Trade in Wild Fauna and Flora

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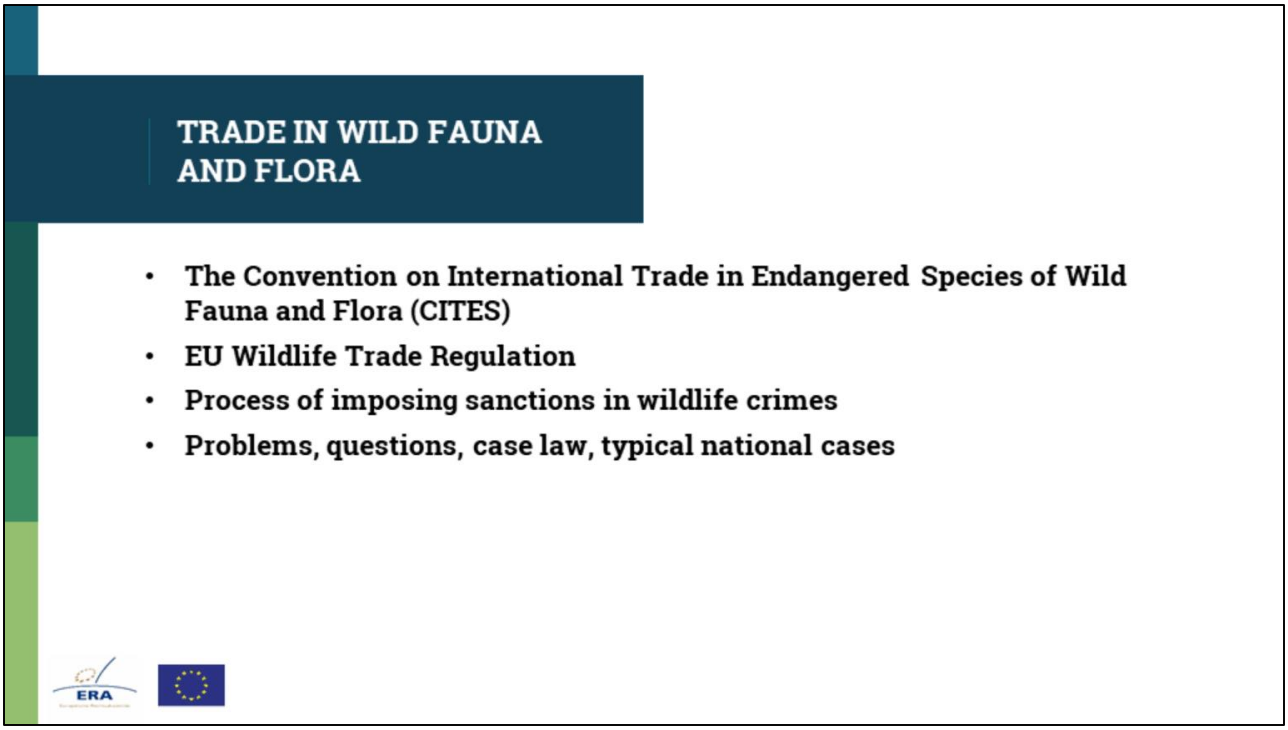
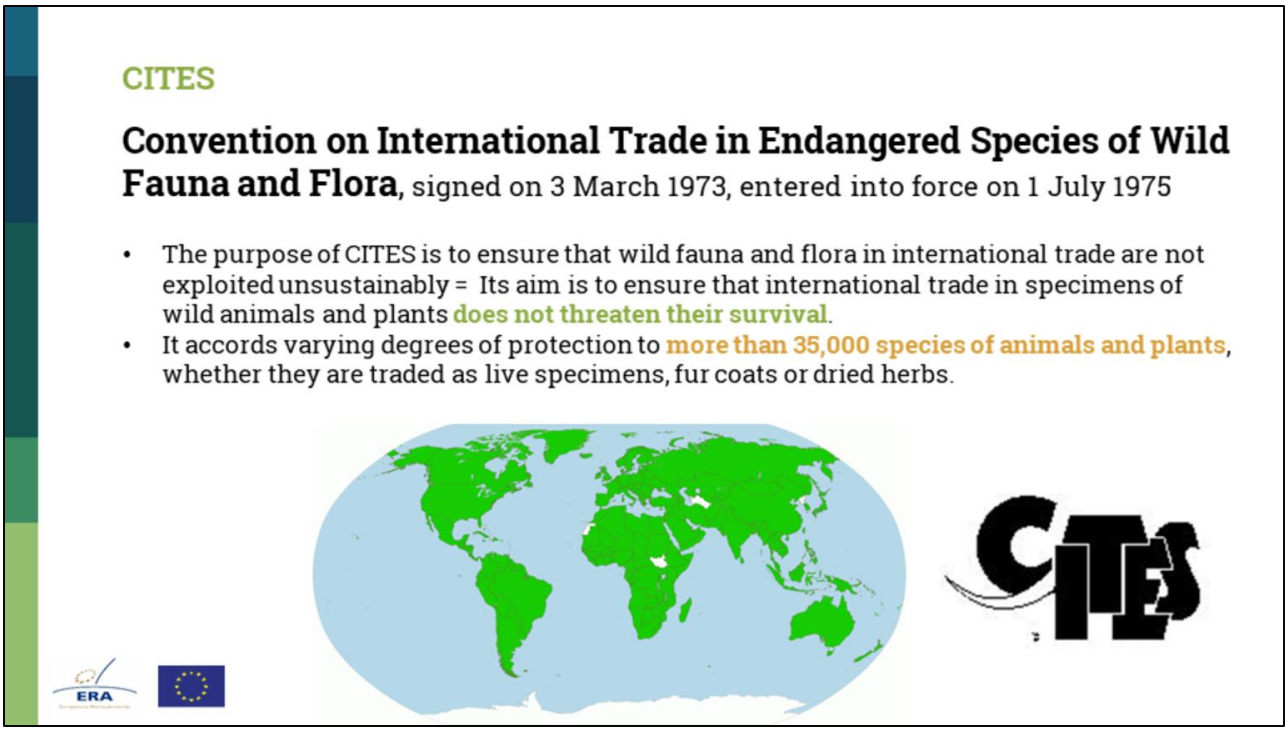
HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE WITH EU NATURE PROTECTION LAW – FOCUS ON SPECIES PROTECTION (24 April 2018, Trier)



This presentation should briefly describe the comperhensive legal system of legal regulation of trade in wild fauna and flora, the corresponding case law and practical issues that may arise. First, the international law (the CITES convention) will be discussed and then the implementing EU regulation. The differences between the two systems will be emphasised. Second, in compliance with the topic of the seminar, I will focus on the proces of imposing sanction in wildlife crimes in the context of the regulation in the CITES regime. In the last part, we will discuss some typical issues and national cases.



CITES is an international convention that combines wildlife and trade themes with a legally binding instrument for achieving conservation and sustainable use objectives.

CITES establishes an international legal framework together with common procedural mechanisms for the strictest control of international commercial trade in species threatened with extinction, and for an effective regulation of international trade in others.

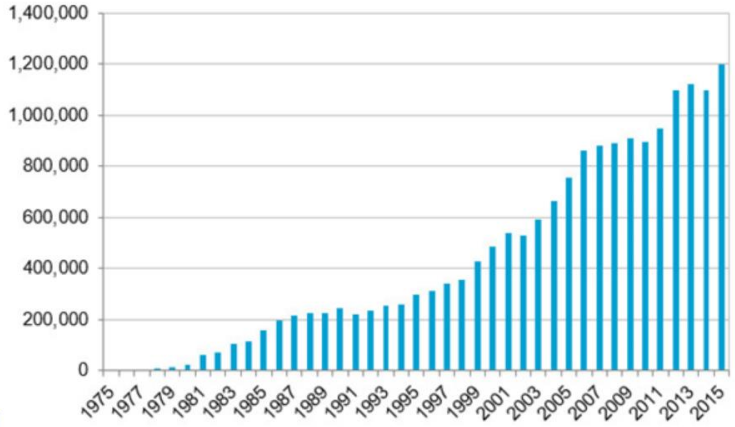
Annually, international wildlife trade is estimated to be worth billions of dollars and to include hundreds of millions of plant and animal specimens. The trade is diverse, ranging from live animals and plants to a vast array of wildlife products derived from them, including food products, exotic leather goods, wooden musical instruments, timber, tourist curios and medicines. Levels of exploitation of some animal and plant species are high and the trade in them, together with other factors, such as habitat loss, is capable of heavily depleting their populations and even bringing some species close to extinction. Many wildlife species in trade are not endangered, but the existence of an agreement to ensure the sustainability of the trade is important in order to safeguard these resources for the future.

Because the trade in wild animals and plants crosses borders between countries, the effort to regulate it requires international cooperation to safeguard certain species from over-exploitation.

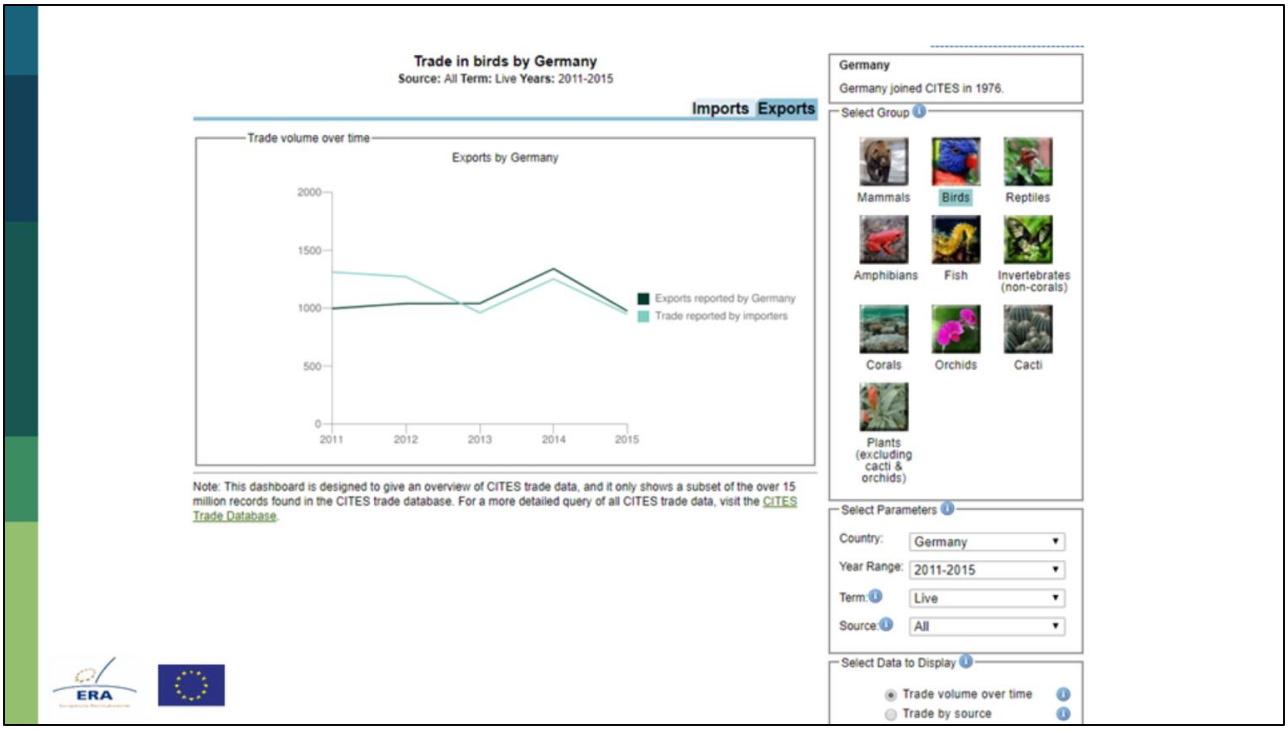
CITES was conceived in the spirit of such cooperation. Today, it accords varying degrees of protection to more than 35,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs.

CITES

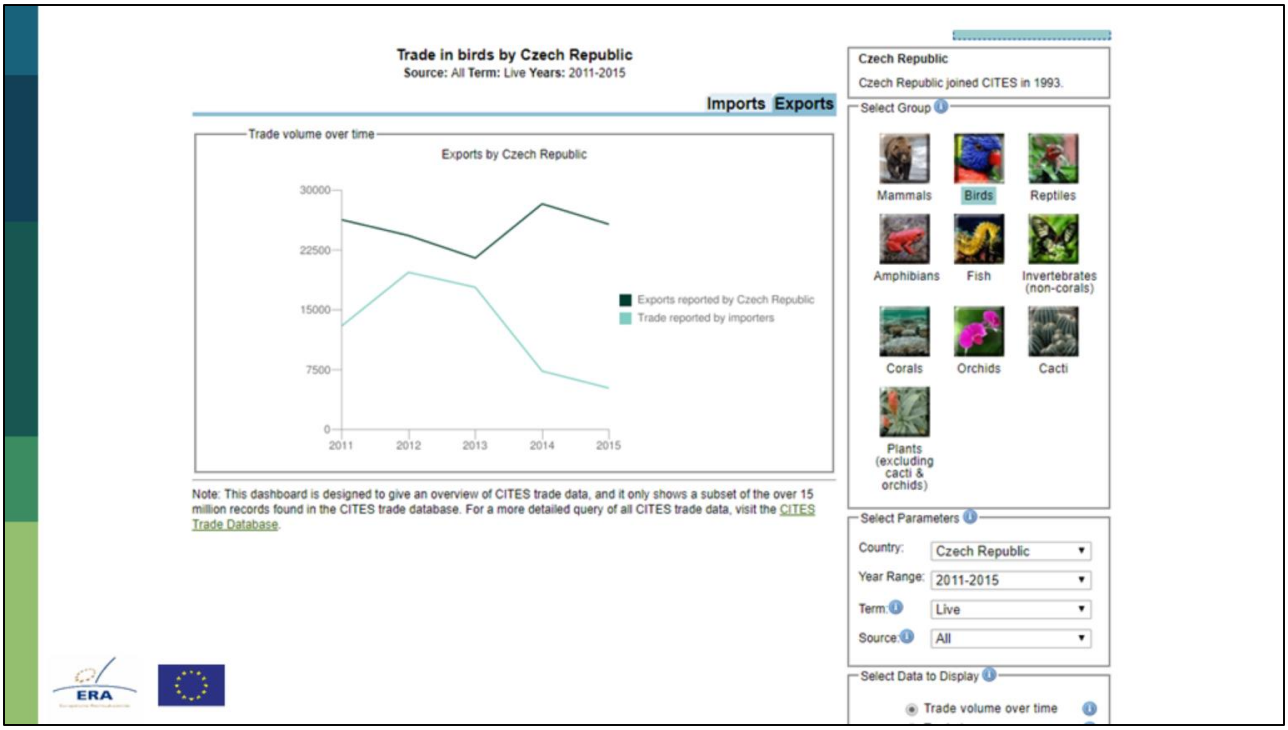
Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on 3 March 1973, entered into force on 1 July 1975



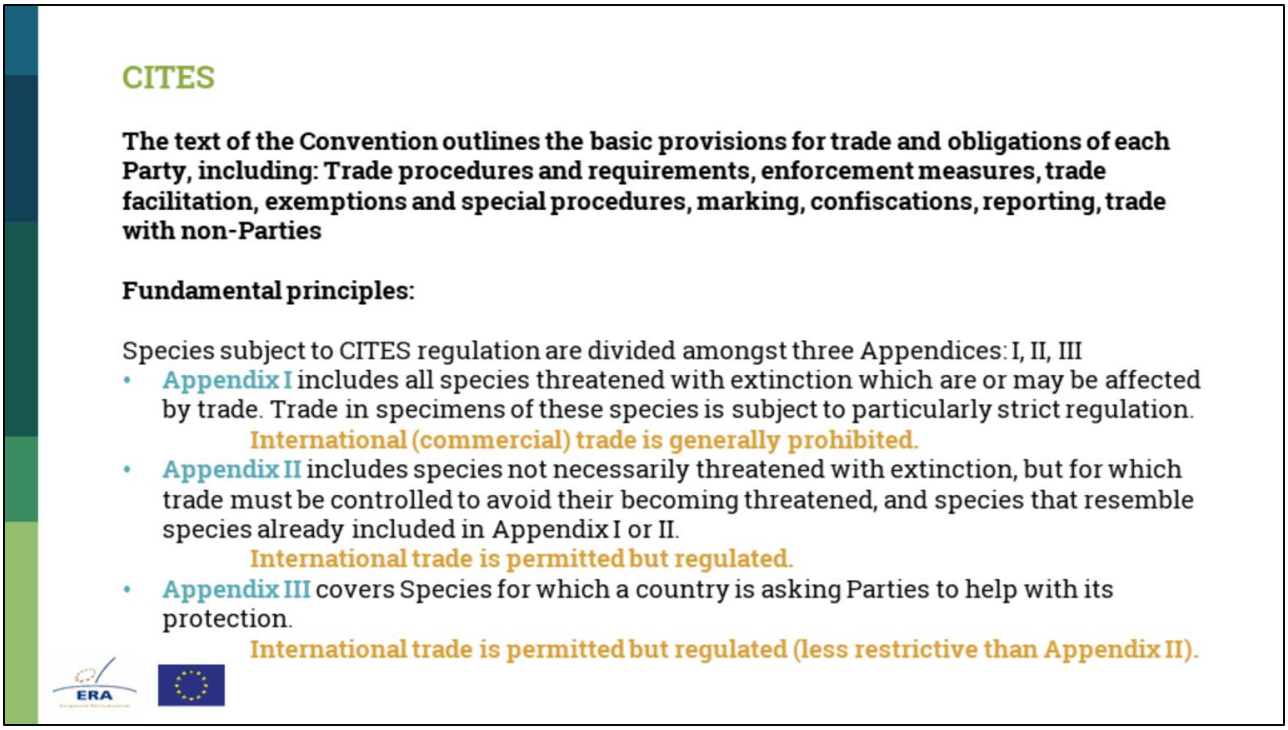
Number of recorded transactions



Number of recorded transactions – birds imported and exported (Germany).



Number of recorded transactions – birds imported and exported (Czechia). You can clearly see huge differences between the two states. There are many factors which play role in the current state of trade in wild fauna and flora in particular countries, very often connected with traditions, but also with current trends and demand on the market. The official numbers do not reflect ilegal trade, but it is assumed that it is proportionate to numbers regarding legal transactions.



CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorized through a licensing system. Each Party to the Convention must designate one or more Management Authorities in charge of administering that licensing system and one or more Scientific Authorities to advise them on the effects of trade on the status of the species.

The species covered by CITES are listed in three Appendices, according to the degree of protection they need.

Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances.

Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.

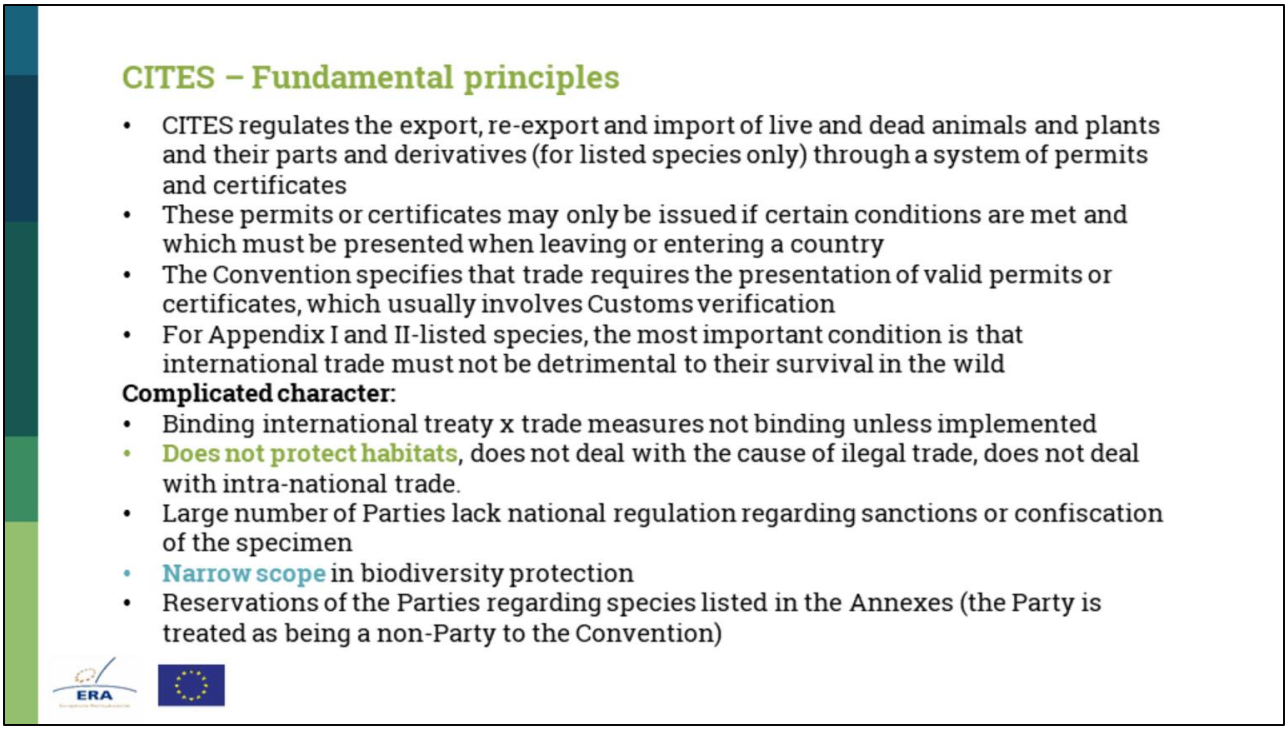
The Conference of the Parties (CoP), which is the supreme decision-making body of the Convention and comprises all its Parties, has agreed in Resolution Conf. 9.24 (Rev. CoP17) on a set of biological and trade criteria to help determine whether a species should be included in Appendices I or II. At each regular meeting of the CoP, Parties submit proposals based on those criteria to amend these two Appendices. Those amendment proposals are discussed and then submitted to a vote. The Convention also allows for amendments by a postal procedure between meetings of

the CoP (see Article XV, paragraph 2, of the Convention), but this procedure is rarely used.

Appendix III

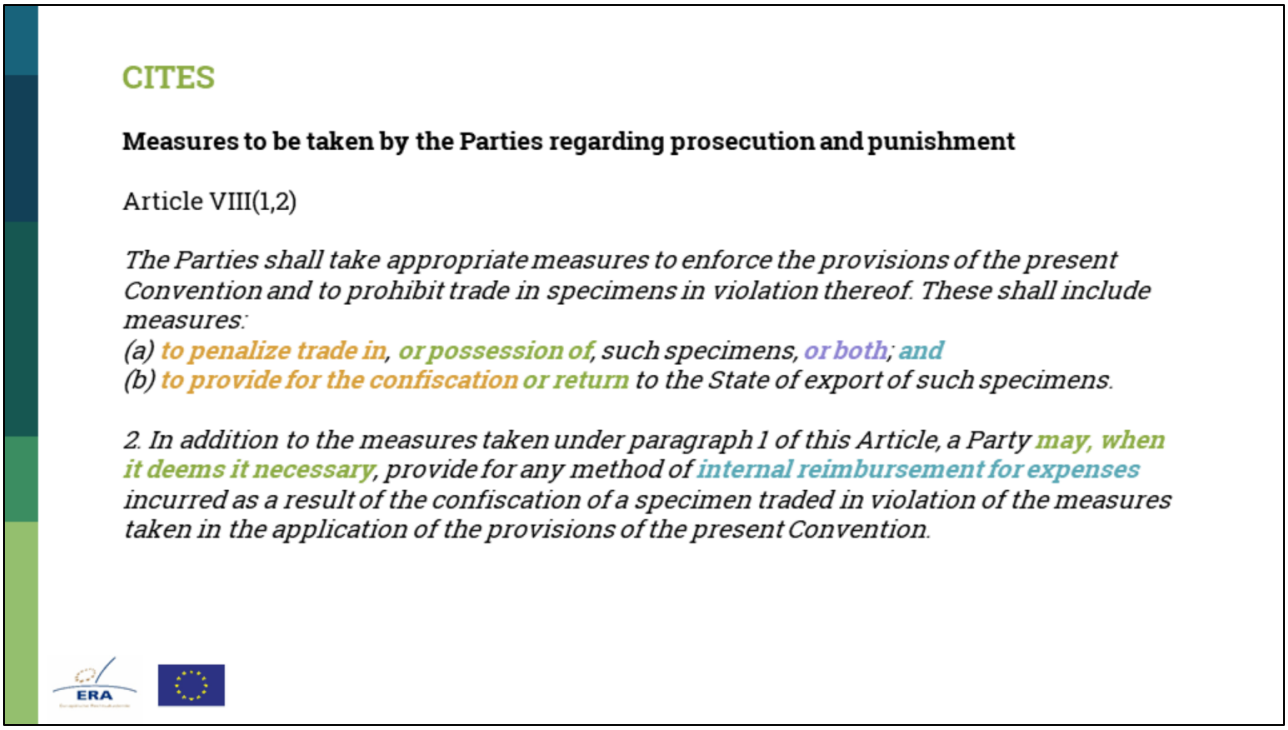
This Appendix contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade. Changes to Appendix III follow a distinct procedure from changes to Appendices I and II, as each Party's is entitled to make unilateral amendments to it.

A specimen of a CITES-listed species may be imported into or exported (or re-exported) from a State party to the Convention only if the appropriate document has been obtained and presented for clearance at the port of entry or exit. There is some variation of the requirements from one country to another and it is always necessary to check on the national laws that may be stricter, but the basic conditions that apply for Appendices I and II are described below.

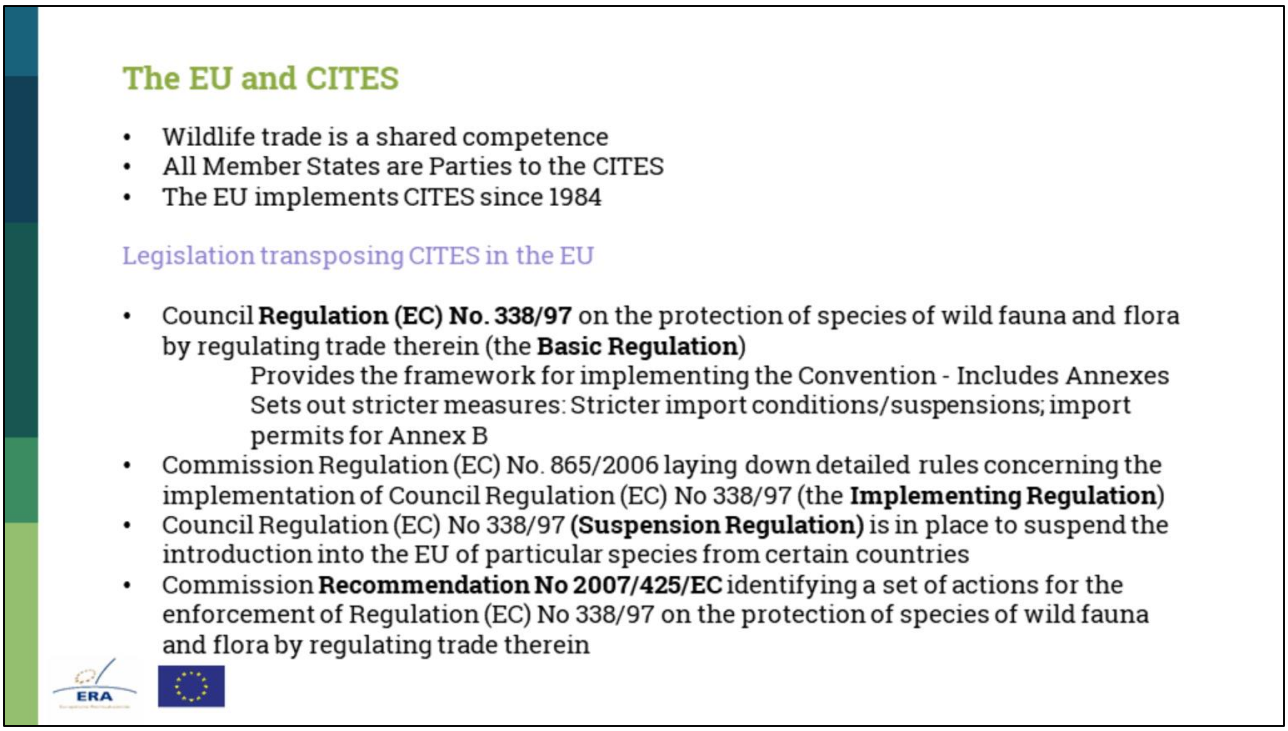


Please note that CITES does not protect habitats and does not deal with intra-national trade. Its regulatory potential is therefore limited and it must be accompanied by a complex set of protective measures in order to ensure a full protection of nature conservation.

Reservations made by importing Parties however create loopholes through which specimens illegally acquired in the countries of origin may find legal markets. Therefore, all Parties should strictly verify export documents originating in such countries of origin with the respective management authorities.



Article VIII of CITES stipulates measures to be taken by the Parties regarding prosecution and punishment. As you can see, it provides the Parties wit considerable space for maneuvering. Especially the sole possession of specimen does not have to be penalized.



Because of the EU set up, all MS must implement CITES in the same way (e.g. import conditions must be the same for all Member States). Therefore the EU provides the framework legislation for the implementation of CITES.

Basic Regulation defines the scope of the measures and lays down the basics for their implementation and enforcement. It broadly transposes the provisions of the CITES Convention. Annexes can be easily updates after each CoP.

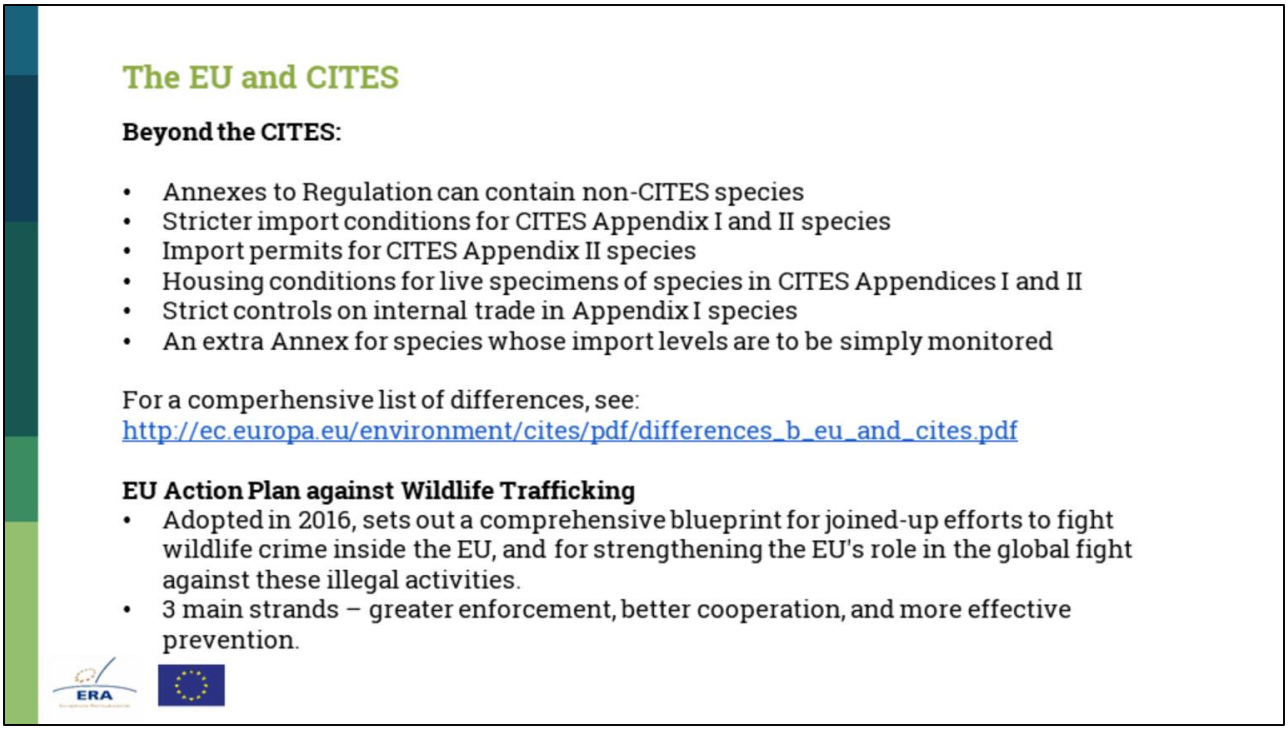
Implementing Regulations fill in the administrative and practical details and specifies the exemptions and derogations.

Suspension Regulation sets out the species and third countries from which imports are suspended temporarily. Revised on a regular basis. A species listed in the Annexes can be suspended from trade for various reason:
Threat to the long term survival of the population of that species
Reg. 338/97 art.4.6 d)…of live specimens of species for which has been established that their introduction in the natural environment of the Community presents an ecologic threat to wild species of fauna and flora indigineous to the Community

In addition to this core legislation, a Commission Recommendation to Member States (Commission Recommendation No 2007/425/EC identifying a set of actions for the

enforcement of Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, commonly referred to as the ‘EU Enforcement Action Plan’) specifies further the measures that should be taken for enforcement of the EU Wildlife Trade Regulations.
Although the EU Wildlife Trade Regulations are directly applicable in all EU Member States, the necessary enforcement provisions must be transferred into national legislation and supplemented with national laws, as these are matters that remain under the sovereignty of each Member State. Member States must ensure that infractions are punished in an appropriate manner.

As a result, the legislation does not need to be transposed into the national law of the member States although some provisions require the adoption of measures at national level (in particular as regards Enforcement)

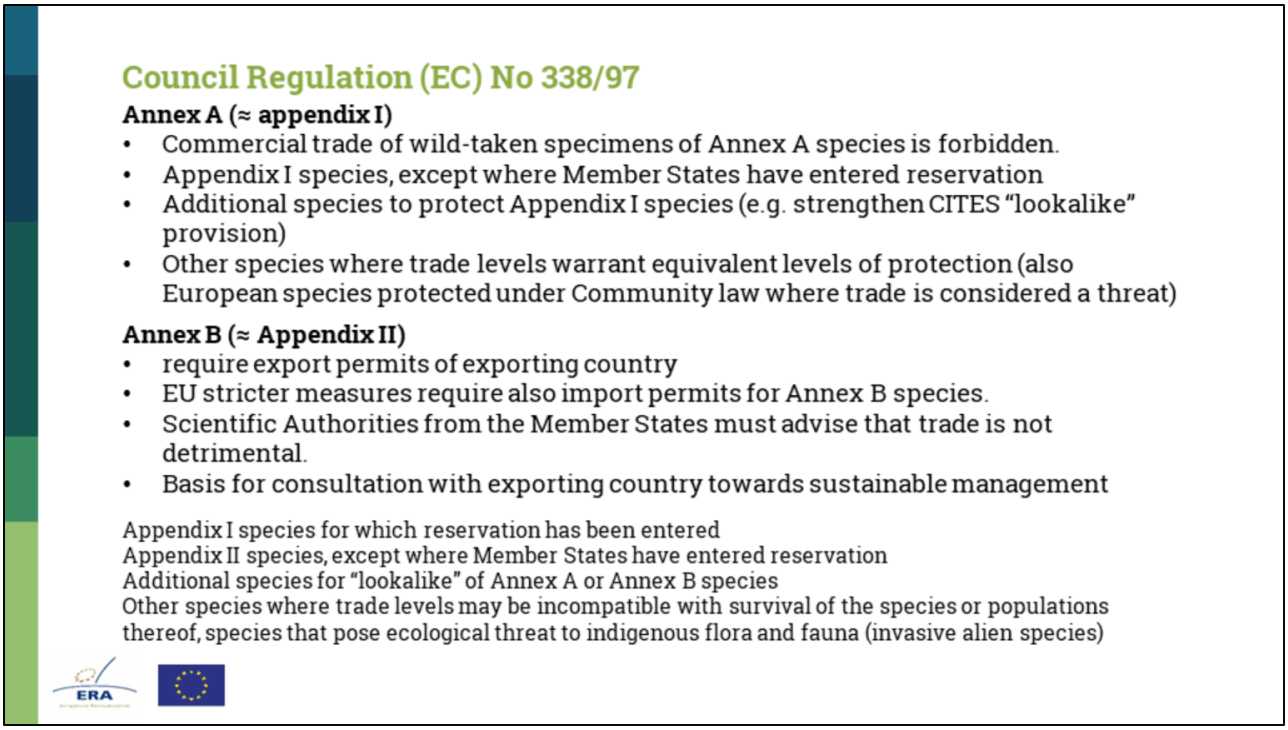


More than CITES:

Annexes include some non-CITES listed species
Stricter import conditions for CITES Annex A and B (import permits needed for Annex B!)
Additional: Annex D for species to simply monitor trade
Imports can be suspended for species from particular countries. This implies that for 4.000 animal species and over 26.000 plant species of Annex B, imports can be suspended for conservation reasons.

Housing conditions are specified for live Annex A and B specimens (animals)

EU Action Plan against Wildlife Trafficking
On 26 February 2016, the European Commission adopted a Communication on the EU Action Plan against Wildlife Trafficking which sets out a comprehensive blueprint for joined-up efforts to fight wildlife crime inside the EU, and for strengthening the EU's role in the global fight against these illegal activities. The plan has three main strands – greater enforcement, better cooperation, and more effective prevention. The Action Plan is to be implemented jointly by the EU (Commission services, EEAS, Europol, Eurojust) and its Member States until 2020. The Action Plan was endorsed through Council conclusions in June 2016.



Council Regulation (EC) No 338/97 deals with the protection of species of wild fauna and flora by regulating trade therein. It lays down the provisions for import, export and re-export as well as internal EU trade in specimens of species listed in its four Annexes. It provides for procedures and documents required for such trade (import and export permits, re-export certificates, import notifications and internal trade certificates) and it regulates the movement of live specimens. It also sets out specific requirements for Member States to ensure compliance with the Regulation and to impose adequate sanctions for infringements.

The Regulation also establishes a number of bodies at EU level, i.e. the Committee on Trade in Wild Fauna and Flora, the Scientific Review Group and the Enforcement Group, all of which consist of representatives of the Member States and are convened and chaired by the European Commission.

Annex B: Of these, most are included because they are at some risk from international trade.

Mention that 3rd countries don't like this

EU REGULATION

Annex C (≈ Appendix III)

- species for which individual Parties have sought assistance of CITES in regulating exports.
- The Party concerned issues export permits.
- Other exporting Parties issue certificates of origin.
- Appendix III species (other than those listed in Annex A or B), except where Member States have entered reservation
- Appendix II species for which reservation has been entered

Annex D (no CITES equivalent)

- It is intended to monitor trade in non-CITES species that might be sensitive.
- Includes also species in Appendix III for which reservation has been entered
- Importers in EU must present import notifications

EU Regulation – principles (CJEU case law)

- The purpose of the arrangements introduced in order to protect specimens of species listed in Annexes A and B to that regulation is **to ensure the fullest possible protection for species of wild fauna and flora through controls on trade** in such species, in compliance with the objectives, principles and provisions of CITES (see *Rubach*, C-344/08, para. 24).
- The aim of the regulation is **predominantly environmental**, even though it contains provisions of commercial nature (see *Commission v Council*, C-94/03, para. 33; *Commission v. Parliament and Council*, C-178/03, para. 39).
- Regulation No 338/97 **does not contain a general prohibition on importing, and trading in**, species other than those which are referred to in Annex A thereto (see *Nationale Raad van Dierenkwekers en Liefhebberst and Andibel*, C-219/07, para. 18).
- The commercial use of specimens of the species listed in Annex B to Regulation No 338/97 is **authorised where the conditions laid down in Article 8(5)** of that regulation are complied with (*Tridon*, C-510/99, para. 44).
- The regulation **does not prejudice any stricter measures** which may be taken or maintained by Member States, in particular with regard to the holding of specimens of species covered by that regulation (*Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, para. 14). However, it must be compatible with the Treaty (*Tridon*, C-510/99, para. 45).

The case law of the CJEU draws some general principles regarding the character of the EU regulation. These might be used as a guidance for interpretation of particular stipulations of the regulation and in the case of conflict with other measures or protection of the trade and property of the traders.

Case law

C-532/13 (Sofia Zoo):

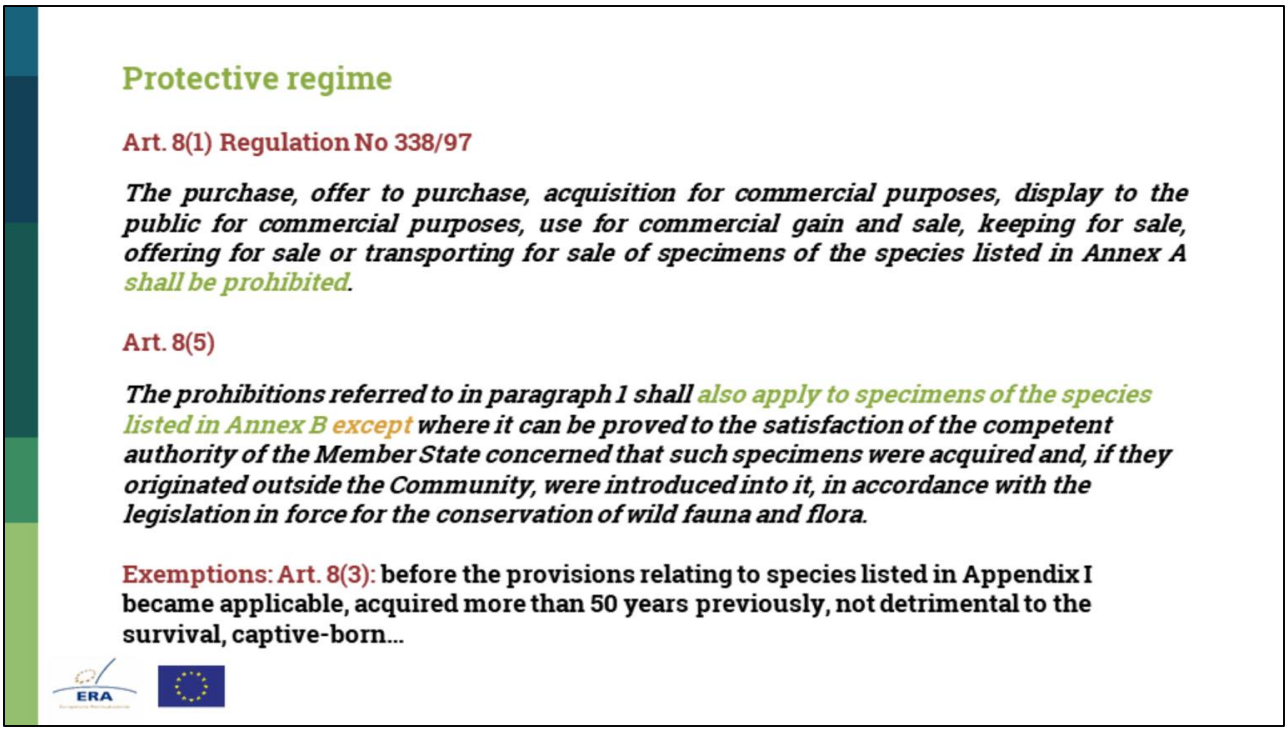
The national authority: All the specimens must be seized and may be confiscated, because Regulation No **338/97** does not provide for partial or relative invalidity of a permit.

CJEU:

Article 11(2)(a) and (b) of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein must be interpreted as meaning that an import permit which does not comply with the conditions laid down in that regulation ***must be considered void only in respect of the specimens actually affected*** *by the ground of invalidity of that import permit, those specimens then being the only ones which may be seized and possibly confiscated by the competent authority of the Member State where they are situated.*

Para 30: *In other words, the competent authority of the Member State where the specimens concerned are situated* ***must ascertain whether the import permit in question is valid for each of those specimens****, without that authority's assessment of a given animal specimen necessarily having to influence its assessment of another specimen.*

In practice, the transactions often cover a large amount of specimen. In its case law, the CJEU interprets the provisions of the Regulation with respect to both protection of specimen and trade. One of the examples is calidity of mport permit. According to the CJEU, an import permit which does not comply with the conditions laid down in that regulation must be considered void only in respect of the specimens actually affected by the ground of invalidity of that import permit, those specimens then being the only ones which may be seized and possibly confiscated.



The general rule which sets the grounds for protective regime in wild fauna and flora is provided by Art. 8(1) of the Regulation. It is further followed by many exemptions that make the trade possible while retaining certain control over it (and providing information regarding specimen traded).

Indeed, the prohibition on trade contained in Article 8 of the regulation does not apply where the competent authority of the Member State concerned has proof that those specimens were acquired and, if they originated outside the Community, were introduced into it in accordance with the legislation in force for the conservation of wild fauna and flora.

Art. 8(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

(d) are captive-born and bred specimens of an animal species or artificially propagated specimens of a plant species or are parts or derivatives of such specimens; or
(e) are required under exceptional circumstances for the advancement of science or for essential biomedical purposes pursuant to Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes (6) where the species in question proves to be the only one suitable for those purposes and where there are no specimens of the species which have been born and bred in captivity; or
(f) are intended for breeding or propagation purposes from which conservation benefits will accrue to the species concerned; or
(g) are intended for research or education aimed at the preservation or conservation of the species; or
(h) originate in a Member State and were taken from the wild in accordance with the legislation in force in that Member State.

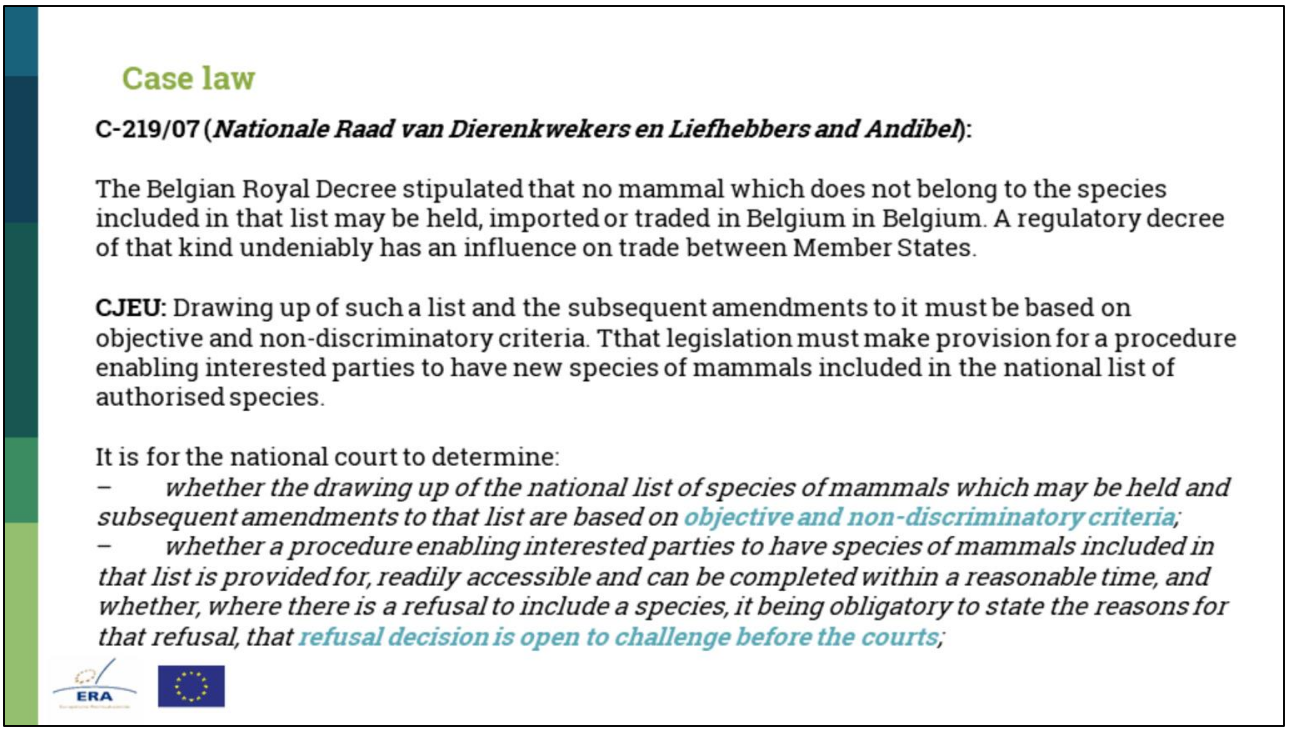
Protective regime

Art. 8 (1) Regulation No 338/97

Member States may prohibit the holding of specimens, in particular live animals of the species listed in Annex A.

- more than 20 MS + Norway
- Belgium made one step further and introduced a positive list of species that can be hold - C-219/07 (*Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*)

The Regulation does not only restrict the trade in wild fauna and flora. The Member States can decide to use the option to prohibit EVEN THE MERE HOLDING OF SPECIMEN listed in Annex A. More than 20 Member States opted for such regulation.



According to the Belgian Government, the legislation at issue in the main proceedings, although it hinders the free movement of goods, pursues a legitimate objective, namely the welfare of animals held in captivity. It is based on the finding that the holding of mammals is acceptable only in a limited number of cases, in view of the minimum physiological and ethological needs of those mammals. The Belgian Government submits in that regard that, if it appears, having regard to those needs, that specimens of a particular species of mammal may not be held by anyone without jeopardising the welfare of those animals, they may not be included in the positive list and, consequently, they may not be traded in, subject to the derogations provided for in Article 3*bis*(2) of the animal welfare law. That legislation is therefore justified in the interests of the protection of the health and life of the animals concerned.

Furthermore, according to the Belgian Government, the contested legislation is proportionate to the objective pursued. First, it does not impose an absolute prohibition on the importation of those animals. Under Article 3*bis*(2) of the animal welfare law, specimens of species or categories other than those included in the list constituting Annex I to the Royal Decree may nevertheless be held inter alia in zoological gardens, laboratories, circuses and travelling exhibitions, but also by private individuals recognised by the Minister responsible for the protection of animals and by firms trading in animals provided that a prior written agreement has been concluded with the natural or legal persons in one of the abovementioned categories.

Two additional requirements by the CJEU:

– *whether applications to obtain the inclusion of a species of mammal in that list or to obtain individual derogations to hold specimens of species not included in that list may be refused by the competent administrative authorities only if the holding of specimens of the species concerned poses a genuine risk to the protection of the abovementioned interests and requirements; and*

– *whether conditions for the holding of specimens of mammals not referred to in that list, such as those set out in Article 3bis(2)(3)(b) and (6) of the Law of 14 August 1986 concerning the protection and welfare of animals, as amended by the Law of 4 May 1995, are objectively justified and do not go beyond what is necessary to achieve the objective pursued by the national legislation as a whole.*

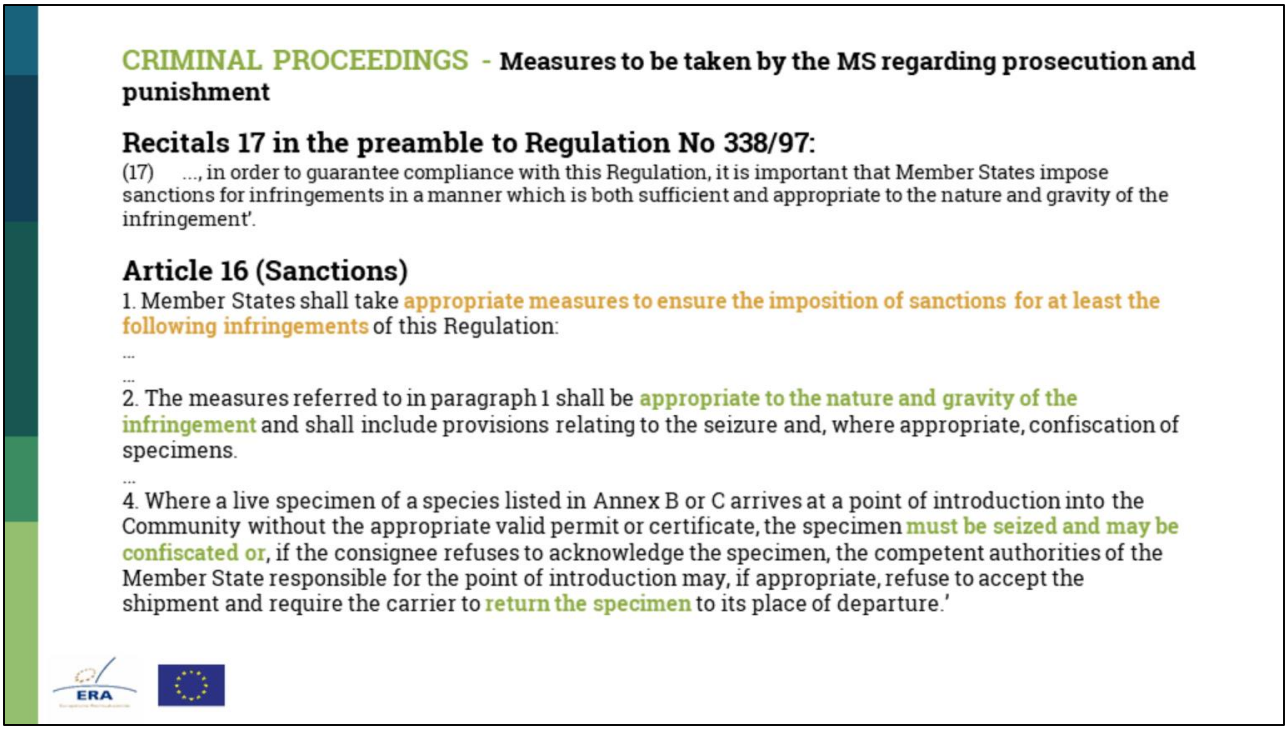
Further obligations:

- **Obtain exemption from the prohibitions**
- **Marking specimens** (see Art. 19(1)3)
- **Registration of specimen** (A + some B)
- **Provide proof of the legal origin** (Art. 9: *„In other cases of movement, the person responsible for moving the specimen must be able, where applicable, to provide proof of the legal origin of the specimen.“*)

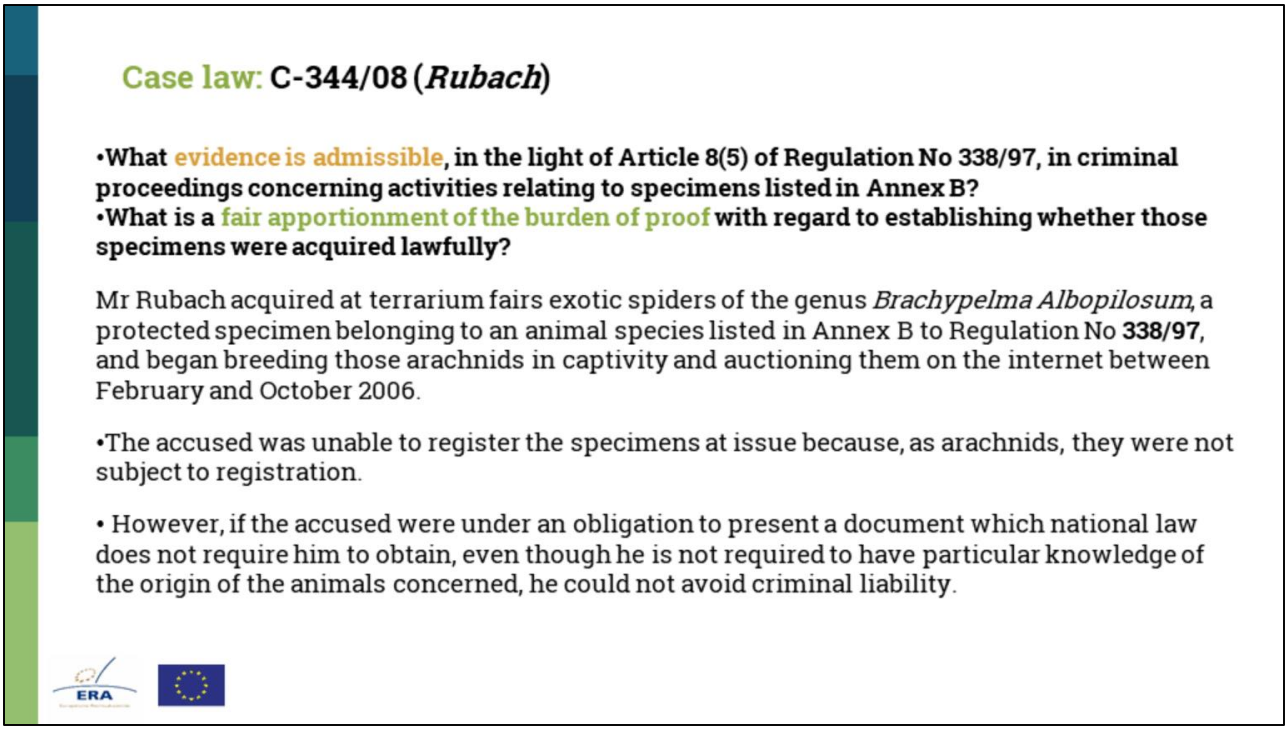
C-100/08 (*Commission v Belgium*)

- Belgium made he import, keeping and sale of specimens of birds born and bred in captivity legally placed on the market in other Member States subject to **restrictive conditions** that required the market participants concerned to **alter the marking of the birds** so as to satisfy the conditions specifically required by the Belgium legislation,
- It **did not ercognise the marking accepted in other Member States** or certificates issued in accordance with Regulation No 338/97
- It **denied traders the opportunity to obtain exemptions** from the prohibition of keeping indigenous European birds legally placed on the market in other Member States,.

In accordance with the procedure laid down in Article 18, the Commission shall lay down uniform conditions and criteria for the establishment of procedures, where necessary, for marking specimens in order to facilitate identification and ensure enforcement of the provisions.

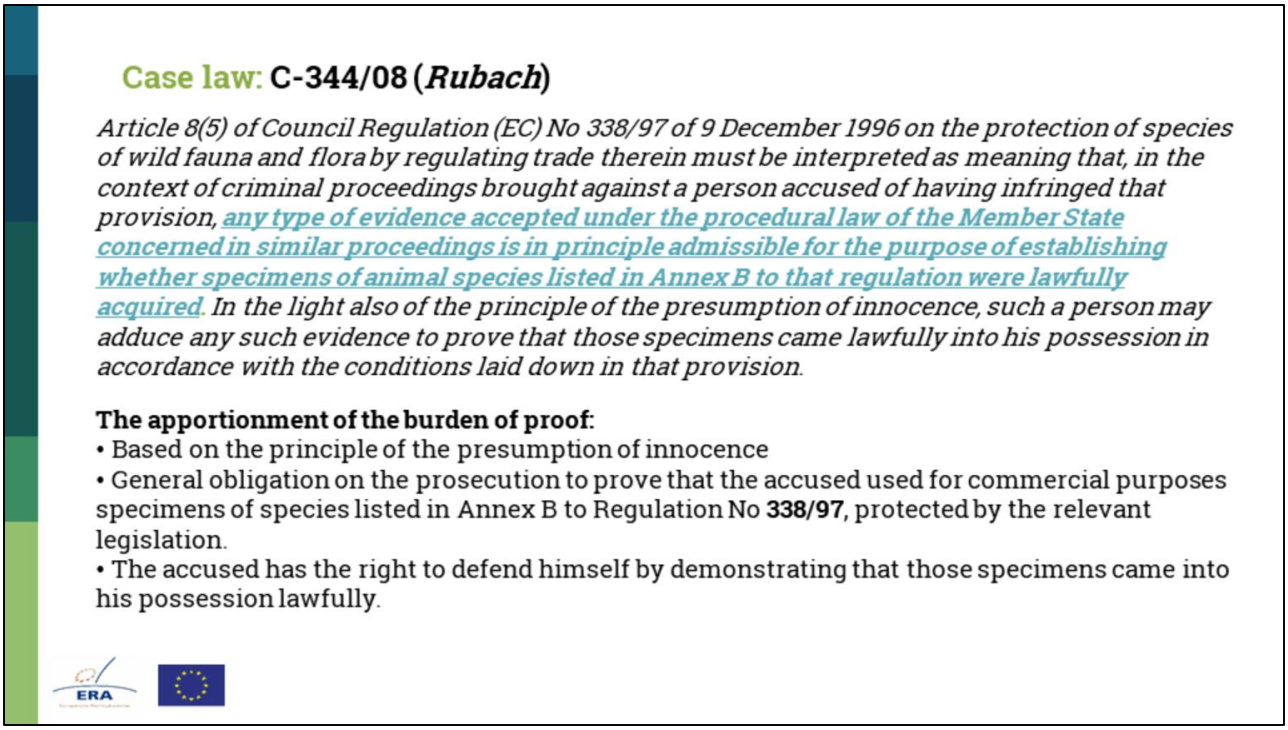


The Regulation does not provide a comperhensive rules in the field of criminal liability. However, it stipulates basic rules for the type and character of the sanctions which should be appropriate to the nature and gravity of the infringement.



A regards admissibility of evidence, the CJEU shared its opinion in case Rubach. In this case, criminal charges were brought against Mr Rubach in respect of 46 infringements the Polish Law on nature protection.

The position of that authority shows that the accused was unable to register the specimens at issue because, as arachnids, they were not subject to registration. That fact was also confirmed by the Polish Government in its written observations.



The answer is based on CJEU case law: (see, to that effect, Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraphs 29 and 30).

And as regards burden of proof: see, inter alia, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 149, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 175).

The presumption of innocence: see paragraph 43 of the judgment of the European Court of Human Rights of 28 October 2004 in Cases 48173/99 and 48319/99 *Y.B. and Others v. Turkey*

Article 8 of Regulation No 338/97 provides:

'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.
...
5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens

were acquired and, if they originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora.

In the light of those provisions, it must therefore be concluded that Regulation No 338/97 does not specify what evidence must be used in order to establish that specimens of species listed in Annex B to that regulation have been acquired lawfully, in accordance with the conditions laid down in Article 8(5) of that regulation, in particular where those specimens have been born in captivity within the Community. The task of determining what evidence may establish that those conditions have been met is thus left to the competent authorities of the Member States. That evidence includes the licences or certificates provided for in Regulation No 338/97 or any other appropriate document which may be deemed useful by the competent national authorities.

The apportionment of the burden of proof with regard to determining whether specimens of species have been acquired lawfully, in the light of the principle of the presumption of innocence, it should be noted that the presumption of innocence is one of the fundamental rights

It should be pointed out that putting in place the system of protection introduced for specimens of species listed in Annexes A and B to Regulation No 338/97 does not affect the general obligation on the prosecution to prove, in criminal proceedings, that the accused used for commercial purposes specimens of species listed in Annex B to Regulation No 338/97, protected by the relevant legislation.

The accused has, in any event, the right to defend himself in an action seeking to establish his criminal liability, by demonstrating, in accordance with Article 8(5) of Regulation No 338/97, that those specimens came into his possession lawfully, under the conditions laid down in that provision, and to use for that purpose any type of evidence admissible under the relevant procedural law.

EXAMPLES

1) Demonstration of power

2) The Bear Inn

As an example, two cases will be presented:
1) using endangered animal (baby tiger) by a politician to celebrate his victory in elections

THANK YOU FOR YOUR ATTENTION!

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