

The hamster and the law: doing the (im)possible?

29th Meeting of the International Hamster Workgroup Brussels – 12&13
October 2022

Hendrik Schoukens

Ghent University



I. THE EUROPEAN DODO



NEWS

Latest evaluation shows Europe's nature in serious, continuing decline

Unsustainable farming and forestry, urban sprawl and pollution are the top pressures to blame for a drastic decline in Europe's biodiversity, threatening the survival of thousands of animal species and habitats. Moreover, European Union (EU) nature directives and other environmental laws still lack implementation by Member States. Most protected habitats and species are not in good conservation status and much more must be done to reverse the situation, according to the European Environment Agency's (EEA) 'State of nature in the EU' report, published today.

Published 19 Oct 2020 — Last modified 19 Oct 2020 — 5 min read —
Photo: © Vladimir Tadic, REDISCOVER Nature /EEA

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Persisting decline with some sparks of hope?



The European dodo?

World's rarest wild hamster is now critically endangered

As scientists warn the tiny rodent could be gone in 30 years, efforts to reintroduce it to parts of Europe are on the rise.

SATURDAY, 18 JULY 2020 | BY CHRISTINE DELL'AMORE



Der Feldhamster steht kurz vor dem Aussterben

Veröffentlicht am 24.02.2016 | Lesedauer: 4 Minuten

Von Peter Zschunke



Der Feldhamster kämpft ums Überleben: Das Problem ist den Behörden zwar seit Jahren bekannt, aber verbessert hat sich die Situation nicht – in Deutschland gibt es von Jahr zu Jahr immer weniger Tiere

Quelle: dpa



Nieuws

Limburgse hamster nog steeds ernstig bedreigd

15 juni 2019

Uit tellingen blijkt dat er in 2017 in Limburg minder dan 200

Flanders' wild hamster threatened with extinction

irropese en is het



by Alan Hope.

Recent articles: Monk business: Cheese, beer and heavenly gingerbread at Averbode abbey . Escape from Auschwitz, aged just 11. Face of Flanders: Johan Swinnen

SUMMARY

The Flemish government has appointed a co-ordinator and provided funding to save wild hamsters, whose numbers have been reduced to 50



HABITAT DESTROYED

Flemish nature minister Joke Schauvliege has approved financing of €800,000 to save the region's wild hamster, which is in danger of becoming extinct. The funding includes the appointment of a co-ordinator.

Extinction by inaction?

Alsace: le retour du grand hamster

Le grand hamster d'Alsace fait partie des espèces menacées, mais les nouvelles sont bonnes. Selon la campagne de comptage du printemps 2018, sa population augmente en Alsace, seule région de France où il existe depuis le Moyen-Age.

Publié le 25/05/2018 à 20h03 • Mis à jour le 12/06/2020 à 15h39

Operatie-Red de hamster

26 uitgezette dieren moeten het hamsterbestand in Vlaanderen opkrikken. Boeren doen hun duit in het zakje met andere gewassen.



Deathbed conservation & money down the drain?

Le grand hamster d'Alsace, une espèce menacée par une autoroute



'E-Limburg' baalt van heilige hamster

Diepe zuiden zoekt het in grensoverschrijdende ITC

26 oktober 2001 00:00 | [Dick Groenendijk](#)

Topic Management



Elders in het land waardeer je een plan op door er eenvoudigweg een e voor te zetten: e-office, e-lab, e-novation. In Limburg werkt het net even beter als je er de letter g aan toevoegt. De g van grensoverschrijdend. Zo staat sinds kort staat in het bronsgroen eikenhout zelfs een grensoverschrijdend bedrijfsverzamelgebouw. Van de ene kamer naar de andere ga je van Nederland naar Duitsland en weer terug. Op ruimere schaal moet hetzelfde kunnen op Avantis, een uitgestrekt Nederlands-Duits bedrijventerrein. Tenzij de vermaledijde korenwolf, goed voor tientallen juridische procedures, opnieuw roet in het eten gooit...

EUGH ZU RECHTSSTREIT:

Auch verlassene Feldhamster-Baue sind zu schützen



Who will miss the hamster anyway?

> [PLoS One](#). 2019 Nov 21;14(11):e0225347. doi: 10.1371/journal.pone.0225347. eCollection 2019.

Hamsters in the city: A study on the behaviour of a population of common hamsters (*Cricetus cricetus*) in urban environment

Anna Flamand ^{1 2}, Nancy Rebout ², Camille Bordes ³, Lauréline Guinefollau ⁴, Matthieu Bergès ⁵, Fanny Ajak ⁴, Carina Siutz ⁶, Eva Millesi ⁶, Christiane Weber ⁷, Odile Petit ²

Affiliations + expand

PMID: 31751416 PMCID: [PMC6872164](#) DOI: [10.1371/journal.pone.0225347](#)

[Free PMC article](#)



Better off in urban environments?



**II. WASN'T THE WILD HAMSTER A
STRICTLY PROTECTED SPECIES?**

Protection of species

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.

Strict protection

Article 16

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):
 - (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 breedings 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.

Derogations?



III. WHY DIDN'T WE SUCCEED IN SAVING THE HAMSTER?

- ‘In the light of the foregoing, it must be held that the Greek Government did not adopt a legal framework within the prescribed time-limit which was capable of ensuring strict protection for the sea turtle *Caretta caretta* against any deliberate disturbance during the breeding period and against any deterioration or destruction of its breeding sites. Consequently, the Commission's application must be granted on this point.’ (CJEU C-133/00)

(1) Failure to timely transpose the system of strict protection

- **law in books vs on the ground:** ‘The Court has already held that the transposition of that provision requires the Member States not only to adopt a **comprehensive legislative framework** but also to implement practical and specific protection measures in that regard and that the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature’
- **effective protection:** ‘A collection of legal instruments does not constitute a comprehensive legislative and regulatory framework **when those instruments do not prevent** breaches of the prohibition on deterioration laid down in Article 6(2) of Directive 92/43 or when the instruments must regularly be supplemented so that the protection required by Article 12 of the directive can be ensured’ (CJEU – C-504/14)

(2) Law in books vs on the ground

- **Destruction and deterioration of breeding sites:** ‘By not limiting the prohibition laid down in Article 12(1)(d) of the Directive to **deliberate** acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by **no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts.**’ (CJEU – C-98/03)

(3) Incorrect application

- **Concrete and effective action plans:** ‘In the present case, the existence of a network of full-time rangers and officers responsible for monitoring and protecting species does not, in itself, demonstrate effective implementation of the system of strict protection for all of the species listed in Annex IV(a) to Directive 92/43 that occur in Ireland. As pointed out by the Advocate General, **those species are not covered by an appropriate monitoring system**, with the exception of the horseshoe bat, the natterjack toad and the leatherback turtle, given the limited numbers of the latter species in Irish waters. Such is the case for the otter, the Kerry slug, various species of bats other than the horseshoe bat, and cetaceans, as is apparent from paragraphs 20 to 24 of this judgment’ (C-183/05)

(4) Lack of comprehensive planning?

- 'The referring court finds that, on the basis of domestic law, an environmental protection organisation is not entitled to rely on infringement of the law for the protection of water and nature or on the precautionary principle laid down in point (2) of the first sentence of Paragraph 5(1) of the BImSchG, as those provisions do not confer rights on individuals for the purposes of point (1) of Paragraph 2(1) and point (1) of Paragraph 2(5) of the UmwRG. (CJEU C-115/09)

(5) Bad enforcement and lack of effective legal protection

IV. LEGITIMACY ISSUES?

Shifting Baseline Syndrome: Are you afflicted?

Text by Christina Ward-Paige, PhD, with Catherine Mui

It's early afternoon. The sun is beating down and mosquitoes are humming. Another decent day's catch is unloaded, men sweating with the effort. If it weren't for the breeze, the stench would be unbearable. Today's tally: more than 100 sharks, some weighing close to 1,000 pounds and reaching nearly 20 feet in length. The catch includes leopard (tiger), dusky, hammerhead, nurse, sand sharks and sawfish—nothing unusual in the shallow (15 feet) waters surrounding Big Pine Key.



Sawfish were regularly caught in shallow nearshore waters off Key West, Florida, until the 1940s. Today, a diver would be considered extremely lucky to observe a sawfish anywhere in the wild because they are among the most vulnerable marine fishes and are listed as Critically Endangered by the IUCN. Photo: Monroe County Public Library, Key West, Florida, courtesy of Lauren McClenaghan



Sharks were processed for leather and oil in the Florida Keys in the 1920s and 1930s. The most commonly caught sharks included tiger, sandtiger, nurse, hammerhead, bull, lemon, sharpnose sharks and sawfish, some of which are extremely rare today. Photo circa 1930. Photo: Monroe County Public Library, Key West, Florida, gift of Jack Thompson

As a diving enthusiast, you may be thinking, wait a minute, back up here. Over 100 sharks in 15 feet of water, many of which have vulnerable, threatened or endangered status according to the IUCN and are on my dream list of species to see? Where is this Big Pine Key and how do I get there?

For those who are familiar with Big Pine Key and know that it is located in the middle of the Florida Keys in the southeastern United States, you may be thinking that this story is made up. Yes, you have seen some sharks in the Florida Keys, possibly more than you have seen elsewhere, but not 100 in one day. And definitely not the combination of species mentioned.

Unfortunately, you're right. A story like this could not be told today, and with good reason, because it describes a scene from the 1920s, commonly documented in newspapers and other publications of the day.

To seasoned divers and fishers that know the local shark "hotspots" around the world, it may seem like there are a lot of sharks still living today—to see them, one just needs to know where to look! However, in most places there are dramatically fewer sharks than there were just a few decades ago. In fact, what most of us don't realize is that what we expect to see on even the very best dive may be quite different from what our parents or grandparents would have seen by a generation or two ago in the same location.

This change in perspective is related to as the *shifting baseline syndrome* where an individual's baseline is the perceived natural condition of an environment based on their first visit, photographs or descriptions.

Marine biologist, Jeremy Jackson, probably puts it best when discussing divers' perceptions of coral reefs in his 2007 article in the scientific journal *Coral Reefs*. "The

problem is that everyone, scientists included, believes that the way things were when they first saw them is natural. However, modern reef ecology only began in the Caribbean, for example, in the late 1950s, when enormous changes in coral reef ecosystems had already occurred. The same problem now extends on an even greater scale to the scuba diving hobby, with a whole new generation of sport divers who have never seen a "healthy" reef, even by the standards of the 1960s, thus there is no public perception of the magnitude of our loss."

History
This problem recognized by fellow marine biologist, Daniel Pauly, in a 1995 article in the journal *Trends in Ecology and Evolution*. The perception of what we see in the water today (or at any point during one's lifetime) can some-

(1) Shifting baseline syndrome?

*Ruling Favors a 10-Inch Citizen of
France*



The European hamster in grass. M. Watson/Ardea, via Animals Animals

**(2) Only when the EU Commission takes
up its role as guardian things change?**

France Faces Fines Of \$24.6 Million For Improper Treatment Of Hamsters



Sarah Rappaport   

Jun. 10, 2011, 3:15 PM



Europe's highest court ruled Thursday that France did not do enough to protect the Great Hamsters of Alsace, the last wild hamster species in Western Europe (via [The New York Times](#)).



(3) ... and threatens with fines?

Thuis › Maatschappij › Culture War › Vlaamse regering verbrast €800.000 om hamsters uit te zetten



Foto: Shutterstock. Vlaamse regering verbrast bijna 1 miljoen om 'wilde' hamst

Culture War Dierenrechten Geld Politiek

Vlaamse regering verbrast €800.000 om hamsters uit te zetten

Door **Jonas Naeyaert** - 26 september 2019 - 17:30  4787  0

(4) Ambitions are set too low?

Hoe een miljoenen kostende reddingsactie de korenwolf van uitsterven behoedt



(5) ... only to stave off imminent extinction?

19 Jun 2020



Science isn't negotiable: Environment MEPs break off CAP negotiations with COMAGRI



Lapwing (*Vanellus vanellus*) ©Yves Adams

By Harriet Bradley, EU Agriculture and Bioenergy Policy Officer

(6) CAP has to change anyway?



**V. IS THERE A BINDING DUTY TO
SAVE THE WILD HAMSTER AT ALL
COSTS?**

- **Temporal scope:** ‘protection also extends to breeding sites which are no longer occupied where there is a sufficiently high probability that that animal species will return to those sites’ (C-357/20)
- **Territorial scope:** ‘the term ‘breeding site’ also includes the surroundings of that site where those surroundings are necessary for the protected animal species listed in Annex IV(a) to that directive, such as the European hamster (*Cricetus cricetus*), to reproduce successfully’ (C-357/20)
- **Substantive scope:** ‘The concepts of ‘deterioration’ and ‘destruction’, must be interpreted as meaning, respectively, the progressive reduction of the ecological functionality of a breeding site or resting place of a protected animal species and the total loss of that functionality, irrespective of whether or not such harm is intentional.’ (C-357/20)

1) Effective protection

- **overarching objective of the HD:** ‘The aim of this Directive shall be to contribute towards ensuring biodiversity through the **conservation** of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.’
- **French hamster ruling (CJEU - C-383/09):** ‘(...) the continuing ecological functionality of the European hamster’s breeding sites and resting places sought by the Habitats Directive **presupposes that hamster populations are viable in the long term**’.

2) To go beyond protection?

- **Definition of FCS of a species:** ‘a viable component of its natural habitat, and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.’
- **Historical levels?** – no general duty yet when checking non-compliance going back to 1994 (entry into force HD)
- **French hamster ruling (C-383/09):** ‘there were no populations of the species in Alsace which reached its minimum viable population threshold, which is estimated at 1.500 individuals spread over an area of contiguous suitable land of 600 hectares’.

3) FCS and robust population targets

- **No explicit reference:** article 12(1) of the HD does not lay down an explicit reintroduction duty
- **Non-binding reference in article 22 HD:** ‘Member States should study the desirability of re-introducing species in Annex IV that are native to their territory where this might contribute to their conservation, provided that an investigation, also taking into account experience in other Member States or elsewhere, has established that such re-introduction contributes effectively to re-establishing these species at a favourable conservation status (...)’
- **French hamster ruling (AG – C-383/09):** ‘if, as in the present case, the populations of a species are so small that they may die out because of natural fluctuations in numbers, an effective system of protection must aim to achieve a sufficient increase in stocks’
- **New EU Restoration Law – more binding rules – both for strictly protected species (article 4) and agricultural ecosystems (article 9)**

4) Reintroduction and repopulation duty?

- **Proactive management measures:** ‘it is important that proactive management measures (such as restoration of habitats/populations, improvements) are **not an obligation under Article 12**; even though they might well be under Article 6’ (Guidance EC 2007) <> new Guidance more openness?;
- **French hamster ruling (AG – C-383/09):** **yes recovery-duty**, but no duty to take **restoration measures** in areas currently not occupied by the hamster;
- **French hamster ruling (CJEU – C-383/09):** non-compliance-approach and focus on **repopulation programmes** that failed to ensure a long-term recovery of the declining populations (agri-environmental schemes
- **New Restoration Law – Article 4 and 9 go beyond protected sites (!)**

5) Restoration measures beyond existing breeding places?

- **French hamster ruling (AG – C-383/09):** ‘(W)here hamster populations are too small, habitats in the vicinity of their burrows must be managed in such a way that hamster stocks recover sufficiently’
- **Vienna hamster ruling (CJEU – C-477/19):** ‘the term ‘resting places also includes resting places which are no longer occupied by (a) protected species, where there is a sufficiently high probability that that species will return to such places’

6) Not confined to protected and occupied breeding sites

- **obligation of result without a clear deadline:** the EC will check **the result**, not necessarily focus on the precise nature of the implementation efforts, which leaves sufficient room for voluntary actions
- **system of strict protection:** such voluntary actions should **complement** and not replace the preventative approaches, there are to be enforced (EC Guidance document)
- **merely voluntary measures do not suffice (CJEU – C-96/98):** compliance requires at a very minimum the adoption and **application of the set of strict protection schemes**
- **EU Restoration Law – national restoration plans (Article 11)**

7) Binding recovery actions

- **Is it justifiable to spent that much money to save a declining species:** moral question, yet hamster functions as a **key-stone species**, whose recovery will also be beneficial for other threatened farmland species
- **Article 2(3) HD:** conservation measures need to take into account **social, economic and cultural requirements** — does not trump explicit protection duties
- **no justification:** **economic costs** cannot be invoked in order to justify the lack of effective recovery programmes for an endangered species protected under EU law (by analogy - C-399-14)

8) Economic consequences

- **Broad access to justice for eNGOs** (CJEU – C-240/09 and C-243/15): **effective judicial protection** whenever EU protected species are at play, via Article 9(3) of the Aarhus Convention
- **Substantive review** (CJEU – C-404/13): **substantive review** in the context of air quality programs, the same goes with recovery action plans, with reference to science-based baselines
- **Precedents:** FCS of the Brown Bear in French Pyrenees (Ct Admin Toulouse, 2018) and eco-corridors for Dutch wild hamsters (Ct The Hague, 2011)

9) Enforceable in national court

France rebuked for not protecting Pyrenees bears

Judges order state to pay €8,000 for “not doing enough”



9 March 2018



Korenwolf heeft recht op ruimte



De korenwolf of wilde hamster. ©ANP

Staatssecretaris Henk Bleker is gisteren door de rechter verplicht tot de aanleg van verbindingzones tussen natuurgebieden in Limburg waarin de ernstig bedreigde korenwolven leven. Bleker vindt deze verbindingen overdreven en

Restoration-based strategic litigation?

- Obligation of result: When it has been objectively found that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary law, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical or structural difficulties encountered by it (by analogy – C-636/18)
- Force majeure – EU restoration law – Article 4(8) – force majeure and unavoidable habitat transformation directly caused by climate change

10) Force majeure?

29 JUN 2022 | STORY | NATURE ACTION

European Union proposes law to bring back nature



Photo: UNEP/Lisa Murray

Towards more binding restoration targets?

VI. CONCLUSION

- **LAW**: under EU law there exist an enforceable restoration duty for endangered species (and beyond if the EU restoration law is passed)
- **SCIENCE**: judges are increasingly inclined to take into account scientific studies when checking the adequacy of recovery programmes
- **SOCIETY**: under EU law eNGOs and citizens can be the voice of nature and enforce existing recovery duties before national courts

Take home messages



Thank you!
