

Case Study by Dr Matthias Keller, Aachen

Case: „Day Cream and Nightmare"



Copyright: JA Brinckmann / Wikipedia: Phalaenopsis amabilis "Moon Orchid",



1

Is there any legal remedy available for Mel C? To a court of law?

- **Legal remedies: against what?** **Confiscation order (cream & orchid)!**
 - So far, there is only the decision by officer Right to confiscate the cream and the orchid. Mel C can challenge it to defend her property rights.
- **Appeal to a court of law?** **Yes, but exhaustion of other remedies?**
 - There may be a direct appeal to a judge. However, it may also be required to exhaust other remedies (to the public prosecutor?) before going to court. I will be more than happy to get to know your "complaint system" before going to court.
- **Ordinary Court or Administrative Court?** **Depends!**
 - Member States establish their court systems as they wish (procedural autonomy).
E.g.: In Germany it all depends on the purpose of the challenged confiscation:
 - Ordinary Courts review confiscations that are linked to **criminal law proceedings**.
 - Admin. Courts review confiscations that are linked to **administrative law proceedings**.



2

Are legal proceedings successful on the merits?

Here are my ideas:

- The legal proceedings are (probably) **not successful** on the merits.
- The challenged **confiscation seems lawful (to me)**; the limitation of property rights is legally justified.
- (It is to be assumed that) Euroland has a valid “**Statute on Customs Control**” that empowers the administration (here: Officer Right) to confiscate goods of which the import is a criminal offence.
- Article 123 (4) of the **Criminal Code of Euroland** constitutes that importing goods without the necessary CITES-documentation is a criminal offense.
- In early 2024 “cream and orchid” from Thailand reached Euroland Airport without the necessary CITES-documentation.



3

The necessity of the CITES-Documentation has to be determined under the “EU wildlife trade regulations”

- **Basic Regulation**
 - Council Regulation [EC] No 338/97 on the protection of species of wild fauna and flora by regulating trade therein lays down the overall provisions for import, export and re-export, as well as internal EU trade in specimens of species. The species are listed in its four Annexes.
- **Implementing Regulation**
 - Commission Regulation [EC] No 865/2006 (as amended) lays down detailed rules and addresses practical aspects for the implementation of Council Regulation (EC) No 338/97.
- **Permit Regulation**
 - Commission Implementing Regulation [EU] 792/2012 lays down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 and Commission Regulation (EC) No 865/2006.



4

The import of “cream and orchid” needs a permit (= specimens of species listed in Annex B)

Under Article 3 (2) of Regulation No 338/97 the

- introduction into the Community [EU]
- of **specimens** of the species **listed in Annex B**
- necessitates an import permit.

Under Article 2 (t) of the same Regulation (“Definitions”):

‘specimen’ shall mean (...) **any listed plant**, whether alive or dead, any part or derivative thereof, whether or not contained in other goods (...)



unless (...) specifically exempted from the provisions of this Regulation or from the provisions relating to the Annex.

Note:

As a rule the EU requires import permits for Annex B specimens and is therefore stricter than CITES.



5

All orchids are listed under Regulation No 338/97!

If not specifically listed in Annex A, **orchids are subject to Annex B!**

	Annex A	Annex B	Annex C	Common name
FLORA				
ORCHIDACEAE		ORCHIDACEAE spp. (II) (Except for the species included in Annex A) (*) #4		Orchids
For all of the following Annex A orchid species, seedling or tissue cultures are not subject to this Regulation, when:				
—they are obtained <i>in vitro</i> , and				
—meet the definition of ‘artificially propagated’ in accordance with Article 56 of Commission Regulation (EC) No 865/2006 ⁽¹⁰⁾ , and				
—when introduced into or (re-)exported from the Union are transported in sterile containers				
	<i>Aerangis elisi</i> (I)			
	<i>Cattleya jangheana</i> (I)			
	<i>Cattleya lobata</i> (I)			
	<i>Cephalanthera cucullata</i> (II)			Hooded helleborine
	<i>Cypripedium calceolus</i> (II)			Lady's slipper orchid



(...) Annex A
list goes on!

6

Here: *Phalaenopsis amabilis* “Moon Orchid”, one of the national flowers of Indonesia, is not specifically listed in Annex A, therefore “our orchid” is included in **Annex B!**

	Annex A	Annex B	Annex C	Common name
FLORA				
ACTINIDACEAE				Actinids
ORCHIDACEAE		ORCHIDACEAE spp. (II) (Except for the species included in Annex A) (*) #4		Orchids
For all of the following Annex A orchid species, seedling or tissue cultures are not subject to this Regulation, when: —they are obtained <i>in vitro</i>, and —meet the definition of ‘artificially propagated’ in accordance with Article 56 of Commission Regulation (EC) No 865/2006 ⁽¹⁰⁾, and —when introduced into or (re-)exported from the Union are transported in sterile containers				
<i>Aerangis elizii</i> (I)				
<i>Cattleya jongheana</i> (I)				
<i>Cattleya lobata</i> (I)				
<i>Cephalanthera cucullata</i> (II)				Hooded helleborine
<i>Cypripedium calceolus</i> (II)				Lady's slipper orchid



(...) Annex A
list goes on!

7

Is - at least - the orchid cream
exempted under Annotation #4? **NO!**



Annotation #4 provides that the listing comprises

“all parts and derivatives, **except**”:
(...)

- g) finished products derived from artificial propagation,
packaged and ready for retail trade of cosmetics
containing parts and derivatives of (...) *Phalaenopsis amabilis* (“our orchid”)

My conclusion:

As the orchid day cream is a finished product **but not “packaged and ready for retail trade”** this single pot for private use does not fulfil the terms of the exemption under the #4 annotation.

[Could also be a case to refer to the CJEU under Art. 267 TFEU!]



8

Is our Moon Orchid exempted under Footnote Nr 9 (as amended)? **NO!**



Footnote Nr 9 (as currently amended) provides:

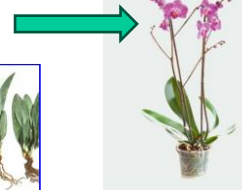
Artificially propagated hybrids of (...) Phalaenopsis are not subject to the provisions of this Regulation (...) under the condition that shipped in flowering state (...) specimens must be **professionally processed for commercial retail sale (...)**

My conclusion:

As the orchid Phalaenopsis is not **“professionally processed for commercial retail sale”** it does not fulfil the terms of the exemption of Footnote 9. For the sake of completeness, it should be mentioned that Footnote 9 says at the end: “Plants not clearly qualifying for the exemption must be accompanied by appropriate CITES documents.”

The requirement of being **“artificially propagated hybrids”** does not even have to be established. (cf. in this context CITES-Secretariat: Differentiating wild-collected and artificially-propagated plants, GreenCustoms Knowledge Series No. 8)

Without obvious signs of wild collection.



Wild collected orchids with dead roots and damaged leaves



9



Are the items a **“personal and household effects”** and therefore exempted from the permit requirement? **NO!**



- Article 7 of Council Regulation No 338/97 provides a derogation relating to listed specimens which are **“personal or household effects”**.
- Article 57 (1) of the **Commission Regulation No 865/2006** concretizes:
- „That derogation shall only apply to **specimens (...)** if they meet one of the following conditions:
 - a) they are **contained in the personal luggage of travellers (...)**

Here:

The day cream and the orchid were shipped from Thailand to Euroland in early 2024 when Mel C was already back home. Thus, the items were not contained in her personal luggage. The derogation is not relevant for the case.

Conclusion: **The confiscation of cream and orchid is lawful.
Legal proceedings will not be successful.**



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**Thank you
for your kind
attention!**



Photo: Austria, Vorsicht Artenschutz!
Österreich, Bundesministerium für Finanzen, Öffentlichkeitsarbeit.