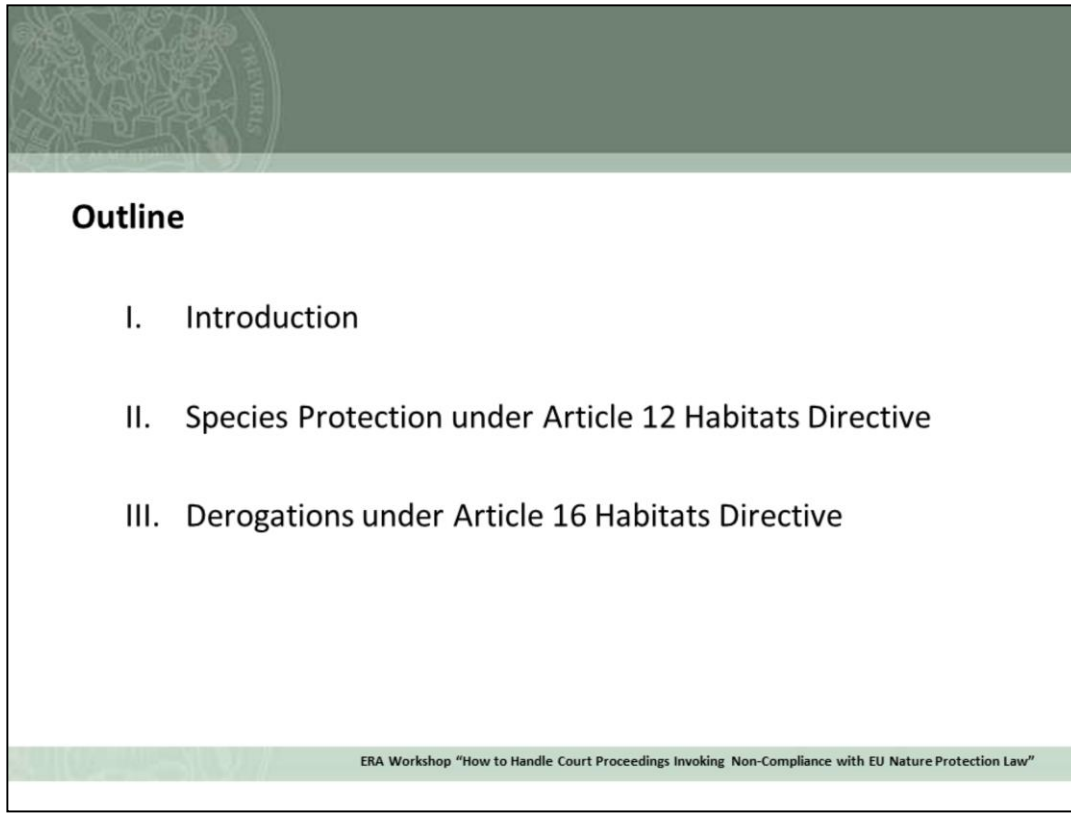
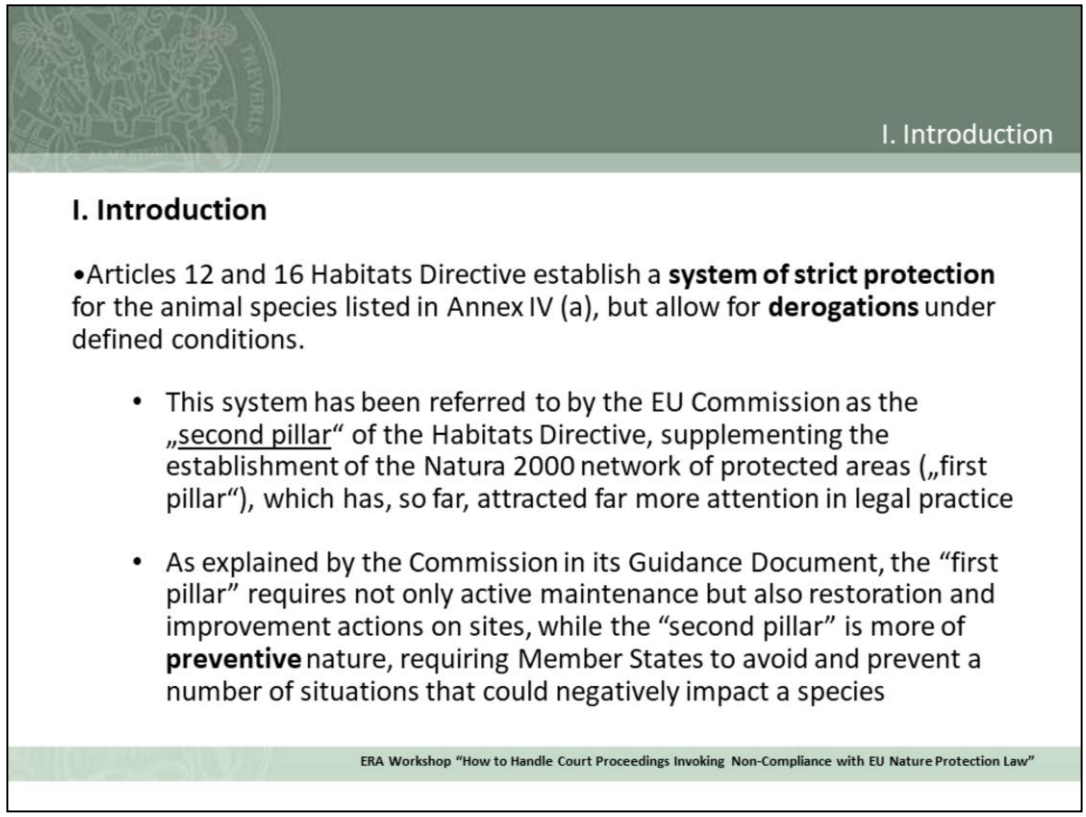
Species Protection under the Habitats Directive

Prof. Dr. Alexander Proelss (Trier University)



The presentation focuses on two central issues in relation to the regime of species protection under the EU Habitats Directive, namely the central provision prescribing obligations of the EU Member States concerning species protection (Article 12 Habitats Directive) and the possibilities to derogate from these obligations accepted under Article 16 Habitats Directive.

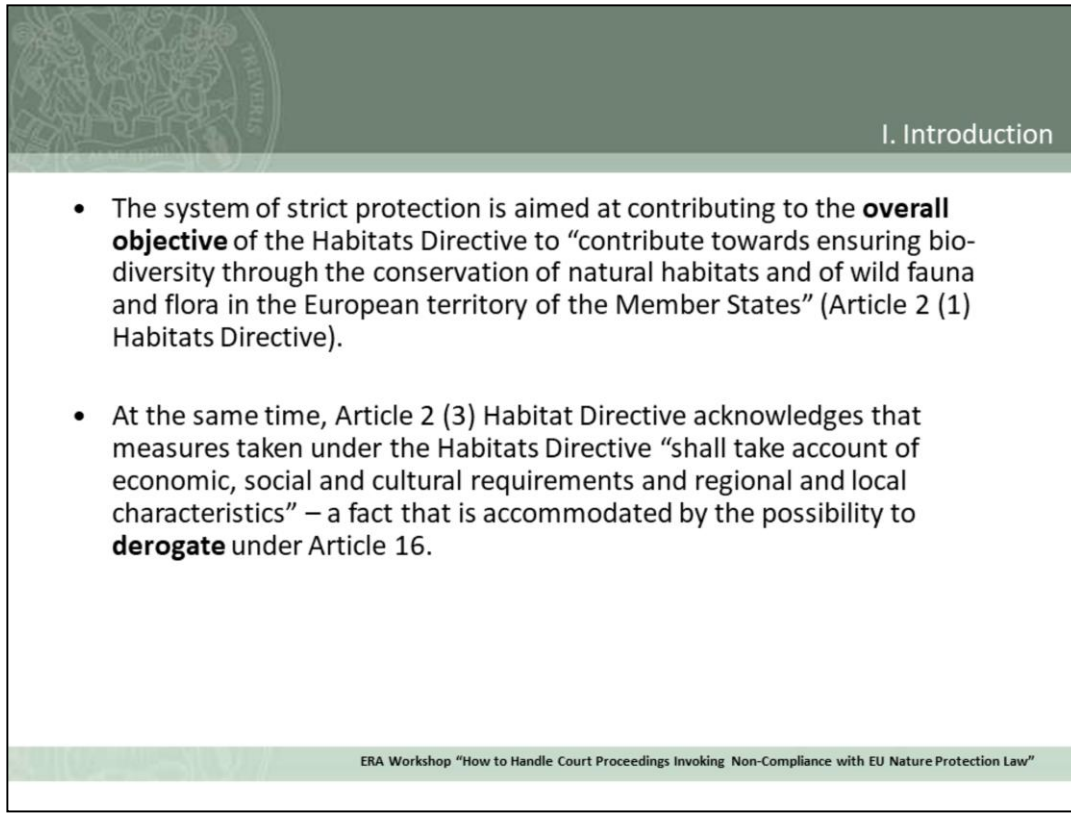


It is important to note that it is the objective of the Habitats Directive to establish a system of strict protection for the animals species listed in Annex IV (a) of the Directive. This implies that the obligations codified in Article 12 Habitats Directive ought to be interpreted and applied in a strict manner. Annex IV (a) lists animal species that are of Union interest and in need of protection. Article 12 Habitats Directive is not applicable to species not listed in the Annex concerned. In contrast, Article 16 Habitats Directive also applies to plant species listed in Annex IV (b).

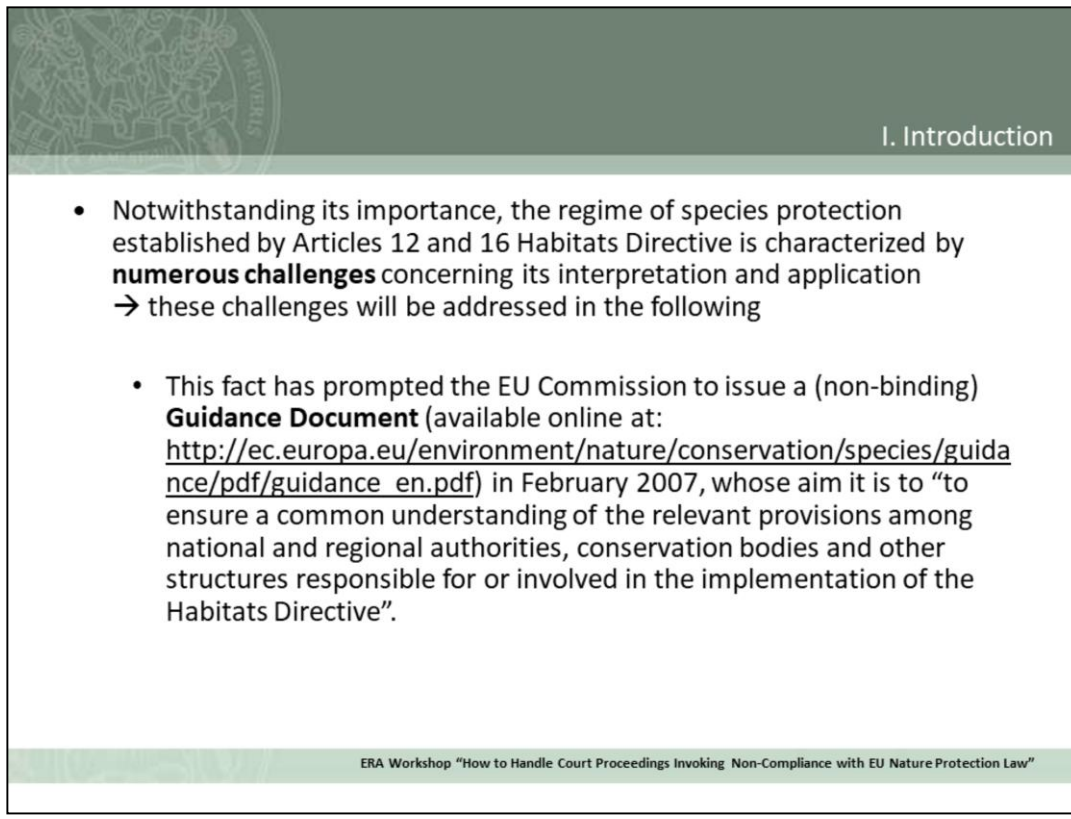
The scope of the Habitats Directive is not limited to the regulation of species protection. Rather, the establishment of the Natura 2000 network of protected areas under Articles 3 et seq., addressing the conservation of natural habitats and habitats of species, constitutes its “first pillar”. Together with the regime of species protection (“second pillar”), the Habitats Directive establishes a comprehensive regime of nature protection.

The guidance document referred to on this slide is available online at http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf. It was issued by the EU Commission in February 2007. It is not legally binding by itself, but taking into account that it is the task of the Commission to “ensure the application of the Treaties, and of measures adopted by the EU institutions pursuant to them” (Article 17 para. 1 of the Treaty on the European Union), the Member States are well advised to carefully take into account the position of the Commission concerning

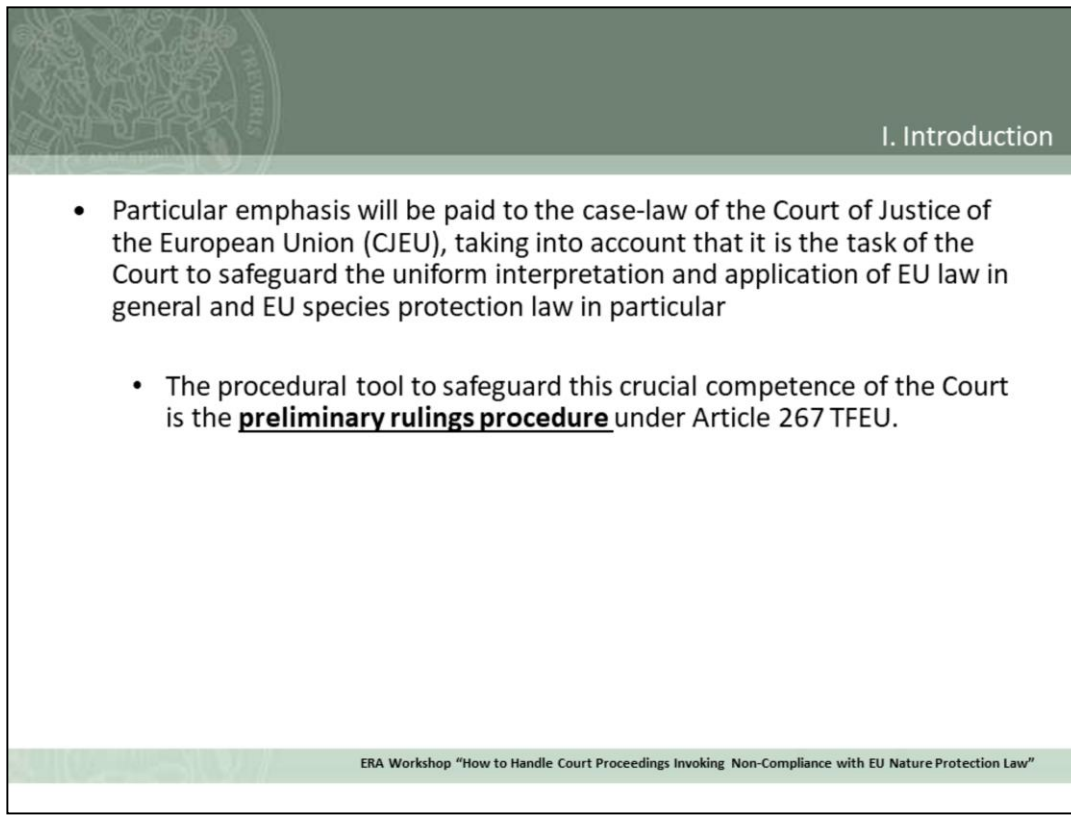
the interpretation of Articles 12 and 16 Habitats Directive that is embodied in the Guidance Document. The Commission is presently in the process of reviewing and amending the existing Guidance Document, but to this day no amended version has been published.



Notwithstanding the comparatively strict requirements in respect of nature protection that are codified in the Habitats Directive, the Directive itself acknowledges that nature protection cannot be allocated absolute priority over colliding values such as economic and social development. Thus, Article 2 para. 3 Habitats Directive states that measures taken under the Habitats Directive "shall take account of economic, social and cultural requirements and regional and local characteristics". The possibility to derogate under Article 16 Habitats Directive constitutes the tool to balance the needs of nature protection on the one hand and potentially colliding values and interests on the other.

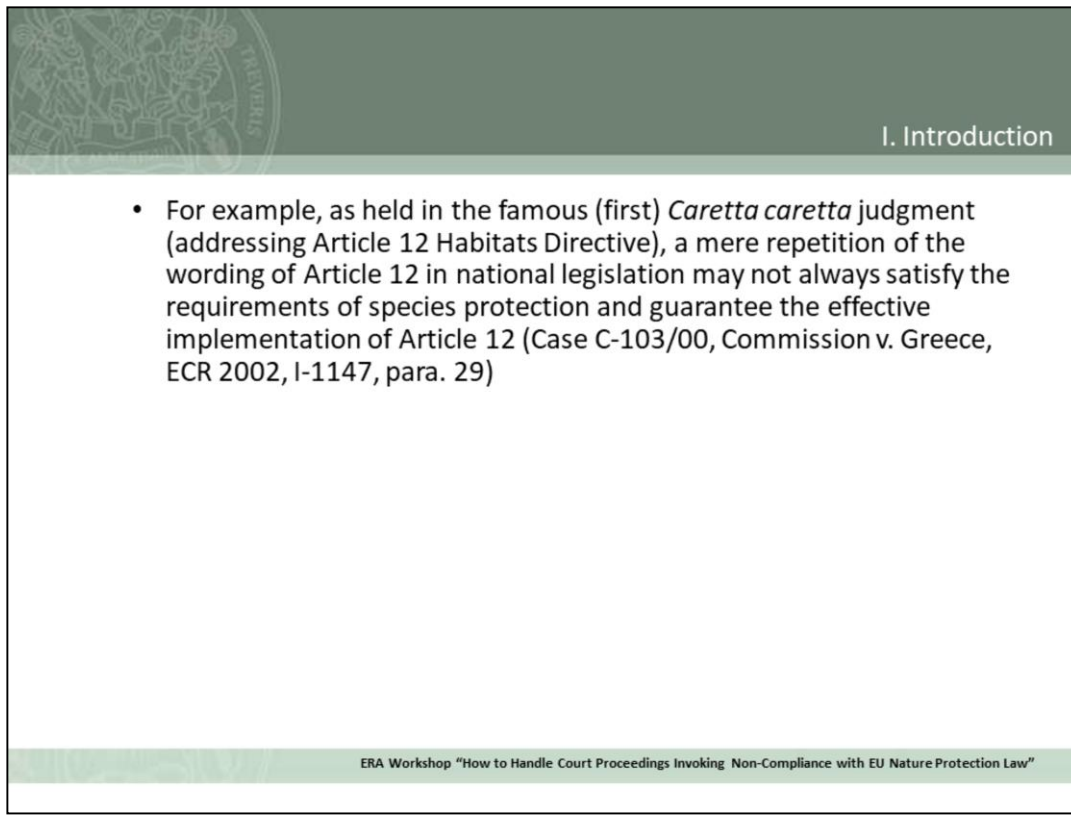


Articles 12 and 16 Habitats Directive contain numerous vague legal terms and concepts – a fact that sometimes impedes their proper implementation within the national legal systems of the Member States. The Guidance Document of the Commission thus provides interpretative aids for judges, advocates and representatives of national authorities, i.e., those that have to apply the requirements of the Habitats Directive in legal practice.

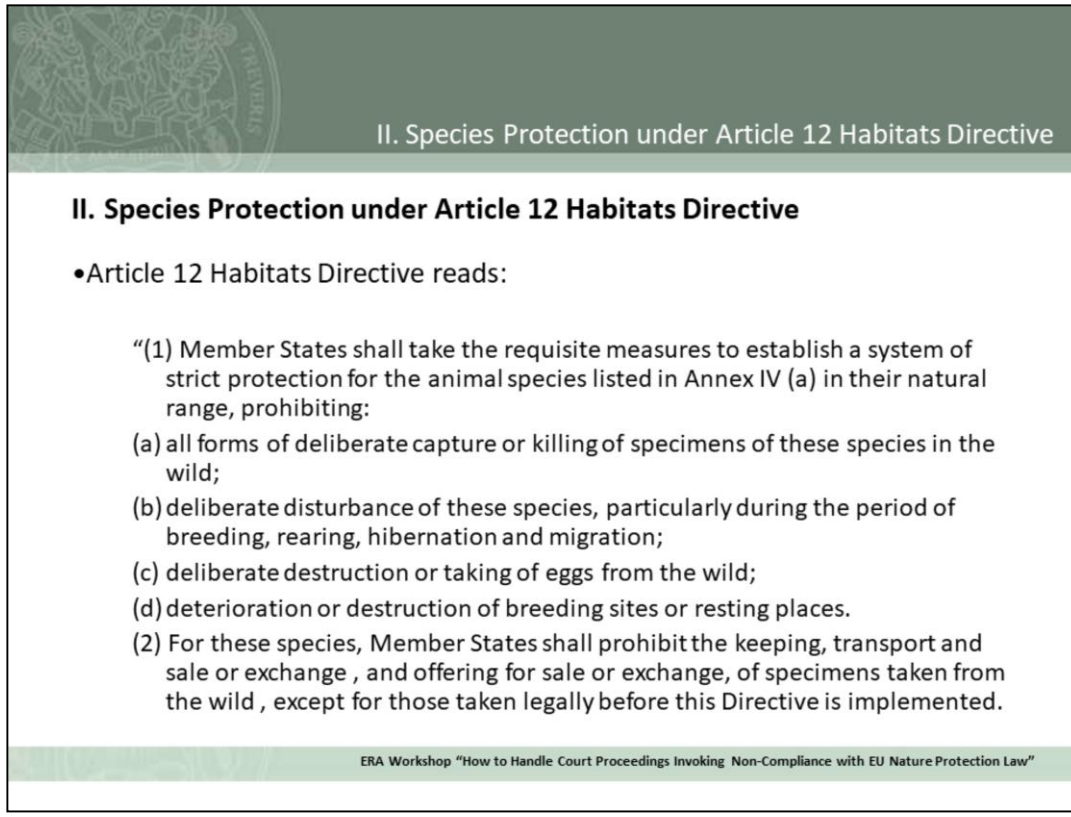


As usual in the EU law context, the case-law of the Court of Justice of the EU (CJEU) is of utmost importance in relation to the interpretation of EU law. The Court has adjudicated on the Habitats Directive, including the regime of species protection under Article 12, at numerous occasions. By referring cases on the interpretation of EU law to the CJEU, national courts contribute to the crucial objective that EU law is uniformly interpreted and applied in all EU Member States.

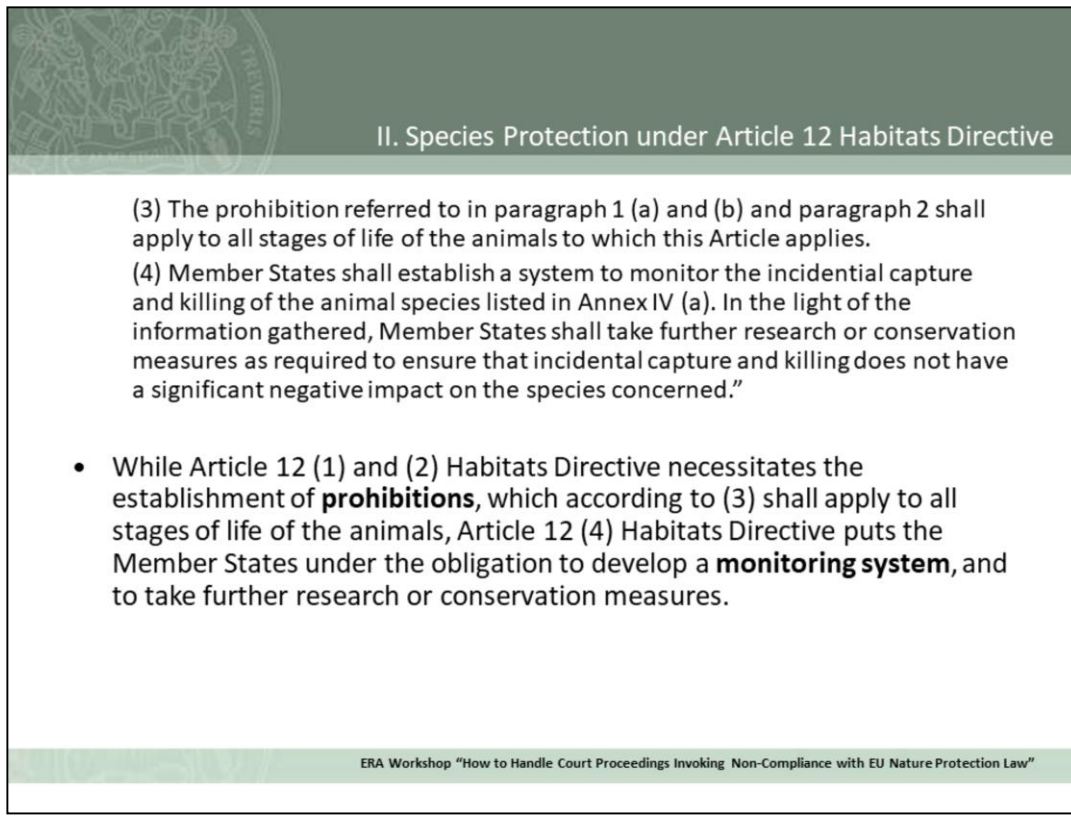
According to Article 288 of the Treaty for the Functioning of the European Union (TFEU), "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Thus, the Habitats Directive is not directly applicable but must be transposed into national law by all EU Member States. This slides refers to case-law of the CJEU addressing the requirements that ought to be fulfilled when implementing Directives into national law. National laws by which the Habitats Directive has been implemented must, again, be interpreted applied in line with the provisions of the Directive itself. This is a consequence arising from the principle of sincere cooperation codified in Article 4 para. 3 of the Treaty on the European Union (TEU).



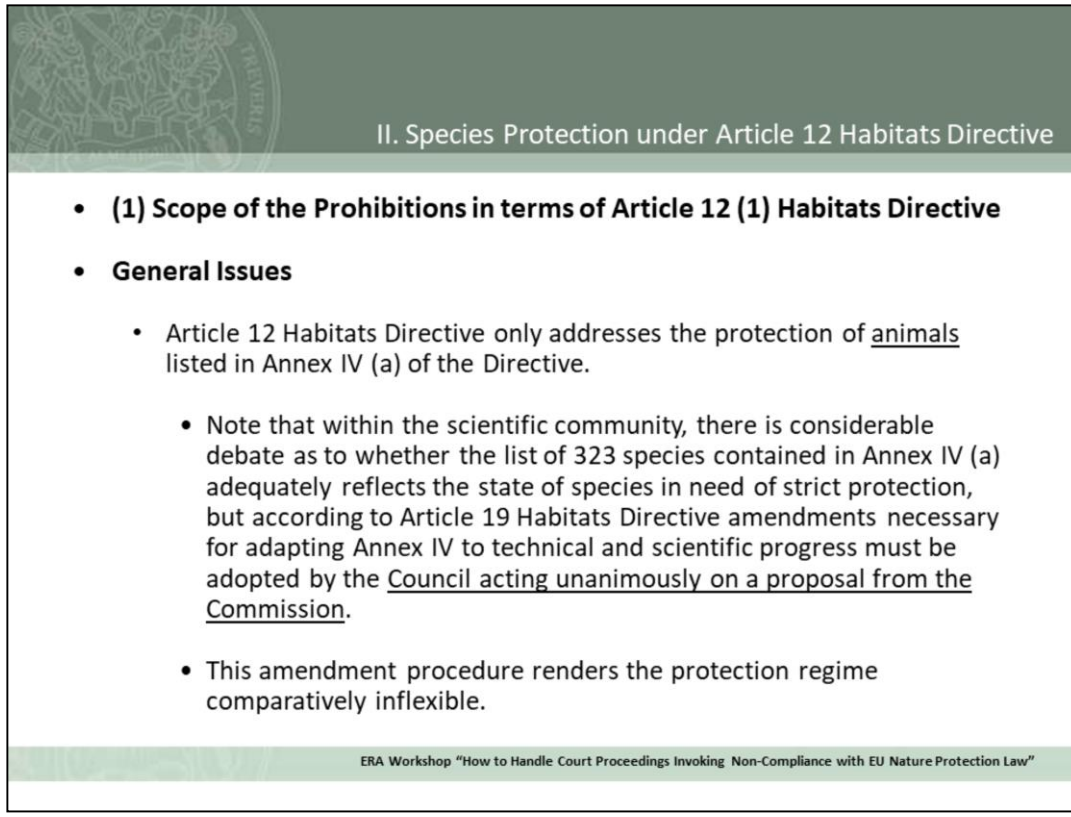
The slide refers to the Caretta caretta judgment of the CJEU,m in which the Court emphasized that it is not possible to speak of proper implementation of the provisions of a Directive if national legislation merely repeats the wording of the Directive concerned.



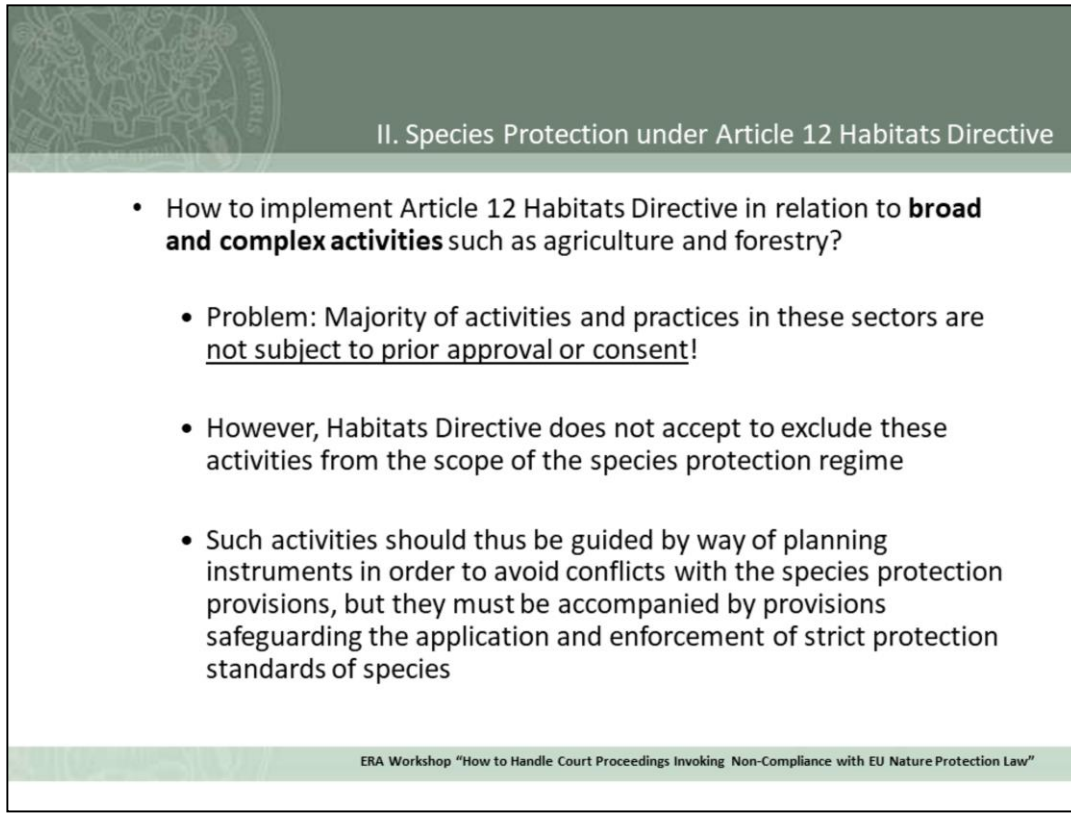
The slide contains the wording of the first part of Article 12 of the Habitats Directive.



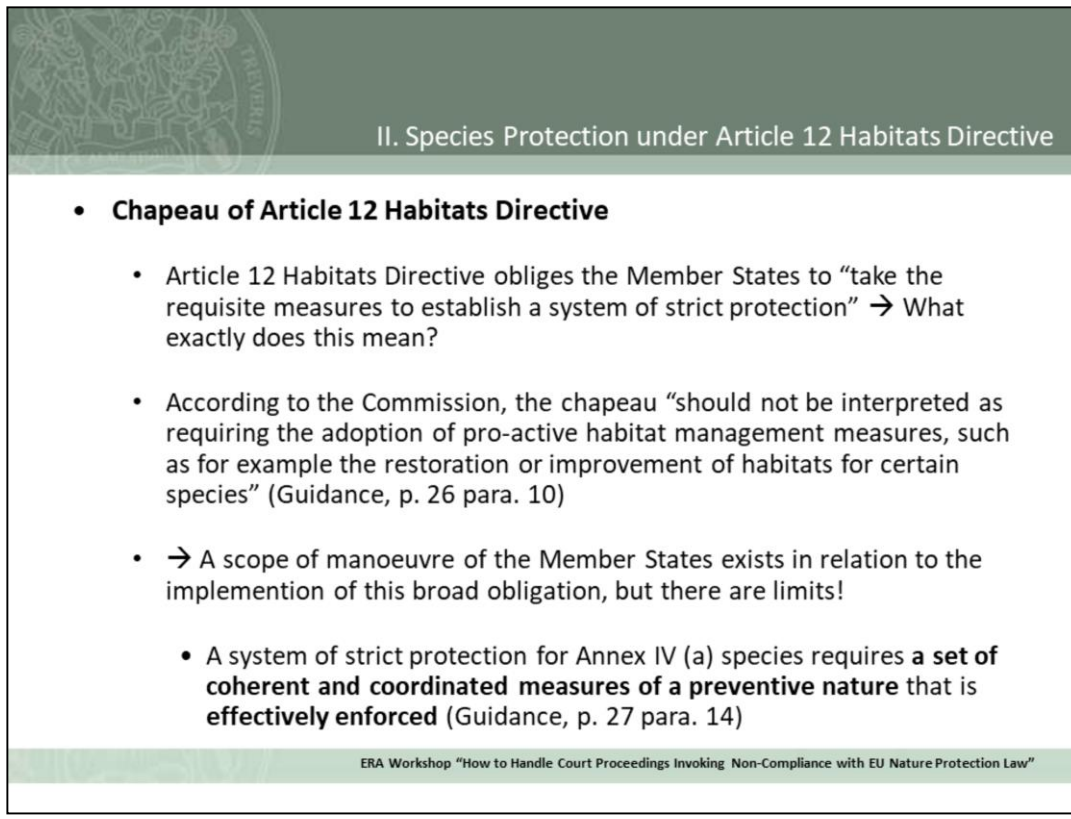
The slide contains the wording of the second part of Article 12 of the Habitats Directive and summarizes the systematic structure of this provision.



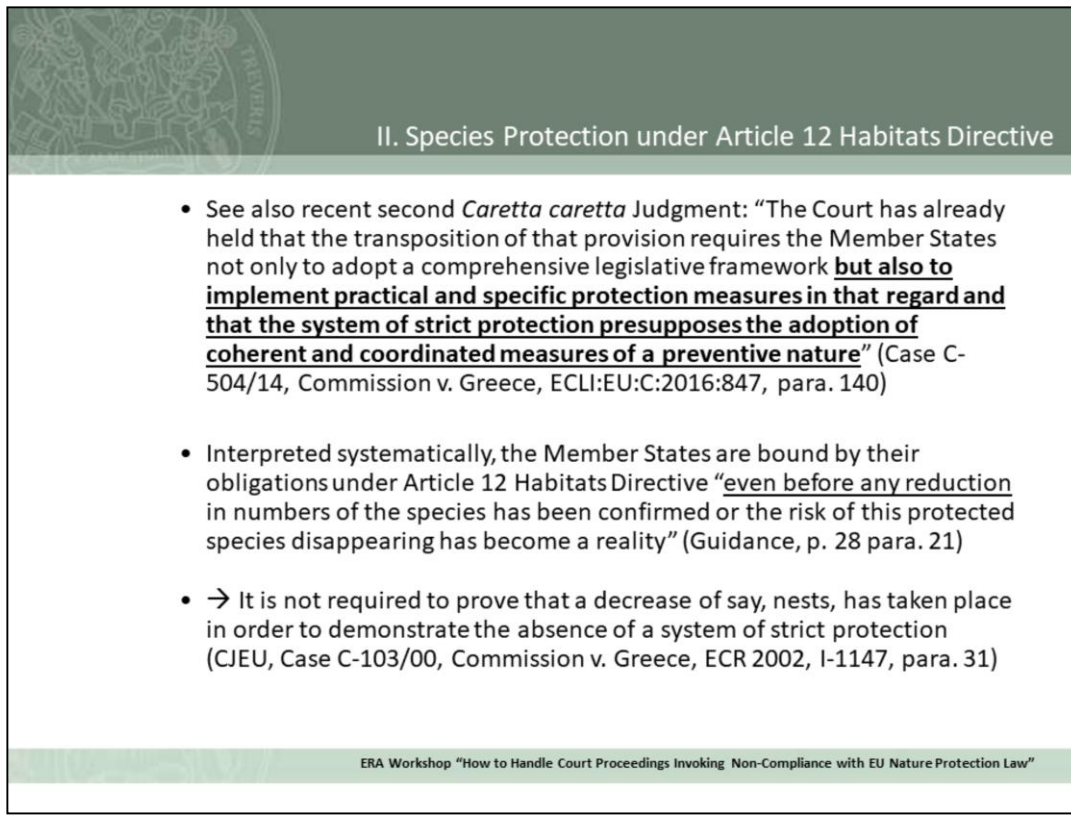
This slide starts to address general issues concerning the interpretation and application of Article 12 of the Habitats Directive. Its content is self-explanatory.



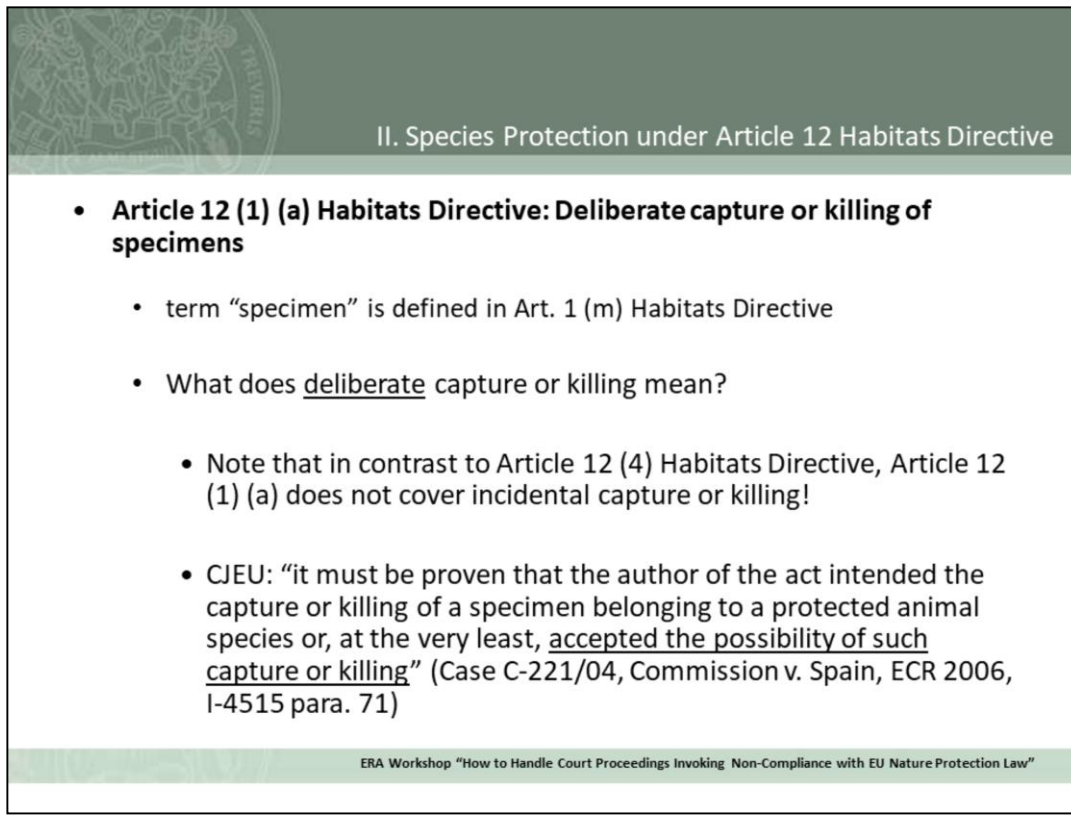
Where an activity can only be undertaken subject to prior authorization by the State (e.g., construction projects), the legal requirements of Article 12 of the Habitats Directive can easily be implemented in the context of the authorization procedure. In contrast, the proper and effective implementation of Article 12 of the Habitats Directive is particularly difficult in respect of activities which are not subject to a prior approval or consent (e.g. agriculture, forestry). In such situations, the requirements of species protection should be taken into account in the context of the application of broader administrative tools such as spatial planning. This is particularly important in light of the fact that Article 12 of the Habitats Directive does not accept any exclusion of certain activities from its scope.



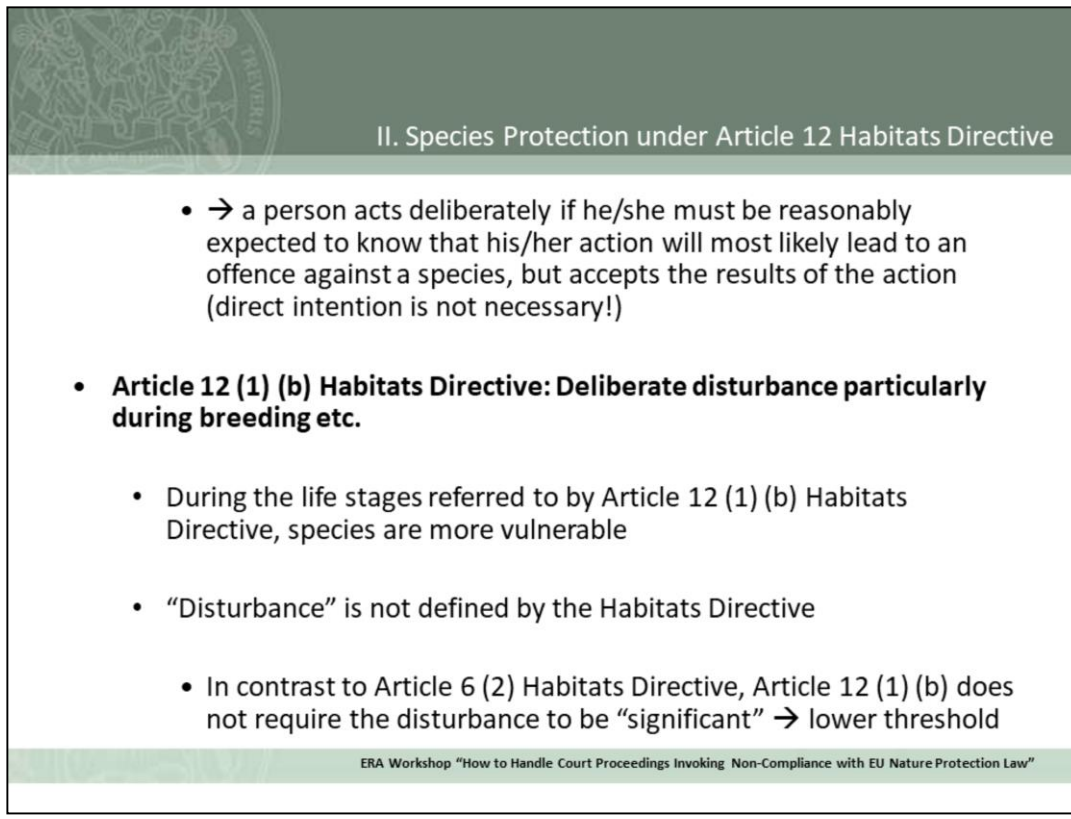
This slide and the following slides are dedicated to the meaning, or interpretation respectively, of the "chapeau" of Article 12 of the Habitats Directive. "Chapeau" is a term of art referring to the introductory text appearing in a legal provision, often defining its principles, objectives, and background. Reference is made on the slides to the Guidance Document of the EU Commission as well as to the pertinent case-law of the CJEU. It is important to note that the scope of discretion of the Member States in relation to the taking of the requisite measures is not unlimited. Rather, when implementing the individual elements of Article 12 of the Habitats Directive, the Member States must always take into account the objectives of the regime of species protection in particular and of the Habitats Directive in general.



This slide serves to substantiate the elements of the chapeau of Article 12 of the Habitats Directive by referring to the case-law of the CJEU as well as to the Guidance Document.



This slide addresses the meaning of the elements codified in Article 12 para. 1 lit. a of the Habitats Directive. The CJEU held that it is only possible to speak of deliberate capture or killing if it is proven that proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.



This and the next slide serve to explain the meaning of the elements contained in Article 12 para. 1 lit. b Habitats Directive. Particular problems in the application of this provision arise from the fact that the Habitats Directive does not contain any definition of the term "disturbance". In light of the objectives of Article 12 of the Habitats Directive, however, it is clear that the act concerned need not directly affect the physical integrity of a species but may include indirect negative effects. That said, there must at least be a likeliness of a certain negative impact.

II. Species Protection under Article 12 Habitats Directive

- Disturbance (e.g. by noise or light) does not need to directly affect the physical integrity of a species but may include indirect negative effects, but **likeliness of a certain negative impact** must be involved
  - See Guidance, p. 38 para. 39: "sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under Article 12".
- Whether or not a disturbance is given can ultimately only be assessed on a case-by-case basis, taking into account the specificities of the affected species
- Note that disturbance must be "deliberate"!

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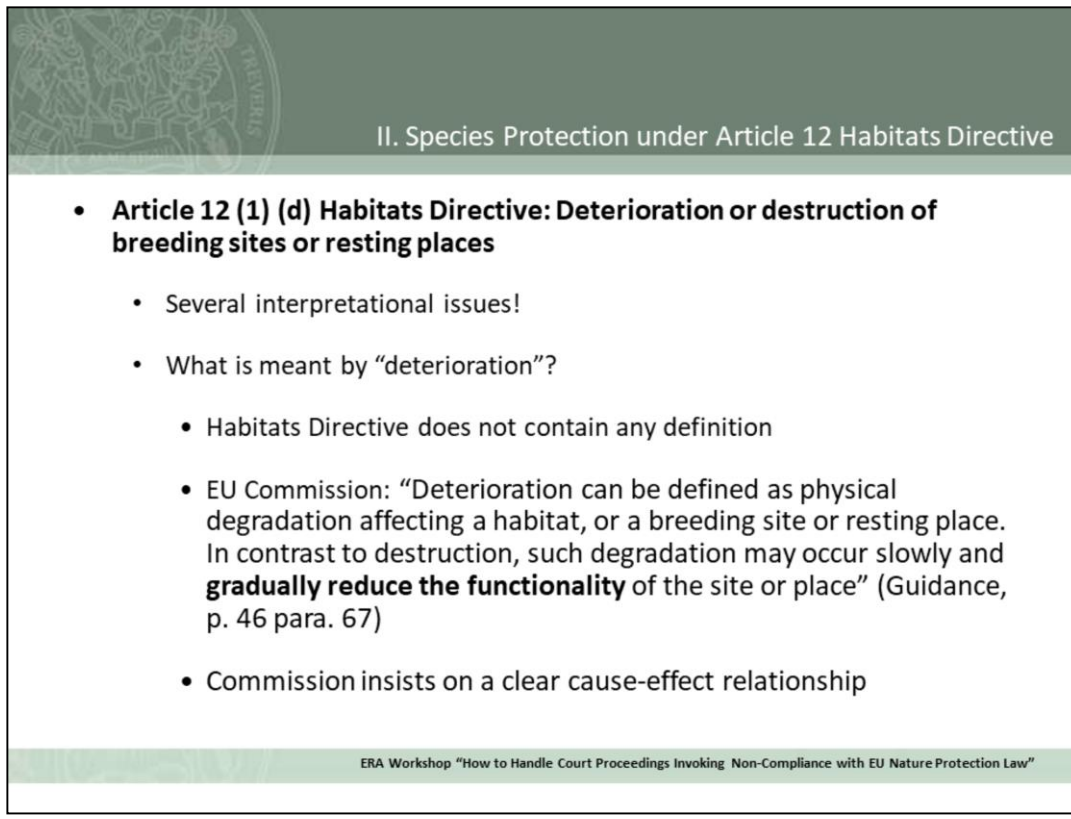

This and the following slides are dedicated to the most complicated element of Article 12 of the Habitats Directive, namely para. 1 lit. d. They serve to substantiate the meaning of the term "deterioration", to address the issue of how to identify breeding sites and resting places, and to answer the question whether it is possible to comply with Article 12 para. 1 lit. d of the Habitats Directive (without the need to derogate from it under Article 16) by taking measures that aim at ensuring the continued ecological functionality of a breeding site or resting place.

II. Species Protection under Article 12 Habitats Directive

- What is the consequence of the fact that Article 12 (1) (d) Habitats Directive does **not require** the deterioration or destruction to be **deliberate**?
  - CJEU: "By not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding sites or resting places increased protection against acts causing their deterioration or destruction" (Case C-98/03, Commission v. Germany, ECR 2006, I-53 para. 55)
  - → non-deliberate acts are included (e.g. construction activities etc.), but proactive habitat management measures are not required

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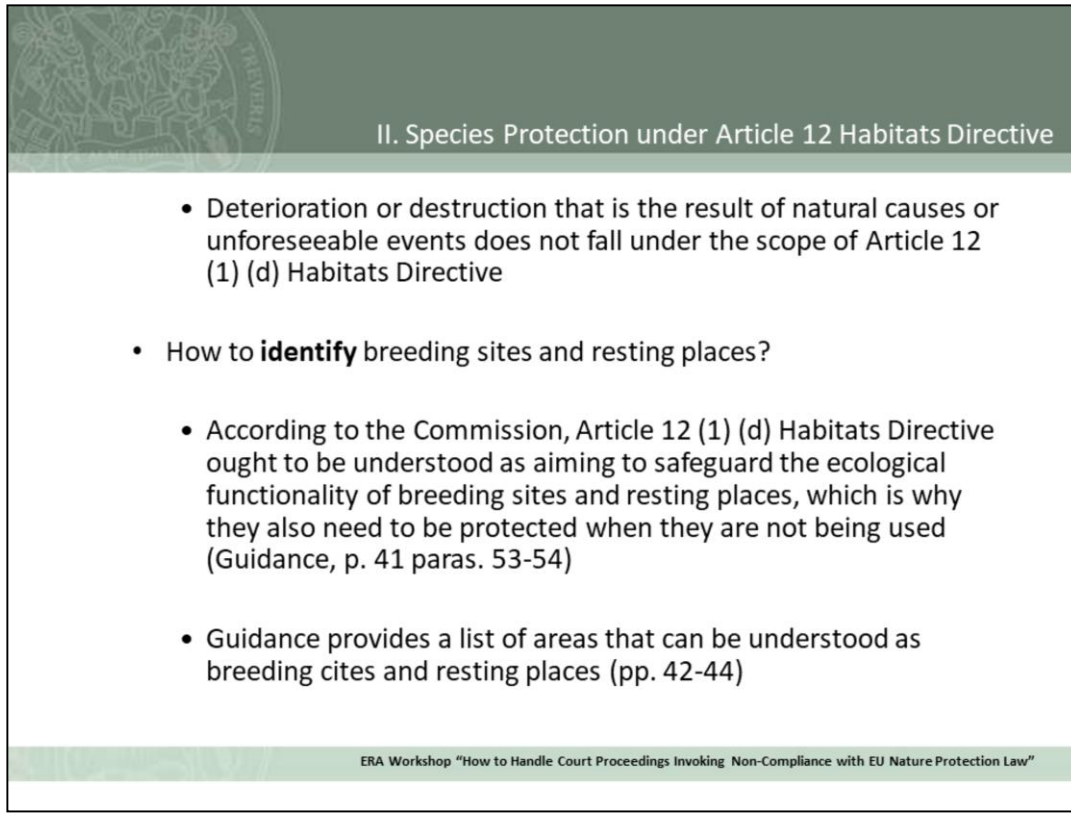

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II. Species Protection under Article 12 Habitats Directive

- Should breeding sites and resting places **be interpreted narrowly or broadly**?
  - E.g., is it the single tree or the entire part of the woodland with trees inhabited by a species that must be protected?
  - Commission distinguishes between species with relatively small home ranges on the one hand and wide-ranging species on the other (Guidance, p. 45 paras. 62-65)
  - In any event, it must be possible to delimit the area concerned, otherwise implementation of Article 12 Habitats Directive would be impossible.

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II. Species Protection under Article 12 Habitats Directive

- Is it possible to comply with Article 12 (1) (d) Habitats Directive (without the need to derogate from it under Article 16) by taking **measures** that aim at ensuring the **continued ecological functionality** of a breeding site or resting place?
  - Note that such measures must be distinguished from **compensatory measures** that aim to compensate for or offset specific negative effects on a species, and which by definition imply a deterioration or destruction of a breeding site or resting place
  - Such measures (ensuring continued ecological functionality) can be in conformity with Article 12 (1) (d) Habitats Directive, provided that:
    - the ecological functionality of the site is maintained or even improved
    - there is a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction.

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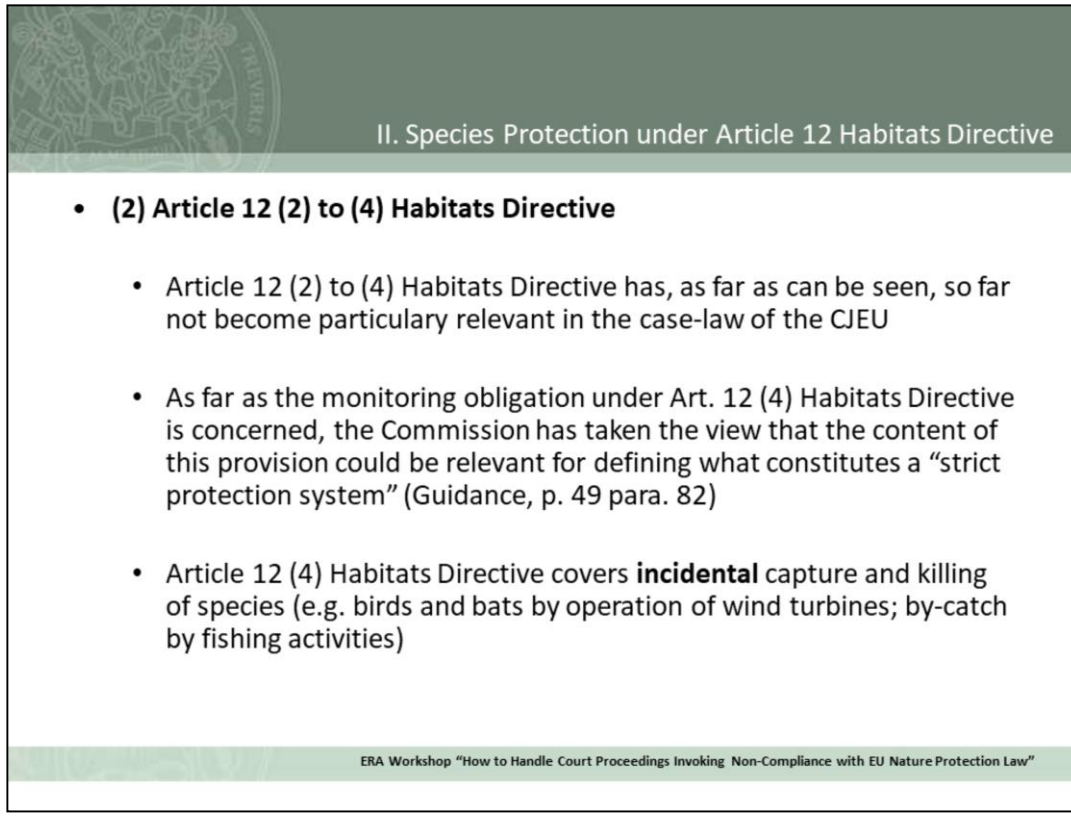
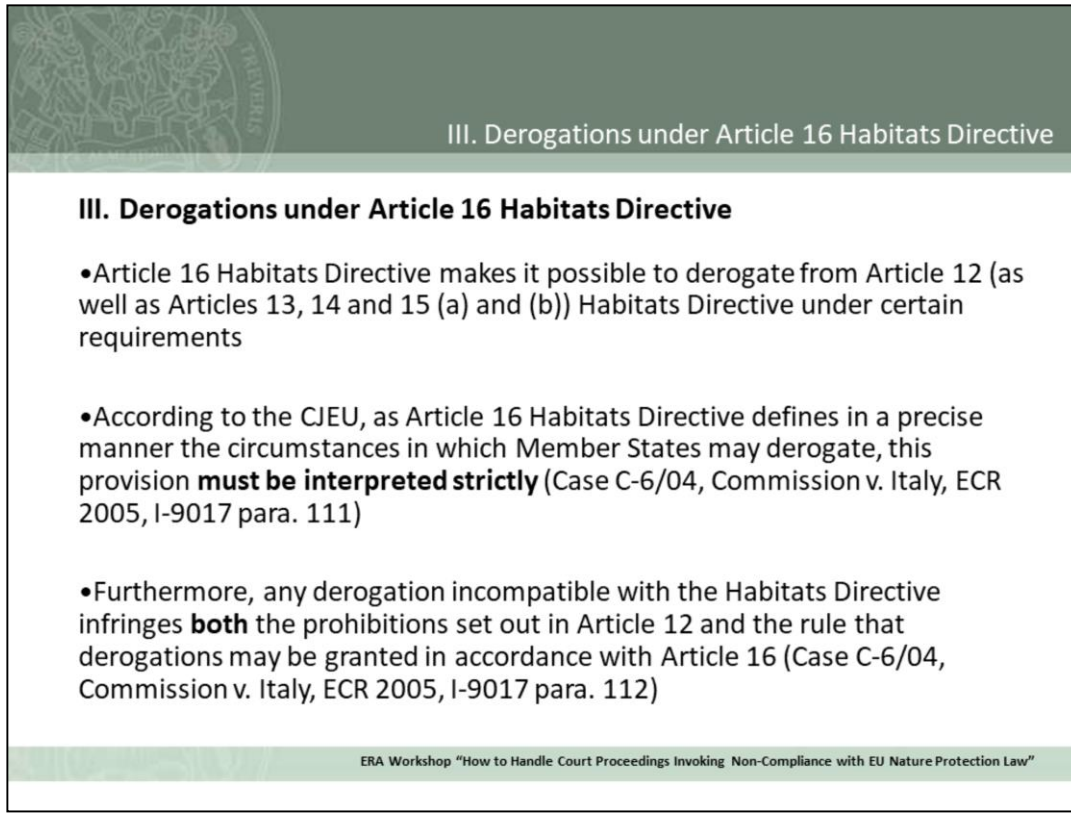
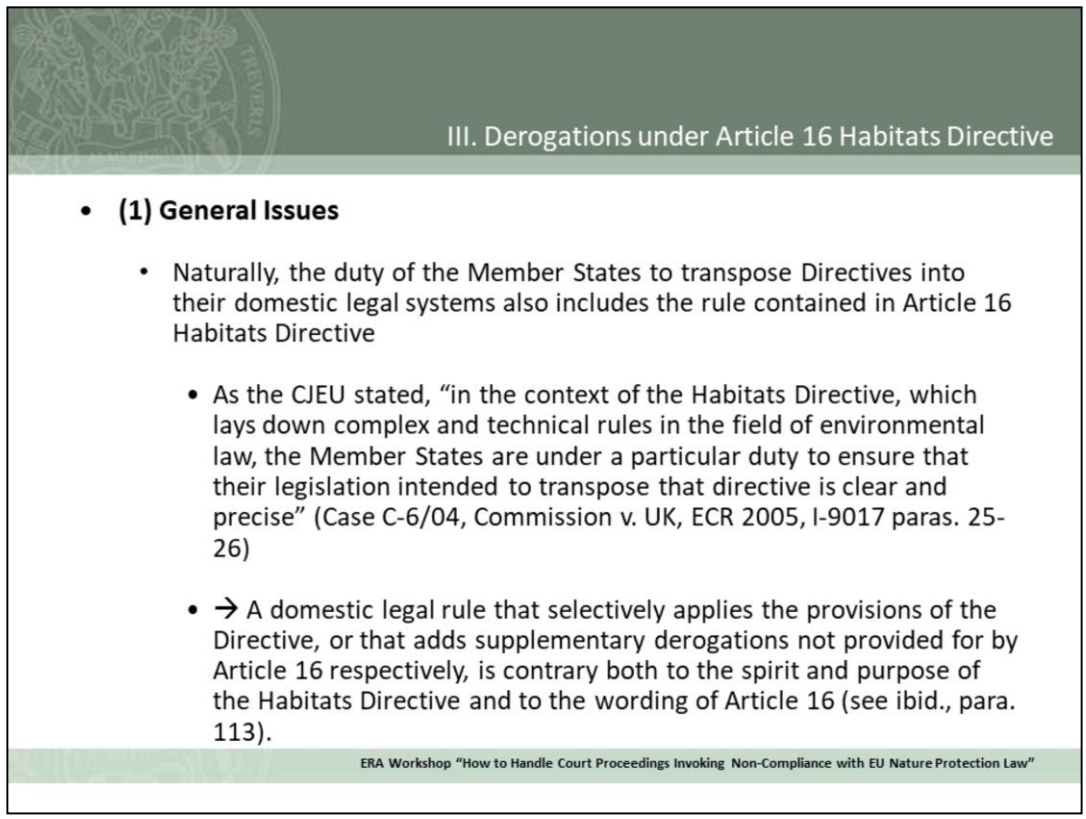


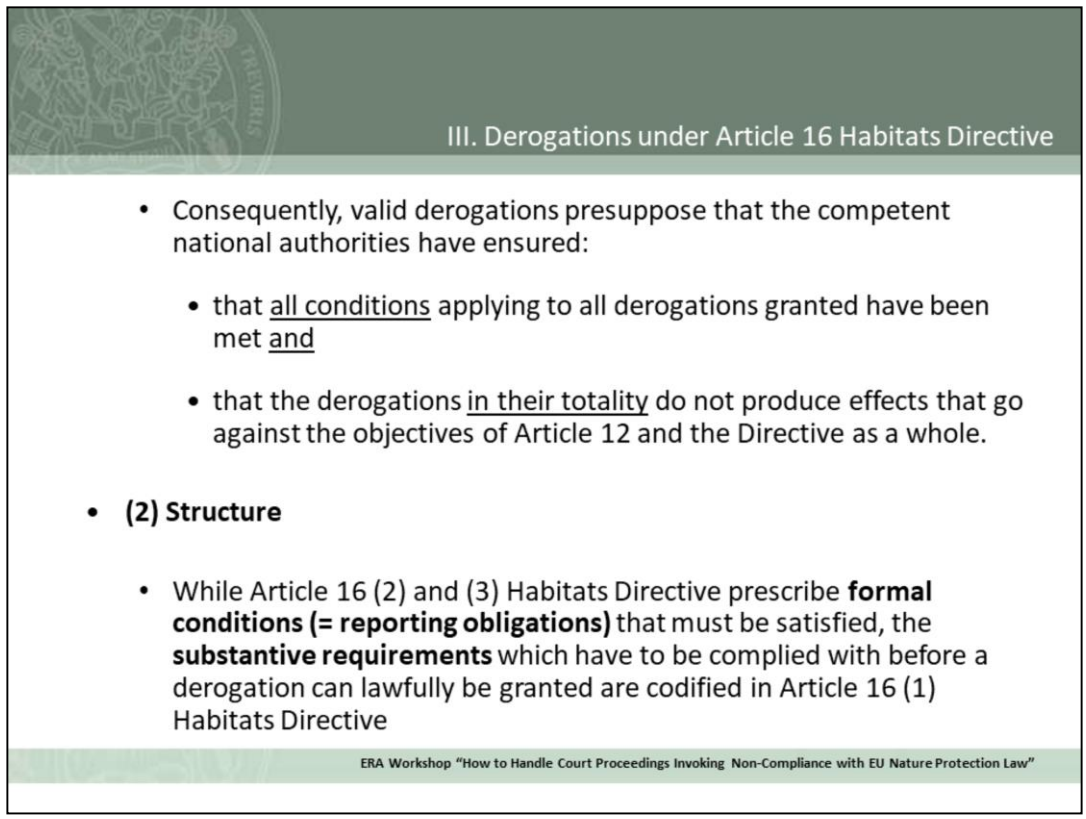
Paras. 2 to 4 of Article 12 of the Habitats Directive have so far not become particularly relevant in legal practice. The Commission has taken the view in the Guidance Document that the content of Article 12 para. 4 (which, in contrast to Article 12 para. 1 lit. a, covers incidental capture and killing of species) could be relevant for defining what constitutes a "strict protection system".



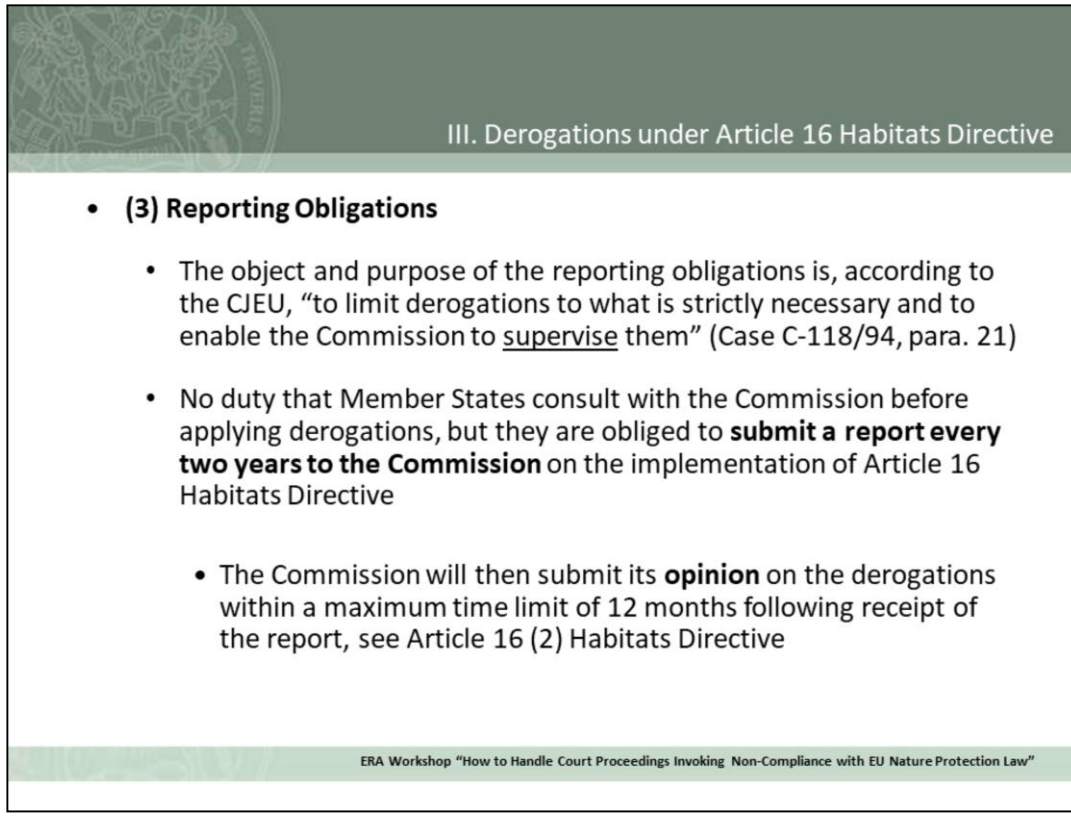
The following slides are dedicared to Article 16 of the Habitats Directive, which governs the legal requirements under which derogations from, inter alia, Article 12 of the Habitats Directive can be justified. The CJEU held that the elements of this provision must be interpreted and applied in a strict manner. Derogations not compatible with Article 16 of the Habitats Directive also automatically violate Article 12 of the Habitats Directive.



This slide serves to clarify that Article 16 of the Habitats Directive ought to be properly transposed into domestic law by the Member States. This includes that no supplementary derogations not provided for by Article 16 of the Habitats Directive may be introduced by way of domestic law.



Derogations from the obligations codified in Article 12 of the Habitats Directive are only lawful if (1) all conditions applying to all derogations granted have been met and (2) the derogations in their totality do not produce effects that go against the objectives of Article 12 and the Directive as a whole. Whether or not the latter condition is respected can only be assessed on a case-by-case basis.



This and the next slide address the reporting obligations prescribed by Article 16 paras. 2 and 3 of the Habitats Directive.

III. Derogations under Article 16 Habitats Directive

- National reports must contain the information required under Article 16 (3) Habitats Directive
- Further information may be included (e.g. details that provide an understanding of the competent authorities' reasoning), but there is no legal obligation to do so
- The derogation reports are, in the form of overview tables, available at: <http://ec.europa.eu/environment/nature/knowledge/rep_habitats/index_en.htm>

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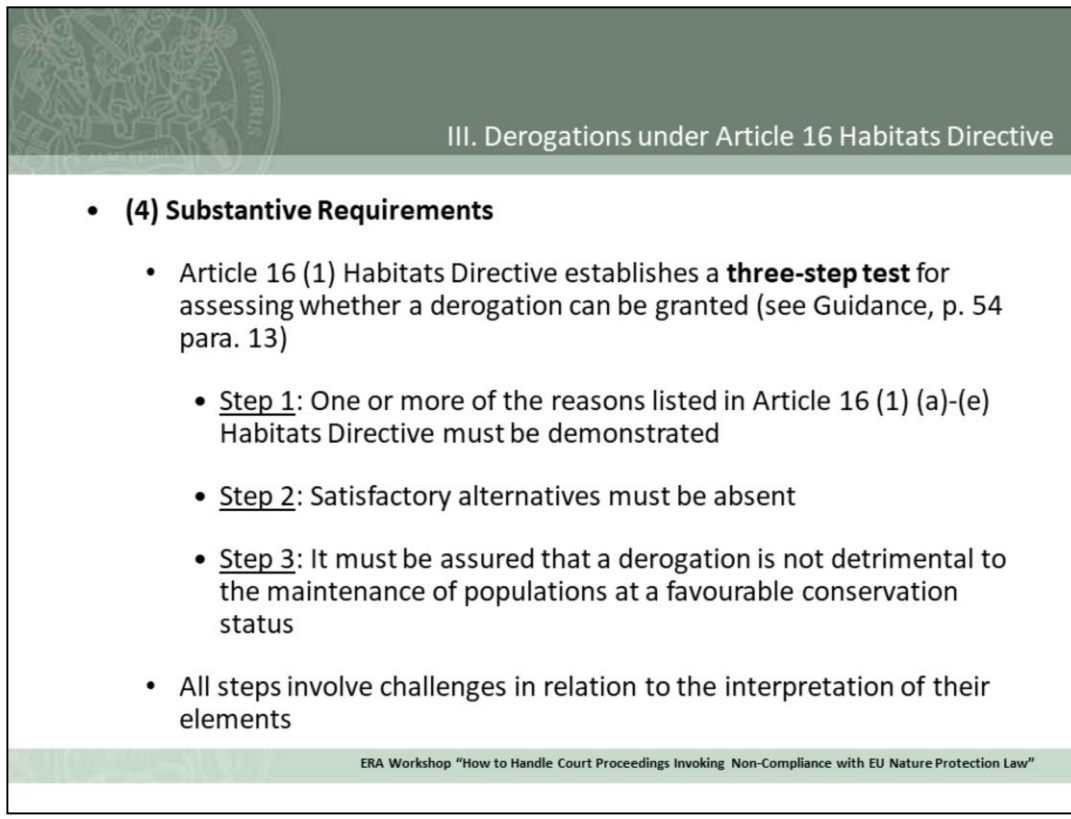
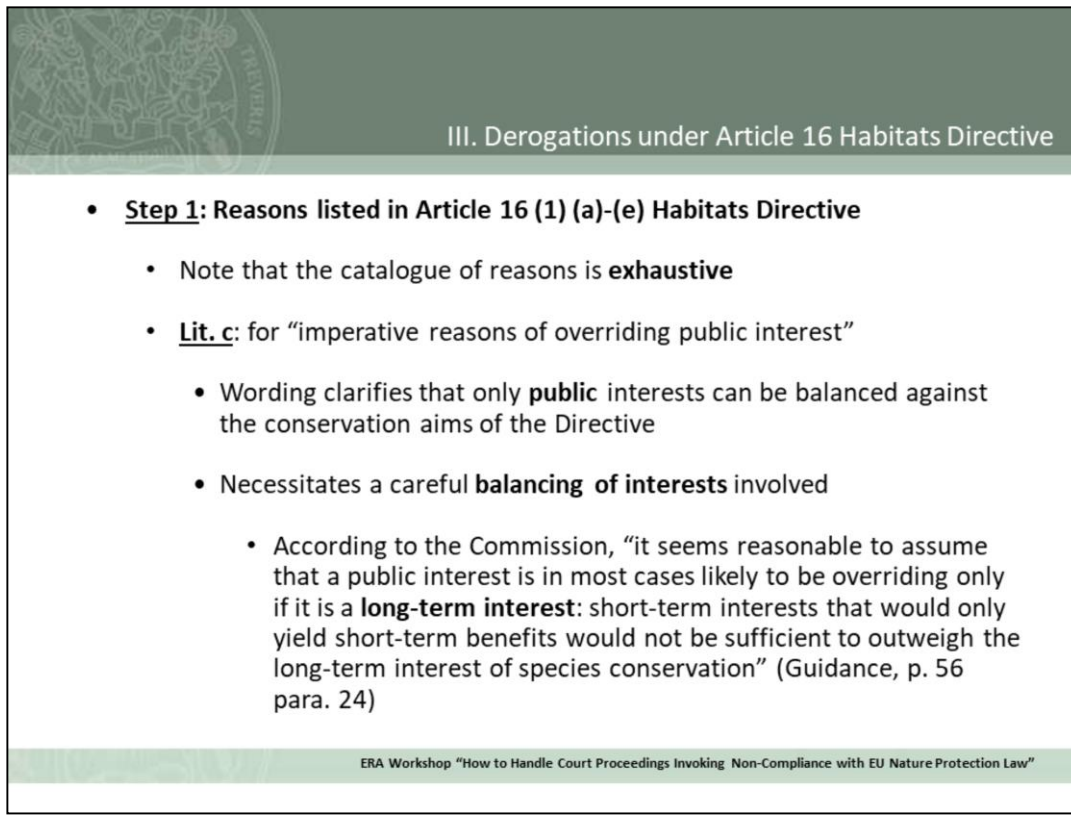
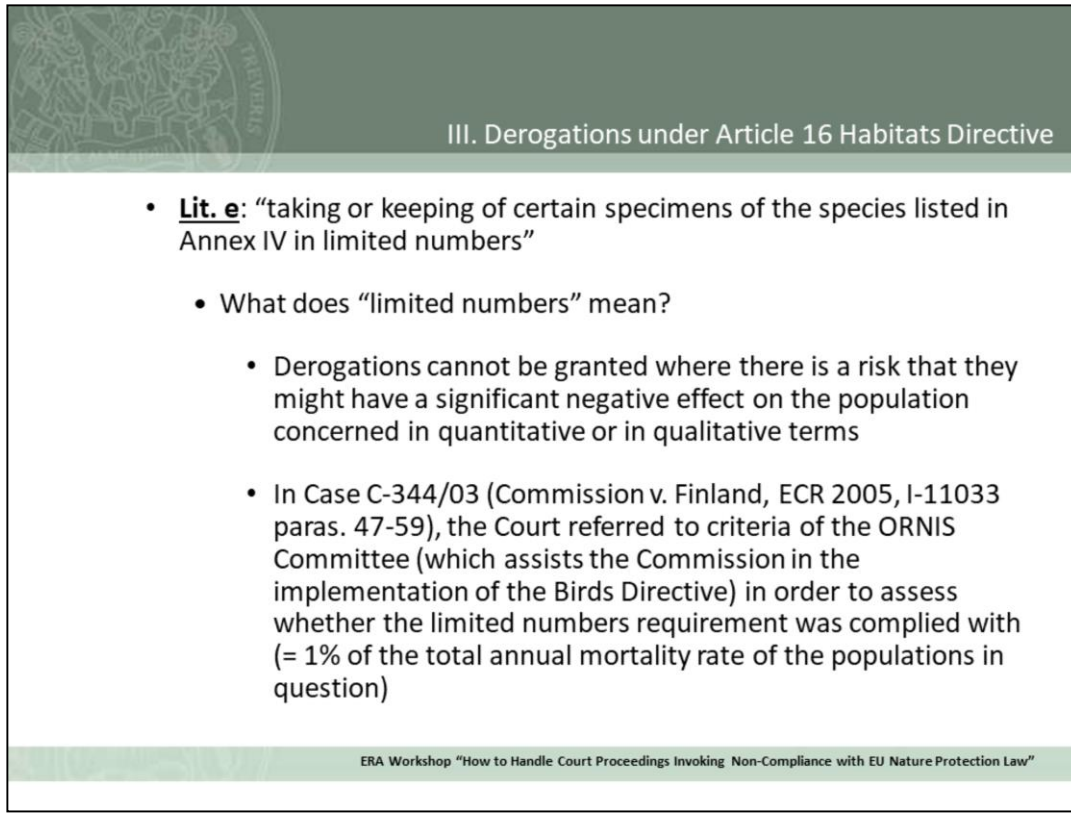


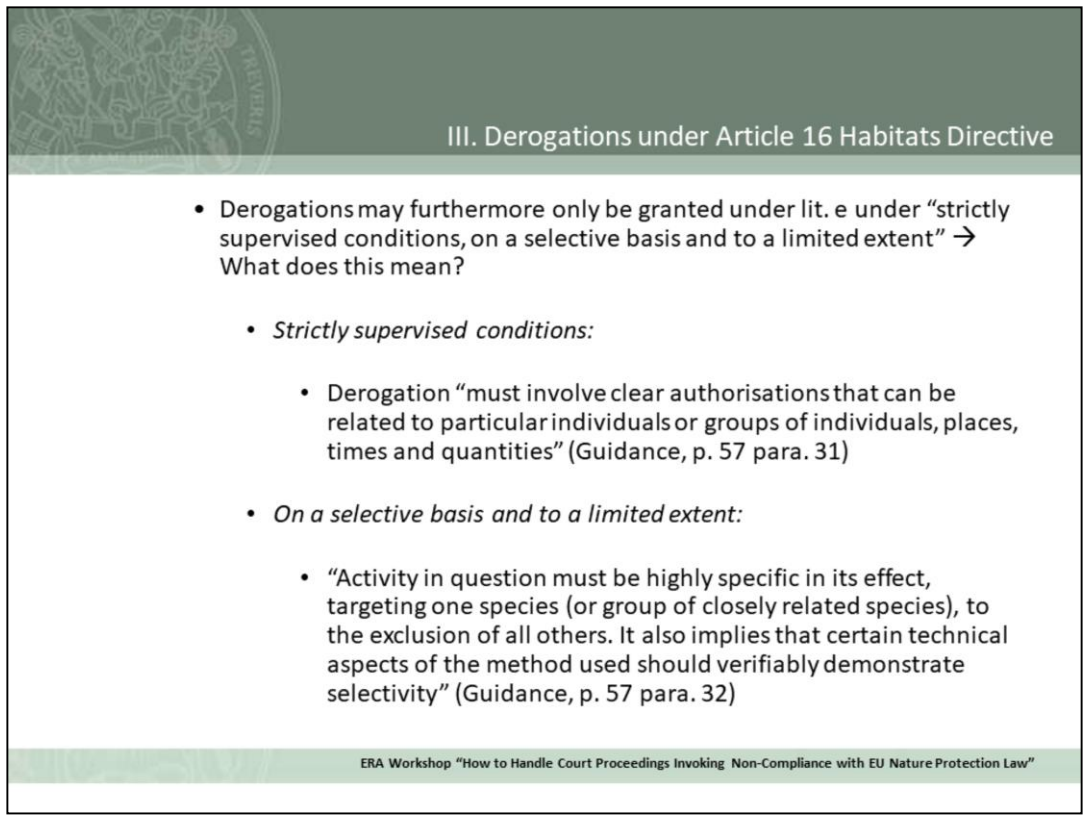
This slide demonstrates that Article 16 para. 1 of the Habitats Directive establishes a three-step test for assessing whether a derogation from the requirements of Article 12 of the Habitats Directive can be granted. All steps involve serious challenges in relation to the interpretation of their respective elements.



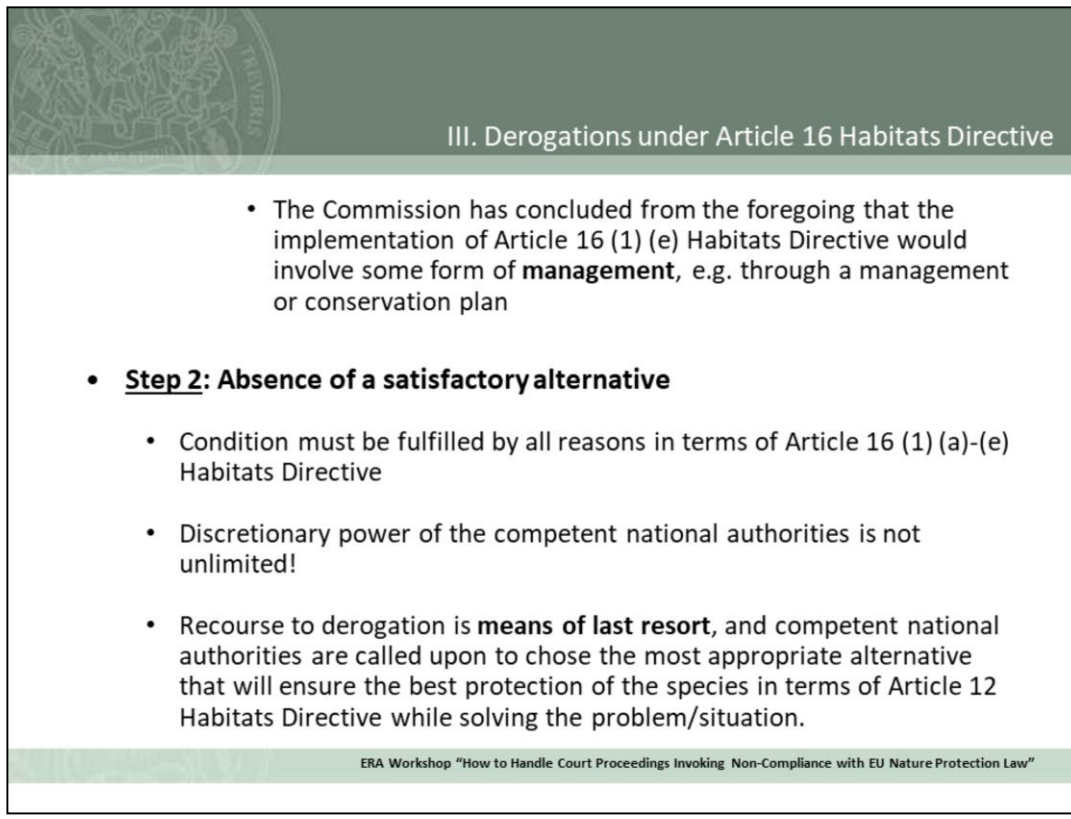
The most complicated substantive requirements are codified in lit. c and e of Article 16 para. 1 of the Habitats Directive. In contrast, the requirements of Article 16 para. 1 lit. a, b and d are predominantly self-explanatory. From a practical viewpoint, "imperative reasons of overriding public interest" in terms of lit. c are arguably the most relevant category of reasons for derogations. They require a careful balancing of the colliding interests.



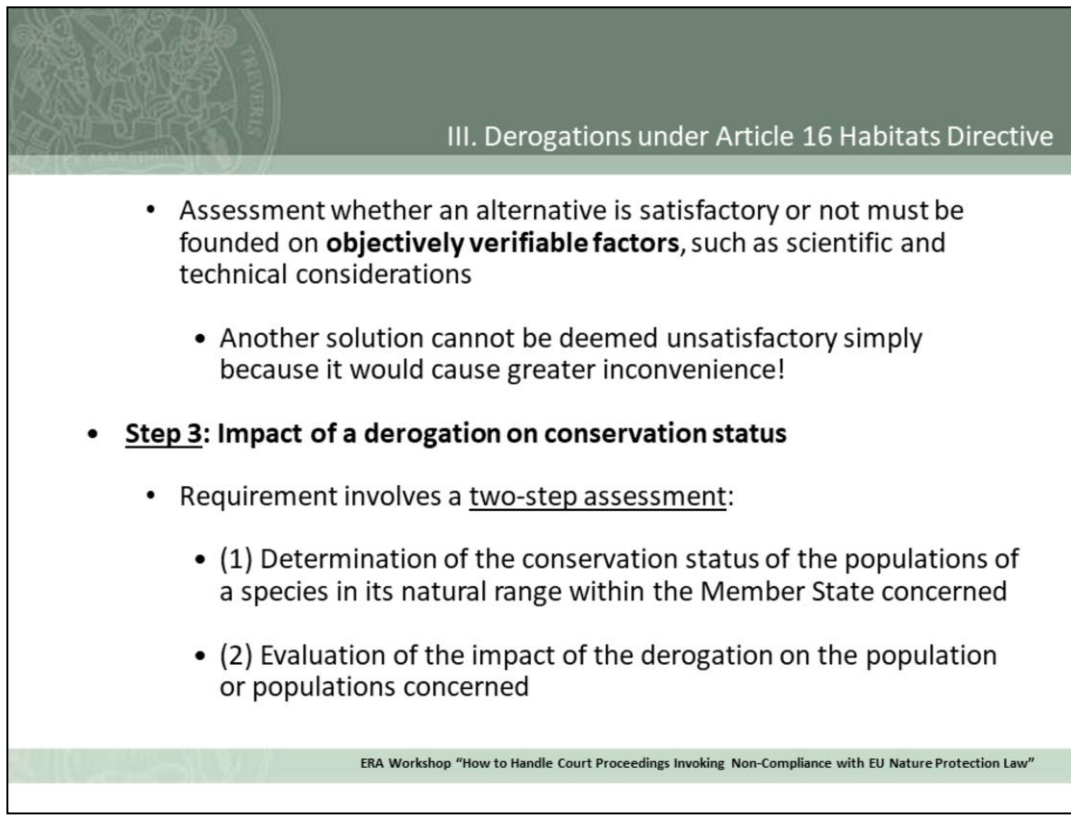
This slide serves to substantiate the meaning of the term "limited numbers" codified in Article 16 para. 1 lit. e of the Habitats Directive.



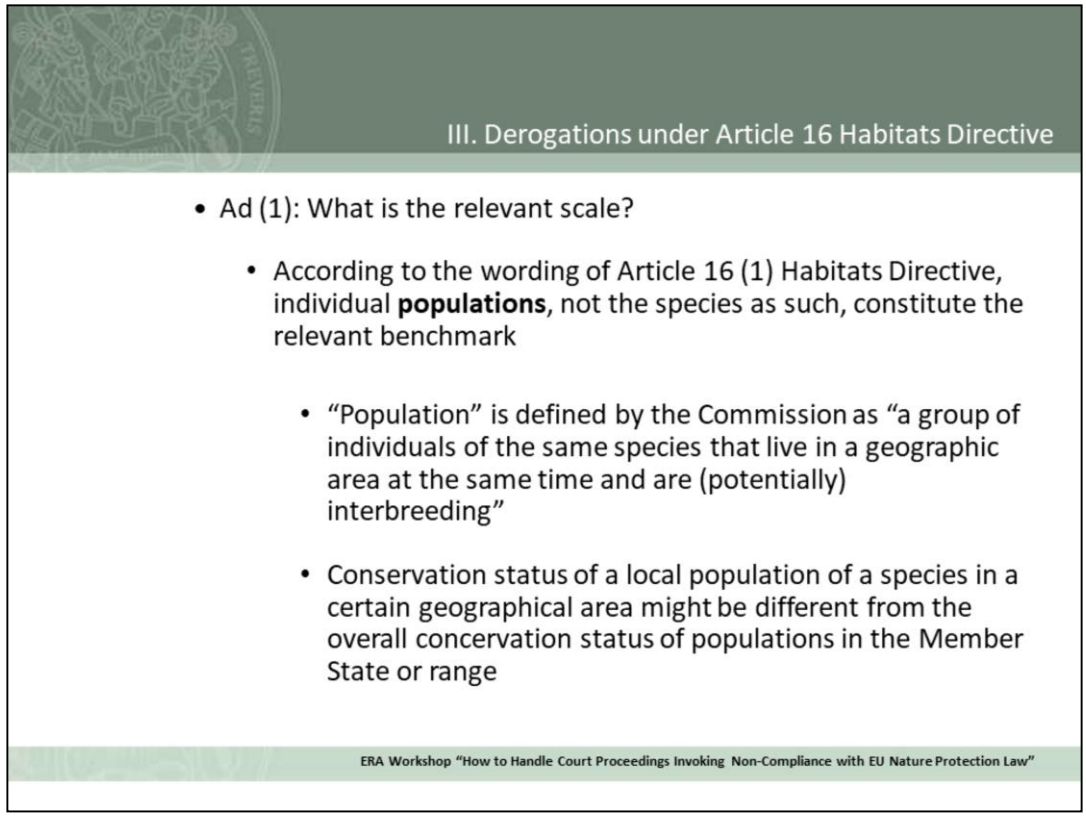
By referring to the Guidance Document of the EU Commission, this slide addresses the meaning of the concepts "strictly supervised conditions" and "on a selective basis and to a limited extent" contained in Article 16 para. 1 lit. e of the Habitats Directive.



In respect of all reasons for derogating from Article 12 of the Habitat Directive, Article 16 para. 1 of the Habitats Directive requires that satisfactory alternatives are absent. While the term "satisfactory" allocates a certain scope of discretion to the competent authorities of the Member States, this discretion must be regarded as being narrow, as derogations are a means of last resort. In particular, an alternative can only be held to be satisfactory if and to the extent to which it is based on objectively verifiable factors such as scientific and technical considerations.



The final step of assessing whether or not a derogation from Article 12 of the Habitats Directive can be accepted requires (1) a determination of the conservation status of the populations of a species in its natural range within the Member State concerned, and (2) an evaluation of the impact of the derogation on the population or populations concerned. As far as the relevant scale for determining the conservation status is concerned, Article 16 para. 1 of the Habitats Directive refers to individual populations, not the species as such. That said, the concept of population is not defined in the Directive. The Commission has taken the view that a population consists of a group of individuals of the same species that live in a geographic area at the same time and are (potentially) interbreeding.



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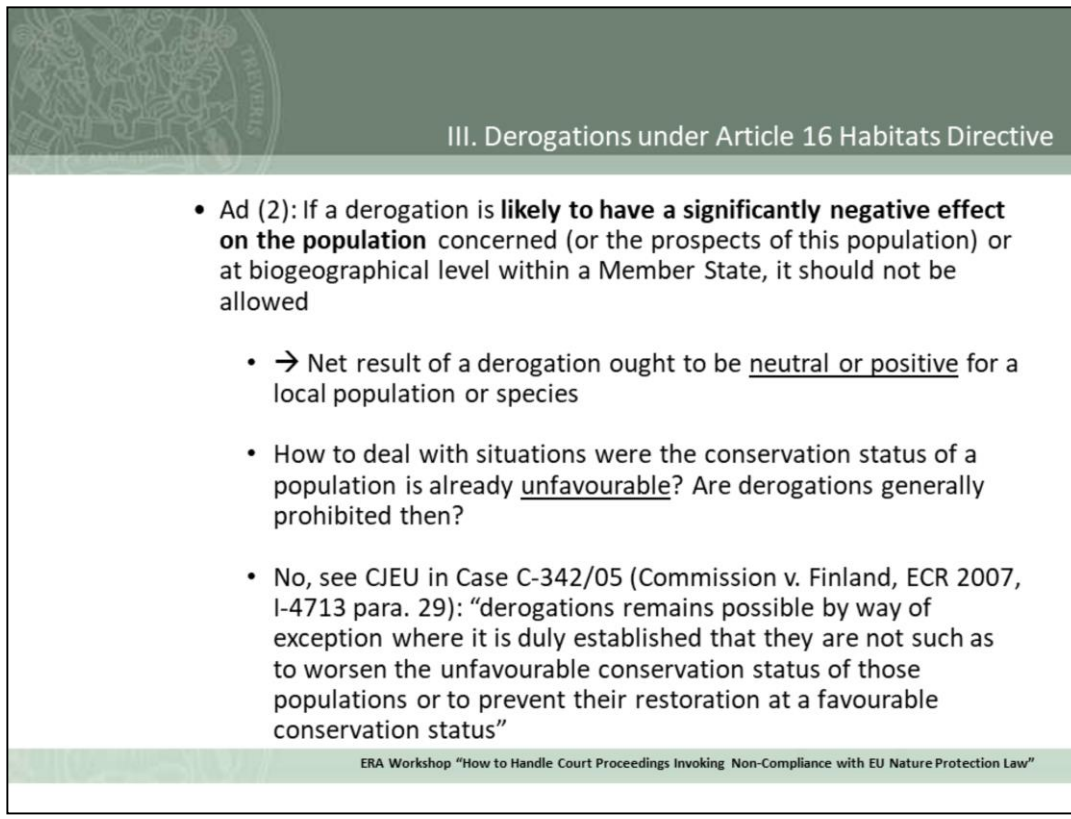
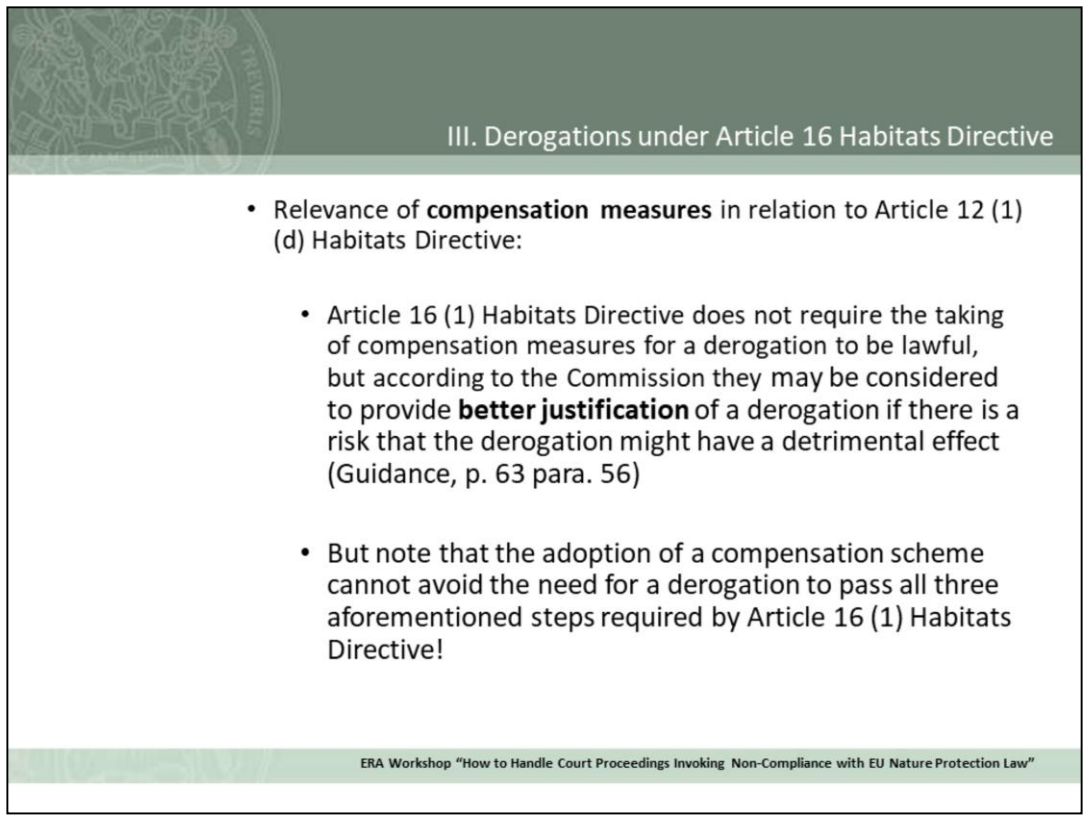


According to Article 16 para. 1 of the Habitats Directive, derogations must not be detrimental to the maintenance of the populations of the species concerned at a favorable conservation status in their natural range. This means that the net result of a derogation ought to be neutral or positive for the population concerned. As far as populations are concerned whose conservation status is already unfavorable, the CFEU clarified that derogations remain possible by way of exception where it is duly established that they are not such as to further worsen the unfavorable conservation status.



Article 16 para. 1 of the Habitats Directive does not require the taking of compensation measures for a derogation to be lawful. That said, the Commission has taken the view that such measures may make it easier to justify derogations in relation to the third element of the test required by Article 16 para. 1 of the Habitats Directive, namely that derogations should, as far as their net results are concerned, not have detrimental effects. This can only the case, however, if the compensation measures refer to the same population of a species in terms of Annex IV (a) of the Habitats Directive.