

NORWAY

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

Species protection

I. General background of Norwegian legislation relevant for species protection¹

The most fundamental norms of the Norwegian legal system regarding species protection is set out in Article 112 of the Norwegian Constitution. It states:

Every person has the right ... to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles.

This provision can be invoked before national courts as a legal basis for rights of individuals and NGOs concerned with species protection. While it sets minimum and long-term standards for diversity between and within species, the productivity of species, as well as for the availability of information regarding the status of and threats against species, it remains unclear where to draw the lines in terms of potential violations of the standards. It has been argued that the relevant standards follow from legislation. However, the legislative history of Article 112 clearly shows that it shall be regarded as establishing standards independent of legislation. There has so far not been any relevant case law that answers this question.

Norwegian legislation of relevance to species protection is based on a general distinction between rules conserving species and genetic diversity, which are set out in the Nature Diversity Act (2009) and rules on (sustainable) harvesting of species, which in essence are set out in the Wildlife Act (1981, applicable to terrestrial animals and birds), the Marine Resources Act (2008), the Act relating to Salmonids and Fresh-Water Fish (1992), the Forestry Act (2005) and the Outdoor Recreation Act (1957).²

Sections 23 and 24 of The Nature Diversity Act authorises the government to adopt regulations that identify “priority species” in cases where:

- population status or trends for the species are contrary to the objective of maintaining species and their genetic diversity for the long term and to ensure that species occur in viable populations in their natural ranges,

¹ Questions: “Is your national law based on a mixture of nature conservation laws and national/regional hunting and fishing regulations; is there a separate regulatory system for specific group of species? Is the law concerning species protection at national level or regional level?”

² Norwegian legislation is thereby based on a mixture of a nature conservation act and national hunting, fishing and harvesting regulations. Norwegian legislation that has been translated into English can be found at https://lovdata.no/info/information_in_english. Please be aware that much of the translated legislation has not been updated with subsequent amendments (unless stated, you may assume that the legislation has not been updated, you may check whether there are amendments at <https://lovdata.no/>, in Norwegian only)

- a significant proportion of the species' natural range is in Norway or it has distinctive genetic characteristics in Norway, or
- there are international obligations related to the species.

The scope of these rules in terms of marine species is limited. So far, regulations have identified 13 priority species. There is no obligation to consider red listed species as priority species. As an alternative to designation as priority species, specific populations may be protected through the establishment of "habitat management areas" (section 38 of the Nature Diversity Act).

Norwegian legislation concerning species protection is essentially adopted and administered at the national level. However, individual decisions regarding harvesting of species is in many cases delegated to the regional level (examples include hunting of carnivores) and in some cases to the municipal level (in particular forestry).

II. Introductory question

1. Risk³

Public authorities have established an interactive web-site for registering and making available information concerning the location and status of species.⁴ The site includes the Norwegian Red List, which contains information regarding risks (impact factors) relating to some of the species (where known). The list was last updated in 2015.

At the level of ecosystems, Norwegian authorities produce a Nature Index every five years on the status and trends of biodiversity. Expert groups assess the state of more than 300 species as part of this undertaking. The index was last updated in 2015.⁵

2. Principles of species protection⁶

Beyond the general norms of Article 112 of the Norwegian Constitution, the specific principles formulated in Norwegian law regarding species protection distinguish between terrestrial and marine species. The most significant "species-by-species" approach beyond the one on "priority species" is the rules on the four significant carnivores (wolf, bear, lynx and wolverine) in sections 17 and 17a of the Nature Diversity Act as further specified in a government regulation, species based rules on the protection and harvesting of marine resources (essentially fish, crustaceans and shellfish), and quality norms for wild salmon adopted according to section 13 of the Nature Diversity Act.

The general principles regarding conservation of species and genetic diversity are set out in Section 5 of the Nature Diversity Act:

The objective is to maintain species and their genetic diversity for the long term and to ensure that species occur in viable populations in their natural ranges. To the extent necessary to achieve this objective, areas with specific ecological functions for different species and other ecological conditions on which they are dependent are also to be maintained.

The management objective under the first paragraph does not apply to alien organisms.

The genetic diversity of domesticated species shall be managed in such a way that it helps to secure the future resource base.

³ Question: "Are there any official or other reports estimating what constitutes the main risk for protected species in your country: e.g. illegal hunting, infrastructure project, agricultural, the absence of the species action plans, insufficient species data; insufficient human resources, others)?"

⁴ See <http://www.artsdatabanken.no/>, in Norwegian.

⁵ See <http://www.miljodirektoratet.no/en/News1/2015/Status-report-for-diversity-in-Norwegian-nature/>, in English.

⁶ Question: "Are there any specific principles formulated in law or in court decisions or academic debate; is a species-by-species approach followed? (please give example)."

In addition, the sections 8 to 12 of the Nature Diversity Act set out principles regarding knowledge base, precaution, ecosystem approach, user pays, and environmentally sound techniques and methods of operation.

The main principles regarding terrestrial species protection are set out in Section 15 of the Act:

Harvesting and other removal of animals that occur naturally in the wild shall be authorised by statute or a decision pursuant to statute. Unnecessary harm and suffering caused to animals occurring in the wild and their nests, lairs and burrows shall be avoided.

Harvesting and other removal of plants and fungi occurring in the wild are permitted to the extent that they do not jeopardise the survival of the population concerned or are not limited by statute or by a decision pursuant to statute.

The provisions of the first and second paragraphs do not preclude lawful access and passage, agricultural activities or other activities that take place in accordance with the duty of care laid down in section 6.

Section 7 of the Marine Resources Act sets out the following less prescriptive principles for protection of marine species:

The Ministry shall evaluate which types of management measures are necessary to ensure sustainable management of wild living marine resources.

Importance shall be attached to the following in the management of wild living marine resources and genetic material derived from them:

- a) a precautionary approach, in accordance with international agreements and guidelines,
- b) an ecosystem approach that takes into account habitats and biodiversity,
- c) effective control of harvesting and other forms of utilisation of resources,
- d) appropriate allocation of resources, which among other things can help to ensure employment and maintain settlement in coastal communities,
- e) optimal utilisation of resources, adapted to marine value creation, markets and industries,
- f) ensuring that harvesting methods and the way gear is used take into account the need to reduce possible negative impacts on living marine resources,
- g) ensuring that management measures help to maintain the material basis for Sami culture.

III. Directive 92/43 (for Norway the Bern Convention)

As the Habitats Directive is not part of the EEA Agreement, it is not binding upon Norway. However, Norwegian authorities have repeatedly stated that they seek to implement a nature protection regime that is at least as advanced as the one of the European Union. In the following, I list the provisions of Norwegian legislation that correspond to the relevant parts of the Directive.

1. Surveillance of conservation status – (art 11, art. 14 HD)⁷

a. The most specific provision on monitoring the conservation status of species is section 8 of the Nature Diversity Act:

Official decisions that affect biological, geological and landscape diversity shall, as far as is reasonable, be based on scientific knowledge of the population status of species, the range and ecological status of habitat types, and the impacts of environmental pressures. The knowledge required shall be in reasonable proportion to the nature of the case and the risk of damage to biological, geological and landscape diversity.

⁷ Questions: “a. The CJEU underlines the necessity of detailed, clear and in precise manner transposition of art. 11 HD as well as fundamental role of surveillance (monitoring) of conservation status of species of Community interest (Case C-6/04). How, if at all, is this obligation is transposed and followed in domestic law in practice? b. What about omissions and measures to remedy them?”

However, this provision only applies when authorities plan to make decisions or take acts that may impact the populations of species. A more general duty to survey the status of species follows from section 8 of the Environmental Information Act:

Administrative agencies such as are mentioned in section [2 of the Freedom of Information Act], shall hold general environmental information relevant to their areas of responsibility and functions, and make this information accessible to the public.

This rule applies to almost all public authorities, with the Parliament being the main exception.

b. Possible remedies for failure to follow the above provisions are to encourage the Office of the Auditor General to carry out an assessment of authorities' implementation, bringing a case to the Parliamentary Ombudsman, or potentially to bring a case to courts. However, the first two would involve no rights to have the matter dealt with, and the latter is unlikely to succeed given the general content of the provisions.

There is no duty for public authorities to assign priority status to species under sections 23 and 24 of the Nature Diversity Act or to establish habitat management areas under section 38 of the Act. However, authorities have a duty to consider whether to design priority species when asked to do so by a private party having sufficient interest, typically NGOs aiming at species conservation.

2. Conservations of species (art. 12 -16)

2.1 Art. 12-13 HD – system of strict protection for animal and plant species⁸

The rules corresponding to articles 12 and 13 of the Habitats Directive are contained in chapter III of the Bern Convention. Norway has implemented these rules in chapter III of the Nature Diversity Act. The general principle regarding species protection (section 15 of the Act) is quoted above. It sets out a general prohibition against killing living organisms unless authorized by legislation or individual decisions according to legislation.

More specific rules concerning groups of living organisms are set out as follows:

- Plants and fungi can be harvested or removed to the extent that this does not jeopardise the survival of the population concerned (section 15). Exceptions are allowed for agricultural activities (section 15) and to prevent injury to the health of persons or animals, damage to crops, forest or other property, to remove alien organisms, or to safeguard important public interests (section 21).
- There has been significant traditional and on-going harvesting of wildlife, salmonids and freshwater fish in Norway. Such harvesting is essentially regulated through individual decisions or specific regulations. Such decisions and regulations are in essence adopted under the Wildlife Act and the Act relating to Salmonids and Fresh-Water Fish. Such decisions may only be taken when the best available documentation indicates that the species produces a harvestable surplus (section 16 of the Nature Diversity Act). In addition, there is a general opportunity to kill specimens if detailed conditions involving inter alia threats to humans or livestock are fulfilled. These conditions mirror the conditions set out in article 9 of the Bern Convention (sections 17, 17a and 18 of the Act).

⁸ Questions: “To what extent does your national law fulfil the requirement laid down in art 12 and 13 HD and the requirements for clear and precise transposition? More detailed issues can be considered in this context include: a. specific measures aiming to establish a comprehensive system of strict protection where chosen in your country (statutory, administrative or contractual measures); b. specific measures (not only prohibitive) adopted to achieve comprehensive and effective system of strict protection (e.g. species action plans, special management plans, monitoring, regulating the population of animals having an impact on protected species, liability for caused by relevant protected species to property etc.); c. the inclusion of proactive habitat management measures (the restoration or improvement of the habitats e.g. in case of a species for which no protected areas are provided (opinion of AG in case C 383/09); d. the way of understanding provided in art. 12(1) concepts of “deliberate”, “disturbance”, “destruction”, “deterioration”. Do you have examples of case-law exploring these concepts?”

- Terrestrial invertebrates can generally be killed if this does not jeopardize the population in the area. In addition, invertebrates that are a nuisance, cause damage or are alien can be killed (section 20).
 - There is no rule regarding microorganisms, and the general principles of section 15 do not apply to such organisms.
 - Harvesting and killing of marine organisms takes place in accordance with the Marine Resources Act. There is elaborate legislation regulating fisheries. In contrast to section 15 of the Nature Diversity Act, there is no general prohibition on killing or harvesting of marine species. General and specific quotas are decided on an annual basis for a broad range of commercially exploited species. Leisure marine fishing has generally been unregulated, but due to increasing tourist and local harvesting and poor status of many populations, stricter regulations have been introduced for some species and some groups of humans (sections 22 and 23 of the Marine Resources Act).
- a. Specific measures to establish comprehensive protection include designation of priority species, establishment of habitat management areas, and prohibitions or restrictions on the harvesting of specific species. The adoption of such measures is not mandatory, and depends essentially on the discretion of public authorities. One special case is the protection zone established for wolves in eastern parts of Norway along the border with Sweden. While wolves enjoy enhanced protection within the zone, there should be increased flexibility for killing wolves outside the zone, in particular in cases where the no imminence and low probability regarding potential harm. There has been very significant political disagreement regarding management of wolves within and outside the protection zone in recent years.
- b. Examples of other and less prohibitive specific measure to protect species include an extensive breeding program for arctic fox, measures taken to prevent the spread and establishment of invasive alien species (in particular lobster, oyster and crayfish), and measures taken to protect species from pests and diseases (examples include wild salmon, wild reindeer and muskox).
- c. Proactive habitat management measures have essentially focused on species that are dependent on certain traditional agricultural practices. It has been estimated that approximately 30% of threatened species in Norway belong to this category. Such measures mostly include subsidies and other forms of support.
- d. There are no parallels to the concepts “deliberate”, “disturbance”, “destruction” and “deterioration” in the relevant provisions of the Nature Diversity Act. On this point, section 15 of the Act prohibits activities that can lead to “unnecessary harm and suffering”, and section 75 on penal measures states that fines and imprisonment are available where activities are carried out “willfully” or “negligently”. Significant court cases of relevance are few and mostly in the lower courts. Lower court decisions carry very limited weight as interpretative arguments. There are a few Supreme Court criminal cases concerning killing of protected species. In one concerning killing of a goshawk (*accipiter gentilis*), the Supreme Court referred to article 7 of the European Convention on Human Rights when deciding that the last sentence of the second paragraph of section 17 of the Nature Diversity Act should be interpreted according to its wording (i.e. not including a “necessity” requirement as in the first sentence).⁹ In another case, the Supreme Court rejected the appeal in a case where two persons had been sentenced for having cut down a tree in which golden eagles (*aquila chrysaetos*) had a nest. The prohibition of unnecessary harm to nests was not conditioned on any intent to kill the birds.¹⁰ Finally, the Supreme Court had before it a case where six persons had been charged with organized hunting of wolves in 2016. What is of particular interest in this case is the application of section 152b of the General Civil Penal Code (1902 no. 10) in a case where the defendants had not succeeded in killing any wolf.¹¹ The Supreme Court found four of the defendants

⁹ Rt 2014 page 238 para. 18.

¹⁰ Rt 2014 page 907.

¹¹ Section 152b was introduced for cases of serious environmental crimes. A similar provision is included in section 240 of the Penal Code of 2005 (no. 28). This was the fourth case in which this provision was invoked by the prosecutors, and the second species protection case in which it was applied, see Hans Tore Høviskeland,

guilty and sentenced them to imprisonment of between five months and one year as well as loss of the right to hunt for three years.¹²

2.2. Art. 14 HD – measures to control taking of and the exploitation of certain animal and plant species of Community interest¹³

Since there are no corresponding provisions and lists under the Bern Convention, this is not applicable to Norway.

In general, it can be noted that for most commercial species, including those that are subject to significant leisure hunting, systems for adopting harvesting quotas exist. The extent to which such quotas are based on scientific data and take into account impacts that are harmful to the populations vary significantly across species. For species that have been important for commercial exploitation over a long period of time, long-standing science based management has been institutionalised. Prominent examples include marine species, some of which are subject to international cooperation through the International Council for the Exploration of the Sea (ICES). Management of commercial species within forestry has mostly focused on regrowth, which has resulted in monocultures and instances of the introduction of invasive alien species. As to wildlife, decisions regarding quota do take into account scientific evidence, but there are important short-term local and economic interests involved that influence such decisions.

2.3 Art 15 HD - The prohibition of indiscriminate means of killing¹⁴

There is a general prohibition in section 15 of the Nature Diversity Act: “Unnecessary harm and suffering caused to animals occurring in the wild and their nests, lairs and burrows shall be avoided.” Specific rules concerning means of killing are set out in harvesting legislation.

The Wildlife Act prohibits the use of spring guns, trapping devices and poison, see sections 20, 24 and 25, respectively.

The Marine Resources Act prohibits the use of explosives as well as some categories of trawling in some areas, see sections 18 and 20.

The Act relating to Salmonids and Fresh-Water Fish prohibits the blocking of rivers, as well as the use of explosives, electricity and artificial light, see sections 35-36 and 37.

The prohibited means of killing animals and fish in Norway do not include all those means listed in Annex VI to the Directive. In particular, the use of aircraft and motorized vehicles for hunting is not generally prohibited, but there are general prohibitions on the use of motorized vehicles outside of roads and specified trails.¹⁵

2.4 Art. 16 HD - derogation from the provisions of Articles 12, 13, 14 and 15 HD¹⁶

Høyesterettspraksis om miljøkriminalitet fra de siste 15 år, in Miljøkrim vol. 20(1) 2017, pp. 9 and 12. The other case concerned illegal logging that was harmful to three species of lichen, see Rt 2005 p. 568.

¹² Case reference: HR-2016-1857-A.

¹³ Questions: “a. Which measures have been adopted to restrict hunting or other form of taking of specimen in your country (licence, quota established)? are quota based on sufficient field or scientific data and other sources of human caused mortalities? b. Differences in the management of species listed under Annex 4 and Annex 5 of the HD respectively, where the wolf is an example.”

¹⁴ Question: “Is there a general prohibition of using all indiscriminate means of killing or the specific list of such means?”

¹⁵ See Act Relating to Motor Traffic on Uncultivated Land and in Watercourses (1977 no. 82).

¹⁶ Questions: “a. Whether derogations from the prohibitions related to protected species are of general (e.g. C-412/85 the normal use land for agriculture, forestry or fisheries) or individual nature (permission in each case)? b. Does national law go beyond the specific grounds justified removals described in art. 16 HD? c. How the three test approach is interpreted according to administrative adjudication, court decisions or academic debate (what is and what is not regarded as i) favorable conservation status, ii) specific reason (e.g. “reason of overriding public interest”), iii) satisfactory alternatives (what is the scope of alternatives be considered)? d. Are compensation measures (although not obligatory in art. 16 HD) adopted?”

Article 16 of the Habitat Directive corresponds to art. 9 of the Bern Convention, which has in essence been copied into section 18 of the Nature Diversity Act.

a. Derogations from prohibitions related to the killing of protected species are partly of a general and partly of an individual nature. A detailed regulation on the hunting of five protected carnivores is the main example (in addition to the main four, it includes the golden eagle), which lays down rules regarding decisions on the killing in individual instances and general seasonal licenses to kill. The latter is intended to regulate the number of carnivores in various regions. The decisions are made by regional management boards, and can be appealed to the Ministry of Climate and Environment. Beyond decisions on the killing of carnivores, there is no specific regime for decisions on derogations for species listed in annexes to the Bern Convention. Moreover, there is no systematic institutional regime for supervising and monitoring derogations beyond the general supervisory regime set up for ensuring compliance with nature protection rules which includes a separate Act establishing a supervisory institution (“Statens naturoppsyn”).¹⁷

b. In principle, the national legislation does not intend to go beyond the grounds justified under art. 9 of the Bern Convention. However, a controversial issue has been the interpretation of “livestock”; in particular whether it includes dogs used for hunting and pets. The Norwegian term in the Act has broader meaning than that of the Bern Convention, and a broad interpretation has been promoted in the preparatory works and subsequent documents and decisions of the Government and the Parliament.

Another controversial issue has been the definition of the population to be taken into account when determining whether the killing would be detrimental to the population concerned. The main issue concerns whether Norwegian authorities can take into account the status of related populations in neighboring countries, in particular Sweden. Despite instructions by the Parliament several years ago to negotiate a joint agreement between Norway and Sweden regarding management of wolves, no such agreement has been concluded. Cooperation between Norway and Sweden in this regard is mostly related to monitoring key individuals in the populations (due to genetic diversity concerns) and joint research programs on the size of the shared population and threats against it. Cooperation regarding the other species of carnivores is less developed. Norway has tended to take into account the populations in other countries when deciding the question of whether killing would be detrimental to the Norwegian populations. The authorities have not considered in any detail how Norwegian decisions to allow the killing of a high share of the Norwegian populations affect efforts to conserve species in neighboring countries.

Another controversial issue has been whether and in what ways the reference to health includes mental health in the sense of fear and associated consequences for well-being, behavior and physical health. Moreover, it has been discussed whether overriding public interests could include maintaining vibrant rural populations, interests in hunting, and the maintenance of agricultural practices involving largely unsupervised pasturing in the wilderness during the summer season. Finally, significant discussions have concerned the extent to which relevant threats have to be imminent and the degree of probability required.

c. The “three test approach” described in the questionnaire is strictly adhered to in administrative practice and academic literature, as well as in court practice (although very few cases have been brought to court and no case has yet been brought to the Supreme Court). The main issue of controversy is how the authorities judge the conservation status, whether a broad reading of some of the reasons for allowing killing is justified, and whether sufficient alternative means have been considered and tried.

d. The main attempt at what could be called a “compensatory measure” has been the establishment of a wolf protection zone in which derogations should be more limited. However, this has led to significant protests among populations living in the zone, arguing that the intention was not to make their local environment into a wolf protection area. Such zoning issues have been hotly debated among politicians and lawyers.

¹⁷ Lov om statlig naturoppsyn (1996 no. 38). No translation is available.

2.5 Art. 22 HD¹⁸

a. There is no specific list of species that forms the basis for decisions regarding reintroduction of native species. The breeding program for the arctic fox and measures taken to maintain a population of muskoxes are the most prominent examples active re-introduction programs, although the arctic fox was never totally extinct. Similarly, it has been argued that the wolf was extinct during the mid 20th century and has been reintroduced, although scientists are of the opinion that the wolf population was never totally extinct and that it has reestablished on the basis of natural migration.

b. The rules on deliberate introduction of non-native species distinguish between the human-induced movement of species within Norway and across Norway's borders. There is no strict prohibition on moving species within Norway, but duties are established that seek to avoid adverse effects on biodiversity (section 28 of the Nature Diversity Act). Import of living organisms to Norway requires a permit, and it is made clear that no permit may be granted if there is reason to believe that the import will have substantial adverse impacts on biological diversity (section 29 of the Nature Diversity Act).

2.6 Overlapping between Annexes - the protection of species listed under Annexes II and IV¹⁹

This scenario is as a starting point not directly applicable to Norway. However, as Norwegian authorities have a framework for and have made decisions designating priority species and selected habitat types, it is of interest to explore the availability of exemptions when such decisions have been made. While the authorities have broad discretion when defining the consequences of designating a priority species, the consequences of designating selected habitat types is regulated in detail in the Nature Diversity Act. The grounds for derogation as regards priority species are comparable to those found in art. 6(4) of the Directive, but significantly more lenient (section 24 of the Nature Diversity Act). The grounds for derogations from regulations that establish protected areas are also comparable to those of art. 6(4) (section 48 of the Nature Diversity Act).²⁰

The grounds for derogation as regards selected habitat types are very flexible and cannot be compared to those of art. 6(4). They include derogations through municipal planning decisions and for the purpose of forestry and agriculture (sections 53 to 55 of the Nature Diversity Act). Relevant derogation decisions are publicly available and illustrate that practice varies significantly among authorities.²¹ This issue may become more important when Norway establishes an Emerald Network in accordance with the Bern Convention to the extent that sites are established outside of protected areas.²²

Concerns regarding the interaction between species protection and habitat protection under the Nature Diversity Act have so far mostly concerned the issue that the establishment of protected areas may involve compensation to property owners while species protection does not involve such compensation. Therefore, there are rules to ensure that species protection measures are not used in a way that would circumvent private parties' right to compensation (section 24(1)(b) of the Nature Diversity Act).

¹⁸ Questions: "a. Is the desirability of re-introducing native Annex IV species used? b. The deliberate introduction of non-native species is regulated - is it prohibited?"

¹⁹ Question: "What is the practice/ possible scenarios/legal requirements of simultaneous application of derogations under Articles 6 (4) HD and 16 HD."

²⁰ Recent jurisprudence includes an appeals court decision, case references: LB-2014-40408 and LB-2014-40427. The Supreme Court did not allow appeal of the decision, case reference: HR-2015-1730-U.

²¹ See <http://www.miljovedtak.no/> (in Norwegian only).

²² See Council of Europe doc. T-PVS/PA (2016) 11 pp. 8-26 which lists the 724 officially nominated candidate Emerald sites of Norway as of October 2016.

IV. Art. 5-9 of the bird directive contain similar provisions and their interpretation by CJEU can be applied to art. 12-16 HD. One can introduce an example of a significant case illustrating the application of art.5-8 and 9 BD or indicate main problems or improper implementation.

Since the Birds Directive is not included in the EEA Agreement, this is not applicable to Norway.

V. Enforcement (legal consequences of infringement of art. 12-16 HD or 5-9 BD)²³

a. The main bodies with responsibilities for the enforcement of species protection legislation include the Ministry of Climate and Environment, the Ministry of Trade, Industry and Fisheries, and the Ministry of Agriculture and Food. These ministries have available a broad range of enforcement measures set out in relevant legislation. The use of enforcement measures is in essence left to the discretion of the ministries, and the ministries have to a significant extent deferred such decisions to directorates and offices of the country governors.

As to law enforcement functions, “Statens naturoppsyn” – a national supervisory institution – has monitoring and police functions that focus on species protection issues defined in a separate Act (1996 no. 38). Moreover, the office of the Higher Prosecuting Authorities has prioritized the prosecution of serious environmental crimes since it issued the first general instructions to police authorities in 1999. Finally, the Ministry of Justice established a Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) in 1989. In addition to bringing complex environmental cases to courts, ØKOKRIM has coordinating and advisory functions in relations to police authorities.

b. Among the enforcement measures that are available under the Nature Diversity Act are amendment and revocation of permits (section 67), the adoption of orders to stop activities or to remedy damage (sections 69 and 70), public authorities may undertake remedial measures and pass the costs of such measures onto the responsible private party (section 71), adoption of coercive fines (section 73), order the payment of environmental compensation to the state (section 74), and penal measures including fines and imprisonment (section 75). Enforcement measures available under agricultural, forestry, hunting and fisheries legislation are less focused on remedying the environmental damages and more focused on penal measures. It is a complex task to gather information on the use of the broad range of enforcement measures available to Norwegian authorities. An example is the establishment of a registry for decisions regarding biodiversity under the Nature Diversity Act.²⁴ The registry includes all decisions related to the Nature Diversity Act, except for decisions associated with enforcement.

²³ Questions: “a. What bodies are responsible for the enforcement of national or regional legislation on species protection is enforced? b. What sanctions are used (eg criminal, administrative or civil means); which is the most effective? c. How is the obligation to monitor incidental capture and killing of animal species (Article 12.4 HD) is transposed and applied; is there a national system of monitoring all relevant species covering the whole territory or is limited to particular species/areas/causes; have any conservation measures been introduced as a remedy to avoid incidental killing or capturing having a significant negative impact on the conservation status of the species? d. Please give two examples of what you consider the most important national legal cases dealing with this area of the law (if any). e. Has the way in which the Environmental Liability Directive has been transposed played any role in your country in species protection?”

²⁴ Section 68 of the Nature Diversity Act and “Forskrift om Miljøvedtaksregisteret” (2013 no. 643). The registry is available online at <http://www.miljovedtak.no/> (in Norwegian).

There have been few criminal cases regarding protection of species before Norwegian courts, and only a handful of cases have reached the Supreme Court.²⁵ In general, the penalties for environmental crimes have been increased significantly the last 15 years, due in essence to legislative amendments followed up by the Supreme Court.²⁶ ØKOKRIM has provided general statistics on environmental cases that are brought to the police from 2012. These statistics include a broad range of cases including cases of little interest to nature protection such as cases concerning cultural artefacts, protected buildings and the welfare of farm animals and pets. Altogether such cases represented 0.7 % of all cases in 2016, they have approximately the same level of resolution as in other cases (almost 60 %), but they have traditionally taken significantly longer to resolve. In 2012 it took almost twice as much time to investigate an environmental case compared to ordinary cases (almost 180 days). This has been significantly reduced in recent years, and the difference is currently approximately 15 %.²⁷ As to the final results, the average numbers from 2009-2014 shows that 75 % of the cases were terminated without charges and the remaining 25 % resulted in fines (21 %) or court sentences (4 %). The figures indicate significant regional variation.²⁸

The Norwegian Environment Agency has the main responsibility for carrying out inspections of the compliance of enterprises with the Nature Diversity Act. Together with the offices of the County Governors, they carry out approximately 1250 inspections per year. These inspections focus mainly on pollution and destruction of habitats. Inspections regarding other threats to species, such as unlawful hunting, fishing and use of vehicles, are carried out by “Statens naturoppsyn” as regards terrestrial activities and the Directorate of Fisheries as regards marine activities. In addition, the Petroleum Directorate and the Water Resources and Energy Directorate have important monitoring and enforcement functions within their respective fields of authority.

The general approach of Norwegian authorities in recent years has been increased focus on extensive prosecution and strict penal sanctions – including imprisonment – in some serious cases, combined with guidance of and cooperation with relevant actors. It has been argued that close cooperation between some public authorities and enterprises represents a problem in some sectors, and that there is need for more extensive use of unannounced inspections.

c. Incidental killing is mostly a problem associated with the use of certain hunting and fishing devices. There has been extensive regulation of the use of devices that do not sufficiently target the intended species, in particular in the fisheries sector. There is no rules on monitoring of incidental capture and killing of species listed in Annex IV(a) of the Habitats Directive in Norway.

d. In addition to the case concerning attempted hunting of wolves, where one of the hunters was sentenced to one year imprisonment (see section 2.1(d) above), I would consider two recent cases concerning aquaculture to be of particular importance in terms of enforcement issues. Salmon farming in Norway has had serious negative consequences for wild salmon populations, and the two cases mark the Supreme Court’s support for strict penalties for not complying with legislation to reduce the problem of salmon lice.²⁹ The main consideration in this regard was that the penalties need to be high in order to remove potential profit as a motivation for unlawful acts.

²⁵ For an overview of relevant Supreme Court cases since 2000, see Hans Tore Høviskeland, *Høyesterettspraksis om miljøkriminalitet fra de siste 15 år*, in *Miljøkrim* vol. 20(1) 2017, pp. 11-27.

²⁶ *Ibid.* pp. 5 and 11.

²⁷ Kenneth Didriksen, *Positiv trend for miljøsakene i politiet*, in *Miljøkrim* vol. 20(1) 2017, pp. 54-55.

²⁸ Joachim Schjolden, *Miljøkrimstatistikk*, in *Miljøkrim* vol. 18(2) 2015, pp. 56-57.

²⁹ See Rt 2015 p. 44 and HR-2016-2507-A.

e. When the Environmental Liability Directive was included in Annex XX to the EEA Agreement, the following adaptation text was included:

- (a) Without prejudice to future development by the EEA Joint Committee, it should be noted that the following Community acts are not incorporated into the EEA Agreement:
 - (i) Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (The Birds Directive),
 - (ii) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (The Habitats Directive).Therefore all references to these acts shall not apply to the EFTA States.
- (b) Article 2(3) shall not apply to the EFTA States.
- (c) With respect to the EFTA States, ‘protected species and natural habitats’ shall mean: Where an EFTA State so determines, any habitat or species or types of habitats or species which the EFTA State designates for equivalent purposes as those laid down in the two Directives referred to in Article 2(3).

As a consequence, the relevant parts of the Liability Directive do not apply to Norway. However, the Nature Diversity Act contains relevant provisions in sections 69 to 74. However, these provisions leave significant discretion to public authorities and would as such not comply with the requirements of the Directive.

VI. SEA, EIA, Appropriate Impact Assessment and species protection³⁰

a. Species protection is generally reflected in Strategic Environmental Assessments (SEAs) in Norway, in accordance with requirements in the Norwegian Regulation on Environmental Impact Assessments (2017 no. 854). However, the scope of application of the Regulation in terms of plans and programs is very limited. Hence, the broad scope of the SEA Directive as set out by the CJEU in C-290/15 is not reflected in the Regulation. Moreover, errors in the SEA procedure do not necessarily lead to invalidity of the associated plan or program. This issue will be decided on the basis of general rules regarding invalidity of administrative decisions in accordance with the Public Administration Act (1967). The Norwegian Supreme Court has indicated that such errors may not lead to invalidity in all cases, and that the issue must be decided on a case-by-case basis.³¹

b. The normal procedure in cases where the environmental impact assessments indicate that the activity is likely to negatively impact a strictly protected species would be to include specific conditions in the permit in order to mitigate or compensate for such impact. It would also be common to include monitoring and reporting requirements in the permits. If unacceptable damage occurs, public authorities would normally have the possibility of revoking or amending the permit. However, there is little information available on how public authorities actually follow up conditions and requirements set out in permits.

³⁰ Questions: “a. How the species protection is reflected in the SEA assessments since the latest CJEU court case on the SEA Directive (C-290/15) indicates that mistakes in SEA-procedure will make legislation as well as decisions based on plans invalid? b. How do the administration or courts deal with the investigation of the project (permits for operations) with a foreseeable impact on strictly protected species; what is “deliberate” in this context; how are the conditions for the operation designed and what happens if damage occur despite those conditions? (e.g a wind park in Southern Sweden where 11 birds of prey have been killed only during 2016). c. What about the activity not restricted by individual decision (e.g. sport event in the protected area, cutting trees by the owners of the land not for economic activities).”

³¹ See Rt 2009 p. 661.

c. Activities that do not require permits fall outside the scope of the Regulation on Environmental Impact Assessment. However, such activities would be subject to section 6 of the Nature Diversity Act which states that: “Any person shall act with care and take all reasonable steps to avoid causing damage to biological, geological and landscape diversity contrary to the objectives set out in sections 4 and 5.” Non-compliance with this provision may inter alia be sanctioned by a “coercive fine” or payment of “environmental compensation”, but no penal sanctions are available under the Act, see sections 69 to 75 of the Nature Diversity Act.

VII. Agricultural or forestry activities with a foreseeable impact on protected species³²

a. Where there are conflicts between species protection and agriculture and forestry, the general approach has been to seek to compensate those who suffer economic losses due to species protection. Examples include compensation for losses due to establishment of protected areas (sections 50 and 51 of the Nature Diversity Act), compensation to farmers and reindeer herders who suffer losses due to presence of carnivores (section 19 of the Act) and rules to ensure that protection of priority species do not cause significant loss to farmers (section 24 of the Act). Forestry and agriculture have significant opportunities for derogations when decisions have been made regarding selected habitat types (sections 54 and 55 of the Act). Individual derogation decisions regarding priority species can be made on a case-by-case basis “if this does not result in the deterioration of the species’ population status or trend, or if significant public interests make it necessary” (section 24 of the Act).

b. There have been several controversial issues associated with the environmental effects of subsidies to agriculture and forestry, and many initiatives have been taken to decrease negative and enhance positive environmental effects. One fundamental principle in this regard has been set out in section 11 of the Nature Diversity Act: “The costs associated with preventing or limiting any damage caused by a project to biological, geological and landscape diversity shall be borne by the project owner, unless this is unreasonable in the light of the nature of the project and of the damage.” Support schemes for constructing roads into forested areas have been among the most controversial support mechanisms. Many support schemes have been introduced to improve and facilitate environmental performance, including for example the Forest Trust Fund established under chapter 4 of the Forestry Act (2005 no. 31).

c. Other forms of more indirect support include agreements between public authorities and property owners regarding management of protected areas established on private property, in accordance with section 47 of the Nature Diversity Act.

VIII. What exactly are the roles of citizens and NGOs in species protection?³³

Public participation in cases of species protection takes as its starting point the principle set out in Article 112 of the Norwegian Constitution which states that “citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out”. This principle is essentially implemented through general rules concerning public

³² Questions: “a. Are there derogations from species regime in every case, general exclusion (binding general guidelines, recommendations, code of conduct, best practice others, etc); what is the legal procedure if they are ignored? b. Are agri-environment, forest, aquaculture financial assistance/support effectively used in development of sustainable forestry, agriculture or aquaculture? c. are there others form of support (e.g. agreements with the owners of the property)?”

³³ Question: “How national law - having in mind the lack of UE rules on the one one hand, on the other the obligation arises from Aarhus Convention - deal with public participation and access to justice in species protection proceedings?”

hearings (sections 37 and 38 of the Public Administration Act), environmental impact assessments, the duty to base decisions on sufficient knowledge, including in particular local and indigenous knowledge (section 8 of the Nature Diversity Act). In addition, there are opportunities for private parties to initiate procedures to designate priority species (section 23 of the Act) and selected habitat types (section 52).

IX. Direct applicability³⁴

This is not applicable to Norway.

³⁴ Question: “Are EU provisions on species protection directly applied in case of improper transposition?”