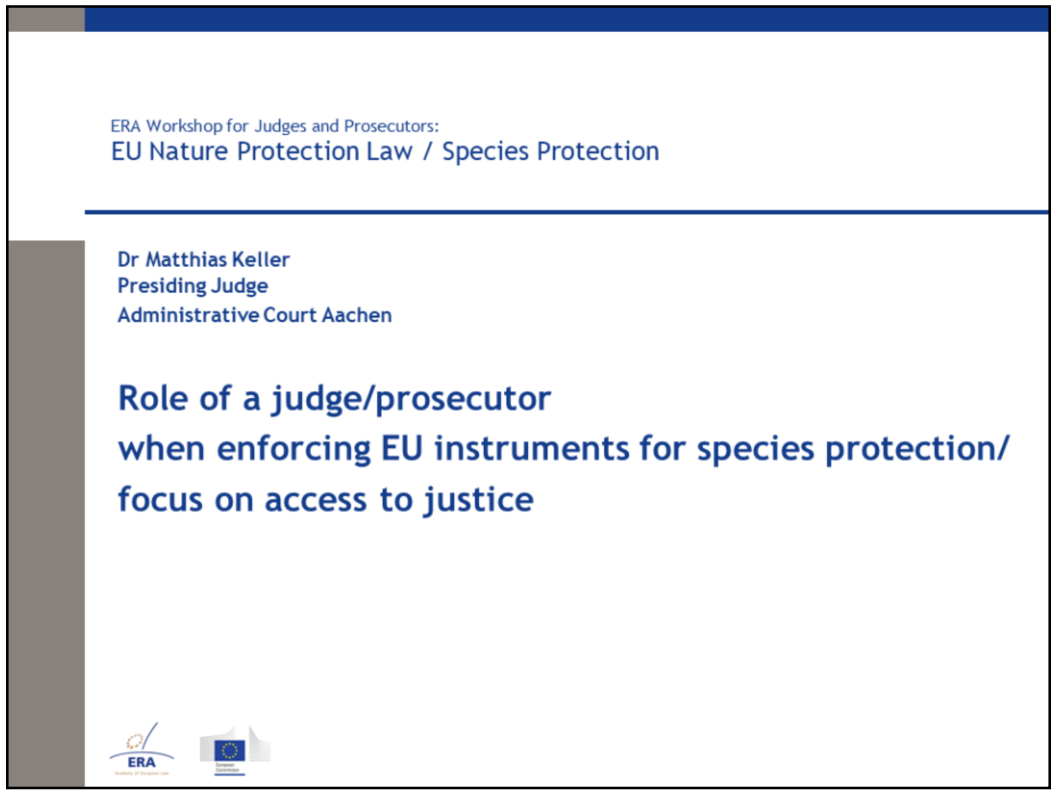
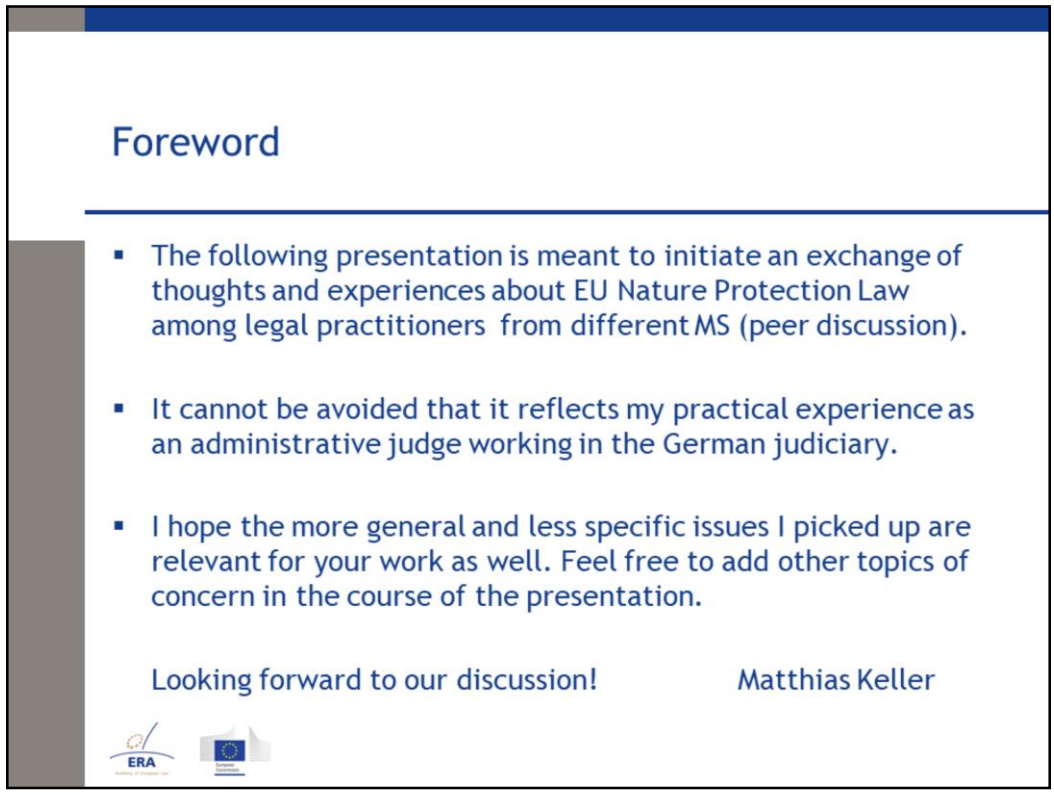
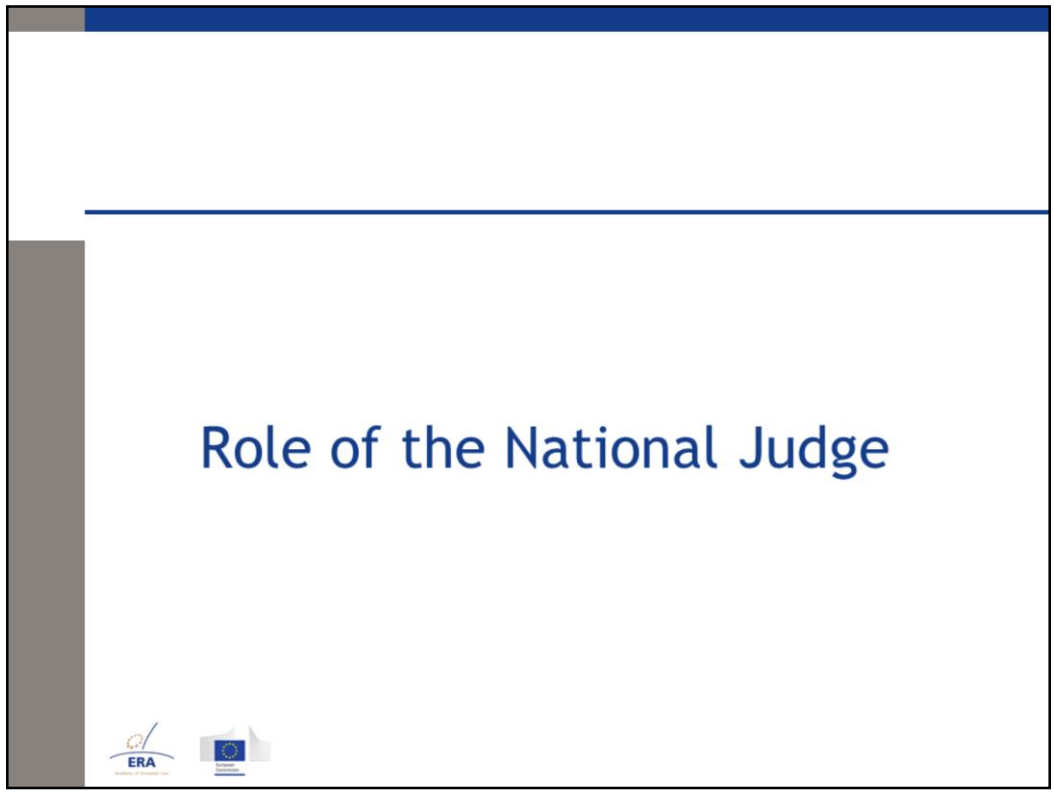


The first slide shows the topic of the training module and speaks for itself.



The foreword sets the scene by mentioning the core of continuous legal training which is the exchange of thoughts and experiences.

It is important for the audience to have a good insight in the structure of the upcoming presentation.



This slide is a title.

The National Judge is (almost always the one and only)
Judge of the European Union!

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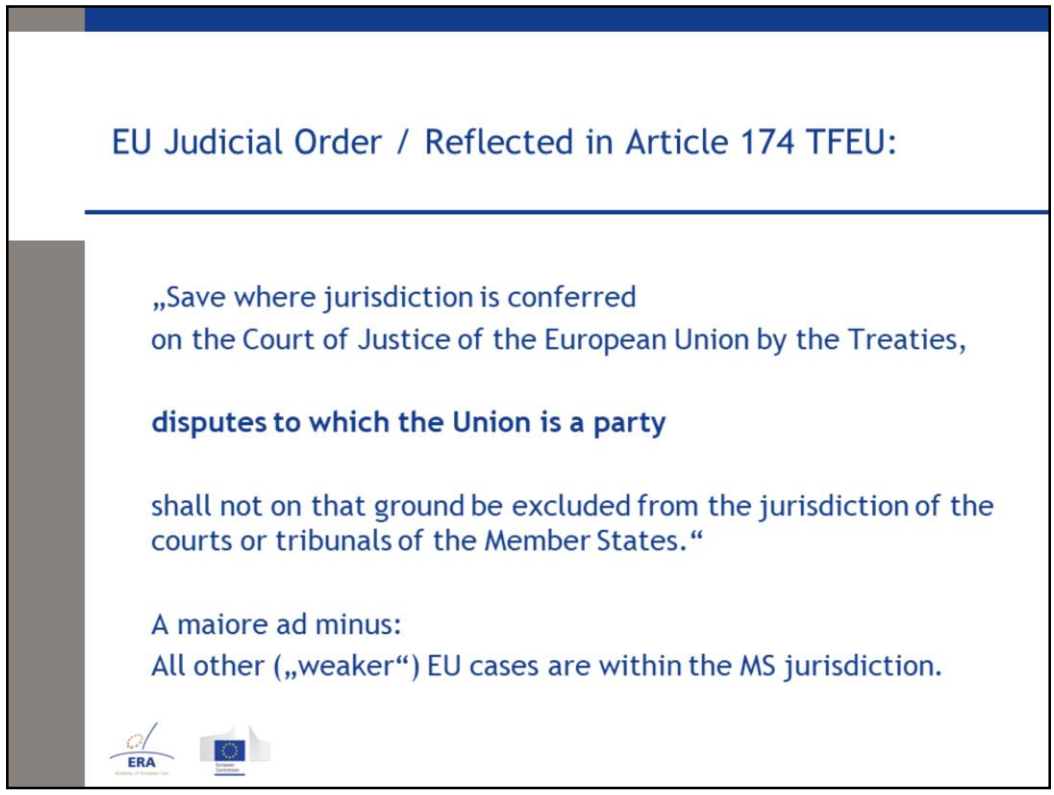
Why?

Rodin's *The Thinker* is meant as an eye catcher setting the path for self-reflection. The crucial point is to achieve the self-perception of the national judge as an EU judge. Therefore, the phenomenon should be thoroughly explained.

The corner stone of the EU judicial order can be found in Article 19 TEU.



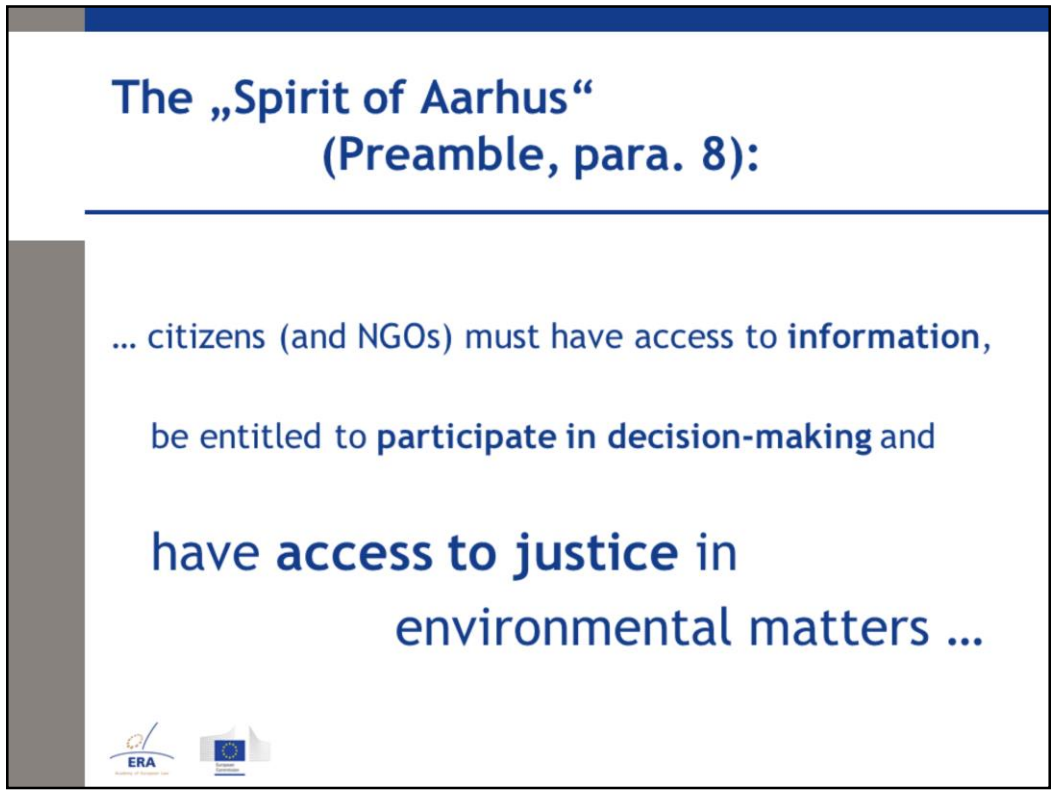
Art. 174 TFEU reflects the overall principle that those EU cases, that are not conferred to the EU courts, have to be decided by the courts of the Member States. As a result access to justice within the European Union is likely to be a combination of a right conferred by the EU law and the enforcement of this right by a national court.

This slide recalls the core features of the preliminary reference enshrined in Article 267 TFEU. Among other things it is important for the national judge to know that he or she can (and should) assess the validity of an EU legal act. However, it is the monopoly of the CJEU to nullify the EU legal act.

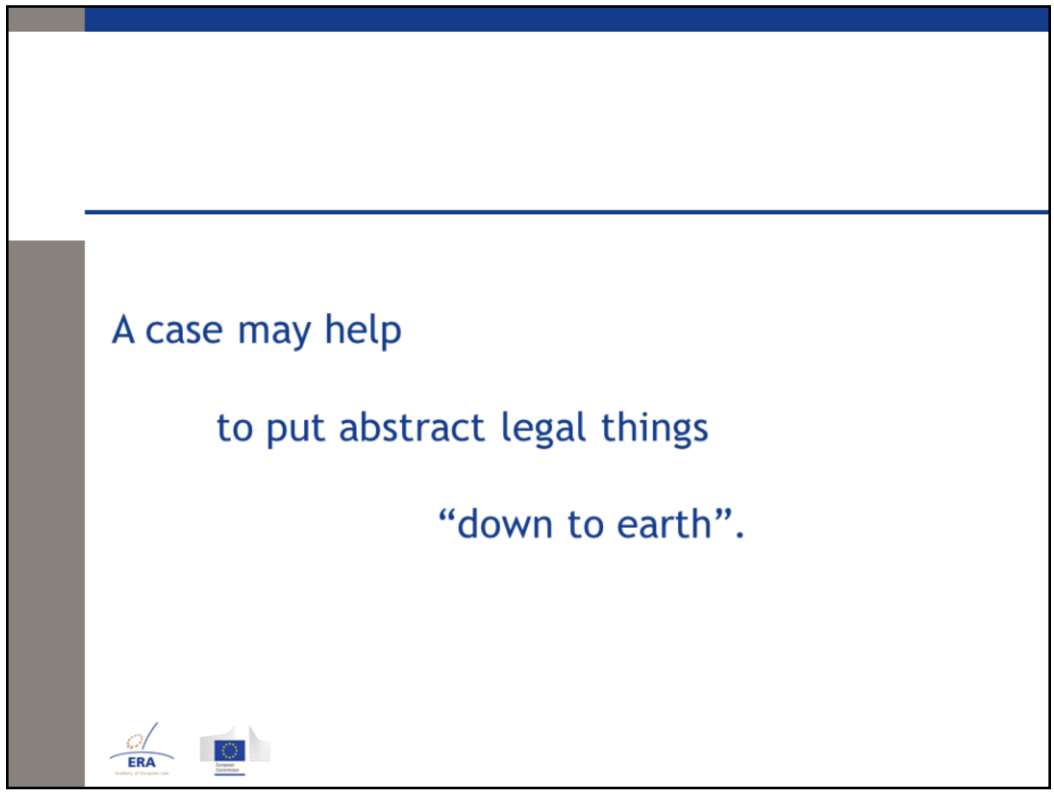
The current EU law system is far from being perfect. An audience of judges and prosecutors has experienced that in one or another way. Every practitioner knows (at least) one story where things went terribly wrong. Those stories - as sad as they may be - are an important help to start interesting discussions and to detect flaws in the system. So the idea is to look not only at the bright side of the matter.

This slide is a title.

The three pillars of the Aarhus Convention are explained as the relevant source of law when it comes to access to information, public participation and access to justice in environmental matters.



It is important to recall the spirit of Aarhus in a catch phrase and put an emphasis on access to justice.



Problem based learning is introduced here. For better results in the learning process it is helpful to change the method of presenting the information.

Case Scenario:
Great Cormorants like fish (about 150 kg per year) at least as much as fishermen do. The government of Saxony-Anhalt issues a **general regulation allowing to hunt cormorants**. An ENGO tries to protect the birds by bringing legal proceedings.
Quid iuris?

Cormorant - Foto: Frank Derer

The case is drafted in a simple manner. It is general knowledge that cormorants eat a lot of fish and therefore can produce damage to fisheries. With this easy-to-understand setting the two specific legal issues may become very clear:

1. the challenged act is general regulation
2. the claimant is an NGO.

The slide gives some more details concerning the Birds Directive and its relevant derogation in Art. 9 (“prevent serious damage fisheries”).

Let‘s first have a look at Art. 9 (3) AC …

Considering the “spirit of the Aarhus” it seems to be crystal clear that in such a case the ENGO should have “a day in court”.

Art. 9 (2) AC and Art. 9 (3) AC guarantee access to courts of law in all environmental matters.

However, as we put it in the German language

… “the devil lies in the detail” …

here, the details of transposition process and national procedural law.

People are invited to read Art. 9 (3) of the Aarhus Convention.

A first reading of Art. 9 (3) AC:

„(...) **each Party shall ensure that ...**
where they meet the criteria, if any, laid down in its national law,

members of the public
have access to administrative or judicial procedures

to challenge acts and omissions
by private persons and public authorities

which contravene provisions of its national law relating to the environment."

The precise wording of Art. 9 (3) AC has to be taken into account.

A second reading of Art. 9 (3) AC
from the view of a Member State
not fully embracing the spirit of Aarhus …

„(…) each Party shall ensure that …
where they meet the criteria,
if any, laid down in its national law,
members of the public have access to (justice)."

Cormorant case closed on the national level?

In many Member States (including Germany with its new Environmental Appeals Act from 2017) there are still "criteria in national law" that exclude access to justice in the "small and medium sized" environmental cases.

The "weak part" of Art. 9 (3) AC is presented.

Why?
The European fear and the German „Angst“
of a quasi actio popularis ...

... still results in a situation where Art. 9 (3) AC is not fully transposed or implemented.

The Court (C-240/09) “Slovak Brown Bear /LZ (I)” tries to fill the gap by demanding to bring national procedural law in line by **interpreting it “to the fullest extent possible”.**

When starting to do this the practitioner can find good guidance in the **Commission’s notice on access to justice in environmental matters (2017/C 275/01) from 28 of April 2017.**

Personal note: This comprehensive document is the kind of up to date “legal commentary” you will probably not find in the library of your court or tribunal. (Americans might call it a **“Restatement of law”**: not meant to command but to persuade)

Having explained the transposition gap, the role and function of the first Slovak Brown Bear Judgement (C-240/09) becomes clear. It is a good moment to introduce the Commission’s notice on access to justice in environmental matters (2017/C 275/01). More and more young colleagues did at least a part of their legal education in the US. Therefore a document meant to be a “restatement of law“ might ring a bell.

The comoran ist still waiting
for the outcome of the its case ...

E.g.: What will the German administrative judge probably do?

No access to justice (A2J) under Art. 9 (3) AC!
Even under the new Environmental Appeals Act from 2017 and an interpretation "to the fullest extent possible" (Slovak Brown Bear /LZ I) there is a gap that **only the German legislator** is competent to fill in.

However, A2J for the NGO may be granted under Art. 9 (2) AC!
Basis: Court's judgment of 8 November 2016 (C-243/15, LZ II), sometimes referred to as

„Slovak Brown Bear II"

Here, the main idea of the case study is presented: If there is a domestic legislative gap on access to justice, the "Slovak Brown Bear II" Judgment (C-243/15) may step in.

C-243/15

„Slovak Brown Bear II“

Here, the CJEU takes a fresh start and establishes **legal standing requirements** on the basis of

Article 47 of the EU Charter of Fundamental rights
and
Article 9(2) of the Aarhus Convention
and
Article 6 of the Aarhus Convention

for decisions, acts and omission for **which the public participation provision** of Article 6 of the Aarhus Convention applies.

Hunting Cormorants: prior public participation?

The fresh start on the basis of the EU legal pyramid is presented. It should be stressed that under this jurisprudence the “emergency exit” to access to justice is opened by the “public participation requirement”.

The decisive question for legal standing in this case turns out to be :
Does the public participation provision (Art. 6 AC) apply?

Article 6 of the Aarhus Convention provides: "1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed **activities listed in annex I**;

(b) Shall, in accordance with its national law, **also apply the provisions** of this article to decisions on proposed activities not listed in annex I **which may have a significant effect on the environment."**

German case „Komoranverordnung":
The hunting has a significant effect.
The ENGO has legal standing.
However, the hunting is justified by preventing serious damage to fisheries.
Cf. Court of Appeal of Saxony-Anhalt, Decision of March 23, 2017 (2 K 127/15) and Judgment of November 22, 2017 (2 K 127/15).

Activities which "may have a significant effect on the environment" require a public participation. If you answer this in the affirmative (like the German Court of Appeal of Saxony-Anhalt did in the case) access to justice can be granted on the basis of Art. 9 (2) AC which seems to be applicable in all Member States.

Conclusions:

1. The comprehensive guarantee of access to justice under Art. 9 (3) AC is still not fully operable because of "transposition deficits" by the EU and some of its Member States.

2. The recent jurisprudence of the CJEU (Brown Bear II /LZ II) finds "a way out" to grant NGO standing by applying Article 47 of the EU Charter in conjunction with Art. 9 (2) AC and Art. 6 para. 1 lit. b) AC for matters which may have a significant effect on the environment.

3. Here there was an obvious linkage to the Birds-Directive. Linkages to Art. 6 (3) of the Habitats Directive or Art. 4 of the Water Framework Directive may lead to the same results. (Cf. recently: CJEU, from 20 Dec. 2017, C-664/15, „Protekt")

Taking a look at the conclusions is important for memorizing the core of the case study.

The slide is a title.

Applying the (Habitats-) Directive (I)

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Question of a national judge:
„Is there still any need to apply the Habitats Directive if my MS has it already implemented into domestic waste law ?“

Legal nature of the WFD under Art. 288 (3) 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.”

Art. 288 (3) TFEU and the idea of “binding as to the result” should be well aware.

Applying the (Habitats-) Directive

Judge:
„That does not answer my question:
Is it really necessary to read and apply the Habitats Directive in the national court room ?“

Only in a “Brave New Legal World” there would be no need to apply a transposed Directive!

However, in the real world things are different:

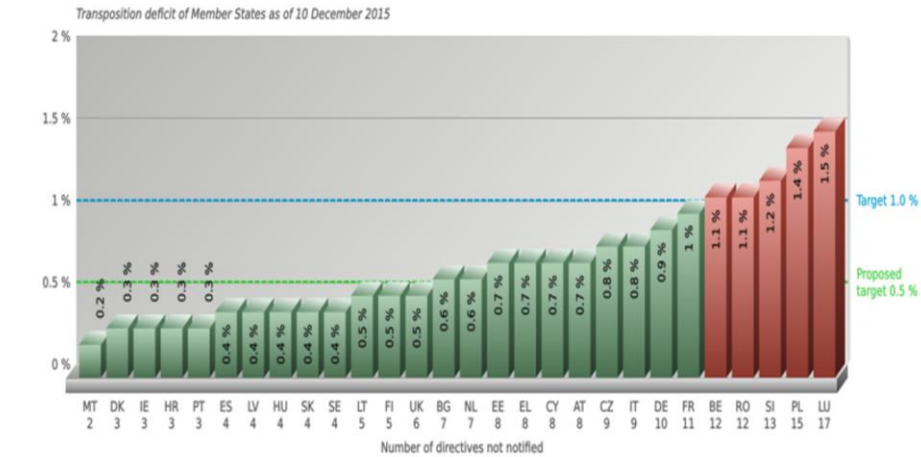
For some reason or other MS can get lost in the transposition process ...
Transposition delayed might mean rights of EU citizens denied ...
Any “precise” provision can become highly unclear if confronted with a specific case no one ever thought of.

The eternal problem of texts, their meaning and their lacunae ...

The slide tries to reflect some typical attitudes when it comes to the application of EU Directives by domestic courts.

World of Statistics: Transposition deficit of MS (all directives)

(Not so bad, isn't it?)



Source : http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm#maincontentSec2

No presentation without statistics.

Applying the Habitats Directive

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What are the conditions of a direct application of a Directive ?

Direct effect? What does it mean in a nutshell?

Direct effect : "Van Gend&Loos" — Generally, an individual can invoke any EU provision in a national court room which is **"sufficiently precise + unconditional"** (e.g. fundamental freedoms)

Vertical direct effect: "Van Duyn" — **Directives:** Against a MS or its "emanation" (vertical) an individual can invoke those provisions of a directive that are **not timely transposed + "sufficiently precise + unconditional".**

Horizontal direct effect: "Faccini Dori" — **Directives:** Against another private party (horizontal) an individual **cannot use direct effect of a directive.**

However, **interpretation of domestic law in the light of EU law** ("consistent interpretation") is always possible and even required ("as far as possible") from the national courts to reach the result to be achieved by an EU directives, cf. Art. 288 TFEU.

Good guidance by the CJEU in "Pfeiffer, C-397/01 , 116": "National methods of interpretation".

ERA

Here the attention is drawn to "direct effect" and its different faces. Among other things it is important for the national judge to have a solid knowledge about these basic features of EU law.

The Application of the Habitats Directive

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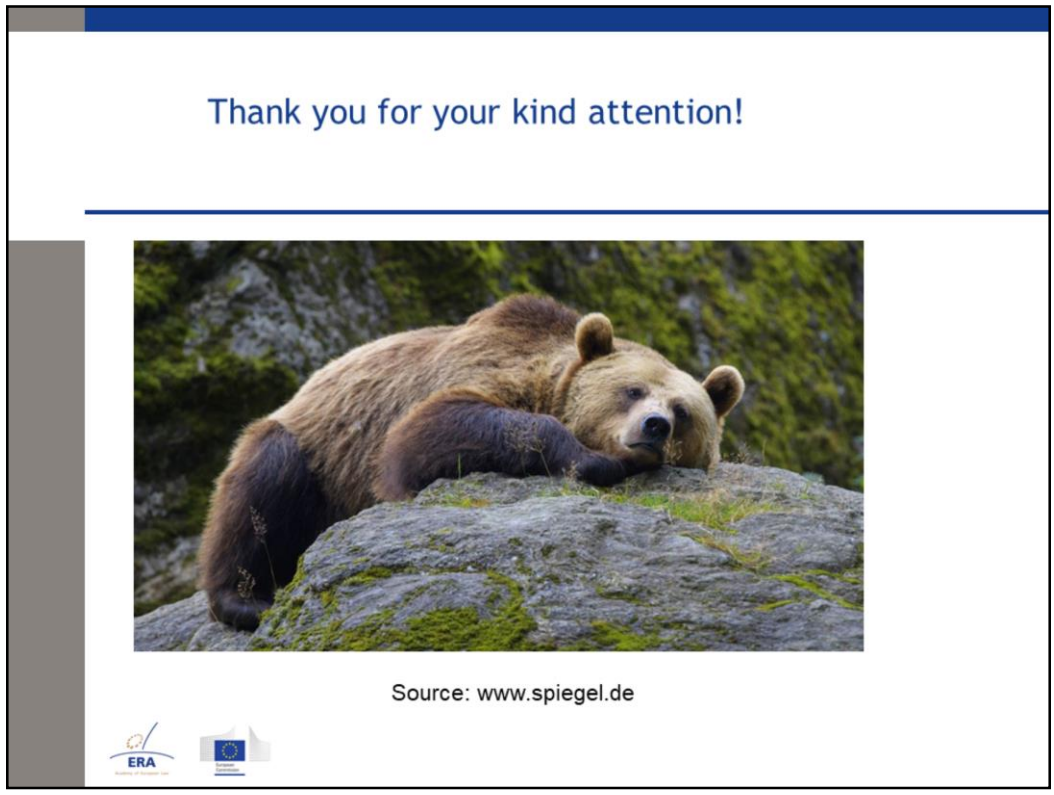
Conclusio:

The Habitats Directive, especially with its „sufficently precise + unconditional“ provisions, should be read in a **synoptical way** with domestic legislation .

A consistant interpretation (**„interprétation conforme“**) of national law in the light of EU law is always to be considered and a very easy tool to make EU law happen without further delay for the claimant who is invoking it.

EU justice delayed is (often) EU justice denied.

Last but not least “reading in a synoptical way” and the famous “consistent interpretation” are mentioned as important working tools.



The last slide speaks for itself.