

MAZANTI-ANDERSEN,
KORSØ JENSEN & PARTNERE
LAW FIRM

MEMORANDUM

regarding ban on fox keeping

This memorandum contains an analysis on whether the bill regarding ban on fox keeping can be adopted in accordance with Community law.

1. The Bill

1.1 The Ban

On 30 September 2008, the Danish Ministry of Justice submitted its bill regarding “The Act on Ban on Fox keeping” for a public hearing procedure. The bill was accompanied by official explanatory notes to the bill prepared by the Danish Ministry of Justice.

The bill contains a general ban on fox keeping (the “Ban”). The bill, however, does not ban trading of live foxes or fox skins.

Persons, who prior to the effective date of the proposed act (if enacted) have started their own business of fox keeping, may, however, continue such business until 31 December 2016. Persons, who prior to the effective date of the proposed act (if enacted) have started their own business of fox keeping and who, at such point in time, had fox keeping as their main profession, may, however, continue such business until 31 December 2023, subject to the consent of the Danish Minister of Justice. According to the official explanatory notes to the bill, this transitional rule has been proposed in order to avoid payment of expropriation compensation to the fox breeders.

1.2 The objective of the bill

In the official explanatory notes to the bill, it is stated that

”The bill, which is based on animal ethical considerations, seeks to introduce a ban on fox keeping in Denmark. The background of the bill is that it has not been possible on a general basis to prescribe housing, which will ensure that foxes held in captivity are afforded reasonable conditions.”

Further, it is stated under ”The background for the Ban on Fox Keeping” that

”During the Autumn of 2007 it became questioned whether the rules contained in the executive order on fur animals functioned as intended. One fox breeder, who during the Autumn of 2007 had furnished a number of cages in accordance with the executive order’s requirements, indicated among other things that the rules did not lead to better animal welfare. (...) The Danish Association of Fox Breeders and the fox breeder in question believe that the new rules on fox breeding imply a significant deterioration of animal welfare of foxes.”

”The discussions have led the Danish Ministry of Justice to the conclusion that it is not possible to prescribe a production method, which secures the farm fox reasonable conditions and on this background it is proposed that a Ban on fox keeping is adopted.”

The Danish Ministry of Justice states that the purpose of the bill is to serve “animal ethical considerations”, while they at the same state that the background for the bill is to serve “animal welfare consideration”.

However, the official explanatory notes to the bill do not account in any greater detail for the animal ethical considerations which according to the preparatory work are the purpose of the bill. On the contrary, only animal welfare considerations are accounted for in detail, such as with respect to design of fox cages; and the animal welfare considerations thus seem to be the genuine objective of the bill.

2. Is the Ban compatible with Community law?

2.1 EU regulation of relevance to the evaluation

2.1.1 Articles 28 and 29 of the EC Treaty

Article 28 of the EC Treaty (“the Treaty”) contains a prohibition on quantitative restrictions or measures having equivalent effect on imports within the Community. Article 29 of the Treaty contains an equivalent prohibition against quantitative restrictions or measures having equivalent effect on exports.

Such quantitative restrictions on imports and exports are only permitted, if they fall within the scope of one or more of the legitimate grounds set forth in Article 30 of the Treaty, such as considerations for the public order or protection of the life and health of human beings and animals.

2.1.2 The Council’s Regulation No 827/68 on the common organization of the market in certain products

Live fur animals fall within the scope of Council Regulation no. 827/68 on the common organisation of the market in certain products (the “Market Organisation”). Fur skins, on the contrary, do not fall within the scope of the Market Organisation.

Article 4 provides that all quantitative restrictions or measures having equivalent effect are prohibited in trade within the Community with regard to products falling within the scope of the Market Organisation.

2.1.3 The European Parliament’s and the Council’s Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes (the “Directive”)

The Directive governs the “protection of animals kept for farming purposes”.

The Directive defines “animal” as animals, which are bred or kept for the production of food, wool, skin or fur or for other farming purposes, cf. Article 2 of the Directive.

According to the eighth recital of the Directive, the purpose of the Directive is to establish minimum standards for the protection of animals kept for farming purposes in order to ensure rational development of production and to facilitate the organization of the market in animals and to secure an equal implementation and application of the principles, which are set forth by the European Convention on protection on animals kept for farming purposes (the “Convention”) and the recommendations adopted pursuant to the Convention. These principles relate to

among other things housing, feeding, watering and tending. The Convention has been approved by the European Community by Decision 78/923/EC.

The latest recommendation adopted pursuant to the Convention regarding fur animals are from 1999 (“the Recommendation”). This Recommendation contains in Appendix C detailed provisions regarding foxes.

Article 3 of the Directive states that the Member States shall make provisions to ensure that the owners or keepers take all reasonable steps to ensure the welfare of animals under their care and to ensure that their animals are not caused any unnecessary pain, suffering or injury.

Further, Article 4 of the Directive provides that the Member States shall ensure that the conditions under which animals are bred or kept comply with the provisions set out in the annex to the Directive, including staff, supervision, freedom to move and buildings used for housing of animals.

Finally, Article 10 (2) of the Directive states that the Member States may adopt provisions for the protection of animals kept for farming purposes stricter than those set forth in the Directive, provided, however, that such (stricter) provisions comply with the general provisions of the Treaty.

2.2 The compatibility between the Ban and prevailing EU regulation

Firstly, the compatibility of the Ban and Community law should be evaluated on the basis of the Directive (cf. item 3 below) and secondly, evaluated on the basis of the Market Organisation (cf. item 4 below).

In this connection, it is noted that the Danish Ministry of Justice – when analysing the issue and finding the Ban to be compatible with Community law – solely refers to the Market Organisation and that the Directive is neither mentioned in the bill nor in the official explanatory notes to the bill.

Further, it is noted that the Danish Ministry of Justice in its memorandum to the bill states that it is not possible to prescribe a production method, which secures that the farm fox has reasonable conditions. It is not entirely clear whether the Danish Ministry of Justice is of the opinion that this is an animal ethical and not an animal welfare problem. However, “rooms and building to animals” are included in Annex 1 to the Directive and minimum dimensions on the fox cages are

included in Appendix C to the Recommendation. Since both the Directive, the Convention and the Recommendation concern animal welfare and not animal ethics and since the official explanatory notes to the bill takes into account the same considerations as set forth in the Directive, the Convention and the Recommendation, the official explanatory notes to the bill (and the bill) also concerns animal welfare and not animal ethics.

Therefore, the evaluation of the compatibility between the Ban and Community law is to be made on the basis of the rules on animal welfare.

3. The Directive

3.1 Article 10 (2)

Article 10 (2) of the Directive provides the possibility for the Member States to adopt stricter provisions for the protection of animals in their territory compared to those laid down in the Directive, provided, however, that these (stricter) provisions are in accordance with the general rules of the Treaty.

By proposing the Ban, Denmark now intends to implement stricter provisions compared to those laid down in the Directive.

According to the wording of Article 10 (2) these stricter provisions shall relate to the Member State's own territory and the measures are only allowed to the extent that they are compatible with the general regulations of the Treaty.

It should be evaluated whether the Ban constitutes a trade barrier pursuant to Article 28 and/or 29 of the Treaty (item 3.2 and 3.3). If this is the case, it should be evaluated if the trade barrier can be justified by one of the legitimate grounds set forth in Article 30 of the Treaty (item 3.4).

3.2 Evaluation of import barriers (Article 28 of the Treaty)

In case 8/74, *Dassonville*, paragraph 5, the European Court of Justice (the "Court") ruled that any measure adopted by a Member State constitutes a trade barrier according to Article 28 of the Treaty, if the measure is capable of hindering, directly or indirectly, actually or potentially, the intra-community trade.

It is not a requirement that the trade barrier shall appreciably affect the intra-community trade, cf. e.g. 177/82 and 178/82, van de Haar. It is sufficient for applying Article 28 of the Treaty that it is demonstrated that the measure directly or indirectly, actually or potentially has a negative effect on the intra-community trade, cf. 53/76, Bouhelier.

Live foxes are a product in the sense of Article 28 of the Treaty. This is emphasized by the fact that live animals are comprised by the Market Organisation.

Imports of live foxes from other Member States to Denmark will be prevented, if the Ban is adopted. In this connection, it is noted that imports of live foxes from Norway and Finland to Denmark exist today. Therefore, the Ban constitutes a quantitative trade barrier for imports of live foxes according to Article 28 of the Treaty. In addition, it is noted that the Ban also indirectly hinders the intra-community trade of fox skins. The evaluation is unaffected by the fact that the bill provides for a transitional period.

3.3 Evaluation of export barriers (Article 29 of the Treaty)

Article 29 of the Treaty has a wording equivalent to that of article 28 of the Treaty, but with respect to export restrictions.

In case 15/79, Groenveld, the Court ruled that Article 29 of the Treaty only prohibits national measures, which have as its purpose or impact to hinder the export trade between Member States, and thus discriminates between the national trade and the intra-community trade, whereby the national production obtains an advantage to the detriment of the intra-community trade.

The above case concerned a ban on manufacture of meat products based on horsemeat. This ban applied both to the national market and the export market, whereby no discrimination was made between the national market and the export market. Therefore, the ban was not held to be incompatible with Article 29 of the Treaty.

Case C-1/96, Compassion in World Farming (the "Compassion-case") concerned a ban on export of live calves from England to other Member States. Since this ban created discrimination between the trade on the national market in the Member State and the export trade, the ban was held to constitute a quantitative trade barrier incompatible with Article 29 of the Treaty.

The Court has never explained why the scope of Article 28 and 29 of the Treaty is not identical, even though the provisions have equivalent wording, and this difference between the interpretation of the two provisions has by commentators been criticized on numerous occasions, cf. e.g. Wulf-Henning and others: "Export of Goods and Services within the single market", page 33.

The ban on fox keeping will hinder the export of live foxes and related products, such as fox skins, from Denmark to other Member States.

The Ban applies generally to the fox keeping in Denmark, and no direct discrimination between the trade on the Danish market and the export market is therefore generated. However, the Ban will have a substantial impact on the intra-community trade of live foxes and related products, such as fox skins. This will create a substantial indirect difference between trade on the Danish domestic market and the export market. Thus, the Ban is likely to constitute an indirect quantitative restriction incompatible with Article 29 of the Treaty

3.4 Is the Ban justified on legitimate grounds pursuant to Article 30 of the Treaty

If the Ban is considered to violate Article 28 and/or 29 of the Treaty, the consequence is that the Ban will only be allowed, if the Ban is justified on one or more of the legitimate grounds set forth in Article 30 of the Treaty, such as considerations regarding the public order or protection of the life and health of human beings and animals. This will be examined below.

3.4.1 Article 30 of the Treaty

Article 30 of the Treaty states that quantitative trade barriers are allowed, if they are justified on the grounds of public order, public morals or animal's or human being's life and health.

In several cases, including C-421/04, Concord paragraph 20 and C-209/92, Spitz, paragraph 59, the Court has ruled that if an area has been fully harmonized, it is no longer admissible for a Member State to take recourse to Article 30. In such case, the national measure shall be evaluated according to the provisions of the harmonisation directive and not Article 30 of the Treaty.

The following considers whether the Directive implies a full harmonisation of the areas of animal ethics and/or animal welfare.

3.4.2 Evaluation of whether the Directive entails harmonisation

According to both its purpose and its content, the Directive concerns the "protection of animals" in an animal welfare sense. Animal ethical considerations are neither mentioned in the Directive.

Hence, it should be examined whether the Directive determines such harmonisation measures regarding animal welfare that the Member States are prevented from adopting legislation on this area.

Settled case law provides that this examination shall be made on the basis of i) the context of which the Directive is part of, ii) the Directive's purpose and iii) the wording of the Directive, cf. case C-127/94, Hönig, paragraph 9 and Compassion, paragraph 49.

Regarding the Directive's context, it appears from the two first recitals of the Directive that the Directive's provisions on minimum requirements regarding protection of animals kept for farming purposes are based on the Convention and the Recommendation.

As stated in the recitals to the Directive, the purpose of the Directive is to determine the minimum requirements regarding protection of animals kept for farming purposes in order to secure a rational development of the production and facilitate the organization of the animal market and further to secure a uniform application of the principles imposed by the Convention and the Recommendations adopted pursuant hereto.

With regard to the wording of the Directive, Article 3 states that the Member States shall make provisions to ensure that the owners or keepers take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering or injury. Further, article 4 of the Directive imposes on the Member States to ensure that the conditions under which animals are bred or kept comply with the provisions set out in the Annex to the Directive, including staff, supervision, freedom to move and rooms and buildings to house animals.

In *Compassion*, the Court examined, if export of calves to other Member States, which did not guarantee the same high standard for animals, as provided by English law, could be prohibited. The area was regulated partly by the Convention, partly by the market organisation regarding beef and veal and finally Directive 91/629/EC regarding determination of the minimum requirements in connection with protection of calves.

Article 11 (2) of directive 91/929/EC contained a clause identical to Article 10 (2) of the Directive.

When examining whether the directive 91/929/EC contained the harmonization measures necessary for the welfare of calves, the Court assessed the context of the directive, the purpose of the directive and the wording of the directive.

The Court ruled that the directive 91/929/EC was part of the policy adopted by the European Parliament concerning animals' welfare and the European Union's approval from 1978 of the Convention.

Further, the Court ruled that the purpose of the directive was to secure the common marketing organisation for calves and related product would work satisfactorily and secure the minimum requirements to protect breeding calves and fatted calves in order to guarantee a rational development of the production.

Finally, the Court ruled that the directive did contain requirements with regard to minimum space for calves and that the directive obligated each Member State to make sure that the breeding of calves took place in accordance with the requirements laid down in an appendix to the directive, including minimum requirements to space and feed.

On this basis, the Court concluded that it appears from the wording and the context of the directive as well as from the objectives which it pursues, that the directive determines common thorough minimum requirements to protection of calves which are kept in buildings for breeding and fattening. Therefore, a ban on exports of live calves would undermine the harmonisation implemented. Accordingly, England could not restrict the export of calves to other Member States with reference to the protection of calves' welfare or other considerations set forth in Article 30 of the Treaty.

The Directive has significant similarities with the directive examined in *Compassion* and this ruling of *Compassion* can - to a large extent – be applied to the legal analysis of the Directive.

The Court's rulings in *Compassion* establishes that a minimum harmonisation directive may constitute a full harmonisation of an area, if the directive, in accordance with its purpose, contents and the context of which it is part, aims at determining thorough minimum requirements for the specific area.

By referring to the Convention and the Recommendation, the Directive provides a detailed regulation regarding fox keeping. Article 4 of the Directive states that the Member States shall ensure that the conditions under which animals are bred or kept comply with the provisions set out in Appendix 1 to the Directive with specific requirements to staff, supervision, freedom to move as well as rooms and buildings used for housing of animals. Further, the Recommendation sets forth detailed rules on the size of fox cages, equipment, enclosure, hygiene, feed and temperature.

When taking into consideration the similarities between the Directive and directive 91/629/EC examined in *Compassion*, as well as the detailed regulation, which follows from the Directive, the Convention and the Recommendation, it is our opinion that the Directive lays down the common thorough minimum requirements for welfare of foxes, and consequently that the Directive provides a full harmonization within this area.

3.4.3 Other Article 30 considerations

As stated above under item 3.4.1 quantitative trade barriers are permitted, if they are justified on the grounds set forth in Article 30 of the Treaty.

Item 3.4.2 above concludes that the Ban is not justified on the grounds of animal welfare, because the Directive entails full harmonization of this area.

In several rulings the Court has stated that if an area has been fully harmonised, the Member States can no longer take recourse to article 30, cf. C-421/04, *Concorde*, premise 20, and C-309/02, *Spitz*, premise 59.

If an area has been fully harmonised, the Member States are compelled to apply the exemptions contained in the harmonization act, and if the act does not contain

exemptions or special rules, the Member States are prevented from introducing national measures, which hinder intra-community trade, cf. 251/78, *Denkavit Futtermittel*, premise 14. This is supported by the *Compassion*-case, paragraph 67 and 68, in which the Court rejected that other legitimate grounds set forth in Article 30 of the Treaty can justify measures which are incompatible with a harmonisation act introduced by one of the Community Institutions.

It follows that the Ban cannot be justified on the grounds set forth in Article 30 of the Treaty, since the Directive constitutes a full harmonization of animal welfare.

3.4.4 National measures justified on the grounds of animal ethics

It can be derived from the Court's case law that even though some aspects of a specific product have been harmonized, the Member States are still entitled to adopt legislation regarding other aspects of the same product, which have not been subject to harmonization.

Consequently, the Member States are not prevented from adopting measures on the grounds of animal ethics, even though the field of animal welfare has been harmonised.

However, it should be emphasized that since requirements for the protection of foxes have been adopted on Community level, the Community has at the same time determined that fox keeping from an animal ethics' point of view is admissible. Accordingly, the Member States are not entitled to justify a ban on the grounds of animal ethical considerations.

This is emphasized by the fact that breeding of fur animals is regulated in great detail by the Recommendation. Denmark has participated in the preparation and adoption of the Recommendation, and the Community, as contracting party, must give effect to the principles laid down in the Convention. Consequently, the Ban is incompatible with this Community regulation. Further, the Recommendation encompasses such enhanced and detailed rules regarding fox keeping that the welfare of foxes has been secured on Community level. Hence, the Community has considered it possible to prescribe a production method, which secures reasonable conditions for foxes. This also means that animal ethics - being moral considerations - as ground for a national ban are not admissible.

4. The Market Organisation

Live fur animals fall within the scope of the Market Organisation. Fur skins, on the contrary, do not fall within the scope of the Market Organisation.

The consequence of live fur animals falling within the scope of the Market Organisation, is that all quantitative restrictions and measures having equivalent effect (both with regard to imports and exports) are prohibited within the Community.

Since the Ban hinders trade in live foxes, the Ban constitutes a quantitative restriction, which is prohibited according to the Market Organisation.

It is settled case law that the establishment of a common organisation of the markets does not prevent the Member States from applying national rules intended to attain an objective relating to the general public interest other than those covered by the common organization; even if those rules are likely to have an effect on the functioning of the common market in the sector concerned, cf. C-462/01, Hammarsten, paragraph 29.

With reference to Hammarsten, the Danish Ministry of Justice argues in the official explanatory notes to the bill that the Member States are free to introduce a ban on certain products governed by the Market Organisation, including live animals, provided that the ban pursues public purposes. The Danish Ministry of Justice assumes that a ban on breeding of foxes is justified on the grounds of general public considerations, which are not governed by the Market Organisation, since neither the preamble nor the wording of the Market Organisation state that animal ethical considerations are pursued.

The Danish Ministry of Justice's interpretation of Hammarsten and the way this interpretation is applied in support of the legality of the Ban, is not correct.

Firstly, the arguments of the Danish Ministry of Justice are only applicable to the extent that the Community has not already harmonised the area of "the specific public consideration", which is the background of the bill.

As stated under item 1.2 above, the genuine motivation for the Ban is animal welfare considerations rather than animal ethical considerations. Therefore, the Ban should be examined on the basis of the rules which apply to animal welfare. As

already stated, the Directive constitutes a harmonisation of the area for protection of animals, which prevents the Member States from adopting legislation in this area, unless in accordance with the Directive. Moreover, as stated above, the Ban cannot be adopted with reference to Article 10 (2) of the Directive.

Even if the bill – genuinely – was motivated by animal ethical considerations, this would not constitute a public consideration (cf. above), as the Community by the Directive, the Convention and the Recommendation has already in great detail adopted rules on fox keeping and thereby determined that it is justifiable to keep foxes seen from an animal ethical point of view.

Secondly, in Hammarsten the Court ruled that the Swedish Government could not justify a ban on cultivating of industrial hemp on the ground of human health, since a regulation on the introduction of restrictions on import of hemp already took these health risks into consideration. Thus, Hammarsten very clearly expresses that the Member States cannot justify national measures on public consideration, which have already been regulated by the Community.

In Compassion, the Court ruled (paragraph 53) in relation to the corresponding market organisation for calves and related products that the purpose of the directive for calves and related products was to ensure the smooth functioning of the market organisation. If this argument is applied to fur animals, it means that the objective of the Directive is to secure the Market Organisation for live fur animals. The consequence hereof is that the desire to secure an efficient and smooth functioning of the Market Organisation hinders the Member States in adopting bans on production of live fur animals.

In consideration of the above, it is our opinion that the Ban is incompatible with the Market Organisation.

5. Fundamental Community principles: Proportionality and equality

5.1 Proportionality

Even if a quantitative restriction is justified on legitimate grounds comprised by article 30 of the Treaty, the quantitative restriction constitutes a violation of Community law, if the restriction infringes the principle of proportionality.

When determining whether a quantitative restriction infringes the principle of proportionality, the Court evaluates, if the national measure is more extensive than necessary. This involves an evaluation of the following:

1. If the measure is appropriate for meeting the objectives pursued by the legislation in question;
2. if the pursued objective can be obtained with less restrictive measures, i.e. measures which have a less harmful impact on the trade within the Community; and
3. if the national measure is proportionate to the objective pursued by the legislation in question.

The examination of whether the principle of proportionality has been complied with, is dependent on the purpose, contents and context of the specific measure. The burden of proof lies with the Member States and according to settled case law, this burden of proof is difficult to satisfy.

5.1.1 Appropriate for meeting the objectives pursued

As regards the purpose and objective of the measure, reference is made to item 1.2 above. It can hardly be disputed that the Ban is appropriate for meeting the objectives pursued.

5.1.2 If the objective can be obtained with less restrictive measures?

The measure contains a general Ban on fox breeding. A ban is - per se - the most extensive kind of restriction. The question is, if the objective and considerations, which the bill pursues, cf. item 1.2 above, can be reached by adopting less extensive measures, e.g. by adopting new provisions regarding housing etc.

According to the official explanatory notes to the bill, the Danish Ministry of Justice has – based on a meeting with a fox breeder in December 2007 - concluded that it is not possible to provide a production method, which secures the farm fox reasonable conditions. This is the reason, why the Danish Ministry of Justice has decided to adopt the Ban rather than less extensive measures.

Together with the Convention and the Recommendation, the Directive contains detailed regulation regarding the fox keeping, including specific regulation on housing etc.

As set forth above the Danish Ministry of Justice has the burden of proof that a Ban – seen from a scientific perspective – is the only possible way to secure the welfare of farm foxes. Based on the available expert opinions, there is no scientific reason to assume so. On the contrary, the Danish Council on Animal Ethics (Det dyreetiske råd) has, in its opinion of January 2003 stated that there are areas, where the fur production is in a better position compared to other domestic animals, cf. below. Therefore it is our opinion that the purpose of the bill can be obtained by adopting less extensive measures than the Ban.

5.1.3 Reasonable in relation to the aimed object

The same applies as referred to above under item 5.1.2.

5.1.4 Evaluation of proportionality

On the basis of the available expert opinions and scientific studies, it can be derived that the purpose of the bill can be obtained by adopting less extensive measures than a Ban. Therefore, the bill infringes the fundamental Community principle of proportionality.

5.2 Equality

A number of animals exists, which – similar to foxes – are kept in cages or which are otherwise confined.

If fox keeping is prohibited – as opposed to other species of animals, which are kept in cages or otherwise confined - it is required that professional analyses of animal ethics and welfare demonstrate that it is worse to keep foxes in cages than other species of animals.

The Danish Council on Animal Ethics has in the opinion referred to above made the following statement regarding foxes:

”Seen from a welfare point of view, some scientists have concluded that the level of welfare in fur production is acceptable, and that the fur animals are

not necessarily in a worse position than many other animals in our production of domestic animals (...). Seen from a welfare point of view, the Council finds that there are strengths and weaknesses in all methods of production of domestic animals, and acknowledges that there are areas, where the fur productions is in a better position compared to other domestic animals, e.g. that the animals are intact (no castration), that the animals are not pressed in terms of reproductions and that the killing of the animals takes place at the farm, whereby the animals avoid transportation to abattoirs, contrary to other species of domestic animals.”

The above statement allows the conclusion that no scientific justification for a Ban on the fox keeping exists, when keeping of other species of animals in cages or otherwise confined, remains allowed.

6. Comments from the Danish Ministry of Justice to the European Commission from respectively 1999 an 2001 in connection with English and Dutch bills regarding Ban on keeping of fur animals

In 1999 England notified a bill to the European Commission regarding a Ban on keeping of fur animals in England and Wales and in 2001 Holland notified a Ban on keeping of fur animals.

The Danish Ministry of Justice states in two almost identical comments that the Ban on fur animals will have an impact on intra-community trade of live fur animals between respectively England and Holland and the other Member States and that it cannot be ruled out that a Ban on fur animals indirectly “has an impact on intra-community trade of fur skins”. Further, the Danish Ministry of Justice states that the Directive was adopted in order to secure the implementation of the principles, which are laid down in the Convention and secure that the Convention and the Recommendation are applied in a uniform manner.

The Danish Ministry of Justice questions, if the Ban on fur farming is in accordance with the prevailing provisions, including the Recommendation. The Danish Ministry of Justice emphasizes that respectively England and Holland participated in the preparation and adoption of the Recommendation, and that the Community according to the Directive shall secure a uniform application of the Convention and recommendation.

Further, it is stated that the adoption of such detailed provisions, as the Recommendation, implies that the welfare of fur animals have been secured in such a manner that “ethical” considerations cannot be invoked as a valid reason for the Ban.

Finally, the Danish Ministry of Justice refers to the fact that live fur animals are governed by the Market Organisation, and that the Market Organisation prohibits any quantitative restrictions and measures having equivalent effect on this area.

If the comments from the Danish Ministry of Justice of respectively 1999 and 2001 are compared to the official explanatory notes to the bill, it can be concluded that there is a remarkable difference in the line of reasoning: Approximately 10 years after, the Danish Ministry of Justice has argued that the English and Dutch bans were incompatible with Community law, they now – without any reason or legal arguments - reach the exact opposite result, namely that the Ban is compatible with Community law.

7. Conclusion

As regards trade in live foxes, it is our conclusion that the Ban constitutes a quantitative restriction, which is incompatible with article 28 and 29 of the Treaty and the Market Organisation.

As regards trade with fox skins, it is our conclusion that the Ban is likely to constitute an indirect quantitative restriction incompatible with article 29 of the Treaty.

The Ban cannot be justified on the grounds of animal ethics or other legitimate grounds comprised by article 30 of the Treaty. Further, the Ban is incompatible with the fundamental principles of proportionality and equality.

Based hereof, it is our overall conclusion that the Ban is incompatible with Community law.

Copenhagen, 17 December 2008

Lise Høgh Frederik B. Hasling