

REPORT ON SPECIES PROTECTION IN ITALY

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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?

You are invited to focus on the questions of your knowledge and interest. So, not all questions and subquestions (introduced more as examples of what might be elaborated upon) deserve a specific and detailed answer. Answer can just also take a form of an example of significant case illustrating the problem(s) prescribed in main question following by subquestions.

Preferable deadline (if possible) for sending the report (please do it to everybody) is 10-15 of May.

Members from states that are not subject to the Birds and Habitat Directives but contracting parties of the Berne Convention should answer the questionnaire accordingly. This will be facilitated by the fact that the regulatory profiles of the Directives and the Convention are largely the same.

I. General background of the MS relevant for species protection

- a. 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?

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In Italy, the most relevant piece of legislation for species protection is represented by Law 157/1992, which implemented in Italy the Birds Directive as well as the Berne Convention. This is a framework legislation which dictates the basic rules for wild species protection, in connection with the regulation of hunting. The general competence to regulate species protection and hunting lies with the State, at national level. However, Regions are empowered by Law 157/1992 to adopt management plans to coordinate species protection with the exercise of hunting activities within their regional territories. Such regional plans have to respect the minimum requirements set by the national legislation, but Regions are allowed to adopt stricter provisions for enhancing species protection.

Beside law 157/1992, other relevant legislations for species protection are: 1) Decree 357/1997, as modified in 2003, which implements the Habitats Directive in Italy and 2) Law 349/91, which represents the framework legislation for the establishment and management of national and regional parks and protected areas.

II. Introductory question

1. Risk

- a. 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)?

There are several Reports dealing with the evaluation of protected species and the related risks. Some reports are regularly produced by Ispra, a national technical institution dealing with environmental research and communication, which works in close connection with the Italian Ministry for the Environment and scientific organisations and societies. See for instance: 1) the 2013 Ispra third Report on the implementation of the Habitats Directive in Italy; and 2) the 2014 Ispra Report on species and habitats conservation in Italy, which describes the distribution, conservation status and trends regarding protected species and habitats under the relevant EU Birds and Habitats directives.

Moreover, there are some Reports drafted by conservation and environmental NGOs. Most notably, with regard to species protection, the relevant activity of Lipu (Italian League for the Protection of Birds) should be acknowledged. An interesting reference source is for instance the 2009 Lipu Report on the assessment of the conservation status of protected birds in Italy.

2. Principles of species protection

- a. 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)

No specific principles on species protection which are peculiar to Italian law or jurisprudence have been detected. It may be said that, in Italy, both the legislature and courts in the nature and species protection fields have rather stuck to the application of EU principles only.

III. Directive 92/43

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

- a. 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?
- b. what about omissions and measures to remedy them?

Under Italian Law, Decree 357/1997, as modified in 2003, which implemented the Habitats Directive in Italy, contains some specific provisions on research and assessment of the conservation status of protected species as well on the surveillance of such a conservation status.

In this sense, art. 14 of Decree 357/1997 foresees that research and assessment is coordinated by the Italian Ministry of the Environment, which relies on the technical expertise of Ispra and coordinates with relevant regional and local authorities. Data are regularly collected and reports are issued every 6 years, pursuant to art. 17 of Directive 92/43. Moreover, art. 15 Decree 357/1997 empowers the *Corpo Forestale dello Stato* (“Forest Police”, recently merged by Legislative Decree 177/2016 into the general police force *Carabinieri*) to monitor the conservation of protected species within the Italian territory.

It may be questioned whether these provisions fully comply with the requirement of art. 11 HD, as interpreted by the CJEU, but to the best of my knowledge no national court has ever dealt with this issue, with regard to the applicable Italian legislation.

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.

2.1. 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?

The requirements contained in articles 12-13 HD are implemented into the national legal system by articles 8-9 of Decree 357/1997. Such provisions do not make an explicit reference to the need to establish a system of “strict protection” for animal and plant species, as foreseen by the directive. However, in practical terms, they contain the same prohibitions mentioned in articles 12-13 HD. In some way, however, it may be argued that the text of the Italian legislation appears stricter than the text of the Directive. This is due to the fact, that, under articles 8-9 of Decree 357/1997, the activities prohibited do not need to be “deliberate” ones, because the mere fact that a violation occurs, even if not a deliberate one, is prohibited and represents a punishable offence under Italian legislation.

While the general prohibitions are contained in the statutory provisions adapted at a national level, the concrete protection, surveillance and monitoring measures are normally contained in implementation and management plans adopted at a regional level. Furthermore, Regions have a

duty to inform on a yearly basis the Italian Ministry for the Environment of the surveillance and monitoring activities undertaken for the protection of animal and plant species.

With regard to the species protected under Annex IV HD, more specific protection measures are contained in administrative regulations, such as the internal regulations of parks, other national or regional protected areas as well as protected sites under the Birds and Habitats directives. Furthermore, for species under a serious risk of extinction, the Italian Ministry of the Environment, in coordination with Ispra, may adopt specific action plans, based on a “species by species” approach. Recent action plans adopted in such a context concern the marsican brown bear (*ursus arctus*), the otter (*lutra lutra*), the partridge (*perdix perdix*), the Mesola deer (*cervus*) and the wolf (*canis lupus*). Moreover, it should be noted that an action plan for sea turtles protection is under preparation and the action plan for wolf protection is under revision (see below, section 2.2 of the present Report).

The violation of the prohibitions contained in article 8-9 of Decree 357/1997, implementing articles 12-13 HD, was originally subjected to the applications of administrative sanctions only. However, since 2011, specific criminal sanctions are also foreseen by the Italian Criminal Code. In particular, the newly introduced article 727 bis of the Italian Criminal Code prescribes that killing, capture or detention of protected animal species listed in Annex IV HD are punishable with a criminal sanction consisting in the imprisonment up to 6 months and a pecuniary fine up to 4000 euros. The same pecuniary fine is foreseen for picking, collecting, cutting or detention of plant species listed in Annex IV HD. Moreover, the newly introduced article 733 bis of the Italian Criminal Code prescribes that the destruction of a habitat within a protected site, or the relevant deterioration of its conservation status, is subjected to a criminal sanction consisting in the imprisonment up to 18 months and a pecuniary fine not below 3000 euros.

2.2. 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.

In Italy, hunting regulations are adopted by the Regions, within the framework provision contained in Law 157/1992. In particular, article 18 thereto determines which species may be hunted and for which period of the year, taking into account the provision of article 14 HD. Hunting regulations must comply with the maintenance of species at a favourable conservation status as well as, more generally, with environmental and ecosystem protection objectives.

The difference between the management of species listed under Annex IV and V HD correspond to the distinction between Annex D and E of DPR 357/1997. In this respect, it should be underlined that only for species listed in Annex IV the adoption of specific action plans by the Italian Ministry for the Environment is foreseen by the national legislation (see above, section 2.1 of this report).

With regard to wolf protection, it should be underlined that the adoption of an updated action plan is currently under discussion; for the first time, such a plan is meant to depart from absolute protection

and allow a limited killing quota of 5% of the total wolves' population. In concrete terms, this will depend on the adoption of regional plans, which will need to be approved by the Italian Ministry for the Environment.

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

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

The use of all indiscriminate means of capture and killing of species protected under Annex VI HD (corresponding to Annex F DPR 157/1992) is prohibited by article 10 DPR 157/1992 (implementing article 15 HD). The general prohibitions are contained in article 10, whereas more specific prescriptions and details on the prohibited means of capture and killing may be foreseen by the management plans of the specific protected areas (including Sites of Community Importance (SCIs) and Special Areas of Conservations (SACs) within the Natura 2000 network of protected areas).

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

Derogations from the provisions of Articles 12, 13, 14 and 15 HD are foreseen by article 11 DPR 357/1992, which implements article 16 HD in Italy. According to this provision, derogations may be authorized by the Italian Ministry for the Environment, in cooperation with the Ministry of Agriculture and Forestry and with Ispra. The conditions for the application of the derogations are essentially the same prescribed by the directive.

Some other derogations to the hunting regulations are also possible under article 19 of Law 157/1992, already mentioned above. According to such a provisions, specific hunting derogations may be introduced by the Regions for specific and exceptional reasons related, for instance, to the excessive increase of the population of certain protected animal species. This is the case of the wild boar species (*sus scrofa*), for which hunting derogations are often foreseen, in order to limit its increase and indirectly reduce damages to agriculture production.

2.5. 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?

The re-introduction of native species is regulated by article 12 of DPR 357/1992, which implements article 22 HD. The re-introduction should be based on specific guidelines issues by the Italian Ministry for the Environment, in cooperation with the Ministry of Agriculture and Forestry and with Ispra. The competence to adopt such guidelines has been *de facto* delegated by the Ministry to Ispra. The specific decisions regarding the re-introduction of native species are taken by the competent Regions, on the basis of the above mentioned guidelines. The introduction of non-native species is prohibited in any case, under Italian law, pursuant to article 12(3) of DPR 357/1992.

2.6. Overlapping between Annexes - the protection of species listed under Annexes II and IV

a. what is the practice/ possible scenarios/legal requirements of simultaneous application of derogations under Articles 6 (4) HD and 16 HD

The relationship between the derogations contained in article 6(4) and 16 HD corresponds, in Italian law, to the relationship between articles 5(7) and 11 of DPR 357/1992, which implements article 22 HD. To my knowledge, no specific relevant case-law exists in Italy on this issue.

IV. 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 add an example of significant case illustrating the application of art.5-8 and 9 BD or indicate main problems or improper implementation.

The application of the derogations foreseen by articles 5-8 and 9 BD into the Italian legal system has raised to a series of legal issues. In fact, the provisions of Law 157/1992, which implemented the BD in Italy, initially did not contain adequate norms to give full effect to the relevant provisions of the BD on derogations. This loophole in the Italian implementing legislation gave rise to a case brought by the European Commission against Italy (Case C-159/99). In such a case, the Court of Justice found that Italy violated articles 5-7 BD. As a consequence, the Italian legislature (by means of Law 221/2002) inserted article 19 bis into Law 157/1992 (later modified by Law 96/2010), in order to properly implement the relevant provisions of the BD on derogations. However, even after this amendments, the European Commission was not satisfied and brought a new case against Italy before the CJEU (case C- 573/08). In this new case, the Court of Justice ruled that article 19 bis of Law 157/1992 does not fully satisfy the requirements on derogations contained in the BD.

In any case, it should be mentioned that according to article 19 bis Law 157/1992, the competence to apply derogations to birds protection provisions in Italy is exercised by the Regions, which have a duty to notify them to the Ministry for the Environment, for a check. Derogations are then communicated in a yearly report transmitted by the Italian Ministry to the European Commission.

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

Enforcement (see also above): competences on enforcement are distributed mostly between the State (largely, the Ministry for the Environment in cooperation with Ispra) and the Regions. Inspection and monitoring is primarily conducted by the so-called forest police (*Corpo Forestale dello Stato*, now part of the general police force *Carabinieri*). (see above, section III (1) of this Report).

Sanctions (see also above): administrative and criminal sanctions are both used for species and habitats protection under Italian law. For the protection of animal species, sanctions are mostly prescribed by Law 157/1992. Such a piece of legislation, as already mentioned above, contains the fundamental rules for wild species protection, in connection with the regulation of hunting. In particular, Law 157/1992 prescribes that wild animal belong to the patrimony of the State. Therefore, hunting is allowed only after obtaining a licence from the State authorities. For licence holders, the violations of the prescriptions of Law 157/1992 may be punished with administrative (pecuniary) sanctions. However, if hunting is exercised without holding a licence, this may be considered a “hunting theft”, which can be punished under the provisions dedicated to “theft” of the Italian

Criminal Code (art. 624 and 625 Criminal Code). In such a case, sanctions may range from 1 to 6 years of imprisonment or amount to a pecuniary sanction up to 1000 euros.

In addition to that, two new misdemeanours were introduced in 2011, by Legislative Decree 121/2011, implementing the provisions of Directive 2008/99/EC on the protection of the environment through criminal law. The two new misdemeanours refer to protected animal and plants species listed in Annex IV HD and have been described in detail above, in section 2.1 of this Report.

Environmental Liability Directive and species protection: The ELD Directive has been implemented in the Italian legal system by Legislative Decree 152/2006, which constitutes the framework legislation of environmental protection. Pursuant to article 300 of Legislative Decree 152/2006, the notion of environmental damage consists in the significant and measurable deterioration of animal and plant species and of habitats protected under EU and Italian Law, as well as of parks and other protected areas under Italian law. Since the State is the unique trustee for environmental goods in Italy, only the State can claim compensation for environmental damage. This implies that no claims for environmental damage can be raised neither by regional or local authorities, nor by environmental NGOs, unless they can prove to have suffered a direct and personal damage (see for instance, Court of Cassation, Criminal Branch, III section, decision No. 19439/2012). In this respect, it should be noted that the implementation of the ELD Directive was used by the Italian legislature to step back as compared to the previous national legislation on environmental damage, which amounted to article 18 of Law 349/1986. In that context, in fact the *locus standi* for environmental damage was recognised also to regional or local authorities and to environmental NGOs. This is not only problematic in terms of reduced access to courts, but it has also diminished the claims for environmental damage, insofar the State (through the Ministry for the Environment) is generally not very keen to begin environmental damage legal actions.

VI. SEA, EIA, Appropriate Impact Assessment and species protection

On the relationship between VAS and HD appropriate impact assessment, it should be noted that article 10(3) of Legislative Decree 152/2006 foresees that the VAS procedure may include the HD appropriate impact assessment, when the interference with a Natura 2000 site is at stake. In order to facilitate the integration of the VAS and HD impact assessments, the Ministry for the Environment, in cooperation with Ispra, has issued a technical report, containing operational guidelines. The performance of a single procedure is concretely foreseen by several pieces of regional legislation, which also dictate operational modalities for the integration of the two assessments. For instance, the Tuscany Region regulates such matter in detail through the regional laws 56/2000 and 10/2010.

VII. Agricultural or forestry activities with a foreseeable impact on protected species

Nothing to report.

VIII. What exactly are the roles of citizens and NGOs in species protection?

To my knowledge, no specific rules exist in the Italian legal order on public participation or access to justice for citizens or NGOs, with regard to species and habitats protection.

With reference to access to justice for environmental damage in connection with significant and measurable deterioration of protected animal and plant species, see above section V of this Report.

IX. Direct applicability - are EU provisions on species protection directly applied in case of improper transposition?

With regard to the possibility of direct applicability of EU provisions on species protection in case of improper transposition, a relevant decision of the Italian Council of State (Supreme Administrative Court) should be mentioned. In decision No. 1054/2009 (section VI), the Court has been called to decide on the failure to properly transpose into Italian Law (by means of article 19 bis of Law 157/1992) the detailed provisions on the derogations for birds hunting, capture or killing contained in article 9 of the Birds Directive. In this respect, the Court has held that since the EU prescriptions dealing with such derogations are not correctly implemented into Italian Law by the framework national legislation, Regions cannot authorise hunting, capture or killing of wild birds in derogation to the general prohibitions contained in the Birds Directive. Therefore, in such a case, the principles contained in article 5 BD, which prescribes a general system of protection for all species of wild birds, must be directly applied within the national legal order.