

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

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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?
Yes, it's a mixture. Species protection is included in the national law on nature conservation. It is applicable to all the Portuguese territory except for the two autonomous insular regions. In fact, the archipelagos of Madeira and Azores that have their own laws (substantially similar as they copy and paste the national law and adapt it slightly to the peculiarities of the region). Additionally, there are national laws on hunting and fishing, on the Iberian wolf, on maritime mammals, on cork oak and holm oak, and regional laws on cetacean watching.

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)?

Yes, in the Sectoral Plan for Natura 2000 there is a detailed datasheet for each species identifying the main risks that affect the species. Different risks, affecting the species directly or indirectly are mentioned: runover, illegal hunting or harvest, bycatch (or accidental capture), human persecution (wolves), human pressure (birdwatching, whale watching) noise pollution, light pollution, shortage of prey, habitat loss, changes in agricultural landscape, etc.

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)

Only an example: the principle of strict liability of the State for damages caused to the cattle or to the guard dogs by wolf attacks. The money comes from a public fund, created for the first time the law protecting wolves in 1988, to compensate the owners and avoid persecution and killing of wolves. The payment is usually a case of strict State liability. It must be noted that there is a maximum limit: the compensation, in accumulation with other State aid, may not exceed €15000.00 over a period of three years, according to the Commission Regulation 1408/2013 of 18 December 2013, on the application of Articles 107 and 108 of the TFEU to *de minimis* aid in the agriculture sector.

Furthermore, there are six legal principles applicable both to species and to habitats: the principle of the social and public function of the natural heritage; the principle of sustainability, the principle of identification; the principle of compensation; the precautionary principle; the principle of protection.

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?

Transposition: the competent authorities have general surveillance powers (in particular concerning natural habitat types and priority species) for monitoring and systematic surveillance of the conservation status of the species and habitats.

Beyond that, the Natura 2000 law only mentions monitoring of accidental catches or killings of wild animal species.

Practical application: the shortage of human, material and financial resources is well known.

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

Nature conservation laws do not mention the consequence of omissions of protection/monitoring/surveillance. On the contrary, the omission of an opinion required by the competent authorities for huntable species, the law establishes a presumption of a favorable (fictitious) act.

The general law on State liability sanctions illegal omissions of any organs that violate constitutional, legal or regulatory provisions or principles or that violate technical norms or objective obligations of care and that result in the offense of rights or legally protected interests. This norm has seldom been applied (for nature conservation, never).

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?

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?
- a) A specific action plan for in situ and ex situ protection of the Iberian Lynx was adopted. The plan includes a program for assisted reproduction in captivity and reintroduction of species in the wild, and prey management (cotton-tail rabbit). The plan involves NGOs, hunters, land owners as well as public and private entities (<http://areasprotegidas.icnf.pt/lince/index.php/lince-iberico/plano-acao/entidades-parceiros>), universities, police, municipalities, forest association producers, and so on.
 - b) In April 2017, Pilot Project for the management of the Tejo International Natural Park was launched. The project involves municipalities, environmental organizations (Quercus), Business Associations, universities and the Public Institute for Conservation of Nature and Forestry. This protocol was presented as "a fundamental turning point" in the management model of protected areas to help overcome the insufficiencies in the management of Natura 2000 sites.
 - c) The above mentioned system of strict liability for wolf damages was instituted in the 80's remains as the most effective public measure to protect the wolf.

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.*

Every year hunting seasons for the various huntable species are defined by law. If the number of hunters exceeds that carrying capacity, there is a random selection of proposed hunters (drawing process) and the selected hunters must pay hunting fees. Fines are applicable in case of disregard to the conditions established in the law. Hunting quotas are also established. As no hunting is allowed in burnt land, every year an updated version of the areas the map of the areas affected by the forest fires is published.

The species listed under annex V are not included in the lists of huntable species. Therefore, the regime is quite similar. Exceptionally, for important reasons, hunting or taking can be allowed by the competent authority.

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?

There is a specific list but two of the entries on the list are quite open:

- a) Nets that are non-selective in their principles or conditions of use;
- b) Traps that are non-selective in their principles or conditions of use.

The other forbidden means are:

For mammals and birds: live, blind or mutilated animals used as decoys; sound recorders; electrical and electronic devices capable of killing or stunning; ties, viscous substances, hooks; artificial light sources; mirrors and other means of dazzling; means of illumination of the targets; sighting devices for night shooting, including an image amplifier or an electronic image converter; crossbow; poison and poisoned baits or anesthetics; release of gases or fumes; automatic or semi-automatic weapons with a loader of more than two cartridges capacity;

For fish: Poisons; Explosives.

Modes of transport: Aircraft; Motor vehicles in motion

2.4. 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?

The derogations must be authorized on a case by case basis.

The national law goes beyond in one case: taxidermy for purpose of research and education.

Political rather than scientific approach to the concepts of favorable conservation status, specific reason and satisfactory alternatives. In each case a formal decision by the competent authority must be issued but the decision is not grounded on detailed scientific studies. The authorization must only mention its purpose and objectives; the reference to the species or species concerned; an indication of the duration of the license, which may not exceed one year; the parishes and municipalities covered by the authorization; the number of specimens of each

species concerned, where such indication is possible; the methods and equipment which may be used; other indications or limits that may be deemed necessary.
No compensatory measures must be adopted.

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?

Yes, mainly for flora species.

Yes, the deliberate introduction of non-native species is regulated and it is prohibited but there are exceptions when there are unequivocal advantages for humans or for natural biocenosis, AND there are no indigenous species fit for the intended purpose AND the release is preceded by the preparation of an in-depth and thoroughly planned impact study. In any case a prior authorization by the Minister must be issued. In protected areas, special protection areas, national list sites, islands with no human population, lagoons and natural lagoons, the introduction is only possible for purposes of nature conservation, public health or public safety.

In other areas, provided that the introduction of species is for purposes of forestry, hunting or aquaculture, it can be authorized by the Directorate-general.

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

No legal requirements for simultaneous application but a possible scenario is the coincidence of a project to be developed in an area where there are reasons, other than the project itself, that justify killing, disturbance, destruction, of species or deterioration of habitats.

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

The main problem is the shortage of human and financial resources to supervise, inspect and sanction illegal activities.

V. 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?

The Institute for Nature and Forest Conservation, the Inspection of agriculture, the sea, the environment and spatial planning, the customs authority (for CITES) all the police organs (Republican National Guard, Public Security Police, Maritime Police, Judiciary Police, and the Municipal police).

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

Civil, administrative and criminal instruments are applicable. The administrative sanctions are the most frequent and the most effective. The main sanctions (valid for every environmental infraction) are the fines, ranging from a few hundred euros (small offences practiced by individuals) to €5 000 000 (very serious offenses practiced by companies).

Small offences by individuals: from €200 to €4000.

Small offences by companies: from €2000 to €36000.

Serious offences by individuals: from €2000 to €40000.

Serious offences by companies: from €12000 to €216000.

Very serious offences by individuals: from €10000 to €200000.

Very serious offences by companies: from €144000 to €5000000.

Accessory administrative sanctions can be applied in conjunction with the fines in case of serious and very serious environmental offenses:

- a) Confiscation and loss to the State of property, belonging to the defendant, that was used or produced at the time of the offense;
- b) Prohibition to exercise professions or activities whose exercise depends on public title or authorization or public authority approval;
- c) Deprivation of the right to benefits or grants awarded by national or European Community entities or services;
- d) Deprivation of the right to participate in conferences, trade shows or national or International markets with a view to negotiating and publicizing their products or their activities;
- e) Withdrawal of the right to participate in auctions or public tenders which have the object of performing public works or concessions, the procurement of goods and services, the provision of public services and the granting of licenses or permits;
- f) Shutting down the installation which operates under a permit or administrative authority license;
- g) Termination or suspension of licenses, permits or authorizations related to the exercise of the activity;
- h) Loss of tax benefits, benefits of credit and credit financing lines;
- i) Sealing off productive equipment;
- j) Imposition of action that may be appropriate for the prevention of environmental damage, the restoration of the situation prior to the offense and to minimize the effects thereof;
- l) Advertising of the conviction;
- m) Confiscation of animals.

(...) 5 – In case of obstruction to implement the measures provided for in points f) i) and j) of paragraph 1 of this Article, the electricity distributing authorities shall be notified of the duty to discontinue the provision of electricity.

The crime of “damage to nature” has been (applied once). Criminal code: Article 278
Damage to nature

1 - Who, not observing legal provisions, regulations or obligations imposed by the competent authority in accordance with those provisions:

(A) eliminates, destroys or captures specimens of protected species of wild fauna or flora or eliminates specimens of fauna or flora in significant numbers;

(B) significantly destroys or deteriorates protected natural habitat or unprotected natural habitat by causing loss of protected species of wild fauna or flora or significant numbers; or

C) Seriously affect underground resources;

Shall be punished by imprisonment for up to 5 years.

2. Who, not complying with legal provisions, regulations or obligations imposed by the competent authority in accordance with those provisions, markets or holds for the exemplary marketing of protected species of wild fauna and flora, dead or alive, as well as any part or product obtained from it, shall be punished with imprisonment up to 2 years or with a fine of up to 360 days.

3 - Any person who, not complying with legal provisions, regulations or obligations imposed by the competent authority in accordance with those provisions, possesses or holds a protected species of wild fauna and flora, alive or dead, shall be punished by imprisonment for up to one year or with a fine of up to 240 days.

4 - The conduct referred to in the previous number is not punishable when:

A) The number of specimens held is not significant; and

(B) the impact on conservation of the species concerned is not significant.

5 - If the conduct referred to in paragraph 1 is committed by negligence, the agent shall be punished with imprisonment for up to two years or with a fine of up to 360 days.

6 - If the conduct referred to in paragraphs 2 and 3 is committed negligently, the agent shall be punished with a fine of up to 240 days.

- 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 ?

Article 12 n.º4 was transposed by mere transcription (copy and paste).

Hunters and fisherman must pass an exam and there is a code of conduct for hunters. The fishing law determines the immediate devolution of the fish accidentally caught.

The police inspects from time to time hunting and fishing activities and sanctions those activities that do not comply with the law.

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

A mussel that made the government give up a huge hydroelectric dam (2010)

Compensation for moral damage caused by wolf attacks (2013)

- 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).

I don't think so.

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

- a. 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?
- b. 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).
- c. 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)

No reflection

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

- a. are there derogations from species regime in every case, general exclusion (*binding general guidelines, recommendations, code of conduct, best practice others, etc*); what is the legal procedure if they are ignored?
- No that I know of
- b. are agri-environment, forest, aquaculture financial assistance/support effectively used in development of sustainable forestry, agriculture or aquaculture?
- Yes.
- c. are there others form of support (e.g. agreements with the owners of the property)?

It's starting now. A protocol with NGOs and public and private entities has been celebrated. The drafting of 20 new management plans for protected areas has been awarded now to private consultants.

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

- a. 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?

NGOs play a very important role. They are close partners, cooperating with the administration on species recuperation and site management.

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

Provided that they impose abstentions to the State, they can be (at least in theory) applied directly.