

# Danish non paper on seal skin bans

***1. National seal skin bans are contrary to EU law***

***2. Extension of Directive 83/129/EEC would also be contrary to EU law***

***1. National seal skin bans are contrary to EU law***

*It is Denmark's opinion that national bans on seal skin products going further than Directive 83/129/EEC concerning the skins of certain seal pups (whitecoat pups of harp seals and of pups of hooded seals (blue-backs)) are contrary to EU law. This applies both to national import bans and national bans on commercial use. It also applies regardless of whether the national bans contain a so-called "Inuit exemption" for traditional hunting.*

National bans on seal skin products are, in Denmark's opinion, a trade restriction which cannot be justified on the grounds of any overriding public interest (cf. Article 28 of the EC Treaty).

The obligations of the Community and Member States towards countries and territories outside of the EU also preclude the introduction of extensive national bans on seal skin products (cf. the OCT arrangement relating to Greenland and WTO rules with regard to other seal skin producing countries).

Denmark has consistently expressed these views to the Commission and the relevant EU Member States, including as part of the consideration of notifications pursuant to Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (previously Directive 83/189/EEC). As part of the notification procedure the Commission has made critical comments on national seal skin bans proposed by Member States.

***- Why are national seal skin bans unjustifiable?***

Article 28 of the EC Treaty prohibits restrictions on the free movement of goods between Member States. According to Article 30 of the EC Treaty and the case-law of the European Court of Justice (the Cassis de Dijon case), the provision does not preclude restrictions justified on the grounds of overriding public interest. According to case-law, these exemptions shall be interpreted narrowly and be subjected to a strict test of proportionality, which means an examination of whether a restriction is appropriate to ensure the realisation of the intended objective and whether the restriction goes beyond what is necessary to achieve that objective.

It cannot be disputed that national bans on imports or on the commercial use of seal skin products constitute a restriction on the free movement of goods. The only question is whether such a restriction can be justified in accordance with Article 30 or case-law concerning overriding public interest.

Several grounds are invoked in support of national bans on seal skin. The grounds are shown with varying clarity in preparatory work to legislation and in public announcements by the

regulatory authorities in the individual countries. The most frequently invoked grounds concern the prevention of unnecessary suffering (animal welfare) and ensuring the survival of the species (biodiversity). In some cases the regulator invokes the grounds of public opinion and public morality.

- ***Animal welfare:***

Article 30 of the EC Treaty mentions, among others, the grounds of the “health and life” of animals. The reference, which dates back to the Treaty of Rome (1957), is aimed primarily at the need to conserve the economic value of production animals. Neither grounds of an environmental nature, including in relation to biodiversity, nor pure animal welfare grounds in relation to the suffering of animals are covered by the wording of Article 30.

The Court of Justice has ruled that animal welfare (protection of animals) can constitute lawful grounds, provided that a national restriction can be justified on the basis of a desire to avoid unnecessary suffering for animals.<sup>1</sup>

A national restriction on the grounds of animal welfare can, however, only be justified if the restriction is aimed at protecting an overriding public interest within the Member State’s own territory. It is not a matter for a Member State to protect the interests of animal welfare outside of its own territory.<sup>2</sup> A national ban on seal skin which is justified on the grounds of avoiding unnecessary suffering for an animal which, like the seal, is hunted exclusively outside of the territory of the Member State, is for that reason alone contrary to EU law.

In addition, a unilateral restrictive measure, such as a seal skin ban, would, in any event, only be compatible with EU law if the measure is appropriate to achieve its objective and if the measure does not go beyond what is necessary to achieve that objective.

In this connection it should be substantiated that there is in fact inhumane slaughter of seals on a wide scale. As the Commission has pointed out, there is no clear evidence of inhumane slaughter of seals on any wide scale. The reports which exist are partly contradictory and only concern certain regions. The Commission has therefore initiated a detailed investigation into methods of slaughter in order to decide whether to propose an amendment to Directive 83/129 concerning the skins of certain seal pups.<sup>3</sup>

Even if it is substantiated that there is inhumane slaughter of seals in certain regions, a measure to protect the welfare of the animals in question would only be proportional and compatible

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<sup>1</sup> Cf. Case C-1/96 (Compassion in World Farming) of 19 March 1998, paragraphs 45 and 47.

<sup>2</sup> Cf. in this regard the judgment of the European Court of Justice in Case C-384/93 (Alpine Investment) concerning restrictions on the freedom to provide services. The Court of Justice provides in paragraph 43 that the protection of an overriding public interest can’t be extraterritorial, but must have a national basis. This condition was met in the case in question. See also the judgment in Case C-5/94 (Hedley Lomas) where there was exhaustive EU regulation on the stunning of animals in connection with slaughter and where the European Court of Justice found that a Member State may not unilaterally adopt, on its own authority, measures designed to obviate any breach by another Member State of rules of Community law (cf. paragraph 20).

<sup>3</sup> See point 7 of the Commission’s analysis of the Declaration of the European Parliament on banning seal products in the European Union (18 January 2007).

with EU law if the measure were directed specifically at seal skin products originating from seals which have been subjected to inhumane slaughter, when, as now, it can be substantiated that there is humane slaughter of seals on a large scale.

There are therefore less restrictive measures than a total ban on seal skins, if it is accepted that a Member State may pursue animal welfare interests outside of its own territory. An example of a less restrictive measure than a total ban could be to introduce an obligatory labelling scheme informing consumers of the origin of the seal skin product. This would enable individual consumers to decide whether a product meets their requirements and standards.

Inuit exemptions in national bans on seal skins, inspired by Article 3 of Directive 83/129/EEC concerning the skins of certain seal pups, would not remedy a national ban's disproportionality under EU law. There is also verifiably sustainable hunting of adult seals using humane methods of slaughter in places other than Greenland and among the Inuit people. Bans on skins from such seal hunts cannot be justified. An extensive ban would stigmatise all seal skins, regardless of origin. The Inuit exemption is therefore without any real value.

- ***Protection of species (biodiversity):***

The grounds of the survival of seal species is an argument aimed at ensuring biodiversity. The arguments above concerning extraterritoriality and proportionality in relation to animal welfare interests also apply in relation to species protection and biodiversity.

In this connection it must be pointed out that there is no scientific evidence that the seal populations of harp seals and hooded seals are endangered. The Commission recently noted that these seal populations are not in danger of being wiped out and that, on the contrary, scientific studies show that harp seal stocks in the North West Atlantic have grown from just under two million in the 1970s to nearly six million today.<sup>4</sup>

If there were specific seal species whose survival were under threat, a protection measure would, in that case, have to be directed specifically at such a species (cf. the proportionality principle).

- ***Public opinion and morality:***

The grounds of public morality are expressly recognised in Article 30 of the EC Treaty as an overriding public interest which may justify restrictions on the free movement of goods. Morality must also include ethical interests with regard to animals. However, these interests can only justify a restriction if it can be substantiated that this really is a matter of a pursuit of ethical interests, that the means are appropriate to achieve the objective and that they do not go too far.

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<sup>4</sup> See point 7 of the Commission's analysis of the Declaration of the European Parliament on banning seal products in the European Union (18 January 2007).

An assessment of this requires more detailed information on what it is about seal skin products that the individual Member State finds ethically problematic.

If it is in fact a question of the Member State believing that it is ethically offensive for its citizens to be confronted with seal skin products from seals which have been subjected to a particularly inhumane form of slaughter, it would, as argued above, be disproportionate to extend a ban to seal skin products originating from seals where this does not apply.

It also has against it the presumption that the production and sale of items of clothing made from the skin of a wild animal which, like the seal, has been hunted by people for thousands of years for, among other things, this purpose could arouse such general offence in a European country that the authorities of the country in question are obliged to introduce a general ban in order to avert a threat to public morality.

It must therefore be repudiated that a ban on seal skin can be justified on the grounds of public morality. People have no special emotional or cultural relationship with the seal as an animal which, of itself, could justify banning the use of its skin for clothing or other articles of everyday use for people.

The relevant species of seal in this context are, like the fox, a wild and non-endangered mammal whose skin has been used by people for thousands of years for clothing and other everyday uses. The same applies to skin from a number of other mammals which over the years have become production animals, such as cows and goats, or are now bred, such as mink.

If a Member State should, nonetheless, argue such a point of view, the Member State in question must give an account of the reason why seal skin products should be banned, while this (presumably) would not apply to products of other similar production animals, such as shoes made of leather from cows. Without such (credible) grounds, a ban on seal skin products cannot be considered appropriate to protect public morality.

As with the food habits of people, it is first and foremost a question of conscience for each individual person whether or not to use products such as leather, skin, fur and horn, originating from animals slaughtered by people, for clothing or other purposes.

## ***2. Extension of Directive 83/129/EEC would also be contrary to EU law***

Denmark does not support an extension of Directive 83/129/EEC concerning the skins of certain seal pups. In this connection Denmark doubts that, on the existing basis, the Community will have the competence to adopt an extended ban on seal skins.

As the Commission has confirmed, the species of seal in question is not an endangered animal and there is no evidence of inhumane slaughter on a wide scale. Should the Commission's further investigations, contrary to expectation, produce evidence of inhumane slaughter of seals on a wide scale, it must in accordance with the principle of proportionality (cf. in this regard Article 5(3) of the Treaty) be examined whether there are less restrictive means than extending

the ban on the skins of certain seal pups to also cover the skins of adult seals. This could, for example, be a certification system, such as is familiar from EU rules on leghold traps.<sup>5</sup>

It is Denmark's opinion that it would be contrary both to EU law (including the principle of proportionality) and Community obligations under WTO law to extend the existing EU ban on the skins of certain seal pups to also cover skins from adult non-endangered seals. This applies even if the Inuit exemption in Article 3 of the Directive is extended correspondingly.

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<sup>5</sup> See Regulation 3254/91/EEC prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards.