Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC

Final version, February 2007

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FOREWORD

Why a guidance document on the protection of animal species?

Up until now, most of the attention regarding the implementation of the Habitats Directive[1] has focused on the establishment of the Natura 2000 network (of protected areas). This "1st pillar" of the Directive refers to the conservation of natural habitats and the habitats of species. However, the Directive also has a "2nd pillar", covering the protection of species. In particular, Articles 12 and 16 aim to establish and implement a strict protection regime for species within the whole territory of Member States. It has become evident that the precise content of the type of measures needed to ensure a "system of strict protection" as well as the correct application of the derogation provisions pose problems. In addition, certain technical terms used in the articles need better definition. Clearly, therefore, guidance is needed on the provisions for species protection and the specific terms used.

Purpose of the guidance document

The essential focus of this document is on the main obligations under Articles 12 and 16 of Directive 92/43/EEC, which establish a system of strict protection for the animal species listed in Annex IV(a), but allow for derogation from these provisions under defined conditions. Particular consideration is given to the definition of a "system of strict protection" specified in Article 12(1), examining it in the context of the overall objectives of the Directive. The document is mainly based on relevant Court judgments (see Annex 1), opinions given by the Commission's Legal Service on some specific questions, and input from the Working Group on Article 12. This Working Group, an ad hoc working group formed under the Habitats Committee, met eight times from June 2002 to February 2005. The Group's final report can be viewed on the Commission's website (http://ec.europa.eu/environment/nature/home.htm).

This document is intended to ensure a common understanding of the relevant provisions among national and regional authorities, conservation bodies and other structures responsible for or involved in the implementation of the Habitats Directive. It aims to assist in devising pragmatic and flexible ways of applying the provisions and making them effective and practical, while fully respecting the legal framework.

Limitations of the guidance document

This guide has been drafted by the Environment Directorate-General of the European Commission. It is intended to be bound by, and faithful to, the text of the Directive and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such, the document reflects only the views of the Commission services and is not of a binding nature. Member States have been consulted on various drafts of this guidance document and were invited to comment on it. There are some parts of the guidance in which some Member States hold differing views on the interpretation of Article 12 and Article 16.

It should be stressed that it rests with the European Court of Justice to provide a definitive interpretation of a Directive. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject, and also with experience arising from the implementation of Articles 12 and 16 in the Member States.

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[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22 July 1992, p. 7).

Also, as with any directive, the interpretation needs to consider the different language versions of the texts, all of which are valid. On this specific issue, we note that some phrases in the different language versions merit careful attention. It is important when looking at the different language versions to elicit a meaning that best reflects the purpose and context of the terms under examination.

Structure of the document

The document is presented in three main chapters. The first chapter reviews species protection within the EC under the Directive and international framework. The second chapter takes a more in-depth look at the relevant legal provisions of Article 12 of the Directive, while the third chapter examines the derogation possibilities under Article 16 of the Directive.

The key points arising from the analyses are summarised (in italics) at the end of each section, in order to highlight the relevant conclusions. Full references for the Court cases quoted throughout the text are provided in an annex at the end of the document.

I. CONTEXT

I.1 Species conservation within a wider political and legal context

I.1.1 Political context

(1) Preserving, protecting and improving the environment, including biodiversity, are essential objectives of general interest pursued by the European Community, as provided for in Article 174 of the Treaty.

(2) In 2001, the EU Heads of State and Government made a commitment at the Spring Summit in Göteborg to *'halt the decline of biodiversity by 2010'*[2]. The same Göteborg Council adopted the EU Sustainable Development Strategy, which again stressed the need *'to protect and restore habitats and natural systems and halt the loss of biodiversity by 2010'.* The Sixth Environmental Action Programme (6th EAP)[3], which constitutes the EU's "environmental work plan" from 2002 to 2012 was adopted in 2002. The issue of nature and biodiversity conservation is one of the four priorities in the 6th EAP, with the focus on *'protecting, conserving, restoring and developing the functioning of natural ecosystems, natural habitats, wild flora and fauna with the aim of halting … the loss of biodiversity, including diversity of genetic resources, both in the European Union and at the global scale*' with a particular view to *'halting biodiversity decline with the aim to reach this objective by 2010'*.

(3) These EU efforts go hand in hand with the EC Biodiversity Conservation Strategy adopted in 1998, which was developed to meet the EC's obligations as a Party to the Convention on Biological Diversity (1992). Under this Strategy, four Biodiversity Action Plans were adopted in 2001 in various policy areas (natural resources, fisheries, agriculture, economic and development cooperation). With the latest Communication of May 2006 on halting the loss of Biodiversity by 2010[4], the Commission launches a new effort to pull together EU actors to meet the 2010 target and foster recovery of biodiversity.

(4) Within all these initiatives, the issue of species protection is at the forefront of debate and has an indicator role in judging the health of ecosystems. Our ability to ensure that species survive over the long term as part of our European natural heritage will show the extent to which our conservation and biodiversity policies are truly effective. The 'target date' of 2010 is very likely to accelerate progress. Accordingly, the full and proper implementation of both the Birds[5] Directive and the Habitats Directive, which seeks to *'… maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'*, is of major importance and a test case as to how far our commitments can be achieved in practice.

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2 'The European Council agrees that biodiversity decline should be halted with the aim of reaching this objective by 2010 as set out in the Sixth Environmental Action Programme.' Presidency Conclusions, Göteborg Council, 15 and 16 June 2001. SN/200/1/01 REV1, page 8. http://ue.eu.int/newsroom/newmain.asp?lang=1.

3 Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242 of 10/9/2002.

4 Communication from the Commission: Halting the loss of Biodiversity by 2010 – and beyond ; Sustaining ecosystem services for human well-being; 22 May 2006, COM (2006) 216 final

5 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 5 April 1979, p. 1).

Summary: There are a wide range of political commitments within the EU aiming to protect nature and biodiversity, with species conservation at the forefront. With a view to meeting the objective of halting the decline of biodiversity by 2010, the full and proper implementation of both the Birds Directive and the Habitats Directive is a test case as to how far EU conservation policies are truly effective.

I.1.2 Legal context

(5) The Habitats Directive and its provisions for species protection should however be seen not only in a political context but also in the context of international conventions and other EC legal instruments.

(6) The legal instrument most closely related to the Habitats Directive is the **Birds Directive** of 1979, which shares not only common objectives (for birds in this case) and a similar conceptual structure, but also common provisions in relation to the network of protected sites (Natura 2000). Furthermore, Articles 5 to 9 of the Birds Directive contain similar provisions regarding species protection. In addition, the ECJ case law on these provisions is already quite extensive. The reasoning behind the judgments arising from the implementation of the Birds Directive is thus of great importance and can often be applied as well to Articles 12 and 16 of the Habitats Directive[6].

(7) Seen in an international context, the species protection provisions of the Habitats Directive help achieve the aims of relevant international nature conservation conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora[7], the Bern Convention[8], the Bonn Convention[9] and the Convention on Biological Diversity[10].

(8) Of particular relevance here is the **Bern Convention**. The Bern Convention (signed in 1979) pre-dates the Habitats Directive and had an important influence on both its conception and drafting. The parallels between Article 6 of the Convention[11] and Article 12 of Directive 92/43/EEC are obvious. However, despite the equivalence of objectives and the similarities in wording, Directive 92/43/EEC creates a more detailed framework for site

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6 For example, in its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017), the Court used the case law for the Birds Directive.

7 Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1).

8 Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ L 38, 10.2.1982, p. 1).

9 82/461/EEC, Council Decision of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (OJ L 210, 19/07/1982, p. 10).

10 93/626/EEC, Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13/12/1993 p. 1).

11 Article 6 of the Convention provides that *"each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:*

(a) all forms of deliberate capture and keeping and deliberate killing;

(b) the deliberate damage to or destruction of breeding or resting sites;

(c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;

(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;

(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this Article."

conservation and protection than does the Convention[12]. The differences between the two texts were confirmed by the Court in case C-75/01, relating to the transposition of Directive 92/43/EEC in Luxembourg. The Court considered that the national measures for transposing Article 12(1)(c) of the Directive, including a law approving the Bern Convention, were insufficient to ensure complete transposition due to the disparities between Annex II of the Bern convention and Annex IV(a) of Directive 92/43/EEC[13]. It follows that even if the Bern Convention and Directive 92/43/EEC have substantially similar objectives, this does not affect the autonomous character of the obligations under the Habitats Directive.

Summary: The species protection provisions of the Habitats Directive have to be seen in the context of international conventions and other EC legal instruments, the most closely related being the Bern Convention and the Birds Directive.

I.2 Species conservation within the overall scheme of Directive 92/43/EEC

(9) The maintenance or restoration, at favourable conservation status, of the natural habitats and species of wild fauna and flora of Community interest is the primary objective of Directive 92/43/EEC. In order to attain this objective the Directive establishes different conservation instruments. Articles 12-16 thus form part of a general framework that aims to meet, along with other provisions, the broad objective of the Directive as set out in Article 2.

I.2.1. Primary aim of the Directive: the role of Article 2

(10) The aim of the Directive is laid down in Article 2. This provision does not in itself create obligations for the Member States, but it is relevant when considering the interpretation of other provisions of the Directive.

Article 2 (Directive 92/43/EEC)

1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

(11) It should be noted that the Court has recognised the need for any interpretation of Community legislation to take into account the aims of that legislation. According to Article 2(1) of Directive 92/43/EEC, the main aim of the Directive is to contribute towards ensuring biodiversity conservation through the conservation[14] of natural habitats and of wild fauna

[12] Two important differences should be stressed. Firstly, the Convention has a greater species coverage, since its Appendix II contains a larger number of species than Annex IV(a) of the Directive (partly due to the larger geographic area covered by the Convention). Secondly, the word "deliberate" figures in Article 6(b) but is absent from Article 12(1) (d).

[13] See the judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 55-58.

[14] According to Article 1(a) of the Directive, "conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status."

and flora in the European territory of the Member States. Following Article 2(2), measures taken by Member States must aim to maintain or restore, at favourable conservation status, the natural habitats and species of wild fauna and flora of Community interest[15]. Consequently, the strict protection obligations set out in Article 12 are important instruments for the achievement and effective implementation of the main aim of the Directive.

(12) In parallel, the economic, social and cultural requirements and regional and local characteristics referred to in Article 2(3) of the Directive should not be neglected when interpreting the species protection provisions. As set out further below, Article 2(3) is applicable to various implementation aspects of Article 12 and 16 (e.g. when defining the requisite measures, especially in the case of ongoing activities, when drafting codes of conduct, when producing species conservation plans, and of course when making use of the derogations system).

(13) Since Article 2(3) requires the protection of natural habitats and species to be balanced against other requirements, one may ask if this provision comprises an independent derogation from the general requirements of the Directive. For Directive 79/409/EEC, the Court has clearly confirmed that it does not[16]. *Mutatis mutandis*, it follows that Article 2(3) of Directive 92/43/EEC does not provide an independent derogation from the obligations and requirements of the Directive. Nonetheless, the Court's pronouncements show that Article 2 is not without relevance and weight when considering the interpretation of other provisions of the Directive. In this regard, the provisions of Article 2 have value as a general orientation guide as to what the Directive requires and allows.

Summary: The strict protection obligations under Article 12 must be interpreted in terms of the overall aim of the Directive described in Article 2, to which they contribute. Article 2(3) cannot be regarded here as providing an independent derogation from the general requirements of the Directive.

I.2.2. Favourable conservation status

(14) The maintenance or restoration of "favourable conservation status" (FCS) is the overall objective for all habitat types and species of Community interest. Such species are listed in Annexes II, IV and V to the Directive. In simple terms, FCS could be described as a situation where a habitat type or species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in future. The fact that a habitat or species is not threatened (i.e. not faced by any direct extinction risk) does not necessarily mean that it has favourable conservation status. The target of the Directive is defined in a positive way, as a 'favourable' situation to be reached and maintained, which needs to be defined based on the best available knowledge. Therefore, the obligation of a Member State

[15] Such species are listed or may be listed in Annex II, IV and V of the Habitats Directive.

[16] See judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 8. The Court noted: "In this context it is necessary to refer to Article 2 of the Directive, which requires Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation." In Case C-262/85 (judgment of 8 July 1987, Commission v Italy, ECR p.3073) the Court rejected arguments by the Italian government that departures from the requirements of Article 7(4) could be based directly on Article 2.

is more than just avoiding extinction. All measures taken under the Directive must aim to reach or maintain a favourable conservation status.

(15) FCS for species is defined in general terms in Article 1(i) of the Habitats Directive.

"conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2. The conservation status will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis."

(16) This definition contains the main parameters (population[17] dynamics, range, sufficient habitat, prospects of long-term viability) for defining and assessing both the current and target conservation status. It also provides a framework for more specific definitions on a species-by-species basis. All these parameters therefore need to be considered thoroughly when designing measures for a certain species. It is important to note that the assessment of conservation status not only includes an element of 'diagnosis' based on current conditions, but also an important element of 'prognosis' (foreseeable future) based on influences. Such foreseeable future influences could be specific or general threats, positive or negative, medium- to long-term impacts, etc.

(17) The concept of FCS is not limited to the Natura 2000 network or to the species protected by this network (i.e. Annex II species). It applies to the *overall situation* of all species of Community interest (Annexes II, IV and V), which needs to be assessed and surveyed[18] in order to judge whether it is favourable or not. Assessing and evaluating the conservation status of habitats and species *within* the Natura 2000 network is therefore not always enough, especially when the occurrences of habitats or species are only partly covered by the network, maybe even in some cases only to a relatively small extent.

(18) In April 2005 the Habitats Committee agreed on a harmonised framework for evaluating the conservation status of habitats and species (see document DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive"[19]). Member States agreed to assess conservation status according to a common 3-grade assessment matrix within each of the biogeographic regions in their territory. The three grades are favourable = green, unfavourable/inadequate = amber and unfavourable/bad = red *("traffic light system")*.

(19) For assessing favourable conservation status, the meaning of the term "natural range" as used in the Habitats Directive was defined as follows:

[17] "Population" is defined here as a group of individuals of the same species living in a geographic area at the same time that are (potentially) interbreeding (i.e. sharing a common gene pool).

[18] Article 11 of the Directive requires surveillance of the conservation status of the natural habitats and species referred to in Article 2, with particular regard to priority natural habitat types and priority species.

[19] See http://forum.europa.eu.int/Public/irc/env/monnat/home (public site, no "sign in" needed) for all relevant documents

The natural range of species and habitats — a dynamic concept

The natural range describes roughly the spatial limits within which the habitat or species occurs. It is not identical to the precise localities (the area actually occupied) or territory where a habitat, species or sub-species permanently occurs. Such actual localities or territories might be patchy or disjointed for many habitats and species (i.e. habitats and species might not be evenly spread) within their natural range. If the reason for disjunction proves to be natural, i.e. caused by ecological factors, the isolated localities should not be interpreted as a continuous natural range. For example, for an alpine species the range may be the Alps and the Pyrenees, but not the lowlands between them. However, the natural range includes areas that are not permanently used: for example for migratory species, their "range" includes all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time during its normal migration[20].

A natural range as defined here is not static but dynamic: it can decrease and expand. A natural range can constitute one aspect for the assessment of (un)favourable conditions for a habitat or species. If the natural range is insufficient in size to allow for the long-term existence of that habitat or species, Member States are asked to define a reference value for a range that would allow for favourable conditions and work towards this, for instance by fostering expansion of the current range.

When a species or habitat spreads on its own to a new area/territory or when a species has been re-introduced into its former natural range (in accordance with the rules in Article 22 of the Habitats Directive), this territory has to be considered part of the natural range. Similarly, the restoration/re-creation or management of habitat areas, as well as certain agricultural and forestry practices, can contribute to the expansion of a habitat or a species and hence its range. However, individuals or feral populations of an animal species introduced deliberately or accidentally by man to locations where they have never occurred naturally, or where they would not have spread to naturally in the foreseeable future, should be considered to be outside their natural range and consequently not covered by the Directive. Vagrant or occasional occurrences would also not be considered as part of the natural range.

Summary: The main parameters for defining the favourable conservation status of a species are given in Article 1(i) of the Habitats Directive. Roughly speaking, this status is a situation where species populations are doing well with good prospects for the future. Member States have agreed on a harmonised framework for evaluating *conservation status in the report required by Article 17 under the Directive.*

I.2.3. Species conservation instruments

(20) The Directive lays down a set of obligations and procedures that aim to meet the broad objective set out in Article 2. Two main concepts or "pillars" can be distinguished: the conservation of natural habitats and the habitats of species through the establishment of the Natura 2000 network (Articles 3 to 10) and the protection of animal and plant species (Articles 12 to 16).

[20] See also Article 1 of the Bonn Convention.

(21) The **1st pillar,** in relation to species[21], targets the conservation of the habitats of species[22], focusing on the maintenance (including positive management measures) and restoration of these habitats by establishing protected sites. The species for which this network of protected sites (Natura 2000) is established are listed in Annex II to the Directive.

(22) Article 6 is the central provision covering positive management (Article 6(1)) and avoidance of negative influences to the network (Article 6(2)); it also deals with plans or projects likely to have a significant negative impact on certain sites (Article 6(3)-(4)). The Commission services have produced two guidance documents explaining in detail the provisions of this Article:

1. "Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1

2. "Assessment of Plans and Projects Significantly Affecting Natura 2000 sites - Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC", European Commission, 2002, ISBN 92-828-1818-7

(23) While the first document deals with the management of Natura 2000 sites in general, the second document focuses on the procedures for the nature impact assessment and its consequences under Article 6(3) and 6(4). Both documents are available at http://www.europa.eu.int/comm/environment/nature/home.htm.

(24) To enhance the effectiveness of the network, the provisions of Article 10 target the ecological coherence of the network by suggesting integrated land-use planning and the management of certain landscape features.

(25) The **2nd pillar** deals with direct influences on the species themselves as well as (in the case of animal species) their eggs, breeding sites and resting places. Provisions under this section are not restricted in geographical terms. They apply to the whole of the territory to which the Directive applies, albeit subject to very few specific geographical restrictions indicated in the annexes[23]. In contrast, the protection afforded by Article 6 is limited to the Natura 2000 network.

(26) A distinction can be made under this pillar between those provisions calling for a "system of strict protection" for Annex IV species (Articles 12 & 13) and measures to control the exploitation of species listed in Annex V (Articles 14 & 15[24]). While the "system of strict protection", as the name suggests, provides a stringent protection regime, species covered by Annex V can be exploited, although such exploitation should not jeopardise the objective of maintaining their favourable conservation status in any way.

(27) Both pillars allow for exceptions from the protection regimes. The system of protection envisaged under Articles 12-15 is qualified by the possibility of derogations under Article 16 of the Directive. Article 6(4) of the Directive addresses specific exceptions (i.e. from the protection granted by the Natura 2000 network) to the general rule of Article 6(3) that authorisation can only be granted to plans or projects not adversely affecting the

[21] The 1st pillar also deals with habitats and their typical species as listed in Annex I to the Directive.

[22] Article 1(f) states that the "*habitat of a species means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle*".

[23] For example for *Vipera seoanni*, there is a geographical restriction which excludes the Spanish population from Annex IV and consequently from the provisions of Article 12.

[24] Article 15 contains elements that also relate to Annex IV(a) species in cases when derogations are applied.

integrity of the sites concerned. The application of Article 6(4) has to respect the various steps and the sequential order established in the Directive.

(28) So while there are certain similarities between both pillars, it should be stressed that the 1st pillar requires not only active maintenance but also restoration and improvement actions on sites, while the 2nd pillar has a more preventive character, requiring Member States to avoid and prevent a number of situations that could negatively impact a species.

(29) In consequence, it can be said that the two pillars are closely interlinked and are complementary in their approach, as their joint aim is the favourable conservation status of all habitats and species of Community interest[25].

Summary: In order to achieve its objectives, the Habitats Directive provides for two main instruments: the Natura 2000 network of protected sites and the species protection provisions. The provisions for species protection apply to the whole of a Member State's territory and concern the physical protection of specimens as well as their breeding sites and resting places. Both regimes allow for exceptions under certain conditions. Both instruments are complementary and jointly aim to ensure a favourable conservation status for all species of Community interest.

I.2.3.a) The Annexes

(30) Which "pillar" applies to which species is specified by the annexes to the Directive. The fact that a species is frequently listed in more than one annex demonstrates the close interaction between the two pillars, which share the same objective.

Purpose of Annex and number of references[26] listed (EU25)

Annex II	Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation ("Natura 2000" sites"). Annex II lists a total of 869 references, of which 297 are animal and 572 plant species.
Annex IV	Animal and plant species of Community interest in need of strict protection. Annex IV lists a total of 922 references, of which 323 are animal and 599 plant species.
Annex V	Animal and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures. Annex V lists a total of 77 references, of which 45 are animal and 32 plant species.

(31) In total, the Directive lists 447 animal and 695 plant species. Although different species are listed in different annexes and therefore fall under different kinds of protection measures, many species are actually listed in more than one annex. For example, plant species listed in Annex II (except bryophytes) are automatically listed in Annex IV(b) as

[25] It should be noted that Articles 12 and 16 are applicable from the date on which Directive 92/43/EEC came into force, i.e. 10 June 1994. The Member States that joined the EU after 1994 were to comply with these provisions from the date of accession.

[26] "References" mostly refers to species but also includes some grouped taxa (e.g. *Alosa spp.*) and sub-species. Refers to annexes valid for the EU-25.

well, so are covered by the habitat protection provisions *and* the strict protection system of Article 13. On the other hand, a group of other plants is listed only in Annex IV. For animal species, such an 'automatic' parallel listing does not exist. The situation with animal species is therefore more complex:

Overlap between Annexes – Animal species (EU25)

Annex	II & IV	II & V	only II	only IV	only V
% of the 447 animal references	45%	5%	17%	28%	5%

(32) How can this situation be explained? At the time of adoption, the legislator considered the level and type of threats to species as well as the best way to counteract threats based on the scientific information available at the time. While site designation and habitat management would be the appropriate approach for certain species, others might need a different regime of protection going beyond protected sites. The development of the annexes to the Habitats Directive follows the logic described below.

(33) A listing in Annex II was chosen for species for which the conservation of their (often quite specific) habitat is the principal factor determining their survival and well-being. The protection and management of sites were selected here as the appropriate instrument, which includes not only the maintenance of species habitats but also, where appropriate, their restoration. The group of species listed in Annex IV may be less suited to conservation by establishing protected areas, but instead needs "physical" protection of the actual species as well as protection of the most important parts of their habitat (i.e. their breeding sites and resting places) throughout the territory of a Member State. This is because of the specific threats they face, the measures needed to counteract them, the species' pattern of occurrence (e.g. scattered) or the type or specific character of their habitat. For the third group of species listed in Annex V, which may be exploited by human beings, this exploitation must be managed — if necessary — in order to ensure a favourable conservation status. Under Article 14 of the Directive, if Member States deem it necessary in the light of the surveillance provided for in Article 11, they have to take measures to ensure that the exploitation or taking in the wild of specimens of the species listed in Annex V is compatible with maintaining their favourable conservation status.

(34) Quite often, however, animal species do not perfectly fit into one of these groups. Usually species are subject to a combination of threats and should consequently be the target of a range of measures. This explains why most species of Community interest are actually listed in more than one annex. The most frequent combination is a listing in both Annex II and IV (see also the next chapter), which maximises the conservation effort by requiring management (maintenance and restoration) of the general habitats in protected sites (which should cover the most important populations) and the protection of the breeding sites and resting places as well as the species itself over the whole territory of a Member State.

(35) Since the development of these annexes, however, research and monitoring have developed further and the conservation status of a number of species may have changed, so that the picture today might be different from the one in the late 1980s/early 1990s when the Directive was prepared. As explained in chapter *I.2.4.b) "Appropriate and effective*

character of measures taken", several reactions are possible. If it is found, for example, that a species in need of habitat restoration or active habitat management is listed only in Annex IV but would effectively need to be listed under Annex II, Member States may voluntarily take additional measures. Alternatively, based on good scientific evidence, the annexes could be amended to include the species in Annex II. On the other hand, the surveillance under Article 11, once collated and analysed at European level, might show that a species should be deleted from one or all the annexes it is listed in because it no longer fulfils the criteria for Community interest (as defined in Article 1(g) of the Directive).

(36) The efficient use of the different species conservation instruments requires **a species-by-species approach**[27]. Such an approach looks at the conservation needs of each species as well as the instruments available for its conservation and formulates on this basis the adequate measures to be implemented. Such an approach ensures flexible implementation of the Directive while at the same time optimum achievement of its objectives. The target of favourable conservation status should always be the guiding principle for all conservation efforts by the Member States and should be addressed by all appropriate means available (see also chapter I.2.4.b).

Summary: The different annexes determine which instruments are available for which species. Most species are covered by more than one annex and therefore are subject to a combination of instruments, i.e. a combination of conservation approaches and measures. How these instruments are finally implemented should be considered on a species-by-species basis, taking account of the specific needs of each species.

I.2.3.b) The protection of animal species listed under both Annexes II and IV in Natura 2000 sites

(37) Since a large proportion (45%) of the animal taxa are listed in both Annex II and Annex IV, it is worth looking at which regime and which procedures apply to an Annex IV species within a Natura 2000 site. The Commission services consider that, within Natura 2000 sites, **a twofold regime applies** to Annex II/IV species. These species should benefit from both approaches: protection under the section on "Conservation of natural habitats and habitats of species", in particular the measures envisaged under Article 6, and the strict protection system envisaged under Article 12.

(38) This view is first of all justified by the different — and complementary — approaches followed by the two systems. Article 6 is concerned with site and habitat conservation and protection, whereas Article 12 is concerned with protecting the individuals of the listed species and their breeding sites and resting places. Furthermore, such an approach is in line with the general objective of the Habitats Directive, i.e. to contribute towards ensuring biodiversity through the maintenance or restoration, at favourable conservation status, of natural habitats and species of Community interest.

(39) It should be observed in this regard that for all Annex II species a coherent and complete network, based on an exhaustive list of sites, has to be established in accordance with the procedure and criteria set out in Annex III of the Directive. Based on a biogeographic approach, the network is established taking into account the threat status, ecology and distribution of a species. Depending on these and other scientific factors, a

[27] There might of course be cases where a whole group of species faces similar situations and has similar needs and can be treated together.

more or less complete coverage of habitats is agreed for inclusion in the network[28]. It therefore is all the more important that for species (listed in Annexes II and IV) not largely covered by the network, measures are also taken outside the network to maintain or restore their favourable conservation status. However, the fact that an Annex IV species is well covered in the Natura 2000 network does not replace the obligation to establish and effectively implement a strict protection system. It follows that, for animal species listed in Annex II and IV(a), within a site belonging to the Natura 2000 network, the simultaneous application of Articles 6 and 12 to 16 needs to be ensured.

(40) Given that these provisions contain similar elements, their simultaneous application may lead to situations where overlaps occur. This is for example the case with the protection of Natura 2000 sites under Article 6(1) and (2) and the protection of breeding sites and resting places under Article 12(1)(d). Both provisions deal with the protection of habitats of species. Breeding sites and resting places are central parts of the total habitat of a species, which has to be protected (maintained and restored) in its entirety in the Natura 2000 site. Natura 2000 therefore has a much more intensive and broader task, namely to maintain (and where needed restore) the entire habitat of a species at certain sites, while the provisions of Article 12 concentrate on preventing negative effects on the most central parts of such habitats, namely those that are essential in order to guarantee successful breeding and resting.

(41) It would be logical for measures taken under Article 6(1) (e.g. management plans) to make special reference to the protection requirements of Annex II & IV species occurring at the site. Also, where, for example, special measures are taken to avoid the deterioration of habitats or disturbance of species (Article 6(2)), these should logically respond to the requirements spelled out under Article 12(1)(a)-(d).

(42) With regard to the **simultaneous application of derogations** under Articles 6(3)-(4) and 16 to animal species listed in both Annexes II and IV, the Commission services consider that their simultaneous or parallel application is feasible in practical terms and meaningful in conservation terms.

(43) Without envisaging all possible scenarios, the Commission services consider that, if for example a project would be likely to destroy or damage the central parts of habitats within a Natura 2000 site, it can be assumed that both Article 6(3) and Article 16 come into play at the same time. It can be further assumed that the impact assessment thus triggered will cover both provisions — as they simultaneously have the same objective (although Article 12(1)(d) is more limited), i.e. the assessment under Article 16 will form part of the presumably broader (because covering the entire habitat) assessment undertaken under Article 6(3). Such a procedure should avoid any double assessment or incoherence in applying the provisions. It has to be ensured in such cases that the outcome of the impact assessment does not go against the species protection provisions. Of course, the decisions taken after the assessment will then have to take into account the requirements under both articles. Should, for example, a harmful project be allowed due to overriding public interest, compensation measures will have to be taken and reported under Article 6(4) and the project also has to be included in the Article 16 (derogation) reports.

(44) On the other hand, it may well be possible that a derogation is required under Article 16 for an activity in a Natura 2000 site even where no impact assessment under Article 6(3) is needed. This might for example be the case when a few specimens or eggs of an Annex

[28] Even where Community lists have been approved, the network still needs improvement for certain habitat types and species: so-called 'reserves' had to be included in the first Community lists of sites of Community interest to allow for completion later on.

II/IV species are to be taken for research purposes although this is unlikely to have any negative effect on the site and its population, or on the contrary will have a positive effect.

Summary: Species listed in Annex II and IV benefit from complementary, twofold protection within Natura 2000 sites. Certain overlaps in the protection of habitats (entire habitat in the Natura 2000 site, including breeding and resting sites under Article 12) exist but can and should be dealt with in a coherent manner.

I.2.4 Basic principles of species conservation

I.2.4.a) Good knowledge and surveillance of conservation status

(45) Recital 19 of the Directive states that "the improvement of scientific and technical knowledge is essential for the implementation of this Directive", while Article 18 of the Directive stresses the necessity for research. Indeed, in order to implement meaningful species conservation measures under the Directive, a good knowledge of each species (range, occurrences, biology, ecology, threats & sensitivity, conservation needs, etc.) is a *conditio sine qua non*. Member States therefore need to collect and use the best available information from all reliable sources (e.g. conservation agencies, universities, conservation NGOs, etc.) when designing their conservation strategies. In addition, as the Directive's aims are framed in an EU and not a national context, it may often be important to look for information beyond regional and national borders in order to cooperate and coordinate with other regions/Member States (this may — among other things — take place in committees and working groups at EU level or through EC co-funded projects). Harmonised, transboundary approaches are valuable for the implementation of the Directive when for example two Member States share one population of a certain species and can only assess the full situation (and consequently define effective measures) when taking the situation 'on the other side of the border' into account.

(46) Besides the factual knowledge on a species, surveillance (or monitoring[29]), meaning long-term systematic observation, is required by the Directive to track trends in conservation status. The establishment of an appropriate surveillance system to monitor the conservation status of a species of Community interest (as listed in Annex II, IV and V) is an obligation arising from Article 11 of the Directive. According to the Court, *"the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner"*[30]. Thus, domestic law should set out the statutory duties of the national authorities to undertake surveillance of the conservation status of natural habitats and species, in order to guarantee that this surveillance is undertaken systematically and on a permanent basis[31].

[29] Article 11 of the Directive refers to the surveillance of the conservation status of natural habitats and species. The Commission services consider that the interpretation of the term "surveillance" and its scope should take into account the relevant definitions of Article 1(e) and (i).

[30] See the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 26 and 65.

[31] In its judgment of 20 October 2005, the Court found that *"inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis"* (Case C-6/04, paragraph 68).

Article 11 (Directive 92/43/EEC)

Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

(47) The scope of Article 11 is not restricted to Natura 2000 sites, but requires monitoring of the conservation status of habitats and species of Community interest, as defined in Article 1 of the Directive, throughout the territories of all Member States.

(48) The position of Article 11, which comes at the end of the section on "conservation of habitats and habitats of species", could give rise to some ambiguity. However, the Commission services consider that this provision applies to the species covered by the 2nd pillar as well. This conclusion is based on several grounds. First of all, the text of Article 11 expressly refers to the surveillance of "the conservation status of the natural habitats and species referred to in Article 2", i.e. the natural habitats and species of wild fauna and flora of Community interest. Additionally, Article 14 of the Directive, which is in the 'protection of species' section, includes a reference to the "surveillance provided for in Article 11". This clearly illustrates that the compartmentalisation between these two sections of the Directive is not absolute. Furthermore, the recitals of the Directive refer to the need to set up a system "for surveillance of the conservation status of the natural habitats and species covered by this Directive" for the implementation of the Directive.

(49) A common framework for evaluating conservation status (in three grades) and reporting on this under Article 17 of the Directive was approved by the Habitats Committee in April 2005[32]. This framework defines what information is to be reported (and consequently collected) and gives rough guidelines on how to assess conservation status, so that conclusions at European level can be drawn from the national reports. Important elements of the agreement are that the 2007 report should include a first assessment of conservation status for each species and habitat of Community interest, based on the best available information. Reports thereafter (every 6 years) should be based on the surveillance systems put in place[33]. In order to know when a species or habitat has a favourable status, this favourable situation first needs to be defined. Member States are therefore encouraged to define "favourable reference values", to be used as benchmarks in the assessment process.

(50) The status of species should be determined at biogeographical level in Member States (for overviews, national/regional strategies, targets and reporting purposes) and at population level[34] where appropriate (for defining requisite measures, management and derogations). In the case of transboundary populations and species that migrate across the frontiers of the EU, their overall natural range, including migration zones outside the EU, should be considered as well where this is feasible. Repeated or regular monitoring will give an indication as to the appropriateness and effectiveness of the conservation measures chosen.

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[32] DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive".

[33] Member States are free to choose their means and methods of gathering data and to adapt monitoring methods to regional differences; however, a certain – voluntary – harmonisation over the medium to long term should be sought.

[34] Regarding the definition of 'population', a group of spatially separated populations of the same species which interact at some level (meta-populations) might be used as a biologically meaningful reference unit. This approach needs to be adapted to the species in question, taking account of its biology/ecology.

(51) Surveillance of the conservation status of animal species should provide valuable information and contribute to effective implementation of the Directive. Such information is also necessary for appropriately applying derogations under Article 16: in order to determine whether any actions would be detrimental to maintaining that species at a favourable conservation status, national authorities must have sufficient information available to assess the conservation status of the species, and to predict the likely effects of any proposed derogation.

(52) In addition to the surveillance of conservation status, there is an explicit obligation under Article 12(4) to establish a system to monitor the incidental capture and killing of Annex IV(a) species and, in the light of the information gathered, to take further research or conservation measures if required. Findings under this system should be incorporated in the overall lessons drawn from the surveillance of conservation status.

Summary: Good knowledge of a species (range/distribution, occurrence, biology, ecology, threats & sensitivity, conservation needs, etc.) and regular surveillance of its conservation status over time (as required in Article 11) are essential preconditions for any meaningful conservation strategy. Cooperation at EU level and transboundary cooperation might be essential for certain species. An EU framework for assessing conservation status was agreed by Member States in April 2005.

I.2.4.b) Appropriate and effective character of measures taken

(53) The Directive does not define in detail the concrete measures needed to fulfil the obligations arising from its various provisions and allows the Member States a certain margin of manoeuvre, or flexibility. The definition, adoption and implementation of such measures fall within the competence of national authorities. The Habitats Directive thus enables the Member States to implement its provisions in a **proportionate and appropriate** manner, an approach that underlies all the provisions of the Habitats Directive, including Articles 12 and 16. However, the discretionary power of Member States should respect some basic requirements.

(54) When it comes to interpreting provisions of a Directive, special attention must be given to the guiding principle laid down in Article 10 of the EC Treaty, which states that *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."*

(55) Consequently, the maintenance or restoration of favourable conservation status has to be taken into consideration when establishing adequate measures for species protection and habitat conservation. Good scientific knowledge and surveillance of a species are preconditions for doing so. The circle is closed when the results of the surveillance of conservation status show that the measures chosen are actually appropriate and **effective** in the field.

(56) The measures taken by the Member States should adequately address the objective pursued, i.e. maintaining and restoring favourable conservation status, while also taking account of economic, social and cultural requirements and regional and local characteristics (Article 2(3)). Such measures will be proportionate where they enable the desired aim to be attained, are necessary for attainment of that aim and are appropriate in terms of the means used.

(57) In addition, it should be underlined that **a species-by-species approach** also needs to be adopted. The concrete targets to be achieved may differ significantly for each species, and can also evolve (e.g. due to better scientific knowledge). Member States should therefore always consider their implementation actions in the light of the intended objective, the species concerned and the circumstances of each case. Thus, a proportionate approach is not a static concept and becomes an important factor for the flexible implementation of species conservation. However, taking no measures at all on account of a species being in a good conservation status is not an option (see also chapter II.2.3).

(58) Flexibility and proportionality should thus not be misunderstood as concepts that reduce the obligations on Member States to act in an effective way, but need to be seen as providing room for authorities to adapt their way of implementation to the specific circumstances of each case (in conservation status terms, but also in social, economic and cultural terms). The implementation of a flexible and proportionate approach calls for the Member States to act within a clear framework of coordinated and effective measures, applied in a coherent[35] way with sufficient safeguards. According to the Court, *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned"*[36]. Thus, such approaches need to respect the overall objective of the Directive, namely to ensure biodiversity and to maintain or restore, at a favourable status, natural habitats and species of Community interest[37].

(59) The following paragraphs are intended to explain the link between conservation status, the use of different instruments and their appropriateness and effectiveness.

(60) In general terms, surveillance or an initial assessment of conservation status can conclude that the status of a species is either favourable or unfavourable (classified in different grades). Based on the best available information, the Member States should then define — in accordance with the provisions of the Directive — the specific conservation measures needed to maintain (a favourable) or restore (an unfavourable) conservation status for each species.

(61) At this stage, the question as to **what types of measures are obligatory** under the Directive arises depending on the annex in which a species is listed. Chapter II will deal in more detail with the concept of 'requisite measures to establish a system of strict protection' under Article 12. At this point, it will only be noted that certain measures, though important or appropriate for a species, might not be required under the provisions of the Directive depending on the annex in which a species is listed in. In relation to the species protection section, it is important to recognise that proactive habitat management measures (such as restoration of habitats/populations, improvement of habitats) are not an obligation under Article 12, even though they might well be under Article 6. For example, if proactive biotope restoration is needed for a butterfly species listed only in Annex IV(a) because its habitat has nearly disappeared and only a larger habitat would ensure long-term survival, such a measure would not be covered by Article 12. Such situations could be avoided or corrected in the medium to long term by revision of the annexes or the Directive itself.

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[35] Coherence in this context means that flexibility and proportionality cannot be applied only when this seems convenient (for example only when granting derogations) but must at the same time be applied to the requisite measures for the effective protection of species under the strict protection system, so that overall implementation is in line with the objectives of the Directive.

[36] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112, and judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 66.

[37] If the Commission considers that such an approach does not comply with the Directive, it needs to prove that this is the case (see, for example, the judgment of 6 November 2003, Commission v UK, Case C-434/01, ECR p.13239, paragraph 21).

(62) Overall, the following main scenarios can be distinguished:

1. If the measures required for a specific species are obligatory under the Directive, there are two possible scenarios:

   - The Member State implements sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

   - The Member State does not implement sufficient and verifiable measures to maintain or restore FCS. This means that it is not complying with its obligations, which normally constitutes an infringement of the Directive.

2. If the measures required for a species (or parts of it) are not obligatory under the Directive (e.g. active biotope restoration or reintroduction for a species exclusively listed in Annex IV), there are two possibilities:

   - The Member State implements voluntarily sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

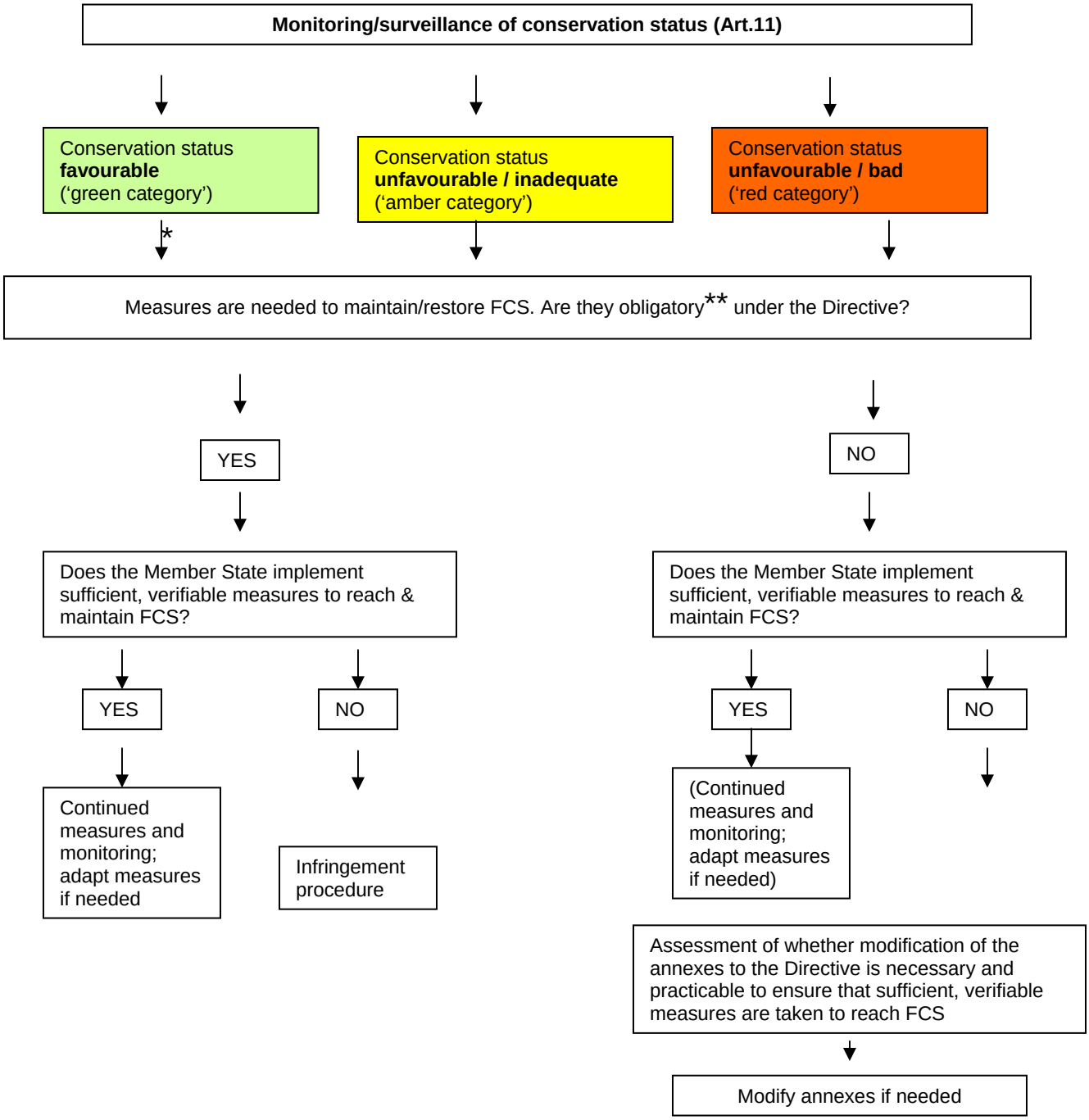
   - The Member State does not implement sufficient and verifiable measures to maintain or reach FCS. In such a case, the need for further action needs to be assessed, which might include modification of the annexes to the Directive if this is the appropriate way of ensuring FCS for a species. Modification of the annexes could involve adding a species listed only in Annex IV to Annex II or upgrading a species to priority status. If modification of the annexes is not likely to bring results, more far-reaching adaptations or additional instruments might be considered[38].

(63) This demonstrates the importance of designing appropriate and effective measures in combination with a surveillance system to monitor the conservation status of species.

Summary: Measures taken by the Member States when implementing the provisions under the Directive should always be proportionate and appropriate to the objective pursued, i.e. maintaining and restoring favourable conservation status. The measures must be appropriate and effective on the ground. There might be some cases where appropriate measures are not obligatory under the Directive. Voluntary measures or adaptation of the Directive and its annexes may be envisaged in such cases.

[38] Annexes could also be modified to remove a species as well, since surveillance could reveal a species to be widely abundant.

APPROPRIATENESS AND EFFECTIVENESS OF MEASURES TAKEN



* Where monitoring shows that a species is in a favourable status with no need for measures to maintain this situation, and consequently no longer fulfils the criteria for Community interest, modification of the annexes (in this case, removal of the species) should be envisaged.

** This refers to the situation described in chapter 1.2.4.b.

II. ARTICLE 12

Text of Article 12
1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting: *(a) all forms of deliberate capture or killing of specimens of these species in the wild;* *(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;* *(c) deliberate destruction or taking of eggs from the wild;* *(d) deterioration or destruction of breeding sites or resting places.* *2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.* *3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.* *4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.*

(1) As a part of the second pillar of Directive 92/43/EEC, Article 12 tackles the more specific question of the protection of Annex IV(a) species. Consequently, Article 12 places the emphasis on the direct threats faced by animal species listed in Annex IV(a) rather than the broader question of the conservation of their habitats — with the exception of 12(1)(d).

(2) Annex IV(a) encompasses a wide variety of species, from large, wide-ranging vertebrates to small invertebrates with very small home ranges. Some of these animal species benefit from the provisions of the section on 'habitat conservation' but others do not. In the case of species listed only in Annex IV, Article 12 is the main provision for achieving the conservation aim in Article 2.

(3) Before addressing the provisions of Article 12 in detail, it is worth recalling some general legal considerations that have previously been developed by the ECJ.

II.1. General legal considerations

(4) Effective implementation of Article 12 of Directive 92/43/EEC requires full, clear and precise transposition by Member States. According to established case law, "*the provisions of Directives must be implemented with unquestionable binding force and with the*

specificity, precision and clarity necessary to satisfy the requirements of legal certainty"[39]. For instance, a prohibition on using pesticides where this is likely to have seriously harmful effects on the balance of nature is not as clear, precise and strict as the prohibition of the deterioration of the breeding sites or resting places of protected animals as laid down in Article 12(1)(d)[40].

(5) According to the Court, the transposition of a Directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the Directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the Directive with sufficient clarity and precision[41]. Any provisions setting up a strict protection framework should specifically address the issue of Annex IV(a) species protection and meet the requirements laid down by Article 12. It should be observed that the Court[42] emphasised the importance of this question in the *Caretta caretta* case. When asked by the Court to identify, and submit the wording of, the specific provisions in force in their legal system which it believed met the requirements laid down by Article 12, "*the Greek Government merely listed a series of laws, regulations and administrative measures without referring to any specific provisions capable of meeting those requirements.*" In consequence, given the specific character of Article 12, legislative or administrative provisions of a general character, e.g. a mere repetition of the wording of Article 12 in national legislation, may not always satisfy the requirements of species protection and guarantee the effective implementation of Article 12. The formal transposition of Article 12 into national legislation may not always guarantee its effectiveness and may need to be complemented by further implementing provisions to ensure strict protection based on the particularities, specific problems and threats faced by species or groups of species.

(6) When transposing the Directive, Member States must respect the meaning of terms and concepts used by the Directive so as to ensure uniformity in its interpretation and application[43]. This also implies that national transposition measures should guarantee the full application of the Directive without modifying its terms, selectively applying its provisions or adding supplementary conditions or derogations not provided for in the Directive[44]. As the Court has observed, *"faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories… It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise"*[45].

(7) For instance, the transposition of Article 12(1)(d) prohibiting the deterioration or destruction of breeding sites and resting places that are "*clearly perceptible*" or "perfectly *known and identified as such*" or prohibiting only the deliberate deterioration or destruction

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[39] See in particular the judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 27), but also the following judgments: 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607, paragraphs 18 and 24; 19 May 1999, Commission v France, Case C-225/97, ECR p.3011, paragraph 37; 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007, paragraph 32.

[40] See the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 67-68.

[41] For instance: judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 21.

[42] See paragraph 29 of the judgment in Case C-103/00.

[43] For instance: judgment of 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461.

[44] Judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

[45] See for instance the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 25-26 and the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 59-60.

of breeding sites or resting places[46] modifies the substance of Article 12(1)(d) and limits its scope of application. The same goes for the exemption of lawful acts from the application of Article 12(1)(d). This kind of transposition is therefore incompatible with Article 12(1)(d).

(8) In addition, "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty*"[47]. It has to be stressed that the existence of national case law alone, with no specific legal provision, cannot be considered as properly complying with the obligation to fully transpose a Directive.

Summary: Effective implementation of Article 12 requires full, clear and precise transposition by Member States. The provisions in their laws must be specific enough to be capable of meeting the requirements of the Directive.

The *Caretta caretta* Judgment

The judgment of 30 January 2002 in the *Caretta caretta* case (Commission versus Greece, Case C-103/00) was the first judgment on the application of Article 12 of the Habitats Directive (Directive 92/43/EEC) for a specific species. The Court had never given an interpretation on its application and scope prior to this judgment.

The loggerhead sea turtle (*Caretta caretta*) is listed in Annexes II and IV to Directive 92/43/EEC as a species of Community interest in need of strict protection. Laganas Bay on the island of Zakynthos is the most important breeding site for this turtle in the Mediterranean and has also been proposed as a Site of Community Importance for the Natura 2000 network.

In 1998, a number of non-governmental organisations exposed the deterioration in the conditions for this species of sea turtle on Zakynthos. The main problems were uncontrolled use of the island's beaches and the surrounding sea for tourism-related activities, including, among other things, the erection of illegal buildings, the use of mopeds on beaches and other activities with potential negative impacts on these turtles. The Commission called on the Greek authorities to provide information on the measures taken to protect the species on this island. Based on this information and the findings of Commission officials on missions, an infringement procedure under Article 226 of the Treaty was initiated on the grounds that Greece had failed to fulfil its obligations under Article 12(1)(b) and (d) of the Habitats Directive. In the course of the pre-litigation procedure, the Greek authorities maintained that all the appropriate measures to ensure the protection of the turtle had been taken or were in the process of being adopted and implemented.

After an updated assessment of the situation by the Commission services in 1999, it was still found to be inadequate and the case was referred to the Court of Justice. More specifically, the Commission alleged that Greece had contravened this Article, firstly by not adopting a legal framework designed to ensure the strict protection of *Caretta caretta* against any deliberate disturbance during its breeding period and against any deterioration in, or destruction of, its breeding sites and secondly by not taking any concrete, effective measures on the ground to avoid such problems.

[46] See also the Court judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 79.

[47] For example: judgment of 23 February 1988, Commission v Italy, Case 429/85, ECR p.843, paragraph 12; judgment of 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001, paragraph 10; judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

On 30 January 2002, the Court accepted the Commission's arguments and condemned Greece for its failure to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakynthos. In particular, the Greek authorities had not taken the requisite measures to avoid disturbance of the species during its breeding period and activities that may bring about deterioration or destruction of its breeding sites.

II.2. Requisite measures for a system of strict protection

(9) Article 12 of Directive 92/43/EEC obliges Member States to take requisite measures to "establish and implement an effective system of strict protection"[48] for the animal species listed in Annex IV(a) in their natural range. This wording leads to several questions as regards the definition of certain terms.

(10) The Directive, while clearly setting out the prohibitions, does not define in detail the "requisite" measures for their implementation and for the establishment of a "system" of strict protection for each of the species concerned. The interpretation and implementation of Article 12(1)(a) to (d) should take into account the aim of the Directive as laid down in Article 2. Article 12 should not be interpreted as requiring the adoption of pro-active habitat management measures, such as for example the restoration or improvement of habitats for certain species. Thus, the Directive gives a certain margin of manoeuvre to the Member States, which are responsible for defining, adopting and implementing the requisite measures establishing a "system" of strict protection for each of the animal species listed in Annex IV(a). However, the discretionary power of Member States is subject to some limitations and should respect some basic requirements.

II.2.1. Measures to establish and effectively implement a system of strict protection

(11) The Commission considers that the full and effective application of Article 12 requires, on the one hand, the establishment of a coherent legal framework, i.e. the adoption of specific laws, regulations or administrative measures to effectively prohibit the activities indicated in Article 12(1), and, on the other hand, the application of concrete measures to enforce these provisions on the ground for the protection of Annex IV(a) species.

(12) The Court also adopted this approach in Cases C-103/00 (concerning the protection of *Caretta caretta* in Zakynthos[49]), C-518/04 (concerning the protection of *Vipera schweizeri* in Milos[50]) and C-183/05 (concerning the protection of several Annex IV species in Ireland[51]). In particular, in Case C-103/00, the Advocate General provided a detailed analysis of the significance and scope of the concept of "system of strict protection".

(13) This concept is fundamental for the application of Article 12. In the *Caretta caretta* case, the Court declared that Greece had failed to fulfil its obligations under 12(1) of Directive 92/43/EEC, since it had failed to take "*the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakynthos to avoid disturbing the species during its breeding period and to avoid activities which may deteriorate or destroy its breeding sites*." Thus, full application of Article 12

[48] See the judgment of 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147.

[49] Judgment of 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147. See also the judgment of 17 January 1991, Commission v Italy, C-157/89, ECR p.57 (in particular paragraph 14), which concerns Article 7 of Directive 79/409/EEC.

[50] Judgment of 16 March 2006, Commission v Greece, Case C-518/04, ECR p.42.

[51] Judgement of 11 January 2007, Commission v Ireland, Case C-183/05, not yet published in the ECR.

requires the establishment and implementation of a system of strict protection which effectively prohibits the activities indicated in Article 12(1).

(14) To summarise the above, an adequate system of strict protection for Annex IV(a) species consists in **a set of coherent and coordinated measures of a preventive nature**. This results directly from the term "system" and also takes account of the need to establish a link between the adopted measures and the objectives of Article 12 and the Directive in general. These measures must contribute to the aim of maintaining the species in the long term or restoring its population in its habitat and must be **effectively enforced**.

(15) Moreover, this interpretation is borne out by recitals 3[52] and 15[53] of the Directive, which refer to the encouragement of human activities and to management measures with a view to maintaining or restoring species at a favourable conservation status. Of course, the recitals themselves do not have any binding legal effect and can never override the substantive provisions of the Directive. The Court does not use the preamble to directly ground a judgment. However, the preamble is often used as an aid in interpreting the substantive provisions of secondary legislation[54].

(16) The need for coherent and coordinated measures of a preventive nature in order to implement the requirement for the strict protection of Annex IV(a) species does not necessarily imply the establishment of new structures or authorisation procedures at national level. Regarding projects that may affect an Annex IV species, **Member States can adapt existing planning procedures to meet the requirements of Article 12.** This means that assessment of the impact on species can be built into the appraisals that form part of existing decision-making processes at various levels in a Member State, including e.g. land-use planning decisions. With regard to ongoing activities, all Member States will most likely employ planning procedures, regulations or best practice codes, which could then be used as tools to implement Article 12 provisions.

Summary: The full and effective application of Article 12 requires, on the one hand, the establishment of a legal framework of coherent and coordinated measures and, on the other, the application of concrete, coherent and coordinated measures to enforce these provisions on the ground effectively.

II.2.2. Measures to ensure favourable conservation status

(17) The interpretation of Article 12 has to take into consideration the objective of Directive 92/43/EEC[55] set out in Article 2, which applies, without distinction, to all Annexes. Consequently, strict protection measures adopted under Article 12 should aim to fulfil the main objective of the Directive by contributing to the maintenance or restoration, at favourable conservation status, of Annex IV(a) species of Community interest, while taking into account economic, social and cultural requirements and regional and local characteristics.

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52 "Whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities."

53 "Whereas a general system of protection is required for certain species of flora and fauna to complement Directive 79/409/EEC; whereas provision should be made for management measures for certain species, if their conservation status so warrants, including the prohibition of certain means of capture or killing, whilst providing for the possibility of derogations on certain conditions".

54 For example, judgment 28 February 1991, Commission v Germany, Case C-57/89, ECR p.883.

55 See chapter I.2.1.

(18) Furthermore, Article 12 has to be interpreted in the light of Article 1(i), which defines the favourable conservation status of a species. In addition, the measures taken by the Member States should be appropriate with a view to attaining the objective of maintaining or restoring the conservation status of a species. This implies that the measures to be taken must be decided depending on the particular circumstances of each situation and taking into account the specificity of each species. For instance, the characteristics of a species, such as its conservation status, may justify more specific or intense protection measures.

Summary: Strict protection measures adopted under Article 12 must contribute to fulfilling the main objective of the Directive, namely maintaining or restoring a favourable conservation status.

II.2.3. Measures regarding the situations described in Article 12

(19) The scope and type of measures taken to establish a system of strict protection are circumscribed by the content of the prohibitions and other obligations in Article 12 (see also chapter II.3). Consequently, the measures taken must relate to actions that threaten the species (12(1)(a)-(c), 12(2), 12(4)) or defined elements of their habitats (Article 12(1)(d)). Article 12 does not, in itself or in conjunction with Article 2, oblige Member States to take proactive habitat management measures. What is required are measures to effectively implement the prohibitions of Article 12.

(20) It is obvious that different types of measures may be required to address each specific species listed in Annex IV and each specific situation. In addition, as already stated in chapter II.1, mere repetition of the wording of Article 12 in national legislation may not always satisfy the requirements of species protection. The transposition of Article 12 into national legislation should guarantee its effective implementation. Based on the particularities, specific problems and threats faced by species or groups of species, Member States should adopt provisions specifically for their protection. It is the responsibility of national authorities to define the measures necessary to implement the prohibitions of Article 12 and to ensure the strict protection of animal species. The nature of these measures will depend on each national system.

(21) However, for some species and in some situations, the adoption and implementation of purely prohibitive measures may not be sufficient, and may not guarantee effective implementation of Article 12. In such cases, Article 12 requires the adoption and implementation of preventive measures. It is also evident from the wording of Articles 12 and 1(i), and from the objective of "maintaining" a favourable conservation status, that Member States are bound by their obligations under Article 12 even before any reduction in numbers of the species has been confirmed or the risk of this protected species disappearing has become a reality[56]. Even if a species has a favourable conservation status and is likely to have this in the foreseeable future, Member States should take preventive measures to protect the species by effectively prohibiting the activities indicated in Article 12.

(22) This view was supported in Cases C-103/00, C-518/04 and C-183/05, where the Court stressed the importance of the preventive character of the measures taken[57]. The Court rejected the Greek Government's argument that a decrease in the number of nests needed to be proved in order to demonstrate the absence of strict protection for *Caretta*

[56] See in particular paragraph 43 of the Advocate General's opinion and paragraph 31 of the *Caretta caretta* judgment, as well as paragraph 21 of the *Vipera schweizeri* judgment.

[57] This solution had already been applied in the Santoña case (judgment of 2 August 1993, Commission/Spain, Case C-355/90, ECR, p.4221, paragraph 15).

caretta. According to the Court *"the fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question"*, i.e. the absence of a system of strict protection for *Caretta caretta*. The same goes for arguments such as the good state of the environment or the stability of a species population. It clearly follows that the measures to be taken under Article 12 should not be purely prohibitive but should also be of a preventive nature.

(23) Such an approach is also founded on Article 174 of the EC Treaty, according to which "*Community policy on the environment shall aim at a high level of protection*", and is based on the precautionary principle and on the principle that preventive action should be taken. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of breeding sites or resting places of Annex IV(a) species (Article 12(1)(d)). Preventive measures that at the same time ensure effective implementation of the prohibitions in Article 12 "on the ground" could include for example:

- information campaigns to raise awareness among a general or targeted public (e.g. landowners, etc.) of the protection requirements for certain species;
- action to have species protection considerations taken into account by relevant economic sectors interfering with Annex IV species (e.g. agriculture, forestry) to avoid the negative impacts of certain land-use practices. This could include training, codes of conduct, guidance documents, or the adaptation of forestry or agricultural plans and best practice or administrative procedures.
- active prevention of likely disturbances (e.g. restricting access to bat caves during sensitive periods to avoid disturbance or vandalism)
- inspections
- preparation of national conservation plans, which could set out in detail the measures mentioned above and provide practical guidance to local/regional authorities, affected interest groups, etc. in effectively implementing provisions for specific species

National Species Action Plans in Sweden

Sweden has put forward about 120 National Action Plans for threatened species that will be developed and initiated in the period 2003 – 2006. A National Action Plan (NAP) is not a legal document, but serves as guidance for authorities, organisations and landowners on important actions needed to conserve species and to review their ecology and present-day status. The NAP normally sets out the division of responsibility among relevant bodies.

The establishment of an NAP is coordinated by one of the 21 County Administration Boards. They normally do not write the plan themselves, but contract an expert (there is a guidance document on how to write NAPs and on the adoption procedure). When the Administration Board and the Swedish Environmental Protection Agency (SEPA) agree that there is a good draft available, the plan is circulated for consideration by relevant bodies and experts. Based on comments received, the plan is modified and finally adopted by the SEPA. The NAP normally includes a draft budget, provided by the SEPA and other bodies. SEPA's present annual budget (2005) for producing and implementing plans is about 6.5 million euros.

Main elements of a Swedish NAP:

- Formal decision by the Swedish EPA to adopt the NAP
- Time period, follow-up and review of the Plan
- Brief description of the species, their ecology and biology, and genetic aspects (if relevant)

- Distribution and conservation status
- Status in relation to national and international legislation and commitments
- Reasons for decline and identified threats
- Experiences from previous actions (if any)
- Vision for the future and gap analyses
- Short-term and long-term NAP objectives
- Priority measures to be taken
- Recommendations targeting municipalities, landowners and others
- Description of consequences to other species/habitats and conflicts of interests
- References
- Appendices (maps, diagrams, and a table with an overview of all agreed actions, actors, priorities, costs and finance)
- Summaries in Swedish and English

The plans, which usually cover a period of several years, are supported by yearly plans dealing with the concrete action to be undertaken. Approximately 40 NAPs have so far been established, e.g. for *Hyla arborea, Bombina bombina, Osmoderma eremita, Margaritifera margaritifera, Ursus arctos* and many others. The programme is ongoing, will probably gain a larger budget in the coming years, and is coupled with environmental objectives approved by the Swedish parliament.

Consequently, for some species, preventive measures would also form part of the "requisite measures" for the system of strict protection. They are not the same as proactive biotope management measures such as restoration or habitat improvement.

Summary: Measures to be taken under Article 12 are circumscribed by the content of the prohibitions and other obligations in Article 12. However, as national legislation should guarantee the effectiveness of Article 12, the formal transposition of Article 12 prohibitions may not be sufficient and Member States should define the measures necessary to implement the prohibitions of Article 12 and ensure the strict protection of species. In addition, for some species and in some situations, the adoption and implementation of preventive measures may be required. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of the breeding sites or resting places of Annex IV(a) species.

II.2.4. Provisions of Article 12(1) (a)-(d) in relation to ongoing activities

(24) While the application of protection provisions can be clearly linked to development permitting procedures, for e.g. construction projects and infrastructure, ongoing activities such as **agriculture and forestry**[58], for example, pose a more complex set of issues. The majority of activities and practices in these sectors are not subject to prior approval or consent and it would be disproportionate to impose a comprehensive set of controls along these lines. It is also important to recognise the positive contribution that many traditional farming and forestry practices make to the creation and maintenance of some of Europe's most valued habitats (e.g. semi-natural grasslands such as hay meadows or species-rich *Nardus* grassland). The Directive does nevertheless apply to these sectors and Member States do therefore have to meet their obligations to protect the species concerned. This

[58] As very widespread activities, agriculture and forestry are looked at in detail in this chapter. However, while the level of statutory control over ongoing activities may vary, the principles set out in this chapter should be seen as generally applying to other ongoing activities as well (e.g. fisheries, tourism, maintenance activities, etc.)

does not necessarily mean that new structures or authorisation procedures should be introduced at national level. All Member States will most likely have planning procedures, regulations or best practice codes in place, and these tools could be adapted in order to apply Article 12 to ongoing activities. **Independently of the option chosen to apply Article 12 to ongoing activities (creation of a new mechanism or adaptation of existing mechanisms), Member States have to ensure that the strict protection requirements are adequately met.** As agriculture and forestry differ significantly on this point, they are discussed separately.

(25) As regards **agriculture**[59], a number of Member States opt for preventive measures to ensure Article 12 compliance, in part by developing **guidance and codes of conduct**. It is important to note that basic farming practice rules will include the protection of features — such as hedges, ponds, etc. — which are most likely to be the habitat of the species concerned. This approach is seen to be appropriate and effective in contributing to the protection of these species, providing a high chance of success. The range of species concerned is very wide, however, and in some cases Member States have thought it appropriate to produce more detailed species-specific guidance. The Directive nevertheless requires that such approaches and tools complement rather than replace formal legal protection, i.e. if these tools (e.g. codes of conduct, best practices) are ignored, there must be legal procedures in place in order to ensure an effective system of strict protection for animal species.

(26) In this context, it should be stressed that the occurrence of protected species in e.g. agricultural land is often the result of traditional land-use and farming practices, usually of an extensive nature. Where land-use practices are clearly supportive of the conservation status of a species under consideration, it is obvious that the continuation of such practices should be encouraged. Accidental disturbance or killing of individuals of the species concerned by such practices needs to be accepted in the interest of the population as a whole (applying proportionality to achieve the overall objective). Where however an ongoing land use (due to changes of practices, intensification, etc.) is clearly damaging to a species, leading to decreases in its population in the area, a Member State is required to find ways to avoid this.

The UK approach of integrating species protection in ongoing activities

In the UK, there are two "layers" for protecting species during ongoing activities: the first is legislative, the second comprises a range of good practice guidance available to farmers, foresters, building professionals, etc. By following good practice guidance, land managers should be able to continue their normal activities and at the same time avoid the deterioration or destruction of the breeding sites / resting places of Annex IV species. Maintaining or restoring optimum habitats for populations is seen as more important than the unintentional loss or disturbance of individuals that might occur as result of ongoing activities. By raising awareness of the possible presence of such species and by giving advice on action that land managers can take, the chances of offences against species are minimised.

[59] With respect to the relationship between agriculture and environment protection, the 2003 reform of the Common Agricultural Policy is significant in two key respects. Firstly, it has broken the link between Community subsidies and the productivity of farmland. The majority of farmers will now receive a Single Farm Payment no longer related to their productivity. The incentive for farmers to increase productivity will in future be solely determined by economic considerations set by market prices. Secondly, a condition for receiving Single Farm Payments and any other support from the CAP will be compliance with a number of environmental standards established in Community environment legislation (known as cross-compliance) and thus observance of a set of basic farming practice rules.

Government agencies in the UK consequently provide a range of practical guidance on protected species aimed at informing property managers. This ranges from simple general guidance (e.g. on newts on farmland) to comprehensive conservation handbooks (e.g. for the dormouse *Muscardinus avellarnarius*). It is disseminated via the internet or as leaflets to people managing farms, forests or even buildings that host protected species, for example information brochures such as 'Great crested newts on your farm', 'Woodland management for bats' and 'Bats in buildings'.

The guidance provides land-owners with

1. information on how to know if a listed species inhabits the property
2. a simple description of the species concerned, supported by illustrations
3. information on the biology and ecological requirements of the species
4. a simple description of the annual life cycle and relationship with the annual management practices of interest to land managers
5. advice on how to prevent damage to species and their habitats and how ongoing activities might be adjusted to favour species protection
6. information on the need for some management operations to have a licence and where to apply for it
7. examples of concrete activities that are damaging to species
8. information on the legal protection status and possible legal consequences in cases where the law might be breached
9. essential contact information on who can help and give advice
10. information on grant schemes available (Environmental Stewardship)

(27) Applying Article 12 to **forestry** is, in some respects, more complex in that it is more likely that the trees to be harvested are themselves the habitat (breeding site/resting place) of some of the species concerned. The specific characteristics of the sector, i.e. the long production cycles and consequently the need for long-term planning add to the special challenges of species conservation. In the search for sustainable forest-management practices, which are consistent with conservation requirements, a variety of approaches have been developed in different Member States to address the issue. Existing approaches vary from detailed forestry planning and prior approval of forest management plans, or general codes of practice, to the pre-notification (see Finnish example below) of felling proposals to permit environmental authorities to intervene where known populations of protected species may be involved. As in the case of agricultural practices, these preventive approaches can ensure the protection of the species concerned, provided that they are communicated effectively and are implemented with good will and sufficient resources. A particular economic incentive to follow such approaches is in fact provided by the growing prevalence of forest certification schemes, which require compliance with environmental protection requirements including biodiversity and species protection (the approaches may of course need to be adapted to conform to the protection requirements of Annex IV species). However, such approaches do not provide an absolute guarantee, except where full prior approval of forest management plans is required, and must (as indicated above) be supported by a legal protection regime as required by the Directive.

Species protection in ongoing forestry management in France

In France, ongoing forestry practices are regulated in both public and private forests. A law adopted in 2001 provides that the management of forests must be sustainable and must guarantee the preservation of biodiversity. The implementation of this law is supported by different types of management plans and codes of good practice depending on whether a

forest is private or public and depending on its size. These documents are approved by the administrative authorities and take full account of protected habitats and species. However, these documents do not stand alone: they are accompanied by awareness-raising, information and training of forest owners and managers so that they can make an active contribution to the implementation of Article 12. Coherent cooperation between the different levels (national, regional, local) is also ensured by planning, information and guidance instruments.

The French forestry plans go beyond the protection of current species occurrences and habitats: they also target the long-term viability of species populations, taking into account their conservation needs over time as well as space. Two examples illustrate this:

Certain bat species need large areas of forest to survive in the long term. A bat-sensitive forest management therefore needs to provide — over a longer-term perspective — the structures needed and other requirements for a sufficiently large habitat, while at the same time allowing for the use and renewal of the forest. Consequently, local, mostly unavoidable deterioration or destruction of bat habitats during the exploitation of single parcels of forests will — due to the overall planning, codes of good practice and safeguards applying on a broader scale to the woodland as a whole — not have any influence on the conservation status of the species in the woodland as such. This situation was confirmed in a special study carried out in the "Rambouillet" forest near Paris.

Another example is the wood-boring beetle *Rosalia alpina*, which inhabits mature broadleaf trees in mountainous forests. During its larval development, it is virtually impossible to detect the presence of the insect in a tree. It is therefore more or less unavoidable that breeding sites and resting places of the beetle will be destroyed during forest exploitation. The management of this species, as laid down in the management plan, therefore targets the long-term preservation of a network of islands with trees likely to be used by the beetle in order to guarantee the conservation status of the species.

(28) The conclusion that can be drawn is that ongoing activities should best be guided so as to avoid conflicts with the species protection provisions in the first place. Tools such as planning instruments, systems of prior consent, codes of conduct and concrete information or guidance are options here. Such measures should:

a) form part of the "requisite measures" needed under Article 12 to "establish and implement an effective system of strict protection",
b) incorporate the strict protection requirements,
c) offer flexibility, i.e. while recognising that absolute protection for all individuals of a species cannot be guaranteed, ensure that any harmful action takes full account of the conservation needs of the species/population concerned,
d) have the advantage that they potentially protect the person engaging in an activity (i.e. from prosecution) as long as the person adheres to these measures.
e) be accompanied by a legal framework for strict protection which ensures adequate enforcement by the regulatory authorities in the case of non-compliance (legal certainty aspects are met)
f) help define appropriate levels of surveillance (required under Article 11 of the Directive) and determine how these should be funded,
g) be in line with Article 2(3) by taking account of economic, social and cultural requirements.

Integrating flying squirrel protection in Finnish forestry

In June 2004 a new legislative protection system was established in Finland to enhance the protection of the breeding sites and resting places of the flying squirrel *(Pteromys volans)*. Under the Forestry Act, a forest owner must notify the regional forest authorities before cuttings take place. The notification must include a map and a short description of planned cuttings. All known breeding and resting places of the squirrel are stored in a database. If a planned cutting site matches information in the database, a formal decision is taken by the environmental authorities. The landowner, the forest company concerned and the regional forest authority are informed. The decision includes a detailed description of the site and a map indicating the location of the breeding sites and resting places. It also lays down what measures, if any, are allowed.

The experience so far shows that there are some problems, such as time-consuming procedures, diverse technical problems, and scientific problems especially in identifying the breeding and resting places, and that the system needs to be improved. On the other hand, it is already evident that the system has improved cooperation and the exchange of information and data between the forest authorities and environment authorities and that it provides landowners with more accurate and updated information on the species they have an obligation to protect. The ecological and economic effects of the system need to be assessed in the near future.

A lot of Member States have used voluntary measures, such as agro/forestry environmental measures under rural development regulation, to support the implementation of Article 12. Such measures have the potential to successfully combine the preventive approach with (voluntary) proactive habitat management.

Developing measures for species protection under rural development regulation & LIFE-nature

The occurrence of large predators protected by the Habitats Directive can sometimes lead to conflicts with farmers and foresters. A characteristic of these large predators is their mobility within very large territories, usually beyond specific Natura 2000 sites designated for them. Large predators may have an impact on ongoing activities, mainly livestock farming (e.g. sheep herding), due to predation. These protected species are widely known by farmers and the need to protect them due to their continuously decreasing numbers is also well communicated and documented. Actions to mitigate the impacts of these species on ongoing activities have been examined for many years. Several measures have been tested with support from the LIFE-nature programme[60] and put in place with support from agri-environmental projects to prevent damage, such as the installation of electric fences, the provision of sheepdogs to watch over herds, the provision of natural prey, improvement of the habitat and feeding possibilities within this habitat, etc., and/or to provide compensation for damage encountered.

Measures of this type have been included in the rural development plans of some Member States. For example, Greece's rural development plan includes the following measures:
1. acquiring and using sheep dogs in areas where wolf and bear are present;
2. installing and maintaining electric fences to protect crops and hives in areas with bears;

[60] For details on LIFE-nature and the projects funded by this programme, please go to http://ec.europa.eu/environment/life/life/nature.htm

3. cultivation of special plots of cereals or fruit trees by farmers to provide food resources for (among others) bears.
These voluntary measures aim at preventing damage from large carnivores, complementing national legislation that prohibits all kinds of actions that have a negative effect on the species, like killing, trapping, baits, etc. Similar measures are included in the rural development programmes of various French regions with populations of large predators.

These positive examples of practices that contribute to species management and protection can in some cases also entail some negative impacts for other protected species in Annex IV, which might be locally disturbed. However, looking at the overall picture, such measures contribute to the protection of Annex IV species and also to good pastoral management.

Summary: For ongoing activities, such as agriculture or forestry, the challenge is to apply the species protection provisions of Article 12 using appropriate means in order to avoid conflicts in first place. The use of tools such as planning instruments, codes of conduct and concrete information/guidance are options here and potentially can satisfy the specific conservation needs while taking into account economic, social and cultural requirements. However, these tools need to be accompanied by a legal framework for strict protection which ensures adequate enforcement by the regulatory authorities in cases of non-compliance.

II.3. The specific protection provisions under Article 12

II.3.1. Deliberate capture or killing of specimens of Annex IV(a) species

(29) Article 12(1)(a) prohibits all forms of deliberate capture or killing[61] of specimens of these species in the wild. In accordance with Article 12(3), this prohibition applies to all stages of life of the animals. According to Article 1(m), *"specimen means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species."*

(30) This prohibition is important as it is linked with the population of a species (its size, dynamics, etc.), which constitutes one of the criteria under Article 1(i) for assessing the conservation status of a species. Killing or capture may lead to an immediate, direct (quantitative) decline in a population, or could have other more indirect (qualitative) negative effects. The prohibition covers deliberate capture or killing, not incidental capture or killing, which falls under Article 12(4).

(31) In Case C-103/00, the Court referred to the element of "intent", observing that: "*the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there.*" Despite the information available to the public on the need to protect these

[61] In its judgment of 18 May 2006 (Commission v Spain, case C-221/04, ECR p.4515, paragraph 69) the Court clarified that it is clear from a reading of the different language versions that "deliberate" refers to both the capture and killing of protected animal species.

areas, the persons on the beach committed the infringements[62]. This constituted a failure of enforcement. Thus, the Court "*seems to interpret the term 'deliberate' in the sense of conscious acceptance of consequences*"[63].

(32) In Case C-221/04[64], the reasoning of the Court was more specific. In that case, the Commission brought an action before the Court because, due to the authorisation by the authorities in Castilla y León of snares in several private hunting areas, Spain had failed to comply with Article 12(1)(a) as regards the protection of the otter (*Lutra lutra*). The Court recalled the findings of the *Caretta caretta* case and stated that ***"for the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing"***[65]. This is used as a "requisite criterion" by the Court, which in the present case found that the contested permit related to fox hunting and accordingly was not in itself intended to allow the capture of otters. In addition, the Court stressed that the presence of otters in the area concerned had not been formally proven, so that it had also not been established that the Spanish authorities knew that they risked endangering otters by issuing the contested permit for fox hunting. Thus, the Court concluded that the requisite criteria for determining that the capture or killing of a specimen belonging to a protected animal species was deliberate had not been met[66].

(33) On the basis of the approach taken by the Court in cases C-103/00 and C-221/04, the following definition could be proposed: **"Deliberate" actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.** In other words, not only a person who fully intends to capture or kill a specimen of an animal commits an offence: an offence is also committed by a person who might not intend to capture or kill a specimen but is sufficiently informed and aware of the consequences his action will most likely have and nevertheless performs the action, leading to the capturing or killing of specimens (e.g. as an unwanted but accepted side-effect), with reckless disregard of the known prohibitions (conditional intent). It goes without saying that negligence is not included in the meaning of "deliberate".

(34) Therefore, it would seem appropriate to alert the public, or other more limited categories of people (e.g. certain categories of land users) who are likely to interfere with a species in Annex IV(a), to the prohibitions that apply to listed species using appropriate means. The public relations work of the Scottish Natural Heritage in relation to bats is an example of this (see http://www.snh.org.uk, publications on bats). The beach notices in the *Caretta caretta* case constitute another.

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62 In Case C-103/00, the Court emphasised the fact that both the driving of mopeds and the presence of small craft were not isolated occurrences. In practical terms, it seems that, in the case of *Caretta caretta*, the repeated character of the violations was decisive in proving the existence of deliberate disturbance.

63 See paragraph 118 of the Advocate General's Opinion in Case C-6/04.

64 Judgment of the Court of 18 May 2006, Commission v Spain, Case C-221/04, ECR p.4515.

65 See paragraph 71 of the judgment.

66 See paragraphs 72-74 of the judgment.

Summary: Article 12(1)(a) prohibits all forms of deliberate capture or killing of specimens of Annex IV(a) species in the wild. The term "deliberate" has to be interpreted as going beyond "direct intention". A person who is reasonably expected to know that his action will most likely lead to an offence against a species, but intends the offence or, if not, at least accepts the results of his action, commits an offence. Good information and guidance by the competent authorities seem an appropriate way of implementing these provisions.

II.3.2. Deliberate disturbance of Annex IV(a) species, particularly during periods of breeding, rearing, hibernation and migration

(35) Article 12(1)(b) prohibits the deliberate disturbance of Annex IV species especially during periods of breeding, rearing, hibernation and migration, where the species are more vulnerable[67]. Under Article 12(3), moreover, this prohibition applies to all stages of life of the animal species concerned.

II.3.2.a) Disturbance

(36) Neither Article 12 nor Article 1 of Directive 92/43/EEC contains a definition of the term "disturbance". Article 6 guidelines[68] contain some useful information on the term in relation to habitats. If we apply the Commission services' guidelines to Article 12, we may observe the following:

(37) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (e.g. by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods in its life cycle (e.g. breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of "disturbance".

(38) The disturbance under Article 12(1)(b) must be deliberate (see chapter II.3.1) and not accidental. On the other hand, while "disturbance" under Article 6(2) must be significant, this is not the case in Article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.

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[67] In Case C-75/01 (judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 53-54), the Court declared that Luxembourg had failed to ensure the full and complete transposition of Article 12(1)(b), since deliberate disturbance of species was not prohibited during the period of migration.

[68] "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC"; see, in particular, points 3.4, 3.5 and 3.6.2.

(39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a Member State (see also chapter III.2.3.a on "Scale of assessment"). For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a "disturbance" in terms of Article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under Article 12. Once again, it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above.

(40) On the question of deliberate disturbance of a species during the breeding period, concerning *Caretta caretta* in Zakynthos, the Court analysed, on a case-by-case basis, the various activities on the breeding beaches with a view to establishing the causal link between these activities and the disturbance of the species. It found, first of all, that driving mopeds on a breeding beach of *Caretta caretta* was likely to disturb this species, mainly because of the noise nuisance, particularly during the egg-laying, incubation and hatching period and when the young turtles were making their way out to sea. Lastly, according to the judges, it was clear that the presence of small craft close to the breeding beaches constituted a threat to their lives and well-being.

Summary: Disturbance need not directly affect the physical integrity of a species but can nevertheless have a direct negative effect. Disturbance is detrimental for a protected species e.g. by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.

II.3.2.b) Periods of breeding, rearing, hibernation and migration

(41) The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. There is, however, no definition of these terms in the Habitats Directive. Nevertheless, similar terms (e.g. "period of reproduction", "return to the breeding areas"[69]) are used in the Birds Directive, where they are defined in the context of birds. As Annex IV(a) includes a much wider range of species, which are very different ecologically, biologically and behaviourally, it is necessary to use, once more, a "species-by-species" approach when defining periods of breeding, rearing, hibernation and migration (where those periods apply at all).

(42) Period of breeding and rearing:

This period may include (where applicable) the period of courtship, mating, nest construction or selection of egg-laying or parturition[70] site, parturition or egg laying, or production of offspring where reproduction is asexual, egg development and egg hatching, and rearing of young.

(43) Period of hibernation:

[69] 'Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds' (to be found under http://www.europa.eu.int/comm/environment/nature/home.htm).

[70] Parturition – act of giving birth.

Hibernation is a period of time when an animal becomes inactive and remains in a state of sleep, a torpid or resting state, usually during winter. Usually such a state is accompanied by a lowered body temperature and slowed heartbeat and breathing. Hibernation allows an animal to survive harsh conditions by using less energy than if it were active (for example some bats, rodents, amphibians or reptiles)

(44) Period of migration:

Migration is the periodic movement of animals from one area to another as a natural part of their life cycle, usually in response to seasonal changes or changes in the food supply.

Summary: The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. These periods can be defined only using a species-by-species approach, due to ecological, biological and behavioural differences between species.

II.3.3. Deliberate destruction or taking of eggs from the wild

(45) Under Article 12(1)(c), deliberate destruction or taking of eggs from the wild is proscribed. As it protects the eggs of species, this provision protects the species population and its viability in the long-term.

II.3.4. Deterioration or destruction of breeding sites or resting places

(46) Article 12(1)(d) is a stand-alone provision. Contrary to the other prohibitions of Article 12, it does not concern directly the species but protects important parts of their habitats, as it prohibits deterioration or destruction of breeding sites or resting places. In addition, while points (a), (b) and (c) of Article 12(1) use the term "deliberate", this is not the case as far as point (d) is concerned. This prohibition presents a number of issues that need further clarification.

II.3.4.a) Consequences of the word "deliberate" not being included in Article 12(1)(d)

(47) Under points (a), (b) and (c) of Article 12(1) only deliberate acts are prohibited and have to be avoided, whereas under point (d) a deliberate act is not required as a necessary precondition[71]. Article 12(1)(d) requires all acts resulting in deterioration or destruction of breeding sites or resting places to be prohibited irrespective of whether they are deliberate or not[72]. Apparently, the Community legislator has focused on the two important areas of breeding sites and resting places and decided that stricter measures are needed. The Court confirmed that "*by not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding sites or resting*

[71] It is worth mentioning that this point constitutes one of the differences between Directive 92/43/EEC and the Bern Convention. While this specific part of Article 12 lacks the word "deliberate", the term appears in the comparable wording of Article 6 of the Bern Convention.

[72] In its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 79), the Court observed that *"by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d)".* The Court followed the same approach in its judgement of 11 January 2007 (Commission v Ireland, Case C-183/05, not yet published in the ECR, paragraph 47): *"by providing that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence, section 23(7)(b) of the Wildlife Act does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not*".

places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts"[73].

(48) In criminal law, a distinction is made between intentional/deliberate and unintentional acts. "Deliberate" also covers situations where the result is not directly intended but the person ought to have taken into account the consequences that could follow from his action. This clearly indicates that, when leaving out the word "deliberate" from subparagraph (d), the intention was to include non-deliberate acts leading to deterioration or destruction in the provision as well. This introduces a special quality to this provision: all deterioration or destruction of breeding sites or resting places is to be effectively prohibited, i.e. avoided.

(49) However, this does not mean that proactive habitat management measures are required under Article 12(1)(d) of the Directive (e.g. to actively manage a meadow for butterflies). Nonetheless, in order to protect breeding sites or resting places from deterioration, a simple prohibition in a legal text is not sufficient and must be supported by an adequate enforcement mechanism, including preventive measures. The lack of the word 'deliberate' underlines the importance of preventive action. Under a strict protection system, Member States should anticipate the threats sites may face from human action and take measures to ensure that those likely to commit an offence (intentionally or not) are aware of the prohibition in force and act accordingly.

(50) However, the deterioration of natural habitats may take place naturally (including through natural succession after cessation of a certain land use like agriculture) or be caused by unforeseeable events, so that the habitat is no longer a suitable breeding site or resting place for certain species. In this case, where no act has been committed to provoke deterioration/destruction of breeding sites or resting places but, where this has arisen through natural causes, Article 12(1)(d) cannot be applied[74].

(51) It should be stressed that, in the *Caretta caretta* case, the Court declared that the presence of buildings on a beach used by the species for breeding was liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive[75]. Significantly, the Court did not use the Commission's wording, which referred to "illegal" buildings. The mere fact that buildings had been built there and were liable to cause deterioration and destruction was the overriding argument for the Court. Therefore, the construction of buildings on a beach classified as "an absolute protection area" and where "special notices had been erected" is sufficient to constitute an infringement of Article 12(1)(d).

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[73] See the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 55.

[74] The appropriate instrument for dealing with deterioration due to natural causes or unforeseeable events is Article 6(2) of the Habitats Directive. In its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 34), the Court stated that *"in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate."*

[75] According to paragraph 38 of the judgment, "there is no doubt that the presence of buildings on a breeding beach such as the one at Dafni is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive".

Summary: The word "deliberate" covers not only situations where a certain result is directly intended but also situations were the person committing an offence knows the consequences of his action but accepts them, even if not directly intended. The fact that the word "deliberate" is not used in Article 12(1)(d) underlines the importance of preventive action by Member States to avoid all likely deterioration or destruction caused by humans. Cases of deterioration or destruction resulting from natural causes (i.e. not directly the consequence of human activities, e.g. natural disasters) or caused by unforeseeable events, do not fall within the scope of Article 12(1)(d).

II.3.4.b) Identification of "breeding sites and resting places"

(52) Although Article 12(1)(d) explicitly refers to the protection of "breeding sites" and "resting places" of species listed in Annex IV(a), neither Article 12(1)(d) nor Article 1 of the Directive provide any specific definitions.

(53) In the light of the objectives of the Directive, however, breeding sites and resting places may be considered to require strict protection because they are crucial to the life cycle of animals and are very important parts of a species' entire habitat[76], needed to ensure its survival. Their protection is directly connected with the conservation status of a species. The provision in Article 12(1)(d) should therefore be understood as **aiming to safeguard the ecological functionality** of breeding sites and resting places. Thus, Article 12(1)(d) ensures that such sites and places are not damaged or destroyed by human activities so that they can continue to provide all that is required for a specific animal to rest or to breed successfully.

(54) It thus follows from Article 12(1)(d) that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can re-use it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place.

(55) The identification of general criteria for breeding sites and resting places is difficult, because Annex IV(a) lists species from many taxa with many different life history strategies. It is not possible to provide a rigid definition of "breeding site" and "resting places" that will apply to all taxa. Any interpretation of the terms "breeding sites" and "resting places" must therefore take into account this variety and reflect different prevailing conditions. The following general definitions aim to provide guidance that will allow species-specific definitions to be prepared in the form of individual dossiers for each of the species listed under Annex IV(a) of the Directive. The definitions are based on the assumption that the sites in question can be identified and reasonably delimited. They are intended to be used as a checklist of elements to be considered when preparing individual species dossiers; meaning that not all these elements will be applicable to all species (e.g. *Canis lupus* has no clearly definable mating site). Knowledge gaps for species can be identified here. For example, the current information on *Caretta caretta* permits only breeding sites (i.e. the beaches) to be well defined, with resting places (in marine areas) not yet determined.

[76] Article 1(f) defines the "habitat of a species" only as "an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle".

However, with improved knowledge and increased research, resting sites may be delimited in future.

(56) The two definitions below are detailed in separate sections, though in practice they will often interlink and overlap and so could be considered together.

(57) ***Breeding sites: a definition***

Breeding is defined here as: mating, giving birth to young (including egg laying) or production of offspring where reproduction is asexual. A breeding site is defined here as the areas needed to mate and to give birth in and covers also the vicinity of the nest or parturition site, where offspring are dependent on such sites. For some species, a breeding site will also include associated structures needed for territorial definition and defence. For species that reproduce asexually, a breeding site is defined as the area needed to produce offspring. Breeding sites that are used regularly, either within or between years, must be protected even when not occupied.

(58) The breeding site may thus include areas required for:

1. courtship;
2. mating;
3. nest construction or selection of egg-laying or parturition[77] site;
4. place used for the purpose of parturition or egg laying or production of offspring where reproduction is asexual;
5. place of egg development and egg hatching;
6. nest or parturition site when occupied by young dependent on that site;

(59) ***Resting places: a definition***

Resting places are defined here as the areas essential to sustain an animal or group of animals when they are not active. For species that have a sessile stage, a resting place is defined as the site of attachment. Resting places will include structures created by animals to function as resting places. Resting places that are used regularly, either within or between years, must be protected even when not occupied.

(60) Resting places essential for survival may include one or more structures and habitat features required for:

1. thermoregulatory behaviour, e.g. *Lacerta agilis*;
2. resting, sleeping or recuperation, e.g. *Nyctalus leisleri* roosts;
3. hiding, protection or refuge e.g. *Macrothele calpeiana* burrows;
4. hibernation, e.g. bat dormitories; *Muscardinus avellanarius* hides.

Examples of breeding sites and resting places

	Breeding site	**Resting place**
Triturus cristatus *(see also*	All points of the definition apply to *T. cristatus*. The pond used for mating has individual male territories within which	During the terrestrial phase of its life, *T. cristatus* makes use of refuges such as stones and logs to hide under during the day. Similar refuges are used for periods of hibernation (in cold regions) or

[77] parturition – act of giving birth

dossier in Annex III)	courtship and mating take place. Eggs are laid singly on emergent plants and mature over a period of 12 – 18 days. Young larvae emerge and swim freely. The pond is therefore the breeding site.	summer dormancy (in hot regions). During the aquatic phase of their life, adults and larvae make use of submerged and emergent vegetation as a place of refuge. *T. cristatus* does not migrate but does disperse to adjacent pools. Healthy populations of *T. cristatus* utilise a series of pools and move between them, dispersing over a suitable interconnecting terrestrial habitat. Individuals may move approx. 1 km from their natal pool. The resting places for *T. cristatus* are thus the ponds they inhabit and the adjacent terrestrial habitat that supports them during the terrestrial part of their life cycle.
Nyctalus Leisleri	Males establish mating territories in tree holes in the autumn. Mating takes place in late autumn and females delay fertilisation until the spring. Young are born in a maternity roost and are dependent on their mother until they are weaned in the summer. Male territories and maternity roosts are therefore breeding sites. This strict application of the definition omits winter hibernation roosts, which are covered by "resting places" in Article 12(1)(d)	Hibernation *N. leisleri* is principally a tree-dwelling bat that hibernates over winter. In the winter they roost in tree-holes, buildings and occasionally caves and tunnels that provide a suitable microclimate. They will also utilise artificial roost boxes. Tree roosts have been found in parkland and urban areas as well as deciduous and coniferous woodland. These roosts must be in a relatively undisturbed position as bats roused from their torpor expend valuable energy reserves that cannot be replaced in winter. Day roosts during their active period (in spring) are also essential to all bat species, requiring a relatively undisturbed site during daylight hours, again in the cracks and crevasses of old trees and buildings. Depending on their location, a colony may use several summer roosts in turn, the larger of which may be used as maternity roosts, while males will become solitary or live in small groups. Migration *N. leisleri* is known to migrate in some parts of its European range: individuals ringed in Germany have been found to winter in France and Switzerland (National report 2003). Exact migration patterns are not known. However, other populations appear more sedentary with both maternity and winter roosts located in the same location. Roosts used by *N. leisleri* to rest during the day and to hibernate in are resting

		places.
Osmoderma eremita	All points of the definition apply to *O. eremita* This saproxylic species lives for the majority of its life within the rot-filled cavities of mature deciduous trees, usually of the *Quercus* species. A high proportion of individuals do not leave the natal tree. Mating takes place inside the substrate, and eggs are deposited deep within the substrate. The development from egg to beetle takes several years. Pupae develop in the autumn; adults emerge in the late spring / early summer. A series of mature and substantially hollow deciduous trees, usually *Quercus* sp. with heart rot, being used by the species is the breeding site for *O. eremita*.	Resting place and breeding site are in effect synonymous for *O. eremita*. This saproxylic species lives for the majority of its life within the rot-filled cavities of mature deciduous trees, usually of the *Quercus* species. A high proportion of individuals do not leave the natal tree. Mating takes place inside the substrate, and eggs are deposited deep within the substrate. The development from egg to beetle takes several years. Pupae develop in the autumn; adults emerge in the late spring / early summer. A series of mature and substantially hollow deciduous trees, usually *Quercus sp*. with heart rot, being used by the species is the resting place for *O. eremita*.
Maculinia arion	Points 1 to 5 of the definition apply to *M. arion*. *M. arion* requires a site with its larval food plant (*Thymus* species) and larval host and food source, *Myrmica* ant nests, to complete its development. Eggs are laid in the bud of a *Thymus* flower where they feed and develop. At a certain stage, the larva drops from the plant and attracts an ant to pick it up and take it into the ants nest. The larva continues its development within the nest, predating ant larvae. Pupation occurs within the nest and the adults emerge in early summer. The breeding sites for *M. arion* will be a site with *Thymus* sp. plants close to the site of adult emergence and the *Myrmica* ant nest where the larvae and pupae develop.	This species has no clearly defined resting places other than those needed for larval development and pupation. These life stages are covered by the definition of breeding site on the left.

(61) The prohibition of Article 12(1)(d) can consequently be seen as an aspect of habitat conservation, albeit covering only specific parts of the biological cycle. Other parts of the habitat, e.g. feeding areas, are not covered unless they coincide with breeding sites or resting places. An example of this is the butterfly species, *Parnassius apollo*, whose breeding sites coincide with locations where adults lay eggs and caterpillars live and feed (in Finland, stands of the plant species *Sedum telephium*). Consequently, a proper implementation of Article 12(1)(d) requires a good knowledge of the ecology (biology, habitats, population size, distribution and dynamics) and behaviour of the species (life cycle, organisation, interaction within and between species).

(62) **'Narrower' or 'wider' definition of breeding sites and resting places?** Discussions in the Article 12 working group and elsewhere have shown that the "framework" definition given above provides room for different interpretations. This is also because of the great variety of species listed in Annex IV. One frequent debate concerns whether breeding sites and resting places should be delimited in a narrower or a wider sense. For example, the wood-boring beetle *Osmoderma eremita* lives for the majority of its life within the rot-filled cavity of mature deciduous trees, usually of the *Quercus* species, and a high proportion of individuals do not leave the natal tree: so what is its breeding site and resting place? Is it the single tree or is it maybe that part of the woodland with trees inhabited by *O. eremita*? There are arguments for both views. From the Commission services' point of view the 'wider' definition seems to be more meaningful here in conservation terms, as it allows the woodland as a whole to be taken into account, linking both the protection measures under Article 12 and any derogations under Article 16 to the wider unit of the woodland and focusing on the continued functionality of that site as a whole for the species under consideration. Besides the advantage of a more holistic approach to species protection, this also allows more flexibility when considering impacts on such sites. In the Commission services' view, however, this approach seems more feasible for species with relatively **small home ranges**.

(63) The species dossier on *Triturus cristatus* (see box above) assumes overlapping breeding sites and resting places, stating that "*The functional unit needed to maintain a viable T. cristatus population thus comprises a series of ponds, the majority of which will be resting places and a proportion of which will be breeding sites, as well as a proportion of other areas which will be resting places set within a suitable terrestrial habitat*." This view of an ecological / functional unit suits a species with a small home range. The 'local' population of such a species could play a role in such a definition.

(64) The situation is different for **wide-ranging species**. The particular problem posed by wide-ranging species is already recognised in Article 4(1) of the Directive. Here, it may be advisable to restrict the definition of a breeding and resting site to a locality that can be clearly delimited: e.g. the roosts for bats or the holt of an otter.

(65) In the *Caretta caretta* case, the Court did not give any definition of breeding sites and resting places for species and followed a case-by-case/species-by-species approach. In the case in question, the Court emphasised the importance of Laganas Bay, which was (easily) identified as a "*vital breeding region for the protected species Caretta caretta*"[78]. This clearly identifiable area has the physical and biological factors essential for the reproduction of the species (marine area and nesting beaches). This prudent approach of the Court seems due to the fact that it is difficult to establish a general definition of "breeding sites" and "resting places" because of the wide range of differences in the ecological characteristics of species.

Summary: Breeding sites and resting places are to be strictly protected, because they are crucial to the life cycle of animals and are vital parts of a species' entire habitat. Article 12(1)(d) should therefore be understood as aiming to safeguard the continued ecological functionality of such sites and places, ensuring that they continue to provide all the elements needed by a specific animal to rest or to breed successfully. The protection applies all year round if these sites are used on a regular basis.

[78] Paragraph 27 of the judgment.

II.3.4.c) Concept of "deterioration"

(66) Neither Article 12(1)(d) nor Article 1 of Directive 92/43/EEC contains a definition of the concept of "deterioration", although this term is also present in other provisions of the Directive (e.g. Article 6).

(67) In general, deterioration can be defined as physical degradation affecting a habitat, or a breeding site or resting place. In contrast to destruction, such degradation may occur slowly and **gradually reduce the functionality** of the site or place. Deterioration may therefore not immediately lead to a loss of functionality of a site/place, but would adversely affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss. Because of the wide variety of species listed in Annex IV(a), the assessment of deterioration of a particular breeding site or resting place must be carried out on a case-by-case basis. Again, deterioration or destruction that is the result of natural causes (not human-caused) or unforeseeable events does not fall under the scope of Article 12(1)(d). Neither does the deterioration of a site due to natural succession as a consequence of the abandonment of certain human land-uses or the abandonment of a building.

(68) When trying to identify and avoid the causes that lead to the deterioration or even loss of breeding/resting functionality, it is important to establish a clear **cause-effect relationship** between one or more human-induced activities and the deterioration/destruction of a breeding site or resting place. Obviously, the causes for deterioration can be located inside or outside, or possibly even at some distance from, the breeding site or resting place under consideration. Such causes/activities then need to be controlled in such a way that deterioration and destruction can be avoided. Only a clear view of the causes will enable the authorities to act accordingly and avoid further or future deterioration or destruction.

(68a) In cases where the deterioration/destruction of a breeding site or resting place is due to diffuse causes, it will probably be difficult to establish a clear cause-effect relationship with a human-induced activity. For instance, where there is a gradual deterioration (eutrophication) of water bodies due to a complexity of sources in terms of time and origin, it will be difficult to establish a clear cause-effect relationship with agricultural activities. In these situations, it is very unlikely that an infringement of Article 12 can be proven, in particular if the activity complies with obligations arising from other relevant EC environmental legislation, e.g. the Nitrates Directive.

(69) Focusing on the functionality of breeding sites and resting places and the establishment of a cause-effect relationship also gives guidance on the matter of divergences between **different linguistic versions** regarding the term "deterioration". The terms used in the German, Danish, Dutch and Swedish versions of Article 12(1)(d)[79] correspond rather more to the word "damage" than "deterioration". Nonetheless, in Article 6(2) of the Directive, the German version uses a word which corresponds slightly better to "*deterioration*". Given this discrepancy between different language versions, it should be recalled that the Court has on earlier occasions stressed the necessity for uniform application and ruled out the possibility of considering one single version of a text in isolation. Hence, the Court holds that such provisions must be interpreted on the basis of the actual intention of the author and the aim pursued in the light of all language versions[80].

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[79] The German, Danish, Dutch and Swedish versions of Article 12.1(d) employ the terms *"Beschädigung", "beskadigelse", "beschadiging"* and *"skada"* (damage), respectively.

[80] See the following judgments: 12 November 1969, Stauder, case 29/69, ECR 1969 p.419, paragraph 3; judgment of 27 October 1977, Bouchereau, case 30/77, ECR 1977 p.1999, paragraph 14; judgment of 12 July

(70) In order to define the limits of what one can regard as "deterioration", a scrupulous analysis of Article 12(1)(d) as a whole is indispensable. The purpose of Article 12 is to introduce a system of strict protection for Annex IV(a) species. The explicit protection of breeding sites and resting places in addition to the protection of the species as such, without the qualification "deliberate", demonstrates the importance granted to these sites by the Directive. This specific protection against the deterioration or destruction of breeding sites and resting places is self-evidently linked with the essential function of these sites, which must continue to provide all the elements required by a specific animal (or group of animals) to breed or to rest.

(71) Examples of deterioration under Article 12(1)(d):

- (Repeated) filling in of parts of spawning grounds for the crested newt (*Triturus cristatus*), thereby reducing (in sum) its function as a breeding site.
- Deterioration in the function of parts of a hamster burrow as a breeding and resting place as a result of deep ploughing.
- Hydraulic engineering step by step in a river that is a resting and breeding site for *Acipenser sturio*, so as to gradually reduce the functionality of the site.
- Gradual negative impact on a water soldier (*Stratiotes aloides*) population, which is an egg-laying site for the green hawker (*Aeshna viridis*), due to a point-source discharge into the water body.

Summary: Deterioration can be defined as physical degradation affecting a breeding site or resting place. In contrast to destruction, such degradation might also occur slowly and gradually reduce the functionality of the site or place. If it is possible to establish a clear cause-effect relationship between one or more human-induced activities and the deterioration of a breeding site or resting place, Article 12(1)(d) applies.

II.3.4.d) Measures to ensure the continued ecological functionality of breeding sites or resting places

(72) For cases where projects or activities may have an impact on breeding sites / resting places the distinction between measures under Article 12(1)(d) and those that come under Article 16 needs to be examined. In particular, to what extent are measures that ensure the continued ecological functionality of a concrete breeding site/resting place possible, thereby ensuring compliance with Article 12 (and not requiring derogations under Article 16). The decisive question when drawing the line is: "Does or will a breeding site / resting place suffer from deterioration or destruction (even if only temporarily) due to a certain project/activity?" If the answer is "yes", Article 16 needs to be applied; if the answer is "no", it is reasonable to assume that Article 12 is complied with.

(73) What are "measures that ensure the continued ecological functionality of a breeding site/resting place" (in the following "CEF measures")?

(74) First of all, they must have the character of mitigation measures. Mitigation measures aim at minimising or even cancelling out the negative impact of an activity through a range of preventive actions. However, they may also go beyond this and include actions that actively improve or manage a certain breeding site / resting place so that it does not — at any time — suffer from reduced or lost ecological functionality. This could include e.g. enlarging the site or creating new habitats in, or in direct functional relation to, a breeding

1979, Wörsdorfer, case 9/79, ECR 1979 p.2717, paragraph 6; judgment of 7 July 1988, Moksel, Case 55/87, ECR 1988, p.3845, paragraph 15.

site or resting place, as a counterweight to the potential loss of parts or functions of the site. The ecological functionality of such measures for the species in question would of course have to be clearly demonstrated.

(75) CEF measures may be an option when an activity can affect parts of a breeding site or resting place. If the breeding site or resting place, as a result of such measures, will still remain at least the same size (or greater) and retain the same quality (or better) for the species in question, there will be no deterioration in the function, quality or integrity of the site and the activity can be undertaken with no need for a derogation under Article 16. It is crucial that the continued ecological functionality of the site is maintained or improved. Therefore, the monitoring of CEF measures is important. An interesting approach in this regard is outlined in a Dutch publication entitled "Effective protection of Annex IV species of the EU Habitats Directive: The landscape approach"[81].

(76) In accordance with the precautionary principle, if the measures proposed do not guarantee the continued ecological functionality of a site, they should not be considered under Article 12(1)(d). There must be a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction. The assessment of the probability of success must be made on the basis of objective information and in the light of the characteristics and specific environmental conditions of the site concerned. In addition, the use of CEF measures has to take into account the conservation status of the species concerned. For example, in the case of rare species with an unfavourable conservation status, there must be a higher degree of certainty that the measures will work as intended than in the case of more common species with a favourable conservation status.

(77) CEF measures could be an integral part of the specifications of an activity or project; they could also form part of preventive measures under a strict protection system to comply with Article 12(1)(d). Such measures can be used only in situations where an authorisation or planning regime with formal procedures is in place, and where the competent authorities are able to assess whether the measures taken to preserve the "breeding" or "resting" functionality of a site are sufficient.

(78) Based on the definition of breeding sites and resting places (see chapter II.3.4.b), the approach outlined above seems especially relevant when dealing with animals with small home ranges, where breeding sites / resting places are delimited as "functional units" (i.e. the wider approach is used). Here, it should be stressed that a Member State must be **consistent in its definition** of breeding sites and resting places for a given species and consequently in providing for their protection across its territory.

(79) CEF measures are different from compensatory measures in the strict sense. Compensation measures are independent of an activity/project and aim to compensate for or offset specific negative effects on a species. By definition, **compensatory measures thus imply the deterioration or destruction of a breeding site or resting place** (the effect compensated for). This is not the case with CEF measures, which ensure that the continued ecological functionality of the breeding site/resting place remains fully intact (in quantitative and qualitative terms). Consequently, where there is deterioration or destruction of a breeding site or resting place, a derogation under Article 16 is always necessary. Chapter III.2.3.b deals with the use of compensation measures under Article 16.

[81] Alterra report n° 590, Wageningen, September 2002 (available in English)

Summary: Measures that ensure the continued ecological functionality of a breeding site/resting place in the case of projects/activities with a possible impact on such sites/places must have the character of mitigation measures (i.e. measures minimising or even cancelling out the negative impact), but may also include measures that actively improve or manage a certain breeding site / resting place in such a way that it does not — at any time — suffer from a reduction or loss of ecological functionality. As long as this precondition is fulfilled and such processes are controlled and monitored by the competent authorities, there is no need for recourse to Article 16.

II.3.5. Keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild

(80) For Annex IV(a) species, Article 12(2) states that: "Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented." Article 12(3) stipulates that the prohibitions in Article 12(1)(a) and (b) and Article 12(2) apply to all life stages of Annex IV(a) species.

II.3.6. Incidental capture and killing of Annex IV(a) species

(81) Article 12(4) requires the establishment of a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States have to undertake further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

(82) It should be stressed that Article 12(4) could be of relevance in defining the requirements of both a "strict protection system" and an "appropriate surveillance system". A system of strict protection can also make provision for recording the incidental capture and killing of species (for Article 12(4)). In this context, the strict protection measures may ultimately need to include conservation measures required to offset the negative impact of incidental capture and killing.

(83) An example for the application of this provision is the monitoring of the by-catch of Cetaceans in the fisheries sector and the technical measures taken to avoid such incidents (e.g. attachment of pingers to fishing nets). Another example is the monitoring of bat deaths in wind turbines or roadkills.

III. ARTICLE 16

Text of Article 16
1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b): *(a) in the interest of protecting wild fauna and flora and conserving natural habitats;* *(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;* *(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;* *(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;* *(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.* *2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.* *3. The reports shall specify: (a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used; (b) the means, devices or methods authorised for the capture or killing of animal species and the reasons for their use; (c) the circumstances of when and where such derogations are granted; (d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task; (e) the supervisory measures used and the results obtained.*

(1) The system of strict protection under Article 12 may be bypassed through derogations under Article 16 of the Directive. A number of activities that would normally be prohibited under Article 12 can be permitted by means of Article 16. In practice, consideration of the application of Article 12 will often arise in conjunction with a derogation argued for under Article 16.

(2) The possibilities in Article 16 for derogating from the restrictions and prohibitions in Articles 12, 13, 14 and 15(a) and (b) are limited. Derogations not only must be justified in relation to the overall aim of the Directive, but are subject to three specific conditions.

(3) The failure to respect any one of these conditions may render a derogation invalid. The competent national and other authorities or conservation bodies must therefore carefully examine all those general and specific requirements before granting a derogation.

(4) Before addressing the provisions of Article 16 in detail, it is worth underlining that the ECJ has already developed a quite extensive case law on derogations under Article 9 of Directive 79/409/EEC on the conservation of wild birds. Given the similarity between the derogation systems established by the two Directives, the reasoning of those judgments is of great importance and can be applied to Article 16[82].

III.1. General legal considerations

III.1.1 Obligation to ensure full, clear and precise transposition of Article 16

(5) The transposition into national law of Article 16 should guarantee the implementation of the derogations by the competent national authorities in an appropriate manner. It should be recalled that a Directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. However, the Court has set limits to this margin of manoeuvre for Member States when they transpose a Directive. Hence, the national transposition of the derogation system under Article 16 has to comply with some basic legal principles of EC law and must meet a number of requirements.

(6) According to ECJ case law[83], *"the transposition of a Directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. A general legal context may, depending on the content of the Directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the Directive in a sufficiently clear and precise manner."* Mere administrative practices, which, by their nature, are alterable at will by the authorities and which are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty and the Directive[84]. Accordingly, the application of the requirements of Article 16 in practice is not a substitute for proper formal transposition.

(7) Moreover, the provisions of the Directives must be implemented with unquestionable binding force, and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty[85]. The Court was more explicit in Case C-339/87[86], which relates to derogations under Article 9 of Directive 79/409/EEC. The Court stated that "*the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories.*" In its judgment of 20 October 2005, the Court applied this case law to the Habitats Directive and observed that "*in the context of the Habitats Directive, which lays down complex and*

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[82] The third chapter of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds", which examines the derogation system under Article 9 of the Birds Directive, is a useful reference for the understanding of Article 16. The document is available on the website http://www.europa.eu.int/comm/environment/nature/home.htm.

[83] See the judgment of 28 February 1991, Commission v Germany, Case 131/88, ECR p.825.

[84] For example, see the judgment of 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001, paragraph 10.

[85] See in particular the following judgments: 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607, paragraphs 18 and 24; 19 May 1999, Commission v France, Case C-225/97, ECR p.3011, paragraph 37; 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007, paragraph 32; 13 February 2003, Commission v Luxembourg, Case C-75/01, paragraph 28, ECR p.1585, paragraphs 87-88; 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 27.

[86] Judgment of 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851, paragraph 28.

technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise"[87].

(8) Finally, when transposing Article 16, Member States must respect the meaning of terms and concepts used by the Directive with the aim of ensuring uniformity in its interpretation and application[88]. This also implies that national transposition measures should guarantee the full application of the Directive, without modifying its terms, without selectively applying its provisions and without adding supplementary conditions or derogations not provided for by the Directive[89]. For instance, in Case C-6/04[90], the Court found that a derogation authorising acts that lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, provided such acts are lawful and cannot be reasonably avoided, *"is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof"*. In Case C-98/03[91], the Court found that German law (paragraph 43(4) of the BNatSchG 2002) was not compatible with Article 16. The German provision provided as the sole condition for derogation that animals, including their nesting or incubation sites, habitat or resting places, and plant species under particular protection must not be subject to deliberate harm. According to the Court, "*even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 of the Directive subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16 of the Directive*". In case C-183/05[92], the Court considered that the regime of derogations under Irish legislation (Section 23(7)(b) of the Wildlife Act) was inconsistent with Articles 12 and 16 of Directive 92/43/CEE. The Irish provision provided that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence. According to the Court, not only this provisions does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not, but it goes beyond what is provided for in Article 16 of Directive 92/43, since the latter determines, in an exhaustive manner, the conditions under which derogations may be granted.

Summary: Article 16 must be fully and formally transposed with unquestionable binding force. The criteria to be met before granting a derogation must be reproduced in specific national provisions. National transposition measures should guarantee the full application of Article 16, without modifying its terms, without selectively applying its provisions and without adding supplementary conditions or derogations not provided for by the Directive. Mere administrative practices are not sufficient.

87 Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 25-26.

88 For instance see the judgment of 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461.

89 Judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

90 Judgment of 20 October 2005, Commission v UK, Case C-6/04, paragraphs 109-113.

91 Judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 57-62.

92 Judgement of 11 January 2007, Commission v Ireland, Case C-183/05, not yet published in the ECR, paragraphs 47-49.

III.1.2. Appropriate overall application of derogations

(9) Primarily, the national authorities responsible for applying derogations need to take into consideration that, under the case law of the Court of Justice[93], derogations must be interpreted and implemented restrictively to avoid undermining the main provisions of a Directive. This has been also confirmed for the Habitats Directive[94]. In the case of Directive 79/409/EEC, the Court has on several occasions underlined the need for strictness when implementing Article 9 derogations. Given that Article 9 has close parallels with Article 16 in terms of content, it can be reasonably assumed that the Court would take a similarly strict approach regarding the interpretation and implementation of Article 16.

(10) For derogations under Article 9 of Directive 79/409/EEC, the Court[95] has already noted that although Article 9 authorises wide derogations from the general system of protection, its application must deal with precise requirements and specific situations.

(11) As regards measures to be taken under Article 12, the need to implement appropriate and effective measures in a sufficient and verifiable manner has been underlined. The same approach can be followed for the derogations scheme. If used correctly, this ensures that granting derogations does not go against the objective of the Directive[96]. **Applying proportionality does not overrule or marginalise any of the conditions applying to the derogation scheme but can <u>adapt</u> their application in the light of the overall objective of the Directive. As a general rule, the severity of any of the conditions or "tests" will increase with the severity of the impact of a derogation on a species/population**.

(12) Allowing a valid derogation presupposes that the competent national authorities have ensured that all the conditions applying to all the derogations granted have been met and also that the derogations in their totality do not produce effects that go against the objectives of Article 12 and the Directive as a whole. Consequently, applying a proportional approach to the use of derogations needs careful consideration and framing at national and/or biogeographic level within a Member State. The authority with the greatest territorial overview in a Member State (and, if necessary, also a view extending beyond borders in the case of transboundary populations) thus needs to guide this proportional approach, even though it may then be applied in practice at regional or local level[97].

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[93] See the following judgments of the ECJ: judgment of 8 July 1987, Commission v Italian Republic, Case 262/85, ECR p.3073; judgment 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223; judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne, Case C-10/96, ECR p.6775.

[94] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 111 (*"Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively"*).

[95] See in particular: judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 7; judgment of 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073, paragraph 7; judgment of 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223, paragraph 21.

[96] It should be recalled that the Court observed that *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16"* (judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112).

[97] This of course does not exclude the possibility that, depending on the organisational structure in a Member State, regional or local authorities will also be in a position to consider the effects of derogations beyond their own territories.

Summary: Derogation provisions need to be interpreted narrowly: they must deal with precise requirements and specific situations. It is up to the competent authority with the greatest territorial overview to ensure that the totality of derogations in a Member State does not lead to effects that go against the objectives of the Directive.

III.2. A carefully controlled system for granting derogations: the 3 tests

(13) Article 16 sets three preconditions, all of which must be complied with before granting a derogation: 1) the demonstration of one or more of the reasons listed in Article 16(1) (a)-(e), 2) the absence of a satisfactory alternative and 3) the assurance that a derogation is not detrimental to the maintenance of populations at a favourable conservation status. Before the second and third preconditions can be examined, precondition 1 must be met: in practical terms, there is little point examining the issue of satisfactory alternatives and impact on conservation status if the actions concerned by the derogation do not come under Article 16(1) (a)-(e).

III.2.1. Demonstration of one of the reasons under Article 16(1)(a) to (e) (Test 1)

(14) Derogations are granted because there is a specific problem or situation which needs to be tackled. Derogations must be based on at least one of the reasons listed in Article 16(1)(a), (b), (c), (d) and (e). Specific derogations not justified by any of these reasons (e.g. a provision exempting acts that lead to the killing of protected species or to the deterioration or destruction of their breeding and resting places, provided they are the result of a lawful operation that cannot be reasonably avoided) are contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16[98]. When the competent national authorities are called upon to grant a derogation, they need to explain the particular circumstances justifying the choice of a reason under Article 16(1)(a) to (e) and verify that the specific conditions are met[99].

(a) In the interest of protecting wild fauna and flora and conserving natural habitats

(15) The first reason for granting a derogation is the protection of wild flora and fauna and the conservation of natural habitats. Article 16(1)(a) specifies neither the types of fauna, flora or natural habitats covered nor the types of threats. In the light of the general objective of the Directive, vulnerable, rare, endangered or endemic species and natural habitats (as for example listed in the annexes to the Habitats Directive) are more likely to be concerned by this reason, which would effectively aim to reduce the negative impact of a given species on them. It would be unusual to prioritise the interests of a common and thriving species over the interests of a species meeting the criteria of Article 1(c) and (g) of the Directive. However, one may not exclude other species and habitats completely from consideration.

(b) To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property

[98] See also the Court judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraphs 109-113).

[99] See also the Order of 19 December 2006 (Commission v Italy, Case C-503/06 R).

(16) The second reason for granting a derogation is to prevent serious damage in particular to crops, livestock, forests, fisheries, water, and other types of property. This derogation takes into account economic interests, and, as noted, the damage to be prevented has to be serious.

(17) It is worth noting that the list is not exhaustive and other damaging situations may be covered. Moreover, property interests are also covered, which is not the case in Directive 79/409/EEC (the Birds Directive)[100].

(18) With regard to Article 9 of Directive 79/409/EEC, the Court noted that: "The aim of this provision of the Directive is not to prevent the threat of minor damage. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive."[101] It follows that mere nuisance and normal business risk are not covered."

(19) As this provision is intended to *prevent* serious damage, it is not necessary that the serious damage itself has already occurred; it is sufficient that such serious damage is likely to occur.

(c) In the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment

(20) The third reason for granting a derogation covers "imperative reasons of overriding public interest." This concept is not defined in the Directive but the paragraph mentions public interest reasons such as public health, public safety, reasons of social or economic nature, reasons with beneficial consequences of primary importance for the environment, and also covers other reasons not mentioned, as the list is not exhaustive.

(21) In other fields of Community law where similar concepts appear, for instance the free movement of goods, the European Court of Justice has held that overriding requirements or public interest reasons can justify national measures restricting the principle of freedom of movement: it has recognised public health, environmental protection, and the pursuit of legitimate goals of economic and social policy as such imperative requirements.

(22) The same concept also appears in Article 6(4) of the Directive. So far, the Court has not given clear indications for the interpretation of this specific concept. The Commission's analysis in the Article 6 guidance document[102] is pertinent for a better understanding of the concept and may be recalled here.

(23) Firstly, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects that are entirely in the interest of companies or individuals would generally not be considered as covered.

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[100] According to Article 9(1)(a), "Member states may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution,… to prevent serious damage to crops, livestock, forests , fisheries and water."

[101] Judgment of 8 July 1987, Commission v Belgium, Case C-247/85, ECR p.3029, paragraph 56.

[102] "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1, also available on the website http://www.europa.eu.int. See, in particular, section 5.3.2.

(24) Secondly, the "overriding" character of this public interest must be underlined. This qualification implies that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive. Careful balancing of interests is needed here. In this context, it also seems reasonable to assume that a public interest is in most cases likely to be overriding only if it is a long-term interest: short-term interests that would only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation.

(d) For the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants

(25) Such derogations could for example concern the marking of certain individuals of a species for research purposes (e.g. radio collars) in order to understand their behaviour better, or for conservation projects aiming at the reintroduction of species. Research projects must obviously also be subject to consideration of alternative methods if they are likely to have a negative impact on the population concerned.

(e) To allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities

(26) The fifth and last reason for derogation concerns the taking or keeping of certain specimens of the species listed in Annex IV. This reason is subject to several conditions that must be respected[103]. This is why its application in practice seems exceptional:

- "*limited numbers*"

(27) This criterion is not an absolute criterion, but has to be compared to the population level of a species and is directly linked with its conservation status[104]. Therefore it is essential to determine a threshold or quantity below which the derogation can be granted. This threshold/quantity must be fixed taking into account the conservation objectives of the Directive and the need to ensure a system of strict protection for the species concerned.

(28) Derogations should not be granted where there is a risk that the derogation might have a significant negative effect on the population concerned in quantitative or in qualitative (e.g. a negative impact on population structure) terms. In Case C-182/02 (which concerned derogations authorised under Article 9 of Directive 79/409/EEC)[105], the Court confirmed that the condition specifying small numbers *"cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."* In Case C-344/03, which concerns the derogations granted in Finland for the hunting of bird species, the Court used the criteria of the ORNIS Committee (1% of the

[103] Paragraphs 3.5.20-3.5.48 of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds" contains useful information especially as regards the concept of limited/small numbers.

[104] In a case regarding Article 9 of Directive 79/409/EEC (judgment of 27 April 1988, Commission v France, Case C-252/85, ECR p.2243), the Court stated that: "It is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned."

[105] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.

total annual mortality rate of the populations in question) in order to assess whether the limited numbers requirement was complied with[106].

(29) Obviously, if it can be clearly demonstrated that such derogations will be beneficial to the conservation status of the species or population concerned, there is no obstacle to granting them. However, the Commission services consider that an appropriate plan for the conservation of the species, aiming at restoring favourable conservation status, should be the recommended way of demonstrating compliance with this criterion.

- "*under strictly supervised conditions, on a selective basis and to a limited extent*"

(30) This qualification clearly demonstrates that the EC legislator intended significant constraints.

(31) The principle of strictly supervised conditions implies that any use of this type of derogation must involve clear authorisations that can be related to particular individuals or groups of individuals, places, times and quantities. The term "to a limited extent" supports this interpretation. It also implies the need for efficient enforcement of such derogations to ensure compliance.

(32) The principle of selectivity in turn means that the activity in question must be highly specific in its effect, targeting one species (or group of closely related species), to the exclusion of all others. It also implies that certain technical aspects of the method used should verifiably demonstrate selectivity. There is a need to come to a view on methods that are themselves not entirely selective unless combined with the skills and/or experience of the operator.

(33) From the above, it follows that the implementation of this provision would involve some management, and one way of delivering this would be through a species management/conservation plan. Such plans aim at the long-term conservation of a species and contain measures mainly concerning the viability of the population and the natural range and habitats of the species. Derogations could be provided for in the plan and be part of the regulation of the species population, without this affecting favourable conservation status. Thus, a species management/conservation plan could be an appropriate tool for the use of derogations under Article 16(1)(e), as it is the best way of demonstrating compliance with the strict requirements of Article 16.

Example: Latvian Lynx management plan

The plan was prepared by national experts and confirmed by order of the Minister of Environment and Regional Development in 2002. The entire text is available at www.dap.gov.lv/public/files_uploaded/sugu_plani/lynx_lynx_mp.pdf.

The plan forms the basis for a long-term strategy for the conservation and management of the lynx in Latvia, including strictly limited harvesting of the population by hunting. It takes a long-term view, where the lynx in Latvia currently has its best distribution status within the last 150 years and is considered to have a favourable conservation status. Limited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception. The practice thus fully complies with Article 16(1)(e) of the Habitats Directive.

[106] See paragraphs 47-59 of the judgment of 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033.

The following main requirements are imposed to prevent hunting from affecting favourable conservation status:

- The goal is not only to preserve the size and range of population but also to maintain the environmental capacity for and the natural ecological functions of the species in its ecosystem. This allows applications for scientific research providing important data for conservation.
- The season for lynx hunting is adapted to the species' biological requirements.
- Samples for scientific research have to be taken from the harvested animals to monitor the sex-age structure, reproduction rate, diet and health of the population in order to avoid any negative impact on the population structure.
- The annual assessment of population size and distribution range must be continued.
- Annual hunting quotas have to be set considering the monitoring data.
- Public education and involvement must be promoted. Hunters are to be involved in collecting research samples and subsequently informed of the results obtained.

The management plan has been implemented and the national legislation amended accordingly. The authority responsible for supervising management is the State Forest Service (www.vmd.gov.lv).

Summary: the first consideration when envisaging a derogation should be whether it is justified by one of the reasons given under 16(1) (a) to (e). The type and weight of the reason must also be seen in relation to the interest of the protected species in the concrete and specific circumstances in question in order to judge the appropriateness of a derogation.

III.2.2. Absence of a satisfactory alternative (Test 2)

(34) Under Article 16(1), Member States must be certain that "there is no satisfactory alternative" before allowing a derogation. As with Article 6(4) of Directive 92/43/EEC and Article 9(1) of Directive 79/409/EEC[107], this is an overarching condition that all derogations must satisfy.

(35) In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons and evaluate those alternative solutions. Nevertheless, this discretionary power is subject to several constraints.

(36) Based on the case law of the Court on derogations under Article 9 of Directive 79/409/EEC[108], especially in Case C-10/96, an analysis of whether there is "no other satisfactory alternative" can be considered as having three parts: What is the problem or specific situation that needs to be addressed? Are there any other solutions? If so, will these resolve the problem or specific situation for which the derogation is sought? The following remarks are based on the case law of the Court on Article 9 of the Birds Directive and apply the approach adopted by the Court to Article 16.

[107] For this condition, see also section 3.4 of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds".

[108] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, ECR p.6775; judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

(37) The analysis of whether "there is no other satisfactory alternative" presumes that a specific problem or situation exists and needs to be tackled. The competent national authorities are called upon to solve this problem or situation by choosing, among the possible alternatives, the most appropriate that will ensure the best protection of the species while solving the problem/situation. To ensure the strict protection of species, these alternatives must be assessed with regard to the prohibitions listed in Article 12. They could involve alternative locations (or routes), different development scales or designs, or alternative activities, processes or methods.

(38) In any case, recourse to Article 16 derogations must be a **last resort**[109]**.** The essential common characteristic of any derogation system is that it has to yield to other requirements laid down in the Directive in the interest of conservation.

(39) The same strict approach applies to the interpretation of the term "satisfactory". Given the exceptional nature of the derogation regime and the duty of Member States under Article 10 of the EC Treaty to facilitate the achievement of the tasks of the Community, a derogation would only be justified on the basis of an objective demonstration that there is no other satisfactory solution. According to the Advocate General in case C-10/96, this term "*may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted.*"

(40) As regards the factors for evaluating the existence of another satisfactory solution, it is recognised that this is a matter for the national courts. The appraisal of whether an alternative is satisfactory or not, in a given situation, must be founded on objectively verifiable factors, such as scientific and technical considerations[110]. In addition, the solution finally selected, even if it involves a derogation, must be objectively limited to the extent necessary to resolve the specific problem or situation[111].

(41) Evidently, the requirement to consider seriously other alternatives is of primary importance. The discretionary power of Member States is limited, and where another solution exists, any arguments that it is not "satisfactory" will need to be convincing. Moreover, it should be stressed that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation.

(42) The judgment in Case C-182/02 illustrates the strict approach adopted by the Court for derogations under the Birds Directive. In order to determine whether or not a satisfactory solution existed, the Court assessed the "need" and "purpose" of the

[109] See paragraph 33 of the Advocate General's Opinion in Case C-10/96.
[110] See also paragraph 39 of the Advocate General's Opinion in Case C-10/96.
[111] See paragraphs 21-22 and 26-27 of the judgment.

derogation[112]. This judgment confirms the importance of demonstrating that there are compelling reasons to justify a derogation[113].

Managing otter in the fish pond area "Oberes Waldviertel", Austria

While the otter was historically very widespread in Austria, including the Alps, it became rare and nearly extinct during the 19th and early 20th century, most probably due to direct persecution and habitat loss. Since 1980, there has been a slow but steady recovery with the species spreading from its core (relict) populations in the region of Waldviertel (near the border to the Czech Republic) and the Pannonian basin in Burgenland/Styria. The Waldviertel region is known for its fish ponds, mostly for breeding carp. As otters cause damage to these ponds, especially in winter, the need for counter-measures became obvious early on, in the 1980s/90s. The killing or relocation of animals was not an option, however. As the area was (and still is) a core centre of the fragmented Austrian population, an alternative was envisaged: the regional government established a damage compensation scheme for fish pond owners and also financed measures to avoid damage (e.g. electric fences). With these measures, damage to the ponds could be kept down to a certain level and the compensation made the remaining damage acceptable to fish pond owners.

Summary: The second consideration is whether there is a satisfactory alternative to the derogation sought, i.e. whether the problem the authority is faced with can be solved in a way that does not involve a derogation.

III.2.3 Impact of a derogation on conservation status (Test 3)

(43) According to Article 16(1), derogations must not be "*detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*". The implementation of this provision should include a two-step assessment: firstly, determination of the conservation status of the populations of a species in its natural range within the Member State concerned (and possibly beyond national boundaries if the populations are shared with neighbouring countries) and, secondly, evaluation of the impact of the derogation on the population or populations concerned. The assessment is thus at two levels: the level of "natural range" and the level of "population". For the sake of clarity, "population" is defined here as a group of individuals of the same species that live in a geographic area at the same time and are (potentially) interbreeding (i.e. sharing a common gene pool). As for the definition of "natural range" and for background on the concept of "favourable conservation status", please see chapter I.2.2.

[112] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02. According to paragraph 16, the condition requiring the absence of a satisfactory alternative "cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection (see, to that effect, Commission v Italy, paragraph 39). There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."

[113] See also paragraphs 18-46 of the judgment of 15 December 2005, Commission v Finland, Case C-344/03, not yet published.

III.2.3.a) Scale of assessment

(44) One may ask what level is best considered for evaluating whether the impact of a derogation is detrimental, neutral or even positive for the conservation status of a species.

(45) The conservation status of a species must ultimately be considered across its natural range, according to Article 1(i). In discussions with the Habitats Committee, it was therefore agreed that, for the purpose of reporting under Article 17 (in connection with Article 11), conservation status should be assessed at biogeographic level in each Member State. This would ultimately allow information to be aggregated for complete biogeographic regions across the EU. The conservation status of a species within the relevant biogeographic region within a Member State should be important information to be used when considering a derogation.

(46) However, an appropriate **assessment of the impact** of a specific derogation will in many cases, if not most, have to be at a lower level than the biogeographic region in order be meaningful in ecological terms. A useful level in this regard could be the (local) population. The wording of Article 16, which points to *"populations of the species concerned"*, confirms this interpretation. The approach of course needs to be adapted to the species in question: the killing of individuals of a wide-ranging large carnivore will need to be evaluated at population level (transboundary where applicable[114]), while the impact of the destruction of a breeding site in a rather fragmented amphibian habitat may be better evaluated on site or at meta-population level[115]. It should be kept in mind that, according to established case law, derogations must be applied appropriately in order to deal with precise requirements and specific situations[116]. It follows that assessments at lower levels are normally essential, since the derogations have to deal with specific problems and provide suitable solutions. Such an assessment at a lower level would then have to be seen in relation to the situation on a larger scale (e.g. biogeographic or national), for a complete picture of the situation.

Summary: The overall conservation status of a species in a Member State should, in line with the harmonised reporting framework agreed for Article 17 (in relation to Article 11) of the Directive, be evaluated at biogeographic level in each Member State. An appropriate assessment of the impact of a specific derogation will normally have to be at a lower level (e.g. site, population level) in order to be meaningful in the specific context of the derogation.

III.2.3.b) Derogations and conservation status

(47) To begin with, it must be acknowledged that neither the granting of derogations for species in an unfavourable conservation status nor the use of compensation measures is explicitly provided for in the Directive. However, by interpreting and implementing the provision in 16(1) in a way that puts the focus on reaching the overall objective of favourable conservation status, we believe that both concepts may be incorporated in the

[114] Regarding species with transboundary populations or species that migrate across the frontiers of the EU, the overall natural range of these species, including the migration zones outside the EU, should be considered where possible or feasible.

[115] A metapopulation consists of a group of spatially separated populations of the same species which interact at some level. The term metapopulation was coined by Richard Levins in 1969 to describe a model of population dynamics of insect pests in agricultural fields, but the idea has been most broadly applied to species in naturally or artificially fragmented habitats.

[116] See in particular: judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 7; judgment of 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073, paragraph 7; judgment of 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223, paragraph 21.

interpretation under the condition that reaching this objective is not compromised in any way.

(48) Obviously, the less favourable the conservation status and trends, the less likely that the granting of derogations would be justified apart from under the most exceptional circumstances. It is also clear that the **application of a proportional approach** to derogations is **only possible within a clear and well-developed framework of species conservation measures**. Again (as with protection measures), the conservation status of a species (at biogeographic and population level) is the core concept for a flexible and proportional approach to the use of derogations. It is therefore important not only to consider the present conservation status, but also to examine how it is developing.

(49) Two things have to be distinguished in applying "Test 3":

1. What is the actual conservation status of the affected species — at biogeographic level and at (local) population level?

2. What is the impact of the derogation as such?

(50) Considering the **first question,** it should be recognised that the conservation status of the (local) population of a species in a certain geographical area might well be different from the overall conservation status of populations in the biogeographic region in the Member State (or even the range). Both situations should be considered and taken into account in any decision.

(51) As for the **second question**, it is generally the rule that no derogation can be granted if it has a **detrimental** effect on the conservation status or the attainment of favourable conservation status for a species at all levels. In other words, if a derogation is likely to have a significantly negative effect on the population concerned (or the prospects of this population) or at biogeographical level within a Member State, the competent authority should not allow it. The net result of a derogation should be neutral or positive for a species[117].

(52) Where the population concerned within a biogeographic region in a Member State is healthy and unlikely to suffer detrimental effects from a derogation, even if the picture at biogeographic level is less good, the derogation would naturally be easier to justify than when the population concerned is already in a bad state and declining. In such cases where the conservation status is different at the different levels assessed, the situation at population level should be considered first, and the impact of the derogation on the population should then be examined in the context of the biogeographic region. In this way, a variety of situations and conservation interests can be taken into account.

(53) In line with the proportionate approach, derogations can be more easily justified if

a) requisite (appropriate, effective and verifiable) measures are established and implemented effectively in a Member State for a species to ensure strict protection and to aim for favourable conservation status

b) the derogation does not work against, render ineffective or neutralise the requisite measures

[117] In responses to human health disasters, however, the net result of a derogation may be negative for the species.

c) in the case of the deterioration or destruction of breeding sites and resting places: sufficient compensatory measures (see below) are taken to offset the impact at population and biogeographic levels

d) the impact of the derogation and the effectiveness of compensation measures are closely monitored and lessons are drawn for the future

(54) One recommended way of implementing a flexible and proportional derogation system as part of a strict protection system is the preparation of **species conservation plans** (even though not required under the Directive). Such plans could, besides informing and guiding the requisite measures under Article 12, also give guidance on the implementation of derogation schemes on a species-by-species basis or at transboundary population level, where applicable (guidance on assessing and monitoring the impact of derogations, possible compensation measures, etc.). Such plans would naturally have to be adapted regularly in the light of improved knowledge and monitoring results. These plans could be considered as a tool for demonstrating that the derogation system is in line with the objectives of the Directive.

The role of compensation measures *(derogations from Article 12(1)(d))*

(55) Compensation measures are independent of the activity causing deterioration or destruction of a breeding site or resting place. Such measures are intended to compensate for or offset specific negative effects on a species. Compensation measures should target precisely the negative effects on the species concerned and it is recommended that they are in place and effective before the negative effect occurs[118].

(56) Even though compensation measures are not mentioned in Article 16, and are as such not obligatory, they may be considered to provide better justification of a derogation if there is a risk that the derogation might have a detrimental effect. Compensation measures may be envisaged for derogations from Article 12(1)(d), i.e. in the case of the deterioration or destruction of breeding sites and resting places. Depending on the biology, ecology and behaviour of species, such measures may work well for some species but not for others. In general, compensation would have to:

i) offset the negative impact of the activity under the specific circumstances (at population level),
ii) have a good chance of success and be based on best practice,
iii) guarantee a species' prospects of achieving FCS,
iv) be effective before or at the latest when deterioration or destruction of a breeding site or resting place starts to take place.

(57) Compensation could thus guarantee that no detrimental effect is produced at either population or biogeographic level. ***However, it does not replace or marginalise any of the 3 tests.*** This means that the adoption of a compensation scheme cannot avoid the need for a derogation to pass all three tests described in chapter III.2.

[118] In some cases, compensation measures may not be fully functional by the time deterioration/destruction is taking place. Whether compensation has to be put in place without delay or whether some delay is acceptable depends on the type of species and the species' habitat. This should be taken into account in the decision authorising such compensation measures.

Compensation under Article 16 — a case concerning *Triturus cristatus*

During the planning stage for a housing area, a small Swedish municipality discovered that a small pond within the area designated for exploitation harboured a population of great crested newts (*Triturus cristatus*).

The population and its breeding site were in a difficult situation, as in previous years the surrounding woodland, probably used by wintering newts, had been destroyed and the habitats adjacent to the pond had been degraded. The chances of long-term survival of the population under these circumstances were considered to be uncertain to low. Closer investigation showed that the population size was about 100 adult specimens.

The completion of the housing area was considered to be of public interest and important in the regional context. Alternatives that would have been less damaging to the newt population could not be found in the neighbourhood. The overall conservation status of the species was unclear, with trends not known, although its range in Southern Sweden was continuous and the total Swedish population was estimated at 100 000 reproductive animals. A new population assessment and a National Action Plan for the species were launched during 2005.

It was therefore decided to create new habitats for the newts as a compensatory measure and to move the whole population. If successful, this action would improve the situation of the population concerned. A suitable compensation site was found less than 10 km away, an area already holding newts and providing sufficient habitat (including terrestrial wintering areas) for the long-term survival of the population. Within this area, a new pond was dug. The newts were translocated using the latest "state of the art" techniques. Studies showed that the number of adult newts had increased to about 160 specimens and the number of young leaving the pond in the autumn amounted to about 1 300 specimens.

The derogation was subject to several preconditions: a survey of the breeding newt population was to be performed in the housing area and at potential new sites; the timing of the construction activities for the housing complex was brought into line with the compensation actions; the permit to catch and move newts was linked to monitoring of the effects on the newt population for the following 8-10 years. Through bottle traps, visual counting and the taking of pictures of individual belly patterns, the long-term development of the population was to be assessed. The project was also intended as a pilot study for tackling future situations and has provided valuable information on the translocation of newts.

How can multi-species derogations be dealt with?

(58) For some projects (e.g. large infrastructure projects of public interest, such as transport networks), a number of Annex IV species might be affected. In such cases, the impact on ***each*** of the affected species should be considered and, based on this information, a picture of the overall impact should be formed in order to determine the solution to be implemented. The solution must also meet all 3 "tests". It is not enough to just list the number of species potentially affected without taking the further step of judging the extent of the problems and finding ways to avoid them.

Summary: the less favourable the conservation status and trends, the less likely will the granting of derogations be justified apart from in the most exceptional circumstances. The net result of a derogation should be neutral or positive for a species; detrimental effects should not occur. Compensation measures may, under certain circumstances, be used to offset the impact of a derogation on breeding sites and resting places, but do not replace or marginalise any of the "3 tests". Species conservation plans are not obligatory but are recommended as tools to demonstrate — among other things — that derogations for a certain species are in line with the objectives of the Directive.

III.2.4 Monitoring the impacts of derogations / Reporting on derogations

(59) Competent national authorities not only have to ensure that all the conditions of the derogation scheme are met *before* derogations are granted, but it is also recommended that they should monitor the impact of derogations and the effectiveness of compensation measures, if any, *after* they are implemented. This should ensure that any risk for a species arising unintentionally through the derogations (possibly in combination with other negative factors) is detected. The Directive does not explicitly provide for such monitoring. However, when advocating a proportional and flexible use of the derogation system (as set out above), we consider that the framework conditions must be right to ensure that the flexible approach does not lead to undesired effects. Monitoring is a key element in this regard.

(60) Such monitoring could also be seen as a part of the general surveillance obligation under Article 11 of the Directive. It would be reasonable for such surveillance to be sensitive to the effects (including cumulative effects and the effects of compensation measures) of derogations implemented for species for which derogations are regularly granted or which are in an unfavourable conservation status (and are nevertheless the subject of derogations).

Reporting obligation for derogations set out in Article 16(2) and 16(3)

(61) Derogations must also satisfy the formal conditions set out in Article 16(2) and (3). In the words of the Court in Case C-118/94 (a Birds Directive case), these formal conditions "*are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them.*"

(62) Member States do not need to consult the Commission before applying derogations but are obliged to submit a report every two years to the Commission on the implementation of Article 16. Article 16(2) does not define the precise content of these national reports. It is however clear that the information must be factual and cover the details set out in Article 16(3). On the basis of the information provided in the derogation reports, the Commission must be in a position to supervise the application of Article 16 within the Member States and its compatibility with the Directive. In cases where the Commission concludes that the use of derogations is not in conformity with the requirements of the Directive, it has the right to initiate an infringement procedure against the Member State concerned.

(63) Even though not mentioned explicitly in the Directive under Article 16(3), and therefore not obligatory, the Commission services consider that the two-yearly derogation reports might also include details that provide an understanding of the competent authorities' reasoning in applying a proportionate and flexible approach.

(64) Such additional information could include:

- Information on the conservation status of the derogated species (at biogeographic level in the Member State),

- Special justifications for derogations for species in a less than favourable status (e.g. references to conservation plans, conservation measures undertaken and their effects, summary of the impact assessment of the derogation on the species, alternatives assessed)

- Compensation measures taken

(65) Corresponding changes to the derogation reporting format have now been agreed. The new reporting format and a new IT tool, called the Habitats and Birds Directives Derogation System (HaBiDeS), is currently being tested and will be implemented by the Commission services and Member States.

Summary: Competent national authorities not only have to ensure that all conditions of the derogation scheme are met before derogations are granted (i.e. the "3 tests" are met), but it is also recommended that they should monitor the impact of derogations and the effectiveness of compensation measures, if any, after they are implemented. Again, although not obligatory, the Commission services consider that future derogation reports should include information to allow the Commission to understand and evaluate the use of a proportionate and flexible approach by Member States as set out in this document.

Annex I: Court case references

Annex II: List of animal species covered by Annex II, IV and V

Annex III: Example of a species dossier for *Triturus cristatus*

Annex I

Court case references

- 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029
- 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073
- 23 February 1988, Commission v Italy, Case 429/85, ECR p.843
- 27 April 1988, Commission v France, Case C-252/85, ECR p.2243
- 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851
- 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461
- 17 January 1991, Commission v Italy, C-157/89, ECR p.57
- 28 February 1991, Commission v Germany, Case C-57/89, ECR p.883
- 28 February 1991, Commission v Germany, Case 131/88, ECR p.825
- 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607
- 2 August 1993, Commission/Spain, Case C-355/90, ECR, p.4221
- 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223
- 12 December 1996, Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne, Case C-10/96, ECR p.6775
- 19 May 1999, Commission v France, Case C-225/97, ECR p.3011
- 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001
- 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007
- 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147
- 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585
- 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02
- 20 October 2005, Commission v the UK, Case C-6/04, ECR p.9017

- 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033
- 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53
- 16 March 2006, Commission v Greece, Case C-518/04, ECR p.42
- 18 May 2006, Commission v Spain, case C-221/04, ECR p.4515
- 11 January 2007, Commission v Ireland, case C-183/05, not yet published in the ECR

List of animal species covered by Annexes II, IV and V of the directive 92/43/EEC

Disclaimer : The table enclosed is a consolidated table produced by DG Environment. It is meant purely as an overview tool but we do not assume any liability for its content. The legally binding versions of the annexes are those officially published in the relevant legal acts. The latest version of these annexes on which the table is based is published in the "Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania"

The species listed in this Annex are indicated

- by the name of the species or subspecies (in bold and italics), or
- by all the species belonging to a higher taxon or to a designated part of that taxon. The abbreviation « spp. » after the name of a family or genus designates all the species belonging to that family or genus.

An asterisk (*) before the name of a species indicates that it is a priority species of Annex II (Annex VI and V do not distinguish between priority and non-priority species).

The annexes consolidated in this table are :

ANNEX II : SPECIES OF COMMUNITY INTEREST WHOSE CONSERVATION REQUIRES THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION

ANNEX IV : SPECIES OF COMMUNITY INTEREST IN NEED OF STRICT PROTECTION

ANNEX V : SPECIES OF COMMUNITY INTEREST WHOSE TAKING IN THE WILD AND EXPLOITATION MAY BE SUBJECT TO MANAGEMENT MEASURES

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
VERTEBRATES				
MAMMALS				
INSECTIVORA				
Erinaceidae				
Erinaceus algirus		**X**		
Soricidae				
Crocidura canariensis		**X**		
Crocidura sicula		**X**		
Talpidae				
Galemys pyrenaicus	**X**	**X**		
CHIROPTERA				
MICROCHIROPTERA				
Rhinolophidae				
Rhinolophus blasii	**X**	**X**		
Rhinolophus euryale	**X**	**X**		
Rhinolophus ferrumequinum	**X**	**X**		
Rhinolophus hipposideros	**X**	**X**		
Rhinolophus mehelyi	**X**	**X**		
Vespertilionidae				
Barbastella barbastellus	**X**	**X**		
Miniopterus schreibersi	**X**	**X**		
Myotis bechsteini	**X**	**X**		
Myotis blythii	**X**	**X**		
Myotis capaccinii	**X**	**X**		
Myotis dasycneme	**X**	**X**		
Myotis emarginatus	**X**	**X**		
Myotis myotis	**X**	**X**		
All other Microchiroptera		**X**		
MEGACHIROPTERA				
Pteropodidae				
Rousettus aegiptiacus	**X**	**X**		
RODENTIA				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Gliridae				
All species except *Glis glis* and *Eliomys quercinus*		**X**		
Myomimus roachi	**X**	**X**		
Sciuridae				
**** Marmota marmota latirostris***	**X**	**X**		
**** Pteromys volans (Sciuropterus russicus)***	**X**	**X**		
Spermophilus citellus (Citellus citellus)	**X**	**X**		
**** Spermophilus suslicus (Citellus suslicus)***	**X**	**X**		
Sciurus anomalus		**X**		
Castoridae				
Castor fiber	**X**	**X**	**X**	**Annex II** : except the Estonian, Latvian, Lithuanian, Finnish and Swedish populations **Annex IV** : except the Estonian, Latvian, Lithuanian, Polish, Finnish and Swedish, populations **Annex V** : Finnish, Swedish, Latvian, Lithuanian, Estonian and Polish populations
Cricetidae				
Cricetus cricetus		**X**	**X**	**Annex IV** : except the Hungarian populations **Annex V :** Hungarian populations
Mesocricetus newtoni	**X**	**X**		
Microtidae				
Microtus cabrerae	**X**	**X**		
**** Microtus oeconomus arenicola***	**X**	**X**		
**** Microtus oeconomus mehelyi***	**X**	**X**		
Microtus tatricus	**X**	**X**		
Zapodidae				
Sicista betulina		**X**		
Sicista subtilis	**X**	**X**		
Hystricidae				
Hystrix cristata		**X**		
CARNIVORA				
Canidae				
**** Alopex lagopus***	**X**	**X**		
Canis aureus			**X**	
**** Canis lupus***	**X**	**X**	**X**	**Annex II** : except the Estonian population ; Greek

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
				populations : only south of the 39th parallel ; Spanish populations : only those south of the Duero ; Latvian, Lithuanian and Finnish populations **Annex IV :** except the Greek populations north of the 39th parallel ; Estonian populations, Spanish populations north of the Duero ; Latvian, Lithuanian, Polish, Slovak, Bulgarian populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management **Annex V** : Spanish populations north of the Duero, Greek populations north of the 39th parallel, Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management, Latvian, Lithuanian, Estonian, Polish and Slovak populations
Ursidae				
**** Ursus arctos***	**X**	**X**		**Annex II** : except the Estonian, Finnish, and Swedish populations
Mustelidae				
**** Gulo gulo***	**X**			
Lutra lutra	**X**	**X**		
Martes martes			**X**	
Mustela eversmanii	**X**	**X**		
Mustela putorius			**X**	
**** Mustela lutreola***	**X**	**X**		
Vormela peregusna	**X**	**X**		
Felidae				
Felis silvestris		**X**		
Lynx lynx	**X**	**X**	**X**	**Annex II** : except the Estonian, Latvian and Finnish populations **Annex IV** : except the Estonian population **Annex V** : Estonian population
**** Lynx pardinus***	**X**	**X**		
Phocidae				
Halichoerus grypus	**X**		**X**	
**** Monachus monachus***	**X**	**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Phoca hispida bottnica	**X**		**X**	
**** Phoca hispida saimensis***	**X**	**X**		
Phoca vitulina	**X**		**X**	
All other Phocidae			**X**	
Viverridae				
Genetta genetta			**X**	
Herpestes ichneumon			**X**	
DUPLICIDENTATA				
Leporidae				
Lepus timidus			**X**	
ARTIODACTYLA				
Cervidae				
**** Cervus elaphus corsicanus***	**X**	**X**		
Rangifer tarandus fennicus	**X**			
Bovidae				
**** Bison bonasus***	**X**	**X**		
Capra aegagrus (natural populations)	**X**	**X**		
Capra ibex			**X**	
Capra pyrenaica **(except *Capra pyrenaica pyrenaica*)**			**X**	
**** Capra pyrenaica pyrenaica***	**X**	**X**		
Ovis gmelini musimon (Ovis ammon musimon) (natural populations – Corsica and Sardinia)	**X**	**X**		
Ovis orientalis ophion **(*Ovis gmelini ophion*)**	**X**	**X**		
**** Rupicapra pyrenaica ornata*** **(*Rupicapra rupicapra ornata*)**	**X**	**X**		
Rupicapra rupicapra **(except *Rupicapra rupicapra balcanica*, *Rupicapra rupicapra ornata* and *Rupicapra rupicapra tatrica*)**			**X**	
Rupicapra rupicapra balcanica	**X**	**X**		
**** Rupicapra rupicapra tatrica***	**X**	**X**		
CETACEA				
Phocoena phocoena	**X**	**X**		
Tursiops truncatus	**X**	**X**		
All other Cetacea		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
REPTILES				
CHELONIA (TESTUDINES)				
Testudinidae				
Testudo graeca	**X**	**X**		
Testudo hermanni	**X**	**X**		
Testudo marginata	**X**	**X**		
Cheloniidae				
**** Caretta caretta***	**X**	**X**		
**** Chelonia mydas***	**X**	**X**		
Lepidochelys kempii		**X**		
Eretmochelys imbricata		**X**		
Dermochelyidae				
Dermochelys coriacea		**X**		
Emydidae				
Emys orbicularis	**X**	**X**		
Mauremys caspica	**X**	**X**		
Mauremys leprosa	**X**	**X**		
SAURIA				
Lacertidae				
Algyroides fitzingeri		**X**		
Algyroides marchi		**X**		
Algyroides moreoticus		**X**		
Algyroides nigropunctatus		**X**		
Gallotia atlantica		**X**		
Gallotia galloti		**X**		
Gallotia galloti insulanagae	**X**	**X**		
**** Gallotia simonyi***	**X**	**X**		
Gallotia stehlini		**X**		
Lacerta agilis		**X**		
Lacerta bedriagae		**X**		
Lacerta bonnali (Lacerta monticola)	**X**	**X**		
Lacerta monticola	**X**	**X**		
Lacerta danfordi		**X**		
Lacerta dugesi		**X**		
Lacerta graeca		**X**		
Lacerta horvathi		**X**		
Lacerta schreiberi	**X**	**X**		
Lacerta trilineata		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Lacerta viridis		**X**		
Lacerta vivipara pannonica		**X**		
Ophisops elegans		**X**		
Podarcis erhardii		**X**		
Podarcis filfolensis		**X**		
Podarcis hispanica atrata		**X**		
Podarcis lilfordi	**X**	**X**		
Podarcis melisellensis		**X**		
Podarcis milensis		**X**		
Podarcis muralis		**X**		
Podarcis peloponnesiaca		**X**		
Podarcis pityusensis	**X**	**X**		
Podarcis sicula		**X**		
Podarcis taurica		**X**		
Podarcis tiliguerta		**X**		
Podarcis wagleriana		**X**		
Scincidae				
Ablepharus kitaibelli		**X**		
Chalcides bedriagai		**X**		
Chalcides ocellatus		**X**		
Chalcides sexlineatus		**X**		
Chalcides simonyi (Chalcides occidentalis)	**X**	**X**		
Chalcides viridianus		**X**		
Ophiomorus punctatissimus		**X**		
Gekkonidae				
Cyrtopodion kotschyi		**X**		
Phyllodactylus europaeus	**X**	**X**		
Tarentola angustimentalis		**X**		
Tarentola boettgeri		**X**		
Tarentola delalandii		**X**		
Tarentola gomerensis		**X**		
Agamidae				
Stellio stellio		**X**		
Chamaeleontidae				
Chamaeleo chamaeleon		**X**		
Anguidae				
Ophisaurus apodus		**X**		
OPHIDIA (SERPENTES)				
Colubridae				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Coluber caspius		**X**		
**** Coluber cypriensis***	**X**	**X**		
Coluber hippocrepis		**X**		
Coluber jugularis		**X**		
Coluber laurenti		**X**		
Coluber najadum		**X**		
Coluber nummifer		**X**		
Coluber viridiflavus		**X**		
Coronella austriaca		**X**		
Eirenis modesta		**X**		
Elaphe longissima		**X**		
Elaphe quatuorlineata	**X**	**X**		
Elaphe situla	**X**	**X**		
Natrix natrix cetti		**X**		
Natrix natrix corsa		**X**		
**** Natrix natrix cypriaca***	**X**	**X**		
Natrix tessellata		**X**		
Telescopus falax		**X**		
Viperidae				
Vipera ammodytes		**X**		
**** Macrovipera schweizeri (Vipera lebetina schweizeri)***	**X**	**X**		
Vipera seoanni		**X**		**Annex IV** : except Spanish populations
Vipera ursinii **(except *Vipera ursinii rakosiensis*)**	**X**	**X**		
**** Vipera ursinii rakosiensis***	**X**	**X**		
Vipera xanthina		**X**		
Boidae				
Eryx jaculus		**X**		
AMPHIBIANS				
CAUDATA				
Salamandridae				
Chioglossa lusitanica	**X**	**X**		
Euproctus asper		**X**		
Euproctus montanus		**X**		
Euproctus platycephalus		**X**		
Mertensiella luschani (Salamandra luschani)	**X**	**X**		
Salamandra atra		**X**		
**** Salamandra aurorae (Salamandra atra***	**X**	**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
aurorae)				
Salamandra lanzai		**X**		
Salamandrina terdigitata	**X**	**X**		
Triturus carnifex (Triturus cristatus carnifex)	**X**	**X**		
Triturus cristatus (Triturus cristatus cristatus)	**X**	**X**		
Triturus dobrogicus (Triturus cristatus dobrogicus)	**X**			
Triturus italicus		**X**		
Triturus karelinii (Triturus cristatus karelinii)	**X**	**X**		
Triturus marmoratus		**X**		
Triturus montandoni	**X**	**X**		
Triturus vulgaris ampelensis	**X**	**X**		
Proteidae				
**** Proteus anguinus***	**X**	**X**		
Plethodontidae				
Hydromantes (Speleomantes) ambrosii	**X**	**X**		
Hydromantes (Speleomantes) flavus	**X**	**X**		
Hydromantes (Speleomantes) genei	**X**	**X**		
Hydromantes (Speleomantes) imperialis	**X**	**X**		
Hydromantes (Speleomantes) strinatii	**X**	**X**		
Hydromantes (Speleomantes) supramontes	**X**	**X**		
ANURA				
Discoglossidae				
Alytes cisternasii		**X**		
**** Alytes muletensis***	**X**	**X**		
Alytes obstetricans		**X**		
Bombina bombina	**X**	**X**		
Bombina variegata	**X**	**X**		
Discoglossus galganoi **(including** ***Discoglossus « jeanneae »*****)**	**X**	**X**		
Discoglossus montalentii	**X**	**X**		
Discoglossus pictus		**X**		
Discoglossus sardus	**X**	**X**		
Ranidae				
Rana arvalis		**X**		
Rana dalmatina		**X**		
Rana esculenta			**X**	
Rana graeca		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Rana iberica		**X**		
Rana italica		**X**		
Rana latastei	**X**	**X**		
Rana lessonae		**X**		
Rana perezi			**X**	
Rana ridibunda			**X**	
Rana temporaria			**X**	
Pelobatidae				
Pelobates cultripes		**X**		
Pelobates fuscus		**X**		
**** Pelobates fuscus insubricus***	**X**	**X**		
Pelobates syriacus		**X**		
Bufonidae				
Bufo calamita		**X**		
Bufo viridis		**X**		
Hylidae				
Hyla arborea		**X**		
Hyla meridionalis		**X**		
Hyla sarda		**X**		
FISH				
PETROMYZONIFORMES				
Petromyzonidae				
Eudontomyzon spp.	**X**			
Lampetra fluviatilis	**X**		**X**	**Annex II** : except the Finnish and Swedish populations
Lampetra planeri	**X**			**Annex II** : except the Estonian, Finnish, and Swedish populations
Lethenteron zanandreai	**X**		**X**	
Petromyzon marinus	**X**			**Annex II** : except the Swedish populations
ACIPENSERIFORMES				
Acipenseridae				
**** Acipenser naccarii***	**X**	**X**		
**** Acipenser sturio***	**X**	**X**		
All other Acipenseridae species			**X**	
CLUPEIFORMES				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Clupeidae				
***Alosa* spp.**	**X**		**X**	
SALMONIFORMES				
Salmonidae / Coregonidae				
***Coregonus spp. (except Coregonus oxyrhynchus* -anadromous populations in certain sectors of the North Sea)**			**X**	
**** Coregonus oxyrhynchus* (anadromous populations in certain sectors of the North Sea)**	**X**	**X**		
Hucho hucho (natural populations)	**X**		**X**	
Salmo macrostigma	**X**			
Salmo marmoratus	**X**			
***Salmo salar* (only in fresh water)**	**X**		**X**	**Annex II** : except the Finnish populations
Thymallus thymallus			**X**	
Umbridae				
Umbra krameri	**X**			
CYPRINIFORMES				
Cyprinidae				
Alburnus albidus (Alburnus vulturius)	**X**			
Anaecypris hispanica	**X**	**X**		
Aspius aspius	**X**		**X**	**Annex II** : except the Finnish populations
Barbus spp.			**X**	
Barbus comiza	**X**		**X**	
Barbus meridionalis	**X**		**X**	
Barbus plebejus	**X**		**X**	
Chalcalburnus chalcoides	**X**			
Chondrostoma genei	**X**			
Chondrostoma lusitanicum	**X**			
***Chondrostoma polylepis* (including *C. willkommi*)**	**X**			
Chondrostoma soetta	**X**			
Chondrostoma toxostoma	**X**			
Gobio albipinnatus	**X**			
Gobio kessleri	**X**			
Gobio uranoscopus	**X**			
Iberocypris palaciosi	**X**			
**** Ladigesocypris ghigii***	**X**			
Leuciscus lucumonis	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Leuciscus souffia	**X**			
Pelecus cultratus	**X**		**X**	
Phoxinellus spp.	**X**			
**** Phoxinus percnurus***	**X**	**X**		
Rhodeus sericeus amarus	**X**			
Rutilus alburnoides	**X**			
Rutilus arcasii	**X**			
Rutilus frisii meidingeri	**X**		**X**	
Rutilus lemmingii	**X**			
Rutilus pigus	**X**		**X**	
Rutilus rubilio	**X**			
Rutilus macrolepidotus	**X**			
Scardinius graecus	**X**			
Cobitidae				
Cobitis elongata	**X**			
Cobitis taenia	**X**			**Annex II** : except the Finnish populations
Cobitis trichonica	**X**			
Misgurnus fossilis	**X**			
Sabanejewia aurata	**X**			
***Sabanejewia larvata* (*Cobitis larvata* and *Cobitis conspersa*)**	**X**			
SILURIFORMES				
Siluridae				
Silurus aristotelis	**X**		**X**	
ATHERINIFORMES				
Cyprinodontidae				
Aphanius iberus	**X**			
Aphanius fasciatus	**X**			
**** Valencia hispanica (Valencia letourneuxi)***	**X**	**X**		
PERCIFORMES				
Percidae				
Gymnocephalus baloni	**X**	**X**		
Gymnocephalus schraetzer	**X**		**X**	
**** Romanichthys valsanicola***	**X**	**X**		
***Zingel* spp. (except *Zingel asper* and *Zingel zingel*)**	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Zingel asper	**X**	**X**		
Zingel zingel	**X**		**X**	
Gobiidae				
Knipowitschia (Padogobius) panizzae	**X**			
Padogobius nigricans	**X**			
Pomatoschistus canestrini	**X**			
SCORPAENIFORMES				
Cottidae				
Cottus gobio	**X**			**Annex II** : except the Finnish populations
Cottus petiti	**X**			
INVERTEBRATES				
ANNELIDA				
HIRUDINOIDEA - ARHYNCHOBDELLAE				
Hirudinidae				
Hirudo medicinalis			**X**	
ARTHROPODS				
CRUSTACEA				
Decapoda				
Astacus astacus			**X**	
Austropotamobius pallipes	**X**		**X**	
**** Austropotamobius torrentium***	**X**		**X**	
Scyllarides latus			**X**	
Isopoda				
**** Armadillidium ghardalamensis***	**X**	**X**		
INSECTA				
Coleoptera				
Agathidium pulchellum	**X**			
Bolbelasmus unicornis	**X**	**X**		
Boros schneideri	**X**			
Buprestis splendens	**X**	**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Carabus hampei	**X**	**X**		
Carabus hungaricus	**X**	**X**		
**** Carabus menetriesi pacholei***	**X**			
**** Carabus olympiae***	**X**	**X**		
Carabus variolosus	**X**	**X**		
Carabus zawadszkii	**X**	**X**		
Cerambyx cerdo	**X**	**X**		
Corticaria planula	**X**			
Cucujus cinnaberinus	**X**	**X**		
Dorcadion fulvum cervae	**X**	**X**		
Duvalius gebhardti	**X**	**X**		
Duvalius hungaricus	**X**	**X**		
Dytiscus latissimus	**X**	**X**		
Graphoderus bilineatus	**X**	**X**		
Leptodirus hochenwarti	**X**	**X**		
Limoniscus violaceus	**X**			
Lucanus cervus	**X**			
Macroplea pubipennis	**X**			
Mesosa myops	**X**			
Morimus funereus	**X**			
**** Osmoderma eremita***	**X**	**X**		
Oxyporus mannerheimii	**X**			
Pilemia tigrina	**X**	**X**		
**** Phryganophilus ruficollis***	**X**	**X**		
Probaticus subrugosus	**X**	**X**		
Propomacrus cypriacus	**X**	**X**		
**** Pseudogaurotina excellens***	**X**	**X**		
Pseudoseriscius cameroni	**X**	**X**		
Pytho kolwensis	**X**	**X**		
Rhysodes sulcatus	**X**			
**** Rosalia alpina***	**X**	**X**		
Stephanopachys linearis	**X**			
Stephanopachys substriatus	**X**			
Xyletinus tremulicola	**X**			
Hemiptera				
Aradus angularis	**X**			
Lepidoptera				
Agriades glandon aquilo	**X**			
Apatura metis		**X**		
Arytrura musculus	**X**	**X**		
**** Callimorpha (Euplagia, Panaxia) quadripunctaria***	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Catopta thrips	**X**	**X**		
Chondrosoma fiduciarium	**X**	**X**		
Clossiana improba	**X**			
Coenonympha hero		**X**		
Coenonympha oedippus	**X**	**X**		
Colias myrmidone	**X**	**X**		
Cucullia mixta	**X**	**X**		
Dioszeghyana schmidtii	**X**	**X**		
Erannis ankeraria	**X**	**X**		
Erebia calcaria	**X**	**X**		
Erebia christi	**X**	**X**		
Erebia medusa polaris	**X**			
Erebia sudetica		**X**		
Eriogaster catax	**X**	**X**		
Euphydryas (Eurodryas, Hypodryas) aurinia	**X**			
Fabriciana elisa		**X**		
Glyphipterix loricatella	**X**	**X**		
Gortyna borelii lunata	**X**	**X**		
Graellsia isabellae	**X**		**X**	
Hesperia comma catena	**X**			
Hypodryas maturna	**X**	**X**		
Hyles hippophaes		**X**		
Leptidea morsei	**X**	**X**		
Lignyoptera fumidaria	**X**	**X**		
Lopinga achine		**X**		
Lycaena dispar	**X**	**X**		
Lycaena helle	**X**	**X**		
Maculinea arion		**X**		
Maculinea nausithous	**X**	**X**		
Maculinea teleius	**X**	**X**		
Melanargia arge	**X**	**X**		
**** Nymphalis vaualbum***	**X**	**X**		
Papilio alexanor		**X**		
Papilio hospiton	**X**	**X**		
Parnassius apollo		**X**		
Parnassius mnemosyne		**X**		
Phyllometra culminaria	**X**	**X**		
Plebicula golgus	**X**	**X**		
Polymixis rufocincta isolata	**X**	**X**		
Polyommatus eroides	**X**	**X**		
Proserpinus proserpina		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Pseudophilotes bavius	**X**	**X**		
Xestia borealis	**X**			
Xestia brunneopicta	**X**			
**** Xylomoia strix***	**X**	**X**		
Zerynthia polyxena		**X**		
Mantodea				
Apteromantis aptera	**X**	**X**		
Odonata				
Aeshna viridis		**X**		
Coenagrion hylas	**X**			
Coenagrion mercuriale	**X**			
Coenagrion ornatum	**X**			
Cordulegaster heros	**X**	**X**		
Cordulegaster trinacriae	**X**	**X**		
Gomphus graslinii	**X**	**X**		
Leucorrhina albifrons		**X**		
Leucorrhina caudalis		**X**		
Leucorrhinia pectoralis	**X**	**X**		
Lindenia tetraphylla	**X**	**X**		
Macromia splendens	**X**	**X**		
Ophiogomphus cecilia	**X**	**X**		
Oxygastra curtisii	**X**	**X**		
Stylurus flavipes		**X**		
Sympecma braueri		**X**		
Orthoptera				
Baetica ustulata	**X**	**X**		
Brachytrupes megacephalus	**X**	**X**		
Isophya costata	**X**	**X**		
Isophya harzi	**X**	**X**		
Isophya stysi	**X**	**X**		
Myrmecophilus baronii	**X**	**X**		
Odontopodisma rubripes	**X**	**X**		
Paracaloptenus caloptenoides	**X**	**X**		
Pholidoptera transsylvanica	**X**	**X**		
Saga pedo		**X**		
Stenobothrus (Stenobothrodes) eurasius	**X**	**X**		
ARACHNIDA				
Araneae				
Macrothele calpeiana		**X**		
Pseudoscorpiones				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Anthrenochernes stellae	**X**			
COELENTERATA				
Cnidaria				
Corallium rubrum			**X**	
MOLLUSCS				
GASTROPODA				
Anisus vorticulus	**X**	**X**		
Caseolus calculus	**X**	**X**		
Caseolus commixta	**X**	**X**		
Caseolus sphaerula	**X**	**X**		
Chilostoma banaticum	**X**	**X**		
Discula leacockiana	**X**	**X**		
Discula tabellata	**X**	**X**		
Discula testudinalis		**X**		
Discula turricula		**X**		
Discus defloratus		**X**		
Discus guerinianus	**X**	**X**		
Elona quimperiana	**X**	**X**		
Geomalacus maculosus	**X**	**X**		
Geomitra moniziana	**X**	**X**		
Gibbula nivosa	**X**	**X**		
**** Helicopsis striata austriaca***	**X**			
Helix pomatia			**X**	
Hygromia kovacsi	**X**	**X**		
Idiomela (Helix) subplicata	**X**	**X**		
Lampedusa imitatrix	**X**	**X**		
**** Lampedusa melitensis***	**X**	**X**		
Leiostyla abbreviata	**X**	**X**		
Leiostyla cassida	**X**	**X**		
Leiostyla corneocostata	**X**	**X**		
Leiostyla gibba	**X**	**X**		
Leiostyla lamellosa	**X**	**X**		
**** Paladilhia hungarica***	**X**	**X**		
Patella feruginea		**X**		
Sadleriana pannonica	**X**	**X**		
Theodoxus prevostianus				
Theodoxus transversalis	**X**	**X**		
Vertigo angustior	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Vertigo genesii	**X**			
Vertigo geyeri	**X**			
Vertigo moulinsiana	**X**			
BIVALVIA				
Anisomyaria				
Lithophaga lithophaga		**X**		
Pinna nobilis		**X**		
Unionoida				
Margaritifera auricularia		**X**		
Margaritifera durrovensis (Margaritifera margaritifera)	**X**		**X**	
Microcondylaea compressa			**X**	
Unio crassus	**X**	**X**		
Unio elongatulus			**X**	
Dreissenidae				
Congeria kusceri	**X**	**X**		
ECHINODERMATA				
Echinoidea				
Centrostephanus longispinus		**X**		

Annex III

An example of a species dossier for *Triturus cristatus*

The crested newt, *Triturus cristatus* (senso lato), is a complex of closely related species occurring in Europe. In fact, *T. cristatus* is now considered to be a superspecies comprising 4 species: 1) Northern crested newt, *T. cristatus* (Laurenti, 1768) (sensu stricto): north and central Europe, to the Ural Mts., in the east; 2) Italian crested newt, *T. carnifex* (Laurenti, 1768): Italy and the Adriatic side of the Balkan peninsula; 3) Danube crested newt, *T. dobrogicus* (Kiritzescu, 1903): lowlands of the rivers Tisza and Danube; 4) Southern crested newt, *T. karelinii* (Strauch, 1870): SE Balkans, Crimea and Caucasus.

Even though these species are mostly allopatric, there is some complexity in transitional areas with morphological and genetic intergradation.

As with other members of the same family, the great crested newt shows an alternation between periods of aquatic and terrestrial activity. During the aquatic period it feeds on aquatic invertebrates, tadpoles and occasionally small fish. During the terrestrial periods it is active at night: searching for invertebrates. During the day it rests under stones, logs and other refuges. Breeding occurs during the aquatic period while summer dormancy and winter hibernation occur during the terrestrial one. Dispersion among ponds can be active, by nocturnal movements, or caused by seasonal floods.

The life cycle of newts shows great variation and is dependent upon several key factors, primarily water temperature and availability. The alternation between aquatic and terrestrial activity, and dormancy, shows considerable variation according to climatic conditions. In northern regions (and higher altitudes), there is a period of winter hibernation. In many southern areas, where water does not freeze, newts do not hibernate, and are found in water from autumn to late spring. Summer dormancy is common in areas of drought or where water temperature is raised.

Eggs are usually laid on the leaves of aquatic plants and larvae take refuge in amongst dense aquatic vegetation (plants and algae). Ponds with a large amount of aquatic vegetation and no fish represent the ideal environment for successful newt breeding, because of refuge availability and the lack of fish predation of both newt larvae and invertebrate prey. The occurrence of good structural variation such as dense terrestrial vegetation in or near the ponds, especially old growth forests, is also important because it offers diurnal refuges to adults during their terrestrial (nocturnal) life period.

Threats to the species include: (1) destruction of aquatic habitat; (2) cleaning of artificial springs, water reservoirs and ponds; (3) lowering of subterranean water table; (4) loss of connectivity including deforestation and consequent loss of small water basins; (5) use of pesticides that can accumulate in trophic webs which effect the invertebrate food of newts; (6) introduction of fish species in to ponds.

Interpretation of definitions for T. cristatus

All points of the definition of breeding site apply to *T. cristatus.*

The pond used for mating has individual male territories within which courtship and mating take place. Eggs are laid singly on emergent plants and mature over a period of 12 – 18 days. Young larvae emerge and swim freely.

The pond is, therefore, the Breeding Site.

T. cristatus does not migrate but does disperse to adjacent pools. Healthy populations of *T. cristatus* utilise a series of pools and move between them dispersing over suitable interconnecting terrestrial habitat. ndividuals may move ca. 1 km from their natal pool.

The Resting Places for *T. cristatus* are thus the ponds they inhabit and the adjacent terrestrial habitat that supports them during the terrestrial part of their life cycle as far as these terrestrial areas are essential and resting places can be identified.

The **functional unit** needed to maintain a viable *T. cristatus* population thus comprises a series of ponds, the majority of which will be resting places and a proportion of which will be Breeding Sites, as well as a proportion of other areas which will be resting places set within suitable terrestrial habitat.