Bill proposed by member Van Velzen and Waalkens on a prohibition of fur farming (Fur Farming Prohibition Act)

EXPLANATORY MEMORANDUM AS AMENDED FOLLOWING RECOMMENDATIONS BY THE COUNCIL OF STATE

§ 1. Introduction`

On 1st July 1999 Parliament adopted the motion by Swildens- Rozendaal c.s. (Parliamentary document 26 200 XIV, nr. 63, hereafter: the motion), thereby articulating its opposition to the continuation of mink farming in the Netherlands. The literal text of the motion is as follows: «Parliament, having heard the deliberations, and taking into consideration that mink are naturally solitary, predatory animals whose welfare is harmed by being kept for commercial production; taking into consideration that commercial rearing of mink is primarily aimed at fur production; taking into consideration that the objective of fur production does not justify maintaining commercial mink farms; requests that the government prepare measures as soon as possible in order to end commercial rearing of mink and inform Parliament thereof as soon as possible, and shall proceed to the orders of the day ».

Although the motion refers to the consequences of mink farming to animal welfare, it is clear that the issue is mostly based on ethical and moral attitudes with respect to this form of farming. Rearing mink primarily for their – economically valuable – fur, is not acceptable and clashes with the «no-unless»-principle of the Animal Health and Welfare Act that is expressly built on the objective of using animals with moral justification. In that sense, fur production is distinctly different from the production of food, in that is does not serve to meet one of the basic human needs.

In general, the bill in question aims to prohibit keeping and slaughtering animals primarily for their fur. Therefore, the bill is not limited to mink farming alone, but makes a broader point with respect to fur production in the Netherlands. That alone will reflect the given moral attitude, of which the focus is not the nature of a specific species, but the objective of this kind of farming.

Much research has been conducted into the welfare of mink living in captivity. There were and are several studies in progress into the welfare of mink, including the European study «The welfare of animals kept for fur production» by the Scientific Committee for Animal Health and Animal Welfare (2001) of the European Commission and «Cage enrichments and welfare of farmed mink» by Vinke, C.M. (2004). The Animal Science Group vof Wageningen UR (Leenstra et al 2007) has conducted research into discomfort among livestock, pigs, poultry, mink and horses and concludes that the mink is the only production animal that lives a solitary life in the wild, and has furthermore not been domesticated. Discomfort is the result of their accommodation and food. There is a high incidence of mortality among pups. Consensus has as yet not been reached concerning the degree of detriment to welfare, which is why the sponsors of this bill neither can nor will make definitive statements concerning the degree of detriment to welfare of mink living in captivity. We can state, however, that any degree of detriment welfare is unnecessary when animals are kept primarily for the objective of producing fur.

An earlier bill to prohibit fur farming was introduced by the Cabinet Kok II, but due to the premature dissolution of that government, it was debated. Subsequently, Cabinet Balkenende I decided to withdraw the bill. Nevertheless, at this point in time the public debate on the acceptability or non-acceptability of keeping animals for fur production has not died down. Quite the contrary, results of the most recent survey on whether keeping mink for fur production is acceptable show that 72% of the population believe that fur production in the Netherlands should be prohibited by law. 86% disapprove of wearing fur (TNS-NIPO, 2006). Based on this bill, the debate about the acceptability of fur farming should lead to a prohibition.

§ 2. Contents of the bill

Section 2 of this bill prohibits keeping and slaughtering animals exclusively or primarily for their fur. In the Netherlands, three different species are exclusively kept for fur production. The mink farming industry, with approximately 200 farms, is the largest in the sector.

In accordance with the Decree regulating animals kept for production, a small number of farms may keep fox and chinchillas until no later than April 1st 2008. The transitional regime of the Decree regulating animals kept for production was kept in place for these farmers, excepting their fur farms from the prohibitions in Article 2, until April 1st 2008.

Therefore, this bill has the greatest effect on particularly mink farming; as of yet, this category of farmers has not been confronted with legislative measures, specifically geared at termination. In order to take the interests of the existing fur farmers into consideration and allow them to earn back their investments, the bill provides ample transitional rights.

On 17th January 2008 the sponsors announced the fur farming prohibition law by means of a letter to Parliament and a press release. Pursuant to the bill, mink farmers who already kept mink or ad the required licenses and animal accommodations on 17th January 2008 are eligible for the transition period of ten years.

Condition is that the mink farmers continue their mink farming without interruption in order to be eligible for a transition period. This entails that transfer of mink farms to third parties is no longer possible. In extraordinary cases where the mink farmer is forced, due to circumstances beyond his control, terminate operation of and sell the mink farm, this may lead to unreasonable financial hardship for the individual mink farmer. Examples are death, divorce, disability or reaching the pensionable age. Under these extraordinary circumstance the successive farmer, under specific conditions, may keep mink during the transition period, in accordance with Section 3, paragraph four.

The current mink farmers are obligated to register with the Minister of Agriculture, Nature and Food Quality (hereafter: the minister) within four weeks of the Act coming into force. They must inform the minister of the number of mink their license permits them to keep, how many mink pens were available at their mink farm on 17th January 2008, the number of mink they kept at the time of notification, the location or locations where the mink are kept on 17th January 2008 and at the time of notification. During the 10-year transition period these mink farmers are required to inform the minister of any potential location changes to the mink farm, they will not be allowed to keep more mink than their license permits and may never keep more mink than they could accommodate on 17th January 2008. In addition, they must keep the mink in accordance with the requirements set by the Mink Welfare Standards Regulation (PPE) 2003. In this manner, the sponsors offer current mink farmers the opportunity to earn back their investments during the transition period of 10 years, yet does not allow for expansion of mink farms after 17th January 2008. Mink farmers who decide to expand their farms after 17th January 2008 are not eligible for the transition period. This was expressly stated in the aforementioned letter sent to Parliament on 17th January 2008 and the press release.

§ 3. Case History

As early as during the drafting of the Animal Health and Welfare Act, fur production was a problematic issue for Parliament. Furthermore, fur farming was discussed several times in the Permanent Committee for Agriculture, Nature and Food Quality. In the course of time, the main focus of debate shifted from concerns over animal welfare to the general attitude in Parliament that keeping animals for fur production is undesirable under any circumstances. In November 2003 Parliament passed the motion introduced by Van Velzen (Parliamentary document 29 200 XIV, nr. 29), which requested that the government to prohibit the import of and trade in dog and cat fur, and products that contain dog and/or cat fur. In 2006 members Kruijsen and Snijder-Hazelhoff introduced a proposal to amend the Flora and Fauna Act with respect to the trade in harp seal and hooded seal products (Parliamentary document 30 409, nr. 2). In the bill, the members appealed to the national, public sense of morals and the protection of animal welfare. The bill was later withdrawn, because the minister dealt with the trade prohibition himself by means of an Order in Coucil (Stb. 2007, 253).

In 1994 studies were completed on the welfare situation of three animals kept for fur production: foxes, chinchillas and mink. The results of this research were such that foxes and chinchillas were placed on the list of animal species, in accordance with Section 34 of the Aminal Health and Welfare Act, that are not permitted to be kept for production purposes.

For mink, the results of the study were that the implementation of a number of improvements would make keeping mink without impeding their welfare possible. The motion introduced by Van der Vlies (Parliamentary document 23 900 XIV, nr. 36), in which the sector and the minister were asked to propose a plan of approach to facilitate further improvement of the welfare of mink kept in captivity was adopted by unanimous vote. In order to execute the motion by Van der Vlies, the sector and the Ministry of Agriculture, Nature and Foord Quality drafted a plan of approach in 1995, which included the definition of a process in order to effectuate improvements with respect to accommodation and care. The plan of approach included regulations for feeding practices, nesting boxes, group accommodations and additional requirements for the cages. The plan did not include requirements for swimming water.

The assessment of the plan of approach in 1998, sent to the President of the Permanent Committee for Agriculture, Nature and Food Quality on 3rd February 1999, showed that nearly all mink fur farmers implemented the steps from this initial phase. This letter states the following conclusions:

• the plan of approach has a substantial positive effect on the welfare of mink. It reduces deviant behaviour, and promotes positive social and play behaviour, particularly among younger animals;

• the steps from this initial phase were implemented by nearly all mink fur farmers. This means that the accommodation and the manner in which the animals are cared for has changed drastically;

• not all deviant behaviour by mink has been eradicated, and further positive behaviour can be encouraged.

On the occasion of the parliamentary debate on the assessmet on 1st July 1999 Parliament pronounced, following a motion by Swildens-Rozendaal c.s., its opposition of continuation of mink fur farming. On assignment of the minister, mr. J. van Noord conducted research into the consequences of a fur farming prohibition. In his report d.d. 20 September 1999 entitled «The consequences of a prohibition of commercial mink farming in the Netherlands» will be discussed in paragraph 4 of this memorandum. In order to take into proper account the legal-philosophical aspects of this issue, the Rathenau Institute called a discussion meeting. Subsequent to this meeting, the Rathenau Institute published a report entitled: «Assessing the moral acceptability of production objectives in animal farming. Ethical, legal-philosophical and administrative aspects». (Supplement to the letter by the minister of Agriculture, Nature and Food Quality, 23rd February 2000). The doubts stated in the report about the feasibility of a prohibition on ethical grounds were not supported by the majority of the members of the Permanent Committee for Agriculture, Nature and Food Quality.

The bill «Fur Farming Prohibition» (Parliamentary document 28 048, nr. 2) was sent to Parliament in October 2001. naar de Kamer gezonden. Following the Policy subsequent to the report, (Parliamentary document 28 048, nr. 6) in April 2002, in which the majority spoke out in favour of the Act, a change of government took place. The new strategic agreement stated the principle that the European minimum standard of national welfare regulations would be enforced. As a result, the minister did not deem continuation of the debate on the bill «Fur Farming Prohibition» desirable. During the Parliamentary debate following the formation of the Cabinet Balkenende II the topic of the prohibition was once again raised, but the debate did not lead to a proposal.

The Product Boards for Livestock, Meat and Eggs established the Mink Welfare Standard Ordinance in 2003. This ordinance is based on the 1998. At the European Agricultural Council Meeting in February 2006, the minister stated that European mink welfare norms should be addressed in the community animal welfare plan. In October 2007 the minister commissioned Wageningen University to conduct a survey into potential welfare issues for livestock, pigs, poultry, mink and horses, in preparation of the Animal Welfare Policy (Leenstra et al 2007). The conclusions of that survey include that discomfort results from accommodation (lack of stimuli) and nutrition (limited feeding of hibernating females). The mortality rate of pups is high and could be improved by better climate control of the stables and better management. The sponsors of this bill are of the opinion that any discomfort to animals exclusively held in order to acquire their fur is unacceptable.

§ 4. Ethics

The past has clearly shown us that animal protection legislation comes to pass step by step, and that each measure is primarily weighed and assessed on its individual merit. In principle, progress in animal protection legislation is impossible when it is based on the lowest possible standards. Subsequently, it is not inconsistent to prohibit commercial mink farming, and simultaneously not include other animal production. The Netherlands’ long-standing strong disapproval of morally reprehensible treatment of animals serves as justification for adopting specific animal protection legislation. Legislature has determined that there are certain acts against animals that are intrinsically and morally unjust and can therefore not be accepted. For instance, as early as 1875, the deliberate cruelty to dogs and cats became punishable by law (Act passed on 5 June 1875 to determine provisions to prevent rabies). The past decades have seen an increase of legislation to restrict various forms of ethically unacceptable treatment of animals: the use of draught dogs (1961), fox breeding (1995), keeping calves in crates (1996), chinchilla breeding (1997), animal testing for beauty products (1997), keeping sows on chains (1998), battery cages (1999), the use of great apes for experimentation (2002).

There is a strong, rational argument for protecting animals. The vast collection of academic literature and philosophical discourses that is available today demonstrates a clear consensus that humans have obligations to animals and that certain acts they undertake against animals are morally suspect or abject. Animals are not capable of giving or withholding their consent. Moreover, they are essentially vulnerable to and defenseless against exploitation and cruelty by humans. These considerations prove to make moral justification for bringing unnecessary harm to animals, even when alternatives to such maltreatment, all the more difficult.

This point has been paramount to all subsequent social and ethical debates about our rights and obligations with respect to animals. Since the 2nd half of the 19th century, the social debate about the right of animals to be protected and their place within society has become more poignant, in part due to our growing awareness of their capacities and their close kinship to humans. We can discern a consistent rise in our concerns about what animals are subjected to.

In addition to the adoption of this legislation, the ‘do no harm to animals’ norm has become the primary moral basis for animal protection policies with respect to the Animal Health and Welfare Act (AHWA, 1992). This is particularly reflected in Section 36, paragraph 1 of the AHWA: «It is prohibited to, without a reasonable objective or by overstepping the acceptable bounds in order to attain that objective, cause pain or injury to an animal or inflict harm to the health or welfare of that animal.». With respect to the slaughtering of animals, this «no, unless» principle means that slaughtering animals is prohibited, barring those instances where this may be justified on substantial grounds. It is referred to in Section 43, which stipulates that the slaughtering of animals is prohibited, barring those instances as cited in an Order in Council. Unfortunately, this Order in Council has not yet been established. Nevertheless, this provision does provide opportunity to prohibit the slaughtering of animals under certain circumstances, such as commercial farming of animals for fur production.

Article 34 of the AHWA provides for taking animals off the list of animals permitted to be kept for production purposes, thereby allowing for prohibiting certain species of animals from being farmed. Nevertheless, the Ministry of Agriculture, Nature and Food Quality consistently explains the AHWA in such a limited manner that the livestock sector cannot independently be subjected to an ethical assessment. There is an exclusive focus on the harm to welfare of the animal, and not on the ethical acceptability of the purpose for which the animal is kept. However, the AHWA does not require amendment or modification in order to establish a prohibition on commercial mink farming. Separate legislation could see to this. In this respect, the sponsors of this bill would like to refer to the letter by the minister dated 10th April 2002 (28 048, nr. 6) which determines that when a specific production purpose for farming animals does not justify keeping animals for that purpose, this has an enormous societal impact. Even if a more general basis were to be incorporated in the Animal Health and Welfare Act, the government presumes that Parliament would wish to debate every decision on prohibition of a production purpose with the government, and subsequently influence the debate. It seems clear that he protocol for adopting legislation provides the most suitable tools for this.

The principle of the intrinsic value of an animals lies at the very foundation of Dutch animal protection legislation. This important principle entails that animals are independent creatures, whose value may not be derived from their economic value for humans. This principle underscores that animals must be treated respectfully, as creatures that have feelings, consciousness and integrity.

Acknowledgement of the intrinsic value of animals by society and through the incorporation of that intrinsic value in legislation is considered a step forward for civilization. Over the past decades philosophers, ethicists and sociologists have increasingly reached the conclusion that society has a great vested interest in the protection of animals. People will benefit from living in a society that discourages unacceptable treatment of animals, and makes those actions punishable by law. The question of whether en when inflicting harm and discomfort on animals is justifiable has lead to disagreement, both among ethicists and within society at large. In general, justifiability is determined by considering whether inflicting harm is necessary or inevitable in order to achieve a certain objective, in addition to whether society benefits substantially from that objective and whether there are no alternatives to reach the desired result.

The objective of commercially keeping and slaughtering animals in order to acquire their fur does not pass this (moral) test. Although one may argue that fur is beautiful, fashionable and warm, this product may not reasonably be considered an essential good by the majority of people. It is a luxury good for which many common alternatives exist that are also beautiful, fashionable and warm. Inflicting suffering on and taking the life of an animal for a non-essential and even trivial purpose kan not be morally justified. It is unmistakably at odds with public morals.

The research by the NWO (Netherlands Organisation for Scientific Research) on the slaughter of farmed animals (Rutgers et al. 2003) concludes that respect for animal life is, from the perspective of the Dutch population, the principal moral argument for limiting the slaughter of animals. The principle of respect for lige is general moral principle that reflects the normative attitudes concerning the manner in which we treat animals in our society. The research concludes: «According to this principle we are not to intervene in the lives of animals, unless we may defend our actions based on sound arguments. The majority of the population feels that obtaining fur is insufficient justification for ending the life of mink. The objective, obtaining fur, is much less important than the right of animals to stay alive.» (Rutgers et al 2003: 80–1).

The importance of the objective for which the animals are kept and slaughtered offers an important argument why it is not inconsistent to prohibit mink farming, whereas other forms of animal farming - in which animal welfare is also impeded and animal lives are also ended – are not. Fur production is distinct from other food production, because it does not address a basic necessity of human life.

The Dutch population also makes a clear distinction between the two. Eating animal products is often considered a basic human necessity. The aforementioned research showed that only 6.4% of the Ditch population considers keeping livestock for the production of food unacceptable. This means that our society adheres more value to eating animal products than to the importance of allowing animals to stay alive. A similar consideration does not apply to the importance of people being able to wear fur versus the importance of allowing animals to stay alive. A recent NIPO survey (2006) shows that 86% of the Dutch populations considers wearing fur unacceptable. Subsequently, inflicting harm to the welfare of food producing animals is considered acceptable to a certain degree. With respect to the objective for which mink are kept commercially, any form of harm to animal welfare is considered unacceptable.

The Netherlands have a long tradition of prohibiting ethically unacceptable practices – including child labour and environmental issues – despite the economic limitations such prohibitions entail. The proposed initiative for a prohibition of all seal products is an excellent example of how Dutch legislation may be modified as a result of ethical objections to certain practices against animals. vA prohibition of commercial mink farming for the production of fur would be a continuation of this valuable democratic tradition.

§ 5. The consequences of enforcing a prohibition of commercial fur farming

In 1999 mr. Van Noord, former MP and spokesman for Agriculture from the CDA was asked to advise the cabinet on the socio-economic consequences of a prohibition of commercial fur farming. His recommendations were summarized in «The consequences of commercial mink farming in the Netherlands » (supplement to the letter by the minister of Agriculture, Environmental Management and Fishery dated 21st September 1999 to the Chairman of the House of Parliament.) His conclusions include that a prohibition of fur farming may be established from the perspective of the objections to fur production, leaving welfare considerations aside.

Mr. Van Noord also provides a number of recommendations about the transition period. He and the sponsors of the bill agree that is not justifiable to end mink farming within 10 years. The investments made by mink farmers and the investment obligations they have in order to meet the Policy requirements can be earned back in a period of ten years, during which they would also be able to maintain reasonable compensation for labour and invested capital.

§ 6. Indemnification obligation with respect to Article 14 of the Constitution and Article 1 of the first protocol of the ECHR

It was assessed whether the proposed transition period of 10 years still requires indemnifying mink farmers. In this case, Article 14 of the Constitution and Article 1 of the first protocol of the European Convention on Human Rights (ECHR) are both important. Article 14 of the Constitution regulates expropriation subsequent indemnification. The prohibition of fur farming cannot be defined as expropriation, but is a limitation of the execution of the right to property as defined in the third paragraph of Article 14 of the Constitution. Pursuant to that paragraph, limitation of the right to property requires indemnification or compensation for damages in cases determined by or in accordance with the law.

Article 1 of the first protocol of European Convention on Human Rights (ECHR) states that every natural or legal person is entitled to the peaceful enjoyment of his property. No one shall be deprived of his property except in the public interest and subject to the condition provided for by law and the general principles of international law. This does not affect the rights of a State to apply those laws that he considers necessary in order to regulate the use of property in accordance with public interest. EU human rights court jurisprudence addresses this issue in more detail. In this respect, the weight of a specific case determines whether it must be considered expropriation or regulation of property. In the event of expropriation, the government is generally obligated to provide indemnification, but for regulation of property this is only the case in the event that the individual is required to carry an unreasonably high burden in order to achieve the issue of public interest by means of a regulating measure. In this particular case, public interest refers to the ethical and social objections to fur production. This measure does not entail expropriation. The prohibitions specified in Article 2 of the bill may be defined as regulations in accordance with Article 1 of the first protocol of the EHCR. Therefore, there is no obligation for indemnification. As such, it is important to stress that the Fur Farming Prohibition is accompanied by a transition period of 10 years. This prevents a disproportionality between the interests of the fur farmers and public interest.

§ 7. Aspects of European Law

a. Compatibility with EU-legislation

A prohibition on keeping and slaughtering animals for their fur may have consequences for the import and export of animals for fur production and as such has implications for European legislation. The question arises whether the prohibition may be considered as a quantitative restriction of import and export as stipulated in Articles 28 and 29 of the EU Treaty. There is no export restriction with respect to Article 29 EU Treaty, in the event that, as is the case here, the measure is objectively applicable to the production of a product, irrespective of whether a product is intended for the national market or for export (Court of Justice, case 15/79: Groeneveld). For import restrictions with respect to Article 28 of the EU Treaty, set jurisprudence of the Court of Justice has determines that all measures that (potentially) impede trade are subject to the prohibition of Article 28 (Court of Justice, case V 8/74: Dassonville), unless the measure is justified by the «rule of reason» (Hof van Justitie, zaak 120/78: Cassis de Dijon). In that decree and subsequent verdicts the Court has determined that a measure that may be justified by the «rule of reason» if it is a non-discriminatory measure, the measure is not economic in nature and meets the requirements of necessity and proportionality. The prohibition of keeping and slaughtering animals for fur production will not discriminate according to country of origin of the animals nor the country for which the animals are intended, and as such, may be defined as non-discriminatory. The objective of the prohibition is to protect animals from ethically unwanted use by humans and therefore, is not economic in nature. The necessity of the prohibition lies in the growing ethical and social conviction that animals in the Netherlands should not be used for the production of fur. In order to achieve this objective, the prohibition is proportional. There is no other possible measure that is less invasive yet could yield the same effect. When these arguments are taken into consideration, is may be deemed highly probable that an appeal to the «rule of reason» will be successful. If an appeal to the «rule of reason» is not successful, the prohibition may be considered a restrictive measure on import to which Article 28 EU Treaty applies. However, the prohibition may then be justified by Article 30 of the EU Treaty that allows for prohibitions or restrictions on imports, exports or goods in transit justified if this is necessary to ensure the protection of a number of grounds specified in that Article. In this case, particularly the protection of public morality applies. In the rare instances where the Court of Justice has assessed claims based on the grounds of “public morality”, these claims were about national regulations that are a topic of debate in most European societies.

With respect to the slaughter of animals in order to acquire their fur, there has been an appeal to Article 30 of the EU Treaty in the past, on the grounds of public morality. On 4th June 2004 a prohibition on seal fur and all its derivative products and dog and cat fur came into force. Article 30 was cited in order to effectuate a prohibition of these animal products. In Italy on 13th February the import of seal fur and other seal products was suspended and at this time, a bill for a permanent prohibition is being drafted, in part based on the same EU Treaty Article. Furthermore, in December 2005, PMs Kruijsen and Snijder-Hazelhoff proposed a preparatory bill for amendment of the Flora and Fauna Act with respect to the prohibition of trade in harp seal and hooded seal products. The sponsors of this bill state that violation of public morality warrants the trade restriction on products derived from seal hunting and that based on the fact that the great majority of the Dutch population objects to this type of hunting, a prohibition is justified. The sponsors consider it their duty to defend public morality and national legislation. The modification of the Resolution listed animal and plant species Flora and Fauna Act and the Resolution exemption protected animal and plant species with respect to the prohibition of trade in products derived from harp seals and hooded seals, are a clear precedent for a prohibition of fur farming. Similarly, keeping mink for fur production is in clear contradiction with public morality and as such must be regulated by law. A justified appeal to Article 30 of the EU Treaty and the issue of «public morality» can therefore also be applied to mink fur farming.

Jurisprudence with respect to «public morality» implies that every member state is free, based on its own morals and standards, to determine what requirements they deem necessary in terms of public morality (Court of Justice, case 34/79 and case C-23/89). Naturally, this requires meeting the demands of non-discrimination, necessity and proportionality. From the above, it becomes clear that those demands have been met.

The existing directive nr. 98/58/EG of the Council of the European Union of 20th July 1998 with respect to the protection of animals kept for agricultural purposes (PbEG L 221), that also applies to keeping fur production animals, exclusively addresses the manner in which the animals are kept and do not refer to the question of whether the purpose for which those animals are kept is acceptable. Therefore, this directive does not stand in the way of this bill. Within the scope of the Council of the European Union, based on Artikel 9 of the 10th March 1976 Strasbourg European Agreement with respect to agricultural animals (Trb. 1980, 154 en 188), recommendations were given in June 1999 with respect to keeping and slaughtering fur production animals. Regarding the regulations for keeping mink, these recommendations largely correspond with the objectives stated in the plan of approach for the keeping of mink. Unfortunately, the recommendations do not address the issue of moral acceptability of keeping and slaughtering animals for the value of their fur.

Fur farming has been an topic of debate for some time in multiple European countries. The government of the United Kingdom adopted a law that prohibits the keeping and slaughtering of animals for their fur. In December 1999 the European Commission denoted this proposal as a technical regulation in the scope of directive

98/34/EU on the information protocol with respect to standards and technical regulations concerning the information society. A number of member states responded to the British bill. The European Commission made a number of general statements after the expiration of the so-called standstill period. The Commission’s view is essentially that member states have the autonomous authority to instate measures, similar to those taken by the United Kingdom. Any drawbacks for intra-communitary trade, the Commission states, could probably be justified by an appeal to public morality, within the limits set by the EU Treaty and jurisprudence of the European Court of Justice. The statements made by the Commission essentially support the conclusion that it is unlikely that European law principally conflicts with a prohibition of fur farming. The lone fact that the Commission asks member states to display restraint for taking national measures in order to await the results of a study into welfare aspects, does not detract from this.

Even if this study would lead the Commission to implement a directive, this does not mean that such a directive would make a prohibition on moral grounds impossible. This will only be the case if such a directive would aim for total harmonization, i.e. an exhaustive regulation, with respect to the keeping and slaughtering of animals for their fur. Therefore, it is important to stress that the European Commission has only stated they are conducting research into the welfare aspects of fur farming and not into the acceptability of keeping animals for the production of fur.

The report «The welfare of animals kept for fur production» by the Scientific Committee for Animal Health and Animal Welfare (2001) of the European Union concludes that there are welfare problems among farmed mink throughout Europe, particularly problems such as self-mutilation, tail biting, tail sucking and stereotypical behaviour. In addition, an increasing number of breeders keep the animals in groups, although the animals are naturally solitary predators that require their own territorium and shallow swimming water. The report states: «In experimental conditions, farm mink show strong preferences for the opportunity to swim. An adequate fur-farming system for provision of swimming water has yet to be designed.» (Conclusion 32, pg. 178). The Committee also states that: «Changes in accommodation are needed in order to provide: sufficient environmental complexity and opportunities for investigation and exercise. Examples of normal mink behaviour which cannot be carried out in typical farm housing are running, climbing, and swimming». (Recommendation 17, pg. 183)

It must be noted that the «Ordinance Welfare Standards Mink (PPE) 2003», was drafted after the motion was withdrawn, did not use this report for the improvement of the welfare of mink. The issue of swimming water was not taken into account in this product board ordinance.

Other EU member states have implemented the results of the study. In 2005, Sweden announced that it would impose strict new welfare standards for mink. Focal point of the plans is that the accommodation of mink should meet the requirements for their natural behaviour. In effect, the plans include that mink bred in Sweden, must be given access to swimming water. This optimization of animal welfare will essentially lead to the end of mink farming in Sweden, as keeping mink is no longer economically viable. Similar welfare demands have already been implemented in three federal states in Austria; in the other federal states of that country fur farming has been prohibited completely. In Germany and Italy proposals have also been made to implement similar welfare standards.

Taking paragraph 4 of this explanatory memorandum into account, we do not advocate following the example of these EU countries. As we aim to implement a prohibition of farming mink for the purpose of fur production, defining new accommodation requirements that meet the natural behavioural needs of mink is superfluous.

A further question is whether the prohibition is a violation of the freedom of establishment as set out in Article 43 of the EU Treaty. This case, with respect to the freedom of establishment, concerns a non-discriminatory measure. Therefore, the rule of reason exceptions may also be appealed to here. In this specific case, it concerns the protection of animals. In the Gebhart case (C-55/94) the Court of Justice of the European Community found that is possible for a citizen of a member state to execute his right of establishment and the conditions for the execution of the right must be assessed in light of the activities that person wishes to undertake in that member state. National measures that may restrict free establishment must meet four conditions. They must be applied in a non-discriminatory fashion. They must be justified by urgent necessity of a general nature, they must be appropriate for achieving and securing the desired objective and must not exceed that which is necessary to achieve the objective. Thus in this case, the prohibition of keeping, slaughtering, or transferring for slaughter of fur animals is general. Thus, this is a non-discriminatory measure. The general interest that is served by this act is the protection of fur animals, more generally protection of animal welfare. Furthermore, the proposed measures are appropriate to improve the welfare of fur animals and the measures are not excessive.

b. Notification of this bill

The original law proposal was announced to the Commission of European Communities on 30th January 2001 pursuant to tArticle 8, paragraph 1, of directive nr. 98/34/EU of the European Parliament and the Council of the European Untion of 22nd June 1998 with regard to a notification protocol for standards and technical regulations concerning the services of the information society (PbEU L 204) as amended by directive nr. 98/48/EU of 20th July 1998 (PbEU L 217). Denmark, Finland, France, Greece and Spain entered comments, as did, after expiration of the valid time period, the European Commission. The comments of the given member states were addressed by letter on 10th July 2001. The comments of the European Commission, which were received later, were addressed by letter on 20th August 2001. The comments by the member states and the European Commission were not cause for adapting the bill. In his response, the European Commission reiterated its view as mentioned earlier in response to notification by the United Kingdom, in addition to a number of other comments. The Commission acknowledges that member states have a certain degree of freedom to take measures in order to achieve legal, non-agricultural objectives, even if those are not in accordance with the workings of the community ordering of markets. The restriction of inter-communitary trade that is a consequence of a prohibition of fur farming can be justified on ethical grounds, if those fall within the limitations set in the EU Treaty and the jurisprudence of the Court. The European Commission also noted that the share of Dutch fur farming in the production of mink fur will possibly be taken over by other countries, where welfare norms are less strict, which would not benefit the welfare of mink. In response to the Commission, this risk was acknowledged. However, it was also stressed that this problem arises in many issues at hand, including and particularly, those issues where animal welfare is the focus. Concerns in this regard cannot serve as a reason not to take measures that are considered necessary in the Netherlands or within Europe. Furthermore, the sponsors retort that concerns as stated by the European Commission may also not serve as a reason not to tackle issues considered unethical in their own country. The sponsors of this bill confidently await notification.

As this bill aims to prohibit fur farming in the Netherlands, it could result in a potential trade barrier as defined in the WTO Treaty. Consequently, the bill must be submitted to the WTO pursuant to Article 15 of the Agreement on Technical Barriers to Trade (Trb. 1994, 235). Based on the WTO Treaty the implementation of standards that may result in a trade barrier, are permitted in the event that these are implemented to serve a legitimate purpose, such as the protection of persons, flora, fauna, the environment or consumer interests. This bill does serve a legitimate purpose, namely the protection of non-domesticated animals in captivity, for the sole purpose of the production of a product that is not socially accepted.

§ 8. Implications of further regulations

Based on the Animal Health and Welfare Act (hereafter: AHWA) rules and regulations may be implemented that promote animal health and welfare. In accordance with the documented considerations behind this act ethical considerations with respect to animals and treatment of animals are also placed in a legal scope. An explicitly ethical assessment has exclusively been determined in the paragraph on biotechnology and animals, so its scope is marginal at best. Therefore, a stipulation that prohibits keeping animals for a particular purpose because there are ethical objections agains that purpose, is less suited to that act. In order to do justice to the individual nature of this topic, this bill provides in a separate regulation set by law. Article 34, paragraph 1 of the AHWA is the basis for the Ordinance list of animals that may be kept for production, which determines animal species and categories that may be kept for production purposes. Howecer, this would require a much broader interpretation of Article 34 of the AHWA than the explanatory memorandum of that Ordinance addresses. What we have here is the prohibition of a sector that is as yet legal. The decision to no longer permit the farming of animals for a particular production purpose is so substantial that full involvement of the States General in the decision making process, as is the case in the adoption process of a new law, is pertinent. A regulation based on Article 34 would not do justice to the prevailing objections against fur production in general. Therefore, this explanatory memorandum need not address Article 34 any further.

§ 9. Enforcement aspects

Although it is not relevant to the applicability of Article 2 whether the activity is commercial or not, in practice, the keeping and slaughtering of animals, solely or primarily for the purpose of obtaining their fur, exclusively takes place commercially. IN this light, the decision has been made to make violations of this law punishable as an economic crime, qualified as a violation.

Furthermore, the bill includes a notification obligation for mink farmers who continuously keep mink from 17th January 2008. They must specify how many animals are kept, where they kept the animals on the indicated date and, in the event that the mink farm has relocated, where the animals are kept as of the day the Act comes into force. Farmers who have the required permits and accommodation for keeping mink on 17th January 2008 are bound to this notification obligation. They ay only appeal to the transition period in the event that they actually keep mink as of the day that the Act comes into force. This provides an accurate overview of the situation as of day one and provides a thorough basis for sound monitoring of the farmers. An exception is made, pursuant to the provisions of Article 3, paragraph 4, whereby fur farmers may transfer their business. The subsequent farmer is obligated to inform the minister of such transfer. extraordinary circumstances that force the farmer to transfer his business. Furthermore, he is not permitted to keep more mink than the number his predecessor had a license and accommodation for on 17th January 2008. Enforcement of the Act and investigations into violations will initially officials from the General Inspection Service (Algemene Inspectiedienst (AID)) of the Ministry of Agriculture, Nature and Food Quality. As the bill is applicable to approximately 200 businesses, only a limited effort by the AID is required. The AID will particularly monitor fur farms during the time period until 10 years after 17 January 2008, and check whether a fur farm meets the conditions of the transition period as stipulated in Article 4. After that date, operating fur farms will no longer be permitted and the effort by the AID will be limited to enforcement agains violations of the prohibition. Enforcement of the Act is subject to criminal law. The consequences of this bill for the workload of law enforcement and the courts will however, considering the size of the sector that the bill is applicable to, be limited.

§ 10.Consequences for trade and industry

According to the Dutch Federation of Fur Farmers the Dutch sector is currently comprised of 200 mink farmers for whom mink farming is their primary business focus. The mink are slaughtered on the mink farm. Globally, the current production level lies at 40 million pelts. According to the Oslo Fur Auctions, Denmark, with 32.1% market share of global production, is by far the largest producer of mink fur in the world. China produces 19.9% of all pelts. The Netherlands rank third, producing 8.2% of van all mink fur. In order to meet global demand, mink farming in other countries is likely to increase once fur production in the Netherlands comes to an end. Clear shifts in the global production of mink fur over the past ten years is already visible. Mink fur production in China has seen explosive growth, from 1/5 million pelts in 1996 to 8 million in 2005. The shift of mink production to China is partly the result of that country’s much less strict requirements for the environment, animal welfare and labour circumstances. Furthermore, over 70% of all fur processing currently takes place in China. During that same time frame, Europe has also seen a production increase for mink pelts, in Poland (from 10,000 to 1.8 million) and the Baltic States (from 650,000 to 1.25 million). Consequently, the Nwetherlands has lost nearly 2% of its global market share. Sources from the fur farming sector (fur farmers) state that fur farmers are wary of competition from low-wage countries. The fact that there is still demand for mink fur abroad, is no reason to not prohibit commercial fur farming in the Netherlands. There is no reason not to adhere to our own morals and values in our own country. There are also countries where child labour is not considered a reprehensible issue. In the Netherlands, we do object to such practices and have not implemented child labour, simply because it is acceptable elsewhere is no reason to accept it ourselves. Much the same, the fact that other countries farm mink under even more appalling welfare circumstances does not stand in the way of prohibiting it here.

It is also suggested that a prohibition of mink farming in the Netherlands would lead to the mink farmers relocating to other countries, particularly Eastern Europe. However, a 2005 study by accountant firm ABAB into fur farming showed that the majority of the mink farmers did not consider emigration an option. Only large farms with over 6000 breeding females stated they would consider emigration (the average mink farm has approximately 3000 breeding females).

In the Netherlands, over 4 million pelts are produced annually. The annual trade value of Dutch pelts amounts to over 75 million euro. The average yield for one pelt is between 15 to 30 euro, depending on quality, demand and supply. The cost price per pelt, not including labour and management costs, is between 30 and 60 euro per mink pelt. According to the Dutch Federation of Fur Farmers mink farms in 2006 employed circa 950 fulltime and 250 part-time employees. Mink farms also provide seasonal labour for a portion of the year. The fur farming sector currently finds it very difficult to find enough Dutch workers who are willing to slaughter and hide mink. The lack of man power is so great that in 2005, the CWI (Centre for Work and Income) met the demands of the fur farming sector by implementing a short-term employment procedure. This meant that work permits were more easily issued to labourers from the new Easter European countries in order to facilitate pelt processing. Furthermore, mink farming is often not the sole source of income for mink farmers. Many yield income from other (agricultural) activities such as arable farming, horticulture, livestock, pig farming, chicken farming and horse breeding. Termination of the mink fur sector as such would not necessarily have major consequences for those involved who already earn a part of their income from other commercial activities.

At the time of the Van Noord report, an estimated 20% of the businesses was registered as a general partnership, where parent (usually the father) and child form a partnership, and the father is older than 50. Another 20% has a person of 50 years or older at the helm. The remaining businesses are led by a person younger than 50 years old. The supply chain and buyers’ sector have 450 jobs that are dependent on mink farming. Mr. Van Noord expected the employees from the supply chain to be able to find work elsewhere. He furthermore assessed that employment in the supply chain and buyers’ markets will disappear only partially. Particularly with respect to the international auction houses located in the Netherlands, he expected that the consequences will be much more limited than those for the Dutch fur trade.

The ABAB report offers a clearer overview of the state of affairs in 2005. This fur farming trade study showed that 37% has chosen a partnership as their legal form. 31% has chosen a limited company. Only 9% of mink fur farmers work as sole proprietors. This study furthermore showed that 56% of breeders are not yet certain whether they have a successor for their business, 27% state they do not have a successor. Consequently, the report concludes that only 25% of those fur farms surveyed expects to transfer their business to someone else within 10 years. The report also shows that 56% of the breeders is 45 years old or older. Less than 4% of those surveyed is younger than 30.

The evaluation of the plan of approach in 1998 showed that nearly all mink farmers executed the initial phase of the plan. The investments that incurred amounted to approximately 27 million euro. There was a further total investment in low emission manure systems, amounting to another 27 million. This total is an average of 95 euro per breeding female. Mr. Van Noord anticipated that the investments that had been made could be earned back in 10 years, at the pelt rates that were valid at that time (1999). However, he did note that prices are unpredictable and are typically cyclical in nature. Slaughterhouses for poultry and the fish processing industry that supply mink farms with raw materials for mink food will have to tap into a new buyer’s market. The estimates of these costs range from 1 to 2.5 million euro.

In 2006, the Dutch Federation of Fur Farmers (NFE) also purchased United, an American vaccine manufacturer, for nearly 10 million euro. The organisation aimed to prevent dependency on obtaining vaccines. 70% of the costs for this takeover was financed by participation certificates and the NFE itself. Considering the fact that this American vaccine manufacturer also supplies vaccines to mink producers in North America, Russia and other European countries, it is not likely that the prohibition of mink fur farming in the Netherlands will have disastrous consequences for the factory.

On 30th April 2004, the «Ordinance Welfare Standards Mink (PPE) 2003» came into force. Within the scope of this product board ordinance mink farmers are obligated to make new investments in the accommodation systems. Before 1st January 2009, 25% of the animals must be accommodated according to the new welfare norms. Between 1st January 2009 and 1st January 2014, the required percentage is 50%. From 1st January 2014, all mink in the Netherlands must be living in accommodations that comply with the PPE-Welfare norms. In addition to these mandatory investments, many mink farmers see an opportunity to increase the number of mink they keep on their farms. As a result, more applications for licenses have been submitted in accordance with the Environmental Management Act. Due to the prohibition of keeping foxes for fur production that comes into force on 1st April 2008, fur farms are applying to substitute the number of foxes they were licensed to keep by mink. Usually, these farms already farm mink.