

Legal analysis on the consistency of the development and implementation of an adaptive management framework for the Saker Falcon with the provisions of the Convention on the Conservation of Migratory Species of Wild Animals (CMS)

I. Introduction

1. The European Commission requested the preparation of a legal analysis regarding whether the development and implementation of an adaptive management and monitoring framework for the Saker Falcon would be consistent with the legal requirements of CMS¹.

II. History

2. The Saker Falcon (*Falco cherrug*) was listed in CMS Appendix I, excluding the population of Mongolia, at the 10th Meeting of the CMS Conference of the Parties (COP10, Bergen, 2011)².

COP10 Resolution 10.28

3. In connection with the listing of the Saker Falcon in Appendix I, COP10 adopted Resolution 10.28³, later repealed in full by COP12⁴, in which it established a Concerted Action for the Saker Falcon. It also agreed, *“as part of the Concerted Action, on the establishment of a Task Force under the auspices of the Interim Coordinating Unit of the UNEP/CMS Memorandum of Understanding on the Conservation of Migratory Birds of Prey in Africa and Eurasia (Raptors MoU), to bring together Range States, Partners and interested parties, to develop a coordinated Global Action Plan, including a management and monitoring system, to conserve the Saker Falcon”*.
4. Resolution 10.28 paragraph 4 included the following text *“Decides that those improvements in the conservation status of the Saker Falcon in any Range State may allow sustainable taking from the wild in that Range State under a management system. In such cases, a Party or Parties may request an exclusion from Appendix I listing to apply in that Range State. The Task Force will endeavour to facilitate this process through the Scientific Council inter-seasonally and through the Conference of the Parties.”*

COP11 Resolution 11.18 (Rev.COP12)

5. In Resolution 11.18⁵, COP11 adopted the ten-year Saker Global Action Plan (SakerGAP) *“as the basis for action on the conservation and management of the Saker Falcon in the coming triennium and beyond, with the overall goal ‘to re-establish a healthy and self-sustaining wild*

¹ This analysis does not address the international or national regulation of the take or trade-in of the Mongolian population of the Saker Falcon.

² The proposal for inclusion of the species in Appendix I, excluding the population of Mongolia, was presented by the European Union and its Member States.

³ [UNEP/CMS/Resolution 10.28](#)

⁴ The proposal to repeal the Resolution in full [UNEP/CMS/COP12/Doc.21/Rev.2/Annex 2](#), Page 24, was adopted by COP12, see [Report of the 12th Meeting of the Conference of the Parties to CMS](#), Paragraph 155.

⁵ [UNEP/CMS/Resolution 11.18](#)

Saker Falcon population throughout its range and to ensure that any use is sustainable". The SakerGAP included an analysis of the population trends and threats to the Saker Falcon and set forth a rationale for a management framework for the sustainable use of this species. The preamble of Resolution 11.18 (Rev.COP12) made reference to paragraph 4 of Resolution 10.28.

6. As part of the same Resolution, COP11 further decided to continue the Saker Falcon Task Force under the auspices of the Coordinating Unit of the CMS Raptors MoU and instructed the Task Force to:

- "a) Actively promote the implementation of the SakerGAP, including by continuing to facilitate engagement, communication, cooperation and collaboration between the stakeholders;*
- b) Further develop, refine, and implement an adaptive management and monitoring framework to improve the present conservation status of the Saker Falcon through, inter alia, regulated, and sustainable use; and*
- c) Keep under review the option to down-list the species."*⁶

7. COP12 revised Resolution 11.18 (Rev.COP12) to establish ongoing reporting obligations for the Taskforce to the COP and made no changes to the instructions to the Taskforce⁷.

III. Applicable CMS provisions for species listed in Appendix I

Prohibition to take species listed in Appendix I

8. Article III.5 of CMS provides that "*Parties that are Range States of a migratory species⁸ listed in Appendix I⁹ shall prohibit the taking of animals belonging to such species.*" Article I.1 i) of CMS defines "taking" to mean "*taking, hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct.*"
9. Article III.5 of CMS allows a limited number of exceptions. It provides that "*Exceptions may be made to this prohibition only if:*
 - a) the taking is for scientific purposes;*
 - b) the taking is for the purpose of enhancing the propagation or survival of the affected species;*
 - c) the taking is to accommodate the needs of traditional subsistence users of such species; or*
 - d) extraordinary circumstances so require;*

⁶ [UNEP/CMS/Resolution 11.18 \(Rev. COP12\)](#), para 4

⁷ The proposal to repeal the Resolution in full [UNEP/CMS/COP12/Doc.21/Rev.2/Annex 2](#), Page 44, was adopted by COP12, see [Report of the 12th Meeting of the Conference of the Parties to CMS](#), Paragraph Paras 156-164 and 670.

⁸ Article I 1 a) defines a "migratory species" as: the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries.

⁹ Article III of the CMS Convention, on "Endangered Migratory Species: Appendix I", provides the legal status of the species listed in Appendix I of CMS. Article III.1 states that "*Appendix I shall list migratory species which are endangered.*" Article III.2 specifies that "*A migratory species may be listed in Appendix I provided that reliable evidence, including the best scientific evidence available, indicates that the species is endangered*".

Article I.1 e) of the Convention defines "*Endangered*" in relation to a particular migratory species means that the migratory species is in danger of extinction throughout all or a significant portion of its range". The Conference of the Parties has further interpreted the term "endangered" in Resolution 13.7 paragraph 1 as meaning "*facing a very high risk of extinction in the wild in the near future*". Resolution 13.7 also defines a general correspondence between the term "endangered" as defined within CMS and the IUCN Red List Criteria (Version 3.1).

provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species.”

Reservations to the Appendices

10. Article XIV.2 of the Convention provides that any State or regional economic integration organization may enter specific reservations concerning the presence of a species on either Appendix I or Appendix II or both on depositing its instrument of ratification, acceptance, approval, or accession:

“Any State or any regional economic integration organization may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to the presence on either Appendix I or Appendix II or both, of any migratory species and shall then not be regarded as a Party in regard to the subject of that reservation until ninety days after the Depository has transmitted to the Parties notification that such reservation has been withdrawn”.

11. Article XI of the Convention, in paragraphs 5 and 6, provides as follows:

“5. An amendment to the Appendices shall enter into force for all Parties ninety days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties which make a reservation in accordance with paragraph 6 of this Article.

During the period of ninety days provided for in paragraph 5 of this Article, any Party may by notification in writing to the Depository make a reservation with respect to the amendment. A reservation to an amendment may be withdrawn by written notification to the Depository and thereupon the amendment shall enter into force for that Party ninety days after the reservation is withdrawn”.

12. No CMS Parties entered a reservation regarding the listing of the Saker Falcon in Appendix I of the Convention within 90 days from the meeting of the Conference of the Parties at which this listing was adopted, and no States or regional economic integration organizations have entered a reservation regarding the Saker falcon on depositing their instrument of ratification, acceptance, approval or accession¹⁰.

De-listing process

13. The process for delisting a species is established under CMS Article III.3:

III. 3. A migratory species may be removed from Appendix I when the Conference of the Parties determines that: a) reliable evidence, including the best scientific evidence available, indicates that the species is no longer endangered, and b) the species is not likely to become endangered again because of loss of protection due to its removal from Appendix I.

14. If the science-based conditions established in Article III.3 are met, removing a species from the Appendices should follow the process for amending the Appendices outlined in Article XI. Consistent with the definition of migratory species under Article I, an entire population or a geographically separate population of the taxon could be delisted.

15. CMS Resolution 13.7 adds a requirement to consult with relevant Conventions regarding the suitability of removing the protection provided by the CMS Appendices in those instances

¹⁰ The list of reservations can be found here

https://www.cms.int/sites/default/files/basic_page_documents/cms_list_reservations_and_territories_June2020.pdf

where species proposed for delisting are also subject to the provisions of other Conventions to ensure that a complete assessment of the consequences of delisting a species from CMS has been considered within the context of the whole management of the species.

IV. Analysis

16. As stated above, no CMS Parties entered a reservation regarding the listing of the Saker Falcon in Appendix I of the Convention in accordance with relevant provisions¹¹. Therefore, no CMS Parties are excluded from the obligation to fully implement CMS Article III.5 concerning the Saker Falcon, which prohibits the taking of Appendix I species.
17. The language of Resolution 10.28, cited in the preamble of 11.18 (Rev.COP12), which foresees the possibility that *“improvements in the conservation status of the Saker Falcon in any Range State may allow sustainable taking from the wild in that Range State under a management system, and that in such cases a Party or Parties may request an exclusion from the Appendix I listing to apply in that Range State”*, conflicts with the Convention’s prohibition on taking of Appendix I species listed on Appendix I unless it is understood as envisioning a de-listing (“exclusion”) of all or some populations of Saker Falcon that are currently covered by the Appendix I listing.
18. Resolution 11.28 (Rev.COP12) called for the Saker Falcon Task Force not only to develop an adaptive management and monitoring framework (AMF) to improve the present conservation status of the Saker Falcon but also to *implement* an AMF through, inter alia, regulated, and sustainable use.
19. While there is no agreed definition of an adaptive management and monitoring framework under CMS, AMF is commonly understood in the scientific community as an approach for simultaneously managing and learning about natural resources¹². The harvesting or taking of targeted species may or may not be a feature of a particular application of adaptive management. The SakerGAP, endorsed by COP11, clearly anticipates an AMF that may include harvesting or taking of the Saker Falcon.
20. The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity¹³, mentioned in the SakerGAP, recommend that adaptive management should be practiced based on science and traditional and local knowledge, iterative, timely and transparent feedback derived from monitoring the use, environmental, socio-economic impacts, and the status of the resource being used, and adjusting management based on timely feedback from the monitoring procedures.
21. Developing an adaptive management and monitoring framework, or elements of an AMF, for Appendix I species *per se* is not in itself problematic from a legal standpoint, even if it includes harvesting.

¹¹ As noted in Section II, the Mongolian Population of Saker Falcon is excluded from the listing

¹² William, B.K., 2011. Adaptive management of natural resources – framework and issues, Journal of Environmental Management 92 1346-1353

¹³ Secretariat of the Convention on Biological Diversity, 2004, Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (CBD Guidelines) Montreal: Secretariat of the Convention on Biological Diversity

22. However, if the AMF includes harvesting or taking of the Saker Falcon, it could only be *implemented* when all or the relevant population of the species had been de-listed from Appendix I.

V. Conclusion

23. The development of an adaptive management and monitoring framework for the Saker Falcon would not, by itself, contravene any provision of the Convention. However, any implementation of an AMF that includes harvesting or taking of the Saker Falcon beyond the Mongolian population would contravene Article III.5 unless it is limited to populations, or the entire species, previously delisted from Appendix I.

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