

QUESTIONNAIRE FOR THE AVOSETTA MEETING KRAKOV, MAY 26-27, 2017

Species protection

The main focus of the questionnaire and subject matter for the Friday is on species protection rather than habitats protection as such, although there is an obvious connection.

Some of the general issues that hopefully will emerge during our discussion are:

- Does the **EC law do enough** for the protection of species in MS and at worldwide scale?
- Does the MS law and practice do **enough for effective protection** of species and follow the EU requirements? are there proposals **for reforming national law or practice**?
- What are the **successes or the difficulties** encountered in the process of implementation of the Habitats Directive and the Birds Directive (provisions on species protection)?
- What can be done **to improve the protection** of species within the EU, the Bern Convention? Do we need **a new instrument/concept/principles of species** protection?
- Which **specific problems** hindered the species protection process (lack of data, overlapping administrative responsibility)?
- What about the **reports by the Commission** on the implementation of Birds and Habitats Directive in relation to species protection - are they sufficient and sufficiently frequent?

I. General background of the MS relevant for species protection

Before answering this first question on the distribution of powers between national and regional powers, I prefer to present an overview of the history and the main developments of the legal species protection, especially in the light of the French obligations under EU law. Such introduction will be useful in the light of the general issues mentioned above in order to identify and analyse the main trends in this area and the role and the capacity of Law to meet the crucial Biodiversity challenge.

A brief history

Several key Laws reflect the history of legal protection of wildlife species in connection with the legal preservation of natural sites and habitats:

- the 1930 Law on monuments and natural sites (in particular modified in 1957 with the creation of nature reserve in the classified natural site)* roots in Law 1906
- the 1960 Law on National Natural Park
- the 1967 decree on Regional Natural Park
- the 1976 Law on Nature (with specific provisions on the protection of fauna and flora)

* 1979 Bird Directive

* 1992 Habitat Directive – *1992 Rio Biodiversity Convention

- The 1993 Law on Landscape

* 2000 Florence Convention on Landscape

- 2004 First national Biodiversity strategy (2004-2010)

- The 2006 Law on National Natural Park, Marine Natural Park and Regional Natural Park (important reform of existing legal system and new specific provisions on marine park)

- The 2009 and 2010 Grenelle Laws on environmental policy (important reform in the line of the 1995 Barnier Law on the strengthening of environmental protection : introduced the green and blue corridors)

- The 2016 Law on Biodiversity, Nature and Landscape (important conceptual, material and institutional reform: 174 provisions, more 30 decrees expected)

Others Laws are to take into account because of their impact on legal species protection and the integration of those requirements: for example concerning human activities and urban planning (Law 2014 on agriculture, alimentation and forestry – Law 2015 on energy transition- Law 2014 on access to housing and urban planning) and concerning the distribution of powers between State and regional and local authorities (Law on grass-roots democracy, Law 2015 on the new territorial organization of the French Republic (important reform of decentralisation process).

The major developments and their characteristics

*In short, I would like to focus on essential aspects which reflect the major ideological trends and transformations under way: values & concepts – legal principles – objectives and protection and management approaches (integrated, ecosystem, adaptive), – public and private tools – actors, spatio-temporal scales and governance
Of course, such synthetic analysis of the French law is necessarily and closely interlinked with obligations and actions of EU.*

Values and concepts

Wildlife species are protected for several reasons, including for their intrinsic value.

Since the Law on Nature (1976), it's clear that the species protection (as environmental protection) is a general interest objective and animal and vegetal species are part of the common heritage.

According to the term used to qualify the wildlife species (rare, vulnerable, threatened with extinction) different legal regimes for their protection and their management are adopted. Depending of their state of conservation, even their survival, different legal measures can range from strict protection with a series of prohibition to diverse managements measures (including derogations and authorisation for destruction, in particular related wild game). We also have to keep in mind that lots of wildlife species are not protected by law (only the species belong to the biological national and European heritage) and some of them are subject to eradication legal actions (invasive species, nuisance species) highlighting the complexity of the issue.

The barrier that legally divide the legal status of species (wildlife/domestic) are blurring, especially for animal species. The genetic engineering, various behaviours and practices and new ethical concerns oblige the legislator to promote legislative change. The recent amendment to the civil code (2015) which affirm that “all the animals are sentient beings” (wildlife and domestic). But, the new article 515-14 precise that subject to applicable laws which protect them, the animals are subject to property regime”

A series of new concepts (in particular scientific concepts) are emerging since the last decade and reflect the diversity of visions related biodiversity and species protection & management at stake, reflecting values conflicts. I do not have time to debate in detail this issue but we could have in mind the rapid dissemination of these concepts: ecosystem services, ecological functionality, connectivity, not net loss and equivalence, green infrastructure, resilience and adaptation All of these concepts are integrated progressively into the law and invite to remain careful and attentive to the impact of them on the legal protection of species and biodiversity.

Legal principles

Naturally, the principles of Environmental Law would be implemented. The recent Law on Biodiversity, Nature and Landscape (2016) introduces and reinforce different principles:

- Principle of non-regression: “the protection of the environment...may only be subject to a constant improvement given the current scientific and technological knowledge”.

- Principle of ecological solidary: this concept included in the Law on National natural Park (2006) is now integrated and generalised : it calls to take into account in any public decision which have a significant (notable) impact on the environment and territories concerned, the interactions with ecosystem, living being and natural and managed natural areas”.

- Principle of prevention and the place of the compensatory measures in the hierarchy of the trio “: prevent, reduce and if possible compensate”. The Law 2016 precise that the “species, natural habitats and the ecological functions affected” have to be take into account. The law introduces the objective of no net loss.

Objectives, protection & management approach

As international and European level, the different legal regimes for the species protection are changed their ways of protection and management. From sectorial approach (specific species) to more global and ecosystemic approach (species, habitats, ecosystem, networks, functions, landscape ecology....). The necessity to improve the integration of species protection requirements into all the politics and decisions is also mentioned into the French Law but the implementation of this obligation still varies depending, in particular on the legal status (simply taking account, legal compatibility...) of this integration process in the light of the article 6 of the Environmental constitutionnal Charter¹. Following the media success of the concept of ecosystem service and others concepts in the same spirit, several visions of protection and management species and biodiversity confront each other (utilitarianism, anthropocentric, ecocentric...). The choice of legal protection

¹ - Les politiques publiques doivent promouvoir un développement durable. A cet effet, elles concilient la protection et la mise en valeur de l'environnement, le développement économique et le progrès social.

and management approach largely depends on the social constructs and representations of species and nature (sanctuary approach, utilitarian approach, dynamic and socio-ecological approach). This also raises the question of the reintroduction of native species, the choice of the protection perimeters, ecosystem restoration...) not only through the capacities of scientific and technical knowledge.

Public and private tools

As mentioned above, the majority of legal regime related to the protection of species (and their habitats) is based on classic unilateral acts adopted by the State. In order to raise the awareness of the critical importance of protecting the wildlife species, in particular at local and rural scales, the legislator has mobilised different policy instruments (contractual approach (as Natura contracts), voluntary tools (as regional natural park ...), financial tools). The implementation of legal species protection is faced a number of difficulties and the problematic question of the cost of such protection obligations is raised by the opponents. In the light of these conflictual situations, the public authorities promote the assessment of the benefits of biodiversity and the species protection (MAE, TEEB Ecosystem services, UE ecosystem services mapping, French assessment of ecosystem and ecosystem services). Linked directly to these process, the public authorities are increasingly interested to encourage innovative tools, especially economic tools as payments for ecosystem service, or mixed tools as biodiversity offsets and land management tools.

Actors, scales and governance

The French centralism is well known and the State has been and is again the principal public authority responsible of legal species protection. If the role of the State is relevant in order to ensure uniform application of all the legal obligations imposed on different actors, it's important to take into account the diversity of local and regional scale where the species live or stay for longer or shorter period. In addition, all the actors, in particular in rural areas (farmers, forest owners, landowners) do not agree with restrictions and interdictions imposed by the species protection. Furthermore, the local French authorities requested to be more associated by the State and its representative authority (Préfet) to conduct and implement the legal species and natural ecosystem policy. Thanks to the decentralization dynamic, several provisions were introduced in the environmental code, the urban planning code and the general Local Authorities Code. The recent Law 2015 on the new territorial organization of the French Republic continues this approach of decentralization under the supervision of the State. We also have to keep in mind the specificity of the French overseas départements which house a remarkable richness of nature and France is the second biggest marine territory in the world (11 millions Km²)

Faced to strong protest by hunters, farmers and landowners (eg. Transposition of Habitat directive-Implementation of Birds Directive, reintroduction of bears in the Pyrénées...), the public authorities looked for different solutions by improving the dialogue and the public participation process. The strengthening of scientific knowledge (and participatory science system) on species, biodiversity and ecosystem services is crucial in order to obtain a better assessment of species and their state of preservation and adaptation in the context of climate change. The sustainability of human activities (eg agriculture and the future of agro-écologie...) depends largely on it. The role of NGO and the judges are an important element to take into account in this issue which generated lots of disputes.

Is your national law based on a **mixture of nature conservation laws and national/regional** hunting and fishing regulations; is there a **separate regulatory system** for specific group of species? Is the law concerning species protection at **national level or regional level**?

The environmental code provides a special chapter related to hunting. The hunting practice is described as an *environmental, cultural, social and economic activity which participate to the sustainable management of the faune and flora heritage. Hunting contributes to the balance between game, natural environment, human activities by ensuring a real agro-forest and game balance.* (L 420-1). The government ensures the supervision and the hunting police in the general interest.

The Minister of the environment adopted lists of wildlife animal species and vegetal species (order 1987 game species, order 2009 vertebrate species protected (excluded the Wolf which is not considered as endangered species) which distribution area extend the territory of the department (local authority between region and municipalities); for the others species located at local (département, municipalities) scale, the list is adopted by

the Préfet. 38% of vertebrates known are protected. Others national lists of birds, amphibians and reptiles, mammals and marine mammals, sea turtles, insects, shellfish. Regional lists complete the national lists For vegetal species protected (decree 2007), we also have lists adopted at national (429) and regional level (1654).

II. Introductory question

1. Risk

are there any **official or other reports estimating what constitutes the main risk** for protected species in your country: e.g. illegal hunting, infrastructure project, agricultural, the absence of the species action plans, insufficient species data; insufficient human resources, others)?

The mains risks identified are

- the destruction and fragmentation of ecosystems due to the rapid urbanization, transport infrastructures and agriculture and forestry practices
- the overexploitation of species (marine and terrestrial), including poaching and trafic
- Air, water and soils pollutions
- Invasive species (environmental, economic and health impact: eg. Asian hornet, the Asian tiger mosquito, ragweed, ...) in the context of climate change.

The Ministry mentioned that 70 000 hectares of natural environment per year has destroyed (transport infrastructure, urban planning..). 261 globally threatened species in France (as beetle larvae scarabee pique-prune, European mink...)

** The problematic reintroduction of native species (Wolf and Bears in the Pyrénées) is reflected through this several decisions of justice*

2. Principles of species protection

are there any **specific principles** formulated in law or in court decisions or academic debate; is a **species-by-species approach** followed? (please give example)

See above general General overview

III. Directive 92/43

1. Surveillance of conservation status – (art 11, art. 14 HD)

The CJEU underline the necessity of **detailed, clear and in precise manner transposition** of art. 11 HD as well as fundamental **role of surveillance** (monitoring) of conservation status of species of Community interest (Case C-6/04) - How, if at all, is this obligation is transposed and followed in domestic law in practice?

what about omissions and measures to remedy them?

The Ministry of Environment ensure the monitoring of conservation status of species of Community interest. The natural history museum is the national scientific center in charge of the implementation process of Natura Network. The first state of conservation of species and habitats of Community interest was send to the European Commission in 2008. (2001-2006): 131 habitats, 209 species of the metropolitan territory, and the Second State (2007-2012). COM (2015) 219.

The national natural history Museum has created unified database (taxonomic, administrative, geographical referential) which allow to access to the lists of species by municipalities, area protected or by mesh (10x10km). In order to improve the knowledge of the species and habitats, the Museum collected different data on fauna and flora. All the observations are submitted by a naturalist network (national office of forest, national office of hunting and wild fauna, national office of water...). The recent Law on Biodiversity created a new national agency which absorbed some national office (water, marine protected area agency).

2-Conservations of species (art. 12 -16).

The *objective* of part 2: Taking into consideration the way of interpretation of art. 12-16 HD by the CJEU whether the very small room for derogation is actually followed in the Member States.

Art. 12-13 HD - **system of strict protection** for animal and plant species

To what extent does your national law fulfil the requirement laid down in art 12 and 13 HD and the requirements for clear and precise transposition?

It is settled case-law that the transposition of that provisions requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures.

More detailed issues can be considered in this context include:

a. *specific measures aiming to establish a **comprehensive system of strict protection** where chosen in your country (statutory, administrative or contractual measures)*

b. ***specific measures** (not only prohibitive) adopted to achieve comprehensive and effective system of strict protection (e.g. species action plans, special management plans, monitoring, regulating the population of animals having an impact on protected species, liability for caused by relevant protected species to property etc.);*

c. *the inclusion of **proactive habitat management measures (the restoration or improvement of the habitats e.g. in case of a species for which no protected areas are provided (opinion of AG in case C-383/09)***

d. *the way of understanding provided in art. 12 (1) concepts of “deliberate”, “disturbance”, “destruction”, “deterioration”*

Do you have examples of case-law exploring these concepts?

Art. 14 HD – **Measures to control taking of and the exploitation of certain animal and plant species of Community interest.**

a. which measures have been adopted to restrict hunting or other form of taking of specimen in your country (licence, quota established)? are quota based on sufficient field or scientific data and other sources of human caused mortalities?

b. differences in the management of species listed under Annex 4 and Annex 5 of the HD respectively, where the wolf is an example.

Art 15 HD - the prohibit to **use of all indiscriminate means of killing**

Is there a general prohibition of using all indiscriminate means of killing or the specific list of such means?

Art. 16 HD - derogation from the provisions of Articles 12, 13, 14 and 15 HD

a. whether derogations from the prohibitions related to protected species are of general (e.g. C-412/85 the normal use land for agriculture, forestry or fisheries) or individual nature (permission in each case)?

b. does national law go beyond the specific grounds justified removals described in art. 16 HD?

c. how the three test approach is interpreted according to administrative adjudication, court decisions or academic debate (what is and what is not regarded as i) favorable conservation status, ii) specific reason (e.g. “reason of overriding public interest”), iii) satisfactory alternatives (what is the scope of alternatives be considered)?

d. are compensation measures (although not obligatory in art. 16 HD) adopted?

Art. 22 HD

- a. Is the desirability of **re-introducing native** Annex IV species used?
b. the **deliberate introduction of non-native species** is regulated - is it prohibited?

Overlapping between Annexes - the protection of species listed under Annexes II and IV
what is the practice/ possible scenarios/legal requirements of simultaneous application of **derogations** under Articles 6 (4) HD and 16 HD

Art. 5-9 of the bird directive contain similar provisions and their interpretation by CJEU can be applied to art. 12-16 HD. One can an example of significant case illustrating the application of art.5-8 and 9 BD or indicate main problems or improper implementation.

Enforcement (legal consequences of infringement of art. 12-16 HD or 5-9 BD)

- a. What bodies are responsible for the **enforcement of national or regional legislation** on species protection is enforced?

Depending on the legal species and habitats protection systems concerned. National authorities in the majority of the case (special polices), but for example in national natural park, the director of the Park exercise police powers. The judge accepted that the municipality (the major) use its general police (for example wenn a risk for the security of the persons is at stake : presence of Bear.

- b. What **sanctions** are used (eg criminal, administrative or civil means); which is the most effective?

Among the different type of sanctions, under article L 415-3 of environmental code, the damage to protected species are subject to criminal sanctions: one year of imprisonment and a fine of 15 000 euros. The offences committed in a natural park or by an organized group are subject to more severe sanctions

The new Law on Biodiversity, nature and landscape introduced specific sanctions related to the use of genetic resources or traditional knowledge linked without the document required by the EU regulation (Nagoya protocol): one year of imprisonment and a fine of 150 000 euros. If the use of these resources and knowledge linked provided commercial use : fine of 1 million euros is allowed.

- c. How is the obligation to **monitor incidental capture and killing of animal species** (Article 12.4 HD) is transposed and applied; is there a national system of monitoring all relevant species covering the whole territory or is limited to particular species/areas/causes; have any conservation measures been introduced as a remedy to avoid incidental killing or capturing having a significant negative impact on the conservation status of the species?

- d. Please give two examples of what you consider the most important national legal cases dealing with area of the law (if any).

- e. Has the Environmental **Liability Directive** and how it has been transposed played any role in your country in species protection?

For example: a) is 'damage' under national law limited to damage to species protected under EU legislation; b) are there examples of effective application ELD to damage to protective species

(e.g.: in case of destruction of nesting sites of the swift or closing vent openings as a result of fitting thermal insulation on a building which had been used by the swift every year as a nesting site or in case damage to protected species caused by the installation of an electrical and lighting system in forest clearings or in case of damage to protected species and habitats caused by the pollution of water by the discharge of untreated waste water from the municipality), c) are there obstacles to using this enforcement mechanism in case of damages to protective species (e.g. no determination of the initial state of the environment – the example can be the case when court states that the authority can not impose the obligation to take corrective action at a particular facility, relying only on assumption that each vent or fissure in building facade could pose a potential nesting site (habitat) for Swift).

Not yet but the recent judgement of the Court of Cassation give few information. In march 2016, the Court of cassation reversed the decision of the Appeal Court which refused to compensate the ecological damage requested by the LPO (Birds destruction after water pollution in the estuary of Loire caused by Total refinery). The Court of Cassation considered that the Appeal Court could not disallow LPO using the argument that the ecological damage assessment presented by LPO was not precise. The Court of Cassation indicated that the liability common rule could be combined with the administrative liability required by the directive 2004/35. In December 2016, the appeal Court (Rennes, 16/01249 – Britany) condemned Total to pay compensation to LPO for ecological damage (85 000 euros) : the Court took into account the number and the bird species destroyed, the unit value fixed for different game species by the national office for hunting and fauna (and the cost of the reintroduction of the birds specimen in natural environment, with a coefficient rarity-threat).

III-SEA, EIA, Appropriate Impact Assessment and species protection

1. how the **species protection is reflected in the SEA** assessments since the latest CJEU court cases on SEA Directive (C-290/15) indicate that mistakes in SEA-procedure will make legislation as well as decisions based on plans invalid?
2. how do the administration or courts deal with the investigation of the project (permits for operations) with a foreseeable impact on strictly protected species; what is “deliberate” in this context; how are the conditions for the operation designed and what happens if damage occur despite those conditions? *(e.g a wind park in Southern Sweden where 11 birds of prey have been killed only during 2016).*
3. what about the activity not restricted by individual decision (e.g. sport event in the protected area, cutting trees by the owners of the land not for economic activities)

The inventories of natural zones of ecological interest, flora and fauna are an interesting information tool for publics makers and operators for the conception of their plan, programmes or projects. For the judge, when such inventory exists in site where a project is proposed, it constitutes one of the elements useful for the control of the quality of the environmental impacts assessment produced by the operator (CAA Bordeaux 2014).

For the Council of State (CE 20/12/2013), the charter of regional natural park is not among the plan and programs which have a significant impact on environmental issues. An ordonnance (August 2016) revised the French legislation related the environmental assessment for plans, programs and projects. It is mentioned that the environmental assessment describes and appreciates, in an appropriate manner, the significant impacts direct or indirect on, in particular the biodiversity (with a special attention related to species and habitats protected by the Directives Habitats and Birds). This ordonnance mentioned that the decree precise the projects category, according to the criteria L 122-1 environmental code, and where required after an exam case per case, are subject to an

environmental assessment. The French legislator try to take into account the jurisprudence of ECJ 241/08.

IV-Agricultural or forestry activities with a foreseeable impact on protected species

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| 4. | are there derogations from species regime in every case, general exclusion (<i>binding general guidelines, recommendations, code of conduct, best practice others, etc</i>); what is the legal procedure if they are ignored? |
| 5. | are agri-environment, forest, aquaculture financial assistance/support effectively used in development of sustainable forestry, agriculture or aquaculture? |
| 6. | are there others form of support (e.g. agreements with the owners of the property)? |

According to the national biodiversity strategy, the integration of species protection is expected. The recent Law on agriculture, Food and Forest has among its objectives the promotion of agro-ecological production systems which combine economic, social, environmental and health performance (art.1). This article indicated that such agro-ecological systems are based on the biological interactions and the use of ecosystem services and the potential provided by natural resource, in particular water resources, biodiversity..."

A recent national plan France, Land of pollinator populations was adopted last year for halting the loss of biodiversity and pollinators (2016-2020). The prohibition of neonicotinoids insecticides is adopted and will be effective in September 2018 (despite few derogation).

Of course, lots of room for improvement related to the implementation of eco-conditionality, green payments and agro-environmental measures are expected and could be more used for the species protection and habitats (new agriculture practices linked in particular with the creation of the green and blue corridors)

V-What exactly are the roles of citizens and NGOs in species protection?

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| 7. | how national law - having in mind the lack of UE rules on the one one hand, on the other the obligation arises from Aarhus Convention - deal with public participation and access to justice in species protection proceedings? |
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According to the article 7 of the environmental constitutional Charter, every person has, the right, in the conditions defined by law, to access to environmental information held by public authorities and to participate in decision making that affect the environment. The Law 2012/1460 organizes the implementation of the participation principle according to this article 7.

A question of unconstitutionality (QPC) related the classification procedure of natural sites (under the Law 1930, L 341-3 environmental code) before the Constitutional Court led the judge to pronounce the unconstitutionality of this procedure in the light of article 7 of the Charter (CC decision 2012/283 QPC 23/11/2012). The legislator was obliged to modify the article L 341-3 (public inquiry expected).

The Constitutional Council judged contrary to the article 7 of the Charter the article L 411-4 environmental code which did not provide any public participation concerning the adoption of derogations to complete species protection (decision 2012/269 QPC 27/7/2012). Now, since 2013, all the derogations have to be subject to public participation.

The recent Law on Biodiversity, nature and Landscape which introduced the creation of fishery conservation area provided the public participation.

VI- Direct applicability

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| 2. | Are EU provisions on species protection directly applied in case of improper transposition? |
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Not in my knowledge in the jurisprudence of the Council of State. By contrast, Council of State refused to recognize direct effect related to the Berne Convention.