

Case Study by Dr Matthias Keller, Aachen

Case: „Hunting Trophy ”



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Structure of the Case Study

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



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



EU Judicial Order / Cornerstone in Article 267 TFEU:

The Court of Justice of the European Union
shall have jurisdiction to give MS Courts
preliminary rulings concerning:

- (a) the **interpretation** of the Treaties
- (b) the **validity** and interpretation of (EU) acts



Is the lawsuit well-founded?



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.)



Two approaches to decide the case



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.”



Thank you
for your kind attention!

