

## QUESTIONNAIRE FOR THE AVOSETTA MEETING IN 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?

**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?

#### 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)?

##### 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)

#### 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?

## 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?*

### 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.

### 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?

### 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?

#### 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?

#### 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

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.

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

## 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)

## 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?
- b. are agri-environment, forest, aquaculture financial assistance/support effectively used in development of sustainable forestry, agriculture or aquaculture?
- c. are there others form of support (e.g. agreements with the owners of the property)?

## 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?

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