

Questionnaire on Species Protection – Avosetta Meeting 2017 in Krakow

Report from Switzerland

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I. General background of the MS relevant for species protection

a. The **Federal Constitution** requires the Confederation (national level of government) to legislate on the protection of animal and plant life and on the preservation of their national habitat and their diversity. It shall also protect endangered species from extinction (art. 78 para 4 Const.). In addition to this, the Confederation likewise has the power to enact framework legislation with regard to hunting and fisheries, namely when it comes to preserve the diversity of fish species, mammals and birds (art. 79 Const.). In carrying out this mandate, the Confederation **combines** a *species-based approach* resulting from the different threats/uses of nature with a *more general approach*, which in its core is composed of three acts: (1.) The Federal Act on Hunting and the Protection of Wild Mammals and Birds [HPA] covering birds and a broad range of mammals (predators, cloven hoofed animals, beavers, marmots, squirrels, lagomorphs – or put more simply: animals which are usually subject to hunting), (2.) the Federal Act on Fisheries (FA), which applies to fish, crabs and species serving as important sources of food for fish and finally (3.) the Federal Act on the Protection of Nature (NCHA) dealing with general habitat and species protection. Whereas legislation with regard to hunting and fishing is limited to the principles on the level of the Confederation, while the cantons (federal sub-units) have to enact more detailed legislation, the general regime of nature and habitat is more or less in the hands of the Confederation even though the cantons can also foresee further protective measures (federal law thus constitutes only a minimal standard). Moreover, it is the cantons that are mandated with the execution of law in all these fields and they therefore play a very important role apart from purely legislative tasks. In addition to these areas of law, the (federal) legislation on forestry, agriculture, water protection and hydraulic engineering also contain certain provisions pertaining to species protection.

II. Introductory question

A short word on the **factual background** with regard to biodiversity in Switzerland: The number of known species in Switzerland amounts to about 45'900 (among this about 32'000 animals). It is estimated that the country hosts another 20'000 or so species (mainly fungi and insects). The drastic areal losses between 1900 and 1990 resulted in the current situation of about one third of the species being threatened and about ten percent being potentially threatened. Many native species only exist in either isolated or reduced populations and in quite some cases only a few individuals remain. The decline has slowed down since 1990 and even positive developments could

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be witnessed in some cases. However, projections for the future are not very bright as many populations are very small and would barely be able to survive.

The **main risks** with regard to the conservation of species in the country are related to:

- The destruction and damaging of *specialized habitats* (moors, meadows, dry grasslands, ruderal sites);
- The removal of elements of habitat structure (hedges, ponds, bushes);
- Damage done to water (hydropower plants; straightening of watercourses);
- Disturbance of water balance;
- Changes in agriculture (intensification, structural changes);
- Changes in forestry;
- Substance discharges into ecosystems (mainly nitrogen);
- Fragmentation of habitats;
- Direct disturbance e.g. by means of recreational use of nature.

III. Directive 92/43

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

a. As Switzerland is not a Member State of the European Union, there is **no legal obligation** to transpose the Habitat Directive. However, the law contains an obligation of the Federal Office for the Environment (FOEN) to ensure the monitoring of biodiversity and to coordinate this activity with other aspects of environmental monitoring. In addition to this, the cantons may ensure further measures of monitoring (art. 27a Ordinance on the Protection of Nature and Cultural Heritage – NCHO). The current monitoring system comprises several monitoring-programs and -projects, such as (i.) “Biodiversity Monitoring Switzerland (BDM)” surveying the long-term development of species diversity in select plant and animal species, which was implemented in order to comply with the obligations under the Convention on Biological Diversity; (ii.) the “Programme Monitoring the Effectiveness of Habitat Conservation in Switzerland” ensuring a long-term control over the habitats of national importance and providing an early-warning system in case of deterioration; (iii.) the “Agricultural Species and Habitats Monitoring Programme”, which aims at surveying species and habitats and evaluating areas reserved for promoting biodiversity; (iv.) data centres collecting and managing data on animals, plants, fungi, lichen and mosses and finally and – in particular – (v.) the Red Lists on threatened species and on threatened habitats, which are established according to the IUCN methodology.

b. As far as I can see, the surveillance and monitoring mechanisms are fairly well developed in Switzerland and would therefore **most probably also comply** with the standard required by art. 11 HD as understood by the ECJ in Case C-6/04.

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

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

Art. 6 et seq. Berne Convention (and thus more or less art. 12 HD) is transposed in a **series of provisions** in (i.) the Federal Act on the Protection of Nature (NCHA) [art. 19 and 20] as well as in the respective ordinance [art. 20 para 2 NCHO], (ii.) in the Federal Act on Hunting and the Protection of Wild Mammals and Birds [art. 7 HPA] and the corresponding ordinance [art. 7 Ordinance on Hunting and the Protection of Wild Mammals and Birds (HPO)], (iii.) in the Federal Act on Fisheries (FA) [art. 4 and 5] and the corresponding ordinance [art. 1, 2a and 5 Ordinance concerning the Federal Act on Fisheries (OFA)] and (iv.) the Federal Act on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (FACITES) (art. 1 seqq.). Art. 5 Berne Convention (and thus more or less art. 13 HD) is implemented into national law via the Federal Act on the Protection of Nature and the respective ordinance [art. 19 and 20 NCHA and art. 20 para 1 NCHO].

Even though a detailed assessment of the (theoretical or abstract) conformity of these provisions and the protective framework they contain with the requirements of the habitat directive may be difficult, it seems that the level of protection under Swiss law is **more or less equivalent** to the level of protection demanded by EU-law. What can (and has to be) said however, is that the Swiss legal framework in this respect is highly fragmented as can be seen from the relevant provisions cited above. This **fragmentation** is the consequence of the fact that the legislative structure combines a general or global approach (Federal Act on the Protection of Nature) with a more threat/use specific approach (Acts on Fisheries, Hunting and Trade). The fragmentation is furthered by the shared powers of the Federation and the cantons when it comes to legislative powers with regard to species protection, particularly in the field of fisheries and hunting. Under their respective legislative powers the cantons also have enacted various legal acts in this field, mainly in the form of a combination of general act on nature and landscape protection with more specific acts on fisheries and hunting.

Even though the regime of species protection in Switzerland can – maybe – primarily be qualified as a **statutory** one, it actually includes several elements and approaches and expands to a broad range of sectors:

The most important category of instruments regarding species protection is the **establishment of protected areas**. The inventory of biotopes of national importance follows a habitat- and a species-oriented approach, as it contains biotopes, which are listed because of certain habitat-characteristics (raised bogs and fens; meadows; dry grassland or moor-landscapes of national importance) and a category of biotopes aiming specifically at the protection of a single group of species (amphibian spawning areas). In addition to this there are emerald-sites, parks and particularly the Swiss National Park as well as forest reserves, which are determined by the cantons. There are no-hunting areas (41), aquatic and migratory bird reserves (26) and undisturbed wildlife habitats (which it is forbidden to enter in winter, but where hunting in general is permitted). In addition to this the cantons and municipalities, but also private organizations maintain a large number of protected areas with various objectives, usually including species protection.

On top of the statutory provisions in the fields of nature protection, hunting and fisheries, there is a broad range of **further instruments** connected to species protection. Between the Confederation and the cantons, there exists the instrument of the **programme agreement**, whereby the cantons and the Confederation agree upon objectives and aims to be achieved by federal subsidies in certain domains. In the field of environment protection there is quite a broad range of such agreements (protection of native fauna and flora; revitalization of water bodies; forest biodiversity etc.). In the period from 2012 to 2015, 250 such agreements with a volume of nearly one billion Swiss francs were negotiated and concluded between the Confederation and the cantons. The programme on forest biodiversity e.g. aims at promoting rare species of trees, oaks, preservation of old and dead wood and areas of sparse forest. Furthermore the Confederation has established **concepts for the management** of bears, lynxes, wolves and beavers, which take into account the arising conflicts with humans, respective solutions and regulate the compensation for damages caused by the animals. There are several **action plans** to promote certain species, e.g. for some species of birds, for butterflies, for crayfish and most recently for little owls. The “Data centres and platforms for coordination regarding Flora, Fauna and Cryptogams” manage national data-bases containing data on habitats, vulnerability and characteristics of species, coordinate expert knowledge, establish the Red Lists, conduct education programmes and serve as advisors. To help with the implementation of federal legislation, the Confederation has also formulated so-called “enforcement aids” in order to assist the cantons with the enforcement of rules in various fields such as with regard to amphibian spawning areas, to the management of dry meadows, to recreational fishing or to protection-, restoration- and compensation-measures.

Finally, **certain sectoral policies** are (among other objectives) also oriented towards species protection: the “*Forestry Policy 2020 Programme*” is about to develop an objective with regard to biodiversity in forests. *Agricultural policy* sets goals in the field biodiversity, requires that at least 7 % of the permanent agricultural land is designated as area for ecological compensation and includes a compensation scheme oriented towards enhancement of biodiversity (cf. below). After all, in the field of water protection, extensive programmes of renaturalization of water bodies are planned for the coming years.

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

The details of the hunting regimes depend on the **respective cantonal rules**. Federal law determines seasons where hunting is not allowed, obliges the cantons to take measures for the protection of threatened species and defines minimal standards regarding the hunting regime. The cantons may (and have to) deviate from the federal minimal standards if the protection of locally threatened species requires to do so. In addition to this, there exist no-hunting areas (41), aquatic and migratory bird reserves (26) and undisturbed wildlife habitats.

2.3. Art 15 HD - the prohibit to use of all indiscriminate means of killing

As far as I can see, the law foresees no general ban on indiscriminate means of killing but rather a **detailed list of prohibited hunting instruments** such as traps (except for box traps which are controlled daily), lured twigs, nets, the use of gas, explosives, poisons, poisoned baits, but also e.g. the use of living animals as bait (art. 2 HPO which closely resembles Annex VI HD). The cantons may foresee further prohibitions.

With regard to fisheries, the federal law leaves the power to determine the prohibited tools to the cantons. The cantons often foresee positive and/or negative lists of the fishing instruments allowed on their territory, which should help to prevent indiscriminate killing.

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

Under Swiss law **derogations from the prohibitions** related to protected species may be granted for *scientific purposes; educational and therapeutic purposes*; if this serves to *preserve biological diversity* and – finally – for *technical interventions* pertaining to a specific site, which meet an overriding need under the condition that the person responsible takes best possible protection measures, or failing that, appropriate compensation measures (art. 22 para 1 NCHA and art. 20 para 3 NCHO). The power to grant such permissions lies with the cantonal authorities. In addition to this, the cantons (and in some specific cases the Federal Office) may foresee measures with regard to protected animals “causing considerable damage” (art. 12 para. 2 HPA).

The permissions granted are thus specific and at least the wording of the justifications seem rather slightly narrower than the ones foreseen in the HD. Compensatory mechanisms are applied when it comes to so called **technical interventions** (which usually are related to specific sights and thus primarily touch habitat protection, but in consequence also regard species protection). As for technical interventions into habitats, the party responsible must take measures to ensure the best possible protection, restoration or, failing that, the provision of appropriate compensation (art. 18 para 1ter NCHA). The legality of such interventions requires (i.) that the damage caused is unavoidable, (ii.) that it can be measured or an estimation given, (iii.) a (positive) ponderation of the interests at stake and (iv.) the implementation of the required (compensatory-)measures. These measures follow the hierarchy protection—restoration—compensation. These requirements also apply when it comes to technical interventions concerning specific species.

The thorniest issue regarding derogation regimes in recent years was maybe the discussion around the **protection of the wolf**. Already in 2001, a parliamentary initiative demanded that Switzerland adds a reserve to the Berne Convention in order to be able to qualify the wolf as huntable species. Even though this step was not taken, political pressure prompted the authorities to submit a demand to the standing committee of the Berne Convention that protection of the wolf is lowered by transferring it from annex II to annex III of the Berne Convention. However, committee rejected this demand arguing that the exception regime of art. 9 of the Convention suffices to protect the public interests of Switzerland and other European countries. In 2014 yet another parliamentary initiative asked for an amendment of the federal hunting legislation in order to allow for a better regulation of the wolf population within the framework of the Berne Convention. The proposal for this legislative amendment went through public consultation and has now to be finalized by the government and to be discussed in Parliament. The statistics show that since 2000 21 wolves have been killed with the required permissions: 17 because of heavy damages and 4 under the provision which allow for the regulation of the population in case of damages. The law also foresees adequate compensation for damage caused to the forest, to agriculture or to livestock by animals which can be hunted. In the case of the wolf, 80% of the damage is compensated by the Confederation. Since 1996 the average compensations paid by the Confederation amount to about 40'000 francs annually.

2.5. Art. 22 HD

a. The **re-introduction of native species** is permitted under Swiss law provided that: (i.) an appropriate habitat of adequate size is available, (ii.) appropriate legal safeguards are introduced for protection of the species and (iii.) the preservation of the diversity or genetic characteristics of species will not be adversely affected. As for the species regulated by the Hunting Act, it is further required that the re-introduction does not have any detrimental effects on agriculture or forestry. This requires the authorization of the ministry, which acts in agreement with the cantons concerned (art. 21 NCHO and art. 8 HPA). As for re-introduction under the Hunting Act, animals have to be marked and reported. In practice in-situ-conservation clearly constitutes the rule, while re-introduction is only considered in exceptional circumstances. When re-introduction is implemented, the IUCN recommendations in this field are followed. The reasons for this rather cautious approach are multiple: The risk of outbreeding, introduction of illnesses and parasites, but also the fact that costs generated by re-introduction measures may lower the acceptance of species-protection more generally. Nevertheless, there were quite a few programs of re-introduction which are considered to have been successful, such as for ibex, beavers, lynx, white storks and bearded vultures but also for plants and other species on the level of the cantons.

b. Generally the establishment of **animals or plants of species not native to the country or the specific site** are subject to the approval of the Federal Council (executive on the federal level), except when enclosures, gardens, parks or agricultural and forestry enterprises are concerned (art. 23 NCHA). In the case of fishes and crabs, the required approval by the Confederation requires that the applicant shows that the import or establishment of species not native to the country or sight does not threaten autochthonous animals and plants and does not result in an undesired alteration of fauna (cf. art. 6 FA and the list of autochthonous species in the annex of the Ordonnance).

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

Historically, species protection was established before habitat protection in Switzerland and the respective derogation regimes are – at least when it comes to legislation – **not fully coordinated**. With regard to the legal formulation, derogations for species protection are designed in a more restrictive manner than those for habitat protection. In cases where an intervention into a habitat where protected species are situated is at stake, both derogatory regimes should be applied cumulatively. The decisions with regard to both derogations have to be coordinated according to the coordination principle and would thus usually be rendered in one act.

IV. Bird and Habitat Directive

As for Switzerland, there legislative structure does not follow the same distinction as EU-law in this field. Rather, Swiss law foresees a **single regime** (the “hunting regime”) both for birds and a broad range of mammals (art. 2 HPA). Therefore Swiss cases may not offer much insight when it comes to the use of precedents under the bird directive for the provisions of the habitat directive.

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

a. Generally speaking, the responsibility for the enforcement of the legislation in this field lies with the **cantonal authorities**. In the field of hunting the enforcement of the act is a matter dealt with by the cantons, both when it comes to the administrative implementation and to criminal prosecution (art. 21 and art. 24 seq HPA respectively). More or less the same pattern applies to fisheries, where the cantons are responsible for criminal proceedings (except for those regarding import) and for the general administrative implementation of the act (art. 20 and art. 21 seq. respectively) as well as to ensure fisheries control under the oversight of the Confederation (art. 21 para 2 FA), while there are parallel powers for the Confederation and the cantons when it comes to information and counselling with regard to fish waters. With regard to the general regime of the Act on the Protection of Nature and Cultural Heritage (art. 24d and art. 24f seq. respectively) finally, it is again the cantons, which are in charge of the criminal proceedings and of the general implementation of the legal framework more generally.

b. The general regime contains two **criminal provisions**: (i.) the law qualifies as guilty of a misdemeanour any person who wilfully and without authorization “destroys or seriously damages a natural or cultural monument protected under this Act, a protected historical site, a protected natural landscape or a protected biotope” (art. 24 para 1a NCHA) an offence which may lead to a term of imprisonment up to one year or a monetary penalty of the 100'000 Swiss francs. In addition to this, a violation of further obligations resulting from the Ordinance (e.g. obligations related to species protection) may be sanctioned with a monetary fine of up to 20'000 Swiss francs (art. 24a para 1b NCHA). The latter provision is formulated in a very open and vague manner, basically delegating the definition of the offence to the executive, which renders the provision fairly problematic in the light of the *nulla poena sine lege certa* principle.

c. The criminal administrative provisions prohibit both **intentional and negligent behaviour**, but if the threshold of negligence is not reached, the prohibitions do not apply. Swiss law thus does not prohibit any form of incidental capture or killing of animal species by criminal law provisions. As for the species monitored by Red Lists, the monitoring should also include changes due to incidental capture and killing. This monitoring would however be limited to the species under the regime of the Red Lists (the Red List currently cover 21 animal groups – all vertebrates and 15 further groups of invertebrates).

d. The use of the cited criminal provisions seems to be quite **rare** in practice and there seems to be no case concerning the relevant provisions decided by the Federal Tribunal in recent years.

e. The Environmental Liability Directive **has not been transposed** into Swiss law.

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

a. So far, in Switzerland, neither the Confederation nor most of the cantons have implemented an instrument similar to the **SEA-procedure**, the only exception being the canton of Geneva, where the SEA assessment is mandatory and the canton of Vaud, which even though no formal legal basis seems to exist conducts SEA assessments on a voluntary basis. Based on this small sample, it is

difficult to give an informed judgement on whether and to what extent the application of the instrument really affects species protection.

b. In the framework of the EIA, an assessment on the **impact on fauna, fauna and habitats is mandatory**. According to the “Handbook on EIA” issued by the federal authorities, the report has to list protected habitats, must contain an inventory of threatened flora and fauna including the development of the species concerned. Furthermore it must contain adequate measures, namely concerning protection, restoration, compensation and interlinking listing also management- and maintenance plans, control and monitoring measures and instruments assessing the effectiveness of the measures taken. In a recent case decided by the Federal Tribunal a planning zone for a windpower-installation was held to violate the legal requirements because the effect of the installation on the bat population was not assessed in a sufficiently thorough manner, even though the proposal included quite detailed measures of protection and compensation (among others: installation of a device measuring the intensity of birds migration in order to allow for the installation to be stopped during the peak migratory season, installation of power poles safe for birds, designation of quiet areas, establishment of adequate compensatory habitats for black grouses and meadow pipits close by etc.). If damages occur during operation it would, generally speaking, be possible to foresee the revocation of permissions granted or at least the impositions of further conditions in order to react to the malfunction. In its recent case on wind-power-installations the Tribunal now proposes in cases of scientific doubt, to foresee a control of success during operations, with the possibility to take further measures if results are not satisfactory.

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

a. As far as I can see, the **general exception regimes** would apply also in the case of agricultural or forestry activities.

b. and c. Agriculture is **very strongly subsidized** in Switzerland. In 2015 about 3.5 billion Swiss francs or 5.6% of the total expenditures of the Confederation were paid for the sector of agriculture. In order to obtain the federal subsidies, the farmers have to comply with certain minimal ecological criteria. In addition to this, they may obtain so-called “biodiversity-subsidies” for specific activities for furthering biodiversity. In 2015 this category of subsidies amounted to 387 Mio. Swiss francs or about 14% of the subsidies paid directly to the farmers. A recent evaluation conducted by the government assessed whether the objectives with regard to biodiversity in agriculture had been attained. It concluded that the quantitative goals concerning the proportion of agricultural areas of high quality in the different segments have mostly been reached. At the same time however, Red Lists regarding habitats show that more than half of the habitats in agricultural areas are threatened, that the population of birds is not satisfactory, that the composition of vascular plants becomes more and more similar and thus less diverse – short, that the situation regarding biodiversity in agriculture is not satisfactory.

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

NGOs, citizens and particularly farmers play an important role when it comes to the actual **implementation** of species protection in Switzerland. The Confederation may grant subsidies for national organizations involved with nature protection (art. 14 NCHA) and the cantons support private organizations in the field of species protection. The canton of Berne for instance is granting subsidies to organizations active in the field of amphibians and reptiles, bats and insects. In addition to this, the authority offers various kinds of possibilities of become a “godparent”, such as for the monitoring of toads or for the control of sites where bats live. Farmers may receive a whole range of subsidies for activities with regard to furthering biodiversity (cf. above). The activities required in order to obtain the subsidies are often determined in so-called farming contracts between cantonal authorities and the farmers but based on the federal regulatory framework.

When it comes to judicial proceedings, organizations concerned with nature protection are **entitled to appeal rulings** of cantonal or federal authorities. In order to be granted such a right the relevant organizations have to be active throughout Switzerland and have to pursue solely non-profit making objectives. To exclude ad-hoc entities from the right to appeal the law also requires that the relevant legal field must have formed part of the objectives of the organization for at least ten years. Currently 24 organizations are entitled to a right to appeal; they are (and have to be) listed in a government-ordinance. The right of appeal of NGOs has been subject of political debates for quite some time and a popular constitutional initiative even demanded its abolishment (but was rejected quite clearly in the popular votation in 2008). Due to this high degree of controversy, statistical data on the subject are quite abundant and we thus know that appeals by nature protection organizations are fairly successful on average: In 2015 for instance, 62 cases were decided (mainly by cantonal tribunals, 4 by the Federal Tribunal) and in 38 cases the appeal was either fully or partially successful. This however covers all fields of environment protection, not only species protection.

IX. Direct applicability

Switzerland as a non-EU-member is **not directly bound** by the EU provisions in this field.