



Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

Task 2
Agriculture: Country studies



May – 2022



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Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study *Germany*

ENV/2020/OP/0022



Stritih



May 2022

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ABBREVIATIONS

BArtSchV	Federal Ordinance on the Protection of wild Animal and Plant Species
BBodSchG	Federal Soil Protection Act
BD	Birds Directive
BbgNatSchAG	Nature Conservation Implementation Act of Brandenburg
BfN	Federal Agency for Nature Conservation
BMEL	Federal Ministry of Food and Agriculture
BMUV	Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection
BayNatSchG	Bavarian Nature Conservation Act
BNatSchG	Federal Nature Conservation Act
BWaldG	Federal Forest Act
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
HD	Habitats Directive
LANUV	NRW State Agency for Nature, Environment and Consumer Protection
LNatSchG	State Nature Conservation Act
NGO	Non-governmental organisation
NRW	North Rhine-Westphalia
ROG	Federal Spatial Planning Act
SEA	Strategic Environmental Assessment
UVPG	Federal Environmental Impact Assessment Act

1 INTRODUCTION

The following analysis presents the findings on the implementation of Article 12 and 13 Habitats Directive (HD), and Article 5 Birds Directive (BD). To this end, more than 20 national and regional experts were contacted (contact list can be found in Appendix III). Their perspectives were handled anonymously in the report.

Due to the federal structure of Germany, we limited the scope of our analysis to only a few states for explanatory purposes, but intended to provide insights from all other regions, where available. The states of North Rhine-Westphalia, Lower Saxony and Brandenburg provided most of the responses to this study.

The Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (BMUV) was offered to give its feedback on the present study. The overarching perspective was stated as such:

The EU COM already recognizes in its "Guidance document on the strict protection of animal species of Community interest under the Habitats Directive" (C(2021) 7301 final) that the application of species protection legislation in the area of ongoing activities, e.g. in agriculture, forestry or fisheries, may be problematic. However, it also quite rightly points out that the HD also applies to these activities. In the area of agriculture, for example, preventive measures are possible to ensure compliance with Article 12 HD. These may include, for example, the development of sufficiently detailed and clear guidelines and codes of conduct (even if they are not legally binding). As in the case of agricultural practices, such preventive approaches to forestry can ensure protection of affected species, provided that they are communicated effectively and implemented with good will and with sufficient resources.

Nonetheless, this report focuses on examining and outlining the legal frameworks of member states, but, in our view, does not adequately address the real core problem of species decline, namely harmful land use practices. Over-intensive land use can only be addressed with a comprehensive approach, especially with attractive funding incentives, and only to a small extent through an (improved) legal framework. The presented reports do not address other causes of species decline, so from our point of view the reports are incomplete.

1.1 AGRICULTURE IN GERMANY

About 50.7% of Germany's landscape is used for agriculture. This share has been decreasing slowly but steadily for several decades (-2.7% between 2004 and 2019), while the share for settlements and transport is continuously increasing (UBA, 2020).

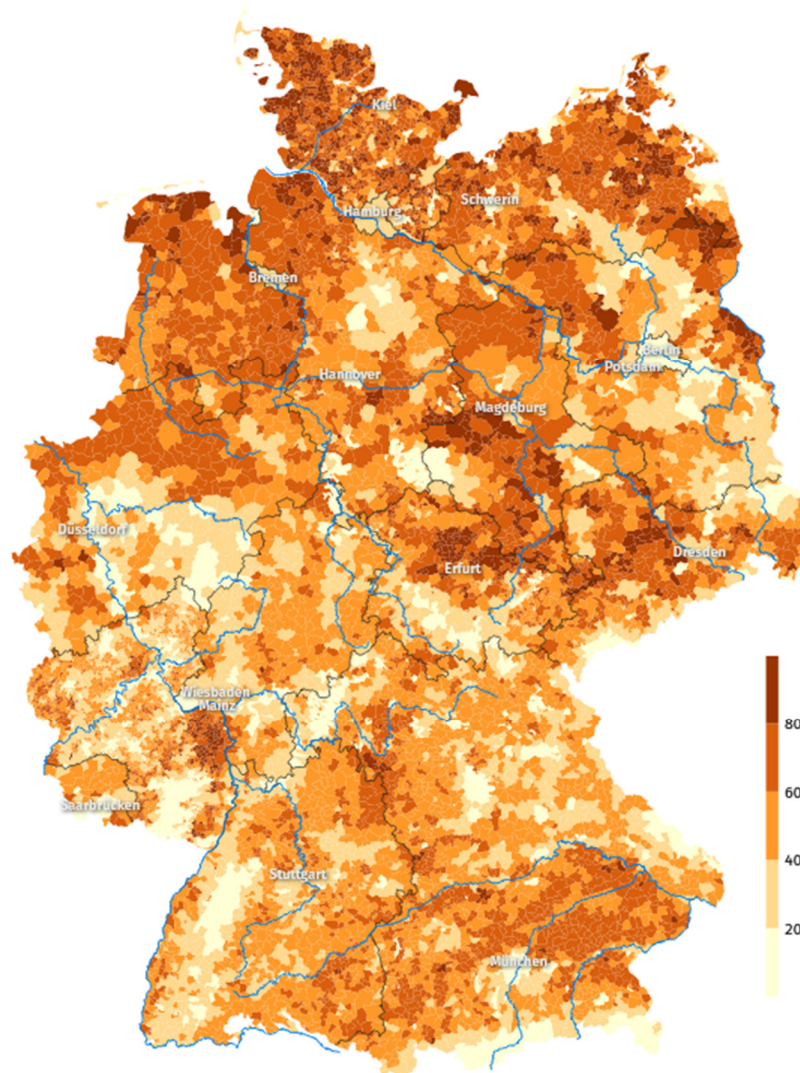


Figure 1: Share of area for agriculture in total land area 2019 in %
Data: Statistical Offices of the Federation and the Länder, 2021

History and development of agricultural land use in Germany

A major step in the **intensification of German agriculture** began in the 19th century when rising purchasing power and the growth of the non-agricultural population in the wake of industrialisation led to an increasing demand for agricultural products and a shift in consumption habits toward more animal-based foods. Beginning in the 1950s, advances in animal and plant breeding and the use of mineral fertilisers, pesticides and concentrated feeds steadily increased the intensity of agriculture in Germany. In addition, there was increasing **farm simplification, expansion and specialization**: for example, the formerly close connection between arable and livestock farming was broken down, and many wild animal and plant species that had previously benefited from extensive field and pasture management became threatened. This introduced pressures on certain wild organisms that have adapted to the diverse farming landscape over the past centuries. Vascular plants and certain invertebrates, in particular, have

benefited from the transformation of nature by agriculture (Möckel *et al.*, 2014).

Since the 1950s and 1960s, conventional and increasingly industrialised agriculture began to dominate. Farms increased their farmland area and livestock numbers, while small farms became increasingly unprofitable and were forced out of business. Manual labour was increasingly replaced by machinery, to the point of complete mechanisation. All of this had an increasingly **negative impact on biodiversity**. Agricultural land use is now considered one of the main causes of the decline in biodiversity in Germany (BMUV & BfN, 2020). Due to intensive agriculture, ecologically valuable parts of the landscape (e.g., hedgerows and groves of trees) have disappeared. Instead of many small fields, huge fields with one and the same crop dominate, wetlands have been drained and meadows converted into arable land. With the disappearance of these biotopes, the diversity of many species is also declining (Möckel *et al.*, 2014).

For example, according to the Federal Agency for Nature Conservation (BfN), the **population of breeding birds** in Germany declined by about 8% between 1992 and 2016 (Gerlach *et al.*, 2019). Species-rich bird communities on arable land can still be found wherever there are still enough bird and insect-friendly structures, such as mesophile grassland, fallow land, wide field margins, unpaved field paths and unused wayside meadows, for example in north-eastern Germany. In the densely populated west and in many regions of southern Germany, on the other hand, the typical bird species of meadows and fields, such as the Corn bunting (*Emberiza calandra*), have declined sharply or disappeared altogether.

The influence of animal diseases in the wild bird population must also be taken into account. The losses due to avian influenza (HPAIV) are noticeable in White-tailed eagles and Knotts, as well as in Black-necked grebes (HPAI season 2007). The losses due to West Nile virus (WNV) in wild birds are also worthy of note.

Agriculture is also a major source of **soil degradation and pollution** (BfN, 2021). The erosion or compaction of the soil through the use of large agricultural machinery has negative impacts on nature and biodiversity. In addition, the use of pesticides and fertilisers is one of the biggest sources of soil, water and groundwater pollution. On average, far greater amounts of nitrogen and phosphate are applied to agricultural land in Germany than the plants extract from the soil. This overfertilisation of cultivated land leads to soil acidification, which impairs its filtering and buffering function as well as its fertility. Pesticides can accumulate in the soil and thus enter drinking water and food, **destroying soil organisms and reducing biodiversity** below and above ground. Studies on **insect declines** have documented a decline of up to 75% in insect biomass over the past 30 years in the areas examined (Hallmann *et al.*, 2017) and a species decline of one-third over the past 10 years (Seibold *et al.*, 2019) suggesting a link to land use.

With a total area of around 4.73 million ha, **grassland (Grünland)** accounts for **less than one third** of the agriculturally used land in Germany (Destatis, 2021). Due to the intensification of agriculture, intensive meadows and mown pastures with high yields and forage qualities are taking up an increasingly large share of land compared to the biologically diverse, extensive grassland areas that for agricultural use are lower yielding. This development began with the industrialisation of agriculture and the introduction of mineral fertilizers. From 1990 to 2009 alone, the area of grassland in Germany decreased by 875,000 ha and only amounted to 4,621,000 ha in 2013. From 2003 to 2012, the absolute loss of permanent grassland was about 5% (BfN, 2014). It was not until 2014 that permanent grassland and its share of agricultural land increased slightly again. Since then, the area of grassland has stabilised, in particular due to the regulations on permanent grassland conservation under “greening”, and is increasing slightly in absolute terms, even the low-yield permanent grassland. In the meantime, more than 12% of the agricultural land in Germany is used for the cultivation of energy crops (in 2000, it was still 2.5%). Crops for biogas production (1.15 million ha) and rapeseed for fuel production (0.75 million ha) account for the largest shares.

Economic importance

The agricultural sector in total accounts for 0.9% of the German BIP and around 1.4 percent of the

workforce. However, German agriculture, forestry and fisheries generated a production value of 57.6 billion euros in 2017 (R-LGR, 2021), which is considerably more than the production value of the pharmaceutical industry at 48.4 billion euros in 2017 (Statista, 2018), giving it considerable economic importance.

1.2 GOVERNANCE

Germany is a federal republic with 16 **federal states** (Bundesländer; hereafter called Land, singular, or Länder, plural), where each *Land* has an elected parliament (Landtag) and a state government (Landesregierung). Legislative competence and responsibility for the execution of laws are distributed by the German Constitution between the federal government and the 16 states. On *Länder* level, Germany is divided into 294 districts (Kreise), and 107 independent cities (kreisfreie Stadt) which form their own districts. The administrative office of a district, the district administration, is headed by the district commissioner (Landrat/Landrätin) or, in the case of cities, by the mayor ((Ober)bürgermeister/bürgermeisterin).

The [Federal Nature Conservation Act](#) (BNatSchG), last amended in 2021, aims to protect, care for and develop nature and landscapes in recognition of their intrinsic value as well as for their significance for human life, health, and wellbeing. The authorities responsible for nature conservation and landscape management are required to ensure and monitor compliance with the provisions of this Act (including the species protection regulations).

According to § 3 of the BNatSchG, the authorities responsible for nature conservation and landscape management are:

1. the 16 *Länder* authorities responsible for nature conservation and landscape management under state law or
2. the Federal Agency for Nature Conservation (BfN), insofar as responsibilities are assigned to it under this Act.

Since the federal/national law does not precisely specify this distinction between the two levels of governance, the responsibility for agricultural supervision (management and control) as well as for compliance with the regulations on special species protection law is stipulated **differently** in each *Land* and its respective laws. The **upper nature conservation authority** (state environment ministry) is usually the **structural and approval directorate**. In many *Länder*, the de facto responsibility for all administrative matters lies with the provincial government (Kreis) in the form of **lower nature conservation authorities**; in independent cities, it is the **city administration**. Supplements to § 3 BNatSchG in the respective state nature conservation laws include, for example, [LNatSchG Rhineland-Palatinate § 2](#).

The Federal Ministry of Food and Agriculture (BMEL) oversees agricultural policy development with the Common Task for the Improvement of Agricultural Structure and Coast Protection (Gemeinschaftsaufgabe "Verbesserung der Agrarstruktur und des Küstenschutzes", GAK) being a principal funding vehicle at the federal level for the support of agri-environmental measures. However, the BMEL is bound by the constitutional division of competences between the national level and the states. National agricultural policy initiatives are therefore primarily aimed at shaping overarching legal-regulatory as well as socio-economic framework conditions for sustainable management and the development of the agriculture sector. This includes, i.e., the development of the [Agrobiodiversity Strategy for the Conservation and Sustainable Use of Biodiversity in Agriculture, Forestry and Fisheries \(2007\)](#), serving as a complement to the [National Biodiversity Strategy \(2007\)](#)¹. The BMEL also coordinates **data collection and information management** at the national level. The

¹ In order to prepare the further development of the National Biodiversity Strategy, dialogues with stakeholders are currently being conducted. A stakeholder workshop with over 70 social actors took place at the beginning of November 2020. The dialogues are to be intensified throughout 2021 (BMUV 2021).

[Scientific Advisory Board on Biodiversity and Genetic Resources](#) has the task of advising BMEL on general and fundamental questions of conservation and sustainable use of biological diversity at national, EU and international level.

The Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (**BMUV**) and the associated Federal Agency for Nature Conservation (BfN) are spearheading the development of a [National Biodiversity Monitoring Centre](#) (which is currently in the development phase), interdepartmentally with BMEL as well as the Ministries of Research (BMBF), Digital Infrastructure and Transport (BMDV) and Finance (BMF) plus representatives of the states. The aim is to advance nationwide biodiversity monitoring by ensuring that the numerous actors from science, federal and state authorities, professional societies and associations are better networked and that scientific findings on biodiversity are incorporated into monitoring practice.

The **Chambers of Agriculture** have their core mission in education and training as well as consulting in the agricultural sector, which also includes communicating the importance and concerns of (sustainable) agriculture for environmental and biodiversity protection. They play an important role in providing direct advice to farmers and in preparing and implementing information from higher-level authorities. In some states, the Chambers of Agriculture are responsible for approvals and controls in plant protection, although they typically only have a contributory role in implementing and enforcing the species protection legislation.

1.3 PROTECTED SPECIES

According to the agricultural classifications², 63% of the species protected under Annex IV of the Habitats Directive are either directly or indirectly dependent on agricultural management. These are mostly related to mammals (29 species) such as bat species like the Greater horseshoe bat (*Rhinolophus ferrumequinum*), arthropods (20 species), vascular plants (11 species) and amphibians (10 species) such as the Great crested newt (*Triturus cristatus*). As for wild birds in Germany, 12% of the wild bird species protected under the Bird Directive are classified as farmland birds – according to the Common Birds indicator for agriculture. The majority of these farmland birds are Passeriformes (20 species), such as the Eurasian skylark (*Alauda arvensis*) or the Barn swallow (*Hirundo rustica*). Still, due to the large amount of agricultural land in Germany, experts assume that on some level, most of the Annex IV species and birds are either directly or indirectly dependent on or impacted by agricultural management.

Many of the species found in Germany are dependent on agricultural habitats, particularly on richly structured cultural landscapes with a mosaic of natural and near-natural habitats. In addition to most native ferns and flowering plants, which have their main distribution in grassland, this also applies to a large number of animal species. However, modern agricultural production methods have led to increasing intensity of use and thus to a continuous decline in biodiversity (BfN, 2017). The Common hamster (*Cricetus cricetus*), which used to be common in many arable landscapes is one of the most prominent victims of large-scale intensive agriculture – and is now nearly extinct in Germany. But the national Red List for invertebrates also shows that negative population trends, for example of the butterfly species found on rough and dry grasslands, has continued unabated (BfN, 2017). This illustrates the state of biodiversity in the agricultural landscape of Germany with, in some cases, striking declines in the populations of a large number of species, including agricultural birds and insects (BfN, 2017). For example, the Whinchat (*Saxicola rubetra*), where a population decline of 63% was recorded between 1990 and 2013 (BfN, 2017). However, and especially for larger animals such as the White stork (*Ciconia ciconia*), recent assessments for few animals show improving population sizes (BMUV & BfN, 2020).

² Article 12 and Article 17 species classification is based on the current State of Nature Report 2020 (EEA 2020). While the classification for HD Annex IV species relies on the definition from Halada et al. 2013 (only available for Article 17), the birds classification refers to the classification from the Common Bird Indicator classification for birds with ecological preferences for agriculture (CFaBI).

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

The **Federal Nature Conservation Act (BNatSchG)** distinguishes between general species protection and special species protection. § 39 BNatSchG provides for general species protection, but if specially or strictly protected animal or plant species are affected, the provisions for special species protection in § 44 BNatSchG apply in addition to the provisions for general species protection in § 39 BNatSchG. § 44 BNatSchG on special species protection implements Art. 12 and 13 of the Habitats Directive and Art. 5 of the Birds Directive.

Under § 44 in connection with § 7 para. 2 no. 13 and 14 BNatSchG, the following wild animals/species are protected:

- Annex IV species of the Habitats Directive
- European bird species
- Animal and plant species listed in Annex A or Annex B to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein.
- Animal and plant species listed under § 54 BNatSchG³

The following Table 1 shows the translated transposition of Art. 12 and 13 of the Habitats Directive and Art. 5 of the Birds Directive into the German § 44 BNatSchG.

Table 1: Transposition of the species protection rules into German law Art. 12 and 13 of the Habitats Directive				
Art 12(1) prohibits: (a) all forms of deliberate capture or killing of specimens of these species in the wild Art 13(1) prohibits: (a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild	Art 12(1)c) prohibits: (c) deliberate destruction or taking of eggs from the wild	Art 12(1)d) prohibits deterioration or destruction of breeding sites or resting places.	Art 12(1)b) prohibits: b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration	Art 12(2) and Art 13(1)b) prohibits the keeping, transport and sale or exchange and offering for sale or exchange of specimens taken in the wild, except for those taken legally before the Directive is implemented
(1) It is prohibited to, 1. To pursue, capture, injure or kill wild animals of specially protected species or to take their developmental forms from nature, to	(1) It is prohibited to, 1. To pursue, capture, injure or kill wild animals of specially protected species or to take their developmental forms from nature,	(1) It is prohibited to, [...] 3. Remove, damage or destroy breeding or resting places of wild animals of the	(1) It is prohibited to, [...] 2. <i>significantly disturb wild animals of strictly protected species and European bird</i>	(2) It shall also be prohibited to, 1. To take animals and plants of the specially protected species into possession or custody, to have

³ §54 Authorisation to Issue Statutory Orders, BNatSchG:

(1) The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety is hereby empowered to place under special protection by ordinance, with the consent of the Bundesrat, certain animal and plant species or populations of such species not covered by section 7 para. 2 no. 13 letter a or letter b, insofar as they are naturally occurring species which

1. are endangered in their domestic population as a result of human intervention, or insofar as they are species which may be confused with such endangered species or with species within the meaning of section 7 para. 2 no. 13 letter b, or

2. are endangered in their population and for which the Federal Republic of Germany is highly responsible.

<p>damage or destroy them [...]</p> <p>4. Take wild plants of specially protected species or their developmental forms from the wild, damage or destroy them or their habitats.</p>	to damage or destroy them	specially protected species	<i>species during the breeding, rearing, moulting, hibernation and migration periods; significant disturbance is deemed to occur if the disturbance worsens the conservation status of the local population of a species</i>	them in possession or custody or to process them (prohibition of possession), 2. Animals and plants of the specially protected species within the meaning of section 7(2) no. 13 letters b and c a) to sell, buy, offer for sale or purchase, keep in stock for sale or transport, exchange or give for use or enjoyment in return for payment, b) acquire, display or otherwise use for commercial purposes. (marketing prohibitions).
Art. 5 of the Birds Directive				
Art 5 a) deliberate killing or capture by any method;	Art 5 (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;	Art 5 (c) taking their eggs in the wild and keeping these eggs even if empty	Art 5 (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;	Art 5 (e) keeping birds of species the hunting and capture of which is prohibited;
(1) It is prohibited to: 1. To pursue, capture, injure or kill wild animals of specially protected species or to take their developmental forms from nature, to damage or destroy them	(1) It is prohibited to: 1. To pursue, capture, injure or kill wild animals of specially protected species or to take their developmental forms from nature , to damage or destroy them 3. to remove, damage or destroy breeding or resting places of wild animals of the specially protected species	(1) It is prohibited to, 1. To pursue, capture, injure or kill wild animals of specially protected species or to take their developmental forms from nature , to damage or destroy them	(1) It is prohibited to: 2. significantly disturb wild animals of strictly protected species and European bird species during the breeding, rearing, moulting, hibernation and migration periods; significant disturbance is deemed to occur if the disturbance worsens the conservation status of the local population of a species 3. Remove, damage or destroy breeding or resting places of wild animals of the specially protected species	(2) It shall also be prohibited to: 1. To take animals and plants of the specially protected species into possession or custody , to have them in possession or custody or to process them (prohibition of possession), 2. Animals and plants of the specially protected species within the meaning of section 7(2) no. 13 letters b and c a) to sell, buy, offer for sale or purchase, keep in stock for sale or transport, exchange or give for use or enjoyment in return for payment, b) acquire, display or otherwise use for commercial purposes. (marketing prohibitions).

Agricultural exceptions within the transposing legislation

§ 44 BNatSchG further provides exceptions for agriculture, forestry and fisheries, articulated in the exemption clause of § 44 para. 4 BNatSchG (**Privilegierung**) that states:

If the agricultural, forestry and fisheries land use and the utilisation of the products obtained thereby comply with the requirements specified in § 5 para. 2 to 4 of this Act as well as with the requirements of good professional practice⁴ resulting from § 17 para. 2 of the Federal Soil Protection Act and the law on agriculture, forestry and fisheries, they shall not violate the prohibitions on access⁵, possession and marketing. If species listed in Annex IV of the Directive 92/43/EEC, European bird species or such species listed in a statutory instrument pursuant to § 54 para. 1 no. 2 are affected, this shall apply only as long as the conservation status of the local population of a species does not deteriorate as a result of the management.

§ 5 BNatSchG on agriculture, forestry and fisheries, in correspondence to the Federal Soil Protection Act (BBodSchG) § 17 para. 2, states:

(1) Nature conservation and landscape management measures shall take into account the special importance of agriculture, forestry and fisheries compatible with nature and the landscape for the conservation of the cultural and recreational landscape.

(2) In the case of agricultural use, in addition to the requirements arising from the regulations applicable to agriculture and from section 17 para 2 of the Federal Soil Protection Act, the following principles of good agricultural practice shall be observed:

- 1. Soil cultivation must always be adapted to the site, taking into account the weather conditions,*
- 2. The soil structure is maintained or improved,*
- 3. Soil compaction is avoided as far as possible, in particular by taking into account the soil type, soil moisture and the soil pressure caused by the equipment used for agricultural land use,*
- 4. Soil erosion is avoided as far as possible by site-adapted use, in particular by taking into account slope, water and wind conditions and soil cover,*
- 5. The natural structural elements of the fields, in particular hedges, copses, field margins and field terraces, which are necessary for the protection of the soil, are preserved,*
- 6. the biological activity of the soil is maintained or promoted by appropriate crop rotation; and*
- 7. The humus content of the soil typical of the site is maintained, in particular by a sufficient supply of organic matter or by reducing the intensity of cultivation.*

[...]

Hence, according to § 44 (4) BNatSchG, agricultural land use that respects the principles of “good agricultural practice” is excluded from the species protection rules. In other words, agricultural land use in line with “good agricultural practice” intrinsically respects the species prohibitions according to German law, at least *as long as the conservation status of the local population of a species does not deteriorate as a result of the management*. The seven principles of “good agricultural practice” listed in § 17 (2) BBodSchG are not further detailed via sub-legislative standards so far; § 5 para. 2 BNatSchG is also neither concretised from a nature conservation perspective nor enforceable⁶.

⁴ In the context of agriculture, the terminus “good agricultural practice” is common and further refers to the specifications outlined in § 17 para. 2 (2) BBodSchG. Subsequently, this wording will be used.

⁵ Prohibitions defined under § 44 para. 1 BNatSchG are called **access prohibitions** (Zugriffsverbote) in German law, prohibitions defined under § 44 para. 2 no.1 BNatSchG are called **possession prohibitions** (Besitzverbote), prohibitions defined under § 44 para. 2 no.1 BNatSchG **marketing prohibitions** (Vermarktungsverbote).

⁶ In response to this assessment, the BMUV responded the following: “This is a well-known criticism, which is only partly true, since there are also laws on plant protection, a fertilizer law and also an immission control law, as well as climate change regulations. § 17 (2) BBodSchG contains a total of seven principles of good professional practice. These are to be communicated by the agricultural advisory bodies responsible under state law in their advisory activities. Good agricultural practice in the management of agricultural soils is not static but is constantly developing on the basis of new scientific knowledge and technical progress. The Länder and also the federal government provide information on this (e.g. https://www.lwk-niedersachsen.de/lwk/news/31127_Leitlinien_Ordnungsgem%D9%86%D9%83e_Landwirtschaft)

According to case law regarding individual principles of “good agricultural practice”, e.g. § 5 para. 2 no. 5 BNatSchG, the principles of “good agricultural practice” are merely a guideline for action⁷. A comprehensive specification of the “good agricultural practice” has been demanded for a long time and has already been raised in the German Bundesrat (council of federal states), see its recommendations under [Bundesrat 168/1/17](#). Besides this political debate, there is extensive literature available that criticises the vague and abstract principles, such as Köck (2019) and Möckel et al. (2014). The authors of the BfN Soil Report (2021) call for a “more concrete definition of “good agricultural practice” in agriculture, oriented more towards a sustainable way of land management”. However, these discussions have not as yet resulted in any update of the legislation or official guidance documents.

In accordance with § 54 para. 10 BNatSchG, state governments are authorised to issue legal ordinances that can be used to specify general requirements for agricultural and forestry land use within the meaning of § 44 para. 4 BNatSchG. Hence, the *Länder* have their own state nature legislations, and in some cases use their legislation to specify “good agricultural practice”. One example is Brandenburg where § 2 BbgNatSchAG states that “*supplementary to § 5 paragraph 2 of the Federal Nature Conservation Act, the principles of good agricultural practice also include that binding material used in agricultural land use should be removed from the open landscape after its use*”. Furthermore, Bavaria has formulated specific prohibitions in relation to § 5 BNatSchG, such as in § 3 para. 4 no. 1 BayNatSchG the prohibition to convert permanent grassland into permanent wasteland. More extensive legal provisions that specify the principles of “good agricultural practice” could not be identified.

For certain species, including those listed in Annex IV of the Habitats Directive, the exemptions only apply as long as “*the conservation status of the local population of a species does not deteriorate as a result of the management*” (§ 44 para. 4 BNatSchG). If this is not ensured by other protective measures, e.g., by site protection measures, species protection programs, contractual agreements or targeted education, the **competent authority** shall order the necessary **management conditions** (Bewirtschaftungsauflagen) towards the causative farmers. While some experts argue that § 44 para. 4 BNatSchG is compatible with European law (e.g. Fellenberg in Kerkmann (2010), Lütkes in Ewer/Heugel (2018), Messerschmidt in Bundesnaturschutzrecht (2019)), other authors have questioned the compatibility of § 44 para. 4 BNatSchG with European law:

- Gellermann, in: Landmann/Rohmer § 44 BNatSchG, Rn. 40: According to § 44 para. 4 sentence 3 BNatSchG, agricultural, forestry or fishery land use that kills or disturbs species protected by European legislation or results in the destruction of protected habitats only violates the prohibitions of Article 44 para. 1 BNatSchG if it is not compatible with official management requirements.
- Gellermann, in: Landmann/Rohmer § 44 BNatSchG, Rn. 40 further states, that “while the relativisation of the prohibition on disturbance is still compatible with Article 5 (d) of the Birds Directive, it is nevertheless subject to concerns under EU law because it is not supported by Article 12 para. 1 b of the Habitats Directive”.
- Gläß, in: Giesberts/Reinhardt, BeckOK, § 44 BNatSchG, Rn. 55: The ECJ has ruled that a blanket exemption of agricultural and forestry land use is not compatible with European law.

Good agricultural practice for fertilization and plant protection are regulated in the Fertilization and Plant Protection Law. The Fertilizer Ordinance contains, among other things, restrictions on the application of nitrogenous and phosphatic fertilizers depending on location and soil condition, specifications for determining fertilizer requirements, blocking periods for the application of fertilizers and specifications for application technology.

Further specifications for soil management result from subsidy law: according to § 5 of the Agricultural Payments Commitments Ordinance, minimum requirements for soil cover must be met, and according to § 6, minimum tillage practices to limit erosion must be followed. According to § 7 of the Agricultural Payments Commitments Ordinance, it is prohibited to burn stubble fields and straw on stubble fields. According to § 8 of the Agricultural Payments Commitments Ordinance, landscape elements may not be removed. Under greening, grassland in FFH areas may not be ploughed or converted. The remaining permanent grassland not defined as environmentally sensitive may only be converted with an official permit.”

⁷ The Federal Administrative Court (BVerwG) has ruled (BVerwG, judgement of 1.9.2016, Ref. 4 C 4.15, para. 16 et seq.), for example, that the provision of § 5 para. 2 no. 5 BNatSchG, according to which grassland conversion must be avoided on peatland sites, does not contain a prohibition within the meaning of § 67 para. 1 BNatSchG. Thus, the principles of good agricultural practice are merely a guideline for action.

Other exemption clauses

§ 44 para. 5 BNatSchG includes further exemptions for

- 1) construction projects that are subject to the “intervention regulation” (§ 15 para. 1 BNatSchG, for more detail on this see section 5), for which impairments are identified as “unavoidable” and require a permit according to § 17 para. 3; and
- 2) construction projects on areas with development plans (mostly in interior areas of cities and communes) according to § 18 para 2 BNatSchG.

According to one legal expert on species protection, “there are reasons to believe that §44 BNatSchG 5 No. 3⁸ does not meet the requirements of EU law”. This view, however, is not shared by the BMUV.

Apart from defining the provisions needed for a derogation under Art. 16 HD, § 45 BNatSchG provides further clauses transposing the derogations detailed in Article 16 HD/Article 9 BD.

Additionally, § 37 para. 2 BNatSchG states that “*the provisions of plant protection law, animal protection law, the law on epidemics and the law on forestry, hunting and fishing shall not be affected by the provisions of this chapter*”. This implies, inter alia, that the species identified as huntable species in the Federal Hunting Act (Bundesjagdgesetz – BJagdG) or state Hunting Laws are not covered by the species protection rules under § 44 BNatSchG). However, Annex IV species are de facto not huntable, as they do not have any hunting season, such as the Wildcat (*Felis silvestris*), the Lynx (*Lynx lynx*) or the Eurasian otter (*Lutra lutra*), or the European bison (*Bison bonasus*). The same is true for the four fish species in Germany protected under Annex IV. Analogously, many birds such as birds of prey are excluded from hunting throughout the year. This is regulated in the Federal Hunting Hours Ordinance (Bundesjagdzeitenverordnung – BJagdZ-VO).

Additional regulations related to species protection

§ 39 para. 5 BNatSchG – although the general species protection regulation does not specifically target the EU species protection rules, this provision is relevant because it details further prohibitions on the deliberate destruction on breeding sites (incl. nests) and resting places:

It is prohibited to,

1. *Burn off the ground cover on meadows, field margins, high meadows and unused ground areas as well as on hedges and slopes or treat areas not used for agriculture, forestry or fishing in such a way that the fauna or flora is considerably impaired,*
2. *cut, plant or remove trees, hedges, living fences, shrubs and other woody plants outside of forests, short-rotation plantations or horticulturally used areas in the period from 1 March to 30 September; gentle shaping and maintenance cuts are permissible to remove the growth of plants or to maintain the health of trees,*
3. *cut back reed beds in the period from 1 March to 30 September; outside these periods, reed beds may only be cut back in sections,*
4. *permanently clear water-bearing ditches using trenchers if this has a significant impact on the natural balance, in particular on wildlife.*

According to § 39 para. 6 BNatSchG, it is also prohibited to visit caves, galleries, earth cellars or similar spaces that serve as winter roosts for bats during the period from 1 October to 31 March; this does not apply to the performance of activities that cannot be postponed and cause only minor disturbance or to areas that are developed for tourism or are heavily used. While this is not directly linked to agricultural management, it is part of the German legislation on species protection.

EU Species protection regulation is not included in the Federal German Forest Act (BWaldG). The German building law accounts for nature conservation concerns in outskirt areas (§ 35 BauGB), which according to the legal commentary (Gellermann, in: Landmann/Rohmer § 44 BNatSchG, Rn. 40) also includes § 44 BNatSchG.

⁸ §44 BNatSchG 5 No. 3: The prohibition pursuant to sub-section 1 number 3 does not apply if the ecological function of the reproduction sites and resting places affected by the intervention or project continues to be fulfilled in the spatial context.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

The BNatSchG is accompanied by a complementary Federal Ordinance on the Protection of wild Animal and Plant Species (BArtSchV). Besides giving the list of strictly protected species (Article 1), § 4 para. 1 BArtSchV entails further – rather general – prohibitions on the deliberate disturbance of species, namely:

1. *With snares, nets, traps, hooks, glue and other adhesives,*
2. *Using live animals as bait,*
3. *With crossbows,*
4. *With artificial light sources, mirrors or other illuminating or dazzling devices,*
5. *With acoustic, electric or electronic devices,*
6. *By fumigation or using poisons, poisoned or stupefying baits or other stupefying agents,*
7. *With semi-automatic or automatic weapons whose magazine can hold more than two cartridges, or using sighting devices for shooting at night with electronic image amplifiers or image converters,*
8. *Using explosives,*
9. *From motor vehicles or aircraft; or*
10. *From boats with a propulsion speed of more than five kilometres per hour*

These do not include any specifications for agricultural management. Apart from this ordinance, no additional official subsidiary legislation that derived from the EU transposing legislation could be identified. Based on the knowledge of interviewed experts from administrations and non-governmental experts as well as on additional desk research, this study concludes that the **intermediate layer of additional legislation regarding species protection rules is rather thin.**

With regard to the Cormorant, many states instead have a regulation in place to enable the taking of these birds. One example is the “*Ordinance on the Protection of Naturally Occurring Wildlife and the Prevention of Significant Damage to Fisheries by Cormorants of the State of North Rhine-Westphalia*” (Kormoranverordnung Nordrhein-Westfalen - Kormoran VO-NRW).

The Federal Ministry of Food and Agriculture (BMEL) published a framework guidance document (2015) on the implementation of the current EU CAP that specifies Cross Compliance regulations. In a joint federal states working group, Cross Compliance regulations and commitments were last updated in 2021. These were adopted and further amended by each of the 16 German states in separate guidance documents (see [guide of Mecklenburg-Vorpommern](#) as example). In this context, the seventh standard on Good agricultural and environmental condition, GAEC 7, targeting the retention of landscape features and the restrictions on hedge/tree cutting season, is most relevant. According to this guidance and with reference to the Federal Ordinance on **Agricultural Payments Commitments (§8 para. 1 AgrarZahlVerpflV)**, the following landscape structures fall under Cross Compliance protection (see Appendix I for more detail).

Table 2: Landscape features that are protected under §8 para. 1 AgrarZahlVerpflV

Landscape structure	Definition
Hedges or hedge banks	Linear structural elements that are predominantly overgrown with woody plants and have a minimum length of 10 m and an average width of up to 15 m, whereby smaller unpaved interruptions are harmless.
Tree lines	At least five linearly arranged, non-agricultural trees along a stretch of at least 50 m in length.
Field copses	Areas predominantly covered with woody plants, not used for agricultural production, with a size of at least 50 m ² but not exceeding 2 000 m ² ; areas for which afforestation aid or afforestation premium has been granted are not considered as groves.

Wetlands	Wetlands not exceeding 2 000 m ² in size: a) in biotopes which are protected under section 30(2), first sentence, numbers 1 and 2 of the Federal Nature Conservation Act or under more extensive provisions of Land law and which are recorded in the biotope mapping, b) ponds, tarns, sinkholes, and c) other wetlands comparable to b.
Individual trees	Trees that are protected as natural monuments within the meaning of § 28 of the Federal Nature Conservation Act.
Field margins	Narrow, elongated areas predominantly covered with grass and herbaceous plants, with an overall width of more than 2 m, located within or adjacent to agricultural land and not used for agricultural production.
Dry stone and natural stone walls	Walls of fieldstone or natural stone grouted or not grouted with earth or clay, more than five metres in length, which do not form part of a terrace in accordance with number 10.
Clearance cairns	Fills of stones of more than 5 m in length
Rock and stone bars as well as naturally stony areas	Rock and stone bars and natural petrified areas not exceeding 2 000 m ² in size.
Terraces	Linear-vertical structures in the agricultural landscape created by humans using auxiliary materials and designed to reduce the slope of farmland.

The CAP regulations, however, are subject to constant adjustments. As such, for the new funding period from 2023-2027, the regulations of the German AgrarZahlVerpflV will be contained in modified form under the term "conditionality" in the German CAP Conditionalities Act and the CAP Conditionalities Ordinance.

The state governments are authorised to specify further landscape features which may not be removed, in case it is necessary to take into account special regional conditions (§ 8 para. 4 AgrarZahlVerpflV). However, no additional specifications have been identified. According to §8 para. 5 AgrarZahlVerpflV, the prohibitions of the removal of landscape features do not include any other duties of care or maintenance, because otherwise (if such obligations were to have been included) there would be no legal space for 2nd Pillar support of the CAP for these kinds of activities.

The restrictions on hedge/tree cutting season are legally accounted for in § 39 para. 5 BNatSchG which prohibits the cutting of individual trees, hedges, living fences, bushes, other woody plants as well as reed beds between 1st May and 30th of September. In line with the exemptions under this law, many Cross Compliance guidance documents of the *Länder* include the following addition: “*However, gentle shaping and maintenance cuts to remove the growth of the plants are permissible.*”

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL UNDER THIS LEGISLATION

Besides the Cross Compliance regulations discussed above, no additional farm level rules could be identified.

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

The results of the expert interviews, supplemented by a literature review, reveal some key aspects of the governmental advice regarding the legal requirements for species protection in the German agriculture sector. **Government advice** to farmers in Germany is mainly organised **at the *Länder* level**.

The Federal Ministry of Food and Agriculture (BMEL) and some state ministries with their associated Chambers of Agriculture have further specified the legal regulations in guidelines and information brochures. However, these specifications are **not legally binding**, but merely interpretative aids for farmers, authorities, and courts. Insofar as they have the character of official administrative regulations, they can be characterised as "anticipatory expert opinions", which are to be taken into account when interpreting standards but do not need to be complied with as is the case with legal ordinances (BfN, 2014). Some *Länder* seem to be more active than others in providing guidance, having relatively extensive **advisory services**, such as North Rhine-Westphalia (NRW). These take the form of web-based information systems, distributed written information (guides, official instructions, etc.) or through direct (on-site) advisory activities carried out by the Chambers of Agriculture or other subordinate entities or contractors.

Moreover, a wide range of experts pointed to a **disparity between the states**, with some state ministries openly stating that they do not (yet) have "soft measures" such as guidelines for subordinate authorities, other experts, and ultimately farmers. Extensive research of online resources has come to similar conclusions (although it is possible that they simply cannot be found online or are not freely accessible). Another observation in this context, voiced by several experts, is that in the affluent states (mostly in the south of Germany such as Baden-Württemberg) a higher level of government advice is available. According to interviewed expert assessments, this is mostly due to the availability of more financial and human resources in the respective ministries.

Examples of specification, advice and data sources to authorities at different levels as well as directly to farmers include:

- All *Länder* have made efforts to **bundle all relevant data** and information on protected species as well as on the various topics and instruments of biodiversity conservation online. However, these differ in the depth of information provided. Some *Länder* have established **central species databases** (e.g., [Bavaria](#), [Hessen](#), [Thuringia](#), [Schleswig-Holstein](#)) that serve as a *Länder*-wide recording, documentation and information system for fauna and flora. Some of them, e.g. Saxony, have established online-tools, which allow access to the central databases by everyone. The information in the databases is needed for a variety of administrative and specialized tasks of state and local administrations. Such tasks focus in particular on the **documentation of species occurrences**, but can also relate to impact regulation, special species protection assessment, environmental impact assessment, monitoring, Natura 2000 and nature conservation assessments and planning. Similarly and often embedded in an extensive species web-portal, are **species profiles** (Artensteckbriefe) e.g., [Mecklenburg-Western Pomerania](#); [Saxony](#); [Baden-Württemberg](#)), which also contain important information relevant for species protection as well as for planning and approval issues. These are aimed at planning offices and authorities primarily, but also other relevant stakeholders (e.g., farmers) and the general public. In addition, some *Länder* have published working aids for special species protection assessment in the context of planning approval/permit procedures. This is discussed further in chapter 5.
- At the national level, there is an [online information service](#) for forestry, fisheries and agriculture with profiles of HD Annex IV species. In addition to information on biology, ecology, endangerment and management, the service provides gridded distribution maps with a 10km x 10km resolution. By the same token, the Scientific Information System on International Species Protection ([WISIA-online](#)) provides a database of animal and plant species that are specially and strictly protected under the Federal Nature Conservation Act (BNatSchG). More technical

information of the national government and the states is accessible via the [BfN website](#). Projects and programs for species affected by agricultural activities at the national and state levels are also listed here (e.g., for the [European hamster *Cricetus cricetus*](#)).

- There is also the option to establish a **Species Action Plan** for a strictly or specific protected species. While no national case was identified there are instances on state level, as is the case with the [Action Plan Wolf](#) in Bavaria.
- One *Land* that has a particularly rich range of advisory and information services and publications is NRW. The state has published a detailed [brochure on regulations on species and biotope protection](#), which contains information on the legal provisions for species protection and focuses particularly on **species protection assessments**. It is aimed at nature conservation and planning authorities at all administrative levels of the *Land* and at the municipal level. It also serves as a planning aid and guide for planning offices, nature conservation associations, investors and, expressly, for land users. A further [guide on species conservation in agriculture](#) was developed in cooperation with the NRW State Agency for Nature, Environment and Consumer Protection (LANUV) and the NRW Chamber of Agriculture. The guide is intended to serve as a **working aid** for regional authorities at the level of the *Kreise*, but also to help farmers to respect species protection rules. In the [online portal](#), the guide is supplemented by a brochure on the protected species, annexes to nationwide **occurrence maps** of local populations, as well as species-specific **fact sheets** and another method manual for **EIAs** with regards to protected species (see section 5).

NRW guidance on § 44 para. 4 BNatSchG in agriculture (2013)	NRW brochure on protected species (2015)
<p>Ministerium für Klimaschutz, Umwelt, Landwirtschaft, Natur- und Verbraucherschutz des Landes Nordrhein-Westfalen (MKULNV)</p>  <p>Leitfaden</p> <p>Umsetzung des Artenschutzes gemäß § 44 Abs. 4 BNatSchG in der Landwirtschaft in Nordrhein-Westfalen</p>  <p>(Fassung: 5. Juli 2013)</p>	<p>Ministerium für Klimaschutz, Umwelt, Landwirtschaft, Natur- und Verbraucherschutz des Landes Nordrhein-Westfalen</p>   <p>Geschützte Arten in Nordrhein-Westfalen Vorkommen, Erhaltungszustand, Gefährdungen, Maßnahmen</p> <p>www.umwelt.nrw.de</p>

Factsheet example

Barbastella barbastellus

(excerpt, full factsheet see here:

<https://artenschutz.naturschutzzinformationen.nrw.de/artenschutz/de/arten/gruppe/saeugetiere/kurzbeschreibung/6522>)

Mopsfledermaus (*Barbastella barbastellus* (Schreb., 1774))

EU-Code: 1308

FFH-Anh. II, FFH-Anh. IV

Rote Liste 2010 NRW: 1

Rote Liste D: 1

Erhaltungszustand in NRW (ATL): U†

Erhaltungszustand in NRW (KON): S



Mopsfledermaus (*Barbastella barbastellus*)
© Foto: Henning Vierhaus, Bad Sassendorf-Lohne

der Art mit dem Detektor schwierig ist.

Die Mopsfledermaus ist mit einer Körperlänge von 4,5 bis 6 cm und einem Gewicht von 6 bis 14 g eine mittelgroße Fledermausart. Das Fell ist ober- und unterseits dunkel schwarzbraun bis schwarz gefärbt. Das Rückenfell wirkt mitunter bereift, da es weißliche bis gelblichweißliche Spitzen besitzt. Das Gesicht und die Ohren sind schwarz, die Flughäute graubraun bis schwarzbraun. Die breiten Ohrmuscheln sind an der Kopfmittle miteinander verwachsen. Charakteristisch sind die mopsartig gedrungene Schnauze, die kleine Mundspalte sowie die nach oben hin geöffneten Nasenlöcher. Die Flügel sind relativ breit und erreichen eine Spannweite von 26 bis 29 cm. Im Flug erscheint die Mopsfledermaus so groß wie ein Sperling. Mit dem Ultraschalldetektor ist die Art meist bei 30 bis 32 kHz, seltener bei 42 kHz zu hören. Die Ortungslaute sind sehr variabel, so dass eine sichere Bestimmung

Artinformationen

- Kurzbeschreibung
- Gefährdung / Erhaltungsziele
- Steckbrief
- Literatur

Artenschutzmaßnahmen

- Status und Habitat
- Maßnahmen
- Quellen

Bestandserfassung

- Methodensteckbrief
- Fledermaus-Erfassungsmethoden
- Erfassungstermine
- ABC-Bewertungsbogen

Verbreitungskarten

- Rasterkarten

- **Chambers of Agriculture** play a key role in providing direct advice to farmers and in preparing the information provided by higher-level authorities. Through information and statements collected by the BMUV for the purpose of this study, it is stated that the focus of the biodiversity advisory service of the NRW Chamber of Agriculture is to communicate as well as specify which measures can be used to support/promote specific species and how this is to be done (i.e., contractual nature conservation). Information on **species protection regulations/prohibitions** is included, but this is allegedly **not the main focus of their advisory work**.⁹ In addition, there is a dedicated program of “[advisors for wild habitats](#)” (Wildlebensraumberater) in Bavaria. Nonetheless, according to the survey responses, biodiversity advisory services in Germany are perceived to still have a rather limited impact but are increasing in number and visibility.
- As part of the “Lower Saxony Way”¹⁰, an extended advisory service on biotope and species protection has been developed by the state ministry. It is concerned with agricultural practices, where farmers should receive further information on how they can implement more nature and species protection on their land. In this context, reference is made to corresponding funding opportunities. However, when examining the advice offered in the form of publications and guidelines concerning species protection and legislation, there is only a brief directory of the Lower Saxony especially or strictly protected species, and some little detailed flyers (e.g., “[Habitats Directive and species protection in Lower Saxony](#)”), or the only available working aid referring to species rules being not directly linked to agricultural activities (“[Watercourse maintenance measures](#)” in Lower Saxony).
- For several other states, the openly accessible advisory publications on species protection in agriculture merely reproduce the exact texts of the national and state law and/or provide lists of the species occurring in the respective federal states (e.g. [Baden-Württemberg](#)), while providing no more explanations or specifications to it.

⁹ Chambers of Agriculture from several *Länder* were contacted as part of this study, but none of them agreed to be interviewed or to give a statement on the extent to which their advisory work includes aspects relevant to biodiversity and species protection.

¹⁰ The “Lower Saxony Way” is an agreement reached by the federal state government of Lower Saxony, the Chamber of Agriculture and NGOs that is unique in Germany. In the joint agreement, all participants commit to great efforts in nature and species conservation, biodiversity and the management of landscape resources (<https://www.niedersachsen.de/niedersaechsischer-weg>).

- A study by Möckel et al. (2014) identifies a lack of will to achieve species protection objectives on the part of both controllers and controlled, with maximizing yields seemingly more important than adequately protecting biodiversity. This was echoed by several NGO representatives interviewed as part of the present study who stated that the interests of agriculture and species protection in Germany were simply too conflicting. In this context, it must also be said that farmers might not lack will but are bound by the extremely competitive nature of this sector and thus need to secure high production and rather lack clear support and capacities to prioritize species protection.

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

Compliance with the provisions of species protection law is **monitored by the competent authorities within the Länder**. The competent authorities **differ from state to state** and both centralized and more decentralized approaches coexist. For example, in Schleswig-Holstein, the state ministry is responsible (centralized), whereas in NRW it is the Lower Nature Conservation Authorities (decentralized), along with the Chambers of Agriculture and the forty “Biologic Stations” ([Biologische Stationen](#))¹¹ unique to this state (but similar organizations/structures exist in other Länder like Natura-2000-stations, Landschaftspflegeverbände etc.).

According to German law, agricultural land use in line with “good agricultural practice” **intrinsically respects the species prohibitions**. The principles of good agricultural practice set out in § 5 para. 2 BNatSchG are not strictly binding. This has been expressly clarified by the Federal Administrative Court even in view of the relatively strictly formulated principle of § 5 para. 2 no. 5 BNatSchG (see also Section 2 for more detail). Consequently, there are **generally no violations** of the species protection prohibitions for such activities according to § 44 para. 4 BNatSchG. However, according to the same paragraph, an agricultural measure can be classified as unobjectionable or in need of coordination with the competent authority, depending on whether the conservations status of a local population will **deteriorate as a result of the activity**. Furthermore, the exemptions do not include construction activities or other agricultural activities beyond those of “good agricultural practice”. To this end, the requirements of § 44 para. 4 BNatSchG must be comprehensively addressed, and the competent state authorities must be required to enforce the protection regime, including monitoring compliance and imposing sanctions. As outlined in Section 2 of this report, although management restrictions are the logical response to a breach of species protection rules, survey results indicate that they are rarely imposed and the lax definition of 'good agricultural practice' hinders effective enforcement of the EU regulations.

Penalty provisions that sanction violations of the prohibitions laid down in § 44 para. 1 and 2 BNatSchG also form part of the legislation. According to § 69 para. 7 BNatSchG an administrative fine of up to 50,000 EUR can be applied. Notably, the extent to which a farmer carrying out a specific activity has **knowledge of the species prohibitions and the associated sanctions**, was deemed as **low** by most of the interviewed stakeholders. This is important in this context, because, although penalties do exist, they are hardly ever imposed according to all the survey responses, and a lack of knowledge of the regulations by farmers raises the legitimate question of whether the penalties may not be sufficient to ensure a functioning system of species protection.

As outlined above, the BMEL coordinates data collection and information management on a national level in the relation to CAP-obligations. In this regard, it collects **statistics on cross-compliance financial subsidies, controls of compliance with the CAP-obligations and sanctions** (financial reductions) **for all states** including those targeting the retention of landscape features (GAEC 7). Based on data provided by the BMEL, it can be established that annual Cross Compliance controls, including for GAEC 7, steadily reach around 1% of the farmers applying for CAP subsidies (slightly more than 3,000 farmers)¹². Identified violations of GAEC 7 are shown in the following Figure 2.

According to the BMUV, the ban on the removal of landscape elements (LE) including hedges, ponds, ditches, trees (in rows, groups or standing alone), field margins and terraces, which is further specified in the national IACS, is monitored automatically and does not require direct on-site visits.

¹¹ In NRW, the Biological Stations emerged from voluntary nature conservation and today represent a link between voluntary and official nature conservation. In this context, their main tasks are the development, implementation and supervision of species conservation programs/projects.

¹² 2020 makes an exception with significantly less controls due to the COVID-19 pandemic.

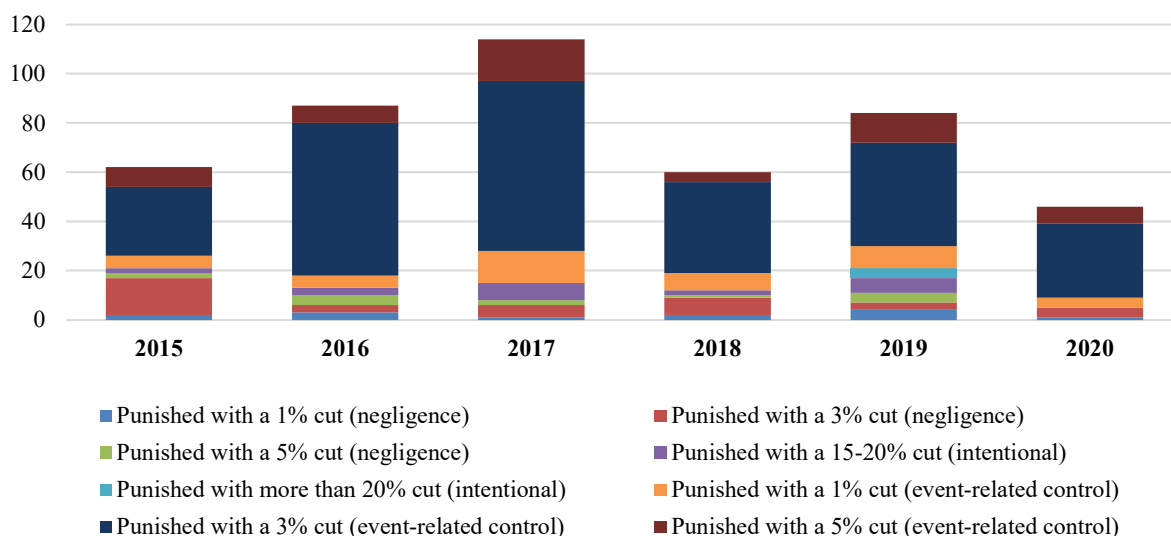


Figure 2: Violations of GAEC 7 reported to the BMEL between 2015-2020 (Source: BMEL, summarised specifically for this study)

Note: Due to the federal structure, some cases could be missing.

The literature review and the expert assessment reveal some further evidence on the monitoring and enforcement of the legal requirements for species protection over Germany's agricultural land.

- For example, in NRW, like in most of the Länder, the Lower Nature Conservation Authorities are responsible for implementation of the species protection according to state law (§ 2 para. 4 LNatSchG NRW). Within this framework, it is also their task to determine whether the local population of a given species is deteriorating as a result of management. Should this be the case, the farmers concerned would be informed, as well as the Chambers of Agriculture and the Biologic Stations. As a next step, coordination/optimisation of the protection concept (primarily through contractual nature conservation) is the state's measure of choice to stop/reverse deterioration. In what the NRW Ministry calls an "escalating cascade of measures", the ordering of **management requirements, which** apply to individual land managers to take remedial action according to § 44 para. 4 BNatSchG, and the imposition of sanctions, are only used as a **last resort**. They are only to be used when targeted education/awareness campaigns, consulting and development of suitable measures with the farmer (species protection programs and contracts for nature conservation), as well as spatial protection have all been exhausted. This point was **also echoed by other officials from other state ministries**. It is noteworthy that authorities in NRW have only exhausted the entire legal process and imposed management requirements in very few cases (legal consequence of a deterioration according to § 44 para. 4 BNatSchG) and sanctions are rarely imposed (see example in box 1 below).
- The picture is the same in Lower Saxony, where the ministry of environment is only aware of "a few individual cases", as the responsibility for compliance monitoring, the order of management requirements and sanctions lies with the municipal authorities (see example in box 2 below). Statistics on violations of § 44 BNatSchG or § 69 BNatSchG and their penalties were generally not available or pooled at the level of the state environmental ministries and were therefore not provided upon request.

Box 1: Example of a case of a violation of § 44 (4) BNatSchG in the state of North Rhine-Westphalia



Black-tailed godwit (*Limosa limosa*) © Andreas Trepte

A farmer had mowed on his land on the Lower Rhine in NRW, where several Black-tailed godwit (*Limosa limosa*) nests had been mapped despite the prohibitions and marking of the nests by NGOs. He claimed that it was allegedly too foggy to see anything. The competent authority cross-checked and ordered management conditions. As a result, the farmer had to pay back direct payments and the Environmental Crime Unit became active. The case went to court and the person was convicted and had to pay a fine. According to the ministry, this example was the impetus for the creation of a guide on species protection in agriculture in cooperation with the chambers of agriculture. Since this guideline came into force, there has not been a single management order or sanction under § 44 (4) BNatSchG in NRW.

Box 2: Example of efforts by the state of Lower Saxony to protect a BD Annex I species, acknowledging the shortcomings of the principles of “good agricultural practice”



Corncrake (*Crex crex*)
© Rachel Davies

Good agricultural practice in the field of grassland management is “not sufficient to secure and maintain breeding occurrences” of the corncrake (*Crex crex*) according to the Lower Saxony state ministry of environment. The corncrake returns from its African wintering grounds very late and does not begin breeding until early/mid-May. The breeding season can last until the end of July. In order to consider special protection of the species in view of declining breeding populations, the district of Harburg carries out annual mapping of corncrake occurrences in the bird sanctuary “Moors near Buxtehude”. On the basis of this mapping, individual management requirements/orders are subsequently issued for populated grassland areas to ensure the breeding success of the corncrake. This procedure is carried out in consultation with local farmers. The state of Lower Saxony bears the compensation payments to affected farmers resulting from the individual orders.

- Regarding **compliance** with the species protection legislation, some interviewed experts (mostly from NGOs, lower levels of the administration or from academia) assumed that **violations of the species protection rules in agricultural landscapes are relatively common**. However, several state ministry representatives stated that they assumed that the principles of “good agricultural practice” were being followed throughout the *Land*.
- Despite increasing efforts by all *Länder* to have accurate knowledge on species occurrences and their conservation status, several experts stated that in most cases, the **data is not extensive enough** to assess populations at the site level. It was pointed to the fact that to legitimately sanction violations, authorities need to demonstrate that the population of a species in a specific location is declining due to the activities of an individual farmer. However, such a **causal connection between concrete action and deterioration of the conservation status** is supposedly not possible in practice. Even if sanctioning individual violations would be feasible with greater certainty, **human and technical capacities** of the authorities for control were deemed as not nearly sufficient by some of the interviewed experts.

- Interview partners from the NGO sector attribute a major problem to the **lack of enforcement capacity and political will/direction**. In order to levy fines, an authority would have to regularly monitor what is happening. Experts suggest that nature conservation authorities are often ill-equipped to handle this, as public prosecutors are not familiar with environmental criminal law and the staff of the lower-level nature conservation authorities are mostly lawyers who lack biological knowledge, creating an enforcement deficit. Additionally, agricultural authorities, especially the Chambers of Agriculture, are often perceived as too closely intertwined with agriculture to ensure effective control/enforcement of species protection and therefore often do not want to take action against their own clientele.¹³ One expert states that fines are extremely rare even for intentional violations of species protection law (illegal killings/poisonings e.g. of birds of prey and wolves), because there are no enforcement capacities (political prioritisation) to find the offenders. In this regard, he concludes that sanctioning species protection violations that result from regular farming or forestry practices is likely to be even less of a priority and that the focus of the controls is more on the quantitative delimitation of the area eligible for contractual nature conservation payments.
- Several interview partners note that regulatory law (as provided with **§ 44 BNatSchG**) is not a suitable instrument to ensure effective protection of species in forestry and agriculture. One representative of a *Länder* ministry argues that sanctions and controls would work for the “rare and last of their kind” (e.g. European hamster (*Cricetus cricetus*)) where mediation with sanctions is a viable option. However, as soon as it comes to more common species (e.g., Eurasian skylark, *Alauda arvensis*), **§ 44 BNatSchG** he considers that it is **not a suitable instrument** to stop the loss of biodiversity in forestry and agriculture, a statement which was even printed and presented during an official workshop of the ministry to explain the guideline for species protection in agriculture and forestry to a range of relevant stakeholders.¹⁴ The extensive exemptions for good practice agricultural activities, and the limited willingness of state governments to enforce and sanction violations of the regulations, imply that violations of the species rules are likely to occur on a relatively large scale, given the known impacts of industrial agriculture on rare but also common species. That is, unless the following approach, which is widely considered by federal state governments to be the more effective and successful alternative, is entirely sufficient to uphold the species rules at large scale (an assumption which was questioned by some survey respondents outside of the government): the so-called “commitment to the **principle of cooperation**”, which does not ignore the legal regulations but places the focus more on cooperation with the land users and thus also, arguably, presupposes a greater degree of trust and protection efficiency¹⁵.
- It must be noted, that beyond the legal requirements and specifications, many managers and landowners envisage and carry out supportive management measures for endangered and protected species, often implemented through corresponding contractual nature conservation models. It is important to note that such **conservation activities** (including many other projects (e.g. LIFE projects), cooperations, initiatives and associations of this kind) are arguably **also very important** in addressing the shortcomings outlined above in relation to the prevention of negative impacts on protected species through common day-to-day agricultural practices. In fact, the § 3 para. 3 BNatSchG stipulates that “*in the case of nature conservation and landscape management measures, priority shall be given to examining whether the purpose can also be achieved at reasonable expense through contractual agreements. If this is the case, contractual agreements take precedence.*” Such conservation activities are approved and notified by the EU Commission and supported with some hundred million Euro per year in public funds (EU-Funding from the 2nd pillar of the CAP, national and state funding).

¹³ The fact that the Chambers of Agriculture are not sufficiently independent of the farms they are supposed to control is also referenced by several studies including, Möckel et al. (2014) and German National Academy of Sciences Leopoldina (2020)

¹⁴ The workshop slides were provided as part of the answer to this study but are not available online

¹⁵ As a response to this assessment, the BMUV responds the following: “The main problem here is that financial support under EU state aid rules is only possible for “voluntary” measures.”

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

In Germany, authorisation procedures for land management are mostly based on the BNatSchG and the Federal Environmental Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung – UVPG).

5.1 IMPACT REGULATION

An important instrument of the German nature protection legislation is the impact regulation (**Eingriffsregelung**), which is specified under §§ 13 - 19 BNatSchG. However, there are a number of deviations from §§ 14-17 BNatSchG in the legislative text of the *Länder*. Its goal is to maintain the performance and functionality of the natural processes and the landscape, including areas outside of special conservation areas.. It states in § 13 BNatSchG:

“Significant impairments to nature and landscape are to be avoided by the polluter as a matter of priority. Significant impairments that cannot be avoided shall be compensated for by compensatory or substitute measures or, where this is not possible, by monetary compensation.”

§ 14 para. 2 BNatSchG, states that agricultural, forestry and fishery land use are exempted from this regulation, as long as it respects the requirements of § 5 para. 2-4 BNatSchG, and § 17 para. 2 BBodSchG respectively (please see section 2.1)¹⁶. This also includes the resumption of such activities if it was temporarily paused or restricted, provided that the requirements regulated in § 14 para. 3 BNatSchG are met. Thus, this regulation most frequently targets construction projects for settlements, industries or transportation. In such cases, the “*polluter*” is obliged to refrain from avoidable impairments of nature and landscape if “*reasonable alternatives*” are possible (§ 15 para. 1 BNatSchG). If impairments cannot be avoided, the “*polluter*” has to bring forward a justification and is obliged to conduct compensatory measures (“*polluter-pays principle*”, Verursacherprinzip, § 15 para. 1 and 2 BNatSchG). According to § 15 para. 2 BNatSchG, compensation is assured as soon as the impaired functions in the affected natural area have been restored in a similar or equivalent way. Restoration measures include compensatory measures and substitution measures that are equivalent in their applicability. This instrument needs to be respected for any encroachment that requires official authorisation or notification to an authority under other legal provisions (§ 17 para. 1 BNatSchG). However, § 17 para. 10 BNatSchG states that, if an intervention is a project subject to an **environmental impact assessment under the UVPG**, the procedure needs to match the requirement of this law.

Special species protection has become increasingly important in the context of intervention planning and project approvals in recent years, as the species protection prohibitions of § 44 para. 1 BNatSchG now also apply to intervention projects. For the process of the project, this thus requires appropriate technical assessment approaches. If such projects may concern species protected under Annex IV HD or European birds, §44 para. 5 BNatSchG states that in following cases, no violation occurs:

- if the impairment caused by the intervention or the project does not significantly increase the risk of killing or injuring specimens of the species concerned and this impairment cannot be avoided by applying the necessary, professionally recognised protective measures
- if the animals or their developmental forms are impaired in the context of a necessary measure aimed at protecting the animals from killing or injury or their developmental forms in the spatial

¹⁶ § 14 para. 2 BNatSchG is further specified and amended in some states, such is the case for Bavaria (Art. 6 BayNatschG) with a longer time period for resumption of agricultural, forestry and fishery land use; or for Saxony-Anhalt (Art 6 NatSchG LSA) which states that care and maintenance measures on dykes, dams and other flood protection facilities, as well as the restoration of a proper condition after an incident of damage on the existing route, are generally not to be regarded as encroachment.

context, and these impairments are unavoidable if the ecological function of the reproduction and resting places affected by the intervention or project continues to be fulfilled in the spatial context.

It further states that early compensatory measures may also be applied.

5.2 ENVIRONMENTAL IMPACT ASSESSMENT

The environmental impact assessment is addressed in a separate legislation and applies to larger and more complex projects. With regard to agricultural interventions, Annex 1 UVPG includes a large list of stable and slaughterhouse construction and operation (section 7) and other agricultural projects, such as listed under Table 1.

Table 1: Agriculture related UVPG projects

7.	Foodstuffs, luxury foodstuffs and animal feed, agricultural products:		
7.1	Construction and operation of a facility for the intensive rearing of hens with		
7.1.1	60 000 or more places,	X	
7.1.2	40 000 to less than 60 000 places		A
7.1.3	15 000 to less than 40 000 places		S
7.2	Construction and operation of a facility for the intensive rearing or rearing of pullets with		
7.2.1	85 000 or more places	X	
7.2.2	40 000 to less than 85 000 places		A
7.2.3	30 000 to less than 40 000 places		S
7.3	Construction and operation of a facility for the intensive rearing of fattening poultry with		
7.3.1	85 000 or more places	X	
7.3.2	40 000 to less than 85 000 places		A
7.3.3	30 000 to less than 40 000 places		S
7.4	Construction and operation of a facility for the intensive keeping or rearing of turkeys with		
7.4.1	60 000 or more places	X	
7.4.2	40 000 to less than 60 000 places		A
7.4.3	15 000 to less than 40 000 places		S
7.5	Construction and operation of a facility for the intensive keeping or rearing of cattle with		
7.5.1	800 or more places		A
7.5.2	600 to less than 800 places		S
7.6	Construction and operation of a plant for the intensive rearing of calves with		
7.6.1	1 000 or more places		A
7.6.2	500 to less than 1 000 places		S
7.7	Construction and operation of an installation for the intensive rearing of pigs for fattening (pigs of 30 kg live weight or more) with		
7.7.1	3 000 or more places	X	
7.7.2	2 000 to less than 3 000 places		A
7.7.3	1 500 to less than 2 000 places		S
7.8	Construction and operation of an establishment for the intensive rearing or keeping of sows including associated piglets (piglets up to less than 30 kg live weight) with		
7.8.1	900 or more places	X	
7.8.2	750 to less than 900 places		A
7.8.3	560 to less than 750 places		S
7.9	Construction and operation of an installation for the separate intensive rearing of piglets (piglets of 10 to less than 30 kg live weight) with		
7.9.1	9 000 or more places	X	
7.9.2	6 000 to less than 9 000 places		A
7.9.3	4 500 to less than 6 000 places		S

7.10	Construction and operation of a facility for the intensive rearing of fur-bearing animals with		
7.10.1	1 000 or more places		A
7.10.2	750 to less than 1 000 places		S
...			
17.3	Projects for the use of wasteland or semi-natural land for intensive agricultural use with		
17.3.1	20 ha or more,	X	
17.3.2	10 ha to less than 20 ha,		A
17.3.3	1 ha to less than 10 ha;		S

Legend: X in column 1 = project is subject to EIA; A in column 2 = general preliminary assessment of the individual case; S in column 2 = site-specific preliminary assessment of the individual case

The EIA further targets construction activities that might also impact agricultural species. In Germany, the UVPG also entails the requirements of a Strategic Environmental Assessment (SEA) in §§ 33 et seq. UVPG that is further mirrored in the Federal Spatial Planning Act (Raumordnungsgesetz – ROG). It mainly involves the development of an environmental report detailing possible impacts by a spatial plan on, inter alia, “*humans, including human health, animals, plants and biodiversity*” at an early stage (§ 8 para 1 ROG). While the EIA is only employed during the approval of environmentally significant projects, the SEA is already carried out at the planning level, because important environmentally significant decisions are often already made within the framework of preliminary plans and programs. In addition to spatial planning, the SEA is also applicable in the context of urban land use plans, transport concepts, waste management plans, energy concepts, etc. **Neither of the two instruments make specific reference to HD Annex IV species or wild birds and respective prohibitions.**

5.3 SPECIES PROTECTION ASSESSMENT

Importantly, in case of projects or plans that might impair strictly protected species under HD Annex IV or European wild birds, a (**specific**) **species protection assessment** (Artenschutzprüfung – ASP) in accordance with § 44 para. 1 BNatSchG needs to be conducted. This can include technical contributions, a species protection report, or, depending on the requirements of the competent authority, a mapping of existing habitat populations. However, not much information could be identified regarding agricultural activities. The *Länder* provide specifications on how to identify and account for protected species. NRW, for instance, provides extensive materials **for the species protection assessment** with regards to protected species on its [online portal](#). These include lists and maps of relevant species, legal documents and guidelines, protocols as well as educational materials (e.g. on methods, compensation measures, etc.).

With regard to Natura 2000 areas, § 34 BNatSchG (corresponding to Article 6 HD) requires an impact assessment for projects or plans that “*individually or in combination with other projects or plans, they are likely to have a significant effect on the site and do not directly serve the management of the site*”. In principle, a strict precautionary principle applies within the framework of a preliminary assessment, where even the possibility of a significant impairment, e.g. through agricultural practices, triggers the obligation to carry out a full impact assessment. Whereas the UVPG is largely focused on assessing the impact of a physical structure in a construction project, as identified above, these assessments are broader, by taking into account the potential impacts of a project too. A legal commentary of the state of Brandenburg suggests that, due to the broad definition of the term project, agricultural, forestry or fishery activities cannot be excluded. As such, “*it is possible, for example, that special features of agricultural use in a specific case are not compatible with the nature conservation conditions*” and are thus defined as a project requiring an impact assessment.

6 KEY FINDINGS

6.1 TRANSPOSITION ISSUES

The prohibitions of Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive are transposed into national law via § 44 of the BNatSchG. In addition to the HD Annex IV species and European birds, these rules also apply to a) species listed under EU Wildlife Trade Regulation (EC No 338/97) and nationally endangered birds (§ 54 para. 1 BNatSchG). All aspects of the relevant articles are formally addressed. In exceedance of the Nature Directives, § 44 does not limit its prohibitions to “deliberate” disturbance and killing, it also includes negligent actions impacting species. However, potential weaknesses in the transposition were identified, which mainly relate to:

- Far reaching **exemptions for land use from the agriculture, forestry and fisheries sectors** that are limited to the rule of “no deterioration” in the conservation status of local species (applies to HD Annex IV species, European birds)
- The German transposition under § 44 para. 1 no. 2 BNatSchG, which includes the term “**significant disturbance**”. A legal commentary (Gellermann, in: Landmann/Rohmer § 44 BNatSchG, Rn. 40) states, that “while the relativisation of the prohibition on disturbance is still compatible with Article 5 (d) of the Birds Directive, it is nevertheless subject to concerns under EU law because it is not supported by Article 12 para. 1 b of the Habitats Directive”.

Hence, BNatSchG with its implicit notion of intrinsic compliance to the species protection rules given the broad exemptions for “good agricultural practice” as well as limited controls and enforcement activities provides a rather weak legal framework with regard to species protection in agriculture.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- No specific legislation could be identified for implementing species protection rules applicable at farm level other than the generic species protection rules transposing the relevant BD and HD provisions.
- Many managers and landowners envisage and carry out supportive management measures for endangered and protected species beyond the legal requirements and specifications, often implemented through corresponding contractual nature conservation models.

Specific agriculture or CAP cross-compliance conditions

- The Federal Ministry of Food and Agriculture (BMEL) published a framework guidance document (2015) on the implementation of the current EU CAP that specifies Cross Compliance regulations.
- After a joint federal states working group, Cross Compliance regulations and commitments were last updated in 2021. These were adopted and further amended by each of the 16 German states in separate guidance documents (see [guide of Mecklenburg-Vorpommern](#) as example). In this context, the seventh standard on Good agricultural and environmental conditions, GAEC 7, targeting the retention of landscape features and the restrictions on hedge/tree cutting season, is most relevant. This standard includes all landscape features identified by the CAP legislation.
- The state governments are authorised to further specify landscape features which may not be removed in case it is necessary to take into account special regional conditions (§ 8 para. 4 AgrarZahlVerpflV). However, no additional specifications have been identified.

Other implementing or stimulating measures

The Federal Ministry of Food and Agriculture (BMEL) and some state ministries with their associated Chambers of Agriculture have further specified the legal regulations in guidelines and information brochures. However, these specifications are not legally binding, but merely interpretative aids for farmers, authorities, and courts. Insofar as they have the character of official administrative regulations, they can be characterised as "anticipatory expert opinions", which are to be taken into account when interpreting standards, but which need not be complied with as in the case of legal ordinances.

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Government advisory services

- All Federal States (*Länder*) have made efforts to bundle all relevant data and information on protected species as well as on the various topics and instruments of biodiversity conservation online. However, these differ in the depth of information provided. Some *Länder* have established central species databases (e.g., [Bavaria](#), [Hessen](#), [Thuringia](#), [Schleswig-Holstein](#)) that serve as a *Länder*-wide recording, documentation and information system for fauna and flora.
- Chambers of Agriculture play a key role in providing direct advice to farmers and in preparing the information provided by higher-level authorities. While there are some activities on communicating about species protection rules, agricultural advisors in general do not have sufficient expertise to provide specialised advice on the protected species.
- Some *Länder* seem to be more active than others in providing guidance, having relatively extensive advisory services. These take the form of online-available information systems or distributed written information (guides, official instructions, etc.) or through direct (on-site) advisory activities carried out by the Chambers of Agriculture or other subordinate entities or contractors.

Enforcement of species protection legislation

- As stated, Germany largely excludes agricultural land use from the species protection rules. This means that there is no direct enforcement on agricultural land except through the monitoring and enforcement regarding compliance with CAP requirements.
- Due to the presented circumstances, species protection rules are not effectively enforced in Germany, here is no system of frequent monitoring of compliance with species protection regulations. Enforcement of species protection rules mainly occurs on the basis of complaints or notifications of infringements by citizen or civil society.
- No numbers or concrete cases on infringing procedures against farmers could be identified, although sanctions are technically possible.
- German law specifies that the exemptions for agriculture only apply if the conservation status of the local population of a species does not deteriorate as a result of management. Determining whether the local population of a given species is deteriorating as a result of management is independently realised by the *Länder* and local authorities. In such cases, the most frequent measure is to find a common coordination concept with the farmer, primarily through contractual nature conservation. Management requirements, which apply to individual land managers to take remedial actions according to § 44 para. 4 BNatSchG, and the imposition of sanctions, are only used as a "last resort" and rarely applied.
- While most experts belonging to NGOs demand stricter enforcement to be conducted, government representatives almost entirely agree that "cooperation rather than coercion" is the only way forward to not risk losing the trust and motivation of agricultural land users to implement (voluntary) biodiversity-friendly measures.
- Numbers on Cross Compliance for GAEC 7 provided by the BMEL indicate that around 1% percent of the farms are routinely controlled each year (around 3,000 farms). Most violations of GAEC 7

are identified and fined during controls. Such controls of implementation of CAP cross-compliance rules are not frequent and rigorous enough to ensure compliance regarding species protection rules in agriculture.

- As stated, a lack of will to achieve species protection objectives evident on the part of government but also among farmers (that are faced with a competitive industry aimed at high yields at low costs) was voiced by NGO representatives interviewed as part of the present study as well as in sources of published scientific literature on the topic. I

6.4 ASSESSMENT AND AUTHORISATION PROCEDURES

EIA

An Environmental Impact Assessment will only be required for a limited number of very significant (mostly constructional) developments in the case of agriculture. No link to species protection rules is made by German legislation implementing the EIA Directive.

Other authorisation procedures

In accordance with § 44 para. 1 BNatSchG, a (specific) species protection assessment (Artenschutzprüfung – ASP) in accordance with § 44 para. 1 BNatSchG needs to be conducted in case of projects or plans that might impair strictly protected species under HD Annex IV or European wild birds. This can include technical contributions, a species protection report, or, depending on the requirements of the competent authority, a mapping of existing habitat populations. However, not much information could be identified with regard to agricultural activities.

6.5 RECOMMENDATIONS

Legislative transposition measures of species protection rules:

- Consider revising the far-reaching exemptions for agricultural land use with regard to the species protection rules
- Revise and concretise the concept of “good agricultural practice” in the national legal framework, preferably at the national level within BNatSchG and the Federal Soil Protection Act (BBodSchG) to clarify farmer’s obligations.

Preventive and implementing measures:

- Enact not only voluntary and supporting instruments (such as contractual nature conservation), but also strengthen the application of obligatory management requirements according to § 44 para. 4 BNatSchG for substantial or repeated neglect of the species protection legislation.
- Create more cross-compliance links with the CAP, making CAP payments conditional on compliance with the species protection prohibitions.

Public advisory and enforcement:

- Increase monitoring of local species occurrences and site-specific assessments of conservation status of species to respect the species protection regulations, e.g. through additional funding and human/technical capacities.
- Increase controls regarding compliance with the species protection legislation and the enforcement of CAP compliance, potentially linking these two mechanisms.
- Foster and mainstream concepts like the “Biologic Stations” (NRW) for monitoring species

protection.

Authorisation and permits:

- Concretise and standardise the (specific) species protection assessment with regard to agricultural activities for all *Länder*.

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Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study *Denmark*

ENV/2020/OP/0022



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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

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ABBREVIATIONS

CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
BEK	<i>Bekendtgørelse</i> (Danish) – Statutory Order
DEPA	Danish Environmental Protection Agency
EIA	Environmental Impact Assessment
GAEG	Good Agricultural and Environmental Status (<i>God Landbrugs og Miljømessig stand</i> or GLM in Danish)
IE	Industrial Emissions
KO	<i>Krydsoverensstemmelse</i> (Danish) – Cross Compliance
LBK	<i>Lovbekendtgørelse</i> (Danish) – Consolidated Act
MOF	Ministerial Board on Environment and Food

1. INTRODUCTION

Denmark, with a total area of **42,943 km²** and a generally flat landscape, is home to unique natural features and around **26,000 km²** of agricultural land. The nation's long coastline, with its many lagoons, gulfs and inlets, means no part of Denmark is more than 32 miles (67 kilometres) from the sea.

Agricultural production has played a major role in Danish history. By the middle of the 19th century, agrarian reforms had structured productive land into about 2,000 larger farms, estates and proprietary farms, 70,000 farms—traditionally defined as farms of more than one barrel of hart grain (comparing to approximately 0,55 hectare (ha.))—and approximately 80,000 small farms of less than 1 barrel of hart grain. The old divide between estates and peasantry was essentially erased in 1849¹.

Co-operative movements appeared in Danish agriculture at the end of the 19th century, partly in response to poverty and economic depression, and through sustained co-operative tradition made possible large-scale production of high-quality crops and husbandry. Denmark has a strong agricultural sector with a rapidly growing organic segment. In 2017 there were 3,469 organic farms on 245,000 out of a total 39,4040 ha. Danish farms occupying 2,668,649 ha.²

Approximately 62% of Denmark's total land is currently agricultural land. Farms and fields in rotation make up 96% of this land; the remaining 4% are small biotopes. There are, however, significant regional differences³

Danish agricultural land consists of cultivated fields, areas in rotation and small biotopes. These biotopes include uncultivated areas such as fences, field boundaries, dikes, unpaved field roads, ditches, burial mounds and the like.

The share of permanent grasslands is historically low and has represented around 0.2% of cultivated land since the late 1990s. The few remaining perennial grasslands and small grasslands are affected by operations in neighboring fields, and the condition of these affected areas is generally very poor⁴.

Of the 97 threatened Danish bird species requiring special protection, 20% are present on agricultural land. For red-listed species related to arable land (a high percentage of which are also classified as Annex IV species), 114 species have been declining, 86 species are stable and only 28 species are in recovery. There has been a continuous decline in plants, vertebrates and arthropods⁵.

1.1 ABOUT THIS PROJECT

This project looks at species-protection rules in place under the Birds and Habitats Directives according to legislation and case law and assesses how effectively they are applied in certain specific EU Member States in either agricultural policy (DE, DK, FR, ES, IE, NL, PL, RO) or forestry policies and legislation (AT, FL, FR, DE, SL, PL, RO, SE).

The legal framework is clearly stated in the Nature Directives in a consistent way as interpreted by the

¹ <https://denstordanske.lex.dk/landbrug - struktur%C3%A6ndringer i det danske landbrug efter 1850> (National on-line Dictionary).

² See Table 1, p. 9. Statistics on agricultural holdings in Statistics 'Organic Agricultural Holdings in 2017 Authorisation and Production', Danish Agricultural Agency and former Danish Ministry of Environment and Food (the Danish Ministry of Food, Agriculture and Fisheries was established in 2020). <https://lbst.dk/>

³ *Biodiversity in Denmark 2020*, p. 115. Ejrnæs, R., Nygaard, B., Kjær, C., Baattrup-Pedersen, A., Brunbjerg, A. K., Clausen, K., Fløjgaard, C., Hansen, J. L. S., Hansen, M. D. D., Holm, T. E., Johnsen, T. J., Johansson, L. S., Moeslund, J. E., Sterup, J., Hansen R. R., Strandberg, B., Søndergaard, M & Wiberg-Larsen, P. 2021. Danmarks biodiversitet 2020 – Tilstand og udvikling. Aarhus Universitet, DCE – Nationalt Center for Miljø og Energi, 270 s. – Videnskabelig rapport nr. 465. <http://dce2.au.dk/pub/SR465.pdf>.

⁴ *Ibid.*, p. 116.

⁵ *Ibid.*, p. 117.

jurisprudence of the Court of Justice of the European Union (CJEU). It includes Article 12 of the Habitats Directive, which requires Member States to establish a system of strict protection for the **animal species listed in Annex IV** and prohibits:

- all forms of **deliberate** capture or killing of specimens of these species in the wild;
- **deliberate disturbance** of these species, particularly during the period of breeding, rearing, hibernation and migration;
- **deliberate destruction** or taking of eggs from the wild;
- deterioration or destruction of breeding sites or resting places;
- 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 13 of the Habitats Directive requires Member States to establish a system of strict protection for the **plant species listed in Annex IV**, and prohibits:

- the **deliberate** picking, collecting, cutting, uprooting or destruction of such **plants** in their natural range in the wild;
- the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before the Directive is implemented.

Article 5 of the Birds Directive requires Member States to establish a general system of protection for **all species of birds** occurring in the EU and prohibits:

- **deliberate** killing or capture by any method;
- **deliberate** destruction of, or damage to, their nests and eggs or removal of their nests;
- taking their eggs in the wild and keeping these eggs even if empty;
- **deliberate disturbance** of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- keeping of bird species the hunting and capture of which is prohibited.

Article 5 of the Birds Directive requires Member States to ban the deliberate killing or capture of all species of wild birds by any method, as well as the deliberate destruction of, or damage to, their nests and eggs and the deliberate disturbance of those birds; the CJEU requires that under the Birds Directive the killing, destruction or damage should be purposeful⁶. By contrast, Article 12(1)d of the Habitats Directive 92/43 does not require acts of deterioration and destruction **of breeding and resting places to be deliberate**: unintentional acts are also forbidden. According to the Court, prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned does not satisfy the requirements of Article 12(1)(d) of the Habitats Directive⁷. Furthermore, in Case C-183/05⁸ the Court established that Article 12(1)d of the Habitats Directive prohibits acts that ‘interfere with or destroy breeding sites or resting places of wild species’... ‘whether they are intentional or not.’

Member States may avail themselves of certain derogations from these rules, but the use of derogations must be justified in relation to the overall objectives of the directives and the specific relevant articles. In addition, derogations must be reported.

Both directives require Member States to establish regimes of species protection inside and outside Natura 2000 sites. While the Birds Directive requires Member States to adopt *general* species protection systems, the Habitats Directive refers to the need to establish *strict* systems of species protection. It is

⁶ C-412/85.

⁷ Case C-98/03 Commission v Germany [2006] ECR I-00053; Case C-6/04 Commission v United Kingdom [2005] ECR I-09017.

⁸ Case C-183/05, Commission v Ireland [2007] ECR I-00137.

not sufficient to adopt a legislative framework; Member States must also ‘implement concrete and specific protection measures⁹.’

1.2 GOVERNANCE

The Danish Minister of Environment and the Ministry of Environment¹⁰ hold the overall responsibility for the protection of species in relation to Article 5 of the Birds Directive and Articles 12 and 13 of the Habitats Directive. The Ministry of Environment and its related agencies take part in EU meetings and working groups concerning species and habitats protection and are responsible for preparation of Danish legislation transposing EU nature directives.

The Danish Environmental Protection Agency (DEPA)¹¹ and the Nature Agency¹² are responsible for the specific implementation, management and supervision of the Danish species-protection legislation that implements these strict species protections.

DEPA is organised into five centres: Center for Rich Nature, Center for Clean Water, Center for Safe Chemistry, Center for Green Production and Center for Staff.

DEPA is the main actor in the implementation of central Danish laws, such as the Environmental Protection Act, the main water acts, the Hunting and Game Management Act, parts of the Nature Conservation Act, and the related statutory orders and guidance¹³. The Center for Rich Nature and Center for Clean Water are of particular importance within the context of the Nature Directives. The Nature Agency is the main planning and managing/operational authority of the Danish natural heritage on land (forests and nature areas) and coastal zones.

For the last three years, Danish authorities have been discussing a new national plan for species management. The plan will strengthen the Nature Agency’s work on rare and endangered plant and animal species in Denmark, and is expected to enhance diversity in the Danish countryside¹⁴.

The Danish Hunting and Game Management Act and Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game that include strict species-protections regimes appoint DEPA as permitting and inspection authority. Both DEPA and the Nature Agency have established regional offices with administrative and management/operational functions; Danish administrative law classifies this as de-concentrated state administration.

Danish environmental and nature-protection legislation establishes decentralised administrative systems leaving the municipalities as governing bodies in various fields of environmental and nature protection. The 98 Danish municipalities are responsible, e.g., for inspection and control related to integrated pollution-prevention control permits concerning livestock. The municipalities are also responsible for decisions on dispensations from nature-protection legislation in Natura 2000 sites and other protected areas, and for environmental impact assessments (EIAs) when required in connection with a farmer’s application for exemptions from the general prohibitive requirements in the Nature Conservation Act.

Two Danish independent appeals boards—the Danish Town and Country Planning Board of Appeal and the Danish Environment and Food Board of Appeal—handle claims concerning municipal and occasionally DEPA decisions according to planning, environmental and nature-protection legislation. The Boards include recent CJEU practice in the interpretation of Danish legislation.

The Minister of Food, Agriculture and Fisheries is responsible for Common Agricultural Policy (CAP) support to farmers and landowners. The Danish Agricultural Agency is responsible for management and control of various agriculture-related tasks, including CAP support and cross-compliance¹⁵. Five

9 Case C-441/18 Commission v Poland.

10 In Danish, Miljøministeriet.

11 In Danish, Miljøstyrelsen.

12 In Danish, Naturstyrelsen.

13 In Danish, miljøbeskyttelsesloven, miljømaalsloven, lov om vandplanlægning, jagt og vildtforvaltningsloven and naturbeskyttelsesloven ect.

14 <https://mst.dk/natur-vand/natur/national-naturbeskyttelse>

15 <https://lbst.dk/landbrug/krydsoverensstemmelse/>

regional Agricultural Agency offices of the Danish Veterinary and Foods Administration carry out inspections and control of agricultural production and areas that are CAP-supported, including cross-compliance checks.

1.3 PROTECTED SPECIES

Altogether, Denmark has designated **937** protected areas covering **14.8 %** of its land and **15.2 %** of its ocean territory, including **350** Natura 2000 sites, **113** Special Protection Areas under the Birds Directive and **261** Sites of Community Importance under the Habitats Directive (EEA Natura 2000 Barometer, 2020). Denmark also has **587** sites designated under national laws.

Of the total 2,500 species protected under the Annexes of the Habitats Directive, **261** are present in Denmark, as are **229** of the 500 wild bird species protected under the Birds Directive¹⁶.

According to agricultural species classifications 62% of the species in Denmark protected under Annex IV of the Habitats Directive (in total 47 species) are either directly (around 15%) or indirectly (around 47%) dependent on agricultural management. A list of Annex IV species present on Danish agricultural areas can be found in Appendix 1, below.

For wild birds in Denmark, 10% of the wild bird species protected under the Birds Directive are classified as farmland birds.. A list of wild birds present on Danish agricultural land can be found in Appendix 1¹⁷.

As described in the introduction, some Annex IV species and wild bird species that are present on agricultural land in Denmark show declining numbers, which is likely a result of the sum impacts of agricultural practices on various species over years.

The table below shows farmland birds' declining numbers in Denmark between 1976 and 2019. The *vibe* (*vibe*) and song lark (*sanglaerke*) reflect the general trend for farmland birds. The primary reason for their decline is most likely increasingly intensive agricultural practices. The white wagtail (*vipstjaert*) is an example of a species that has managed to adapt to modern agriculture; the species' numbers have therefore increased¹⁸.

¹⁶ Numbers taken from Member State reporting under the Nature Directives 2013–2018.

¹⁷ See Danish reporting in relation to Article 12 of the Birds Directive and Article 17 of the Habitats Directive:

<https://cdr.eionet.europa.eu/>

¹⁸ <https://xn--miljtilstand-yjb.nu/>

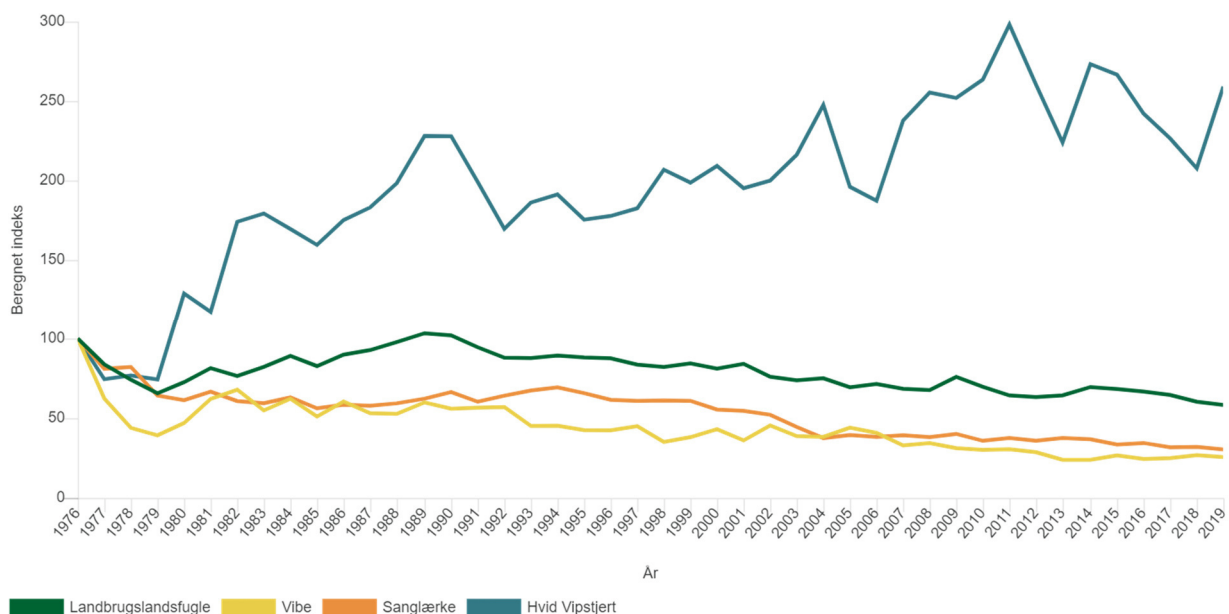


Table 1: Calculated index (y-axis) for the population of Danish birds on agricultural land (22 species) in the period 1976–2019 (x-axis) and calculated index for three species of agricultural land birds. The figures are based on the Danish Ornithological Society’s point counts.
Source: Danish Ornithological Society, *Monitoring of Common Bird Species in Denmark 1975–2019* (PDF).

Some factors influencing the decline or stability of species may be classified as structural and a result of farmer activity. Individual farmers in Denmark are in general aware of the likely presence of the amphibian *Triturus cristatus* (great crested newt), which is quite common in waterholes and ponds. The reptile *Lacerta agilis* (sand lizard) is common and recognised too¹⁹.

Two Annex IV animal species are currently viewed as particularly important in an agricultural context: *Muscardinus avellanarius* (dormouse)²⁰ and *Sicista betulina* (birch mouse)²¹. These mouse species are rare and included on International Union for Nature Conservation (IUCN) red lists; they are thus the focus of occurrence data, environmental assessments and specific protection initiatives²².

Surveillance of wild bird, animal and plant species is carried out according to the requirements of the Birds and Habitats Directives as part the National Monitoring and Assessment Programme (NOVANA). Five-year programmes set priorities and various scientific reports present the current state of wild birds and Annex IV species in Denmark²³.

¹⁹ Interview with Environmental Director of Danish Agriculture and Food Council carried out as part of Task 1 of this study.

²⁰ *Hasselmus* in Danish. Forest habitats and agricultural habitats close to forest environment are suitable for this mouse.

²¹ *Birkemus* in Danish. This mouse prefers agricultural areas and is occasionally observed in forest environments.

<https://mst.dk/>

²² Subject to Environment and Food Boards decisions; see note 46. (43 in accepted clean version)

²³ <https://www2.mst.dk/>, <https://novana.au.dk/fugle/fugle-2018-2019>

2. LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

The core of Danish legislation transposing Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive are the Danish Hunting and Game Management Act, the Nature Conservation Act and a Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game. The Statutory Order on Determination and Administration of International Conservation Areas and Certain Protected Species includes maps of designated Natura 2000 areas in DK, Sites of Community Importance (SCI) habitats (SCIs) and Special Protection Areas (SPAs) in DK²⁴.

Also relevant is legislation related to EIAs and livestock farming approval and permits. EIA rules may apply in connection with applications for livestock farming permits outside Natura 2000 sites and for agricultural (project) developments inside Natura 2000 sites. Assessment of the presence or the likely presence of Annex IV species and wild birds forms part of the permitting framework set out in legislation, as do municipal formats for application for and approval and permitting of livestock farming. In terms of livestock approvals and permits, one or more conditions may refer directly to Annex IV species and wild birds likely to be present on the property.

At the level of the individual farmer, deliberate actions or purposive omissions in relation to killing wildlife and destruction of and damage to nests and eggs are subject to sanctions.

The EU CAP and its related secondary legislation include statutory management requirements with which all EU farmers must comply. They also establish the agricultural and environmental conditions (GAECs) farmers receiving CAP support must meet. The Danish CAP Support Act²⁵ and a Statutory Order on Cross-compliance²⁶ establish the Danish legal cross-compliance regime. Guidance targeting various groups of actors (professionals, farmers, inspectors, ect.) is issued by the Agriculture Agency²⁷. Statutory orders on cross-compliance are issued once a year. Only GAEC 7, on the minimum level of landscape maintenance by farmers in relation to the cutting of hedges and trees during birds' breeding season, is of relevance to this study, however.

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13(1) OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

Habitats Directive:

The Danish Hunting and Game Management Act²⁸, the Danish Nature Conservation Act²⁹, and Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game³⁰ include the main provisions transposing Articles 12 and 13 of the Habitats Directive. The Statutory Order is issued by the Minister of Environment based on provisions in the Nature Conservation Act and the Hunting and Game Management Act.

Section 29(a) of the Nature Conservation Act (Consolidated Act no. 1986 of 27/10/2021 on Nature Conservation) includes the general protection and prohibition rules applying to Annex IV species and

²⁴ Statutory Order on Determination and Administration of International Conservation Areas and Certain Protected Species, (BEK nr 2091 of 12/11/2021) – Habitatbekendtgørelsen <https://www.retsinformation.dk/eli/lta/2021/2091>

²⁵ Act on Common Agricultural Policy (Consolidated Act - LBK no 115 af 06/02/2020 (Landbrugsstøtteleven) <https://www.retsinformation.dk/eli/lta/2020/115>

²⁶ Statutory Order no. 2370 of 10/12/2021 on Cross Compliance <https://www.retsinformation.dk/eli/lta/2021/2370>

²⁷ KO -Krydsoverensstemmelse in Danish <https://lbst.dk/landbrug/krydsoverensstemmelse/vejledning-og-instrukser/> (in Danish).

²⁸ Act on hunting and game management (Consolidated Act - LBK no. 265 of 21/03/2019 – Jagt og vildtforvaltningsloven) <https://www.retsinformation.dk/eli/lta/2019/265>

²⁹ Consolidated Act on Nature Conservation (LBK no 1986 of 27/10/2021 – Naturbeskyttelsesloven) <https://www.retsinformation.dk/eli/lta/2021/1986>

³⁰ Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game (BEK no. 521 of 25/3 2021) – Artsfredningsbekendtgørelsen <https://www.retsinformation.dk/eli/lta/2021/521>

breeding- and resting-areas protection. An annex to the Nature Conservation Act lists all Annex IV species present and/or naturally occurring in Denmark. Section 29(a)(1) focuses on intentional disturbance having a detrimental effect on Annex IV species or populations and Section 29(a)(2) addresses protection of Annex IV species habitats. This general prohibition of disturbance applying to all species does not include a reference to Article 12(1)(b) ‘in particular during the period of breeding, rearing, hibernation and migration’, however. Since the general prohibition applies, it is not clear if this gap in transposition should be considered a major issue, as it might not lead to problems implementing species-protection rules.

Section 29(a) is to be applied when municipal authorities make decisions in accordance with the Nature Conservation Act concerning (agricultural) activities. Section 29(a) forms part of the decision making criteria for authorisations when Annex IV species are present either inside or outside Natura 2000 sites.

The Statutory Order on Determination and Administration of International Conservation Areas and Certain Protected Species sets out the ‘Danish map’ of Natura 2000 sites, (SCI’s), bird SPAs and Ramsar areas³¹

The Hunting and Game Management Act and Statutory Order 521 in particular include the core of Danish provisions transposing the strict direct-protection regime for Annex IV plant and animal species, wild birds, their resting and breeding areas, and nests and eggs as set out in Articles 12 and 13(1) of the Habitats Directive, and Article 5 of the Birds Directive (see table below on The Birds Directive).

The Danish provisions transposing the Birds Directive Article 5 and the Habitats Directive Articles 12 and 13(1) are believed to encompass all elements of the directives’ species-protection provisions, except for the Danish provisions transposing Article 12(1)(b) of the Habitats Directive and Article 5(d) of the Birds Directive.

Section 7(1) of the Hunting and Game Management Act and Section 29(a)(1) transpose Article 12(1),(b) of the Habitat Directive regarding deliberate disturbance of species, particularly during the period of breeding, rearing, hibernation and migration; while Section 7(2) of the Hunting and Game Management Act transposes Article 5(d) of the Birds Directive.

The Danish provisions are not word-for-word transpositions of those provisions and thus do not transpose all elements of the relevant directive provisions. Authorities nevertheless claim that the Danish texts and the rationale or interpretation behind them provide a framework enabling a fully compliant application of the above-mentioned directive provisions. Section 29(a)(1) was inserted into the Nature Conservation Act in 2009 after dialogue with the EU Commission. Sections 7(1) and 7(2) of the Hunting and Game Management Act are phrased similarly to Article 29(a)(1).

Tables summarising Danish transposition of Articles 12 and 13(1) of the Habitats Directive and Article 5 of the Birds Directive are provided below. A table with the full wording of the transposing provisions in English (un-official translation from Danish) is provided in Appendix 1. Links to official legislation in Danish can be found in the footnotes and Appendix 3 (retsinformation.dk).

Habitats Directive – Article	Danish Provisions	Compliance – transposition
12 (1)(a), 13(1)(a) Deliberate capture or killing.... Deliberate picking, cutting, excavation, and destruction....	Statutory Order no. 521 of 25/3/2021 Prohibitive provisions Section 10(1) reference to Annex IV animals and specific text Section 10(2) Reference to Annex IV plants—and specific text	Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.

³¹ Ramsar areas refer to area appointed according to the ‘Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat’ signed on 2. February 1991 in Ramsar, Iran.

<p>12(1)(c) Deliberate destruction or taking of eggs from the wild....</p>	<p>Statutory Order no. 521 of 25/3/2021 Section 10(2) Text reflecting 12(1)(c) Consolidated Act no. 265 of 21/03/2019 Section 6a(2)</p>	<p>Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.</p>
<p>12(1)(d) deterioration or destruction of breeding sites or resting places.</p>	<p>Consolidated Act no. 265 of 21/03/2019 Section 6(a). Breeding and resting areas for the mammals mentioned in Appendix 1 must not be destroyed or damaged. Consolidated Ac no. 1986 of 27/10 2021 on Nature Conservation §29(a)(2) Prohibition to damage or destroy breeding or resting areas for the species listed in Annex 3 to the Act.</p>	<p>Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.</p>
<p>12(1)(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.</p>	<p>Consolidated Act no. 265 of 21/03/2019 Section 7. The animal species mentioned in Appendix 1 (mammals) may not be intentionally disturbed with detrimental effect on the species or population. Consolidated Ac no. 1986 of 27/10/2021 on Nature Conservation Section 29(a)(1). Animal species (listed Annex IV species) must not be intentionally disturbed with detrimental effect on the species or population.</p>	<p>No The text of Section 7(1) of the Hunting and Game Management Act and Section 29(a)(1) of the Nature Conservations Act transposes the Directive wording ‘deliberate disturbance’ as ‘intentionally disturbance with detrimental effect on the species or population’. The Danish provisions have to be interpreted in light of Article 12(1)(b) in order to take all relevant elements into consideration. The Danish text and the interpretation or rationale behind it provide the framework for a fully compliant application of the Directive provision. Section 29(a)(1) was inserted into the Nature Conservation Act in 2019 after dialogue with the EU Commission. Neither the Hunting and Game Management Act transposing Article 12(1)(b) nor the measures of the Nature Conservation Act transposing Article 12(1)(b) refer to ‘in particularly during the period of breeding, rearing, hibernation and migration’, however, and this lack of word-for-word transposition means it cannot therefore be considered to include all elements of the Directive.</p>
<p>12(2), 13 (1)(b) ...prohibiting: keeping, transport and sale or exchange, and offering for sale or exchange....</p>	<p>Statutory Order no. 521 of 25/3/2021 Section 11. Text reflecting Habitats Directive Article 12(2) and Article 13(1)(b) Section 12. Derogations —very strict.</p>	<p>Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.</p>

The Danish Nature Conservation Act includes a general prohibition clause that applies to all (farm) land/property that includes **protected areas** described in Section 3 of the Act³²: Activities such as filling in waterholes can constitute a violation of Section 3. See Box 1 for more about Section 3 of the Nature Protection Act.

In the event of a deviation from Section 3 of the Nature Conservation Act cf. Section 65(2), Section 29(a) or Section 10 of the Statutory Order on Determination and Administration of International Conservation Areas and Certain Protected Species must be observed.

Violation of Sections 3 and 29(a) of the Nature Conservation Act or the Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game or the Hunting and Game Management Act may constitute violation of Articles 12(1)(a), 12(1)(b) and 12(1)(d) of the Habitats Directive which they transpose.

BOX 1

Protected habitats, etc.

Lakes, streams, heaths, bogs, salt marshes, beach marshes, fresh meadows, grasslands, etc.

Section 3. No change may be made to the habitat condition³³ of natural lakes whose area is more than 100 m², or of watercourses or parts of watercourses that have been designated as protected by the Minister of the Environment and Food³⁴ on the recommendation of the municipal council. However, this does not apply to usual maintenance work in watercourses. Section 3 (2) No changes may be made to the habitat condition of

1) moors,

2) bogs and the like,

3) beach meadows and beach swamps, or

4) fresh meadows and biological pastures,

when such habitat types individually, together or in connection with the lakes mentioned in Section 3 (1)1, are larger than 2,500 m² in total area.

Section 3(3). The condition of bogs and the like that are less than 2,500 m² shall not be altered when they are connected to a lake or watercourse that is covered by the protection in Subsection (1). 1

The Nature Conservation Act includes similar provisions in 8 concerning dune protected areas and in 15 concerning coastal areas.

*Section 29a(1). The animal species mentioned in Annex 3 to the Act (Annex IV species present in Denmark) may not be intentionally disturbed with detrimental effect on species of animals or population. * The prohibition applies in relation to all life stages of the animal species covered.*

Section 29a(2). Breeding or resting areas for the species listed in Annex 3 to the Act must not be damaged or destroyed.

**Inserted into the Danish Nature Conservation Act after dialogue with the EU Commission in 2009.*

Birds Directive

The Danish transposing provisions relating to Article 5 of the Birds Directive were inserted into the same Danish legislation as the provisions transposing Articles 12 and 13 of the Habitats Directive.

The Danish legislation transposing Article 5 of the Birds Directive is included in the Danish Hunting and Game Management Act and the Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game. Furthermore, transposing provisions concerning eggs from wild birds can be

³² Consolidated Act no. 1986 af 27/10/2021.

³³ The Danish original, '[d]er må ikke foretages ændring i tilstanden af naturlige søer', may be translated as 'no change may be made to the habitat condition of ...'

³⁴ Now Ministry of Environment.

found in a separate statutory order³⁵.

The Danish provisions concerning deliberate destruction of eggs and nests (Article 5(b)) and disturbance of birds in breeding and rearing season (Article 5(d)) are found in both the Act on Hunting and Game Management Section 6(a)(2) cf. Section 7(2) and Section 6 of the Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game. Section 29(a)(1) inserted into the Nature Conservation Act does not fully transpose Article 5(d) as it fails to transpose the sentence ‘particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive’. According to the authorities, the general prohibition nevertheless enables implementation of the Directive’s provision.

The Danish provisions on felling nest-hosting trees are to a certain extent similar and overlapping. Section 6(a) of the Hunting and Game Management Act relates to individual birds, their nests and eggs, while Section 7(2) and Section 6 of the Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game relate to groups of species as such and to populations. See the table below for compliance status evaluation.

Birds Directive – Article 5	Danish Provisions	Compliance – transposition
Article 5(a) Deliberate killing....	Statutory Order no. 521 of 25/3/2021 Section 4 referring to Section 1(1) Prohibition Section 4(2) Exeptions	Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.
Article 5(b) deliberate distruction – damage nest and eggs – removal	Consolidated Act no. 265 of 21/03/2019 Section 6a Statutory Order no. 521 of 25/3/2021 Section 6 Prohibition against felling of trees in breeding and rearing seasons for various birds	Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.
Article 5(c) taking eggs....	Statutory Order no. 935 of 27/6/2016 Section 2 cf. Section 1	Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.
Article 5(d) deliberate disturbance	Consolidated Act no. 265 of 21/03/2019 Section 7(2)—wild birds (reference to Section 7 and Birds Directive) may not be intentionally disturbed with detrimental effect on the species or population. (parallel for Annex IV species Section 7(1))	No The text of Section 7(2) of the Hunting and Game Management Act has to be interpreted in light of Article 5(d) in order to take all relevant elements into consideration. The phrasing of the text of Section 7(2) and Section 7(1) concerning mammals protection is basically the same. For analysis on Section 7 (1) transposition – see table above on Habitats Directive. The Hunting and Game Management Act transposing Article 5(d) can not be evaluated as encompassing all elements of the Directive because of a gap in transposition of the sentence ‘particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive’.

³⁵ Statutory Order no. 936 of 27/6/2016.

Birds Directive – Article 5	Danish Provisions	Compliance – transposition
Article 5(e) keeping birds....	Statutory Order no. 521 of 25/3/2021 Section 4 referring to Section 1(1) Dispensations Section 9—very strict	Yes The national measure encompasses all elements of the provision of the Directive, which is therefore considered fully transposed.

In addition, the Nature Conservation Act Section 65(2) derived from Section 3-protected habitats (applies to farming activities inside and outside Natura 2000 sites) and Section 19(b) (applies to farming inside Natura 2000 sites) may be of importance in the context of the Birds Directive Article 5. Farmers must, e.g., notify the municipal nature-protection authority according to Section 19(b) when they intend to use even very small grassland plots for a new purpose/activity. See Nature Conservation Act, Appendix 2, nos. 3 and 5.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

Farmers' agricultural activities and management of cultivated and uncultivated areas (and changes thereto) must be carried out according to Birds and Habitats Directives protection rules. The legislative frameworks within which farmers carry out, monitor and follow up on their activities usually address animal and plant species protection indirectly.

CAP support/EU subsidies available to landowners with agricultural activities/cultivating land are regulated by the Danish Act on CAP support and a Statutory Order on Cross- Compliance³⁶. This Danish statutory order is amended/adjusted once a year.

2.2.1. Environmental permits:

Livestock breeding and agricultural activities

The Act on Livestock Farming and Use of Manure³⁷, the Statutory Order on Approval and Permitting of Livestock Farming³⁸, and the Statutory Order on Environmental Regulation of Livestock Holding and Storage of Manure³⁹ form the main regulatory framework for granting environmental permits to farmers with livestock and/or crops production and/or management of uncultivated areas⁴⁰.

The application, approval and permitting processes include assessment of the presence or likely presence of Annex IV species and protected wild birds on the farmer's property. Large-scale livestock farming must go through a comprehensive permitting process including EIA. The Danish legislation implementing the Industrial Emissions (IE) Directive must be followed, while smaller farms and smaller changes to existing facilities must comply with less strict requirements. The vulnerability of the nature surrounding a farm project is nevertheless decisive when deciding which requirements must be complied with. Both applicants and authorities have access to the 'Danish Miljøportal', which is very comprehensive and includes several means of mapping and layering⁴¹.

The conditions set out in environmental permits may include precautions targeting protection of Annex IV species or wild birds likely to be present on farmland. Such precautions may, e.g., include activity restrictions in animal-species breeding seasons (relevant in the context of the provisions transposing Article 5(1)(a) and (d) of the Birds Directive and Article 12(1)(b) and (d) of the Habitat Directive)

A ban on fertilisation, spraying and conversion of farmland within Section 3-protected habitats (Nature

³⁶Act no. 115 of 06/02/2020 on CAP support and Statutory Order no. 1861 of 07/12/2020.

³⁷Consolidated Act no. 520 of 01/05/2019 on Livestock Farming and Use of Manure.

³⁸ Statutory Order no. 2256 of 29/12/2020 Statutory on Approval and Permit of Livestock Farming.

³⁹ Statutory Order no. 2243 of 29/11 2021 on Environmental Regulation of Livestock Holding and Storage of Manure

⁴⁰ Statutory Order no. 2225 of 27/11/2021 on Approval and Permit of Livestock Farming and Statutory Order no. 1551 of 2/07/2021 on Livestock Manure.

⁴¹ <https://arealinformation.miljoportal.dk/html5/index.html?viewer=distribution>

Conservation Act) will enter into force on 1 July 2022. The ban applies regardless of such activities having previously been allowed as part of cultivation activities⁴².

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL

2.3.1. Destruction of or damage to birds' nests or eggs

The Hunting and Game Management Act (Consolidated Act no. 265 of 21/03/2019) includes a chapter on sanctions (under the Criminal Law Act) that apply if Section 6(a) on deliberate destruction of ground nests⁴³ and trees hosting nests has been violated by owner/operators on purpose; if unlawful action has been carried out on purpose; or if the owner actively refrains from taking action (e.g., through lack of instruction of a third person or contractor).

The Order on Conservation of Certain Species⁴⁴ addresses seasons when felling of specific sorts of trees hosting nests is prohibited (Section 6)—the provisions included are violated if the actions or omissions of the owner can be classified as negligence.

Felling of trees with birds nests

Section 6. Colonial birds' nesting trees may not be felled during the period 1 February–31 July.

(2) The nesting trees of birds of prey and owls may not be felled during the period 1 February–31 August, cf. (3)

(3) The nest trees of eagles, black storks and red kites must not be felled. (Section 6(3) constitutes an exemption rule (eagles' nests) to the general Section 6(2) rule concerning stipulated prohibition period for felling of trees hosting bird of prey nests).

(4) Hollow trees and trees with woodpecker holes may not be felled in the period 1 November–31 August.

(5) Dike swallow nests must not be destroyed during the period 1 April–31 August.

CAP support and Cross-compliance

The cross-compliance Statutory Order includes the GAEC 1.38 prohibition (covalent to GAEC 7) concerning the pruning of trees and bushes during birds' breeding season, which was inserted into the Statutory Order in 2015.

The following provisions of the Statutory Order are relevant:

BOX 2

4(7) cross-compliance Statutory Order 2021

GAEC 1.38

1) In the period from 15 March to 31 July no pruning of hedges and trees may be carried out on areas located in field lots.

1.38 – prohibition concerning pruning of trees and hedges in birds' breeding season

Verifiable standards are found in cross-compliance 2021: Guidance and Controlling 2021 – Instructions for Professionals⁴⁵.

Applies to farmers inside and outside Natura 2000 areas.

⁴² Act no.1057 af 30/06/2020 on changes to the Nature Conservation Act (*Lov om ændring af naturbeskyttelsesloven*) <https://www.retsinformation.dk/eli/ta/2020/1057>

⁴³ The Environmental and Foods Board of Appeal in a decision of 31 May 2021 on withdrawal of a building permit (gas pipe located on agricultural land) emphasised that precautions regarding damage to birch mouse nests must be taken, including restrictions relating to ploughing. <https://mfkn.naevneneshus.dk/>

⁴⁴ Statutory Order no. 521 of 25/3/2021.

⁴⁵ https://lbst.dk/fileadmin/user_upload/NaturErhverv/Filer/Landbrug/Kontrol/18122020_Faginstruks_Miljoe_2021.pdf

Source: GLM (Good Agricultural and Environmental Condition) (GAEC)

God Landbrugs- og Miljømessig stand

Table – Cross-compliance control 2021 instructions to inspectors/professionals

GAEC 1.38 – Hedges or small groups of trees

Nature of violation Criterion	1 Very little impact measured against GAEC 1.38	2 Minor impact measured against GAEC 1.38	3 Significant impact measured against GAEC 1.38	4 Decisive impact measured against GAEC 1.38
Seriousness	Light pruning	Intensive pruning	Bushes/hedges cut down One or more trees have been felled	Bushes/hedges or trees have been intensively pruned or cut down, and loss of nests, eggs and/or animal species/birds has been identified
Range	10m–100 m Or 1–9 trees	100 m–249 m Or 10–29 trees	250–499 m Or 30–49 trees	More than 500 m Or More than 50 trees
Duration	The nature of duration follows the impact of unlawful activity	The nature of duration follows the impact of unlawful activity	The nature of duration follows the impact of unlawful activity	The nature of duration follows the impact of unlawful activity

According to a specialist at the Danish Agricultural and Food Council interviewed as part of Task 1 of this study in 2020, very few farmers have violated cross-compliance requirement 1.38. The Council did some lobbying in 2015 in order to ensure that the GAEC 1.38 cross-compliance requirement was easy for farmers to manage. During control visits according to the Statutory Order on Cross Compliance 2021, Section 7, farmers must explain and afterwards remediate any violations of cross-compliance requirements. If the remediation requirements are not complied with by a set deadline, the farmers may be sanctioned by reduced CAP support for the year.

Municipality approval and permits for livestock farming

In terms of approvals and permits for livestock farming various conditions concerning animal, plant and wild birds species present on the property may be applied.

Example of application for change of use of existing barn facilities: excerpt from consultant's report concerning evaluation of the presence or likely presence of Annex IV species on or close to project location

'...Change in use of building with pig breeding/rearing and slaughter pigs implying increased volume of ammonia emissions.'

The ammonia disposition and associated emissions are viewed in light of a Natura 2000 area 5 km away.

No Annex IV species are close to the building – the farm is however located in distribution/range areas for Annex IV species – e.g. the rare birch mouse.

The presence or the likely presence of the Annex IV species is screened, and species present or likely to be present on the agricultural land surrounding the building are assessed specifically. Annex IV species such as large salamander (evaluation: water holes are not likely to dry out) sand lizard (increased emission level is not seen as a threat to the range of lizards present), and likely effects for more bat species are assessed.

The conditions of the permit in this case do not give rise to precautions in the context of Annex IV

species.

<https://www.mors.dk/media/7115/ringsborgvej-10-endelig-miljoegodkendelse.pdf> (*in Danish*).

Plans and projects within and outside Natura 2000 areas

If farmers located in Natura 2000 areas want to implement a change of activities that alters the nature status of an area according to Habitats Directive Article 6(2), they must first perform an EIA as the basis for seeking permits and dispensations. The EIA and the associated permitting takes place within the framework of the Environmental Assessments Act⁴⁶.

Danish EIA rules require animal species and plants relevant to a certain project be taken into consideration. Developers will often have to bring in a specialist in the field of Annex IV species, plants and wild birds in order to ensure that the EIA meets the requirements on scope and content set out in appeal-board practice⁴⁷. The consequence of, e.g., disturbing birds and nests at ground level must be mitigated by application of appropriate measures: establishing areas suitable for rehousing nests or establishing new nests.

The EIA legislation applies to the processes for both livestock-farming permitting (IE Directive installations) and farming projects inside Natura 2000 areas. In the case of IE Directive permits, the Environmental Protection Act and associated statutory orders map the route to be followed, while the Natura 2000 farming projects follow a route set out in nature-conservation legislation.

⁴⁶ Consolidated Act no. 1976 of 27/10/2021.

⁴⁷ Cf. footnote 46.

3. GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

The main bodies advising farmers on implementing legal requirements on species protection are DEPA, the Nature Agency, the Agricultural Agency and Danish municipalities.

Up-dated on-line guidance relevant to farmers' implementation of species-protection requirements are found on ministerial and municipal websites. Such information should be seen as an entry point, and the websites usually include the names and phone numbers of relevant contacts and experts.

The Agricultural Agency has developed a very informative site/portal, Markliv ('Field Life')⁴⁸, in cooperation with several organisations—including SEGES (latin word for cornfield/crop) , an advisory body under the Danish Agriculture and Food Council that has traditionally had and continues to have substantial influence in both political and legislative processes.

The 'Field Life' advisory portal for farmers

The website is described as a knowledge portal and the intention is to inform farmers on how to handle cultivated land and the wildlife on-site.

Introductory text



Cultivated open land is home to a large number of wild animal and plant species. As a landowner, you can make a big difference to the nature that is on your property, among other things by creating more variety in the plant cover and protecting the permanent structures in the landscape, e.g. windbreaks, game traps, etc. On this page, you can find inspiration for what opportunities you have to create more habitats in the landscape, just as you can find a collection of the various guides and fact sheets that are available in the area. **Markliv.dk** has been created in collaboration with a number of organisations, the agricultural industry, research institutions and authorities.

[The following example is a guide on how to avoid injuring wildlife (including nests, birds, Annex IV species and eggs) during harvest]

Beware of wildlife when harvesting

In May, the first harvest begins, and in the period from early May to late July, there are areas where there is a significant risk that there are animals in the field that could be harmed when you harvest.

In our guide on avoiding harming game at harvest, you can find tips for a number of specific measures that you can take before and during the harvest, so you can avoid harming game.

Go to the guide "Avoid harming game during harvest"

The purpose of the guide is to provide farmers with tools to avoid damage to game during the harvest and thus protect wild game, preserve the feed value of the crops, create a better working environment for machine operators and increase the hunting value.

The following tips are provided concerning birds ground nests and brooding birds (grassland and cultivated land with harvest season 1 May–31 July)

- How birds nests could be located: varied, not too tight vegetation (grassland) all over

⁴⁸ <https://lbst.dk/landbrug/markliv/>

cultivated land (be aware when harvesting)

- Apply harvest patterns to allow birds to escape—brooding birds do not move from the nest and are not likely to escape—consider delay of harvest
- Application of proven practical and technical solutions spare brooding birds and their nests

If you want to know more about game-friendly harvests, you can also contact SEGES, Aarhus University, the Danish Society for Nature Conservation or the Danish Hunters' Association, which participated in the preparation of the guide.

[The page provides names and phone numbers for expert contacts]

Guidance on cross-compliance 2021

The Agriculture Agency's website includes a section with frequently asked questions⁴⁹, and guidance for how to see if there are Section 3 habitats on farmland (box below).

Self-service for farmers on location of Section 3-protected habitats on individual farms⁵⁰

You can stay up to date with the protected areas:

You can see on IMK (Internet Markkort) whether you have Section 3 areas in your fields—and whether they are within or outside a Natura 2000 area. The Section 3 areas are registered for guidance. If you want to be sure whether an area is Section 3 protected, you must contact the municipality. You can also apply to your municipality for a dispensation or to deregister the area as Section 3 protected.

The IMK is only accessible via a farmer's log on service—a feature launched in September 2021 including a red, yellow, green indication of the likely status of cultivated farmland and grassland in context of CAP support eligibility.⁵¹

DEPA and the Nature Agency⁵²

DEPA/the Nature Agency offers more links and publications on their website addressing agriculture and Annex IV species. Some publications are quite dated, e.g., back to 2011, but they do include important information that is still relevant. For example, *The Habitat Guidance* (updated in 2020) focuses on livestock farming and describes the connection between nature-conservation rules and rules included in the Act on Livestock Farming concerning Annex IV species⁵³. *The Habitat Guidance* sets out and explains how, e.g., scientific evidence of potential damage to protected species may lead to rejection of an application for permission to expand farm activities or refusal of an application to change the use of an area to ensure conservation status for Annex IV species in their natural range (in line with the Habitats Article 16 (1)). Ammonia disposition from farming, which changes eco-systems influence, is addressed in *The Habitat Guidance* as a specific important issue in the context of farming in Natura 2000 sites⁵⁴.

Other tools for identification of protected areas and Annex IV species and birds populations⁵⁵

Farmers can use an app to determine if any Section 3 (Nature Conservation Act) protected areas are present inside the borders of their property. It doesn't help in identification of Annex IV species,

⁴⁹ <https://lbst.dk/>

⁵⁰ <https://lbst.dk/>

⁵¹ <https://selvbetjening.lbst.dk/#/homepage>

⁵² <https://lbst.dk/>

⁵³ <https://www2.mst.dk/Udgiv/publikationer/2020/12/978-87-7038-248-9.pdf>

⁵⁴ *Habitats Guidance 2020*. <https://www2.mst.dk/Udgiv/publikationer/2020/12/978-87-7038-248-9.pdf>

⁵⁵ https://naturstyrelsen.dk/media/nst/Attachments/Naturen_i_Landbruget2.pdf

however⁵⁶; for guidance on how to determine Annex IV species and wild bird populations on specific plots of land, a different app can be downloaded, and a specific guide is provided⁵⁷.

Municipalities

Most of Denmark's 98 municipalities have websites providing information for farmers regarding environmental permits and dispensations from nature-conservation legislation. Nearly all municipalities encourage applicants to learn about the status of the land on their property and the presence of Annex IV species and wild birds before contacting the municipal authority⁵⁸. Municipal websites on environmental and nature-protection matters refer, e.g., to the app for protected nature and offer links to guidance for download and installation⁵⁹.

⁵⁶ <https://mst.dk/>

⁵⁷ <https://mst.dk/natur-vand/natur/national-naturbeskyttelse/naturpleje/naturplejeguiden/bilag-iv-arter/>

⁵⁸ <https://www.aarhus.dk/borger/kultur-natur-og-idraet/pas-paa-naturen/beskyttet-natur-paa-egendommen/>

⁵⁹ <https://mst.dk/natur-vand/natur/national-naturbeskyttelse/3-beskyttede-naturtyper/appen-for-beskyttet-natur/>

4. ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

The inspection and control systems for Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive as transposed and implemented in Danish legislation involve several different authorities.

4.1. Environmental inspection:

(livestock) farms and compliance control concerning Section 3 of the Nature Conservation Act

Inspection and control is conducted mainly by municipal environmental inspectors (several municipalities may cooperate). This involves inspection of livestock farms' compliance with environmental permits and the conditions set. The municipal inspections cover 22,000 (livestock) farms in Denmark⁶⁰. Statutory Order no. 1536 of 9/12/2019 sets minimum requirements for inspection frequency. Municipalities make their own inspection plans, and the minimum requirements are related to, for example, new developments and first inspection; general inspections; selected inspections; and the timing of inspections after reports or knowledge of violation of permit conditions.

Inspection Plan 2017–2021 for Aarhus Municipality , second largest municipality in Denmark

General inspection every 3rd year—all 210 farms.

Every year 40% of the 210 farms (IE permits).

A database provides access to the inspection reports.

Danish municipalities are also responsible for checking compliance with nature-protection rules that apply to farmers located in Natura 2000 sites and other protected areas. Compliance with Section 3 of the Nature Conservation Act concerns many farmers, since the classification of agricultural land inside the borders of a farmer's property is to a certain extent dynamic, and Annex IV species may enter the area unexpectedly.

4.2 Cross-compliance system—inspection and control

Farmers receiving CAP support must carefully report according to guidance for the development of control reports for the calendar year (2021) All farmer must prepare annual reports, while selection of farms for inspection control is made on random selection of 1% of the control population⁶¹.

Control is carried out on the basis of 1% control population; 20 % of the 1% control population is selected randomly, while risk assessment determines the selection of the remaining 80% of the 1% of the control population. All 105 elements subject to cross-compliance are assessed by two inspectors—one veterinarian (if animals are on the holding) and one with an agricultural/environmental background. After their visit the farmer receives a control report⁶².

Requirements for remediation in the case of violation of specific provisions/EU standards are clearly stated in a pamphlet directed towards the farming community receiving CAP support⁶³.

⁶⁰ <https://mst.dk/erhverv/industri/miljoetilsyn/tilsynsindsats/kommunernes-tilsyn/>

⁶¹ <https://lbt.dk/>

⁶² The control process is carefully described here: <https://lbt.dk/landbrug/krydsoverensstemmelse/kontrol/#c7372> (in Danish).

⁶³ <https://lbt.dk/>

4.3 Reporting violations

Reporting violations of the Hunting and Injured Game Act and Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game

At the level of the farmer, deliberate actions or purposive omissions in relation to killing wildlife and destruction of and damage to nests and eggs are subjects to sanctions (Criminal Law Act). The burden of proof nevertheless lies with the police or prosecutor. It has proven difficult meet the burden of proof if the violation is not discovered while it is being committed. Episodes with poisoned birds of prey have been reported, but resources to take cases through the system seem to be limited; few cases have ended up in court (e.g., one of destruction of active birds nests came before the Court of Esbjerg on 12 May 2021). The Danish Society for Nature Conservation, (DSNC) has registered 13 cases of poisoning were registered between 2010 and 2018. Some of the incidencies has been reported to the police but investigations have not lead to accusation of anybody. DSNC requests more resources and a specialised police investigation force.⁶⁴.

⁶⁴ <https://www.dn.dk/nyheder/ulovlige-giftdrab-pa-rovfugle-savner-efterforskning/>

5. ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT PROTECTED SPECIES

Please see the relevant sections above for:

- Environmental permitting—livestock production (Sections 2.2. and 2.3)
- Plans and projects in nature-conservation areas—EIA (Section 2.3)

6. OVERALL ASSESSMENT OF SPECIES PROTECTION ON AGRICULTURAL LAND

KEY FINDINGS (CHALLENGES)

The effectiveness of the transposing legislation and its implementation in practice is linked to a well-functioning municipal-level system for environmental permitting and inspection as well as effective habitats protection according to Section 3 of the Nature Protection Act. The agricultural sector is not subject to control/enforcement activities carried out by the Nature Agency and DEPA according to the Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game and the Hunting and Game Management Act that include the core provisions transposing Article 5 of the Birds Directive and Articles 12 and 13 of the Habitat Directive.

The intermediate Danish legislation that facilitates the implementation of Article 5 of the Birds Directive and Articles 12 and 13 of the Habitats Directive includes well-established permitting, inspection and control systems. No major regulatory barriers seem to exist.

6.1 TRANSPOSITION ISSUES

- The legal framework establishes direct and general protection rules applying either to individual birds/specific Annex IV species, their products and habitats, or to species of animals or plants and populations thereof and their preferred areas.
- The Danish Hunting and Game Management Act⁶⁵, the Nature Conservation Act⁶⁶ and the Statutory Order on Conservation of Certain Animal and Plant Species and Injured Game⁶⁷ include the main provisions transposing Articles 12 and of the Habitats Directive and Article 5 of the Birds Directive. Transposing provisions concerning eggs from wild birds is found in a separate statutory order⁶⁸.
 - The overall majority of transposing Danish provisions and measures fully transpose Article 5(a), (b), (c), (e) of the Birds Directive and Articles 12 (1)(a), (c) and (d), 12(2), 13 (1)(a) and 13(1)(b) of the Habitat Directive by nearly word-for-word translation of Directive provisions from English into Danish.
 - The Danish provisions transposing Article 5(d) of the Birds Directive and Article 12(1)(b) of the Habitat Directive do not encompass all elements of the EU Directives. They fail to transpose the sentence ‘particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive’ of Article 5(1)(d) of the Birds Directive and ‘in particular during the period of breeding, rearing, hibernation and migration’ of Article 12(1)(b) of the Habitats Directive.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- Farmers’ agricultural activities and management of cultivated and un-cultivated areas (and changes thereto) must be carried out in line with Birds and Habitats Directives protection rules. The legislative frameworks within which farmers carry out, monitor and follow up on their activities usually address species and plant protection indirectly.
- The Order on Conservation of Certain Species⁶⁹ defines seasons in which it is prohibited to fell

⁶⁵ Consolidated Act no. 265 of 21/03/2019.

⁶⁶ Consolidated Act no. 1986 af 27/10/2021.

⁶⁷ Statutory Order no. 521 of 25/3/2021. The recent Statutory Order includes an Annex 1 that has been updated to include a number of papiliones/butterflies which have been given conservation status.

⁶⁸ Statutory Order no. 936 of 27/6/2016.

⁶⁹ Statutory Order no. 521 of 25/3/2021.

certain nesting trees (of birds of prey, owls, eagles, black storks, red kites and woodpeckers) and dike swallow nests. The provisions are violated if the actions or omissions of the owner can be classified as negligent. **(Good practice.)**

Specific agriculture or CAP cross-compliance conditions

- The GAEC 7 cross-compliance requirement prohibiting pruning/cutting of hedges and trees between 15 March and 31 July during the breeding season of protected species is of direct importance to the protection of Annex IV species and wild birds (nesting birds and bats in particular). Cross-compliance requirement 1.38 was inserted into the cross-compliance Statutory Order in 2015, and a new cross-compliance order is issued once a year⁷⁰.

Other implementing or stimulating measures

- An example of a violation of Section 3-protected habitats, the condition of which may not be changed, could be a farmer filling in a waterhole hosting, e.g., great crested newts. In the event of a deviation from Section 3 of the Nature Conservation Act, habitat protection (Article 12(1)(d)) must be observed in accordance with Section 10 of the Statutory Order on Determination and Administration of International Conservation Areas and Certain Protected Species.
- Another example relating to wild birds is change of use of grassland on a farmer's property. The use of both cultivated and other areas is addressed in permits for livestock farming. Cultivation/change to habitat conditions of even small areas of grassland with the likely presence of wild birds must be notified to the municipal nature-protection authority according to the Nature Conservation Act, Section 19b. (Section 19b applies to farming inside Natura 2000 sites.)
- The Nature Conservation Act in particular provides a legal framework that focuses on the protection of Annex IV species and the protection of wild birds⁷¹. Natura 2000 requirements have been implemented in Danish nature-conservation legislation and mainly focus on activities inside Natura 2000 areas. Problems involving ammonia deposits originating from farming activities and which change ecosystem conditions are carefully addressed in the context of animal species and wild birds present in the area concerned⁷².

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Government advisory services

- Ministerial agencies provide a great deal of information on the protection of wild birds and especially Annex IV species and plants. DEPA, the Nature Agency and the Agriculture Agency provide comprehensive guidance on various issues of importance for protection of Annex IV species and wild birds. Farmers can use an app to determine if any Section 3-protected areas (Nature Conservation Act) are present inside the borders of their property⁷³. For guidance on how to determine the presence of Annex IV species and wild bird populations on specific plots of land, a different app can be downloaded, and a specific guide is provided⁷⁴. **(Good practice.)**
- During the environmental-permitting process, municipalities encourage farmers to use available DEPA apps for locating Nature Conservation Act, Section 3-protected areas on their property and the likely presence of Annex IV species and wild birds. Such background information can provide some of the basis for issuing livestock farming permits, including conditions that must be complied with. Municipal maps may also constitute a starting point for determination of the status of specific farmland.

⁷⁰ Statutory Order no 1861 of 07/12/2020

⁷¹ Consolidated Act no. 1986 af 27/10/2021

⁷² Statutory Order no. 2225 of 27/11/2021 and Statutory Order no. 1551 of 2/07/2021

⁷³ <https://mst.dk/>

⁷⁴ <https://mst.dk/natur-vand/natur/national-naturbeskyttelse/naturpleje/naturplejeguiden/bilag-iv-arter/>

Enforcement of species protection legislation

- The 98 Danish municipalities play a major role, directly and indirectly, in establishing farmers' compliance with the requirements set out in Article 5 of the Birds Directive and Articles 12 and 13 of the Habitats Directive on Denmark's 22,000 farms. The municipalities are competent authorities for environmental permitting and for issuing dispensations, exemptions, approvals, etc. from prohibitive nature-conservation rules.
- CAP cross-compliance control is the responsibility of the Agricultural Agency, and is implemented by five regional Veterinary and Food Administrations. Planned but un-announced inspections are carried out on a small sample of farms every year based on random selection and risk assessments made by the Agriculture Agency. Very few farmers have violated the GAEC 7 cross-compliance requirement on cutting hedges and trees.
- The Danish inspection and control systems function well for authorised projects on livestock farms—these are inspected at the latest six months after establishment/implimentation of major changes. All farms should be inspected every 3rd year, and around 40% of the total number of farms should be selected for inspection every year.
- Deliberate killing of wildlife and destruction of and damage to nests and eggs are subject to criminal sanctions, but the burden of proof lies with the police or the prosecutor. It has proven difficult to meet the burden of proof if the violation is not discovered while it is being committed. Episodes with poisoned birds of prey have been reported, but the resources to take cases through system seem to be a limited, and only a few cases have come to court.

EIA

- EIA legislation applies to both the livestock farming permitting process (IE Directive installations) and farming projects inside Natura 2000 areas. In the case of IE Directive permits the Environmental Protection Act and associated statutory orders map the route to be followed, while Natura 2000 farming projects follow the route set out in nature-conservation legislation.
- EIA rules require that animal species and plants relevant to a certain project are taken into consideration as part of assessment. Developers will often have to bring in a specialist in the field of Annex IV species, plants and wild birds in order to ensure that the EIA is sufficient. The consequence of, for example, disturbing birds and nests at ground level must be mitigated by appropriate measures.

Environmental permits for farmers

- The Act on Livestock Farming and Use of Manure,⁷⁵ the Statutory Order on Approval and Permitting of Livestock Farming,⁷⁶ and the Statutory Order on Environmental Regulation of Livestock holding and Storage of Manure⁷⁷ form the main regulatory framework for granting environmental permits to farmers with livestock and/or crop production and/or management of uncultivated areas⁷⁸.
- The application, approval and permitting processes include elements emphasising the presence or likely presence of Annex IV species and protected wild birds on the farmer's property. Large-scale livestock farming must go through a comprehensive permitting process including EIA. The Danish legislation implementing the IE Directive must be followed, while smaller farms and smaller changes to existing facilities must comply with less strict requirements. The vulnerability of the nature surrounding a farm project is nevertheless decisive when deciding which requirements must be complied with.

⁷⁵ Consolidated Act no. 520 of 01/05/2019 on Livestock Farming and Use of Manure.

⁷⁶ Statutory Order no.2256 of 29/12/2020 on Approval and Permit of Livestock Farming.

⁷⁷ Statutory Order no. 2243 of 29/11/2021 on Environmental Regulation of Livestock Holding and Storage of Manure.

⁷⁸ Statutory Order no. 2225 of 27/11/2021 on Approval and Permit of Livestock Farming and Statutory Order no. 1551 of 2/07/2021 on Livestock Manure.

- Environmental-permitting conditions may include precautions targeting protection of Annex IV species or wild birds likely to be present on farmland. Such precautions may include, e.g., activity restrictions during animal species breeding seasons and thus support farmers' compliance with the provisions transposing Article 5(1)(a) and (d) of the Birds Directive and Article 12(1)(b) and (d) of the Habitat Directive. **(Best practice.)**

RECOMMENDATIONS

- Ensure complete transposition of all elements of the EU Directives especially regarding the protection periods as required in Article 5(1)(d) of the Birds Directive and Article 12(1)(b) of the Habitats Directives.
- Provide additional resources for police and prosecutors to gather sufficient evidence of deliberate violations of species-protection legislation.

APPENDIX 1 – PRESENCE OF WILDLIFE – DANISH AGRICULTURE

Habitats Directive – Danish reporting according to Article 17 – 2013-2018 -Agriculture

Birds Directive – Danish reporting according to Article 12 - 2013-2018 - Agriculture

Ciconia ciconia	B	Ciconiiformes
Falco tinnunculus	B	Falconiformes
Vanellus vanellus	B	Charadriiformes
Streptopelia turtur	B	Columbiformes
Galerida cristata	B	Passeriformes
Alauda arvensis	B	Passeriformes
Hirundo rustica	B	Passeriformes
Anthus campestris	B	Passeriformes
Anthus pratensis	B	Passeriformes
Motacilla flava	B	Passeriformes
Saxicola rubetra	B	Passeriformes
Saxicola torquatus	B	Passeriformes
Sylvia communis	B	Passeriformes
Lanius collurio	B	Passeriformes
Corvus frugilegus	B	Passeriformes
Sturnus vulgaris	B	Passeriformes
Passer montanus	B	Passeriformes
Serinus serinus	B	Passeriformes
Emberiza citrinella	B	Passeriformes
Emberiza calandra	B	Passeriformes
Linaria cannabina	B	Passeriformes
Limosa limosa limosa	B	Charadriiformes
Perdix perdix all others	B	Galliformes

APPENDIX 2 – TABLES – FULL TEXT TRANSPOSITION

Habitats Directive – Articles 12 and 13(1)

<p>Article 12(1)(a) prohibiting all forms of deliberate capture or killing of specimens of these species in the wild</p> <p>Article 13(1) prohibiting the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild</p>	<p>Article 12(1)(c) prohibiting deliberate destruction or taking of eggs from the wild</p>	<p>Article 12(1)(d) prohibiting deterioration or destruction of breeding sites or resting places</p>	<p>Article 12(1)(b) prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration</p>	<p>Article 12(2) and Article 13(1)(b) prohibit the keeping, transport and sale or exchange and offering for sale or exchange of specimens taken in the wild, except for those taken legally before the Directive is implemented</p>
<p>Statutory Order no. 521 of 25/3/2021</p> <p>Conservation of animals and plants covered by the Habitats Directive, Annex IV</p> <p>Prohibition §10 For wild animals which occur naturally in Danish nature and which are covered by Annex IV of Council Directive 92/43/EEC of 21 May (Habitats Directive), cf. Annex 1 to this Order 1) All forms of intentional capture and killing are prohibited</p> <p>§10(2) For wild-growing plants in nature, which are covered by Annex IV of the Habitats Directive, cf. Annex 2 to this Statutory Order there is a prohibition on intentional picking, collection, cutting, excavation or uprooting or destruction</p>	<p>Statutory Order no. 521 of 25/3/2021</p> <p>§ 10 For wild animals which occur naturally in Danish nature and which are covered by Annex IV of Council Directive 92/43/EEC of 21 May (Habitats Directive), cf. Annex 1 to this Order</p> <p>2) Intentional destruction or collection of eggs in the wild are prohibited</p> <p>Consolidated Act no. 265 of 21/ 2019</p> <p>Section 6(a)(1) Breeding and resting areas for the mammals mentioned in Appendix 1 must not be destroyed or damaged</p>	<p>Consolidated Act no. 265 of 21/03/2019</p> <p>§6(a) Breeding of resting areas for mammals mentioned in Annex 1 may not be disturbed or damaged</p> <p>Consolidated Act no. 1986 of 27/10/2021 on Nature Conservation</p> <p>§ 29(a)(2) Breeding or resting areas for the species listed in Annex 3 to the Act (Annex IV animal species present in Denmark) must not be damaged or destroyed</p> <p>Note: The Hunting and Game Management Act focuses on mammals and wild birds, while the general species protection rule set out in the Nature Conservation Act § 29(a)(2) covers all Annex IV species</p>	<p>Consolidated Act no. 265 of 21/03/2019</p> <p>§ 7 The mammals mentioned in Appendix 1 may not be intentionally disturbed with detrimental effect on the species or population. The prohibition applies in relation to all life stages of the covered animal species</p> <p>Consolidated Act no. 1986 of 27/10/2021</p> <p>Section 29(a)(1) Animal species (listed Annex IV species) must not be intentionally disturbed with detrimental effect on the species or population</p>	<p>Statutory Order no. 521 of 25/3/2021</p> <p>§11 For animals and plants that are continuously covered by Annex IV of the Habitats Directive, cf. Annex 7 to this Executive Order..... (reference to the Bern Convention)... storage, transport, trade or exchange, offerings for sale or exchange, transfer....</p>

Birds Directive Article 5

Article 5 (a) Deliberate killing or capture by any method;	Article 5 (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;	Article 5 (c) taking their eggs in the wild and keeping these eggs even if empty	Article 5 (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive:	Article 5 (e) keeping birds of species the hunting and capture of which is prohibited;
<p>Statutory Order no. 521 of 25/3/2021</p> <p>§4 For birds covered by §1(1) it is prohibited to intentionally kill or capture them, regardless the method used, and be in possession of live birds.</p> <p>§4(2) Exemptions according to Order on Birds in Captivity</p>	<p>Statutory Order no. 521 of 25/3/2021 on conservation of certain animal and plant species</p> <p>Consolidated Act no. 265 of 21/03/2019 on Hunting and Game Management</p> <p>§6(a)(2) Birds' nests must not be intentionally destroyed, damaged or removed. Eggs must not be intentionally destroyed or damaged.</p> <p>(3) Enables Minister of Environment to issue order on felling of trees and further rules on birds nests protection</p> <p>Statutory Order no. 521 of 25/3/2021 Felling of trees with birds nests</p> <p>§6 Colonial birds' nesting trees may not be felled during the period 1 February–31 July</p> <p>(2) The nesting trees of birds of prey and opwis may not be felled during 1 February to 31 August</p> <p>(3) Eagle, black storks and red kite nests must not be felled</p>	<p>Statutory Order no. 935 of 27/6/2016 on Eggs from Wild Birds</p> <p>Scope/coverage</p> <p>§1 This Statutory Order covers eggs from wild birds, which are naturally occurring in Danish nature and eggs from other wild birds, which are at all times covered by Article 1 of the Directive of the European Parliament and of the Council of 30 November 2009 on protection of wild birds (2009/147/EC), as well as subspecies of these species, whether or not the subspecies are naturally occurring in EU Member States</p> <p>(2) The provisions of this Executive Order also apply to empty eggs as well as egg parts and products</p>	<p>Consolidated Act no. 265 of 21/03/2019</p> <p>§7(2) Birds must not be intentionally disturbed to the detriment of the species or population (supplements §6(a)(2) and (3) focus on removal of nests and eggs, while 7(2) focuses on birds themselves)</p>	<p>Statutory Order no. 521 of 25/3/2021</p> <p>Hunting and capture of species of birds is prohibited according to Statutory Order no. 521 of 25/3/2021 §1(1) cf. §4</p> <p>Dispensation §9 Capture and keeping of birds</p> <p>Under strict conditions specified by the Environmental Protection Agency</p>

APPENDIX 3 – FULL REFERENCE AND LINKS TO DANISH LEGISLATION

List of legislation:

Statutory Order on conservation of certain animal and plant species and injured game
(BEK no. 521 of 25/3 2021) – Artsfredningsbekendtgørelsen
<https://www.retsinformation.dk/eli/lta/2021/521>

Statutory Order on Game Injuries (derogations rules on regulation of certain species)
(BEK nr 1006 af 14/06/2020)
Vildtskadebekendtgørelsen
<https://www.retsinformation.dk/eli/lta/2020/1006>

Statutory Order on eggs from wild birds and registration of egg collections
(BEK no. 936 of 27/6 2016)
Bekendtgørelse om æg fra vilde fugle og indsamling heraf
<https://www.retsinformation.dk/eli/lta/2016/936>

Statutory Order on birds in captivity
(BEK no. 848 of 27/06/2016)
Bekendtgørelse om hold af fugle i fangenskab
<https://www.retsinformation.dk/eli/lta/2016/848>

Act on hunting and game management (Consolidated Act - LBK no. 265 of 21/03/2019 – Jagt og vildtforvaltningsloven)
<https://www.retsinformation.dk/eli/lta/2019/265>

Act on Nature Conservation
(Consolidated Act - LBK no. 1986 af 27/10/2021 – Naturbeskyttelsesloven)
<https://www.retsinformation.dk/eli/lta/2021/1986>

Supplementing legislation :

CAP Support Act
LBK no 115 af 06/02/2020
Landbrugsstøtteleven
<https://www.retsinformation.dk/eli/lta/2020/115>

Statutory Order on Cross Compliance-2021
BEK no 1861 of 07/12/2020
<https://www.retsinformation.dk/eli/lta/2020/1861>

Statutory Order on Cross Compliance-2022
BEK no. 2370 of 10/12/2021
<https://www.retsinformation.dk/eli/lta/2021/2370>

Statutory Order on Approval and Permit of Livestock Farming
BEK no. 2256 af 29/12/2020
Bekendtgørelse om godkendelse og tilladelse mv. af husdyrbrug
<https://www.retsinformation.dk/eli/lta/2020/2256>

Consolidated Act on Livestock Farming and Use of Manure
LBK no. 520 of 01/05/2019
<https://www.retsinformation.dk/eli/lta/2019/520>

Statutory Order on Environmental Regulation of Livestock Holding and Storage of Manure
BEK nr 2243 af 29/11/2021
[Husdyrgødningens bekendtgørelse \(retsinformation.dk\)](https://www.retsinformation.dk)

Statutory Order on Determination and Administration of International Conservation Areas and Certain Protected Species
BEK nr 2091 af 12/11/2021
Habitatbekendtgørelsen
<https://www.retsinformation.dk/eli/lt/2018/1595>

[Habitatsguidance 2020](https://www2.mst.dk/Udgiv/publikationer/2020/12/978-87-7038-248-9.pdf) - Habitatvejledningen Vejledning til bekendtgørelse nr. 1595 af 6. december 2018 om udpegning og administration af internationale naturbeskyttelsesområder samt beskyttelse af visse arter
<https://www2.mst.dk/Udgiv/publikationer/2020/12/978-87-7038-248-9.pdf>

Consolidated Act on Environmental Assessments of Plan, Programs and Projects
LBK no. 1976 of 27/10/2021
Miljøvurderingsloven
<https://www.retsinformation.dk/eli/lt/2020/973>

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<https://www.retsinformation.dk/>

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<https://naevneneshus.dk/start-din-klage/miljoe-og-foedevareklagenaevnet/tidligere-afgoerelser/>

Danish Environment and Food Board of Appeal decisions

Species Conservation

<https://mst.dk/natur-vand/natur/international-naturbeskyttelse/eu-direktiver/naturbeskyttelsesdirektiver/tilskud-bilag-iv-arter/>

<https://mst.dk/natur-vand/natur/national-naturbeskyttelse/naturpleje/naturplejeguiden/naturbeskyttelseslovens-paragraf-3/>

<https://arter.dk/landing-page>

Agriculture

<https://lbst.dk/landbrug/markliv>

https://lbst.dk/fileadmin/user_upload/NaturErhverv/Filer/Landbrug/Planteavl/Undgaa_at_skade_vildt_ved_hoest.pdf

Maps : <https://lbst.dk/landbrug/kort-og-markblokke/markkort-og-markblokke/>

CAP support and cross-compliance

<https://lbst.dk/landbrug/krydsoverensstemmelse/>

<https://lbst.dk/nyheder/nyhed/nyhed/landbrugsstyrelsen-praeciserer-krydsoverensstemmelses-krav-til-naturbeskyttelse-uden-for-natura-2000/>

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<https://lbst.dk/landbrug/krydsoverensstemmelse/kontrol/#c7372>

Cross compliance guidance 2021 -

https://lbst.dk/fileadmin/user_upload/NaturErhverv/Filer/Landbrug/Krydsoverensstemmelse/Vejledning_om_krydsoverensstemmelse_2021__omraade_1__august_2021.pdf

Environmental Permitting/ Nature Conservation Authorisation processes

<https://mst.dk/natur-vand/natur/national-naturbeskyttelse/3-beskyttede-naturtyper/administration-af-3/dispensation-vedroerende-beskyttede-naturtyper/>

<https://mst.dk/erhverv/landbrug/> (Agriculture)

<https://www.aarhus.dk/borger/kultur-natur-og-idraet/pas-paa-naturen/beskyttet-natur-paa-ejendommen/>

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<https://www2.mst.dk/udgiv/publikationer/1999/87-7909-360-4/html/kap02.htm>

Digital Environmental Administration: Permissions, EIA report

<https://dma.mst.dk/>

Inspection Plan: Municipality of Aarhus

<https://www.aarhus.dk/demokrati/politikker-og-planer/natur-og-miljoe/miljoetilsynsplan/>

Digital Environmental Administration: Inspection reports

<https://dma.mst.dk/>

Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study

Spain

With specific focus on Andalucía

ENV/2020/OP/0022



February 2022

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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

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ABBREVIATIONS

BOE	Spanish Official Journal
BOJA	Official Journal of the Regional Government of Andalucía
CE	Spanish Constitution
CA	Autonomous Community
CCAA	Autonomous Communities
CEPNB	National Committee for the Natural Heritage and Biodiversity <i>Comisión Estatal para el Patrimonio Natural y la Biodiversidad</i>
CJEU	Court of Justice of the European Union
EIA	Environmental Impact Assessment
FAS	Farm Advisory Service
GAEC 7	Good Agricultural and Environmental Condition - Standard 7
LESRPE	Listado de Especies Silvestres en Regimen de Protegidas Proteccion en España
MITECO	Spanish Ministry for Ecologic Transition
NGO	Non-governmental organisation
SEA	Strategic Environmental Assessment
SEPRONA	Nature Protection Service of the Civil Guard.

1 INTRODUCTION

1.1 ABOUT THIS PROJECT

This project looks at the species protection rules under the Birds and Habitats Directives in place according to the legislation and case law and assesses how effectively they are applied in a few specific EU Member States in the agriculture sectoral policy (DE, DK, FR, ES, IE, NL, PL, RO) and forestry policies and legislation (AT, FL, FR, DE, SL, PL, RO, SE).

The legal framework is clearly stated in the Nature Directives in a consistent way as interpreted by the jurisprudence of the CJEU. It includes Article 12 of the Habitats Directive, which requires Member States to establish a system of strict protection for the **animal species listed in Annex IV** and prohibits:

- *all forms of **deliberate** capture or killing of specimens of these species in the wild;*
- ***deliberate disturbance** of these species, particularly during the period of breeding, rearing, hibernation and migration;*
- ***deliberate destruction** or taking of eggs from the wild;*
- *deterioration or destruction of breeding sites or resting places;*
- *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 was implemented;*

and Article 13 of the Habitats Directive requires Member States to establish a system of strict protection for the **plant species listed in Annex IV**, and prohibits:

- *the **deliberate** picking, collecting, cutting, uprooting or destruction of such **plants** in their natural range in the wild;*
- *the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before the Directive was implemented;*

and Article 5 of the Birds Directive requires Member States to establish a general system of protection for **all species of birds** found in the EU and prohibits:

- ***deliberate** killing or capture by any method;*
- ***deliberate** destruction of, or damage to, their nests and eggs or removal of their nests;*
- *taking their eggs in the wild and keeping these eggs even if empty;*
- ***deliberate disturbance** of these birds particularly during the period of breeding and rearing, in so far as the disturbance would be significant having regard to the objectives of this Directive;*
- *keeping of bird species, the hunting and capture of which is prohibited.*

Article 5 of the Birds Directive requires Member States to ban the deliberate killing or capture of all species of wild birds by any method, as well as the deliberate destruction of, or damage to, their nests and eggs and the deliberate disturbance of those birds, and the CJEU requires that the killing, destruction or damage under the Birds Directive should be purposeful¹. By contrast, Article 12(1)d of the Habitats Directive 92/43 does not require the acts of deterioration and destruction of **breeding and resting places to be deliberate**, with unintentional acts also forbidden. According to the Court, prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, does not

¹ C-412/85.

satisfy the requirements of Article 12(1)(d) of the Habitats Directive². Furthermore, in Case C-183/05³ the Court established that Article 12(1)(d) of the Habitats Directive prohibits acts that ‘interfere with or destroy breeding sites or resting places of wild species’... ‘whether they are intentional or not.’

Member States may avail themselves of certain derogations from these rules, but the use of derogations must be justified in relation to the overall objectives of the Directives and the specific relevant articles. In addition, derogations must be reported.

Both Directives require Member States to establish regimes of species protection inside and outside Natura 2000 sites. While the Birds Directive requires Member States to adopt *general* species protection systems, the Habitats Directive refers to the need to establish *strict* systems of species protection. It is not sufficient to adopt a legislative framework, the Member States must also ‘*implement concrete and specific protection measures*’⁴.”

1.2 GOVERNANCE

Competences

The Spanish Constitution (CE) recognises the right to enjoy an environment suitable for the development of the person and the duty to preserve it⁵. However, this is not the recognition of a fundamental right but of a guiding principle. The constitutional framework entails a complex administrative situation regarding the distribution of responsibilities between central and regional governments on environmental matters. The extent of competence of the State and each of the regional governments is described in the Constitution and the respective *Estatutos de Autonomía* (regional constitutions for each Autonomous Community (CA)). The Constitutional Court resolves any conflict regarding power distribution between the State and Autonomous Communities (CCAA). According to the CE adopted in 1978, the Central Government is responsible for providing basic environmental legislation and establishing common levels of environmental protection. Article 149(1) 23rd of the Constitution gives the State exclusive competence to enact basic legislation on environmental protection, including nature conservation and forest, without prejudice to the powers of the Autonomous Communities (CCAA) to adopt measures that provide for additional protection (Article 148 CE). Legislation adopted under Article 149(1) 23rd CE is considered state basic legislation, meaning that CCAA can only legislate with those basic provisions as the minimum standards and are entitled, if they so wish, to adopt stricter provisions which provide for a higher level of environmental protection.

On species protection, in particular, the State has the competence to adopt the national legislation transposing the species protection rules under the Nature Directives and to draw up the list of protected species (LESRPE). The national law establishes the common species protection rules to be applied by the regions. It also has competence to adopt the strategies for the protection of endangered species that are present in more than one region and the strategies to fight against the main threats for biodiversity, such as the use of toxic substances, electrocution and collision with power lines and lead-poisoning.

Spain’s 17 CCAA have the competence to set standards of legal nature protection beyond basic legislation and implementation of the State environmental legislation, such as the species protection rules established by national law implementing the Nature Directives. They are also fully responsible within their own territories for matters such as agriculture and livestock, forestry management, hunting

² Case C-98/03 Commission v. Germany [2006] ECR I-00053; Case C-6/04 Commission v. United Kingdom [2005] ECR I-09017.

³ Case C-183/05, Commission v. Ireland [2007] ECR I-00137.

⁴ Case C – 441/18 Commission v Poland.

⁵*Id.* Article 45 which states that: (1) Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. (2) The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity. (3) For those who break the provisions contained in the foregoing paragraph, criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused.

and fishing, public works, transport, non-commercial ports and airports, etc. It is important to note that CCAA have competence for agriculture, while the State has competence to issue the concessions or authorisations for the use of hydrological resources.

The body responsible for issuing an integrated permit or an authorisation of a project subject to an Environmental Impact Assessment (EIA) depends on who is competent for the matter in accordance with Articles 148 and 149 of the Constitution. Authorisations required for a change of land use modifying the ecosystem within the territory of Andalucía are the responsibility of the relevant *Consejería* of the regional government of Andalucía which in this case is the *Consejería* or Regional Ministry of Agriculture, Livestock, Fisheries and Sustainable Development. The Directorate for environment, water and climate change is responsible for conducting the EIA and providing the assessment and advice to authorise, or not, the activity. The decision to authorise or not is the responsibility of the DG for agriculture.

Besides this regional level with legislative powers (the CCAA), local municipalities with their local councils also have considerable responsibilities for some environmental issues, e.g. urban waste management, town planning, parks, or promotion of economic development and authorisations related to town planning or public services that can have an impact on the environment⁶. It is worth noting that provinces have lost competences with the establishment of the CCAA and while they formally keep a coordination role, it is not meaningful.

In any case, a permit or authorisation for a project is issued through a public administration's decision. In the Spanish system, all public administrations' decisions are subject to administrative and judicial review. Law 40/2015 of 1 October on the Legal Regime of the Public Sector (Law 40/2015) sets out the general regime applicable to review public administrative decisions and omissions including decisions on issuing an integrated permit or authorising a project. And Law 29/1998 of 13 July on the Jurisdiction of Contentious-Administrative Proceedings (Law 29/1998) lays down how judicial reviews of final administrative decisions take place, once the administrative review procedure is exhausted.

Institutional structure

From an institutional point of view, the State authority in charge of species protection and environmental impact assessment at the national level is the Ministry for Ecological Transition and Demographic Challenge (also known as MITECO). The Ministry of Agriculture, Fisheries and Food (MAPA) develops the Government's policy on agricultural, livestock and fisheries resources, the agri-food industry and food at the national level within its scope of competence, which is very limited as the legislative power lies with the regional governments. Royal Decree 2/2020 establishes all Ministries for the current government including the Ministry for Ecological Transition and the Demographic Challenge and the MAPA.

Royal Decree 500/2020 develops the basic organic structure of the Ministry for Ecological Transition and the Demographic Challenge which is responsible for:

- The proposal and execution of the **Government's policy** on the fight against climate change, pollution prevention, **protection of natural heritage, biodiversity, forests, the sea, water** and energy for the transition to a more environmentally friendly production and social model.
- The drafting of **state legislation** on water and coasts, climate change, biodiversity protection, environment, forestry, meteorology and climatology.
- Direct management of the **public water domain** in inter-community basins and the maritime-terrestrial public domain.
- The drafting of state legislation on energy, the development of national energy policy, together with measures aimed at ensuring energy supply.
- The drafting and development of the Government's strategy and policy in the face of the

⁶ Article 25 of Law 7/1985 of April 2 regulating the basic legal framework for local governments.

demographic challenge, as well as the proposal and execution of the policy to combat depopulation.

According to Articles 7 and 9 of Royal Decree 1078/2014, the Ministry of Agriculture, Fisheries and Food is the national authority in charge of the Spanish Agricultural Guarantee Fund (EAGF/FEGA) for direct payments to farmers, including coordination of the payment agencies and of the system of coordination of cross-compliance checks, within the meaning of Article 7(4) of Regulation (EU) No 1306/2013.

At a regional level, the institutional structure of the bodies responsible for the relevant issues is designed and organised by the Autonomous Communities. While some have separated regional Ministries (*Consejerías*) for Agriculture and for Environment other Autonomous Communities have included both policies under the same regional ministry (*Consejería*), i.e. Andalucía.

As the agriculture policy is a regional competence, the regional *Consejerías* of Agriculture are in charge of the management and disbursement of the direct payments to farmers in each of the Autonomous Communities. However, the approval and the coordination of the payment procedures are harmonised at the national level by the MAPA. The Autonomous Communities designate the corresponding specialised control bodies to ensure the observance of the cross-compliance rules.

While the study focuses on the Autonomous Community of Andalucía for an in-depth analysis of some of the issues raised in the report, other examples might also be included. The criteria for selecting this region is the importance of the agriculture sector in the region and the existence of emblematic strictly protected species, such as the Iberian lynx. The Regional Ministry of Agriculture, Livestock, Fisheries and Sustainable Development in Andalucía is in charge of agriculture and environmental issues. It is divided into the following relevant management directorates:

- Agriculture, Livestock and Food
- European Funds for Sustainable Rural Development, including the European Agricultural Fund for Rural Development (EAFRD)
- Environment, Water and Climate change

However, we have also provided examples in other regions if appropriate.

Based on the information from several interviews with authorities and some literature, the following governance issues in Spain are worth highlighting:

The coordination and dialogue between the different State ministries could be improved. According to competent authorities' representatives, when both policies were under the same Ministry, the agriculture interests seemed to be prioritised above environmental protection, where not much could be achieved. It seems that environmental protection receives more attention now that there is a Ministry in charge, which facilitates the adoption of measures and achievement of objectives. However, coordination and dialogue between the relevant ministries is still a challenge⁷.

The State has legislative competence but not implementation powers both on agriculture and environmental policies related to terrestrial habitats. This implies that the State has competence to adopt the legislation establishing common rules for the development of species protection systems. Regional authorities are therefore responsible for implementing the common system of species protection measures needed in relation to the agriculture sector activities, including the adoption of implementing legislation.

However, there is no State monitoring system of the implementation of species protection measures at regional level and none of the State ministries has developed a coordination function or activities to ensure that measures implementing the species protection rules under the national legislation transposing the Nature Directives are taken at a regional level⁸. Some cooperation organisms have been

⁷ Interview CA – agriculture, July 2021.

⁸ Interview CA – agriculture, September 2021 confirming the information in the Sustainable Governance Indicators in Spain, SEOBirdlife, 2018 and in the Sustainable Governance Indicators report, 2016 and 2020 which highlight the weak

established, such as the National Commission for Natural Heritage and Biodiversity and its Committees, which ensure coordination on the implementation of basic legislation rules. In addition, the national government coordinates the collection of information or reports on the status of species from the autonomous communities to draft the national reports on the status of biodiversity in Spain and to report to the European Commission about the implementation of the Nature Directives⁹. Andalucía approves annual statistics on Environmental indicators, including the status of wild flora and fauna, which are relevant for reporting and to show effectiveness on implementing species protection rules¹⁰.

1.3 PROTECTED SPECIES

The Annex to Royal Decree 139/2011 of 4 February 2011 lists the species of Annex IV of the Habitats Directive and other threatened species in Spain, as well as the bird species protected under the Birds Directive present in Spain. This is known as the List of Wild Species under Special Protection Regime. Spain hosts 343 Annex IV species¹¹ and around 132 of Spain's Annex IV species are linked to agricultural ecosystems¹². As Spain has designated additional strictly protected species at the national level, the list of species under the Special Protection System includes 626 species, including 170 species of flora, 67 invertebrates, 26 fish species, 20 amphibians, 53 reptiles, 249 bird species, and 41 mammals¹³.

Under the Birds Directive, Spain reported on 309 bird species under Article 12¹⁴, while according to Birdlife it hosts 383 bird species¹⁵. Spain is one of the countries with a comparatively high proportion of endemic bird species within its territory and a large proportion of bird species populations¹⁶.

According to the latest EEA report on the State of Nature in the EU, only 18.93 % of the species in Spain are in good conservation status. In addition, 26.23 % are in bad conservation status and about 39.64 % are in poor conservation status. There is no information on the status of 15.20 % of the species of EU conservation interest in Spain¹⁷.

1.3.1 Information on occurrence of strictly protected species

Spain's Habitats Directive's reporting 2013-2018 includes national occurrence data for 336 of the 343 species listed in Annex IV.

interministerial coordination and strong departmentalisation where legislative proposals are drafted avoiding to involve other ministries

⁹ Informe sobre el estado del Patrimonio Natural y de la Biodiversidad en España a 2020. Ministerio para la Transición Ecológica y el Reto Demográfico (MITECO). Available at : https://www.miteco.gob.es/es/biodiversidad/temas/inventarios-nacionales/inventario-espanol-patrimonio-natural-biodiv/informe-anual/Informe_2020_IEPNB.aspx#prettyPhoto.

¹⁰ Statistics on Environmental Indicators in Andalucía, 2020

Wild fauna: https://www.juntadeandalucia.es/medioambiente/portal/documents/20151/24243301/BIO03_2019.pdf/0bd0cc97-9e1c-5a09-1ea5-e86f77e63d5c?t=1631258368548 or

Wild flora: https://www.juntadeandalucia.es/medioambiente/portal/documents/20151/24243301/BIO01_2019.pdf/a115f6fb-f56d-fd13-812f-ed38708c7e1a?t=1631258249921.

¹¹ Source: Member State reported data on conservation status of habitat types and species (Article 17, Habitats Directive 92/43/EEC) - <http://tiny.cc/idu16y> Owner: ETC/BD, EEA.

¹² ETC/BD (2015) Linkages of species and habitat types to MAES ecosystems. Dataset.

<https://www.eea.europa.eu/data-and-maps/data/linkages-of-species-and-habitat>.

¹³ <https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/especies-proteccion-especial/ce-proteccion-listado-situacion.aspx>.

¹⁴ EEA, State of Nature report, 2020.

¹⁵ For more information, see <http://datazone.birdlife.org/species/search>.

¹⁶ EEA, State of Nature report, 2020 - For more information, see <http://datazone.birdlife.org/species/search> and https://www.miteco.gob.es/es/biodiversidad/temas/inventarios-nacionales/inventario-espanol-patrimonio-natural-biodiv/informe-anual/Informe_2020_IEPNB.aspx.

¹⁷ <https://www.eea.europa.eu/themes/biodiversity/state-of-nature-in-the-eu/article-17-national-summary-dashboards/conservation-status-and-trends>

The species for which no occurrence data has been provided include one species of arthropod, and three mammal species including Iberian ibex (*Capra pyrenaica*), sadly extinct since 2000. No data is provided for three vascular plant species, including *Narcissus yepessi*¹⁸, linked to agricultural activities in its habitat of meadows or deciduous oak forest.

Spain has developed the [Spanish Nature database](#)¹⁹ which provides information on biodiversity, species and habitats threatened or not and includes access to the [EIDOS](#) database which provides information collected on the Ministry's servers on wild species in Spain and which is presented to the citizens in real time, although without distribution data.

Spain has developed four different GIS tools, mapping data on nature in Spain, on the network of national parks, the link to the EU map of Natura 2000 sites and to the EU map of protected sites.

Andalucía provides an online tool that maps the occurrence of strictly protected species on a scale of 5km x 5km, searchable by species and by area²⁰ (see box below).

Andalucía protected species map at scale 5 km x 5 km

The Regional Ministry of Agriculture, Livestock, Fisheries and Sustainable Development has made available to the public a cartographic viewer developed by REDIAM that provides data on the distribution of species of wild flora and fauna that are regularly monitored.

The viewer is an agile and simple tool that provides citizens with information on the distribution of species, both threatened and non-threatened. This information is obtained from the monitoring carried out within the framework of the different recovery and conservation plans including the Andalusian Wildlife Monitoring Programme covering the annual census of the wintering and the reproduction of the abundant avifauna present in Andalusia by the Regional Ministry of Agriculture, Livestock, Fisheries and Sustainable Development. It also includes the monitoring information in the database of Endangered Flora of Andalusia (FAME).

The information provided by the viewer can be consulted in two different ways:

- Query by polygon. In this option, a specific area is delimited, and as a result a table is displayed with the species present in the selected area.
- Species locator. This alternative offers the option of selecting a specific species from those available, through its scientific name. Once selected, the viewer draws on the map the distribution area of the species in Andalusia. This area is represented by 5 x 5 km grids showing the presence of the detected selected species .

Farmers can consult the online map called Land Parcel Identification System (LPIS) (*SIGPAC* in Spanish) which provides information on the location of farm/plots in relation to CAP funding and on whether they are close to or in Natura 2000 areas. However, no information on species is available in that system²¹.

1.3.2 Strict protection of the Iberian wolf (*Canis lupus*)

The **Iberian wolf** is listed under Annex IV of the Habitats Directive South of the Duero River in Spain and as Annex V species North of the Duero River in Spain. It is generically protected throughout its distribution area in Spain, according to Article 52.3 of Law 42/2007 on Natural Heritage and Biodiversity²². The protection of the wolf has been modified with the amendment adopted on 20

¹⁸ split from *Narcissus longispathus*.

¹⁹ <https://sig.mapama.gob.es/bdn/>

²⁰ https://www.juntadeandalucia.es/medioambiente/portal/landing-page-%C3%ADndice/-/asset_publisher/zX2ouZa4r1Rf/content/visualizador-de-especies-protegidas-de-andaluc-c3-ada-5x5km/20151

²¹ <https://sigpac.mapama.gob.es/fega/visor/>

²² <https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/especies-silvestres/ce-silvestres-interacciones-medidas.aspx>

September 2021 of the Royal Decree 139/2011²³, listing the species populations located north of the Duero under special protection system in Spain. With this amendment of the Royal Decree, the wolf becomes a non-huntable species in the whole territory of Spain.

Until September 2021, Law 42/2007 and the Royal Decree 139/2011²⁴ together with the relevant regional legislation, established a difference of legal status and treatment between the wolf north of the Duero river, which could be subject to management measures, including hunting, and the strict protection system applied **south of the Duero river**²⁵, in line with the exemption listed in Annex IV of the Habitats Directive.

The wolf census performed in 2012-2014 coordinated by MITECO estimated that more than 90 % of the wolf population lives in Castilla y León, Galicia, Cantabria and Asturias — corresponding to the 297 packs estimated to live in the Spanish Iberian Peninsula²⁶. Until the Order of 20 September 2021, the wolf was a species that could be hunted in those Autonomous Communities based on annual quotas defined by public administration²⁷. Prior to this Order, the Basque Country and Asturias allowed selective hunting and carried out population controls, although Asturias 2018's permits have been subject to investigation by the Prosecutor's Office²⁸.

The authors of a study on the conservation status of the wolf in Spain published in 2018²⁹, claimed the “lack of transparency”, as well as a lack of scientific criteria in the management of the species in Spain. *“Wolf population controls are carried out in a random and irrational way, without taking into account the hierarchy of the different individuals in the pack or their sex or age. The authors consider that if this dynamic of annual killing continues, scientifically unjustified at all points, it is very likely that the species will continue to disappear from large territories where until very recently it was common, as it has happened since the beginning of the century”*³⁰. The Administrative Order of 20 September 2021 aims to address this problem (see section 3).

In relation to the situation in Andalucía and other southern Spanish regions, during the last two decades the remaining wolf nuclei present in that area became extinct with no direct or proxy observations of individuals during the last 10 years.

1.3.3 Main threats to species from agriculture practices in Spain

■ Crop changes that destroy habitats and provoke bird mortality

Crop changes, sometimes derived from changes of CAP financial support, may have a negative impact on habitats and may even cause their destruction, with a consequent negative impact on species. Crop changes is the sort of agricultural practice that is not subject to authorisations or environmental impact assessments (except for those activities to allocate uncultivated areas or semi-natural areas to agricultural exploitation or logging, or to transform irrigation or drainage in land affecting an area

²³ <https://www.boe.es/boe/dias/2011/02/23/pdfs/BOE-A-2011-3582.pdf> or consolidated at: <https://www.boe.es/buscar/act.php?id=BOE-A-2011-3582>

²⁴ BOE 46, 23 February 2011, Royal Decree 139/2011, 4 February for the development of the List of Wild Species under the Special Protection Regime and the Spanish Catalogue of Threatened Species available at: <https://www.boe.es/boe/dias/2011/02/23/pdfs/BOE-A-2011-3582.pdf> or consolidated at: <https://www.boe.es/buscar/act.php?id=BOE-A-2011-3582>.

²⁵ The wolf is included in Annex II and V of the List of Wild Species under Special Protection Regime adopted by Royal Decree 139/2011 and protected under Law 42/2007.

²⁶ CENSO 2012-2014 DE LOBO IBÉRICO and <https://www.miteco.gob.es/es/biodiversidad/publicaciones/pbl-fauna-flora-estrategias-lobo.aspx>;

²⁷ Orden TED/980/2021, de 20 de septiembre, por la que se modifica el Anexo del Real Decreto 139/2011, de 4 de febrero, para el desarrollo del Listado de Especies Silvestres en Régimen de Protección Especial y del Catálogo Español de Especies Amenazadas

²⁸ https://elpais.com/politica/2017/09/22/actualidad/1506076446_834745.html;

<https://www.lavanguardia.com/vida/20210926/7748032/siete-comunidades-rebelan-prohibicion-cazar-lobos-espana.html>

²⁹ Observatorio de la Sostenibilidad (2017) Por la convivencia del Hombre y el Lobo: Aproximación al balance de mortalidad no natural del lobo Ibérico. <https://censoloboiberico.files.wordpress.com/2018/03/informe-mortandad-lobo-iberico-20171.pdf>.

³⁰ <https://censoloboiberico.files.wordpress.com/2018/03/informe-mortandad-lobo-iberico-20171.pdf>

greater than 10 ha) and the environmental agents do not report it.

Agricultural changes have been driven mainly by an increase in mechanisation, technification and intensification that has generated negative effects at the demographic level in the populations of wild species present in the agricultural environment, with sharp population declines that have even caused several of them to be at risk of extinction. The population decline is related to the loss of food and refuge resources, as well as to mortality and disturbance of wildlife during the breeding season, caused by activities such as the widespread use of phytosanitary products, the loss of boundaries and margins with natural vegetation between agricultural plots³¹ or the modification of harvest patterns and techniques. Among the groups of animals most affected, birds and invertebrates occupy a prominent place, as reflected in the indices developed and used specifically for birds or butterflies by the European Environment Agency or the European Commission. In any case, there is scientific evidence³² that the decline of birds and invertebrates, such as pollinators, in the agricultural environment is associated with the collapse that the entire ecosystem has suffered, as a consequence of the changes that have occurred in recent decades. In addition, the disappearance of the top elements of the trophic chains, such as birds and other predatory vertebrates, poses a risk of increasing crop pests³³.

Some of the agricultural activities provoking the greatest negative impacts on wild birds are related to the systems and dates of harvest of non-irrigated cereal crops and the management of fallows. The earlier time of harvest is not matched by an advance in the breeding season of the birds, so the harvesting/packing machinery consequently destroys nests and eggs, as well as the nesting habitat, disturbing the birds during reproduction and even causes mortality of juveniles or chicks still incapable of avoiding the machinery³⁴.

Several scientific studies have revealed this situation, both in the European Union as a whole and in Spain³⁵. The Montagu's harrier (*Circus pygargus*) is probably the bird species most affected by this early harvest: different studies³⁶ have shown that between 60 and 70 % of reproduction events are spoiled by the passage of harvesting machines, projecting the extinction of the species in Spain in 20 years if measures are not adopted to avoid such impacts. A third of the nests of the endangered little bustard (*Tetrax tetrax*) are lost as a result of early cereal harvest, which is also the main cause of chick mortality among the bustard (*Otis tarda*)³⁷. Apart from these endangered species, other ones protected under Annex V and therefore that are subject to hunting, are also affected by early harvest: 36 % of red-legged partridge (*Alectoris rufa*) nests fail due to the passage of agricultural machinery during their reproduction, an aspect that also constitutes one of the main threats to the common quail (*Coturnix coturnix*)³⁸.

On the other hand, fallows are also key areas for biodiversity and the ploughing, tilling or clearing of these fallow plots overlapping with breeding time leads to chick mortality, loss of clutches during incubation and serious disturbances to the birds. In fact, it has been shown that these changes in the configuration of the fallows during critical reproductive periods pose one of the main threats to protected species such as the aforementioned little bustard, the Dupont's lark (*Chersophilus duponti*), the two sandgrouse species *Pterocles alchata* and *Pterocles orientalis* and the stone curlew (*Burhinus*

³¹ Hass A.L. et al. 2018. *Proceedings of the Royal Society of Biological Sciences B*.

³² For example, Geiger et al. 2010. *Basic and Applied Ecology*; Tscharnke et al. 2012. *Biological Conservation*; Sánchez-Bayo y Wyckhuys. 2019. *Biological Conservation*; Sirami et al. 2019. *PNAS*.

³³ For example, Ricucci y Lanza. 2014. *Vespertilio*; Evenden 1995. *Forest & Conservation History*; Garfinkel y Johnson. 2015. *Agriculture, Ecosystems & Environment*.

³⁴ On the one hand, the use of certain cereal varieties of early sowing and harvest, the commercial opportunities related to the harvest cereal "in green" to be used for livestock feeding or the rental of harvesting machines that have to work unavoidably in concrete parts of the territory, have caused a general advance in the harvest dates of the rainfed cereal. This advancement of dates has important effects on the birds that nest on the ground inside the agricultural plots: the birds reproduce during specific periods depending on their own seasonality –associated with climate, weather and photoperiod- as well as with trophic resources available.

³⁵ Concepción y Díaz. 2011. *Agriculture, Ecosystems & Environment*.

³⁶ Corbacho et al. 1997. *Bird Study*; Arroyo et al. 2002. *Animal Conservation*; García y Arroyo. 2002. *Ornithologischer Anzeiger*; Santangeli et al. 2014. *Biological Conservation*.

³⁷ Lapedra et al. 2011. *Biological Conservation*; Ena et al. 1987. *Ibis*.

³⁸ Casas y Viñuela. 2010. *Environmental Management*; Puigecerver et al. 2004. *Libro Rojo de las Aves de España*.

oedicnemus)³⁹. All these species, which show sharp population declines, and have unfavourable conservation status in Spain, are included in Annex IV of the Habitats Directive or in the List of Wild Species under Special Protection Regime, and some of them in the Spanish Catalogue of Threatened Species.

Apart from certain rules applicable to farmers applying for CAP funding, there are currently no rules imposing dates for the harvesting of crops by region and altitude⁴⁰.

Intentional poisoning and illegal use of poison bait

Intentional and illegal use of poison bait has a very serious impact on Spanish protected species as has been identified by several competent authorities and NGOs working on this problem since 1992⁴¹.

The illegal poisoning in Spain is related to agricultural practices as it has its origins in conflicts between predators and game species (rabbit and partridge), and in conflicts between predators (especially dogs and wolves) and livestock. It is also linked to the use of plant protection products⁴². It is considered as a massive and non-selective method for killing predators, prohibited by national, regional law and the Spanish Penal Law, which imposes a prison sentence of up to two years for this crime.

The organisations SEO/Birdlife and WWF joined forces to put together a project called Antidote programme to develop multidisciplinary actions against poisoning including dissemination, reporting and following up on cases, including litigation⁴³. The latest report includes information provided by the relevant authorities answering a request for environmental information submitted to all the 17 Spanish autonomous communities on data related to poisoning cases registered between 2013 and 2017. According to this data, Andalucía is the region where more cases of intentional poisoning have been detected⁴⁴.

The report from SEO/WWF states that in Spain, between 1992 and 2017, 21,260 animals have been confirmed dead from poison, in a total of 9 700 poisoning episodes⁴⁵. According to the associations, these data are only the tip of the iceberg of this problem, the real dimension of which is much greater, since only a small proportion of the total number of cases are detected. The illegal use of poison has a very serious impact on Spanish biodiversity and affects species such as the black vulture (*Aegypius monachus*), the griffon vulture (*Gyps fulvus*), the Egyptian vulture (*Neophron percnopterus*), the bearded vulture (*Gypaetus barbatus*) and the red kite (*Milvus milvus*). The report also states that other mammals, such as the brown bear (*Ursus arctos*), Iberian wolf (*Canis lupus subsp. signatus*), Iberian lynx (*Lynx pardinus*) or the European wildcat (*Felis silvestris*), are also victims every year of the use of poison. The most commonly used poison in Spain is the carbamate aldicarb, a substance banned since 2007, carbofuran (banned since 2008), and strychnine (banned since 1994).

With respect to the previous report published in 2016 and covering up to 2015, there has been a decreasing trend in the use of poisoned baits in the last 10 years.

Although the data are obviously encouraging, the poison has a massive effect so that even a few episodes can have a broad impact on certain species and their conservation. Comparing the two reporting periods (1992-2004 and 2005-2017), the data is more gloomy for species that are most threatened and sensitive to the use of poisoned baits such as the Imperial Eagle for which the number of cases has increased (80 to 115). The situation for the royal kite remains stable with a high number of cases, around 595, which

³⁹ Madroño et al (Eds). 2005. Libro Rojo de las Aves de España; Tarjuelo et al. 2020. *Journal of Applied Ecology*; Giralt et al. 2018. *Manual de gestión de barbechos para la conservación de aves esteparias*. Fundación Biodiversidad.

⁴⁰ Interview 16 June 2021 Environmental Spanish NGO.

⁴¹ de la Bodega, Cano, Mínguez, El veneno en España. Evolución del envenenamiento de fauna silvestre (1992-2017) Informe 2020. SEO/Birdlife y WWF, Madrid 2020, p.6.

⁴² https://ec.europa.eu/food/system/files/2019-03/pesticides_sup_nap_esp-rev-2017_en.pdf

⁴³ Ibid, p.5.

⁴⁴ de la Bodega, Cano, Mínguez, El veneno en España. Evolución del envenenamiento de fauna silvestre (1992-2017) Informe 2020. SEO/Birdlife y WWF, Madrid 2020 p.16.

⁴⁵ <http://www.venenono.org/wp-content/uploads/2020/11/Veneno-en-Espan%CC%83a-informe-2020-web-corr-24julio.pdf>

evidences the need for more effective measures. The cases affecting the Egyptian vulture and the Black vulture have decreased, but not substantially⁴⁶.

The decreasing trend may reflect the work that has been done for years to reduce the incidence of wildlife poisoning by the NGOs and relevant authorities (see sections 3 and 4).

■ **Unbalanced use of nutrients and/or use of toxic chemicals**

Soil is a natural resource that needs to be protected to ensure its long term fertility and to increase its resilience. This requires maintaining water retention capacity and its resilience to soil diseases.

In agricultural practices, the input of nutrients in the soil is quite common. The main sources of nutrients used are fertilisers and manures, which when used in excess, generate nutritional imbalances and environmental pollution problems. The overdose of certain substances and active ingredients has dangerous negative impacts on the environment and on wildlife fauna and flora, including those protected under Annex IV. This would contradict Article 12 (1)d) requiring that the strict system of protection for animal species in their range entails the prohibition of causing deterioration or destruction of breeding sites or resting places. The lack of control of the use of fertilisers in agriculture causes deterioration of breeding sites and resting places and contamination of water for animal consumption which can also be released to the sea, affecting Annex IV species in their natural range (habitat). The well-known case in *Campo de Cartagena and Mar Menor* in Murcia is a clear example of lack of control of the use of nutrients in agriculture causing damage to, and even death of, relevant species such as the Iberian toothcarp (*Aphanius iberus*) protected under Annex II of the Habitats Directive and the fan mussel (*Pinna nobilis*) protected under Annex IV of the Habitats Directive⁴⁷. The nitrogen inputs that the soil receives from a farm come from various sources (from atmospheric inputs, from weathering, from fertilisation with nitrogenous compounds).

Furthermore, the use of insecticides based on neonicotinoids such as: acetamiprid, clothianidin, imidacloprid, nitenpyram, nitiazine, thiacloprid and thiamethoxam cause significant disturbances for honeybees and other wild pollinators, and their use is one of the causes of honeybee and pollinator declines observed in recent years. Neonicotinoids are neuroactive insecticides developed to control mainly aphids and other sucking insects⁴⁸.

According to one of our interviewees, farmers use *shielded seeds (semillas blindadas)* which are treated with pesticides before they are sown to achieve higher yields. Those seeds are authorised for commercial use and do not need special authorisation even though they affect the reproduction lives of granivorous bird species such as the red-legged partridge (*Alectoris rufa*) protected under Annex II and Annex III of the Birds Directive. A recent study claims that the risk assessment of phytosanitary products in Spain does not consider the analysis of the effects on the reproduction of birds if the phytosanitary products are applied during the autumn. The results of this research work show the need to evaluate the risks of triazole fungicides on the reproductive process of birds regardless of the period of the year in which the animals are exposed^{49, 50}.

In general, the use of adjusted crop nutrient balance and the analysis of the impacts of their nitrogen input use on wildlife should be considered by farmers every year. This analysis requires communication with farmers, training and adaptation of their farm notebooks. Nitrogen balance is an agronomic calculation that takes into account nitrogen inputs and outputs on farms. The method requires annual farm-level data on all nitrogen inputs (mineral fertilisers, manure, organic fertiliser, nitrogen fixed by legumes, atmospheric deposition, etc.) and outputs (e.g. export of nitrogen in fruits, other tissues or

⁴⁶ Ibid

⁴⁷ https://www.miteco.gob.es/es/biodiversidad/temas/espacios-protegidos/pinna_nobilis_tcm30-196966.pdf

⁴⁸ Ibid

⁴⁹ Fernández-Vizcaíno, E., Fernández de Mera, I. G., Mougeot, F., Mateo, R., Ortiz-Santaliestra, M. E. 2020. Multi-level analysis of exposure to triazole fungicides through treated seed ingestion in the red-legged partridge. Environmental Research; <https://revistajaraysedal.es/estudio-descubre-nuevos-perjuicios-semillas-blindadas-perdiz-roja/>.

⁵⁰ Spanish Environmental NGO, Interview 16 June 2021 and <https://www.lanzadigital.com/provincia/semillas-dbc1blindadasdbc1-el-veneno-legal-que-emponzona-el-campo/>.

volatilisation). However, information available to farmers on the appropriate methods to use seems to be scattered⁵¹. The Guide on Good Practices for biodiversity in the rural environment has identified this problem and proposes certain measures to counteract their impacts on biodiversity. There is no information on how this Guide is distributed or implemented (see section 3).

⁵¹ Red Rural Nacional, 'Buenas prácticas para la Biodiversidad en el medio rural' Dirección General de Desarrollo Rural, Innovación y Política Forestal, 2019 p. 10-12.

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

2.1 ENVIRONMENTAL LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE AND APPLICABLE TO AGRICULTURE SECTOR

State legislation

The Spanish transposition of the Nature Directives is stricter in some aspects than the Birds and Habitats Directives, in particular the list of strictly protected species goes beyond the list of protected species under the EU Directives.

- **Law 42/2007 of 13 December 2007 on Natural Heritage and Biodiversity**⁵²

Article 54 of the Law 42/2007 confers a general protection regime on wild animals, whereby it is prohibited to kill, capture, pursue or disturb all of them.

Its paragraph 1 establishes the system of responsibilities as follows:

The General State Administration and the Autonomous Communities, within the scope of their respective competences, shall adopt the necessary measures to guarantee the conservation of biodiversity living in the wild, paying particular attention to the preservation of their habitats, and establishing specific protection regimes for those wild species whose status so requires, including them in one of the categories referred to in Articles 56 and 58 of this law.

The wording of this paragraph provides a **broader scope** of species than the one under Article 12 of the Habitats Directive linked to Annex IV to the Directive, as it includes further species to be strictly protected in Spain. Article 54 of the Law 42/2007 refers to the establishment of specific protection systems for those species whose status so requires by including them in the list of Wild Species under Special Protection System or in the list of Threatened Species.

The title of **Article 56** refers literally to ‘List of Wild Species under Special Protection System’ which includes Annex IV species of the Habitats Directive. The title framing **Article 58** refers to the ‘Spanish Catalogue of Threatened Species’, which includes the list of protected species that are threatened by extinction in Spain and need particular urgent national measures.

The scope of the protection system and prohibitions within Article 56 of Law 42/2007 covers those species referred to in the list of species under special protection. This provision is implemented and developed by Royal Decree 139/2011 of 4 February establishing the List of wild Species under special protection system, which lists the species under Annex IV of the Habitats Directive occurring in Spain and all wild native birds according to the Birds Directive.

Articles 54(5) and 57 of Law 42/2007 transpose **the prohibitions** under Article 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive in relation to the species protected under EU law as well as other species considered as threatened in Spain. Article 54(5) states:

It is prohibited to intentionally kill, harm, disturb or disturb wild animals, regardless of the method used or the stage of their life cycle. This prohibition includes their retention and capture alive, the destruction, damage, collection and retention of their nests, young or eggs, even if empty, as well as the possession, transport, trafficking and trade in live or dead specimens or their remains, including foreign trade.

For species of animals not included in any of the categories defined in Articles 56 and 58, these prohibitions shall not apply in cases with specific regulations, especially in the legislation on forests, hunting, agriculture, public health and sanitation, inland fishing and sea fishing, or in other

⁵² Law 42/2007 of 13 December 2007 on Natural Heritage and Biodiversity, BOE A 2007 21490.

cases regulated by the General State Administration or the Autonomous Communities within the scope of their competences, for their exploitation, in a manner compatible with the conservation of these species.

Article 54(5) **prohibits intentionally** killing, harming or disturbing wild animals, regardless of the method used or the stage of their biological cycle. This prohibition includes the retention and capture, the destruction, damage, collection and retention of their nests, young or eggs, the latter even when empty, as well as the possession, transport, traffic and trade of live or dead individuals or their remains, including their trade. In this paragraph there is no explicit prohibition of *deterioration or destruction of breeding sites or resting places*. However, transposition to this provision is ensured through Article 57 (1)b), discussed below.

It further states that the species protection rules apply also to other animal species not included in any of the categories of species under special protection (regulated in Articles 56 and 58 of the Law 42/2007) except when they are subject to specific regulations, such as the legislation on forests, hunting and agriculture. Therefore, agriculture legislation may revert the prohibitions stated under environmental legislation for species not under special protection. Protection of these other categories of species is not considered in this study.

The protection system follows with Article 57(1) of Law 42/2007 which states that the inclusion in the List of Wild Species under Special Protection Regime of a species, entails **generic prohibitions** such as disturbing them or their habitats, as follows:

*(a) In the case of **plants, fungi or algae**: collecting, cutting, mutilating, uprooting or intentionally destroying them in the wild.*

*b) In the case of animals, including their larvae, offspring or eggs: any action carried out with the **purpose** of killing, capturing, pursuing or **disturbing** them, as well as the destruction or deterioration of their nests, nurseries **and breeding, wintering or resting places**.*

*c) In **both cases**, to possess, naturalize, transport, sell, trade or exchange, offer for sale or exchange, import or export live or dead specimens, as well as their propagules or remains, except in those cases in which these activities, in a manner controlled by the Administration, may be clearly beneficial for their conservation, in the cases to be determined by regulations.*

*These prohibitions shall apply to **all phases of the biological cycle of these species**, subspecies or populations.*

Article 57(2) also requires the General State Administration and the Autonomous Communities, within their respective scopes of competence, to establish a **control system for accidental captures** or deaths and, based on the information collected therein, to adopt the necessary measures so that these do not have significant negative impacts on the species of the List, and are minimised for the future. Article 57(2) of Law 42/2007 states:

*The General State Administration and the Autonomous Communities, within the scope of their respective competences, shall establish a **control system for monitoring incidental catches or deaths** and, on the basis of the information collected therein, shall adopt the necessary measures to ensure that these do not have a significant negative impact on the species included in the List of Wild Species under Special Protection Regime, and are minimised in the future.*

This transposes Article 12.4 of the Habitats Directive.

In compliance with Article 16 of the Habitats Directive and Article 9 of the Birds Directive, **Article 61** of Law 42/2007 lays down the conditions under which the protection regime provided for in **Article 54 may be exempted**. Exceptional authorisations may be granted if it is demonstrated that there are **no other satisfactory solutions** to the alteration of the protection regime for the species, and without prejudice to the maintenance of the populations concerned in a favourable conservation status and under the following reasons:

- in the interest of public health and safety

- to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- 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;
- for the purpose of research and education, of repopulating and reintroducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;
- 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;
- in the interest of protecting wild fauna and flora and conserving natural habitats;
- The principle of no net biodiversity loss will be applied in case of reasons related to damages to property and the protection of fauna and flora and the conservation of natural habitats.

■ **Royal Decree 139/2011, 4 February for the development of the List of Wild Species under the Special Protection Regime and the Spanish Catalogue of Threatened Species⁵³**

Article 56 of Law 42/2007 establishes the obligation to develop the List of Wild Species under the Special Protection Regime (LESRPE) which will be further developed and implemented by regulation, after consulting the Autonomous Communities and which will include species, subspecies and populations that need particular attention and protection based on their scientific, ecological and cultural value due to its uniqueness, rarity, or degree of threat, as well as those that appear as protected in the annexes of the Directives and international conventions ratified by Spain. It also requires the List to have an administrative status and scope in the whole State, and to be the responsibility of the Ministry of Ecological Transition which has the power to add to the list of species and/or change of category or exclusion of a taxon or population in this List when there is technical or scientific information that advises it.

On that basis, the Ministry has recently adopted the Order TED / 980/2021, modifying the Annex to Royal Decree 139/2011, providing the List of Wild Species under Special Protection Regime (LESRPE) and the Spanish catalogue of Threatened Species to include the wolf as a non-huntable species in the whole Spanish territory⁵⁴. On that basis the wolf has become protected throughout the national territory. This decision means unifying the legal status and management of the species at the national level, putting an end to the difference in the levels of conservation of this species in different Autonomous Communities of Spain.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

Regional transposing legislation (Andalucía)

The Autonomous Communities develop subsidiary legislation derived from the national law in order to ensure regional and local implementation taking into account the local specificities.

Law 8/2003, of 28 of October, on Wild Flora and Fauna of the Autonomous Community of Andalucía

⁵³ BOE 46, 23 February 2011, Royal Decree 139/2011, 4 February for the development of the List of Wild Species under the Special Protection Regime and the Spanish Catalogue of Threatened Species available at: <https://www.boe.es/boe/dias/2011/02/23/pdfs/BOE-A-2011-3582.pdf> or consolidated at: <https://www.boe.es/buscar/act.php?id=BOE-A-2011-3582>.

⁵⁴ Order TED / 980/2021, of 20 September 2021, to modify the Annex to Royal Decree 139/2011, of February 4, for the development of the List of Wild Species under Special Protection Regime and the Spanish catalogue of Threatened Species accessible at: <https://www.boe.es/boe/dias/2021/09/21/pdfs/BOE-A-2021-15244.pdf>.

last updated in 2010⁵⁵ further develops the provisions established in national Law 42/2007.

Law 8/2003 reproduces the species protection rules established in the Directives. In particular, Article 7 of Law 8/2003 transposes the prohibitions under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive; however, it includes an exemption for some activities by stating ‘without prejudice to the provisions regulating the use or exploitation of wild fauna and flora under Title II of this law and other specific regulations of forestry and fishing’. This Article states:

1. *The wild species, especially the endangered species and their habitats, shall be protected and prohibitions established in this Law and the regulations that develop it, against any type of actions or aggressions susceptible to alter their ecological dynamics.*
2. *It is forbidden, within the framework of the objectives of this Law and **without prejudice** of the rules established under Title II with respect to hunting, **fishing and other uses/exploitations**, as well as in the **specific regulations on forestry and maritime fishing** in inland waters, shellfish maritime fishing and marine aquaculture:*
 - a) *Intentionally killing, capturing alive, damaging, persecuting, disturbing wild animals, whatever the method used, in particular during the period of reproduction, breeding, hibernation and migration, collecting larvae or offspring, disturbing their larvae or young, alter or destroy their habitat, as well as their breeding and resting places.*
 - c) *Destroying, damaging or intentionally removing nests or their eggs, spawning areas, as well as the collection or retention of eggs, even when empty.*
 - d) *Destroying, collecting, cutting, cutting down or uprooting, in part or in whole, natural specimens of wild flora, as well as destroying their habitats.*
 - e) *Possession, retention, naturalization, sale, transportation for sale, retention for sale and, in general, the sale, traffic, trade and exchange of live or dead specimens of wild species or of their propagules or remains, including the import, export, offering for sale or exchange, as well as public exhibition.*
 - f) *To release, introduce and cause the proliferation of specimens of species, subspecies or breeds of wild allochthons, hybrid or transgenic wild species, in the Andalusian natural environment, with the exception of those declared as hunting and fish species.*
3. *Any agent of the authority may order the cessation of any unauthorized activity that seriously infringes the provisions of this article, communicating it immediately to the competent authority on environmental matters for the purpose of initiating the initiation of the corresponding sanctioning procedure.*

Article 7 of Law 8/2003 introduces two types of exemptions to the species protection prohibitions: to the rules in Title II with respect to fishing and other uses/exploitations (such as agriculture) and to the specific regulations on forestry and fishing.

In the way it is drafted, the reference to Title II in Article 7 of Law 8/2003 seems to refer to those activities that use wild fauna and flora, such as hunting and fishing and other uses such as agriculture. There is no reference to a more limited scope of species (e.g. Annex V species) covered by Title II in this Chapter I providing for the General provisions. It just establishes, under Article 30, that ‘wild species may only be used and commercialised under the conditions determined by regulatory measures’. In addition, Title II does not exclude agriculture from these general provisions and under Article 7 agriculture may fall under the reference to ‘other uses/exploitations (*aprovechamientos*)’. Therefore it provides a general exemption to the prohibition rules based on Title II with respect to other uses/exploitations (including agriculture) without reference to the species under Annex V for which derogations to the prohibitions are legally accepted.

⁵⁵ published at the «BOJA» num. 218, de 12 de November de 2003 <https://www.boe.es/buscar/pdf/2003/BOE-A-2003-21941-consolidado.pdf>.

Article 31 further develops this provision establishing that any activity for the use of wild species referred to under Article 30, will require administrative authorisation from the regional Ministry responsible for the environment and, where appropriate, the drafting of a technical plan in the terms established by regulation. However, it states that administrative authorisation is not required for the sporadic collection in small quantities of specimens of wild species of invertebrates, plants and fungi in traditional places and on traditional dates, provided that this does not entail a risk of local disappearance of the species. This implies a general derogation from administrative authorisations for the collection of species, including those protected under Annex IV of the Habitats Directive.

Chapter II of Title II introduces provisions common to hunting and inland fishing, stating that both activities are limited to the species listed in Annex III. However, this limitation is not applicable to ‘other uses/exploitations’, which includes agriculture and it is referred to under Article 30. Therefore, agricultural activities do not seem to require administrative authorisation even if it might affect protected species under Annex IV of the Habitats Directive.

The general system of species protection under Article 7 refers to all wild species, especially those endangered, which may also include those protected under Annex IV of the Habitats Directive. The general exemption to Title II may aim at providing a framework for certain uses or exploitation of certain species such as hunting and fishing. However, the lack of clarity in the scope of this provision entails a transposition problem which could lead to an implementation problem authorising the exploitation of species protected under Annex IV to the Habitats Directive.

Article 7 also refers to the forestry and fisheries’ legislation. This general exemption goes beyond the provisions of the Habitats Directive for hunting species. Articles 8 and 9 of Law 8/2003 transpose the Directive’s provisions related to the wise use of species, in particular Articles 15 and 16 of the Habitats Directive. Therefore, the reference to the specific regulations on forestry and fisheries within the provision related to the prohibitions under the strict systems of species protection does not correspond to the wording of Articles 12 and 13 of the Habitats Directive or Article 5 of the Birds Directive and entails a transposition problem which could affect the implementation of the environmental provisions related to species protection in the agriculture, forestry and fisheries’ sectors.

On that basis, we consider that the regional Law 8/2003 does not correctly transpose the species protection rules under Article 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive because it provides for a general exemption from the species protection rules to agriculture activities; and a general derogation from the requirement to get authorisation for carrying out agriculture activities that might affect protected species. Furthermore, the existing provisions related to the derogations related to hunting species evidence that the scope of Article 7 is different and refers to species other than Annex V. The whole legal framework allows for agriculture activities to be developed without taking into account the species protection rules and it is therefore a problem of compliance with the species protection rules of the Nature Directives.

2.3 PREVENTIVE MEASURES APPLICABLE TO THE AGRICULTURE SECTOR RELATED TO SPECIES PROTECTION

2.3.1 National measures

National Species Action plans and Strategies related to threatened species

Law 42/2007 on Natural Heritage and Biodiversity, requires, in its Article 54(1), the General State Administration and Autonomous Communities, in their respective areas of competence, to adopt the **necessary measures** to guarantee the conservation of biodiversity that lives in the wild, preferably attending to the preservation of their habitats and establishing specific protection systems for those wild species whose situation so requires.

Under Articles 59 and 60, Law 42/2007 requires the adoption of **action plans for threatened species** and places the responsibility to develop and adopt those plans on the Autonomous Communities, while at State level, the Sectoral Environmental Conference, to the proposal of the State Commission for

Natural Heritage and Biodiversity, is responsible for the adoption of the strategies and recovery and conservation plans of threatened species present in more than one Autonomous Community.

Within the framework of its competences, the **Spanish Government** has adopted the following relevant measures:

- **Conservation and management strategies for threatened species⁵⁶:**

The State Ministry has adopted Action Plans for certain threatened species (Annex IV) including the Iberian imperial eagle (*Aquila adalberti*); marbled teal (*Marmaronetta angustirostris*), European Red-knobbed Coot (*Fulica cristata*) and white-headed duck (*Oxyura leucocephala*), Iberian Desman (*Galemys pyrenaicus*), ferruginous limpet (*Patella ferruginea*), Iberian lynx (*Lynx pardinus*), the Wolf (*Canis lupus*), freshwater mussel (*Margaritifera auricularia*), Cantabrian brown bear (*Ursus arctos*), brown bear in the Pyrenees (*Ursus arctos*), Balearic Shearwater (*Puffinus mauretanicus*), osprey (*Pandion haliaetus*), bearded vulture (*Gypaetus barbatus*), Cantabrian capercaillie (*Tetrao urogallus*), Pyrenean capercaillie (*Tetrao urogallus aquitanicus*), and European mink (*Mustela lutreola*).

In most of those action plans, the analysis of threats includes the impact of agricultural and forestry practices. Some measures proposed, e.g. for the Iberian imperial eagle, are the development of sustainability criteria in the planning of sectoral activities, including agriculture, to avoid the loss of habitats. However, we have not obtained information on the development of those criteria or the distribution of these strategies to farmers or farming organisations or their implementation.

The National Strategy on **fauna threatened by poisoned baits⁵⁷** and the Antidote Program aim to tackle illegal use of poison. While there is no strategy to deal with the use of poisoned baits in agriculture in particular, Spain has adopted a National Strategy developed in 2004 against the illegal use of poisoned baits in the natural environment, including in agricultural land and/or by farmers⁵⁸. This strategy is linked to the implementation of Article 12 (1) a) and b) of the Habitats Directive and Article 5 (1) a) and d) of the Birds Directive aiming to enforce the prohibition to kill and cause disturbance of species, including Annex IV species. The environmental NGOs SEO/BirdLife and WWF Spain founded the Antidote Program, a coalition of NGOs whose objective is to raise awareness about the impact of poisoning and the eradication of this non-selective practice for the control of predators. Both organisations have carried out various reports on the impact that poison has on biodiversity and have carried out numerous actions to contribute to its solution, promoting and organising training programmes and managing projects and actions at national and regional level. The most recent report provides information and analysis of the situation for the period 1992-2017⁵⁹. This report updates the 2016 one which had data until 2013.

The ANTIDOTO project (meaning antidote), is a LIFE project which started in 2007 covering three European areas, the National Park of Gran Sasso and Monti della Laga (Italy), Andalusia and Aragon (Spain), with the aim of promoting the conservation of large carnivores and necrophagous raptors through the dissemination of innovative measures to prevent and combat the illegal use of poison applied to protect the domestic livestock. It also led to a LIFE + VENENO project, with additional innovative measures. All these actions have led to the spreading of the use of canine units, the creation of the SOS Veneno Telephone, exercise of *actio popularis* in legal actions and other types of collaboration between NGOs (exchange of information, joint communication actions, etc.) as well as close collaboration with competent public administrations in nature conservation but also enforcement bodies such as forestry agents, Nature Protection Service of the Civil Guard (SEPRONA).

Currently, another national strategy for the **conservation of threatened birds linked to agro-steppic environments** has been prepared and agreed at the technical level within the existing working groups in Spain (administrations, experts and organisations involved) and is pending its official approval by the

⁵⁶ <https://www.miteco.gob.es/es/biodiversidad/publicaciones/pbl-fauna-flora-estrategia-list-arbol.aspx>

⁵⁷ <https://www.miteco.gob.es/es/biodiversidad/publicaciones/pbl-fauna-flora-estrategias-lucha-venenos.aspx>

⁵⁸ Approved by the National Commission for the Protection of Nature (Madrid, September 23, 2004) and by the Environment Sector Conference (Mérida, October 23, 2004).

⁵⁹ de la Bodega, Cano, Mínguez, 2020. El veneno en España. Evolución del envenenamiento de fauna silvestre (1992-2017). SEO/BirdLife y WWF, Madrid.

regional and national ministers, according to the above-mentioned regulations. This strategy includes the diagnoses and definition of the main objectives in relation to the status of **seven target species** which are listed under Annex IV of the Habitats Directive, and provides recommendations on activities to reduce the impact of agricultural practices.

The Spanish government has also developed four **Strategies for the conservation of threatened flora** and fight against their threats which cover Coastal flora; Rocky flora, Flora linked to high peaks, Flora linked to water environments. They refer to agriculture as one of the main threats. However, there is no information on the impact of these strategies in the planning or management of agriculture practices and the distribution amongst farmers or farming practices.

These Strategies provide for the framework of conservation and restoration plans which implement the requirement under the Nature Directives to establish a strict system of species protection. While they do not include references to the prohibitions, they implement the provisions in Law 42/2007 where the prohibitions are mentioned. While some Strategies and Action Plans have been adopted, they only cover some specific species in Annex IV of the Habitats Directive and not all birds protected under the Birds Directive. There is no information on how they are implemented by farmers or their impact.

- **Other relevant national strategies**

In addition, the State Ministry responsible for environmental policy has developed *several Strategies* to combat the main **threats from specific invasive species** such as the strategy on the American mink (*Neovison vison*) or the zebra mussel (*Dreissena polymorpha*) or the California king snake (*Lampropeltis getula californiae*). It also covers some invasive plant species such as the pampas grass (*Cortadelia selloana*) and the common water hyacinth (*Eichhornia crassipes*).

The **pollinator conservation strategy** is a Ministerial non-legally binding act, adopted by the Sectoral Conference on Environment held in September 2020. It includes an analysis of the impact of agriculture and proposes certain measures to improve the habitats in agricultural environments such as the development and dissemination of a manual of good practices in agriculture for the conservation of pollinators or the integration within the framework of Rural Development Programmes, of specific actions related to the conservation of pollinator habitats in the context of the current CAP. In addition, it highlights the need to analyse and study the new possibilities for environmental measures within the CAP reform and undertake the application of those measures that are considered most appropriate for the improvement of natural and semi-natural habitats for the conservation of pollinators in agricultural environments. It proposes to integrate aspects specifically related to the conservation of pollinators within the framework of the reinforced conditionality of the CAP post 2020; to improve natural and semi-natural habitats in agricultural settings through the promotion of voluntary measures for farmers (eco-schemes and agri-environmental measures) in the context of the post-2020 CAP and to promote the use of indigenous seeds of ecologically appropriate varieties adapted to the area, in initiatives for the conservation and improvement of pollinator habitats.

As the strategy has only recently been adopted, no information has been found so far on the impact of this strategy and its dissemination to farmers and farmers' associations.

Again, these Strategies implement the requirement under the Nature Directives and the Spanish transposing legislation to establish a strict system of species protection, but do not include references to the prohibitions under Article 12 of the Habitats Directive or Article 5 of the Birds Directive. The Strategies are Ministerial documents, non-legally binding. While some measures are taken, they only cover some specific species in Annex IV of the Habitats Directive and not all birds protected under the Birds Directive. There is no information on how they are implemented by farmers or their impact.

2.3.2 Regional measures

- **Species protection plans in Andalucía**

In the region of Andalucía, taking into account the relevant competences, the Governing Council of Andalucía approved in March 2012 the **Plan for the Recovery and Conservation of Species of High Peaks in Andalucía**⁶⁰ covering plants and invertebrates, in particular two extinct species, 31 in danger of extinction (29 of vascular flora and 2 of invertebrates) and 28 vulnerable species (25 of vascular flora and 3 of invertebrates) according to the Andalusian list of Threatened Species (Law 8/2003, of October 28, on wild flora and fauna).

The Decision establishes the Recovery and Conservation Plans to be implemented through Action Programmes, which will specify in time and space the actions necessary for the development of the measures provided for in the corresponding Plans. Therefore, the High Peaks Recovery and Conservation Plan guides the work to achieve or maintain an adequate status of species conservation. The Action Programme for the years 2015 - 2019 includes few measures related to agriculture⁶¹. It proposes the adoption, during the period 2017 to 2019, of a ‘Manual of good practices in the field of agriculture, livestock, forestry and hunting for the conservation of biodiversity’. It has not been adopted yet.

These Species Action Plans implement the requirement under the Nature Directives and the transposing legislation to establish a strict system of species protection but do not include references to the prohibitions under Article 12 of the Habitats Directive or Article 5 of the Birds Directive. In addition, the Action Plans focus on certain species and do not cover all species in Annex IV of the Habitats Directive nor all birds protected under the Birds Directive.

- **Strategy for the eradication of the illegal use of poisoned baits in Andalusia**

The region of Andalucía adopted the **Strategy for the eradication of the illegal use of poisoned baits in Andalusia** and, within that framework, systematically collects information and statistics on the use of poisoned baits⁶². The statistics evidence the decline in the number of cases. This strategy is linked to the implementation of Article 12 (1) a) and b) of the Habitats Directive and Article 5 (1) a) and d) of the Birds Directive.

The improvement in the situation is recognised to be due to the Specialized Canine Unit, which was established by the *Consejería* in 2004 and by 2010 developed more than 430 emergency and preventive inspections. Since then, the number of actions have been reduced to 106 carried out in 2019. It is not clear if this is due to an improvement of the situation or rather a problem derived from the lack of resources and a decision to reduce preventive actions taken by Administration management.

2.3.3 CAP Cross-compliance: GAEC 7

■ National level

Royal Decree 1078/2014, in Articles 7 and 8 and Annex II, establishes cross-compliance rules that beneficiaries of CAP direct payments or area-based RDP support need to comply with in Spain⁶³. Those rules are subject to controls and criteria to implement penalties through Order 3/2021.

Good Agricultural and Environmental Condition (GAEC) standard 7 is established at national level, under Annex II to the Royal Decree 1078/2014, and further defined in the regional regulations on these obligations. It implements GAEC 7 under Regulation (EC) 1306/2013 establishing the landscape maintenance conditions for ensuring payment and which includes retention of landscape features,

⁶⁰ Decision of March 13, 2012, of the Governing Council, adopting the Recovery and Conservation Plans of certain wild species and protected habitats.

⁶¹ Orden de 20 Mayo 2015, aprobando el Programa de Actuación de Especies de Altas Cumbres.

⁶² https://www.juntadeandalucia.es/medioambiente/portal/documents/20151/24243301/BIO04_2019.pdf/ce69c45e-0acf-9380-f520-8091c6aebb5b?t=1631258422092

⁶³ Real Decreto 1078/2014, de 19 de diciembre, por el que se establecen las normas de la condicionalidad que deben cumplir los beneficiarios que reciban pagos directos, available at: <https://www.boe.es/eli/es/rd/2014/12/19/1078>.

including where appropriate, hedges, ponds, ditches, trees in line, in group or isolated, field margins and terraces, and including a ban on cutting hedges and trees **during the bird breeding and rearing season** and, as an option, measures for avoiding invasive plant species.

Annex I refers to Articles 3 and 4 of the Birds Directive which apply to bird species inside and outside Natura 2000 and Article 6 of the Habitats Directive which relates to the Natura 2000 network.

Annex II to the Royal Decree establishes the GAEC standards divided into three different types according to their focus on water, soil protection or landscape protection. This type of standards in the Royal Decree establishing cross compliance rules for the use of EU funds, are **not particularly targeted** to species protection. However, there are no EU or national measures targeting species protection linked to the CAP payments to ensure harmonised implementation in the agriculture sector of all Member States.

Under the conditions for the protection of landscape, Royal Decree 1078/2014 (Annex II, GAEC 7) establishes certain farming practices to ensure maintenance of topographical features. It forbids cutting hedges and trees during the **birds' breeding** and reproduction season, unless expressly authorised by the environmental authority. The reference period shall be taken as the period between the months of March and July, although this may be modified by the autonomous communities when justified.

Furthermore, it also prohibits harvesting with mechanical tools during nighttime in permanent crops with intensive hedgerow plantations with tall, dense foliage where **birds** nest or roost, in order to protect birds during the breeding and reproduction season, on the dates established by the Autonomous Communities.

This provision also includes exceptions to the obligation to get authorisations for the construction of barriers, for the correction of streams and terraces, or for land refining operations carried out on plots to be dedicated to the cultivation of rice and other irrigated crops.

Following the EU legislation, Article 8 of Regulation 2078/2014 establishes that in cases of breach of the cross-compliance rules, a penalty is applied by reducing or excluding the total amount of payments granted to the beneficiary. The penalty applies when the non-compliance is the consequence of an action or omission directly attributable to the beneficiary and related to the agricultural activity. Those rules are further developed through Order 3/2021.

Furthermore, **Royal Decree 1075/2014** as updated in April 2021 **on the implementation from 2015 of direct payments for agriculture and livestock and other support schemes** as well as on the management and control of direct payments and rural development payments includes provisions promoting the financial support of **agricultural practices that are beneficial for the environment** and that should be respected by farmers in order to receive the payments. It refers to the **prohibition** to convert or crop existing permanent pastures which are designated as **environmentally sensitive** (sited in Natura 2000 areas, including wetlands and marshes) and to reconvert that land to permanent pastures again, and to respect any other instructions from competent authorities to revert the damages that are in designated environmentally sensitive areas according to the Nature Directives. Where a farmer has converted or ploughed these pastures, the authorities will inform the farmer of his obligations to revert the environmental damage caused and the deadline to comply with them (Article 21). However, environmentally sensitive areas are not defined in relation to species outside Natura 2000 areas according to species protection rules under the Nature Directives.

While Spain has carried out research and collected, published and reported information on the distribution of species, it has not defined any sensitive areas for species outside Natura 2000 that can be taken into account when developing agricultural practices. Article 21 of Royal Decree 1075/2014 refers to Natura 2000 areas.

The above-mentioned provisions promote the implementation of preventive measures specific to birds in compliance with EU legislation linked to CAP but not covering other species or targeting distribution areas of other species outside Natura 2000 areas. They are very limited in scope and evidence the need for clearer EU legislation and enforcement measures targeting implementation of species protection

rules by Member States in the agricultural sector. In fact, there are current identified activities in farmlands that are drivers of population decline in the population of birds and pollinators that should be modified not only in CAP planning for receiving payment, but from a legal point of view.

■ **GAEC 7 in Andalucía**

Under the Rural Development Programme of Andalucía 2014 – 2020, GAEC 7 relates to maintaining topographic characteristics and prohibition of cutting hedges and trees during the breeding and reproduction seasons of birds⁶⁴.

These conditions include the prohibition to cut both hedges and trees during the breeding and reproduction seasons of birds, unless expressly authorised by the competent environmental body, if necessary. The period to be taken as a reference is the one between the months of February to July.

In addition, the Autonomous Community of Andalucía Directorate-General for the Natural Environment, Biodiversity and Protected Areas, passed the **Resolution of 8 October 2019**⁶⁵ and **Resolution of 15 June 2020**⁶⁶ of the **suspending night-time olive harvesting in super-intensive olive groves due to possible damage to wild birds** for the 2019-2020 and the 2020-2021 seasons.

According to the explanatory memorandum, this resolution was adopted due to the “lack of knowledge of the potential environmental cost on avifauna of harvesting with horse-drawn machinery at night in hedgerow olive groves and with the aim of making agricultural practices compatible with the conservation of agricultural biodiversity and compliance with the provisions of the Birds and Habitats Directives”.

2.3.4 Other preventive regional measures related to agriculture practices relevant to species protection systems

- Within this framework, the Autonomous Community of Andalucía adopted in 1999 a **Code of Good Agricultural Practices**⁶⁷ adopted through Resolution 12 December⁶⁸.

This Code’s main objective is the development of environmentally compatible agricultural practices, taking into account the optimal use of nitrogen inputs to the soil compatible with the environment, due to agricultural and livestock practices. This Code was adopted to implement the Nitrates Directive 91/676/EEC and does not mention the Nature Directives in the list of related EU legislation.

This Code refers to a farmer advisory system and provides recommendations that could be used or be replicated to distribute information about measures to ensure the implementation of the species protection rules (see Section 3). It deals with a problem that has a negative impact on species protection (see Section 1) and provides information to farmers on practices that implement and comply with Article 12 (1)d) of the Habitats Directive avoiding the deterioration of breeding sites or resting places and, in a similar way, would be in line with Article 5 d) of the Birds Directive. However, as stated above, the purpose does not include any reference to improving species protection rules. There is no reference to the implementation of other prohibitions or to the requirement to develop strict systems of species protection.

- **Law 3/2020 on the restoration and protection of Mar Menor**

Following the description in Section 1, the case of *Mar Menor* and its surroundings demonstrates some of the problems in Spain relating to the lack of implementation of species protection rules in the

⁶⁴ BCAM 7 <https://www.juntadeandalucia.es/export/drupaljda/Anexo%208.1%20BCAM.pdf>.

⁶⁵ Resolution of 8 October 2019 <https://www.juntadeandalucia.es/boja/2019/199/2>.

⁶⁶ Resolution of 15 June 2020 <https://www.juntadeandalucia.es/boja/2020/123/25>.

⁶⁷ Código de Buenas Prácticas Agrarias.

⁶⁸ Resolución del 12 de diciembre de 1997, de la Dirección General de la Producción Agraria, por la que se hace público el Código de Buenas Prácticas Agrarias de Andalucía para la protección de aguas contra la contaminación producida por nitratos de origen agrario, BOJA, 08/01/1998 <https://www.juntadeandalucia.es/boja/1998/2/45>.

agricultural sector. The Mar Menor case evidences the problems related to unclear governance and lack of control of a strong economic sector in the region in relation to environmental objectives.

This area in the South East of Spain is emblematic for its singular characteristics which have led to the hosting of abundant species, some of which are protected under Annex IV of the Habitats Directive. In addition, it hosts more than 25 types of habitats of community interest (eight of them priority) which are critical for those species. Some examples include the presence of fish species of special value such as seahorses or the Iberian toothcarp (*Aphanius iberus*), endangered species such as the fan mussel (*Pinna nobilis*), or relevant communities of aquatic birds. Pressures identified by several studies⁶⁹ on those species come from agricultural activity and the impact of tourism and recreational or fishing uses.

It is too early to determine the effectiveness of the recently adopted Law 3/2020 on the restoration and protection of Mar Menor in relation to species protection⁷⁰. However, it is worth noting that despite this law, a new episode of massive fish deaths happened on 16 August 2021 on the shores of the Mar Menor lagoon⁷¹. Almost two years after the episode in 2019, history repeated itself and 4.5 tonnes of asphyxiated specimens appeared on the sandbanks of the shores of Mar Menor.

The poor state of the water in the lagoon, which receives between three and five tonnes of nitrates per day, mainly from agriculture, has led to the formation of a pocket with little oxygen in the southern part of the salty lagoon, leading to decomposition of organic matter. The lack of oxygen especially affects fingerlings⁷². A significant expansion of irrigation - by more than 140 % between 1988 and 2009 led to a significant increase of water and nutrient flows reaching the Mar Menor and its coastal wetlands. Fertilisers and phytosanitary products are leached and transported by runoff water towards the Mar Menor, and by underground discharge of fresh (brackish) water towards the sea. Other emerging pollutants such as pesticides, antibiotics and other drugs reach the Mar Menor, as well as residues from livestock farms.

The Mar Menor is a portion of the State maritime-terrestrial public domain which, according to Article 132.2 of the Spanish Constitution, falls under the scope of competences of the State and Law 22/1988, of July 28, on Coasts. However, Law 22/1988 attributes certain competences to the Autonomous Communities such as the control of discharges into the sea, environmental and biodiversity protection or land planning of the coastline. Furthermore, the management of the designated Natura 2000 sites falls under the remit of the regional authorities. However, the unclear distribution of responsibilities between the State and the Autonomous Community of Murcia and poor coordination has been one of the root causes of the lack of adoption and implementation of effective measures to prevent the deterioration of the area and ensure species protection in this area⁷³.

Law 3/2020 has been adopted with the aim of ensuring the protection, restoration and revaluation of the biological, environmental, economic and social wealth of the Mar Menor (which includes protected species) and a clearer attribution of powers to the Autonomous Community of the Region of Murcia. While the law does not refer explicitly to the species protection objective, it refers to the need to preserve and recover the **biological, environmental, and socioeconomic wealth of the Mar Menor** and its surroundings; this would include **species protection** even if it is not explicitly mentioned.

The law establishes a governance system to clarify the situation and is based on an Integrated Management plan of the protected areas in Mar Menor, including those SACs protected under the Habitats Directive and the SPAs under the Birds Directive adopted in 2019⁷⁴.

For the sustainable exercise of agricultural activities carried out in the surroundings of the Mar Menor

⁶⁹ Comprehensive report on the ecological state of the Mar Menor, prepared by the Mar Menor Scientific Advisory Committee, and which was made public by the Plenary of the Committee at its meeting on February 13, 2017 - Informe Integral sobre el Estado Ecológico del Mar Menor, preparado por el Comité de Asesoramiento Científico del Mar Menor.

⁷⁰ Law 3/2020 of 27 July on restoration and protection of Mar Menor – Ley 3/2020 de 27 de julio, de recuperación y protección del Mar Menor at: <https://www.boe.es/eli/es-mc/l/2020/07/27/3>.

⁷¹ La Vanguardia, 16/08/2021.

⁷² El PAIS, 22/08/2021.

⁷³ Ley 3/2020 Preamble.

⁷⁴ Decreto 259/2019, de 10 de octubre, de declaración de Zonas Especiales de Conservación (ZEC), y aprobación del Plan de gestión integral de los espacios protegidos del Mar Menor.

and to reduce the pollution caused by nutrients of agricultural origin and their effect on the protected areas declared in the Mar Menor and its surroundings, **agricultural holdings are required to adopt the measures that are established in the law**, according to the area in which they are located, following Annex I. These measures include, *inter alia*:

- the progressive transformation to sustainable agriculture in the Mar Menor basin according to technical criteria (type of soil, availability and quality of water, slope of the land, piezometric levels) will be promoted, which includes changing to rainfed crops;
- the prohibition to change from rainfed crops to irrigation, except when there is a right for irrigation previous to the adoption of the law;
- limitations and conditions to agricultural activities in an area within 1500 m from the inner limit of the Mar Menor shore, such as the prohibition of all types of fertilisers or manure except in cases of ecological agriculture or a total ban on using chemical fertilisers or non-composted manure.
- the obligation for agricultural holdings that still have cropland under irrigation systems to establish conservation plant structures for water retention, runoff control, nutrient absorption, and protection against soil erosion. These will consist of barrier structures, as well as groups of native vegetation in the non-productive or marginal areas of the farms, or areas designated for this purpose. Annex III provides guidelines for the establishment of these conservation plant structures.

While some of these obligations need to be further defined (for example how the transformation to sustainable agriculture will be promoted), the Law defines administrative infringements for the implementation of the measures and consequent sanctions. As mentioned above, Mar Menor is an important ecological area hosting Annex IV species (as mentioned above) and integrating a Natura 2000 area but larger. Site protection measures and species protection systems are critical for the protection of habitats and species, including those under Annex IV of the Habitats Directive given the pressures threatening it. It is an example of the lack of effective species protection systems in Spain.

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

1. The Catalogue of preventive measures for coexistence of strictly protected species with agriculture

In March 2011, the Ministry of Agriculture, Food and Environment, the Autonomous Communities and the main sectoral organisations signed the "Agreement for the coverage of wildlife damage within the framework of agricultural insurance". This Agreement led to the adoption of the Order AAA/1623/2014 and requested the Ministry to carry out studies for the elaboration of a **catalogue of preventive measures**, as well as to encourage the use of these means for coexistence of strictly protected species with agriculture practices.

In this context, the then called Directorate General for Environmental Quality and Assessment and the Natural Environment of the Ministry of Agriculture, Food and the Environment worked on a **Catalogue of preventive measures**, as a proposal of good practices to avoid or minimise negative interactions between protected wildlife and agricultural and livestock farms.

Certain species may be at the heart of conflicts with farmers due to the species interactions with crops, livestock, and other types of property. The Spanish Ministry has worked with five case-studies and has developed a **catalogue or guide of preventive measures**, as a proposal of recommended good practices to avoid or minimise negative interactions between protected wildlife and agricultural and livestock farms. The selected Annex IV species for which information is provided are namely: Abejaruco/ European bee-eater (*Merops apiaster*), Calamón común/ purple swamphen (*Porphyrio porphyrio*), Lobo ibérico /Iberian wolf (*Canis lupus*), Oso pardo/Brown bear (*Ursus arctos*) and Aguila real/Golden eagle (*Aquila chrysaetos*).

The information contained in the Code is presented in the form of friendly fact sheets by species of wild fauna and the type of resource to be protected. Each sheet identifies and describes the type of interaction between the farm and the species, and sets out in detail the recommended methodology, detailed technical description of the proposed preventive measures, technical requirements for implementation, time of application, effectiveness or advantages of the measure and approximate cost for the farmer to implement.

The measures contained in this catalogue are not compulsory and their implementation is therefore recommended to the sectors involved. These recommendations include, for example regarding the wolf, the use of certain types of enclosure in the farm with a perimeter fence, electric shepherd, selective access door systems and indoor infrastructure support. They are addressed to farmers when planning their exploitation but should also be taken into account by the competent authorities when establishing priority lines of aid for farm improvements or subsidies or technical conditions in the framework of agricultural insurance. The measures propose alternative solutions to prevent significant damage to crops or livestock in the context of the application of Article 58 of Law 42/2007 on Natural Heritage and Biodiversity on species protection. While the Catalogue has been published on the website of the Ministry, distribution of the guide should be done by each regional administration. For example, in 2017 the Xunta de Galicia published a study evaluating the effectiveness of the implementation of preventive measures applied in relation to the wolf in Galicia⁷⁵. We have not been able to find evidence or examples of distribution or actual use of this Code **amongst farmers or farmers' organisations**.

It also includes the scientific references on which the proposed measures are based. The information contained in the sheets comes from the review and evaluation of technical or scientific publications on good practices or best prevention techniques, as well as from specific experiences developed in the Spanish context. It should be adapted regularly, but this catalogue as published in 2012 has not really been developed further and contains only six fiches covering:

⁷⁵ https://cmatv.xunta.gal/c/document_library/get_file?folderId=444684&name=DLFE-45218.pdf

- Bee-eater (*Merops apiaster*) in relation to the protection of apiaries
This fiche aims at managing the impact of bee-eaters on apiaries. It proposes measures other than those typically used to deter bee-eaters and which are considered detrimental by the Guide, for example by: shooting; capture by use of Japanese nets; or the use of falconry as a deterrent measure which are not very effective and they all require an exceptional authorisation from the administration under Article 58 of Law 42/2007 of 13 December 2007.
In addition, the guide refers to beekeeping insurance lines of the National Body of Agrarian Insurance (ENESA) which aim at minimising the economic impact of bee-eaters on apiaries.
- Purple Gallinule (*Porphyrio porphyrio*) related to the protection of rice paddies.
- Iberian wolf (*Canis lupus*) related to the protection of cattle farms, protection of sheep and goat farms: the guide proposes measures to ensure the protection of cattle, sheep and goat farms in compliance with the legal protection of the Iberian wolf.
- Brown bear (*Ursus arctos*) regarding the protection of apiaries and the protection of sheep holdings:
The brown bear (*Ursus arctos*) is a species protected under Article 54.3 of Law 42/2007 and included in the Spanish Catalogue of Threatened Species under Royal Decree 139/2011, of 4 February 2011, in the category ‘in danger of extinction’. The guide proposes measures to protect the agricultural practices while ensuring compliance with the protection requirements of the species.
- Golden eagle (*Aquila chrysaetos*) and the protection of goat holdings.
The insurance system of the National Agricultural Insurance Entidad Nacional de Seguros Agrarios (ENESA) provides for compensation for attacks by wild fauna on goat and sheep farms.

2. The Code of Good Agricultural Practices for biodiversity in the rural environment

The Code was published in 2019 and was produced by the National Rural Network within the Ministry of Agriculture, and the working group ‘Good environmental practices for actors in the rural environment’ involving key environmental NGOs such as SEO/Birdlife and WWF. The RRN (abbreviation from Spanish name) is under the DG in charge of Rural Development, Innovation and Forestry policy with the Ministry of Agriculture⁷⁶.

The suggested recommendations can be considered as implementing Article 12 d) of the Habitats Directive requiring the establishment of strict protection systems for animal species in their natural range prohibiting deterioration and destruction of breeding sites or resting places. While the Code does not refer specifically to the species protection rules, it aims to promote voluntary practices that go beyond compliance with the existing legislation, which is considered the baseline, as a precondition of being called good practices.

- This Code proposes the adoption of measures related to a more sustainable use of nutrients which have a positive effect on implementation of Article 12 d) of the Habitats Directive (even if it is not mentioned in the text of the Code as an objective) and include:
 - Carry out conservation tillage and reduce autumn tillage (the latter of which has a negative impact on species when it is done out of season).
 - Ensure maximum plant cover throughout the year. Temporary or permanent plant cover in perennial crops.
 - Avoid stubble burning and bury straw and other plant residues.
 - Crop rotation that allows the land to be occupied as much as possible and in a succession that allows the best productive use to be made of it. Use the nitrogen left by leguminous plants with the following crop.
 - Rotation of active ingredients to reduce environmentally hazardous substances and their

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http://www.redruralnacional.es/documents/10182/30117/Buenas_practicas_para_la_Biodiversidad_en_el_Medio_Rural_completa.pdf/5f9b7952-5287-4448-91c9-d42beb305c96

negative effects on wildlife.

- The Code of good practices proposes as well certain measures such as stopping the use of neonicotinoids, crop rotation, basic soil conservation measures, reduction of the use of active substances, incorporation of stubble and pruning residues into the soil (after shredding and composting, if necessary) to naturally increase soil fertility and enhance soil fauna, as well as leaving crop residues such as leaves, stalks and rejected fruits to decompose which enriches the soil structure and organic matter content. It recommends maintaining buffer strips without fertiliser (2 to 10 metres wide) and buffer perimeters (35 to 50 metres wide) around springs, wells or boreholes supplying water for (human or) animal consumption. In relation to the problem of destruction of hedgerows, it recommends:
 - the maintenance of natural vegetation on the boundaries of the plots in order to ensure food and shelter for biodiversity. It further proposes increasing the area of hedgerows and permanent flower strips by 10 % on the perimeter of agricultural plots, unused areas, banks, as well as paths and watercourse edges. To this end, spontaneous vegetation would be left to develop, and native plants and trees would be introduced to provide refuge for enemies of crop pests, insectivorous birds and bats.

3. Technical guidelines related to species protection:

The MITECO has adopted technical guidance related to the use of species in Spain to ensure their protection⁷⁷. The following are highlighted as linked to agriculture and/or the forestry sector. They are related to the establishment of strict systems of species protection but do not refer to the prohibitions listed under Articles 12 and 13 of the Habitats Directive or Article 5 of the Birds Directive.

- Technical guidelines for the management of feeding of scavenger species in Spain, adopted in July 2011⁷⁸.

These Guidelines for the management of the feeding of necrophagous species in Spain are aimed at promoting actions to overcome the threat to the Spanish populations of avian and other scavengers derived from the application of health management measures for animal by-products not intended for human consumption, mainly associated with the alteration in food availability. The guide analyses the origin of the problem and the impact on species conservation and presents measures for the management of the feeding of the scavenger species, detailing the different proposed methods and type of actions within the current legal framework, including the Habitats Directive, the Spanish law 42/2007 and the Spanish Catalog of Threatened Species, regulated by the Royal Decree 139/2011 for the development of the List of Wild Species in the Special Protection Regime.

- Guidelines for the monitoring and evaluation of the conservation status of endangered and special protection species, adopted in December 2012⁷⁹.

Their objective is to facilitate the reporting of information on the monitoring of biodiversity in Spain in a coordinated and homogeneous way. It intends to establish the procedure for the transmission of information between the regions and the State, in order to respond effectively to the obligation to report to the Commission about the conservation status of the taxa included in Annex I of the Birds Directive and Annexes II, IV and V of the Habitats Directive and from Law 42/2007 and of RD 139/2011. It establishes that the Autonomous Communities are responsible for the monitoring of the conservation status of species, while the Ministry is responsible for the evaluation of the conservation status of species that are hosted in several regions and for gathering the information to prepare the relevant reports.

- Protocol for intervention with bears in the Cantabrian Mountain Range (approved by the National Committee for the Natural Heritage and Biodiversity - *Comisión Estatal para el Patrimonio Natural*

⁷⁷ <https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/especies-proteccion-especial/ce-proteccion-ley.aspx>

⁷⁸ See: https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/doc_directrices_alimentacion_necrofagas_tcm30-194721.pdf

⁷⁹ See: https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/doc_directrices_vigilancia_evaluacion_v10_tcm30-198875.pdf

y la Biodiversidad (CEPNB) 24 January 2019)⁸⁰.

This Protocol develops and harmonises the guidelines in the area of distribution of the brown bear in the Cantabrian Mountains covering the autonomous communities of Galicia, Cantabria, the Principality of Asturias and Castilla y León. It develops the Brown Bear Recovery Plans and the Strategy for the Conservation of the Brown Bear, in relation to the protection of the species and the prevention of conflicts between bears and humans, including the actions to be followed in bear intervention operations, as well as in operations to release those specimens that have overcome the circumstances that required their capture and transfer to clinics or recovery centres. The basic material needed, the human resources to implement it, and the handling and recovery facilities are also determined. The Protocol is based on the principle of collaboration between the Autonomous Communities responsible for the management of the species and facilitates the exchange of both specialised personnel and material resources. While it does not refer to the nature legislation or nature Directives, it complies with the requirements of Article 12 of the Habitats Directive.

- Protocol for intervention with bears in the Pyrenees (approved by the CEPNB October 2018)⁸¹.

This Protocol provides detailed recommendations following those in the strategy for the conservation of the brown bear in the Pyrenees, relating to the protection of the species and the prevention of conflicts between bears and humans, and is applicable to wild populations of Pyrenean bears. The protocol provides guidance with the aim of promoting efficiency and coordination of actions and interventions with bears in the Pyrenees. While it does not refer to the nature legislation or nature Directives, it complies with the requirements of Article 12 of the Habitats Directive.

4. Regional measures:

As mentioned in a previous section, in 1999 the Autonomous Community of Andalucía adopted a **Code of Good Agricultural Practices** aiming to develop environmentally compatible agriculture, in relation to the optimal use of nitrogen inputs to the soil⁸². While linked to the implementation and requirements of the Nitrates Directive, it has a positive effect on the implementation of Article 12 d) of the Habitats Directive which requires the establishment of strict protection systems for animal species in their natural range prohibiting deterioration and destruction of breeding sites or resting places.

This Code refers to a farmer advisory system which provides an objective and specific service to any farm in the Autonomous Community of Andalucía for the rational use of fertilisers. The code could be used by farmers and for the training organised by the advisory system.

The Code provides recommendations regarding nitrogen fertilisation and erosion including references to different types of fertilisers, types of crops and application period or way of application of the recommended measures.

It also provides recommendations for the management of the land to reduce the risk of nitric contamination of water, through techniques of soil management or specific practices designed for each crop and each zone or area of application and not only measures linked to the use of fertilisers.

We have not been able to get confirmation on the use of this Code in practice.

No other guidelines or preventive measures have been identified linked to the establishment of strict systems of species protection or prohibitions listed under Article 12 and 13 of the Habitats Directive or Article 5 of the Birds Directive.

⁸⁰ See: https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/protocolointervencionosocantabricos_aprobadocepnb_tcm30-527062.pdf

⁸¹ See: https://www.miteco.gob.es/es/biodiversidad/temas/conservacion-de-especies/protocolointervencionosospirineos22102018_aprobadocepnb_tcm30-527063.pdf

⁸² https://www.3tres3.com/3tres3_common/art/3tres3/651/fitxers/Cod_bpa_andalucia.pdf

5. Advisory services and environmental agents

In Spain there are two types of advisory services: the environmental agents and the Farm Advisory Service. The service of environmental agents acts at State level and at regional level. While the relevant websites recognise the role of the environmental agents to provide information on environmental issues, including nature legislation and species protection to citizens, we have not had access to any formal document establishing the specific responsibilities of those bodies to provide advice or information on the implementation of species protection rules by farmers or actors in the agricultural sector.

■ Environmental Agents

This administrative body is linked to the environmental services in the Autonomous Communities in charge of monitoring implementation of environmental legislation, inspections and enforcing rules through imposing penalties or sanctions for breaches of environmental law (see Section 4). These agents may also provide advice to economic actors when carrying out their monitoring or inspection activities.

Internal rules in the form of orders or circulars define their role and competences within their regional administrative framework⁸³. They are issued by the environmental regional authority (*Consejería de medioambiente*) for which they work and their functions are related to the environmental competences of the *Consejería*. No access has been obtained to any of the circulars establishing their competences. The functions published on the web at national or regional level do not refer to species protection⁸⁴ but to a broad array of functions that according to some sources, are not properly covered with sufficient resources to ensure an effective functioning of this body⁸⁵.

■ Farm Advisory Service (FAS)

In Spain, rural development and, within this, the Farm Advisory Service (FAS) for agriculture and rural development, is implemented through two major instruments. The first is the National Rural Development Framework which, based on EU regulations, sets strategic guidelines and includes common provisions to be integrated into the second instrument, Rural Development Programmes which include actions at national level, under the responsibility of the central government, and at regional level through the regional RDPs, where regional governments define the specificities of their rural development policy⁸⁶. In Spain, the farm advisory measures are provided at a regional level operating on demand through a procedure answering a public competitive tender issued by the regional Ministry in which farmers' organisations predominate as providers of the advisory services. According to the 2019 study, entities selected and authorised to provide those advisory services with resources, professional and technical staff available to farmers are: UPA, COAG, Cooperativas Agro-alimentarias de Andalucía, Agama, Federación de Arroceros de Sevilla, Surveco Veterinarios, Asociación de Agricultura Sostenible de la Comarca de Baena, Galpagro y Basallen.

In Andalucía the regulatory bases for granting financial support to entities that provide free advisory services are published in the BOJA (Official Journal of the Regional Government of Andalucía)⁸⁷. Annex I to these rules list the mandatory items that need to be covered by the advice and may be subject to demand by farmers. They make **no particular reference to species protection rules or the provisions of the Nature Directives related to species protection**, other than the cross compliance

⁸³ Interview of representative of authority, July 2021.

⁸⁴ Valencia: <https://agroambient.gva.es/es/agentes-medioambientales/que-hacen#funciones>;

Andalucía: https://www.juntadeandalucia.es/medioambiente/portal/web/guest/landing-page-%C3%ADndice/-/asset_publisher/zX2ouZa4r1Rf/content/agentes-de-medio-ambiente-1/20151; and the la *Carta de Servicios de los Agentes de Medio Ambiente* based on the Order of 1 December 2005: https://www.juntadeandalucia.es/medioambiente/portal/landing-page/-/asset_publisher/4V1kD5gLiJkq/content/carta-de-servicios-de-los-agentes-de-medio-ambiente/20151.

⁸⁵ https://www.eldiario.es/andalucia/andalucia-no-suficientes-agentes-medio-ambiente-cuidar-montes-trabajo-incendios_1_8299037.html

⁸⁶ F. Abbasi¹, J. Esparcia², H.A. Saadi, From analysis to formulation of strategies for Farm Advisory Services (Case study: Valencia, Spain) an application through SWOT and QSPM³; Volume 11, 2019.

⁸⁷ Orden de 4 de septiembre de 2019, por la que se aprueban las bases reguladoras para la concesión de subvenciones, en régimen de concurrencia competitiva, dirigidas a apoyar el uso de servicios de asesoramiento a explotaciones agrarias, en el marco del Programa de Desarrollo Rural de Andalucía 2014-2020, BOJA Num. 175 - 11 September 2019.

criteria with regard to GAEC 7 that refer to Natura 2000 areas or birds⁸⁸.

According to sources consulted⁸⁹, farmers apply to receive advice. The advisor carries out a preliminary interview and then makes a visit to the farm to advise farmers on possible infringements of the cross-compliance rules. That way, farmers have the possibility to remedy those anomalies and avoid sanctions in case they are subject to a conditionality check. Each farmer can receive one advisory service per year. In the questionnaire that must be completed by the advisors to which we had access through an interview with representatives of the regional authorities, there is no specific reference to species protection rules or the provisions of the Nature Directives related to species. However, the following questions from the official template have been selected as relevant because they are related to species protection:

- In the case of a farm located in an area subject to the Recovery and Conservation Plan for endangered species, does it comply with the provisions on the illegal use of toxic substances, electrocution etc.?
- In the case of an action (plan, programme, project), does it have an assessment of no impact on Natura 2000, an Environmental Impact Assessment, Strategic Environmental Assessment or an Integrated Environmental Authorisation?
- Has the topographical particularity of the landscape been respected, as well as the prohibition of cutting down trees and/or bushes during the breeding and reproduction season?
- If changes involving the elimination or transformation of the farming system have been made, have they been authorised?
- Has any type of building been erected, or any road modified? Has it been authorised?

There are no publicly accessible documents establishing clearly specific responsibilities that require the FAS to provide information on the implementation of species protection rules by farmers or actors in the agricultural sector.

The desk research shows some examples publicly available through media where one of these organisations, APROA-Coexphal, has participated in these advisory activities to show their experience on the owl case. This nocturnal bird of prey used to be very common throughout the rural environment in Spain. Their numbers have dropped alarmingly, due to the massive use of agrochemicals especially in areas of intensive agriculture. Nowadays, thanks to the massive implementation of biological control in crops promoted by this organisation, their living conditions seem to be improving⁹⁰.

⁸⁸ The EU legislation defining the Member State obligations with regard to the Farm Advisory Service in the 2014 to 2020 period stated that advice at farm level must cover at least the cross-compliance obligations, including the species protection relevant hedge cutting rules, and information on the positive correlation between biodiversity and agro-ecosystem resilience, and the spreading of risk (crop failure/damage from pests and extreme climatic events), and information on preventing the spread of alien invasive species (Regulation (EU) No 1306/2013 Article 12), while other specific advice on biodiversity, such as strictly protected species affected by agriculture, may be provided but is not obligatory (Regulation (EU) No 1305/2013 preamble 13). In the 2021 to 2027 CAP framework, the Farm Advisory Service must ensure implementation of the EU Birds and Habitats Directives regarding Natura 2000 but no reference to species protection has been included.

⁸⁹ Interview Regional Authorities, September 2021.

⁹⁰ <https://www.hortoinfo.es/index.php/10577-coexphal-recuperacion-lechuza-230621>

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

The Nature Protection Service (SEPRONA)

This national police body has the role of enforcing environmental legislation affecting the natural environment when infringement would entail a crime or administrative infraction.

This Service enforces the Penal Code articles that refer to environmental contraventions.

Article 332 of the Spanish Penal Code refers to the protection of wild flora by stating that whoever, in contravention of the laws or other provisions of a general nature, cuts, collects, acquires, possesses or destroys **protected species of wild flora**, or traffics them, their parts, derivatives thereof or their propagules, except where the conduct affects an insignificant number of specimens and does not have relevant consequences for the conservation status of the species, will be punished with a prison sentence of six months to two years or a fine of eight to twenty-four months, and special disqualification from their profession or office for a period of six months to two years.

The same penalty will be imposed on anyone who, in contravention of the laws or other provisions of a general nature, destroys or seriously alters their habitat. The penalty will be imposed in the upper half of its range if it is a question of species or subspecies catalogued in danger of extinction.

The protection of wild animals is ensured through Article 334 of the Spanish Penal Code which imposes a prison sentence of six months to two years or a fine of eight to twenty-four months and, in any case, special disqualification from their profession or trade and special disqualification from the exercise of the right to hunt or fish for a period of two to four years **whoever**, in contravention of the laws or other provisions of a general nature:

- a) Hunts, fishes, acquires, possesses or destroys **protected species of wildlife**;
- b) Traffics them, their parts or derivatives thereof; or,
- c) Carries out activities that prevent or hinder their reproduction or migration.

The same penalty will be imposed on anyone who, in contravention of the laws or other provisions of a general nature, destroys or seriously alters their habitat.

This service, linked to Civil Guard, has the competence to carry out inspections related to infringements of legislation that affect the natural environment. Within the SEPRONA, there is a more specific Antitox Service that aims at combating the use of poisons and of non-selective means of pest control with an impact on the environment.

SEPRONA works with a Criminalistics Laboratory Service of the Civil Guard that supports any necessary analysis. The Environmental Laboratory of the Criminalistics Service of the Civil Guard also plays an important role due to the support it provides to SEPRONA, both in carrying out toxicological analysis and in preparing expert reports regarding other types of management subareas (genetic identification of animal and plant material, ballistic comparison, instrumental traces, human DNA profiles, etc.).

The recognised success of Operation Antitox, in all its editions as illustrated above (Section 1.3.3 and box below), is also due in large part to the participation and involvement of the Civil Guard Cynological Service, through its canine units. These canine units constitute a fundamental tool, due to the versatility and advantage offered by specialised dogs in the search and detection of toxic substances and constitute a fundamental reinforcement for SEPRONA.

Examples can be found of inspections and interventions, seizures and other actions such as:

- During 2019 the SEPRONA inspected 289 hunting estates, phytosanitary establishments and livestock farms in 25 provinces, actions that have resulted in the opening of 175 administrative and 37 criminal offences, with 28 people being investigated for the illegal use of poison and other means of non-selective hunting in the natural environment. The use of non-selective hunting means such as ropes, cages, balls or garters has exploded and the trend of the use of poison in the urban environment is worrying.

Among the poisoned animals there are some of the most threatened species in the Spanish catalogue of threatened species in the category of “endangered” such as the lammergeier, the red kite and the imperial eagle, bearded vulture, the Iberian lynx, and griffon vultures. In Toledo, corpses of imperial eagles, red kites and foxes were found in the surroundings of a cattle farm. In Ciudad Real, the agents discovered 12 dead intoxicated griffon vultures and, in another area, the corpses of five black vultures and an imperial eagle. In Murcia five people were arrested for the use of poison. In Asturias the corpse of a female bearded vulture was found, which had been introduced in Picos de Europa through the LIFE + RED QUEBRANTAHUESOS project. In Caceres several poisoned royal kites were also found.

- In February 2020, SEPRONA carried out several inspections on banana farms located in the municipality of Los Silos, in Tenerife, and intercepted a large number of **toxic products**. The agents found in a warehouse **4.7 kg of Carbo 5 G** insecticide-nematicide, which is highly toxic for humans and the environment, since its active ingredient is **Carbofuran**, a pesticide that is already banned in the EU. In addition, with the collaboration of a dog specialist in detection of poisons, a large number of prohibited phytosanitary products were obtained, among which there were 18 boxes of Tenik 10 g, which contained Aldicarb which only 1.5 g of which has the **capacity to kill 500 foxes or 15,000 kestrels**, and cause the death in turn of other animals that ate the corpse. Other boxes and containers containing various toxic products were also seized. The agents took samples which were sent to the Criminalistics Laboratory Service of the Civil Guard for analysis. This action was framed within the **Antitox Service order**, by SEPRONA in Puerto de la Cruz⁹¹.
- In June 2021 it was announced that SEPRONA is currently investigating a case opened by the Junta de Castilla y León to determine the causes of the death of 54 griffon vultures, a black vulture and a black kite, which appeared in the municipality of Monterrubio de la Armuña (Salamanca), after ingesting sheep remains. There are more than 45 live specimens (including griffon vultures and black vultures and black kites) also affected. Environmental and technical agents of the Junta de Castilla y León and agents of the SEPRONA are investigating it as an "episode of poisoning of birds”.

Although the fines can sometimes be high, some agents in SEPRONA have declared they are not sufficient to reflect the enormous damage to the environment caused by the death of specimens such as golden eagles or Iberian lynx⁹².

Environmental agents

Environmental agents under the Ministry of Ecological Transition are public employees, with the status of Agent of the Authority, who report on activities related to damage to the environment.

They have the legal function of surveillance, protection and custody of the land and public goods where they carry out their work: hydrographic basins, coastal demarcations, state land and non-transferred national parks. In relation to the state land and public parks, their functions include the surveillance, management and protection of the natural environment. The monitoring of the natural values requires the control of exploitations, works and other possible acts that may damage the environment, as well as

⁹¹ <https://www.eldia.es/sucesos/2020/02/06/seprona-requisa-productos-toxicos-explotaciones-22472212.html>

⁹² <https://www.lavanguardia.com/vida/20200212/473490133276/seprona-muerte-animales-cepos-ilegales-veneno.html>

the prevention and extinction of forest fires and, where appropriate, reporting violations of laws and regulations.

They constitute a mixed police of a special administrative and judicial nature in the environmental field, enjoying the principle of certainty in their reports and complaints, without prejudice to the evidence that the interested parties may present. The dual status of Administrative and Judicial Police introduces them at the service of judges and prosecutors⁹³.

Regional Environmental Agents

Similar to the State Environmental agents, the regional environmental agents are linked to the Regional Ministry responsible for environmental affairs. They have a double task: technical and administrative police, and guarding the regional environmental heritage. A third task involves the responsibility to act as judicial police, participating in the investigation and clarification of environmental crimes.

Their mission is to ensure the custody, protection and surveillance of environmental assets at regional level, as well as to provide information, advice and control, formulation of complaints, technical assistance, sampling, preparation of censuses and any other action or activity in relation to the competences of an environmental nature attributed to the Ministry.

They develop their activity in different areas of work, such as: forest management; prevention, investigation and extinction of forest fires; hunting and inland fisheries management; prevention and improving environmental quality. During 2016, the environmental agents in Andalucía carried out 709 390 actions, which implies a monthly average of 59 116 interventions.

Environmental Prosecutor's Office at State and at regional level

The Public Prosecutor's Office is a body of constitutional relevance, with its own legal personality and functional autonomy in the Judiciary. It is established by Article 124 of the Spanish Constitution with the mission of promoting the action of Justice in defence of legality, the rights of citizens and the public interest protected by Law, ex officio or at the request of the stakeholders, as well as to ensure the independence of the Courts.

The environmental Prosecutor's office was created in response to the need for specialisation in this complex area, as well as to ensure adequate coordination of regional actions.

In August 2021, the Environmental Prosecutor's Office investigated the drowning of birds in irrigation and fire ponds in several autonomous communities, after detecting a high number of deaths of specimens of protected species in these infrastructures. This investigation is the result of a complaint filed by the Association for the defence of nature south of Valencia (ADENSVVA), who informed the Public Ministry of the drowning of these species in the Valencian Community⁹⁴.

The Prosecutor's Office has an attached Unit of Forestry and Environmental Agents, which makes it possible to speed up investigations in a coordinated manner involving different autonomous Communities. In the case at stake, the Prosecutor's Office addressed a letter to the environmental agents of the autonomous communities of Madrid, Catalonia, Andalusia and Vizcaya, and later on those of Murcia, Castilla-La Mancha and Extremadura, asking them to inspect their ponds and to prepare a report on the implementation of the relevant regulations.

The Environmental Prosecutor's Office will prepare a report based on the information received on the scope of this environmental problem, its impact on the different protected species, and the recommendations to adopt the necessary preventive measures.

⁹³ See: https://www.juntadeandalucia.es/medioambiente/portal/web/guest/landing-page-%C3%A9ndice/-/asset_publisher/zX2ouZa4r1Rf/content/agentes-de-medio-ambiente-1/20151.

⁹⁴ <https://www.fiscal.es/-/la-fiscal-c3-ada-de-medio-ambiente-investiga-el-ahogamiento-de-aves-en-balsas-de-regad-c3-ado-y-contra-incendios>

Enforcement of CAP cross-compliance rules

The enforcement of the cross-compliance rules is regulated mainly by the above-mentioned Royal Decree 1078/2014 establishing the rules that beneficiaries of CAP direct payments or support under RDP environmental land management payments need to comply with. The Royal Decree is further developed by the implementing Order 3/2021. In Andalucía, enforcement of the cross-compliance rules is also regulated by the Order of 12 June 2015 (BOJA nº 118 of 19 June 2015)⁹⁵.

In Andalucía, conformity checks are carried out annually on at least 1 % of the beneficiaries of the CAP direct payments. This means that around 2 000 farms are inspected annually. The penalty for failing to comply with the cross-compliance obligations is a 3 % to 5 % reduction of the total aid received. In the event of a repeated infringement, a reduction of between 3 % and 15 % may be applied and in case of intentional non-compliance the sanction imposed is between a 20 % and 100 % reduction. The amount of the penalties and their determination is published in a resolution which is updated annually⁹⁶.

The information on detected cross-compliance infringements is recorded in a database. On the basis of that information, a report on the cross-compliance control system is drawn up annually and sent to the European Commission. No specific information was made available to this study on rates of infringements of the GAEC 7 rule banning hedge cutting and other tree cutting during the bird breeding season.

⁹⁵ <https://www.juntadeandalucia.es/boja/2015/118/2> .

⁹⁶ [Resolución de 24 de septiembre de 2020, de la Secretaría General de Fondos Europeos al Desarrollo Rural Sostenible, por la que se adoptan los porcentajes de reducción y exclusiones de los pagos en el Marco de la Política Agrícola Común por incumplimientos de requisitos y normas en materia de condicionalidad, para la campaña 2020. \(juntadeandalucia.es\)](#)

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

Spanish Law 21/2013, of 9 December, on environmental assessment, transposes the Environmental Impact Assessment (EIA) Directive and the Strategic Environmental Assessment (SEA) Directive, establishing the bases and principles of the environmental assessment procedure for plans, programmes and projects that may have significant effects on the environment and, in particular, in areas included in the Natura 2000 Network. It requires a **mandatory EIA** for the following projects listed in Annex I of Law 21/2013 linked to agriculture practices:

- Projects that involve a change of land use affecting an area of land equal to or greater than 100 ha
- The following projects **affecting a Natura 2000 area** or a protected area
 - Projects of land concentration involving a change of land use when it involves a substantial alteration of vegetation cover.
 - Projects to use uncultivated areas or semi-natural areas for agricultural exploitation or timber harvesting that affect an area larger than 10 ha.
 - Projects to convert land into irrigated land or to drain it, when they affect an area of more than 10 ha.

Other projects which may take place in large farms, **affecting Natura 2000 areas** or protected areas:

- Projects which require the change of land use to urbanisation for residential use which occupy more than 5 ha.
- River dredging when the volume extracted exceeds 20 000 cubic metres per year, and marine dredging when the volume extracted exceeds 20 000 cubic metres per year.
- Pipelines for the transport of chemical products and of gas and oil, with a diameter of more than 800 mm and a length of more than 10 km in the areas referred to in section a).
- Electricity transmission lines whose route affect Natura 2000 areas or other protected natural areas with a length of more than 3 km, excluding those which cross an urbanised area.

It requires the **simplified EIA** for projects listed in Annex II and linked to agriculture practices:

- Projects not included in Annex I or II but that affect **directly or indirectly Natura 2000 areas**.
- Projects for land concentration involving a change of land use which are not listed in Annex I where they affect an area larger than 100 ha.
- Forestation projects affecting an area of more than 50 ha and the felling of forest mass for the purpose of changing to another type of land use.
- Projects for the management of water resources for agriculture:
 - Projects for the improvement of irrigated land over an area of more than 100 ha (projects not included in Annex I).
 - Projects to convert land to irrigation or drainage, when they affect an area of more than 10 ha.
- Projects to use natural, semi-natural or uncultivated areas for agricultural purposes which are not included in Annex I and whose surface area exceeds 10 ha.

This legislation shows that only projects regarding non-regular agricultural activities such as land concentration or changes of land use to agriculture from uncultivated areas require an impact assessment. Furthermore, only certain type of projects outside Natura 2000 areas and related to agricultural practices require a simplified EIA of their impacts. The Spanish legislation does not include

a general requirement to assess the impact of agricultural practices on protected species under Annex IV of the Habitats Directive and that are not in Natura 2000 areas or other protected areas.

Most of the regular agriculture activities are not considered projects requiring authorisations or impact assessment of their impacts even if they may cause damage to species. As can be seen from the description of the Spanish law above, authorisations or impact assessments are only triggered when the project relates to major changes of land-use and/or affects Natura 2000 areas. The preventive objective of the impact assessment is not applied when threatened species are involved and damage can only be dealt with once it is done, through complaints.

Those activities outside Natura 2000 areas entailing a change in the use of the land require an impact assessment but they are not the day-to-day agricultural practices such as land concentration, forestation projects affecting an area of more than 50 ha and the felling of forest mass for the purpose of changing to another type of land use, or projects to convert land to irrigation or drainage. Therefore, the impact of agriculture practices on species protection objectives is not taken into account as a criteria for requiring an impact assessment in the same way as the criteria of being a project likely to affect a Natura 2000 site.

There are no rules requiring an assessment of the impacts of more regular agriculture activities which may affect species protected under Annex IV of the Habitats Directive such as a change of crop which would require an earlier or more frequent harvest.

In addition, the authority in charge of providing authorisation to agriculture practices are the regional authorities in the Agriculture *Consejería* of the relevant Autonomous Community. According to a representative from the relevant authorities interviewed, the authorities in charge of authorising agriculture practices might not know the species protection legislation and would not think about the need to analyse the impact of certain agriculture practices on species⁹⁷. As there is no requirement in legislation to systematically assess the impact of agricultural practices on protected species, meaning such an assessment occurs only if the authority considers that there is a need to contact the environmental services, as assessment of the impact on species protection might be required.

Similarly, in Andalucía, agricultural activities do not generally require prior authorisation. However, pursuant to the Order of 7 February 2018 regulating the procedure for the maintenance and updating of the Geographical Information System for the Identification of Agricultural Parcels (SIGPAC)⁹⁸, changes to agriculture use from pasture, shrub pasture, wooded pasture or grassland are subject to prior authorisation.

Subdirector General for Environmental Assessment at the Ministry of Ecologic Transition has developed the SABIA project, which aims to improve the management of environmental assessments as well as consultation by the interested public. SABIA brings together the databases of the files in the environmental evaluation procedure, both for plans and programmes and for projects, and incorporates their georeferencing. It provides access to a search page of projects, plans or programmes under the administrative procedure of environmental impact assessment by choosing the type of activity and the region or Autonomous Community. While the search page of projects does not allow for searching agriculture as type of activity, the searching tool for plans and programmes includes that option leading, for example, to the current consultation on the next rural development operational programmes in Andalucía.

In brief, the current legislation requires an assessment of the impacts of certain agricultural practices, mainly those requiring land use changes (such as concentrations or the use for agriculture of uncultivated areas or semi-natural areas) when they affect Natura 2000 areas or other protected areas but do not require an assessment of the impact of general agriculture practices when they affect species outside Natura 2000 areas. It is worth noting that, once an impact assessment of a project is required, Annex IV to the Law 21/2013 lists the content of the assessment, which includes the analysis of the impact on protected species under the list of species needing special protection.

⁹⁷ Interview authority Ministry of Agriculture, July 2021.

⁹⁸ [Orden mantenimiento actualizacion SIGPAC 2018.pdf \(juntadeandalucia.es\)](#)

6 OVERALL ASSESSMENT OF SPECIES PROTECTION ON AGRICULTURAL LAND

According to the recent Commission Guidance on species protection, Article 12 requires: 1) the establishment of a coherent legal framework for the strict protection system; 2) concrete measures to enforce it effectively on the ground; and 3) the application of a set of coherent and coordinated measures of a preventive nature.

KEY FINDINGS (CHALLENGES & BEST PRACTICES)

6.1 TRANSPOSITION ISSUES

- The Spanish Law 42/2007 on Natural Heritage and Biodiversity correctly transposes the EU law regarding the prohibitions under Article 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive.
- In Andalucía, the general system of species protection is transposed by Law 8/2003 of Wild Fauna and Flora adopted by the Autonomous Community. Its Article 7 refers to all wild species, especially those endangered which goes beyond Annex IV of the Habitats Directive and establishes the prohibitions under Articles 12 & 13 of the Habitats Directive and Article 5 of the Birds Directive *without prejudice to the rules established under Title II with respect to hunting, fishing and other uses/exploitations, as well as in the specific regulations on forestry and maritime fishing* ... The scope of Title II is not limited to huntable species and entails a general exemption to the species protection rules for *other uses*, such as agriculture. The lack of clarity in the scope of Article 7 of Law 8/2003, which also covers species under special protection regime, and the exemption under Title II entails a transposition problem which could lead to an implementation problem authorising the exploitation of species protected under Annex IV to the Habitats Directive. Furthermore, Article 7 of Law 8/2003 also refers to the forestry and fisheries legislation. This general exemption goes beyond the provisions of the Habitats Directive. Articles 8 and 9 of Law 8/2003 transpose the Directive's provisions related to the wise use of species, in particular Articles 15 and 16 of the Habitats Directive. Therefore, the reference to the specific regulations on forestry and fisheries within Article 7 related to the prohibitions under the strict systems of species protection do not comply with the wording of Article 12 and 13 of the Habitats Directive or Article 5 of the Birds Directive and entail a transposition problem which could affect the implementation of the environmental provisions related to species protection in the agriculture, forestry and fisheries' sectors.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- Law 42/2007 requires the adoption of **action plans for threatened species** attributing the responsibility on the Autonomous Communities, while the State is in charge of the adoption of the strategies and conservation plans of threatened species present in more than one Autonomous Community. Within the framework of its competences, the **Spanish Government** has adopted:
 - **Action Plans** for certain threatened species⁹⁹. In most of those plans, the analysis of threats

⁹⁹ Action plans for threatened species cover the Iberian imperial eagle (*Aquila adalberti*); Marbled teal (*Marmaronetta angustirostris*), European Red-knobbed Coot (*Fulica cristata*) and white-headed duck (*Oxyura leucocephala*), Iberian Desman (*Galemys pyrenaicus*), Ferruginous limpet (*Patella ferruginea*), Iberian lynx (*Lynx pardinus*), the Wolf (*Canis lupus*), Freshwater mussel (*Margaritifera auricularia*), Cantabrian brown bear (*Ursus arctos*), Brown bear in the Pyrenees (*Ursus arctos*), Balearic Shearwater (*Puffinus mauretanicus*), Osprey (*Pandion haliaetus*), Bearded Vulture (*Gypaetus barbatus*), Cantabrian capercaillie (*Tetrao urogallus*), Pyrenean capercaillie (*Tetrao urogallus aquitanicus*), European mink (*Mustela lutreola*).

includes the impact of agriculture and forestry practices. Some measures proposed, include the development of sustainability criteria in the planning of sectoral activities, including agriculture, to avoid species' decline. However, we have not obtained information on the development of those criteria or the distribution and implementation of these strategies to farmers or farming organisations.

- **The national strategy on fauna threatened by the illegal use of poison adopted in 2004** and the Antidote programme monitoring the situation, reflect evident success.
 - Four **Strategies for the conservation of threatened flora** and fight against their threats which cover Coastal flora; Rocky flora, Flora linked to high peaks, Flora linked to water environments. They refer to agriculture as one of the main threats. However, there is no information on the impact of these strategies in the planning or management of agriculture practices and the distribution amongst farmers or farming practices. In addition, several Strategies have been adopted to combat main **threats from specific invasive species**.
 - Currently, the **conservation of threatened birds linked to agro-steppic environments** has been prepared covering **seven target species** but it has not yet been adopted.
 - The **pollinator conservation strategy** was adopted in September 2020. It includes an analysis of the impact of agriculture and proposes certain measures such as the development and dissemination of a manual of good practices in agriculture for the conservation of pollinators or the integration within the framework of Rural Development Programmes, of specific actions related to the conservation of pollinator habitats in the CAP. As the strategy has been recently adopted, no information has been found so far on the impact of this strategy and its dissemination to farmers and farmers associations.
- At a regional level, Andalucía has adopted the following actions:
 - In March 2012, the **Plan for the Recovery and Conservation of Species of High Peaks in Andalucía** covering plants and invertebrates was adopted. The Action Programme for the years 2015 - 2019 includes few measures related to agriculture. It proposes the adoption during the period 2017 to 2019 of a 'Manual of good practices in the field of agriculture, livestock, forestry and hunting for the conservation of biodiversity'. This manual has not yet been adopted.
 - **Strategy for the eradication of the illegal use of poisoned baits in Andalusia** and within that framework, it systematically collects information and statistics on the use of poisoned baits. It created the Specialized Canine Unit in 2004. Since 2010, the number of actions has been reduced and it is not clear if this is due to an improvement of the situation or rather a problem derived from the lack of resources and a decision to reduce preventive actions taken by administration management.
 - While some Strategies and Action Plans have been adopted in Spain, they only cover some specific species in Annex IV of the Habitats Directive and not all birds protected under the Birds Directive. There is no information on how they are implemented by farmers or their impact. The species protection system in Spain is incomplete in relation to its mainstreaming within agricultural policies and lacks proper strategic development planning. In addition, we have not been able to find any institution or body which could provide us with information on the extent to which species protection rules are implemented in the agricultural sector.
 - From an institutional point of view, the authorities in charge of species protection and the authorities in charge of rural development and agricultural policy, both at national and regional level, are separated in different administrative units and do not seem to collaborate effectively. The coordination and dialogue between the different State ministries in charge of environment and of agriculture is challenging. While nature protection seems to get more relevance when there is a Ministry in charge of environmental protection, the coordination and dialogue between the relevant ministries is still a challenge. A similar situation has been acknowledged at a regional level where the authorities in charge of nature conservation and those in charge of agricultural policy do not

have mechanisms of dialogue and cooperation in place.

- As the State has competence in establishing basic legislation but not in implementing measures on agriculture and environmental issues, it leaves to each of the regional authorities the responsibility to implement species protection in the agricultural sector. There is not a clear overview at State level of the situation at regional level regarding the implementation of the species protection rules in the agricultural sector.

Specific agriculture or CAP cross-compliance conditions

- Some preventive measures adopted in relation to the implementation of the CAP and EU rural development legislation could be considered linked to species protection. However, they are very limited in scope and evidence the need for clearer EU legislation and enforcement measures targeting implementation of species protection rules by Member States in the agricultural sector.
- Royal Decree 1078/2014 (Annex II, GAEC 7) forbids cutting hedges and trees during **birds' breeding** and reproduction seasons, unless expressly authorised by the environmental authority. However, there are no EU or national measures broadly targeting species protection linked to the CAP payments to ensure harmonised implementation in all Member States' agricultural sectors. Royal Decree 1075/2014 as updated in April 2021 on the implementation from 2015 of CAP direct payments for agriculture and livestock refers to the prohibition to convert or crop existing permanent pastures which are designated as environmentally sensitive (sited in Natura 2000 areas, including wetlands and marshes). However, environmentally sensitive areas are not defined in relation to species outside Natura 2000 areas according to species protection rules under the Nature Directives. Similar rules are implemented at regional level.
- The Mar Menor case evidences the problems related to unclear governance and lack of control of a strong economic sector in the region in relation to environmental objectives. Pressures identified by several studies on threatened species come from agricultural activity and the impact of tourism. While it is too early to determine the effectiveness of **Law 3/2020 on the restoration and protection of Mar Menor**, it is worth noting that, despite this law, a new episode of massive fish deaths happened on 16 August 2021 on the shores of the Mar Menor lagoon.

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Government advisory measures and services

- The Spanish Ministry has developed a catalogue or guide of preventive measures and recommended good practices to avoid or minimise negative interactions between protected wildlife and agricultural and livestock farms. The measures contained in this catalogue are advisory. We have not been able to find evidence or examples of distribution or actual use of this guide amongst farmers or farmers' organisations.
- A **Code of good agricultural practices for biodiversity** in the rural environment was published in 2019 and produced by the National Rural Network within the Ministry of Agriculture and the working group 'Good environmental practices for actors in the rural environment' involving key environmental NGOs such as SEO/Birdlife and WWF. (Best Practice)
- The MITECO has adopted **technical guidance** related to the use of species in Spain to ensure their protection. The following are highlighted as linked to the agricultural and/or forestry sector.
 - Technical guidelines for the management of feeding of scavenger species in Spain, 2011.
 - Guidelines for the monitoring and evaluation of the conservation status of endangered and special protection species, December 2012.
 - Protocol for intervention with bears in the Cantabrian Mountain Range, January 2019.
 - Protocol for intervention with bears in the Pyrenees, October 2018.
- In 1999, the Autonomous Community of Andalucía adopted a **Code of Good Agricultural Practices** aiming to develop environmentally compatible agriculture, in relation to the optimal use

of nitrogen inputs to the soil. While linked to the implementation and requirements of the Nitrates Directive, it has a positive impact on the implementation of Article 12 d) of the Habitats Directive.

- In Spain there are two types of advisory services: the environmental agents and the Farm Advisory Service. The environmental agents act at State level and at regional level. While the relevant websites recognise the role of the environmental agents to provide information on environmental issues, including nature legislation and species protection, we have not had access to any formal documents referring to species protection rules.
- The FAS do not provide systematic information on species protection rules to be taken into account by farmers. The training services offered are based on requests from farmers. The existing measures regulating training and advisory services do not include species protection rules in the list of mandatory issues. The existing bodies of environmental agents have a very broad array of functions, which is not supported by sufficient resources to carry them out, and the advisory role to farmers is limited to recommendations in cases of breaches of the law.

Enforcement of species protection legislation

- While Spain has established a system of enforcement and control of environmental crime (e.g. through SEPRONA or Environmental Agents) which covers certain agricultural practices such as the use of banned chemical products or poison, other agricultural practices that might have negative impacts on species such as crop changes, excessive use of legal fertiliser, early harvest, escape the control 'radar'.

6.4 ASSESSMENT AND AUTHORISATION PROCEDURES - EIA

- The Spanish EIA law does not provide the appropriate framework to trigger the assessment of the impacts of regular agricultural practices on threatened species. The Spanish law requires an impact assessment for certain water or infrastructure projects, land concentration or changes of land use to agriculture from uncultivated areas and affecting Natura 2000 areas (Annex I of EIA law). Furthermore, only certain types of projects outside Natura 2000 areas and related to major agriculture practices require a simplified EIA of their impacts (as listed in Annex II of the EIA law). These are not the more common agriculture practices which might impact species protection objectives, but are not taken into account as a criterion for requiring an impact assessment in the same way as the criteria affecting a Natura 2000 site. It is worth noting that, once the impact assessment is required, the Spanish legislation does require the assessment of the project impacts on wild threatened species. However, the Spanish legislation does not require the assessment of the impact of agriculture practices when/because they might impact protected species under Annex IV of the Habitats Directive and therefore, the impact assessment will not be triggered. There are no rules requiring an assessment of the impacts of day-to-day agricultural activities which may affect species protected under Annex IV of the Habitats Directive.

RECOMMENDATIONS

It can be concluded that while certain conservation measures have been adopted, a strict system of species protection in Spain is not fully developed yet and species protection rules do not seem to be systematically implemented by Spanish farmers.

Legislative transposition measures of species protection rules:

- Ensure accurate transposition of the species protection rules at a regional level, in all Autonomous Communities.

Preventive and implementing measures:

- Complete the adoption of specific Strategies Action plans covering all species under Annex IV of the Habitats Directive, and bird species.

- Ensure the development of sustainability criteria in the planning of sectoral activities, such as agriculture, to avoid species decline and ensure these criteria are known and implemented by farmers.
- Ensure implementation and raise awareness amongst farmers and farmer organisations of the existence of species protection rules and the implementation of species strategies and action plans.
- Ensure that the currently identified activities in farmlands that are drivers of population decline in population of birds and pollinators are modified not only in CAP planning for payment reception but also in legislation.
- Ensure that cross-compliance measures under the CAP cover all threatened species and ensure implementation of species protection prohibitions.
- Ensure the definition of sensitive areas hosting threatened species listed under Annex IV to ensure their protection for the purpose of CAP cross compliance standards, agri-environment climate payments or EIA requirements (see below).

Public advisory and enforcement:

- Adopt clear rules clarifying the environmental agents' role as advisory services at State and regional level, in particular in relation to the implementation of species protection rules by farmers. Ensure that the body of environmental agents has sufficient resources to carry out their advisory as well as enforcement roles.
- Ensure that the FAS provides systematic information on species protection rules to be implemented by farmers.
- Ensure that certain agricultural practices that might have negative impacts on threatened species such as crop changes, excessive use of legal fertiliser, early harvest, are properly controlled by the enforcement services (SEPRONA and environmental agents).

Authorisation and permits:

- Ensure that agricultural activities are subject to an environmental impact assessment when threatened species might be affected, even if outside Natura 2000 areas. The introduction of an amendment to the EIA Directive could be considered.
- It could be useful to require the designation of sensitive areas for species protection to guide for the requirement of carrying out an EIA on grounds of species protection rules.

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Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study France

ENV/2020/OP/0022



Stritih



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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.

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ABBREVIATIONS

AECM/MAEC	Agri-environment-climate Measures/ <i>Mesures agrienvironnementales et climatiques</i>
ASP	Payments and services agency/ <i>Agence des services et paiements</i>
CAP	Common Agricultural Policy
DDT	<i>Direction départementale des territoires/</i> Departmental territories directorate
EAFRD	European Agricultural Fund for Rural Development
ERDF	European Regional Development Fund
ESF	European Social Fund
DRAAF	<i>Direction régionale de l'agriculture, de l'alimentation et de la forêt/</i> Regional Directorate of Agriculture, Food and Forestry
DREAL	<i>Direction régionale de l'environnement de l'aménagement et du logement/</i> Regional Directorate of Environment, Planning and Housing
Env.c.	Environmental code
FAS	Farm Advisory System
GAEC/BCAE	Good Agricultural and Environmental Condition / <i>Bonnes conditions agricoles et environnementales</i>
ICPE	Establishments classified for environmental protection/ <i>Installations classées pour la protection de l'environnement</i>
MAEC	Agri-environment-climate measure
MISEN	Nature and Water Interservices mission/ <i>Mission interservice de l'eau et de la nature</i>
NGO	Non-governmental organisation
NAP	National Action Plan for protected species
OFB	French Biodiversity Agency/ <i>Office français de la biodiversité</i>
OPEDER	Environmental protection operations in rural areas / <i>Opération de protection de l'environnement dans les espaces ruraux</i>
RDP/PDR	Rural Development Programme (<i>Programme de développement rural</i>)
SMR/ERGM	Statutory Management Requirement/ <i>Exigences réglementaires en matière de gestion</i>
ZAP/PAA	Priority Action Areas
ZPB	Biodiversity priority areas / <i>zones prioritaires de biodiversité</i>

1 INTRODUCTION

1.1 GOVERNANCE AND INSTITUTIONS

In France, the **Minister of Agriculture and Food** is in charge of preparing and implementing the national policy in matters of agriculture, forestry, fishing and food. At the regional level, the Ministry is represented by 13 regional offices (**DRAAF**), and in each of the 96 departments through the interministerial departmental territories directorate (**DDT**).

The **DRAAF** (Regional Directorates of Agriculture, Food and Forestry) are placed under the supervision of the Prefect of the region, and are in charge of implementing and supervising the national agricultural policy and rural development in each region. They are deconcentrated¹ services of the Ministry. The Prefect is the highest representative of the State in each region and in each department.

In each department, the Ministry is represented within the **DDT** (Departmental Territories Directorate), which is a deconcentrated and interministerial service of the State. The DDTs are responsible on behalf of the Ministry of Agriculture for the implementation of the CAP at departmental level. More specifically, they are in charge of processing CAP income support applications, including cross-compliance. DDTs are in charge of the Statutory Management Requirements (SMR/ERGM) cross-compliance controls regarding the Nitrates, Habitats and Birds Directives (SMRs 1, 2 and 3 respectively). Within the DDTs, the “*Mission interservice de l’eau et de la nature*”(MISEN) is a strategic coordination body for State services and public establishments carrying out missions in the field of water and nature, in order to coordinate enforcement and control of water and nature regulations.

The **Services and Payment Agency** (ASP) is a public body under the supervision of the Ministry of Agriculture and the Ministry of Labour, Employment and Social Inclusion. It is in charge of the payment and control of different aids, including CAP income support payments, and the control of Good Agricultural and Environmental Conditions (GAEC) standards and the agri-environment-climate measures (AECM).

Chambers of Agriculture are another major actor in the field of agriculture. They are public entities placed under the supervision of the State and administered by elected officials from the agriculture and forestry sectors and professional agricultural groups. 89 departmental Chambers support farmers and 13 regional Chambers coordinate their work. Finally, “Chambers of agriculture France” is the national level of the network and provides technical, legal, economic support to the different Chambers. They are, in particular, in charge of advising farmers, and can be in charge of the Farm Advisory System (FAS). They can check if farmers are respecting their cross-compliance requirements.

The **Ministry of Ecological Transition** is in charge of preparing and implementing national policy on sustainable development and the environment, including biodiversity policy. It is represented by regional offices (DREAL) and in each department through the DDT.

The **French Biodiversity Agency** (OFB) was created in 2020, by the merger of the French Agency for biodiversity and the ONCFS (“*office national de la chasse et de la faune sauvage*”). It is a public body placed under the supervision of both the Ministry in charge of the environment and the Ministry in charge of agriculture. Its 1700 environmental inspectors contribute to the implementation of the

¹ There is no transfer of competencies from the State to other entities such as the region or the department contrary to decentralisation.

administrative and judicial policies related to water, protected species, protected areas, hunting and fishing.

Departments and **Regions** are decentralised entities. They share some competencies but each level has exclusive competencies. Regions have been entrusted with managing European funds such as the European Agricultural Fund for Rural Development (EAFRD), the European Regional Development Fund (ERDF), and part of the European Social Fund (ESF). Regional Councils are the managing authorities of these funds.

1.2 PROTECTED SPECIES

According to the agricultural species classifications², **58 %** of the 207 species protected under Annex IV of the Habitats Directive present in France are directly or indirectly dependent on agricultural habitats. Another **25 species** are classified as mere grassland species without overlap with agricultural species.

Under the Birds Directive, **12 %** of the 337 wild bird species that occur in France are directly or indirectly dependent on agricultural habitats.

Farmers can impact protected species through many of their daily actions such destruction of or damage to hedges, grassland conversion, mowing meadows, irrigation, stubble crushing, fertilisation and harvesting.

57% of agricultural birds are affected by reduction of their habitats and 69% are in decline³. Populations of corncrake (*Crex Crex*) have declined because of the drainage of alluvial meadows and early mowing⁴. Little bustard (*Tetrax Tetrax*) populations have also suffered from the reduction of grassland in favour of cereals, and the mechanisation of mowing⁵.

² Article 12 and Article 17 species classification is based on the current State of Nature Report 2020 (EEA 2020). While the classification for Annex species relies on the definition from Halada et al. (2013) (only available for Article 17), the birds classification refers to the classification from the Common Bird Indicator classification for birds with ecological preferences for agriculture (CFaBI).

³ Bird Life international et LPO (2016) *40 ans de protection de la nature, 1976-2016. Oiseaux et milieux*, Suppl. à *L'Oiseau Mag*, n° 123, 32p.

⁴ Bird Life international et LPO (2016) *ibid.*

⁵ Bird Life international et LPO (2016) *ibid.*

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

Legal obligations under both the Habitats and Birds Directives are laid down in the same articles of the **Environmental code** (Env.c.) of 2000, in its **legislative (art.L)** and **regulatory (art.R.)** parts⁶.

Thus, **article L411-1 Env.c.** provides for a system of strict protection for wild fauna and flora species which are listed in joint **Ministerial orders** of the Ministry in charge of the Environment and the Ministry in charge of Agriculture (art.R411-1). Within this regulatory framework “protected species” includes all species covered by a **Ministerial Order**. Ministerial orders can be complemented by **Regional orders** depending on the species concerned.

“L411-1 :

I. - When a particular scientific interest, the essential role in the ecosystem or the need to preserve the natural heritage justifies the conservation of sites of geological interest, natural habitats, non-domesticated animal or non-cultivated plant species and their habitats, the following are prohibited

1° The destruction or removal of eggs or nests, the mutilation, destruction, capture or removal, intentional disturbance, naturalisation⁷ of animals of these species or, whether alive or dead, their transport, peddling, use, possession, offering for sale, sale or purchase;

2° The destruction, cutting, mutilation, uprooting, gathering or removal of plants of these species, their fruiting bodies or any other form taken by these species during their biological cycle, their transport, peddling, use, offering for sale, sale or purchase, the possession of specimens taken from the natural environment;

3° The destruction, alteration or degradation of these natural habitats or the habitats of species;

4° The destruction, alteration or degradation of sites of geological interest, notably natural or artificial underground cavities, as well as the removal, destruction or degradation of fossils, minerals and concretions present on these sites;

5° The installation of telephone poles and posts for avalanche and anti-slide nets, that are hollow and not plugged⁸.

II. - The prohibitions of possession decreed in application of 1°, 2° or 4° of I do not concern the specimens held legally at the time of the entry into force of the prohibition relating to the species to which they belong.”

⁶ Since 2000, France has gathered all environmental texts into the Environmental Code. The Environmental Code includes most of environmental laws passed by Parliament and all regulatory instruments (decrees). All law articles and decrees are included as specific articles of the Code. The Code includes two sections: a legislative section, covering all law provisions (“L.” articles), and a regulatory section, covering decrees (“R.” or “D.” articles). Therefore, the provisions of new laws are integrated into the Environmental Code.

⁷ Meaning integration of alien species into the natural environment.

⁸ Closed at the top so that birds do not fall inside.

Birds Directive	Art 5 a) deliberate killing or capture by any method;	Art 5 (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;	Art 5 (c) taking their eggs in the wild and keeping these eggs even if empty	Art 5 (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;	Art 5 (e) keeping birds of species the hunting and capture of which is prohibited;
National measures					
Article L411-1 environmental code (Environmental code, in force since 21 September 2000) https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEX/T000006074220?etatTexte=VIGUEU	Art.L411-1.I. [...] the following are prohibited: 1° The destruction or removal of eggs or nests, the mutilation, destruction, capture or removal, deliberate disturbance, naturalization of	Art.L411-1.I. [...] the following are prohibited: 1° The destruction or removal of eggs or nests , the mutilation, destruction, capture or removal, deliberate disturbance, naturalization of animals of these species [...].	Art.L411-1.I. [...] the following are prohibited: 1° The destruction or removal of eggs or nests, the mutilation, destruction, capture or removal, deliberate disturbance, naturalization of animals of these species [...].	Art.L411-1.I. [...] the following are prohibited: 1° [...] deliberate disturbance , [...] of animals of these species [...].	L.411-1.I. [...]the following are prohibited: 1° [animals of these species] whether alive or dead, their transport, peddling, use, possession ,

Habitats Directive	Art 12(1) prohibiting: (a) all forms of deliberate capture or killing of specimens of these species in the wild Art 13(1) prohibiting: (a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild	Art 12(1)c) prohibiting: (c) deliberate destruction or taking of eggs from the wild	Art 12(1)d) prohibiting deterioration or destruction of breeding sites or resting places.	Art 12(1)b) prohibiting: b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration	Art 12(2) and Art 13(1)b) prohibits the keeping, transport and sale or exchange and offering for sale or exchange of specimens taken in the wild, except for those taken legally before the Directive is implemented
Environmental code (Environmental code, in force since 21 September 2000)	L.411-1.I. 2° The destruction, cutting, mutilation, uprooting, gathering or removal of plants of these species, their fruiting bodies or any other form taken by these species during their biological cycle, their transport, peddling, use, offering for sale, sale or purchase, the possession of specimens taken from the natural environment;	Art.L411-1.I. [...] the following are prohibited: 1° The destruction or removal of eggs or nests , the mutilation, destruction, capture or removal, deliberate disturbance, naturalization of animals of these species [...].	Ministerial orders	Art.L411-1.I. [...] the following are prohibited: 1° [...] deliberate disturbance, [...] of animals of these species [...].	L.411-1.I. [...]the following are prohibited: 1° [animals of these species] whether alive or dead, their transport, peddling, use, possession, offering for sale, sale or purchase; 2°[plants of these species], their transport, peddling, use,

Analysing the existing legislation, we conclude that:

In relation to Article 12(1)a) neither the Environmental code nor the Ministerial orders (specifying the prohibitions for each group of species) mention the word “kill”, but they use the term “destruction”.

Regarding Article 12(1)b), the Environmental Code does not refer explicitly to ‘*breeding, rearing, hibernation or migration periods*’, but each Ministerial Order mentions explicitly the case of breeding and nesting periods. Migration is not explicitly mentioned, but there are references to the natural movement area of existing populations.

None of the above issues seem to be a transposition problem which could lead to implementation problems and hence lack of species protection.

Art.L411-2 Env.c.is the legal basis for the decree organising the content of specific **Ministerial orders**, which specify the conditions under which those restrictions apply for each species group (duration and methods of implementation of bans, the part of the territory to which they apply, etc.). Therefore, **Ministerial orders**⁹ are also relevant for the transposition of the Directives, especially:

- Ministerial Order of 20 January 1982 fixing the list of protected plant species on the whole territory;
- Ministerial Order of 29 October 2009, fixing the list of birds protected throughout the whole territory and the modalities of their protection;
- Ministerial Order of 23 April 2007 fixing the list of terrestrial mammals protected on the whole territory and the modalities of their protection;
- Ministerial Order of 23 April 2007 fixing the list of insects protected on the whole territory and the modalities of their protection;
- Ministerial Order of 23 April 2007 fixing the list of molluscs protected on the whole territory and the modalities of their protection;
- Ministerial Order of 8 January 2021 fixing the list of amphibians and reptiles represented in mainland France, protected on the whole territory and the modalities of their protection;
- Ministerial Order of 26 June 1987 fixing the list of game species whose hunting is authorised.

The Ministerial Order related to the protected wild flora recalled the prohibitions applying to those species, but it provides that prohibitions on destruction, cutting, mutilation and grubbing up **are not applicable to the daily exploitation operations of plots on rural land, that are usually cultivated.** (art.1, order of 20 January 1982 establishing the list of protected plant species on the whole territory). ‘Daily exploitation operations’ are not further defined. This general exemption to daily exploitation operations seems to be a **major transposition** issue leading to implementation problems affecting the strict system of species protection.

The Ministerial Order related to birds, states that *“the intentional disturbance of birds [is prohibited], in particular during the period of reproduction and dependence, insofar as the disturbance jeopardises the proper accomplishment of the biological cycles of the species in question.”* (art.3, Ministerial Order fixing the list of birds protected). Moreover, Ministerial orders mention that prohibitions *“apply throughout mainland France and at all times”*. We might assume that “all times” include migration periods.

Similarly, the Environmental Code does not refer to *‘destruction of breeding sites or resting places’* required under Article 12(1)d) but Ministerial orders mention explicitly the case of destruction of breeding and nesting places. (*“sites de reproduction et aires de repos des populations”* (mentioned in Ministerial orders related to birds and related to mammals)). (See Annex for specific articles of the different Ministerial Orders).

It is worth noting that the French legislation goes beyond the EU Directives as it only requires intention when causing disturbance to wild species, destruction or removal of eggs and nests and the destruction and mutilation of birds in the natural environment.

The implementation modalities of articles L411-1 and L.411-2 are subsequently specified in the regulatory part of the Environmental code (articles R411-1 to R411-21).

⁹ Ministerial orders have been modified since their adoption, there are consolidated versions, but their dates refer to their adoption.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

Two spatial tools can be used to ensure the protection of listed species:

2.2.1 Biotope Orders and Biodiversity Priority Areas

Biotope Order (“*arrêtés de protection de biotope*”) (art.R411-15 to R417-17 env.c.) were created in 1977 by decree, and their scope was modified in 2018¹⁰.

Biotope orders are taken by the Prefect in order to protect specifically the biotope of specimens of protected species. Their geographical scope is limited to the particular biotope of the particular specimens of protected species (following art.L411-1 nv.c.). Before 2018 the biotope was limited to natural areas, scarcely exploited by human action, but since 2018 the scope of implementation has been extended to include other non-natural areas such as “buildings, structures, mines and quarries [...] or any built or *artificial sites* [...]” (art.R411-15 env.c.). Therefore, under the concept “artificial site” farms could be included¹¹. In the defined biotope areas, the Prefect can edict prohibitions related to actions likely to undermine the biotope, such as slash and burn, stubble burning, burning or shredding of vegetation, hedge destruction, spreading of phytosanitary products. But the biotope order has to take into account the interest of maintaining current activities insofar as these are compatible with the biotope protection objectives. So far, no specific biotope order has been created on farmland, but buildings (however, not agricultural buildings) housing bats have been protected with this tool¹².

Biodiversity priority areas (“*zones prioritaires de biodiversité*”(ZPB)) :

Biodiversity Priority Areas have been created as a consequence of the failure of France to establish a programme of measures to ensure the strict protection of the European hamster (*Cricetus cricetus*)¹³ and its failure to fulfil its obligations under article 12(1)(d) of the Habitats Directive¹⁴, and “implement concrete and specific measures”.

Indeed, in 2016, the new biodiversity law (“*loi du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages*”) introduced Biodiversity Priority Areas, to address situations where changes in the habitats of a species protected under Article L. 411-1 env.c are likely to compromise the maintenance of a population of this species in a favourable conservation status (art.411-2.II env.c.). According to this article, the administration can:

“1° Delimit areas where it is necessary to *maintain or restore these habitats*;

2° Establish, in accordance with the procedure set out in Article L. 114-1 of the Rural and Maritime Fishing Code, a *programme of actions to restore, preserve, manage and develop in a sustainable manner the areas* defined in 1° of this II;

3° Decide, at the end of a period that may be reduced in view of the results of the implementation of the programme mentioned in 2° with regard to the objectives set, to make mandatory certain agricultural practices that are favourable to the species in question or its habitats. These practices may benefit from aid when they lead to additional costs or loss of income during their implementation.”

¹⁰ Decree N°2018-1180 19 December 2018.

¹¹ Jolivet S. (2019) *Biotoques et habitats naturels, les faux jumeaux de la protection de la nature*, AJDA, 2019(9), 519.

¹² According to the INPN database, 22 biotope orders have been set up to protect the roof space of churches in the interest of bats, for example: *arrêté portant création d'une zone de protection du biotope des combles de l'église de St-Rémi de Camaret-sur-Mer, 2001*.

¹³ Jolivet, S. (2020) De la survie des espèces menacées d'extinction à la lutte contre le déclin des populations. Réflexions sur l'efficacité du statut d'espèce protégée à partir du cas de la faune sauvage. *Revue Juridique de l'environnement*, 2020(1), 101-121.

¹⁴ Case C-383/09 European Commission v/France, 9 June 2011.

A decree (*décret n°2017-176 du 13 février 2017*) has specified the conditions under which Biodiversity Priority Areas can be established and what kind of actions can be included in the action plan of each area (the provisions have been integrated into articles R411-17-3 and following env.c.). So far, no Biodiversity Priority Areas have been established in France¹⁵.

2.2.2 National Action Plans for protected species

Finally, **National Action Plans** (NAP) specific for the conservation or recovery of the species referred to in Articles L. 411-1 and L. 411-2 env.c. as well as pollinating insect species, can be drawn up, for species or a group of species, and implemented on the basis of data from the competent scientific institutes and environmental protection organisations, if the biological situation of these species so warrants (art.L411-3 env.c.). Some species are regarded as priority species for public action and for benefiting from a NAP. Their selection is mainly based on their vulnerability (national IUCN Red list)¹⁶. The Ministry in charge of the environment takes the initiative to draft a NAP with the support of different stakeholders (NGOs, research centres...). Regional action plans for specific species can also be set up in the case of species with more regional stakes. Once drafted, the NAPs are implemented and coordinated most of the time by a Regional Directorate of the Environment, Planning and Housing (DREAL), which can also designate a leader organisation (“*animateur*”), such as an NGO, in order to implement its activities.

NAPs are complementary to regulations and define mid or long-term strategies (5 or 10 years). Their objectives are to increase knowledge about species, to take management and restoration actions (including reintroduction of specimens), and to ensure conservation of species and raise awareness¹⁷. In 2012 the number of NAP reached 72¹⁸. Nevertheless, the 60 NAPs that were implemented by 2020 covered only 2% of threatened species¹⁹.

Among the current NAPs so far adopted and relevant for agricultural activities, these can be mentioned:

- 3rd National action plan for the Little Bustard (*Tetrax tetrax*) (2020-2029);
- National action plan for the European Hamster (*Cricetus cricetus*) (2019-2028);
- National action plan for bat species (*Chiroptera*) (2016-2025);
- National action plan for the Grey Wolf (*Canis Lupus*) and livestock activities (2018-2023).

All species so far covered by a NAP are species protected under Annex IV of the Habitats Directive or by the Birds Directive. In 2020, 22 bird species protected under Annex IV (out of 337) had, have or will benefit from a NAP. Nineteen bat species are covered by the 2016-2025 NAP. Excluding bats, 7 mammals (*Cricetus cricetus*, *Canis lupus*, *Lutra lutra*, *Lynx lynx* (not yet), *Ursus arctos*, *Galemys pyrenaicus*, *Mustela lutreola*) are or will be covered by a NAP²⁰.

¹⁵ One hypothesis can be put forward to explain this situation. Indeed, all Biodiversity Priority Areas for a region should be determined in one general order taken by the Prefect. It would be easier and maybe quicker if each biodiversity area of a region could benefit from its own order.

¹⁶ Savouré-Soubelet A. & Meyer S. (2018). *Liste hiérarchisée d'espèces pour la conservation en France. Espèces prioritaires pour l'action publique. V2. Mise à jour 2017*. UMS 2006 PatriNat. 21 p.

¹⁷ Ministère de l'écologie, du développement durable et de l'énergie, *Plans nationaux d'action en faveur des espèces menacées : objectifs et exemples d'action*, Leaflet, June 2012.

¹⁸ Ministère de l'écologie, du développement durable et de l'énergie, *Plans nationaux d'action en faveur des espèces menacées : objectifs et exemples d'action*, Leaflet, June 2012.

¹⁹ See <https://naturefrance.fr/indicateurs/especes-menacees-concernees-par-un-plan-national-daction> accessed 04/10/2021.

An assessment of the NAP mechanism was carried out in 2014, which called for their reforms (done through the biodiversity law of 2016).

²⁰ Tableau général de suivi des plans nationaux d'actions en faveur des espèces menacées, March 2020,. Available : <https://www.ecologie.gouv.fr/plans-nationaux-dactions-en-faveur-des-especes-menacees>.

2.2.3 CAP cross-compliance (GAEC 7)

The CAP Regulation 1306/2013 is implemented in the Rural code from art.D615-45 to D615-61 (regulatory part of the rural code) and although it does not directly reference the transposing legislation, it is indirectly relevant to Article 5 of the Birds Directive, through the definition of GAEC 7 requirements:

Good Environmental and Agricultural Condition (GAEC/BCAE) requirements are regulated in articles D645-46 to D615-61. Article D615-50-1 provides that farmers have to maintain specific landscape features (“*Les agriculteurs [...] maintiennent les particularités topographiques*”). A Ministerial Order has specified the detailed implementation of GAEC requirements²¹. Its Article 4 specifies the landscape features concerned:

- ponds with a surface area strictly greater than 0.1 hectare and less than or equal to 0.5 hectares;
- copses with a surface area strictly greater than 0.1 hectare and less than or equal to 0.5 hectares;
- hedges with a width of less than or equal to 10 metres. This width is assessed over the whole of the hedge, whether or not it is adjoining.

It defines the term hedge as “a linear unit of woody vegetation, planted on a flat, slope or hollow, with the presence of shrubs and, where appropriate, trees and/or other woody plants (brambles, broom, gorse...) or with the presence of trees and other woody plants (brambles, broom, gorse...)”

It forbids the pruning of hedges and trees between April 1st and August 31st. This obligation concerns only farmers who are required to comply with CAP cross-compliance, but does not apply to other farmers. Indeed, there are no such provisions related to dates for hedge cutting in the Environmental code which could apply to everybody. The OFB has only made recommendations not to cut hedges between March 15th and July 31st.

According to the aforementioned Ministerial Order related to GAEC, the use of the wood from hedges and the clear-cutting of hedges are authorised, as well as re-cutting.

The destruction, removal and replacement of hedges are authorised in some specific cases and require an administrative authorisation from the DDT.

An annual Ministerial Order specifies that every year data should be made available on the implementation of cross-compliance (GAEC and SMR/ERGM)²², with a national matrix of cases of non-compliance and the associated penalties.

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL UNDER THIS LEGISLATION

The Environmental Code applies to all citizens, including farmers, and to the whole national territory. Therefore, farm activities have to comply with Articles related to protected species. There are no specific obligations apart from those of the Environmental Code. Even within the context of GAEC 7 standards for CAP cross-compliance, where it is forbidden to cut hedges between April 1st and July 31st ²³, there is no reference to the relevant obligations of the Habitats and Birds Directives. Furthermore, GAEC 7 standards do not apply to all farmers, only to those who claim CAP Pillar 1 direct payments and/or RDP environmental land management payments.

²¹ Arrêté du 24 avril 2015 relatif aux Bonnes conditions agricoles et environnementales

²² Arrêté du 30 décembre 2020 relatif à la mise en œuvre de la conditionnalité au titre de 2021.

²³ Arrêté du 30 décembre 2020 relatif à la mise en œuvre de la conditionnalité au titre de 2021

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

3.1 CAP ADVISORY SYSTEM

Farmers can be supported by the **13 regional and 89 departmental Chambers of Agriculture** to get specific advice for their farms, especially in the context of the CAP Farm Advisory System (FAS).

Networks of Chambers of Agriculture can be appointed by the DRAAF/DAAF to provide the CAP FAS. Some private entities (such as cooperatives, consulting firms, etc.) can also be approved to provide advice as part of a CAP FAS.

There is no generalised advisory system on protected species and habitats, and farmers benefit from advice on protected species only in some specific cases, for example, during a biodiversity survey of their farm, through cross-compliance advice, or through training for new farmers. But the information is limited to reminding them of the legislation in general, not specifically related to their plots.

Some Chambers of Agriculture have produced leaflets on protected species e.g. on skylark (*Alauda arvensis*)²⁴; guides on bird-friendly landscapes; and guides on bat-friendly landscapes²⁵. But there is no systematic information on protected species organised at the national level. Each Chamber delivers information tailored to the context in which they operate.

Farmers can use an information tool call ProAgri on agricultural legislation and regulations²⁶, but there is no information about the legislation on species protection. Outside specific areas with biodiversity interest (such as Natura 2000 sites, biotope orders), they are scarcely notified by the authorities about the presence of a protected species or the existence of a nest of a protected species.

3.2 ADVICE ON PROTECTED SPECIES REGULATIONS

DDT also provides advice to farmers but on the regulatory aspects of species protection (the rules applying to some agricultural practices such as hedge management²⁷). Farmers can also get information on protected species regulations through the National Inventory of Natural heritage (INPN), through regional biodiversity observatories, through DREAL and the regional offices of the OFB.

Clearly, farmers get more information if their plots are located within a Natura 2000 site (rather than outside) as there they are fully involved from the beginning in the implementation of management and conservation measures²⁸.

One of the constraints related to access to information can be the lack of communication between environmental protection NGOs and other actors such as farmers. The former are reluctant to share inventories of protected species.

²⁴ Produced by the Chamber of Agriculture Centre-Val de Loire

²⁵ Produced by Chamber of Agriculture of Pays de la Loire

²⁶ <https://extranet-info-reglementaire.proagri.fr/index.php>

²⁷ DDT Maine et Loire, 2020, Guide pratique de la haie bocagère, enjeux et réglementations. Available: <http://www.maine-et-loire.gouv.fr/guide-pratique-de-la-haie-bocagere-r2202.html>

²⁸ France has opted for contractual and voluntary management of Natura 2000 sites. Each Natura 2000 site has an objectives document (called DOCOB), based on an ecological diagnostic and developed in a concerted way with all stakeholders. The DOCOB identifies species and habitats, defines management and conservation requirements and how these will be implemented (especially through Natura 2000 contracts, Natura 2000 charters and agri-environment-climate measures) and the financial provisions. Each DOCOB is implemented by an “animateur” organisation (e.g. an NGO, a Regional Park, etc) that is in charge of raising awareness about the species and habitat of the Natura site, especially among landowners and land users, including farmers.

3.3 WIDER CAP CONTEXT FOR ADVICE ON SPECIES PROTECTION

Priority Action Areas for agri-environment-climate contracts

In mainland France, rural development is implemented through 21 Rural Development Programmes (RDP/PDR) that are consistent with the National Framework Programme (2015-2020, and transition period of 2021-2022). Regional Councils have been the managing authorities so far. Each PDR identifies areas called “priority action areas” (ZAP/PAA) for agri-environment-climate contracts (AECM/MAEC) offered to farmers. This is relevant to some protected species because, among the national criteria to identify these ZAP areas is the following: “the areas of presence of species concerned by the 20 National Action Plans for species”.

With AECM/MAEC contracts, farmers commit to biodiversity friendly practices such as limiting phytosanitary treatments and not ploughing up natural grassland, in return for annual financial compensation. So farmers can benefit from a 1 year contract, or in some cases of a 5 year contract called “MAEC”²⁹, which are one of the environmental land management measures in the CAP RDPs. MAEC annual payments compensates farmers for the additional costs and/or income foregone of managing their land/livestock according to the requirements of the MAEC contract. To be eligible, the agricultural plots must be located in an area where there is an agri-environment climate project (PAEC) validated by the Region. Therefore the use of MAEC is very different from one Region to another.

Localised MAEC are used at the plot level. Farmers make biodiversity friendly commitments in exchange for financial compensation. MAEC are defined according to a land cover or a linear element. Some MAEC are relevant for protected species as they can be used in case of species benefiting from a National Action Plan. They are called MAEC with a biodiversity stake³⁰. For example:

- COUVER 07: Creation and maintenance of a vegetation cover of floristic or faunistic interest;
- LINEA 08: Maintenance of a refuge strip;
- HAMSTER 01: Collective crop rotation management for the Common Hamster.

Preventive measures to protect pastoral herds from large predators

The National Action Plan for the wolf (*Canis Lupus*) endeavours to reconcile conservation of the wolf and pastoralism. It focuses on the protection of herds from attacks by wolves. Thus, breeders and shepherds receive aid for protection measures against large predators (wolves and brown bears (*Ursus Arctos*)), through Environmental Protection Operations in Rural Areas (called OPEDER) (art.D114-11 rural code). The Prefect determines the territories where OPEDER can be implemented, taking into account data on damage to herds for which the responsibility of wolves has not been ruled out and data on signs of wolf presence³¹.

OPEDER are implemented and funded within the framework of RDPs under the EAFRD measures (CAP Pillar 2). Breeders and shepherds enter into a contract and commit themselves to respect protection measures (e.g. guard dogs, surveillance, material investments) for their herds in return for aid³².

²⁹ There are 3 kinds of MAEC: *MAEC système* apply to the whole farm, *MAEC localisées* apply at plot level, and *MAEC préservation des ressources génétiques* which apply to rare breeds or crop varieties.

³⁰ A recent study in the Grand-Est region has shown that localised MAEC with a biodiversity stake are mainly located in Natura 2000 areas. Wolff J., *Evaluation des MAEC dans le Grand Est*, SciencesduVivant [q-bio] (2019) dumas-02372483.

³¹ Arrêté du 28 novembre 2019 relatif à l’opération de protection de l’environnement dans les espaces ruraux portant sur la protection des troupeaux contre la prédation.

³² Arrêté du 28 novembre 2019 relatif à l’opération de protection de l’environnement dans les espaces ruraux portant sur la protection des troupeaux contre la prédation.

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

4.1 CONTROLS AND SANCTION OF INFRINGEMENTS OF SPECIES LEGISLATION (ESPECIALLY ARTICLE L.411-1 ENVIRONMENTAL CODE)

All over the country, including on agricultural land, controls of compliance with species protection legislation (Environmental Code) can be carried out by environmental inspectors of the French Office of Biodiversity (OFB), who have environmental police competencies. Environmental inspectors are not in charge of CAP cross-compliance controls related to protected species, but they can support DDT in performing controls related to the Birds and Habitats Directives and GAEC, and they can inform the DDT (through MISEN) in case of legislative infringements relevant for the CAP controls, such as hedge cutting.

Regional directorates of the OFB publish annual reports about their activities. In 2020 for example, in the Centre Val de Loire region, 4% of controls were related to protected species (of 2213 controls). In Normandy 7% of controls were related to protected species (of 1819 controls). Within these controls, many infringements were related to the clearing of hedges without the protected species exemption. But reports do not enter into details³³.

Legal requirements of the Environmental Code apply to all types of land, therefore farmers have to comply with them and can face either administrative or criminal sanctions in the case of infringements.

According to art.171-7 env.c. and following, **administrative sanctions** can be imposed, independently of criminal sanctions, by the competent administrative authority (the Prefect): for example, in the case of the absence of an exemption request in compliance with art.L.411-2 env.c., the administrative sanction can be imposed. This might entail conservation measures or the suspension of the activity.

Criminal sanctions have been strengthened since 2016.

According to art. L.415-3 env.c. :

“The following is punishable by three years' imprisonment and a fine of €150,000

1° The action in violation of the prohibitions or prescriptions provided for by the provisions of Article L. 411-1 and by the regulations or individual decisions taken in application of Article L. 411-2:

- a) To harm the conservation of non-domesticated animal species, with the exception of intentional disturbance;
- b) To affect the conservation of non-cultivated plant species;
- c) To harm the conservation of natural habitat”

The **intentional disturbance of protected species** is sanctioned by a “*contravention de 4ème classe*” according to of art. R415-1 env.c, and punished by a fine of up to €750. It is worth noting that normally contraventions are independent from the moral element of the infraction. But in the case of disturbance of protected species, the intentional aspect is necessary to issue a fine. Therefore, this

³³ In the department of Deux-Sèvres, a report mentioned that in 2018, 180 controls were carried out by the Biodiversity Agency. 30% of controls concerned farmers. Out of the 48 farmers, only 1 farmer did not comply with protected species regulations. Available on: <https://www.deux-sevres.gouv.fr/Politiques-publiques/Agriculture-foret-et-developpement-rural/Bilan-des-contrôles-dans-les-exploitations-agricoles/Bilan-2018-des-contrôles-dans-les-exploitations-agricoles>.

aspect can be regarded as ineffective in ensuring species protection³⁴.

4.2 CONTROLS AND SANCTIONS RELATED TO CAP CROSS-COMPLIANCE

Responsibility for controls to check farmers' compliance with CAP cross-compliance requirements is allocated according to Article D615-52 Rural code:

- the DDT is in charge of controls of SMRs/ERGMs in the field of environment and climate change;
- whereas the ASP is in charge of controls of GAEC standards, which apply only to farmers benefiting from CAP direct payments (CAP Pillar 1) and some Pillar 2 area-based measures, including the controls of the agri-environment-climate MAEC contracts.

Both SMR and GAEC controls have indirect relevance to species protection both within and outside Natura 2000 sites. CAP cross-compliance controls are performed on a sample of 1%³⁵ of CAP recipients annually, organised on a departmental level. Of this 1% sample, a quarter of the farms are selected randomly and the remaining three-quarters are selected on the basis of either a targeted selection or a risk analysis.

A technical note³⁶ from the Ministry of Agriculture was issued to set out in detail the procedure for organising on-the-spot controls of farms with respect to the SMRs from the three environmental Directives (Birds, Habitats and Nitrate). This note is directed towards the services in charge of controls (DDT, ASP, DRAAF), and even if this note relates to SMR controls, its content is relevant to understanding how and when controls are carried out.

Guidance is provided by the Ministry for inspectors undertaking controls. Thus controls of the Birds Directive must take place during the nesting period (between April and July) to check for evidence of pruning or cutting of trees and hedges. The technical note also identifies the risk criteria with respect to the Birds Directive SMR controls, these include:

- farming operations located in a protection zone (biotope order, protection zone or ecological compensation zone for bird protection, national park, nature reserve);
- farmers have been notified of a protected species' habitat by the competent authority (Prefect).

In case of the infringement of the SMR/ERGM related to the Birds' Directive, the CAP aid is cut by 5%, and in addition farmers may face prosecution under the Environmental Code, or administrative sanctions.

In the case of infringement of GAEC standards CAP aid is cut. For example, pruning hedges or trees between April 1st and July 31st entails a 3% cut. Moreover, if the infringement is linked to infringement of protected species legislation (such as destroying nests of protected birds), farmers can also face sanctions on the basis of the Environmental Code.

Moreover, in addition to routine cross-compliance controls, there are also induced controls, which are carried out following a species protection control by the OFB. Indeed, the OFB informs the DDT of the infringement of the species protection regulation, and in such cases the infringement also leads to cross-compliance sanctions (e.g. for cutting hedges which are home to a protected species)³⁷.

³⁴ Landelle P., Suas C., 2016, De la caractérisation au relevé d'infraction de la perturbation intentionnelle d'espèces protégées, *Faune sauvage*, (312), 45-50.

³⁵ Due to the sanitary crises, all cross-compliance controls were cut by half (0,5% instead of 1%)

³⁶ Ministère de l'agriculture et de l'alimentation, « Guide à l'usage des contrôleurs pour la vérification du sous domaine "environnement" de la conditionnalité pour la campagne 2021, Instruction technique DGPE/SDPAC/2021-412, 31/05/2021.

³⁷ In the Doubs department, in 2020, 60 OFB reports were related to hedges grubbing. 15 administrative procedures were taken on the basis of the CAP with the obligation to replant hedges. 57 judicial procedures were related to protected species

Several DDT publish the results of their CAP controls annually, on their websites. This example is from DDT of the Nord department³⁸:

DDT	year	Nr. of controls of GAEC	Conformity %	Hedges
Nord	2020	35 out of 216	75% conform	5 farms not conforming with respect to hedge cutting
Nord	2019	54 out of 359	70% conform	12 farms no hedge maintenance

Data on cross-compliance controls are centralised by the Ministry of Agriculture, which forwards data to the DG AGRI of the European Commission. The data are not available on the Ministry's website and have to be requested directly from the DG AGRI.

in 2020. <https://www.doubs.gouv.fr/Politiques-publiques/Environnement/Eau/Mission-inter-services-de-l-eau-et-de-la-nature-MISEN/Police-de-l-environnement-dans-le-Doubs-bilan-des-actions-menees-par-l-Etat-en-2020>

³⁸<https://www.nord.gouv.fr/Politiques-publiques/Agriculture-foret-et-developpement-rural/Agriculture/Controles-et-conditionnalite-des-aides/Bilan-des-contrôles-conditionnalite>

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

5.1 AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES

5.1.1 Derogation process for activities impacting protected species under Art.9 BD and Art.16 HD:

As mentioned earlier, farmers have to comply with the general provisions on protected species under the Environmental Code; however, there is no legal obligation to check if there are protected species in the plot. Therefore, if they know that their farming activities are likely to impact a protected species, they have to request an authorisation to carry out the activity and, if this is granted they must comply with the derogation procedure (art.L411-2 env.c.) and respect the three restrictive conditions to be granted an authorisation derogating the species protection prohibitions. These are similar to the conditions under Article 16 of the Habitats Directive, namely:

- that there is no satisfactory alternative;
- that the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range;
- and under strictly supervised conditions (
 - o In the interest of wildlife protection and conservation of natural habitats;
 - o To prevent significant damage to, among other things, crops, livestock, forests, fisheries, waters and other forms of property;
 - o In the interest of public health and safety or for other compelling reasons of overriding public interest, including those of a social or economic nature, and for reasons that would have an overriding beneficial effect on the environment;
 - o For the purposes of research and education, repopulation and reintroduction of such species and for breeding operations necessary for these purposes, including the artificial propagation of plants;
 - o To permit, under strictly controlled conditions, in a selective manner and to a limited extent, the taking or keeping of a limited and specified number of certain specimens.³⁹.

Farmers have to fill out the request for authorisation⁴⁰ and send it to the Prefect (departmental level, through the DDT) where the activity will take place. The authorisation is granted by an order of the Prefect.

If agricultural activities are likely to have a negative impact on protected species, farmers have to comply with the restrictive derogation conditions under art.L411-2-4°envc. in order to initiate an activity that may have an impact on those species. Those conditions include the assessment of the impact on the maintenance of the FCS of the species. Farmers may face prosecution for non-compliance with the conditions. For example, derogations have been granted to disturb intentionally, to kill or to capture the European jackdaw (*Corvus Monedula*) in the department of Morbihan in 2020,

³⁹ If a project or activity is likely to impact the protected species, an exemption to those prohibitions can be considered under specific conditions. The art.L411-2-4°env.c. transposes literally article 16 of the Habitats directive, requiring the fulfilment of 3 conditions (2 common conditions and one specific, one is related to agriculture and forestry).

⁴⁰ There are ten or so available forms to fill in, depending on the type of derogation (for example, one form relates to the destruction/capture/ intentional disturbance of protected species. In the form, it is necessary to specify the species, the purpose of the action, methods and techniques of the action, measures planned to maintain the species in a favorable conservation status, location and date). All administrative forms can be found either on DDT website or on the general website: <https://www.demarches.interieur.gouv.fr/formulaires>.

due to severe agricultural damage by this protected species⁴¹.

The same derogation authorisation procedure applies if farmers want to cut hedges which are home to a protected species or if they need to demolish or carry out work on buildings which are home to a protected species, such as bats.

5.1.2 Establishments classified for environmental protection (ICPE) authorisation:

Agricultural activities likely to create risks or cause pollution, such as livestock farms, slaughterhouses, manure storage facilities, can be subject to the ICPE process and might require either an administrative authorisation, a declaration or a recording depending on their risks to the environment, and on the threshold set in the ICPE requirements. For example, a farm rearing calves for meat will require an authorisation for cattle more than 800 calves, a recording for between 401 and 800 calves and a declaration for under 400 calves.

To ease procedures, if activities submitted for an authorisation also require other authorisations such as an exemption on protected species or forest clearance authorization, they will be subject to a **unique environmental authorisation**, merging different authorisation procedures. The unique environmental authorisation is delivered by the Prefect of the department.

They will also be subject to an Environmental Impact Assessment due to their likely significant effects on the environment.

5.2 ENVIRONMENTAL IMPACT ASSESSEMENT OF AGRICULTURAL ACTIVITIES

Some agricultural activities might have to comply with the requirements of Environmental Impact Assessment, provided for by article L.122-1 and following the Environmental Code: art.122-1.II: *“Projects which, by their nature, size or location, are likely to have significant effects on the environment or human health are subject to an environmental assessment according to criteria and thresholds defined by regulation and, for some of them, after a case-by-case examination”*.

It is specified that :

“art.L.122-1.III: “[...] The environmental assessment makes it possible to describe and assess in an appropriate manner, according to each particular case, the direct and indirect significant impacts of a project on the following factors: [...]

2° Biodiversity, paying particular attention to species and habitats protected under Directive 92/43/EEC of 21 May 1992 and Directive 2009/147/EC of 30 November 2009”.

Therefore the environmental impact assessments of agricultural projects have to describe the impacts on species and habitats protected under the Nature Directives.

Art.R122-2 env.c. provides the list of projects subject to an EIA (either automatically, or after a case-by-case screening assessment by the Prefect of the region). This list covers:

- Category 16: agricultural water projects submitted to an EIA after case-by-case screening process:
 - o Agricultural water projects, including irrigation and land drainage projects, on an area equal to or greater than 100 ha.

⁴¹ Préfet du Morbihan, Arrêté de dérogation pour destruction de spécimens de choucas des tours, 26 June 2020.

- Agricultural water projects requiring the draining, impounding, sealing or filling of wetlands or marshes, the drained or impounded area being greater than or equal to 1 ha.
 - Irrigation projects requiring an abstraction greater than or equal to 8 cubic m/h in a zone where permanent quantitative distribution measures have been instituted.
- Category 45: agricultural and forestry land development operations mentioned in article 1 of art.L.121-1 rural code, whatever their area, automatically require an EIA.
 - Category 46: projects to use uncultivated land or semi-natural areas for intensive agriculture that are submitted to an EIA after a case-by-case screening process include:
 - Projects involving the use of more than 4 ha of uncultivated land for intensive farming.
 - Projects involving the conversion of more than 4 ha of semi-natural land to intensive agricultural use.
- Category 47: forest clearing for soil conversion:
- Forest clearance in forests over 25 ha is automatically submitted for an EIA.
 - Forest clearance on land over 0.5ha and requiring an authorization in compliance with art.341-3 of the forest code, are submitted to an EIA after a case-by-case screening process.

However, the law does not include any criteria related to species protection that would trigger the need to carry out an EIA.

6. OVERALL ASSESSMENT: SPECIES PROTECTION ON AGRICULTURAL LAND

KEY FINDINGS (CHALLENGES)

The French system of species protection is based on lists of species and prohibitions (dating back to 1976 and the law of nature protection⁴²) and included in the Environmental Code. On paper, species are protected but in the field, the decline of species puts into question the effectiveness of the legal framework⁴³.

6.1 TRANSPOSITION ISSUES

- The provisions of the Habitats and Birds Directives have been transposed in the same articles of the Environmental Code (both the legislative and regulatory parts), providing a system of strict protection for wild fauna and flora species across France. This is further defined in joint Ministerial Orders (of the Ministry in charge of the environment and the Ministry in charge of agriculture). These Orders list the protected species (plants, birds, terrestrial mammals, insects, molluscs, amphibians and reptiles) and specify for each species group how the restrictions apply. For some species Ministerial Orders can be complemented by Regional Orders.
- Despite this detailed legal framework, the Ministerial Orders do not take full account of all potential threats to protected species from agricultural activities and practices:
 - For protected wild flora, the prohibitions on the destruction, cutting, mutilation and grubbing up are **not applicable to the daily exploitation operations of plots on rural land that are usually cultivated**. The term ‘daily exploitation operation’ is not further defined. This general exemption to agriculture activities could be a **major transposition** issue leading to implementation problems affecting the strict system of species protection.
 - For birds, the Ministerial Order identifying the list of birds protected (art.3) states that “*the intentional disturbance of birds [is prohibited], in particular during the period of reproduction and dependence, insofar as the disturbance jeopardises the proper accomplishment of the biological cycles of the species in question*”.
- The concept of independence of legislation in France can also undermine the effectiveness of the protected species legal framework as, according to this principle, the legality of authorisation permits issued on the basis of one law cannot be challenged on the basis of another law. For example, building authorisation cannot be challenged on the basis of the protected species legislation, even if the project is in an area protected by a biotope order⁴⁴.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- There are no specific obligations relating to species protection applicable at farm level other than those of the Environmental Code and Ministerial Orders which, apply to all citizens and the whole national territory.

⁴² Loi 76-629 du 10 juillet 1976 relative à la protection de la nature.

⁴³ Untermaier J., 2016, Une innovation durable : la protection de la faune et de la flore dans la loi du 10 juillet 1976, *Revue juridique de l'environnement*, (4), 647-663.

⁴⁴ Jolivet, S., 2020, De la survie des espèces menacées d'extinction à la lutte contre le déclin des populations. Réflexions sur l'efficacité du statut d'espèce protégée à partir du cas de la faune sauvage. *Revue Juridique de l'environnement*, 2020(1), 101-121.

- Nevertheless, some progress has been made on other biodiversity tools relevant to species protection on farmland:
 - The implementation of **National Action Plans** (NAP) for species protected under Annex IV of the Habitats Directive or under the Birds Directive. Each NAP defines a 5-10 year strategy to increase knowledge and raise awareness of the species, and to take management and restoration actions to ensure its conservation. NAPs have proven successful for birds of prey⁴⁵, and current NAPs adopted that are relevant to agriculture include those for Little Bustard (*Tetrax tetrax*), European Hamster (*Cricetus cricetus*), Grey Wolf (*Canis Lupus*) and bats (*Chiroptera spp.*). (**Best practice**) Nevertheless, the 60 NAPs were implemented by 2020 covered only 2% of threatened species⁴⁶.
 - **Biotope Orders** are adopted by the authorities to specifically protect the biotopes of protected species by prohibiting certain activities, whilst taking into account compatible current activities. Since 2018, the scope of a Biotope Order has been widened to potentially include farmland, where it could be an effective tool to implement species protection rules, using prescriptions that can be tailored to the site. So far, no specific Biotope Order has been created on farmland, but non-agricultural buildings housing bats have been protected with this tool. (**Potential best practice**)
 - A new spatial tool, **Biodiversity Priority Areas (ZPB)**, was introduced in 2016 in response to an ECJ case on France's failure to ensure the protection of the European hamster (*Cricetus cricetus*) and to fulfil obligations under Art. 12(1)d) of the Habitats Directive. It seems interesting on paper because it is specific to agriculture sector and, rather than simply prohibiting agricultural activities, it encourages a programme of positive action by farmers (eligible for financial support) in a defined area where the conservation status of a protected species is threatened. So far, this tool has not been implemented and its effectiveness remains to be seen. (**Potential best practice**)

Specific agriculture or CAP cross-compliance conditions

- The Rural Code, which transposes CAP Regulation 1306/2013, makes no reference the Habitats and Birds Directives in the context of GAEC 7 standards for cross-compliance, but these are indirectly relevant to Art.5 of the Birds Directive because they require:
 - Maintenance of certain landscape features of a specified size (ponds, copses and hedges)
 - Prohibition of pruning hedges and trees between April 1st and August 31st. The Environmental Code has no dates for hedge cutting and although the French Biodiversity Agency recommends not to cut hedges between March 15th and July 31st, GAEC 7 is the only requirement, and does not apply to all farmers, only to those who claim CAP Pillar 1 direct payments and/or RDP environmental land management payments.

Other implementing or stimulating measures

- Each of France's 21 regional Rural Development Programmes under the EAFRD identifies 'priority action areas' (ZAP) where agri-environment-climate measures can be requested by farmers. The national criteria to identify ZAP areas includes: 'areas of presence of species concerned by the 20 National Action Plans for species'.
- Examples of RDP measures for biodiversity linked to a NAP include:

⁴⁵ Bird Life international et LPO, 2016, *40 ans de protection de la nature, 1976-2016. Oiseaux et milieux*, Suppl. à *L'Oiseau Mag*, n° 123, 32p.

⁴⁶ See <https://naturefrance.fr/indicateurs/especes-menacees-concernees-par-un-plan-national-daction> accessed 04/10/2021. An assessment of the PNA mechanism was carried out in 2014, which called for their reforms (done through the biodiversity law of 2016)

- agri-environment-climate contracts for collective crop rotation management for the European Hamster (*Cricetus cricetus*);
- the OPEDER measure which provides support to breeders and shepherds for protection measures against large predators (grey wolf (*Canis Lupus*) and brown bear (*Ursus Arctos*)), such as guard dogs, surveillance and material investments.

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Government advisory services

In the context of the CAP Farm Advisory System (FAS) farmers are supported by networks of the 13 regional and 89 departmental Chambers of Agriculture to receive specific advice for their farms. Private entities can also be approved to provide advice as part of the FAS. Each Chamber delivers information tailored to their regional context, and some have produced leaflets on protected species, e.g. the skylark (*Alauda arvensis*), and guides on bird and bat-friendly landscapes.

Farmers can use an information tool on agricultural legislation and regulations, called ProAgri, but there is no information about protected species legislation.

There is no systematic information on protected species at the national level. Information for farmers with respect to species protection rules is quite limited, especially if farmers' plots are not included in an area with specific protection regulations, such as a Natura 2000 site. Therefore, their activities can have an unintentional impact on protected species.

Enforcement of species protection legislation

Controls of compliance with species protection legislation under the Environmental Code, including on agricultural land, can be carried out by environmental inspectors of the French Office of Biodiversity (OFB) who have environmental police competencies. Regional data for 2020 show that a small percentage of OFB controls relate to protected species (4% in the Centre Val de Loire and 7% in Normandy). Many of the infringements reported relate to the clearing of hedges without protected species exemption.

Administrative sanctions (e.g. cessation of the activity, conservation measures), can be applied independently of criminal sanctions.

Criminal sanctions have been strengthened since 2016, with three years' imprisonment and a fine of €150,000 for violations of the transposing legislation which affect or harm the conservation of natural habitats, plants and animals - but this does not apply to the *intentional disturbance of protected animal species* which is sanctioned by a lesser fine of €750.

Responsibility for control of cross-compliance is split between the DDT, which controls SMR standards, and the ASP which controls GAEC standards (and also AECM). In addition, the OFB can inform the DDT of infringements of species protection regulations, which can lead to 'induced' cross-compliance controls by the DDT and possible sanctions under CAP rules.

6.4 ASSESSMENT AND AUTHORISATION PROCEDURES

EIA

Some agricultural projects might require an Environmental Impact Assessment (EIA) as required by the Environmental Code, which specifies that EIAs have to describe the direct and indirect impacts on species and habitats protected under the Birds and Habitats Directives. Depending on the type and scale of the agricultural project an EIA may be required automatically, or after a case-by-case screening assessment by the Prefect of the region. Types of project covered include:

agricultural water projects (drainage and irrigation), agricultural and forestry land development operations, use of uncultivated land or semi-natural areas for intensive agriculture, and forest clearance for soil conversion. However, the law does not include any criteria related to species protection that would trigger the need to carry out an EIA.

Other authorisation procedures

In addition to the EIA requirements, agricultural projects likely to create risks or cause pollution can be subject to the requirements for Establishments Classified for Environmental Protection (ICPE in French). For example, livestock farms, slaughterhouses or manure storage facilities might require an ICPE administrative authorisation, a declaration or a recording, depending on their risks to the environment and on the threshold size set in the ICPE authorisation. If a project is subject to the ICPE authorisation procedure and also requires another authorisation, such as an exemption for protected species, it will be subject to a ‘unique environmental authorisation’ which merges the different authorisation procedures and is delivered by the Prefect of the department.

RECOMMENDATIONS

Legislative transposition measures of species protection rules:

- Strengthen the joint Ministerial Orders for the protection of wild flora and of birds to take full account of all potential threats to protected species from agricultural activities and practices, including those that are covered by the exemption for ‘daily exploitation operations of plots on rural land that are usually cultivated’.
- Incorporate within the Environmental Code and joint Ministerial Orders the prohibition on cutting of hedges during the bird breeding and rearing season, to widen its scope and strengthen enforcement (it now applies only to farmers in receipt of CAP payments and carries only administrative sanctions).

Preventive and implementing measures:

- Establish Biodiversity Priority Areas (ZPB) for species protection where necessary.
- Make full use of RDP funds to:
 - provide tailored financial support to assist the effective implementation of National Action Plans for protected species associated with agriculture; and
 - support farmers in Biodiversity Priority Areas to implement programmes of positive action for conservation of protected species and their habitats.
- Make appropriate use of Biotope Orders to implement site-specific prescriptions for agricultural habitats of protected species, where these are threatened (for example, by projects of a size below the EIA thresholds).

Public advisory and enforcement:

- To comply with legislation on protected species, farmers have to be aware of the rules, of the presence and needs of protected species on their farms and of sources of advice and funding to help them comply with the rules. Proposed improvements include:
 - In conjunction with the OFB and regional environmental authorities, define national guidance on the scope and content of advice and information on protected species and habitats to be provided for farmers, taking into account the needs of farmers outside Natura 2000 areas.
 - Require Chambers of Agriculture and other farm advisers, as part of their contracts to implement the FAS, to provide farmers with advice and information on protected species, based on this guidance and tailored to local circumstances as appropriate.
 - Ensure that farm advisers are trained to provide advice on protected species and that each Chamber of Agriculture has a specialist biodiversity adviser with access to up-to-date information on the presence of protected species on a farmer’s land.
 - Review the criminal sanctions for intentional disturbance of protected animal species to bring these in line with sanctions for unintentional disturbance.

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Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study *Ireland*

ENV/2020/OP/0022



Stritih



February 2022

This Report has been prepared by Milieu Consulting SRL, Ecologic Institute, IEEP and Stritih under Contract No ENV/2020/OP/0022.

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ABBREVIATIONS

ARC	Activity Requiring Consent
CAP	Common Agricultural Policy
DAFM	Department of Agriculture, Food, and the Marine
DCHG	Department of Culture, Heritage and the Gaeltacht
DHLGH	Department of Housing, Local Government and Heritage
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
GAEC	Good Agricultural and Environmental Condition
NBDC	The National Biodiversity Data Centre
NPWS	National Parks and Wildlife Service
NHA	Natural Heritage Areas
pNHA	proposed Natural Heritage Area
Teagasc	Agriculture and Food Development Authority

1 INTRODUCTION

1.1 ABOUT THIS PROJECT

This project looks at the strict species protection regime under the Birds and Habitats Directives in place according to the legislation and case law, and assesses how effectively this is transposed and applied to the agriculture sector in eight EU Member States (DE, DK, FR, ES, IE, NL, PL, RO) and to the forestry sector in eight Member States (AT, FI, FR, DE, SI, PL, RO, SE).

The legal framework is clearly stated in the Nature Directives in a consistent way, and has been further interpreted by the jurisprudence of the CJEU. This report focuses on the strict species protection regime as articulated in Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive.

Article 12 of the Habitats Directive requires Member States to establish a system of strict protection for **animal species listed in Annex IV** and prohibits:

- all forms of **deliberate** capture or killing of specimens of these species in the wild;
- deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration
- deliberate destruction or taking of eggs from the wild
- deterioration or destruction of breeding sites or resting places;
- 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 13 of the Habitats Directive requires Member States to establish a system of strict protection for the **plant species listed in Annex IV**, and prohibits:

- the **deliberate** picking, collecting, cutting, uprooting or destruction of such **plants** in their natural range in the wild;
- the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before the Directive is implemented;

Article 5 of the Birds Directive requires Member States to establish a general system of protection for **all species of birds** occurring in the EU and prohibits:

- deliberate killing or capture by any method;
- deliberate destruction of, or damage to, their nests and eggs or removal of their nests
- taking their eggs in the wild and keeping these eggs even if empty;
- deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
- keeping of bird species the hunting and capture of which is prohibited.

Article 5 of the Birds Directive requires Member States to ban the deliberate killing or capture of all species of wild birds by any method, as well as the deliberate destruction of, or damage to, their nests and eggs and the deliberate disturbance of those birds, and the CJEU requires that the killing, destruction or damage under the Birds Directive should be purposeful¹. By contrast, Article 12(1)d of the Habitats Directive 92/43 does not require the acts of deterioration and destruction of **breeding and resting places to be deliberate**, with unintentional acts also forbidden. According to the Court, prohibiting only the

¹ C-412/85.

deliberate damaging or destruction of breeding sites or resting places of the species concerned, does not satisfy the requirements of Article 12(1)(d) of the Habitats Directive². Furthermore, in Case C-183/05³ the Court established that Article 12(1)(d) of the Habitats Directive prohibits acts that ‘interfere with or destroy breeding sites or resting places of wild species’ ... ‘whether they are intentional or not.’

Member States may avail of certain derogations from these rules, but the use of derogations must be justified in relation to the overall objectives of the Directives and the specific relevant articles. In addition, derogations must be reported. However, the transposition and enforcement of these derogation provisions falls outside the scope of these reports.”

Both Directives require Member States to establish regimes of species protection inside and outside Natura 2000 sites. While the Birds Directive requires Member States to adopt *general* species protection systems, the Habitats Directive refers to the need to establish *strict* systems of species protection. It is not sufficient to adopt a legislative framework, the Member States must also ‘*implement concrete and specific protection measures*’⁴.”

1.2 GOVERNANCE

In Ireland, three Departments of Government and public authorities have responsibilities linked to species protection under the Habitats and Birds Directives:

- The **Department for Housing, Local Government and Heritage (DHLGH)** is the lead government department for species protection in Ireland. In 2020, some of Ireland’s nature protection functions were transferred from the Minister for Culture, Heritage and the Gaeltacht to the Minister for Housing, Local Government and Heritage⁵. The following year the remaining functions, including the Birds and Habitats Regulation 2016, were also transferred to the Minister for Housing, Local Government and Heritage, who now has the statutory responsibility for nature protection and the legal responsibility to enforce the EU Birds and Habitats Directives transposed legislation⁷.
- The **National Parks and Wildlife Service (NPWS)** is a unit within the DHLGH and is responsible for implementing the nature protection legislation.
- The DHLGH also provides funding (via the Heritage Council) to the **National Biodiversity Data Centre (NBDC)** which is the national centre for the collection, collation, management, analysis, and dissemination of data on Ireland’s biological diversity. It has no regulatory or enforcement role relating to species protection, but it helps in making biodiversity data more freely available.
- The **Environmental Protection Agency (EPA)**, under the aegis of the **Department of the Environment, Climate and Communications**, is responsible for other environmental legislation, including protection of water, air and the marine environment.

The **Department of Agriculture, Food, and the Marine (DAFM)** is responsible for agricultural and food policy in Ireland. Its responsibilities relevant to species protection legislation include:

- Administration and control of the CAP Basic Payment Scheme and associated Pillar 1 direct payments, cross-compliance requirements and the Pillar 2 Rural Development Programme.

² Case C-98/03 Commission v. Germany [2006] ECR I-00053; Case C-6/04 Commission v. United Kingdom [2005] ECR I-09017.

³ Case C-183/05, Commission v. Ireland [2007] ECR I-00137.

⁴ Case C – 441/18 Commission v Poland.

⁵ S.I. No. 339 of 2020.

⁶ European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). Official publication: Iris Oifigiúil; Publication date: 27/09/2011, <http://www.irishstatutebook.ie/eli/2011/si/477/made/en/print>

⁷ Until 2020 the Department of Culture, Heritage and the Gaeltacht (DCHG) was responsible for nature protection.

- Legal responsibility for implementation and control of the EIA (Agriculture) Regulations
- Oversight of Teagasc (Agriculture and Food Development Authority), the national body providing integrated research, advisory and training services to the agriculture and food industry and rural communities.

Public authorities have a key role to play in implementing the EC (Birds and Natural Habitats) Regulations 2011⁸ as well as other relevant legislative acts such as Planning and Development Acts.

1.3 PROTECTED SPECIES

1.3.1 Native bird species

Ireland has 185 regularly occurring native bird species, many of which have populations which increase significantly in winter, including 4 species which are present only in winter⁹. All native bird species and their habitats are subject to the general species protection legislation that transposes the EU Birds Directive Articles.

Because the Irish countryside has low forest cover, most countryside bird species are more or less closely linked to farmland and/or grazed grassland and heath, including species that are typical forest birds in other countries¹⁰.

The 51 most **common countryside bird species** are monitored in detail in the Irish Countryside Bird Survey¹¹. It shows that about a quarter of Ireland's common countryside birds are exhibiting serious declines, in the long term (1998-2016) and in the short term (2006-2016). The **Irish Farmland Birds Index**¹² lists 18 bird species, of which 6 have declining populations and breeding range trends, and 3 of which are red-listed (Kestrel, Stock Doves and Yellowhammer). Four species on the Farmland Birds Index are stable and 8 are increasing, in part because of expansion into suburban and urban areas and higher breeding success in these areas compared to farmland. The BirdWatch Ireland list of **Birds of Conservation Concern in Ireland**¹³ red-lists 10 bird species associated with lowland farmland and 9 species associated with upland or coastal rough grassland, heath, and blanket bog. The amber list includes 7 more. Of the twelve species of wader nesting in Ireland, 11 have suffered declines of at least 50% since the 1970s, as shown by the Irish atlas of breeding birds¹⁴, the most recent wetland bird survey¹⁵, and the survey of breeding birds on coastal grassland¹⁶.

⁸ Regulation 27 and Part V of the Birds and Habitats Regulations 2011.

⁹ Balmer, D.E., Gillings, S., Caffrey, B.J., Swann, R.L., Downie, I.S. & Fuller, R.J. (2013) Bird Atlas 2007-11: the breeding and wintering birds of Britain and Ireland. BTO Books, Thetford.

¹⁰ Balmer et al (2013) ibid.

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¹³ Lists all native species according to international conservation status, historical breeding declines, recent population declines (numbers and range in breeding and nonbreeding seasons), European conservation status, breeding rarity, localised distribution, and the international importance of populations. In: Gilbert, G, Stanbury, A and Lewis, I (2021) Birds of Conservation Concern in Ireland 2020-2026. Irish Birds No 43, 1-22.

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¹⁵ Lewis, L, Burke, B, Fitzgerald, N, Tierney, D and Kelly, S (2019) Irish Wetland Bird Survey: Waterbird status and distribution 2009/10 - 2015/16. Irish Wildlife Manuals 106, National Parks and Wildlife Service, Department of Culture, Heritage and the Gaeltacht, Ireland.

¹⁶ Suddaby, D, O'Brien, I, Breen, D and Kelly, S (2020) A survey of breeding waders on machair and other coastal grasslands in Counties Mayo and Galway. Irish Wildlife Manuals No 119, National Parks and Wildlife Service, Department of the Culture, Heritage and the Gaeltacht, Ireland.

The BirdWatch Ireland list of **Birds of Conservation Concern in Ireland**¹⁷ lists the following birds of conservation concern in Ireland that are associated with farmland and that show severe declines in breeding population and/or range:

- Corncrake (*Crex crex*) – critically endangered and at risk of going extinct in Ireland within a few decades (83% short-term decline in breeding population).
- Grey Partridge (*Perdix perdix*) – long-term breeding population decline of more than 50%, short-term breeding range decline of 66%.
- Meadow Pipit (*Anthus pratensis*) – no information available.
- Quail (*Coturnix coturnix*) – long-term breeding range decline of 54%.
- Stock Doves (*Columba oenas*) - short-term breeding population decline of 37% and breeding range decline of 40%.
- Yellowhammer (*Emberiza citronella*) - long-term breeding range decline of 62%, both linked to loss of mixed farming and arable with winter stubbles, weeds, and spring crops.
- Swift (*Apus apus*) – 56% decline in breeding population, 38% short-term decline in breeding range.
- Kestrel (*Falco tinnunculus*) has had a short-term breeding population decline of 53% and a breeding range decline of 31%.

The Turtle Dove (*Streptopelia turtur*) has not been confirmed breeding in Ireland since the 1980s. The Corn Bunting (*Emberiza calandra*) is extinct in Ireland since 1992.

Red-listed birds of conservation concern¹⁸ that are typical breeding birds of the Irish upland or coastal rough grassland, heath and blanket bog, and that show severe declines in breeding population and/or range, are:

- Curlew (*Numenius arquata arquata*) - severe declines in breeding (87% short-term, 93% long-term) and wintering populations, 71% short-term breeding range decline.
- Dunlin (*Calidris alpina schinzii*) - severe declines in breeding (87% short-term, 93% long-term) and wintering populations, 71% short-term breeding range decline.
- Lapwing (*Vanellus vanellus*) – severe declines in breeding (74% short-term, 95% long-term) and wintering populations, 53% long-term breeding range decline.
- Redshank (*Tringa totanus*) – severe declines in breeding population (50% short-term, 94% long-term) and breeding range (47% short-term, 55% long-term).
- Twite (*Linaria / Carduelis flavirostris*) – close to extinction (98% long-term decline in breeding population)
- Whinchat (*Saxicola rubetra*) - severe declines in breeding population (62% short-term, 89% long-term), and breeding range (64% short-term, 76% long-term).
- Red Grouse (*Lagopus lagopus*) – breeding population decline of more than 25% short-term and 50% long-term, long-term breeding range decline of 66%.
- Golden Plover (*Pluvialis apricaria*) – 38% short-term decline in breeding population (84% long-term), 42% short-term decline in breeding range.
- Snipe (*Gallinago gallinago*) – severe declines in breeding and wintering populations.

Amber list birds of conservation concern¹⁹ associated with farmland, that show moderate declines in

¹⁷ Gilbert, G, Stanbury, A and Lewis, I (2021) Birds of Conservation Concern in Ireland 2020-2026. Irish Birds No 43, 1-22.

¹⁸ Gilbert et al (2021) ibid

¹⁹ Gilbert et al (2021) ibid

breeding population and /or ranges:

- Skylark (*Alauda arvensis*)
- Chough (*Pyrrhocorax pyrrhocorax*)
- Linnet (*Linaria cannabina*)
- Swallow (*Hirundo rustica*)
- Starling (*Sturnus vulgaris*)
- House Sparrow (*Passer domesticus*)
- Tree Sparrow (*Passer montanus*)

Raptors and owls in Ireland²⁰: Kestrel (*Falco tinnunculus*), once the most frequent raptor on farmland, is red-listed. Barn Owl (*Tyto alba*) breeding populations are declining (33% short-term decline, 50% long-term decline), with a halving of the breeding range. The Hen Harrier (*Circus cyaneus*) population is declining, including declines within designated Natura sites. Others are increasing. Sparrowhawk (*Accipiter nisus*) was previously amber-listed but is now increasing. Buzzard (*Buteo buteo*) populations naturally recolonised after the species was lost due to persecution and are increasing and spreading. The Peregrine Falcon (*Falco peregrinus*) has also slowly started to recover after decade-long declines. Three extinct raptor species have been reintroduced to Ireland and are now present in small but growing populations in and around protected areas: 5 breeding pairs of Golden Eagles (*Aquila chrysaetos*); 12 breeding pairs of White-tailed Sea-eagles (*Haliaeetus albicilla*) in and around Killarney National Park; and 63 breeding pairs of Red Kites (*Milvus milvus*).

1.3.2 Other EU strictly protected species

Ireland has 16 terrestrial non-bird species strictly protected under the EU Habitats Directive (Annex IV)²¹, of which 10 are directly associated with agriculture²².

Ireland's 10 strictly protected **bat species** are mostly associated with forest habitat elsewhere in Europe, but in the absence of large forest areas in Ireland, bats can be found in most of the agricultural landscape, with the exception of Lesser Horseshoe Bat (*Rhinolophus hipposideros*) and Nauthusius' Pipistrelle (*Pipistrellus nathusii*), which have more restricted distributions (no information is available for Brandt's Bat (*Myotis brandtii*)). Most recorded bat roosts in Ireland are in buildings and other structures such as bridges, but this may be due to lack of information about roosts in other sites. The species core habitat requirements²³ in relation to farmland are:

- Whiskered Bat (*Myotis mystacinus*), Natterer's Bat (*Myotis nattereri*), Lesser Noctule (*Nyctalus leisleri*), Common Pipistrelle (*Pipistrellus pipistrellus*) are typical forest bat species but in Ireland they have broad foraging niches and are found in grassland landscapes with hedges. Whiskered Bats roosts are found in trees and in roof spaces. Natterer's Bats roost in the roof spaces of churches and other old buildings. Common and Soprano Pipistrelles roost in houses (e.g. under cladding or roof tiles) and in tree holes.
- Soprano Pipistrelle (*Pipistrellus pygmaeus*) and Nauthusius' Pipistrelle (*Pipistrellus nathusii*) are strongly associated with riparian forests and waters, especially lakes. Little is known about Nauthusius' Pipistrelle nursery roosts.

²⁰ Gilbert et al (2021) *ibid*

²¹ Complete list of Annex IV species in Ireland includes 24 cetacean species and one species of marine turtle <https://www.npws.ie/legislation>.

²² See Task 1 report for further information on how these are identified.

²³ Lundy MG, Aughney T, Montgomery WI, Roche N (2011) Landscape conservation for Irish bats & species specific roosting characteristics. The Centre for Irish Bat Research & Bat Conservation Ireland. <http://www.donegalcoco.com/media/donegalcountyc/heritage/pdfs/LandscapeConservationforIrishBats.pdf>

- Daubenton's Bat (*Myotis daubentonii*) is closely associated with water bodies, and is the only Irish bat associated with bog, marsh, and heathland cover, but avoids areas with intensive agricultural use. Often roosts in stone bridges or buildings close to water.
- Brown Long-eared Bat (*Plecotus auratus*) is closely tied to habitats with trees and tends to avoid open farmland, natural grassland, and bog habitats. It roosts preferably in large open attics or spaces of churches and farm buildings but also in tree holes.
- Lesser Horseshoe Bat (*Rhinolophus hipposideros*) is tied to structurally rich landscapes where grassland is interspersed with woodland and ditches, streams, or lakes. Its small core distribution is in the karst landscape of western Ireland with most roosts in caves.

Ireland has only one strictly protected **amphibian**, the Natterjack Toad (*Epidalea calamita*), found in coastal dune systems and grassland in four Natura 2000 sites on the Dingle and Iveragh peninsulas in the southwest of Ireland, as well as a translocated population in Wexford. There is one strictly protected mollusc, the Kerry Slug (*Geomalacus maculosus*), which is found in the south and west of Ireland in a range of habitats, including blanket bog, heath, wet grassland and woodland²⁴.

The strictly protected terrestrial **plant species** are Killarney fern (*Trichomanes speciosum*) and Marsh Saxifrage (*Saxifraga hirculus*). The latter is typical of mineral flushes in blanket bog. It requires grazing that keeps the habitat open, but too high a level of grazing may adversely affect seed set. It is sensitive to water table changes from drainage or erosion. Two strictly protected **freshwater species** in Ireland Slender Naiad (*Najas flexilis*) and the Otter (*Lutra lutra*) are indirectly affected by agriculture because of degraded water quality from agricultural run-off and erosion (see below).

1.3.3 Main pressures on protected species associated with agriculture

Agriculture is the dominant land use in Ireland, taking up almost 70% of the total land area. A further 17% is wetlands and peatlands, and just 11% is forest²⁵. Of this agricultural land 85% is grassland - predominantly lowland grassland, but there are significant areas of rough grazing, much of which is unfenced upland mixed heath and grass, some of it managed in commonages. The lowland fields are frequently bordered by hedges and/or ditches, but larger areas of forest are rare, and are dominated by plantation forests of commercial non-native trees.

Unsustainable agricultural practices are one of the main threats to protected species on land, whilst many species are dependent on the continuation of extensive agricultural practices such as low intensity grazing, late mowing, and low intensity management of landscape features. The main pressures are²⁶:

Intensification of grassland management, with overgrazing, more frequent cutting, and increased fertilisation, is a direct threat to ground nesting birds in damp pastures, traditional hay meadows and blanket bogs. It also indirectly threatens other bird species through reductions in available food from insects, weeds, and species-rich grassland. Damaging practices associated with intensification of grassland include:

- Drainage of wetlands and damp pastures
- Reseeding and conversion to multiple cut silage grassland

²⁴ Mc Donnell, R.J. and Gormally, M.J. (2011). Distribution and population dynamics of the Kerry Slug, *Geomalacus maculosus* (Arionidae). Irish Wildlife Manuals, No. 54. National Parks and Wildlife Service, Department of Arts, Heritage and the Gaeltacht, Dublin, Ireland. <http://www.npws.ie/sites/default/files/publications/pdf/IWM%2054.pdf> (accessed 6 Oct 2021).

²⁵ Data for 2019 in Central Statistics Office Environmental Indicators Ireland 2021 <https://www.cso.ie/en/releasesandpublications/ep/p-eii/environmentalindicatorsireland2021/landuse/>

²⁶ Taken from Lewis et al (2019) Countryside Bird Survey: Status and trends of common and widespread breeding birds 1998-2016. Irish Wildlife Manuals, No. 115, National Parks and Wildlife Service, Department of Culture, Heritage and the Gaeltacht, Ireland. <https://www.npws.ie/sites/default/files/publications/pdf/IWM115.pdf>

- Earlier and more frequent cuts for silage
- Increased fertilisation
- Use of larger, more efficient agricultural machinery for grassland management and cutting
- Overgrazing of blanket bog

Conversion of late cut hay meadows to multiple cut silage has reduced the Corncrake (*Crex crex*) population to critically low levels and reduced its distribution to small areas in the north and northwest. Silage making is also a factor in decreases in the breeding range of Skylark (*Alauda arvensis*). Kestrels (*Falco tinnunculus*) have declining population and breeding range linked to reduced prey availability, mainly the loss of small mammals due to intensification of grassland. Linnets (*Linaria cannabina*) are affected by loss of weed seeds on intensive grassland. In contrast, Common Starlings (*Sturnus vulgaris*) find abundant food in improved dairy pasture with high soil fertility.

Breeding populations that have become more fragmented by intensification are less able to withstand predation by mink, rats, foxes, and other predators, both native and alien. Curlew (*Numenius arquata*) and Lapwing (*Vanellus vanellus*) have very low levels of breeding success in part because nests show high levels of nest and chick predation.

Although Marsh Saxifrage (*Saxifraga hirculus*) is only found within Natura 2000 sites, has a stable population (in the 19 surveyed localities) and mostly improved habitat condition due to more suitable management, four sites are being affected by drainage (partly for agriculture), and four others have degraded hydrology²⁷.

Loss of mixed and arable farming and conversion of arable to grassland is the cause of the decline in birds that rely on spilt grain in stubble fields for winter foraging, particularly Yellowhammer (*Emberiza citronella*), Skylark (*Alauda arvensis*), and Stock Dove (*Columba oenas*). The switch from spring sown to autumn sown arable crops has also removed winter food sources. Herbicide use reduces the availability of weed seed food. Yellowhammers are highly dependent on winter stubbles and weed seeds, and structurally heterogeneous swards with uncultivated margins around arable and pasture. The Corn Bunting (*Emberiza calandra*), once common in arable land, recently became extinct in Ireland.

Hedgerow removal or intensification of management: hedgerows are key habitat for Yellowhammer (*Emberiza citronella*) and many other typical farmland species and are a valuable resource for the regularly occurring migrant passerines which visit Ireland in the winter months. Hedges are also favoured hunting or foraging paths for bats, Barn Swallows (*Hirundo rustica*), Kestrels (*Falco tinnunculus*) and Sparrowhawks (*Accipiter nisus*). There was a net removal of hedgerows of between 0.16% and 0.3% per annum between 1995 and 2015, a rate of hundreds of kilometres a year, according to an EPA study using aerial photography and county-level survey records, though the rate has been much slower from the year 2000 onwards²⁸. Poor management of hedges that reduces their structural complexity (cut too short, too narrow, removal of uncropped margins), as well as neglect that leads to gaps and thinning, significantly reduces their value as wildlife habitat.

Removal or neglect of small landscape features reduces habitat diversity at a local scale and is likely to reduce feeding opportunities for many species, as well as nesting opportunities for some species too. Countryside birds are increasingly reliant on small landscape features including hedgerows, stone walls,

²⁷ NPWS (2019) The Status of EU Protected Habitats and Species in Ireland 2019: Volume 3 (Species). Conservation Status in Ireland of Habitats and Species listed on the European Council Directive on the Conservation of Habitats, Flora and Fauna 92/43/EEC, National Parks and Wildlife Service, Ireland.

²⁸ Green, S, Martin, S, Gharechelou, S, Cawkwell, F and Black, K (2019) BRIAR: Biomass Retrieval in Ireland using Active Remote sensing. EPA Research Report 305, Environmental Protection Agency, Ireland.

<https://www.epa.ie/researchandeducation/research/researchpublications/researchreports/research305.html>

stone-earthen banks, patches of rushes, open ditches, springs, and other small wetlands.²⁹ Species likely to be affected include Blackbird (*Turdus merula*), Chaffinch (*Fringilla coelebs*), Dunnock (*Prunella modularis*), Greenfinch (*Chloris chloris*), Goldfinch (*Carduelis carduelis*), Linnet (*Linaria cannabina*), Long-tailed Tit (*Aegithalos caudatus*), Mistle Thrush (*Turdus viscivorus*), Robin (*Erithacus rubecula*), Song Thrush (*Turdus philomelos*), Tree Sparrow (*Passer montanus*), Whitethroat (*Sylvia communis*), Woodpigeon (*Columba palumbus*), Wren (*Troglodytes troglodytes*), and Yellowhammer (*Emberiza citrinella*). The more intensive use of farmland, resulting in fewer or no fallow patches, corners or field edges or other patches of unused land with rough grassland and scrub, is a contributor to the decline of many farmland birds. The Irish countryside traditionally had one of the highest densities of stone walls and stone-earthen banks in Europe³⁰. Irish farmland was traditionally rich in wetland features but improvements in drainage techniques have resulted in the disappearance of many wetland habitats on intensive farmland, and ponds have become very infrequent on Irish farms³¹. The ponds that remain are usually suffer heavily from eutrophication due to the high levels of nutrients from slurry and fertiliser run-off.

Abandonment of grassland use and undergrazing of heath is affecting some areas of habitat. In contrast, Common Linnet (*Linaria cannabina*) is likely to be benefiting from farmland abandonment providing fallow rough ground with abundant weeds.

Afforestation is a threat to Hen Harrier (*Circus cyaneus*) populations, which have lost much upland nesting habitat to the planting of non-native conifer plantations, and Merlin (*Falco columbarius*) which is affected by the degradation and loss of heather moorland and by afforestation. Ground nesting birds of open habitats are at higher risk of nest predation if their habitat is broken up by forest stands that are the result of afforestation.

Overgrazing of coastal grassland, heath, and upland habitats is a high-level threat to Ireland's ground nesting wader species such as Golden Plover (*Pluvialis apricaria*), Snipe (*Gallinago gallinago*) and Lapwing (*Vanellus vanellus*). Overgrazing of *machair* is a threat to Dunlin.

Burning of heath and upland habitats: burning is carried out by graziers to remove older growth to increase the availability of palatable vegetation and is often associated with overgrazing of heath. There are indications that some burning is done to maintain land eligibility for CAP direct payments³².

Degraded water quality because of agricultural run-off and erosion is a threat to Otter (*Lutra lutra*), most of the bat species, and Slender Naiad (*Najas flexilis*), a species typical of natural eutrophic lakes with *Magnopotamion* or *Hydrocharition* - type vegetation^{33,34}. Lakes and rivers affected by nutrient run-off and other inputs often have reduced invertebrate abundance, which affects insectivorous freshwater birds such as Dipper (*Cinclus cinclus*), Kingfisher (*Alcedo atthis*), and Grey Wagtail (*Motacilla cinerea*).

Building demolition, renovation, or timber treatment is a threat to bats that roost in agricultural buildings, notably: Pipistrelle species' (*Pipistrellus pipistrellus*, *Pipistrellus nathusii*, *Pipistrellus pygmaeus*) nursery roosts are typically in wall claddings of houses, under flat roof coverings, between underboarding and tiled roofs and in cavity walls; Lesser Horseshoe Bat (*Rhinolophus hipposideros*) is

²⁹ Lewis et al (2019) Countryside Bird Survey: Status and trends of common and widespread breeding birds 1998-2016. Irish Wildlife Manuals, No. 115, National Parks and Wildlife Service, Department of Culture, Heritage and the Gaeltacht, Ireland. <https://www.npws.ie/sites/default/files/publications/pdf/IWM115.pdf>

³⁰ <https://www.teagasc.ie/news--events/daily/other/dry-stone-wall-building.php>

³¹ <https://www.thebrideproject.ie/ponds>

³² BirdWatch Ireland February 28, 2020 'Hedge-cutting and scrub-burning prohibited from 1st March' <https://birdwatchireland.ie/hedge-cutting-and-scrub-burning-prohibited-from-1st-march/>

³³ NPWS (2019) The Status of EU Protected Habitats and Species in Ireland 2019: Volume 3 (Species). Conservation Status in Ireland of Habitats and Species listed on the European Council Directive on the Conservation of Habitats, Flora and Fauna 92/43/EEC, National Parks and Wildlife Service, Ireland.

³⁴ The Freshwater Pearl Mussel (*Margaritifera margaritifera*) is also endangered in Ireland because of poor water quality principally due to agricultural run-off and erosion, but it is not on Annex IV.

dependent on suitable roost sites in buildings with large, accessible roof spaces, typical of old farm buildings. Swifts (*Apus apus*) are tied to traditional nest sites on buildings in lowland farmland, and are affected by renovation or demolition of farm buildings, as are Barn Swallows (*Hirundo rustica*) which nest colonially in farm barns and outhouses.

Rodenticides used to control rats and mice cause secondary poisoning of raptors which consume rodents that have ingested the poison. The majority of the Barn Owl (*Tyto alba*) and Red Kite (*Milvus milvus*) population are exposed to these toxins, and Long-eared Owl (*Asio otus*), Kestrel (*Falco tinnunculus*), Buzzard (*Buteo buteo*), and Peregrine (*Falco peregrinus*) are also affected³⁵. The RAPTOR protocol database has recorded the detection of rodenticides in 60% of all dead raptors recorded over the period 2007 to 2019³⁶.

Deliberate killings (poisoning, trapping, shooting) are a pressure on birds of prey in Ireland, although the full extent of illegal activity is not known. The RAPTOR protocol database records numerous incidents of raptor poisoning, most frequently affecting Buzzards (*Buteo buteo*)³⁷. Kestrel (*Falco tinnunculus*), Sparrowhawk (*Accipiter nisus*) and other raptor and owl species are illegally shot³⁸. Indiscriminate use of highly toxic poisons has also resulted in the death of Starlings (*Sturnus vulgaris*), corvid species, and pigeons³⁹. The motives behind illegal killings are broad, including perceived threats to livestock, such as sheep (e.g. from Raven (*Corvus corax*) and Buzzard (*Buteo buteo*)), and also perceived threats to captive-bred birds, including Pheasant and racing pigeon (e.g. from Buzzard and Sparrowhawk).

1.3.4 Protected species data availability

The National Biodiversity Data Centre⁴⁰ provides a web portal of protected species, on which it is possible to view information on the species' preferred habitat (using the Irish habitat classification system) and a map of records within each 10km² grid square⁴¹. The portal shows dates of records, so it is possible to check how up to date the occurrence information is. The bird distributions are based on the Bird Atlas (2007-2011) which maps the presence or absence of bird species in winter and summer in all 10km² grid squares of the island of Ireland⁴². Other data come from NPWS, EPA, and NGOs.

Data on most protected birds is comprehensive at the 10km² grid square scale, except for some scarce (but not rare) and/or difficult to survey breeding bird species, including Barn Owl (*Tyto alba*), Common Quail (*Coturnix coturnix*), Merlin (*Falco columbarius*), Chough (*Pyrrhocorax pyrrhocorax*), and Snipe (*Gallinago gallinago*). NPWS carries out regular surveys of some rare species in which most or all of the breeding pairs or breeding sites are located. For example, the Corncrake (*Crex crex*) survey in 2018 recorded 151 calling males, two thirds of which are in Donegal. Just over half the population is now confined to offshore islands. Strongholds include Inishboffin, Tory and the Mullet Peninsula. The detailed location data on certain rare breeding species are not made public but are available to NPWS

³⁵ BirdWatch Ireland statement July 2019.

https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_culture_heritage_and_the_gaeltacht/submissions/2019/2019-07-02_opening-statement-oonagh-duggan-assistant-head-of-policy-advocacy-birdwatch-ireland_en.pdf

³⁶ O'Donoghue, B G, Casey, M J, Malone, E, Carey, J G J, Clarke, D and Conroy, K (2020) Recording and addressing persecution and threats to our raptors (RAPTOR): A review of incidents 2007–2019. Irish Wildlife Manuals, No. 126, National Parks and Wildlife Service, Department of Housing, Local Government and Heritage, Ireland.

³⁷ O'Donoghue et al (2020)

³⁸ O'Donoghue et al (2020)

³⁹ Lewis et al (2019)

⁴⁰ <https://www.biodiversityireland.ie/>

⁴¹ The full list of datasets with links is available at <https://maps.biodiversityireland.ie/Dataset>

⁴² Balmer, D.E., Gillings, S., Caffrey, B.J., Swann, R.L., Downie, I.S. & Fuller, R.J. (2013) Bird Atlas 2007-11: the breeding and wintering birds of Britain and Ireland. BTO Books, Thetford.

conservation rangers⁴³.

Although bird distribution information is available at the 10km² grid square scale, this is not necessarily sufficient to allow a farmer to identify whether they have a certain species present on their land.

The online Bat Records Database is maintained by Bat Conservation Ireland with grant funding from the Heritage Council. The bat records can be viewed and mapped at county level through the Bat Conservation Ireland website⁴⁴ or the National Biodiversity Data Centre. More detailed information on the records with the actual location of roosts must be requested from Bat Conservation Ireland.

BATLAS 2020⁴⁵ is a project funded by NPWS to map the four most common bat species in the Republic of Ireland on a 5km² x 5km² grid map. The species covered are Common Pipistrelle (*Pipistrellus pipistrellus*), Soprano Pipistrelle (*Pipistrellus pygmaeus*), Lesser Noctule (*Nyctalus leisleri*) and Daubenton's Bat (*Myotis daubentoni*), all widespread on farmland. The map is due to be published in 2021. It uses information from the National Bat Monitoring Programme and additional volunteer surveys coordinated by Bat Conservation Ireland.

⁴³ Little Ringed Plover (*Charadrius dubius*), Golden Eagles (*Aquila chrysaetos*), White-tailed Eagles (*Haliaeetus albicilla*) and Red-necked Phalarope (*Phalaropus lobatus*).

⁴⁴ <https://www.batconservationireland.org/what-we-do/monitoring-distribution-projects/bat-record-maps>

⁴⁵ <https://www.batconservationireland.org/what-we-do/monitoring-distribution-projects/batlas>

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

This case study is one of a series that looks at the transposition and implementation of the species protection rules under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directives, in eight EU Member States, and assesses how these rules are applied within the agriculture sector (a further eight case studies look at the forestry sector).

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

The Irish legislation transposing the two Directives has developed over 45 years in a process of iteration, leading to two key pieces of legislation, the **Wildlife Acts 1976-21** (as amended)⁴⁶ and the **European Communities (Birds and Habitats) Regulations 2011-21** (as amended). The extract in Box 1, taken from the NPWS website, illustrates the development of the current legislation. An updated, administrative consolidation of the revised Wildlife Act, prepared by Law Reform Commission, is available online.

Box 1 Extract from NPWS information on wildlife legislation in Ireland⁴⁷

“The most important legislation underpinning biodiversity and nature conservation in Ireland is the **Wildlife Acts 1976 to 2021** and the **European Communities (Birds and Natural Habitats) Regulations 2011-2021**

The **Wildlife Acts 1976 to 2021** is a collective citation for the following:

Wildlife Act 1976 (no. 39 of 1976)

Wildlife (Amendment) Act 2000 (no. 38 of 2000)

Wildlife (Amendment) Act 2010 (no. 19 of 2010)

Wildlife (Amendment) Act 2012 (no. 29 of 2012)

Heritage Act 2018 (no. 15 of 2018), Part 3

Planning, Heritage and Broadcasting (Amendment) Act 2021 (no.11 of 2021), Chapter 3

Please also see [here](#) for the complete list of amendments made to the Wildlife Act 1976 and Statutory Instruments made under the Wildlife Act 1976, listed by section of the Act.

The Wildlife Act, 1976 provided a [...] legislative base for nature conservation. The species protection provisions, including those regulating hunting, are quite comprehensive, to the extent, for example, that they largely foresaw similar aspects of the EU Birds and Habitats Directives. However, the habitat/site protection measures in the 1976 Act were relatively weak, and were almost completely limited to measures which could be introduced in agreement with landowners. There was very limited power to ensure protection, even in the case of outstanding habitats or sites, where agreement of landowners was not forthcoming. Nature conservation legislation was substantially enlarged and improved by the Wildlife (Amendment) Act, 2000 and the Birds and Natural Habitats Regulations. Read more about the Wildlife Acts on this website:

- [Wildlife Act, 1976](#)

⁴⁶ A consolidated version of the Wildlife Acts, prepared by Law Reform Commission, is available online and regularly updated (the most recent update, at the time of writing, is to 22 November 2021). <https://revisedacts.lawreform.ie/eli/1976/act/39/revised/en/html>

⁴⁷ Source NPWS <https://www.npws.ie/legislation> (accessed 23 March 2022).

- [Wildlife \(Amendment\) Act, 2000](#)

Birds and Natural Habitats Regulations

The [European Communities \(Birds and Natural Habitats Regulations 2011 \(S. I. No. 477 of 2011\)\)](#) transpose the Habitats Directive and the Birds Directive. The 2011 Regulations were amended by:

- S.I. No. 290 of 2013
- S.I. No. 499 of 2013
- S.I. No. 355 of 2015
- Planning, Heritage and Broadcasting (Amendment) Act 2021 (no.11 of 2021), Chapter 4
- S.I. No. 293 of 2021”

2.1.1 Habitats Directive

Articles 12 and 13 of the Habitats Directive are fully transposed into Irish law by the **European Communities (Birds and Habitats) Regulations 2011-21** which establish a system of strict protection for fauna and flora species listed in Annex IV of the Directive, using almost identical wording to that of the Directive.

2.1.1.1 Article 12 of the Habitats Directive

In relation to fauna species listed in Annex IV(A) of the Habitats Directive **the Birds and Habitats Regulations 2011-21**:

- **Regulation 51(2)** makes it an offence for a person to:
 - deliberately capture or kill a species listed in Annex IV(a) in the wild,*
 - deliberately disturb these species particularly during the period of breeding, rearing, hibernation and migration,*
- **Regulation 51(2)** also makes it an offence for a person to:
 - deliberately take or destroy eggs of those species from the wild,*
 - damage or destroy a breeding site or resting place of such an animal, or*
 - keep, transport, sell, exchange, offer for sale or offer for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive*

Additionally, and to complement Regulation 51(2)(e), **Regulation 50** prohibits any person from having ‘*in his or her possession for sale, or for the purposes of breeding, reproduction or propagation, or from offering or exposing for sale, transportation, distribution, introduction or release*’ an animal or plant (or its reproductive/propagating material) listed in Annex IV of the Habitats Directive.

2.1.1.2 Article 13 of the Habitats Directive

In relation to flora species listed in Annex IV(B) of the Directive⁴⁸, the **Birds and Habitats Regulations 2011-21**:

- **Section 52(2)** of makes it an offence for a person to:

⁴⁸ The Flora (Protection) Order, 2015 (S.I. No. 356/2015) was made under Section 21 of the Wildlife Act 1976 and lists the Annex IVB species which occur in Ireland: Slender Naiad (*Najas flexilis* (Willd.) Rostk. & W.L.Schmidt), Marsh Saxifrage (*Saxifraga hirculus* L.) and Killarney fern (*Trichomanes speciosum* Willd.).

- (a) *deliberately pick, collect, cut, uproot or destroy any specimen of these species in the wild, or*
- (b) *keep, transport, sell, exchange, offer for sale or offer for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 13(1)(b) of the Habitats Directive*

2.1.1.3 Agricultural exemptions and derogations past and present

It is interesting to note that, prior to the enactment of the **Birds and Habitats Regulations 2011**, the **Wildlife Acts Section 23(7)** provided an exemption for agricultural activities, which stated that it shall not be an offence for a person, while engaged in agriculture, fishing or forestry, to unintentionally injure or kill a protected wild animal or to interfere with or destroy the breeding place of such an animal.

The **European Court of Justice ruling of 2005 (C-183/05)** on Ireland's transposition of the Habitats Directive Articles on species protection stated that Ireland had not implemented a system of strict protection in accordance with Articles 12 - 16 of the Habitats Directive and referred to Section 23(7)(a) of the Wildlife Act as in conflict with such requirements.

After this ruling, the **Wildlife Acts** were amended by SI 378/2005⁴⁹ which inserted, **after Section 23(7) of the Wildlife Act**, the provision that *'the provisions of subsection (7) do not apply to the species listed in Annex IV (A) of the [Habitats Directive] and including any amendments that shall be made thereto.'*⁵⁰

Therefore, the earlier provisions of the **Wildlife Act** which provided an agricultural exemption from the strict species protection rules of the Habitats Directive are still in force, but the exemption no longer applies to Annex IV(A) species.

The scope of this study does not normally cover transposition of Article 16 of the Habitats Directive, but it is worth noting that the **Birds and Natural Habitats Regulations 2011** introduced a **new safeguard** on licensing, in the **Wildlife Act 1976 Section 9(5)** which provides that *'Nothing shall be allowed to be done by licence or permit that would not be allowed to be done under the provisions of the European Communities (Birds and Natural Habitats) Regulations 2011 or that would otherwise contravene the requirements and obligations of the Birds Directive or the Habitats Directive'*⁵¹.

2.1.2 Birds Directive

In contrast to Articles 12 and 13 of the Habitats Directive, the transposition of Article 5 of the Birds Directive is more complex. It is not transposed entirely in the 2011 Regulations, but in the **Wildlife Acts 1976 to 2021**⁵² (as amended), supplemented by the **Birds and Habitats Regulations 2011**⁵³ (as amended).

The **Wildlife Acts 1976 to 2021**⁵⁴ (as amended) sets out the general system of protection in Ireland:

- **Section 19** (*Protection of wild birds*) provides that:

'Wild birds and their nests and eggs, [...] shall be protected.'

The detailed transposition of Article 5 is covered in two parts, below, looking first at the transposition of Article 5 (a), (b), (c) and (e), then separately at that of Article 5 (d)

⁴⁹ S.I. No. 378/2005 - European Communities (Natural Habitats) (Amendment) Regulations, 2005, <https://www.irishstatutebook.ie/eli/2005/si/378/made/en/print>

⁵⁰ Introduced by Reg. 2(3) of European Communities (Natural Habitats) (Amendment) Regulations 2005 (S.I. No. 378 of 2005)

⁵¹ Substituted (21.09.2011) by *European Communities (Birds and Natural Habitats) Regulations 2011* (S.I. No. 477 of 2011), reg. 56(28), in effect as per reg. 1(3).

⁵² <https://revisedacts.lawreform.ie/eli/1976/act/39/revised/en/html>

⁵³ <https://www.irishstatutebook.ie/eli/2011/si/477/made/en/print>

⁵⁴ <https://revisedacts.lawreform.ie/eli/1976/act/39/revised/en/html>

2.1.2.1 Transposition of Article 5 (a), (b), (c) and (e) of the Birds Directive

Under the **Wildlife Acts** 1976 to 2021⁵⁵ (as amended) the following provisions apply to the transposition of Article 5 (a), (b), (c) and (e) of the Birds Directive (subject in some cases to licenced derogations and hunting legislation which are beyond the scope this study):

- **Section 22(4)** (*Enforcement of protection of wild birds*) states that it is illegal to:

‘(a) hunt[s] a protected wild bird [...]

(b) injure[s] a protected wild bird otherwise than while hunting it [...]

(c) wilfully take[s] or remove[s] the eggs or nest of a protected wild bird

(d) wilfully destroy[s], injure[s] or mutilate[s] the eggs or nest of a protected wild bird’

There is an additional provision for agriculture (and other sectors) making clear that unintentional killing is not prohibited by the Birds Directive. **Wildlife Act Section 22(5)** provides that it *‘shall not be an offence for a person [...] engaged in agriculture [...] unintentionally to injure or kill a protected wild bird, or [...] to destroy unintentionally the eggs or nest of a protected wild bird in the ordinary course of agriculture [...]*

- **Section 31** (*Sale, purchase and possession of certain perching birds prohibited*) makes it an offence to:

‘sell, purchase or have in his possession a live perching bird [...] other than a close-ringed specimen bred in captivity[...] (order Passeriformes) which occurs in the wild’ in Ireland or the UK. There are exceptions for licensed wildlife traders.

- **Section 32(1)** makes it an offence to:

‘take by net, trap or by any other means any such animal or bird for the purposes of so marking it or attaching to it any band, ring, microchip, tag or other marking device’.

- **Section 34(1)(a)** makes it an offence to:

‘hunt any wild bird, wild mammal or protected wild animal by means of a trap, snare, net, line, hook, arrow, dart, spear or similar device however propelled, instrument or missile, or birdlime or any substance of a like nature, or any poisonous, poisoned or stupefying bait, any gas or smoke or chemical wetting agent or any electrical device which is calculated or likely to cause death, unconsciousness or bodily injury to such bird, mammal or animal’

- **Section 45** (*Sale, purchase and possession of fauna restricted*) prohibits a person who is not a licensed wildlife dealer from selling, keeping or offering for sale or exchange, purchasing for resale, or engaging in taxidermy in respect of a protected wild bird or protected wild animal, whether alive or dead (a), or the eggs or spawn of a protected wild bird or animal (b). **Section 46** provides that the Minister may make regulations to control the business of wildlife dealing by wildlife dealers, and may also make Regulations to prohibit or control the purchase or sale of species of wild bird in the interests of conservation.

As noted above for the transposition of the Habitats Directive, the **Birds and Natural Habitats Regulations 2011** also reinforce the licensing and permitting provisions of the Birds Directive by introducing the provision in the **Wildlife Act 1976 Section 9(5)** which provides that *‘Nothing shall be allowed to be done by licence or permit that would not be allowed to be done under the provisions of the European Communities (Birds and Natural Habitats) Regulations 2011 or that would otherwise contravene the requirements and obligations of the Birds Directive or the Habitats Directive’*⁵⁶.

⁵⁵ <https://revisedacts.lawreform.ie/eli/1976/act/39/revised/en/html>

⁵⁶ Substituted (21.09.2011) by *European Communities (Birds and Natural Habitats) Regulations 2011* (S.I. No. 477 of 2011), reg. 56(28), in effect as per reg. 1(3).

In conclusion, the transposition of Article 5 (a), does not always use the same wording as the Directive (instead of prohibiting ‘*deliberately killing or capture*’ it prohibits hunting by several methods, and injuring) but not killing by other methods than those used for hunting. Therefore it is not properly transposed. Furthermore, Article 5 (c) of the Birds Directive is incorrectly transposed by the Irish legislation as it limits the prohibition of taking eggs to a wilful action. However, the transposition of sub-articles 5 (b), and (e) of the Birds Directive appears to be generally satisfactory.

2.1.2.2 Transposition of Article 5 (d) of the Birds Directive

Article 5(d) of the Habitats Directive requires prohibition of the ‘*deliberate disturbance of [...] birds, particularly during the period of breeding and rearing, insofar as disturbance would be significant having regard to the objectives of this Directive*’. Several legislative acts are relevant to the transposition of this part of Article 5.

Under the **Wildlife Acts** 1976 to 2021⁵⁷ (as amended):

- **Section 22(4)(e)** (*Enforcement of protection of wild birds*) states that it is illegal to:

‘*wilfully disturb[s] a protected wild bird on or near a nest containing eggs or unflown young*’

This prohibition of disturbance to all birds during breeding or rearing season is limited to wild birds on or near a nest, which, eventually, could be interpreted as covering the rearing period but not the whole breeding period.

Also relevant to Article 5(d), although not specifically referencing protected birds, are the provisions on management of certain types of vegetation during the breeding and rearing season. These include a basic prohibition as follows:

- **Section 40 (1)** (Destruction of vegetation on uncultivated land restricted) makes it an offence to:

‘*cut, grub, burn or otherwise destroy, during the period beginning on the 1st day of March and ending on the 31st day of August in any year, any vegetation growing on any land not then cultivated [...and/or] growing in any hedge or ditch*’⁵⁸

This does not cover any disturbance of birds that is not related to destruction of vegetation and, it is limited to vegetation growing on land not cultivated, which entails an exemption to agriculture land from the species protection rule.

Despite the likelihood that such vegetation will be used by a wide range of birds during the breeding and rearing season, there are additional significant exemptions from this prohibition on vegetation clearance between 1 March to 31 August. Most notable is the **exemption for ordinary farming activities** (other than burning):

- **Section 40(2)** provides that the prohibition in Section 40(1) does not apply ‘*in the ordinary course of agriculture or forestry*’ to ‘*vegetation growing on or in any hedge or ditch*’ [or to] ‘*the cutting or grubbing of isolated bushes or clumps of gorse, furze or whin or the mowing of isolated growths of fern*’; but this exemption ‘*does not apply to burning*’ Other exemptions include ‘*felling, cutting, lopping, trimming or removal of a tree, shrub, hedge or other vegetation pursuant to section 70 of the Roads Act 1993*’ with respect to dangerous structures and trees; and for government actions for reasons of public health and safety, for actions under inland fisheries legislation, for site clearance for road or building construction, and destruction of noxious weeds.

In conclusion, as stated in previous section, the Irish transposition of Article 5(a) is incorrect as it limits

⁵⁷ <https://revisedacts.lawreform.ie/eli/1976/act/39/revised/en/html>

⁵⁸ Substituted (12.03.2001) by *Wildlife (Amendment) Act 2000* (38/2000), s. 46(a), S.I. No. 71 of 2001.

the prohibition of deliberate killing to hunting or injuring and Article 5(c) of the Birds Directive is incorrectly transposed since it limits the prohibition of taking eggs to wilful actions while the Directive does not require a deliberate act.

In addition, Article 5(d) of the Birds Directive is fragmented and incomplete. Firstly it differs from the wording of the Directive, in that it omits *‘during the period of breeding and rearing’* but instead specifies *‘on or near a nest containing eggs or unflown young’* which, eventually, could be interpreted as covering the rearing period but not the whole breeding period. Secondly, the related prohibitions on destroying certain types of vegetation between March and August have a broad exemption (other than by burning) as it is limited to vegetation growing on land not cultivated and if this is done in *‘the ordinary course of agriculture’* (a term which is not defined in the legislation). This is in marked contrast to the protection of Annex IV (Habitats Directive) species in Ireland, where a similar exemption was removed in 2011.

2.1.3 Measures related to the species protection regime in both Directives

2.1.3.1 Activities requiring consent (ARC)

These government powers apply only within SACs and SPAs, but may be relevant to protected species.

- **Regulation 28 of the of the Birds and Habitats Regulations 2011** gives the government the power to decide that an activity which requires consent and which may cause the deterioration of the habitat of species for which a Natura 2000 site has been designated pursuant to the Habitats and Birds Directive shall not be carried out within the site or at any other specified land.

A list of 38 Activities Requiring Consent (ARCs) has been established. They are not prohibited activities, but they require consent to be granted by the Minister for Housing, Local Government and Heritage or another relevant public authority before being carried out. It is an offence to carry out an ARC without prior consent. Some ARCs relate to agricultural activities, such as:

- ARC-17 Agricultural improvement of heath or bog
- ARC-21 Grazing of livestock between 1st April and 31st October on traditional winterages
- ARC-22 Changing of agricultural use from hay meadow to any other use

Other ARCs concern agricultural activities but with exceptions on cultivated land under some conditions. For example, consent is not required under ARC-18 on the application of pesticides, including herbicides, for these activities which occur on established reseeded grassland or cultivated land provided it is greater than 20 metres from a river, stream or floodplain; or greater than 50 metres from a wetland, lake, turlough or pond. The absence of a requirement for consent for such activities might be an additional species protection problem, when the transposition of Article 5a) c) and d) of the Birds Directive is so weak.

2.1.3.2 Ministerial Directions to control specified activities in specified places

Ministerial Directions are not restricted to Natura 2000 sites, so theoretically they could be used to apply specific species protection measures in cases where certain activities are causing damage to protected species, including birds:

- **Regulation 29(1) of the Birds and Habitats Regulations 2011** gives the government the power to issue Ministerial Directions to control any activity that may have an adverse effect on the conservation status of Annex IV (A) and (B) species protected by Articles 12 and 13 the Habitats Directive, or any naturally occurring birds in the wild state.
- **Regulation 29(2) makes clear that** activities which may be controlled ‘include the operation of any off-road or other vehicle or recreational watercraft, or trampling or walking

or riding animals on damaged, sensitive or rehabilitating habitats’ [but ...] ‘shall not, unless expressly provided in the Direction, apply to the lawful use of any vehicle or machinery or watercraft in the course of agriculture or any other lawful occupational land use activity by the owner or occupier of the land’.

Therefore, a Direction issued by the Minister could control an operation using vehicles or machinery in the course of agriculture, but this is not necessarily the case for every Direction.

2.1.3.3 Poisoning of protected species

The indiscriminate poisoning of protected species was banned by the **European Communities (Birds and Natura Habitats) (Restrictions on use of Poisoned Bait) Regulations 2010**⁵⁹:

- Regulation 4(1) makes it illegal for a person to place or have with him any poisoned or anaesthetic bait to capture, kill, poison, stupefy, anaesthetise, harm or injure any species referred to in Article 1 of the Birds Directive or any species of wild fauna listed in Annex IV(a) of the Habitats Directive, except in accordance with a licence. A person who contradicts that provision commits an offence.
- Regulation 5(1) provides that the Minister may license derogations from this in certain circumstances, including ‘to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property’ but Regulation 6(2) introduces a provision that before issuing such a derogation the Minister must be satisfied that the declaration will not authorise any action that is inconsistent with the requirements of the Birds and Habitats Directives.
- Further controls on rodenticide use were put in place in Irish law implementing the **EU Biocidal Products Regulation**⁶⁰.

2.1.3.4 Duties of local authorities

- **Regulation 27(3) of the Birds and Habitats Regulations 2011-21** (*Duties of public authorities relating to nature conservation*) provides that all public authorities have a responsibility to avoid the deterioration of natural habitats and species protected under the Birds and Habitats Directives, and to exercise their functions and statutory powers in compliance with the Directives’ requirements. Public Authorities have a duty of care to ensure that bat roosts are protected and that the conservation status of protected species, such as bats, is not negatively affected in the planning process.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

The **Environmental Impact Assessment (Agriculture) Regulations 2011** (as amended in 2017⁶¹) is relevant to species protection because it regulates removal of some agricultural habitats outside Natura sites. This requires farmers planning to undertake certain agricultural improvement works (restructuring of rural land holdings, commencing to use uncultivated land or semi-natural areas for intensive agriculture, or land drainage works on land used for agriculture) to apply to DAFM for a screening decision to determine if prior consent is required. In the event that prior consent is required, the Minister may refuse consent if the proposed activity “*is likely to have impacts on [...] biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC*”⁶².

⁵⁹ S.I. No. 481 of 2010.

⁶⁰ <https://www.pcs.agriculture.gov.ie/biocides/changestouseofanticoagulantrodenticides/>

⁶¹ SI 456/2011 amended by S.I. No. 407/2017.

⁶² Article 2(f) S.I. No. 407/2017.

The **Planning and Development Regulations 2011** require farmers to seek planning permission⁶³ to: drain or reclaim wetlands above a threshold size.

Local planning authorities have a duty of care for bat roosts, and may request a bat survey, even if none have been recorded before, if they feel that the habitat or buildings on a site proposed for development or requiring planning permission have bat potential.

The CAP cross-compliance standards (2014-2020) are contractual obligations applied to apply to all the land (including commonage) farmed by a beneficiary of CAP direct payments and some RDP area-based payments (including agri-environment-climate payments). Although two of the cross-compliance standards do reference other Articles of the Habitats and Birds Directives none references Articles 12 and 13 or Article 5. However the standard for GAEC 7 reiterates one requirement of Art.5 of the Birds Directive (but does not reference it directly).

Threat Response Plans: Regulation 39(1) of the 2011 Regulations gives the government the obligation to⁶⁴ develop and implement an appropriate threat response plan to ‘*cease, avoid, reverse, reduce, eliminate or prevent the threat, pressure, hazard, combination of threats, pressures or hazards, adverse effect, pollution, deterioration or disturbance*’ where the Minister considers it necessary or appropriate for the purposes of meeting the objectives of the Habitats Directive or the Birds Directive, including to provide strict protection of Annex IV species and bird species referred to in Article 1 of the Birds Directive, their eggs, nests and habitats. The plans are valid for three years. They focus on the threats facing each species and identify the measures required to address these threats, as well as identifying who is responsible for implementing them and providing a time frame for delivery. They provide detailed information on range, distribution, and habitat.

Threat Response Plans were Ireland’s response to the **European Court of Justice ruling of 2005 (C-183/05)** on Ireland’s transposition of Articles 12 and 16 of the Habitats Directive on species protection, which stated that Ireland’s Wildlife Act Section 23(7)(a) (as amended), which defines the exemption from the species protection rules for agricultural activities, was in conflict with the requirements of the system of strict protection in accordance with Articles 12 and 16 of the Habitats Directive⁶⁵. However, implementation of the Threat Response Plans is not audited and there is no public information available reporting who did what action and with what result. It is therefore not possible to judge whether the plans are effectively protecting species from agricultural activities⁶⁶.

Ireland’s Threat Response Plans for protected species

Ireland prepared Threat Response Plans for the following species:

- Red Grouse (*Lagopus lagopus scotica*) Species Action Plan 2013-2016
- Threat Response Plan - Kerry Slug (*Geomalacus maculosus*) 2010-2013
- Threat Response Plan - Otter (*Lutra lutra*) 2009-2011
- Vesper bats (2009-2011) (*Pipistrellus pipistrellus*, *Pipistrellus pygmaeus*, *Pipistrellus nathusii*, *Myotis mystacinus*, *Myotis nattereri*, *Myotis daubentonii*, *Plecotus auritus*, *Nyctalus leisleri*)

The species covered by these Plans are either now in good, stable or improving status and no longer face major threats, and/or major knowledge gaps have been filled enabling a better assessment of

⁶³ Under the Planning and Development (Amendment) (No. 2) Regulations 2011 and the European Communities (Amendment to Planning and Development) Regulations 2011.

⁶⁴ European Communities (Birds And Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). Official publication: Iris Oifigiúil; Publication date: 27/09/2011, <http://www.irishstatutebook.ie/eli/2011/si/477/made/en/print>

⁶⁵ Section 23 - (7) Notwithstanding subsection (5) of this section, it shall not be an offence for a person—(a) while engaged in agriculture, fishing or F62 [aquaculture, forestry or turbary,] unintentionally to injure or kill a protected wild animal, or (b) while so engaged to interfere with or destroy the breeding place of such an animal, or...

⁶⁶ Interview with NGO

conservation needs.

More recent recommendations have not yet been implemented:

- The Curlew (*Numenius arquata*) Task Force was set up in 2016 with experts and decision makers from environment (DCHG) and agriculture (DAFM) ministries to build upon previous cooperation and undertake further positive actions for the Curlew⁶⁷. It published its recommendations in September 2019⁶⁸:
- The draft Hen Harrier (*Circus cyaneus*) Threat Response Plan, which is still in preparation, is being developed with the participation of many NGOs and farming organisations in Ireland. It should be finalised in 2022. The plan committed to clear measures to disrupt ‘bottle necks’ created by the current nature of the forest estate within SPAs, expanding corridors along natural features, linking upland habitats, and selective forest removal to expand upland habitats. The Plan has not yet been published by the government though certain measures are underway, e.g. *Coillte* & Bird Watch Ireland are reviewing the current Disturbance Operations Procedure, and there has also been the very significant Hen Harrier EIP funded by DAFM/CAP funds⁶⁹.

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL UNDER SUBSIDIARY LEGISLATION

Most farms in Ireland are family farms and, but there are significant regional differences in type and intensity of agricultural land use. Around 80% of the utilised agricultural area (excluding commonage) is accounted for by permanent grasslands, with intensive dairying and (limited) arable farming predominant in the south and east, and cattle and sheep rearing to the west and north. A significant number of farms deliver a wide range of biodiversity and ecosystem services particularly along the western seaboard, where there are high proportions of economically vulnerable farms in HNV areas at greatest risk from land abandonment, overgrazing and, increasingly, afforestation.

The **EIA Regulations (Agriculture) 2011 (as amended⁷⁰)** are not species-specific but clearly apply to defined agricultural features and activities that could affect protected species (removing field boundaries, recontouring farmland, commencing to use uncultivated land or semi-natural areas for intensive agriculture, land drainage works) and also to drainage/reclamation of wetlands (e.g. bogs, turloughs⁷¹) which may be within the ownership of the farmer, even if not in agricultural use.

At farm level, the EIA Regulations (Agriculture) 2011 list actions requiring a screening by DAFM as:

- removing more than 500 metres of field boundaries including hedges, stone walls, and clay banks
- removing field boundaries on an area of more than 5ha
- re-contouring farmland land by levelling hills or filling hollows on an area of over 2 ha.
- commencing use for intensive agriculture more than 5 ha of: *uncultivated land* (that has not been ploughed, rotovated or had organic or chemical fertilisers applied for at least 15 years; *semi-natural areas* such as species-rich grassland, limestone pavement, heath or heather, bracken
- installing drains on more than 15 ha of agricultural land
- such actions below these thresholds, if the activity is likely to:
 - have a significant effect on the environment

⁶⁷ <https://www.npws.ie/research-projects/animal-species/birds/curlew-task-force>

⁶⁸ <https://www.npws.ie/research-projects/animal-species/birds/curlew-task-force-september-2019>

⁶⁹ www.henharrierproject.ie

⁷⁰ By S.I. No. 407/2017 <https://www.irishstatutebook.ie/eli/2017/si/407/made/en/print>

⁷¹ Seasonally flooded areas on calcareous substrate.

- have a significant effect on a European site (SAC, SPA)
- impact adversely on ... a nature area [defined in detail in the legislation, and referred to in DAFM’s cross-compliance farmer guidance as a ‘nature reserve’]⁷².

Regardless of these thresholds, screening is required if the proposed work are within or may affect a proposed Natural Heritage Area (pNHA)⁷³ or a nature area⁷⁴ or are likely to have a significant effect on the environment, and the guidance explains what this means (see Figure 1). If DAFM consider, after screening, that the works are likely to have a significant effect and the farmer wishes to proceed they will have to apply for consent and submit an Environmental Impact Statement (EIS), or Natura Impact Statement as appropriate before consent can be considered⁷⁵. The Environmental Impact Statement (EIS) (Flora and Fauna section) should be completed by a competent expert in the field and should identify and describe protected species that might be affected by the proposed development. The Minister ‘*shall refuse consent if, in his or her opinion [...] the proposed activity [...] is likely to have adverse impacts on [...] biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC*’⁷⁶.

Under the **Planning and Development Regulations** farmers must seek planning permission (from the local planning authority, not DAFM) if they propose to;

- drain or reclaim wetlands over 0.1 ha (and if the area is >2ha, or the works are likely to have a significant effect, an EIS will be required).

Although local authorities have a duty to protect bat roosts, this has limited effect at farm level because agricultural buildings are exempt from planning permission under the Planning and Development Regulations and are also not covered by the EIA regulation. This means that the local authorities have no control mechanism to prevent or influence renovation or demolition of agricultural buildings that would damage or destroy bat roosts or the breeding sites of other protected species⁷⁷. It also prevents the surveillance of agricultural structures that could be responsible for water pollution incidents e.g. through leakage of silage, slurry or manure. Owners of agricultural buildings may still require a derogation licence under Regulation 54 of the Birds and Habitats Regulations 2011 before lawfully carrying out construction work.

The species-relevant element of the CAP cross-compliance requirements under GAEC 7 covers landscape features (which may be habitats for protected species), cutting times of trees and hedges, and the removal of invasive species:

- landscape features are defined in Ireland as hedgerows including gappy hedgerows; trees in a line; drains and ditches (but not rivers); and combinations of hedge, drains and area within fence.
- landscape features cannot be removed unless replaced in advance by like with like, e.g. using

⁷² DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland. <https://www.gov.ie/en/publication/6ab3e9-cross-compliance-requirements/>

⁷³ There are approximately 630 proposed NHAs (pNHAs), which were published on a non-statutory basis in 1995, but have not since been statutorily proposed or designated. These sites are of significance for wildlife and habitats. Some of the pNHAs are small, such as a roosting place for rare bats, others are quite large.

⁷⁴ A “nature area”, which means lands subject to: an order under section 15(2) of the Wildlife Act 1976, as amended by section 26 of the Wildlife (Amendment) Act 2000 (reserves and refuges); or an order under section 16(1) of the Wildlife Act 1976, as amended by section 27 of the Wildlife (Amendment) Act (nature reserves on land other than land to which section 15 applies) or an order under section 17(9) of the Wildlife Act 1976, as amended by section 28 of the Wildlife (Amendment) Act (refuges for fauna); or a notice under section 16(2) of the Wildlife (Amendment) Act 2000 – (proposed NHAs).

⁷⁵ DAFM (undated) Environmental Impact Assessment (Agriculture) Regulations Guide for Farmers <https://www.gov.ie/en/publication/5c8ed-advice-for-farmers-on-environmental-impact-assessment-regulations/>

⁷⁶ European Communities (Environmental Impact Assessment) (Agriculture) (Amendment) Regulations 2013, as amended by European Communities (Environmental Impact Assessment (Agriculture) (Amendment) Regulations 2017.

⁷⁷ Interview with Irish Environmental Law Network.

hedgerow species traditional to the area⁷⁸. They must be maintained, and allowing hedges to encroach on a field, or failing to maintain drains may lead to a sanction.

- cutting and/or trimming/removal of tree branches/limbs and/or hedges is prohibited between 1 March and 31 August (bird breeding season).
- farmers are required to avoid encroachment on fields of 'invasive species and noxious weeds'. It is worth noting that the GAEC 7 definition of 'invasive species' to be removed includes native scrub such as hawthorn (*Crataegus monogyna*), briar (*Rosa fruticosa*), elder (*Sambucus nigra*) and gorse (*Ulex europaeus*) which can be bird breeding/nesting/feeding habitat as well as providing wider biodiversity benefits.

2.4 OTHER IMPLEMENTING OR STIMULATING MEASURES

Although farm-level incentives for improved management are not within the scope of this study, it is worth noting that Ireland has recently taken a much more pro-active 'carrot rather than stick' approach to engaging and supporting farmers in conservation of protected species, which may feed into gradually changing attitudes to and understanding of wildlife protection among farmers. The innovative model of farm payments for biodiversity results, in which experts work closely with farmers to improve the long-term management of both wildlife and livestock, was pioneered in Ireland by the Burren project 20+ years ago and is now a key element of mainstream CAP and wildlife policy in Ireland⁷⁹. For example, the current EIP-AGRI projects for Hen Harrier, Curlew and Freshwater Pearl Mussel run from 2017/18 to 2022/23 with a total budget of more than €35m from the Ireland RDP. These projects all aim to improve farmers' awareness and understanding of key species' requirements, and although not directly linked to species protection rules are expected to have an important role in raising farmer awareness. Some of them build on the government's Threat Response Plans and appear to have had a positive effect (although the implementation of the plans is not audited and there is no public information available reporting what action was taken and with what result⁸⁰).

⁷⁸ DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland. <https://www.gov.ie/en/publication/6ab3e9-cross-compliance-requirements/>

⁷⁹For details see DAFM (2019) *EIP-AGRI: Ireland's Operational Groups 2019* <https://www.nationalruralnetwork.ie/eip-agri-news/eip-agri-irelands-operational-groups-2019-booklet-launch/#>

⁸⁰ Interview with Irish Environmental Law Network.

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

There are two types of agricultural advisers in Ireland, who receive the same training. In both cases the farmer seeks advice and pays for it.

The Farm Advisory Service (FAS)

FAS provides advice to help farmers to meet their obligations and avoid financial reductions under various EU Schemes, through a network of DAFM approved FAS advisors that act as ‘general consultants’, linking all of the different elements of farming with the various compliance requirements. Adviser training covers GAEC standards⁸¹. The minimum requirement to be a FAS adviser is a degree in agriculture.

Teagasc farm advice

Teagasc provides a similar professional service but offers a greater breadth of services, including advice from a pool of 30-40 specialist biodiversity advisers who are trained in species protection requirements. However, the adviser interviewee reports that farmers seeking advice are often concerned with ensuring they receive CAP direct payments and are focused on running a competitive farm business to help deliver Ireland’s policy of producing high quality food (mainly dairy and beef). Teagasc advises 40,000 of the estimated 140,000 farmers in Ireland (data on the number using FAS advisers is not available).

National Parks and Wildlife Service (NPWS)

Although not directly targeted at farmers, NPWS has recently published *Guidance on the Strict Protection of Certain Animal and Plant Species under the Habitats Directive in Ireland*⁸² and also *Strict Protection of Animal Species - Guidance for Public Authorities*⁸³

Bat mitigation guidelines for Ireland v2 is also a new publication from NPWS, updating the version first published in 2006⁸⁴. These guidelines have been developed to assist those involved with land-use planning and development operations (in the widest sense) where bats are known or suspected to occur. Although the emphasis is on developments that fall within the remit of the planning system, the guidelines apply equally to other sorts of developments and contain elements of good practice that apply to a wide range of situations.

EIA guidance

DAFM publishes an illustrated guidance document on the EIA (Agriculture) Regulations. The guidance explains that a farmer must apply to DAFM for a screening decision before work commences on removing field boundaries, recontouring farmland, commencing the use of uncultivated land or semi-natural areas for intensive agriculture or land drainage works, if the proposed work exceeds specified size thresholds. Regardless of these thresholds, screening may be required if the proposed work might affect a nature reserve or pNHA or otherwise have a ‘significant effect on the environment’ (see Figure 1). Farmers are also reminded that they should consult an NPWS Ranger if the proposed activity is within or may affect an SAC, SPA or NHA⁸⁵; and that they may need to apply for planning permission (not EIA screening) if they propose to drain wetlands.

⁸¹ <https://www.gov.ie/en/publication/b41a6-farm-advisory-system/#>

⁸² <https://www.npws.ie/sites/default/files/files/strict-protection-of-certain-animal-and-plant-species.pdf>

⁸³ <https://www.npws.ie/sites/default/files/files/article-12-guidance-final.pdf>

⁸⁴ Marnell, F., Kelleher, C. & Mullen, E. (2022) Bat mitigation guidelines for Ireland v2. *Irish Wildlife Manuals*, No. 134. National Parks and Wildlife Service, Department of Housing, Local Government and Heritage, Ireland <https://www.npws.ie/sites/default/files/publications/pdf/IWM134.pdf>

⁸⁵ A designated area considered important for the habitats present or which holds species of plants and animals whose habitat needs protection. <https://www.npws.ie/protected-sites/nha>

Figure 1 Extract from DAFM guidance for farmers on requirements for EIA screening - significant effect on the environment⁸⁶

6.3 Significant effect on the environment

Screening may also be required, regardless of the matters set out in sections 6, 6.1 and 6.2, where the proposed works may have a significant effect on the environment. Where the proposed development work is below the threshold for screening, it is a matter for the person who proposes to carry out the works to make an assessment as to whether the works may have a significant effect on the environment (professional advice may be required).

In assessing whether the development is likely to have a significant effect on the environment, the person concerned must consider matters such as the relative abundance of the habitat in the area (which may be lost as a result of the proposed works), the environmental sensitivity of the areas likely to be affected by the project (see other factors that should be considered in Annex 2).

Regardless of the foregoing, you should always apply to DAFM for screening (Local Authority in the case of wetlands) where you suspect that the proposed works may impact adversely, either directly or indirectly, on rare semi-natural grasslands such as orchid rich grasslands, dune systems, raised and blanket bogs, oligotrophic lakes, fens and mires or on species such as the Atlantic salmon and freshwater pearl mussel. You should apply for screening for any activities that result in the exposure and/or works are likely to give rise to losses of soil to drains, streams and rivers thereby impacting on SAC protected populations of freshwater pearl mussel.



Figure 9 – Orchid rich semi-natural grassland
(picture – courtesy of J. Cross, NPWS)



Figure 10 - Pond used by Natterjack toad

The EPA guidance on EIA requirements was updated in 2017 to reflect the changes in the EU EIA Directive 2014 but was published as a draft as the Irish EIA Regulation has not yet been revised⁸⁷. The guidelines on information to be contained in Environmental Impact Statements (EIS) were published in 2002⁸⁸ and the Advice Notes on Current Practice (in the preparation of EIS) to accompany the guidelines in 2003⁸⁹. Under the Flora and Fauna section the 2003 EPA guidelines⁹⁰ (Advice Notes on Current Practice in the Preparation of EIS, 2003) recommend that protected species or Red Data Listed Species should be identified and described within the area of the proposed development.

GAEC 7 guidance

DAFM publishes a clearly illustrated guidance document on all cross-compliance requirements⁹¹. The extract in **Figure 2** refers to the section on protection of landscape features and tree/hedge cutting under GAEC 7. Although it reminds farmers of the requirements for EIA screening it does not refer to the need

⁸⁶ DAFM (undated) Environmental Impact Assessment (Agriculture) Regulations Guide for Farmers European Communities (Environmental Impact Assessment)(Agriculture) Regulations 2011 European Communities (Environmental Impact Assessment((Agriculture) (Amendment) Regulations 2017.

⁸⁷ <http://www.epa.ie/pubs/advice/ea/drafterguidelines.html>

⁸⁸ EPA (2002) Guidelines on the information to be contained in Environmental Impact Statements.

⁸⁹ <http://www.epa.ie/pubs/advice/ea/guidelines/#.VMDoXUesWSo>

⁹⁰ EPA (2003) Advice Notes On Current Practice (in the preparation of Environmental Impact Statements).

⁹¹ DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland.

for this where there may be a significant effect on the environment.

Figure 2 Extract from DAFM cross-compliance handbook for farmers - GAEC 7 requirements for landscape features and cutting trees and hedges⁹²

GAEC 7 Retention of Landscape Features & Designated Habitats and Controlling Invasive Species

Landscape Features

Landscape Features (LF) under GAEC were designated in 2009 and include:

- Hedgerows including gappy hedgerows
- Trees in a line
- Drains and ditches
- Combinations of hedge, drain and area within fence



Line of trees

In 2012 farmers who had been in REPS had the option to have former REPS 3 or 4, Option 4A habitats, designated as Landscape Features. She/he could do this by declaring them as "Designated Habitats" on his/her annual SPS/BPS application form.

In 2015 Archaeological sites and monuments were designated as Landscape Features and are therefore protected and cannot be removed or interfered with.

Landscape Features and Designated Habitats are eligible for payment and cannot be removed (*see exception below). They must be maintained

*Landscape Features may be removed if a replacement hedge/line of trees/drain is planted/dug **in advance** of the removal. You can only replace like with like i.e. hedge for a hedge and the hedgerow species used must be traditional to the area, and the replacement cannot be for amenity purposes, e.g. around farmyard or driveway. The EIA Regulations should be adhered to at all times.

NOTE: Removed/Damaged Landscape Features must be reinstated in all cases or further sanctions will apply

Farmers must not cut or trim hedgerows and/or trees between 1st March and 31st August each year (during the bird breeding season).

Hedgerows that are allowed to encroach into a field will lead to a GAEC sanction

Drains that are not maintained, may overtime lead to the adjacent area becoming ineligible or the landscape feature itself becoming seriously damaged leading to a GAEC sanction. Livestock continually accessing drains may lead to their damage



Hedgerow

⁹² DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland.

Farmer awareness

Little information is available on whether farmers are aware of the presence of protected species on their land, and whether they are aware that all bird species and their habitats are protected. Recent pilot projects on HNV farmland in Ireland found that farmers could be completely unaware of the conservation value of important plant species on their land but were willing to engage with specialist advisers over the duration of the project, which was focused on rewarding biodiversity outcomes, rather than enforcing regulations)⁹³.

Farmers (and their contractors) are most likely to be aware of the restrictions on hedge/tree cutting under GAEC 7 and on hedge removal under GAEC 7 and EIA rules, simply because of the reach of CAP cross-compliance requirements, which apply to almost all farmland in Ireland and are subject to EU-defined inspection and control systems. However, the different sources of published guidance might make it difficult for farmers to understand what they should do. For example, The DAFM EIA guidance for farmers aims to clarify where and when a screening application is necessary, including for the sub-threshold activities which may have a significant effect on the environment. In contrast, the DAFM guidance on GAEC 7 cross-compliance reminds farmers of the EIA thresholds but fails to mention the need to screen proposed activities on smaller habitat areas which may be important for protected species.

Public attitudes to wildlife on farms are reported to have shifted significantly in the past two years or so⁹⁴, and have generally become less tolerant of obvious breaches of wildlife rules by farmers. This has been reflected in increasing numbers of successful prosecutions and, to an extent, by social pressure on the farming community – for example, one interviewee commented that hedge-cutting contractors would no longer dare to work during the prohibited months because they would be identified quickly on social media. In the recent past there were efforts to weaken the implementation of some secondary wildlife legislation, for example the Heritage Act 2018 including a provision for shortening the permitted periods for vegetation burning (into March) and hedge cutting (into August), but the two-year window has passed without these regulatory changes being made⁹⁵.

⁹³ Presentation by Caitriona Maher, Farming for Biodiversity: building on know-how from the results-based (RBPS) pilots. 17 October 2019, Brussels. <https://iecp.eu/news/event-building-on-the-know-how-from-the-results-based-payment-scheme-rbps-pilots>

⁹⁴ Two interviewees, one a Teagasc biodiversity adviser, the other from an environmental NGO.

⁹⁵ Article 7 of Heritage Act 2018.

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

4.1 RESPONSIBILITIES

The regional staff of NPWS are the frontline in terms of enforcement matters **under the Wildlife Acts** and the **Birds and Habitats Regulations**. In March 2021 the NPWS had around 240 staff at regional level, including 4 Divisional Managers, 11 Regional Managers, 19 District Conservation Officers and 72 Rangers (and plans to increase the number of Rangers to 82).

NPWS conservation rangers conduct patrols and site visits to enforce the various provisions of national and EU legislation, as required, some in one county some in more than one county. They also investigate reports and breaches of legislation including Natura site protection matters.

Controls and sanctions under **the EIA Regulations (Agriculture) 2011** are the responsibility of DAFM⁹⁶ and undertaken as part of **the CAP cross-compliance inspections** by the Basic Payment Unit in the DAFM⁹⁷. **GAEC 7 inspections** include checking for evidence of damage/removal of designated landscape features and of the cutting of trees and hedges in bird nesting season and breeding season, but there are no inspection requirements linked specifically to protected species. Local authorities and other competent control authorities are required under EU and national law to report breaches of cross-compliance to the Basic Payment Unit in DAFM⁹⁸.

Even when physical evidence of a breach is available (e.g. of poisoning/shooting birds, removal of plants), linking the damage to the farmer's actions may be difficult, especially if hunters or the public have access to the land. However there have been recent successful prosecutions by NPWS for breaches of the legislation on protected birds⁹⁹. There is more opportunity for DAFM and the EPA to control (and quantify) measures which protect visible features of farmland, such as those protected by the **EIA Regulations (Agriculture)** and **GAEC 7**, mainly through the LPIS/IACS maps and the CAP payment verification system. However, for such features the link between habitat and protected species is less clear, especially if inspectors do not have sufficiently detailed locational data on species' distribution, which is more likely to be lacking on land outside Natura 2000 sites.

4.2 CONTROL RESULTS, SANCTIONS AND FOLLOW-UP

Available data relates mainly to GAEC 7 cross-compliance sanctions and prosecutions under the EIA Regulations for hedge-cutting and hedgerow removal respectively.

GAEC 7 sanctions. Irish government data for the 2019 full cross-compliance inspections shows that 60% of the GAEC non-compliance cases were related to GAEC 7, and of these 105 cases all but four of them resulted in a financial penalty¹⁰⁰.

According to the cross-compliance handbook, if an applicant is found to be in breach of a standard through negligence, a sanction of 3% of the support payment will generally apply but this can be increased to 5% or decreased to 1% depending on the extent, severity, and permanence of the

⁹⁶ <http://www.irishstatutebook.ie/eli/2011/si/456/made/en/print>

⁹⁷ DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland. <https://www.gov.ie/en/publication/6ab3e9-cross-compliance-requirements/>

⁹⁸ DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland. <https://www.gov.ie/en/publication/6ab3e9-cross-compliance-requirements/>

⁹⁹ See <https://www.gov.ie/en/press-release/78e0d-minister-malcolm-noonan-congratulates-national-parks-and-wildlife-service-on-two-successful-wildlife-crime-prosecutions-relating-to-birds/>

¹⁰⁰ DAFM (undated) Statistics on 2019 Cross Compliance Inspections provided by an NGO interviewee.

infringement¹⁰¹. The Irish government does not apply a sanction where the breach is minor and remedial action is taken within the stipulated period. Where the non-compliance is deemed intentional, a reduction of 20% shall generally be applied. The sanction can be increased up to 100%, or reduced to 15%, depending on the seriousness of the non-compliance. In extreme cases, the sanction can extend beyond the year of the finding¹⁰². In the case of an infringement of the same requirement, or standard occurring more than once, within a consecutive period of 3 calendar years, the sanction will be trebled.

NPWS prosecutions for illegal hedge-cutting or removal. An investigation in 2020 showed that the National Parks and Wildlife Service brought 88 successful prosecutions between 2007 and 2020 for illegal hedge cutting or removal, according to data released via Access to Information on the Environment (AIE) requests¹⁰³. Following recent prosecutions related to illegal hedgerow destruction under Section 40 of the **Wildlife Act**, the NPWS of the Department of Housing, Local Government and Heritage has warned of a ‘zero tolerance’ approach to the illegal cutting of hedges and illegal burning of vegetation between 1st March and 31st August each year¹⁰⁴. However, prosecutions under Section 40 of the Wildlife Act may not be successful if the court decides to use the exemption for agricultural activity, as illustrated by a case in May 2021¹⁰⁵.

It appears that most hedge cutting that takes place during the bird breeding season is along roads, where local authorities act under the exemption for roadside hedge cutting for road safety. They either request landowners to do the cutting or do it through contractors. Local authority data and records revealed that between 2018 and 2020, at least 3,000km of hedgerow and road verges were cut by local authorities during the prohibited season (March 1st to August 31st) under exemptions in the interests of road safety¹⁰⁶. The investigation concluded that the true figure is likely to be higher as records released show that many local authorities do not keep accurate records of cut hedgerows, often due to resource constraints. Councils rarely have formal procedures in place to decide when there is a genuine road safety concern¹⁰⁷.

EIA screening and offences under requirements for boundary removal. EIA screening applications to DAFM for hedgerow removal in Ireland have a very high rate of approval, and the current approach does not seem to be using all the options available in the legislation and the different screening criteria to prevent important field boundary removals and potentially significant impacts on protected species (see Box 2 below).

Box 2 Implementation of EIA regulations on hedgerow removal

Approximately 250–1050km of hedgerow removal were granted permission under the EIA regulations between 2011 and 2017¹⁰⁸. In 2017 and 2018, the approval rate of EIA screening applications for field boundary removal was 100%.¹⁰⁹ An EPA report and a journalist’s analysis¹¹⁰ found that 638 or 93% of applications for hedgerow removal have been approved at the screening stage since the introduction of the EIA requirement in September 2011, which indicated that at least

¹⁰¹ DAFM (2016) Explanatory Handbook for Cross Compliance Requirements. Irish Department of Agriculture, Food and the Marine (DAFM), Ireland. <https://www.gov.ie/en/publication/6ab3e9-cross-compliance-requirements/>

¹⁰² Including retrospectively – protection of landscape features has been a requirement of GEAC 7 for 12 years, and historic removals can be penalised.

¹⁰³ <https://www.thejournal.ie/nw-shear-force-pt1-5359014-Feb2021/>

¹⁰⁴ See <https://www.gov.ie/en/press-release/a9db8-npws-warns-of-zero-tolerance-for-destroying-vegetation-during-the-bird-nesting-season-following-successful-prosecution/> and <https://www.agriland.ie/farming-news/galway-farmer-fined-for-destroying-hedgerows/>

¹⁰⁵ <https://www.agriland.ie/farming-news/fci-contractor-and-farmer-win-hedge-cutting-court-case/>

¹⁰⁶ <https://www.thejournal.ie/nw-shear-force-pt1-5359014-Feb2021/>

¹⁰⁷ The local authorities stated that they try to get landowners to cut their hedges outside of the prohibited season, placing advertisements in local media, making verbal requests, and sending written letters.

¹⁰⁸ Green, S, Martin, S, Gharechelou, S, Cawkwell, F and Black, K (2019) BRIAR: Biomass Retrieval in Ireland using Active Remote sensing. EPA Research Report 305, Environmental Protection Agency, Ireland.

¹⁰⁹ DAFM, *EIA Screening applications 2017* and *EIA Screening applications 2018*, Register of EIA Screening applications.

¹¹⁰ <https://www.thejournal.ie/shear-force-article-2-5358956-Feb2021/>

190km of hedgerows were removed between 2011 to 2019 without the need for any environmental impact assessment. An investigation of the reasons for farmers' applications pointed to changes to dairy systems, requiring more space for machinery.

Data released by DAFM showed that 971 offences linked to the EIA requirement on hedgerow removal were identified, with penalties imposed in 963 cases between 2011 and 2019¹¹¹. It did not specify the types of offences or penalties received. Bird species which are reliant on hedges during nesting, feeding and sheltering, however, they are declining at an alarming rate (see section 1.2.1). The implementation of the EIA Regulations in relation to the removal of field boundaries is difficult to assess because although DAFM publishes a register of EIA screening applications every year with some information (approval or rejection of the application, total area or linear amount), it does not publish the screening decisions.

Based on the analysis for this study, the factors that appear to contribute to limiting the effectiveness of implementation of the species protection rules on agricultural land include:

- Lack of GIS-based data on species/habitat occurrence at a sufficiently small scale for farmers to use at land parcel level.
- Limited numbers of government biodiversity advisers and inspection staff working at farm level, especially outside Natura 2000 areas, and potential for confusion between different advisory sources/materials.
- A reactive approach to checking compliance for most species-protection rules at farm level (other than for CAP GAEC 7 cross-compliance). This can make it more difficult to secure the level of evidential proof of responsibility that is required for successful prosecutions.
- The broad discretion granted to the local courts in determining the application of the 'agricultural' exemption to the Wildlife Act prohibition of vegetation destruction on uncultivated land, hedges and ditches, during the period 1 March to 31 August.
- The very high approval rate (at screening stage) of EIA applications for hedgerow removal.

¹¹¹ <https://www.thejournal.ie/shear-force-article-2-5358956-Feb2021/>

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

Please see section 2.1.3 above for discussion of activities requiring consent (in Natura 2000 sites) and for Ministerial Directions to control specified activities in specified places; and section 2.2 above for requirements and thresholds for EIA and planning regulations in relation to agricultural land.

6 OVERALL ASSESSMENT OF SPECIES PROTECTION ON AGRICULTURAL LAND

Lowland grassland accounts for more than 80% of Ireland's agricultural land, rough grazing 11% and arable land just 8%. The main threat to protected species, especially birds, is intensification of grassland management, for example through drainage of wetlands and damp pastures, reseeding and conversion to silage production, earlier and more frequent silage cuts, increased fertilisation, and use of larger, more efficient agricultural machinery for grassland management and cutting.

Because the Irish countryside has low forest cover, most countryside bird species are more or less closely linked to farmland and/or grazed grassland and heath, including species that are typical forest birds in other countries. Of the birds of conservation concern in Ireland, seven red-listed species associated with farmland, plus nine red-listed species that are typical breeding birds of the Irish upland or coastal rough grassland, heath and blanket bog, all show severe declines in breeding population and/or range.

6.1 TRANSPOSITION ISSUES

- Articles 12 and 13 of the Habitats Directive are transposed literally in Irish legislation (an earlier exemption for agricultural activities was removed by the 2011 legislation).
- The legislation transposing the Birds Directive is more complex. The transposition of sub-articles 5 (b), and (e) appear to be satisfactory, but the transposition of Article 5 (a) and c) are not correct. Instead of prohibiting '*deliberately killing or capture*' the transposition of Article 5 (a) prohibits hunting by several methods and injuring, but it does not prohibit killing other than by hunting. The transposition of Article 5 (c) limits the prohibition of taking eggs to a wilful action.
- The transposition of Article 5(d) of the Birds Directive is fragmented and incomplete. The prohibition on disturbance of all birds '*particularly during the period of breeding or rearing*' is limited to wild birds on or near a nest, which could be interpreted as covering the rearing period but not the whole breeding period. The other relevant prohibition, on the destruction of hedges and certain other types of vegetation between 1 March and 31 August is weakened by an exemption for ordinary agricultural activities (other than burning).

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

In Ireland the species and bird protection rules applicable at farm level are implemented primarily by the NPWS but other government institutions play a role directly or indirectly. These include the DAFM (responsible for CAP cross-compliance and involved in EIA screening); the EPA (administration of EIA for agriculture); and local planning authorities, which have responsibilities linked to protection of bat roosts and also approval of proposals to drain agricultural wetlands.

Specific environmental measures/rules applicable at farm level

- There is no additional legislation implementing species protection rules applicable at farm level other than the species protection rules in the transposing legislation which applies generally, and the CAP cross-compliance, EIA and other authorisation procedures detailed below.

Specific agriculture or CAP cross-compliance conditions

- GAEC 7 cross-compliance standards are relevant to the disturbance of birds during the breeding season and to the management of other farmland features which may be important breeding/nesting/feeding habitats for protected birds. Farmers receiving CAP area payments are required:

- To maintain landscape features, defined as hedgerows, trees in a line, drains and ditches (but not rivers); if they allow hedges to encroach on a field, or fail to maintain drains farmers may face financial sanctions.
- Not to cut and/or trim/remove tree branches/limbs and/or hedges between 1 March and 31 August (bird breeding season);
- To avoid encroachment on fields of 'invasive species', which are defined to include some native scrub species (e.g. hawthorn (*Crataegus monogyna*)) which can provide bird breeding/nesting/feeding habitat.
- The strictly-defined CAP cross-compliance inspection and control system, is implemented by the Basic Payment Unit in the DAFM which inspects farmers' compliance with EIA requirements at the same time.
- In 2019 60% of the 105 GAEC non-compliance cases were related to GAEC 7, and almost all resulted in a financial penalty applied to CAP payments.

Other implementing or stimulating measures

- Ireland has, since 2009, implemented Threat Response Plans for a number of protected species (bird, mammal, slug and seven bat species), which are now in good, stable or improving status and no longer face major threats. A further two Plans for protected birds are under way, for curlew (*Numenius arquata*) and hen harrier (*Circus cyaneus*).
- Ireland has recently taken a much more pro-active 'carrot rather than stick' approach to engaging and supporting farmers in conservation of protected species. Result-based payments for biodiversity, in which experts work closely with farmers to improve the long-term management of both wildlife and livestock, is now a key element of mainstream CAP and wildlife policy in Ireland¹¹². The current EIP-AGRI projects for Hen Harrier (*Circus cyaneus*), Curlew (*Numenius arquata*) and Freshwater Pearl Mussel (*Margaritifera margaritifera*) run from 2017/18 to 2022/23 with a total budget of more than €35m from the Ireland RDP 2014-20. These projects all aim to improve farmers' awareness and understanding of key species' requirements, and although not directly linked to species protection rules are expected to have an important role in raising farmers' awareness of the need for species protection and understanding of the important contribution they can make, at least in the areas where they are implemented. **(Best practice)**

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Based on the analysis for this study, the factors that appear to contribute to limiting the effectiveness of implementation of the species protection rules on agricultural land include:

- Lack of GIS-based data on species/habitat occurrence at a sufficiently small scale for farmers to use at land parcel level.
- Limited numbers of government biodiversity advisers and inspection staff working at farm level, especially outside Natura areas, and potential for confusion between different advisory sources/materials.
- A reactive approach to checking compliance for most species-protection rules at farm level (other than for CAP GAEC 7 cross-compliance). This can make it more difficult to secure the level of evidential proof of responsibility that is required for successful prosecutions.
- The broad discretion granted to the local courts in determining the application of the 'agricultural' exemption to the Wildlife Act prohibition of vegetation destruction on uncultivated land, hedges and

¹¹²For details see DAFM (2019) *EIP-AGRI: Ireland's Operational Groups 2019* <https://www.nationalruralnetwork.ie/eip-agri-news/eip-agri-irelands-operational-groups-2019-booklet-launch/#>

ditches, during the period 1 March to 31 August.

- The very high approval rate (at screening stage) of EIA applications for hedgerow removal

Government advisory services

- The FAS provides advice to help farmers to meet their obligations and avoid financial penalties under the CAP, through a network of DAFM-approved FAS advisors who are familiar with the GAEC cross-compliance requirements.
- Teagasc (the Agriculture and Food Development Authority) provides a similar professional service over a greater breadth of topics, including advice from a pool of 30-40 specialist biodiversity advisers who are trained in species protection requirements. Teagasc provides advice to around 40,000 of Ireland's 140,000 farmers.
- The DAFM publishes a farmers' handbook on cross-compliance, which details GAEC 7 obligations, and also a clearly illustrated guidance document on the EIA (Agriculture) Regulations
- NPWS has recently published general guidance on strictly protected species, detailed guidance on Articles 12 and 16 HD specifically for local authority development projects, and updated guidance on bat mitigation measures.

Enforcement of species protection legislation

- NPWS Conservation Rangers are the frontline in terms of enforcement of the species protection legislation, conducting patrols and site visits, and investigating reports of breaches of legislation, for both species protection and Natura sites. NPWS can initiate criminal prosecutions in the local courts but linking evidence to the farmer's actions may be difficult, especially if hunters and the public have access to the land.
- Between 2007 and 2020 the National Parks and Wildlife Service brought 88 successful prosecutions for illegal hedge cutting or removal
- Public attitudes to wildlife on farms are reported to have shifted significantly in the past two years or so, and generally become less tolerant of obvious breaches of wildlife rules by farmers. This has been reflected in increasing numbers of successful prosecutions and, to an extent, by social pressure on the farming community.

EIA

- The EIA Regulations (Agriculture) apply to defined agricultural features and activities that could affect the habitats of birds and other protected species. The threshold criteria which trigger an obligatory EIA or a screening decision by DAFM on the need for an EIA are based mainly on the scale of the proposed activity (removing more than 500 metres of field boundaries, recontouring more than 5 ha of farmland, commencing to use more than 5 ha of uncultivated land or semi-natural areas for intensive agriculture, or installing drains on more than 15 ha of agricultural land). Below these thresholds an obligatory EIA may be required if the activity is likely to have a significant effect on the environment or on a Natura site or nature reserve. If an EIA is required, an Environmental Impact Statement (EIS) (flora and fauna section) should be completed by a competent expert in the field and should identify and describe protected species that might be affected by the proposed development.
- EIA screening applications for hedgerow removal to DAFM in Ireland have a very high rate of approval, and the current approach does not seem to be using all the options available in the legislation and the different screening criteria to prevent important field boundary removals and potentially significant impacts on protected species.

Other authorisation procedures

- Under the Planning and Development Regulations farmers must seek planning permission from the local authority if they propose to drain or reclaim wetlands over 0.1 ha (and if the area is >2ha, or the works are likely to have a significant effect, an EIS will be required).
- Local authorities have a duty to protect bat roosts, and may request a bat survey of the habitat or buildings on a proposed development, or require planning permission. Agricultural buildings are exempt from planning permission and also not covered by the EIA Regulation. However, owners of agricultural buildings may still require a derogation licence under species protection legislation before lawfully carrying out construction work.

6.4 RECOMMENDATIONS

Overall, there is a need for significant improvement in farmers' awareness of their obligations to protect species and their willingness to actively seek advice on how to do this on their farm. Significant investment will be needed in biodiversity expertise within the government advisory, extension and inspection services, as well as consolidation of the legislation and advice to farmers in a way that improves the coherence of different regulations and removes the remaining ambiguities.

Legislative transposition measures of species protection rules:

- Rationalise the transposition of Article 5(d) of the Birds Directive; remove the agricultural exemption to the prohibition on vegetation removal between 1 March and 31 August; and enact a Statutory Instrument to consolidate the transposition of the Birds Directive.

Preventive and implementing measures:

- In the next CAP programming period, continue and develop further the use of RDP/EAFRD co-operation measure for result-based biodiversity management payments to improve the conservation status of protected species and of birds which depend on farmland habitats. Use opportunities within the CAP (e.g. the Rural Network and exchange visits) to share Ireland's experiences in this area with other Member States.

Public advisory and enforcement:

- Provide resources and training opportunities to increase the number of government-funded biodiversity advisers and inspectors with expertise in species protection in NPWS, Teagasc and FAS who are working at farm level, especially outside Natura areas.
- Take a pro-active approach, in FAS and Teagasc to including advice and information on species protection to farmers, alongside the agronomic and business advice they typically ask for.
- Consider how best to address the lack of GIS-based data on species/habitat occurrence at a sufficiently small scale for advisers/farmers to use at land parcel level.
- Provide resources for a more pro-active and well-publicized approach to checking compliance with species protection legislation, especially outside Natura 2000 sites
- Provide national judicial guidelines for the local courts on the limits to and definition of the 'normal agricultural activity' exception to the species protection legislation.

Authorisation and permits:

- Review the EIA screening decisions taken by DAFM on activities below the threshold size, to determine to what extent species protection requirements were taken into account, both in terms of individual applications and cumulatively at landscape scale.
- Consider if there is a need to reduce the threshold sizes for agricultural activities automatically requiring an EIA, and/or to include the potential impact on protected species (not just protected sites) as a requirement for an EIA below the threshold.

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Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study *The Netherlands*

ENV/2020/OP/0022



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1 INTRODUCTION

1.1 GOVERNANCE

Constitutional responsibility for agriculture and farmland management, on the national level, lies with the Dutch ministry of Agriculture, Nature and Food Quality (*Ministerie van Landbouw, Natuur en Voedselkwaliteit*). Previously, until 2017, the Dutch Ministry of Economic Affairs was responsible for various parts of agricultural policy, such as CAP payments and other agricultural subsidies, but since 2017 all agricultural and nature policy was brought together in the agricultural Ministry.

Most executive responsibility for the Dutch Nature Protection Law (the *Wet Natuurbescherming*), the law implementing the Birds and Habitats Directive in the Netherlands, is delegated to the provincial executive of each of the twelve provinces of the Netherlands. The provincial executive is generally the competent authority to enforce the obligations in the Nature Protection Law, to grant derogations from the Dutch species protection provisions and to grant authorisations where needed pursuant to the Nature Protection Law.

The 352 municipalities in the Netherlands also play a role in the governance of species protection, as they are the competent authorities to grant environmental permits for spatial developments. In case such developments may impact species protected under the Nature Protection Law, an authorisation must be applied for with the provinces, which will be granted based on the outcome of a ‘nature test’ in which the impacts on protected species are assessed¹.

On a national level, the Netherlands Enterprise Agency, a government executive agency, retains a residual role in nature management, including the species protection rules. The Netherlands Enterprise Agency, *Rijksdienst voor Ondernemend Nederland* (RVO) is competent to grant derogations and authorisations for activities which have not been derogated to the provinces, and it has a role in assessing behavioural codes set up to stimulate good practice.

Moreover, on a regional level in between the municipalities and provinces, there are 29 Environmental Services (*Omgevingsdiensten*), which are semi-public agencies. They supervise and enforce environmental laws and advise citizens and undertakings with regard to environmental permits, for which an authorisation from the provinces on the basis of the species protection rules may be a precondition.

1.2 PROTECTED SPECIES

The Netherlands has established itself as the second largest exporter of agricultural produce in the world after the United States, focusing on cereals (mostly wheat), feed crops and potatoes. Agriculture represents **1.7 %** of total GDP in the Netherlands (Statista, 2019). Agricultural land represents **53.3 %** of the country’s area (World Bank, 2016a).

According to the agricultural classifications², **65 %** of the species protected under Annex IV of the Habitats Directive and **12 %** of the wild bird species protected under the Birds Directive, for which reported national data is openly available in the Netherlands, are directly/indirectly dependent on agricultural habitats.

¹ See for example information on the website of the province of Gelderland regarding the requirements for the ‘nature test’ for the authorisation of spatial developments: <https://www.gelderland.nl/Wet-natuurbescherming-Verklaring-van-geen-bedenkingen>.

² Article 12 and Article 17 species classification is based on the current State of Nature Report 2020 (EEA 2020). While the classification for Annex species relies on the definition from Halada et al. 2013 (only available for Article 17), the birds classification refers to the classification from the Common Bird Indicator classification for birds with ecological preferences for agriculture (CFaBI).

In the Netherlands, numbers of farmland birds such as the black-tailed godwit, the lapwing, the oystercatcher and the Eurasian skylark are falling rapidly³. Since 1990, open farmland birds such as the black-tailed godwit and the partridge decreased in numbers by around 70 % on average⁴. Farmland birds in general, including species occurring in yards and shrubs such as the barn swallow and the common starling, fell by 50 % on average since 1990⁵. In spring 2018, only 6,500 young black-tailed godwits were born, but double that number are needed to maintain the population of black-tailed godwits in the Netherlands⁶. Research indicates that almost half of farmland bird species found in the Netherlands have declined strongly in numbers, both in the short term and the long term⁷. For certain species, such as the partridge, tree sparrow and turtle dove, yearly decline has been accelerating in the last decade⁸.

Reptiles and amphibians, including protected species, are under high pressure in the agricultural landscape. Intensification of agriculture over the years has resulted in the demise of habitats, such as ponds, hedges, wetlands and grasslands, which has pushed species into conservation areas⁹. The garlic toad, for example, is near disappearance in agricultural landscape. Similarly, reptiles such as the northern crested newt and various fish species that live in ponds only remain in conservation areas, as their habitats in farmland have gradually disappeared¹⁰.

³ Netherlands Birds Association, *Birds Association files European complaint against the Netherlands about protection of farmland birds*, 8 November 2016, available at: <https://www.vogelbescherming.nl/actueel/bericht/vogelbescherming-dient-europese-klacht-in-tegen-nederland-over-bescherming-van-weidevogels> (Dutch).

⁴ Kleyheeg E., Vogelzang T., van der Zee I. & van Beek M. 2020, *Boerenlandvogelbalans 2020*, Sovon Vogelonderzoek Nederland, Nijmegen / LandschappenNL, De Bilt, p. 12. Data source: Farmland birds index Netherlands, NEM (Sovon, CBS, Provinces) (Dutch).

⁵ Kleyheeg E., Vogelzang T., van der Zee I. & van Beek M. 2020, *Boerenlandvogelbalans 2020*, Sovon Vogelonderzoek Nederland, Nijmegen / LandschappenNL, De Bilt, p. 12. Data source: Farmland birds index Netherlands, NEM (Sovon, CBS, Provinces) (Dutch).

⁶ Netherlands Birds Association, *The black-tailed godwit - our national bird*, vogelbescherming.nl (Dutch).

⁷ Kleyheeg E., Vogelzang T., van der Zee I. & van Beek M. 2020, *Boerenlandvogelbalans 2020*, Sovon Vogelonderzoek Nederland, Nijmegen / LandschappenNL, De Bilt, p. 13. Data source: Farmland birds index Netherlands, NEM (Sovon, CBS, Provinces) (Dutch).

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⁹ Interview on 11 June 2021 with representative of RAVON, the Dutch foundation for the protection of reptiles, amphibians and fish.

¹⁰ Interview on 11 June 2021 with representative of RAVON, the Dutch foundation for the protection of reptiles, amphibians and fish.

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

Habitats Directive

Articles 12 and 13 of the Habitats Directive have been transposed virtually literally by Articles 3.5 and 3.6 of the Dutch Nature Protection Law (the *Wet Natuurbescherming*), which entered into force on 1 January 2017 replacing and combining the various pre-existing national nature protection laws to simplify the system of protection and harmonise the national rules with obligations under the Birds and Habitats Directive. The transposing provisions of the Dutch Nature Protection Law stay very close to the wording of the species protection provisions in the Habitats Directive, and have equivalent legal effect.

Article 3.5 Nature Protection Law¹¹

(1) It is prohibited to deliberately kill or capture wild animals of the species listed in Annex IV, part a, of the Habitats Directive, Annex II of the Bern Convention or Annex I of the Bonn Convention, with the exception of the species referred to in Article 1 of the Birds Directive, in their natural range.

(2) It is prohibited to deliberately disturb animals referred to in subsection 1.

(3) It is prohibited to deliberately destroy or collect eggs from animals as referred to in paragraph 1 in the wild.

(4) It is prohibited to damage or destroy the breeding sites or resting places of animals referred to in paragraph 1.

(5) It is be prohibited to deliberately pick and collect, cut, uproot or destroy plants of species listed in Annex IV(b) to the Habitats Directive or Annex I to the Bern Convention, within their natural range.

Article 3.6 Nature Protection Law¹²

(1) It is prohibited to keep for sale, transport for sale, trade, exchange or offer for sale or exchange animals or plants of species listed in Annex IV of the Habitat Directive, Annex I or II of the Bern Convention or Annex I of the Bonn Convention, with the exception of the species referred to in Article 1 of the Birds Directive.

(2) It is prohibited to have in one's possession or to transport animals or plants as referred to in subsection 1, other than for sale.

Birds Directive

Article 5 of the Birds Directive has been transposed by the Article 3.1 of the Dutch Nature Protection Law. The transposing provisions of the Dutch Nature Protection Law stay very close to the wording of the species protection provisions in the Birds Directive, and have equivalent legal effect.

¹¹ *Wet Natuurbescherming, 2017, 1 January, Stb. 2016, 34, last amended 1 July 2018, Stb. 2018, 142.*

¹² *Wet Natuurbescherming, 2017, 1 January, Stb. 2016, 34, last amended 1 July 2018, Stb. 2018, 142.*

Article 3.1 Nature Protection Law¹³

(1) It is prohibited to deliberately kill or capture birds of the species referred to in Article 1 of the Birds Directive that occur naturally in the wild in the Netherlands

(2) It is prohibited to deliberately destroy or damage nests, resting places and eggs of birds as referred to in subsection 1 or to remove nests of birds.

(3) It is prohibited to take eggs from birds referred to in paragraph 1 and to keep them.

(4) It is prohibited to deliberately disturb birds as referred to in subsection 1.

(5) The prohibition referred to in subsection 4 shall not apply if the disturbance does not significantly affect the conservation status of the bird species concerned.

While the prohibition to deliberately disturb birds does not include a reference to ‘...particularly during the period of breeding and rearing, in so far as the disturbance would be significant having regard to the objectives of this Directive’, it is considered that the transposition is effective.

Article 3.2 (6) Nature Protection Law¹⁴

(6) It is prohibited to keep or transport birds, parts or products referred to in the first paragraph, other than for sale, unless these birds, parts or products can be shown to have been killed or captured, or obtained, in accordance with the provisions of or pursuant to this Act.

Paragraph 1 of Article 3.2 to which paragraph 6 refers, prohibits the sale, transport, keeping or offering of birds as mentioned in Article 1 of the Birds Directive. Therefore, paragraph 6 also refers to birds as defined in Article 1 of the Birds Directive, meaning all species of naturally occurring birds in the wild in the Netherlands.

The Nature Protection Law and various other laws will be brought together into a new comprehensive Environmental Law, which is currently expected to enter into force on 1 January 2023. The aim of this law is to simplify and bring together rules related to spatial planning and environmental protection, in one Act. The current provisions of the Nature Protection Law related to species protection are expected to be integrated with the new Environmental Law.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

2.2.1 CAP cross-compliance conditions

There are no cross-compliance requirements pursuant to CAP Regulation No.1306/2013 Article 93 (as amended), making reference specifically to species protection rules in the Netherlands. Cross-compliance conditions have been enacted with regard to other provisions in the Nature Protection Law, such as conservation obligations in Natura 2000 areas as prescribed in Articles 3 and 4 of the Birds Directive and Article 6 of the Habitats Directive, but conditionality of CAP payments upon compliance with the species protection rules has not been implemented in the Netherlands.

One other cross-compliance condition is indirectly relevant in this respect, which is the prohibition of trimming hedges and trees during birds’ breeding period (GAEC 7)¹⁵. This is provided in the implementation decree regarding direct CAP payments, in the Annex to Article 3.1 providing the cross-compliance conditions pursuant to Article 93(1) of the CAP Regulation No.1306/2013:

¹³ *Wet Natuurbescherming, 2017, 1 January, Stb. 2016, 34.*

¹⁴ *Wet Natuurbescherming, 2017, 1 January, Stb. 2016, 34.*

¹⁵ GAEC 7, Landscape, minimum level of maintenance, Annex II Regulation (EU) 1306/2013.

§ 6. Retention of landscape features, including, where appropriate, hedges, ponds, ditches, rows of trees, groups of trees or isolated trees, field margins and terraces and including the prohibition to cut hedges and trees during the bird breeding period and, as an option, measures to prevent invasive plant species:

A. The farmer shall comply with the following provisions

1°. the Articles 4.2 and 4.3, first and second paragraphs, of the Nature Protection Law, and

2°. the rules laid down, if necessary, by the relevant Provincial States pursuant to Article 4.3, third paragraph.

B. It is prohibited to trim hedges and trees in the period from 15 March to 15 July inclusive and in the event that birds nest in hedges or trees outside of this period.¹⁶

The Articles 4.2 and 4.3 of the Nature Protection Law to which the above provision refers relate to the prohibition to cut down trees without prior notice to the provincial executive, and obligations with regard to the replanting of trees after cutting down trees with permission.

As hedges and trees, ponds, ditches, field margins and terraces form an important habitat and breeding space for birds and other protected species, this cross-compliance condition may be considered relevant especially in view of the prohibition of deliberate disturbance of birds, particularly in the breeding period.

2.2.2 Environmental Impact Regulations

In the Netherlands, the Environmental Impact Assessment Directive (Directive 85/337/EEC) is implemented by the Environmental Management Act (*Wet Milieubeheer*) and the Environmental Impact Assessment Decree (*Besluit m.e.r.*). The Environmental Impact Assessment Decree determines for which activities an Environmental Impact assessment is required in the Netherlands. An Environmental Impact Assessment is required:

For *plans* in cases where:

- a plan sets the framework for future decisions about activities in an area for which an Environmental Impact Assessment is required; or
- the developments indicated in the plan possibly lead to significant consequences for Natura 2000 areas on the basis of which an ‘appropriate assessment’ is required pursuant to the Nature Protection Law.

For *projects* in cases where:

- the activity is included in column 1 of part C of the Environmental Impact Assessment Decree; and
- the size thresholds of column 2 of part C is met; and
- a Decision as meant in column 4 of part C is required¹⁷.

The main activity relevant to agriculture which is included in the C-list indicated above, is ‘*The establishment, change or expansion of an installation for the breeding, fertilizing or keeping of poultry or pigs*’ in cases where the activity relates to more than: 85,000 broilers, 60,000 chickens, 3,000 pigs or 900 sows¹⁸. Hence, an Environmental Impact Assessment will only be required for a limited number of significant (agricultural) developments or significant plans in the vicinity of a Natura 2000 area.

¹⁶ *Uitvoeringsregeling rechtstreekse betalingen GLB*, Annex 4 to Article 3.1, § 6.

¹⁷ Factsheet MER, ‘*Milieueffectrapportage in een notendop*’, Commission for the Environmental Impact Assessment, June 2020.

¹⁸ Environmental Impact Assessment Decree (*Besluit m.e.r.*), Part C, C.14, Stb. 2010/197.

No specific link to species protection rules is made by the Dutch legislation implementing the Environmental Impact Assessment Directive. A link that can be made is that for most species in the Netherlands, conservation obligations from Articles 4 of the Birds Directive and 6 of the Habitats Directive are implemented by designating Natura 2000 areas and by designation as part of the Dutch Nature Network (Natuurnetwerk Nederland)¹⁹. Natura 2000 areas are designated for the protection of certain species by virtue of their function, for example as resting, foraging or breeding area of protected species. Regardless of meeting the EIA thresholds, authorities may not grant a permit for spatial developments, including agricultural developments such as the expansion of stables on agricultural land, which would potentially have a significant effect on such designated areas, without conducting a nature screening²⁰. In case negative impact on protected species in protected nature areas is likely, which may be determined by permit applicants and the permitting authorities with the help of an online routeplanner²¹, the permit applicant must either apply for a separate environmental permit under the Nature Protection Law, or a nature screening can be conducted as part of the permit application process. In the nature screening, it is assessed whether the project, alone or together with other plans or projects, could have significant consequences for protected species and habitat types in a Natura 2000 or other protected area. Such preliminary screening also includes a determination of whether protected species are present on location of the intended development. If protected species might be present, which for agricultural developments is often the case for bats, likely impact on those protected species must also be assessed as part of the screening²². If potential significant consequences for protected species or a protected nature area are detected, an in-depth assessment must be conducted to analyse the consequences for the protected area or species. A permit may only be granted if the in-depth assessment demonstrates with certainty that the plan or project will not damage the natural qualities of the protected area. When such areas are designated conservation areas due to the presence of protected species, this assessment will concentrate on impacts on protected species. As a result, measures to ensure species protection may form a condition for approval of the planned (agricultural) development, thereby indirectly contributing to compliance with the species protection rules in the Articles 5 Birds Directive and 12 and 13 Habitats Directive (such as the prevention of deliberate disturbance).

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL UNDER THIS LEGISLATION

No specific legal obligations on species protection exist which are applicable at farm level, other than the generic species protection rules indicated under section 2.1 above, which also apply to everyday agricultural activities, and CAP payments indicated under section 3.2 below.

Article 3.31 (1) of the Nature Protection Law does provide for derogations from the species protection rules in Articles 3.1, 3.5 and 3.6 of the Nature Protection Law, for specific regulated activities, including for land management in the agricultural sector, by way of a code of conduct:

Article 3.31 (1) Nature Protection Law

The prohibitions referred to in Articles 3.1, 3.2(6), 3.5, 3.6(2) or 3.10, and the notification obligation pursuant to Article 3.11(1), do not apply to actions described and demonstrably performed in accordance with a code of conduct approved by Our Minister, which actions take place within the framework of:

¹⁹ H. Dotinga, K. Bastmeijer, A. Trouwborst et. al., *De Juridische Bescherming van Boerenlandvogels*, Vogelbescherming Nederland, VMR 2019-1, p. 102.

²⁰ Nature Protection Law (*Wet natuurbescherming*), Article 2.7 – 2.9, 1 January 2017, Stb. 2016, 34, last amended on 4 February 2021, Stb. 2021, 71.

²¹ Routeplanner Protected Nature within the environmental permit (*Routeplanner beschermde natuur binnen de omgevingsvergunning*), available at: <https://www.synbiosys.alterra.nl/bij12/routeplanner.aspx#:~:text=Deze%20routeplanner%20is%20bedoeld%20voor,de%20gemeente%20en%20de%20provincie>.

²² Interview on 10 June 2020 with representative of the Dutch association of agriculture and horticulture (LTO).

- a. *the voluntary management or maintenance of waterways, watercourses, dykes, water defence works, banks, airfields, roads, railways or verges, or within the framework of nature conservation;*
- b. *an operational management or maintenance in agriculture or forestry;*
- c. *an intended use, or*
- c. *spatial development or planning*²³.

Such codes of conduct must comply with the following requirements as provided for in the second subsection of Article 3.31, which ensure that derogations in the form of a code of conduct comply with EU species protection law:

Article 3.31 (2) Nature Protection Law

(2) A code of conduct as referred to in subsection 1 will only be approved if each of the following conditions is complied with:

- a. *the code of conduct describes actions which are required for:*

1°.in the case of operations which may affect birds, one of the reasons referred to in Article 3.3, fourth paragraph;

2°.in case of operations which may affect animals as referred to in Article 3.5, first paragraph, one of the reasons set forth in Article 3.8, fifth paragraph

[...]

- b. *The Code of Conduct describes a method of performing activities which, in the opinion of Our Minister, adequately safeguards that no exploitation or economic gain shall take place in respect of the species referred to in Article 3.1, Article 3.5(1) or (5) or Article 3.10(1);*

- c. *the Code of Conduct describes a method of performing activities which, in the opinion of Our Minister, adequately guarantees that the species referred to in Articles 3.1, 3.5(1) or 3.5(5), or 3.10(1) are treated with due care.*

Hence, Article 3.31(2) stipulates that codes of conduct may only serve to provide a derogation from the species protection rules under the conditions prescribed in Article 3.3(4) and 3.8(5), which are the same as the conditions for derogations under the Birds and Habitats Directives, Articles 9 and 16 respectively (no satisfactory solution and the exemption or derogation is necessary in the interest of public health; safety; air traffic safety; to prevent material damage to crops, cattle, forests, fisheries or waters; to protect flora and fauna, for research or education, certain conservation experiments; and the measures may not lead to deterioration of the state of conservation of the species in question),

Article 3.31(3) of the Nature Protection Law provides certain guidelines for when ‘due care’ under Article 3.31, subsection 2 is deemed to have been respected:

Article 3.31(3) Nature Protection Law

3 Acting with due care as referred to in subsection 2(c) of Article 3.31 shall in any case be deemed to have taken place if the following conditions have been met:

- a. *activities are only carried out in such a way that no significant impact is made on the species referred to in subsection 2, and*

- b. *if actions are undertaken which affect animals, everything is reasonably done or left in place prior to and during the actions to prevent or limit as much as possible that:*

²³ Nature Protection Law (*Wet natuurbescherming*), Article 3.31, 1 January 2017, Stb. 2016, 34, last amended on 1 January 2019, Stb. 2018, 487.

1°.animals as referred to in Article 3.1, 3.5, first paragraph, or 3.10, first paragraph, are killed

2°.nests of birds are destroyed, damaged or removed, resting places of birds are destroyed or damaged, or breeding places or resting places of the animals referred to in Article 3.5, first paragraph, or Article 3.10, first paragraph, are damaged or destroyed, and

3°.eggs of animals as referred to in Article 3.1, Article 3.5(1) or Article 3.10(1) are destroyed, or

c. in the event that actions are performed which affect plants of species as referred to in Article 3.5(5) or 3.10(1), prior to and during the actions, everything is reasonably done or left in place to prevent these plants from being plucked, cut, uprooted or destroyed.

Hence, pursuant to Article 3.31(2) and (3) of the Nature Protection Law, providing the conditions for derogations, certain activities may benefit from derogation from the species protection rules only if they (i) are necessary for the protection of certain interests as specified in the Nature Protection law and taken over from the EU Nature Directives; (ii) if they do not lead to deterioration of the state of conservation of the protected species; and (iii) certain guidelines as prescribed in the behavioural code are observed which prevent exploitation of the protected species and ensure they are treated with due care.

Such codes of conduct are set up and adhered to on a voluntary basis by the relevant industry or sector, and have to be approved by the Minister of Agriculture, Nature and Food²⁴. Codes of conduct have been set up by provinces, municipalities, the Dutch Water Authorities²⁵ and the forestry sector, but not by the agricultural sector. This is remarkable, since Article 3.31 of the Nature Protection Law specifically provides for the development of a code of conduct for the agricultural sector, and the Dutch Ministry of Agriculture, Nature and Food and the Dutch Agriculture and Horticulture Associations have explicitly called for the development of a code of conduct for the agricultural sector²⁶.

Codes of conduct linked to species protection rules

Certain specific, circumscribed activities in particular sectors which are performed on the basis of an approved code of conduct may benefit from a derogation from the prohibitions contained in the species protection rules, Articles 3.1, 3.2 and 3.6, provided that they comply with the conditions as set out in Articles 3.31(2) and 3.31(3) of the Nature Protection Law and reflect the conditions for exemptions in the Nature Directives. This includes mainly management and maintenance activities in the relevant sector, such as maintenance of waterways, roadside land strips, dikes, parks and forest. For example, the codes of conduct set rules about mowing, trimming, dredging, maintenance inspections, flooding and traffic movements. Codes of conduct also set rules and procedures for works to ensure optimal conservation of the species present on the relevant site, including an obligatory screening of protected species, data sharing with the National Database on Flora and Fauna and the creation of and adherence to an ecologic working protocol for the execution of works. Adherence to the strict and detailed rules laid down in the code of conduct are a condition for being able to use the exemptions from the species protection rules for the intended management activities. The code of conduct which was established by the Dutch Water Authorities is adhered to voluntarily by some farmers' collectives and therefore forms an indication for farmers of best practices in relation to

²⁴ Explanatory Memorandum to the Nature Protection Law, TK 2011-2012, 33 348, nr. 3.

²⁵ Code of conduct of the Dutch Water Authority, Ministry of Infrastructure and Environment, *Wet Natuurbescherming - Gedragscode Soortenbescherming Rijkswaterstaat*, May 2015, available at: <https://www.rvo.nl/sites/default/files/2020/06/Gedragscode%20soortenbescherming%20Rijkswaterstaat.pdf>.

²⁶ Interview on 10 June 2020 with representative of the Dutch association of agriculture and horticulture (LTO), H. Dotinga, K. Bastmeijer, A. Trouwborst et. al., *De Juridische Bescherming van Boerenlandvogels*, Vogelbescherming Nederland, VMR 2019-1, p. 101.

species protection and land management. The code of conduct of the Dutch Water Authority provides for measures to ensure ‘careful management’ with regard to the species protected by the Birds and Habitats Directives. It contains an overview indicating per type of protected species the measures which can be taken to prevent violations of the prohibitions in the species protection provisions or limit damage to protected species or their habitats through the envisioned conduct which is exempted on the basis of the interests as stipulated on the basis of Article 3.31(2) and explained above, prioritised based on level of effectiveness. In case it is not possible to avoid conduct which might harm or disturb protected species, their habitats and nesting places in line with the species protection prohibitions, compensating or limiting measures are required to minimise the impact on protected species and their habitats and the activities may in any case not have a material impact on the protected species.²⁷ An ecological expert is appointed to advise contractors executing the works concerned which measures must be prioritised on the condition that it is effective for the species that are present. This is laid down in a working protocol. If certain measures are not possible or not effective, this must be explained in the working protocol. The Water Authority ensures compliance with the working protocol through audits, following which the working process may be adapted to better comply with species protection requirements.

²⁷ *Article 3.31(3) (a) of the Nature Protection Law.*

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

3.1 GOVERNMENT AND NON-GOVERNMENT ADVISORY SERVICES

There are no government CAP advisory services, advisory services to assess eligibility for different types of payments are mainly offered by private parties. Provision is made for farm CAP advisory Services in the Dutch legislation implementing CAP Regulation 1306/2013 through the possibility for the Minister to appoint a private advisory organisation to advise farmers upon request. The Dutch Agriculture and Horticulture Association (*Land en Tuinbouworganisatie Nederland* (LTO)) also provides advisory services in relation to cross-compliance requirements for the CAP, but there are no specific cross-compliance conditions making reference to species protection rules. Furthermore, the Netherlands Enterprise Agency provides information on cross-compliance conditions on its website and has a service that may be contacted in case of questions²⁸.

Regional Environmental Services, which are semi-public agencies, advise citizens and undertakings (including agricultural undertakings) regarding environmental permits required for certain spatial developments (for example developments of stables), for which an exemption from the species protection rules under the Nature Protection Law may need to be applied for with the Provincial executive²⁹.

In the context of entry into force of the Nature Protection Law and the resulting decentralisation of a wide range of competences from the national level to the provincial executive, the provinces set up an online interprovincial knowledge sharing and information exchange platform regarding management of the natural environment: *Bij12* (referring to the 12 provinces of the Netherlands)³⁰. This platform supports provinces in their executive tasks, including the enforcement of species protection rules, and facilitates information exchange about nature management and subsidies. The platform is freely accessible to all and contains a broad range of relevant information on nature management and species protection, also available to farmers.

Civil society, including NGOs, agricultural nature associations and volunteers are actively involved in sharing knowledge on best practices with farmers through events, flyers, newsletters and online information. The organisation *Boerennatuur* (Farmer's Nature) acts as an intermediary for knowledge exchange on flora, fauna and nature between farming collectives, as well as between knowledge institutes and farming collectives. It organises knowledge exchange circles around the different agricultural habitats (open grassland, open arable land, wet marshland and dry marshland), as well as a yearly Farmer's Nature day to share experiences and the latest knowledge on nature and agriculture through the various workshops and lectures offered. In addition, Farmer's Nature provides information on agrarian nature management and nature inclusive farming on its website³¹ and local farmers' collectives provide information on sustainable farming in the context of available ANLb subsidy programmes in which they have a management task³², as further explained under 2.2.1 above.

In interviews with species protection organisations and the Dutch agricultural branche association (LTO) it was indicated that farmers are generally aware of the main species protection rules and of the most important protectional safeguards, given that the species protection rules have been in place for a

²⁸ See the RVO webpage on cross-compliance conditions.

²⁹ See <https://www.omgevingsdienst.nl/>.

³⁰ See <https://www.bij12.nl/>.

³¹ See: <https://www.boerennatuur.nl/wat-doen-we/agrarisch-natuur-en-landschapsbeheer/>.

³² See for example information on the website of the farmer's collective of the Province of Drenthe: <https://agrarischenatuurdrenthe.nl/>.

long time and that there is close cooperation and involvement with the organisation Farmer's Nature³³. However, it is noted that implementation of protectional measures, although information is proactively made available and distributed through Farmer's Nature, continues to mainly depend on farmers' voluntary efforts, given that monitoring and enforcement levels are low³⁴.

The Dutch Nature Protection Law was enacted in 2017, but previously, partially stricter species protection rules under the old Flora and Fauna Law (*Flora en Faunawet*) had been in force in the Netherlands for a longer period of time. Therefore, farmers are overall found to have a relatively good awareness about their obligations with regard to species protection under the generic provisions in the Nature Protection Law³⁵.

Information which helps farmers contribute to the protection of species and habitats, in part specifically addressed to farmers, is furthermore available on websites of RVO, provinces, funding bureaus and NGOs. RVO, for example, provides an explanation of the Nature Protection Law, division of enforcement competences between the national level and provincial level and brief explanation of the permitting system and where to apply for permits on its dedicated website³⁶ where there is a webpage³⁷ on protected animals for agrarian entrepreneurs, providing a brief overview of the protection regime of the Nature Protection Law. RVO also provides an overview³⁸ with links to the various public databases which provide information on protected species in the Netherlands, such as the species database³⁹, providing information about wild species in the Netherlands and their protection regime; the species register⁴⁰, providing detailed information on species found in the Netherlands and whether they are indigenous, introduced or expected; and the National Database on Flora and Fauna⁴¹, providing detailed information on spatial occurrence of animals and plants in the Netherlands which is available on subscription to companies and governments. The Dutch national office managing programmes funded through the EAFRD manages a platform for agrarian entrepreneurs, government officials and stakeholders in rural development which provides ample information for farmers on sustainable farming and nature management, such as a webpage on biodiversity and sustainable farming⁴². NGOs also provide information on protected species and the measures farmers may take to stimulate conservation⁴³.

3.2 WIDER CAP CONTEXT FOR ADVICE ON SPECIES PROTECTION

Moreover, similarly under the first CAP Pillar of income support, the implementation of sustainable land use measures are a requirement for receipt of direct payments under the CAP, for some farmers. Sustainable land use measures ('greening requirements') consist of three main measures for these farmers, which each need to be implemented:

(a) crop diversification; (b) maintenance of existing grassland; and (c) the obligation to manage 5 % of the land as an Ecological Focus Area (EFA)⁴⁴. With regard to the latter obligation, the Netherlands has chosen a package of measures which make it attractive for farmers to opt for catch crops to comply with

³³ Interview on 11 June 2021 with representative of *RAVON*, the Dutch foundation for the protection of reptiles, amphibians and fish, Interview on 10 June 2020 with representative of the Dutch association of agriculture and horticulture (*LTO*), Interview on 10 June with representative of *Vogelbescherming*, the Dutch Birds Association.

³⁴ Interview on 10 June with representative of *Vogelbescherming*, the Dutch Birds Association.

³⁵ Interview on 11 June 2021 with representative of *RAVON*, the Dutch foundation for the protection of reptiles, amphibians and fish, Interview on 10 June 2020 with representative of the Dutch association of agriculture and horticulture (*LTO*), Interview on 10 June with representative of *Vogelbescherming*, the Dutch Birds Association.

³⁶ See: <https://www.rvo.nl/onderwerpen/agrarisch-ondernemen/beschermde-planten-dieren-en-natuur/wet-natuurbescherming>.

³⁷ See: <https://www.rvo.nl/onderwerpen/agrarisch-ondernemen/beschermde-planten-dieren-en-natuur/beschermde-dieren>.

³⁸ See: <https://www.rvo.nl/onderwerpen/agrarisch-ondernemen/beschermde-planten-dieren-en-natuur/ruimtelijke-ingrepen/beschermde-soorten>.

³⁹ See: <http://minez.nederlandsesoorten.nl/soorten>.

⁴⁰ See: <http://www.nederlandsesoorten.nl/>.

⁴¹ See: <http://www.ndff.nl/>.

⁴² See: <https://www.netwerkplatteland.nl/inspiratieverhalen/agrarisch-natuurbeheer-en-biodiversiteit>.

⁴³ See for example the website of the Netherlands Birds Association on birds species occurring on Dutch farmland: <https://www.vogelbescherming.nl/bescherming/wat-wij-doen/onze-boerenlandvogels> and the website of the association for reptiles, amphibians and fish providing information on occurrence of species and conservation: <https://www.ravon.nl/>.

⁴⁴ Regulation (EU) 1307/2013, Article 43 (1) and (2), 44, 45 and 46.

this obligation, which is not conducive to farmland birds⁴⁵. An alternative package of optional land use measures made available in the Netherlands to meet the greening requirements under Article 43(3) of Regulation (EU) 1307/2013 includes measures for the protection of farmland birds, encouraging the maintenance of strips of land at the edges of farmland and certification packages for the skylark, but farmers do not often make use of this package⁴⁶. The latter package encourages compliance with the species protection provisions in the Birds Directive, in particular the prohibition of damaging nests, resting places and eggs of birds and the prohibition of deliberately disturbing birds (implemented in the Articles 3.1(2), 3.1(4) and 3.1(5) of the Nature Protection Law).

Under the second CAP pillar, each province in the Netherlands has created its own rural development programme as part of the Dutch national Rural Development Programme (POP3), under which measures to enhance rural developments are financed from the EU agricultural fund for rural development (EAFRD) in combination with funds from the provinces⁴⁷. The rural developments achieved under the national rural development programme are meant to contribute to a new system of agricultural nature management, focusing on stimulation of innovation, sustainability, competitiveness, enhancing nature and landscape and improving water quality⁴⁸. However it is criticised for a lack of funding to make a real difference for the decline of protected species⁴⁹.

Sustainable land management is further stimulated by provincial agrarian nature management policy (ANLb)⁵⁰. This was introduced in the Netherlands in 2016 and focuses on collective, area-based management based on contracts between individual farmers and farmers' collectives which have a supervisory task of managing these subsidies in cooperation with provinces. Such provincial subsidies, such as SNL⁵¹ and SKNL⁵² are co-financed by the EAFRD and stimulate sustainable land management for the maintenance of specific habitats, based on provincial nature management plans. It connects conservation areas and takes a habitat-approach by focusing on the creation of habitats for species or groups of species that require similar management. Subsidies are granted for four different types of agrarian habitats: open grassland, open farmland, dry and wet interlacing. The ANLb subsidy system for sustainable land management has shown potential when it comes to making farmland greener and maintaining important habitats when well managed by agricultural collectives; however, currently the surface area of farmland subject to management under such agricultural nature management subsidy packages is only approximately 5 % of the total farmland surface area in the Netherlands, and therefore its impact can only be limited⁵³. By enhancing rural development and the protection of habitats, indirectly these subsidies and schemes contribute to the observance of the species protection rules in the Birds and the Habitats Directives, but there is no direct link or reference. Through the protection of natural habitats, nesting and resting places, these sustainable agrarian nature management policies

⁴⁵ H. Dotinga, K. Bastmeijer, A. Trouwborst et. al., *De Juridische Bescherming van Boerenlandvogels*, Vogelbescherming Nederland, VMR 2019-1, p. 109.

⁴⁶ H. Dotinga, K. Bastmeijer, A. Trouwborst et. al., *De Juridische Bescherming van Boerenlandvogels*, Vogelbescherming Nederland, VMR 2019-1, p. 109.

⁴⁷ RVO, Roadmap Plattelandsontwikkelingsprogramma (POP3), available at: <https://www.rvo.nl/onderwerpen/agrarisch-ondernemen/glb/plattelandsontwikkelingsprogramma-pop3-wegwijzer>.

⁴⁸ RVO, Roadmap Plattelandsontwikkelingsprogramma (POP3), available at: <https://www.rvo.nl/onderwerpen/agrarisch-ondernemen/glb/plattelandsontwikkelingsprogramma-pop3-wegwijzerH>.

⁴⁹ H. Dotinga, K. Bastmeijer, A. Trouwborst et. al., *De Juridische Bescherming van Boerenlandvogels*, Vogelbescherming Nederland, VMR 2019-1, p. 110.

⁵⁰ Bij12, Provincial cooperation platform, *Het Agrarisch Natuurbeheer (ANLb)*, available at: <https://www.bij12.nl/onderwerpen/natuur-en-landschap/subsidiestelsel-natuur-en-landschap/agrarisch-natuurbeheer-anlb/>.

⁵¹ SVNL, Nature Management Subsidy for protected areas under the Nature Network Netherlands (designated by the Provinces), based on the provincial nature management plans. See <https://www.bij12.nl/onderwerpen/natuur-en-landschap/subsidiestelsel-natuur-en-landschap/natuurbeheer/> for further information.

⁵² SKNL, Nature and Landscape Quality Impulse Subsidy (*Kwaliteitsimpuls natuur en landschap*), based on the provincial nature management plan. See <https://www.rvo.nl/subsidies-regelingen/kwaliteitsimpuls-natuur-en-landschap-skn> for further information.

⁵³ Interview on 11 June 2021 with representative of RAVON, the Dutch foundation for the protection of reptiles, amphibians and fish.

encourage compliance with the species protection provisions in the Birds and Habitats Directives, in particular the prohibition of damaging nests, resting places and eggs of birds; the prohibition of deliberately cutting, uprooting or destroying plants and the prohibition of deliberately disturbing animals (implemented in the Articles 3.1(2), 3.1(4), 3.1(5), 3.5(2), 3.5(3) and 3.5(5) of the Nature Protection Law).

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

Infringement of the species protection rules may be sanctioned with: (i) an administrative order pursuant to Article 7.2 of the Nature Protection Law; or (ii) a criminal sanction pursuant to Article 7.7 of the Nature Protection Law.

Although sanctions exist, there is no preset system of frequent controls regarding compliance with the species protection rules specifically, outside protected areas such as Natura 2000, neither in the agricultural sector nor in other sectors. Enforcement is incidental, based on notifications by citizens or nature protection organisations that species protection rules are being violated by farmers. It is difficult to establish liability in these cases since the burden of proof lies with the claimant and, in order to have access to farmland, a formal authorisation from the farmer is required, which is another reason why enforcement is low. No aggregated statistics on enforcement regarding species protection obligations were found. Sanctioned instances of non-compliance with environmental legislation, including violations of species protection rules under the Nature Directives, are not generally publicly available. However, information on sanctions may be requested from the competent authorities, in the case of species protection legislation the NVWA and RVO, as explained below, based on the Open Government Act⁵⁴. Individual judgments regarding environmental crimes from various courts can be found on the website of the Dutch judiciary, which is searchable by topic⁵⁵.

With regard to compliance with the requirements of CAP direct payments and various available sustainable land-use subsidies, monitoring occurs more frequently. The Dutch subsidy system for landscape and agricultural nature management (ANLb) is managed and enforced by the provinces. The subsidy is conditional on the implementation of management measures to create and maintain habitats for species requiring similar management. The agricultural nature management subsidies under the ANLb are applied for by farmers' collectives, which are a voluntary cooperation between agrarians and other land users in a particular area⁵⁶. The farmers' collectives conclude contracts with individual farmers regarding nature and landscape management under the subsidy package applied for and also play an important role in ensuring the subsidy package's requirements are complied with⁵⁷.

In addition, the Dutch food and consumer product safety authority (*Nederlandse Voedsel en Waren Autoriteit* (NVWA)) exercises certain competences in the enforcement of derogations from the species protection rules in relation to nature management on the basis of the Agrarian Nature and Landscape Management ('Agrarisch Natuur en Landschapsbeheer' (ANLb)). The NVWA monitors compliance and enforces obligations with regard to nature management under ANLb subsidy packages. The NVWA also conducts periodical field controls on the spot⁵⁸. Furthermore, RVO contributes to compliance with the species protection rules through a dedicated enforcement team which works on the basis of a risk- and target-based compliance programme. The RVO compliance team works with education, enforcement communication, project visits, administrative controls and correctional discussions. In case administrative sanctions are required, RVO makes use of competent officials of the Dutch Food and Consumer Product Safety Authority⁵⁹.

⁵⁴ *Wet Openbaarheid van Bestuur* (Open Government Act), Stb. 1991, 703, last amended 25-20-2021, Stb. 2021, 499, available at: <https://wetten.overheid.nl/jci1.3:c:BWBR0005252&z=2018-07-28&g=2018-07-28>.

⁵⁵ Website [De Rechtspraak](https://www.bij12.nl/onderwerpen/natuur-en-landschap/subsidiestelsel-natuur-en-landschap/agrarisch-natuurbeheer-anlb/).

⁵⁶ <https://www.bij12.nl/onderwerpen/natuur-en-landschap/subsidiestelsel-natuur-en-landschap/agrarisch-natuurbeheer-anlb/>

⁵⁷ Interview on 11 June 2021 with representative of RAVON, the Dutch foundation for the protection of reptiles, amphibians and fish.

⁵⁸ Interview on 10 June with representative of Vogelbescherming, the Dutch Birds Association.

⁵⁹ Interview on 9 June with specialist on Dutch Public Law, the Nature Protection Law, the Birds and Habitats Directive.

Since enforcement levels with regard to species protection rules are low, in practice compliance levels with species protection rules in the agricultural sector are not expected to be high and are perceived to have a voluntary nature⁶⁰.

Farmers wanting to actively engage in species protection, for instance by adapting their mowing, ploughing or harvesting activities to breeding seasons, may do so, but the chance of sanctions for failure to take species protection rules and best practices into account is low, due to low levels of monitoring and enforcement regarding the species protection obligations as contained in the Nature Directives.

Infringement of the species protection rules may be sanctioned with: (i) an administrative order pursuant to Article 7.2 of the Nature Protection Law; or (ii) a criminal sanction pursuant to Article 7.7 of the Nature Protection Law. In practice, sanctioning is very infrequent, which might be a result of the lack of specific rules enabling targeted controls, in combination with the difficulty of obtaining evidence to prove infringements due to a lack of a monitoring system⁶¹. The regional environmental services, which are involved in enforcement and advice on permits including nature permits, have no data in their reports available on species protection, which demonstrates the lack of enforcement in this area⁶².

⁶⁰ Interview on 11 June 2021 with representative of RAVON, the Dutch foundation for the protection of reptiles, amphibians and fish, Interview on 10 June 2020 with representative of the Dutch association of agriculture and horticulture (LTO).

⁶¹ Interview on 10 June with representative of Vogelbescherming, the Dutch Birds Association.

⁶² Interview on 9 June with specialist on Dutch Public Law, the Nature Protection Law, the Birds and Habitats Directive.

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

Besides the appropriate assessment of potential impacts on Natura 2000 sites and developments in general which require an Environmental Impact Assessment pursuant to Directive 2014/52/EU which are indicated under 2.2.2 above, protection of breeding and resting places of protected species is impacted by spatial planning legislation. Provinces have enacted habitat protection legislation through provincial regulations, both within and outside the Dutch Nature Network. Such provincial regulations must be observed by municipal spatial plans and land management regulations. For spatial developments which require a municipal environmental permit, which may include agricultural developments such as the construction of stables or the expansion of land, an exemption pursuant to the Nature Protection Law may be required. Environmental permits are applied for with the local municipality.

In the situation where an intended spatial development may pose a risk of damage to protected species, municipalities must obtain an authorisation from the provincial executive, which will be granted on the basis of a nature screening assessing the impact on protected species and conservation areas⁶³. Provincial authorisation may be subject to taking measures to prevent the infringement of prohibitions under the Nature Protection Law, such as the requirement to wait until after the breeding season before cutting trees in which protected bird species are present, or adapting the order of working, using different tools or using a phased approach in maintenance works, allowing species to migrate and thus facilitating compliance with Article 5 BD and Article 12 and 13 BD⁶⁴.

Various tools have been developed on a national level for municipalities to determine whether provincial authorisation on the basis of the Nature Protection Law and further provincial nature protection legislation, is required, in case a planned development potentially violates Articles 3.1, 3.2, 3.5 and 3.6 of the Nature Protection Law implementing the species protection rules from the Nature Directives. Such tools, such as the ‘Roadmap protected nature within the environmental permit’⁶⁵, ‘species effects indicator’⁶⁶ and the brochure ‘species protection in spatial developments’⁶⁷ are publicly available and therefore also provide information to citizens and undertakings regarding potential impacts of projects. The ‘Roadmap protected nature within the environmental permit’ has been developed for applicants and local government officials to determine whether a provincial nature screening is required for the granting of an environmental permit for a spatial development. The ‘Species effects indicator’⁶⁸ provides information to potential permit applicants and permit granting authorities on what impact on locally occurring protected species certain intended activities requiring a permit might have. The Ministry of Economic Affairs’ brochure ‘species protection in spatial developments’ provides information on the procedure ensuring species protection in planned spatial developments in the Netherlands, the provincial nature screening and cooperation between municipalities and provinces in this process⁶⁹, which contains

⁶³ Ministry of Economic Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at: http://www.natuurindegemeente.nl/aandeslagmetdenatuurwet/wp-content/uploads/2016/12/Soortenbescherming_bij_ruimtelijke_ingrepen_1.3_15122016.pdf.

⁶⁴ Ministry of Economic Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at: http://www.natuurindegemeente.nl/aandeslagmetdenatuurwet/wp-content/uploads/2016/12/Soortenbescherming_bij_ruimtelijke_ingrepen_1.3_15122016.pdf.

⁶⁵ See <https://www.synbiosys.alterra.nl/bij12/routeplanner.aspx>.

⁶⁶ See <https://www.synbiosys.alterra.nl/bij12/effectenindicatorsoortenappl2016.aspx?subj=soorten>.

⁶⁷ Ministry of Economic Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at: http://www.natuurindegemeente.nl/aandeslagmetdenatuurwet/wp-content/uploads/2016/12/Soortenbescherming_bij_ruimtelijke_ingrepen_1.3_15122016.pdf.

⁶⁸ <https://www.synbiosys.alterra.nl/bij12/effectenindicatorsoortenappl2016.aspx?subj=soorten>

⁶⁹ Ministry of Economic Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at: http://www.natuurindegemeente.nl/aandeslagmetdenatuurwet/wp-content/uploads/2016/12/Soortenbescherming_bij_ruimtelijke_ingrepen_1.3_15122016.pdf.

explicit reference to obligations under the species protection rules contained in Article 5 BD and Article 12 and 13 HD. For certain types of projects or spatial developments, fixed exemptions may exist in the form of a code of conduct, a programme or a provincial regulation. In this case, no provincial authorisation is required (regarding the exemption system pursuant to the Nature Protection Law and codes of conduct, see section 2.3).

As such, provinces set requirements for the protection of species upon which provincial approval of a municipal spatial plan depends. The requirements for developments outside the Dutch Nature Network are more lenient than for developments within the nature network. Provincial regulations ensure a certain level of species protection, through protection of their habitats such as hedges, grassland and wetlands. Moreover, provinces ensure that species protection prohibitions are observed in spatial developments through the obligatory nature screening of certain municipal environmental permits and the system of exemptions and derogations as explained under section 2.3. As part of the permitting procedure, in case protected species may be impacted it is considered whether measures could be taken which could prevent (through mitigation or compensation) the negative impact on the relevant protected species⁷⁰. Such measures may consist of changing the order of working, working with adapted tools and machines, a staggered approach of working spread over space and time, or measures which may neutralise the impact for affected population through restoration or improvement on another location⁷¹. The latter form of ‘compensation’ of impacts on protected species is criticised by nature organisations as not being sufficient to prevent impacts on certain protected species⁷².

⁷⁰ Ministry of Economic Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at: http://www.natuurindegemeente.nl/aandeslagmetdenatuurwet/wp-content/uploads/2016/12/Soortenbescherming_bij_ruimtelijke_ingrepen_1.3_15122016.pdf, p. 14.

⁷¹ Ministry of Economic Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at: http://www.natuurindegemeente.nl/aandeslagmetdenatuurwet/wp-content/uploads/2016/12/Soortenbescherming_bij_ruimtelijke_ingrepen_1.3_15122016.pdf, p. 14.

⁷² H. Dottinga, K. Bastmeijer, A. Trouwborst et. al., *De Juridische Bescherming van Boerenlandvogels*, Vogelbescherming Nederland, VMR 2019-1, p. 106.

6 OVERALL ASSESSMENT OF SPECIES PROTECTION ON AGRICULTURAL LAND

KEY FINDINGS (CHALLENGES & BEST PRACTICES)

6.1 TRANSPOSITION ISSUES

The species protection rules from the Nature Directives have been correctly transposed into Dutch legislation, using almost identical wording and with equivalent legal effect. There are no general derogations or exemptions from species protection rules applicable to agriculture. The system allowing derogations from species protection rules if activities are performed pursuant to a code of conduct appears to comply with the Nature Directives, because sufficient conditions seem to have been put in place for derogations to be specific and limited. The condition that a derogation may not lead to deterioration of the species' state of conservation is ensured by the guidelines in the codes of conduct.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- There is no specific legislation implementing species protection rules applicable at farm level other than the generic species protection rules transposing the relevant BD and HD provisions.
- Species-specific protection plans⁷³ exist which streamline various efforts in the area of spatial planning and sustainable agricultural management to protect specific bird species; however, these are criticised due to a limited budget and only focusing on certain high-profile species.
- No code of conduct has been set up by the agricultural sector, which could serve to create more specific rules and guidelines for agricultural activities to enhance species protection in the sector.

Specific agriculture or CAP cross-compliance conditions

There are no cross-compliance requirements pursuant to CAP rules making reference specifically to species protection legislation in the Netherlands (there are with regard to conservation obligations of Natura 2000) except for the prohibition of hedge trimming (GAEC 7)⁷⁴ during birds' breeding period. While it helps to prevent disturbance of birds and their nests, it is limited to bird species and CAP cross-compliance conditions in the Netherlands could be better designed to achieve further compliance with the species protection rules.

Other implementing or stimulating measures

Provincial agrarian nature management policy (ANLb)⁷⁵ provides financial incentives to stimulate collective, area-based sustainable land management based on contracts between individual farmers and farmers' collectives. Farmers' collectives have a supervisory task in managing these subsidies in cooperation with provinces. This has shown promise in maintaining specific habitats, but the spatial coverage is still limited. The level of cooperation between farmers' collectives, nature organisations, individual farmers and the government as a subsidy provider, which stimulates dissemination of information, understanding of species protection objectives and better adherence on a farm level, is

⁷³ Province of Overijssel, 'Actieplan weide- en akkervogels Overijssel 2018-2021', June 2018, p. 8; reference to decision making in the Inter-Provincial Consultation, committee vital farmland, early 2018.

⁷⁴ GAEC 7, Landscape, minimum level of maintenance, Annex II Regulation (EU) 1306/2013.

⁷⁵ Bij12, Provincial cooperation platform, *Het Agrarisch Natuurbeheer (ANLb)*, available at: <https://www.bij12.nl/onderwerpen/natuur-en-landschap/subsidiestelsel-natuur-en-landschap/agrarisch-natuurbeheer-anlb/>.

furthermore conducive to compliance with species protection rules. **(Best practice)**

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Government advisory services

- There are no government CAP advisory services, this has been delegated to private agencies which provide advisory services on request
- Information for farmers on species protection is made available online⁷⁶ and on request by the Dutch Agriculture and Horticulture Association (LTO) and the Netherlands Enterprise Agency (RVO) and an interprovincial knowledge platform BIJ12⁷⁷ facilitates information exchange about nature management, species protection and subsidies and is freely accessible to all.
- The wide range of information available online and through agricultural associations on sustainable land management and species protection makes it easier for farmers wanting to contribute to a better species protection system through sustainable farming, to do so. **(Best practice)**

Enforcement of species protection legislation

- Species protection rules are not effectively enforced in the Netherlands, monitoring and enforcement levels are low, there is no preset system of frequent controls regarding compliance with the species protection rules. Enforcement of species protection rules mainly occurs on the basis of complaints or notifications of infringements by citizens or civil society.
- The evidentiary burden creates a barrier to litigation against infringing farmers, which is unlikely to be successful. No information was found on the sanctioning of violations of species protection rules, although sanctions are technically possible. Due to low enforcement levels, in practice compliance with the species protection rules is perceived to have a voluntary nature.
- Monitoring and enforcement regarding compliance with CAP requirements and sustainable agriculture (ANLb) is higher and more effective.

6.4 ASSESSMENT AND AUTHORISATION PROCEDURES

EIA

- An Environmental Impact Assessment will only be required for a limited number of very significant (agricultural) developments or significant plans in the vicinity of a Natura 2000 area.
- No link to species protection rules is made by Dutch legislation implementing the EIA Directive, except when Natura 2000 areas are designated for the protection of certain species, in which case a preliminary nature screening is required before certain spatial developments.

Other authorisation procedures

- Municipal spatial planning procedures may require a nature screening to obtain an authorisation to carry out certain agricultural activities from the provincial executive to assess the impact on protected species and conservation areas, in case such impact is likely. This only applies to a limited number of agricultural spatial developments.
- Online tools⁷⁸ have been developed to determine whether a nature screening will be required and

⁷⁶ See the RVO webpage on cross-compliance conditions.

⁷⁷ See <https://www.bij12.nl/>.

⁷⁸ See <https://www.synbiosys.alterra.nl/bij12/routeplanner.aspx>; <https://www.synbiosys.alterra.nl/bij12/effectenindicatorsoortenappl2016.aspx?subj=soorten>; and Ministry of Economic

what the potential impact of protected species of a planned project is, which are accessible to citizens. **(Best practice)**

- Authorisation may be granted under the condition of taking measures to prevent the infringement of prohibitions under the Nature Protection Law, which can be related for instance to timing or order of the work and instruments used.

RECOMMENDATIONS

Legislative transposition measures of species protection rules:

- Enact sector-specific rules on species protection in agriculture, specifying required actions and omissions by species and activity, clarifying farmer's obligations in ensuring compliance with the species protection rules.

Preventive and implementing measures:

- Stimulate the creation of a code of conduct for the agricultural sector, following the example of provinces, municipalities, the Dutch Water Authorities⁷⁹ and the forestry sector, providing an example to farmers of best practices to encourage compliance with their obligations under the species protection rules.
- Stimulate the adoption of strict systems of species protection, covering all species affected by agriculture practices.
- Create more cross-compliance links with the CAP, making CAP payments conditional on compliance with the species protection prohibitions.

Public advisory and enforcement:

- Government advisory services carrying out targeted actions on species protection in agriculture could further stimulate compliance with species protection rules by farmers.
- Enhance monitoring and enforcement regarding species protection rules, consider keeping a record of sanctioning of nature-specific infringements.
- Consider linking species protection enforcement to existing more effective controls and sanctioning systems linked to CAP payments or provincial sustainable nature management subsidies (e.g. ANLb), making use of existing cooperation structures between farmer collectives, government authorities and farmers.

Authorisation and permits:

- Continue the use and development of widely accessible online tools to assess the potential impact of spatial developments on protected species, ensuring the authorisation procedure takes into account presence protected species and ensuring a high level of scrutiny.

Affairs, Soortenbescherming bij ruimtelijke ingrepen, December 2016, available at:

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⁷⁹ Code of conduct of the Dutch Water Authority, Ministry of Infrastructure and Environment, *Wet Natuurbescherming - Gedragscode Soortenbescherming Rijkswaterstaat*, May 2015, available at:

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Website of the Dutch Birds association, information on species protection: vogelbescherming.nl

RVO, Roadmap Plattelandsontwikkelingsprogramma (POP3): <https://www.rvo.nl/onderwerpen/agrarisch-ondernemen/glb/plattelandsontwikkelingsprogramma-pop3-wegwijzer>

SKNL, Nature and Landscape Quality Impulse Subsidy (*Kwaliteitsimpuls natuur en landschap*): <https://www.rvo.nl/subsidies-regelingen/kwaliteitsimpuls-natuur-en-landschap-skn>

Bij12, Provincial cooperation platform, *Het Agrarisch Natuurbeheer (ANLb)*: <https://www.bij12.nl/onderwerpen/natuur-en-landschap/subsiestelsel-natuur-en-landschap/agrarisch-natuurbeheer-anlb/>

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Interview on 10 June with representative of Vogelbescherming, the Dutch Birds Association

Interview on 10 June 2020 with representative of the Dutch association of agriculture and horticulture (LTO)

Interview on 11 June 2021 with representative of RAVON, the Dutch foundation for the protection of reptiles, amphibians and fish

Interview on 18 June with representative of the Dutch Ministry of Agriculture, Nature and Food

Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study *Poland*

ENV/2020/OP/0022



Stritih



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ABBREVIATIONS

ARMA	Agency for Restructuring and Modernisation of Agriculture
CAP	Common Agricultural Policy
EIA	Environmental Impact Assessment
GAEC	Good Agricultural and Environmental Conditions
MARD	Ministry of Agriculture and Rural Development
NGO	Non-governmental Organisation
RDP	Rural Development Programme
SMR	Statutory Management Requirements

1 INTRODUCTION

1.1 GOVERNANCE

In Poland, the Ministry of Agriculture is the principal administrative body supervising implementation of agricultural policy. The Ministry of Agriculture and Rural Development (MARD) is supported by the Agency for Restructuring and Modernisation of Agriculture (ARMA), which is responsible for the implementation of the Polish Rural Development Programme (RDP) and monitors compliance of farmers receiving support from the CAP with the relevant rules. Agricultural advisory centres at various levels of administration (central, regional and local) organise training sessions for farmers, including training with respect to biodiversity protection provisions of EU and national legislation. The Ministry of Climate and Environment is the highest governmental institution responsible for issues related to the protection of habitats and species across the country. The General Directorate for Environmental Protection is an executive institution subordinate to the Ministry of Environment. The Directorate supervises a network of 16 regional directorates for environmental protection which implement day-to-day activities in the area of protection of natural habitats and species, including administrative procedures of environmental impact assessment.

1.2 PROTECTED SPECIES

According to the agricultural classifications¹, **69%** of the species protected under Annex IV of the Habitats Directive, for which reported national **data is openly available** in Poland, are directly or indirectly dependent on agricultural habitats. Among the 98 Annex IV species dependent on agriculture which were identified in Poland, 23% are plants and 77% are animals. Among the animals, approximately 48% are mammals, 19% are butterflies, and 15% are amphibians. For **none of the wild bird species** protected under the Birds Directive that are linked to agricultural habitats is national data openly available.

According to the Monitoring of Birds of Poland project, the aggregate index of changes in the abundance of 22 species of farmland birds closely related to agricultural habitats since 2000 has shown a decrease of approximately 1% per year (an opposite trend has been observed with respect to forest birds)². A significant decreasing trend in the population (50% or more in the years 2000-2016) was registered for several species including Common whitethroat (*Sylvia communis*), Northern lapwing (*Vanellus vanellus*), Common linnet (*Linaria cannabina*), Western yellow wagtail (*Motacilla flava*), Eurasian skylark (*Alauda arvensis*) and Black-tailed godwit (*Limosa limosa*)³.

According to the General Directorate of Environmental Protection, agricultural activity poses a serious threat to species protection, especially for species with a narrow range of habitat tolerance and farmland-related biology. Increasing agricultural intensity and changing the agricultural model has a major impact on the conservation status of species associated with the agricultural landscape. The most damaging activities implemented by farmers include irrigation, mowing of grass and harvesting of agricultural plants (especially with the use of large agricultural machines), as well as the use of pesticides and other chemical substances. For example, Box 1 below provides information regarding agricultural threats to the European hamster.

¹ Article 12 and Article 17 species classification is based on the current State of Nature Report 2020 (EEA 2020). While the classification for Annex species relies on the definition from Halada et al., 2013 (only available for Article 17), the birds classification refers to the classification from the Common Bird Indicator classification for birds with ecological preferences for agriculture (CFaBI).

² Information from the State Forests website on [guidelines for bird protection](#).

³ Inspectorate for Environmental Protection, [Trends of abundance of birds in Poland](#), Library of Environmental Monitoring 2018.

Box 1 Agriculture-related threats to the European hamster

Despite the status of the European hamster (*Cricetus cricetus*) as a species protected under the Habitats Directive, in Poland there are no tools for controlling and protecting the hamsters and their habitats from the negative impact of agriculture. Needs arising from the biology of the species are not taken into account. Agrarian works are carried out to the detriment of this species, which is disappearing from the landscape at an alarming rate. The amount of herbicides and biocides used is not subject to any controls, which translates into a low survival rate of this species. The changing structure of Polish agriculture also has a negative impact on the European hamster. Small, diversified farms are disappearing in favour of large-scale monocultures (corn, rapeseed). The way of growing crops has also changed: the fields are ploughed immediately after harvesting cereals, therefore species such as the European hamster are not able to collect a sufficient amount of seeds to survive. Hamsters wake up during their winter sleep and feed. The lack of accumulated grain means starvation and death. Furthermore, deep ploughing is used, which destroys the hamsters' burrows.

Source: Interview with a representative of the Wild Poland Foundation

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

In Poland, plant and animal species listed in Annex IV of the Habitats Directive, and bird species are protected under the Nature Conservation Law⁴ and ordinances of the Minister of Environment⁵. The ordinances establish species under strict protection (with specification of species requiring active protection), species under partial protection (including those that may be harvested), and species that require the establishment of protection zones, shelters, breeding sites or regular stay, as well as ways to protect the above-mentioned species.

The lists of protected species include all the species protected under the Nature Directives, plus several other species that are protected under Polish law. Not all Annex IV species are covered under strict protection. For example, the beaver (*Castor fiber*) and otter (*Lutra lutra*), while featuring on the Annex IV list of species, only appear in the Polish ordinance as species covered under partial protection. According to the Nature Conservation Law, partial protection means that under certain conditions and following consent of the respective authorities, it is permitted to reduce the population of the protected species or capture their representatives. Articles 51 and 52 of the Nature Conservation Act contain prohibitions which reflect the provisions of the Nature Directives that are the focus of this study. The same Polish legislation transposes both directives.

The Nature Conservation Act introduces derogation from these provisions concerning rational forest, fishing or agricultural activities, which can apply in cases where due to technology it is impossible to comply with the prohibitions of Articles 51 and 52 (these derogation are stated in Article 51(2)1 and Article 52(2)10 of the Nature Conservation Law for plant and animal species, respectively). However, as indicated in Article 51(3) and Article 52(5) of the Nature Conservation Law, such derogations do **not apply to the protected species listed in Annexes II and IV of the Habitats Directive**.

However, according to Article 53 of the Nature Conservation Act, Regional Directors for Environmental Protection can introduce, for a limited period of time, derogation from the prohibitions established in Articles 51 and 52 concerning, respectively, deliberate damaging or destroying of plant and fungi habitats and deliberate killing or capturing of animal species. The decrees of the Regional Directors contain justifications for such temporary lifting of prohibitions – these reflect the reasons that must be given by the applicants (e.g. farmers) on the dedicated applications for granting of such derogation⁶.

Moreover, according to Article 56, the General Director of Environmental Protection can issue consent for killing or capturing of protected animal species as well as for damaging or destroying protected plant and fungi habitats for larger areas of the country, or if it is required within the framework of programmes of protection and sustainable use of biodiversity, or programmes of species protection and international agreements. Article 56.4 states that such consent can be issued only in situations where no alternative solutions are possible and when the lifting of prohibitions does not preclude maintaining of the protected species in appropriate condition. These conditions are similar to the ones under Article 16 of the Habitats Directive. None of these provisions include a similar clause to art. 51 and 53 stating that such derogations do not apply to the species of Annex II and IV or the Habitats Directive. Therefore, both provisions apply to strictly protected species under Polish law (similar to Annex IV of the Habitats Directive) and to partially protected species under Polish law (which include some Annex IV species of

⁴ [Act of 16 April 2004 on Nature Protection](#) (Journal of Laws 2021 item 1098).

⁵ [Ordinance of the Minister of Environment of 16 December 2016 on the protection of animal species](#) (Journal of Laws 2016 item 2183), [Ordinance of the Minister of Environment of 9 October 2014 on the protection of plant species](#) (Journal of Laws item 1409).

⁶ [Application for a derogation from the prohibitions concerning protected species](#).

the Habitats Directive). Therefore, these provisions do not seem to comply with the species protection rules of the Nature Directives.

Other relevant legislation

Another legal act which indirectly applies to plant and animal species as well as natural habitats covered by the Nature Directives is the Act on the prevention of environmental damage and its repair⁷. Immediate threat of damage or environmental damage may also be caused by other activities of an entity which uses the environment, if they concern protected species or protected natural habitats, and if they have occurred due to the fault of the entity using the environment (Article 2(1)2 of the Act). The types of activities that pose a risk of environmental damage are indicated in Article 3 of the Act on environmental damage and include among others: surface water retention, wastewater discharge, use of chemical substances and pesticides. Types of environmental users are defined in the Environmental Protection Law⁸. The list of categories includes farmers and persons who undertake productive activities in the forestry sector.

According to Article 6 item 11 of the Act on environmental damage, damage to the environment is understood as negative, measurable change in the state or function of natural elements, assessed in relation to the initial state, which was caused directly or indirectly by activities carried out by an entity using the environment. It affects protected species or protected natural habitats, having a significant negative impact on achieving or maintaining the proper conservation status of these species or natural habitats.

There are a number of derogations from these provisions that refer to previously identified negative impacts resulting from the use of the environment in accordance with:

- the decision referred to in Article 34 of the Nature Conservation Law (in cases of overriding public interest, it is possible that regional environmental authorities issue a consent for activities with negative environmental impact concerning Natura 2000 or Sites of Community Importance provided that compensatory activities are undertaken);
- the decision referred to in Article 56 of the Nature Conservation Law (in cases when the General Director of Environmental Protection or the relevant Regional Director of Environmental Protection or other relevant authorities issue a consent for activities with negative impact on the protected species);
- an approved forest management plan for which a strategic environmental impact assessment has been carried out⁹;
- the decision on environmental conditions issued in accordance with the Environmental Impact Assessment (EIA) Act¹⁰.

Protection zones

Article 60 of the Nature Conservation Law contains provisions for the creation of protection zones for shelters, breeding sites and places of regular presence of animals, plants and fungi that are covered under species protection, which can be established by the general or regional directors of environmental protection. In 2020, there were 1,642 animal protection zones (including 1,622 for birds), 2 plant protection zones and 24 lichen protection zones. Such protection zones are located primarily in the State Forests¹¹. In such zones it is forbidden to:

1. enter, except for the owner of the property and persons managing and supervising the areas covered by the protection zone, as well as persons performing the work under an agreement

⁷ [Act of 13 April 2007 on the prevention of environmental damage and its repair](#) (Journal of Laws of 2020 item 2187).

⁸ [Act of 27 April 2001 on Environmental Protection](#) (Journal of Laws of 2020 item 1219, as amended).

⁹ As referred to in Article 46 of the [Act of 3 October 2008 on the provision of information about the environment and its protection, public participation in environmental protection and environmental impact assessments](#) (Journal of Laws of 2021 item 247, as amended, hereafter referred to as an EIA Act); hereafter referred to as the EIA Act.

¹⁰ As referred to in Article 71 item 1, Article 90 item 1 and Article 98 item 1 of the EIA Act.

¹¹ Information obtained from the General Directorate of Environmental Protection, July 2021.

- concluded with the owner or the manager of the area of the zone;
2. cut down trees or shrubs;
 3. make changes to water conditions, if it is not related to the need for protection of individual species;
 4. erect any objects, devices and installations.

Penal regulations regarding the violation of prohibitions apply to the protection zones, however, no statistics on such violations with respect to the protection zones could be found.

Programmes of protection of endangered species

Article 57 of the Nature Conservation Law envisages that the General Directorate of Environmental Protection prepares programmes for the protection of endangered plant, animal and fungal species. Such programmes combine the current knowledge and experience in the protection of a given species, identify threats and propose actions that should be taken to improve the conservation status of the population of endangered species, together with a description of their implementation and funding sources. The expert studies developed within such programmes are to help all institutions and entities that are relevant for a given species, not only regarding scientific research but also concerning the planning and management of forestry, agriculture, water, etc.

It should be emphasised that species protection programmes are not legally binding; they provide guidelines for the improvement of the state of preservation for a given species. So far, six national species protection programmes have been adopted, including five programmes for bird species and one for whales¹². The bird species covered under the programmes include Eurasian curlew (*Numenius arquata*), Great snipe (*Gallinago media*), Lesser spotted eagle (*Clanga pomarina*), Greater spotted eagle (*Clanga clanga*), and Western marsh harrier (*Circus aeruginosus*). None of these species are classified as farmland birds.

Rural Development Programme

The Polish Rural Development Programme which implements the rules related to the Common Agricultural Policy (CAP) is established with the Act on support for the development of rural areas¹³. This Act refers to the cross-compliance rules of Regulation 1306/2013 on the CAP that are directly applicable. Furthermore, some cross-compliance rules which are indirectly relevant for the protection of species and habitats are regulated in the dedicated regulations of the Minister of Agriculture¹⁴. These pieces of legislation provide only a basic transposition of the CAP rules and do not go into more detail in the area of nature protection.

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

The legislation transposing the Birds and Habitats Directives is indicated in the preceding section; there are no more specific requirements in Polish law regarding the provisions in the focus of this study. The CAP rules are described in section 2.3; the EIA provisions in section 5.

¹² General Directorate of Environmental Protection, [Endangered Species Protection Programmes](#).

¹³ [Act of 20 February 2015 on support for the development of rural areas with the use of the European Agricultural Fund for Rural Development within the framework of the Rural Development Plan for the years 2014-2020](#), Journal of Laws 2015 item 349.

¹⁴ [Regulation of the Minister of Agriculture and Rural Development of 9 March 2015 on standards for good agricultural and environmental condition](#), Journal of Laws 2015 item 344, and [Announcement of the Minister of Agriculture and Rural Development of 10 March 2015 on the list of requirements specified in the provisions of the European Union, taking into account national provisions implementing these provisions](#), the Polish Monitor 2015 item 329.

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL UNDER THIS LEGISLATION

According to the Polish environmental NGOs interviewed¹⁵, the legislation and rules concerning the protection of species and habitats as described in the preceding sections seem to be adequate on a formal level but they are not well implemented in the agricultural sector in practice. For example, there are no procedures in agriculture which would require that farmers actively search for the protected species. Training sessions that are organised primarily within the framework of the CAP programmes are helpful for some selected requirements, but they are not practical in teaching how to identify and protect the species. If the protected species are not identified, agricultural activities are implemented as if the species did not exist there. Furthermore, even if the protected species are identified, in situations of conflicts with agricultural activities, farmers can apply to the Regional Directorates for Environmental Protection for a permit to eliminate such species (as indicated in section 2.1, such derogations are in accordance with Article 53 of the Nature Conservation Act). This happens very often with respect to, for example, beavers (*Castor fiber*) which cause damage in agricultural areas – see Box 2 below.

Box 2 Permits to eliminate beavers

In 2020, in one of the Polish regions (Podkarpackie voivodship), the Regional Directorate for Environmental Protection issued a permit to shoot up to 2,400 beavers over the course of 2020 and 2021¹⁶. Similarly, in December 2019 the Regional Directorate for Environmental Protection in Poznań issued a permit to shoot up to 310 beavers¹⁷. These ordinances in addition to killing the animals also allow disturbing their habitats and destroying wood constructions which they build and inhabit. Similar examples of authorised shooting of species are observed with respect to wolves, wild boars and bison¹⁸.

CAP rules

Within the framework of the CAP, a farmer applying for direct payments, as well as some other payments governed by the RDP, i.e. payments for areas with natural or other specific constraints, agri-environmental-climate payments, payments for afforestation of agricultural land, as well as welfare payments conditional on compliance with certain requirements, is obliged to comply with cross-compliance rules (SMR and GAEC standards) as set out in Annex II to the Regulation of the European Parliament and of the Council (EU) No. 1306/2013. For the Birds Directive, the SMR 2 lists Article 3 items 1 and 2 b) and Article 4 items 1, 2 and 4, while for the Habitats Directive, SMR 3 refers to its Article 6 items 1 and 2.

Thus, under cross-compliance principles set out the CAP legislation, there is no obligation for Member States to formulate requirements for farmers strictly on the basis of Article 5 a-e of the Birds Directive and Articles 12 and 13 of the Habitats Directive¹⁹. Nevertheless, compliance with the SMR standards with respect to the articles mentioned in Regulation 1306/2013 at least indirectly contributes to the objectives of the legal provisions in the focus of this study – especially for the Birds Directive.

Article 3(1) of the Birds Directive (invoked in the context of the SMR 2) requires Member States to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for *all the species of birds* occurring in the wild state in their territory. Article 6 of the Habitats Directive (invoked by the SMR 3) requires Member States to establish the necessary protective measures in the Special Areas of Conservation, which is more limited in scope, as it applies only to protected areas (Natura 2000).

¹⁵ Interviews with representatives of the Naturalists' Club and Wild Poland Foundation, September 2021.

¹⁶ Official Journal of the Podkarpackie voivodship of 25 May 2020 item 2296, [Ordinance concerning permission for activities in relation to *Castor fiber*](#). The beavers can be shot by hunters who are members of local hunters' organisations.

¹⁷ [Ordinance of the Regional Director for Environmental Protection in Poznań of 11 December 2019 concerning permission for activities in relation to *Castor fiber*](#). The ordinance contains a detailed justification, which states that beavers cause significant damages to agricultural activities, i.e. "they flood agricultural land, cut trees in forests and in fruit plantations, damage anti-flood dikes, roads and railway constructions, and destroy agricultural produce and equipment". Damage compensation paid out of State Treasury in the Wielkopolska region amounted to approximately EUR 300,000 in 2017 and EUR 240,000 in 2018.

¹⁸ See Greenpeace publication "[Hunting – the Polish way of bison protection](#)".

¹⁹ Information obtained during an interview with a representative of the Ministry of Agriculture, 25/06/2021, and further correspondence.

According to SMR2, it is forbidden in the whole area of Poland to destroy habitats and shelters that are used for breeding, rearing, resting, migration or feeding by protected birds (i.e. for all bird species listed in Annexes 1 and 2 to the executive ordinance of the Minister of Environment of 16 December 2016). Furthermore, in the protection zones, shelters, breeding sites and sites of regular presence of birds (i.e. for all bird species listed in Annex 4 to the executive ordinance of the Minister of Environment of 16 December 2016), it is forbidden to cut down trees or shrubs, change water conditions (unless it is related to the need to protect individual species) and erect objects, installations or devices²⁰. These prohibitions do not apply to persons who have received specific consents of the Regional Director for Environmental protection to carry out such activities.

Not only the SMRs 2 and 3 but also other SMR and GAEC standards can at least potentially and indirectly contribute to compliance with the requirements of the Birds and Habitats Directives, including the scope specifically covered by our study. For example, in order to comply with the GAEC 1, buffer zones have been established for the use of agricultural fertilisers containing nitrates²¹. Such buffer zones can be beneficial for habitats and species of wild fauna and flora and protect them from the negative impact of nitrates. GAEC 6 imposes a ban on the burning of grass or other plants covering agricultural land, and GAEC 7 obliges farmers to retain water reservoirs and forbids cutting down shrubs and trees in the period between 15 April and 31 July.

It should also be mentioned (as was stressed by MARD) that in addition to cross-compliance, the agri-environment-climate measure creates a financial incentive for the beneficiaries who voluntarily decide to conduct agricultural activity and implement 5-year commitments in relation to the fulfillment of specific environmental requirements. As part of this measure, two packages in the Polish RDP 2014-20 are dedicated to the protection of valuable natural habitats and endangered species of birds (Package 4: *Valuable habitats and endangered species of birds in Natura 2000 areas* and Package 5: *Valuable habitats and endangered species of birds outside Natura 2000 areas*). In order to promote good agricultural practices among the beneficiaries of agri-environment-climate payments, cyclical trainings are organised and brochures/guidelines are published on the website of the Ministry of Agriculture²².

Agri-environment-climate programmes can to some extent be helpful but they are not directly relevant as they target only specific habitats located on the selected farms which implement these voluntary programmes. Similarly, the GAEC standards are only indirectly relevant for species protection. However, they can have a positive impact on some species. Again, these measures apply only to the farms which receive CAP payments, and thus cannot be seen as comprehensive.

According to a representative of the Polish NGOs²³, while the system of direct CAP payments generally fulfils its role regarding the protection of birds and their habitats, other species are unfortunately not sufficiently protected. The protection of insects, amphibians and mammals in the agricultural sector practically does not exist. For example, mid-field water bodies and buffer strips with shrubs and trees (which are home to many protected and endangered species of amphibians, birds and mammals) are regularly being destroyed. The situation with insects, including pollinating insects, is even worse: bans on the use of biocidal sprays during the activity periods of wild pollinators (in accordance with the legislation on the use of pesticides) are not respected. Inadequate equipment is often used for spraying, which causes some of the harmful substances to leak out along the way, leading to contamination. Many farmers use herbicides such as Roundup (glyphosate)²⁴, which are damaging for plant and animal species. This product is often used to 'dry out' agricultural plants before their harvesting.

²⁰ Ministry of Agriculture and Development of Rural Areas, [Standards and Norms of Cross-compliance](#).

²¹ In Poland, such buffer zones are established in the 'Programme of measures to reduce nitrate pollution in waters from agricultural sources and to prevent further pollution', which was adopted in the [Ordinance of the Council of Ministers of 12 February 2020](#), Journal of Laws 2020 item 243.

²² Information obtained during an interview with a representative of the Ministry of Agriculture, 25 June 2021, and further correspondence.

²³ Interview with a representative of the Wild Poland Foundation (Fundacja Dzika Polska), September 2021.

²⁴ Glyphosate will be banned in the EU from December 2022 https://ec.europa.eu/food/plants/pesticides/approval-active-substances/renewal-approval/glyphosate_en#status-of-glyphosate-in-the-eu

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

A network of agricultural advisory centres on national, regional and local levels train agricultural advisors, agri-environmental advisors and environmental experts, who then advise farmers on compliance with the requirements that apply to them. The advice regarding nature protection focuses primarily on CAP cross-compliance, conditions of agri-environment-climate programmes and potential conflicts with Natura 2000 areas. The MARD has published guidelines on cross-compliance²⁵ and on agri-environment-climate programmes²⁶. Furthermore, regional and local advisory centres also publish their own materials on nature protection requirements and good practices²⁷.

In the opinion of the General Directorate for Environmental Protection²⁸, it is noticeable that social awareness of the need for nature protection, including the awareness of the farmers, is growing. Agricultural practices nowadays encompass a range of measures which are beneficial for nature protection, such as leaving trees in the mid-field balks, and maintaining the mosaic of forest and agricultural land. These measures are primarily promoted through the CAP.

In the view of the ARMA, regulations concerning protection of birds, habitats and species are not new, and the farmers have been aware of them for a long time; compliance with these requirements is not particularly problematic. Species protection in agricultural areas is treated as a priority because of the beneficial role of birds and habitats for the natural environment²⁹.

However, according to the opinion of one of the agricultural advisors, farmers' awareness regarding the protected species is rather limited³⁰. The awareness increases if farmers have an opportunity to obtain subsidies or payments, e.g. from the agri-environment-climate schemes. In addition, the farmers running agritourism or other ecological activities are more aware about species protection rules than the average farmer. Other than that, the knowledge of individual protected species of plants or birds is rather minimal, except for hobbyists. Additional observations of the agricultural advisor who participated in the study are included in the Box below.

Box 3 Observations and recommendations of the Polish agricultural advisor participating in the study, regarding sharing information on protected species

'At the moment, transfer of information between the authorities and farmers is problematic. For example, the management plans for Natura 2000 are posted on the websites of individual Regional Directorates for Environmental Protection. All of them require compliance with certain provisions for farmers, they cite paragraphs of ordinances and laws, but there is no clear information for the recipient, i.e. the farmer, to understand what should be done on the ground. Advisory institutions could be used to transfer this knowledge but they do not specialise in nature protection, and they are used primarily as an information channel.

The method of communication with the farmers could be diversified depending on the age of the recipient (e.g. for older recipients, direct meetings could be organised during the autumn and winter period within municipalities, while for younger recipients, digital communication and social media could be used).

Information sources should be presented in a more accessible and legible manner. Long descriptions and repetition of legal provisions are unnecessary - the farmer should be clearly informed where the protected areas are situated, what is protected and why, what effects (economic, ecological) are associated with the loss of certain species in the area of his/her municipality or farm, and what he/she should absolutely not do on his/her farm in order to protect the species. At the same time, the information should be presented in an interesting way to the recipient. People are usually proud of what can be found in their area, and this has to be presented so as to emphasise the uniqueness of the area, stressing not only natural but also social

²⁵ Ministry of Agriculture and Development of Rural Areas, [Standards and Norms of Cross-compliance](#).

²⁶ Ministry of Agriculture and Development of Rural Areas, [guidelines on agricultural-environmental-climate programmes](#).

²⁷ See for example guidelines for agricultural advisors published by the agricultural centre for in Poznań, "[Environmental protection on an agricultural farm](#)" issued in 2020.

²⁸ Written feedback received from the General Directorate of Environmental Protection, July 2021.

²⁹ Written feedback received from the Agency for Restructurisation and Modernisation of Agriculture, August 2021.

³⁰ Written feedback received from an agricultural advisor working in the Central Agricultural Advisory Centre in Brwinów.

functions. A farmer degraded to a "peasant" will not be interested in nature protection – but a farmer nobilitated to the role of a "nature guard" in his/her area will take care of his/her resources.

I can see a large role for women in ensuring better habitats and species protection because very often they are at the forefront of fighting for the improvement of their place of living. I can also see a bigger role for natural scientists who should descend from their institutes to rural areas and perform some basic field work. For example, meetings of botanists or ornithologists with inhabitants of villages on Sunday afternoons could be organised.

In my opinion, EU regulations with respect to agriculture are sufficient - however the manner of enforcing these regulations is much more important, and this is the responsibility of the Member States rather than of the European Commission. When it comes to prevention, it is primarily education that plays a role. Our observations from cooperation with farmers show that they are willing to protect nature on their farms, and if there are cases of non-compliance with the prohibitions, it is not because of lack of good will, but because of ignorance or lack of knowledge. Penalties for non-compliance with the requirements should be in place but the main focus should not be on imposing fines but rather on educational activities and financial compensation for the desired actions'.

Source: fragments of the written feedback received from an agricultural advisor working in an agricultural advisory Centre in Poland.

A representative of a Polish NGO perceives the agricultural advisory services generally as a positive measure promoting nature protection in agriculture³¹. The quality of the advice is on average good but it is too superficial – the agricultural advisors do not provide sufficient information for farmers on how to recognise and protect specific species. Moreover, such advisory sessions are organised only for farmers who receive support within the CAP schemes (all the farmers who receive such support are obliged to participate in such training sessions). Agricultural advisors usually focus on selected measures according to the CAP standards such as leaving a certain share of agricultural land without mowing. Farmers do respect these requirements but at the same time, they carry out other activities which are damaging for species and habitats, for example they destroy water ponds, use large agricultural machines which damage some species (the machines are often bought with the use of CAP subsidies) or apply pesticides in a way that is not in compliance with the relevant legislation.

³¹ Interview with a representative of the Wild Poland Foundation (Fundacja Dzika Polska), September 2021.

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

According to Article 131(14) of the Nature Conservation Law, violation of the prohibitions concerning protected species is an offence and is punishable by detention or a fine. Additionally, if the destruction of plants or animals is of considerable scale, Article 181 of the Penal Code can be relevant³².

However, enforcement of legal requirements concerning species protection in agriculture is generally weak³³. Theoretically, various sanctions can be applied for breaching nature protection rules as stipulated in the Nature Conservation Act and in the Act on Environmental Damages – however such sanctions are rarely applied on the ground. There are cases of notifying police about breaking the rules of nature protection but in practice, most proceedings are dropped due to “low harm”. The police have no knowledge about species, and sometimes the police refer more severe cases to Regional Directorates for Environmental Protection. However, these institutions are overloaded with work and often have no time and resources to follow up. Besides, the different Regional Directorates for Environmental Protection (there are 16 such directorates in Poland, one in each region) are not equally dedicated and diligent in the enforcement of the requirements of nature protection legislation. There are examples of directorates which indeed do their best to protect the species despite limited resources. Some of them, however, seem to prioritise good cooperation with State Forests and hunting associations, which is not to the benefit of species protection³⁴.

No statistics on breaches of species protection regulations could be found; the General Directorate for Environmental Protection does not gather such statistics³⁵. The only available statistics concerning control of nature protection rules in agriculture were obtained from the ARMA and relate strictly to the implementation of CAP standards that are, as indicated earlier, only partly relevant for the scope of this study.

Control of CAP requirements

The Agency for Restructuration and Modernisation of Agriculture carries out inspections of farmers regarding compliance with the requirements that reflect the implementation of the specific provisions related to agricultural practices. The Agency carries out compliance inspections with the requirements emerging from the management plans for the Natura 2000 areas; it also inspects all farmers with respect to cross-compliance rules of the CAP. As already pointed out in section 2.3, compliance with the SMR standards indirectly contributes to the objectives of the legal provisions being in focus of this study – especially for the Birds Directive.

The compliance inspections of the SMR 2 that apply to the whole area of Poland concern the verification of:

- Compliance with a ban of causing damage to sites used for breeding, raising young and feeding by birds protected on the basis of the ordinance of the Minister of Environment on the protection of animal species, and listed in Annexes 1 and 2 thereof³⁶.
- Compliance with a ban on cutting down trees and shrubs, changing water condition, and erecting any constructions, installations and devices on the sites used for breeding, raising young and feeding by birds protected on the basis of the ordinance mentioned above and listed in Annex 4

³² [Act of 6 June 1997: Penal Code](#) (Journal of Laws of 2020 item 1444, as amended). Article 181 imposes a penalty of detention which may last from 3 months to 5 years for deliberate activities resulting in substantial damages to plants or animals.

³³ Interviews with representatives of Polish NGOs: Naturalists' Club, Wild Nature Foundation, September 2021.

³⁴ This can be seen for example in the ease of issuing exemptions from species protection rules regarding some species that can be shot by hunters.

³⁵ Written feedback obtained from the General Directorate for Environmental Protection, August 2021.

³⁶ [Ordinance of the Minister of Environment of 16 December 2016 on the protection of animal species](#) (Journal of Laws 2016 item 2183), [Ordinance of the Minister of Environment of 9 October 2014 on the protection of plant species](#) (Journal of Laws item 1409).

thereof.

The Agency also controls compliance with the GAEC 6 and GAEC 7, i.e. the ban on burning grass or other plants covering agricultural land and the ban on cutting hedges and trees during the bird breeding season (i.e. between 15 April and 31 July). Compliance with the SMR3 is inspected only in the Natura 2000 areas³⁷.

In 2019, the ARMA carried out 9,523 random inspections regarding cross-compliance, which stands for 1% of the farms covered by these rules. Lack of compliance was observed in 59 farms; 45 breaches related to SMR 2 and 17 breaches related to SMR 3. In the same year, the ARMA registered 24 cases of burning of agricultural land (i.e. breaching the GAEC 6); no problems were discovered regarding the GAEC 7. Monetary penalties (in the form of lowering CAP payments) amounted to approximately EUR 17,500 in total, with the highest fine amounting to approximately EUR 1,400. In 2020, the ARMA carried out 4,877 random inspections of cross-compliance (this stands for 0.5% of the farms covered by the rules, as the minimum threshold for the number of inspections was lowered that year, because of the Covid-19 pandemic). In 2020, 16 cases of breaching the SMR 2 and 10 cases of breaching the SMR 3 were discovered, with 25 farmers involved. Furthermore, the ARMA discovered 15 cases of burning of agricultural land (GAEC 6) and no breaches of the GAEC 7. The total amount of monetary fines in 2020 amounted to approximately EUR 8,000, with the highest fine at approximately EUR 540.

Regarding agri-environment-climate schemes, the ARMA verifies the conditions which farmers must comply with in order to receive the payments. Verification is carried out by certified agricultural experts for 100% of applications for these schemes. In the case of lack of compliance with the required actions stipulated within the agri-environment-climate scheme, the payment is revoked. The number of inspections of these schemes in 2020 amounted to 2,412. Lack of compliance was discovered most often with respect to the following conditions: 1) leaving 15-20% of grass without mowing, 2) leaving a fragment of land without mowing in accordance with the graphic depiction, 3) compliance with the mowing periods or the frequency of mowing as described in the conditions.

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According to a representative of a Polish NGO, inspections of the SMR and GAEC standards are rarely applied, which implies that they are not effectively implemented. The interviewee also expressed the opinion that inspections for agri-environment-climate programmes are applied more rigorously than the inspections of the SMR and GAEC standards³⁸. This aligns with the above summary of inspections – implementation of the SMR and GAEC is inspected only in 1% or 0.5% of farms receiving CAP support, while in the case of agri-environment-climate programmes, all participating farmers go through a verification process.

Another NGO representative expressed a positive opinion about the role of the SMR standards for birds and their habitats even despite not very rigorous inspections. However, other species are not protected under this mechanism, and this is one of the main drawbacks of the CAP schemes with respect to nature protection³⁹.

³⁷ Written feedback received from the Agency of Restructurisation and Modernisation of Agriculture, August 2021.

³⁸ Interview with a representative of the Naturalists' Club (Klub Przyrodników), September 2021.

³⁹ Interview with a representative of the Wild Poland Foundation (Fundacja Dzika Polska), September 2021.

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

Environmental Impact Assessment

Species protection rules are not a general criteria requiring assessment and authorisation procedures for agricultural activities unless they are large-scale undertakings, which are covered under the requirements of the EIA legislation⁴⁰. Therefore, agriculture activities are not subject to assessment in relation to their impact on species that are protected under Annex IV of the Habitats Directive or under the Birds Directive. Those agriculture practices subject to EIA include two categories: projects which always trigger the requirement to launch the Environmental Impact Assessment procedure and projects which need to be individually assessed regarding such a need⁴¹. In agriculture, the first category applies to animal breeding units with over 210 animals and installations to produce wind energy power over 100 MW. The second category is broader and encompasses, among others, installations to produce biofuels; installations to recover and dispose of waste; animal breeding units with fewer than 210 animals, but where certain circumstances apply (e.g. if it is located in nature protected areas or their buffer zones); converting forest into agricultural land; irrigation of meadows, pastures or fallow land; setting up water reservoirs or ponds; afforestation of certain areas⁴².

According to one representative of a Polish green NGO, in cases where EIA procedures are triggered, protection of species is performed more rigorously. However, since only selected, large-scale agricultural activities are covered by such procedures, the EIA cannot be seen as an effective instrument for species protection in agriculture⁴³. Furthermore, even if the EIA procedures are implemented with respect to agricultural activities, they do not always ensure appropriate protection of species, as there have been cases of allowing large animal breeding farms in close vicinity of protected areas⁴⁴.

⁴⁰ [Act of 3 October 2008 on providing information about environment and its protection, participation of society in environmental protection and environmental impact assessments](#) (Journal of Laws 1999 item 1227).

⁴¹ The types of undertakings falling in each of these categories are listed in the [Ordinance of the Council of Ministers of 10 September 2019 concerning undertakings which may pose significant impact on environment](#).

⁴² Rules regarding allowed proximity to protected areas are set in the [Ordinance of the Council of Ministers of 10 September 2019 concerning undertakings which may pose significant impact on environment](#).

⁴³ Interview with a representative of the Naturalists' Club (Klub Przyrodników), September 2021.

⁴⁴ Interview with a representative of the Wild Poland Foundation (Fundacja Dzika Polska), September 2021.

6 OVERALL ASSESSMENT: SPECIES PROTECTION ON AGRICULTURAL LAND – KEY FINDINGS

The Polish legal framework is quite extensive, and in compliance with EU Nature Directives. The provisions for permitted derogations from strict protection in certain circumstances are of some concern, but the main problems are with the practical implementation and enforcement of species protection legislation.

In general, awareness of the need for species protection is increasing. Many farmers are interested in species protection, and in most cases lack of compliance is not intentional but due to gaps in information and knowledge.

6.1 TRANSPOSITION ISSUES

- In Poland, the plant and animal species listed in Annex IV of the Habitats Directive as well as bird species in the Birds Directive are protected under the Nature Conservation Law⁴⁵ and the dedicated ordinances of the Minister of Environment⁴⁶. Some of the Annex IV species are covered with strict protection while others are covered with partial protection.
- The Nature Conservation Act introduces derogation from species protection provisions concerning rational forest, fishing or agricultural activities, which can apply in cases where, due to technology, it is impossible to comply with the prohibitions.
- The legislation allows the General Director of Environmental Protection and the 16 Regional Directors of Environmental Protection to issue time-limited permits for activities that will have a negative impact on protected species. Both provisions apply to strictly protected species under Polish law (similar to Annex IV of the Habitats Directive) and to partially protected species under Polish law (which include some Annex IV species of the Habitats Directive). Therefore, these provisions do not seem to comply with the species protection rules of the Nature Directives..
- Such permits are issued primarily in situations of conflict between protected species and agriculture, mainly concerning damage by beavers (permits allowed the killing of up to 2,400 in 2020 and 2021 as well as the disturbance/destruction of their habitats and structures), and where there are conflicts with wolves and bison.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- Protected species benefit from a higher level of legal protection than other species, because the general derogations under Nature Conservation Law for normal agricultural activities (if it is impossible to comply due to technology) do not apply to species listed in Annexes II and IV of the Habitats Directive, unless permits are in place.

Specific agriculture or CAP cross-compliance conditions

- The CAP cross-compliance rules are by no means comprehensive and they focus on selected issues. Furthermore, inspections of the implementation of CAP cross-compliance rules are not sufficiently frequent or rigorous to ensure compliance.
- Under the CAP legislation, there is no obligation on Member States to formulate GAEC cross-compliance standards strictly on the basis of the Birds and Habitats Directives. Nevertheless, in

⁴⁵ [Act of 16 April 2004 on Nature Protection](#) (Journal of Laws 2021 item 1098).

⁴⁶ [Ordinance of the Minister of Environment of 16 December 2016 on the protection of animal species](#) (Journal of Laws 2016 item 2183), [Ordinance of the Minister of Environment of 9 October 2014 on the protection of plant species](#) (Journal of Laws item 1409).

Poland two GAEC standards are indirectly helpful to species protection. The GAEC 6 bans burning of grass or other plants on agricultural land. The GAEC 7 bans cutting of shrubs and trees between 15 April and 31 July, and requires farmers to retain water reservoirs.

- Under SMR 2, since 2016 it is forbidden in the whole of Poland to damage or destroy habitats and shelters that are used by protected birds for breeding, rearing, resting, migration or feeding; it is also forbidden on such sites to cut down trees or shrubs, change water conditions (unless related to the protection of individual species), or to erect objects, installations or devices.
- These CAP cross-compliance rules offer more protection to birds and their habitats than to other protected species, on farms which are beneficiaries of CAP area-based payments.

Other implementing or stimulating measures

- The agri-environmental-climate measure in the Polish RDP 2014-20 offers land managers voluntary five-year contracts to fulfil specific environmental requirements. Two of the packages in this programme are dedicated to the protection of valuable natural habitats and endangered species of birds, both within and outside Natura 2000 areas. **(Best practice)** These may benefit some protected species and their habitats, on the farms where they are implemented.
- CAP cross-compliance rules and the agri-environmental-climate measures in Poland are only to a limited extent helpful in supporting species protection in agriculture. They have been of benefit to some bird species but are by no means comprehensive, and they focus on selected issues.

Public advisory services and public enforcement

Government advisory services

- A network of agricultural advisory centres at national, regional and local level train agricultural advisors, agri-environmental advisors and environmental experts, who then advise farmers.
- The agricultural advisory service provides advice primarily with respect to the CAP rules. Advice, training and guidance on nature protection focuses on CAP cross-compliance, the requirements of agri-environmental-climate contracts and potential conflicts with Natura 2000 sites. The farmers who receive CAP support are primarily interested in compliance with the rules linked to these payments. Other measures important for species protection which are formally required in various regulations and guidelines (e.g. concerning the use of pesticides) are often not appropriately implemented.
- Agricultural advisory services are not specialised in nature protection and therefore are used primarily as an information channel, but they are generally perceived as a positive factor in promoting better nature protection in agriculture.
- Agricultural advisors in general do not have sufficient expertise to provide specialist advice on protected species.
- Farmers on average do not have sufficient knowledge to identify and protect specific species and habitats. Information about nature protection needs is not adequately transferred from environmental authorities to farmers.
- Farmers' awareness of protected species is rather limited, but this is perceived as improving if farmers have the opportunity to obtain agri-environmental-climate payments, or if they are running agritourism or have other ecological activities in place.

Enforcement of species protection legislation

- Enforcement of the legal requirements concerning species protection in agriculture is generally weak; breaches are not adequately monitored. The General Directorate for Environmental Protection does not gather relevant statistics, and the data provided by the ARMA relate strictly to the implementation of the CAP cross-compliance standards.

- Violation of the legal requirements for species protection is an offence punishable by detention or a fine. Criminal sanctions can also be applied to the large-scale destruction of plants or animals. However, such sanctions are rarely applied in practice, and most proceedings are dropped due to "low harm".
- The police have no knowledge of protected species, and the Regional Directorates have insufficient time and resources to follow-up on incidents referred to them.
- The ARMA carries out inspections of CAP cross-compliance, SMR and GAEC standards, of agri-environment-climate contracts and of requirements emerging from the Natura 2000 management plans. Non-compliance is penalised by financial sanctions on the farm's CAP payments. All agri-environment-climate contracts are compliance-checked by certified agricultural experts but only 1% of farms are checked for compliance with SMR and GAEC standards each year.

6.3 ASSESSMENT AND AUTHORISATION PROCEDURES

EIA

- Large-scale agricultural activities for animal breeding units with more than 210 animals and wind energy installations producing more than 100 MW automatically require an EIA.
- Individual assessments of the need for an EIA are required for a wider range of agricultural activities, including installations for production of biofuels, or recovery and disposal of waste; animal breeding units with fewer than 210 animals located in a protected area or a buffer zone; converting forest to agricultural land; irrigation of meadows, pastures or fallow land; establishing water reservoirs or ponds, and afforestation of certain areas.
- The protection of species is perceived to be more rigorous when an EIA is automatically triggered but, given the scale of the threshold for this to happen, the EIA legislation cannot be seen as an effective instrument for species protection in agriculture.

6.4 RECOMMENDATIONS

Legislative transposition measures of species protection rules:

Preventive and implementing measures:

- Ensure compliance with species protection rules under the Nature Directives in relation to the permitted derogation affecting strictly protected species by using RDP or national funding to support preventative measures and/or compensation.

Public advisory and enforcement:

- A more practical and positive approach is needed to ensure that farmers have the specialist advice and information that will enable them to identify protected species and understand how to manage their habitats.
- Regional Directorates for Environmental Protection should explain clearly, in a more accessible and legible manner, which species and habitats are protected and why, and what farmers must do to safeguard them.
- The advisory institutions need to become more specialised in nature protection, to use communication methods best suited to the recipients (e.g. direct meetings for older recipients and digital communication for younger ones) and to involve natural scientists doing field work.
- Engage more women from farming communities in species protection, because they are often at the forefront of fighting to improve their local environment.
- Train police forces to deal with cases of infringement of the species protection legislation. Provide the Regional Environmental Directorates with the staff and expertise to assist police dealing with infringements.

Authorisation and permits:

- When a preliminary assessment of an agricultural activity leads to a full EIA, ensure that full account is taken of the potential impact on protected species and their habitats.
- Broaden the scope of undertakings for which a full EIA is needed, taking due account of circumstances where also smaller undertakings can be harmful for the protected species.

Species protection rules under the Birds and Habitats Directives: how effectively are they integrated into sectoral policies?

TASK 2 – Case Study Romania

ENV/2020/OP/0022



Stritih



milieu
Law & Policy Consulting

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ABBREVIATIONS

AFRI	Agency for Financing Rural Investments
APIA	Agency for Payments and Intervention in Agriculture
EGO	Emergency Governmental Ordinance
GAEC	Good Agricultural and Environmental Condition
IACS	Integrated System of Administration and Control
LPIS	Land Parcel Identification System
MADR	Ministry of Agriculture and Rural Development
NRDP	National Rural Development Plan 2014-2020
SMR	Statutory Management Requirement
HNV	High Natural Value
CAP	Common Agricultural Policy
CFP	Common Fishery Policy
EAGF	European Agricultural Guarantee Fund
NRDP	National Rural Development Plan 2014-2020
EAFRD	European Fund for Agriculture and Rural Development
APDRP	Paying Agency for Rural Development and Fisheries
ANZM	The National Agency of the Mountain Area
NAEP	The National Agency for Environmental Protection
NEG	The National Environmental Guard
SMR	Statutory Management Requirements
GHG	Greenhouse Gas Emissions
RNDR	National Network for Rural Development
NAPNA	National Agency for Protected Natural Areas
NSP	National Strategic Plan
EPA	Environmental Protection Agency
CDRJ	County Rural Development Departments
SAPS	Single Area Payment Scheme
CNDP	Complementary National Direct Payment
LFA	Less Favoured Areas

1 INTRODUCTION

In 1945, the Communist state expropriated the farmers that owned more than 50 ha of agricultural land. In fact out of 1,400,000 ha of agricultural land that belonged to private owners, 1.109.000 ha were expropriated. Of this area, about 825,000 hectares were distributed to the peasants entitled to receive land (they were not owners of land or of the private properties, they were burgeoise, capitalists or intellectuals). The remaining, approximately 243,000 hectares constituted the embryo of state agriculture, the establishment of state farms.

The stated goal of the agrarian reform of 1945 was to increase the arable land of peasants that owned less than 5 hectares, or that didn't own any land. As a result, the average surface of an agricultural holding decreased from 6 ha in 1930 to 2.5 ha in 1945.

In 1949, the Romanian Labour Party established a farm law of collectivisation by decree. Through a series of later decrees, landowners were forced to give their agricultural land to the state. Over a period of 13 years, over two million ha of agricultural land was collectivised.

Due to intensive agriculture, until 1989 the productive capacity of the soil was negatively affected by a decrease in humus content, soil erosion (which affects about 6 million hectares), an excess of humidity as well as a high degree of pollution. The irrigation system requires certain consumption of water, fuel and volunteer work, resulting in reduced efficiency of agricultural production. The functional irrigation system covered about 1 - 1.2 million ha. The remaining land, 1.8 – 2 million ha has represented an investment that remained unused.

As a result, in 1989 agriculture in Romania was not competitive in European markets.

Following the fall of Communism in 1989, Law 18/1991 was passed, regulating land restitution to the former owners whose properties were nationalised by the Communist state. Because of this law, the collective, state owned and cooperatives agricultural production were dismantled. These were replaced by private owners, individuals, associations, and private companies.

In 1992, the private sector owned 69.8 % of agricultural land, 79 % of arable land, 51.8% of pastures and hayfields, and 67.4% of vineyards and orchards.

The negative effect of this is fragmentation of property (over 4.7 million agricultural holdings) and the excessive parcelling of the land (the total number of the resulting plots is estimated at about 18-20 million), a problem that has still not been properly addressed.

The new owners of the land were mostly elderly and without the necessary resources to develop modern farming. As a result, productivity in agriculture has decreased even more.

A series of reforms and legislative frameworks in the 1990s increased agricultural productivity. In 1996, it produced about 20% of total gross value. The general crisis that Romania went through in the 1990s prevented further development of agriculture due to a lack of resources (the GDP per capita in 1995 was 24% of the average EU GDP).

In 2010, Agriculture in Romania was one of the largest branches of the economy, accounting for 6% of GDP¹, the highest rate recorded.

According to the Minister of Agriculture and rural Development², in 2010 the agricultural areas used in agricultural holdings represented 62.5% of the total agricultural land. The total agricultural land represented 55.9% (13.3 million ha) of the total area of Romania, out of which 8.3 million ha was agricultural land.

According to EU statistics³ as updated in 2016, 91.8% of the total agricultural holdings were less than

¹ <https://www.madr.ro/docs/agricultura/agricultura-romanici-2015.pdf>

² <https://www.madr.ro/docs/agricultura/agricultura-romanici-2015.pdf>; p.1.

³ https://ec.europa.eu/info/food-farming-fisheries/farming/facts-and-figures/performance-agricultural-policy/agriculture-country/eu-country-factsheets-0_ro, p. 16.

5 ha, and 84.6% generated less than EUR 4,000 per year.. 3.1% were owned by farmers younger than 35 years old, while 44.3% were owned by persons over 65. .

The draft version of the Strategy for the Development of the Agri-food Sector in the Medium and Long Term - Horizon 2020-2030, published on the website of the Minister of Agriculture and Rural Development⁴ provides measures intended to implement ecofriendly agricultural practices, but none of the measures refer to protected species outside the Natura 2000 sites.

Romania has one of the richest resources of agricultural land that can be classified as having a high natural value (fifth place in the EU-27 with an area of 5,221,251 ha). Areas of meadows with high natural value (HNV) make a major contribution to the maintenance of biodiversity in Romania, which, in 2010, covered an area of approximately 2.79 million ha. Natural and semi-natural meadows were included in this category. Extensive traditional orchards (included in HNV eligible areas in Romania since 2012) have a high natural value, as do mosaic landscapes including meadows, trees, shrubs and small agricultural plots which are extensively cultivated where biodiversity, including wildlife, is high, as well as meadows in the vicinity of forests. According to the results of studies on the conservation value of natural and semi-natural grassland habitats in the mountain area, approximately 50% of these habitat types require conservation measures. HNV ecosystems and landscapes are threatened by the abandonment of agricultural activities, by their transformation into arable land, and by other interventions with negative effects.

The most important issue in agriculture is climate change – so far in 2022 the most severe drought in history has been registered⁵.

According to Eurostat⁶, Romania is the country with the smallest share of organic area, only 2.9%.

At the same time, in January 2022, Environmental NGOs⁷ published information concerning derogations on the use of neonicotinoid pesticides granted by the Minister of Agriculture and Rural Development, after they were banned in 2020 and 2021.

1.1 GOVERNANCE

The Minister of Agriculture and Rural Development is the central authority responsible for agriculture, deciding together with the Minister of Environment, Water and Forests on the environmental impact of agriculture. In this sense, they issue orders together, and the subordinated agencies are jointly responsible.

Subordinated to the Minister of Agriculture and Rural Development are: the Agency for Payments and Intervention in Agriculture (APIA), the Agency for Financing Rural Investments (AFRI), the National Agency for Mountain Areas and their regional or county offices.

Subordinated to the Minister of Environment, Water and Forests is the National Environmental Protection Agency and its county agencies.

1.1.1 The Ministry of Agriculture and Rural Development

The Ministry of Agriculture and Rural Development is a specialised body of the central public administration, with legal personality, subordinated to the Government with the following main tasks: *“responsible for implementing the governance strategy and program, with a role in developing and implementing national sectoral strategies in the fields of agriculture and food production, rural*

⁴ <https://www.madr.ro/strategia-pentru-dezvoltarea-sectorului-agroalimentar-pe-termen-mediu-si-lung-orientat-2020-2030.html> (pp. 43,44) .

⁵ <https://romania.europalibera.org/a/seceta-romania/31768827.html>

⁶ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Organic_farming_statistics#Total_organic_area

⁷ <https://www.g4media.ro/ministrul-agriculturii-adrian-chesnoiu-a-dat-unda-verde-folosirii-insectidelor-interzise-in-ue-pentru-ca-omoara-albinele-lobby-puternic-al-marilor-fermieri-romani.html>

*development, land improvement, and related fields: specialised scientific research, conservation and sustainable management of soils and plant and animal genetic resources*⁸.

Also, The Ministry of Agriculture and Rural Development “*shall develop specific strategies and regulations in its fields of activity, within the policy of the Government and in accordance with European Union regulations, the principles of the common agricultural policy, hereinafter referred to as the CAP, and the principles of the Common Fisheries Policy, hereinafter PCP*”.

1.1.2 The Agricultural Payments and Intervention Agency⁹ (APIA)

The Agency for Payments and Intervention for Agriculture (APIA) operates under the Ministry of Agriculture and Rural Development under **Law 1/2004**¹⁰, with subsequent amendments and completions. The institution is organised in the following way: 1 central body, 42 county centres and 266 local centres.

As of 1 January 2007, Agency for Payments and Intervention in Agriculture (APIA) has been managing European funds to implement support measures funded by the European Agricultural Guarantee Fund (EAGF).

Subsidies are granted in the form of direct payments per hectare, managed by the Integrated Administration and Control System (IACS) and in the framework of market measures for the implementation of trade mechanisms under the Common Agricultural Policy (CAP). Thus, the Agency for Payments and Intervention in Agriculture (APIA) administers the system of export-import certificates and guarantees for agricultural products, and elaborates and implements procedures regarding the application of the intervention system for agricultural products.

APIA responsibilities:

- Ensures the conduct of financial operations related to the management of allocated funds;
- Ensures the verification of payment requests received from beneficiaries;
- Authorises payment to the beneficiaries following the verification of payment requests or notifies them on any notified irregularities, in order to solve them;
- Executes authorised payments to beneficiaries;
- Keeps records of payments made;
- Follows the allocation of funds allocated for the activities provided above;
- Ensures the fulfillment of requirements regarding public information on activities carried out;
- Ensures the smooth running of the Agency's economic, administrative, accounting, personnel and audit activities;
- Collaborates with the central and local public administration bodies to ensure the fulfilment of certain responsibilities;
- Prepares and implements provisions regarding commercial mechanisms;
- Manages the system of export-import certificates and guarantees for the import and export of agricultural products;
- Develops and implements procedures regarding the application of the intervention system for agricultural products;
- It is the public authority responsible for the implementation of the Integrated Administration and Control System;
- Ensures the management of sugar and isoglucose production quotas and manages the contributions related to these quotas;
- Elaborates manuals of procedures and methodologies in order to properly implement the attributions incumbent on it;
- Implements and manages export refunds and the system of refund guarantees;
- Provides all information requested by the Coordinating Body of the paying agencies for agriculture, rural development and fisheries.

⁸ <https://legislatie.just.ro/Public/DetaliuDocument/185804>

⁹ <https://apia.org.ro/despre-apia/prezentare-apia/>

¹⁰ <https://legislatie.just.ro/Public/DetaliuDocument/49972>

With regard to the organisation and operation of the central apparatus of APIA, according to Order 1955/2019¹¹ issued by the Minister of Agriculture, , one of the deputy directors is responsible for field control and has an internal role of executing tasks including the implementation of ecoconditionality norms. Another deputy director is responsible for inspection and overcontrol. The Directors of APIA are also in charge of implementation and monitoring of national and community legislation (Article 20 letter x of Order 1955/2019), among other attributions. This attribution should also include the implementation of ecoconditionality norms related to protected species.

In accordance with Order 999 of 20 December 2016¹², regarding the approval of the system of administrative sanctions for cross-compliance applicable to schemes and support measures for farmers, since 2016 APIA has been in charge of inspection and control of the implementation of Common Agricultural Policy (CAP) cross-compliance.

1.1.3 The Agency for the Financing of Rural Investments (AFRI)

AFRI is an institution subordinated to the Ministry of Agriculture and Rural Development (MADR) with the attribution of the technical and financial implementation of the National Rural Development Plan 2014-2020 (NRDP 2014-2020).

The Agency carries out its activity according to the provisions of the Government Emergency Ordinance no. 41 of 18 June 2014¹³, on the establishment, organisation and operation of the Agency for Financing Rural Investments by reorganising the Paying Agency for Rural Development and Fisheries (APDRP), approved by Law 43 of 17 March 2015.

The purpose of the Agency is the technical and financial implementation of the European Fund for Agriculture and Rural Development, hereinafter referred to as the EAFRD.

The Agency's main task is technical implementation, under the conditions of the delegation of functions by the Ministry of Agriculture and Rural Development, through the Managing Authority for the National Rural Development Plan, as well as the financial implementation (payment) of EAFRD through the National Rural Development Plan for 2014-2020 (NRDP 2014-2020). The Agency has taken over the responsibilities of technical implementation, payment and monitoring for the National Rural Development Plan 2007-2013 as well as the reporting, debt recovery, and ex-post monitoring tasks of the Agency for the The Special Accession Programme for Agricultural and Rural Development (SAPARD)¹⁴ Program.

1.1.4. The National Agency of the Mountain Area – (ANZM)

The main role of ANZM is to develop and implement the strategy and policies for the development and protection of mountain areas in Romania, as well as the implementation of measures within the National Rural Development Program 2014-2020 and the state budget.

It is a public institution, with legal personality, fully financed from the state budget, subordinated to the Ministry of Agriculture and Rural Development and with specific attributions of representation on behalf of the Ministry of Agriculture and Rural Development for the mountain area.

The main mission of the institution is the elaboration and application of the Government's strategy and policies in the field of development and protection of the Romanian mountain area, an area marked by specific issues. It is ecologically fragile and economically and socially disadvantaged due to natural causes, and this requires specific management, according to Law no. 197 of 20 July 2018 – known as The Law of the Mountain.

¹¹ <https://apia.org.ro/despre-apia/organizare/regulament-de-organizare-si-functionare/>

¹² <https://legislatie.just.ro/Public/DetaliiDocumentAfis/185098>

¹³ <https://legislatie.just.ro/Public/DetaliiDocumentAfis/159336>

¹⁴ https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/sapard_ro

The activity of the ANZM is regulated by Governmental Decision no. 1036/2018 concerning the organisation and functioning of the National Mountain Area Agency. The ANZM as a result of reorganisation of the Mountain Area Agency, as well as for the establishment of measures regarding regional centres and mountain development offices.

Since 2019, the ANZM is present in national territory through functional structures, organised within the network of regional mountain development centres and mountain development offices.

In order to achieve the proposed objectives, the ANZM exercises the following main functions¹⁵:

- state authority in the field of sustainable development of the mountain area, with the approval of the Ministry of Agriculture and Rural Development;
- strategy, which ensures the preparation and proposal for approval of the strategy for the sustainable development of the mountain area;
- representation, which ensures, on behalf of the Ministry of Agriculture and Rural Development, representation internally and externally in its field of activity and within the limits established by it;
- competences related to implementation of the Program for encouraging activities in the mountain area, according to the provisions of Article 16 of the Mountain Law no. 197/2018;
- it is the competent authority responsible for the management of the European Montane Product Quality Scheme at national level.

In the exercise of its functions, the ANZM has the following relevant responsibilities:

- ensures the monitoring and evaluation of the implementation of the national strategic guidelines for the sustainable development of the mountain area;
- elaborates and proposes the approval of technical-operative measures regarding the application in the territory of the Government's strategy and policies in the field of development and protection of the mountain environment, in order to increase the quality of life of the mountain population;
- elaborates and proposes to the Ministry of Agriculture and Rural Development the drafts of normative acts whose objective refers to the economic-social development and protection of the mountain area, preservation of the ecological attributes of the mountain meadows, and superior valorization of natural and human resources in the mountain area, while respecting the limits of authority, the principles of autonomy of economic operators and local autonomy, and stimulating the growth of livestock in the mountain area;
- elaborates and proposes to the Ministry of Agriculture and Rural Development draft normative acts for investment support programs aimed at the sustainable development of the mountain area, which establish the amounts, conditions, criteria, method of granting, source of financing, etc. ., in compliance with European and national regulations regarding the granting of state aid/de minimis/European funds;
- develops criteria for selecting priority mountain microzones to benefit from special programs;
- performs the analysis, synthesis and forecast of socio-economic phenomena in the mountain area;
- sets priorities and regularly submits information to the Government on the progress of actions taken in the mountain area;
- makes proposals regarding the prevention of any actions unfavorable to the mountain area;
- ensures the circulation of information and the promotion of educational programs regarding the mountain area through the media;
- contributes to the formation of a mountain culture in Romania;
- implements the strategy of sustainable development of the mountain area in the designated territory;

¹⁵ <https://azm.gov.ro/despre-anzm/>

- cooperates with the National Agency for Environmental Protection in order to green the agro-zootechnical farms and the localities from the mountain area;
- organises training activity related to agromontan topics for central apparatus personnel and for personnel at territory level;
- organises the database of the mountain area and keeps records of the effects of the application of the measures provided by law for the support of farmers and economic operators in the rural mountain area;
- provides, upon request, technical advice on the establishment of non-governmental organisations, associations, foundations and other forms of association aiming to support the activities and serve the interests of the mountain population, with priority given to the development of agriculture, small and medium enterprises, traditional crafts, rural and mountain tourism, ecotourism and agrotourism, and other job-creating activities. The main objective is to support the professional organisations of mountain farmers;
- proposes to the Ministry of Agriculture and Rural Development the initiation of normative acts regarding the criteria, amount, conditions and method of granting, in the cases and under the conditions provided by law, of the facilities and compensation for the inhabitants and communities of the mountain area, following their application;
- monitors the sectoral and integrated development programs and projects in the mountain area, according to the priorities and in accordance with the objectives established by the mountain area development strategy;
- elaborates good practice guides specific to the economic activities in the mountain area, for the mountain area population.

1.1.4 Minister of Environment, Water and Forests (MEWF)

According to Governmental Decision no 43/2020¹⁶ on the organisation and functioning of the Ministry of Environment, Water and Forests¹⁷, the Ministry of Environment implements policy at national level in the fields of environmental protection, green economy, biodiversity, protected natural areas, climate change regarding all sectors and subsectors that it manages, and elaborates the strategy and specific regulations for the development and harmonisation of these activities. The general policy of the Government ensures and coordinates the application of the Government's strategy in its areas of competence, fulfilling the role of state authority, synthesis, coordination, regulation, monitoring, inspection and control in these fields.

The Ministry of Environment acts to protect environment and natural resources, to guarantee a clean environment for current and future generations, in harmony with economic development and social progress.

Areas of competence of the Ministry of Environment:

- industrial pollution control;
- air quality and ambient noise;
- *management of protected natural areas, biodiversity conservation, biological security;*
- *environmental infrastructure;*
- waste management;
- management of hazardous chemicals and preparations;
- soil and subsoil protection;
- sustainable development;
- green economy;
- climatic changes.

¹⁶ <https://legislatie.just.ro/Public/DetaliuDocumentAfis/222504>

¹⁷ <http://www.mmediu.ro/>

With the main objectives of strengthening administrative structures - as a basic element for building a sound environmental management system - and contributing to sustainable development, the Ministry of Environment has set the following priorities:

- *integrating environmental protection requirements into other sectoral policies, in line with European and international requirements and standard;*
- *biodiversity protection;*
- *improving the quality of environmental factors in urban and rural areas.*

1.1.5 The National Agency for Environmental Protection (NAEP)¹⁸

According to *Governmental Decision no 1000/2012 on the reorganisation and functioning of the National Agency for Environmental Protection and its subordinate public institutions (NAEP)* it is “a public institution with a legal entity, financed from the state budget, reorganised as a specialised body of the central public administration, subordinated to the central public authority for environmental protection, with competences in implementing policies, strategies and legislation in the field of protection environment at national level”¹⁹.

The NAEP coordinates 42 county agencies for environmental protection and has the following functions in the field of environmental protection:

- a) technical support for the approval of projects of normative acts, of the sectorial strategies and policies, as well as of the action plans in the field of environmental protection;
- b) implementing policies, strategies and legislation in the field of environmental protection, at national level;
- c) coordination, monitoring and control of the activity of the subordinate environmental protection agencies;
- d) being the authority that issues regulatory acts, according to the legal provisions;
- e) continuous training and improvement of the personnel belonging to the subordinate county agencies for environmental protection;
- f) representing its field of activity, both in internal and external relations, according to the mandate granted by the head of the central public authority for environmental protection.

The NAEP does not have any attribution concerning Common Agricultural Policy (CAP) cross-compliance.

1.1.6 The National Environmental Guard (NEG)

The NEG is a public institution and functions as a specialised body of the central public administration, with legal personality, financed entirely from the state budget, and subordinated to the Ministry of Environment, Water and Forests.

The NEG is a specialised inspection and control body that can take sanction and, suspension measures, respectively can order cessation of activity, as a result of pollution and damage to its environment due to non-compliance with the conditions imposed by regulations.

The organisation and functioning of the NEG is regulated by the Romanian Government Decision no. 1005/2012²⁰ with subsequent amendments and completions.

The NEG has specific attributions in the field of biodiversity:

¹⁸ <http://www.anpm.ro/web/guest/acasa>

¹⁹ Article 1 of GD 1000/2012 <https://legislatie.just.ro/Public/DetaliiDocumentAfis/142352>

²⁰ <https://legislatie.just.ro/Public/DetaliiDocument/142351>

- Monitors compliance with the provisions of specific legislation related to protected natural areas, parks and nature reserves;
- Provides control and inspection of activities involving living genetically modified organisms;
- Controls the observance of regulations regarding the import/export of plants and animals from wild flora and fauna;
- - Controls and verifies the fulfillment of the obligations incumbent on operators who place timber on the market for the first time, as well as traders with regard to information on suppliers of timber or timber products, in accordance with Regulation (EU) no. 995/2010;
- Controls the activities of harvesting, capturing and/or purchasing and marketing on the internal market of plants and animals of wild, terrestrial and aquatic flora and fauna, or of parts or products thereof, in the living, fresh or semi-processed state;
- Controls the observance of the legal provisions regarding the management, storage and recovery of waste from wood processing;
- Controls compliance with the obligations of landowners and owners, with or without title, to protect their existing wild flora and fauna, in order to maintain the ecological balance and conserve biodiversity;

It is not clear if NEG executes any inspections regarding the biodiversity affected by agriculture, as there is no public inspection plan and the result of the inspections is presented only as statistical data²¹.

According to Order 999/2016 only APIA is in charge of the CAP ecoconditionality norms.

1.2 PROTECTED SPECIES

Twenty bird species specific to agricultural land were identified in Romania, using **the methodology of calculating the ‘index of bird populations specific to agricultural lands in Romania’**. These bird species are as follows: *Alauda arvensis*, *Corvus frugilegus*, *Coturnix coturnix*, *Miliaria calandra* (*Emberiza calandra*), *Emberiza citrinella*, *Galerida cristata*, *Hirundo rustica*, *Lanius collurio*, *Lanius minor*, *Motacilla flava*, *Passer montanus*, *Perdix perdix*, *Phasianus colchicus*, *Saxicola torquata*, *Saxicola rubetra*, *Streptopelia turtur*, *Sturnus vulgaris*, *Sylvia communis*, *Upupa epops* and *Vanellus vanellus*).

Furthermore, there are 97 birds species and 142 Annex IV species associated with agriculture in Romania.

The main threats identified for protected species and habitats are related to:

- the intensification of agriculture in areas where birds are present and a possible conversion of HNV land or grasslands (where birds or butterflies are present) in arable land or intensively used grasslands, and
- the increasing use of mechanised means for agricultural work and of chemical fertilisers and plant protection substances.

There are no reports concerning the evolution of biodiversity related to agriculture.

²¹ <https://www.gnm.ro/note.php>

2 LEGISLATION AND RULES ON SPECIES PROTECTION ON AGRICULTURAL LAND

2.1 LEGISLATION TRANSPOSING ARTICLES 12 AND 13 OF THE HABITATS DIRECTIVE AND ARTICLE 5 OF THE BIRDS DIRECTIVE

Habitats Directive

Articles 12 and 13 of the Habitats Directive have been transposed into Romania law through Article 33 paragraph 1 of the Emergency Governmental Ordinance 57/2007 approved by Law 49/2011 (EGO 57/2007)²² of the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, as it follows:

Art 33 paragraph 1 of EGO 57/2007: “(1) *In relation to terrestrial, aquatic and underground wild plants and animals species, mentioned in Annexes no. 4A and 4B, with the exception of bird species, which live both in and outside protected natural areas, the following are prohibited:*

- a) *any form of harvesting, capturing, killing, destroying or damaging the specimens found in their natural environment, in any of the stages of their biological cycle;*
- b) *intentional disturbance during the period of reproduction, growth, hibernation and migration;*
- c) *intentional damage, destruction and/or collection of nests and/or eggs from the wild;*
- d) *damage and/or destruction of breeding or resting places;*
- e) *harvesting flowers and fruits, harvesting, cutting, uprooting or intentionally destroying these plants in their natural habitats, in any of the stages of their biological cycle;*
- f) *holding, transporting, selling or exchanging for any purpose, as well as offering for exchange or sale specimens taken from the wild, at any stage of their biological cycle”.*

Birds Directive

Article 5 of the Birds Directive has been transposed through Article 33 paragraph 2 of the Emergency Governmental Ordinance 57/2007 approved by Law 49/2011 (EGO 57/2007) on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, as it follows:

Art 33 paragraph 2 of EGO 57/2007:“(2) *Without prejudice to the provisions of Article 33 paragraphs (3) and (4) and of Article 38 of this emergency ordinance, as well as of Article 17, Article 19 paragraph (5), Articles 20, 22 and 24 and Article 26 paragraphs (1) and (2) of the Law on hunting and protection of the hunting fund no. 407/2006, as subsequently amended and supplemented, in order to protect all species of birds, including migratory ones, the following are prohibited:*

- a) *intentional killing or capture, regardless of the method used;*
- b) *intentional damage, destruction and/or collection of nests and/or eggs from the wild;*
- c) *collecting eggs from nature and keeping them, even if they are empty;*
- d) *intentional disturbance, in particular during the period of reproduction or maturation, if such disturbance is relevant in the context of the objectives of this emergency ordinance;*
- e) *possession of specimens of species for which hunting and capture are prohibited;*
- f) *the sale, possession and/or transport for the purpose of selling and offering for sale in living or dead state or of any parts or products derived therefrom, which are easily identifiable”.*

Article 15 of EGO 57/2007 stipulates that the central public authority for agriculture should highlight in the Land Parcel Identification System (LPIS) protected natural areas and ecological corridors.

²² <http://legislatie.just.ro/Public/DetaliiDocument/83289>

Unfortunately, the system for identification of land parcels is not publicly accessible, so this information cannot be used in practice.

According to **Article 22** of EGO 57/2007, the natural protected areas in Romania are divided into specific zones, and in each zone only certain activities are allowed:

- Agricultural activity is not allowed in areas with strict protection. These are areas of national and natural parks of great scientific importance, which include both scientific reserves and wild areas where there have been no anthropogenic interventions or their level has been very low.
- In integral protection areas that comprise the most valuable natural heritage assets within national and natural parks, the following is allowed as an exception: *“the rational use of grassland for mowing and/or grazing with domestic animals only, the property of members of communities holding pastures or having the right to use them in any form recognized by the national legislation in force, on areas, periods of time and with approved species and herds by the park administration, so as not to affect the natural habitats and species of flora and fauna present”*. Such activities are also allowed in the sustainable management areas, which are buffer zones of the Natural Parks²³. This ensures the transition between areas with full protection and areas of sustainable development.
- In areas of sustainable development, activities specific to the organic production method of cultivating agricultural land and raising animals are allowed, in accordance with the specific legislation of the organic farming system.

Other than those mentioned, measures aiming to protect species in agriculture are missing from the legislation. In general, there are serious problems of implementation of the environmental objectives in sectorial policies, including in agriculture.

On 30 March 2022, a coalition of NGOs led by WWF Romania, concluded in their analysis concerning the National Strategic Plan issued by the Ministry of Agriculture and Rural Developments that: *“Consequently, Romania’s agricultural policy for the coming years, a critical period in terms of food security and the evolution of the climate crisis, will miss most of the targets set at European level through the Common Agricultural Policy and the Green Deal and will continue to make small producers vulnerable, as well as ecosystems and essential species both in terms of environment, biodiversity and agricultural production - forests, meadows, pollinators. In addition, it will continue to fuel soil degradation, pesticide dependence and mismanagement of wetlands in the meadow and the Danube Delta, leading to the loss of carbon stocks and therefore to increasing greenhouse gas emissions”*²⁴.

Derogations to the transposing provisions

While the transposition of the species protection rules of the Nature Directives is almost literal as mentioned above, the Emergency Governmental Ordinance 57/2007 approved by Law 49/2011 and transposing Article 5 of the Birds Directive, establishes **derogations for hunting** by referring to Article 38 of the emergency ordinance and to the conditions under the Hunting Law. These derogations are related to Article 9 of the Birds Directive:

Article 38 of the Emergency Governmental Ordinance 57/2007 – “By exception from the provisions of Article 33 paragraphs (1)-(4) and of Article 37 paragraph (1), the central public environmental protection authority (that is the Ministry of Environment Water and Forests) **shall establish, annually and whenever necessary, derogations**, provided that, in line with Article 9 of the Birds Directive, there is no acceptable alternative and that the derogating measures are not to the detriment of maintaining the populations of those species in a state of conservation favourable in their natural area and only in the following situations:

- a) in the interest of the protection of wild fauna and flora and the conservation of natural habitats;
- b) to prevent significant damage, in particular to crops, domestic animals, forests, fisheries and

²³ National level protected areas that usually overlap with Natura 2000 sites

²⁴ <https://wwf.ro/paduri/pns-am-sesizat-comisia-europeana/>

water, and in the case of animal species other than birds, and to prevent significant damage to other property;

c) in the interests of public health and safety, and in the case of animal species other than birds, and for other reasons of major public interest, including of a social or economic nature, and for beneficial consequences of major importance for the environment;

d) for the purposes of scientific research and education, repopulation and reintroduction of these species, as well as for breeding operations necessary for this purpose, including for the artificial propagation of plants;

e) to allow, under strictly controlled conditions, in a selective manner and to a limited extent, the catching or holding of a limited and specified number of specimens of certain species of birds or of the species set out in Annexes no. 4 A and 4 B;

f) in the interests of aviation safety, for all species of birds, including migratory ones.

(2) The derogations shall be established by order of the head of the central public authority for the protection of the environment and forests, with the approval of the Romanian Academy.

(2 ^ 1) By exception of the provisions of paragraph (2), for the establishment of derogations concerning all species of birds and species of mammals provided for in Annexes no. 4 A and 4 B, the assent of the central public authority for the protection of the environment and forests is also required.

(2 ^ 2) The procedure for establishing derogations shall be approved by order of the central public authority for the protection of the environment and forests:

a) species that are subject to derogations;

b) the means, systems or methods authorised for capture or slaughter;

c) the risk conditions and the circumstances of time and space subject to which such derogations may be granted;

d) the authority empowered to declare that the required conditions are met and to decide on the means, systems or methods that may be used, to what extent and by whom;

e) the checks to be performed.

3. The competent authority for environmental protection shall report to the European Commission on the derogations applied, as follows:

a) annually, for derogations applied to wild bird species;

b) every two years, for the derogations applied to the wild species provided in annex no. 4 A (...)."

National action plans for large carnivores, *Ursus arctos* and *Canis lupus* were adopted, but there is no implementation of the plans except for **derogations Orders for hunting** or killing the animals posing a threat to humans.

In that sense, an Emergency Governmental Ordinance no 81/2021 on the approval of immediate intervention methods for preventing and combating attacks by Brown bears on persons and their property, within the built-up areas of localities, as well as for amending and supplementing normative acts, was passed allowing the killing of the Brown bears without the involvement of the environmental protection agencies.

There is no involvement of the environmental authorities in trapping and killing of Brown bears, and no formal analysis of the documentation. Previously, it was discussed in the commissions of the Parliament, where there is a modification proposed to also apply these measures outside the localities area (in the forests, and in the protected habitats of Brown bears).

To conclude, Emergency Governmental Ordinance no 81/2021 provisions **are breaching Articles 12 and 13 of the Habitats Directive** by the way the hunting of the bears is allowed. In addition, the modification proposed and debated by the Parliament currently would allow the elimination of the bear in the wild following the same methods, which would also violate European law. A similar provision is

also being proposed under the Hunting Law affecting the protection of migratory birds (see section below).

Further, ministerial orders for harvesting wild animals are issued such as for ex Order no 1652/2021 on the approval of the derogation for certain species of wild animals establishing a derogation from article 33 paragraph 1 of Emergency Governmental Ordinance 57/2007, and setting an obligation on the beneficiary to inform the Environmental Protection Agency within seven days AFTER the harvesting took place. This provision is non-compliant with the requirements of the Habitats Directive.

Protection measures required

The Emergency Governmental Ordinance 57/2007²⁵ concerning the regime of protected natural areas, conservation of natural habitats, and wild flora and fauna transposes the Habitats Directive and the Birds Directive. The EGO was approved through Law 49/2011 and includes the following Annexes which follow the Directive Annexes:

- Annex 2 of EGO 57/2007 corresponds to Annex I of the Habitats Directive - natural habitat types of community interest whose conservation requires the designation of special areas of conservation, and also corresponds to Annex I of the Birds Directive.
- Annex 3 of EGO 57/2007 corresponds to Annex II of the Habitats Directive - animal and plant species of community interest whose conservation requires the designation of special areas of conservation.
- **Annex 4.a of EGO 57/2007** corresponds to Annex IV of the Habitats Directive - animal and plant species of community interest in need of strict protection.
- Annex 4.b of EGO 57/2007 concerns animals and plants protected at national level.
- **Annex 5.a of EGO 57/2007** corresponds to Annex V of the Habitats Directive - animal and plant species of community interest whose taking in the wild, and exploitation, may be subject to management measures.
- Annex 5.b of EGO 57/2007 concerns animals and plants protected at national level that may be subject to management measures.
- Annex 5.c of EGO 57/2007 corresponds to Annex II of the Birds Directive – Species that can be hunted. In 2020, **PELECANIFORMIS – Phalacrocoracidae – Phalacrocorax carbo sinensis (The Grate Cormorant)** was added.

EGO 57/2007 establishes in Article 21 that the conservation objective and measures for protected areas in Romania, including Natura 2000 Sites, are adopted through **management plans, which are approved by Order of the Minister of Environment, Water and Forests.**

Article 21 paragraph 4 states “*Compliance with management plans and regulations is mandatory for protected natural area managers, authorities regulating activities in the territory of protected natural areas, as well as for natural and legal persons who own or manage land and other assets and/or who carry out activities in the perimeter and in the vicinity of the protected natural area*”. The forest managers must respect the conservation measures provided by the management plans of the Natura 2000 sites.

Furthermore, the land use plans, those of local and national development, as well as any other plans for exploitation/use of natural resources in the protected natural area shall be harmonised by the issuing authorities with the provisions of the management plan.

²⁵ <https://legislatie.just.ro/Public/DetaliuDocument/83289>

2.2 SUBSIDIARY LEGISLATION DERIVED FROM OR REFERENCING THE TRANSPOSING LEGISLATION

There is no specific legislation implementing species protection rules in agricultural areas, other than the generic species protection rules transposing the relevant Birds Directive (BD) and Habitats Directive (HD) provisions.

According to the technical standards regarding CAP cross-compliance within the schemes and support measures for farmers in Romania adopted by Order no 352/636/2015, there is an indirect link between the species protection requirements of the Birds Directive and the Habitats Directive and activities on agricultural land through the measures that are applied outside Natura 2000 sites.

2.2.1 CAP cross-compliance

Order no. 352/636/2015²⁶ for the approval of the standards regarding cross-compliance within the CAP schemes and support measures for farmers in Romania, with subsequent amendments and completions, establishes conditions concerning the provision of financial support from European and national funds for farmers' compliance with basic rules. These conditions are related to the environment, climate change, good agricultural and environmental condition, public health, animal and plant health, animal welfare. The order is issued jointly by the Ministry of Agriculture and Rural Development and the Ministry of Environment, Water and Forests.

SMR 2 applies both inside and outside Special Protection Areas in Romania. The legal definition follows the transposition of Article 5(a-d) of the Birds Directive closely and extends the transposition of Article 5(d) with a detailed list of prohibited activities on agricultural land (see text in bold below).

Order 352/636/2015: “SMR 2 - Conservation of wild birds. Regulations:

Directive 2009/147/EC of the European Parliament and of the European Council of 30 November 2009 on the conservation of wild birds (published in the Official Journal of the European Union, L series, no.20 of 26 January 2010): Article. 3 paragraph (1), Article. 3 paragraph (2) lit. (b), Article 4 paragraphs (1), (2) and (4); Government Emergency Ordinance no. 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, approved with amendments and completions by Law no. 49/2011, with subsequent amendments and completions: Article 21 paragraph (4), Articles 22, 28, Article 31 paragraph (2), Article 33 paragraph (2) and Annexes no. 3 and 4A; Government Decision no. 1.284/2007 regarding the declaration of the special avifauna protection areas as an integral part of the European ecological network Natura 2000 in Romania, with the subsequent modifications and completions: Article 1 and Annex 1.

(...)

2. In order to protect all species of wild birds, including migratory birds, **both in and outside special avifauna protection areas, the following are prohibited:**

- a) intentional killing or capture of wild birds, regardless of the method used;
- b) intentional damage, destruction and/or collection of nests and/or eggs from nature;
- c) intentional disturbance of wild birds, especially during the period of reproduction or maturation, **through activities that contradict the purpose of their protection and conservation, such as: burning of vegetation, cutting down of trees/shrubs/protective strips of trees existing on agricultural land or changes in land use and watercourses, as well as other activities that contradict the purpose of protection and conservation of the protected natural area”.**

Similarly, SMR 3 applies inside and outside Special Areas of Conservation, and is based on the transposition of Article 12(1)(a)(b)(d) and Article 13(1)(a) of the Habitats Directive and extends the transposition of Article 12(1)(b)(d) with the same list of prohibited activities as in SMR2.

²⁶ <http://legislatie.just.ro/Public/DetaliiDocumentAfis/168308>

Order 352/636/2015: “SMR 3 - Conservation of natural habitats and of wild flora and fauna Regulations: Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (published in the Official Journal of the European Communities, L, no. 206 of 22 July 1992): **Article 6 paragraphs (1) and (2)**; Government Emergency Ordinance no. 57/2007, approved with modifications and completions by Law no. 49/2011 with subsequent amendments and completions: Articles 21, 22, 28, Article 33 paragraph (1) and Annexes 3, 4A and 4B:

(...)

2. For the protection of species of wild plants and animals provided in Annexes 4A and 4B to the Government Emergency Ordinance no. 57/2007, approved with modifications and completions by Law no. 49/2011, with subsequent amendments and completions, living **both in and outside protected natural areas**, the following are prohibited:

a) any form of harvesting, capturing, killing, destroying or damaging the specimens found in their natural environment, in any of the stages of their biological cycle;

b) damage and/or destruction of breeding sites or resting places **of wild animals and intentional disturbance of wild animals during the period of reproduction, breeding, hibernation and migration, through activities contrary to the purpose of their protection and conservation, such as: burning of vegetation, cutting down of trees/clumps shrubs/protective strips of trees existing on agricultural land, changes in land use and watercourses, as well as other activities that contradict the purpose of protection and conservation of the protected natural area;**

c) harvesting flowers and fruits, harvesting, cutting, uprooting, or intentionally destroying wild plants in their natural habitats, in any of the stages of their biological cycle”.

GAEC 7

The detailed requirements of GAEC 7 include maintenance of landscape features (trees and terraces) and a ban on cutting hedges and trees during the bird breeding season. In the explanatory text, the more detailed definition of ‘cutting’ reflects (but does not reference) elements of the species protection legislation.

Order 352/636/2015: “GAEC 7 - Maintaining landscape features, including trees in lines, in groups or in isolation and existing terraces on agricultural land, including a ban on felling hedges and trees during the breeding and rearing of wild birds, taking measures to prevent the establishment and spread of invasive plant species on agricultural land.

(...)

3. *It is forbidden to cut hedges and trees during the breeding and rearing of wild birds”*

“1. The landscape features shall be maintained, including trees in lines, in groups or in isolation, and existing terraces on agricultural land.

2. Measures shall be taken to prevent the establishment and spread of invasive plant species on agricultural land.

3. The cutting of hedges and trees during the breeding and rearing of wild birds shall be prohibited.

Invasive plants on agricultural land means plants with high expansion capacity, having harmful effect on agricultural crops, without prejudice to the definition of ‘invasive species’ offered in Article 4 point 27 of the Governmental Emergency Ordinance no. 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, approved with amendments and completions by Law no. 49/2011, with subsequent amendments and completions.

Cutting hedges and trees means any kind of pruning or intervention on hedges and trees, which would lead to the deterioration or destruction of breeding and rearing sites of wild birds, as well as their deliberate disturbance.

The period of breeding and rearing of wild birds means the period in which a species of bird lays eggs, hatches them and raises their chicks until they are able to fly. Without prejudice to the restrictions in the management plans and regulations of the protected natural areas, the breeding and rearing period for bird species is 15 March to 30 June, both within and outside the protected natural areas (Natura 2000 Sites). Compliance with GAEC 7 requirements is verified at the level of the agricultural plot.”

2.3 SPECIFIC RULES APPLICABLE AT FARM LEVEL UNDER THIS LEGISLATION

As described above, the requirements of SMR 2, SMR 3 and GAEC 7 relevant to protected species are applicable at parcel-level²⁷ for all farms in Romania that benefit from CAP area-based agricultural support payments (direct payments under Pillar 1 and environmental land management contracts under Pillar 2).

Outside Natura 2000 areas, there are no specific rules at farm level for protection of species found in agricultural areas (as there are for example in Hungary, where a buffer zone is established around nests of the protected species and where the owner of the land is not allowed to work on it until the young are old enough²⁸). Although GAEC 7 clearly prohibits cutting down trees and hedges between 15 March and 30 June, and SMR 2 prohibits intentional disturbance of wild birds and their nests, especially during the breeding season, there is no specific information for farmers on what the nests look like, or how to deal with certain protected species if they do find them on their farm.

Within Natura 2000 areas, the Ministry of Environment, Water and Forests has set out species protection measures in their Natura 2000 management plans, also related to agriculture. The Ministry of Agriculture and Rural Development does not agree with the measures set out in the management plans for Natura 2000 sites, considering that they exceed the requirements of agri-environment measures. As a result, the measures regulated by the Environmental authority are not respected by the competent agricultural institutions. The management plans are adopted by Orders of the Minister of Environment, on the same level as the Minister of Agriculture. According to the comments from the Ministry of Agriculture, the management plans are issued without following a joint procedure and without the input of the Ministry of Agriculture. This is not entirely correct since the Natura 2000 Management plans are adopted through an open procedure whereby the Ministry Of Agriculture can participate in the working group established according to the SEA procedure, and can participate in the measures imposed for the protection of agriculture related biodiversity. If this collaboration tool is not functional, it is due to a lack of coordination between different governmental bodies. The Order defining SMR 2 and SMR 3 includes species protection requirements derived from the transposing legislation (as described in section 2.2) and also stipulates that farmers respect Natura 2000 management plans. However, as long as the Ministry of Agriculture and Rural Development does not approve the management plans, then even the provisions of the SMR cannot be completely fulfilled.²⁹

The agri-environment-climate measures of the National Rural Development Plan 2014-2020 are relevant in this context. These are voluntary contracts that are available to farmers, who are defined as natural or legal persons or associative forms of natural or legal persons, regardless of their legal status, whose holding is located on the territory of Romania and who carry out an agricultural activity. Each agri-environment and climate package from the NRDP contains specific requirements that farmers must meet if they have volunteered for that package³⁰. These packages of measures funded by the NRDP 2014-20 enable farmers to respect species protection legislation including the management of grassland ecosystems/HNV, and support the implementation of management and action plans for the conservation of some bird species, large carnivores (*Ursus arctos*, *Canis lupus*), and management measures for bat species and beaver (*Castor fiber*)³¹. Compensatory payments are granted to the farmers that assume such

²⁷ <https://www.sciencedirect.com/science/article/abs/pii/S0168169919321465>

²⁸ Interview of Carpathians Society Satu Mare.

²⁹ Written comments from Ministry of Agriculture and Rural Development.

³⁰ Interview of counsellor at the Ministry of Agriculture and Rural Development - Managing Authority for the National Rural Development Program – MADR.

³¹ <http://www.mmmediu.ro/articol/ghiduri-si-alte-publicatii/436>

voluntary contracts³².

Box 1 provides a list of packages of agri-environment measures targeted at protected species and their habitats, and Box 2 details examples of agri-environment commitments at plot level relevant to maintaining habitats used by protected birds and butterflies associated with farmland.

Box 1 Agri-environment-climate packages for protected species and their habitats in NRDP 2014-20

Package 1 - high natural value (HNV) meadows

Package 2 - traditional agricultural practices

- variant 2.1 - manual works on permanent meadows used as hayfields
- variant 2.2 - works with light equipment on permanent meadows used as hayfields

Package 3 - important meadows for birds (*Crex crex*, *Lanius minor* and *Falco vespertinus*)

- sub-package 3.1 - *Crex crex*
 - variant 3.1.1 - manual works on important meadows for *Crex crex*
 - variant 3.1.2 - works with light equipment on important meadows for *Crex crex*
- sub-package 3.2 - *Lanius minor* and *Falco vespertinus*
 - variant 3.2.1 - manual works on important meadows for *Lanius minor* and *Falco vespertinus*
 - variant 3.2.2 - works with light equipment on important meadows for *Lanius minor* and *Falco vespertinus*

Package 4 - green crops

Package 5 - adaptation to the effects of climate change

Package 6 - important meadows for butterflies (*Maculinea* spp.)

- variant 6.1 - manual works on important meadows for butterflies (*Maculinea* spp.)
- variant 6.2 - works with light equipment on important meadows for butterflies (*Maculinea* spp.)

Package 7 - important arable land as feeding grounds for red-breasted geese (*Branta ruficollis*)

Package 8 - raising local endangered farm animals

Package 9 - concerning arable land and on meadows for the lesser spotted eagle (*Aquila pomarina*)

- sub-package 9.1 - arable land important as feeding grounds for the lesser spotted eagle (*Aquila pomarina*),
- sub-package 9.2 - important permanent meadows as feeding areas for the lesser spotted eagle (*Aquila pomarina*)
 - variant 9.2.1 - manual works on important meadows for the lesser spotted eagle (*Aquila pomarina*),
 - variant 9.2.2 - works with light equipment on important meadows for the lesser spotted eagle (*Aquila pomarina*).

Package 10 - ecological shelters on arable land for common bird species associated with agricultural land

Package 11 - important agricultural land for bustards (*Otis tarda*)

- sub-package 11.1 - important arable lands for bustards (*Otis tarda*)
 - variant 11.1.1 - conversion of arable land into meadows
 - variant 11.1.2 - protection zone for bustards (*Otis tarda*) on arable land
- sub-package 11.2 - important meadows for bustards (*Otis tarda*)
 - variant 11.2.1 - manual works on important meadows for bustards (*Otis tarda*)
 - variant 11.2.2 - works with light equipment on important meadows for bustards (*Otis tarda*)
 - variant 11.2.3 - works with heavy equipment on important meadows for bustards (*Otis tarda*)

³² <https://www.fonduri-ue.ro/pndr-2014>

Box 2 Relevant agri-environment-climate commitments at plot level in NRDP 2014-20

Examples of agri-environment-climate commitments relevant to maintaining habitats used by protected farmland species:

- working with mechanised equipment is not allowed on the surface of the meadows subject to a commitment, with the exception of equipment operated by animal power, or the work can be performed with low-capacity mechanised equipment (mowing with machines with short blades and low travel speed); the use of heavy equipment is prohibited;
- the use of chemical fertilisers and pesticides is prohibited;
- the traditional use of manure is allowed up to the equivalent of a maximum of 40 kg N sa/ha;
- an uncut strip, 3 metres wide, will be left on the edges of each plot (can be mowed after 1 September);
- 10% of the surface of each plot under commitment will remain uncultivated; the uncultivated area will be located so that the compact cultivated area does not exceed 4 ha and the minimum width of the strips that will be set up for this purpose will not be less than 3 metres;
- when harvesting a maize crop, an unharvested area of minimum 5% and maximum 10% is left (the crop can be left standing or lying flat) or, in the situation when a maize crop is not established, in the respective commitment year the farmer is obliged to ensure a quantity of 100 kg of grain per hectare and at least one feeding point on the area of each plot employed;
- pesticides and phytostimulants (fertilizers) may not be used in the period between sowing the autumn crop and 15 March;
- agricultural work and/or grazing are prohibited from 15 October to 15 March;
- the use of methods of repelling birds between 15 October and 31 March is prohibited;
- mowing is carried out using a device (described in the chapter “Description of the type of operation”) for the protection of nesting birds on the ground;
- work with mechanised equipment is not permitted on the surface of the grassland under commitment with the exception of those operated by animal force, or the work may be carried out with low capacity mechanised equipment (mowing with short blade equipment and low speed), the use of heavy equipment is prohibited, or the works can be performed with conventional/heavy mechanised equipment, but the mowing is done using a device for the protection of nesting birds on the ground.

According to the representatives of the Ministry of Agriculture and Rural Development³³, the evaluation of the efficiency and effectiveness of the environment and climate measures was carried out through the study “On-going evaluation of PNDR 2014-2020 from 2017-2020 - Evaluation study VII - Environmental and climate measures from PNDR 2014-2020”. The study is available on the MADR website³⁴:

*“Environmental and climate measures contribute to the conservation of important habitats and their related species in Romania. The significant effort of the NRDP in supporting traditional biodiversity-friendly practices is highlighted primarily by the significant increase in the area where such practices were implemented, in recent years. In addition, in some areas, there is a positive correlation between the efforts made through the program and the slowdown in the decline of the bird population specific to agricultural land or, in some cases, the reversal of the declining population at local level. However, there are a few exceptions, such as the species *Branta ruficollis*, which had a downward trend during the period under review. In addition, the significant area of NRDP commitments concerning Natura 2000 sites demonstrates the relevance of these measures in supporting management plans for the conservation of priority habitats, as identified in the Habitats and Birds Directives.*”

³³ Interview of counsellor at the Ministry of Agriculture and Rural Development - Managing Authority for the National Rural Development Program – MADR.

³⁴ <https://www.madr.ro/pndr-2014-2020/implementare-pndr-2014-2020/evaluare-pndr-2014-2020/studii-rapoarte-de-evaluare/studiul-de-evaluare-vii.html>, pp. 24, 25.

The results highlighted by the correlation analysis are also supported by the literature, which usually shows a causal link between environmental and climate interventions and biodiversity conservation. Moreover, the perception of the beneficiaries of measure 10³⁵ confirms the link between PNDR support and the improvement of the natural environment, including in terms of biodiversity, as observed in the areas covered during the period under review.”

The clear efforts by the managing authority, MADR, to provide targeted NRDP funding designed to support and encourage farmers in taking action for protected species and their habitats on farmland are a positive step, but are only a part of the solution to improving the implementation of species protection legislation in Romania. There are no available statistics concerning the uptake of these commitments among farmers.

According to the NGOs interviewed, the system does not ensure an effective protection of the species and habitats, with recent years representing the biggest losses in biodiversity of the last 60 years³⁶. The main problems identified are: merging plots, dismantling plot edges and alignments of trees and shrubs, transforming grasslands into arable land. This is exacerbated by the lack of regulations supporting species protection (other than the voluntary agri-environment measures) and inefficient checks on site. These problems are resulting from a small number of checks and a lack of experts on protected species involved in the checks (e.g. biologists instead of agronomists)³⁷.

³⁵ Measure 10 of NRDP – Agri-environment and climate

³⁶ Interview of Carpathians Society Satu Mare.

³⁷ Interview of Carpathians Society Satu Mare.

3 GOVERNMENT ADVICE TO FARMERS ON IMPLEMENTATION OF LEGAL REQUIREMENTS ON SPECIES PROTECTION

One of the specific requirements of the agri-environment-climate measures packages in the RDP 2014-20 is that “the beneficiaries of the measure will have to prove that they have the necessary competences to implement the commitments”.

3.1 FARM ADVISORY SERVICE

The government requirement provided by the NRDP - to provide a CAP Farm Advisory Service - is funded through NRDP Measure 2 (Advisory services, farm management services and on-farm replacement services). Consultancy services are provided to support the improvement of agricultural activities in terms of economic performance and in terms of environmental practices which benefit biodiversity, soil and water, and contribute to better adaptation to the effects of climate change in high-risk areas and to the reduction of GHG and ammonia emissions. Advice on particular aspects of the process of setting up and developing associative forms³⁸ stimulates the formation of producer groups and helps them in the phases of effective development and implementation of investment projects. In addition, the consultancy will aim to promote sustainable management of natural resources, adapt to the effects of climate change and reduce GHG and ammonia emissions and comply with the specific obligations of the measures of the NRDP.

However, it is not clear who is actually advising the farmers on specific issues related to protected habitats and species, as the government agencies do not have any programmes or employees with such responsibilities, and the local landowners and NGOs are not receiving advice.³⁹ In conclusion, specialised advice for farmers on their legal obligations concerning protected species is not provided by the authorities. The Ministry of Agriculture provides two reports concerning the advice given to farmers for 2014 and 2015⁴⁰. The reports are related to CAP cross-compliance.

Between 2014 and 2020, under NRDP Measure 1 (knowledge transfer and information actions) some information was provided for the farmers⁴¹. In June 2015, a call was launched for projects concerning information sessions for the farmers⁴². The projects concerned CAP cross-compliance.

According to the Ministry of Agriculture and Rural Development Report in 2015, they have organised:

Initiation seminars concerning:

- Common Agricultural Policy 2014-2020;
- Implementation of cross-compliance rules in support schemes and measures for farmers in Romania:
 - Good agricultural and environmental conditions (GAEC), including maintaining the area of permanent pasture at national level
 - Complete list of standards
 - Legal requirements for Statutory Management Requirements (SMR) on environment, identification and registration

³⁸ <https://www.econstor.eu/handle/10419/76840>

³⁹ Interview of Carpathians Society Satu Mare.

⁴⁰ <https://madr.ro/pndr-2014-2020/implementare-pndr-2014-2020/evaluare-pndr-2014-2020/1817-raport-sintetic-privind-activitatile-de-consultanta.html>

⁴¹ <https://www.madr.ro/pndr-2014-2020/implementare-pndr-2014-2020/masura-1-actiuni-pentru-transferul-de-cunostinte-si-actiuni-de-informare.html>

⁴² https://www.madr.ro/docs/dezvoltare-rurala/programare-2014-2020/fise-masuri/aprobate-iunie2015/M01_-_Ac%C8%9Biuni_pentru_transferul_de_cuno%C8%99tin%C8%9Be_%C8%99i_ac%C8%9Biuni_de_informare_aprob.pdf

- Minimum requirements for the use of fertilizers and plant protection products
- European and national legislation on cross-compliance
- Code of good agricultural practice for water protection against nitrate pollution from agricultural sources;
- Adapting agriculture to climate change;
- Mitigating the effects of climate change on agriculture and the rural environment;
- Use of renewable energy sources;
- Cultivation, animal husbandry and primary processing technologies, results of applied research.

Training courses regarding:

- Information/training courses on cross-compliance rules, PNDR 2014 - 2020, adaptation of agriculture to climate change, etc.;
- Training courses for the beneficiaries of Measure 141 - Support for semi-subsistence farms from PNDR 2007-2013;
- Training courses for the beneficiaries of Measure 112 - Installation of young people from PNDR 2007-2013;
- Training courses for the beneficiaries of Measure 10 - Agri-environment and climate and Measure 11 - Organic farming from PNDR 2014-2020.

Professional training courses for consultants. The main topics are:

- Common Agricultural Policy 2014-2020;
- PNDR objectives 2014 - 2020;
- Implementation of cross-compliance rules in support schemes and measures for farmers in Romania:
 - Good agricultural and environmental conditions (GAEC), including maintaining the area of permanent pasture at national level
 - Complete list of standards
 - Legal requirements for management (SMR)
 - Minimum requirements for the use of fertilizers and plant protection products (CM)
 - European and national legislation on cross-compliance;
- Adapting agriculture to climate change; Mitigating the effects of climate change on agriculture and the rural environment;
- Use of renewable energy sources;
- Promoting community and national legislation on the development of the food industry sector, of agricultural and food products that have acquired national and community protection, and of traditional and established products;
- Implementation of Directive no. 128/2009 EC and GEO no. 34/2012 for establishing the institutional framework for action for the sustainable use of pesticides in Romania, according to the protocol concluded with The National Fitosanitary Authority;
- Preparation of pastoral arrangements in accordance with the provisions of GEO no. 134/2013 on the organisation, administration and operation of permanent meadows.

It is not clear why such trainings were not organized after 2015. There is no detailed program concerning training or advice given to the farmers on protected species.

3.2 INFORMATION PROVIDED ABOUT THE NRDP 2014-2020

Within the **National Rural Development Program 2014-2020**, agri-environment and climate measures contributed to the conservation of biodiversity. Thus, the sustainable management of essential arable land is ensured as feeding areas for the red-breasted goose (*Branta ruficollis*), the supported surface area being approximately 52,000 ha/year and approximately 639 beneficiaries per year. Measure 10 - Agri-environment and climate has created the necessary framework for the widespread application of extensive general agricultural methods that meet the specific conservation needs of a wide range of species and habitats (eg those found in the HNV area). In addition, in areas representative of certain elements of biodiversity (e.g. species of butterflies or wild birds), Measure 10 proposes some commitments adapted to ethological specificity, which will ensure the achievement of the proposed objectives. Further, some types of proposed commitments will ensure better management of natural resources in the context of risks associated with agricultural activities⁴³. Although some areas designated as Natura 2000 sites are covered by areas eligible under Measure 10, and users of agricultural land in these areas can benefit from compensatory payments following the implementation of commitments that promote extensive agricultural practices with little impact on environmental factors, the agri-environmental measures do not cover all conservation needs for the Natura 2000 network. These measures are voluntary, not mandatory as the **measure on Natura 2000 Payments** would be. An assessment was also made in the European Court of Auditors' 2020 Report, "Biodiversity on agricultural land: the contribution of the CAP has not stopped declining". Recommendation 2 of the report states: "EU rural development instruments have a greater potential than direct payments for maintaining and enhancing biodiversity. The most appropriate are agri-environment and climate measures, followed by organic farming and **Natura 2000 payments**, so the need to have Natura 2000 payments is urgent in Romania.

The financing opportunities from the EAFRD through the NRDP 2014-2020 are brought to the attention of those interested both by publishing the relevant information on the websites of the paying agencies⁴⁴, as well as on the website of the Ministry of Agriculture and Rural Development⁴⁵.

The National Network for Rural Development (RNDR) has undertaken a series of promotional activities for all rural development measures, including environmental (biodiversity) and climate measures, namely:

- organisation of events (thematic conferences, expert meetings, national conferences, etc.);
- printing of promotional materials (leaflets, flyers, posters);
- networking (websites, social networking sites, etc.);
- information through the RNDR newsletter⁴⁶, as well as on the social media pages managed by it, with information regarding the sessions for submitting funding applications, and submission deadline.

Thus, the National Network for Rural Development organised in 2018 and 2019 two meetings of experts in Buzău and Braşov counties, on the implementation of the *environmental and climate measures* in the 2014-20 NRDP, respectively Measure 10 (agri-environment-climate), Measure 11 (organic agriculture) and Measure 13 (Payments for areas facing natural constraints or other specific constraints).

The two events were attended by a total of 40 participants, representatives of the Management Authority for the NRDP (Ministry of Agriculture - NRDP), the Agency for Financing Rural Investments (AFRI),

⁴³ Interview of counsellor at the Ministry of Agriculture and Rural Development - Managing Authority for the National Rural Development Program – MADR.

⁴⁴ www.afir.info www.apia.org.ro

⁴⁵ Interview of counsellor at the Ministry of Agriculture and Rural Development - Managing Authority for the National Rural Development Program – MADR.

⁴⁶ <https://www.rndr.ro/comunicare/newsletter.html>

the Agency for Payments and Intervention for Agriculture (APIA), as well as representatives of the National Agency for Protected Natural Areas (NAPNA) and of the County Agencies for Environmental Protection (EPA).

The topic of *environment and climate* was also debated at two thematic conferences in 2019, held respectively in Bucharest from 29-30 August and in Buziaş from 16-17 October. Approximately 100 people participated in each of the events and topics were discussed which addressed the opportunities for funding interventions relating to the environment and climate in the context of the National Strategic Plan (NSP).

At the same time, in 2018, the following informative materials concerning *environment and climate issues* was available:

- Leaflet regarding the payment schemes/measures that Romanian farmers could benefit from during the 2020 Campaign;
- Flyer “Compensatory payments for environmental and climate measures from PNDR 2014-2020”;
- Infographic “Measure 10 Agri-environment and climate” - 2020;
- Leaflet on Measure 10, Package 8 Endangered Breeds - 2020;
- Infographic “Measure 13 Payments for areas facing natural or other specific constraints” - 2020;
- Brochure on compensatory rural development measures applicable on agricultural land in 2020;
- Informative guide for the beneficiaries of Measure 10 Agri-environment and climate from the National Rural Development Program (PNDR) 2014 - 2020 related to the 2020 Campaign;
- Informative guide for the beneficiaries of Measure 13 Payments for areas facing natural constraints or other specific constraints from the National Rural Development Program (PNDR) 2014 - 2020 related to the 2020 Campaign;
- Maps of areas eligible for Measures 10, 11 13, by counties, also valid in the 2020 Campaign;
- List of areas eligible for environmental and climate measures (Measures 10, 11 and M13), 2020;
- Calendars of agricultural works for the packages related to Measure 10, Campaign 2020;
- List of Control Bodies for organic farming approved by MADR, Campaign 2020;
- Brochure “Plant species used as indicators of grassland management”;
- Brochure “Indicative plant species for meadows with high natural value”.

The materials were distributed throughout the country, at the level of County Rural Development Departments (CDRJ) of MA PNDR, APIA and AFRI county centres, at the level of Local Action Groups, as well as at local institutions, such as town halls, prefectures, County Agricultural Directorates, etc. At the same time, the promotional materials listed above can be found on the MADR, AFIR and APIA websites, by accessing the relevant links⁴⁷. Also, MADR responded to the numerous requests from those interested in environmental and climate issues in the context of the National Rural Development Program or the National Strategic Plan, addressed to the institution by email or traditional mail. These promotional actions are complemented by those carried out by the paying agencies (AFIR and APIA), responsible for the implementation of agri-environment and climate measures.

According to the interviewed NGOs⁴⁸, the brochures and guides offered by the Government are too complicated and difficult for local farmers to understand, as well as insufficient for a real protection of

⁴⁷ <https://www.madr.ro/pndr-2014-2020/implementare-pndr-2014-2020/masuri-de-mediu-si-clima.html>; <https://www.afir.info/> ; and <https://apia.org.ro/materiale-de-informare>;

⁴⁸ Interview of Carpathian Society Satu Mare.

the species and habitats. However, no civil society initiatives were identified concerning the conservation measures of the protected species and habitats in agriculture.

The information included in environment and climate issues, is not detailed concerning the biodiversity chapter. For example, in a guide issued by MADR in 2019 for farmers⁴⁹, at page 28 it is mentioned the farmers should respect SMR 2 – protection of wild birds but the content is a copy and paste of the law: to respect the management plan of the Natura 2000 site, to carry on the environmental assessments when needed. Also, it is mentioned that it is not permitted, inside and outside the Natura 2000 sites, to kill, capture, damage nests, destroy eggs or to intentionally disturb protected species of birds. The guide also presents the other provisions of SMR and GAEC, providing the same information as mentioned in the legislation. Only eight pages of the guide is dedicated to biodiversity. The farmers in Romania are in general elderly people, who learnt how to farm before the environmental norms were passed in Romania. The environmental legislation is new and the possibility for farmers to learn about such issues does not exist. The training and information provided by the government is insufficient for farmers to be able to implement it effectively, and thus they are unable able to fulfil the environmental requirements.

⁴⁹ <https://www.madr.ro/pndr-2014-2020/implementare-pndr-2014-2020/masuri-de-mediul-si-clima/masuri-de-mediul-si-clima-2021.html>

4 ENFORCEMENT OF LEGAL REQUIREMENTS FOR SPECIES PROTECTION ON AGRICULTURAL LAND

4.1 ENFORCEMENT OF ENVIRONMENTAL LEGISLATION

According to the NGOs interviewed⁵⁰, field inspections linked to the CAP payments to farmers are very rare and carried out without paying attention to the needs of protected species and habitats.

The National Environmental Guard, the inspection body on environmental issues, does not conduct any planned inspections on agricultural farms, but it can respond to particular complaints. If they find evidence of environmental crimes when investigating the complaints, they may submit a criminal complaint based on EGO 57/2007 on the regime of protected natural areas, and conservation of natural habitats, wild flora and fauna. Any other person who becomes aware of environmental crimes can make complaints to the police. Usually, it is the environmental NGOs who file such complaints to the National Environmental Guard or directly to the police.

The NEG does not have the competence to investigate crimes. The full jurisdiction belongs to the judiciary institutions (the police and prosecution and the courts of justice) .

The CAP Cross-Compliance norms are not subject to NEG inspections and control. According to Order 194/2019⁵¹, the competent authority is APIA. In this regard, a clarification of the competences is needed. Also, the NEG has very limited resources in terms of human resources, very few inspectors compared to the amount of work they need to do, with very limited income (between EURO 500 and 800 net monthly), and also in terms of technical resources⁵².

EGO 57/2007⁵³ on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, Article 52 paragraph 1(d) regulates a criminal offence for the violation of Article 33 paragraph 1 and 2, transposing Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive. The sanction provided by law is imprisonment from three months to one year, or a fine.

Criminal offences are also regulated by **Article 52 paragraph 1 of EGO 57/2007**, punished also with the penalty of imprisonment from three months to one year, or a fine.:

- Letter a) the definitive or temporary removal from the agricultural or forestry circuit of lands within the protected natural area, except for those located in the areas of sustainable development, for other objectives than those provided in Article 27 paragraph (1);
- Letter b) the definitive or temporary removal from the agricultural or forestry circuit of lands from the protected natural area without the consent of the National Agency for Protected Natural Areas or, as the case may be, of the administrator, issued according to the provisions of Article 27 paragraph (2);
- Letter c) non-compliance with the provisions of Article 28 paragraph (1);
- Letter e) hunting of bird species provided in Annex no. 5 C during the breeding and rearing periods of the chicks;
- Letter f) hunting of migratory bird species provided in Annex no. 5 C during their breeding season or during the return route to nesting areas;
- Letter g) capture or killing of wildlife species provided in Annexes no. 5 A, 5 B, 5 C, 5 D and 5 E and for the cases in which derogations are applied, according to the provisions of Article 38, taking, capturing or killing the species provided in Annexes no. 4 A and 4 B with the

⁵⁰ Interview of Carpathians Society Satu Mare.

⁵¹ <http://legislatie.just.ro/Public/DetaliiDocument/211804>

⁵² <https://ziare.com/crestere/crestere-salarii-angajati-garda-de-mediu-1726669>

<https://romania.europalibera.org/a/31305931.html>

⁵³ <https://legislatie.just.ro/Public/DetaliiDocument/83289>

methods or means provided in Annex 6;

- Letter h) capture or killing of wildlife by illegal means;
- Letter h¹ trade with specimens of the species listed in Annexes A and B to Regulation (EC) No 1234/2007. Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by controlling trade therein, published in the Official Journal of the European Communities no. L61 of 3 March 1997, with subsequent amendments and completions, or with parts or derivatives thereof, breaching the relevant legal provisions, unless the trade affects a small number of such specimens and has an insignificant impact on the state of conservation of species;

For criminal offences regulated in Article 52 letters c, d and h¹ committed without intention, the punishment is a criminal fine.

In fact, there are hardly any criminal investigations opened because the criminal offence is not defined clearly and the police have no proper means or knowledge to investigate the crime as provided by the law. **The criminal fines are established according to Article 61 and Article 62 of the Criminal Code:**

Article 61 of the Criminal Code

The amount of the fine shall be determined by the system of 'fine days'. The amount corresponding to a fine day, between 10 lei and 500 lei, is multiplied by the number of fine days, which is between 30 and 400 days.

Article 61 paragraph 3 - The court establishes the number of fine days according to the general criteria for individualising the punishment. The amount corresponding to a fine day shall be determined by taking into account the material situation of the convicted person and the legal obligations of the convicted person towards the dependent persons .

(4) The special limits of fine days are between:

- a) 60 and 180 days, when the law provides the penalty of a fine only for the crime committed;
- b) 120 and 240 days, when the law provides for the punishment of a fine alternating with imprisonment of maximum two years;
- c) 180 and 300 days, when the law provides for the punishment of a fine alternating with imprisonment of more than 2 years.

(5) If the crime was aimed at obtaining a patrimonial benefit, and the punishment provided by law is only a fine or the court decides to apply this punishment, the special limits of the fine days may be increased by one third.

(6) The fractions established by law for reasons of attenuation or aggravation of the punishment shall be applied to the special limits of the fine days provided in paragraph (4) and paragraph (5).

Article 62 of the Criminal Code

The fine that accompanies the prison sentence:

(1) If the committed crime was aimed at obtaining a patrimonial benefit, in addition to the prison sentence, the penalty of a fine may be applied.

(2) The special limits of the fine days provided in Article 61 paragraph (4) letter b) and letter c) is determined in relation to the duration of the prison sentence established by the court and may not be reduced or increased as a result of the causes of mitigation or aggravation of the sentence.

(3) When establishing the amount corresponding to a fine day, the value of the patrimonial benefit obtained or pursued shall be taken into account.

According to EGO 57/2007 Article 52 paragraph 3 (3), by derogation from the provisions of the Criminal Code, in the case of the offence provided in paragraph (1), the amount corresponding to a fine day for the legal entity is between 500 lei and 25,000 lei.

Other administrative fines are provided by AGO 57/2007, such as Article 53 paragraph 3 letter g

“(3) The following acts constitute a contravention and are sanctioned with a contravention fine from 7,500 lei to 15,000 lei for natural persons and from 50,000 lei to 100,000 lei for legal entities:

g) the marketing, possession and/or transport for the purpose of marketing, live or dead, of any parts or products derived from the species referred to in Annex 5.E⁵⁴ without the special authorisation issued by the central public authority for the protection of the environment and forests, according to the provisions of Article 33 paragraph (6)”;

The system of administrative sanctions for cross-compliance applicable to schemes and support measures for farmers is regulated by Order 194/2019 of the Ministry of Agriculture and Rural Development⁵⁵ for Measure 10 “Agri-environment and climate”:

Chapter I paragraph 1. The system of penalties applicable to applications for payment under measure 10 “Agri-environment and climate” submitted by farmers since the 2020 marketing year shall be established taking into account the following aspects of non-compliance found:

- in case of negligence the penalty consists of application of a reduction in the total amount of payments calculated without penalty, even if no other sanctions have been imposed on the farmer, if the non-compliance was due to his or her unintentional action;
- intention presupposes the prediction by the farmer of the result of his deed in the conditions in which either he or she intended to bring about a specific consequence through his or her actions or, although he or she does not intend it, he or she performs the action with a wrongful purpose..

Chapter I paragraph 2. These cases may relate to, but are not limited to: knowingly misleading the competent authorities in verifying supporting documents, providing false data or documents, and any other attempt to defraud in order to obtain payments from non-reimbursable European funds.

A recurrence of non-compliance is considered intentional (deliberate non-compliance) only if the share of the area affected by the non-compliance that generated the recurrence compared to the declared area is greater than or equal to 20%. If this weighting does not exceed 20%, recurrence shall not be punished. This provision applies only to specific requirements that are verified and sanctioned at plot level, not to over-declaration/administrative sanctions in respect of declared animals;

- the extent of the non-compliance depends in particular on its effect on the operation as a whole;
- the duration (persistence) depends in particular on the period of time in which its effect is manifested or on the possibility of putting an end to that effect by reasonable means;
- recurrence is the identification of similar non-compliances in the last four years, in the case of the same beneficiary or the same measure, provided that the beneficiary has been informed of a previous case of non-compliance and has been able, if necessary, to take the necessary measures to remedy a previous situation of non-compliance;
- the seriousness of the non-compliance depends in particular on the significance of its consequences, having regard to the objectives pursued by the commitments or obligations which have not been complied with.

According to Chapter I paragraph 4 of the Order 194/2019, there are six categories of sanctions, which apply in the following order to the amount of payment remaining after the previous stage of sanctioning:

- A. Sanctions for over-declaration of areas/administrative sanctions in respect of declared animals;
- B. Sanctions for non-compliance with the general eligibility conditions, specific requirements and relevant basic requirements;
- C. Penalties for late submission of the request for payment;

⁵⁴ Species of birds of EU interest - whose marketing is permitted under special conditions.

⁵⁵ <http://legislatie.just.ro/Public/DetaliiDocument/211804>

- D. Sanctions for non-declaration of all surfaces/areas;
- E. Sanctions for non-compliance with cross-compliance;
- F. Additional sanctions.

(5) The farmer will not be sanctioned in cases of force majeure and exceptional circumstances if he or she has presented supporting documents in this regard, according to the legislation in force and specific procedural regulations for the implementation of the National Rural Development Program 2014-2020 (PNDR 2014-2020), approved by order of the Minister of Agriculture and Rural Development.

The responsible authority for applying the administrative sanctions is APIA.

The field checks for CAP payments is based on a sampling plan for farmers, developed by APIA. The selection of the applications to be verified in the field is made on the basis of risk analysis and elements of the representativeness of the submitted payment requests. For farmers included in the control sample for EAFRD Measure 10 (agri-environment-climate), the relevant mandatory cross-compliance standards⁵⁶ must be verified. These are some of the basic requirements that must be met at the level of plots under commitments under Measure 10 packages 1-7 and 9-11, and at the level of animals for commitment in the case of package 8 of measure 10. The technical file of Measure 10 includes clarifications on the correspondence of relevant GAEC and SMR standards with the packages/sub-packages/variants of the agri-environment measure.

Each year, APIA establishes the control sample of the farmers subject to inspections. In 2021 APIA established⁵⁷ a control sample of 55,844 farmers for whom the compliance with cross-compliance rules will be verified, a total of 1,319,383.3 ha out of 13.3 million ha of agricultural land in Romania.

4.2 ENFORCEMENT OF CAP REQUIREMENTS

APIA has developed the CAP Integrated System of Administration and Control in Romania (IACS)⁵⁸.

The following area payment schemes are managed by APIA: SAPS (single area payment scheme), CNDP (complementary national direct payments), LFA (less-favoured areas) payments, agri-environment-climate measures, energy crops scheme and, since 2008, transitional payments for tomatoes.

IACS consists of a set of components bringing together staff, procedures, computer technology and telecommunications in order to manage payment requests submitted by farmers and verify the correctness of the information declared by them.

At the end of each annual application period, farmers' requests are entered in the IACS database, and an automatic administrative check takes place within the software. This check involves verifying the correctness⁵⁹ and completeness of the data in the applications and, mainly, cross-checking with the LPIS⁶⁰ database (the system of plot identification). The basic eligibility conditions that a farmer must meet in order to benefit from CAP direct area support are:⁶¹ the use of an area of agricultural land greater than or equal to 1 ha consisting of plots larger than 0.3 ha; maintaining the respective land in accordance with the cross-compliance requirements (GAEC and SMR).

European regulations⁶² require that each year a sample of at least 5 % of all CAP applications for Pillar I

⁵⁶ Established under Title VI, Chapter I of Regulation (EU) No 1306/2013.

⁵⁷ http://www.apia.org.ro/files/news_files/CP_APIA_demareaz%C4%83_controlul_Campania_2021_09.07.2021.pdf

⁵⁸ <http://www.apia.org.ro/ro/directia-masuri-de-sprijin-i-iasc/sistemul-integrat-de-administrare-si-control-iasc-din-romania1393245798>

⁵⁹ This is done by comparing the data declared by farmers with a series of reference data stored in the databases.

⁶⁰ <http://www.siveco.ro/ro/solutii-business-to-public/eagriculture/lpis>; <http://www.siveco.ro/ro/solutii-business-to-public/eagriculture/lpis>

⁶¹ http://www.apiabn.ro/?page_id=723

⁶² Regulation (EU) 809/2014 Article 30 and Article 32.

area related payment schemes and agri-environment-climate schemes be effectively inspected on the ground. These farms are chosen by risk analysis which is done automatically by the software used. These farms are selected cumulatively, both on the basis of risk factors (size of payment required, size of agricultural area, type of crop, etc.) and on the basis of a random selection process. The control sample at this point is separated into two categories: farms that will be monitored through spot checks and farms that will be monitored by remote sensing, using satellite images. APIA employees monitor selected farms on site or by remote sensing and prepare reports that will be entered into the IACS database. It is important that field-inspected farmers do not refuse access to the farm for the APIA inspector, as they will then be excluded from payment.

The field inspection reports are not publicly accessible. On APIA's website there are no statistics concerning the sanctions applied to farmers for non-compliance of the CAP cross-compliance requirements.

The sanctions concerning the violation of CAP payments are administrative, in the form of reduction in a farmer's CAP payments. In the case of NRDP area-based payments on agricultural land, these are provided by Order no. 194/2019 of the Ministry of Agriculture and Rural Development⁶³ on the approval of the systems of sanctions applicable to payment applications submitted from 2019 for Measure 10 "Agri-environment and climate", with subsequent amendments and completions.

⁶³ <http://legislatie.just.ro/Public/DetaliuDocument/211804>

5 ASSESSMENT AND AUTHORISATION PROCEDURES FOR AGRICULTURAL ACTIVITIES WHICH MIGHT AFFECT THE PROTECTED SPECIES

5.1 ENVIRONMENTAL IMPACT ASSESSMENT

The Environmental Impact Assessment and the Appropriate Assessment are transposed in Romania through the Environmental Impact Assessment Law no 292/2018, which defines the projects connected to agriculture needing such assessment as follows:

Annex 1 – relevant projects for which an EIA is mandatory:

“17. Installations for the intensive rearing of poultry or pigs having at least:

- a) 85,000 places for raising poultry, respectively 60,000 places for laying birds;*
- b) 3,000 places for raising pigs over 30 kg; or*
- c) 900 places for sows”.*

Annex 2 – relevant projects for which the necessity of an EIA has to be determined

“1. Agriculture, forestry and aquaculture:

- a) projects regarding the restructuring of rural land properties;*
- b) projects for the use of uncultivated land or partially man-made areas for intensive agricultural purposes;*
- c) water management projects for agriculture, including irrigation and drainage projects;*
- d) afforestation of land on which there was no previous forest vegetation or deforestation, in order to change the destination of the land;*
- e) installations for the intensive breeding of farm animals, other than those included in annex 1;*
- f) fish farms for intensive fish farming;*
- g) land reclamation from the sea”.*

Annex 3 – selection criteria for determining the necessity of conducting an EIA, mentioning the potential impact on biodiversity

According to the legislation only some agricultural practices are subject to mandatory EIA or screening to determine if the EIA is needed. General agriculture activities are not subject to EIA in line with the EIA Directive.

The Appropriate Assessment (HD Article 6(3)) is regulated by Article 28 paragraph 2 of the EGO 57/2007: *“Any plan or project which has no direct link or is not necessary for the management of the protected natural area of Community Interest, but which could significantly affect the area, alone or in combination with other plans or projects, shall be subject to appropriate assessment of the potential effects on the protected natural area of Community interest, taking into account its conservation objectives”.*

The procedure is established by Order 19/2010 for the approval of the Methodological Guide on the Appropriate Assessment (HD Article 6(3)) of the potential effects of plans or projects on protected natural areas of Community Interest.

The implementation of the Appropriate Assessment and also the transposition of the obligation to carry

out such an assessment for plans or projects located outside the Natura 2000 sites are not properly implemented, resulting in a small number of assessments carried out outside the SEA or EIA procedures (where they are being carried out together, under the same procedure). Such exclusion violates Article 6 of the Habitats Directive. In this regard, the European Commission has started an infringement procedure: INFR(2020)2297⁶⁴.

The Appropriate Assessment procedure is conducted only for the plans or projects for which the Environmental Protection Agencies decide that SEA or respectively EIA procedures are needed. According to Article 6 of the Habitats Directive, the Appropriate Assessment must be carried out when a plan/project/activity is likely to produce significant effects on the protected habitats or species, even if they are located outside the Natura 2000 sites. The Romanian State has not correctly transposed this requirement, for which, as mentioned, an infringement procedure is taking place.

In addition, the protected species of birds are protected outside the Natura 2000 sites. This requirement is stipulated by and Article 4 of the Birds Directive and also by Article 28 paragraph 1 of the EGO 57/2007⁶⁵ on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna. Thus, unless an EIA or SEA are needed, there will be no Appropriate Assessment procedure for agricultural activities located inside or outside Natura 2000 sites even if there were significant effects of such activities on the protected species and habitats.,.

5.2 STRATEGIC ENVIRONMENTAL ASSESSMENT RELATED TO AGRICULTURAL PLANS

Any plans related to agricultural development should be subject to an SEA assessment, according to the Government Decision 1076/2004⁶⁶. In this respect, the National Rural Development Plan for 2014-2020 was submitted to an SEA assessment⁶⁷. In addition, EGO 34/2013 on the organisation, administration and operation of permanent meadows and for amending and supplementing the Land Fund Law no. 18/1991, with further amendments of modifications, requires pastoral arrangements to be issued at local level (by Local Counties), that are subject to SEA procedure. The pastoral arrangements are mandatory since 2018. Failure to adopt the pastoral arrangements is a contravention according to Article 14 letter m, sanctioned with an administrative fine between 4,000 lei (about EUR 800) and 8,000 lei (about EUR 1,600).

Violation of the pastoral arrangements is also a contravention sanctioned with an administrative fine between 500 lei (about EUR 100) and 1,000 lei (about EUR 200) for a natural person, and a fine between 4,000 lei (about EUR 800) and 8,000 lei (about EUR 1,600) for a legal entity.

Pastoral arrangements should assess and pass protective measures for protected species. The process of adopting pastoral arrangements is ongoing. So far there are no monitoring reports to show any results of the implementation of the pastoral arrangements. From the content of the pastoral arrangements passed via Governmental Decision 1064/2013⁶⁸ with further modifications, there is a measure regarding protected species which might be affected by agricultural work that should be provided or assessed in the pastoral arrangements.

Outside the Natura protected areas, the impact of various plans or projects is evaluated through the Strategic Environmental Assessment regulated by Government Decision no 1076/2004 or the EIA procedure, for the projects mentioned in Annex 1 or 2 under Law 292/2018⁶⁹, transposing the EIA Directive.

⁶⁴https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=RO&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=RO&title=&submit=C%C4%83utare

⁶⁵ <https://legislatie.just.ro/Public/DetaliiDocument/83289>

⁶⁶ <http://legislatie.just.ro/Public/DetaliiDocument/54164>

⁶⁷ <http://194.102.67.36/app/webroot/uploads/files/raport-de-mediu-PNDR-2014-2020.pdf>
https://www.madr.ro/docs/dezvoltare-rurala/2021/PNDR_2014-2020_v13_0.pdf

⁶⁸ <https://legislatie.just.ro/Public/DetaliiDocumentAfis/154070>

⁶⁹ <http://legislatie.just.ro/Public/DetaliiDocumentAfis/208590>

The most relevant is the documentation defined by Law no 350/2001⁷⁰ on spatial planning and urbanism, subject to an SEA assessment, where any protected species should be identified and assessed, and protective measures should be established. The SEA is finalised either with a screening decision if no effects on environmental factors are possible, or with an SEA permit if negative effects are generated and in-depth analysis is necessary.

Species likely to be affected by agricultural plans are established inside Natura 2000 sites according to the Natura 2000 standard form, or, if the site has adopted a management plan, according to that plan. Outside Natura 2000 site is more difficult, as there is no local analysis of biodiversity. The experts hired by the beneficiary of the plan must investigate the area affected by the plan and check on site the existence of any protected species, given that that the plan may affect the Natura 2000 sites nearby (such assessment is not required by Romanian law and it is rarely done). Most of the time, the biodiversity chapter for the plans located outside Natura 2000 sites do not list or assess any protected species.

The plans are subject to monitoring after the plan is adopted and any effects on protected species should be published in a report on the Environmental Protection Agency's (EPA's) websites. However, in fact they are not mentioned on the EPA websites. It is unknown whether the agricultural plans are monitored by the beneficiaries and how detailed this monitoring is.

⁷⁰ <http://legislatie.just.ro/Public/DetaliuDocument/29453>

6 OVERALL ASSESSMENT OF SPECIES PROTECTION ON AGRICULTURAL LAND

1. KEY FINDINGS (CHALLENGES & BEST PRACTICES)

Implementation of species protection on agricultural land in Romania is fragmented, involving two government Ministers (one of Agriculture and Rural Development, and the other of Environment, Water and Forests) and five of their subordinate agencies. The system offered for the farmers outside Natura sites does not ensure the integrity of protected species and habitats. These issues result from the lack of constant and clear assistance on species protection requirements offered to farmers, the lack of monitoring of farm plots for protected species, and the lack of monitoring mechanisms able to identify and prevent the risks to protected species and habitats.

Best practices could not be identified in this regard.

6.1 TRANSPOSITION ISSUES

- The transposition of the species protection rules under the Habitats and Birds Directives into Romanian legislation is almost literal. They are transposed by the Emergency Governmental Ordinance 57/2007 approved by Law 49/2011 and further modified on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna.
- Current legislation providing for derogations of species protection rules seem to be in breach of the Nature Directives. Emergency Governmental Ordinance no 81/2021 provisions also entail a breach of Articles 12 and 13 of the Habitats Directive as they allow for derogations to hunting bears without environmental controls. In addition, the modification proposed and debated by the Parliament currently would allow the hunting of the bear in the wild following the same methods.
- Ministerial orders for harvesting wild animals are issued such as for ex Order no 1652/2021 on the approval of the derogation for certain species of wild animals establishing a derogation from article 33 paragraph 1 of Emergency Governmental Ordinance 57/2007, and setting an obligation on the beneficiary to inform the Environmental Protection Agency within seven days AFTER the harvesting took place.
- A recent proposal to modify the Hunting Law no 407/2006 would allow the hunting of migratory birds by daily species quotas per hunter, impossible to verify by any authority. This proposal is still being discussed by the Parliament, but according to the latest decision in Senate, it would allow the hunting of migratory birds, without controls.

6.2 PREVENTIVE OR IMPLEMENTATION MEASURES

Specific environmental measures/rules applicable at farm level

- There is no specific legislation implementing species protection rules in agricultural areas, other than the generic species protection rules transposing the relevant BD and HD provisions.

Specific agriculture or CAP cross-compliance conditions

- The SMR standards are normally beyond the scope of this study because the CAP legislation⁷¹ refers only to sub-sections of BD Article 3 and Article 4 (SMR 2) and to HD Article 6 (SMR 3). However, **in Romania, SMR 2 and SMR 3 standards apply across the whole country**, both inside and outside Natura 2000 sites. The legal definitions of the two SMRs follow closely the

⁷¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R1306-20201229> (Article 95 and Annex II) accessed 24/02/2022.

transposed legislation for BD Article 5(a-d), and for HD Articles 12(1) (a)(b)(d) and Article 13(1)(a) respectively, and both SMRs extend this with a detailed list of prohibited activities on agricultural land:

- SMR 2 uses an extended version of BD Article 5(d), which in the transposed legislation is “*intentional disturbance of wild birds, especially during the period of reproduction or maturation*”. The **SMR 2** definition is “*intentional disturbance of wild birds, especially during the period of reproduction or maturation **through activities that contradict the purpose of their / protection and conservation, such as: burning of vegetation, cutting down of trees/clumps shrubs/protective strips of trees existing on agricultural land or changes in land use and watercourses, as well as other activities that contradict the purpose of protection and conservation of the protected natural area***” (author’s translation and emphasis).
- Similarly, SMR 3 uses an extended version of HD Article 12(1) (d) (b) which in the transposed legislation refers to “*species of terrestrial, aquatic and underground wild plants and animals, provided in Annexes no. 4 A and 4 B, with the exception of bird species*” and prohibits “*damage and/or destruction of breeding or resting places [and] intentional disturbance during the period of reproduction, growth, hibernation and migration*”. The **SMR 3** definition is “*damage and/or destruction of breeding sites or resting places **of wild animals and intentional disturbance of wild animals during the period of reproduction, breeding, hibernation and migration, through activities contrary to the purpose of their protection and conservation, such as: burning of vegetation, cutting down of trees/clumps of shrubs/protective strips of trees existing on agricultural land, changes in land use and watercourses, as well as other activities that contradict the purpose of protection and conservation of the protected natural area.***”
- GAEC 7 requirements include maintenance of landscape features (trees and terraces) and a ban on cutting hedges and trees between 15 March and 30 June. In the explanatory text, the more detailed definition of ‘cutting’ reflects (but does not reference) elements of the species protection legislation.
- SMR 2 requirements apply across the whole country and, for **farmers on Natura sites, there is a requirement to implement relevant provisions of the Natura management plan, but the Ministry of Agriculture and Rural Development considers that these exceed the requirements of agri-environment-climate measures in the NRDP 2014-20**. This limits the effectiveness of these SMRs for species protection.
- In this context, it is worth noting that the Strategic Environmental Assessment of the Romanian NRDP 2014-20 concluded that there was an urgent need for EAFRD Natura 2000 compensation payments⁷² to be available in Romania.

Other implementing or stimulating measures

- Some agri-environment-climate packages in the Romanian Rural Development Plan 2014-2020 offer farmers the option of land management contracts to conserve the habitats of certain groups of protected species. Grassland examples include specific management packages for: HNV hay meadows; corncrake (*Crex crex*); lesser grey shrike (*Lanius minor*); red-footed falcon (*Falco vespertinus*); and butterflies (*Maculinia* spp). There are both arable and grassland sub-packages for the lesser spotted eagle (*Aquila pomarina*) and great bustard (*Otis tarda*). The NRDP also offers support for preventive action against damage by large carnivores (*Ursus arctos*, *Canis lupus*) and management measures for bat species and beavers (*Castor fiber*). However, it has never been implemented.
- Apart from these targeted packages, the government assistance programs do not address species protection in the farming sector, and monitoring programs by specialists (biologists, ornithologist, etc.) do not appear to be developed.

⁷² Under Article 30 Regulation(EU) 1305/2013.

6.3 PUBLIC ADVISORY SERVICES AND PUBLIC ENFORCEMENT

Government advisory services

- FAS consultancy services do not at all provide specialised advice for farmers on their legal obligation concerning protected species.
- Farmers do have access to information about the agri-environment-climate measures in the NRDP 2014-2020, through government websites, promotional activities by the National Network for Rural Development and leaflets and flyers which have been distributed throughout the country. According to NGOs, the brochures and guides offered by the government are too complicated for local farmers to understand, and insufficient for effective protection of species and habitats.

Enforcement of species protection legislation

- The National Environmental Guard is the inspection body on environmental issues. It does not conduct planned inspections, but it can respond to specific complaints. It can submit a criminal complaint based on the Ordinance on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, which transposes Article 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive. Criminal sanctions are either imprisonment (three months to a year) or a fine.
- Field checks for CAP cross-compliance are undertaken on only a small proportion of farms (as required by the CAP legislation) but the inspectors do not have the expertise to pay attention to protected species and habitats.

EIA and SEA

- The Environmental Impact Assessment Law no 292/2018 defines which projects connected to agriculture require a mandatory EIA (Annex 1 of EIA Directive), or only after a preliminary assessment (Annex 2 of EIA Directive):
 - **Projects which require a mandatory EIA** - large installations for the intensive rearing of poultry or pigs, above a certain threshold numbers of animals;
 - **Projects for which the necessity of an EIA has to be determined** – restructuring rural land; using uncultivated land for intensive agriculture; agricultural irrigation and drainage projects; afforestation and deforestation; installations for intensive livestock (other than those requiring a mandatory EIA); fish farms; land reclamation from the sea;
 - **Selection criteria for determining the need for an EIA, relevant to biodiversity**, include: projects which could significantly affect a Natura 2000 area. These require an Appropriate Assessment taking into account the conservation objectives of the Natura 2000 area;
 - **Outside the Natura 2000 Areas there are no measures provided by Romanian legislation to require EIA due to species protection criteria.**
- **Under the transposed Strategic Environmental Assessment**, the most relevant are spatial planning projects which are subject to an SEA assessment, and for which protected species should be identified and assessed, and protective measures should be established.

Other authorisation procedures

- The implementation of the Appropriate Assessment procedure required by the Habitats Directive is also relevant to species protection, due to the failure to transpose the obligation to carry out such an assessment for plans or projects located outside Natura 2000 sites. This results in few Appropriate Assessments being carried out, other than those required under the SEA or EIA procedures. The European Commission has started an infringement procedure in this regard: INFR(2020)2297.

2. RECOMMENDATIONS

Preventive and implementing measures:

- Resolve the perceived conflict between the definition of CAP cross-compliance, SMRs 2 and 3, Natura 2000 site management plans, and NRDP agri-environment support measures in a way that enables and supports farmers *across the whole country* (both inside and outside Natura 2000 areas) to make a positive contribution to the management of protected species and their habitats.
- Implement the NRDP Natura 2000 compensation measure⁷³ to provide farmers with annual payments that recognise the need to underpin the economic viability of these HNV farming systems. It is important to do this in a way that still enables these farmers to benefit from agri-environment payments targeted at HNV management and species protection. (The CAP explicitly allows Natura 2000 compensation payments and agri-environment payments to be applied cumulatively on the same plot of land).
- Extend the GAEC 7 definition to require the retention of other eligible landscape features (hedges, ponds, ditches and field margins) which could then be eligible for CAP direct payments.

Public advisory and enforcement:

- Provide all farmers with government-funded advice and information on how they can identify protected species and habitats on their land, and how to adapt their farming activities to look after them. This advice should be specific to the locality and farming system, up to date, easily accessible and readily understood by all farmers.
- Require FAS consultancies to deploy specialist biodiversity advisers alongside their other advisory specialists and ensure coherent delivery of advice (e.g. on improving economic performance whilst complying with species protection legislation).
- Use experts from governmental environmental agencies and/or specialised NGOs to train agricultural biodiversity advisers and to advise farmers directly on the recognition and the proper protection of species and habitats.
- Reinforce the control procedure by the Environmental Guard to ensure that it has the powers and resources to undertake pro-active control inspections, not just react to complaints by others.
- Strengthen criminal sanctions for criminal violation of species protection laws and provide a more specialised judiciary system with the powers to call on species protection experts to assist their investigations.

Authorisation and permits:

- Respond to the infringement procedure initiated by the Commission by remedying the violation of Appropriate Assessment procedures. Ensure that the provisions in national law (including on the criteria for EIA and SEA screening requirements for full assessments) apply to activities or projects *outside* Natura 2000 sites, and take full account of the presence of protected species on farmland across the whole country.

⁷³ Measure 12 under Article 30 of Regulation (EU) No 1305/2013.

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