

## **Summary Evaluation of the Memorandum on Trophies**

### **Summary Evaluation of Memorandum 3747/2024 1KGO / 1KGO**

German Delegation of the International Council for Game and Wildlife Conservation (CIC) regarding the import ban on hunting trophies

**Dr. Nikolas Sellheim, Sellheim Environmental, Germany**

#### **Content**

Memorandum 3747/2024 1KGO / 1KGO German Delegation of the International Council for Game and Wildlife Conservation (CIC) regarding the import ban on hunting trophies (hereinafter referred to as 'the Memorandum') presents the legal foundations for a potential import ban on trophies into Germany, modelled on a recently enacted law in Belgium. The Memorandum addresses the following questions:

1. Legislative competence for a similar or even broader "general" import ban.
2. Whether such an import ban violates fundamental rights.
3. Possible strategies to oppose such an import ban.

#### **The Memorandum reaches the following conclusions:**

- Concerning an import ban, the more convincing arguments point towards exclusive EU competence. Although a comprehensive ban on hunting trophies pursues environmental policy goals, it is primarily a specific trade policy measure intended to regulate foreign trade and has immediate impacts on it.
- A general import ban could violate Article 14 Paragraph 1 GG (Basic Law) and Article 3 Paragraph 1 GG.
- A direct constitutional complaint against the import ban before the Federal Constitutional Court of Germany is conceivable. Should the court recognise the violations of fundamental rights, it could declare the import ban void, independent of a preliminary ruling by the European Court of Justice (ECJ) on the competence question. Alternatively, through legal action against the refusal of an import permit for a hunting trophy or against a penalty for violating the import ban, incidental control of norms could be sought. This could ultimately lead to a referral to the Federal Constitutional Court or the ECJ by a lower court.

#### **Summary Evaluation**

##### **Results**

The results presented in the Memorandum are correct and represent a proper interpretation and application of the applicable legal norms.

## **Possible Further Approaches**

Despite the correctness of the results, further elements could be considered that were not addressed in the Memorandum.

## **Harmonization of the Internal Market**

The harmonization of the internal market is a core element of European integration (cf. Art. 26 et seq. TFEU). The trade ban on seal products (cf. Regulation 1007/2009) was based on the harmonization of the internal market because different regulations regarding seal products were in force in Member States (cf. Recitals 8 and 10 of Regulation 1007/2009). National bans on trophies lead to a disruption of the internal market, which cannot be justified by animal welfare arguments.

## **Animal Welfare**

Although the Memorandum addresses the Belgian import ban concerning animal welfare, this can be argued more broadly. Generally, quantitative import and export restrictions between Member States are prohibited under Articles 34 and 35 TFEU. However, Article 36 TFEU provides narrow exceptions to this rule, including "for the protection of the health and life of humans, animals, or plants." It should be noted that the Member State must provide scientific evidence clearly demonstrating that, for example, an import ban on trophies serves to protect the health and life of animals. Moreover, the ECJ noted in *Leclerc* (Case 229/83): "Article 36 [EEC: now Article 36 TFEU] is to be interpreted strictly as an exception to a fundamental provision of the Treaty; it cannot be extended to objectives not explicitly mentioned there." This means that if reasons other than those listed in Article 36 TFEU are decisive for an import ban, they cannot serve as justification.

## **Public Morality**

An import, export, or transit ban is permitted under Article 36 TFEU for reasons of public morality. There is an extensive body of case law in the ECJ on this ground (for foundational cases, see *Henn and Darby* [Case 34/79]; *Conegate / HM Customs & Excise* [Case 121/85]). However, the Member State must also demonstrate that a measure contrary to Articles 34 and 35 TFEU is scientifically justified. The term "public morality" is also used in the European Convention on Human Rights (ECHR) multiple times as a justification for restricting certain rights. The European Court of Human Rights (ECtHR) has not yet provided a uniform definition of the term. Instead, the Court has given states a wide margin of appreciation to determine the exact content of public morality and to assess whether a restriction or sanction is necessary.

## **International Trade**

Article XX of the General Agreement on Tariffs and Trade (GATT) allows Member States to adopt measures for the protection of public morals, even though the scope

of this clause is not clearly defined. The WTO has established that trade restrictions based on moral standards are justified when they are based on "standards of right and wrong behavior upheld by or on behalf of a community or nation." When applying the moral exception, Member States must demonstrate that the measure is genuinely based on deeply rooted moral concerns of their population, which can be evidenced by legislative processes and societal standards. The measure must be necessary to protect public moral values, and no less restrictive alternatives should be available. Furthermore, such measures must not lead to arbitrary or unjustifiable discrimination between countries and must not constitute disguised trade restrictions.

### **Quantitative Restrictions and MEQRs**

The prohibition of "quantitative restrictions and all measures having equivalent effect" (MEQRs) as established in Articles 34 and 35 TFEU is also relevant to the import of trophies. If a Member State receives trophies from another Member State that has not imposed an import ban and wishes to import them into a Member State with an import ban, the formula of the ECJ in *Dassonville* (Case 8/74) applies, which has been used as a fundamental formula by the ECJ in subsequent cases: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered measures having an effect equivalent to quantitative restrictions." An import ban on trophies in one Member State is thus to be considered a potential hindrance to intra-Community trade and thus as an MEQR.

### **Glossary**

1. **GG (Grundgesetz)**
2. **TFEU (Treaty on the Functioning of the European Union)**
3. **ECJ (European Court of Justice)**
4. **ECHR (European Convention on Human Rights)**
5. **GATT (General Agreement on Tariffs and Trade)**
6. **MEQRs (Measures Equivalent to Quantitative Restrictions)**

### **Laws Referenced**

- **Grundgesetz (Basic Law for the Federal Republic of Germany)**
  - **Article 14 Paragraph 1:** [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0068](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0068)
  - **Article 3 Paragraph 1:** [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0044](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0044)
- **Treaty on the Functioning of the European Union (TFEU)**
  - **Article 26:** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E026>
  - **Article 34:** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E034>

- **Article 35:** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E035>
- **Article 36:** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E036>
- **European Convention on Human Rights (ECHR)**
  - [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)
- **General Agreement on Tariffs and Trade (GATT)**
  - **Article XX:**  
[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02\\_e.htm#articleXX](https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX)
- **Regulation (EC) No 1007/2009 on trade in seal products**
  - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R1007>
- **Case Law**
  - **Dassonville (Case 8/74):** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61974CJ0008>
  - **Leclerc (Case 229/83):** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0229>
  - **Henn and Darby (Case 34/79):** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61979CJ0034>
  - **Conegate / HM Customs & Excise (Case 121/85):** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0121>