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Training module

HOW TO ENFORCE EU LEGISLATION ON BIODIVERSITY AND WILDLIFE  
TRAFFICKING

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The first slide speaks for itself.

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## Case: „Precious Old Rhino Horn”



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This slide is designed to have a good insight in the structure of the presentation.

### Introductory remarks on the case

The following case study covers administrative law and administrative justice. Two criminal cases (“Pelican” and “Turquoise”) have already been presented before. The administrative case (“Precious Old Rhino Horn”) raises questions whether a 19<sup>th</sup> century rhino horn can get an administrative approval to be put on the market and be sold at an auction house. The case has to be assessed under the following provisions:

### Article 8 of Reg. No 338/97

#### Provisions relating to the control of commercial activities

1. The purchase, **offer to purchase**, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A **shall be prohibited**.

(...)

3. In accordance with the requirements of other Community legislation on the conservation of wild fauna and flora, **exemption from the prohibitions referred to in paragraph 1 may be granted** by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, **on a case-by-case basis** where the specimens:

- (a) were acquired in, or were introduced into, the Community **before the provisions** relating to species listed in Appendix I to the Convention or in Annex C1 to Regulation (EEC) No 3626/82 or in Annex A **became applicable** to the specimens; or
- (b) are **worked specimens** that were acquired more than 50 years previously; or
- (c) were **introduced into the Community in compliance** with the provisions of this Regulation and are to be used for purposes which are not detrimental to the survival of the species concerned; or

Firstly, it is the task of the audience to see the strict prohibition in Article 8 para. 1 of the regulation.

Secondly, possible exemptions in Article 8 para. 3, subpara. (a), (b) and (c) are to be discussed.

Thirdly, the participants are requested to put themselves in a typical position of an administrative judge. This judge is asked for a legal review on the proper use of administrative discretion. In the case presented the administration used its discretion to deny the requested exemption relying on a Guidance Document of the EU Commission. The problem is whether this can be seen as deciding on a “case-by-case” basis, since an exemption under Art. 8 (3) a) is pertinent.

## Structure of the Case Study

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- Case law / Guidance Document
- Is the lawsuit well-founded?
- Two approaches to decide the case



An overview of the case law of the CJEU is given here and the German decision on which the case is based.

## Case law ...

- CJEU: „Rubach“ C-344/08 (para. 25)
- CJEU “Nationale Raad (...)” C-219/07 (para. 18 f.)
- CJEU: „Tridon “ C-510/99 (para. 32 ff.)

Case based on

- VG Karlsruhe „Rhino Horn“ - 4 K 1326/13 -

Footnote: (VG = Verwaltungsgericht = Administrative Court of 1<sup>st</sup> Instance)



It is very important to make the audience acquainted with the idea that there might be a EU Guidance Document on the legal topic. Here it is a Guidance document on “export, re-export, import and intra-Union trade of rhinoceros horns” (2016 / C 15/02).

## ”Brand new” EU Guidance Document

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COMMISSION NOTICE  
(2016/C 15/02)

Guidance document:  
export, re-export, import and intra-Union trade of  
rhinoceros horns



This slide speaks for itself.

## Is the lawsuit well-founded?

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To solve the case “lege artis” one has to understand the claim. Does the claimant, who wants to propose rhino horn for sale, necessitate a permit or certificate?

**Understanding the claim:  
What does Mel C want to do?**

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She wants to propose rhino horn for sale (= commercial activity)

**Does this necessitate a permit or certificate?**

Yes, because of the prohibition in Regulation No 338/97.

Its Article 8 (1) establishes the general rule that intra-EU trade of specimens of species listed in Annex A is prohibited.

Rhinoceros species are (almost completely) included in Annex A.



The proper understanding of the scope of derogations or of exemptions is not at all easy. It should be remembered that this is a core question of legal practice and methodology.

## Understanding derogations:

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- Old legal wisdom says:

exceptio est strictissimae interpretationis  
= derogations must be subject to a strict interpretation

- Modern legal science:  
not at all helpful to understand derogations properly
- However, in practice it is still a good thumb rule ...



Subparagraph (c) of Article 8 (3) cannot be pertinent “ratione temporis” because the rhino horn was brought in long ago (1906).

## Derogation under subparagraph (C) of Article 8 (3)?

“ ... were introduced into the Community in compliance with the provisions of this Regulation and are to be used for purposes which are not detrimental to the survival of the species concerned ...”

Our rhino horn was brought in long ago, in 1906.

At least under its wording the derogation does not apply *ratione temporis* to the present case.

However, Mel C may derive a (valid?) argument from the provision:

... an old rhino horn may be not detrimental to the survival of the species concerned ...



Subparagraph (b) of Article 8 (3) can lead to a discussion. Surely the horn was acquired before 3 March 1947, but is it a “worked specimen”? Here it helps to remember that an exemption should be interpreted narrowly. The horn in case is not to be considered a worked specimen since Article 2(w) provides that the alteration should be carried out for “jewellery, adornment, art, utility, or musical instruments”.

## Derogation under subparagraph (b) of Article 8 (3)?

“are worked specimens that were acquired more than 50 years previously”

Worked specimen?

No, not really!

Article 2 (w):  
“significantly altered”



‘cause of the plaque??

The derogation is **not** pertinent,  
although the specimen has been required before 3 March 1947!



Subparagraph (a) of Article 8 (3) is obviously pertinent.

## Derogation under subparagraph (a) of Article 8 (3)?

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“ ... before the provisions relating to species ...  
became applicable to the specimens...”

= **before 4 February 1977** for all rhinoceros species

(= before 1 July 1975 for the white rhinoceros)

**Here: 1906 !**

**The derogation is pertinent!**



The (everlasting) problem of  
**administrative discretion and judicial review**

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Even if the conditions of a derogation are met Article 8(3) does not provide a strict obligation to grant a certificate.

Member States “**may**” (or **may not**) grant a certificate for intra-EU trade.

However, under the rule of law discretion must at least not be used in a “capricious or arbitrary way” (US terminology).  
What are the “legal limits” (German concept) for using discretion?

**That differs from Member State to Member State!**



Slide 12 recalls an approach to review administrative discretion in terms of factual and legal aspects.

## Here is a basic structure of judicial review:

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The use of administrative discretion must be done

1. **in line with the aim** of the regulation
2. considering the relevant **factual aspects**
3. considering the relevant **legal aspects**

(e.g.: EU law, Constitutional law, Human Rights,  
principle of proportionality or non discrimination etc.)



Slide 13 speaks for itself.

## Two approaches to decide the case

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This slide introduces the legal approach of a German Administrative Court (Karlsruhe) in a judgement from 2015. The reasoning shows a good awareness of the current problem.

## Administrative Court Karlsruhe (I)

in its judgment from 28 January 2015 on our case:

- The use of discretion is within legal limits.
- The general refusal to grant derogations for the trading of rhino horn is in line with **the aim of the Regulation No 338/97** which is the effective protection of endangered species.
- It is based on the **uncontested information** concerning the conservation of rhinoceroses and the threats posed by recent increase in poaching and illegal trade.



Furthermore, the German Administrative Court relies on the overall principle of precaution which is to be applied in all environmental matters.

## Administrative Court Karlsruhe (II)

in its judgment from 28 January 2015 on our case

- The public authority did not miss the **relevant legal aspects**.
- The **principle of precaution** which is an important part of the EU environmental law (cf. Article 191 (2) TFEU) justifies administrative action to fight risks for endangered species.
- It is a **plausible risk** that putting rhino horn on the market could lead to more illegal trade and increase poaching.



However: two jurists, three opinions (German saying). There may be another approach to solve the case that may be more convincing. A general refusal to grant exemptions is problematic. A proper use of discretion should be done on a case-by-case basis and should not ignore that the conditions of an exemption (subparagraph (a) of Article 8 para. 3) are obviously met.

My doubts: Is this reasoning convincing?  
Is the use of discretion really flawless?

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- The legislator confers power to the national public authority. When exercising its delegated power, the public authority cannot alter the empowering provision.
- In my understanding Article 8 (3) demands a proper **case by case assessment** conducted by the competent public authority.
- Ergo, a general refusal to grant derogations cannot be seen as a proper use of discretion.
- In the present case it ignores a relevant legal aspect which is that conditions of the first derogation (a) are met.
- However, it does not mean that the certificate cannot be denied  
...



All in all, the proposal here would be to remit the case for a new decision-making. In such a judgment the court has to point out that the exemption in subparagraph (a) of Article 8 (3) has to be taken into account for a proper use of discretion or a proper weighing up of the conflicting interests.

**My proposal for a judgment:  
Remitting the case for a new decision-making:**

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### **Judgment**

**“The contested refusal is quashed and the public authority is obliged to make a new decision on the application of Mel C concerning the requested certificate and to observe the legal opinion of the Court within the new decision-making.”**



Slide 18 speaks for itself.

Thank you  
for your kind attention!

