

# BirdLife Position on Species Protection under the EU Birds and Habitats Directives

*For external use. Adopted by the Birds and Habitats Directives Task Force on 11 October 2016.*

## **Summary**

This joint position of EU BirdLife Partners focuses on the delivery of effective species protection under the EU Birds and Habitats Directive (in the following "the Directives"). It gives BirdLife's view on legal, scientific and political requirements to ensure that both Directives' species protection provisions are fully implemented and contribute effectively and efficiently to the achievement and maintenance of Favourable Conservation Status of species of European importance (in particular all wild bird species and species of Annex IV of the Habitats Directive, in the following "EPS").

BirdLife stresses that these provisions have to be implemented thoroughly in all Member States to ensure effectiveness of the Directives, legal certainty for all stakeholders and acceptance of EU species protection in the wider public. BirdLife asks all responsible authorities to develop workable but always legally and scientifically sound approaches to permission procedures and standards. A clear understanding of the conservation status and objectives for each species is fundamental, as well as the application of the precautionary principle in case of knowledge gaps or lacking enforcement capacities.

## **Key Messages**

1. The species protection rules set out in the Birds and Habitats Directives are sufficiently flexible, where properly transposed and implemented, to allow environmentally sustainable economic developments to proceed
2. Inadequate implementation and enforcement of species protection provisions is undermining achievement of the EU's nature conservation objectives, causing increased costs, delays and uncertainty for businesses and jeopardising the acceptance of nature conservation.
3. The species protection provisions of the EU Nature Directives and related case law of the European Court of Justice have to be strictly followed. BirdLife has serious concerns about attempts to sidestep or subvert the derogations process enshrined in the Directives, both from a legal and from a conservation point of view.
4. The derogation provisions of the Directives do, if they are properly transposed and fully implemented in the Member States, provide a workable and legally certain framework for developments and operation of economic actors. The derogations framework ensures that progress towards nature conservation objectives is not jeopardised, while allowing economic developments that meet the criteria set out in the Directives to proceed. In this context, BirdLife supports constructive dialogue and cooperation to find workable solutions that are both legally sound and effective for the conservation of EPS, e.g. in the area of "temporary nature" or when it comes to the protection of individual specimens.

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## **Introduction**

1. The basic unit of biological diversity is the species. Action to conserve and restore species diversity is therefore critical to biodiversity conservation. The EU is a party to multilateral environmental agreements including the Convention on Biological Diversity, the Bonn Convention on Migratory Species and several of its daughter agreements, the Bern Convention on the Conservation of European Wildlife and Natural Habitats, and CITES which place obligations on signatories to conserve biodiversity, including species diversity, in recognition of its intrinsic value, ecological importance, and the services biodiversity provides to humanity. The Bern and Bonn Conventions and CITES require strict protection of specific species listed in the Appendices to the treaties.
2. The Birds Directive and the Habitats Directive are the cornerstones of EU action to conserve biodiversity, and the key policy instruments for delivering on the EU's international biodiversity conservation obligations. Under the Birds and Habitats Directives, Member States are required to establish a system of strict protection for certain species – both inside and outside Natura 2000 sites – as part of the range of measures required to maintain or restore Favourable Conservation Status (FCS)<sup>1</sup>.
3. This paper outlines the principles BirdLife believes must underpin implementation of the species protection measures of the Nature Directives. The paper also identifies actions the European Commission and national authorities must and can take to deliver species protection in an effective and efficient way on the ground.

## **The species protection provisions of the EU Nature Directives**

4. Figure 1 at the end of this document outlines how the strict protection rules applying to European Protected Species (EPS, i.e. those species of Annex IV of the Habitats Directive), and derogation rules under the Habitats Directive are intended to work. The Directive applies a series of tests in deciding whether a derogation can be granted. As can be seen, in failing to achieve Steps 1 and 2, Member States have undermined the ability of developers to comply with the derogation tests set out in the Directive.
5. The situation under the Birds Directive is slightly different. Here species protection provisions apply to all bird species occurring in the wild. Article 9 authorises the Member States to derogate from the general prohibitions and from the provisions concerning marketing and hunting. The European Court of Justice (ECJ) has clarified that this possibility is subject to three conditions: first, the Member State must restrict the derogation to cases in which there is no other satisfactory solution; secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c); thirdly, the derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. A further condition that needs to be met, after the previous three have been met, is related to conservation status of the species concerned. Derogations should not be detrimental to the conservation of the

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<sup>1</sup> Although the term FCS does not literally appear in the EU Birds Directive, this paper - as several publications of the European Commission and Member States - assumes that Article 2 of the Birds Directives aims at FCS for all species of birds following the definition of FCS of the Habitats Directive.

species involved, which means that monitoring and assessment is needed for bird species as well.

6. In contrast to the Habitats Directive, the Birds Directive does not directly allow derogations for overriding public interest. The latter can however be de-facto addressed by using the provision of Article 9 (1) (c) as *"to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers"*. While this has been applied in several Court rulings in Member States<sup>2</sup> it would be desirable to clarify this in European Commission guidance and Member State legislation.<sup>3</sup>

### **Findings of the Fitness Check related to species protection**

7. The Fitness Check of the Birds and Habitats Directives has brought to light strong evidence that the species protection rules set out in the Directives are sufficiently flexible, where properly implemented, to allow environmentally sustainable economic developments to proceed.<sup>4</sup> Member States are granted a degree of flexibility in terms of the approach they choose to adopt in implementing the Directives, consistent with the principle of subsidiarity. The Directives take a flexible and proportionate approach to ensuring that nature conservation objectives are not compromised by short-term interests. Where necessary derogations exist to ensure that important public interests prevail.
8. At the same time the Fitness Check has also brought to light evidence of widespread malpractice in the application of these rules, and incomplete implementation of key elements of the species protection framework provided by the Directives (including inadequate monitoring, and the widespread failure to define FCS through favourable reference values).<sup>5</sup> This and the recurrent and incoherent use of derogations also in the area of hunting has contributed to the EU's failure to meet its conservation objectives for protected species. While there have been several major conservation successes, many of the species that are protected under the Directives – including those that have experienced significant historical declines – remain in unfavourable conservation status and continue to be threatened by ongoing pressures.
9. The Fitness Check also revealed that several stakeholders, especially from industry and infrastructure planning, perceive the species protection provisions set out in Article 12 and 16 Habitats Directive as well as the equivalent Articles 5 and 9 of the Birds Directives as a challenge, mainly because of procedural delays as a consequence of legally uncertain project permissions, that are often (successfully) challenged in the Courts - or because of (perceived) overly strict interpretation of the legislation by

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<sup>2</sup> E.g. Munich Airport Ruling of BayVGH of 19 Feb 2014 - 8 A 11.40051 - juris Rn. 851

<sup>3</sup> The European Commission Evaluation Study to support the Fitness Check of the Birds and Habitats Directives (March 2016) confirmed the coherence of both Directives also regarding species protection, see chapter 8.1.3.4.4

<sup>4</sup> Ibid., chapter 6.5.3.12

<sup>5</sup> Ibid., chapter 5.1.3.1.5

authorities.<sup>6</sup> Underlying problems identified in the Fitness Check were inter alia:

- a. incomplete and/or poorly communicated EU and national guidance on the Directives species protection provisions;
- b. understaffed and/or poorly qualified permission authorities, leading to inconsistent and/or overly strict permission or to permissions that can be challenged in Courts by NGOs due to poor quality;
- c. lack of definition of Favourable Conservation Status /Favourable Reference Values for EPS;
- d. lack of undisputed data about EPS distribution and lack of quality of impact assessments (leading to them being challenged in Court cases).

### **BirdLife view: The conditions for sound implementation of EU species protection**

10. **Sound, clear and specific transposition of the Directives species protection provisions into national and regional law (and soft law) is key.** The less specific the transposition the more there are risks for legal disputes, project delays and infringements of EU law.
11. **Clear EU and national guidance** on the relevant provisions of the Directives and related case law, as well as practical guides and standards for permitting authorities developers, planners and conservationists. It has to be guaranteed that such guidance is specific enough and of a high scientific quality so that problems perceived by industry are addressed.
12. **Comprehensive and accessible information on the distribution of EPS** is essential for effective and efficient nature conservation, and to identify where and how development projects are likely to impact on protected species.
13. The **setting of sound Favourable Reference Values (FRVs)** and other parameters needed for identifying the current Conservation Status of EPS and the ultimate conservation objectives at all relevant levels is essential for effective, efficient and legally sound implementation of the Directives. Where the respective values are not set in a scientifically sound manner by Member States, the precautionary approach has to be applied, e.g. when it comes to assessing the impact of development projects on local population of EPS.
14. **Strict and consistent enforcement** of all relevant legislation, codes of conducts and other standards must be ensured by the European Commission, national and local authorities. The lower governance and supervision standards are the less room there is for the development of solutions that in the same time help to solve existing problems on the ground and improve nature protection. Where government enforcement fails BirdLife

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<sup>6</sup> Ibid., boxes 36,68,74 and 75

will always stand ready to take or promote legal action against breaches.

15. **Adequate staffing and training** of staff in permitting authorities is fundamental to ensure quality and legal certainty of permissions.
16. **High technical quality standard of project impact assessments** must be ensured, e.g. through national systems that guarantee independence and quality standards for assessing experts and the availability of objective data.

### **BirdLife view: Derogations from EU species protection provisions**

17. The species protection provisions of the EU Nature Directives and related case law of the European Court of Justice have to be strictly followed. **BirdLife opposes attempts to sidestep or subvert the derogations process** enshrined in the Directives, both from a legal and from a conservation point of view. In this context, BirdLife generally prefers a sound application of derogations to an approach that tries to mitigate project impacts in order to circumvent the prohibitions or to avoid derogation tests (inter alia through so called measures of "Continued Ecological Functionality"). Such measures have proven to be very limited in their effectiveness for many groups of species.
18. **Derogations must be considered and granted on a case by case basis**, in line with the relevant Directives provisions, ECJ case law and Commission guidance. Under the Habitats Directive this includes passing of three derogation tests: non-existence of an alternative solutions, applicability of one or more reasons listed in Article 16(1)a-e and no negative impact on the objective of restoring to or maintaining the species in Favourable Conservation Status. The same applies under the provisions of the Birds Directive's Article 9 in an equivalent way, including regarding conservation status.
19. The development of **sector and/or species specific "codes of conduct", "species action plans" (or similar instruments)** can help avoiding breaches of the Directives, inter alia by defining rules and standards for the application of derogations. Such instruments must be as specific as possible, they must be guided by the need to achieve Favourable Conservation Status for the species in question, they must be developed in cooperation with all relevant stakeholders without letting commercial interests overrule legal and scientific requirements, they should be implemented under appropriate supervision and enforcement and they should be regularly reviewed.
20. If a scientifically and legally sound granting of permissions and proper enforcement of derogations cannot be guaranteed the **precautionary principle** must be applied, which implies that derogations should not be granted.
21. **The protection of individual specimens** is a requirement of the Directives (e.g. Article 12 (1) (a) Habitats Directive and Article 5 (a) Birds Directive). The ECJ case law has made clear that these prohibitions are strict and that deliberate also covers "conditional intent". As a first step, therefore, strategic planning of projects should avoid impacts on "hotspots" of EPS - which is in line with the overarching objective of the Directives. If a negative impact cannot be avoided, and all mentioned derogation tests are passed, a sound application of derogations should come into place. For such derogations workable

solutions should be found, that are sufficiently specific and in line with legal requirements. Comprehensive information on the distribution and status of EPS is needed so that decisions on, for example, whether translocation of specimens is necessary and acceptable or not, can be taken on an informed basis, rather than being an automatic precautionary requirement.

22. **The creation of “temporary nature”** on land that has previously been developed (i.e. brownfield land), land which is awaiting development, and land that is subject to ongoing but intermittent or phased development such as mineral working can be important for maintaining and improving the status of EPS. BirdLife does not support the exclusion (or deterrence) of EPS from habitats that might otherwise be available to, and suitable for their use. We support approaches to “temporary nature” that are legally sound, that are subject to appropriate supervision, and that have the overall effect of enhancing (rather than merely to maintaining) the conservation status of the local population, provided there are binding and long-term commitments to the ongoing management and monitoring of the habitat provided/retained to ensure that the objective of sustaining and enhancing populations is achieved over time. Where quality and enforcement of such schemes cannot be guaranteed and demonstrated BirdLife opposes to the application of "temporary nature" schemes. At EU level standards and good practice for such schemes should be developed.

### **BirdLife asks to the European Commission**

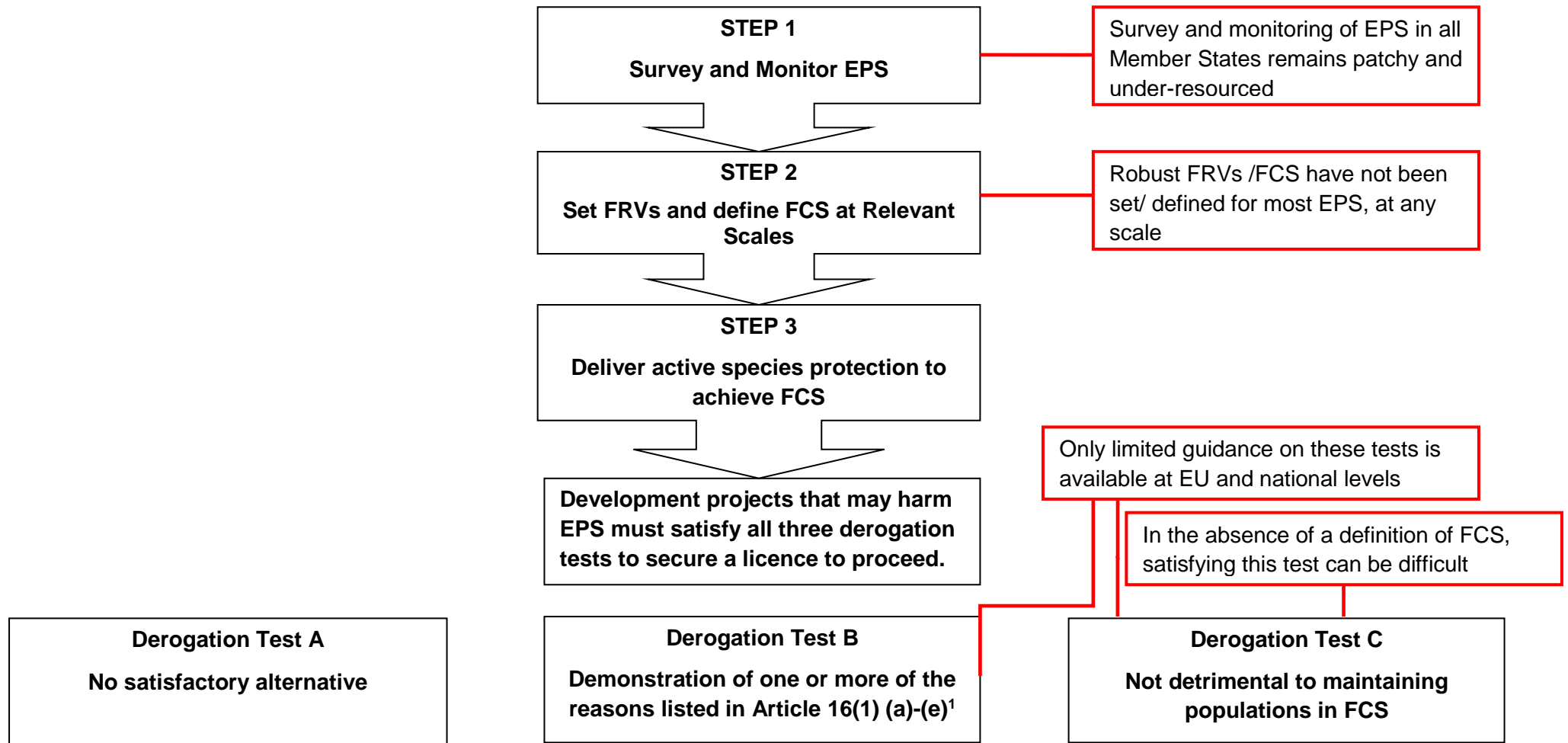
23. The European Commission has a vital role to play in ensuring that available and well communicated (in all EU languages) guidance at EU level enables an informed and consistent approach to derogations across the EU.
24. The Commission should facilitate and encourage the swift setting of sound Favourable Reference Values for EPS in the Member States.
25. The Commission should facilitate through appropriate platforms the sharing of Member States' and stakeholders' lessons learned (best and bad practice) regarding the implementation of species protection provisions with a view to ensuring legally and scientifically sound approaches across the EU.
26. The Commission must significantly step up own enforcement capacities to ensure the Directives' species protection provisions are followed by Member States. If needed the Commission must carry out infringement procedures against Member State governments.
27. Through the EU budget the Commissions should provide support to
- a. comprehensive monitoring programmes of EPS to inform conservation action and facilitate compliance with relevant EPS provisions;
  - b. regional platforms and other advisory services where authorities, planners and stakeholders are informed about EU and national level law, guidance and best practice;

- c. the development of species action plans for EPS that include sector specific standards for dealing with the Directives requirement.

### **BirdLife asks to Member States**

- 28. Member States must implement and finance active species conservation measures, including the development, dissemination and implementation of species action plans for EPS.
- 29. Member States have to ensure that national legislation and guidance complies with the EU legal requirements, while reflecting national planning systems, species conservation objectives, and relevant sectoral approaches.
- 30. National authorities should work with developers and conservation organisations to develop standards and standard approaches to permissions and derogations that fulfil legal requirements, achieve nature conservation objectives, and provide legal certainty to developers.
- 31. Member States have to ensure permitting authorities are equipped with adequate levels of qualified staff to ensure legally certain, scientifically sound and consistent impact assessments, permissions and where appropriate derogations to development projects.
- 32. Member States should introduce clear quality standards for surveys and studies, as well as for private companies that are carrying these out, to ensure assessments provide a technically sound and legally certain basis for permissions.
- 33. Member States must ensure that sufficient survey and monitoring is undertaken to assess conservation status for all EPS in their territory and inform decisions on resourcing and derogations. Relevant data must be publicly available.

## How the Habitats Directive EPS system is intended to work (and how implementation failures undermine it in practice)



<sup>7</sup> (a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

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