

**Guidance document on the strict protection of
animal species of community interest
provided by the 'Habitats' Directive
92/43/EEC**

DRAFT - VERSION 3

DISCLAIMER

This is the third draft version of the guidance document. Its content will still be subject to a final consultation of the Commission's Legal Service as well as an interservice consultation and may therefore still undergo some changes. Chapter II.2.3 (Provisions of Article 12.1(a)-(d) in relation to ongoing activities) will still be amended in the light of the meeting with member states on the 18th October 2005.

II. ARTICLE 12

Text of Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

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

(1) As a part of the second pillar of Directive 92/43/EEC, Article 12 tackles the more specific question of the protection of Annex IV(a) species. Consequently, Article 12 places the emphasis on the direct threats faced by animal species listed in Annex IV(a) rather than the broader question of the conservation of their habitats, with the exception of Article 12.1(d).

(2) Annex IV(a) encompasses a wide variety of species, from large, wide-ranging vertebrates to small invertebrates with very small home ranges. Some of these animal species benefit from the provisions of the chapter on 'habitat conservation', while others do not. In the case of species only listed in Annex IV, Article 12 is the main provision for achieving the conservation objectives set out in Article 2 of Directive 92/43/EEC.

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

II.1. General legal considerations

(4) An effective implementation of Article 12 of Directive (92/43/EEC) requires a full, clear and precise transposition by Member States. According to a settled caselaw, "the provisions of Directives must be implemented with unquestionable binding force and with

Summary: For ongoing activities such as agriculture or forestry, the challenge is to integrate the species protection provisions of Article 12 using appropriate means in order to avoid conflicts.

II.3. The specific protection provisions under Article 12

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

(27) Article 12.1(a) prohibits all forms of deliberate capture or killing of specimens of these species in the wild. It has to be noted that, in accordance with Article 12.3, this prohibition applies to all stages of life of the animals.

(28) According to the Article 1(m), "*specimen means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species.*"

(29) This prohibition is of importance as it is linked with the population of a species (its size, dynamics, etc.) which constitutes one of the criteria established under Article 1(i) to assess the conservation status of a species. Killing or capture may lead to an immediate, direct (quantitative) decline in populations, or could have other more indirect (qualitative) negative effects on a population. Contrary to the incidental capture or killing that falls under Article 12.4, this prohibition covers deliberate capture or killing.

(30) In the case C-103/00, the Court referred to the element of "intent", observing that: "*the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there.*" Despite the information available to the public for the need to protect these areas, the persons on the beach committed the infringements⁴⁴. This constituted a failure of enforcement.

(31) **"Deliberate" actions are to be understood as actions by a person who is reasonably expected to know, in light of general experience, that his action will most likely lead to an offence against a species, but he intends the action or consciously accepts the results of his action, even if not intended.** In other words not only the person, who fully intends to capture or kill a specimen of an animal commits an offence. Also a person who might not want to capture or kill a specimen but is sufficiently informed and aware of the consequences his action will most likely have and nevertheless undertakes the respective activity whereby capturing and killing specimens is involved (e.g. as an unwanted but accepted side-effect), is committing an offence.

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

⁴⁴ In case C-103/00, the Court emphasised the fact that both the driving of mopeds and the presence of small craft were not isolated occurrences. In practical terms, it appears that the repeated character of the violations is determining for proving the existence of deliberate disturbance.

Summary: Article 12.1(a) prohibits all forms of deliberate capture or killing of specimens of these species in the wild. The term "deliberate" has to be interpreted as going beyond "direct intention". A person who is reasonably expected to know, in the light of general experience, that his action will most likely lead to an offence against a species, but he intends the action or accepts the results of his action, even if not intended, commits an offence. Good information and guidance by the competent authorities seem an appropriate means to deal with these provisions.

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

(33) Article 12.1(b) prohibits the deliberate disturbance of Annex IV species especially during periods of breeding, rearing, hibernation and migration, where the species are more vulnerable⁴⁵. It has to be stressed that, in conformity with Article 12.3, this prohibition shall apply to all stages of life of the animal species concerned.

II.3.2.a) Disturbance

(34) Neither Article 12 nor Article 1 of the Directive 92/43/EEC contains a definition of the concept of "disturbance". The Commission's Article 6 guidelines⁴⁶ contain some useful information on the term "disturbance" in relation to habitats. If we transpose the Commission's guidelines in the context of Article 12, we may observe the following:

(35) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (e.g. by using lots of energy to flee; Bats for example, when disturbed during hibernation heat up as a consequence and take up flight are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing the possible impact of disturbance on a species. Different species will have different sensitivities/reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also the sensitivity of a single species might be different depending on the season or on certain periods in its life-cycle (e.g. breeding period). The provision under Article 12.1(b) takes into account this possibility by stressing especially that any form of disturbance should be prohibited during the sensitive periods of breeding, rearing, hibernation and migration. Once more a species approach is needed when determining in detail the meaning of "disturbance".

(36) The disturbance under Article 12.1(b) must be deliberate (see chapter II.3.1) and not accidental. On the other hand, while "disturbance" under Article 6.2 must be significant, this is not the case in Article 12.1, where the legislator did not explicitly give this margin. This does not exclude however some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain level of negative impact which is likely to be detrimental must be involved.

⁴⁵ In the case C-75/01 (judgement of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 53-54), the Court declared that Luxembourg had failed to ensure the full and complete transposition of Article 12.1(b), since deliberate disturbance of species was not prohibited during the period of migration.

⁴⁶ "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC"; See, in particular, points 3.4, 3.5 and 3.6.2.

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

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

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

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

(39) The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. There is however, no definition of these terms included in the Habitats Directive. Nevertheless, similar terms (e.g. "period of reproduction", "return to the breeding areas"⁴⁷) are used in the Birds Directive and have been defined in the context of birds. As annex IV(a) includes a much wider range of species which are very different ecologically, biologically and behaviourally, it is necessary to use, once more, a "species-by-species" approach when defining periods of breeding, rearing, hibernation and migration (where those periods apply at all).

(40) Period of breeding and rearing:

This period may include (where applicable) the period of courtship, mating, nest construction or selection of egg laying or parturition⁴⁸ site, parturition or egg laying or production of offspring where reproduction is asexual, egg development and egg hatching, rearing of young.

(41) Period of hibernation:

⁴⁷ 'Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds' (to be found under <http://www.europa.eu.int/comm/environment/nature/home.htm>).

⁴⁸ Parturition – act of giving birth