

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 Bern 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?

The most important and generally applicable regulation implementing the AHDs species protection provisions is found under Environmental Code (8 Chapter), namely the Species Protection Ordinance (2007:845). Concerning hunting and fishing, the species protection scheme is placed in the Hunting Law (1987:259) and the Hunting Ordinance (1987:905) and the Fishing Law (1993:787). All regulation is on national 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)?

Obviously, this depends upon what species we are talking about. I would say, although this amounts to guessing, that agriculture and forestry are the main threats to biodiversity in Sweden, along with infrastructural projects and city development. In the public debate, however, the wolf issue and the impact of windfarms on birds and bats have been in the centre...

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)

I would say that the Land and Environmental Court's understanding of the "deliberate" criterion has general acceptance today, along with its emphasizing that the evaluation of the impact the operation at stake should be focusing on the conservation status of the impacted species. And also as of today, the Waddensee criteria No 1 and 2 are closely abided to by the land and environmental courts when they review a permit for a project/plan which may have a significant to the environment in a Natura 2000 site...

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?

Xx

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?

I sak har HFD nu dömt i frågan om licensjakt för första gången.¹ Före detta beslut hade denna form av jakt genomgående underkänts av förvaltningsdomstolarna, med Kammarrätten i Sundsvall som tydligt undantag. Det var särskilt två av kriterierna i artikel 16.1.e AHD som underrätterna slog ned på, nämligen att en jakt som omfattade mer än tio procent av populationen inte kan anses vara ”begränsad” och att länsstyrelsen inte hade visat att det inte fanns några alternativa åtgärder för att åstadkomma ökad acceptans i vargförvaltningen. Här gör HFD en helt annan bedömning på så vis att numerärbegränsningen i bestämmelsen anses uppfyllt så länge som jakten inte negativt påverkar vargens bevarandestatus i landet. När det sedan gäller ändamålsenligheten, betonar domstolen istället att artskyddet måste vägas mot de ekonomiska, sociala och kulturella intressen som talar för jakten för att uppnå en balans. Över huvud taget är HFD betydligt mindre strikt i

¹ HFD 2016 ref. 89.

tillämpning av undantagsreglerna och man godtar i stor utsträckning myndigheternas uppgifter om de förväntade effekterna. Detta gör beslutet problematiskt, då det lämnar öppet för vidare licensjakt utan att ge några tydliga riktlinjer. Så tar domstolen exempelvis ganska lätt på det faktum att den genetiska förstärkning som förutsätts i vargbesluten inte har uppfyllts under innevarande 5-årsperiod, samtidigt som man inte inhiberade 2017 års licensjakt i ett läge då vargpopulationen minskar. Här är emellertid inte plats för att analysera den frågan vidare, men jag vill ändå peka på det uppseendeväckande att HFD inte begärde förhandsavgörande av EUD i en fråga som varit föremål för ett överträdelseärende med kommissionen sedan 2011. Den situationen är troligen unik och jag tror inte att HFD skulle uppvisa en sådan rättslig *chutzpah* i en annan målkategori där EU-rättens position är kontroversiell och oklar. Domstolens motivering att klaganden inte angett vilken fråga som bör ställas är i det sammanhanget inte särskilt övertygande. Den sedvanliga hänvisningen till rättspraxis som görs är också svår att förstå, då avgöranden från EUD saknas i frågan om förvaltningsjakt över huvud taget är tillåten på en art som är upptagen på bilaga 4 i AHD. Men detta får diskuteras mera ingående i ett annat sammanhang.

Även kommissionens agerande i vargfrågan känns märkligt. Överträdelseärendet om licensjakten har pågått sedan 2011. Den svenska regeringen har från början – med undantag för 2012 – öppet trotsat kommissionen utan att något har hänt från Bryssels sida, även om ärendet heller inte har stängts. Uppenbarligen anser DG/Miljö att licensjakten strider mot artikel 12 och 16 AHD och lika uppenbart får man inte med sig kommissionens kollegium på att stämma Sverige. Skälet till det senare torde vara politiskt, vilket illustrerar svagheten i konstruktionen med kommissionen som vakthållare av EU-rätten.² Men det visar också det starka behovet av att miljöorganisationerna kan utmana myndigheternas beslut på miljöområdet, vilket kan vara ett lämpligt slutord i denna kommentar kring överklagandeförbudet i jaktförordningen.

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)

² Se Darpö, J: *The Commission: a sheep in wolf's clothing? On infringement proceedings as a legal device for the enforcement of EU law on the environment, using Swedish wolf management as an example.* JEEPL 2016 p. 270.

- 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?