EUFJE-conference 2010
Enforcement of European Biodiversity Law at National Level

Belgium: report Federal State – Flemish Region – Brussels Region

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Abbreviations and full references of the legislation

ANB	(Vlaams) Agentschap voor Natuur en Bos *(Flemish) Agency for Nature and Forests*
B. Br. H. R.	Besluit Brusselse Hoofdstedelijke Regering *Decree of the Government of the Brussels-Capital Region*
BIM	Brussels Instituut voor Milieubeheer *Brussels Institute for Environmental Management*
BMM	Beheerseenheid van het Mathematisch Model van de Noordzee *Management Unit of the North Sea Mathematical Models (federal research and management institute for the Belgian North Sea)*
BS	Belgisch Staatsblad *Belgian Moniteur*
B. Vl. R.	Besluit van de Vlaamse Regering *Flemish Government Decree*
BWHI	Bijzondere Wet tot Hervorming van de Instellingen, zoals gewijzigd *Special Act on the Reform of Institutions, as amended*
CITES-Act (1981)	Wet 28 juli 1981 houdende goedkeuring van de Overeenkomst inzake de internationale handel in bedreigde in het wild levende dier- en plantensoorten, en van de Bijlagen, opgemaakt te Washington op 3 maart 1973, alsmede van de Wijziging van de Overeenkomst, aangenomen te Bonn op 22 juni 1979 (*BS* 30 december 1983), zoals gewijzigd *Federal Parliament Act of 28 June 1981 approving the CITES-Convention (Washington 1973 as amended by Bonn 1979), as amended*
CITES-Decree (2003)	KB 9 april 2003 inzake de bescherming van in het wild levende dier- en plantensoorten door controle op het desbetreffende handelsverkeer (*BS* 6 juni 2003), zoals gewijzigd *Royal Decree of 9 April 2003 on the protection of wild fauna and flora species by control of trade therein, as amended*
Environmental Crimes Ordinance (1999)	Ordonnantie 25 maart 1999 betreffende de opsporing, de vaststelling, de vervolging en de bestraffing van misdrijven inzake leefmilieu (*BS* 24 juni 1999), zoals gewijzigd *Brussels Ordinance (Parliament Act) of 25 March 1999 on the Tracking, detection, prosecution and punishment of environmental crimes, as amended*
Environmental Enforcement Decree (2008/2009)	B. Vl. R. 12 december 2008 tot uitvoering van titel XVI van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid (*BS* 10 februari 2009), zoals gewijzigd *Flemish Government Decree of 12 December 2008 implementing title XVI of the Act of 5 April 1995 concerning general provisions on environmental policy, as amended*
Environmental Policy Act (1995/2009)	Decreet 1995 Algemene bepalingen milieubeleid (*BS* 3 juni

	1995), zoals recent gewijzigd door toevoeging van titel XVI Toezicht, handhaving en veiligheidsmaatregelen (*BS* 29 februari 2008) en het Uitbreidingsdecreet '(*BS* 30 april 2009) *Flemish Parliament Act of 5 April 1995 concerning general provisions on environmental policy, as amended recently to insert Title XVI Supervision, enforcement and safety measures*
Fauna and Flora Decree (2000)	B. Br. H. R. 26 oktober 2000 betreffende de instandhouding van de natuurlijke habitats en van de wilde fauna en flora (*BS* 28 november 2000), zoals gewijzigd *Brussels Government Decree of 26 October 2000 on the preservation of the natural habitats and the wild fauna and flora, as amended*
Fauna and Hunting Ordinance (1991)	Ordonnantie 29 augustus 1991 betreffende de bescherming van de wilde fauna en betreffende de jacht (*BS* 13 november 1991), zoals gewijzigd *Brussels Ordinance (Parliament Act) of 29 August 1991 on the protection of wild fauna and on hunting, as amended*
KB	Koninklijk Besluit *Royal Decree (federal Government decree)*
Marine Environment Act (1999)	Wet 20 januari 1999 ter bescherming van het mariene milieu in de zeegebieden onder de rechtsbevoegdheid van België (*BS* 12 maart 1999), zoals gewijzigd *Federal Parliament Act of 20 January 1999 on the protection of the marine environment in the sea areas under Belgian jurisdiction, as amended*
MB	Ministerieel Besluit *Ministerial Decree*
Nature Act (1997)	Decreet 21 oktober 1997 betreffende het natuurbehoud en het natuurlijke milieu (*BS* 10 januari 1998), zoals gewijzigd *Flemish Parliament Act of 21 October 1997 on nature conservation and the natural environment, as amended*
Nature Conservation Act (1973)	Wet 12 juli 1973 op het natuurbehoud (*BS* 11 september 1973) *Belgian Parliament Act of 12 July 1973 on nature conservation*
Nature Conservation Ordinance (1995)	Ordonnantie 27 april 1995 betreffende het behoud en de bescherming van de natuur (*BS* 7 juli 1995), zoals gewijzigd *Brussels Ordinance (Parliament Act) of 27 April 1995 on the conservation and protection of nature, as amended*
Parl. St.	Parlementaire Stukken *Parliamentary Proceedings*
R. v. St.	Raad van State *Council of State (highest administrative court of Belgium)*
Special Areas Decree (2005)	KB 14 oktober 2005 tot instelling van speciale beschermingszones en speciale zones voor natuurbehoud in de zeegebieden onder de rechtsbevoegdheid van België (*BS* 31 oktober 2005), zoals gewijzigd *Royal decree of 14 October 2005 on the creation of special protection areas and special areas for nature conservation in the sea areas under Belgian jurisdiction, as amended*

Species Decree (2009)	B. Vl. R. 15 mei 2009 met betrekking tot soortenbescherming en soortenbeheer (*BS* 13 augustus 2009) *Flemish Government Decree of 15 May 2009 on the protection and management of species*
Species Protection Decree (2001)	KB 21 december 2001 betreffende de soortenbescherming inde zeegebieden onder de rechtsbevoegdheid van België (*BS* 14 februari 2002) *Royal Decree of 21 December 2001 on species protection in the sea areas under Belgian jurisdiction*

Introduction: the Belgian legal system [2]

1. Belgian law is codified. Environmental law is therefore to be found in statutes and administrative regulations.

2. Belgium evolved from a unitary state to a federal state consisting of 3 communities – the Flemish Community, the French-speaking Community and the German-speaking Community, 3 regions – the Flemish Region, the Walloon Region and the Brussels-Capital Region, 10 provinces and 589 municipalities. Both the federal state and the constituent states have their own parliamentary assembly and their own government.

The communities were set up in order to protect the cultural identity of the Dutch-speaking, French-speaking and German-speaking populations of Belgium. The regions were set up mainly to regulate economic and local matters. Of both types of federated entities, the regions therefore are the federated entities with powers in environmental affairs.

The division of powers between the federal state and the regions is very important since it determines who can take which measures in the field of environmental law.
The powers of the regions in environmental affairs are wide-ranging: town and country planning, environmental protection with respect to soil, water, air, noise, supervision of industries and nuisance establishments, waste management, water management, land use and conservation, nature protection and conservation, agriculture and environment, European and international environmental policy with respect to their powers and scientific research with respect to their powers. The federal government is responsible for protection against ionizing radiation and radioactive waste, the transit of waste, the establishment of product standards, the protection of the North Sea, European environmental policy and the conclusion of treaties with respect to its powers. The federal state also retained its powers in all matters that have not been devolved to the regions.

[2] See www.eufje.org, L. LAVRYSEN, J. VAN DEN BERGHE & K. VAN DEN BERGHE, *Report to the European Forum of Judges for the environment (EUFJE) on the Belgian situation concerning criminal enforcement of environmental law*, Gent, 2007, *unpublished*, 1 – 2 (hereafter "LAVRYSEN, VAN DEN BERGHE & VAN DEN BERGHE (2007)").

I. Natural habitats and their fauna and flora

§ 1. Belgian Constitutional Law: the division of competences

3. Article 6 §1, III, 2° BWHI states that the **Regions** have authority for nature protection and conservation. This implies that the Regions are competent within their territories for all matters relating to biodiversity, including amongst others the habitat- and species protection.
The **Federal State**, however, remains competent for the protection of the North Sea and all species living there. This competence is rooted in territorial divisions. The territory of the Flemish Region, the region bordering the North Sea, does stop at the low ebb line ("laagwaterlijn") [3], leaving the authority over the Belgian part of the North Sea with the Federal State. Therefore, some say the North Sea is our 11th province, the only one under exclusively federal rule.

The following sections discuss the implementation of the Habitat-directive (92/43/EEC) [4] and Birds-directive (79/409/EEC) [5] by the Flemish Region, the Brussels Region and the Federal State.

§ 2. Flemish Region

A. Habitat protection [6]

§ 2. A.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?

4. To implement the Habitat-directive (92/43/EEC) and the Birds-directive (79/409/EEC) a new Section 3*bis* regarding special protection areas was added to the Nature Act (1997). In this Flemish piece of legislation, the words 'special protection areas' cover the special areas of conservation of the Habitat-directive as well as the special protection areas of the Birds-

[3] E. DE PUE, L. LAVRYSEN & P.STRYCKERS, P., *Milieuzakboekje 2009*, Mechelen, Kluwer, 2009, 14 (hereafter "DE PUE, LAVRYSEN & STRYCKERS (2009)").
[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ No. L 206, 22 July 1992).
[5] Council Directive 79/409/EEC of 22 April 1979 on the conservation of wild birds (OJ No. L 103, 25 April 1979).
[6] DE PUE, LAVRYSEN & STRYCKERS (2009), 647-664.

directive. In the following analysis, the words 'special protection areas' therefore encompass the Habitat protection areas as well as the Bird protection areas. In Flanders, 101,891 ha of Habitat-directive areas [7] and 98,243 ha of Birds-directive areas were designated [8].

Worth mentioning is that many of the special protection areas will be part of the European Ecological Network ("Natura 2000"). Up to now 23 Birds-directive areas and 38 Habitat-directive areas have been proposed as Natura 2000 – areas.

5. Not all areas with nature values are situated in well defined nature conservation areas. To give an example: agricultural lands can also be given a nature label by designating them as an Habitat-directive area. The legal status of protected areas therefore isn't always clear and secure. Starting from 2002, an effort has been made to coordinate and bring together the nature conservation policy and the land use policy. The Flemish Ecological Network [9], for instance, has been delineated in land use plans. While for the already existing special protection areas all will remain as it was, in the future the new special protection areas will be created by a decree of the Flemish Government holding a graphic plan that delineates the area or areas the order applies to and a scientific description and assessment of the area or areas.

6. The Flemish legislation regarding the conservation and protection of special protection areas combines two types of rules: (1) general obligations to do or not to do and (2) a general obligation for competent authorities to design site specific measures, which can be obligations to do or not to do. A typical feature of the protection and conservation measures, is their wide variety, encompassing many kinds of instruments which consist of tasks for public authorities. So, for instance, the articles 47 and 48 Nature Act (1997). Article 48 Nature Act (1997) states that the Flemish Government has to design a nature orientation plan for each special protection area within five years after its designation as such. The nature orientation plan sets the nature conservation goals for the area and lists all instruments and measures, linked to projects or not, which will be used to realise those goals. The plan has to be designed and realised in collaboration with the owners and users of the grounds in the area. Article 47 Nature Act (1997) sheds some light on the instruments and measures which can be involved. It provides the legal basis to design nature development plans. Such plans can, amongst others, be designed for special protection areas. If so, they can only provide measures necessary to the conservation of the habitat or habitats of species wherefore the special protection area was designated. The possible measures article 47 mentions, vary from infrastructure works such as the redesigning of roads, over water management works such as changing the structural characteristics of small and less small rivers and changes in the water flow off, to modifications in soil relief, the creation of educative centres and the relocation of

[7] B.Vl.R. 24 May 2002 "tot vaststelling van de gebieden die in uitvoering van artikel 4, lid 1, van de Richtlijn 92/43/EEG van de Raad van de Europese Gemeenschappen van 21 mei 1992 inzake de instandhouding van de natuurlijke habitats en de wilde flora en fauna aan de Europese Commissie zijn voorgesteld als speciale beschermingszones" (*BS* 17 August 2002).

[8] B.Vl.R. 17 October 1988 "tot aanwijzing van de speciale beschermingszones in de zin van artikel 4 van de Richtlijn 79/409/EEG van de Raad van de Europese Gemeenschappen van 2 april 1979 inzake het behoud van de Vogelstand" (*B.S.* 29 October 1988), as amended.

[9] The Flemish Ecological Network ("Vlaams Ecologisch Netwerk", "VEN") is an interconnected and organized whole of areas of open spaces/lands where a specific nature conservation policy is followed, based upon the characteristics and elements of the natural environment, the interconnection between the areas of open space/land and their actual and potential nature values. - art. 17 §1 Nature Act (1997).

enterprises. This kind of legislation, we do not take along in our analysis. Indeed, however interesting and useful it is, it doesn't raise enforcement issues as those aimed at by this conference. We just mention the most important provisions of this kind, to give a flavour of the habitat protection provided.

General obligations to do or not to do

7. The general conservation and protection provisions come in two kinds. Some have been designed for special protection areas only, others have a wider scope. Here follow the most important ones.

- Article 13 §4, 3° Nature Act (1997) introduces a permit obligation for changes in the vegetation or small landscape elements and their vegetation situated in special protection areas.
- Article 14 imposes a general standard of care: "*Anyone doing works or giving the order to works, who knows or reasonably can suspect that nature elements in the immediate surroundings hereby can be destroyed or seriously damaged, is obliged to take all measures which reasonably can be expected from him to avoid damages, limit them or, if not possible otherwise, repair them*".
- Next to the conservation and protection measures, the Nature Act (1997) organizes in article 36*ter* §3 a procedural obligation to 'appropriate assessment'[10]: *"Any activity requiring a permit, any plan and any project likely to cause a significant deterioration of the natural characteristics of a special protection area, either individually or in combination with one or more existing or proposed activities, plans or programs, has to be subjected to an appropriate assessment of its significant effects on the special protection area."* What is a 'significant deterioration' of the natural characteristics of the special protection area? According to the Nature Act (1997) such deterioration is a deterioration having a detectable and measurable impact on the natural characteristics of the special protection area, in so much as to have a detectable and measurable impact on the status of conservation of the species and habitats wherefore the special protection area has been designated or on the status of conservation of species mentioned in Annex III of this act insofar they occur in the special protection area.[11] The authority competent to decide over the permit demand, the plan or program, can only deliver the permit or approve the plan or program if the plan or program or the realisation of the activity cannot cause a significant deterioration of the natural characteristics of the special protection areas [12].
- The special protection areas of the Nature Act (1997) are considered as especially protected zones for the application of the legislation regarding environmental impact assessment.[13]

A flavour of the site specific habitat-protection: basic obligations to design site specific conservation and protection measures

[10] Art. 36*ter* §§ 4 to 6 Nature Act (1997).
[11] Art. 2, 30° Nature Act (1997).
[12] Art. 36*ter* §4 Nature Act (1997).
[13] B.Vl.R. 10 December 2004 "houdende vaststelling van de categorieën van projecten onderworpen aan milieueffectrapportage (MER)" (*BS* 17 February 2005).

8. Once a special protection area has definitively been designated in accordance to article 36*bis* Nature Act (1997), the *conservation measures* established by article 36*ter* §1 Nature Act (1997) apply*: "Within its competences, the administrative authority takes in special protection areas, whatever their urban planning destination is, the necessary conservation measures corresponding to the ecological requirements of the natural habitat types listed in Annex I to this act and of the species listed in the Annexes II, III and IV to this act as well as the migratory bird species not listed in Annex IV to this act regularly occurring in the Flemish Region's territory."*. The Explanatory Notice [14] mentions that those protection measures can combine two or more of the following instruments and means:

- *obligations to do and not to do imposed by the Nature Act and its executive decrees*;
- the use of instruments such as the right of pre-emption and nature development;
- giving priority to buying nature and forest areas in the special protection areas or giving subsidies for buying such areas;
- selective use of contractual instruments such as nature management contracts with farmers;
- use of management contracts with forest owners or –managers;
- make and execute nature orientation plans;
- recognition of privately owned nature reserves and designation of Flemish nature reserves;
- creation of forest reserves;
- the drafting and realization of management plans based on the Nature Act, the Forest Act [15] and the Landscape Care Act [16];
- the planning and realization of a nature oriented management in cooperation agreements between the Flemish Region and other public authorities;
- administrative law measures or contract based measures including the Flemish Region, the European Commission and authorities such as sea port areas.

9. Article 36*ter* §2 Nature Act (1997) provides a 'prevention principle' for all types of special protection areas. It stipulates the following: *"The administrative authority also takes, within its competences, whatever the destination of the area concerned, all measures required to:*

a. avoid all worsening of the nature quality and the natural environment of the habitats listed in Annex I to this act and of the habitats and species listed in the annexes II, III and IV of this act as well as the migratory species regularly occurring on the territory of the Flemish Region not listed in Annex I of this act;

b. to avoid all significant disturbance of a species mentioned in the annexes II, III or IV of this act as well as the migratory species regularly occurring on the territory of the Flemish Region not listed in Annex I of this act in a special protection area.

The Flemish Government shall therefore take more precise measures.".

10. Worth mentioning, finally, is article 16 Nature Act (1997). It obliges authorities deciding on permit demands to make sure the activities the permit would allow can create no avoidable damage to nature, by refusing the permit or by imposing reasonably feasible permit conditions to prevent or limit damages or, if not possible otherwise, to repair damages.

[14] Memorie van Toelichting, *Parl. St.* Vl. Parl. 2001-02, nr. 967/1, 30.
[15] "Bosdecreet" 13 June 1990 (*BS* 28 September 1990).
[16] Act 16 April 1996 "betreffende de landschapszorg" (*BS* 21 May 1996).

§ 2. A.2. Who supervises habitat protection measures in your country? Are there (also) specialized inspections supervising them?

11. In theory, the supervision of habitat protection measures is a responsibility for all public servants and a few specialized inspections. In practice, the specialized inspections are the driving force behind supervision. We first discuss the latter, to have a look at the former next.

12. As provided for by article 16.3.9 Environmental Policy Act (1995/2009) and article 25 Environmental Enforcement Decree (2008/2009), the **specialized supervision** of compliance with nature conservation legislation, with the Nature Act (1997) at its core, is entirely centralized in hands of the agency for nature and forests, the ANB, more specifically three of its sections at the central level -- the Nature Inspection of the Department Nature Inspection, Administration and Communication, the Department Management and the Department Policy -- and the Nature Inspection Units within the five provincial divisions [17]. The provincial divisions are directed by the central administration. Involved in supervision activities are nature inspectors and forest guards.

The **nature inspectors** (Department Nature Inspection, Administration and Communication) can not only have the capacity of supervisor but also be conferred the capacity of criminal investigation officer, allowing them not only to execute supervision tasks but also to invest in the tracking of environmental offences. The investigation rights of criminal investigation officers differ from the investigation rights of supervisors: somehow surprisingly, they are more limited. So for example their right to get access to non public places. Supervisors have a wide right of access. In principle they may always, without prior notice, freely enter any place and take with them the necessary supervision material [18] Criminal investigation officers, on the contrary, have no right of access. They only have a right to search a house if an investigation magistrate previously did give them a permission to do so or if the offender has been catched hand-in-bags breaching the law in that house. As we'll see further on, this certainly is a handicap when tracking offenders having breached species protection rules.
Their numbers are not high. The goal of the ANB as formulated in its (proposal of) human resources plan 2009 – 2014 is to get to the equivalent of, on average, minimally 8 full time equivalent Nature Inspectors for each of the five provinces.

The main task of the **forest guards** (Department Management) consists in managing forests and nature areas within their appointment region. Being in the field each day, they are well placed, however, to assume some supervision on the more. In the domains managed by the Flemish Government, they therefore are in charge of the supervision of some specific legislation such as hunting and forestry law.

[17] AGENTSCHAP VOOR NATUUR EN BOS, *Handhavingsrapport 2009*, 4 – 5.
[18] Art. 16.3.12 Environmental Policy Act (1995/2009). They have, however, a more restricted access to homes, having to meet one of the following conditions: have prior and written permission from the occupant or have been authorized, in advance and in writing, by the Judge of the Police Court, in which case they only can get access between 5 a.m. and 9 p.m. *Ibid.*

13. A **general supervision** on the respect of all legislation is rooted in article 29 Belgian Criminal Prosecution Code. This article states that each public authority, each public officer or servant whom in the exercise of his function gets knowledge of a crime or offence, has to report it immediately to the Public Prosecutor. In practice, mainly the local police and the federal police draw up reports on environmental offences related to nature conservation and protection [19].
Noteworthy is, that as criminal prosecution is a federal matter, the obligation under article 29 has to be respected throughout the whole of the federal construction (Federal State, Regions, Communities).

§ 2. A.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 effective? Can those sanctions be applied on legal persons?

14. Until recently, violations of the Flemish environmental regulations could rarely be sanctioned otherwise than under criminal law. Hence environmental law enforcement was in essence a matter of criminal law, neglecting the possibilities of law enforcement by means of administrative and civil law. This approach, however, did prove to be insufficient to duly enforce environmental regulations in the region.
Therefore, the Flemish Parliament Acts of 21 December 2007 and 30 April 2009 supplementing the Flemish Parliament Act of 5 April 1995 containing general provisions regarding environmental policy with a title XVI "Supervision, Enforcement and Safety Measures" ("Environmental Policy Act (1995/2009)") have shifted the accent from a criminal law enforcement model to a more balanced law enforcement model, with an equal importance of criminal and administrative sanctioning instruments. The new legislation not only introduces a broad possibility to use remedial administrative sanctions but also attributes a major role to administrative fining. The use of civil sanctions is limited.

In the following pages, we first discuss the criminal sanctions and next the administrative ones. For both categories of sanctions, we pay attention to the punitive sanctions as well as the remedial sanctions. We end by discussing briefly the possibility of civil sanctions.

Criminal sanctions

Punitive criminal sanctions

15. The offences regarding nature conservation and protection law are mentioned in the articles 16.6.3*ter*, 16.6.3*quater* en 16.6.3*quinquies* Environmental Policy Act (1995/2009). It is important to know that the fines which condemned offenders actually have to pay, are to be multiplied by 5.5 ("opdeciemen", to correct inflation). A fine level of minimum 100 and maximum 500,000 euro thus allows for fines-to-pay between minimum 550 and maximum 2,750,000 euro.

[19] LAVRYSEN, VAN DEN BERGHE & VAN DEN BERGHE (2007) mention that, in 2005, they made some 360 reports concerning cases related to nature conservation and protection. – LAVRYSEN, VAN DEN BERGHE & VAN DEN BERGHE (2007), 20.

Article 16.6.3*ter*. act

"*Anyone who deliberately, in contravention of the provisions of law or in contravention of a licence:*
1° has in their possession, catches, appropriates, damages, kills or trades in specimens of the protected wild fauna and flora specified in Annexes II, II and IV of the Act of 21 October 1997 concerning nature conservation and natural habitats, or eggs belonging to these species, or parts or derived products from these fauna and flora, or;
2° who damages the nests, resting places or breeding places of these species;
3° subject to application of Article 13, § 6, of the Act of 21 October 1997 concerning nature conservation and natural habitats, changes without licence the vegetation referred to in Article 13 § 4, or pursuant to Article 13 § 4, of the same act;
is punishable by a custodial sentence of one month to five years and a fine of EUR 100 to 500,000 or one of these penalties.

Anyone who through lack of caution or care, in contravention of the provisions of law or in contravention of a licence:
1° (...) <idem>
2° (...) <idem
3° (...) <idem>
is punishable by a custodial sentence of one month to three years and a fine of EUR 100 to 350,000 or one of these penalties."

Article 16.6.3*quater* act

"Anyone who, in contravention of the provisions of law or in contravention of a licence, causes significant damage to a habitat of the type mentioned in Annex I or a habitat of the type mentioned in the Annexes II or III or a habitat of the type of Annex IV of the Act of 21 October 1997 concerning nature conservation and natural habitats, within the perimeter of a definitively designated special protection area demarcated on the grounds of Article 36bis of the same act, is punishable by a custodial sentence of one month to five years and a fine of EUR 100 to 500,000, or one of these penalties.

Anyone who, through lack of caution or care, in contravention of the provisions of law or in contravention of a licence, causes significant damage to (...) <idem>, *is punishable by a custodial sentence of one month to three years and a fine of EUR 100 to 350,000, or one of these penalties*.

Anyone who deliberately fails to abide by the provisions of Article 25, § 3, 2° of the Act of 21 October 1997 concerning nature conservation and natural habitats, is punishable by a custodial sentence of one month to five years and a fine of EUR 100 to 500,000, or one of these penalties.

Anyone who trough lack of caution or care deliberately fails to abide by (...) <idem>, *is punishable by a custodial sentence of one month to three years and a fine of EUR 100 to 350,000, or one of these penalties*."

Article 16.6.3*quinquies* act

"*Anyone who, in contravention of the legal provisions or in contravention of a licence, deliberately takes action through which an area of land covered in trees as referred to in Article 3, §1 and §2, of the Forest Act of 13 June 1990, completely or partially disappears and the land is given another designation or use, is punishable by a custodial sentence of one month to five years and a fine of EUR 100 to 500,000, or one of these penalties.*

Anyone who, through lack of caution or care, in contravention of the legal provisions or in contravention of a licence, (...) <idem> is punishable by a custodial sentence of one month to three years and a fine of EUR 100 to 350,000, or one of these penalties."

16. Book I Criminal Code also provides a number of sanctions, including for instance the forfeiture of illegally acquired benefits (article 42, 3° code), a sanction which truly has potential with regard to nature conservation issues, as it can neutralize all gain-inspired illegal activities, trade and commerce. This sanction can be used for the punishment of offences against all Flemish nature conservation law imposing obligations to do and not to do, including such legislation implementing the Habitat-directive and the Birds-directive.

Remedial criminal sanctions

17. Very important for an effective protection of habitats is the possibility to order restoration provided and organized by the articles 16.6.6 to 16.6.10 Environmental Policy Act (1995/2009).

Article 16.6.6 act

"§ 1. In addition to the penalty the court may, either officially, or at the request of the Public Prosecution, or at the request of the authorized official, or at the request of the civil parties, order that a place be restored to its original condition, that an end be brought to the non-authorized use, or that alteration works be carried out.

Should the authorized official submit a remediation request to this end, shall the court's order be based on this request.

§ 2. The authorized official shall submit there mediation request by regular letter to the Public Prosecution, in the name of the Flemish Region.

The request shall mention at least the applicable provisions and give a description of the situation prior to the offence.

§ 3. The court shall determine the term within which the remedial measures are to be carried out, account taken of the term specified for the remedial measures in the request for remediation referred to in § 1.

The court may also, at the request of the authorized official, determine a penalty payment payable per day of delay in the implementation of remedial measures."

Article 16.6.7 act

"*The authorized official may also request the remedial measures referred to in Article 16.6.6 before the court of first instance judging in civil matters in the legal district in which the environmental offence took place*."

Article 16.6.8 act

"*If the person required to carry out the remedial measures thus imposed has carried them out voluntary, he shall notify the authorized official of this by registered letter or recorded delivery.*

On receiving this notice, the authorized official will immediately verify the situation on site and draw up a report of the findings. The authorized official shall send a copy of this report to the person on whom the remedial measures were imposed.

The report of the findings shall serve as proof of remediation and establish the date of remediation."

Article 16.6.9 act

"*The authorized official shall compel the person referred to in Article 16.6.8 to implement the remedial measures ordered by the court and to do so within the term specified by the court. The authorized official shall carry out the judgement or order himself, at the expense of the person ordered to carry out the remedial measure, if this person does not meet the obligation within the term specified*."

Article 16.6.10 act

"*The prescription of the remedial measure shall commence at the expiry of the term of execution specified by the court in accordance with Article 16.6.6 § 3*".

Within the ANB, the heads of the Nature Inspection Units of the five provincial divisions of the agency have been designated as authorized officials.

Administrative sanctions

Punitive administrative sanctions

18. The Environmental Policy Act (1995/2009) creates the possibility to lift the infringement of less important offences -- in general strictly administrative obligations as for instance the obligation to communicate monitoring data to the public authorities at a given moment in the year -- out of the realm of criminal law and punish them exclusively by an administrative fine. For the infringements of the nature conservation and protection law relevant to this report, this

possibility has not been used. Therefore, infringements on this legislation, labelled environmental offences, still belong to the realm of criminal law enforcement. The Public Prosecutor, however, can decide not to treat the offence by means of criminal law. When the Public Prosecution decides so, it sends the file to a newly established division within the Department of the Environment, Nature and Energy of the Flemish Government, the Division for Environmental Enforcement, Environmental Damage and Crisis Management. This division can henceforward impose an administrative fine which may, depending on the case, be accompanied by an administrative forfeiture of illegally acquired benefits [20]. The fine shall amount to a maximum of EUR 250,000, to increase with the multiplication factor applicable for criminal fines (now 5.5). A convicted offender will be able to lodge an appeal against the fining decision and an eventual forfeiture of illegally acquired benefits with the Environmental Enforcement Court of Flanders.

Remedial administrative sanctions

19. Following article 16.4.5. e.s. Environmental Policy Act (1995/2009), supervisors can impose the following remedial administrative sanctions when having detected an environmental offence: regularisation orders, cessation orders and administrative constraint.

These remedial sanctions can a.o. take the form of:

- the termination or implementation of transactions or activities;
- a ban on the use or the sealing of buildings, installations, machines, equipment, means of transport, containers, premises and all that is contained in or on these;
- the removal of all relevant materials, including waste materials, the possession of which is in contravention of the environmental legislation, including the nature conservation and protection law;
- the immediate destruction, at the expense of the offender, of perishable materials or materials of which possession is forbidden. If the offence involves animals the possession of which is forbidden, those animals may, at the expense of the offender, be immediately released or taken to an accredited rescue centre for birds and wild animals or be destroyed, depending on the case.

Civil law sanctions

20. The civil law consequences of environmental offences, including those infringing nature conservation and protection law, can also bring along a civil sanction (reparation of damages), within a criminal case and before a civil court.

21. The Act of 12 January 1993 establishing a right of action for the protection of the environment [21] gives to i.e. administrative authorities the right to request the president of the court of First instance to give an order of cessation of evident infringements of environmental

[20] Under the Environmental Policy Act (1995/2009) a forfeiture of illegally acquired benefits is a sanction "*under which an offender is obliged to pay a sum of money, whether or not assessed, amounting to the net asset gain obtained from the environmental offence*". – art. 16.4.26 act.

[21] "Wet 12 januari 1993 betreffende een vorderingsrecht inzake bescherming van het leefmilieu" (*BS* 19 February 1993).

law. Within the ANB, the decision to introduce such request is a competence of the administrator-general of the agency, that has not been delegated.

Further comments

22. It is too early to tell if the punitive criminal and administrative sanctions provided by the new environmental enforcement legislation are effective, since the new legislation is but one year into force.
Building upon the experiences with criminal law enforcement existing before the new system entered into force, we know that prison sentences nowadays are used to punish environmental crime. But if we know they are imposed to more than 10% of the offenders in pollution legislation cases, we have no data regarding their use in nature conservation law. Yet, we strongly suspect they are used far less for this kind of environmental criminality, mainly because of a lower inflow of nature conservation cases in the criminal system. This could change in the coming years as ANB makes far more notices of violation since the new legislation entered into force.
Criminal courts use fines to punish in nearly all environmental cases, also concerning nature protection and conservation legislation. And we know for sure that the level of the fines the judges impose, are in the lowest margin of the generally wide range between the minimum and maximum fine provided by the law. Therefore, we expect the high fines possible under the new legislation to remain theory, unused.

As for the use and efficiency of the new administrative fining system, there are indications that since it exists, the prosecutor sends many environmental files to the Division for Environmental Enforcement, Environmental Damage and Crisis Management for administrative sanctioning, mobilizing the new capacity to punish with administrative fines. This also should lead to a higher density of punishment than existed before the new system entered into force.

23. Since 1999, criminal liability extends to legal persons: they can be brought to court, punished, and be inflicted remedial criminal sanctions. Because legal persons cannot be imprisoned, the Criminal Code contains a provision, article 41*bis*, correcting the fines they can get, heightening their level in accordance to the level of the prison sentences a natural person can get.
Punitive and remedial administrative sanctions and civil sanctions can since "always" be inflicted to natural as well as legal persons.

§ 2. A.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? Makes it a difference if not only an appropriate assessment is lacking, but also a permit for the project or an approval of the plan?

24. As far as the obligation of an appropriate assessment concerns activities requiring a permit – see No. 7, article 36*ter* § 3 Nature Act (1997) – the sanction on the lack of assessment should consist in the impossibility to obtain the permit. The issue, however, is still subject to discussion. An important question that still didn't get an answer, is the following one: can a

public authority which delivered permits for activities within special protection areas when no appropriate assessment was carried out be punished on ground of article 16.6.3*quater* Environmental Policy Act (1995/2009) or is the only means of restriction of such illegal permitting an annulment of the permit at the end of an administrative procedure with the Council of State?

§ 2. A.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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

25. See *supra*, No. **15**: this provision has already been implemented in our country. It's described in a specific national description: article 16.6.3*quater* Environmental Policy Act (1995/2009).

26. For the minimum and maximum penalties: see *supra,* Nos. **15** and **18**.

27. For the difference between penalties for natural and legal persons: see *supra*, No. **23**.

28. It is perfectly possible not to prosecute such an offence before a criminal court. The public prosecutor has a right to decide to make a transaction offer (the payment of the transaction sum by the offender annuls the possibility of a prosecution) or to simply drop the case. He can also decide to send the file to the Division for Environmental Enforcement, Environmental Damage and Crisis Management, where it will be subject to an administrative procedure that can lead to an administrative fine and, possibly, an administrative forfeiture of illegally acquired benefits.[22] See *supra*, No. **18**, for the administrative sanctions.

B. Species protection

§ 2. B.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?

29. The provisions of the Habitat- and Birds-directive aiming at the protection of species have in general been transposed (converted) into Flemish Law by the **Nature Act (1997)**. Its most important Government Decree nowadays is the **Government Decree of 15 May 2009 on the protection and management of species** (*BS* 13 August 2009), that entered into force

[22] Procedure: article 16.4.31 – 16.4.35 Environmental Policy Act (1995/2009).

September 1st 2009. Previously, the legislation was more scattered. So, for instance, there were the Royal Decree of 16 February 1976 on measures to protect some wild species of flora, the Royal Decree of 22 September 1980 on measures, within the Flemish Region, to protect some wild native species of animals, not protected by the acts and decrees on hunting, river fishing and birds protection, the Royal Decree of 9 September 1981 on the protection of birds in the Flemish Region and the Flemish Government Decree of 21 April 1993 on the introduction in the wild of non-native animal species. All those decrees have, for the Flemish Region, been abrogated.

30. Up to now, the protection of species is partly realized by other legislation, such as for instance the Hunting Act of 24 July 1991, the Forest Act of 13 June 1990, the River Fishing Act of 1 July 1954, the Environmental permitting Act (1985) and the planning and land use legislation (environmental impact assessment obligations!), but only for rather specific aspects and, with regard to the planning and land use legislation, rather habitat-oriented measures. The borderline between habitat oriented and species oriented protection measures of course isn't always a clear one. Noteworthy is that the species protected by this collection of scattered legislation, for instance river fishes and game, can/are also protected by the Nature Act (1997). The overall framework for species protection truly is given by this Act and, with regard to enforcement aspects, the Environmental Policy Act (1995/2009).

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

31. See *supra*, Nos. **11 – 13**: idem.

§ 2. B.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?

32. There are no direct indications that the enforcement efforts have been concentrating on specific species, even if the majority of the educational efforts and efforts to reorganise protected areas are species-oriented. According to the 'Note of priorities in the prosecution policy regarding environmental crime' from 2000, however, the protection of red-list species and species of the annexes of the Habitat-directive and the Convention of Bern did get special attention.

The expectation is that the new enforcement legislation will create new enforcement dynamics. Enforcement nowadays is carried out through inspection planning: each year the enforcement priorities for the next year are described in an inspection plan. The Enforcement Plan 2010 of ANB plans specific actions regarding the illegal killing of birds of prey, the illegal catching of eel and zander, pike-poaching, and the illegal capture and trade of birds.

§ 2. B.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 effective? Can those sanctions be applied on legal persons?

33. *Supra,* Nos. **14 – 23**: idem.

§ 2. B.5. Conduct falling under article 3(f) 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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

34. *Supra,* Nos. **25 – 28**: idem.

§ 3. Brussels Region

A. Habitat protection

§ 3. A.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?

35. Since 2002, the Brussels Region counts three special protection areas, covering together some 2,375 ha., equalling some 14% of the territory of the region. Those areas are the Zoniën Forest and a row of smaller areas which are linked together by protected connection areas. 90 to 95% of the Natura 2000 – areas consists of public domain wherefore management plans with area specific protection measures have been made.

The transposition of the Habitat-directive in regional legislation has been realized by the Fauna and Flora Decree 2000, modified twice already (decrees of 28 November 2002 and 24 November 2005).
If no specific nature permit exists, there is a system of environmental permitting and building permitting covering also activities and measures with a potential impact on nature (appropriate assessment).
As of now, a new nature ordinance is prepared, aiming at a better integration of the obligations under the Habitat-directive and Birds-directive.

§ 3. A.2. Who supervises habitat protection measures in your country? Are there (also) specialized inspections supervising them?

36. The Forest division of the Department of Nature, Water and Forests of the Brussels environmental agency, the BIM, counts 9 forest guards, criminal investigation officers with limited supervision competences, who supervise and guard the Brussels part of the Zoniën Forest, and a number of forest supervisors, who are no criminal investigation officers, but do nothing else than supervise and report problems, writing notices of violation. There exists an organised collaboration between these supervisors and the supervisors of the Environmental Inspection Department of the BIM (who are officers of the judicial police) as well as the administration in charge of Monuments and Landscapes. Even if important difficulties for nature conservation within privately owned property are related with land use and building legislation, there exists no collaboration with the Building Inspection.
Communal public servants too can be designated as supervisors of the environmental and nature conservation legislation.
When executing their supervision tasks, the supervisors can request assistance from the police and impose security measures and remedial sanctions (see *infra*). Their specific competences are listed in Chapter II Environmental Crimes Ordinance (1999).

37. General supervision based on article 29 Criminal Prosecution Code: see *supra*, No. **13**.

§ 3. A.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 effective? Can those sanctions be applied on legal persons?

38. As in the Flemish Region, punitive and remedial criminal, administrative and civil sanctions can be imposed.

Criminal sanctions

39. The criminal fines stipulated by the Nature Conservation Ordinance (1995) amount to 0.25 to 125 euro (to multiply with the multiplication factor of 5.5) …!

The criminal courts can not only inflict fines but also impose a row of other sanctions, including remedial sanctions: forfeit goods damaging for the environment or human health; condemn to refund costs the public authorities have made to prevent, limit, stop or remediate to damages and danger; order the restoration of the location in its original state; order the partial or complete cessation of activities or the temporary or definitive closure of plants;

prohibit to perform a professional activity (repeat offenders only); order publication of the judgement. [23]

40. Possibility of forfeiture of illegally acquired benefits based on article 42, 3° Criminal Code: see *supra*, No. **16**.

Administrative sanctions

41. The administrative fines provided for by the Environmental Crimes Ordinance (1999) amount to minimum 62.50 and maximum 62,500 euro. Offences regarding nature protection and conservation, however, are nearly all considered as less serious offences and the fines, accordingly, are minimum 62.50 and maximum 625 euro [24]. Under this Brussels ordinance, the administrative fines are not multiplied by a multiplication factor of 5.5 [25].

The remedial sanctions supervisors can impose, include the partial or complete cessation of activities and the closure of one or more establishments[26].

Civil sanctions

42. See *supra*, Nos. **20 – 21**: idem.

Further comments

43. There is no information available concerning judgements in criminal cases. The BIM-public servants think the criminal courts simply never had a Brussels case to judge regarding this legislation. Over the past decade, there have been a few scarce cases where infringements of nature conservation legislation were punished with administrative fines.

44. The sanctions can be imposed to legal persons.
Correction factor for criminal fines when applied to legal persons to compensate for prison sentences: see *supra*, No. **23**, idem.

§ 3. A.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? Makes it a difference if not only an appropriate assessment is lacking, but also a permit for the project or an approval of the plan?

45. The Brussels Government Decree of 24 November 2005 that modifies the Fauna and Flora Decree 2000, organizes the appropriate assessment of plans and projects. This decree is based

[23] Artt. 24 – 30 Environmental Crime Ordinance (1999).
[24] Artt. 32 – 33 ordinance.
[25] Artt. 32 – 42 ordinance, *a contrario*.
[26] Art. 9 § 2 ordinance.

upon Nature Conservation Ordinance (1995). As such, the criminal sanctions provided for by this ordinance apply to offences against the decree.
An appropriate assessment, however, is only required when the plan or project has a potential impact on a special protection area and the administration decides whether to allow to proceed with it or not.

In practice, the obligation is poorly applied and not enforced. Demands for building permits are declared incomplete if an appropriate assessment deems to be required and is lacking, but many incomplete demands introduced at communal level are not spotted and once the demand has been declared to be complete it is too late to realise an appropriate assessment.
Whenever a project is realised without the required building permit and/or environmental permit, however, the enforcement possibilities given by the Building and Land Use legislation and the Environmental Permitting legislation of course apply, irrespective of the question if an appropriate assessment was or wasn't carried out.

§ 3. A.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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

46. Not implemented yet within the Brussels Region.

A. Species protection

§ 3. B.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?

47. The species protection measures required by the Habitat- and Birds-directives were implemented rather incoherently. In general terms, those measures have been taken in the Nature Conservation Ordinance (1995) and the Fauna and Flora Decree 2000. Yet the Fauna and Hunting Ordinance (1991), as modified by ordinance of 14 January 2000, should also be mentioned. This ordinance states that all vertebrate animals, their nests and eggs, are protected in the whole of the Brussels Region. This general protection measure is considered to be too strict because exemptions are continuously needed, even for the control or destruction of introduced non-indigenous species. A new nature conservation ordinance that is in the drafting process right now, would provide a truly more appropriate system. It would *inter alia* allow to develop well focused action plans fitting within a general nature plan and, within those action plans, species oriented measures.

§ 3. B.2. Who supervises fauna and flora protection measures in your country? Are there (also) specialized

inspections supervising them?

48. *Supra,* Nos. **36 – 37**: idem.

§ 3. B.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?

49. No, not now. But the nature conservation ordinance-to-come would organise coordinated enforcement efforts, including the setting of priorities.

§ 3. B.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 effective? Can those sanctions be applied on legal persons?

50. Offences against the Fauna and Hunting Ordinance (1991) and its government decrees are punishable with criminal fines ranging from 2.5 to 125 euro (to multiply with the multiplication factor of 5.5) and/or prison sentences from minimum 8 days to maximum 2 months.

More: see *supra,* Nos. **38 – 44**: idem.

§ 3. B.5. Conduct falling under article 3(f) 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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

51. Not implemented yet within the Brussels Region.

§ 4. Federal State

52. The implementation of the Habitat-directive and the Birds-directive by the Federal State with regard to the '11th Belgian province', the North Sea area under Belgian authority, is

realized by the Marine Environment Act (1999) and its executive decrees, mainly the Species Protection Decree (2001) and the Special Areas Decree (2005). This body of federal legislation is surprisingly well structured and coherent. When reading the following information, one should be aware that all rules apply to sea areas.

A. Habitat protection

§ 4. A.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?

53. On ground of the articles 6 and 7 Marine Environment Act, the Special Areas Decree (2005) has been designating two kinds of special areas: special protection areas, aiming to protect the habitat of two birds species listed in Annex 1 Birds-directive, and special conservation areas, aiming to implement the Habitat-directive. Three of the first kind and two of the latter were created, covering 110.01 km², 144.80 km² and 50.59 km³ *resp.* 181 km² and 19.17 km³ [27].

The protection of those areas is realized by a mixture of general and site specific protection measures.

General protection measures first of all include measures designed to protect all protected areas. In special protection areas are forbidden: activities of civil engineering, industrial activities and activities of advertisement and commercial enterprises [28]. In special protection areas, the same interdictions apply and, on the more, the interdiction to deposit dredging slurry and inert materials of natural origin [29]. All protected areas also benefit from measures aiming at the protection of the full North Sea area under Belgian jurisdiction such as, for instance:

- the obligation for all users of the sea to take into account the precautionary principle, the prevention principle, the principle of sustainable management, the Polluter Pays principle and the restoration principle, when carrying on their activity [30];
- the obligation for each person carrying on an activity in the sea areas to take all precautions required to prevent damage and environmental disturbance [31];
- an interdiction to burn waste and other materials at sea [32];
- an interdiction to dump waste and other materials in the sea, including ships, airplanes, off-shore installations and pipelines[33];
- an interdiction on all direct discharges [34].

[27] Artt. 2 and 8 Special Areas Decree (2005).
[28] Art. 5 decree.
[29] Art. 10 decree.
[30] Art. 4 §1 Marine Environment Act (1999).
[31] Art. 5 Marine Environment Act (1999).
[32] Art. 15 §1 j° art. 2, 16° Marine Environment Act (1999).
[33] Art. 16 §1 j° art. 2,15° Marine Environment Act (1999).
[34] Art. 17 Marine Environment Act (1999).

Site specific protection measures are designed within the framework of site specific management plans [35]. They are partly realized with user agreements [36], conventional instruments which do not raise the enforcement issues studied in this report.

§ 4. A.2. Who supervises habitat protection measures in your country? Are there (also) specialized inspections supervising them?

54. The federal institute for marine research and management, the BMM, is in charge of the permanent monitoring of the state of the marine environment, and especially the sea bottom, the benthos and the fish and bird populations. Supervision of compliance with protection measures is their responsibility also, as well as a responsibility for water scouts and agents of the Shipping Police, the officers in charge of patrol ships and planes of the State, some officers of the naval forces, some agents of the federal Ministry of Economic Affairs and the division for sea fishery of the Ministry of Small Business and Agriculture and the supervisors of the sea nature reserves.

Article 29 Criminal Prosecution Code – see *supra*, No. **13** – applies too but its potential in sea areas seems non existent.

§ 4. A.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 effective? Can those sanctions be applied on legal persons?

55. When habitat protection measures are infringed, criminal and civil sanctions can be imposed.

The criminal sanctions, imposed by the courts, are mainly punitive sanctions.
A violation of the protection measures designed to protect all special protection and conservation areas, is punishable with a fine of 500 EUR to 100,000 EUR (to multiply with a multiplication factor of 5.5). If the violation was perpetrated between sunset and sunrise, the level of the minimum and maximum fine is doubled. [37]
A violation of the protection measures designed to protect the whole North Sea under Belgian jurisdiction is punishable with a fine of 100,000 EUR to 1,000,000 EUR (to multiply with a multiplication factor of 5.5) and a prison sentence of two months to two years, or one of these punishments. If the violation was perpetrated between sunset and sunrise, the level of the minimum and maximum fine is doubled. [38]
A remedial sanction is also possible. Whenever the minister in charge of the Belgian North Sea demands it, the court orders the removal of objects, establishments or constructions

[35] Royal Decree of 14 October 2005 "betreffende de voorwaarden, sluiting, uitvoering en beëindiging van gebruikersovereenkomsten en het opstellen van beleidsplannen voor de beschermde mariene gebieden in de zeegebieden onder de rechtsbevoegdheid van België" (*BS* 31 October 2005).
[36] *Ibid.*
[37] Art. 49 §1 and §4 Marine Environment Act (1999).
[38] Art. 50 §1 and § 4 Marine Environment Act (1999).

placed in the sea areas in contravention with the Marine Enforcement Act (1999) as well as the restoration of the place in its original state. The court imposes a delay to execute its order. If the order is not executed in due time by the condemned person, it can be executed by the authorities, the condemned person paying all execution costs endured.

56. Civil law sanctions: see supra, Nos. **20 – 21**, idem.

57. There is a real enforcement effort. Patrol ships go out, plane patrolling is used too. There is a difficulty, however, regarding the possibility of detection. The detection problems are less important with regard to the forbidden conducts as such – as for instance, oil and slug dumping (leaving trails on the water) – but, more, with regard to the linking of the facts to a properly identified perpetrator. The possibilities of the use of satellite images are studied in context of a European research project. [39] As of today, the sanctions are applied, but scarcely and certainly far less often than wished for. As far as used, the sanctions are considered effective.

58. The sanctions can be applied on legal persons.
Correction factor of the fines to compensate for the impossibility to impose prison sentences: see *supra,* No. **23** (idem).

§ 4. A.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? Makes it a difference if not only an appropriate assessment is lacking, but also a permit for the project or an approval of the plan?

59. According to the Special Areas Decree (2005), the obligation of an appropriate assessment has to be fulfilled by executing an environmental impact assessment as provided for by the Royal Decree of 20 December 2000 "houdende de regels betreffende de milieu-effectenbeoordeling in toepassing van de <Wet 1999 Mariene milieu>" (*BS* 25 January 2001). As far as the assessment is an element in a permitting procedure, the sanction on the lack of assessment consists in the inadmissibility of the permitting demand. Because the sea setting doesn't allow to realize any important plan of project having a significant impact unnoticed by the enforcement authorities, the hypothesis that an appropriate assessment as well as a permit could be lacking, has not to be considered.

§ 4. A.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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

[39] BMM, mails November 2009 – January 2010.

60. No copy-and-paste federal provision implementing article 3(h) Ecocrime-directive exists. Because of the rules set in the Marine Environment Act (1999) and in the Special Areas Decree (2005) as completed by the criminal sanctions provided for by the Marine Environement Act (1999), article 3(h) Ecocrime-directive most probably needs no specific implementation action. It is, at first analysis, duly implemented by this legislation.

B. Species protection

§ 4. B.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?

61. In our "11th province" the species protection measures are organized within one coherent legislative framework: the Marine Environment Act (1999) and its executive royal decrees, mainly the Species Protection Decree (2001). The species protection is mainly achieved by general measures. Specificity is most often limited to measures aiming at the protection of species listed on one or more annexes to the legislation. [40] Only the sea mammals (*Cetacea* and *Pinnipedia*) are subject to specific protection measures [41].

§ 4. B.2. Who supervises fauna and flora protection measures in your country? Are there (also) specialized inspections supervising them?

62. See *supra*, No. **54**: idem.

§ 4. B.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?

63. There are species getting more care than others. Within the special protection and special conservation areas, the wellbeing of the species these areas were created for – the sandwich tern (*sterna sandvicensis*), the common tern (*sterna hirundo*), the great crested grebe (*podiceps cristatus*) and the little gull (*larus minutus*) as well as, sideways (protection by the Flemish Government for breeding in Zeebrugge), the little tern (*sterna albifrons*) [42] – constitutes an issue. In the Marine Environment Act (1999) special attention is paid to all sea

[40] Artt. 10 – 14 Marine Enforcement Act (1999). See also the artt. 4 and 5 Marine Enforcement Act, cited *supra*, *sub* No. **53**.
[41] Artt. 13 and 14 Marine Enforcement Act (1999).
[42] Special Areas Decree (2005).

mammals (*Cetacea* and *Pinnipedia*), with specific obligations regarding their wellbeing [43], and enforcement efforts logically follow these rules.

We do not know if there is an evolution through time in the enforcement efforts.
Benthos is subject to permanent monitoring.

§ 4. B.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 effective? Can those sanctions be applied on legal persons?

64. See *supra*, Nos. **55 – 58**: idem.

§ 4. B.5. Conduct falling under article 3(f) 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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

65. See *supra*, No. **60**: idem. The protection offered by the Marine Environment Act (1999) even seems more far reaching, as no exception is made for the cases where the conduct concerns a negligible quantity of specimens and has a negligible impact on the conservation status of the species.

[43] Artt. 13 and 14 Marine Enforcement Act (1999).

X. International trade

§ 1. Belgian Constitutional Law: the division of competences

66. As mentioned, the division of competences with regard to nature conservation and endangered species is regulated by article 6 §1, III, 2° BWHI. According to article 6 §1, III, 2° BWHI, each Region is competent within its territory for nature protection and nature conservation, **the import, export and transfer of non-indigenous species as well as non-indigenous fauna and their cadavers excepted**. As the CITES-regulation (338/97/EC) aims to protect endangered species by regulating international trade therein, this provision is highly important to know what state level in Belgium is competent for the trade in endangered species. A textual reading of the article learns that the Federal State remains competent for the non-indigenous species with regard to their import, export and transfer. But which species are non-indigenous? In a judgement of 29 October 2003, our Constitutional Court (formerly Court of Arbitration) formulated a position on this matter [44]. According to the parliamentary discussions preceding the adoption of the Nature Conservation Act (1973), non-indigenous species are "foreign species" [45], "species causing economic catastrophes" [46]. This allows to infer that the non-indigenous species considered in article 6 §1, III, 2° BWHI are "exotics", species which naturally do not occur on the European territory and which can severely disrupt the biological equilibrium of the fauna and flora. The species the CITES-regulation (338/97/EC) applies to, however, are not exclusively non-indigenous but also indigenous, be it to a lesser extent. This would imply that the division of competences of the BWHI makes that the CITES-regulation (338/97/EC) is a federal competence as far as it protects non-indigenous endangered species but a regional competence with regard to the indigenous endangered species.

Furthermore, the division of competences also needs some attention for the aspect *import, export and transfer*. The BWHI explicitly states that the Federal State is competent for non-indigenous species, with regard to their import, export and transfer. But the CITES-regulation (338/97/EC) does not only regulate the international trade but also introduces rules to control commercial activities of endangered species within member states. In a restrictive interpretation of article 6 §1, III, 2° BWHI, the Federal State isn't competent with regard to these. A judgement of the Council of State, however, takes another perspective on the issue [47]. In this judgement, the Council of State considers the connection between import, export and transfer on the one hand, and commercial activities such as buying, selling, and transporting for sale on the other hand. The Council deems that commercial activities have to be considered as intertwined with import, export and transfer activities, precisely because the latter can encompass or bring along commercial activities. Therefore, says the judgement, it would be more reasonable to give to the exception on the regional competence an extensive interpretation, wherein the federal state remains not only competent for the import, export and transfer of non-indigenous species but also for the commercial activities with regard to those same species. This judgement has been criticised, *inter alia* by ORBAN DE XIVRY [48]. The criticism stresses that the autonomy principle, a constitutional principle underlying our

[44] Arbitragehof nr. 139/2003, 29 October 2003.
[45] *Parl. St.*, Senate, 1971-72, nr. 262/1, 11.
[46] *Parl. St.*, Senate, 1972-73, nr. 262/1, 10.
[47] R.v.St. nr. 72.970, 2 April 1998, *Amén.* 1999/1, 28-29.
[48] E. ORBAN DE XIVRY, "Observations de l'importation, de l'exportation en du transit des espèces animales non indigènes", *Amèn.* 1999/1, 29-30 (annotation of R.v.St. nr. 79.970, 2 April 1998).

division of powers between the Federal State and the federated entities, requires a restrictive interpretation of all exceptions on competences attributed to the federated entities. Therefore, commercial activities within the country cannot be merged with import, export and transfer activities. The author, moreover, ventilates the opinion that the division of competences by article 6 §1, III, 2°, BWHI should be reconsidered, so as to make the regions competent for the import, export and transfer too, subject to the conclusion of cooperation agreements between the regions and/or the Federal State.

We can conclude that article 6 §1, III, 2°, BWHI brings along the following division of competences with regard to the CITES-regulation (338/97/EC):

a. in an extensive interpretation of the exception on the regional competence:
- Federal State: the international trade as well as the commercial activities (transport included) with regard to non-indigenous endangered species.
- Regions: the international trade as well as the commercial activities (transport included) with regard to the indigenous endangered species.

b. in a restrictive interpretation of the exception on the regional competence:
- Federal State: the international trade with regard to non-indigenous endangered species.
- Regions: the commercial activities (transport included) with regard to non-indigenous endangered species and the international trade and the commercial activities (transport included) with regard to the indigenous endangered species.

The competence to enforce the CITES-regulation (338/97/EC) belongs in each case partly to the federal and partly to the regional competence. Furthermore, the division of competences depends on the interpretation given to article 6 §1, III, 2° BWHI. Even if the situation created by this division of powers is truly complicated, up till now no cooperation agreement has been concluded between the Federal State and the regions. The only development going in this direction is a ministerial decree [49] creating a Supervision Group where the regions are represented. According to article 1 of the house rules of the Supervision Group, the Group studies all technical matters concerning the application of the CITES-regulation at national, European and international level.

§ 2. Federal State

§ 2.1. Who supervises compliance with the CITES-regulation in your country? 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?

67. Article 29 of the Belgian Criminal Prosecution Code allows for a general supervision of the CITES-regulation (338/97/EC), as it does for all Belgian laws. See *supra* No. **13**.

[49] MB 4 June 2008 "tot benoeming van de leden van de Toezichtgroep bedoeld in artikel 17 van het Koninklijk Besluit van 9 april 2003 inzake de bescherming van in het wild levende dier- en plantensoorten door controle op het desbetreffende handelsverkeer", *BS* 15 July 2008.

68. At the federal level, the CITES-division of the Federal Department of Public Health, Security of the Alimentary Chain, and Environment is in charge of the application and enforcement of CITES-regulation (338/97/EC) [50]. The CITES-division issues permits and certificates for the legal trade in endangered wild fauna and flora. The division also records statistics concerning the trade of these species in Belgium. Furthermore, according to article 15 CITES-regulation (338/97/EC), it makes the CITES-reports for the European Commission. Those reports *inter alia* give information about the number of import and export permits issued each year per protected species. They also give an overview of the measures taken to assure a good application of CITES-regulation (338/97/EC) and offer data about the number of specimens of CITES-species confiscated. [51]
For the supervision activities, the CITES-division works with several other control instances, such as customs agents, the federal police, the federal Food Agency, and public prosecutors offices[52]. Control operations are conducted subsequent to a complaint, when there is a suspicion of fraud, and at random. Control activities are quite often carried out in cooperation with the regions – for instance for birds of prey – or the Unit Environment of the federal police. [53]

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

69. Right now, the sanctions are essentially criminal in nature.

Article 20 CITES-Decree (2003) states that offences against the decree, CITES-regulation (338/97/EC) and the Commission-regulation (1808/2001/EC) [54] are punishable with the sanctions provided by the articles 5 and 6 CITES-Act (1981) and article 44 Nature Conservation Act (1973) (see *infra*).

Article 20 CITES-decree (2003) does not mention article 5*bis* CITES-Act (1981). As a result, offences against CITES-regulation (338/97/EC) can not be sanctioned using an administrative transaction based on that article. In a near future, however, this omission will be corrected and it will become possible to use those transactions.
The transaction-mechanism operates as follows. A public servant designated by royal decree has the competence to propose to the offender to pay an amount of money not lower nor higher than the minimum *resp*. maximum criminal fines. If the offender accepts the offer

[50] Art. 2 CITES-Act (1981).
[51] Those reports can be consulted on the CITES-website.
Annual reports: http://www.cites.org/common/resources/annual_reports.pdf;
bi-annual reports: http://www.cites.org/eng/resources/reports/biennial.shtml.
[52] See art. 7 par. 1 CITES-Act (1981).
[53] See, for instance, the Belgian bi-annual report 2007-2008:
http://www.cites.org/common/resources/reports/pab/07-08Belgium.pdf.
[54] Commission Regulation 1808/2001/EC of 30 August 2001 executing Council Regulation 338/97/EC of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (*Pb. L* No. 250, 19 September 2001).

made and does pay, the payment annuls the possibility of a public prosecution. If the offender refuses to pay, the case is sent to the public prosecutor, who then freely decides if he will prosecute or not. [55] The transaction is not considered as a penalty because of its consensual *modus operandi* [56]. The question arises whether such sanctioning instrument meets the enforcement requirements of article 16 CITES-regulation (338/97/EC), demanding "*measures to ensure the imposition of sanctions*" (article 16.1) and "*measures (…) appropriate to the nature and gravity of the infringement*" (article 16.2). The European Court of Justice has not yet had the opportunity to consider the question.

Civil law sanctions: *supra,* Nos. **20 – 21**.

70. Where specimens are illegally imported, exported, re-exported or imported by sea or traded, article 6 CITES-Act (1981) opens the possibility to seize and, possibly, butcher or destroy them. Seized specimens which are not butchered or destroyed are given in care to the CITES-division. After having consulted the State of export and eventually a scientific authority or the Secretariat of the CITES-Convention, the division sends the specimens back to the State of export at the expense of that State or send them to a conservation centre or each other place fit to meet the Conventions goals. This division also can choose to butcher or destroy the specimens. Where other than live specimen are seized, the CITES-division takes care of their conservation and, eventually, destruction.
When the offender involved is convicted, the court pronounces the confiscation of the specimens which were not sent back to the State of export or destroyed and condemns the offender to pay the costs caused by the sending back which were not refunded by the State of export, as well as the costs for expertises, transport to conservation centres, butchering, destruction, and guarding until the day of the judgement.

Each year again customs at our airports seize innumerable specimens of CITES-species: wallets and purses in snakeskin, shells, corals, caviar, and even living snakes, frogs, spiders, parrots and other birds.[57]

71. The level of the prison sentences and fines is the following one:
- Article 5 CITES-Act (1981): a prison sentence of six months to five years and a fine of 25 EUR to 50,000 EUR (to multiply with a multiplication factor of 5.5), or one of these penalties.
- Article 44 Nature Conservation Act (1973): a prison sentence of fifteen days to three months and a fine of 100 EUR to 2000 EUR (to multiply with a multiplication factor of 5.5), or one of these penalties.

72. For the frequency of application and the effectiveness of the sanctions, we refer to the biannual reports the member-states have to communicate to the European Commission. It should be stressed that the case law published in law journals offers near to no case law on offences against the CITES-regulation.

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[55] Art. 5*bis* CITES-Act (1981).
[56] A. DE NAUW, "L'évolution législative vers un système punitif administratif", *Rev. Dr. Pén.* 1989, 383.
[57] See for instance the bi-annual Belgian report 2007-2008:
http://www.cites.org/common/resources/reports/pab/07-08Belgium.pdf.

73. The criminal and civil sanctions can be applied to legal as well as natural persons.
Correction factor applied to criminal fines for legal persons to compensate for the impossibility of prison sentences: see *supra*, No. **23**.

§ 2. 3. Conduct falling under article 3(g) 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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

74. Up to now, conduct falling under article 3(g) Ecocrime-directive has not been implemented literally in the federal CITES-legislation. The sanctioning obligation in article 3(g) concerns the species of wild fauna and flora listed in Annex A or B of CITES-regulation (338/97/EC). Under the federal CITES-legislation in force, all offences against the do's and don't's in trading the protected species imposed by CITES-regulation (338/97/EC), whatever be the annex they are listed in, are punishable with criminal penalties on ground of article 20 CITES-decree (2003) *juncto* the articles 5 CITES-Act (1981) and 44 Nature Conservation Act (1973). This seems to offer a broader protection than the one required by article 3(g) Ecocrime-directive, where no criminal punishment is asked for in cases where the forbidden trading conduct concerns a negligible quantity of the specimens and has a negligible impact on the conservation status of the species.

Minimum and maximum penalties: see *supra*, No. **71**.
Penalties for natural and legal persons: see *supra*, No. **73**.
Possibility not to prosecute and drop the case: yes (right to propose a transaction offer or simply drop the case - see *supra*, No. **28**).
Other sanctions: see *supra*, Nos. **69 – 70**.

§ 3. Flemish Region

§ 3. 1. Who supervises compliance with the CITES-regulation in your country? 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?

75. As mentioned above [58], the Flemish Region did recently get a new enforcement legislation for its environmental law: a new Enforcement title inserted in the Environmental Policy Act (1995). The CITES-legislation falling within the scope of this new enforcement legislation is the following:
- according to article 16.1.1, 11° Environmental Policy Act (1995/2009), the new legislation applies to the CITES-Act (1981). This act aims at giving full effect to the old CITES-Treaty.[59]
- article 2, 1° of the Environmental Enforcement Decree (2008/2009) brings the former CITES-regulation of 1982, CITES-regulation (3626/82)[60] within the scope of the new enforcement legislation. That regulation, however, was replaced by the CITES-regulation (338/97/EC) more than a decade ago ...

As a result, the most recent and actual CITES-legislation, **CITES-regulation (338/98/EC), can not be enforced using the new legislation**. Worse, there are no other enforcement provisions in force for this regulation within the Flemish law. The existence of this flaw has been noticed and legislative steps have been taken to solve the problem soon. Meanwhile, the possibility to enforce the old CITES-treaty helps to avoid a full-blown enforcement void. We therefore will discuss the enforcement-possibilities relating to the CITES-Act (1981).

76. At the Flemish regional level, the agency for nature and forests, the ANB, is in charge of the supervision of the CITES-Act (1981). Yet, as mentioned above when discussing the division of powers between the Federal State and the regions, the ANB does not come much in contact with these enforcement issues; they are mainly a job in care of the federal CITES-division.

The task-allocation is embedded in article 7, 7° of a ministerial decree of 22 February 2010[61] that states that the public servants mentioned in its articles 5 and 6 are competent to track and detect environmental crimes relating to the CITES-Act (1981).

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

77. The sanctions that can be imposed are punitive and remedial criminal, administrative and civil sanctions. For a discussion of those sanctions: see *supra*, Nos. **14 – 23**.

Information specific for the enforcement of CITES-Act (1981):

[58] *Supra*, No. **14**.
[59] Art. 1 CITES-Act (1981).
[60] Council Regulation 3626/82/EEC of 3 December 1982 on the application within the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora *(*OJ No. L 384, 31 December 1982). This regulation was last amended by Commissions Regulation 558/95/EC (OJ No. L 57, 15 March 1995).
[61] MB 22 February 2010 "betreffende de aanwijzing van gewestelijke toezichthouders, gewestelijke milieuopsporingsambtenaren en gemachtigde ambtenaren bij het Agentschap voor Natuur en Bos van het Vlaams ministerie van Leefmilieu, Natuur en Energie overeenkomstig het besluit van de Vlaamse Regering van 12 december 2008 tot uitvoering van titel XVI van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid", *BS* 5 March 2010.

- With regard to offences against this law, article 16.6.1. § 1 Environmental Policy Act (1995/2009) applies: "*Any violation of the regulation enforced by the present Title, committed intentionally or due to lack of precaution or care, is punishable with a prison sentence of one month to two years and with a fine of EUR 100 to EUR 250.000 or with one of the penalties*.". The fines have to be multiplied with a multiplication factor of 5.5.
- The administrative fines which apply, are those for environmental offences, provided by article 16.4.27 par. 2 Environmental Policy Act (1995/2009): maximum 250.000 EUR (to multiply with a multiplication factor of 5.5), eventually completed with a forfeiture of illegally acquired benefits and expertise fees.

78. The Environmental Policy Act (1995/2009) provides a kind of administrative confiscation. The remedial sanctions the supervisors can impose, can, states article 16.4.7. §2, 4°, *inter alia* consist in: "*the removal of relevant goods, including waste materials, the possession of which is in contravention with the environmental legislation <this title applies to>*", including thus, right now, the CITES-Act (1981). What next happens to the removed goods, or has to happen with them, is not specified at all.

In the criminal sanctioning track, it is worth checking if the Criminal Code does not provide provisions organizing a confiscation in accordance with CITES-regulation (338/97/EC).
Article 42, 1° Criminal Code offers the possibility of a forfeiture of the goods which form the object of the crime if those goods are owned by the condemned offender. This possibility seems too specific to offer the confiscation possibilities the CITES-regulation is requiring.
Article 44 Criminal Code offers the possibility to order restoration of the situation disturbed by the offence. The question whether this article could be used to send back species to the country of export at the expense of the convicted person, seems truly doubtful.

79. With regard to the effectiveness of the sanctions, little can be said. Not only did the new legislation come into force quite recently, roughly just a year ago, but moreover there is the fact that the enforcement of the CITES-legislation mainly happens at federal level.

§ 3. 3. Conduct falling under article 3(g) 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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

80. In the Flemish legislation also, the behaviour described in article 3(g) Ecocrime-directive has not (yet?) been implemented. And there is more. As explained above, the Flemish Region displays a lack of proper follow-up of the CITES-legislation of the EU, with the former and abrogated CITES-regulation (3626/82/CEE) still mentioned in the Environmental Policy Act (1995/2009) instead of the actual CITES-regulation (336/97/EC). The enforcement of the whole of the rules of CITES-regulation (336/97/EC) by the Environmental Policy Act

(1995/2009) thereby is non-existent and cannot offer a solution to implement article 3(g) Ecocrime-directive.

§ 4. Brussels Region

§ 4. 1. Who supervises compliance with the CITES-regulation in your country? 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?

81. The regional Brussels administration working with the federal CITES-division for the supervision of the CITES-legislation is the following:

Leefmilieu Brussel, BIM – Bruxelles Environnement, IBGE
Afdeling Natuur, Water en Bos – Division Nature, Eau et Forêt
Dienst Strategie Biodiversiteit – Service Strategie Biodiversiteit
Gulledelle 100
1200 Brussel – Bruxelles
tel: 02/775.77.14
fax: 02/775.78.04
www.leefmilieubrussel.be

82. Division of competences between the Federal State and the regions: see *supra*, No. **66**. The Brussels legislation holds no provisions organizing the supervision of CITES-regulation (338/97/EC).

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

83. The Brussels legislation holds no provisions organizing the sanctioning of CITES-regulation (338/97/EC).

§ 4. 3. Conduct falling under article 3(g) 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 these provision already been implemented in your country, as the case may be, by pre-existing legislation? How is this 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?

84. The Brussels legislation has not (yet?) implemented article 3(g) Ecocrime-directive.

Please provide, if available, summaries of interesting cases that illustrate the answers to the questions above.

➢ In a decision of 8 November 2007 (non published) the Court of Appeal of Antwerp condemned two offenders for illegal trade in reptiles from 1998 to 2004 and inflicted the following punishments:
- a prison sentence of 3 months and a fine of 14,538.49 EUR;
- a prison sentence of 13 months and a fine, with payment suspension, of 7,500.00 EUR or a compensatory prison sentence of 3 months.

➢ In a decision of 2 March 2010 (non published), the Court of First Instance of Gent condemned a chicken farmer for illegal trade in protected bird species (together with infringements of the legislation implementing the Birds-directive, facts committed in 2007) and imposed the following punishment: an effective prison sentence of 18 months and an effective fine of 55,000 EUR (10,000 x 5.5 multiplication factor).