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“Beyond 2020: Shaping flyway conservation for the future”

**DRAFT GUIDANCE ON SATISFYING THE CONDITIONS OF PARAGRAPH 2.1.3
OF THE AEWA ACTION PLAN**

(Compiled by the Technical Committee)

Introduction

Paragraph 2.1.3 of the AEWA Action Plan identifies the circumstances in which Contracting Parties may permit certain activities that are otherwise prohibited by the Agreement. The paragraph thereby allows Contracting Parties a measure of flexibility in implementing their AEWA commitments. However, the possibilities for using exemptions are constrained insofar as Contracting Parties can only rely upon paragraph 2.1.3 if several general and specific conditions are met.

After briefly describing the prohibitions that Contracting Parties are ordinarily required to implement under paragraphs 2.1.1 and 2.1.2 of the AEWA Action Plan (and the limitations thereto), this document provides guidance on satisfying the conditions described in paragraph 2.1.3. This includes, but is not limited to, guidance on measures to be taken to prevent exemptions from operating to the detriment of Table 1 populations. Such guidance was called for in the 2007 *Review on hunting and trade legislation in countries relating to the species listed in Annex 2 to the African-Eurasian Migratory Waterbird Agreement*, the recommendations of which were endorsed by [Resolution 4.3](#).

In drafting this guidance, consideration was paid to the extensive body of guidelines that have been developed on the interpretation and application of similar legal text in the European Union’s Birds and Habitats Directives¹ and the Council of Europe’s Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).² However, due regard was paid to differences between AEWA’s provisions and those of other legal instruments.

The guidance should be read alongside various other guidelines that have been adopted by the AEWA Meeting of the Parties – in particular, the [Guidelines on National Legislation for the Protection of Species of Migratory Waterbirds and their Habitats](#) (part V) and the [Guidelines on Sustainable Harvest of Migratory Waterbirds](#).

¹ Including European Commission (2008), [Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds “The Birds Directive”](#); European Commission (2007), [Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EE](#); and relevant decisions of the Court of Justice of the European Union.

² Bern Convention Standing Committee, [Revised Resolution No. 2 \(1993\) on the interpretation of Articles 8 and 9 of the Convention](#).

The prohibitions required by paragraphs 2.1.1 and 2.1.2 of the AEWA Action Plan

A Contracting Party need only resort to relying upon paragraph 2.1.3 of the AEWA Action Plan if it wishes to allow an activity for which prohibition is prescribed by paragraph 2.1.1 or 2.1.2.³ These prohibitions concern:

- (i) The taking⁴ of birds and eggs of populations listed in Column A of Table 1. (Para. 2.1.1(a).);
- (ii) The deliberate disturbance of populations listed in Column A of Table 1, insofar as such disturbance would be significant for the population's conservation. (Para. 2.1.1(b).);
- (iii) The taking of birds belonging to populations listed in Column B, or (where allowed) Column A, of Table 1 during their various stages of reproduction and rearing and during their return to their breeding grounds if the taking has an unfavourable impact on the conservation status of the population concerned. (Para. 2.1.2(a).);
- (iv) The taking of birds belonging to populations listed in Column B, or (where allowed) Column A, of Table 1 through the use of means that are indiscriminate or capable of causing mass destructions, as well as local disappearance of, or serious disturbance to, populations of a species. This provision includes a non-exhaustive list of means of taking that must be prohibited. (Para. 2.1.2(b).); and
- (v) The possession or utilization of, and trade in, birds or eggs of those populations which have been taken in contravention of the above prohibitions, as well as the possession or utilization of, and trade in, any readily recognizable parts or derivatives⁵ of such birds and their eggs. (Paras 2.1.1(c) & 2.1.2(d).).

The prohibitions described in points (ii) and (iii) are not framed in absolute terms but are contingent upon the impacts that disturbance or taking will have upon Table 1 populations. Guidance on when deliberate disturbance should be considered significant for a population's conservation, such that it must be prohibited, is annexed to [AEWA Resolution 6.7](#).⁶ Guidance on whether taking during a population's stages of reproduction and rearing, or during its return to its breeding grounds, would have an unfavourable impact on the population's conservation status, and must thus be prohibited, is provided in the [AEWA Guidelines on Sustainable Harvest of Migratory Waterbirds](#).⁷

Both paragraphs 2.1.1 and 2.1.2 contain exemptions which, if satisfied, eliminate the need to rely upon paragraph 2.1.3. Thus:

- (i) The hunting of Column A populations that are marked with an asterisk or included in Category 4 is permissible, provided that this occurs sustainably, endeavouring to implement the principles of adaptive harvest management within the framework of an international species action plan; and

³ Guidance on implementing these prohibitions (and exemptions thereto) through domestic legislation is provided in the [AEWA Guidelines on National Legislation for the Protection of Species of Migratory Waterbirds and their Habitats](#).

⁴ In the context of these provisions, "taking" includes hunting, capturing, harassing and deliberate killing, as well as attempting to engage in any such conduct (Convention on the Conservation of Migratory Species of Wild Animals, Art. I.1(i), read with AEWA Art. I.2).

⁵ For the purposes of paragraph 2.1.1(c) and 2.1.2(d) of the AEWA Action Plan, the term '*readily recognizable part or derivative*' should be interpreted to include any specimen which appears from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be a part or derivative of a bird or egg of a population to which these provisions apply.

⁶ Appendix I to this Resolution additionally provides guidance on interpreting the terms "deliberate" and "disturbance".

⁷ The Guidelines additionally provide guidance on defining periods of breeding and pre-nuptial migration for migratory African-Eurasian waterbirds.

- (ii) The modes of taking that Parties are required to prohibit in terms of paragraph 2.1.2(b) may be permitted to accommodate use for livelihood purposes, where sustainable.

Guidance on granting exemptions to accommodate use for livelihood purposes

The exemption can only be relied upon to accommodate sustainable use. The assessment of whether taking for livelihood purposes is sustainable should consider the cumulative impacts of taking throughout the population's range. Contracting Parties relying upon the exemption should monitor its impact and take measures to ensure that livelihood taking does not become unsustainable. Use for "livelihood purposes" can include both direct consumption and selling at markets.⁸

This ground of exemption is not available in respect of the prohibitions prescribed by paragraph 2.1.1 of the AEWA Action Plan. Thus, if the utilization of indiscriminate means of taking would result in the taking of, or significant disturbance to, birds belonging to Column A populations, a Contracting Party wishing to allow such means, in order to accommodate livelihoods use will need to rely on the exemptions in paragraph 2.1.3 rather than that in paragraph 2.1.2(b).

Exemptions permitted by paragraph 2.1.3 of the AEWA Action Plan

AEWA Action Plan, para. 2.1.3

Parties may grant exemptions to the prohibitions laid down in paragraphs 2.1.1 and 2.1.2, irrespective of the provisions of Article III, paragraph 5, of the Convention, where there is no other satisfactory solution, for the following purposes:

- (a) to prevent serious damage to crops, water and fisheries;
- (b) in the interests of air safety, 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 to the environment;
- (c) for the purpose of research and education, of re-establishment and for the breeding necessary for these purposes;
- (d) to permit under strictly supervised conditions, on a selective basis and to a limited extent, the taking and keeping or other judicious use of certain birds in small numbers; and
- (e) for the purpose of enhancing the propagation or survival of the populations concerned.

Such exemptions shall be precise as to content and limited in space and time and shall not operate to the detriment of the populations listed in Table 1. Parties shall, as soon as possible, inform the Agreement Secretariat of any exemptions granted pursuant to this provision.

⁸ For further discussion of the various motivations for harvest (including livelihoods), and measures to ensure that harvest is sustainable, see the [AEWA Guidelines on Sustainable Harvest of Migratory Waterbirds](#).

Paragraph 2.1.3 identifies an exhaustive, non-cumulative list of reasons for which exemptions may be granted. It additionally identifies the following general conditions for exemptions, which have implications for both an exemption's prior justification and its subsequent application:

- (i) There must be no other satisfactory solution;
- (ii) The exemption must be precise as to content;
- (iii) The exemption must be limited in space and time; and
- (iv) The exemption must not operate to the detriment of Table 1 populations.

These general conditions are cumulative.

Guidance on determining that there is “no other satisfactory solution”

The use of exemptions must be restricted to cases in which there is no other satisfactory solution which does not involve setting aside the prohibitions ordinarily required by AEWA.

The availability of another satisfactory solution should be determined by considering:

- (i) the particular problem or situation that needs to be addressed (i.e. the purpose for which the exemption is sought; this must be capable of being covered by one of the grounds identified in paragraph 2.1.3, subparagraphs (a)-(e));
- (ii) possible alternative solutions which do not involve deviating from paragraphs 2.1.1 and 2.1.2 of the AEWA Action Plan (e.g. reducing conflicts through habitat management or scaring techniques); and
- (iii) whether these alternatives are capable of resolving the problem/situation for which the exemption is sought.

The competent national authority should choose, among possible alternatives, the most appropriate one that will have the least adverse effects on the species, while solving the problem or situation. The reasoning of the choice should be objective and verifiable.

Guidance on the grounds of justification identified in subparagraphs (a)-(e)

All exemptions must be based on at least one of the grounds listed exhaustively in paragraph 2.1.3, subparagraphs (a)-(e).

(a) Preventing serious damage to crops, water and fisheries

The measures permitted must be preventative in nature. It is not necessary that damage already have been sustained. However, it must be probable that damage will occur in the future if the exemption is not granted.

The damage concerned must be serious, as opposed to minor. Whether damage is “serious” in this context should be evaluated in terms of the intensity and duration of the prejudice that would be sustained as a result of the damage, and the scale of the destruction or deterioration concerned. Damage need not be widespread in order to be considered serious. However, the scale of the measures allowed by an exemption needs to align with the nature and scale of the problem that such measures are intended to remedy. It follows that damage

over large areas, and/or that is demonstrably linked to the size of a population, may justify exemptions that are more generalized in their territorial scope than damage that is very localized.

This exemption can only be relied upon in respect of damage to crops, water, or fisheries. Exemptions aimed at preventing damage to other interests (e.g. to other forms of property or to flora and fauna) will therefore only be permissible if the grounds described in subparagraphs (b) or (d) are present.

Broader guidance on reducing damage to crops and fisheries (including potential solutions which do not involve deviating from paragraphs 2.1.1 and 2.1.2 of the AEWa Action Plan) is provided in the [AEWA Guidelines on reducing crop damage, damage to fisheries, bird strikes and other forms of conflict between waterbirds and human activities](#).

(b) Air safety, public health and public safety, and other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance to the environment

This ground for exemption may be relied upon if the presence of birds causes a demonstrable risk to human health or increases the risk of accidents. Broader guidance on reducing bird strikes is provided in the [AEWA Guidelines on reducing crop damage, damage to fisheries, bird strikes and other forms of conflict between waterbirds and human activities](#).

Other kinds of interests upon which Contracting Parties may rely to justify an exemption for overriding public interests include:

- (i) social interests;
- (ii) economic interests; and
- (iii) environmental protection.

However, this list is not exhaustive.

The interests concerned must be public interests, as opposed to the private interests of particular companies or individuals.

Not every public interest (even if it is of a social, economic, or environmental nature) will necessarily qualify as a ground for exemption. To do so, an interest must be imperative and overriding in nature. The interest must therefore be carefully balanced against the conservation interests protected by AEWa. For instance, for this exemption to be relied upon with the purpose of protecting other fauna and flora, the species being protected should have a higher conservation priority than the AEWa-listed population, in respect of which the exemption is granted.

In most instances, a public interest should only be considered overriding if it is a long-term interest. Further, since all of the grounds for exemption identified in paragraph 2.1.3 are qualified by the requirement that they do not operate to the detriment of Table 1 populations, it is not permissible for public interests to entirely outweigh conservation concerns.

(c) Research and education, re-establishment, and the breeding necessary for these purposes

This would, for example, cover the ringing of individual birds for research purposes.

Contracting Parties granting exemptions in order to re-establish Table 1 populations into parts of their range where they no longer exist should also consider paragraph 2.4 of the AEWAs Action Plan (requiring that such Parties endeavour to develop and follow a detailed re-establishment plan and inform the UNEP/AEWA Secretariat, in advance, of all re-establishment programmes). Broader guidance on re-establishments and other forms of translocation for conservation purposes is provided in the [IUCN Guidelines for Reintroductions and Other Conservation Translocations](#) and the [AEWA Guidelines for Translocation of Waterbirds for Conservation Purposes: Complementing the IUCN Guidelines](#).

Importantly, even this ground for exemption is subject to the condition that no other satisfactory solution be available.

(d) Permitting under strictly supervised conditions, on a selective basis and to a limited extent, the taking and keeping or other judicious use of certain birds in small numbers

This ground differs in nature from the others identified in paragraph 2.1.3 insofar as it does not indicate the purpose for which the exemption can be granted. A Contracting Party may consequently rely on the exemption for any reason not already covered by subparagraphs (a)-(c) or (e). To do so, both the general conditions described in paragraph 2.1.3 and the specific conditions described in subparagraph (d) must be satisfied. The following guidance should be taken into consideration when interpreting the latter:

(i) “under strictly supervised conditions”

This condition should be interpreted to mean that the authority granting the exemption must possess the necessary means for overseeing the activities authorized thereby. To this end, it is advisable that the authorizations through which exemptions are granted (whether these be in the form of individualized permits/licenses or more generalized in nature) clearly identify the conditions under which the activity is permitted; and that mechanisms be in place to closely monitor compliance with such conditions and respond to instances of non-compliance.

(ii) “on a selective basis”

This condition should be interpreted to mean that the activity must be highly specific in its effect. The activity needs to target particular species (or even particular gender or age classes within a species). The methods of taking authorized by the exemption should either avoid the taking of non-target species or, where the methods themselves are not entirely selective, allow for individuals of the target species to be kept and those of other species to be released unharmed. Measures should further be taken to minimize the risk of confusion between target and non-target species.

(iii) “to a limited extent”

This condition can be satisfied by limiting the persons, places and times in respect of which the exemption applies.

(iv) “judicious use”

The expression “other judicious use” should be interpreted to mean activities other than taking and keeping that are reasonable and prudent, as distinct from any excessive action that might prejudice a population’s maintenance at, or restoration to, a favourable conservation status. Depending on the circumstances, this could, for instance, include hunting for recreational, cultural or livelihood purposes, or the capture of live birds for sale.

(iii) “small numbers”

This expression should be construed in light of the conservation status of the population concerned, and its annual reproduction and mortality rates. The number of birds that a Contracting Party allows to be taken under the exemption should be sufficiently small as to have a negligible effect on the population dynamics of the population in question.

(e) For the purpose of enhancing the propagation or survival of the populations concerned

This ground can, for example, be relied upon to allow exemptions for the purpose of conservation translocations other than re-establishments (the latter already being covered by subparagraph (c)). Broader guidance on such activities is provided in the [IUCN Guidelines for Reintroductions and Other Conservation Translocations](#) and the [AEWA Guidelines for Translocation of Waterbirds for Conservation Purposes: Complementing the IUCN Guidelines](#).

Guidance on ensuring that exemptions do not operate to the detriment of Table 1 populations, and that they are precise as to content and limited in space and time

In light of Article II.1 of AEWA’s Agreement text, an exemption should be considered to “operate to the detriment” of a population if it is detrimental to the population’s maintenance at, or restoration to, a favourable conservation status. This assessment should be based on current data on the state of the population, including its size, its distribution, the state of its habitat, and its future prospects. If there is uncertainty concerning the impacts of a proposed exemption, the precautionary principle should be taken into account (Article II.2).

The relevant scale at which to both determine conservation status and evaluate whether an exemption’s impact is likely to be detrimental, is the population level. Hence, the cumulative effects of exemptions across the population’s flyway need to be taken into account.

An International Species Action Plan or Management Plan can provide a framework for ensuring that the cumulative impact of national exemption schemes is not detrimental to a population’s conservation status. The existence and implementation of such a plan can consequently assist Contracting Parties to demonstrate that their exemptions will not operate to the detriment of specific Table 1 populations.

Special caution needs to be taken when assessing the potential impacts of exemptions upon populations with an unfavourable conservation status. For an exemption to be permissible in respect of such a population, it must either operate to the population’s benefit or be neutral in the sense that it does not impair the prospect of restoring a favourable conservation status. This will be easier to demonstrate if appropriate measures are being taken to promote the population’s recovery and the exemption is unlikely to work against, render ineffective, or neutralize these measures. Ideally, such measures should be implemented within the framework of an International Species Action Plan.

The condition that exemptions do not operate to the detriment of Table 1 populations, should be taken into consideration when determining whether or not to grant an exemption in the first place. If an exemption is granted, the condition should additionally be taken into account when determining the various limitations subject to which it is authorized and ensuring that these are adhered to. Reading this condition with the accompanying requirements that exemptions be precise as to content and limited in space and time, it is advisable that each authorization clearly identify the species to which it applies, the means authorized for

taking, and the persons/entities, places, times, and quantities in respect of which the exemption is allowed. To ensure that there is no detrimental impact upon Table 1 populations, mechanisms should be in place to monitor compliance with these conditions and respond to instances of non-compliance. The impacts of exemptions should also be monitored, so as to detect any unintended risks should these arise.

Reporting exemptions to the UNEP/AEWA Secretariat

Paragraph 2.1.3 requires Contracting Parties to “as soon as possible” inform the UNEP/AEWA Secretariat of any exemptions granted pursuant to this provision. Ideally, such notifications should immediately follow the granting of each exemption.

Information should be provided on each species for which an exemption was granted and should include the purpose of the exemption, the number of individuals (or eggs) for which the exemption was granted, the territorial coverage and the time span of the exemption.