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Dolphinariums in Europe

from the animal protection law viewpoint

taking the legal situation in Switzerland in

particular into account

Report by the Foundation for the Animal in Law drawn up by Dr.iur Antoine F. Goetschel, Managing Director, Zurich, for the attention of the Working Group for the Protection of Marine Mammals (Switzerland) ASMS.

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I. Introduction

Dolphins are considered as the embodiment of freedom-loving animals. Their great intelligence and their pronounced social behaviour constantly awaken man's respect. Dolphins play a particular role in the discussion about the capture and keeping in captivity of wild animals in zoos, circuses and entertainment shows. Awareness seems to be increasing that keeping these mammals in captivity as understood in full is hardly possible appropriately to animals, the species and its requirements.

In Switzerland too, one of two dolphinariums shut its doors in 1998 under pressure from the public and the Working Group for the Protection of Marine Mammals (Switzerland) ASMS. An expert report on the legal animal protection and –ethical evaluation of the dolphinarium subsequently closed down played an authoritative role.

The present report is based on the expert report referred to and investigates the scope of questions as to what extent the operation of a dolphinarium may satisfy legal animal protection requirements in Switzerland. In addition, an effort is made beyond individual state legislation, namely Swiss legislation, to work out the legal animal protection and ethical principles which must be taken into consideration by the operators of dolphinariums and by the authorities.

The legal animal protection aspects of keeping wild animals on a European and domestic level will be illuminated on the following pages. An example from experience of a dolphinarium in Switzerland is gone into. The special features of keeping dolphins compared with classic keeping of wild animals is elucidated. The obligations the enforcement bodies have in animal protection are briefly explained and arguments set out which speak for critical evaluation of dolphinariums from the legal animal protection viewpoint.

The present document is aimed at members of authorities which are entrusted with the enforcing animal protection law and especially with licensing, supervision and monitoring of dolphinariums. In addition it aims to assist dolphin lovers and animal protection organisations in examining the legality and the proportionality of official activity in the field of protecting these mammals of high standing within the framework of individual countries' legislation.

This report is not in a position to achieve a comprehensive and current description of domestic and international legislation on dolphinariums along with an overview of the particular licence or supervisory procedures and the specific individual state criteria on dolphinariums. The readership who are actively interested in the protection of dolphins should themselves ascertain the specific legislation and practice currently applicable in their country.

The order cetacea (whales and dolphins) comprises ten families, 38 genera and between 80 and 100 species. The classification of whales and dolphins is subject to amendment. (Thus according to a newer classification, the river dolphin types do not constitute new species but their own families). Currently the English system starts out from 82 species. Since bottle-nose dolphins are chiefly kept in dolphinariums (lat. name: "Tursiops truncatus") the present report will restrict itself to this animal species.

1. Wild animal protection by the European Community

1.1. Working and laboratory animals

II. Keeping wild animals and animal protection law at international level

The European Community has issued various directives and decrees to protect working and laboratory animals. They deal with slaughtering, laying hens, calves and pigs, animal transport, agricultural working animals and laboratory animals (see the overview of this in German in Kallab, Kallab, Noll in the latest instalment).

1.2. Wild animal decrees

Protection of wild animals was regulated in Decree (EC) no. 338/97 of the Council dated 9. December 1996 on the protection of specimens of wild animal and plant species by supervising trade in them (file L 61 dated 3.3.1997; most recently amended by Decree (EC) no. 2724/2000 by the Commission (file L 320/1 dated 18.12.2000). According to this it is necessary to provide proof of the existence of suitable facilities for accommodating and caring for living specimens of numerous species of animals before their importation into the Community is authorised. This same decree bans the importing of specimens of species referred to in Annex A of the decree for profit-making purposes in public, insofar as no exceptional licence is granted for educational, research or breeding purposes.

Directive 79/409/EEC by the Council dated 2. April 1979 on the conservation of wild bird species (file L 103 dated 25.4.1979, p. 1. Directive most recently amended by Directive 97/49/EC (file L 223 dated 13.8.1997, p. 9) and Directive 92/43/EEC of the Council dated 21. May 1992 for the conservation of natural habitats and wild animals and plants (file L 206 dated 22.7.1992, p. 7. Directive most recently amended by

Directive 97/62/EC Commission (file L 395 dated 8.11.1997, p. 42) prohibit the capture and keeping of a large number of species as well as trade in them and provide for exceptions for particular purposes such as research and education, renewing stock, repatriation and breeding.

1.3. Zoo Directive

The current directive by the Council dated 29. March 1999 on the keeping of wild animals in zoos is of decisive importance (1999/22/EC; file no. L 094 dated 9.4.1999, p. 0024 – 0026), which came into force on 9. April 1999. Its purpose amongst other things is to ensure that zoos properly perform their important duty of conserving species, educating the public and/or scientific research which is why it is necessary to lay down a joint basis for Member States' legal provisions regarding operating licences for zoos, their supervision, the keeping of animals, the training of staff and the education of visitors. Permanent facilities where living specimens of wild animals are kept for exhibition purposes for a period of at least seven days per year count as zoos. Circuses, animal acts and facilities are exempted from the Directive which the Member States exempt from the directive's requirements because they do not exhibit any significant number of animals or species and the exception does not endanger the Directive's aims. Thus the Directive is applicable to the keeping of dolphins in zoos but also to dolphinariums insofar as the Member States expressly exempt them from the scope of the application due to a lack of a significant number of animals or species and the exception does not endanger the Directive's aims (Art. 2).

Article 3 of the Zoo Directive describes the requirements for zoos and obliges the Member States to take measures to ensure that all zoos apply the following conservation measures.

Thus they must be involved in research activities which contribute to the conservation of the species and/or in training in knowledge and skills specific to conservation and/or in the exchange of information on species conservation and/or if necessary breeding in captivity, regeneration of stocks or repatriation of species in their natural habitat (Art. 3 para 1). They must promote enlightenment and consciousness in the public regarding conservation of biological diversity, especially through information on the species exhibited and their natural habitats (Art. 3 para 2). Art. 3 para 3 of the Zoo Directive is of crucial importance for animal protection.

“They keep their animals under conditions under which the biological and conservation requirements of the particular species should be taken into account, which

involves amongst other things arrangement of enclosures appropriate to the species and they ensure that animal keeping consistently complies with high standards though a well thought-out programme of veterinary prophylaxis, treatment and nutrition."

In Article 4 of the Zoo Directive on operating licences and supervision, the Member States' authorities responsible are exhorted to examine whether the conditions for the operating licence or the conditions provided for in the operating licence are met when granting, refusing, extending the duration or significantly modifying an operating licence. The Member States must enact the legal and administrative provisions required by 9. April 2002 at the latest.

EU Directives are not binding for non-EU Member States. However Switzerland for instance attaches importance to compatibility with Europe in domestic adaptation of laws and quite often incorporates EU provisions into its own legislation beforehand literally or *mutatis mutandis*. Such action would not be surprising either in an adaptation of the animal protection legislation in the field of wild animal protection in zoos and circuses.

2. Wild animal protection by the Council of Europe, in particular the "Bern Convention"

In addition to the European Community, the Council of Europe has issued certain conventions, partly preparing, partly supplementing EU Directives and Decrees, such as on international transport, keeping agricultural animals, animals for slaughter, animal experiments and domestic animals¹. Particular significance is attached in wild animal protection to the "Agreement on the Conservation of European wild Plants and Animals and their Natural Habitats" dated 19. September, 1979, the so-called "Bern Convention"². According to this, the bottle-nose dolphin (*Tursiops truncatus*) included in Annex II represents a strictly protected animal. Any type of intentional catching and keeping is prohibited in principle (Art. 6 Provision a of the Bern Convention). Exceptions to this principle are only permissible amongst other things under the prerequisite that there is no other satisfactory solution *"for permitting, the capture, keeping or other sensible use of some wild animals and plants in small numbers selectively and in limited scope under strictly monitored conditions for purposes of research, education and breeding."* (Art. 9 item 1, Al. 4 and 5).

¹ cf. Tanja Gehrig, 1999, 66 – 87.

² systematic collection of federal law SR, 0.455

The agreement applies in all the states in Europe listed below, with the exception of Greenland and the Faeroe Islands under the influence of Denmark. Thus one must examine at individual state legislation level whether the protection of the bottle-nose dolphin strictly protected under the Bern Convention is sufficiently translated and guaranteed. In particular one must critically question where dolphins are used for (human) purposes of entertainment whether the exceptional facts of a total ownership ban on research, education and breeding actually exists.

The Bern Convention only protects dolphins found in European waters. This prerequisite does not apply to all dolphins in European dolphinariums. However the Bern Convention should stimulate the tightening up of other conventions and the more pithy protection of dolphins from viewpoints appropriate to the species.

3. Wild animal protection law at European level, in particular the so-called Washington Species Protection Agreement (CITES)

3.1. The CITES provisions in general

Provisions protecting species are to be found in every state in the first and second worlds. At international level the Convention on International Trade in Endangered Animals and Plants dated 3. March 1973³ (SR 0.453), the so-called Washington Convention or CITES (Convention on International Trade of Endangered Species), represents the most important legal basis for species protection in world trade.

The central element in this agreement is a catalogue split into three annexes which divides animal and plant species into three different degrees of protection. Annex I comprises species directly in danger of extinction. Commercial trade in these species is prohibited. Annex II lists the species which could be threatened by extinction if trade is not monitored and restricted. International trade in these species is regulated by an import and export monitoring system. Finally Annex III contains those species which are considered as worthy of protection by the particular government in their country of origin even if they are not considered threatened world-wide⁴.

The international agreement provides the basic provisions which individual states have to comply with. It does not automatically apply in individual states. Put technically, we are dealing with a non self-executing international convention. This is why a decree has to be made in domestic law which translates international given standards. It is also referred to as translation into state law.

³ reflected *inrer alia* in the systematic compilation of federal law SR 0.453.

⁴ Dollinger, BVet as Swiss species protection authority, p.32; Goetschel, commentary, N 5 on Art. 9, 83 seq., of the same Animal Protection and Basic Rights, 25 seq.; on the legal foundations: Goetschel, Compilation of Decrees, Decree A4, 97 - 169; Goetschel/Odok, Decree A4, 37 - 97 and subsequent revisions.

3.2. Dolphin protection through the Washington Species Protection Convention

The bottle-nose dolphin (*Tursiops truncatus*) which the present report restricts itself to is included in principle in Annex II. Some contracting states have included the bottle-nose dolphin in Annex I with other dolphin species such as the South American river dolphin (*Sotalia*) or the old-world river dolphin. Art. 14 item 2 of the Convention authorises the contracting states to take stricter domestic measures regarding conditions for trade. Thus each contracting state must clarify in each case which annex it has included the bottle-nose dolphin in and what licence requirements it has set up.

Directive 338/97 on the Washington Species Protection Convention applies in the European Community. The bottle-nose dolphin is listed there in Annex A and thus enjoys considerable protection. Products and derivatives from the bottle-nose dolphin which are harvested under licence by the people of Greenland are exempt from this. With the exception of meat for commercial purposes, these are under Annex B.⁵

A licence is required to import specimens of an animal species listed in Annex II of the Convention on International Trade of Endangered Species. The importing state must check whether the prerequisites mentioned in Art. IV of the Washington Species Protection Convention are complied with. The licence concentrates on species protection questions⁶.

In principle the state importing animals according to Annex II does not have to take animal protection into consideration. Exceptions to this are specimens of a species listed in Annex II "from the sea". For these the enforcement authority of the state which it is to be imported into must satisfy itself that each living specimen is handled in such a way that danger of injury, damage to health or cruelty is eliminated as much as possible⁷. Where the dolphins imported to date are concerned, it can be assumed that they mostly derive from capture in the wild, thus "from the sea". That is why authorities are under an obligation, at least regarding the importing of dolphins

⁵ Written information from Christoph Bail, European Commission, dated 15. November 2000. Original text about inquiry regarding protection of Orca and *Tursiops*: "I can confirm that the above two species are included in Annex A of Regulation 338/97, although products and derivatives of these two species (other than meat products for commercial purposes) which are taken under licence by the people of Greenland are treated as belonging to Annex B. Therefore they are all treated as Appendix A species except the one exception listed above."

⁶ cf. BVet, Commentary, 3.

⁷ Art. IV para 6 b CITES.

from capture in the wild, to take animal protection aspects into consideration as well.

III. Keeping wild animals and animal protection law at individual state level in Europe

Knowledge of the legal provisions is helpful for the operation of effective wild animal protection. A brief overview of domestic legislation on keeping wild animals should facilitate lead-in to the subject. A report of current and comprehensive details on legal provisions for dolphin protection would break open the framework of the present work. (All the following details are taken from S. Blumenstock, 1994, p. 6 – 129, with the exception of Germany and Austria).

In Belgium commercial animal collections and zoos and similar must be approved by the Minister for Agriculture (Art. 5 Animal Protection Law 1986). The animal keeper is obliged to care for the animals according to their physiological and ethologic requirements.

In Denmark animals may only be used for exhibition purposes if this does not involve any inconvenience for them. In principle wild animals may not be used for exhibition purposes (Part III Animal Protection Law 1991). Every animal kept commercially must be examined at least once annually by a vet.

Germany stipulates that the operator of a zoo or other facility where animals are kept and exhibited must have the permission of the responsible authority. Permission may only be granted if nutrition, care and accommodation are appropriate to the species, its behaviour and its requirements (§ 11 para 2, § 2 APL 1998).

Finland forbids the capture of mammals living in the wild except for temporary care and their being kept in captivity (Art. 2 APL 1971). Exhibitions of animals which could cause pain or suffering must be prohibited by the vet (Art. 4).

In France the accommodation and the environment of animals kept in captivity must not cause the emergence of pain, suffering or accidents (Art. 276 Code rural, titre I). Each animal is “a sentient being and must be accommodated by his owner according to the biological requirements of his species” (Art. 9 Law no. 76-629).

Greece only provides provisions in its Animal Protection Law 1981 regarding pets, working and breeding animals, not on wild animals (Art. 1). Cruelty to animals is forbidden.

Italy's Animal Protection Law (1913) with its supplements stipulates a ban on cruelty to animals and prohibits commercial users of animals from abusing them.

In Luxembourg putting animals on show requires a licence. Provisions to ensure the well-being of the animal can be included in the licence (Chap. 3 APL 1983). The animal must be accommodated in accordance with its physiological and ethologic requirements and any restriction of its natural requirements for activity and exercise

in a form which leads to pain, suffering, harm or injuries for the animal should be avoided. The Minister can forbid the keeping of certain animals (Chap. II).

In the Netherlands, the Animal Protection Law 1991 prohibits the keeping of animals which are not amongst those species the keeping of which is permitted according to the General Administrative Directive. This decree lays down the corresponding provisions on keeping animals. It is forbidden to inflict pain or injuries on an animal without good reason or beyond necessary bounds, to damage its health or welfare (Art. 36 of the General Administrative Directive).

In Norway anybody owning an animal kept in captivity or with one in his care must ensure that it is accommodated according to the requirements of the particular species of animal. Space, temperature, light and ventilation conditions must be appropriate (APL 1974/77; Chap. 1). "Natural instincts and needs" must be taken into consideration so that they are not caused unnecessary suffering.

In Austria the decree in 70a GewO on the protection of animals against cruelty and the keeping of animals according to their species within the framework of commercial activity is authoritative for all federal Länder (1991). According to this, people in business are responsible for keeping animals appropriately to the species and for protecting animals kept by them from cruelty within the framework of exercising their trade and must in particular adhere to temperature and hygiene conditions appropriate to the species and ensure animals freedom of movement appropriate to the species. Detrimental effects due to sunshine, drafts, noise and vibrations should be avoided and the species specific requirements the animals have must be taken into consideration when counting the number in an enclosure used for keeping animals. The keeping of animals which because of their species are unsuitable for keeping is forbidden (§ 2 VO in § 70a GewO; Kallab/Kallab/Noll, Ö IIIa/3). Apart from this, the paragraphs on cruelty, animal transport and animal experiments, each single one of the nine federal Länder has its own legislation on animal protection which does not obtrude itself to be dealt with in more detail here. Merely as an example let us pick out the Lower Austrian Animal Protection Law (1986, § 7) according to which the keeping of wild animals which require special keeping and care is forbidden for animal protection reasons. Amongst them are the Cetacea (whales and dolphins according to § 2 of the corresponding decree).

Portugal forbids force against animals (Animal Law 1919), the abuse of working animals (1925) and bull fighting involving the death of the bull (1928) and regulates the killing of animals for slaughter.⁸

Sweden requires that animals be handled carefully and protected against unnecessary suffering and unnecessary illness (Animal Law 1988, section 2). Species of animals are listed which may not be exhibited in public (section VIII of Animal Protection Decree).

⁸ Status of legislation: 1994; Blumenstock, 1994, 98.

In Spain animal protection law is regulated based on 13 regions. An exception to this is traditional cruelty to animals which is forbidden throughout Spain since 1961. More recent legislation is only to be found in three regions with animal protection concentrating chiefly on pets.

In the United Kingdom and in Ireland anybody who locks up an animal or arranges for this to be done is responsible for its being provided with food and water. If this does not happen, anybody has the right to enter the stall after six hours to look after the animal (APL 1977/88, § 7).

In summary keeping wild animals is organised very differently in the individual animal protection laws in Europe. Some states

- forbid the keeping of wild animals living in the wild with possible exceptions, such as Denmark, Finland, commercially some federal Länder in Austria,
- authorise the executive to prohibit the keeping of certain species of animal (Luxembourg, the Netherlands, commercially, Austria, not commercially, partly at Land level, Switzerland),
- stipulate their own obligation to authorise licence (Federal Republic of Germany, Belgium, Luxembourg, Switzerland),
- demand accommodation adapted to the physiological and ethologic needs of the animals according to species and animal (Belgium, Federal Republic of Germany, Luxembourg, the Netherlands, Norway, Austria, Sweden, Switzerland),
- acknowledge the animal as a co-creature (Federal Republic of Germany), attribute "dignity" (Switzerland) or "natural instincts" worthy of protection (Norway) or "intrinsic value" (Netherlands) to him or recognise in him a "sentient being" (France),
- forbid animals from suffering from their captivity (France, United Kingdom), or
- prohibit cruelty in general (Greece, Italy, Portugal, Spain).

IV. Special features in keeping dolphins

There are numerous problems connected with keeping dolphins. These can be divided into stress, with capture and transport, noise, light and pain mentioned as stress factors, poor water quality, incorrect feeding, short life expectancy, problematic reproduction, behavioural disturbances (making noises, social, pecking order and stereotypical behaviour and disturbed behaviour across food acquisition) and various causes of death⁹. Some problems will be discussed in more detail.

1. Need for exercise

Dolphins are animals with a very *marked need for exercise*. They cover very great distances in the wild. They move on average at between 6 km/h and 15 km/h and reach peak speeds of up to 40 km/h or 55 km/h¹⁰. Bottle-nose dolphins often cover long distances of between sixty and one hundred kilometres daily and reach maximum speeds of 40 km/h. They dive to depths of up to 500 metres and are thus obviously dependent on the third dimension, namely on the deep. As an example of one expert report amongst many one can pick out the "Viennese Environmental Legal Advocacy" where an official vet, a zoo director and a zoologist attribute "*extremely high water quality and space requirements to*" the dolphin¹¹.

In a very recent contribution about zoo and circus animals, Dr.rer.nat. Fritz Jantschke, editor of the magazine "The Animal" known as favourable towards zoos, attributes particular requirements regarding keeping in spacious sea water pools and expensive feeding with fish to the approximately hundred types of whales and emphasises sufficiently large pools. In addition to large, deep main pools, (at least 275 sq.m at a depth of 3 - 5 m for three bottle-nose dolphins) it demands holding pools which are "not too small" for quarantine, treatment and rearing young. Only natural or artificially created salt water with a salt content of between 2.6 and 3.3 ‰ is suitable which needs to be constantly well filtered because of the dolphins' large quantities of dung and urine. It refers to circulation every two to four hours¹².

The EU Commission Directives drafted so far partly go further regarding import licences for live cetaceans in the annex to the version dated 8. May 1990, which requires a pool diameter of at least 7 m and a water surface of at least 275 sq.m also for a group of up to five animals with the separate pool being at least 125 sq.m, all

⁹ This is the overview in Buholzer, 1996, 68 – 88, with references.

¹⁰ Gsandtner et. al., 84; Carwadine, 46, 48.

¹¹ Gsandtner et al., 84.

of this with a depth of at least 3.5 m and 5 m in at least 20 % of the pool. The draft directive was not put into force or even translated. Even these minimum dimensions which are well below the suggestions made by the Federal Republic of Germany amongst others, considerably exceed the Swiss minimum requirements and the actual conditions at the current Swiss licence holder.

Switzerland in particular refers in its existing provisions to the "EAAM Standards for Establishment Housing Bottlenose Dolphins", published in 1995 which is itself based on guidelines which were worked out in 1987 by the Marine Mammals Expert Group of (scientific) European zoos. They take into account recommendations for keeping dolphins which were drawn up within the framework of an expert report required by the British Department of the Environment.¹³ The EAAM is the Association for Aquatic Mammals, an organisation which chiefly represents the interests of dolphin users and not of dolphins. The EAAM guidelines require an area of 275 sq.m or a volume of 1000m³ for the complete pool complex while the Marine Mammals Expert Group only applies these values to the main pool and not the holding one. Longer term keeping of dolphins in a small isolation pool is also not justifiable for the Swiss Federal Council. Thus to date standards are applied in Switzerland which have already been superseded.

The information supplied by Laurent Couquiaud-Douaze, 1999, can be considered as the latest scientific findings. In dolphin circles this comprehensive work is considered the most up-to-date complete report on minimum requirements for keeping cetaceans living in captivity. In it dolphinariums world-wide are compared with one another and requirements for size, depth and design are inferred based on this. In this work from the sphere of the captivity industry itself, the following pool sizes are demanded:

Surface Area

Surface area (in m²) is calculated by multiplying the MAL (in metres) [MAL = Maximum Adult Length compared to Average Adult Length AAL] of the largest species in the pool by 150 for the Main pool, and by 100 for the Holding pool. This is a constant factor that applies to all animals and species, regardless of sex and age. It can be considered as multiplying the MAL 150 times in all directions. A pool with the recommended initial surface area can contain up to 4 animals (p. 60seq.).

Example of Main pool and Holding pool surface areas for 3 Bottlenose dolphins (MAL = 3.80m):

¹² Jantschke, 412.

¹³ This is clear from the letter from Federal Council member P. Couchepin to National Council member Ms.P. Hollenstein dated 15. January 2001

$$S (= \text{Surface Area})(\text{Main}) = 3.8 \times 150 = 570\text{m}^2$$

$$S (\text{Holding}) = 3.8 \times 100 = 380\text{m}^2$$

Example of Main pool surface area for 6 Bottlenose dolphins (4 initials + 2 additional)

[St = Total Surface Area with additional Animals; St = S + 1/4S + 1/4S + ...]

$$\text{St (Main)} = 570 + (570:4) + (570:4) = 855\text{m}^2$$

$$\text{St (Holding)} = 380 + (380:4) + (380:4) = 570\text{m}^2$$

Where there are five dolphins one must accordingly assume a main pool size of 712.5 m² which is calculated as follows: St (Main) = 570 + (570:4) = 712.5m². The holding pool must be (St (Holding) = 380 + (380:4) = 475m².

The Swiss wild animal ecologist Dr. Helen Müri too is of the opinion that dolphins must be included amongst animals which are extremely difficult to keep according to Art.40 40 Animal Protection Decree, since in practical terms in captivity they cannot be given a life appropriate to the species¹⁴. The considerable space requirement dolphins have *finds expression in all these provisions and requirements*.

There is now only a single dolphinarium in existence in Switzerland, "Conny-Land" imbedded in an amusement park in Lipperswil, in Canton Thurgau. The former dolphinarium at Knies Childrens' Zoo was closed in 1997 under pressure from the Working Group for the Protection of Marine Mammals and that of the public. The dolphinarium in Conny-Land built in 1985 currently contains 5 dolphins plucked from the wild in Florida and Cuba. It is the only facility world-wide which is linked to an "underwater bar/night club" and thus additionally subjects the dolphins to light, noise and the gaze of visitors during the night. The dolphins have no opportunity of withdrawing from being on show and must submit to the light emissions from the night club, the noise of the music and of the loud pumping system.¹⁵.

The current dimensions of the dolphinarium in Lipperswil are small, only barely meet the minimum legal requirements in the version currently valid and in part considerably fall below¹⁶ the minimum requirements needed according to most recent scientific findings.

¹⁴ by phone with Dr. Helen Müri on 11. February 1997; cf. also her summary of a study in 1996: Animal Protection in Zoos and Circuses.

¹⁵ Delaquis, 22seq.

¹⁶ Jantschke, 1997.

2. Ability to withdraw and quarantine pool

German zoo directors drew up an "export report on the keeping of mammals appropriate to animal protection" as early as 1977. Over twenty years ago it was discovered not by animal protectors but by responsible animal users that the animals needed to have sufficient places to rest (p. 6) and that the fitting out of the enclosure must take account of the functional areas of movement, rest, protection, nutrition and other essential behaviour the animals have. Where animals are kept together in larger groups visual shields in the form of cover are required to enable lower ranking animals to get out of the way (p. 6).

Keeping wild animals must in principle be so organised that it meets the prerequisites for breeding and for healthy rearing of offspring possibly resulting (p. 8). Dolphins are described as mammals which live sociably, enjoy communication and are very talented learners which is why the way they are kept must take this state of affairs into account p. 50). The spatial requirement comprises "*at least two pools, if possible a 3 pool system*" (p. 50); and there must be a night pool and a quarantine pool in addition to the main one. The quarantine pool must have a special filter system and the access to the pool from the connecting channel must be capable of being closed using watertight gates or doors. Naturally all pools require a filter system so that the *water is crystal clear* and the bottom can be clearly seen.

According to information dating from 1977 circulation should be 2-4 hours for the main pool, 1-2 hours for the night pool and 1/2-1 hours for the quarantine pool with all pumps and filter parts in contact with sea water having to be sea waterproof. A recognised expert institute must draw up a bacteriological report on the state of the water's chemistry (p. 51 seq.).

Against this background the dolphinarium with its underwater bar/night club appears not even to meet these twenty year old minimum requirements in all respects. One is justified in asking what the animal protection and scientific criteria were according to which the dolphinarium built eight years after this expert report was licensed.

3. On constant show/day and night rhythm

In Connyland the dolphin pool was linked to an underwater bar via glass windows, so that the animals could be watched too during dancing and drinking, As a result the dolphins are not only exposed without interruption during the day from 10 to 6 but also in the evening from 7 to 12 midnight (Sunday to Tuesdays) or from 7 to 2 in

the morning (Wednesdays to Saturdays)¹⁷. In addition, the said dolphinarium including the underwater bar and night club and a dolphin show spot can be hired at any time, according to the brochure and telephone information. Thus the animals have no opportunity of withdrawing from continuous exposure to visitors¹⁸ by which their individual requirements are probably taken too little into account.

4. Social structure

Dolphins are very social creatures and often live in large communities. A "school" of dolphins as closed groups of dolphins are called can consist of up to 1,000 individuals. In the wild, bottle-nose dolphins live in very complex social groups subject to quite special dynamics. When keeping dolphins attention must also be paid to the distribution of male and female dolphins, paying special attention to sexual maturity. Such appropriate distribution is significant for the social and sexual behaviour of the animals¹⁹.

5. Sense of hearing

Dolphins have developed pronounced hearing and can hear sounds of between 150 and 200,000 vibrations per second Hertz=Hz). The range of hearing in man is between 20 and 20,000 Hz. According to Art.42 para Animal Protection Decree animals must be protected by construction measures against disturbance from visitors and noise. Dolphins are very sensitive to the effects of noise. In addition to the normal noise emissions during the day and the many shows with tany announcements, music over the tany, emissions from the public and the compulsory loud underwater pumps, other effects of noise, some with live music, should be capable of being ascertained in some dolpinariums. The research results meanwhile in the field of stress research in humans and animals and of acoustics, particularly in marine mammals with special consideration of the partly deferred hearing range of man and dolphin must be taken into account when investigating a dolphinarium. The appropriate thorough clarification must be undertaken by impartial experts.

¹⁷ Cf. the current "Connyland" brochure including the underwater bar/night club establishment, status June 2000.

¹⁸ Teutsch, The "Dignity of the Creature", 46 and 56 with other references cf. also Teutsch, Dictionary, keyword Zoo and Circus Animals, 267seq.

¹⁹ On the difficulties in social structure and behaviour, most recently Jantschke, 405seq. Also Buholzer, 1996, 81 seq.

6. Echo location/orientation

Dolphins orientate themselves in their environment using their sonar system, the so-called echolot. The frequencies of their sound signals at between 25,000 and 220,000 Hz are in the supersonic range, thus above the human hearing limit. The uniformity of life in small pools must lead to a reduction in enjoyment of communication and make echo location superfluous which equates to behavioural disturbance²⁰.

V. Keeping dolphins according to Swiss animal protection legislation as example of concept

Using Swiss animal protection legislation as an example the licensing procedure and the legal problems of keeping dolphins will be examined in more detail. This procedure is aimed at determining the things in common, similarities and differences in the corresponding problematics in other states. Investigation as to whether possible licensing and monitoring of a dolphinarium in another state is lawful and appropriate is easier with awareness increased by this.

1. Obligation for a dolphinarium to be licensed

The operators of the Swiss "Connyland" amusement park in Lipperswil, Canton Thurgau, keep bottle-nose dolphins (*Tursiops truncati*) commercially. They require a cantonal licence for this in accordance with Art. 6 of the Federal Animal Protection Law (APL)²¹. According to Art. 41 para 1 of the Animal Protection Decree (APD) the canton in which the animals are kept is responsible for granting the licence. In the case under consideration here it is the Canton of Thurgau or the Thurgau Veterinary Office²². In addition, an import licence from the Federal Office for Veterinary Matters is required to import the animal species listed in Annex II of the Washington Species Protection Convention, amongst which is the bottle-nose dolphin, according to Art. 5 lit. a of the Species Protection Decree (SPD). Furthermore, the United States of America which up to the 80s at least appeared to be one of the main supplier countries for dolphins only issues an export licence if the dolphinarium the dolphins are being taken to meets additional requirements over and above those in the species protection convention.

²⁰ Thus Buholzer also, 1996, 81.

²¹ Art. 6 para 1 APL, Art. 38 para 1 prov. a APD.

²² Art. 41 para 1 APD in conjunction with § 4 APD/Animal Law.

2. The legal status of animal protection legal licence

The legislator has made keeping wild animals commercially subject to a general licence due to wild animals' particular need for protection and because of the abuses which have arisen in this field. It found itself prompted to take special measures to ensure the keeping of wild animals in captivity appropriately to the species and deemed the introduction of an obligation to be licensed to keep wild animals commercially and the *strict monitoring* of such operations as a suitable means²³. The licence to keep wild animals commercially is a police licence as are all licences provided for under the Animal Protection Law²⁴. The police licence is a decision reached on request which establishes that there are no police obstacles to the activity intended²⁵. In our case it is the formal prerequisite for the legality of the activity subject to approval for keeping dolphins commercially. The licence may only be granted if the material requirements in accordance with Art. 42 APD are met. The former licence for keeping dolphins seems to be based on all legal requirements counting as met..

3. Restriction on keeping according to Art. 40 APD

Art. 40 para 1 APD takes special steps to protect wild animals which cannot be guaranteed any conditions when held in captivity appropriate to the animal (or only with great difficulty) or for animals which can barely adapt to captivity²⁶. Licences may only be granted if an expert report by a recognised expert shows that keeping appropriate to the animal is ensured. Art. 40 para 2 APD lists in a non-conclusive manner which finds expression "in particular" with use various animal species which are particularly difficult to keep. Bird species such as swifts for instance come under this which are so difficult to keep because they require a very great amount of space²⁷. Deep sea sharks are included on the list too because they need a huge amount of space and a pool of a size which could hardly be realised²⁸.

²³ Communication APL, BBI 1977 I 1088; Rebsamen-Albisser, 184seq.

²⁴ Goetschel, Commentary, N 5 on Art. 8 APL, 75 and N 4 on Art. 13 APL, 109; of the same Animal Protection and Basic Rights, 98; cf. BVet, Elucidations, 19; Communication on Animal Protection Law BBI 1977 I 1089.

²⁵ Häfelin/Müller, N. 1958, 1960, 460seq.

²⁶ cf. BVet, Commentary, 16.

²⁷ cf. BVet, Commentary, 16.

²⁸ Telephone information from Dr.phil.nat. Thomas Althaus, species protection section of BVet dated 11. February 1997.

The bottle-nose dolphin too requires a very large space which remains to be shown. That is why a report by a recognised expert should be sought which not only makes keeping appropriate to the animal credible but also “proves it”. This is needed although the bottle-nose dolphin is not expressly listed on the list of animals which are very difficult to keep.

The pertinent criteria on the obligation of civil servants and members of authorities to not to put themselves forward must be heeded when selecting the appropriate expert. Thus anybody with a personal interest in the matter is considered partial²⁹, anybody who was already active for a party in the same matter or who could be biased for other objective reasons³⁰.

4. Conditions linked to a licence

According to Art. 43 para 4 APD licences can be linked to conditions. A condition is an obligation linked to a decree regarding an action, tolerance or omission³¹. Exercising the main activity, accordingly keeping wild animals in the case in point, can be linked to various conditions and stipulations³². The stipulation serves the principle of proportionality. Instead of having to refuse a licence completely, the less severe step of granting a licence linked to a supplementary provision is chosen. Since the Animal Protection Decree expressly accords the cantons express power to lay down feeding, care and accommodation in more detail and to provide the licence with stipulations and conditions³³, the legal basis is given for issuing supplementary provisions. Thus the authority responsible, here the Canton Thurgau Veterinary Office, has very extensive powers for implementing the keeping of dolphins appropriate to the animals by means of stipulations and conditions imposed on the dolphinarium operator.

5. Duration of licence

By federal rights the operator of the “Connyland” amusement park in Lipperswil in Thurgau is probably in possession of the relevant licence to keep dolphins since 1985. According to the traditional view dolphins are considered as apparently easy

29 Federal Court Decision BGE 103 Ib 137seq.

30 Federal Court Decision BGE 97 I 94seq.; VPB 1983 no. 2; on the whole subject: Kölz/Häner, N 119 and 103-106; also Bolzern, 33.

31 Häfelin/Müller, N. 729.

32 Goetschel, Commentary, N 3 on Art. 6, 67; cf. also Poledna N 227, 203. Häfelin/Müller, N 721.

33 Art. 43 para 4 APD

to keep which is the reason for the licence under the meaning of Art. 43 para 1 at the end of APD is (as a rule) not limited as to time. However it is questionable whether dolphins must not count as "extremely difficult" given their requirement for a very great amount of space, their considerable requirements for water quality and feeding and their complex social structure which is why the appropriate licence within the meaning of Art. 43 para 3, clause 2 in conjunction with Art. 40 para 1 APD should be limited to two years at most.

A time limit makes it clear to the licence holder that he cannot rely on carrying on his activity without restriction. This would also ensure that licensing authorities can take into account and translate the most recent findings in the fields of psychology, behavioural science and hygiene within the framework of the entirely new award procedure within the meaning of Art. 1 para 2 APD. This time limit is very significant for wild animals which according to Art.40 APD are extremely difficult to keep because it is only through this that continuous fresh monitoring of the prerequisites for the licence can be ensured.

But in licences as a rule without a time limit their temporal effect is always restricted legally or in practice. A "permanent" licence does not exist in practical terms,³⁴. Thus according to general administrative law, police licences can in principle be revoked at any time due to altered circumstances, if the licence would no longer be granted under the new circumstances³⁵.

6. Revocation of licence according to Art. 69 APD

Art. 69 APD regulates the refusal and the revocation of licences over and above the general provisions of administration law. According to para 1 licences can be revoked if the holder has repeatedly infringed the provisions on animal protection, species protection or impaired the livestock epidemic authorities. Art. 69 para 2 APD provides that the licensing authority, the cantonal vet, can prudently revoke a licence if the basic prerequisites for it are no longer met. Each licence according to the Animal Protection Law is restricted in time by the fundamental changes in the facts and the law taking the more recent findings in physiology, behavioural science and hygiene particularly into account within the meaning of Art. 1 para 2 APD³⁶. Art.69 para 2 ALO essentially only repeats a principle in general administrative law that the duration of right of use is under the proviso of revocation even if it is not

³⁴ Poledna, N 280, 242.

³⁵ Hangartner, 174seq.

³⁶ Goetschel, Commentary, N 4 on Art. 3 APL, 41seq.

expressly limited in time³⁷. Subsequent stipulations and conditions with an obligation to adapt also come into question as a milder form of revocation due to altered actual or legal existing circumstances³⁸. In casu an obligation to adapt the licence could impose itself due to more recent scientific findings on keeping dolphins or as a result of altered social conditions.

Looked at quite generally, establishing a dolphinarium, operating such a facility and the trade in and importing of dolphins needs a state licence. When being established the state must investigate whether the project planned corresponds with legislation on buildings, area planning and security police. The operator of a dolphinarium must also show that the building project meets all possible safety standards and is solid enough, provides escapes and sufficient fire protection and much more. These measures by the security police chiefly for the protection of visitors and staff and less for the protection of the animals are of a practical significance which cannot be underestimated. In some circumstances calling in an expert on matters of structural safety can lead to measures which indirectly also have an animal protection effect.

The building project must also be examined from an animal protection viewpoint: Will dolphins, will wild animals in general be able to lead a life appropriate to the animal in the planned dolphinarium or in the planned wild animal enclosure? Once the building project has been completed, the authorities will regularly monitor the keeping of animals and ensure that the animal protection requirements are constantly guaranteed.

VI. On the “dignity“ of dolphins or “their part in creation“

The animal protection laws are intended to prevent “suffering, pain, harm and stress“ in animals, to protect the animal's “well-being“ and to permit it to live out its “physiological and ethologic needs“. Animals must live under conditions which are intended to take account of the biological and conservation requirements of the particular species which includes among other things design of enclosures appropriate to the species. The extent to which dolphins are protected in their well-being depends also on legislation, doctrine and established case law on animal protection law in the individual state. Over and beyond this classical approach in individ-

³⁷ Poledna, N 224, 201, N 284, 244, N 256, 224. cf. also BGE 94 I 336,343: “It accords with the special features of public law and the nature of public interest that an administrative decision which does not correspond to or no longer corresponds to the law is not unalterable.“

³⁸ Poledna, N 385fseq., 309. Also Gigy, Verwaltungsrecht, (Administrative Law) 290.

ual states animals are accorded "dignity" or "intrinsic value" (Switzerland, the Netherlands) or they are called a "co-creature" (Germany). The EU too within the framework of the Amsterdam Treaty acknowledges animals as living beings sensitive to suffering. This necessitates an amplification of the previous concept of animal protection.

1. The "dignity of the creature" in the Swiss Federal Constitution

In Art. 120 para 2 (formerly: 24^{novies} para 3) of the Federal Constitution (FC) dignity is conferred on the creature since 1992³⁹. The legislator must now "take account of ... the dignity of the creature", that is, he must consider it and heed it circumspectly. It emerges from the systematic analysis that "creature" means "animals and plants"⁴⁰. Meanwhile a number of contributions on the content and significance of the new constitutional provision have been published. That of the social ethicist Prof.Dr. Gotthard M. Teutsch (1995) must continue to count as the most far-sighted and discriminating one.

2. Infringements by dolphinariums of creaturely dignity or participation as creatures

In Connyland the dolphin pool was linked via glass windows with the underwater bar to be able to look at the animals during dancing and drinking as well. Thus the dolphins are not only exposed to the gaze of visitors during the day but also in the evening until well into the night without interruption⁴¹. In addition, the said dolphinarium including the underwater bar and night club and a dolphin show spot can be hired at any time, according to the brochure and telephone information.

Prof.Dr. G.M. Teutsch considers the dignity of the creature infringed or endangered in certain types of exhibitions of animals if they are forced to satisfy purposes set by people, in casu it is a question of economic and voyeuristic purposes, and in so doing are restricted in executing their species specific behaviour. They are infringed in particular, *"if the animals have no opportunity of withdrawing from continuous exposure to visitors"*⁴². Not only the gaze of the visitors and night club or bar customers is important. People like these also regularly seek closer contact through the glass

³⁹ Saladin/Schweizer, N 32 on Art. 24^{novies} FC.

⁴⁰ cf. on this Saladin/Schweizer, N.114 on Art. 24^{novies} FC.

⁴¹ Cf. the current "Connyland" brochure including the underwater bar/night club establishment, summer 2000 status.

⁴² Teutsch, The "Dignity of the Creature", 46 and 56 with other references cf. also Teutsch, Dictionary, keyword Zoo and Circus Animals, 267seq.

with the animals, knock on the glass, move in time with the animals or try to attract them with the jingle of a bunch of keys. They are thus reduced to objects in a way which would not meet the modern view of an animal-human relationship.

However the dignity of the dolphins can also be infringed or endangered if man sees the animals as underdeveloped or defective beings and "trains" them to as human methods of behaviour as possible⁴³, through which he does not respect them in their way of being different; one can for instance think of the "repeating" of common children's songs by dolphins or when dolphin trainers stand on the snout of one or two dolphins during a show, reduce them to catapults for somersaults and thus express their dominance over the animals. If they are provided with clothes or accessories such as sunglasses in shows, the animals are objectified, so seen as mere things⁴⁴. Animals also have their dignity infringed if they are chiefly seen as means and too little as purposes in themselves, that is if they are forced to satisfy (amusement) purposes set by people and in so doing are restricted in executing their species specific behaviour⁴⁵

VII. The authorisation authority's duties when granting a licence

In the states listed previously, (Federal Republic of Germany, Belgium, Luxembourg, Switzerland) which make the building and operating of a dolphinarium dependent on licensing by an authority, the rights and obligations this authority has are primarily based on domestic administrative law. This can be refined to a certain extent by animal protection legislation. The somewhat more detailed description of the licensing procedure according to Swiss (animal protection) law is aimed at serving to examine the corresponding practice in other states on the particular domestic and animal protection law together with other experts.

1. Responsibility

According to Art. 6 para 1 APL in conjunction with Art. 41 para 1 APD the canton is responsible in Switzerland for granting a licence to keep dolphins. In casu, § 4 of the animal protection decree in the Canton of Thurgau determines that the Veterinary Office executes animal protection law. For that reason, it is incumbent on the Thurgau cantonal vet to grant animal protection licences. As an official he is in a public

⁴³ Teutsch, 1995, 43, with references.

⁴⁴ Teutsch, 1995, 46, with references

⁴⁵ Teutsch, 1995, 56.

law employer-employee relationship. An official is legally obliged to execute animal protection law in this field⁴⁶.

2. Principle of investigation

By contrast with a civil case where the parties have themselves to furnish the proof for the facts of the case alleged, the responsible authority must ex officio comprehensively gather information comprehensively about the facts of the case⁴⁷. This principle of investigation is referred to as the so-called inquisition maxim and means that the fact in the case legally relevant for the licence in question must be fully established by the office itself and that the licence application is examined regarding its legality⁴⁸.

3. Possible complex of questions

The following complexes of questions arise when assessing the dolphinarium taking the underwater bar/night club in particular into account:

Initially as in any other licence application and according to a general principle of the administration law, one would need to examine “whether the facts claimed by the applicant correspond to the truth and whether the prerequisites required for granting or extending a licence are complied with.”⁴⁹ As a rule, the licensing authority is also responsible for creating the basis for the decision and may not solely rely on the statements of third parties or of the applicant⁵⁰. If the facts of the case are not correct or are established as inaccurate, then according to the general rules of the administrative law, a faulty ruling already bearing flaws when issued exists⁵¹. Rulings like these can be amended at any time, be subject to fresh examination or even become invalid⁵².

When assessing a dolphinarium again from an animal protection law viewpoint, the following spheres of questions are under consideration for detailed examination:

46 Steiger, A Veterinary Surgeon's Duties, 47.

47 Fleiner-Gerster, Main Features, N 40seq., 201.

48 Poledna, N 347, 283; cf. Häfelin/Müller, N339, 79.

49 cf. Goetschel, Commentary, N 2 on Art. 34 APL, 220.

50 cf. also Kölz/Häner, 38; Häfelin/Müller, N 1283, 304.

51 Gigy, Legality of Administrative Rulings 240; Häfelin/Müller, N 761, 179; Knapp, N 1246.

52 Knapp, N 1159, N 1171, N 1244; Gigy, Administrative Law, 310.

- a) Is the dolphinarium part of a zoo which could possibly be adjudged to follow certain aims in the public interest⁵³ or can one start out from a purely private amusement operation to which “*the standards of animal protection can be applied more tightly rather than more loosely in the absence of meaningful public “ work*”⁵⁴?
- b) If according to more recent findings the dolphin should not be dealt with as an animal, which within the meaning of Art. 40 para 1 APD is extremely difficult to hold, by which an expert opinion by a recognised expert must be obtained which proves (and does not just claim) that keeping appropriate to the animal is guaranteed? Does this expert satisfy the high standards of objectivity and impartiality?
- c) Can the complex social behaviour of the dolphins be considered when they are kept in captivity? Is their life still appropriate to a dolphin with a large curtailment of their social structure?
- d) Is it clear that it merely makes the licensing authority responsible for legal animal protection investigation of the aforementioned licence and that the legal species protection side should possibly be clarified by another authority⁵⁵?
- e) One would need to establish how long the animals are subjected to the gaze and other annoyances (shows, access to pool, fanoy announcements, knocking on the glass panes etc.) by people without being able to retreat from them. One would have to examine whether where there is excessive duration and unsatisfactory opportunities for withdrawal an infringement exists against the – dignity of the creature protected in Switzerland under constitutional law and against the findings assured for a long time in the sphere of keeping zoo animals⁵⁶.
- f) Are the dolphins sufficiently protected by construction measures against noise and irritating echo, namely from music and the vibrations linked to it and possible echoes and the circulation pump (Art. 42 para 2 2 APD)? Here calling

53 Federal Court decision BGE 109 Ia 335 seq., not published, Deliberation re Basle Zoo.

54 Jantschke, 402.

55 Art. 7 Prov. a para 7 Species Protection Decree dated 19. August 1981.

56 Art. 120 para 2 FC (formerly: 24^{novies} para 3 FC) in conjunction with 42 para 2 APD Cf. also the importance of opportunities to withdraw for wild animals from the viewpoint of the German zoo directors in their expert report on the keeping of mammals appropriately to animal protection 1977.

in objective and highly qualified experts in acoustics in marine mammals appears decisive not least because of the dolphins' displaced hearing range compared to the human one.

- g) Is possible illumination of the dolphins for over 16 hours per day permissible without the animals being able to defend themselves against it and compatible with their adaptability which cannot be overtaxed? The type of bright or flashing lighting during an entertainment operation should also be concentrated on.
- h) Are the building inspection authority requirements met, namely the provisions on a sufficient number of well constructed escapes, on protection of people and animals by electric wiring, in particular around and over the dolphin pool?
- i) What opportunity for involvement is available to organisations or experts in animal protection when preparing the decision, in investigating and possibly challenging it through the appeal procedure and when monitoring dolphin keeping?

VIII. Species protection

1. Restricting the licence according to animal protection and species protection law

Species protection comprises all legislative and practical steps which aim at conserving an animal or a plant species⁵⁷. Animal protection is the most comprehensive concept for all efforts and steps to protect the life and well-being of animals⁵⁸. Legal animal protection as it is regulated in individual state norms of animal protection aims at protecting animals as individuals against pain, suffering, harm or fear which they suffer from man⁵⁹.

⁵⁷ Dollinger, BVet as Swiss species protection authority, 31; Goetschel, Animal Protection and Basic Rights, 25; cf. also Dollinger, Is Species Protection worthwhile?, 83; Teutsch, Encyclopaedia, keyword Protecting Nature 150seq.; see also Goetschel, Commentary, N on Art. 9 APL, 84.

⁵⁸ Teutsch, Encyclopaedia, keyword Protecting Nature 208. Sambraus recently also, 30; Steiger, Animal Protection Legislation in Switzerland, 857.

⁵⁹ Goetschel, Animal Protection and Basic Rights, 25;

2. Approval from a species protection viewpoint

The Species Protection Decree (SPD) (SR 453) and the Monitoring Decree were issued within the framework of the Species Protection Convention (SR 453.1)⁶⁰. All cetaceans are listed in Annex II of the Convention on International Trade in Endangered Animal and Plant Species which is why a licence is required to import them into Switzerland in accordance with 5 lit. a SPD. According to Art. 3 SPD the Federal Office for Veterinary Matters is responsible for this, having to examine whether the prerequisites mentioned in the Washington Animal Protection Convention. under Art. IV. are met or not (Art. 7 para 1 lit. a SPD)⁶¹. Licensing according to the Species Protection Decree concentrates on species protection questions⁶². In principle the state importing animals according to Annex II need not take animal protection into consideration. The exceptions to this are specimens of the species “from the sea” listed in Annex II. For these the enforcement agency in the state it is being imported into must satisfy itself that each living specimen is handled in such a way that danger of injury, damage to health or cruelty is eliminated as far as possible⁶³. Where the dolphins imported to date are concerned, it can be assumed that they mostly derive from trapping in the wild, thus “from the sea”. For that reason the federal authority responsible for species protection has an obligation at least when examining the importation of dolphins captured in the wild to also take the animal protection viewpoint into consideration.

Along with the Federal Office for Veterinary Matters as an enforcement body, according to Art. IX item 1b of the Washington Convention a scientific body is required in addition to have a licence granted. This body described in the Species Protection Decree as an expert commission consist of between seven and nine members and advises the Federal Office for Veterinary Matters on all questions connected with the Convention (Art. 4 SPD).

60 Art. 9 para 2 APL grants the Federal Council the authority to regulate or prohibit the import, export and transit of animals for animal protection reasons; cf. Goetschel, Commentary, N 5 on Art. 9 APL, 83seq.

61 cf. Federal Office for Veterinary Matters, Washington Animal Protection Convention, licencing procedure for import and export of animals; As/ar - 820.105.11.

62 cf. BVet, Commentary, 3.

63 Art. IV para 6 b CITES.

IX. Conclusion

In the present report the question is investigated as to how according to domestic animal protection law one can clarify whether dolphinariums can be justified. It is aimed at encouraging dolphin lovers in Europe to question how in keeping with the times a licence for the building and operation of a dolphinarium granted on a perhaps slender legal basis is, possibly in conjunction with specialists in administrative and animal protection law and with domestic enforcement agencies for animal protection. The report provides arguments of a legal nature which lead to a critical approach to dolphinariums.

It stimulates examining in principle whether the facts alleged by a dolphinarium operator correspond to the truth and whether the prerequisites needed for granting or extending a possible licence for a dolphinarium are satisfied. When newly assessing a dolphinarium from the viewpoint of animal protection law one must examine amongst other things whether one is dealing with a pure amusement operation where the aims of species conservation, research and education are not or merely superficially pursued. Then animal protection requirements would need to be adhered to even more strictly. Are the individuals who are called on to assess the appropriateness to the animals of the dolphinarium, the behaviour and the health of the dolphins and the sound and light situation qualified and unbiased? Are licences of a legal animal protection nature in place?

Are the animals not overtaxed by the period during which they are subject to the gaze of and other annoyances by people? Are the dolphins sufficiently protected by construction measures against noise and irritating sounds, namely by music and the vibrations associated with it, possible echoes and the circulation pump? Are provisions of a building-code nature to protect people against electricity or panic adhered to? What opportunities for participation do organisations or experts in animal protection have available during preparation of a decision, when investigating and possibly challenging it through appeal procedure and monitoring keeping dolphins and can they be expanded if necessary?

By thoroughly elaborating the answer to these urgent legal questions about a dolphinarium the chances of success for public work and for constructive co-operation with the authorities responsible for animal protection could be increased and contribute to improved protection of dolphins against humans.

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2. Legal sources:

2.1. Federal decrees

- Animal Protection Law (APL) dated 9. March 1978; SR 455
- Animal Protection Law (APL) dated 27. May 1981; SR 455.1
- Species Protection Decree (SPD) dated 19. August 1981; SR 453
- Monitoring decree within the framework of the Species Protection Convention dated 16. June 1975; SR 453.1

2.2. Cantonal regulatory decrees

- Thurgau: Government Council Decree on federal legislation on animal protection (Animal Protection Decree) dated 17. May 1983, version dated 12. May 1992

2.3. International agreements and decrees

- (EC) Decree no. 338/97 of the Council dated 9. December 1996 on the protection of specimens of wild animal and plant species by monitoring trade (file L 61 dated 3.3.1997; most recently amended by EC Decree no. 2724/2000 by the Commission (file L 320/1 dated 18.12.2000)
- Directive 79/409/EEC by the Council dated 2. April 1979 on the conservation of wild bird species (file L 103 dated 25.4.1979, p. 1. Directive most recently amended by Directive 97/49/EC (file L 223 dated 13.8.1997, p. 9)
- Directive 92/43/EEC of the Council dated 21. May 1992 for the conservation of natural habitats and wild animals and plants (file L 206 dated 22.7.1992, p. 7. Directive most recently amended by Directive 97/62/EC Commission (file L 395 dated 8.11.1997, p. 42)
- Directive by Council dated 29. March 1999 on the keeping of wild animals in zoos (1999/22/EC; file no. L 094 dated 9.4.1999, p. 0024 – 0026)
- Agreement on trade in endangered species of wild animals and plants dated 3. March 1973 (Washington Species Protection Agreement CITES (Convention on International Trade of Endangered Species) SR 0.453
- Zoo Directive (1999): Council Directive dated 29. March 1999 on the keeping of wild animals in zoos (1999/22/EC);
- Convention on the conservation of European wild plants and animals and their natural environment dated 19. September 1979 ("Bern Convention").