

## **Species protection**

### **REPORT ON GERMANY**

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I would like to take the liberty to somewhat deviate from the sequence of questions of the questionnaire although I hope my own structuring addresses most of the raised issues.

#### **A. Competences and Laws**

The legislative competence for nature protection and for hunting lies with the German Federal State. The Länder however have the competence to derogate from the federal regulations but this does not apply to species protection and marine nature protection. Thus species protection can be found in the Federal Nature Protection Law (Bundesnaturschutzgesetz) plus a sublegal Federal Regulation on Species Protection (Bundesartenschutzverordnung - BArtSchV) that lists those species which are protected in addition to those listed in the FFH and Bird Directive. There is a separate Federal Law on Hunting (Bundesjagdgesetz) with Laender laws specifying it and partially deviating from it. Concerning fishing the Federal Law on Marine Fisheries (Seefischereigesetz) provides mechanisms implementing the exclusive EU regulations of marine fisheries. Fishing in inland waters are in the competence of the Laender which have adopted laws in that regard. It should be noted that the protection of endangered fish species is a matter of species protection legislation of both the EU and national level.

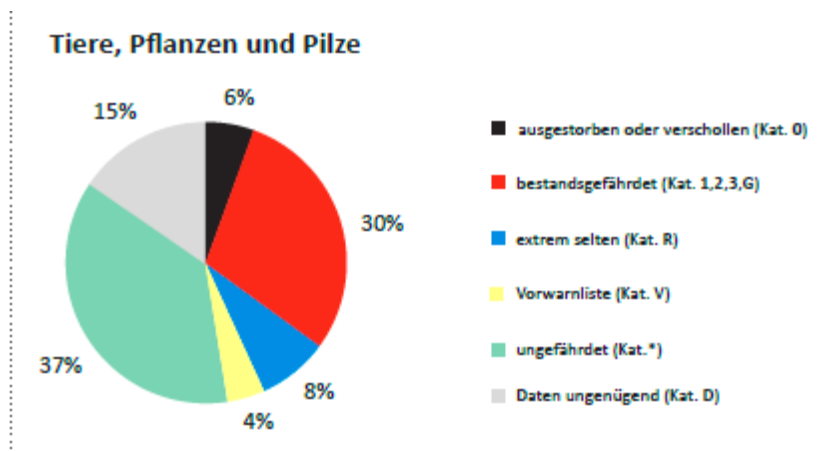
#### **B. Facts**

The German Federal Agency for Nature Conservation (Bundesamt für Naturschutz, BfN) publishes in intervals of about ten years „red lists“ of threatened species, that provide general information on the main risks for protected species in Germany. In 2015 the BfN released a comprehensive „report on species protection“ („Artenschutz-Report 2015“).

The report has alarming data concerning the decline of species and populations and its major causes. Only on very few species a positive development was observed.

Concerning the decline of species and populations see figure 1.

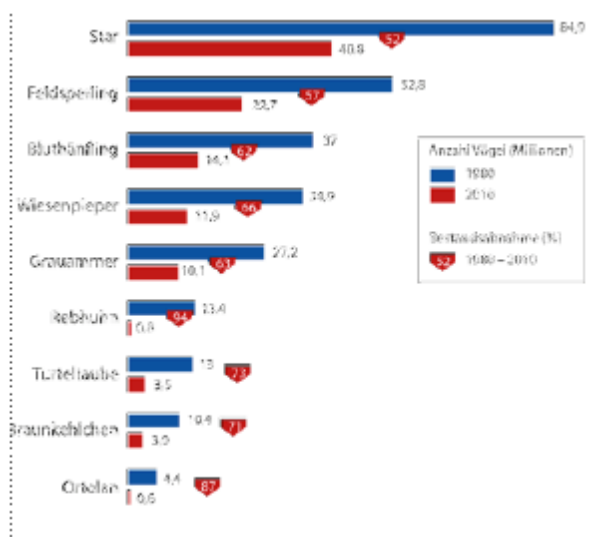
Figure 1 Status of animal, plant and mushroom species according to the German Red List (BfN Artenschutz-Report 2015, p. 16)



It shows that only 37% is not endangered, 6% is extinguished, 30% is endangered, 8% is extremely rare, and 4% on a prewarning list.

An example for the decline of populations are selected birds that are typical for agricultural land (figure 2).

Figure 2: Populations (absolute numbers, in million) of birds on agricultural land in Europe 1980 and 2010 (BfN Artenschutz-Report 2015, p. 34)

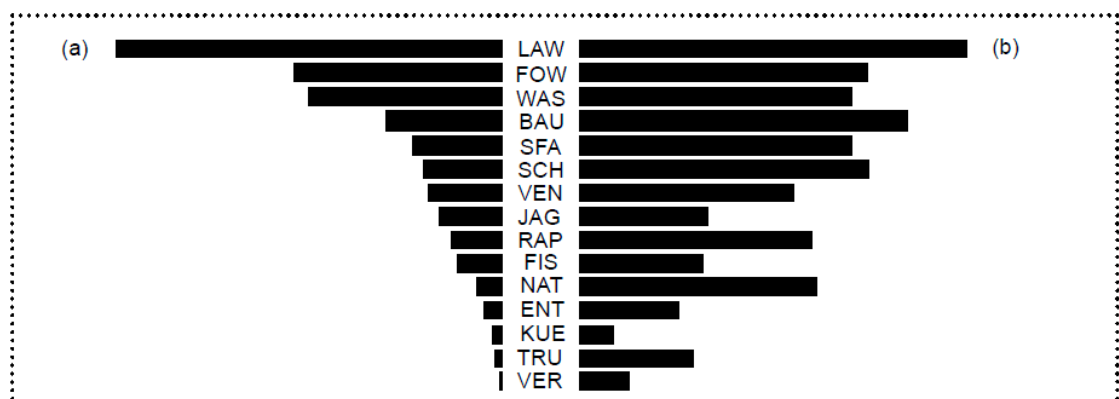


For instance, the populations of previously common birds like the starling went down from 84,9 mio in 1980 to 40,8 mio in 2010, that of the tree sparrow from 52,8 mio to 22,7 mio, that of the red legged partridge from 13,4 mio to 0,8 mio.

Concerning the causes of loss of species populations see figure 3. The left side (a) indicates decline in populations, the right side the number of affected species. The major causes are agriculture (LAW), forestry (FOW), water utilization including

shipping (WAS), construction including minerals exploitation (BAU), emissions (SCH), transportation/ energy (VEN), hunting (JAG), infrastructure, land-use planning (RAP), fisheries (FIS), nature protection (NAT), taking of specimen (ENT), coastal protection (KUE), military training (TRU), neobiota (VER). It is important to note that the traditional approach of species protection, ie the restriction of takings, has become a minor threat as compared to the more structural activities that remove or deteriorate the life conditions of populations.

Figure 3 Causes of species and population decline (BfN Artenschutz-Report 2015, p. 21)

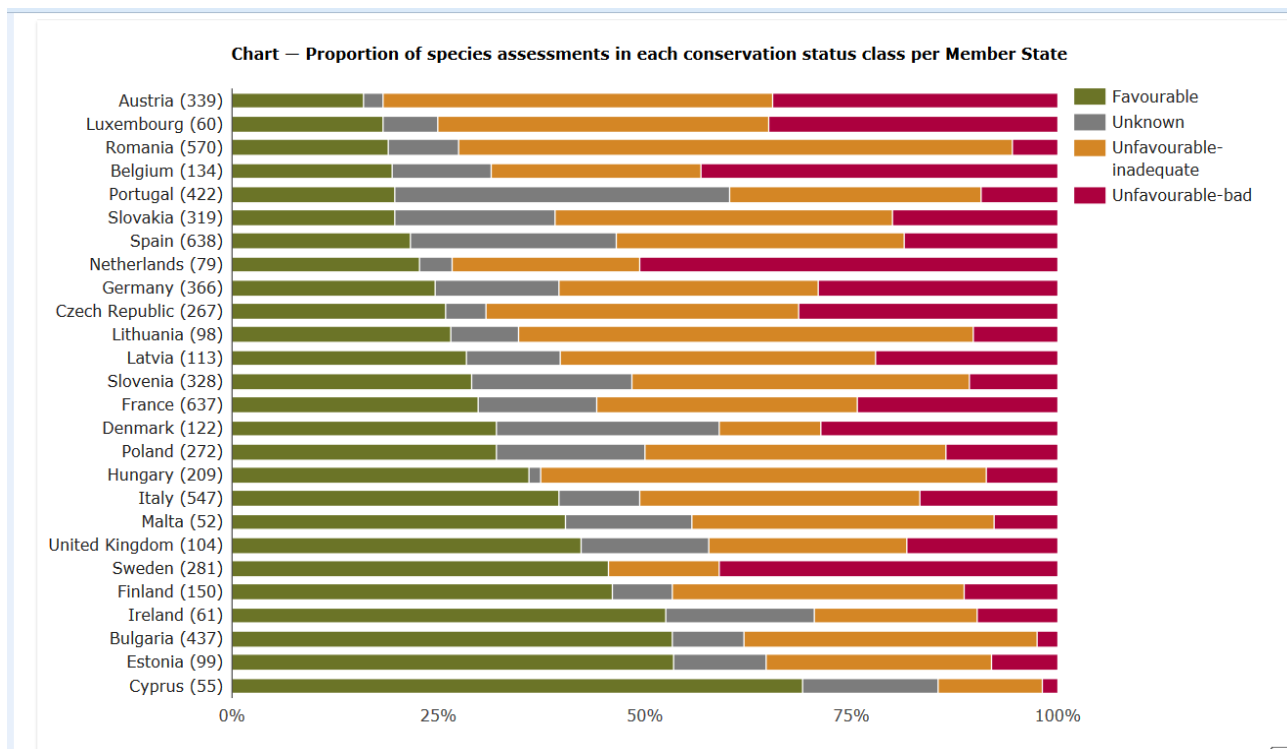


Concerning successes in the recovery of species see figure 4. Most of the successes are due to specific management measures. It rather concerns species of high public esteem, such as the wild cat, wolf, beaver, fish eagle, black stork. Would anybody care about spiders, ants and wasps?

Figure 4: Examples of vertebrates whose populations have improved (BfN Artenschutz-Report 2015, p. 25)

- Säugetiere (Mammalia)**
- Biber (*Castor fiber*)
- Fischotter (*Lutra lutra*)
- Fransenfledermaus (*Myotis nattereri*)
- Großes Mausohr (*Myotis myotis myotis*)
- Wildkatze (*Felis silvestris silvestris*)
- Wolf (*Canis lupus*)
  
- Vögel (Aves)**
- Fischadler (*Pandion haliaetus*)
- Schwarzstorch (*Ciconia nigra*)
- Seeadler (*Haliaeetus albicilla*)
- Wiesenweihe (*Circus pygargus*)
  
- Kriechtiere (Reptilia)**
- Äskulapnatter (*Zamenis longissimus*)
- Mauereidechse (*Podarcis muralis*)
- Westliche Smaragdeidechse (*Lacerta bilineata*)

For a comparative overview of the status of species in the EU member states see figure below.



## C. Regulation

The regulation of species protection is I believe extremely complicated both at EU and national levels and thus very hard to grasp, especially for the general public. I submit that more simplification would help to win more understanding and support for better species protection. In the following I propose a systematisation by distinguishing 4 dimensions and their interrelations with a view to understand the doctrinal system underlying the many specific provisions. In doing this I depart from the German law but also look at the pertinent EU legal acts. The 4 dimensions are:

- Categories of protectable species (I.)
- Categories of harmful activities (II.)
- Kinds of restrictions (III.)
- Kinds of derogations (IV.)

### I. Categories of protectable species

The categorization of species follows the matruschka-principle: the larger less protected group includes the smaller more protected group. This means if a provision says that specially protected species must be protected in a certain way this also

applies to the subgroup of strictly protected species, unless the protection regime is specifically targeted for the latter.

3 categories of protectable species are to be distinguished under German law:

- (1) 'All'<sup>1</sup> (ie not specially protected) wild species
- (2) specially protected wild species ("besonders geschützt")
  - Annex A and B CITES Regulation (EC) 338/97
  - Annex IV a and b FFH Directive
  - European Bird Species (Europäische Vogelarten), defined as birds in the sense of Article 1 Bird Directive (i.e. all bird species occurring in the wild state in the EU, including Annex I and II and beyond)
  - National list under Art. 54 (1) BNatSchG of specially protected species (containing endangered species occurring in Germany, including those not listed in the Annexes to the FFH and Bird Directives)
- (3) strictly protected wild species
  - Annex A CITES Regulation (EC) 338/97
  - Annex IV a and b FFH Directive
  - National List under Art. 54 (2) BNatSchG of strictly protected species (containing highly endangered species occurring in Germany, including those not listed in the FFH and Bird Directives)

The procedure of amending the national list is such that the Ministry for the Environment is empowered to do this with the consent of the Bundesrat. While drafts of such acts will according to common practice be open for public comment, no explicit provision is made to involve stakeholders.

## II. Categories of harmful activities

5 categories of harmful activities are distinguished that may endanger populations and species. One more category has been identified by court case law that (I believe) still waits for better codification at the EU level:

- (1) Access (Zugriff)
  - Chasing, capture, killing of animals
  - Disturbance of animals
  - Destruction of breeding and resting sites of animals
  - Collection, destruction of plants
- (2) Possession (Besitz)
  - Keeping/breeding of animals

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<sup>1</sup> My term.

- Keeping/breeding of plants
- processing
- (3) Trade (Vermarktung)
  - Transportation
  - Sale, exchange
  - International trade
- (4) ‚Land-use change‘<sup>2</sup>
  - Agriculture
  - Infrastructure
  - Any other spatial encroachment on nature or landscape
- (5) Introduction of alien species

### III. Kinds of restrictions

#### (1) ‚General‘ protection

It is prohibited to capriciously (mutwillig) disturb or without good reason catch, hurt or kill wild animals, and to without good reason take, use or destroy wild plants (§ 39).

#### (2) Special protection

All harmful activities (see above) are forbidden, minus disturbance of animals (§44 (1) - (3))

#### (3) Strict protection

All harmful activities are forbidden, plus disturbance of animals (§ 44 (1) no. 2)

#### (4) Special and strict protection from ‚land-use change‘

- Concerning agriculture any activity meeting the rules of good agricultural practice are considered not breach the prohibitions of deliberate access, possession or (national) trade to/of specially protected species. This applies to strictly protected species only insofar as the maintenance status of the local population is not worsened (verschlechtert) (§ 44 (4)). However, even if such rules are not respected it is not certain that the competent administrative body has powers to suppress the offense. For instance, in a much criticized judgment the Federal Administrative Court (BVerwG) held that a violation of a rather precise rule of good practice - not to converse pasture land to crop cultivation - is not a legitimate

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<sup>2</sup> Term suggested by myself. Land use change is characterized by its spatial extension and the fact that the access etc to specimen is not intended but an assented side effect, such as infrastructure or large installations, and agricultural land use changes. Such activities are according to ECJ jurisprudence covered by the term “deliberative” as used in Arts. 12 and 13 FFH Directive (ECJ C-6/04, Commission v UK, paras 73-79; ECJ C-98/03 Commission v Germany, para 55). The term should also include “sea-use change” with large spatial scope.

ground for administrative enforcement measures because rules of good agricultural practice are not binding norms.<sup>3</sup>

- Concerning other spatial works that encroach on nature or landscape German law has a special regime called encroachment rule (Eingriffsregelung). It consists of a set of tests of the entire project and its entire effects including effects on species. The set ranges from the duty to avoid adverse effects via the duty to take compensation measures in case of unavoidable adverse effects to a balancing of unavoidable and uncompensatable effects with the benefits of the project. Concerning species the law says that if a project as a whole was found to meet the set of tests this is not considered as a breach of the prohibitions of deliberate access (killing, destruction of nesting sites etc) to/of specially protected species. This applies to strictly protected species only insofar as the ecological function of the affected breeding and resting sites is maintained (§ 44 (3)).

Court practice has added a criterion of significance to this picture. In a case concerning the accidental killing of animals by road traffic the BVerwG held that this cannot be objected to the construction of a new road unless it is to be expected that the rate of victims would be significantly higher than on average roads, eg because the road crossed an area with particularly high density of protected animals, such as in the present case 2 species of low flying owls.<sup>4</sup> The law is about to be amended to pick up that criterion of significance. Still, it must be noted that even in a case of significant killing a ground for an exception may apply.

- (5) Restrictions of means of capture and killing of species not regulated by hunting and fishing laws
- (6) Hunting regime for a positive list of huntable species (Federal Hunting Law, Bundesjagdgesetz - BJagdG)
- (7) Restrictions of international trade according to CITES and Regulation 338/97/EC
- (8) Introduction of alien species is subject to a prior authorization requirement that allows to check risks (§ 40 (IV)). Concerning invasive<sup>5</sup> species the competent authorities must monitor and remove them or prevent further spreading as the case may be.

#### **IV. Derogations**

##### **I. General derogations (§ 45 (7))**

- (1) 2 overarching preconditions

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<sup>3</sup> BVerwG judgment of 1 Sept. 2016, BVerwG 4 C 4.15

<sup>4</sup> BVerwG judgment of 14 July 2011, BVerwG 9 A 12.10

<sup>5</sup> "invasive" is defined to have a significant potential of danger for ecosystems, biotopes or species (§ 7 (2) no. 9)

- No bearable (zumutbare) alternative
- Derogation not detrimental to the maintenance status (Erhaltungszustand) of populations

(2) Plus alternative specific preconditions

- Serious damage for agriculture or other economic damage (wirtschaftlicher Schaden)<sup>6</sup>
- Protection of wild fauna and flora
- Research, repopulation etc
- Public health
- Effects beneficial for the environment
- Other overriding public interests including of social and economic character<sup>7</sup>

## II. Segmental derogations

- (1) Exemption from possession and trade prohibition for specially protected animals and plants that were bred in the EU, lawfully taken from nature (such as through legal hunting), lawfully imported into the EU, or taken from the wild as dead, injured or ill specimen (§ 44 (1), (2), (5))
- (2) Exemption from taking prohibition for certain mushrooms if collected in minor quantity and for personal needs (§ 2 Federal Species Protection Regulation, BArtSchVO)
- (3) CITES requirements [...]

## D. Enforcement

### I. Overarching instruments

(1) Administrative action

Responsibility of supervision and enforcement in principle lies with Land authorities. In most Laender the supervisory tasks are located at the district (Landkreis) authorities concerning the various harmful activities (access, possession, trade). Concerning spatial encroachments on nature and landscape (such as infrastructure projects) the authority is responsible that is in charge of the authorization of the project; e.g. the Land ministry for the plan approval for the construction of a federal road. That authority has also to apply the species protection provisions. The Federal Nature Protection Agency (BfN) is responsible to supervise species protection in the areas of the exclusive economic zone and continental shelf (§ 58). Any authorization issued for a project in these areas needs consultation (“Benahmen”) with the BfN.

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<sup>6</sup> It has been objected that Art. 16 (1) (b) has damage in kind in mind, not however economic costs.

<sup>7</sup> This appears to deviate from Art. 9 Bird Directive because the derogations are not referring to public interests of a social or economic character.



It is obvious from the gap between ambitious laws and the dramatic decline of species and species populations that enforcement is a major problem in Germany. Indeed, the often tiny crew of officers of the nature protection office of a Landkreis will hardly have the capacity to identify offenses and the courage and standing to really intervene against a big farmer who removes the hedgerows between his fields in order to create larger ones for more efficient cultivation. Moreover, I doubt that BfN will have the necessary equipment to perform any checks on the spot in the EEZ.

## (2) Sanctions

There is a long list of administrative infringements that empower authorities to impose a fine. Some infringements trigger criminal prosecution and sanctions including imprisonment such as the killing of a specimen of the species listed in Annex I Bird Directive or the taking into possession or possession of a specimen of animals or plants species listed in Annex IV FFH Directive or Annex I Bird Directive. I am not informed about the actual application of these sanctions.

## (3) Liability

The German Law on Environmental Damages (Umweltschadensgesetz - USchadG) which transposes the EU Environmental Liability Directive (ELD) extends, as required by the ELD, to damage to species mentioned in Art. 4 (2) Bird Directive (ie migratory birds) or listed in Annex I Bird Directive or listed in Annex II or IV FFH Directive. However, a damage is not considered to be significant if covered by the natural fluctuation of populations or recoverable by intrinsic regeneration. I am not informed about pertinent administrative or court cases.

## II. Segmental instruments

### (1) Facilitation of supervision

- Book-keeping duty for professional traders in specially protected species (§ 6 BArtSchV)
- Marking certain animal and birds (by ring, transponder, etc.) and documentation describing the individual specimen (§ 12-15 BArtSchV)
- The possession of living specially protected animals or plants and of dead parts of strictly protected and of invasive species listed as dangerous must be legitimated upon demand of the competent authority (§ 46 (1)). Concerning dead parts of strictly species this does not apply to specimen for personal use (§ 46 (2)).

### (2) [...]

## E. Court Review

A third party or NGO does not have standing to sue an administrative authority for unlawfully providing a permit to derogate from species protection obligations, or for not intervening in a case of violation, except for cases where the ELD based UmwSchG applies, i.e. if damage has been or is about to be caused. An NGO has only standing if challenging an authorization for a

project that requires a previous EIA, or for an installation subject to the IPPC Directive. It is part of the pertinent EIA and risk assessment to look at species protection requirements although this is not especially mentioned in the relevant provisions about application documents.