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## **Questionnaire EUFJE Conference 2010 - Enforcement of European Biodiversity Law at national level**

### *Introduction*

On 1 March 2010 a new Federal Nature Conservation Act (FNCA) came into effect. The law covers - inter alia - habitat (sec 31 pp.) and species protection (sec 39 pp.) including questions of international trade. It is applicable in all 16 states (Länder) within the Federal Republic of Germany. In contrast to the former FNCA the Länder do not have to implement the law by state legislation. Nevertheless, Nature Conservation Laws of the Länder (NCL) remain relevant. Firstly, because some provisions of the FNCA are general in nature leaving details to state legislation. Secondly, due to an amendment of the constitution in 2006, the Länder may adopt Nature Conservation Laws which deviate from the FNCA - as far as this does not concern general principles of nature conservation, the protection of species and the protection of the marine environment. In the field of habitat protection the Länder may deviate from the FNCA, but - of course - they remain committed to the Habitat- and the Birds-Directive. Most Länder are willing to adjust their Nature Conservation Laws to the new FNCA. Some Länder have already put new Nature Conservation Laws into effect, but the legal situation is still in motion.

### *A. Habitat protection*

*1. Are there general habitat protection measures, applicable to all special areas of conservation and special protection areas in your country, or are they site specific, or is there a combination of general and site specific measures?*

Section 32 par 2 FNCA provides for all special areas of conservation: Sites which have been listed by the Commission have to be declared - in keeping with the specific conservation objectives - as a nature reserve, national park, biosphere reserve, landscape reserve, nature park, natural monument or protected landscape components. The declaration shall set forth the relevant conservation objectives and the required site boundary definitions; it shall also stipulate whether priority natural habitats and priority species have to be protected; last but not least it shall issue suitable orders and prohibitions and suitable management and development measures to ensure that the requirements of Art. 6 of the Habitat-Directive are fulfilled (sec 32 par 3 FNCA). In conclusion: The legal framework is general, but the measures are site specific.

*2. Who supervises habitat protection measures in your country? Are there (also) specialized inspectorates supervising them?*

State law determines which authorities are competent for carrying out the FNCA and the State NCL. Therefore the supervising bodies can differ from state to state. But all states have administrative authorities specialised on nature conservation, mostly on state, regional and local level. Usually the local nature conservation authority is competent as far as the competence of another authority is not established.

Take Saxonia as an example for state legislation in this field: In Saxonia the nature conservation authorities are supported by the State Office for Environment, Agriculture and Geology. This Office shall - inter alia - monitor the special areas of conservation or guide the monitoring thereof (sec 43 par 1 No. 4 Saxonian NCL). In addition, the local nature conservation authority has to assign an ombudsman and volunteers. They shall also monitor special areas of conservation; furthermore they shall supervise conservation and development measures (sec 46 par 3 No. 1 Saxonian NCL). Landowners and tenants have to report any damages of the site to the nature conservation authorities; moreover the Police have to give notice of all events which could call for actions of the nature conservation authorities (sec 55 par 1 and 4 Saxonian NCL).

*3. If habitat protection measures are infringed, what type of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Are those sanctions often applied and considered to be effective? Can those sanctions be applied on legal persons?*

First of all, the nature conservation authority may, in lack of extraordinary circumstances must stop the conduct infringing habitat protection measures and, if possible, order the site to be restored (sec 41 par 1 Saxonian NCL). These sanctions are administrative in nature.

If the environmental damage to the site (see sec 19 par 1 and 3 FNCA) is caused by any of the occupational activities listed in Annex III of the Environmental Liability Directive (2004/35/EC) the operator has to take the necessary remedial measures (sec 6 No. 2 Environmental Damage Act <EDA><sup>1</sup>). The competent authority may order such measures (sec 7 par 2 EDA Act). The operator has to bear the costs for the preventive, mitigating and remedial actions taken (sec 9 par 1 EDA). This obligation can be enforced by administrative orders.

In addition to these administrative orders, administrative fines can be imposed. Anyone who wilfully or negligently contravenes the rules set up for a special area of conservation commits an administrative offence. This does not constitute a crime, but the nature conservation authority can impose an administrative fine on the offender. The details and the level of the fine can differ from state to state. For example, in Saxonia and in Baden-Württemberg the fine may not exceed 50.000 € (sec 61 par 1 No. 1, par 2 No. 1 Saxonian NCL; sec 80 par 1 No. 5, par 3 NCL BaWü).

As administrative offenses don't fall into the jurisdiction of the administrative courts, their cases don't offer material to assess the frequency and the effectiveness of those sanctions.

A legal person can be the addressee of administrative orders. Administrative fines can also be imposed on legal persons (sec 30 par 1 Administrative Offences Act - Ordnungswidrigkeitengesetz <OWiG>).

*4. What type of sanctions can be applied if a plan or project as referred to in Art 6.3 of the Habitat-directive is carried out without an appropriate assessment? Does it*

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<sup>1</sup> Umweltschadensgesetz

*make a difference if not only an appropriate assessment is lacking, but also a permit for the project or an approval of the plan?*

Again, first of all the plan or project may and in lack of extraordinary circumstances must be stopped.

Anyone who wilfully or negligently carries out a plan or project without an appropriate assessment is deemed to have committed an administrative offence which may be punished with a fine of up to 50.000 € (sec 69 par 3 No. 6, par 6 FNCA).

If not merely an assessment pursuant to Art 6 par 3 and 4 of the Habitats-Directive, but also a permit or approval is required, anybody who carries out a plan or project without such authorisation commits another administrative offence. In this case the highest fine prevails (sec 19 par 1 Administrative Offences Act <OWiG>).

*5. Conduct falling under article 3 (h) of the Ecocrime-directive shall, at the latest on 26 December 2010, be qualified as a criminal offence and be punishable by effective, proportionate and dissuasive criminal penalties. Has this provision already been implemented in your country, as the case may be, by pre-existing legislation? How is the conduct described in your legislation: copy and paste or a specific national description? What are the minimum and maximum penalties? Is there a difference between penalties for natural and legal persons? If such an infringement is reported, is it still possible not to prosecute such an offence before a criminal court and to apply other types of sanctions or to simply drop the case?*

In Germany, Art. 3 (h) of the Ecocrime-Directive<sup>2</sup> has so far been implemented by statute law:

Section 69 par 3 No. 6 FNCA (Appendix) constitutes an administrative offence only. But someone who intentionally and for commercial proposes or habitually carries out the action or who intentionally carries out an action oriented to an animal or plant of a strictly protected species commits a crime (Section 71 par 1 and 2 FNCA).

Under Section 329 of the Penal Code specific actions endangering protected areas but not any conduct falling under Art. 3 (h) of the Ecocrime-Directive constitute a crime.

As for the rest please refer to question B.4.

## B. Species Protection

*1. Are the fauna (including birds) and flora protection measures organized within one coherent legislative framework, or through a patchwork of legislations, or is there a combination of general and specific measures?*

Sections 37 to 51 of the new FNCA provide a coherent and conclusive regulation of the species protection. State laws may neither deviate from these provisions nor add substantial rules.

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<sup>2</sup> Member states shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(h) any conduct which causes the significant deterioration of a habitat within a protected site.

*2. Who supervises fauna and flora protection measures in your country? Are there (also) specialized inspectorates supervising them?*

See question A.2.

*3. Do the enforcement efforts concentrate on a few types of fauna, birds or flora? Are there some topics that gather all attention, all enforcement efforts? Is there an evolution through time in the focus of enforcement efforts?*

Essentially, the FNCA defines two different levels of protection:

There are general provisions that apply to all wild fauna and flora species, whether they are endangered or not. For example, throughout Germany it is prohibited to impair or destroy, without good cause, the living sites of wild animals and plants (Section 39 par 1 No. 3 FNCA).

The special provisions (Section 44 to 47 FNCA) only apply to specially and to strictly protected species. They are protected by prohibitions on taking (Section 44 par 1 FNCA), on possession (Section 44 par 2 No. 1 FNCA) and on marketing (Section 44 par 2 No. 2 FNCA). The distinction between specially and strictly protected species is relevant only in very few cases. Strictly protected species are a subset of the specially protected species. Specially protected species are species which are listed in

- Annex A and B of Council Regulation 338/97/EC
- Annex IV of the Habitats-Directive
- a statutory ordinance comprising species which are endangered, with regard to their populations, and for which Germany has a high degree of responsibility (Section 54 par 1 FNCA), and
- European bird species.

Within the last 10 years enforcement efforts have improved significantly, in particular because the mapping of the species has become much more diligent and detailed. A lot of attention is attracted by bats, birds and some other species which surprisingly appear as soon as a project is going to be carried out.

*4. If fauna and flora protection measures are infringed, what type of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Are those sanctions often applied and considered to be effective? Can those sanctions be applied on legal persons?*

First of all, the competent nature conservation authority may and in lack of extraordinary circumstances must stop the conduct infringing fauna and flora protection measures.

If the damage to the species is caused by any of the occupational activities listed in Annex III of the Environmental Liability Directive (2004/35/EC), the Environmental Damage Act applies. For details see question A.3.

Anyone who infringes a prohibition on taking (sec 44 par 1 FNCA) is deemed to have committed an administrative offence which may be punished with a fine of up to 50.000 € (sec 69 par 2, par 6 FNCA). Anyone who intentionally carries out such an

action, oriented to an animal or plant of a strictly protected species, shall be punished with a term of imprisonment of up to five years or with a fine (sec 71 par 2 FNCA). All species listed in Annex IV of the Habitats-Directive are strictly protected; European Bird species are strictly protected only if they are listed in Annex A of Council Regulation 338/97/EC (sec 7 par 2 No. 14 FNCA). If the offender negligently fails to recognise that the relevant action is oriented to an animal or plant of a strictly protected species, the penalty shall be a term of imprisonment of up to one year or a fine (sec 71 par 4 FNCA).

As administrative offenses don't fall into the jurisdiction of the administrative courts, their cases don't offer material to assess the frequency and the effectiveness of those sanctions.

Only an individual representing a legal person, but not the legal person itself can commit a criminal offense. A legal person itself can not be punished with imprisonment or a fine which is not administrative, but criminal in nature. Administration fines can be imposed on a legal person itself (see question A.3).

*5. Conduct falling under article 3 (f) of the Ecocrime-directive<sup>3</sup> shall, at the latest on 26 December 2010, be qualified as a criminal offence and be punishable by effective, proportionate and dissuasive criminal penalties. Has this provision already been implemented in your country, as the case may be, by pre-existing legislation? How is the conduct described in your legislation: copy and paste or a specific national description? What are the minimum and maximum penalties? Is there a difference between penalties for natural and legal persons? If such an infringement is reported, is it still possible not to prosecute such an offence before a criminal court and to apply other types of sanctions or to simply drop the case?*

Article 3 (f) is implemented by pre-existing legislation (sec 44 par 1, 69 par 2, 71 par 2 FNCA - Appendix). The penalized conduct is described in national wording.

The minimum penalty is a fine. According to Section 40 Criminal Code, the fine shall be imposed in daily units (minimum: 5; maximum: 365). The court shall determine the amount of the daily unit taking into consideration the personal and financial circumstances of the offender (minimum 1 €; maximum: 30.000 €). The maximum penalty is a five years imprisonment.

The public prosecution office is obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications (sec 152 par 2 Code of Criminal Procedure <CCP>). It may drop the case only if certain conditions provided by the CCP are fulfilled. Inter alia the prosecutor may drop petty offences (sec 153 CCP). With the consent of the accused and of the court competent to order the opening of the main proceedings, the prosecutor may also dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle (sec 153a par 1

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<sup>3</sup> Member states shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

CCP). To pay a sum of money to a non-profit-making institution or to the Treasury is one out of several conditions that can be imposed on the accused.

### C. International Trade

*1. Who supervises compliance with the CITES-regulation? Do the monitoring efforts concern as well the import into and export and re-export from the Community as the commercial activities and movements of life specimens within the Community, your country?*

Primarily the Federal Customs Administration and the competent authorities for nature conservation pursuant to the legislation of the Länder supervise compliance with CITES. The Federal Agency for Nature Conservation (BfN) is competent to issue certain import and export permits. For details see sections 48 to 50 FNCA (Appendix).

The prohibitions on possessing and on marketing apply regardless of whether cross-border activities are involved or not (sec 44 par 2 FNCA). Compliance of conduct within the country is supervised by the competent authorities for nature conservation pursuant to the legislation of the Länder. The cases falling into the jurisdiction of the administrative courts don't offer material to assess whether the surveillance on traders and holders such as pet shops, breeders and nurseries is effective.

*2. If protection measures are infringed, what type of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Do they include the possibility of seizure and confiscation of specimens? Are those sanctions often applied and considered to be effective? Can those sanctions be applied on legal persons?*

If protection measures (sec 44 par 2 FNCA) are infringed the offender has committed an administrative offence (sec 69 par 3 No. 20 - 23 FNCA), under certain aggravating circumstances a crime (Section 71 par 2 FNCA). For details see the mentioned sections of the FNCA.

Any person who possesses or has actual control over living animals or plants of specially protected species must be able to produce conclusive evidence that they have a right to such possession (sec 46 par 1 FNCA). If the holder is unable to give such evidence, the competent authorities for nature conservation may confiscate the specimen (sec 47 FNCA). In addition, the customs authorities may take relevant animals or plants into custody, confiscate or impound them (sec 51 FNCA).

As for the rest see question A.3 and B.3.

*3. Conduct falling under article 3 (g) of the Ecocrime-directive<sup>4</sup> shall, at the latest on 26 December 2010, be qualified as a criminal offence and be punishable by effective,*

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<sup>4</sup> Member states shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

*proportionate and dissuasive criminal penalties. Has this provision already been implemented in your country, as the case may be, by pre-existing legislation? How is the conduct described in your legislation: copy- and past or a specific national description? What are the minimum and maximum penalties? Is there a difference between penalties for natural and legal persons? If such an infringement is reported, is it still possible not to prosecute such an offence before a criminal court and to apply other types of sanctions or to simply drop the case?*

See question C.2 for the pre-existing criminal penalties in Section 44 par 2 No. 2, 69 par 3 No. 21, 71 par 2 FNCA. As for the rest see questions A.5 and B.5.

## **Appendix: Federal Nature Conservation Act, 29 July 2009, BGBl I p. 2542**

### **Article 33 General provisions pertaining to protection**

(1) All changes and disturbances that could lead to significant adverse effects on a Natura 2000 site, in the elements of the site that are central to the conservation objectives or protection purpose shall be prohibited. The competent authority for nature conservation and landscape management may, if the conditions set forth by Article 34 (3) through (5) are fulfilled, permit exceptions to the prohibition of Sentence 1 and to prohibitions within the meaning of Article 32 (3).

(2) In the case of a site within the meaning of Article 5 (1) of Directive 92/43/EEC, during the consultation phase until the Council's decision, (1) Sentence 1 shall apply *mutatis mutandis* with regard to the priority natural habitat types and priority species occurring within the site. Articles 34 and 36 shall not apply.

### **Section 44: Provisions for specially protected fauna and flora species and certain other fauna and flora species**

(1) It is prohibited:

1. to pursue, capture, injure or kill wild animals of specially protected species, or to take from the wild, damage or destroy their developmental stages,
  2. to significantly disturb wild animals of strictly protected species and of European bird species during their breeding, rearing, moulting, hibernation and migration periods; a disturbance shall be deemed significant if it causes the conservation status of the local population of a species to worsen,
  3. to take from the wild, damage or destroy breeding or resting sites of wild animals,
  4. to take from the wild wild plants of specially protected species, or their developmental stages, or to damage or destroy them or their sites,
- (prohibitions on taking).

(2) It is furthermore prohibited:

1. to gain possession or take custody of, have possession or custody of, handle or process animals or plants of specially protected species, (prohibitions on possession),
2. with regard to animals and plants of specially protected species within the meaning Article 7 (2) No 13 Letters b and c,
  - a) to sell, purchase, offer to sell or purchase, keep in stock or ship for purposes of sale, exchange or loan, for a fee, for purposes of use, such animals and plants,
  - b) to acquire, display to the public or use in some other manner for commercial purposes, such animals and plants,

(prohibitions on marketing). Article 9 of Council Regulation (EC) No. 338/97 shall not be affected.

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## Section 48: Competent authorities

(1) The following bodies shall be the management authorities within the meaning of Article 13 (1) of Council Regulation (EC) No. 338/97 and Article IX of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES):

1. the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), for communication with other Convention parties and with the Secretariat (Article IX (2) of CITES), with the exception of the tasks mentioned in No 2 Letters a and c and No 4, and for the tasks mentioned in Article 12 (1), (3) and (5), Articles 13 and 15 (1) and (5) and Article 20 of Council Regulation (EC) No 338/97,
2. the Federal Agency for Nature Conservation (BfN)
  - a) for issuing of import and export permits and re-export certificates within the meaning of Article 4 (1) and (2) and of Article 5 (1) and (4) of Council Regulation (EC) No 338/97, and of other documents within the meaning of Article IX (1) Letter a of CITES, and for communication with the Secretariat, with the Commission of the European Communities and with authorities of other Convention parties and non- Convention parties in connection with processing of permit applications or in prosecution of import and export violations, and for the tasks mentioned in Article 15 (4) Letters a and c of Council Regulation (EC) No 338/97,
  - b) for granting of exceptions pursuant to Article 8 (3) of Council Regulation (EC) No 338/97 in the case of imports,
  - c) for recognition of enterprises in which specimens are bred, or artificially propagated, for commercial purposes, within the meaning of Article VII (4) of CITES, and for notification of the registration procedure mentioned in Article 7 (1) No 4 of Council Regulation (EC) No 338/97 to the Secretariat (Article IX (2) of CITES),
  - d) for issuing of certificates pursuant to Articles 30, 37 and 44a of Commission Regulation (EC) No 865/2006 of 4 May 2006 with execution provisions with regard to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ EC L 166, of 19 June 2006, p. 1), amended by Regulation (EC) No 100/2008 (OJ EC L 31 of 5 February 2008, p. 3), in the case of imports and exports,
  - e) for registration of caviar-packaging plants pursuant to Article 66 of Regulation (EC) No 865/2006,
  - f) for utilisation of the living animals and plants confiscated by customs agencies pursuant to Article 51, and for utilisation of the dead animals and plants, and parts thereof and products made therefrom, confiscated by customs authorities pursuant to Article 51, where such products originate from strictly protected species,
3. the Federal Customs Administration with respect to the exchange of information with the Secretariat on matters aimed at combating crime in the field of species protection,
4. the competent authorities for nature conservation and landscape management pursuant to the legislation of the Länder for all other tasks within the meaning of Council Regulation (EC) No. 338/97.

- (2) The scientific authority within the meaning of Article 13 (2) of Council Regulation (EC) No 338/97 is the Federal Agency for Nature Conservation (BfN).

#### **Section 49: Involvement of customs authorities; authorisation to issue statutory ordinances**

(1) The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF), and the customs authorities designated by it, shall be involved in supervising the import and export of fauna and flora covered by the import and export regulations pursuant to legal instruments of the European Communities, as well as in monitoring compliance with prohibitions on possession and marketing, pursuant to this Chapter, in goods traffic with third countries. The customs authorities may forward documents presented in the framework of supervision to the competent authorities pursuant to Article 48, where there are adequate, actual indications that animals or plants are being introduced in violation of regulations or prohibitions within the meaning of Sentence 1.

(2) The Federal Ministry of Finance (BMF) shall be authorised to regulate, in consultation with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), the details of the procedure pursuant to (1), by way of a statutory ordinance not requiring the approval of the Bundesrat; where necessary, it may also provide for obligations relating to reporting, notification, provision of information and provision of assistance, tolerance of inspections of business papers and of other documents, tolerance of inspections of premises and tolerance of the taking of unpaid samples and specimens.

(3) The customs offices which are to be notified of animals and plants destined for import, transit and export pursuant to this Chapter shall be announced by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), by agreement with the Federal Ministry of Finance (BMF), in the Federal Gazette. Special reference shall be made to those customs offices which carry out customs formalities for live animals and plants.

#### **Article 50: Registration obligations in connection with imports, transit, exports or with introduction from third countries**

(1) Anyone who introduces animals or plants subject to an import or export regulation issued by the European Community, or whose introduction from a third country requires an exception issued by the Federal Agency for Nature Conservation (BfN), directly from a third country into, or through, the area for which this Act is valid (import or transit), or to a third country from the area for which this Act is valid (export), must register such animals or plants for import, transit or export, and present the permits or other documents required for such import, transit or export, with a customs office promulgated pursuant to Article 49 (3), and must present such animals or plants upon request. The Federal Agency for Nature Conservation (BfN) may, upon application and for a good reason, designate a customs office other than the one referred to in Sentence 1 as the office to be responsible for customs clearance, if such customs office has given its consent to such designation and no statutory provisions conflict with such designation.

(2) The person carrying out the relevant import, transit or export shall notify the customs office responsible for customs clearance of the anticipated arrival time of live animals, giving details of the species and number of such animals, at least 18 hours prior to their arrival.

### **Section 69: Provisions concerning fines**

...

(2) Anyone who carries out one of the following actions shall be deemed to have committed an administrative offence:

1. in contravention of Article 44 (1) No 1, pursues, captures, injures or kills a wild animal, or takes from the wild, damages or destroys its developmental stages,
2. in contravention of Article 44 (1) No 2, significantly disturbs a wild animal,
3. in contravention of Article 44 (1) No 3, takes from the wild, damages or destroys a breeding or resting site, or
4. in contravention of Article 44 (1) No 4, takes from the wild a wild plant, or its developmental stages, or damages or destroys it or its site.

(3) An administrative offence shall be deemed to have been committed by anyone who wilfully or negligently ...

6. in contravention of Article 33 (1) Sentence 1, also in conjunction with (2) Sentence 1, causes a change or disturbance,

...

21. in contravention of Article 44 (2) Sentence 1 No 2, also in conjunction with Article 44 (3) No 1 or No 2, with the latter provision in conjunction with a statutory ordinance pursuant to Article 54 (4), sells or purchases, offers to buy or sell, stocks or transports for purposes of sale, exchanges or makes available for use for a fee, acquires for commercial purposes, displays or otherwise uses an animal, a plant or a good, ...

(6) In the cases referred to in (1) and (2), (3) Nos 1 through 6, 18, 20, 21, 26 and 27 Letter b, (4) Nos 1 and 3 and (5), the administrative offences may be punished with a fine of up to EUR 50,000; in the other cases referred to, the administrative offences may be punished with a fine of up to EUR 10,000.

### **Section 71: Penal provisions**

...

(2) Anyone who intentionally carries out an action, oriented to an animal or plant of a strictly protected species, referred to in Article 69 ... (3) No 21, ... shall be punished with a term of imprisonment of up to five years or with a fine.

...

(4) If, in the cases referred to in (2), the offender negligently fails to recognise that the relevant action is oriented to an animal or plant of a strictly protected species, the penalty shall be a term of imprisonment of up to one year or a fine.

