VERDICT

COURT OF THE HAGUE
Civil Rights Department
Case numbers : 200.150.279/01 and 200.152.339/01
Docket number Court of Justice : C09/443613/HA ZA 13-611

Decree of 10 november 2015

concerning

the State of The Netherland (Ministry of Economy),

seated in The Hague,

appellant in the principal appeal,

respondent in the conditional, cross appeal,

herafter refeered to as: the State,

attorney: mr. G.J.H. Houtzagers in The Hague,

versus

1 de vereniging Nederlandse Federatie van Edelpelsdierenhouders,
Seated in Nederasselt (municipality Heumen),

Hereafter referred to as: NFE,

The Proceedings

For the course of the legal procedures up until the decree of the Court of Appeal of 9 September 2014, which ordered the joining of case numbers 200.150.279/01 and 200.152.339/01, the Court of Appeal refers to that decree. By a statement of grounds for appeal the State has presented seven grievances in appeal against the judgment of 21 May 2014 and an eighth grievance against the judgment of 18 June 2014, which subsequently have been contended by NFE c.s. (The Dutch Federation of Fur Breeders *cum suis*) by means of a statement in reply. By submitting three grievances, NFE c.s. have made a conditional, incidental cross-appeal concerning the judgment of 21 May 2014 and thereby expanded (the grounds) for their claim. The State has contended the grievances put forward in this appeal and objected to the conditional cross-appeal. On 3 September 2015 both parties have had their cases pled for in court, the State by its own attorney and attorney mr. P.P. Huurnink, attorney and NFE c.s. by their attorney. At the occasion both parties submitted underlying documents in support of their case. Eventually a decree was called for.

Judgment of the Appeal

1.1

This case concerns the following:

1.2
According to their statutes one of the objectives of the NFE (the Dutch Federation of fur-breeders) is to look after the interests of the fur-breeding industry as well as its members. Within this procedure NFE also looks after the interests of a number of individual mink farms. The Court of Appeal will therefore reserve the term 'mink farmers' for the mink farmers whose interests are looked after by the NFE. The term 'Mink Farmers' will be used for the parties 2.a to 8.d. The core business of Mink Farmers concerns keeping minks for the production of fur. The 'Mink Farmers' constitute a part of the larger group of 'mink farmers'.

1.3
In 1995 the Van der Vlies-motion was accepted by the Dutch Parliament. This motion requested the industry and the government to devise a joint policy for improving the welfare of farm-kept minks. In response the NFE consulted the Dutch Ministry of Agriculture, resulting in the 'Action Plan for Mink Farming' dated 20 June 1995. This contained plans for improvement of the welfare of farm-kept minks. In 1998 the implementation of the Action Plan was evaluated and assessment showed that the positive effects on the welfare of the minks were unmistakable, that the first phase of the plan had been implemented by nearly all the mink farmers in such a manner that the housing of and care for the animals had been drastically altered and that there was room for the stimulation of further improvements.

1.4
On July 1st 1999 the Dutch Parliament accepted the motion Swildens–Rozendaal c.s.:
"… after due deliberation,
considering that minks by their nature are solitary predators that are harmed in their welfare when kept for industrial production;
considering that the purpose of the mink farming industry is the production of fur;
considering that the purpose of fur production does not justify the maintaining of industrial mink farming;
requests the government to decree a growth arrest on industrial mink farming as soon as possible; and requests the government to prepare measures in order to end industrial mink farming and to inform the Parliament about the proceedings on short notice."

1.5
In the *Staatscourant* of 14 April 2000 (Stcrt. 2000, 75 page 14), the minister had an announcement published, which stated that the government did not object to the execution of the motion Swildens-Roozendaal and that, if the prohibition of industrial mink farming would actually be prepared for implementation, transitionary measures for existing farms would be provided for. The announcement also stated that no transitionary measures would be provided for farmers who started their business after the date of the announcement, with the exception of farmers who had their permits in order and who had already made investments.

1.6
On 18 October 2001 the government submitted a bill for the prohibition of fur farming to the Dutch Parliament. The bill was founded on the notion that the farming of minks with the purpose of obtaining their (in an economical sense valuable) pelts was not acceptable. The production of fur in that sense is distinguished from the production of food, since it does not provide in a necessity of life, according to the government.
(*Kamerstukken* II, 2001-2002, 28 048 no. 3 page 1).

1.7
After a change of the cabinet, the government withdrew the bill concerning the prohibition of fur farming by means of a letter on 14 February 2003, stating that the announcement in the *Staatscourant* mentioned under 1.5 was cancelled. The reason for this withdrawal was that, as part of the new Strategic Agreement, the decision was made to comply with the European minimum welfare requirements, and the bill exclusively contained independent national requirements.

1.8

On 11 December 2003 the *Productschap Pluimvee en Eieren* (PPE, Product Board for Poultry and Eggs) established the Regulation of Welfare Standards (hereafter referred to as the PPE-Regulation). The PPE-Regulation was based on the evaluation of the Action Plan mentioned under 1.3. Until 1 January 2014 mink farmers have had to make compulsory investments in order to keep their minks in accordance with the PPE-Regulation.

1.9
On 4 October 2006 member of Parliament Van Velzen submitted a proposed bill, aimed at the prohibition of fur farming. The bill was based on the notion that it is unacceptable to keep fur animals and kill them solely for the purpose of obtaining their pelts. The bill has led to the Law for the Prohibition of Fur Farming (Stb. 2013, 11), as altered by the laws of 4 January 2013 ((Stb. 2013, 12 and Stb. 2013, 13), hereafter together also referred to as: the Law. The Law has become effective as of 15 January 2013.

1.10
Pursuant to article 2 of the Law it is prohibited to keep, kill or have killed a fur animal, which is defined as an animal that is primarily kept for obtaining its pelt. This prohibition also applies to mink farmers, but an exception was made in article 4. Article 4 states that until 1 January 2024 the Law will not apply to mink farmers who were already in business before 15 January 2015, and otherwise also met the requirements described in article 4. In accordance with article 3 of the Law, they should have reported themselves within four weeks after the implementation of the Law. The period from 15 January 2013 until 1 January 2024 is hereafter referred to as the 'transitional period'. As appears from the legal precendents, the transitional period is incorporated in the Law in order to enable existing mink farmers to earn back the investments or investment obligations that have been made in order to comply with the increased welfare standards stated in the PPE-Regulations (Parliament, 2006-2007, 30 826, no. 3 page 8; Parliament, 2007-2008, 30 826, no. 8 page 8).

1.11

One of the requirements for making use of the transitional period within article 4 is that a mink farmer cannot keep more minks than the housing facilities would allow at the moment of application, in accordance with article 3. The effect of this requirement is that the mink farmer who wishes to continue his business up until 1 January 2024 is not allowed to increase the amount of kept minks (unless he had unused housing facilities at the time of application).

1.12
The transitional period cannot be used by a mink farmer who has obtained a mink farm after 15 January 2013, with the exception of extraordinary circumstances as meant in article 3 clause 4 of the Law. An extraordinary circumstance applies when the mink farmer would suffer a major financial disadvantage because – in short – (i) he suddenly has become unfit to work, (ii) his mink farm is part of a common interest and has to be liquidated in case of a division or (iii) he has reached the age of 65. The effect of this regulation is that the mink farmers who make use of the transitional period cannot convey their business unless one of the special circumstances occurs.

1.13
The Law furthermore contains the following measures in order to allow existing mink farmers to cope with the consequences of the Law:
(a) article 7 of the Law states that, by administrative decree, rules for compensation apply in case of extra costs for demolition or adjustments of buildings in which minks were kept and which have lost their function as a consequence of article 2 (hereafter referred to as 'the demolition regulation');
(b) in article 10 of the Law the regulations concerning the reserve for reinvestments, by means of an alteration of the law on income taxes 2001, is extended in such a way that mink farmers who end their business are enabled to reinvest the net profits in a new commercial activity free of taxes (hereafter referred to as 'the extended reinvestment reserve');
(c) based on article 11 of the Law the minster of Economic Affairs is authorised to offer a compensation to someone who is keeping minks as fur animals at the moment that the Law becomes effective, and to offer a compensation to someone who on 1 January 2014 is 55 years old or older and would suffer excessive consequences concerning his pension expectation as a consequence of the prohibition of article 2 (hereafter referred to as 'the hardship clause pension expectation')

These combined measures will hereafter be referred to as the 'accompanying measures'.

1.14
NFE c.s. state that the Law is not binding because it is in conflict with article 14 of the Constitution, article 1 First Protocol EHRC (hereafter referred to as 'article 1 FP'), Directive 98/58/EC, concerning the European agricultural policy, as well as articles 34, 35, 45 and 49 TFEU. In appeal NFE c.s. have added the conflict with article 26 OHCHR and article 14 EHRC. Summarised, their demands are that the Law is declared not binding as well as a declaration that the State, on grounds of unlawful actions, is liable in case of suffered damage by the Mink Farmers, to be formulated by the State.

1.15
The Dutch Court of Justice has granted these demands, because in agreement with NFE c.s., it judges that the State has infringed upon the mink farmers' rights of property as guaranteed in article 1 FP.

The following considerations were made. The Law infringes upon the mink famers' property rights, meaning their companies. The limitations that the mink farmers experience during the transitional period (the prohibition of expanding and conveying the company) have to be interpreted as a *controlled regulation of property.* From 1 January 2024 on, this regulation of property will be extremely heavy, since the business activities will be altogether prohibited. This regulation of property is provided for by law and in the public interest, while the Law is also sufficiently precise, accessible and foreseeable and thereby in accordance with article 1 FP. Since the transitional period is already causing damage for the mink farmers, it cannot in itself be a compensation for the extremely heavy form of regulation per 1 January 2024. The Court of Justice also considers it unlikely that there will be no damage for the mink farmers after the transitional period, because the commercial capacity connected with mink farming is completely taken away from them. Furthermore, it is realistic to expect that a certain number of mink farmers will not be capable to make optimal use of the transitional period. Since it is still unclear what the accompanying measures will exactly entail, they cannot be regarded as a form of compensation as such in this case. At this moment it is therefore not possible to determine if the regulation of property per 15 January 2013 and the extremely heavy form of regulation per 1 January 2024 are offering any, let alone sufficient, compensation. The interference with the property rights of the mink farmers during the transitional period and beyond is therefore not proportional, meaning in the sense of a *fair balance* between the public interest on the one hand and the rights of the mink farmers on the other. Since the Court of Justice already granted the claims made by NFE c.s. on grounds of a violation of article 1 FP, further grounds submitted by NFE c.s. have not been discussed.

1.16
The first six grievances in appeal by the State are aimed against the judgment that the State has acted in conflict with article 1 FP, more specifically against the judgment that a fair balance is lacking. The seventh and eighth grievances are aimed against the legal fee charge and the immediate effectiveness of the judgment. The conditional, incidental cross-appeal of NFE c.s. has been allowed on the condition that at least one of their grievances within the principal appeal will succeed and will lead to some alteration of the dictum. The grievances in this cross appeal are objecting to the regulation of property, rather than the deprivation of property, stating that the Law is sufficiently precise, accessible and foreseeable and that the Law serves a legitimate goal in the public interest.

The Principal Appeal

2.1
The basic premise of the first six grievances of the State is that, in contrast to the conclusion of the Court of Justice, the compulsory existence of a fair balance between the interests of the mink farmers and the public interest has actually been met. The State's argumentation is based on an interpretation of the term 'property', which is elaborated on in 4.2.1 e.v. of the submitted statement of grievances. The Court of Appeal will first discuss this argument.

2.2

The State argues, as far as the Court of Appeal understands, that a mink farmer's company is considered 'property' in the sense of article 1 FP, but that this is only valid concerning the already *existing* property, such as physical assets, and not valid concerning future incomes. According to the State this means that only the assets (land, buildings, machines) that already are the mink farmers' property, can be considered as 'property' in the sense of article 1 FP, and not the (insecure) incomes that they hope to generate in the future by means of those assets.

2.3
In response NFE c.s. argue that the 'property' deserving protection under article 1 FP is in fact the existing business of the mink farmers and therefore also its value. This means the existing property of the individual mink farmers, which they have built "by dint of their own work" and which exceeds the mere value of the individually determined assets and liabilities. NFE c.s. argues that this type of "goodwill" is part of the value of the deprived business, and is therefore protected by article 1 FP.

2.4
The Court of Appeal preconceives article 1 FP as concerning existing property rights only and not the right to obtain property in the future. Concerning the question if, and to what extent, the Law may infringe upon existing rights, the Court of Appeal considers the following: in the case *Ian Edgar vs. United Kingdom (ECHR) January 25th, 2000, no. 37683/97)*

ECHR considered:
"In the present case, the applicant refers to the value of its business based upon the profits generated by the business as "goodwill". The Court of Appeal considers that the applicant is complaining in substance of loss of future income in addition to loss of goodwill and a diminution in value of the company's assets. It concludes that the element of the complaint which is based upon the diminution in value of the business assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of Article 1 of Protocol No. 1."

2.5
And in the case *Malik vs. United Kingdom (ECHR March 13th, 2012, 23780/08)*

ECHR considered:
"93. The Court of Appeal recalls that goodwill may be an element in the valuation of a professional practice or business engaged in commerce. Future income, on the other hand, is only a "possession" once it has been earned, or an enforceable claim thereto exists (….). Where an applicant refers to the value of his business based upon the profits generated by the business, or the means of earning an income from the business, as "goodwill", the Court of Appeal has indicated that this reference is to be understood as a complaint in substance of loss of future income. The Court of Appeal has previously found that this element of the complaint falls outside the scope of Article 1 of Protocol No. 1 (see *Ian Edgar [Liverpool] Ltd.*; and *Denmark Limited and 11 Others v. United Kingdom (dec.) September 26th, 2000, no. 37660/97*, (…))."

2.6

Based on the ECHR jurisprudence, the Court of Appeal concludes that only the property consisting of commercial capacity derived from existing assets (land, buildings and inventory) and goodwill (such as a client database), as far as already present and owned by the mink farmers on 15 January 2013, respectively 1 January 2024, can be seen as protected property within the scope of article 1 FP. Future incomes that the mink keepers hope to obtain by means of these assets are not covered by article 1 FP. After all, in this case there is no income that has already been realised and there is no lawful claim that can be made to it.

2.7
The Court of Appeal states that NFE c.s. bases the value of the companies almost completely, if not solely, on the income that they hope to generate after 15 January 2013. As a consequence, they base the amount of damage that the Law will cause on the loss of such an income. NFE c.s. are referring to reports by Deloitte, KPMG and Ecorys and LEI that have been submitted to the proceedings. In these reports the value of the mink farmers' companies as well as the amount of damage that they will suffer is based on future incomes or free cash flow that these businesses would miss out on, both during the transitional period and after 1 January 2024. However, ECHR jurisprudence shows that such incomes and the value of a business, as far as it can be based on future incomes, are not protected by article 1 FP.

2.8
Therefore, the Court of Appeal must determine to what extent the existing business assets and goodwill are to be considered part of the mink farmers' companies. Between parties it is established that the mink farmers (normally) own land, company buildings, inventory (such as cages), minks and stockpiles of pelts that can be seen as property in the sense of article 1 FP without question. If the arguments put forward by NFE c.s. are to be interpreted in such a way that the Law is negatively affecting the value of the existing goodwill, the Court of Appeal has to conclude that they have no sufficient grounds to base the value of this goodwill on, other than the reference to future incomes that, as follows from the above, are not protected by article 1 FP. The NFE c.s. argument that this concerns the existing property of individual mink farmers, which they have built up "by dint of their own work", and which exceeds the individual valuation of assets and liabilities only, is too vague to lead to the conclusion that goodwill as 'property' in the sense of article 1 FP is in order. It is not established for instance, that the mink farmers have databases of clients to which they sell the pelts that they have produced. Contrary, when asked the NFE c.s. lawyer declared that 99% of all the produced pelts are sold via the stock market. Also nothing has been established about the company brand names connected to the Netherlands. The Court of Appeal therefore cannot conclude that the Law is negatively affecting the value of the existing goodwill, as far as consisting of something other than the expectation of future income.

2.9
The Court of Appeal concludes that within the context of the NFE c.s. appeal concerning article 1 FP, only the property of the mink farmers as far as it consists of land, company buildings, inventory (such as cages), stockpiles of pelts and minks can be taken into account. This will therefore serve as a basis for further discussion of the grievances. More specific, the loss of future income cannot be taken into account concerning the question whether a fair balance has been provided for.

3.1
Grievances II, III and IV, that will be collectively dealt with by the Court of Appeal, are aimed against the Court of Appeal's judgment that a fair balance between the public interest that the Law is striving for and the interest of the mink keepers has been achieved. Firstly, there is the objection that the Court of Justice has regarded the transitional period as an individual form of interference with property, and has been unwilling to view it as a measure that might offer a compensation for the legislative prohibition on the keeping of fur animals.

3.2
The Law dictates the prohibition of keeping and killing of minks for the production of fur as of 15 January 2013, but during the transitional period an exception is made for –in short– mink farmers who were already active prior to that date. As appears from the Law's legal precendents, the transitional period is mainly meant to enable mink farmers to earn back the investments that they have made for the sake of animal welfare due to the PPE-Regulation. The transitional period is meant as a compensation for suffered damage by postponing the effect caused by the prohibition in article 2 of the Law for mink farmers until 1 January 2024. The Judge has to take this into account during the assessment of the question whether the demand of proportionality has been met. As becomes apparent from ECHR and ECJ jurisprudence (the latter in response to article 17 EU-Charter), the question whether a transitional period is provided for in case of legislations that put an end to economical activities, plays an important role concerning a fair balance (ECHR January 13th, 2015, no. 65681/13, *Vékony vs. Hungary* and ECJ 11 June 2015, C-98/14, *Berlington*).

3.3
Different from what the Court of Justice has founded its judgment on, the single fact that certain limitations apply during the transitional period (no increase in the number of minks, the impossibility to convey the company save for exceptional circumstances) is not in conflict with the notion that the transitional period has to be viewed as a compensation for the damage caused by the prohibition at large. It is not the question whether the mink farmers would have been better off with a transitional period without these limitations in comparison to a situation in which no transitional period would have been provided for at all, and the prohibition would become effective immediately for all mink keepers from 15 January 2013, including those who were already active at the time. Only when it is determined that the continuation of the mink farming industry during the transitional period would offer no advantage whatsoever, in comparison to the situation in which the prohibition would become immediately effective for mink farmers as well, for instance in case no profit is made during the transitional period, the transitional period cannot be viewed as a compensation for the damage. However, it cannot be determined that such a situation would occur in this case and the Court of Justice also did not establish this. Therefore, by grounds of insufficiency, the Court of Justice has not taken the transitional period into consideration as a compensation for the disadvantage caused by the prohibition. This does not mean that, insofar limitations are in order during the transitional period, the latter are weighed as part of the question *to what extent* the transitional period offers compensation for damage. The Court of Appeal will further discuss this concerning the following.

3.4

The Court of Appeal adds that there is no reason to assume that the transitional period will actually cause increased damage, as has been put forward by NFE c.s. If the continuation of business after 15 January 2013 (or any time after that date) would only increase the mink farmer's damage, nothing would or will prevent the mink farmer to terminate his business and with that prevent (further) damage. In that sense a *compulsory* transitional period is not in question (plea notes mr. Lever in appeal under 13). A mink farmer can terminate his business during the transitional period any time he wishes, for instance when he thinks the benefits of continuing no longer outweigh the burden.

3.5
Parties disagree about the question at what moment the (potential) infringement upon the property rights should be situated, namely on 15 January 2013 or 1 January 2024. The Court of Appeal considers this an unproductive discussion insofar that, within the context of the question whether a fair balance is achieved, the consequences of the Law as a whole have to be considered. These consequences come down to the notions that the keeping and killing of minks as from 15 January 2013, is prohibited for everybody in The Netherlands except for (in short) the already active mink farmers, and that as from 1 January 2024 the keeping and killing of minks will be completely prohibited in this country, while as from 15 January 2013 the mink farmers have the option to continue their companies, albeit in observance of the limitations that have been outlined above. The question is whether these consequences, as a whole, cause an individual and excessive burden for the mink farmers.

3.6
The Court of Appeal will now, in order to determine to what extent the transitional period will offer compensation for the infringement on the existing property of the mink keepers, examine which results the mink farmers will be able to achieve with their companies during the transitional period. Because this concerns a period which for the larger part still lies in the future and in which countless uncertain factors apply, the question can only be answered approximately.

3.7
NFE c.s. state that the sector (the Court of Appeal understands: the mink farming sector) was a flourishing agricultural sector at the time that the Law became effective, with considerable future prospects and which also served as an example for other agricultural sectors. The Court of Appeal deduces that the mink farmers were running profitable businesses at the time that the Law became effective. The calculation of damages that NFE c.s. submitted to the proceedings are (in principle) also based on the notion of profitable businesses. NFE c.s. argue that (i) the limitations that apply during the transitional period and (ii) the prospect that the continuation of the business will be prohibited altogether as from 1 January 2024 will negatively influence those profits during the transitional period.

3.8
The Court of Appeal considers it unlikely that the limitations that apply during the transitional period (no conveyance of the company and a prohibition of expansion) cause a diminutive effect on the profits. There is no given cause for the insight that the mere fact of a company not being conveyable will cause a negative influence on its capacity to be profitable. In principle the question of ownership is a different one from the question whether a business is generating a profit. NFE c.s. have not provided

any grounds that things should be considered differently in this case. This also applies to the circumstance that the number of kept minks cannot be increased. The Court of Appeal is willing to assume that a company which is not allowed to expand in the long term will be less viable, for instance because the advantages of operating on a bigger scale or investing in innovations realised by competing businesses cannot be equalled. Yet the Court of Appeal considers it unlikely that the company would no longer, or to a considerable lesser degree, be profitable as a result. Ecorys II (production 20 NFE c.s. page 28) establishes the notion that innovation and growth in scale are indeed of considerable importance concerning a profitable enterprise to the extent that there will be a negative effect on the competitive position and profits, but does not substantiate to what extent this effect will already occur during the transitional period. Ecorys II also does not establish that this 'negative effect' will cause profits to disappear altogether.

3.9
KPMG I report (document 15), submitted to the proceedings by NFE c.s. contains a calculation on page 23, that shows an inflation-based growth of the sector's free cash flow of € 12,9 million, while the number of breeding bitches, in compliance with the expansion prohibition during that transitional period, remains stable at 1.031.000 animals. The free cash flow in fact consists of the business results after tax and investment corrections; also see Ecorys I (document 16 NFE c.s.). Apparently KPMG presumes that the mink farms will be able to remain profitable during the transitional period, despite the expansion prohibition. On page 24 of KPMG I however, the assumption that, due to the prohibition per 1 January 2024, a gradual decline of 30% of the number of entrepreneurs will take place during the transitional period is taken into account. According to KPMG this will result in a € 64 million diminution of the cash flow.

3.10
In the first place the Court of Appeal thinks that the State, based on the profits that KPMG reports apparently assume, is right to question the assumption that that many entrepreneurs will give up their companies during the transitional period. Apart from the unspecified 'external factors', KPMG specifically mentions age as a factor, but there is no substantiation (and without substantiation it appears unlikely) in support of the conclusion that 70% of the mink farmers will reach the retirement age or will quit due to age-related circumstances during the transitional period. Also it is not likely that an entrepreneur will quit a profitable company before 1 January 2024 because of his age. It is more likely that he will postpone his retirement for a couple of years, or have the company continued in his name by a representative, a family member for instance. If a mink farmer none the less decides to quit a profitable company it will be on his own account, according to the Court of Appeal. The Court of Appeal concludes that KPMG apparently assumes that mink farmers who do not quit their companies before 1 January 2024 are still making a profit: the free cash flow that is generated by the 30% of mink farmers that have not quit by 2023 indeed would still be € 27,7 million.

3.11
Furthermore, the Court of Appeal considers it important that the mink farmers do not have regular customers who might start looking for other suppliers in the context of the ending of the mink farming industry per 24 January 2024, since almost all pelts are sold through the stock market. The Court of

Appeal considers it unlikely that the suppliers of the mink farmers will pull out during the transitional period and, as far as NFE c.s. might use this as an argument, unsubstantiated.

3.12
NFE c.s. have argued that the feeding costs may increase caused by (i) the premature pulling out of the fodder market by suppliers, (ii) a decrease in the advantages of the large scale production of fodder and (iii) the use of market power between fodder manufacturers and mink farmers (Ecorys I page 39-40). The Court of Appeal records that there are three manufacturers of mink fodder operating in The Netherlands, all of them owned by mink farmers. One of the manufacturers is owned by a cooperation of approximately 100 mink farmers. (Ecorys I page 40). Different from NFE c.s. the Court of Appeal thinks that the mink farmers will be able to operate on a profitable basis during the transitional period, or at least the larger part of it. Against this background the Court of Appeal considers it quite unlikely that the fodder factories will pull out of the market prematurely, especially since the owners of those factories, all of them mink farmers, would create a problem for themselves by doing so. Because the Court of Appeal assumes that the three fodder manufacturers will be functioning during the larger part of the transitional period, the risks of abuse of the market power according to the Court of Appeal is also unlikely, apart from the notion that this is too much of a speculative circumstance to be taken into account at this stage. For that matter, KPMG I page 24 shows that the possible effect of an increased price for fodder on the business results is marginal.

3.13
NFE c.s. have also argued that innovation would come to a standstill during the transitional period. This argument, specifically elaborated on in the plea notes by mr. Lever in appeal, (8 to 11) comes down to the following. Innovation consists of the breeding of minks with a bigger or better quality (or different colour) pelt. This implicates the annual purchase of new animals for breeding, involving costs and risks, while this takes five years to become profitable. According to NFE c.s. innovation will therefore come to an end after 2019. The Court of Appeal will assume that indeed innovation along this line will not take place anymore from 2019 on. However, on ground of these arguments the Court of Appeal cannot conclude that no innovation will take place before 2019. If innovation takes place each year until 2018, this will be profitable until 2023. Besides, the lack of innovation may well influence the profits negatively in the long term, but that does not mean that the company will suffer immediate losses. The Court of Appeal therefore sees no reason to assume that the profitability of the companies will cease after 15 January 2013. In the worst case a smaller profitability from 2019 on has to be taken into account, but that this should cause a situation with actual losses before 1 January 2014, is not plausible.

3.14
NFE c.s. have also argued that the mink farmers will encounter difficulties attracting sufficient funding during the transitional period. Again the Court of Appeal assumes that the mink farmers will continue to run a profitable business during the transitional period, at least during the larger part of it. In principle the mink farmers should therefore be attract funding. Whether it will prove to be more difficult to do so towards the end of the transitional period is possible, but this will depend on various factors that will vary per individual mink farmer, such as the securities that the mink farmer can offer.

Concerning this nothing has been established and therefore no judgment can be made in a general sense at this time.

3.15
NFE c.s. also put forward that the sector is liable to strong market fluctuations and that the profitability can be influenced negatively if prices drop during the transitional period. The Court of Appeal considers this a risk that is part of running an enterprise, inherent to the market in which the mink farmers operate, and therefore cannot be considered to be an objection against the State. By offering the mink farmers a transitional period the State has given them an opportunity to continue their companies, including all the risks and opportunities. The transitional period is in itself long enough (almost 11 years) to compensate for lower prices for a couple of years. The Court of Appeal also establishes that, according to their own report, KPMG II (document 21 NFE c.s.) has provided realistic calculations that take the volatility of the prices of pelts into account by assuming an average price over the period 2009-2013. These calculations are the basis for KPMG to assume a continuation of profitability, as weighed by the Court of Appeal.

3.16
This leads to the following. It is plausible that towards the end of the transitional period, the mink farmers will be unwilling to make any more investments (for instance in innovation) that they are unable to earn back, and that at some point they will have to deal with higher wage costs or a loss of human resources. Therefore, it is also plausible that there will be more pressure on the business results. Yet, it has not been established that the profitability will turn into a negative result. Furthermore, if a negative result will have to be taken into account at all at some point, this, given the reports on the profit rates, will not occur until the last few years of the transitional period.

3.17
Based on the above, the Court of Appeal assumes that the mink farmers will remain able to run a profitable business during the transitional period (of almost 11 years), or at least during the larger part of it. The Court of Justice therefore has wrongly omitted the transitional period as a (damage reducing) factor that has to be taken into account concerning the question whether a fair balance between the public interest and the infringement on the existing property rights of the mink farmers has been founded.

3.18
The Court of Appeal will now address the question whether the Court of Justice has rightfully excluded the accompanying measures. The Court of Justice has stated that the accompanying measures cannot be regarded as a form of compensation at the moment, since it is still unclear what they will entail exactly, how high the payed amounts will be and who will be entitled to them, while NFE c.s. have determined without a doubt that when there is no final net profit realised, an extended reinvestment reserve is ‘an empty shell’ and furthermore, it cannot be predicted in how far the minister will use his discretionary power concerning the hardship clause pension expectation.

3.19
The accompanying measures consist of (a) the demolition regulation, (b) the extended reinvestment reserve and (c) the hardship clause pension expectation. What these measures entail has been

summarised above, under 1.13. In appeal the State has added that the demolition regulation, which is only available in concept because it still has to undergo consultation, will imply the following at large. 50% of the demolition costs will be compensated, with a maximum amount per square meter taken into account and with a maximum amount of € 95.000 (€ 120.000 if asbestos has to be removed as well). 40% of the adjustment costs are compensated, with a maximum of € 95.000. In case of a combination of the two a maximum of € 95.000 is compensated (€ 120.000 if asbestos has to be removed as well). The State has reserved € 28 million for all the accompanying measures.

3.20
As the State is rightfully addressing, the Court of Justice has been too strict in its criteria by omitting the accompanying measures on the grounds that were provided. In order to assess the question whether a fair balance is provided for, all the related circumstances have to be considered. The circumstance that at this time it is still unclear which amounts will be payed to the individual mink farmers does not justify the exclusion of the accompanying measures as such. As far as the demolition regulation it is clear what can be generally expected. Although it is possible that the extended reinvestment reserve might not apply in all cases, this does not mean that it will actually apply to a substantial number. Indeed, the Court of Appeal assumes that the businesses will continue to be profitable during the larger part of the transitional period and that the mink farmers will be able to end their business when this is no longer the case. It is therefore plausible to assume that there will be a net profit result in the end. The fact that it is not foreseeable how the hardship clause pension expectation will apply to individual cases, is also insufficient reason to exclude this measure altogether. The Court of Justice has therefore unrightfully omitted the accompanying measures from the assessment of the question whether a fair balance has been provided for.

4.1
The question that the Court of Appeal will now address is whether, against the background of what has been discussed previously, the Law as such (meaning besides the individual position of the mink farmers, which the Court of Appeal will address later on) has been able to find a fair balance between the interests that the Law is striving for and the interests of the mink farmers. By means of grievance V the State submits a complaint, stating that the Court of Justice has come to a wrong judgment in this case. In assessing this grievance, the Court of Appeal will take the vantage point that the property upon which the Law is infringing consists of the physical assets, namely land, company buildings, inventory (such as cages), stockpiles of pelts and minks. Concerning the goodwill nothing has been established, while the future incomes that the mink farmers are hoping to realise are not protected by article 1 FP. Goodwill and future income therefore cannot be considered in weighing the question whether a fair balance has been provided for.

4.2
The Court of Appeal states that concerning the question whether a fair balance has been provided for, all the related circumstances are of importance, including the legal precendents of the Law. As appears from what has been stated on the legal precendents of the Law so far, from July 1999, when the motion Swildens-Rozendaal was accepted, the mink farmers had to take into consideration that there would come a time when their activities would be prohibited. Different from what NFE c.s. argue, this motion did not concern animal welfare as such, but the notion that it is ethically not acceptable to keep animals for the production of fur. The motion therefore requested the Government to implement a

prohibition of the keeping of minks. Also it cannot have escaped the mink farmers' attention that the wearing of fur and the keeping of animals for fur production has been considered to be unethical by a large part of Dutch society for a long time. The accompanying explanation of the bill is also referring to these opinions (ao. Dutch Parliament, 2006-2007, 30 862, no. 3 page 2; Dutch Parliament 2007-2008, 30 862 no. 8 page 2; Dutch Parliament, 2007-2008, 30 826, no. 10 page 4 and 11: "… the mink farming industry has been lacking public support for decades"). The Court of Appeal has no reason to assume that the legislator has the wrong insights in the public opinion in this matter. The bill was submitted in 2001. The fact that in 2003, a successive cabinet, with a different political orientation, decided to withdraw the bill and aim for improvement of the animal welfare standards instead, cannot have given the mink keepers a reasonable cause to assume that a prohibition based on ethical objections (namely the notion that, despite the welfare of the animals, the production of fur does not justify the keeping and killing of animals) would no longer be an issue. Indeed, in 1999 a majority of within Parliament was in favour of such a prohibition. Because of this majority and the imperative public opinion on fur production, the mink keepers, even after the withdrawal of the first bill, had to realise that a new bill was imminent, and in fact was submitted three years after the withdrawal of the initial one.

4.3
The Court of Appeal is of the opinion that from 1999 and at least from the time when the new bill was submitted in 2006, the mink farmers had to seriously consider the possibility that the keeping of minks would be prohibited, and from that time on also no longer could assume that they would be able to continue the industry indefinitely. This means that, since then mink farmers had reasons to prepare themselves for the possibility of a general prohibition, for example by expanding or changing their activities into less controversial forms of agriculture in order to spread the risks and become less vulnerable. Taking the amount of time that the mink farmers had until 15 January 2013 -and still will have until 1 January 2024– to prepare themselves for the expected developments into consideration, and also taking into consideration the profitability of their companies, the Court of Appeal assumes that the mink farmers could have expanded or changed their activities to different sectors if they wanted to. They cannot remonstrate against the State that they did not do so. NFE c.s. point out that the initial bill contained a buyout option, but this was not worked out at all. The mink farmers could therefore not deduce from it that the prohibition would not cause any damage at all. Besides the buyout option was already removed from the bill in 2008, just over a year later (Dutch Parliament, 2007-2008, 30 826, no. 6 page 4).

4.4
The Court of Appeal considers it important that, during the transitional period, the mink farmers will be able to (partly) earn back the investments that they had to make until 1 January 2014 in order to comply with the PPE-Regulation. The parliamentary documents concerning the Law (that have been referred to above) show that the transitional period is mainly meant to enable the mink farmers to earn back these investments. NFE c.s. have no, at least no sufficiently motivated, arguments that they will be unable to do this. The Court of Appeal notes that even if it is the case that these investments cannot be written off completely during the transitional period, it is still plausible that the resulting drawbacks can be compensated for the larger part by the profits that will be made during that same period. The Court of Appeal also considers that, also if the mink farmers may not be able to fully earn back the investments that were made in the context of the PPE-Regulation, this does not mean that a

fair balance is lacking. The PPE-Regulation already dates back to 2003 and many of the investments were made later on. The mink farmers could have already realised by then that they would not be able to continue their activities indefinitely. Insofar as they have continued their businesses unaltered – and therefore also had to make the necessary investments for animal welfare – this was at their own risk.

4.5
Finally, the Court of Appeal is not convinced that the mink farmers have no possibility at all to switch to another branch of industry. From 1999, and from 2006 anyway, they had the opportunity to make preparations and investments, for instance by focusing on other activities than mink farming. The fact that these activities might have to be developed on a different location than their current mink farm does not mean that these other activities are impossible for the mink farmers to achieve. Nor is it of sufficient important that the mink farmers are possibly lacking knowledge in other fields than mink farming; knowledge can be obtained or hired. Entrepreneurs can be expected to, if they have the means and the time, which is the case here, adapt to changing social circumstances. If it should be the case that the mink farmers see no other option than to liquidate their company at the end of the transitional period, and there are no other options, this will be at their own risk.

4.6
The previous comes down to the conclusion that the prohibition of the keeping and killing of fur animals for fur production has been foreseeable from 1999, or at least from 2006 on. Therefore, the mink farmers have had the opportunity to prepare themselves for a possible prohibition for a considerable amount of time, long before the Law actually became effective, for instance by diversifying their companies and thereby making themselves less vulnerable. Furthermore, they have been offered an ample transitional period of almost 11 years, which in the first place is meant to enable them to earn back the obligatory investments, but also enables them to continue their companies in a profitable manner for quite some time. In addition, accompanying measures have been provided for, that if applicable means a compensation of (part of) the damage.

4.7
Conclusively the Court of Appeal considers that the infringement upon the property of the companies that this case involves, is an infringement upon the use of the physical assets, namely land, company buildings, inventory (such as cages), stockpiles of pelts and minks.

4.8
This infringement is proportional, since it cannot be understood how justice can be done to the notion that the keeping and killing of fur animals for fur production is unacceptable, without prohibiting the actual keeping and killing. The Court of Appeal thinks that, taking everything into account, it has not been established that a fair balance is lacking. More specifically it has not been established that the mink farmers are suffering an individual and excessive burden as a consequence of the Law.

4.9
Insofar as NFE c.s. also argue that the (individual) Mink Farmers are suffering an individual and excessive burden, that argument fails as well. In itself it is correct to assume that while the Law has

provided a general fair balance between the Law's intentional objective and the interests of the mink farmers, this does not exclude the possibility that it could be different in individual cases. However, it is up to the mink farmers to argue that in their individual situations, an individual and excessive burden is in order. The Mink Farmers have not done so, or at least not sufficiently. As far as their individual cases go they have only calculated the losses of income over a great number of years. Apart from the notion that future income cannot be considered to be property in the sense of article 1 FP and therefore cannot be weighed in the judgment whether a fair balance has been provided for, they are also denying the question whether damage is an individual and excessive burden. The assessment of this question is depending on numerous circumstances, such as the profitability and current capital of the individual Mink Farmer. Data on these subjects are lacking completely. Also it is difficult to assess the question whether an individual Mink Farmer will suffer an individual and excessive burden before the end of the transitional period, without it being known what the practical consequences of the Law will actually entail for the involved Mink Farmers. The Court of Appeal cannot judge this at the moment.

4.10
The conclusion is that grievances II, III, IV, and V succeed.

The Conditional, Cross Appeal and the Expanded Grounds

5.1
Since the grievances of the principal appeal succeed and in principle will lead to an amendment of the dictum, as will appear from the following discussion of the previously omitted grounds for the claim, the requirements for the cross appeal have been met. The Court of Appeal will now assess the grievances concerning article 1 FP. Then the Court of Appeal will assess the NFE c.s. appeal on articles 26 IVBPR and 14 ECHR.

5.2
Grievances I and II of the cross appeal concern the judgment by the Court of Justice that the Law should be regarded as a (very heavy form of) regulation of property. According to NFE c.s. this (in fact) rather is a deprivation of property. In this context NFE c.s. argue that the mink farmers' companies are reduced to "nil", because after 1 January 2024 no realistic alternative use of the enterprise is left.

5.3
According to ECHR jurisprudence deprivation of property applies when the consequences of a regulation are so drastic that no meaningful alternative form of property-use is left or when the property is completely robbed of its value.
The Court of Appeal considers this not to the case here. Different from what NFE c.s. state, it is not relevant that the mink farmers' companies cannot continue as such (compare ECHR 7 July 1989, 10873/84 *Tre Traktörer AB vs. Sweden* under 55). The question is whether any assets that are of more than a negligible value will remain after 1 January 2024. In this case the physical company assets will

remain the mink farmers' property. At least the mink mothers and stockpiles of pelts that are present at the time can be sold for instance. KPMG IV (document 23 NFE c.s.) also assumes that selling business-related material assets could generate income. As far as the mink farmers own any real estate, the Court of Appeal considers it likely that at least the land (insofar as owned by the mink farmers), after demolition of company buildings and a change of the zoning plan, can be used for a different economical function (and therefore keep its value), if only by selling it or hiring it out to another company. Therefore, it cannot be concluded that the property of the mink farmers is robbed of any value. The Court of Justice was right to judge that regulation of property is the proper term here.

5.4
Grievances I and II of the cross appeal fail.

5.5
With grievance III NFE c.s. object to the judgment by the Court of Justice that, since the legislator has provided a proper motivation for the Law and the judge therefore has to show restraint in his assessment, the prohibition is not "manifestly without reasonable foundation" and it also cannot be said that a legitimate goal for the disputed legislation is lacking. The NFE c.s. argument comes down to the notion that the judge has to assess without judicial restraint, whether the demands of "lawfulness" and "in the public interest" have been met.

5.6
Concerning the demand of "lawfulness" the Court of Justice has considered that the Law is sufficiently precise, accessible and foreseeable. It is not apparent that the Court of Justice has made its assessment with judicial restraint. Also no sufficiently clear or apparent grievance is aimed against this consideration by the Court of Justice. Insofar this grievance is aimed against this part consideration by the Court of Justice, it does not succeed.

5.7
The Court of Justice was correct to establish that, concerning the answer to the question whether the Law is in the public interest, the judge should make an assessment with judicial restraint. This notion is justified by the division of tasks between the legislator and the Ministry of Justice in our democratic constitutional state. At the same time this assessment has to be sufficient, in order to prevent or end a violation of article 1 FP by the State as such. The ECHR has acknowledged these different roles. It considered (in regard to *Vistiņš en Perepjolkinsvst. Lithuania* (71243/01): "The Court of Appeal would, moreover, reiterate the finding in its settled case-law that the national authorities are in principle better placed than an international Court of Appeal to evaluate local needs and conditions. In matters of general social and economic policy, on which opinions within a democratic society may reasonably differ widely, the domestic policy-maker should be afforded a particularly broad margin of appreciation (….)."
The Court of Appeal, in agreement with the Court of Justice, decides that the legislator, with regard to the general public opinion concerning the wearing and production of fur, has reason to decide that the keeping and killing of minks for fir production is not in agreement with the general ethical standards in The Netherlands, that putting an end to it is in accordance with the public interest and that a prohibition is therefore necessary. In this the Court of Appeal refers to what has been considered previously, under 4.2 of this decree. Further arguments put forward by NFE c.s., concerning the

opinion of the Rathenau Institute, the history of the sector, the position of a previous cabinet and the consequences of the Law can remain undiscussed since they have no relation to the question whether the legislator is striving for a legitimate goal within the public interest, and the Law can therefore be regarded as a proportional infringement. This grievance fails as well.

The Expanded Claim

5.8
NFE c.s. have expanded their claim in appeal by appealing to articles 26 IVBPR and 14 ECHR. According to NFE c.s. the Law implies an unfair treatment that should be seen as discrimination, since an objective and reasonable justification is lacking. As appears from the clarification of this argument, NFE c.s. state that the mink farmers are treated differently from those who keep animals for human consumption. Meat, they argue, is not a necessary food for which there are no alternatives, while pelts can be seen as a necessity of life to which other types of clothing can offer no alternative. Besides the consumption of meat poses potential negative health issues, while fur offers health advantages in comparison to other types of clothing.

5.9
This argument is unfounded. The prohibition of the keeping and killing of fur animals for the purpose of obtaining fur is founded on an ethical norm that justifies killing for food (a necessity of life) but does not justify killing for (other) goods. Therefore, the legislator has thought it necessary to make a distinction between fur production, which is not regarded as a necessity of life, and the production of meat for human consumption, which is regarded as such. Concerning the question of ethical soundness, opinions may differ. In assessing the legislator's judgment on what is ethical and what is not, the judge should operate with restraint. In this case the legislator's interpretation of the general public opinion within Dutch society was allowed to prevail. In contemporary (Dutch) society meat is generally seen as a necessity of life and fur as a luxury (compare Dutch Parliament, 2006-2007, 30 862, no. 3 page 7 and no. 8 page 7). In regard to this public opinion of a mainly ethical question, the legislator was able to find an objective and reasonable ground for the difference in treatment. In that light the legislator was allowed to conclude that the difference between the production of fur and the production of meat is big enough to justify a difference in treatment. The fact that the hides of the animals that are slaughtered for their meat is allowed to be used for other purposes makes no difference. It is obvious that it is the by-product of an animal that was killed for human consumption, while minks are solely kept for their pelts.

5.10
The Court of Appeal notes that the Law is befitting a wider social tendency, that comes down to the idea that the use of (certain species of) animals for certain purposes is no longer considered acceptable, and is therefore limited or prohibited altogether. The Court of Appeal also refers to the prohibition of using apes for vivisection (article 10 Law on vivisection), the regulation that vivisection is only allowed for a limited number of purposes (article 1c Law on vivisection) and the prohibition of the production of animal pornography (Law of 4 March 2010, Stb. 2010, 111). A reference within the EU-legislation is the prohibition of trading cat and dog fur (Regulation no. 1523/2007 from 11 December

2007). This latter measure is founded on the observation that in the eyes of the European citizens are seen as pet animals and that it is not acceptable that their pelts are used for fur (consideration under 1).

5.11
The appeal on article 26 ICCPR and article 14 ECHR fails

Conclusion Considering the Grievances in the Principal Appeal and the Cross appeal and the Expanded Claim

5.12
Grievances II, III, IV and V in the principal appeal succeed. The State has no separate interest concerning grievances I and VIII, while grievances VI and VII have no independent meaning. The grievances in the conditional, cross appeal fail. The NFE c.s. appeal concerning article 1 FP is unfounded. Also the arguments that NFE c.s. has brought forward in the increased claim are insufficient. This means that the Court of Appeal will now assess whether the grounds that NFE c.s. have brought forward on the first instance, but have not been assessed by the Court of Justice, are sufficient.

The Grounds that have not been assessed by the Court of Justice

6.1
NFE c.s. argue that the Law is in conflict with article 14 of the Dutch Constitution as well as fundamental principles of justice. Different from what NFE c.s. assume, the judge is not authorised to assess whether a formal law or general principles of justice are in accordance with the Constitution (article 120 Constitution). This also applies to the implementation of the Law as far as this implementation necessarily follows from that law. Assessing whether the non-discretionary application of a formal law is in accordance with the Constitution is nothing less than assessing this law itself.

6.2
NFE c.s. argue that the Supreme Court has thought assessment within the framework of the general principles of justice possible in case the legislator in his assessment has not considered the position of the plaintiff (HR 14 April 1989, NJ 1989, 469 and HR 19 December 2014, ECLI:NL:HR:2014:3679). But that is not the case here. The legislator did consider the position of the mink farmers and the consequences of the Law. NFE c.s. also do not make clear which circumstances the legislator would have overlooked.

6.3

Finally, NFE c.s. argue that it is in conflict with article 6 ECHR and article 1 FP if the judge cannot assess whether a law is in accordance with the Constitution. This is incorrect. Article 13 ECHR determines that anyone whose rights and freedoms as mentioned in the treaty have been violated, has the right to an actual remedy of law by a national authority. That demand has been met, since the Dutch judge is obligated to exclude a (formal) law from application when it is in violation of a universally binding regulation of a treaty, such as article 1 FP (article 94 Constitution). That assessment was made by the Court of Appeal. The ECHR, more specifically articles 6 ECHR and 1 FP, do not demand that a formal law can also be assessed concerning its accordance with the (Dutch) Constitution.

6.4
The claim is not accepted on grounds of violation of the Constitution, fundamental principles of justice or articles 6 or 13 ECHR.

7.1
NFE c.s. subsequently appeal to the European Union justice. Firstly, they argue that the Law is in conflict with directive 98/58/EC concerning the protection of farmed animals and the regulations of the common agricultural policy. According to NFE c.s. minks are subject to the common market organisation that has been established by GMO-Regulation 1234/2007, which means that member states cannot impose limitations on the trading of minks and mink fur, except from what follows from EU-regulations such as directive 98/58/EC, which establishes minimum standards concerning animal welfare. The common market organisation is based on the assumption that a trade in fur products exists in the EU, and that its purpose is to realise of equal conditions for competition on the agricultural market as well as to protect and stimulate production. The Dutch prohibition of the keeping and killing of minks is in conflict with this purpose, according to NFE c.s.

7.2
Directive 98/58/EC according to preamble serves the purpose of establishing a smooth running of the organisation of the market in animals, of establishing common minimum standards for the protection of animals kept for farming purposes in order to ensure rational development of production and to facilitate the organisation of the market in animals. As is regulated by article 1 clause 1 of this directive, it establishes minimum standards. The individual member states are allowed stricter regulations for the protection of farm kept animals (article 10 clause 2). While minks are included in the scope defined by article 2 of Directive 98/58/EC, this directive in itself is not a requirement that would actually oblige the member states to allow the keeping of minks (or any other farmed animal as defined in article 2). Taking the ratio of this directive into account, namely to further animal welfare and to ensure fair market competition, this is also not plausible. Indeed, the welfare of minks is not violated if a prohibition of keeping mink is in order. Also there is no improper use of the standards for a fair competition. The prohibition does not imply that the Dutch mink farmers will be allowed more favourable conditions for competition on the market than mink farmers in other member states. Therefore, there is no ground in the NFE c.s. appeal concerning directive 98/58/EC.

7.3

The same applies to the NFE c.s. appeal on Regulation 1099/2009 concerning the protection of animals at the time of killing. This regulation entails directives for the sake of the welfare of the animals as well as the prevention of unfair competition, that have to be observed at the time of the killing or slaughtering of animals. The individual member states are authorised to set stricter regulations, apart from the prescribed stunning methods (article 26 clause 2). Regulation 1099/2009 therefore does not support the argument that it would obstruct the prohibition of killing certain animals (for certain purposes). In fact, the Regulation implies that i*f* a member state allows the killing of animals, the directives of the regulation have to be observed.

7.4
NFE c.s. then appeal on Regulation 1069/2009 and Regulation 142/2011. This regulation entails that fur (ao. mink fur) under certain conditions is exempt from veterinary inspection at the border. As NFE c.s. understand, the Union Legislation takes the viewpoint that the trading of fur without limitations should be possible. Also in this case the circumstance of certain existing limitations being removed does not mean that the member states are obligated to allow the production of fur within their borders. The Law does not prohibit the trading of fur as such.

7.5
Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs, on which NFE c.s. then make an appeal, regulates the (label) information concerning quality and geographical origin, among others that of fur. Again, from this regulation no rule can be deduced that the production of fur cannot be prohibited by a member state. The same applies to Regulation 1523/2007, which only concerns the placing on the market and the import to, or export from, the EU of (products containing) cat and dog fur. The purpose of this regulation is the removal of limitations for the workings of the internal market by the approximation of national prohibitions on the EU-level. Different from what NFE c.s. assume, this does not imply that the trading of fur from other species of animals still has to be possible. NFE c.s. do not deny that the Law does not prohibit the trading, but only the production of fur for that matter.

7.6
Finally, NFE c.s. make an appeal on the Common Organisation of Agricultural Markets (CMO). According to NFE c.s. a prohibition of the keeping and killing of minks is in conflict with the purpose and principles of the CMO, meaning the improvement of the agricultural productivity and the rational development of the production of agricultural products, such as fur. The prohibition would actually obstruct the agricultural productivity and development, according to NFE c.s.

7.7
This argument fails as well. Apart from the directives and regulations that have been discussed, and which do not support their claims, NFE c.s. fail to make clear with which part and/or which regulations the Law would be in conflict. Article 40 clause 1 TFEU establishes that a Common organisation of Agricultural Markets, depending on the product concerned, shall take one of the following forms:

common rules on competition, compulsory coordination of the various national market organisations, a European market organisation. Article 40 clause 2 TFEU sums up the measures that the common organisation established in accordance with clause 1 may include. While this was their intention, NFE c.s. have not established what form of market organisation would apply to the production of mink fur, which measures have been taken within this framework and why the Law would be in conflict with them. Indeed, clause 1 of article 40 TFEU shows that the forms of market organisation and the measures per product (or product group) to be taken within its framework may vary. Regulation 1234/2007 (the Integral CMO-Regulation) does not contain provisions that apply to minks or (the production of) mink fur. For this reason, the NFE c.s. appeal on conflict with the common market organisation has to fail.

7.8
NFE c.s. next take the standpoint that the prohibition of the keeping and killing of minks is in conflict with the prohibition of quantitative import limitations or similar measures within article 34 TFEU as well as the prohibition of quantitative export limitations or similar measures within article 35 TFEU. A similar measure to a quantitative import limitation would in this case apply, because it would in fact mean that minks meant for fur production, as well as related products necessary for fur production (such as fodder, medicines, vaccinations, products for cleaning and maintenance, litter for the cages, tools for slaughter), can no longer be marketed in The Netherlands. A similar measure to a quantitative limitation of export would apply because the export of fur products is limited since nearly the whole fur production in The Netherlands is meant for export to other countries.

7.9
The Court of Appeal preconceives that it has not become apparent that the consequences of these measures are different for products coming from The Netherlands compared to products coming from other member states. NFE c.s. fail to argue that the consequences are in fact heavier concerning the import of products from other member states compared to products coming from The Netherlands. Therefore, this is an 'indiscriminative measure'. The standpoint therefore is that the Law does not entail a prohibition on the import of export regarding any product, and more specifically, that the trading of mink fur as such is not harmed by the prohibition. Therefore, the argument can only concern the question whether the Law entails a similar measure as a prohibition of import or export.

7.10
Concerning the prohibition within article 34 TFEU, the Court of Appeal agrees with the State that NFE c.s. have insufficiently argued that the import of certain products from other member states to The Netherlands will be influenced negatively by the prohibition of the keeping and killing of minks. NFE c.s. do list a number of categories that would not, or to a lesser extent, be marketed in The Netherlands, but it is not established that these products, which are also not clearly specified, are or will be imported by mink farmers from other member states. Therefore, the Law is not in conflict with article 34 TFEU.

7.11
Concerning article 35 TFEU the Court of Appeal notes that within the ECJ jurisdiction this regulation only applies to measures that make a distinction between goods destined for export and goods destined for the national market. The Law does not make this distinction. Although it is correct, as NFE

c.s. put forward, that the measure in question *in fact* makes a distinction, they fail to argue which discriminatory effect *in fact* occurs in this case. Such an effect also has not become apparent.

7.12
As far as should nonetheless be established that a measure causing an effect similar to a quantitative limitation of import or export applies, the Court of Appeal judges this to be legitimate on grounds of article 36 TFEU, founded on the protection of public morality. As has been considered before, the Law is based on the legislator's notion that a imperative ethical standard opposes the keeping and killing of minks for the production of fur. In principle each member state is at liberty to establish the demands for public morality on its own territory, in accordance with its own system of values and by means of its own choice (ECJ in the case *Henn and Darby* C-34/79, ECLI:EU:C:1979:295). The legislator's opinion on what the public morality demands has been described within a law that was established by a democratic process. In contrast to what NFE c.s. argue, it is not true that this is only valid for 'a part of the national public opinion'. The statement that thoughts on these ethical issues may differ is not helping NFE c.s., since the legislator has chosen to support a certain opinion. The fact that the Parliamentary procedure has taken long does not imply an interest worth protecting.

7.13
Different from what NFE c.s. argue the Law is not based on the welfare of animals as such. The circumstance that European approximation concerning animal welfare has taken place to a certain degree does therefore not obstruct the prohibition at hand. It might be possible that the mink industry will move to other member states as a consequence, but in itself this means no obstruction for the effectiveness of the Law in The Netherlands. It is a property of ethical opinions that they may vary between countries, also inside the European Union, and it is precisely for the protection of the public morality that article 36 TFEU allows an exception on the free traffic of goods. This exception would be rendered meaningless if all the member states would have to agree. Insofar as NFE c.s. eventually would still make an appeal on the discrimination of mink farmers in comparison to producers of meat and on the lacking of an adequate compensation for the damage, the Court of Appeal refers to what has been already discussed before concerning the appeal on article 1 FP and article 14 ECHR.

7.14
The Court of Appeal is of the opinion that the prohibition of the keeping and killing of minks for their pelts should be allowed on grounds of the rule of reason developed by the ECJ (ao. ECJ 20 February 1979, *Cassis de Dijon*, C-120/78, ECLI:EU:C:1979:42). Indeed, this concerns a non-discriminatory measure of a non-economical nature, justified by imperative reasons of the public interest. An economic purpose is not in question, since it concerns the ethical notion that the keeping and killing of minks for their fur is unacceptable. The Court of Appeal refers to what it has considered before, in relation with the ethical opinions on the keeping and killing of animals for fur production in The Netherlands, as expressed by the legislator. That is why imperative reasons concerning the public interest apply. The measure that has been taken is not only appropriate to achieve the intended goal, but also proportional. It cannot be made feasible that this goal, the prevention of fur animals being kept and killed for their pelts, can be achieved by other means than the prohibition of the keeping and killing of fur animals. The interests of the mink farmers have been sufficiently taken into consideration, as has been made clear before. The conclusion is that eventual limitations on the import or export are

justified by imperative reasons concerning the public interest.

7.15
NFE c.s. then argue that the Law is infringing upon the freedom of settlement that is guaranteed by article 49 TFEU. Mink farmers from other member states can no longer choose to settle in The Netherlands in order to execute their business. The Court of Appeal considers it in itself undeniable that (potential) mink farmers will not be able to settle in The Netherlands as a consequence of the Law. But NFE c.s. are not foreign mink keepers, nor is it made apparent that they represent foreign mink keepers or can operate on their behalf in any other way. NFE c.s. also have not established what would be their interest if enterprises from other member states would be able to settle in The Netherlands. Therefore, it cannot be made feasible that NFE c.s. have any interest by their own argument that the Law means an infringement on article 49 TFEU.

7.16
Furthermore, national regulations that, like the Law, do not discriminate on grounds of nationality and do not have a purely economic objective, can be justified by imperative reasons concerning the public interest (ECJ 30 November 1995, C-55/94 *Gebhard*, ECLI:EU:C:1995:411). On grounds of what the Court of Appeal has considered before, the Law can be regarded as a measure necessary for imperative reasons concerning the public interest. Besides, the measure is justified by the public order (article 52 clause 1 TFEU). The appeal on the violation of article 49 TFEU fails.

7.17
NFE c.s. have finally made an appeal on article 45 TFEU, which establishes the free traffic of employees within the EU. NFE c.s. state that it will be impossible for people from other member states to find employment in the mink farming industry. However, the fact that employees from other member states will no longer be able to work in the Dutch mink farming industry after 1 January 2024 is not a consequence of any measure concerning employees, but of the fact that the keeping and killing of minks will be prohibited after this date. Article 45 TFEU does not apply to such measures. What does apply here is that, as far as an infringement on article 45 TFEU would even be the case, it is justified by imperative reasons concerning the public interest and/or the public order (article 45 clause 3).

7.18
Therefore, the conclusion is that the grounds derived from the EU-jurisdiction cannot lead to granting the claim.

Conclusion

8.1
The judgment of the Court of Justice cannot be maintained. The claims made by NFE c.s. must be denied.

8.2
NFE c.s. will therefore be awarded the costs of the proceedings for both instances. An awarding of the legal fee concerning the cross appeal will be omitted, since the grievances in the cross appeal

concerning the devolutive effects of the appeal should also have been considered without an cross appeal in Court of Appeal's judgment.
By request of the State the awarded costs will be declared effective immediately. As of fourteen days after the date of this decree the costs will be increased with the legal rent. In consequence of article 237, third clause Rv the establishment of the costs made by The Court of Appeal in this decree are limited to the costs made before the verdict.

Ruling

The Court of Appeal

In the principal appeal

- annuls the Judgment of the Court of Justice of 21 May 2014, as supplemented by the judgment of recovery of 18 June 2014, and judging anew:
- declines the claims by NFE c.s.;
- awards NFE c.s. the legal costs made by the State for both instances, firstly until 21 May 2014 (estimated at € 589,-- in advances and € 904,-- for the attorney's fee) and in appeal until this day (estimated at € 1.595,60 in advances and € 2.682,-- for the attorney's fee) and states that these sums have to be payed within fourteen days after the date of this verdict, and that these sums will otherwise be increased with the lawful interest as meant in article 6:119 BW until the total sum is paid;
- declares the awarding of the legal costs to be effective immediately.

In the cross appeal

- overrules the appeal

This decree is judged by mrs. S.A. Boele, G. Dulek-Schermers and J.H. Gerards and pronounced by public hearing on 10 November 2015, in presence of the registrar of court.