn 2017. The latter is likely to require changes to the ordinance itself.

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## **Endnotes**

(1) Council Directive 92/43/EEC (May 21 1992) on the conservation of natural habitats and wild fauna and flora and Directive 2009/147/EC of the European Parliament and of the Council (November 30 2009) on the conservation of wild birds.

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