

Memorandum

Date	14. August 2024
File no. and name	3747/2024 1KGO / 1KGO Verein zur Erhaltung des Wildes und der Jagd im CIC e. V. re Import Ban on Hunting Trophies
Topic	Defense Against a National Ban on the Import of Hunting Trophies
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A. Question

On 25 January 2024, the Belgian Parliament passed a “general” import ban on hunting trophies.¹ According to this, the import of hunting trophies of animal species listed in Annex A of the European Wildlife Trade Regulation (EC) No. 338/97² (Regulation 338/97) and in Annex B of Regulation 338/97 and at the same time in Annex XIII of Regulation (EC) No. 865/2006³ (Regulation 865/2006) will be prohibited in the future. Based on this “model”, the following questions arise with regard to an announced German import ban on hunting trophies:

- Who has the legislative competence for a similar or even more far-reaching “general” import ban?
- Does such an import ban violate fundamental rights?
- What defense options are available against such an import ban?

B. Findings

- The more convincing arguments speak in favor of exclusive EU competence. Although a comprehensive import ban on hunting trophies pursues environmental policy objectives, it is primarily a specific trade policy measure that is

¹ Amendment of Art. 4 of the Belgian Act of Assent of 28 July 1981 to the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

² Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein.

³ Commission Regulation (EC) No. 865/2006 of 4 May 2006 laying down detailed rules for the implementation of Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

intended to regulate foreign trade and has a direct and immediate impact on it (see **C.1.**).

- A general import ban is also likely to violate Art. 14 (1) and Art. 3 (1) of the German Basic Law (see **C.2.**).
- It would be possible to lodge a constitutional complaint against the import ban directly with the Federal Constitutional Court, which could reject an import ban as null and void if the violations of fundamental rights are acknowledged, without the need for a preliminary ruling by the European Court of Justice (ECJ) on the question of competence. Alternatively, legal action against a concretely denied import license for a hunting trophy or against a penalty for violation of the import ban could lead to an incidental review of the act and thus, if necessary, to a referral to the Federal Constitutional Court or the ECJ by a court of lower instance (see **C.3.**).

C. Legal Assessment

1. Competence to Issue Import Restrictions on Hunting Trophies

1.1 General Import Ban as a Trade Policy Measure

According to Art. 3(1)(e) TFEU, the EU is exclusively competent in the area of “common commercial policy”. According to the ECJ, this refers to **trade with third states**.⁴ However, according to established case law, a legal act of the Union must have a **specific reference** to this. This is the case if it is “essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it”.⁵

In the absence of a concrete definition, one has to fall back on Art. 206 et seq. TFEU, which define the uniform principles and objectives of the common commercial policy in more detail. Art. 207(1) sentence 1 TFEU defines the **measures and instruments** by way of example. As the list begins with “particularly”, it is not exhaustive.⁶ This is because in order to create a customs union – for which the EU expressly has exclusive competence in accordance with Art. 3(1)(a) TFEU – it is not only intended to abolish internal

⁴ Cf. ECJ, Opinion of 16 May 2017, Advice 2/15, *Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, para. 35; see Häde, in: Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV*, 2nd ed. 2023, TFEU Art. 3 para. 15; Weiß, in: Grabitz/Hilf/Nettesheim, *EUV/AEUV*, 81st ed. January 2024, TFEU Art. 207 para. 28.

⁵ ECJ, Opinion of 16 May 2017, Advice 2/15, *Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, para. 36 with further references.

⁶ See Weiß, in: Grabitz/Hilf/Nettesheim, *EUV/AEUV*, 81st ed. January 2024, TFEU Art. 207 para. 24; Hahn, in: Calliess/Ruffert, *EUV/AEUV*, 6th ed. 2022, TFEU Art. 207 para. 10.

market restrictions, but also to contribute to the harmonious development of world trade. To this end, the progressive **abolition of restrictions on international trade** and the lowering of customs and “other barriers” are explicitly mentioned.

In this respect, **import restrictions** on goods from third countries into the EU are also a classic foreign trade policy instrument that is intended to directly regulate foreign trade and has direct and immediate effects on it.

1.1.1 Hunting Trophies as Commercial Goods Imported from Third Countries

The “**trade in goods**” listed in Art. 207(1) TFEU is a central connecting factor for trade policy instruments. The term “**goods**” can be interpreted in line with the free movement of goods.⁷ Therefore, it covers any physical object that has a commercial value and can thus be the subject of commercial transactions.

Hunting trophies as dead animals or animal parts are such physical objects. According to Art. 1 (4b) Regulation 865/2006, the term “**hunting trophy**” means

“a whole animal, or a readily recognisable part or derivative of an animal, specified on any accompanying CITES permit or certificate that fulfils the following conditions:

(i) is raw, processed or manufactured;

(ii) was legally obtained by the hunter through hunting for the hunter's personal use;

(iii) is being imported, exported or re-exported by or on behalf of the hunter, as part of the transfer from its country of origin, ultimately to the hunter's State of usual residence”.

These items also have a market value based on various factors such as the rarity of the species, the size and quality of the trophy and the demand from hunters.

Consequently, hunting trophies fulfill the definition of goods and can be affected by trade-specific regulations.

⁷ Weiß, in: Grabitz/Hilf/Nettesheim, EUV/AEUV, 81st ed. January 2024, TFEU Art. 207 para. 29 with further references.

1.1.2 Trade-specific Reference to Import Restrictions for Hunting Trophies

A general ban on the import of hunting trophies is specifically related to foreign trade due to the direct influence of import regulations, and therefore falls within the scope of exclusive EU competence under Art. 3(1)(e) TFEU.

The fact that a general import ban is to be classified as a specific trade regulation is also confirmed by the definition of “**trade**” in Art. 2(u) Regulation 338/97:

“the introduction into the Community, including introduction from the sea, and the export and re-export therefrom, as well as the use, movement and transfer of possession within the Community, including within a Member State, of specimens subject to the provisions of this Regulation” (emphasis added).

The hunting trophies affected by the import ban would primarily come from third countries.⁸ The regulation would indirectly aim to make hunting trips to the countries in which the animals are native less attractive by banning imports, as hunted trophies would no longer be allowed to be taken to Germany. Thus, such a regulation **specifically** restricts their **import** from third countries into the Union, as an import ban is supposed to directly **regulate** – or even prevent – trade in hunting trophies and therefore **has direct and immediate effects** on it.

1.2 No Competence of the Member States under Art. 4(2)(e) in conjunction with Art. 193 TFEU Based on Environmental Protection Policy Concerns

The lack of legislative competence of the individual Member States to enact a general ban on the import of hunting trophies cannot be remedied by the choice of legal basis for enacting Regulation 338/97.

For Regulation 338/97, the European legislator expressly made use of its **concurrent legislative competence** in the area of environmental policy in accordance with ex-Art. 130s(1) TEC (now **Art. 192(1) TFEU**).⁹ The

⁸ Cf. Statista, [Most frequently imported hunting trophies of endangered animal species worldwide 2014](#); see also Annex 1 to the answer to the minor interpellation 20/8025 of 11 August 2023, [German Bundestag - Imports of hunting trophies](#).

⁹ Cf. the introductory formula before the recitals of the original legal act of Regulation 338/97: "Having regard to the Treaty establishing the European Community, and in particular Article 130s (1) thereof".

choice of the legal basis is **prone to controversy**;¹⁰ at the time, the Commission initially wanted to base the regulation on the trade competence (ex-Art. 113 TEC, now Art. 207 TFEU) in conjunction with the competence for approximation of laws (ex-Art. 100a TEC, now Art. 114 TFEU).¹¹ The dispute over the correct legal basis has continued when adopting Union acts related to the Regulation.¹² In our opinion, this confirms the strong intertwining of Regulation 388/97 with foreign trade.

The ECJ has stated that the exclusive competence for the common commercial policy “cannot be exercised in order to regulate the levels of social and environmental protection in the Parties’ respective territory” because the competence for commercial policy does not prevail over the provisions that provide for shared competence in this respect.¹³

Nevertheless, a closer look at Regulation 388/97 and at a stricter import ban based on it reveals a trade-specific dominance. Even if the EU Regulation is not clearly assigned to one of the two areas of competence, a general ban resulting in a complete import ban is likely to be subsumed under trade competence. This is because the focus is primarily on the specific trade policy regulation to bring about an import ban for the hunting trophies concerned, although the EU has already decided which animal species, in particular as hunting trophies, may be imported into the Union. Commercial bans for the use of and exemptions for hunting trophies and their components have also been established at EU level; the Member States may only deviate from these requirements under strict conditions.¹⁴

The underlying motivation of wanting to regulate trade for environmental reasons cannot change this assessment. Art. 193 sentence 1 TFEU gives the individual Member States the option of maintaining or adopting more stringent protective measures if they are **compatible with the Treaties**. This

¹⁰ See Feichtner, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, 22nd ed. December 2023, Artenschutz-VO para. 16 f., who in this respect speaks of a legally flawed selection of the legal basis, but approves the result as the most practicable way for the EU Member States, as independent contracting parties to CITES, to fulfill their obligation under international law to implement the Convention.

¹¹ Stoll, in: Landmann/Rohmer, Umweltrecht, Regulation 388/97, 103rd ed. March 2024, preliminary remarks para. 14.

¹² See Feichtner, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, 22nd ed. December 2023, Artenschutz-VO Erwg. para. 12, 18.

¹³ ECJ, Opinion of 16 May 2017, Advice 2/15, *Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, para. 164.

¹⁴ See Stoll, in: Landmann/Rohmer, Umweltrecht, 103rd ed. March 2024, Regulation 388/97 Art. 8 para. 2 on the tightening of the ban of the commercial use of listed species in the Member States.

also includes compliance with the exclusive allocation of competences to the EU pursuant to Art. 3(1)(e) TFEU, which a Member State must not disregard.

Finally, recital (8) also confirms that (only) the EU may impose further restrictions on the import regulations for specimens from third countries if deemed necessary. It mentions no competence of the Member States to regulate this more extensively. **Recital (8)** states:

“Whereas, in order to guarantee effective protection of species of wild fauna and flora, additional restrictions may be imposed on the introduction of specimens into, and the export thereof from, the Community; whereas, with regard to live specimens, these restrictions may be supplemented by restrictions at Community level on the holding or movement of such specimens within the Community” (emphasis added).

Recital (8) can be understood as a precautionary reservation for subsequent stricter measures at EU level in the area of the common commercial policy.

A ban on the import of hunting trophies at Member State level cannot be convincingly based on the responsibility for stricter environmental protection measures.

1.3 No Circumvention Through Stricter Member State Possession Bans

The Member States have the power to issue stricter possession bans within their environmental policy competence. In our opinion, however, this Member State competence does not extend to the enactment of import bans on hunting trophies.

1.3.1 Interpretation of the Authorisation and Scope of Implementation

In accordance with **Art. 8(2)** of Regulation 338/97, the Member States

“may prohibit the holding of specimens, in particular live animals of the species listed in Annex A” (emphasis added).

The wording “in particular” indicates that the Member States are not limited to live species listed in Annex A of Regulation 338/97 when regulating

stricter possession bans.¹⁵ The wording of the provision can be interpreted so broadly that, in principle, comprehensive, general possession bans could also be issued for all animals listed in the other Annexes. This could include general bans on the possession of dead specimens such as hunting trophies as well. In this context, however, it should be borne in mind that the EU legislator has deliberately decided to refer only to the adoption of stricter ban for *holding*. From our point of view, the system of the regulation, which explicitly distinguishes between holding, transportation and import,¹⁶ can only be reasonably understood to mean the holding of live animals. After all, when it comes to animal welfare, only the possession of live animals is relevant. For dead animals, no further species-appropriate husbandry conditions can be enforced from the outset at Member State level for animal welfare and environmental protection reasons.

Furthermore, a very broad interpretation of Art. 8(2) of Regulation 338/97 would conflict with the distribution of competences between the Union and the Member States under the Treaty. This speaks in favor of a general restriction for Member States to enact a possession ban for hunting trophies.

The continued commitment to the allocation of competences under the TFEU is also in line with **recital (3)** of Regulation 338/97:

“Whereas the provisions of this Regulation do not prejudice any stricter measures which may be taken or maintained by Member States, in compliance with the Treaty, in particular with regard to the holding of specimens of species covered by this Regulation” (emphasis added).

If a Member State opts for a stricter (comprehensive) holding ban, this should therefore not lead to a circumvention of the exclusive competence of the EU through a disguised import ban.

1.3.2 No Other Interpretation Based on ECJ Decision in Case C-219/07

The ECJ ruling in case C-219/07¹⁷ on the interpretation of the recital (3) of Regulation 338/97 also does not support the assumption that stricter Member State holding bans may amount to a general ban on the possession of hunting trophies – and thus in effect to an import ban.

¹⁵ See Stoll, in: Landmann/Rohmer, Umweltrecht, 103rd EL March 2024, Regulation 338/97 Art. 8 para. 5.

¹⁶ See also Art. 9 para. 6 of Regulation 338/97.

¹⁷ ECJ, judgment of 19 June 2008, Case C-219/07, Nationale Raad van Dierenkwekers en Liefhebbers, ECLI:EU:C:2008:353.

The request for a preliminary ruling concerned the interpretation of ex-Art. 30 TEC (now Art. 36 TFEU) and Regulation 338/97. Specifically, the questions referred concerned the compatibility of a Belgian regulation that expressly stipulated on a positive list which mammal species may be held in Belgium. The subject matter of the regulation explicitly concerned the **holding of live animals**, which Belgium had regulated more strictly than provided for in Regulation 338/97 for **reasons of animal welfare**. The implementation of the ban of holding animals was also linked to a general ban on the import of animals that are not on the positive list from other Member States, which affects trade **between the Member States** if those animals may be legally kept and sold there. Accordingly, the questions referred were only submitted in the context of the alleged intra-Union effect on trade.

Consequently, the ECJ identified the current **Art. 34 TFEU as the standard of review** for the assessment of this very restriction on trade **between Member States** in order to be able to assess the compatibility of a ban on the movement of animals from other Member States to Belgium.

Therefore, the **ruling** itself says **nothing** about the compatibility of a general import ban of animals from **third countries**, as another level of trade with a different allocation of competence and therefore different standards of assessment is involved. In the absence of statements on EU foreign trade, it is **certainly not** possible to conclude from the ruling that the Member States have competence to enact such a regulation.

A transfer of the judgment to hunting trophy import bans is also questionable on closer examination of the criteria set out by the ECJ in paragraphs 27-29 of the judgment:

1.3.2.1 No Animal Husbandry Concerned when Possessing Hunting Trophies

The Belgian government justified the husbandry restrictions with the aim of ensuring the welfare of captive animals. According to the Belgian government, the regulation is based on

“the finding that the holding of mammals is acceptable only in a limited number of cases, in view of the minimum physiological and ethological needs of those mammals”,

and it is

“justified in the interests of the protection of the health and life of the animals concerned.”¹⁸

This justification cannot be applied to the import of already dead animals from the outset.

1.3.2.2 No Improved Animal Welfare with Continued Local Hunting in Third Countries

The intended import ban cannot be justified on the basis of the ECJ’s statements, even with the aim of preserving certain animal species. This is because the measures to be taken for the conservation of certain species are already laid down in Regulation 338/97 and are binding for all EU Member States.

In this context, it must also be taken into account that the Federal Government’s intended purpose of species conservation would be rendered meaningless by a ban on hunting trophies. Due to the tense situation in third countries affected by local overpopulation, these populations would probably be reduced in other ways even without trophy hunters. Reliable facts are missing to which extend import bans would actually lead to a decline in hunting in these situations. Instead, the opposite could even be the case.¹⁹

1.3.2.3 No Danger of “Invasive Species” from Hunting Trophies

The ECJ also recognises imperative requirements of environmental protection as justification for trade restrictions between Member States. However, the risk cited in its ruling that **escaped animals** endanger the **ecological balance** in the Member State does not apply to hunting trophies.

2. Possible Violations of Fundamental Rights Through a General Import Ban

2.1 Fundamental Right to Property, Art. 14(1) German Basic Law

A general ban on the import of hunting trophies could violate the fundamental property rights of those affected.

¹⁸ ECJ, judgment of 19 June 2008, Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers*, ECLI:EU:C:2008:353, para. 24.

¹⁹ Cf. the explanations under no. C.2.1.2.

2.1.1 Scope of Protection and Intervention

As the right of ownership is shaped by the legislator, the scope of protection is in principle changeable. However, the guarantee of ownership covers the fundamental existence and use of property rights and positions under private law that are assigned to the individual as powers of use and disposal by the legal system.²⁰ If hunting trophies lawfully acquired in third countries can no longer be used as desired due to a national import ban, the scope of protection of Art. 14(1) sentence 1 of the German Basic Law is affected.

An abstract and general standardised obligation to refrain from importing hunting trophies of all species covered by Regulation 338/97 is a provision defining content and limits pursuant to Art. 14(1) sentence 2 of the German Basic Law. It is true that a mere import ban does not result in a targeted deprivation of ownership or an impediment to the acquisition of ownership of hunting trophies in third countries. However, domestic use becomes impossible, as the import ban completely rules out the possibility of bringing them to Germany. This is a serious encroachment making even the mere personal possession impossible, which is similar to the effects of expropriation.

2.1.2 No Justification

Only a simple statutory reservation is required for provisions defining content and limits. However, a comprehensive ban on the import of hunting trophies must be qualified as a very serious infringement with an expropriation-like effect, thus as a **disproportionate regulation**.

While the idea of the intended animal and species protection is still to be recognised as a **legitimate goal**, the **suitability** of the regulation must be **questioned**. For example, the hunting trophies permitted under EU law are not animals from specifically endangered populations. The exceptions concern rather precisely those countries in which there is an overpopulation and the local social, economic and ecological structure is therefore severely endangered by these animals. In this respect, legal and sustainable hunting must be proven through appropriate documentation. Even if one assumes that the incentive of tourist trophy hunting would be lost due to the lack of souvenir trophies that can be taken back to Germany, it is doubtful whether this would lead to a reduction in the number of killings in the third countries affected by overpopulations. This is because the danger to public order and

²⁰ Cf. Axer, in: BeckOK GG, 58th ed. June 2024, Art. 14 para. 7; Wendt, in: Sachs, GG, 9th ed. 2021, Art. 14 para. 21.

security caused locally by the animals will continue to force their removal. If necessary, these third countries concerned could even carry out killings using less sustainable and animal welfare-friendly hunting methods, which would make a mockery of the intended protection concept.

It is also questionable whether there are not more effective and milder means of protecting species. For example, animal welfare projects could be promoted locally in international cooperation with third countries and, if necessary, the option of relocating subpopulations to other countries or veterinary-controlled reproduction could be financed.

2.2 General Principle of Equality

The general principle of equality could also be violated by a general ban on the import of hunting trophies.

2.2.1 Unequal Treatment of Hunting Trophy Importers

If the comprehensive import ban were to affect some or all of the species covered by Regulation 338/97, those who import listed and those who import non-listed animal species would be treated unequally in the group of all trophy importers. Likewise, within the group of prohibited hunting trophy imports, there would no longer be an adequate distinction between the degree of endangerment or need for protection of the respective species. As a result, importers of animals that are significantly less endangered would be treated inappropriately in the same way.

2.2.2 No Justification

Unequal treatment of essentially the same or equal treatment of essentially unequal can only be justified by objective reasons. This could include the protection of species, so that a differentiation between endangered and non-endangered species is initially a suitable objective reason. However, in the case of interventions with increased intensity, in particular when other fundamental rights are affected, the justifying reason and the unequal treatment must comply with the principle of proportionality in a balancing exercise.²¹

With regard to Article 3(1) of the German Basic Law, it is also doubtful whether a general import ban meets constitutional requirements. This is because, as explained above, such a ban would not be suitable for ensuring the

²¹ Cf. Kischel, in: BeckOK GG, 58th ed. June 2024, Art. 3 para. 48.

protection of animals in countries affected by overpopulation, as the animals themselves pose a threat to public order and security there. An indiscriminate import ban on all or the majority of the animal species covered by Regulation 388/97 fails to recognise the importance and necessity of hunting in third countries as such and the profoundly drastic effects at the expense of the trophy importers concerned in comparison to the intended but rendered meaningless protection. It must be rejected as a disproportionate unequal treatment.

3. Legal Protection

A corresponding statutory prohibition could be challenged with a constitutional complaint before the Federal Constitutional Court. The Federal Constitutional Court's standard of review is specific constitutional law.

However, a violation of the Union's exclusive competence could also be found by the ECJ without a constitutional complaint. The prerequisite is that a national court refers the matter to the ECJ for a preliminary ruling.

3.1 No Abstract Judicial Review before the Federal Constitutional Court

In the case of an abstract judicial review (*Abstrakte Normenkontrolle*) pursuant to Art. 93(1) No. 2 of the German Basic Law in conjunction with Secs. 13 No. 6, 76 et seq. of the Federal Constitutional Court Act (BVerfGG), a **limited number of applicants** can challenge a parliamentary law if they consider it to be null and void. As only the federal government, a state government or a quarter of the members of the Federal Parliament (*Bundestag*) are entitled to file an application, this option is not available to challenge a national import ban on an individual basis.

3.2 Specific Judicial Review (“Judicial Referral”) Is No Safe Option

With the specific judicial review (*Konkrete Normenkontrolle*) pursuant to Art. 100(1) of the German Basic Law in conjunction with Secs. 13 No. 11, 80 et seq. BVerfGG, legislation relevant to the decision can be submitted to the Federal Constitutional Court for review if the **referring court is convinced** that the act in question is unconstitutional. Mere doubts are not sufficient. In order to make use of this option, specific court proceedings are necessary, for example, defending against a denied import license for a hunting trophy or a violation of the import ban. However, whether the national court will be convinced of the import ban being unconstitutional and refer it

to the Federal Constitutional Court cannot be predicted with certainty. Experience has shown that the courts tend to be cautious in this respect.

3.3 (Legislative) Constitutional Complaint

With a constitutional complaint (*Verfassungsbeschwerde*) pursuant to Art. 93(1) No. 4a of the German Basic Law in conjunction with Secs. 13 No. 8a, 90 et seq. BVerfGG, **any natural or legal person** may challenge any act of a public authority if they have the formal right to lodge a complaint. This is the case if someone can assert that his or her **fundamental rights** may have been **violated directly and currently**. The fundamental requirement of **exhaustion of all legal remedies** and the **subsidiarity clause** of the constitutional complaint must also be met. This means, the complainant must have taken all reasonable procedural steps to remedy a violation of fundamental rights that has occurred or to prevent a violation in the first place.²² If, for example, a violation of a prohibition provision is unreasonable because it has been made subject to a penalty or fine, a **constitutional complaint** can be lodged directly. This option is a direct appeal against a new law. In this case, the time for filing a complaint is limited to **one year** starting with the entry into force of the law or the announcement of an act, see Sec. 93(3) BVerfGG.

The **standard of review** is fundamental rights and rights similar to fundamental rights. If an encroachment on fundamental rights is affirmed, other constitutional law is also part of the standard of review, so that competence provisions, fundamental provisions of the state and other non-fundamental provisions such as Art. 140 of the German Basic Law can also be reviewed as part of a constitutional complaint. However, the standard for deciding a constitutional complaint is neither EU law, international law nor constitutional law of the individual German federal states (*Bundesländer*).²³

This means that the Federal Constitutional Court's own review will initially be limited to violations of fundamental rights. The complaint of violating an exclusive EU competence could, however, lead to an obligation to refer the question of interpreting the EU competences to the ECJ.²⁴ The ECJ is responsible for ensuring the uniform interpretation and application of EU law by

²² Cf. Morgenthaler, BeckOK GG, 58th ed. June 2024, Art. 93 para. 70.

²³ Morgenthaler, BeckOK GG, 58th ed. June 2024, Art. 93 para. 52 with further references.

²⁴ Cf. Karpenstein, in: Grabitz/Hilf/Nettesheim, EUV/AEUV, 81st ed. January 2024, TFEU Art. 267 para. 31.

establishing binding criteria as to how EU law is to be interpreted and thus applied in the individual Member States.²⁵

However, if the Federal Constitutional Court considers the import ban to be unconstitutional due to the blatant violation of fundamental rights, it could possibly leave the question of legal competence open and declare the provision null and void solely on the grounds of a violation of Art. 14 and Art. 3(1) of the German Basic Law. In this case, the ECJ's answer to the referred question would not be relevant to the decision.

3.4 Preliminary Ruling Procedure before the ECJ

The ECJ decides on the interpretation of the Treaties by way of a preliminary ruling (Art. 267(1)(a) TFEU). In preliminary ruling proceedings, the ECJ is **not** entitled to assess the conformity of national law with EU law. However, it may be asked whether a specific EU provision, as interpreted by the ECJ, is to be interpreted in such a way that it precludes the application of a national legal provision or practice.²⁶

Member State courts for which the question of interpretation is **relevant** are entitled to make a referral. The referral must be made **ex officio** and the obligation to refer arises either from the fact that it is a court of last instance whose decision itself can no longer be challenged by means of legal remedies under national law (Art. 267(3) TFEU) or, in the case of courts of lower instance, from the exercise of their **discretion in accordance with their duties** (Art. 267(2) TFEU).²⁷

It is not clear whether a general import ban on hunting trophies is to be classified as exclusive EU competence of the Common Commercial Policy or a shared environmental competence. Therefore, in our opinion, only the ECJ can provide final clarity in this regard. However, it is ultimately up to the competent national court to decide whether a referral to the ECJ is necessary; the parties to the proceedings can only suggest this.

²⁵ See Karpenstein, in: Grabitz/Hilf/Nettesheim, EUV/AEUV, 81st ed. January 2024, TFEU Art. 267 para. 1 f.

²⁶ Karpenstein, in: Grabitz/Hilf/Nettesheim, EUV/AEUV, 81st ed. January 2024, TFEU Art. 267 para. 33 with further references.

²⁷ See Karpenstein, in: Grabitz/Hilf/Nettesheim, EUV/AEUV, 81st ed. January 2024, TFEU Art. 267 para. 15, 25 and 31.

D. Recommendation on How to Proceed

If violations of the import ban are subject to criminal penalties or fines (which is to be assumed), a direct constitutional complaint is likely to be admissible, which could result in the import ban being declared as unconstitutional and void.

Alternatively, a referral by a court of lower instance to the ECJ (interpretation of the provisions on competence) or to the Federal Constitutional Court (decision on the constitutionality of the import ban) can be suggested as an interim procedure if action is taken against a specific denial of an import license or against a punished infringement. In our view, suggesting a referral to the ECJ is the most promising route.

If the appeal process is unsuccessful, a constitutional complaint against the judgment would be possible, in which the Federal Constitutional Court would have to deal with the constitutionality of the import ban at the latest. However, this is by far the most time-consuming route.



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