

OPINION OF ADVOCATE GENERAL
STIX-HACKL

delivered on 15 May 2003¹

I — Introduction

1. The present reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein² (hereinafter ‘Regulation No 338/97’) and the detailed rules for its implementation adopted by the Commission. In particular, it relates to the legal classification of stuffed animals and the forms of acquisition of animals that are covered.

II — Legal framework

A — *International law*

2. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (hereinafter ‘CITES’) was opened for

signature on 3 March 1973. The purpose of that convention is to protect certain endangered species of wild flora and fauna by regulating international trade in them. To achieve its objectives, the Convention imposes a number of restrictions and controls.

3. CITES contains several appendices. Appendix I applies to all species which are threatened with extinction and, consequently, subject to the strictest rules. Appendix II applies, first, to all species which may be threatened with extinction unless trade is subject to strict regulation and, second, to other species which are to be subject to strict regulation.

4. Article XIV(1) provides that the provisions of CITES are in no way to affect the right of Parties to adopt stricter domestic measures regarding the conditions for trade, taking, possession, or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof.

1 — Original language: German.

2 — OJ 1997 L 61, p. 1.

5. Article VII, which contains exemptions and other special provisions, provides, in paragraph 2, that the provisions of Articles III, IV and V, that is the rules on regulation of trade, do not apply to a specimen where the management authority issues a certificate that the specimen was acquired before the provisions of CITES applied to it.

8. Under Article 3, Regulation No 338/97 covers *inter alia* the species listed in Appendix I. These include the specimens that are the subject of the present dispute.

9. Article 2 of Regulation No 338/97 includes the following legal definitions:

6. Because of difficulties of interpretation, Resolution 5.11 was adopted, which recommends that, for live and dead animals, the date on which a specimen is acquired be the date of their initial removal from their habitat. For parts and derivatives of protected specimens, the date of their introduction to personal possession is crucial.

'(m) "primarily commercial purposes" shall mean all purposes the non-commercial aspects of which do not clearly predominate;

...

(p) "sale" shall mean any form of sale. For the purposes of this regulation, hire, barter or exchange shall be regarded as sale; cognate expressions shall be similarly construed;

B — Community law

1. Regulation No 338/97

...

7. The object of Regulation No 338/97, under Article 1 thereof, is *inter alia* to protect species of wild fauna and to guarantee their conservation by regulating trade therein.

(u) "trade" shall mean the introduction into the Community, including introduction from the sea, and the export and re-export therefrom, as well as the use, movement and transfer of pos-

session within the Community, including within a Member State, of specimens subject to the provisions of this regulation;

activities’, includes the following provisions:

...

‘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.

(w) “worked specimens that were acquired more than 50 years previously” shall mean specimens that were significantly altered from their natural raw state for jewellery, adornment, art, utility, or musical instruments, more than 50 years before the entry into force of this regulation and that have been, to the satisfaction of the management authority of the Member State concerned, acquired in such conditions. Such specimens shall be considered as worked only if they are clearly in one of the aforementioned categories and require no further carving, crafting or manufacture to effect their purpose;

...

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

10. Article 8, which contains ‘provisions relating to the control of commercial

(b) are worked specimens that were acquired more than 50 years previously; or

...

tation of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein³ (hereinafter 'Regulation No 939/97') establishes detailed conditions and criteria for the consideration of permit and certificate applications and for the issue, validity and use of such documents. Specific provisions apply to captive born and bred, or artificially propagated specimens.

11. Under Article 8(4), the Commission is empowered to define general derogations from the prohibitions referred to in paragraph 1 based on the conditions referred to in paragraph 3, as well as general derogations with regard to species listed in Annex A in accordance with Article 3(1)(b)(ii). Any such derogations must be in accordance with the requirements of other Community legislation on the conservation of wild fauna and flora.

13. Article 1 of Regulation No 939/97 gives the following definition of 'date of acquisition': 'the date on which a specimen was taken from the wild, born in captivity or artificially propagated'.

14. Article 20(3) contains provisions relating to a certificate for the purposes of Article 8(3) of Regulation No 338/97. It does not, however, make any provision regarding the exemption referred to in Article 8(3) for worked specimens that were acquired more than 50 years previously.

2. The implementing rules

(a) Regulation No 939/97

15. Article 32 provides *inter alia* for the following exemptions:

12. Commission Regulation (EC) No 939/97 of 26 May 1997 laying down detailed rules concerning the implemen-

'The prohibitions of Article 8(1) of Regulation (EC) No 338/97 and the provision in

³ — OJ 1996 L 140, p. 9.

Article 8(3) thereof that exemptions therefrom shall be granted by the issuance of a certificate on a case-by-case basis shall not apply to:

contained in Article 8(1) of Regulation (EC) No 338/97 are uniformly applied, it is necessary to lay down conditions and criteria with regard to their definition.’

...

- (d) worked specimens that were acquired more than 50 years previously as defined in Article 2(w) of Regulation (EC) No 338/97.’

18. In derogation from Article 29(2) of Regulation No 939/97, Article 29(1) of Regulation No 1808/2001 provides:

- (b) Regulation No 1808/2001

‘The exemption for specimens referred to in Article 8(3)(a) to (c) of Regulation (EC) No 338/97 shall only be granted when the applicant has satisfied the competent management authority that the conditions referred to therein are met.’

16. Regulation No 939/97 was replaced by Commission Regulation (EC) No 1808/2001 of 30 August 2001 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein⁴ (hereinafter ‘Regulation No 1808/2001’), which entered into force in September 2001.

19. Article 32 of Regulation No 1808/2001, in contrast to Article 32 of Regulation No 939/97, provides that in the cases mentioned no certificate is required.

- 17. The fifth recital states:

C — *National law*

‘In order to ensure that general derogations from the internal trade prohibitions

20. The Swedish Law (1994:1818) on protected species of fauna and flora (hereinafter ‘the 1994 Law’), in Paragraph 8a,

⁴ — OJ 2001 L 250, p. 1.

makes the following negligent or wilful infringements of Regulation No 338/97 punishable by a fine or imprisonment: introduction into Sweden, export or re-export from Sweden, trade in artificially propagated fauna and transportation, transit, sale, purchase or other commercial transactions. There are also rules on assessing the seriousness of an infringement. In the event that the infringement is not serious, provision is not made for any penalty.

hawks, two hobbies, two hen harriers, one Ural owl, four tawny owls, one goshawk, two kestrels, one snowy owl, one hawk owl, one short-eared owl, one barn owl, one marsh harrier, four buzzards, one long-eared owl, one crane, one golden eagle and one sea eagle. This is a serious infringement, as it involved endangered and rare species and was on a large scale.

21. The 1994 Law was repealed with effect from 1 January 1999 (SFS 1998:808 and 1998:811).

24. In Tyringe in July 1998, either wilfully or negligently, Mr Nilsson unlawfully purchased a mounted dead brown bear, even though this species is listed in Annex A to Regulation No 338/97. This is a serious infringement, as it involved a specimen of an endangered and rare species and, in conjunction with the specimens mentioned in submission 1, was on a large scale.

III — Facts, main proceedings and questions referred for a preliminary ruling

22. In premises used by his company, Tyringe Förmedlingscentral, Jan Nilsson (hereinafter Mr Nilsson) kept a number of stuffed specimens of bird species and a stuffed brown bear, all of which are listed in Annex A to Regulation No 338/97.

25. The mounted animals recovered from Mr Nilsson's premises were stuffed specimens.

23. In Tyringe (Sweden), in August 1998, either wilfully or negligently, Mr Nilsson unlawfully purchased the following mounted dead specimens, even though the species in question are listed in Annex A to Regulation No 338/97: two sparrow

26. In the proceedings in the Hässleholms tingsrätt (Hässleholm District Court, Sweden), the prosecutor indicted Mr Nilsson for serious infringement of the 1994 Law and of the Miljöbalken (Environment Code). Mr Nilsson denied the infringement.

27. The Hässleholms tingsrätt stayed the proceedings and made reference to the Court of Justice pursuant to Article 234 EC for a preliminary ruling on the following questions:

IV — The first question

A — Main submissions of the parties

(1) Do stuffed animals listed in Annex A fall within the definition of ‘worked specimens’?

28. The *Italian Government* emphasises that the legal definition of ‘worked specimens’ under Article 2(w) of Regulation No 338/97 essentially hinges on the notion of ‘work’. Since a significant alteration is necessary under that provision and there is no such significant alteration in the case of stuffing, stuffed animals are not to be regarded as ‘worked specimens’ and do not therefore fall within the scope of Article 2(w).

(2) What is covered by the term ‘acquire’ in Article 8(3) of Regulation No 338/97?

(3) Must the person who acquired the specimen more than 50 years previously be the present owner?

29. The *Commission* first points out that Annex A to Regulation No 338/97 is more extensive than the corresponding appendix of the international convention (CITES) on which it is based.

(4) Do the provisions on exemption in Article 32 of Regulation No 1808/2001 mean that no assessment by the management authority in accordance with Article 2(w) of Regulation No 338/97 is required?

30. On the basis of the legal definition contained in Article 2(w) of Regulation No 338/97, the Commission concludes that stuffed animals are to be regarded as worked specimens if they are jewellery, adornment, art or utility and require no further manufacture.

B — *Assessment*

body parts, such as eyes or claws, are replaced by artificial parts.

31. The legal classification of stuffed animals must be based on the legal definition contained in Article 2(w) of Regulation No 338/97. That provision lays down what is covered by 'worked specimens'.

35. The techniques used in taxidermy must therefore be classified as a significant alteration of the specimens.

32. The first requirement that may be inferred from that provision is that the natural raw state of the specimen must have been significantly altered.

36. In addition, this is not undermined by the fact that the stuffing is intended to preserve the natural appearance of the animals as far as possible. Whether there is a significant alteration within the meaning of Article 2(w) of Regulation No 338/97 does not depend on the outward appearance, but on whether the overall state of the specimen has been altered.

33. As the Commission rightly states, stuffed animals are to be regarded as 'worked', because they have been altered in relation to their live or dead state, that is to say in comparison with the 'natural' state to which the regulation refers.

37. As a second requirement, Article 2(w) mentions the purpose of the alteration, making reference, in the form of an exhaustive list, to 'jewellery, adornment, art, utility, or musical instruments'. Depending on the purpose for which they are worked, each of these options may be relevant with respect to stuffed animals, depending on the specimen.

34. Furthermore, the requirement of a 'significant' alteration is also satisfied, since the activities carried out as part of taxidermy and the result achieved must be classified as a significant alteration. That is true of both conventional stuffing, where the hide is stripped and the pelt is tanned and stuffed, and of the dermoplastic treatment procedure. In that procedure, the hide is removed, the stripped pelt is cleaned and the fur is tanned. The insides are reconstructed and covered with the hide. Certain

38. Lastly, such specimens are to be considered as worked only if they are clearly in one of the aforementioned categories and require no further carving, crafting or manufacture to effect their purpose.

39. Consideration will be given to the other requirements laid down in Article 2(w), that is such specimens are covered only if they were significantly altered more than 50 years before the entry into force of the regulation and if they have been, to the satisfaction of the management authority of the Member State concerned, acquired in specific conditions, in connection with the third and fourth questions referred for a preliminary ruling.

40. The answer to the first question must therefore be that Article 2(w) and Article 8(3)(b) of Regulation No 338/97 are to be interpreted as meaning that stuffed animals listed in Annex A to that regulation fall within the definition of 'worked specimens', provided they require no further carving, crafting or manufacture.

V — The second question

A — *Main submissions of the parties*

41. The *Italian Government* considers that, because the first question is to be answered

in the negative, it is not necessary to answer the other questions.

42. The *Commission*, which deals with the second and third questions together, bases its arguments on the resolution adopted under CITES, the definitions of terms in Article 2 of Regulation No 338/97, the prohibition on trade in Article 8(3) of Regulation No 338/97, and Regulation No 939/97.

43. In the view of the Commission, a specimen is 'acquired' within the meaning of Article 8(3) of Regulation No 338/97 where it has been taken for personal possession irrespective of whether it is taken by the present owner or by a former owner. Therefore, inheritance (by bequest), gifts and removal from the wild are also covered.

B — *Assessment*

44. The term 'acquire' in Article 8(3) of Regulation No 338/97 must be interpreted with reference to the scheme of the regulation.

45. The basic principle of the scheme set out by Regulation No 338/97 is the prohibition under Article 8(1) that applies to specimens of species listed in Annex A. That provision prohibits a number of actions, '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'.

specimen was taken from the wild, born in captivity or artificially propagated.

49. In the present case, however, none of these three alternatives applies, since stuffed animals, as 'worked specimens', are not taken from the wild. That cannot therefore be the date of acquisition of stuffed animals.

46. Article 8(3)(b) grants an exemption from that prohibition for 'worked specimens that were acquired more than 50 years previously'. The legal definition of such worked specimens is laid down in Article 2(w).

50. The date of removal from the wild is certainly also important in the case of stuffed animals in so far as such specimens — before being worked — may be taken from the wild.

47. However, there is no definition of the term 'acquire' in any of these three provisions. Whilst Article 2(w) also makes reference to the period of 50 years with respect to acquisition, it does not give a more precise definition of the term 'acquire'.

51. It is thus possible to infer the following scheme from Regulation No 338/97 with respect to acquisition:

The first date when acquisition can take place is the date of removal from the wild.

48. More precise provision relating to acquisition is made, however, in Article 1(a) of Regulation No 939/97. Under that provision, 'date of acquisition' is regarded *inter alia* as the date when a

The second date when acquisition can take place is, in the case of a stuffed animal, when it is acquired under Article 8(3)(b).

In the case of stuffed animals, there is also the date of significant alteration within the meaning of Article 2(w). This lies between the date of removal from the wild and the date when the already worked, that is stuffed, animal is acquired.

and in Article 2(w) of Regulation No 338/97, the term 'acquire' used in those provisions must be given a broad interpretation.

In the case of stuffed animals, acquisition — prohibited under Article 8(1) — can therefore take place only after removal from the wild and the subsequent working.

55. Since, however, provisions on exemption cannot be given a broader scope than the rules for which they lay down an exemption, Article 8(3)(b) and Article 2(w) of Regulation No 338/97 cannot permit any more actions than are prohibited under Article 8(1).

52. Acquisition within the meaning of Article 8(1) must therefore be distinguished from acquisition under Article 8(3)(b) of Regulation No 338/97 firstly with respect to the date of acquisition.

53. The second distinction lies in the fact that the exemption under Article 8(3)(b) and under Article 2(w) of Regulation No 338/97 relates only to acquisition, whilst the prohibition laid down in Article 8(1) mentions 'acquisition' as just one of several prohibited actions. In addition, as far as the 'acquisition' mentioned in Article 8(1) is concerned, only 'acquisition for commercial purposes' is prohibited.

56. As can be seen from the list of actions that are prohibited under Article 8(1), the crucial factor is introduction to personal possession. Ownership does not have to be acquired, nor is mere possession sufficient.

54. Since there is no precise definition of the term 'acquire' used in Article 8(3)(b)

57. The term 'acquire' in Article 8(3)(b) and in Article 2(w) of Regulation No 338/97 covers all forms of acquisition of ownership. For those Member States that distinguish between the underlying title under the law of obligations and the property law aspect, a specific title is not important. Acquisition by inheritance, as a legacy or

bequest, or by gift is therefore also covered, as are, for example, purchase and barter.

VI — The third question

A — *Main submissions of the parties*

58. Keeping for sale or display to the public, which is prohibited under Article 8(1), would also be permitted under Article 8(3)(b) if it began before the commencement of the period of 50 years.

61. The *Italian Government* considers that, because the first question is to be answered in the negative, it is not necessary to answer the other questions.

59. It can also be seen from a comparison with the original Commission proposal,⁵ in which lawful acquisition was still required, that the Community legislature did not intend to impose any strict requirements on acquisition in general.

62. With regard to the third question, the *Commission*, which deals with this question together with the second question, takes the view that it is unimportant whether the present owner or a former owner took possession.

60. The answer to the second question must therefore be that Article 8(3)(b) of Regulation No 338/97 is to be interpreted as meaning that the specific form of acquisition is unimportant, but that any taking into possession is sufficient.

63. With regard to the period of 50 years after the date of acquisition, the *Commission* states that under CITES it is to be assessed from the entry into force of that convention, that is from 1 July 1975. Under Regulation No 338/97, on the other hand, the entry into force of that regulation is to be used, which — counted back — gives 3 March 1947.

⁵ — See Article 2(a) and Article 18(b) of the Commission proposal for a Council Regulation (EEC) laying down provisions with regard to possession of and trade in specimens of species of wild fauna and flora of 11 November 1991 (OJ 1992 C 26, p. 1).

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64. The third question concerns the issue of who benefits from the exemption laid down in Article 8(3) of Regulation No 338/97, that is to say who must have acquired the specimen. In particular, the question arises whether only the present owner can have acquired the specimen within the meaning of the provision or whether a former owner may also do so.

65. As has already been explained in connection with the second question, the legal definition of the date of acquisition in Article 1 of Regulation No 939/97, under which the relevant date is the date on which the specimen was removed from its natural surroundings, does not apply to stuffed animals.

66. The definition of ‘worked specimens that were acquired more than 50 years previously’ in Article 2(w) of Regulation No 338/97 is to be used. According to that definition, specimens are covered ‘that were *significantly altered* from their natural raw state... more than 50 years before the entry into force of this regulation *and that have been*, to the satisfaction of the management authority of the Member State concerned, *acquired* in such conditions’.⁶

⁶ — Our emphasis.

67. This means that the exemption in Article 8(3)(b) of Regulation No 338/97 applies only where the 50-year period has elapsed with reference to two events, the significant alteration and the acquisition.

68. It should also be stressed that the 50-year period under that provision does not have to run from the last acquisition that has taken place. Rather, the date is not calculated separately for each acquisition, which would amount to a minimum period of possession, but there is one reference date that applies to all cases, 3 March 1947. Significant alteration and acquisition must be before that date.

69. That does not mean, however, that all acquisitions of a stuffed animal must be before the reference date, but only the first acquisition. The exemption therefore also covers specimens which were first acquired before 3 March 1947, but which were subsequently acquired a further time.

70. Consequently, specimens acquired for the first time before 3 March 1947 do not fall within the scope of the prohibition laid down in Article 8(1) of Regulation No 338/97. If they were purchased, inherited or — in accordance with the proposed answer to the first question — acquired in some other way, they

may therefore also be acquired further times after that date.

are to be interpreted as meaning that not only the owner who acquired the worked specimen more than 50 years before the entry into force of the regulation is covered.

71. If, however, Article 2(w) of Regulation No 338/97 were interpreted to the effect that any acquisition had to be before the reference date, that would mean that old objects could no longer be acquired at all after the reference date.

VII — The fourth question

72. If the exemption laid down in Article 8(3) did not apply, this would mean that the prohibition laid down in Article 8(1) did apply. Not only would stuffed animals that are more than 50 years old be excluded from business dealings, but any possession by a further owner would also be prohibited. Such a prohibition would therefore also apply to persons who merely inherited the object or to whom it was given.

A — *Main submissions of the parties*

75. The *Italian Government* considers that, because the first question is to be answered in the negative, it is not necessary to answer the other questions.

73. As the Commission rightly states, it is for the national authorities to ascertain and to prove the date, *inter alia*, of the first acquisition.

76. In the view of the *Commission*, Article 32 of Regulation No 1808/2001, under which no certificate is required in certain cases, has amended Article 8(3) of Regulation No 338/97, which still provided for the issuance of a certificate. There is no inconsistency between Article 32 of Regulation No 1808/2001 and Article 2(w) of Regulation No 338/97, because this provision merely requires the specimens to be acquired, to the satisfaction of the management authority, in certain conditions. The Commission also makes reference to Article 29 of Regulation No 1808/2001.

74. The answer to the third question must therefore be that Article 2(w) and Article 8(3)(b) of Regulation No 338/97

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as defined in Article 2(w) of Regulation No 338/97.

77. It should first be pointed out that, under Article 45 thereof, Regulation No 1808/2001 entered into force on the third day following its publication on 19 September 2001.

78. However, the facts of the main proceedings concern circumstances that had already occurred in July and August 1998.

79. Regulation No 939/97 is therefore still applicable to the main proceedings. Article 32 of that regulation provides that the requirement that the exemption is to be granted by the issuance of a certificate does not apply to specimens that were acquired more than 50 years previously as defined in Article 2(w) of Regulation No 338/97.

80. The provisions on exemption laid down in Article 32 of Regulation No 1808/2001 and Article 32 of Regulation No 939/97 therefore amend Article 8(3) of Regulation No 338/97 in so far as no certificate is required any longer for worked specimens that were acquired more than 50 years previously

81. However, those provisions are without prejudice to Article 2(w) of Regulation No 338/97. Thus, the requirement laid down therein, under which the specimen must, to the satisfaction of the management authority, be acquired in the conditions laid down in the regulation, also continues to apply. The management authority may therefore continue to exercise supervision. This 'satisfaction', which is prescribed in Article 2(w), is even a requirement for the application of the exemption under Article 8(3) of Regulation No 338/97.

82. The management authority must still therefore be given the opportunity to ascertain, to its satisfaction, that the specimens in question were acquired under the circumstances provided for in Article 2(w). The requirement to give the management authority such an opportunity applies to those who rely on the exemption. In this connection, the Commission rightly refers to Article 29(1) of Regulation No 1808/2001. Under that provision, the exemption laid down in Article 8(3)(b) of Regulation No 338/97, which is relevant to the present case, is only granted 'when the applicant has satisfied the competent management authority that the conditions referred to therein are met'.

83. The answer to the fourth question must therefore be that Article 32 of Regulation No 1808/2001 and Article 32 of Regulation No 939/97 are to be interpreted as meaning that, whilst the exemption laid down in Article 8(3) and Article 2(w) of Regulation No 338/97 does

not require the issuance of a certificate, it does require the specimens in question to have been, to the satisfaction of the management authority, acquired under the circumstances provided for in Article 2(w) of Regulation No 338/97.

VIII — Conclusion

84. In the light of the foregoing, it is proposed that the Court give the following answers to the questions referred for a preliminary ruling:

- (1) Article 2(w) and Article 8(3)(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 are to be interpreted as meaning that stuffed animals listed in Annex A to that regulation fall within the definition of ‘worked specimens’, provided they require no further carving, crafting or manufacture.
- (2) Article 8(3)(b) of Regulation No 338/97 is to be interpreted as meaning that the specific form of acquisition is unimportant, but that any taking into possession is sufficient.

- (3) Article 2(w) and Article 8(3)(b) of Regulation No 338/97 are to be interpreted as meaning that not only the owner who acquired the worked specimen more than 50 years before the entry into force of the regulation is covered.

- (4) Article 32 of Commission Regulation (EC) No 939/97 of 26 May 1997 laying down detailed rules concerning the implementation 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 and Article 32 of Commission Regulation (EC) No 1808/2001 of 30 August 2001 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein are to be interpreted as meaning that, whilst the exemption laid down in Article 8(3) and Article 2(w) of Regulation No 338/97 does not require the issuance of a certificate, it does require the specimens in question to have been, to the satisfaction of the management authority, acquired under the circumstances provided for in Article 2(w) of Regulation No 338/97.