



LIFE NATURA THEMIS: International Conference in Athens

SESSION II: Focus on Wildlife Trafficking

Saturday November 24, 11:45 - 12:45

Enforcement of EU wildlife protection
and implementation by domestic judges.

Matthias Keller, Presiding Judge, Aachen Administrative Court



Καλή μέρα!

Το όνομά μου είναι ο Matthias.

Χαίρομαι που βρίσκομαι στην Αθήνα.



Wildlife trafficking:

A growing problem worldwide ...

Wildlife trafficking has become one of the world's most profitable **organised crimes** ... profits from such trafficking

at between EUR 8 and EUR 20 billion annually.

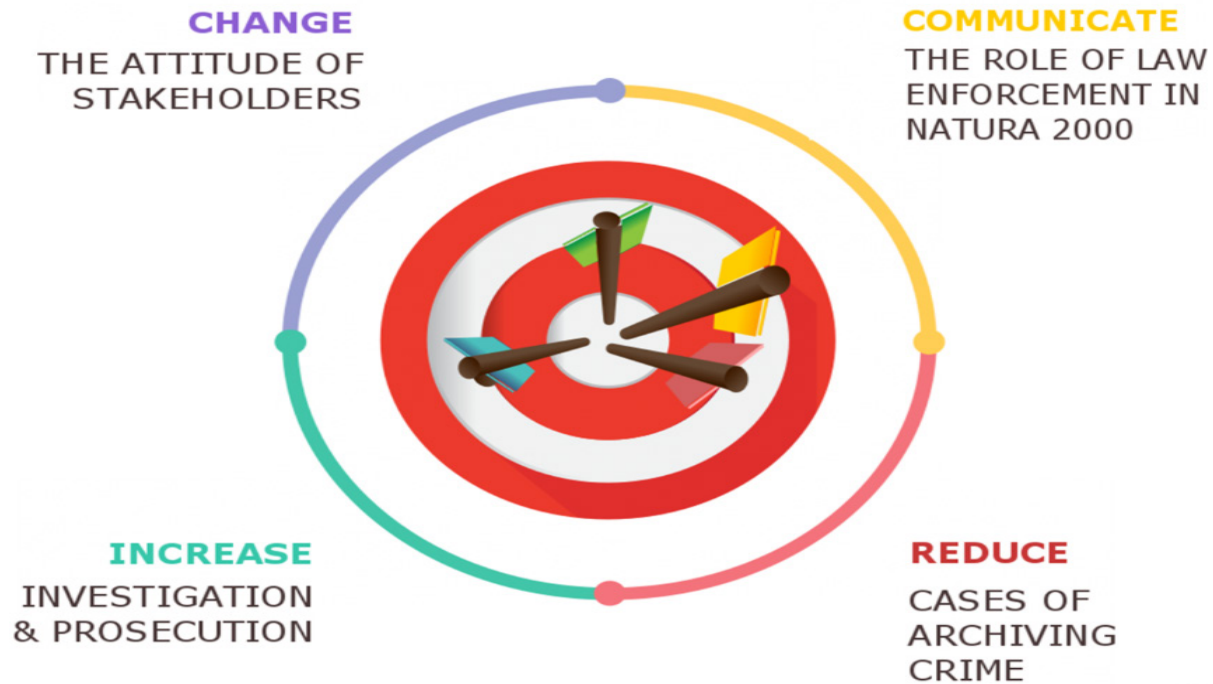
It covers a broad range of protected species, including **elephants and rhinos, corals, pangolins, tigers and great apes ...**

Between 2007 and 2013, rhino poaching increased by 7000% in South Africa, endangering the very survival of this species ...

(cf. EU Action Plan against Wildlife Trafficking, COM(2016) 87 final)



LIFE NATURA THEMIS



What is the role of the judges?



Aristotle on the function of judges ...

(...) when people dispute, they take refuge in the judge;

and to go to the judge is to go to justice;

for the nature of the judge is to be a sort of animate justice (...)

(Nicomachean Ethics, Book V, Chapter 4)



Green Justice

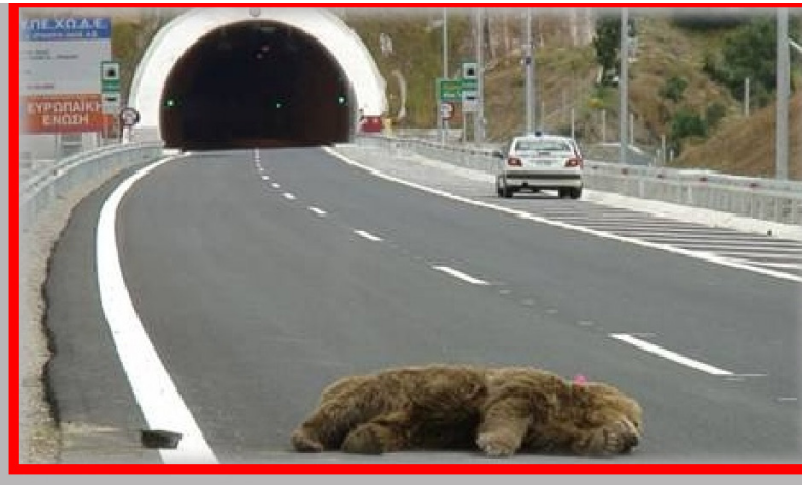


Why is it so **difficult** to grant justice in environmental matters („green justice“)?



Paris 2010- Le penseur CC BY-SA 2.0.Credit:
Daniel Stockman-Flickr: Paris 2010 Day 3-9

In principle, bears cannot go to court ...



If there is no criminal offence involved it is in principle not for the courts to deal with the harm done to nature.

It is up to administration to take action:

One Solution:
Life project Arctos Kastoria
Project- Life09
NAT/GR/000333.

Οδηγείτε ΠΑΝΤΑ Προσεκτικά
Βιότοπος – Πέρασμα Αρκούδας





However, in Greece:

Article 24 of the Constitution provides:

“the protection of natural and cultural environment is an obligation of the State and everyone's right”.

Article 20 of the Constitution stipulates:

“Everyone is entitled to receive legal protection by the courts and can develop his views on rights or interests, as provided by law.”

This is a perfect constitutional basis for „green justice“.



Complexity: Cases of illicit wildlife trafficking have an international, European and national legal context:



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We have (at least) three layers of law ... (=juggling with three balls)

- **CITES (Washington Convention)**
(Appendix I,II,III)
- **Council Regulation (EC) No 338/97**
= Basic Regulation (Annex A,B,C,D)

others: Implementing Regulation
Permit Regulation
Suspension Regulation
- **National law**



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The challenge for green justice :

The dark and the bright side of the legal pyramid

**Awareness / Understanding / Interpretation
by the National Judge or Prosecutor**

Summum ius summa iniuria



Conventions (Cites etc.)

Complexity, Inconsistancies



EU law

Lack of inspection

EU Soft law (guidance)

Non enforcement



**Domestic law
(transposed Directives)**

Corruption



Local law (permits)

Help!



[Help! \(The Beatles album - cover art\).jpg](#) (300 × 300 pixels, file size: 56 KB, MIME type: image/jpeg)
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Toolbox of the National Judge

(confronted with the « dark side » of the pyramid)



- Preliminary reference (Article 267 TFEU)
- Supremacy of EU law
- Consistent interpretation



Reducing complexity by understanding legal concepts (I)



Administrative Law

CITES and the Council Regulation (EC) No 338/97 follow a classical **administrative concept of regulation**, where you may need (import, export, re-export)

„permits / certificates /notifications“

(cf. Art. 4,5,10 Regulation No 338/97)



Reduce complexity
by understanding the legal concepts (II)



Criminal Law

CITES and the Council Regulation (EC) No 338/97
provide for that the Parties / Member States
„shall take“ appropriate measures to enforce
the provisions and

impose (criminal) sanctions.

(cf. Art. VIII CITES / Art. 16 Reg. No 338/97)



Administrative and/or criminal measures

Under Council Regulation (EC) No 338/97 the following measures are possible:

- refusal to grant a CITES document for import, export etc.
- retaining a specimen
- confiscation of a specimen



Administrative Law:

Binding force of a CITES document

A CITES document (for import or export)
is an administrative decision.

Valid administrative decisions have a binding force
(« quasi judgment »).

The concerned activity is deemed to be legal.

As long as a valid CITES document is not quashed
there is no room for (repressive) criminal sanctions at all.



Administrative Law:

The benefits of administrative measures

- Avoiding dangers by a permitting procedure:
„better be save (in advance)
than sorry (and punish afterwards)“
- An administrative order (prohibition) directly aims
at a change of the dangerous or illegal behaviour
- The enforcement of administrative orders is flexible
(immediate enforcement / amicable settlement etc.)
- Courts: The administrative judge may be more specialised
in environmental law than the ordinary judge



What German public veterinarians think about the German judiciary acting in the field



In her 2015 analysis Angela Bergschmidt (Thünen Institut, Braunschweig, Germany) tried to identify problems that occur when violations of animal legislation are put to court.

Public veterinarians answered to her.

Here are some of the critical answers concerning the Criminal Justice:

“High number of criminal proceedings that are terminated without any conviction”

“Very long and cumbersome procedure”

“Punishments are too mild”

“Prosecutors and judges seem to have little interest in animal welfare”

“Lack of knowledge of specific animal protection law”

“not enough staff / overload of work in the judiciary”

Interestingly enough for me it was said that the administrative judge showed interest in the matter but seemed to be “weltfremd” (out of this world)!



The Court Case



Case: „Precious Old Rhino Horn“ (I)



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Melanie Claimant (Mel C) inherited a rhino horn from her deceased father Walter.

The rhino horn has been in the family since the late 19th century.

At the time grandfather Fritz was in South-West Africa. In 1906 he brought the rhino horn to Germany as a hunting trophy. The rhino horn is mounted on a wooden plaque.

It is 42 centimeters long with a weight of 1 kilo.

Case: „Precious Old Rhino Horn“ (II)



www.alamy.com - CYP81W

To be honest, Mel C hates it and wants to sell this relic of another era as fast as possible.

She went to an auction house in Heidelberg and was surprised to learn about the market price (“15.000 Euro or even more”).

However, the auction house refused to sell the horn for her without a “proper certificate”.

Mel C filed an application to obtain a certificate for “intra-Union trade of rhinoceros horns”, which was denied by the administration...

The reasoning given by the administration (I):

- Intra-EU trade of Annex A specimens is strictly prohibited,

cf. Article 8 (1) of Council Regulation (EC) No 338/97.

- In former years derogations from this prohibition were accepted if the conditions listed in Article 8 (3) subparagraphs (a) to (h) of Reg. No. 338/97 were met.



The reasoning given by the administration (II):

However, from now on derogations will not be granted anymore.

This change of administrative practice reflects the discretion which is conferred to the Member States by Article 8 of Reg. No. 338/97. The new line of using this discretion is based on a recent Guidance Document of the EU Commission on Rhinos saying:

“Illicit trafficking of rhino products (especially horns) is one of the main threats for the survival of the species (...).

Between January and April 2014, 294 rhinos have been illegally killed in South Africa.”



Structure of the Case Study

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



Law: Art 8 of the (Basic) Regulation No 338/97

- Article 8
 - 1. The purchase, offer to purchase (...) of specimens of the species listed in Annex A shall be prohibited.
(...)
 - 3. ... **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:



Exemptions: under Art. 8 (3) of R. 338/97

... where 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;



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 1st Instance)



EU Guidance Document

COMMISSION NOTICE (2016/C 15/02)

Guidance document:

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



Understanding the claim:

What does Mel C want to do?

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.



Understanding derogations:

- 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 ...



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 ...



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!

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

“ ... 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

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!



Here is a basic structure of judicial review:

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.)



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 Reg No 338/97** which is the effective protection of endangered species.
- It is based on the **uncontested informations** concerning the conservation of rhinoceroses and the threats posed by recent increase in poaching and illegal trade.



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.



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

- 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 ...



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

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.”



Ευχαριστώ πολύ

