

THE IMPACT OF ARTICLE 13 TFEU ON THE FREE MOVEMENT OF ANIMALS AND ANIMAL PRODUCTS

Word count: 52.128

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A dissertation submitted to Ghent University in partial fulfilment of the requirements for the degree of Master of Laws

Academic year: 2022 – 2023

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Justine Coudron
May 2023

*“The greatness of a nation and its moral progress can be judged
by the way its animals are treated” – M. Gandhi*

ABSTRACT

This dissertation finds that prior to the introduction of the Lisbon Treaty, animal welfare protection only enjoyed little support from EU internal market law. Whereas a certain degree of leniency was used to allow Member States to protect the welfare of wild animals, this was not the case for farm animal welfare, due to the effects of such national measures on the common organisation of the markets in agricultural products.

As of 2023, the EU has harmonized animal welfare standards to a significant extent, especially in the field of farm animal welfare. Nevertheless, this dissertation finds that there are still multiple lacunae and unaddressed issues in this legal framework. This makes it still desirable for Member States to adopt more stringent measures to improve the protection of animals. However, most harmonization measures preclude the extraterritorial effects of these measures on other Member States, as this would restrict the internal market.

The introduction of Article 13 TFEU raised the question of whether the provision upgraded the status of animal welfare protection, but this dissertation finds that this is most likely not the case. Consequently, the role of animal welfare will most likely not increase in the proportionality assessment of actions for annulment or the justification of restrictions on the internal market. Nevertheless, Article 13 TFEU does have an influence on the interpretation of EU law and has been used multiple times already by the Court of Justice to interpret secondary EU law in an animal-friendly manner.

Lastly, Article 13 TFEU did not alter the procedure to harmonize under Article 114 TFEU. Consequently, the EU legislator is prevented from proactively regulating animal welfare protection in the internal market. Instead, the EU legislator must wait for the Member States to act before animal welfare standards can be adopted under Article 114 TFEU.

In conclusion, this dissertation finds that Article 13 TFEU only impacts the interpretation of EU law relevant to the free movement of animals and animal products. The provision fails to address the main issues of the EU's animal welfare policy.

SAMENVATTING

Deze thesis stelt vast dat dierenwelzijnsbescherming voor de invoering van het Verdrag van Lissabon op weinig bijval kon rekenen van het EU interne-marktrecht. Alhoewel voor het beschermen van het welzijn van wilde dieren een zekere flexibiliteit werd gehanteerd in het bepalen van de overgebleven ruimte om nationale maatregelen aan te nemen, was dit voor het beschermen van landbouwdieren niet aan de orde vanwege het effect van dergelijke maatregelen op de gemeenschappelijke ordening van de markten voor landbouwproducten.

De EU heeft een uitgebreid aantal dierenwelzijnsstandaarden aangenomen, voornamelijk in het kader van de bescherming van landbouwdieren. Deze thesis stelt echter vast dat deze standaarden meerdere lacunae en onopgeloste problemen bevatten. Hierdoor is het nog steeds wenselijk voor de lidstaten om individuele maatregelen te nemen om dieren beter te beschermen. De meeste geharmoniseerde standaarden verbieden echter de extra-territoriale toepassing van deze nationale standaarden, aangezien dit de werking van de interne markt zou verhinderen.

Bij de inwerkingtreding van Artikel 13 VWEU rees de vraag of deze bepaling de status van dierenwelzijn zou bevorderen, maar deze thesis stelt vast dat dit hoogstwaarschijnlijk niet het geval is. Bijgevolg zal dierenwelzijn waarschijnlijk geen grotere rol innemen in de proportionaliteitstoets bij het aanvechten van secundair Unierecht, of bij het rechtvaardigen van belemmeringen op de interne markt. Artikel 13 VWEU heeft echter wel een invloed op het interpreteren van het Unierecht, en werd al meermaals gebruikt door het Hof van Justitie om secundair Unierecht op een diervriendelijke manier te interpreteren.

Ten slotte brengt Artikel 13 VWEU geen wijzigingen aan de procedure tot harmonisatie onder Artikel 114 VWEU. Bijgevolg kan de EU-wetgever niet proactief optreden om het welzijn van dieren te reguleren in de interne markt. In plaats daarvan moet de wetgever wachten tot de lidstaten unilateraal optreden vooraleer deze bepalingen geharmoniseerd kunnen worden.

Ter conclusie stelt deze thesis vast dat Artikel 13 VWEU slechts een impact heeft op de interpretatie van het Unierecht in het kader van het vrij verkeer van dieren en dierlijke producten. De bepaling slaagt er niet in de belangrijkste problemen van het Europees dierenwelzijnsbeleid aan te kaarten en te remediëren.

ACKNOWLEDGEMENTS

This dissertation marks the end of five challenging, yet very rewarding years at Ghent University. My time here would not have been so memorable without the people who were by my side. To them, I would like to express my gratitude.

First of all, I would like to thank Professor Dr. Inge Govaere, not only for allowing me to combine my interest in European law and animal welfare protection in this dissertation and providing me with help where needed, but also for passing onto me her passion for EU law in the first place. I also want to thank Ms. Leen Goossens for her feedback on this dissertation.

I also want to thank my fellow ELMC-teammates: Bruce, Jana, Madeline, and Robbe. Combining a moot court and a dissertation proved to be quite a challenge, but the fun we had both during and after the ELMC made it more than worth it. I would also like to thank our coaches: Febe, Jarne, Matthias, and Zuzanna, for all that they have taught us.

Besides, I would like to thank Kelly for being her happy self and always cheering me up when I needed it the most, not the least during the covid pandemic. I will forever cherish our countless pasta-dates outside along the Leie, no matter the weather, where we could talk for hours on end.

I also want to thank Jonas as I could always count on him during the past five years, whether that was for help when studying, for a unique song recommendation, or just to have a good laugh when I needed it.

Lastly, a special thanks goes to my parents for always supporting me in any possible way, and undoubtedly continuing to do so in the future.

Justine Coudron
Ghent, 15 May 2023

LIST OF ABBREVIATIONS

Animal Health Law	Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health, <i>OJ L 84</i> , 31 March 2016, 1-208.
Animal Transport Regulation	Council Regulation (EC) No. 1/2005 of 22 December 2004 on the protection of animals during transport and related operations, <i>OJ L 3</i> , 5 January 2005, 1-44.
Birds Directive	Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, <i>OJ L 103</i> , 25 April 1979, 1-18.
Brambell Report	Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems Presented to Parliament by the Secretary of State for Scotland and the Minister of Agriculture, Fisheries and Food by Command of Her Majesty, December 1965, accessed 25 April 2023 at < https://edepot.wur.nl/134379 >.
Broilers Directive	Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, <i>OJ L 182</i> , 12 July 2007, 19-28.
Calves Directive	Council Directive 2008/199/EC of 18 December 2008 laying down minimum standards for the protection of calves, <i>OJ L 10</i> , 15 January 2009, 7-13.
CAP	Common Agricultural Policy

Cat and Dog Fur Regulation	Regulation (EC) No. 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, <i>OJ L 343</i> , 27 December 2007, 1-4.
Charter	Charter of Fundamental Rights of the European Union, <i>OJ C 326</i> , 26 October 2012, 391-407.
Court of Justice/Court	Court of Justice of the European Union
Declaration No. 24	Declaration No. 24 on the Protection of Animals, <i>OJ C 191</i> , 29 July 1992, 103.
ECHR	Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.
ECtHR	European Court on Human Rights
EU/Union	European Union
Farm Animals Directive	Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, <i>OJ L 221</i> , 8 August 1998, 23-27.
GATT	WTO, General Agreement on Tariffs & Trade 1994, 1867 United Nations Treaty Series, 190, 33 I.L.M. 1153, 1994.
General Court	General Court of the European Union

GMO	Genetically modified organism
Laboratory Animals Directive	Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, <i>OJ L</i> 276, 20 October 2010, 33-79.
Laying Hens Directive	Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, <i>OJ L</i> 203, 3 August 1999, 53-57.
Leghold Trap Regulation	Council Regulation (EEC) No. 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, <i>OJ L</i> 308, 9 November 1991, 1-4.
Official Controls Regulation	Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, <i>OJ L</i> 95, 7 April 2017, 1-142.
Pigs Directive	Council Directive 2009/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs, <i>OJ L</i> 47, 18 February 2009, 5-13.

Protocol No. 33	Protocol No. 33 on the Protection and the Welfare of Animals, <i>OJ C 321 E</i> , 29 December 2006, 314.
Seal Products Regulation	Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, <i>OJ L 286</i> , 31 October 2009, 36-39.
Slaughter Directive	Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, <i>OJ L 316</i> , 26 November 1974, 10-11.
Slaughter Regulation	Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, <i>OJ L 303</i> , 18 November 2009, 1-30.
TEU	Consolidated version of the Treaty on European Union, <i>OJ C 326</i> , 26 October 2012, 13-390.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union, <i>OJ C 326</i> , 26 October 2012, 47-390.
UK	United Kingdom
Wildlife Trade Regulation	Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, <i>OJ L 61</i> , 3 March 1997, 1-69.
WTO	World Trade Organization

TABLE OF CONTENTS

ABSTRACT	I
SAMENVATTING.....	II
ACKNOWLEDGEMENTS	III
LIST OF ABBREVIATIONS.....	IV
TABLE OF CONTENTS	VIII
INTRODUCTION.....	1
Chapter 1: Social and legal context.....	1
Chapter 2: Problem statement	4
Chapter 3: Research questions	4
Chapter 4: Relevance	5
Chapter 5: Demarcation	6
PART 1: THE CONCEPT OF ANIMAL WELFARE.....	7
Chapter 1: Animal welfare: <i>quid?</i>	7
§1: An animal welfare definition?.....	7
§2: What animal welfare is <i>not</i>	9
2.1: Animal health <i>sensu stricto</i>	9
2.2: Species protection through biodiversity law	10
2.3: Fundamental animal rights	11
Chapter 2: Assessing the well-being of animals: the ‘five freedoms’ of animal welfare	12
Chapter 3: Animal welfare: the protection of the physical and mental well-being of an individual animal	15
PART 2: THE FREE MOVEMENT OF ANIMALS AND ANIMAL PRODUCTS PRE-LISBON	17
Chapter 1: Harmonization of animal welfare standards pre-Lisbon.....	18
Chapter 2: Animal welfare as a justification for restrictions of the free movement of animals and animal products	20
§1: Animal welfare as a justifiable objective for limitations of the free movement of goods	21
1.1: Health and life of animals	21
1.2: Public morality	23
§2: The proportionality of national animal welfare measures	24
§3: Exhaustive harmonization in the field of animal welfare	25
3.1: Exhaustive harmonization: <i>quid?</i>	26
3.2: Harmonization in the context of animal welfare	27
3.2.1: Farm animal welfare: exhaustive harmonization as the norm	27
3.2.2: Welfare of wild animals: a shift to minimum harmonization	30

3.3: An <i>overly</i> extensive interpretation of exhaustive harmonization pre-Amsterdam?	31
3.3.1: Exhaustive harmonization and the absence of monitoring compliance	32
3.3.2: Exhaustive harmonization and the common organization of the market in agricultural products	33
3.3.3: The extraterritorial protection of wild animals	34
3.4: Protocol No. 33: a new approach?	35
Chapter 3: The free movement of animals and animal products pre-Lisbon: hampering the advancement of animal welfare protection within the Union	37
PART 3: THE FREE MOVEMENT OF ANIMALS AND ANIMAL PRODUCTS POST-LISBON	39
Chapter 1: The animal welfare <i>acquis</i>	39
§1: Article 13 TFEU: a constitutional basis for animal welfare enhancement	40
1.1: Content and limitations of Article 13 TFEU	40
1.2: An animal welfare integration clause	42
§2: Relevant secondary law on animal welfare protection	43
2.1: The protection of farm animal welfare	43
2.1.1: Minimum standards on livestock husbandry	43
2.1.2: Minimum standards on the slaughter of animals	45
2.1.3: Minimum standards on the transportation of living animals	47
2.2: The protection of the welfare of wild animals	47
2.2.1: The ban on leghold traps	47
2.2.2: The ban on seal products	48
2.3: The protection of the welfare of companion animals	50
2.4: Current weaknesses of the EU's animal welfare <i>acquis</i>	51
2.5: A limited scope for Member States to adopt national animal welfare laws	54
§3: Limitations to animal welfare measures by fundamental human rights	57
3.1: The freedom of religion and the ritual slaughter of animals	57
3.2: The right to property and the prohibition of cruel farming practices	60
§4: No role for Article 13 TFEU in the animal welfare <i>acquis</i>	64
Chapter 2: The status of animal welfare in the EU legal order: public interest or general principle of EU law?	65
§1: General principles of EU law: <i>quid?</i>	65
1.1: The characteristics of general principles of EU law	65
1.2: Determination of general principles of EU law	68
1.3: The influence of general principles on primary and secondary EU law	70
1.4: General principles and the justification of internal market barriers	71
§2: Animal welfare: public interest or general principle of EU law?	72
2.1: <i>Jippes</i> : animal welfare as a public interest	73
2.2: Animal welfare <i>anno</i> 2023: a general principle of EU law?	75
2.2.1: The <i>Jippes</i> -criteria <i>anno</i> 2023	75
2.2.2: Article 13 TFEU as an alternative for a general principle of EU law?	79
2.2.3: Centraal Israëlitisch Consistorie van België: a change of mind?	84
§3: The dubious status of animal welfare in EU law <i>anno</i> 2023	87

Chapter 3: The consequences of Article 13 TFEU on the adoption of secondary law harmonizing animal welfare protection.....	88
§1: Internal market harmonization pre-Lisbon: the <i>Tobacco Advertising</i> -test.....	89
1.1: Limitations to internal market harmonization: <i>Tobacco Advertising</i>	89
1.2: <i>Tobacco Advertising</i> as a ‘drafting guide’ to adopt harmonization measures.....	91
§2: The role of integration clauses in internal market harmonization post-Lisbon.....	93
2.1: Internal market harmonization in theory: a bigger role for non-market aims	93
2.2: Internal market harmonization in practice: <i>Tobacco Advertising</i> in continuation ...	95
§3: Potential animal welfare initiatives under Article 114 TFEU	96
3.1: An EU-wide ban on fur farming	96
3.2: A horizontal Animal Welfare Framework Law	99
§4: The missed potential of animal welfare protection under Article 114 TFEU	101
CONCLUSION.....	103
BIBLIOGRAPHY	106
Legislation.....	106
Primary law	106
Secondary law.....	106
International agreements	108
National legislation	109
Case law.....	109
Judgments of the Court of Justice.....	109
Judgments of the General Court.....	111
Opinions of the Advocates General	111
Judgments of international courts and judicial bodies	111
Judgments of national courts	112
Doctrine	112
Books	112
Contributions to edited books	113
Journal articles.....	116
Blogposts.....	118
Doctoral theses	118
Documents of the EU institutions	119
European Commission	119
European Parliament	119
Websites	120
Other sources.....	121

INTRODUCTION

Chapter 1: Social and legal context

In 1964, animal welfare activist Ruth Harrison published her world-famous book *Animal Machines*, in which she exposed the brutal reality of animals kept in factory farms.¹ On these farms, the reduction of production costs and economic profitability were prominently put at the forefront, at the expense of the well-being of the animals that were reared in these farms.² They were kept on the smallest possible surfaces to reduce land costs, were fed innutritious diets to optimize the production of meat and other animal-derived products, and were selectively bred to create the most productive yet unnatural animal breeds.³ Shocked by Ruth Harrison's revelations,⁴ animal welfare activists started grouping together to advocate for change.⁵ Since then, animal welfare awareness has risen more than ever before.⁶ Not only veterinary researchers start focusing on the study of the cognitive and behavioural characteristics of animals,⁷ but so did academics from other disciplines. Moral philosophers, such as Peter Singer and Tom Regan, opened the debate on animal rights in the 1970s,⁸ which was later met by top law schools such as Harvard University Law School incorporating the topics of animal welfare and animal rights into their curriculum.⁹

This, in turn, also sparked a legislative evolution. All over the world, legal systems adapted to this movement to better accommodate the idea that animals are living, sentient beings.¹⁰ For example, various countries started distinguishing animals from non-living objects in national property law to stress that animals are living beings with consciousness and feelings.¹¹ Or, in

¹ N. K. PEDERSEN, "Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn", Animal Legal and Historical Center, 2009, accessed 23 April 2023 at < <https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn>>.

² G. MATHENY and C. LEAHY, "Farm-animal welfare, legislation and trade", *Law and contemporary problems*, 2007, Vol. 70(1), 328.

³ *Ibid*, 327-328.

⁴ B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 9.

⁵ G. L. FRANCIONE, "Animal rights and animal welfare", *Ruthers Law Review*, 1996, Vol. 48(2), 397.

⁶ J. WELTY, "Animal law: thinking about the future", *Law and contemporary problems*, 2007, Vol. 70(1), 2.

⁷ A. KNIGHT, C. PHILLIPS and P. SPARKS, *Routledge Handbook of Animal Welfare*, New York, Routledge, 2023, xxiv.

⁸ P. SINGER, *Animal Liberation: the definitive classic of the animal movement*, Glasgow, HarperCollins, 1975; T. REGAN, *The Case for Animal Rights*, Berkeley, University of California Press, 1985.

⁹ J. WELTY, "Animal law: thinking about the future", *Law and contemporary problems*, 2007, Vol. 70(1), 1.

¹⁰ G. FUTHAZAR, "Biodiversity, Species Protection, and Animal Welfare Under International Law" in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 97.

¹¹ B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law*, 2017, Vol. 3, 551.

relation to national family law, certain countries adopted legislation on the custody of pets when its owners file for divorce, requiring judges to take into account ‘the best interests of the animal’ when ruling on the matter.¹² A handful of countries went even further, having introduced constitutional clauses on the protection of animal welfare.¹³ Although these clauses do not go as far as to grant animals fundamental rights, they do recognize the duty of the state to respect the welfare requirements of animals in its policies.¹⁴

The increasing attention to animal welfare did not escape the European Union (‘EU/Union’). As EU citizens became more and more concerned about the mistreatment of animals and started expressing their support to improve animal well-being,¹⁵ the EU legislator began to act on the matter. This started with initiatives on the protection of the welfare of farm animals,¹⁶ and quickly the question was raised whether the EU should also incorporate a ‘constitutional’ animal welfare clause in the Treaties. This idea initially failed,¹⁷ but instead, the Member States agreed to adopt Declaration No. 24 on the Protection of Animals (‘Declaration No. 24’),¹⁸ attached to the Treaty of Maastricht. Although Declaration No. 24 was not legally binding, its adoption was considered as a political gesture indicating the willingness of the Member States to improve animal welfare standards in the EU.¹⁹ With the Treaty of Amsterdam, Member States agreed to go one step further by including an amended version of Declaration No. 24 in the newly introduced Protocol No. 33 on the Protection and the Welfare of Animals²⁰ (‘Protocol No. 33’). Herewith, animal welfare protection became a

¹² E. VERNIERS, *Towards new legal instruments for animal welfare*, doctoral thesis in law (not published), Ghent University, 2022, 230, accessed 1 February 2023 at <<https://lib.ugent.be/en/catalog/pug01:01GK17A0VG0QB944VN283M9YZ8?i=0&q=Elieen+Verniers&type=phd>>.

¹³ E. VERNIERS, “Animal constitutionalism: paving the way for animal inclusion in the Belgian constitution”, *Global Journal of Animal Law*, 2022, Vol. 10(1), 1-2.

¹⁴ *Ibid*, 3.

¹⁵ European Commission, “Study to support the evaluation of the European Union strategy for the protection and welfare of animals 2012-2015: executive summary”, October 2020, 2; Special Eurobarometer 442, “Attitudes of Europeans towards Animal Welfare”, March 2016, 9. 94% of Europeans state the importance of the protection of the welfare of farmed animals, and 82% of Europeans is of the opinion that the level of protection of the welfare of farmed animals should increase.

¹⁶ See Part 2, Chapter 1 at page 18 for a brief overview of the Union’s first animal welfare directives.

¹⁷ In both 1984 and 1991, the European Parliament proposed to include animal welfare protection in the body of the Treaties as an objective of the environmental policy and the common agricultural policy. At the same time, the German government proposed to include the protection of farm animals and laboratory animals in the Treaties as an objective of the Union. See K. SOWERY, “Sentient beings and tradable products: the curious constitutional status of animals under Union law”, *Common Market Law Review*, 2018, 66.

¹⁸ Declaration No. 24 on the Protection of Animals, 29 July 1992, *OJ C* 191, 103.

¹⁹ D. RYLAND and A. NURSE, “Mainstreaming after Lisbon: Advancing animal welfare in the internal market”, *European Energy and Environmental Law Review*, 2013, 101.

²⁰ Protocol No. 33 on the Protection and the Welfare of Animals, 29 December 2006, *OJ C* 321 E, 314.

binding provision of primary Union law.²¹ Additionally, contrary to Declaration No. 24, Protocol No. 33 recognized animals as sentient beings. This was considered to be a fundamental shift in how we should think about animals and their well-being.²² When the Lisbon Treaty was being negotiated, there was little discussion among the Member States to incorporate the text of Protocol No. 33 into the actual body of the Treaties.²³ This would become Article 13 of the Treaty on the Functioning of the European Union²⁴ ('TFEU'), the Union's own 'constitutional' animal welfare clause. Similar to the national constitutional clauses, Article 13 TFEU stipulates that the EU institutions as well as the Member States shall (read: must) pay full regard to animal welfare when formulating and implementing certain Union policies.

Despite this positive trend of growing awareness about animal welfare, the use of animals in the economic process keeps posing threats to the protection of the welfare of animals subjected thereto.²⁵ That is because, in these processes, the economic interests at stake generally take the upper hand over the interests of the animals.²⁶ Nations all over the world are adopting legislation to try to remedy this problem to a certain extent, but EU Member States are faced with a particular problem when doing so: EU internal market law. Both animals²⁷ and animal products²⁸ qualify as 'goods' within free movement law, agricultural goods to be more precise,²⁹ meaning that they are subjected to the rules on the free movement of goods within the EU. As the prohibitions of measures having equivalent effect as import or export restrictions, enshrined in Articles 34 and 35 TFEU, are interpreted broadly,³⁰ national legislation on animal welfare is easily caught by this prohibition.³¹

²¹ Article 51 TEU.

²² K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 56.

²³ *Ibid*, 67.

²⁴ Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26 October 2012, 47-390.

²⁵ A. PETERS, *Animals in International Law*, Leiden, Brill Nijhoff, 2021, 195.

²⁶ *Ibid*, 217.

²⁷ This includes living as well as dead animals. For living animals, see judgment of 3 December 2015, *Pfotenhilfe-Ungarn*, C-301/14, EU:C:2015:793, §47. For dead animals, see judgment of 23 May 1990, *Van den Burg*, C-169/89, EU:C:1990:227.

²⁸ Judgment of 10 December 1968, *Commission v Italy*, C-7/68, EU:C:1968:51, 428.

²⁹ T. ERNIQUIN, "Les animaux vivants et la libre circulation: un status de marchandises sensibles", *Revue des affaires européennes*, 2017, vol. 1, 49.

³⁰ K. LENAERTS and P. VAN NUFFEL, *Europees recht*, 7th edition, 2023, Antwerp, Intersentia, 157.

³¹ T. VAN LAER, "The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?", *ELNI Review*, 2011, vol. 1, 37.

Consequently, EU Member States and other actors disadvantaged by these national rules can challenge them before national courts or the Court of Justice of the European Union ('Court of Justice/Court'). These cases demonstrate the tension between economic interests and the interests of animals: will preference be given to free trade within the Union, or could animal welfare concerns pose certain limits thereto?

Chapter 2: Problem statement

As stated above, the wording of Article 13 TFEU flows from that of its predecessor, Protocol No. 33. Nevertheless, some legal scholars argue that the treaty provision will portray a bigger role in EU law than Protocol No. 33 did. If Article 13 TFEU would indeed have a larger impact than its predecessor, there may be consequences for the free movement of animals and animal products within the EU internal market. However, these potential consequences had not been examined yet. It was thus unclear if, and to what extent, the Union's internal market policy has adapted a more animal-friendly approach since the introduction of the Lisbon Treaty. This was problematic, as it adversely affected the legal certainty of Member States who wanted to adopt national animal welfare laws. Additionally, because of the lack of research, little transparency was offered to EU citizens who, over the years, attached more and more importance to animal welfare protection.

Chapter 3: Research questions

This dissertation will examine how economic interests and the interests of animals are balanced within the framework of the free movement of goods since the entry into force of the Lisbon Treaty. More specifically, the following research question will be answered: *"What is the impact of Article 13 TFEU on the free movement of animals and animal products?"*

To answer this research question, five sub-questions will be answered:

1. What is animal welfare, and how can the well-being of an animal be measured?
2. How was the free movement of animals and animal products regulated prior to the entry into force of the Lisbon Treaty?
3. What animal welfare standards are today applicable in the EU, how much scope do they leave to the Member States to adopt more stringent national measures, and how do fundamental rights affect the possibility to regulate animal welfare matters?

4. What is the difference between 'general principles of the EU' and 'public interests' for the functioning of the internal market, and which of both is animal welfare protection since the entry into force of Article 13 TFEU?
5. What is the role of the integration clauses, particularly Article 13 TFEU, in the adoption of secondary EU law under the internal market policy post-Lisbon?

Chapter 4: Relevance

EU citizens attach more and more importance to animal welfare protection. As such, they expect the law to evolve accordingly to limit the suffering of animals as much as possible. When national legislators want to react and adopt animal welfare laws, it is crucial for them to know how much leeway EU law offers them when doing so, as Member States do not want to risk a condemnation by the Court of Justice. In this respect, the answer to the main research question has a double relevance. Firstly, it will frame to what extent national legislators can adopt stricter animal welfare laws without infringing the law of the free movement of goods. Secondly, it will frame the minimum level of protection that should be offered by the national animal welfare laws to be in accordance with EU law, and to prevent that other Member States could restrict the free movement of animals and animal products vis-à-vis the respective Member State. Additionally, this dissertation will offer more clarity to EU citizens as to what extent the Union meets the desire of the general public to protect the well-being of animals.

This dissertation also aims to fill a gap at the doctrinal level. The impact of Article 13 TFEU on the internal market policy had only been researched to a limited extent. The main research question aims to illustrate the impact of Article 13 TFEU on the free movement of goods, more specifically on the free movement of animals and animal products. The principles identified in this dissertation will also be relevant to further research on the impact of Article 13 on other aspects of free movement law. Furthermore, this dissertation will also clarify the importance of Article 13 TFEU as an integration clause. As such, the findings of this dissertation may also be relevant to further research on the impact of Article 13 TFEU in other Union policies.

Chapter 5: Demarcation

Article 13 TFEU is applicable to multiple Union policies. However, it is impossible to examine its impact on all of these policies within the time frame of this dissertation. Therefore, this dissertation will be limited to the impact of Article 13 TFEU on the internal market policy. Nevertheless, the agricultural policy and transport policy may occasionally be introduced in case of overlap or interface with the internal market policy.

Moreover, this dissertation will focus on trade within the EU internal market. International developments may occasionally be addressed, but will not as such form the subject of this dissertation. Within the EU internal market, this dissertation will be limited to the free movement of goods, more specifically the free movement of animals and animal products, as in the past, the majority of the case law of the Court of Justice on animal welfare matters concerned goods of both of these categories.

PART 1: THE CONCEPT OF ANIMAL WELFARE

If you were to ask a group of people if they know what animal welfare is, most of them – if not all – would answer in the affirmative. Animal welfare aims to prevent animals from being in pain or being mistreated. However, people tend to have very different views on what precise situations fall under the animal welfare theory, and what situations do not.³² Should we prevent the lion in the wild from hunting down the gazelle, so the latter does not die in pain? Do you impair the welfare of the bee population in your garden if you remove your flower beds, in an effort to chase these bees away? Does animal welfare protection mean that all human beings should adopt a vegetarian lifestyle, so farm animals get a chance to live instead of being killed for their flesh? Opinions on these questions will differ, depending on what animal protection theory a person supports. Therefore, it is necessary to first conceptualize what will be understood as being part of animal welfare in this dissertation (**Chapter 1**). This will then be followed by an explanation of how the well-being of animals will be assessed throughout this dissertation via the so-called ‘five freedoms of animal welfare’ (**Chapter 2**).

Chapter 1: Animal welfare: *quid*?

The European Union has enforced numerous acts on the protection of animal welfare. However, none of them provides a definition of what exactly should be understood as being part of the welfare of animals. Therefore, it is essential to first examine what animal welfare is (**§1**), and what it is not (**§2**).

§1: An animal welfare definition?

In the aftermath of Ruth Harrison’s *Animal Machines*, the British government set up an animal welfare committee to delve into the revelations made in the book, and to examine how farm animals were treated in the United Kingdom (‘UK’).³³ The results of this study were published in the Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems³⁴ (‘Brambell Report’) of 1965. In the Brambell Report,

³² E. TYSON, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals*, Palgrave Macmillan, 2021, 31.

³³ G. MATHENY and C. LEAHY, “Farm-animal welfare, legislation and trade”, *Law and contemporary problems*, 2007, Vol. 70(1), 341.

³⁴ Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems Presented to Parliament by the Secretary of State for Scotland and the Minister of

the animal welfare committee attempted for the first time to define the concept of animal welfare, stating that “[it] is a wide term that embraces both the physical and mental well-being of the animal”.³⁵ Additionally, the Brambell Report clarified that animal welfare can only be evaluated via scientific research on the feelings of animals as derived from their structure, functions, and behaviour.³⁶ In 2019, the World Organisation for Animal Health adopted a very similar definition in its Terrestrial Animal Health Code³⁷, defining animal welfare as “the physical and mental state of an animal in relation to the conditions in which it lives and dies”.³⁸ This latter definition is nowadays considered to be the most widely accepted one.³⁹ Nevertheless, the definitions of both the Brambell Report and the Terrestrial Animal Health Code are rather vague, requiring further explanations to concretise the concept of animal welfare.

Animals live in an environment that is heavily subjected to changes caused by human behaviour.⁴⁰ This environment impacts the quality of life of animals subjected to it.⁴¹ In this regard, scientific researchers explain that animal welfare focusses on the ability of an animal to cope with the environment in which it finds itself.⁴² As such, the concept of animal welfare essentially covers human-animal relations.⁴³ Consequently, animal welfare motives do not go so far as to prevent the natural predator-prey interaction between wild animals, despite the negative consequences for the prey.⁴⁴ Instead, animal welfare protection aims to prevent humans from engaging in activities that would cause unnecessary suffering to animals.⁴⁵ When studying animal welfare, scientists will assess the positive and negative impacts of the

Agriculture, Fisheries and Food by Command of Her Majesty, December 1965, accessed 25 April 2023 at < <https://edepot.wur.nl/134379>>.

³⁵ §25 of the Brambell Report.

³⁶ §25 of the Brambell Report.

³⁷ World Organisation for Animal Health, Terrestrial Animal Health Code, 28th edition, 2019, accessed 25 April 2023 at < https://rr-europe.woah.org/wp-content/uploads/2020/08/oie-terrestrial-code-1_2019_en.pdf>.

³⁸ Article 7.1.1. paragraph 1 of the Terrestrial Animal Health Code.

³⁹ B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 4.

⁴⁰ G. FUTHAZAR, “Biodiversity, Species Protection, and Animal Welfare Under International Law” in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 96-97.

⁴¹ *Ibid.*

⁴² D. M. BROOM and K. G. JOHNSON, *Stress and Animal Welfare: Key Issues in the Biology of Humans and Other Animals*, 2nd edition, Springer, 2019, 2.

⁴³ G. FUTHAZAR, “Biodiversity, Species Protection, and Animal Welfare Under International Law” in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 96-97.

⁴⁴ *Ibid.*, 97.

⁴⁵ *Ibid.*

environment in which the animal finds itself and how the animal responds to these impacts.⁴⁶ Animal welfare is thus a measurable state,⁴⁷ which will range from ‘very poor’ to ‘very good’ depending on the state in which the animal finds itself at that specific point in time.⁴⁸

§2: What animal welfare is *not*

The definition of animal welfare set out above is still rather vague, leaving space for a multitude of different theories on what animal welfare is and what forms part of an animal’s well-being.⁴⁹ However, three branches of animal protection clearly fall outside of the scope of animal welfare, and will thus not be covered in this dissertation. These three branches are the safeguarding of animal health *sensu stricto* (2.1), the protection of species under biodiversity law (2.2), and the topic of fundamental animal rights (2.3).

2.1: Animal health *sensu stricto*

As will be explained below, the physical health of an animal is one of the aspect that must be taken into consideration when assessing its well-being.⁵⁰ If an animal is in bad health, its welfare could be poor.⁵¹ This link between both concepts is also recognized in the Terrestrial Animal Health Code, which states that “*there is a critical relationship between animal health and animal welfare*”.⁵² The EU legislator also follows this stance in Regulation 2016/429 on transmissible animal diseases⁵³ (‘Animal Health Law’), which regulates the prevention and control of animal diseases that are transmissible to humans or other animals.⁵⁴ Although the Animal Health Law states in its preamble that “[it] does not contain provisions which regulate

⁴⁶ B. V. BEAVER, *Veterinarian’s Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 3; D. B. BROOM, “Animal welfare concepts” in A. KNIGHT, C. PHILLIPS and P. SPARKS (eds.), *Routledge Handbook of Animal Welfare*, New York, Routledge, 2023, 14-15.

⁴⁷ L. LEONE, “Farm animal welfare under scrutiny: issues unsolved by the EU legislator”, *European journal of legal studies*, 2020, Vol. 12(1), 54.

⁴⁸ D. B. BROOM, “Animal welfare concepts” in A. KNIGHT, C. PHILLIPS and P. SPARKS, *Routledge Handbook of Animal Welfare*, New York, Routledge, 2023, 14.

⁴⁹ E. TYSON, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals*, Palgrave Macmillan, 2021, 31.

⁵⁰ B. V. BEAVER, *Veterinarian’s Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 6.

⁵¹ Scientific Committee on Animal Health and Animal Welfare, “The Welfare of Cattle kept for Beef production”, 25 April 2001, 8.

⁵² Article 7.1.2 of the Terrestrial Animal Health Code.

⁵³ Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health, *OJ L 84*, 31 March 2016, 1-208.

⁵⁴ Article 1(1) of the Animal Health Law.

animal welfare”,⁵⁵ it does recognize that animal health and animal welfare go hand in hand, as “*better animal health promotes better animal welfare, and vice versa*”.⁵⁶

However, both concepts are not necessarily interdependent. That is because the concept of animal welfare is broader than that of animal health, as it also includes the animal’s mental state.⁵⁷ Although scientific research on the mental health of animals is increasing, the concept of animal health is still considered to only encompass the *physical* health of animals,⁵⁸ thereby clearly distinguishing it from the concept of animal welfare, where the animal’s mental health *does* play a role.⁵⁹ Consequently, an animal that scores poorly on a welfare assessment will not necessarily score poorly on a health assessment as well, and vice versa.⁶⁰ For example, animals that experience a continuous boredom could be in a very poor mental state. This may result in abnormal behaviour, such as repetitive stereotypies,⁶¹ while their physical health nevertheless stays intact. However, if the abnormalities include self-destructive behaviour, then the physical health of the animal will be negatively affected.

2.2: Species protection through biodiversity law

Biodiversity law, which is one of the branches of environmental law, aims at the conservation and sustainable use of biodiversity.⁶² For the purpose of this branch of law, biodiversity is understood as “*the variability among living organisms from all sources [...] [including] diversity within species, between species and of ecosystems*”.⁶³ Thus, under biodiversity law, a state can take measures to ensure the conservation of wild animals and to prevent animal species from going extinct, for example through a prohibition on killing endangered species or to destruct their natural habitat.⁶⁴ These rules could undoubtedly have a positive impact on the welfare

⁵⁵ Recital 7 of the Animal Health Law.

⁵⁶ *Ibid*; See also Article 1(2)(b)(i) of the Animal Health Law.

⁵⁷ A. PETERS, *Animals in International Law*, Leiden, Brill Nijhoff, 2021, 289.

⁵⁸ B. NICKS and M. VANDENHEEDE, “Animal health and welfare: equivalent or complementary?”, *Revue Scientifique et Technique*, 2014, Vol. 33(1), 99.

⁵⁹ A. PETERS, *Animals in International Law*, Leiden, Brill Nijhoff, 2021, 286.

⁶⁰ B. V. BEAVER, *Veterinarian’s Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 6; see also Article 7.1.1. paragraph 2 of the Terrestrial Animal Health Code.

⁶¹ Examples of repetitive stereotypies include continuous pacing and rocking back and forth. For a detailed analysis on stereotypies and animal welfare, see G.J. MASON, “Stereotypies and suffering”, *Behavioural Processes*, 1991, Vol. 25, 103-115.

⁶² G. FUTHAZAR, “Biodiversity, Species Protection, and Animal Welfare Under International Law” in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 97.

⁶³ Article 2 of the Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79.

⁶⁴ G. FUTHAZAR, “Biodiversity, Species Protection, and Animal Welfare Under International Law” in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 102.

of wildlife, as certain conservation methods may simultaneously prevent harm from being done to the protected animals.⁶⁵ For example, a prohibition to hunt certain endangered animal species prevents these animals from suffering at the time of killing.

However, wildlife conservation and animal welfare have a different rationale. Firstly, under biodiversity law, the protection of certain wild animals aims to protect an entire species, to prevent this species from going extinct.⁶⁶ This approach focuses on the *group* of animals rather than the individual animals in that group. Animal welfare, on the other hand, aims to improve the quality of life of the *individual* animal.⁶⁷ Secondly, wildlife conservation only protects wild animals that are at risk of extinction, whereas animal welfare applies to all animals.⁶⁸ Consequently, wildlife protection under the protection of biodiversity and animal welfare protection are considered to be two separate concepts, despite their occasional overlap.⁶⁹

2.3: Fundamental animal rights

The question of whether or not animals should be granted certain fundamental rights has recently been a hot topic in the field of animal law. According to the animal rights theory, animals should receive rights similar to human rights,⁷⁰ which cannot simply be set aside for the benefit of human interests.⁷¹ This would especially be so when the interests of animals are weighed against mere economic interests.⁷² The latter would be precluded from prevailing if fundamental animal rights would exist.⁷³ TYSON illustrated the idea of the fundamental rights theory with the following example: if pigs were to have fundamental animal rights, they should not be raised in factory farms, and they should not be killed for their flesh.⁷⁴

⁶⁵ S. DUBOIS and D. FRASER, "Rating harms to wildlife: a survey showing convergence between conservation and animal welfare views", *Animal Welfare*, 2013, Vol. 22, 49.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*; D. M. BROOM and K. G. JOHNSON, *Stress and Animal Welfare: Key Issues in the Biology of Humans and Other Animals*, 2nd edition, Springer, 2019, 2.

⁶⁸ S. DUBOIS and D. FRASER, "Rating harms to wildlife: a survey showing convergence between conservation and animal welfare views", *Animal Welfare*, 2013, Vol. 22, 49.

⁶⁹ *Ibid.*

⁷⁰ E. TYSON, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals*, Palgrave Macmillan, 2021, 32.

⁷¹ A. PETERS, "Towards International Animal Rights" in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 111.

⁷² B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law*, 2017, Vol. 3, 573.

⁷³ *Ibid.*

⁷⁴ E. TYSON, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals*, Palgrave Macmillan, 2021, 32.

This approach differs significantly from the concept of animal welfare. The welfare theory defends that animals *can* be used for the benefit of human interests, for example to produce food, carry out experimentations, or for entertainment purposes.⁷⁵ This theory sees the interests of animals as just one of the interests, among several others, that should be weighed against each other, a practice in which human interests will generally prevail.⁷⁶ Nevertheless, the animal welfare theory does still offer a form of protection: it aims to prevent all unnecessary suffering of animals when they are being used for the human interest.⁷⁷ To demonstrate the difference with TYSON's illustration: under the animal welfare theory, pigs *can* be raised and killed for their flesh, as long as they were kept in favorable conditions and were slaughtered in a humane way, without unnecessary pain or suffering being caused to them.⁷⁸ As animal law stands today, it is the welfare theory, rather than the animal rights theory, that is the basis of animal welfare legislation.⁷⁹

Chapter 2: Assessing the well-being of animals: the 'five freedoms' of animal welfare

In an attempt to further conceptualize what animal welfare is and how it should be assessed, the Brambell Report introduced the so-called 'five freedoms' of animal welfare.⁸⁰ At the time, the five freedoms were defined as the ability of an animal to get up, lay down, turn around, groom itself, and stretch its limbs, without any difficulties.⁸¹ These freedoms primarily took into account the physical health of the animal and its ability to move around in a comfortable and unrestricted manner.⁸² However, as social perceptions and scientific research on animal welfare evolved, new parameters were included to introduce the mental state of the animal and other characteristics related thereto in the assessment of animal well-being.⁸³ This

⁷⁵ *Ibid*, 33.

⁷⁶ A. PETERS, "Towards International Animal Rights" in A. PETERS (ed.), *Studies in Global Animal Law*, SpringerOpen, 2020, 111.

⁷⁷ E. TYSON, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals*, Palgrave Macmillan, 2021, 33.

⁷⁸ *Ibid*, 35.

⁷⁹ *Ibid*, 36.

⁸⁰ D. M. BROOM and K. G. JOHNSON, *Stress and Animal Welfare: Key Issues in the Biology of Humans and Other Animals*, 2nd edition, Springer, 2019, 32.

⁸¹ §37 of the Brambell Report.

⁸² B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 4.

⁸³ *Ibid*.

eventually led to the updated five freedoms, adopted in 1979 by the Farm Animal Welfare Council. These new five freedoms entail:⁸⁴

1. **Freedom from hunger and thirst** by ready access to fresh water and a diet to maintain full health and vigour
2. **Freedom from discomfort** by providing an appropriate environment including shelter and a comfortable resting area
3. **Freedom from pain, injury or disease** by prevention or rapid diagnosis and treatment
4. **Freedom to express normal behaviour** by providing sufficient space, proper facilities, and company of the animal's own kind
5. **Freedom from fear and distress** by ensuring conditions and treatment which avoid mental suffering

The broader scope of animal welfare assessments is also recognized in the Terrestrial Animal Health Code of 2019, which refined its definition of animal welfare by adding that the mere fact of being in good health does not suffice for an animal to experience good welfare.⁸⁵ Besides the criterion of physical health, the Terrestrial Animal Health Code now states that the animal must also be comfortable, well-nourished and safe, it must be able to express behaviours that are important to its physical and mental state, and it must be free from fear and stress.⁸⁶

The first three freedoms build upon the initial idea of animal welfare being based on the physical health and the freedom to move. The freedom from hunger and thirst obliges not only to give animals access to fresh water and food, but also for the animal's diet to be sufficiently nutritious.⁸⁷ The freedom from discomfort includes the initial five freedoms of the Brambell Report on the ability of animals to move unrestrictedly, and the obligation to provide shelter and a comfortable (resting) area fit for the animal's needs.⁸⁸ Lastly, the freedom from

⁸⁴ Farm Animal Welfare Council, Press Statement of 5 December 1979, accessed 25 April 2023 at < https://web.archive.nationalarchives.gov.uk/ukgwa/20121010012428mp_/http://www.fawc.org.uk/pdf/fivefreedoms1979.pdf>; Farm Animal Welfare Council, "Five Freedoms", accessed 25 April 2023 at < <https://webarchive.nationalarchives.gov.uk/ukgwa/20121010012427/http://www.fawc.org.uk/freedoms.htm>>.

⁸⁵ Article 7.1.1. paragraph 2 of the Terrestrial Animal Health Code.

⁸⁶ *Ibid.*

⁸⁷ B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 7. The practice of feeding calves iron deficient diets to produce white meat is arguably contrary to the freedom from hunger and thirst, as it lacks sufficient nutrition.

⁸⁸ B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 10.

pain, injury or disease includes both the prevention and the rapid diagnosis and treatment of any diseases or injuries, as pain is a significant indicator of poor welfare.⁸⁹

The fourth and fifth freedoms, on the other hand, are novelties introduced by the Farm Animal Welfare Council. They both put a stronger emphasis on the mental and psychological needs of the animal. The freedom to express normal behaviour entails the possibility of the animal to carry out its natural and innate instincts. For example, pigs have a need to root in soil, birds show various types of nesting behaviour, and livestock have a need to seek social interaction with company of their own.⁹⁰ When these behavioural needs are not met, the animal could develop abnormal behaviour that adversely affects not only its own welfare,⁹¹ but also that of the animals in its surroundings by displaying aggressive behaviour or cannibalism.⁹² Lastly, the freedom from fear and distress aims to avoid mental suffering by providing the animal with proper treatment and proper living conditions.⁹³ Fear and stress in animals can be induced by a variety of factors, some of which there is little control over, such as pregnancy or cold, stormy weather.⁹⁴ Nevertheless, humans do have control over multiple other stress-inducing factors, such as the prevention and treatment of illnesses, the availability of water and food, and the good treatment of the animal.⁹⁵ These controllable factors should be reduced as much as possible in the benefit of the animal's welfare, as stress might trigger abnormal and aggressive behaviour and reduce the animal's fitness.⁹⁶

Originally, these freedoms were adopted to assess the well-being of farm animals specifically. However, nowadays these five freedoms are applied to all different kinds of animal husbandry, going beyond animals kept for agricultural purposes.⁹⁷ If these five freedoms are met in the situation of a specific animal, then it is considered that this animal's welfare has been provided

⁸⁹ *Ibid*; D. B. BROOM, "Animal welfare concepts" in A. KNIGHT, C. PHILLIPS and P. SPARKS, *Routledge Handbook of Animal Welfare*, New York, Routledge, 2023, 18.

⁹⁰ B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 7.

⁹¹ *Ibid*.

⁹² For example, some cattle may show aggressive behaviour when they are constraint. See Scientific Committee on Animal Health and Animal Welfare, "The Welfare of Cattle kept for Beef production", 25 April 2001, 11.

⁹³ B. V. BEAVER, *Veterinarian's Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 10.

⁹⁴ *Ibid*, 5.

⁹⁵ *Ibid*.

⁹⁶ D. B. BROOM, "Animal welfare concepts" in A. KNIGHT, C. PHILLIPS and P. SPARKS, *Routledge Handbook of Animal Welfare*, New York, Routledge, 2023, 16.

⁹⁷ I. VEISSER and R. BOTREAU, "Evaluation of animal welfare: the weight of words and the power of numbers" in S. HILD and L. SCHWEITZER (eds.), *Animal welfare: from Science to Law*, Paris, La Fondation Droit Animal, Ethique et Sciences, 2019, 33.

for.⁹⁸ However, it is generally recognized that it is near impossible for all of these freedoms to be fully attained at once.⁹⁹

Chapter 3: Animal welfare: the protection of the physical and mental well-being of an individual animal

In this dissertation, ‘animal welfare’ refers to a combination of the physical and mental health of an individual animal, influenced by its interactions with human beings. Therefore, situations relating to animal health *sensu stricto* and species protection fall outside of the scope of this dissertation and will thus not be assessed unless there is a clear overlap with the animal welfare theory. Additionally, the animal rights theory is distinct from the animal welfare theory, so this dissertation will only examine the EU’s animal welfare *acquis* in light of the latter theory through an assessment via the five freedoms of animal welfare. To illustrate what this exactly means, this dissertation is based on the idea that we should *not* stop the wild lion from hunting the gazelle, the mere removal of the habitat of your garden’s bee population does not fall under the animal welfare theory, and we should *not* all adopt a vegetarian lifestyle, but we should avoid all unnecessary suffering to animals that are being slaughtered for the production of food.

⁹⁸ E. TYSON, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals*, Palgrave Macmillan, 2021, 36.

⁹⁹ B. V. BEAVER, *Veterinarian’s Guide to Animal Welfare*, San Diego, Elsevier Science & Technology, 2022, 12.

PART 2: THE FREE MOVEMENT OF ANIMALS AND ANIMAL PRODUCTS PRE-LISBON

Despite the fact that animals are living beings, they are traditionally considered as goods from a legal perspective.¹⁰⁰ This is not different in the EU legal order, where the Treaties have always qualified animals as agricultural products,¹⁰¹ the free circulation of which should be ensured within the EU internal market.¹⁰² This was also confirmed by the Court of Justice, which qualified animals as goods within the framework of internal market law.¹⁰³ This means that intra-community trade in animals is governed by Articles 34 and 35 TFEU, which prohibit both import and export restrictions and measures having an equivalent effect thereto. As the latter has been interpreted broadly by the Court of Justice,¹⁰⁴ national laws protecting the welfare of animals are easily caught by this prohibition as soon as they may affect trade in animals or animal products with other Member States.¹⁰⁵ As a result, the compatibility of these national rules with EU law can be questioned before the Court of Justice by Member States and other actors that are disadvantaged by them. It is then up to the Member State that enacted these national rules to prove that they either don't restrict intra-community trade, or that the restrictions are justified under Article 36 TFEU or a mandatory requirement in the sense of the *Cassis de Dijon*¹⁰⁶ judgment.

A useful tool for the Union to ensure the smooth functioning of the internal market is the harmonization of national laws at EU level.¹⁰⁷ By doing so, the interests that could be invoked by the Member States in the justification of national measures restricting intra-community trade are dealt with at Union level.¹⁰⁸ Consequently, Member States cannot, in principle, invoke Article 36 TFEU or the mandatory requirements anymore to justify any national

¹⁰⁰ See Introduction at page 1.

¹⁰¹ Annex I to the TFEU, "List referred to in Article 38 of the Treaty on the Functioning of the European Union", *OJ C* 202, 7 June 2016, 331.

¹⁰² Article 38(2) TFEU.

¹⁰³ Judgment of 3 December 2015, *Pfotenhilfe-Ungarn*, C-301/14, EU:C:2015:793, §47.

¹⁰⁴ K. LENAERTS and P. VAN NUFFEL, *Europees recht*, 7th edition, 2023, Antwerp, Intersentia, 157.

¹⁰⁵ T. VAN LAER, "The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?", *ELNI Review*, 2011, vol. 1, 37.

¹⁰⁶ Judgment of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

¹⁰⁷ P. CRAIG and G. DE BURCA, *EU Law: Text, Cases, and Materials*, 7th edition, Oxford, Oxford University Press, 2020, 656.

¹⁰⁸ G. VAN CALSTER, "Export restrictions - a watershed for Article 30", *European Law Review*, 2000, Vol. 25, 341.

measures that go against the harmonized standards.¹⁰⁹ As national measures protecting animal welfare risked posing barriers on the internal market, the EU started harmonizing animal welfare standards in 1974 to prevent these limitations of free movement law.¹¹⁰

However, the Union's approach when regulating animal welfare matters prior to the introduction of the Treaty of Lisbon has been criticized from an animal welfare point of view. It has been argued that the EU undermined higher national animal welfare standards rather than using Article 36 TFEU to improve animal welfare protection within the Union.¹¹¹ This Part aims to clarify how animal welfare was regulated pre-Lisbon and to address the criticism that was given to this approach. Firstly, the harmonization of animal welfare standards within the EU will be discussed (**Chapter 1**). Secondly, it will be examined how the Court stood upon the justification of national animal welfare measures restricting the free movement of animals and animal products (**Chapter 2**). This will be followed by an interim conclusion on animal welfare within the free movement of animals and animal products pre-Lisbon (**Chapter 3**).

Chapter 1: Harmonization of animal welfare standards pre-Lisbon

Despite the absence of a specific legal basis in the Treaties to adopt animal welfare measures,¹¹² the EU has long been protecting the interests of animals. Without going into the details of these rules,¹¹³ this Chapter aims at clarifying the general nature of the EU's animal welfare *acquis* pre-Lisbon.

The Union's animal welfare approach prior to the Lisbon Treaty predominantly focused on farm animal welfare.¹¹⁴ Since 1974, several directives have been adopted on the rearing of

¹⁰⁹ P. CRAIG and G. DE BURCA, *EU Law: Text, Cases, and Materials*, 7th edition, Oxford, Oxford University Press, 2020, 654.

¹¹⁰ K. WAUTERS and J. VAN BELLE, "La compétence en matière de bien-être animal aux niveaux européen et national" in P. DELVAUX (ed.), *Le droit des animaux: Perspectives d'avenir*, Brussels, ELS Belgium, 2019, 190. The first animal welfare standards at Union level were adopted in Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, *OJ L* 316, 26 November 1974, 10-11.

¹¹¹ See for example R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, vol. 3, 365; J. BEQIRAJ, "Animal welfare", in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 137.

¹¹² R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, vol. 3, 382

¹¹³ For a more thorough assessment of the EU rules on animal welfare, see Part 3, Chapter 1, §2 at page 43.

¹¹⁴ R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, vol. 3, 382.

farm animals¹¹⁵ – with specific rules for the protection of pigs¹¹⁶, calves¹¹⁷ and chickens¹¹⁸ – animal transportation¹¹⁹ and the slaughtering of animals¹²⁰. However, the protection offered by these measures was often limited and only provided little support to animal interests.¹²¹ All of these measures had their legal basis in Article 43 TFEU, within the common agricultural policy ('CAP').¹²² As this policy provided a large margin of appreciation to the EU legislator, these measures could only be annulled by the Court of Justice if they were manifestly inappropriate for the protection of animals.¹²³ This threshold was relatively high, as became clear in the case of *Compassion in World Farming*, situated prior to the introduction of Protocol No. 33.¹²⁴ In this case, the referring court questioned the validity of Directive 91/629/EEC laying down minimum standards for the protection of calves, as its content was not in conformity with the European Convention for the Protection of Animals kept for Farming Purposes¹²⁵ and its recommendations. The EU had ratified this Convention, meaning that it formed an integral part of the EU legal order.¹²⁶ Nevertheless, the Court held that non-compliance with the provisions of the Convention could not threaten the validity of secondary EU law, as the animal welfare standards provided by the Convention are mere recommendations that are not legally binding upon the EU.¹²⁷ This approach was also followed

¹¹⁵ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, *OJ L 221*, 8 August 1998, 23-27.

¹¹⁶ Council Directive 91/630/EEC of 19 November 1991 laying down minimum standards for the protection of pigs, *OJ L 340*, 11 December 1991, 33-38.

¹¹⁷ Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves, *OJ L 340*, 11 December 1991, 28-32.

¹¹⁸ Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages, *OJ L 95*, 10 April 1986, 45-48; Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, *OJ L 182*, 12 July 2007, 19-28.

¹¹⁹ Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport, *OJ L 200*, 8 August 1977, 10-16.

¹²⁰ Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, *OJ L 316*, 26 November 1974, 10-11.

¹²¹ Compare for example the length of the pre-Lisbon measures with those applicable today. Where the current Animal Transport Regulation contains a total of 44 pages, its predecessor only contained 6. The current Slaughter Regulation contains 30 pages, its predecessor 2. See also K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 65.

¹²² R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, vol. 3, 382.

¹²³ T. ERNIQUIN, "Les animaux vivants et la libre circulation: un status de marchandises sensibles", *Revue des affaires européennes*, 2017, Vol. 1, 51.

¹²⁴ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §38.

¹²⁵ Council of Europe, European Convention for the Protection of Animals kept for Farming Purposes, ETS No. 087, 10 March 1976.

¹²⁶ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §31.

¹²⁷ *Ibid*, §34-36.

after the adoption of Protocol No. 33. In the case of *Jippes*, the Court held that, as “the Community legislator enjoys a wide discretionary power in matters concerning the common agricultural policy [...], judicial review must be limited to verifying that the measure in question is not vitiated by any manifest error.”¹²⁸ In other words, the EU legislator was not obliged under the CAP to adopt the best possible rules on animal welfare, as only manifestly inappropriate measures would be annulled.¹²⁹

Furthermore, the legislative approach of the Union on animal welfare matters was also criticized for its nearly exclusive focus on farm animals.¹³⁰ However, this criticism was addressed during the Action Plan on Animal Welfare of 2006-2010, when the EU started to make (limited) use of its harmonization competences under Article 114 TFEU to protect the welfare of species other than farm animals,¹³¹ such as dogs and cats,¹³² and seals.¹³³ Additionally, the welfare of wild animals was occasionally addressed in relation to the preservation of biodiversity.¹³⁴

Chapter 2: Animal welfare as a justification for restrictions of the free movement of animals and animal products

Prior to the introduction of the Lisbon Treaty, a total of seven cases before the Court of Justice addressed the issue of animal welfare as a justification for limitations of the free movement of animals and animal products. These cases have shown that animal welfare considerations can be brought under multiple justification grounds of Article 36 TFEU (§1). Nevertheless, in most of these cases, the challenged national rules were struck down either because they failed

¹²⁸ Judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, §80.

¹²⁹ *Ibid*, §82.

¹³⁰ European Parliament, Resolution on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, 2006/2046(INI), 12 October 2006, point 6; J. BEQIRAJ, “Animal welfare”, in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 147.

¹³¹ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 382.

¹³² Regulation (EC) No. 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, OJ L 343, 27 December 2007, 1-4.

¹³³ Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ L 286, 31 October 2009, 36-39.

¹³⁴ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 382. See for example Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61, 3 March 1997, 1-69.

to overcome the proportionality assessment (§2), or because the Union had exhaustively regulated the subject matter of these rules, thereby prohibiting recourse to Article 36 TFEU to justify the national rules (§3).

§1: Animal welfare as a justifiable objective for limitations of the free movement of goods

Not all limitations of the internal market are in violation of EU law. The Treaties and the Court of Justice recognize several grounds of justification that can be invoked to safeguard higher objectives that are preserved by these limitations. These grounds also offer opportunities to safeguard animal welfare protection. More specifically, Member States have brought animal welfare concerns under the grounds of ‘health and life of animals’ (1.1) and ‘public morality’ (1.2) of Article 36 TFEU.

1.1: Health and life of animals

Article 36 TFEU allows Member States to justify restrictions of the free movement of goods to safeguard the health and life of animals. However, as animal welfare does not necessarily coincide with animal health,¹³⁵ it has been heavily debated whether animal welfare concerns can successfully be brought under Article 36 TFEU, or if they should be invoked as a mandatory requirement,¹³⁶ especially since exceptions to general rules of EU law must be interpreted strictly.¹³⁷ It is argued here that the Court clearly brought animal welfare considerations under Article 36 TFEU, despite the difference between animal welfare and animal health.

The question of the legal basis of animal welfare arguments was dealt with for the first time in *Holdijk*. Even though there was no breach of Article 34 or 35 TFEU in this case, the Court of Justice clarified that, in the absence of EU rules on animal welfare, the disapplication of national rules prohibiting the use of veal crates “*would be incompatible with the [Union’s] concern for the health and protection of animals, as evinced, inter alia, by [Article 36 TFEU]*”.¹³⁸ This phrase opened the door to consider animal welfare as being part of the health and life of animals for the application of Article 36 TFEU.¹³⁹ Remarkably, the Court stayed silent on the

¹³⁵ See Part 1, Chapter 1, Title 2.1 at page 9.

¹³⁶ T. VAN LAER, “The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?” *ELNI Review*, 2011, vol. 1, 37.

¹³⁷ L. VOGEL, *Law of the Internal Market*, 2nd edition, Brussels, Bruylant, 2020, 62.

¹³⁸ Judgment of 1 April 1982, joined cases *Holdijk and others*, C-141/81 to C-143/81, EU:C:1982:122, §13.

¹³⁹ A. PETERS, *Animals in International Law*, Leiden, Brill Nijhoff, 2021, 224.

more nuanced approach of Advocate General Slynn, who argued in his opinion to *Holdijk* that Article 36 TFEU can only be invoked in those cases where the health and well-being of animals overlap or interrelate with each other.¹⁴⁰ The *Holdijk*-approach was confirmed in *Monsees*, where animal welfare considerations were invoked under Article 36 TFEU to justify both import and export restrictions raised by a national law on maximum journey times for animal transportation.¹⁴¹ A last example of this approach is the case of *Andibel* on the prohibition to keep wild animals as pets. Here, the Court clearly linked the argument on the welfare of wild animals to Article 36 TFEU. In relation to the animal welfare argument, the Court stated that “[a]ccording to [Article 36 TFEU], the provisions of [Articles 34 and 35 TFEU] are not to preclude prohibitions or restrictions justified on grounds, inter alia, of the protection of the health and life of [...] animals”.¹⁴² Compare this with the second argument made in *Andibel* that certain animal species may constitute an ecological threat when escaped into the wild. This plea is based on environmental considerations, a ground that is not included in Article 36 TFEU. In relation to this argument, the Court stated that “restrictions on the free movement of goods may be justified by imperative requirements such as the protection of the environment”,¹⁴³ thus explicitly recognizing that the environmental argument fell under a mandatory requirement. Interestingly, the animal welfare argument was based on the physiological and ethological needs of animals, rather than the protection of their physical health.¹⁴⁴ This suggests that even those cases where animal welfare does not overlap or interrelate with animal health fall under Article 36 TFEU.

This approach of the Court is to be applauded from an animal welfare point of view. By bringing animal welfare concerns under Article 36 TFEU even when it strictly does not coincide with animal health, animal welfare concerns can also be addressed by Member States to justify export restrictions in the sense of Article 35 TFEU. A different approach where animal welfare concerns should be invoked as a mandatory requirement would only be able to justify import restrictions in the sense of Article 34 TFEU, as mandatory requirements cannot justify

¹⁴⁰ Opinion of Advocate General Slynn of 4 March 1982, *Holdijk*, C-141/81, EU:C:1982:82, 1319.

¹⁴¹ Judgment of 11 May 1999, *Monsees*, C-350/97, EU:C:1999:242, §23.

¹⁴² Judgment of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353, §28.

¹⁴³ *Ibid*, §29.

¹⁴⁴ *Ibid*, §24.

discriminatory measures such as export restrictions.¹⁴⁵ Article 35 TFEU plays an important role in the refusal to export living animals to Member States that do not respect animal welfare laws, to avoid that these animals would be mistreated there.¹⁴⁶ By recognizing that animal welfare forms part of the health and life of animals in the sense of Article 36 TFEU, these restrictions on the export of living animals can be justified for animal welfare concerns.

1.2: Public morality

Another ground provided in Article 36 TFEU that has been invoked to justify animal welfare laws is public morality. In *Compassion in World Farming*, the United Kingdom argued that the use of the veal crate system “is considered to be cruel and immoral by [...] a considerable body of public opinion”,¹⁴⁷ given its adverse effects on the welfare of the calves housed in these crates. Therefore, the UK wanted to rely on the ground of public morality to prohibit the export of calves to Member States that still allow the use of veal crate systems.¹⁴⁸

Advocate General Léger followed the UK in its reasoning. He argued that, as it is for each Member States to determine what falls under their public morality,¹⁴⁹ it is possible to bring animals welfare concerns risen by the use of veal crates under this justification ground.¹⁵⁰ The Court of Justice, however, provided two counterarguments to refuse public morality from being invoked. Firstly, it held that the argument on public morality was not invoked as a separate justification, but that it should be linked with the argument on the health and life of animals.¹⁵¹ As the protection of the health of calves had been harmonized by the Union,¹⁵² Article 36 TFEU could not be invoked anymore to address these concerns in national legislation.¹⁵³ Secondly, even if public morality would be considered as being distinct from the argument on the health of animals, the Court held that Member States cannot rely on the opinion of just a fraction of the national public opinion to challenge harmonization

¹⁴⁵ L. VOGEL, *Law of the Internal Market*, 2nd edition, Brussels, Bruylant, 2020, 53.

¹⁴⁶ See for example judgment of 23 May 1996, *Hedley Lomas*, C-5/94, EU:C:1996:205; judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113.

¹⁴⁷ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §29 point (g).

¹⁴⁸ *Ibid*, §38.

¹⁴⁹ Opinion of Advocate General Léger of 15 July 1997, *Compassion in World Farming*, C-1/96, EU:C:1997:365, §95.

¹⁵⁰ *Ibid*, §104.

¹⁵¹ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §66.

¹⁵² *Ibid*, §66.

¹⁵³ *Ibid*, §68.

measures.¹⁵⁴ So in that case too, the public morality argument would fail to justify the export restriction.

This judgment is regrettable for the advancement of animal welfare protection. However, the link made by the Court between public morality and animal health was not an isolated case. The same approach was followed in *Commission v Poland* on the Polish prohibition to import genetically modified organisms ('GMOs').¹⁵⁵ Trade in GMOs had been harmonized by the Union to ensure the protection of public health and the environment.¹⁵⁶ The Polish government invoked public morality to justify their import restriction, as ethical considerations against the use of GMOs had not been harmonized.¹⁵⁷ Nevertheless, just as in *Compassion in World Farming*, the Court did not follow this reasoning, as it considered the public morality argument to be part of the safeguarding of public health, which could not be justified anymore under Article 36 TFEU given the harmonization at Union level.¹⁵⁸ Less clear, however, is the argument made by the Court in *Compassion in World Farming* that recourse to public morality cannot be based on just a part of the public opinion, as there have been precedents where the Court did accept limitations of the free movement of goods based on moral considerations of just a part of the citizens of a Member State.¹⁵⁹

§2: The proportionality of national animal welfare measures

For national measures derogating from Articles 34 and 35 TFEU to be allowed under EU law, it is not sufficient that these measures were taken to safeguard any of the justification grounds of Article 36 TFEU or a mandatory requirement recognized by the Court. Additionally, these measures must also be proportionate. Concretely, this means that they must genuinely pursue

¹⁵⁴ *Ibid*, §67.

¹⁵⁵ Judgment of 16 July 2009, *Commission v Poland*, C-165/08, EU:C:2009:473. See also T. VAN LAER, "The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?" *ELNI Review*, 2011, vol. 1, 39; D. DOUKAS, "Morality, Free Movement and Judicial Restraint at the European Court of Justice" in P. KOUTRAKOS, N. SHUIBHNE and P. SYRPIS, *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Oxford, Hart Publishing, 2016, 152.

¹⁵⁶ Judgment of 16 July 2009, *Commission v Poland*, C-165/08, EU:C:2009:473, §29.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*, §55.

¹⁵⁹ Judgment of 14 December 1979, *Henn and Darby*, C-34/79, EU:C:1979:295, §16; see also R. O'GORMAN, "Of eggs, and seals, and leghold traps: Internal and external public morality as a factor in European Union animal welfare legislation" in J.A. MCMAHON and M.N. CARDWELL (eds.), *Research Handbook on EU Agriculture Law*, Cheltenham, Edward Elgar Publishing, 2015, 330.

the invoked overriding objectives and must not go beyond what is necessary to pursue them.¹⁶⁰

In the realm of animal welfare protection, the only three cases where Article 36 TFEU could be invoked failed to overcome this proportionality assessment. In both *Monsees* and *Commission v Belgium*, the national governments failed to prove that the measures did not go beyond what was necessary to protect the welfare of animals. This was because the Union had harmonized animal welfare concerns by imposing measures that were less restrictive than the standards provided by the national rules, but were nevertheless considered to be equally effective as the latter.¹⁶¹ However, in *Monsees*, these Union measures had not yet entered into force,¹⁶² and the measures in *Commission v Belgium* only constituted minimum harmonization.¹⁶³ Nevertheless, even though it was thus technically still possible for the Member States to impose more stringent national measures than those foreseen in the respective Union measures, the mere existence of the harmonization measures made it very difficult for Member States to prove the necessity of their national rules.

As for *Andibel*, the Court did not examine the proportionality of the national rules at stake, as it did not have sufficient information at hand to successfully do so.¹⁶⁴ Instead, the Court provided a strict list of requirements that these national rules must comply with in order to survive the proportionality test.¹⁶⁵ Nevertheless, the national court, after performing the proportionality test, annulled the national measures as they were considered to be in violation of the criteria provided by the Court of Justice.¹⁶⁶

§3: Exhaustive harmonization in the field of animal welfare

As stipulated above, Article 36 TFEU provides for the possibility to adopt national measures aiming at the protection of animal welfare, even if those measures would obstruct the free

¹⁶⁰ L. VOGEL, *Law of the Internal Market*, 2nd edition, Brussels, Bruylant, 2020, 63.

¹⁶¹ Judgment of 11 May 1999, *Monsees*, C-350/97, EU:C:1999:242, §30; judgment of 10 September 2009, *Commission v Belgium*, C-100/08, EU:C:2009:537, §104-105.

¹⁶² Judgment of 11 May 1999, *Monsees*, C-350/97, EU:C:1999:242, §27.

¹⁶³ Judgment of 10 September 2009, *Commission v Belgium*, C-100/08, EU:C:2009:537, §70.

¹⁶⁴ Judgment of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353, §41.

¹⁶⁵ *Ibid*, §43.

¹⁶⁶ Belgian Council of State (Raad van State), 9 March 2009, *VZW De nationale raad van dierenkwekers en liefhebbers en Andibel t. de Belgische Staat*, No. 191.161, Article 1.

movement of goods. But in reality, recourse to Article 36 TFEU was often not possible anymore, as the Union had exhaustively harmonized animal welfare protection and thereby prohibited the introduction of higher national standards.¹⁶⁷ It has been argued that the Court of Justice interpreted the notion ‘exhaustive interpretation’ too extensively in these animal welfare cases, resulting in the unnecessary restriction of stricter animal welfare laws at national level.¹⁶⁸ This section will address this criticism and examine the accuracy of the Court’s approach. First, it will be clarified what exactly exhaustive harmonization is and what the consequences are of this method of harmonization (3.1). Secondly, it will be examined in what cases the Court considered animal welfare concerns to be exhaustively harmonized at Union level (3.2). Thirdly, it will be analyzed whether or not the finding that these measures exhaustively harmonized animal welfare concerns can indeed be considered as being too extensive (3.3). Lastly, it will be examined if the adoption of Protocol No. 33 had an impact on the case law of the Court of Justice (3.4).

3.1: Exhaustive harmonization: *quid*?

The concept of exhaustive harmonization often gets mixed up with that of maximum harmonization.¹⁶⁹ However, both concepts have different implications for the competences of the Member States to adopt national measures. When the Court states that a measure exhaustively harmonizes its subject-matter, it means that the EU legislator harmonized all the measures that are necessary to ensure the protection of the interest pursued by the harmonizing act.¹⁷⁰ Consequently, the Member States cannot rely on Article 36 TFEU anymore to justify more stringent national measures that restrict the free movement of goods.¹⁷¹ Importantly, also a measure of minimum harmonization can exhaustively harmonize its subject-matter.¹⁷² Under these measures, Member States will only be able to introduce more stringent national rules if these do not impede the internal market in any way. Concretely, this means that these national rules cannot be applied to goods imported from or exported to

¹⁶⁷ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 365.

¹⁶⁸ See for example R. O’GORMAN, “Of eggs, and seals, and leghold traps: Internal and external public morality as a factor in European Union animal welfare legislation” in J.A. MCMAHON and M.N. CARDWELL (eds.), *Research Handbook on EU Agriculture Law*, Cheltenham, Edward Elgar Publishing, 2015, 336.

¹⁶⁹ G. VAN CALSTER, “Export restrictions – a watershed for Article 30”, *European Law Review*, 2000, Vol. 25, 344.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, 345.

other Member States. This is different from a maximum harmonization, where Member States must strictly follow the standards set by the EU.¹⁷³ Measures of maximum harmonization contain an ‘exclusivity clause’, which prohibits the sale of goods that don’t comply with the standards laid down by the EU legislator, even if both the manufacturing and the sale of these goods exclusively take place within one and the same Member State.¹⁷⁴ Therefore, a maximum harmonization does not allow Member States to adopt more stringent national rules, even if these rules do not have any effect on trade with other Member States.

Measures of minimum harmonization that exhaustively harmonize their subject-matter leave some space for regulatory diversity between the Member States, albeit in a restricted manner. Namely, the more stringent national rules cannot adversely affect trade with other Member States. This is different when a measure of minimum harmonization does not exhaustively harmonize its subject matter. The latter allows Member States to adopt more stringent national rules that restrict free movement law, as long as these rules find a justification under Article 36 TFEU or a mandatory requirement.¹⁷⁵ As such, these measures ensure the possibility for Member States to properly address their particular social or welfare interests and concerns by refusing to trade with Member States that do not comply with these national rules.¹⁷⁶

3.2: Harmonization in the context of animal welfare

Prior to the adoption of the Lisbon Treaty, the Court of Justice had six opportunities to rule on the interplay between animal welfare and the free movement of goods when harmonizing measures had been adopted at Union level. Hereafter follows a discussion of these cases in the realm of farm animal welfare (**3.2.1**) and the welfare of wild animals (**3.2.2**).

3.2.1: Farm animal welfare: exhaustive harmonization as the norm

The welfare of farm animals was addressed for the first time in the case of *Hedley Lomas* of 1996.¹⁷⁷ In this case, the United Kingdom refused to issue licences to export living sheep to Spain,¹⁷⁸ as animal welfare activists had discovered several breaches of Council Directive

¹⁷³ C. BARNARD, *The substantive law of the EU: the four freedoms*, Oxford, Oxford University Press, 2019, 585.

¹⁷⁴ *Ibid.*

¹⁷⁵ M. DOUGAN, “Minimum harmonization and the internal market”, *Common Market Law Review*, 2000, 855.

¹⁷⁶ *Ibid.*

¹⁷⁷ Judgment of 23 May 1996, *Hedley Lomas*, C-5/94, EU:C:1996:205.

¹⁷⁸ *Ibid.*, §2.

74/577/EEC on the stunning of animals before slaughter¹⁷⁹ ('Slaughter Directive') in Spanish slaughterhouses.¹⁸⁰ The UK argued that the Slaughter Directive did not exhaustively harmonize its subject-matter, as it did not provide for any procedures on the monitoring of compliance with its provisions.¹⁸¹ Therefore, it argued that it could still rely on Article 36 TFEU to justify the export restriction in light of the protection of the health of animals.¹⁸² However, the Court of Justice rejected this position and stated that the Slaughter Directive *did* in fact exhaustively harmonize the protection of farm animals, despite the absence of any procedures to monitor compliance or penalties for breaches of the directive.¹⁸³ Consequently, the UK was obliged to export sheep to Spain, as Article 36 TFEU could not be invoked to justify unilateral measures remedying breaches of the Slaughter Directive by other Member States.¹⁸⁴

An equally restrictive approach was maintained in the case of *Compassion in World Farming* of 1998. Here, the referring court asked whether the UK could restrict the export of living calves to Member States where they would be raised in veal crates,¹⁸⁵ as this housing system was prohibited in the UK due to its adverse effects on the welfare of the calves housed therein.¹⁸⁶ Although the veal crate system was prohibited by EU law as well,¹⁸⁷ the harmonization measure foresaw a transitional period of up to ten years for farms to adapt to the new housing requirements.¹⁸⁸ As this transitional period was still running at the time the preliminary procedure was launched,¹⁸⁹ the national court asked whether the UK government could still invoke Article 36 TFEU to justify the export restriction, more specifically on the grounds of public morality and the protection of the health and life of animals.¹⁹⁰ In this case too, the Court of Justice ruled that the Directive exhaustively harmonized its subject-matter, so the Member States were prevented from adopting more stringent national measures

¹⁷⁹ Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, *OJ L* 316, 26 November 1974, 10-11.

¹⁸⁰ Judgment of 23 May 1996, *Hedley Lomas*, C-5/94, EU:C:1996:205, §7.

¹⁸¹ *Ibid*, §4.

¹⁸² *Ibid*, §12.

¹⁸³ *Ibid*, §19.

¹⁸⁴ *Ibid*, §20.

¹⁸⁵ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §2.

¹⁸⁶ *Ibid*, §20.

¹⁸⁷ Article 3(1) of Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves, *OJ L* 340, 11 December 1991, 28-32.

¹⁸⁸ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §24.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*, §38.

restricting the internal market as far as it concerned the health of animals,¹⁹¹ despite the lengthy derogation periods that were still running at the time.¹⁹² The protection of public morality too was considered to be harmonized, given its intrinsic link with the protection of the health of animals (see *supra*).¹⁹³ Therefore, this export restriction could also not be justified under Article 36 TFEU.

A last example is the case of *Monsees* of 1999.¹⁹⁴ An Austrian law mandated that transporters of animals passing through Austria should bring the animals to the nearest suitable slaughterhouse within the Austrian territory.¹⁹⁵ Mr. Monsees, who faced criminal sanctions for not complying with this law, challenged the compliance of these national rules with Articles 34 and 35 TFEU. At the time, the Union had harmonized maximum journey times for animal transportation, covering the same subject matter as the Austrian law.¹⁹⁶ However, as the transposition deadline of that directive had not yet expired, Austria could still rely on Article 36 TFEU to justify its national measures.¹⁹⁷ Nevertheless, as soon as the deadline would elapse, the possibility to invoke Article 36 TFEU would cease to exist.¹⁹⁸

These three judgments display the difficulty for individual Member States to protect the well-being of farm animals. As soon as animal welfare considerations have been harmonized at Union level, it becomes nearly impossible for Member States to offer a more far-reaching protection¹⁹⁹ – even if the standard set by the Union does not offer a sufficient protection for animals. When it comes to the protection of farm animals, the Court thus prioritizes the smooth functioning of the internal market over the interests of the animals concerned.²⁰⁰

¹⁹¹ *Ibid*, §56

¹⁹² *Ibid*, §57.

¹⁹³ *Ibid*, §67-68.

¹⁹⁴ Judgment of 11 May 1999, *Monsees*, C-350/97, EU:C:1999:242.

¹⁹⁵ *Ibid*, §14.

¹⁹⁶ *Ibid*, §26.

¹⁹⁷ *Ibid*, §27.

¹⁹⁸ *Ibid*.

¹⁹⁹ J. BEQIRAJ, “Animal welfare”, in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 159.

²⁰⁰ L. ANKERSMIT, *Green Trade and Fair Trade in and with the EU: Process-Based Measures within the EU Legal Order*, Cambridge, Cambridge University Press, 2017, 169.

3.2.2: Welfare of wild animals: a shift to minimum harmonization

In *Van den Burg*, the Court was asked to rule on the compatibility of the Dutch Law on Birds with Article 34 TFEU.²⁰¹ This law prohibited the importation into Dutch territory of the Red Grouse,²⁰² a bird species that only occurs in the United Kingdom and Ireland,²⁰³ despite the bird having been lawfully shot in the UK.²⁰⁴ At the time, the hunt on birds was harmonized by Directive 79/409 on the Conservation of Wild Birds²⁰⁵ ('Birds Directive'). Although the Birds Directive allowed hunting on non-endangered bird species,²⁰⁶ it also provided that "*Member States may introduce stricter protective measures than those provided for under [the] Directive*",²⁰⁷ as had done the Netherlands.²⁰⁸ Nevertheless, the Court interpreted this provision as only allowing stricter protection regimes in favour of migratory or endangered species,²⁰⁹ in accordance with the general objective of the Birds Directive as found in its recitals.²¹⁰ As the Red Grouse is neither a migratory nor an endangered species, and as it did not have its habitat within the territory of the Netherlands, the Dutch authorities could not rely on Article 36 TFEU to try justifying their import restriction.²¹¹

However, this restrictive approach of the Court was altered in the case of *Andibel* of 2008.²¹² This case concerned a Flemish decree containing an exhaustive list of animal species that can be kept as companion animals.²¹³ The Belgian government argued that, although this list could restrict the importation of certain animal species, this restriction was justified as it protects the welfare of the animals excluded from the list,²¹⁴ as these species cannot satisfy their physiological and ethological needs in captivity.²¹⁵ Trade in wild species was harmonized by

²⁰¹ Judgment of 23 May 1990, *Van den Burg*, C-169/89, EU:C:1990:227.

²⁰² *Ibid*, §3.

²⁰³ BirdWatch Ireland, "Red Grouse", <<https://birdwatchireland.ie/birds/red-grouse/>>, accessed 30 January 2023.

²⁰⁴ Judgment of 23 May 1990, *Van den Burg*, C-169/89, EU:C:1990:227, §2.

²⁰⁵ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, *OJ L* 103, 25 April 1979, 1-18.

²⁰⁶ Article 6(2) and (3) of the Birds Directive.

²⁰⁷ Article 14 of the Birds Directive.

²⁰⁸ Judgment of 23 May 1990, *Van den Burg*, C-169/89, EU:C:1990:227, §9.

²⁰⁹ *Ibid*, §12.

²¹⁰ *Ibid*, §11.

²¹¹ *Ibid*, §16.

²¹² Judgment of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353.

²¹³ *Ibid*, §10.

²¹⁴ *Ibid*, §24.

²¹⁵ G. MASON and C. BURN, "Frustration and Boredom in Impoverished Environments" in M. APPLEBY, A. OLSSON and F. GALINDO (eds.), *Animal Welfare*, 3rd edition, CABI, 2022, 187.

Council Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein²¹⁶ ('Wildlife Trade Regulation'), which did not provide for a general prohibition on the commercial use of wild species.²¹⁷ Nevertheless, the Court confirmed that Member States were allowed to take more stringent measures despite the effects on intra-community trade,²¹⁸ as the Wildlife Trade Regulation is an act of minimum harmonization.²¹⁹

A similar situation emerged in 2009 in *Commission v Belgium*.²²⁰ This case concerned a Belgian prohibition on the import, export, keeping, buying and selling of wild bird,²²¹ to prevent them from being held in captivity.²²² As the subject-matter of the Belgian law also fell within the scope of the Wildlife Trade Regulation,²²³ the same reasoning as in *Andibel* was applicable, so the Belgian government was allowed to take more stringent measures as long as they could be justified under Article 36 TFEU or a mandatory requirement.²²⁴

At first instance, the Court's attitude towards animal welfare in *Van den Burg* was as restrictive as with the protection of farm animals, leaving only little leeway for Member States to adopt more stringent measures than those foreseen at Union level. However, the approach of the Court in *Andibel* and *Commission v Belgium* differs significantly. By giving Member States the chance to justify their national measures under Article 36 TFEU, the Court opened the door for higher standards to protect the welfare of wild animals.

3.3: An overly extensive interpretation of exhaustive harmonization pre-Amsterdam?

Multiple authors have argued that in *Hedley Lomas*, *Compassion in World Farming* and *Van den Burg*, the Court applied a definition of 'exhaustive harmonization' that is too extensive, thereby limiting the introduction of national animal welfare laws more than necessary. Indeed, as stipulated above, the qualification of the Union's animal welfare standards as measures of exhaustive harmonization does hamper the introduction of higher standards by

²¹⁶ Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, *OJ L* 61, 3 March 1997, 1-69.

²¹⁷ Judgment of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353, §19.

²¹⁸ *Ibid*, §42.

²¹⁹ *Ibid*, §14.

²²⁰ Judgment of 10 September 2009, *Commission v Belgium*, C-100/08, EU:C:2009:537.

²²¹ *Ibid*, §27.

²²² *Ibid*, §90.

²²³ *Ibid*, §55.

²²⁴ *Ibid*, §70 and §79.

individual Member States to a certain extent. However, the approach of the Court is not necessarily wrong from an EU law perspective. It is argued here that the decisions in *Hedley Lomas* (3.3.1) and *Compassion in World Farming* (3.3.2) were correct when put into their wider context. However, this does not seem to be the case for the decision in *Van den Burg* (3.3.3).

3.3.1: Exhaustive harmonization and the absence of monitoring compliance

In *Hedley Lomas*, the Court held that the Slaughter Directive was a measure of exhaustive harmonization, despite the absence of any procedures at EU level to monitor compliance with its provisions and penalties for non-compliance with the Directive.²²⁵ This decision has been criticized, as it is said to wrongly qualify the directive as being a measure of exhaustive harmonization.²²⁶ Instead, the approach of Advocate General Léger²²⁷ was welcomed,²²⁸ who applied the case of *Van Bennekom*²²⁹ to the Slaughter Directive. In that case, the Court ruled that recourse to Article 36 TFEU ceases to exist only “*when Community directives, in pursuance of [Article 114 TFEU], make provision for the full harmonization of all the measures needed to ensure the protection of [...] animal life and institute Community procedures to monitor compliance therewith*”.²³⁰ If this reasoning were followed, the UK would have been allowed to prevent violations of the Slaughter Directive by refusing the export of calves to other Member States, if this would have passed the proportionality assessment under Article 36 TFEU.²³¹

However, the definition in *Van Bennekom* was explicitly framed in the sphere of harmonization under Article 114 TFEU,²³² which corresponds with the legal basis of the harmonization measure in that case. The Slaughter Directive, on the other hand, had its legal basis not only in Article 114 TFEU, but also in Article 43 TFEU within the framework of the CAP.

²²⁵ Judgment of 23 May 1996, *Hedley Lomas*, C-5/94, EU:C:1996:205, §19.

²²⁶ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 374.

²²⁷ Opinion of Advocate General Léger of 20 June 1995, *Hedley Lomas*, C-5/94, EU:C:1995:193.

²²⁸ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 374.

²²⁹ Judgment of 30 November 1983, *Van Bennekom*, C-227/82, EU:C:1983:354.

²³⁰ *Ibid*, §35. Emphasis added.

²³¹ Opinion of Advocate General Léger of 20 June 1995, *Hedley Lomas*, C-5/94, EU:C:1995:193, §39-40.

²³² Judgment of 30 November 1983, *Van Bennekom*, C-227/82, EU:C:1983:354, §35.

Given that the CAP is mainly based on economic objectives,²³³ the decision not to allow Member States to derogate from the EU standards would only benefit the market integration of agricultural products. This approach is consistent with these economic objectives.²³⁴ That could be the reason why the *Van Bennekom* definition of exhaustive harmonization was not applied in *Hedley Lomas*. Moreover, the prohibition for Member States to remedy violations of Union law by other Member States through the adoption of unilateral measures is not limited to *Hedley Lomas*, but has also been applied in other cases framed within the CAP.²³⁵

3.3.2: Exhaustive harmonization and the common organization of the market in agricultural products

In *Compassion in World Farming*, the Court did not allow to invoke Article 36 TFEU during the lengthy derogation period of up to ten years foreseen by the harmonization directive.²³⁶ This decision has been criticized, as it ‘punished’ Member States who already ensured full compliance with the animal welfare standards provided by the directive before the derogation period had elapsed, as they could not invoke Article 36 TFEU to prohibit the export of animals to Member States who waited until the very end to comply with the directive.²³⁷ Moreover, this approach placed the former Member States at a competitive disadvantage, creating the risk that these Member States too would wait until the very end of the derogation period to comply with the Union standards precisely to avoid these disadvantages.²³⁸ It has therefore been suggested to instead apply the approach of *Monsees* during this derogation period, so animals can at all times enjoy the highest possible welfare standards available.²³⁹ This

²³³ C. BLUMANN, *Politique Agricole Commune – Droit Communautaire Agricole et agro-alimentaire*, Paris, Litec, 1996, 44-47.

²³⁴ S. WEATHERILL, “Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market” in L.W. GORMLEY and N. NIC SHUIBHNE (eds.), *From single market to economic union: essays in memory of John. A. Usher*, Oxford, Oxford University Press, 2012, 186.

²³⁵ See for example judgment of 25 September 1979, *Commission v France*, C-232/78, EU:C:1979:215 §9. See by analogy judgment of 25 January 1977, *Bauhuis v Netherlands*, C-46/76, EU:C:1977:6, §22. By applying a system of supervision based on the mutual trust within the Union, the free movement of the covered goods was safeguarded. The directive invoked in *Bauhuis* was also based on both Article 43 TFEU and Article 114 TFEU.

²³⁶ R. MUNOZ, “Case C-1/96, The Queen v. Minister of Agriculture, Fisheries and food, ex parte Compassion in World Farming Limited. Judgment of 19 March 1998, [1998] ECR I-1251”, *Common Market Law Review*, 1999, 838.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 378.

approach was also defended by Advocate General Léger in his opinion to *Compassion in World Farming*.²⁴⁰

However, the harmonizing directive in *Compassion in World Farming* had its legal basis in Article 43 TFEU, within the CAP. This policy aims at creating uniformity within the Union,²⁴¹ an objective that is highlighted even more by the establishment of the common organization of the market in beef and veal within which the harmonizing directive had to be framed.²⁴² As there was a common market organisation, Member States were prohibited from adopting any measures that would affect the structure of this market.²⁴³ Consequently, Article 36 TFEU could not be invoked within the framework of such a market organization.²⁴⁴ Although this approach indeed hampers the adoption of national animal welfare standards, it is the general approach within the CAP to prioritize the functioning of the market over non-economic objectives such as animal welfare protection.²⁴⁵ That is why, also in the case of *Monsees*, the adoption of more stringent national measures aimed at the protection of animals in other Member States would be prohibited after the transposition deadline of this directive would elapse.²⁴⁶

3.3.3: The extraterritorial protection of wild animals

In *Van den Burg*, the Court of Justice limited the scope of what appeared to be a measure of minimum harmonization,²⁴⁷ so Article 36 TFEU could not be invoked to justify national measures applying higher standards than those at Union level.²⁴⁸ However, many authors

²⁴⁰ Opinion of Advocate General Léger of 15 July 1997, *Compassion in World Farming*, C-1/96, EU:C:1997:365, §67.

²⁴¹ C. BLUMANN, *Politique Agricole Commune – Droit Communautaire Agricole et agro-alimentaire*, Paris, Litec, 1996, 66.

²⁴² Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §41.

²⁴³ *Ibid*, §43-44.

²⁴⁴ *Ibid*, §64. See also A. PETERS, *Animals in International Law*, Leiden, Brill Nijhoff, 2021, 226; R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 376.

²⁴⁵ See for example judgment of 29 November 1978, *Redmond*, C-83/78, EU:C:1978:214, §58. In relation to the protection of public health, see by analogy: judgment of 5 October 1994, *Centre d’insémination de la Crespelle v Coopérative de la Mayenne*, C-323/93, EU:C:1994:368, §34-35. It was only because the health aspects regulated by the national measures were not addressed by the harmonization directive that the Member States could adopt more stringent measures.

²⁴⁶ Judgment of 11 May 1999, *Monsees*, C-350/97, EU:C:1999:242, §27.

²⁴⁷ Article 14 of the Birds Directive provided that “Member States [could] introduce stricter protective measures than those provided for under [the] Directive”.

²⁴⁸ Judgment of 23 May 1990, *Van den Burg*, C-169/89, EU:C:1990:227, §16.

disagree with this decision.²⁴⁹ Indeed, it is difficult to justify the removal of the Red Grouse from the scope of Article 14 of the Birds Directive, given that Article 1 of this directive states that the directive “relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States [...]”.²⁵⁰ The Court seemingly ignored this provision and instead relied on the directive’s recitals, which are not legally binding,²⁵¹ to limit the scope of Article 14 of the directive.²⁵² It is argued here that this conclusion of the Court seems to be wrong, as recitals – given their non-binding nature – cannot be used to derogate from the actual provisions of the directive, or to interpret these provisions in a way contrary to their wording.²⁵³ Instead, it seems to be that the Birds Directive constitutes a measure of minimum harmonization,²⁵⁴ an approach that was also followed by Advocate General Van Gerven.²⁵⁵ This approach would have enabled a review of the national measures under Article 36 TFEU, potentially justifying these measures if they would have been proportionate.²⁵⁶

3.4: Protocol No. 33: a new approach?

Remarkably, the two judgments that showed a positive approach towards animal welfare protection – *Andibel* and *Commission v Belgium* – appeared before the Court after the adoption of Protocol No. 33. However, this parallel seems to be entirely coincidental.

The differences between *Andibel* and *Commission v Belgium* on the one hand and the three cases on farm animal welfare on the other hand can be explained by the different legal basis of the respective harmonization directives that were the subject in these cases. The Wildlife

²⁴⁹ See for example L. KRÄMER, *European environmental law: casebook*, London, Sweet and Maxwell, 1993, 153, point 3 and further; R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 372; M. DOUGAN, “Minimum harmonization and the internal market”, *Common Market Law Review*, 2000, 872.; E.H. PIJNACKER HORDIJK, “Oordeel over verenigbaarheid van verbod van invoer en verhandeling van uitheemse vogelsoorten met art. 36 EEG-Verdrag en Richtlijn inzake het behoud van de vogelstand”, *Sociaal-economische wetgeving*, 1991, 269 and further.

²⁵⁰ Article 1(1) of the Birds Directive. Emphasis added.

²⁵¹ K. LENAERTS, T. CORTHAUT and P. VAN NUFFEL, *EU Constitutional Law*, Oxford, Oxford University Press, 2022, 769, point 29.007.

²⁵² Judgment of 23 May 1990, *Van den Burg*, C-169/89, EU:C:1990:227, §11-15.

²⁵³ K. LENAERTS, T. CORTHAUT and P. VAN NUFFEL, *EU Constitutional Law*, Oxford, Oxford University Press, 2022, 769, point 29.007.

²⁵⁴ R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, vol. 3, 378.

²⁵⁵ Opinion of Advocate General Van Gerven of 20 March 1990, *Van den Burg*, C-169/89, EU:C:1990:124, §6.

²⁵⁶ *Ibid.*

Trade Regulation in *Andibel* and *Commission v Belgium* has its roots in Article 192 TFEU, within the Union's environmental policy. This provision must be read on conjunction with Article 193 TFEU, which states that harmonization based on Article 192 TFEU shall always be a minimum harmonization.²⁵⁷ Thus, the Treaty confers to the Member States the competence to introduce more stringent measures in environmental matters, provided that these national measures are compatible with the Treaties.²⁵⁸ On the contrary, the three cases on farm animal welfare featured harmonization directives that had their legal basis in Article 43 TFEU within the CAP (and in *Hedley Lomas* also in Article 114 TFEU). This provision does not provide for the Union to regulate agricultural matters through measures of minimum harmonization.²⁵⁹ Thus, contrary to wild animals, which fell under the environmental policy, farm animal welfare had to be regulated within the framework of a policy that prioritized free movement and regulatory uniformity, rather than welfare considerations.²⁶⁰ Although no cases on farm animal welfare within the framework of the free movement of goods appeared before the Court at the time Protocol No. 33 was in force, it is unlikely that the approach of the Court would have been different had this happened, given that the relevant Treaty provisions regulating the CAP did not change with the Treaty of Amsterdam.²⁶¹ On the contrary, it has been argued that the further expansion of the Union's animal welfare *acquis* and the introduction of the single common organization of the markets in agricultural products in 2007 only hinder national laws on farm animal welfare, rather than enhancing their protection.²⁶²

The difference between *Van den Burg* on the one hand and *Andibel* and *Commission v Belgium* on the other hand also appears to be based on the legal basis of the respective harmonization directives. The Birds Directive in *Van den Burg* was adopted in 1979, prior to the introduction of the Union's environmental policy with the Single European Act.²⁶³ As there was no specific Treaty provision to harmonize environmental matters at that time, the Birds Directive had its

²⁵⁷ N. BOEGER, "Minimum harmonisation, free movement and proportionality" in P. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, 65.

²⁵⁸ Article 193 TFEU.

²⁵⁹ M. DOUGAN, "Minimum harmonization and the internal market", *Common Market Law Review*, 2000, 884.

²⁶⁰ *Ibid*, 876.

²⁶¹ J.A. MCMAHON, *EU agricultural law and policy*, Edward Elgar Publishing, 2019, 1.

²⁶² J. BEQIRAJ, "Animal welfare", in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 141; A. PETERS, *Animals in International Law*, Leiden, Brill Nijhoff, 2021, 225.

²⁶³ N. DE ARRIBA-SELLIER, "Turning Gold into Green: Green Finance in the Mandate of European Financial Supervision", *Common Market Law Review*, vol. 58, 1116.

legal basis in Article 352 TFEU, a ‘catch-all’ clause to be used if no appropriate legal basis can be found in the Treaties.²⁶⁴ However, the successor²⁶⁵ of the Birds Directive, which was introduced when the EU *did* have an environmental policy, has its legal basis within this policy, in Article 192 TFEU. Therefore, it seems that the Court *anno* 2023 would have little choice but to qualify the Birds Directive as a measure of minimum harmonization,²⁶⁶ allowing for a thorough assessment of the national measures via Article 36 TFEU.

Chapter 3: The free movement of animals and animal products pre-Lisbon: hampering the advancement of animal welfare protection within the Union

In conclusion, the regime of the free movement of animals and animal products prior to the Lisbon Treaty hampered the advancement of animal welfare protection rather than enhancing it. The use of exhaustive harmonization under Article 43 TFEU restricted the adoption of national welfare standards offering a higher level of protection than foreseen at EU level, as the CAP aims to ensure the smooth functioning of the common organization of the markets in agricultural products. This is especially regrettable, as the different views between the Member States on the importance of animal welfare made it difficult to find a consensus on high standards of protection. But even if no common organization of the markets was established, the mere existence of harmonizing measures made it difficult for Member States to prove the proportionality of their national laws. This approach is regrettable from an animal welfare point of view, as the harmonized standards imposed by the Union did not sufficiently safeguard the well-being of animals. However, a different approach was followed for the protection of wild animals. Here, there was no choice but to allow Member States to derogate from the harmonizing measures to adopt more stringent national rules, in conformity with Article 193 TFEU. Nevertheless, also within this framework, it was difficult for Member States to prove the proportionality of their national measures once the same subject-matter had been harmonized at Union level.

This trend was especially regrettable since certain Union measures were not in conformity with internationally recognized animal welfare standards. Notwithstanding this lack of

²⁶⁴ S. WEATHERILL, “The limits of legislative harmonization ten years after tobacco advertising: how the Court’s case law has become a ‘drafting guide’”, *German Law Journal*, 2011, 856.

²⁶⁵ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, *OJ L 20*, 26 January 2010, 7-25.

²⁶⁶ Article 193 TFEU.

protection, these measures could not be annulled by the Court of Justice as long as they were not “*manifestly inappropriate*” to reach their aim of animal welfare protection. This threshold proved to be high, as even their non-compliance with the welfare standards provided by the European Convention for the Protection of Animals kept for Farming Purposes was not considered to be manifestly inappropriate.

PART 3: THE FREE MOVEMENT OF ANIMALS AND ANIMAL PRODUCTS POST-LISBON

The adoption of the Treaty of Lisbon is considered as a milestone of the European Union's animal welfare policy, as it introduced Article 13 TFEU into the actual body of the Treaties. This gave the obligation to “pay full regard to the welfare requirements of animals” a constitutional status in the EU legal order.²⁶⁷ It has been argued that this provision will have a significant impact on the Union's internal market policy.²⁶⁸ This is because Article 13 TFEU explicitly recognizes animals as sentient beings, so arguably they cannot be considered anymore as mere goods whose free circulation within the Union should be ensured as much as possible.²⁶⁹ Nevertheless, despite this symbolic change, the Treaties still classify animals as agricultural products within the framework of the CAP and the internal market post-Lisbon.²⁷⁰ Therefore, they are still subjected to the rules on the free movement of goods.

This Part aims at clarifying how Article 13 TFEU impacts the free movement of animals and animal products. First, the current legal framework on animal welfare protection will be discussed (**Chapter 1**). Next, it will be examined whether animal welfare is a public interest, or a general principle of EU law since the entry into force of Article 13 TFEU, and what the implications of this categorisation are on the free movement of animals and animal products (**Chapter 2**). Lastly, it will be assessed what the impact of Article 13 TFEU is on the adoption of secondary legislation on animal welfare protection within the internal market policy (**Chapter 3**).

Chapter 1: The animal welfare *acquis*

Before examining the changes in the EU's animal welfare policy since the adoption of the Lisbon Treaty, it is necessary to frame the Union's current animal welfare *acquis*. First, the newly introduced Article 13 TFEU will be discussed (**§1**). This will then be followed by an overview of the relevant EU legislation on the protection of animal welfare relating to the free

²⁶⁷ D. RYLAND and A. NURSE, “Mainstreaming after Lisbon: Advancing animal welfare in the internal market”, *European Energy and Environmental Law Review*, 2013, 109.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ Annex I to the Treaty on the Functioning of the European Union. See also K. SOWER, “Sentient beings and tradable products: the curious constitutional status of animals under Union law”, *Common Market Law Review*, 2018, 57.

movement of animals and animal products, and the freedom left for the Member States to adopt national animal welfare laws (§2). Finally, it will be examined how fundamental rights might restrict the possibility to adopt animal welfare legislation (§3). This will be followed by an interim conclusion on the state of play of the current animal welfare *acquis* (§4).

§1: Article 13 TFEU: a constitutional basis for animal welfare enhancement

The Treaty of Lisbon introduced Article 13 TFEU on the protection of the welfare of animals into the body of the Treaties. As it was inserted under the provisions having general application, it is a so-called ‘integration clause’.²⁷¹ This section will elaborate on the content and the limitations of Article 13 TFEU (1.1) and on its classification as an integration clause (1.2).

1.1: Content and limitations of Article 13 TFEU

As mentioned above, Article 13 TFEU is not a complete novelty.²⁷² The provision finds its roots in Declaration No. 24 and, more importantly, in Protocol No. 33. Article 13 TFEU reads similar to the latter,²⁷³ stating that:

“In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”²⁷⁴

Article 13 TFEU contains a few novelties compared to Protocol No. 33. Firstly, the recognition of animals as sentient beings is now actively mentioned in the text of the provision itself,

²⁷¹ F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI, “Integration clauses – a prologue” in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 1.

²⁷² See Introduction, Chapter 1 at page 2.

²⁷³ Protocol No. 33 read: “*THE HIGH CONTRACTING PARTIES, DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings; HAVE AGREED UPON the following provision which shall be annexed to the Treaty establishing the European Community,*

In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”

²⁷⁴ Article 13 TFEU.

whereas Protocol No. 33 tucked this recognition away in its preamble. Although this displacement does not make any difference from a legal perspective, this change has nevertheless been applauded from an animal welfare point of view, as it signifies a symbolic shift in how the Union thinks about animals and how animals should be treated.²⁷⁵ It implies that animals are not just goods or products where economic interests should prevail, but living beings for which moral interests come into play as well.²⁷⁶ A second novelty introduced in Article 13 TFEU is the inclusion of the fisheries and space policy as additional areas in which animal welfare considerations should be taken into account. This slightly enlarges the scope for the Union to protect the well-being of animals compared to Protocol No. 33.

Nevertheless, just like its predecessor, Article 13 TFEU contains a double limitation. Firstly, the text of the provision only mentions a handful of Union policies to which the obligation to pay full regard to animal welfare should be applied. Remarkably, the Union's trade and environmental policies are not included in this list. Both policies could, however, have considerable implications on animal well-being. The absence of the Union's trade policy implies that, when concluding trade agreements, the Union is not obliged to ensure in the text of the agreement that the imported animal-derived products were obtained in an animal welfare friendly manner.²⁷⁷ The absence of the environmental policy implies that the Union is currently not under a legal obligation to safeguard animal welfare protection when adopting secondary law on environmental matters. However, measures in relation to the preservation of biodiversity could have an adverse impact on animal welfare,²⁷⁸ or could be used to ensure and improve the welfare of wild animals.²⁷⁹ The second limitation of Article 13 TFEU is

²⁷⁵ K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 56.

²⁷⁶ *Ibid.*

²⁷⁷ The absence of concrete animal welfare guarantees and commitments in trade agreements has been criticized by animal welfare organizations. See for example Eurogroup for Animals, "Modernised EU-Chile trade deal disappointing for animal welfare", 15 December 2022, < <https://www.eurogroupforanimals.org/news/modernised-eu-chile-trade-deal-disappointing-animal-welfare>>, accessed 25 March 2023.

²⁷⁸ See for example Regulation No. 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and the management of the introduction and spread of invasive alien species, *OJ L 317*, 4 November 2014, 35-55. As this regulation has its legal basis in Article 192 TFEU within the Union's environmental policy, the Union is not under the obligation to ensure that the eradication of invasive alien species happens in an animal friendly manner. Nevertheless, despite the absence of any legal obligation, Article 17(2) of the regulation prescribes the use of eradication methods which spare animals from "any avoidable pain, distress and suffering".

²⁷⁹ R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, vol. 3, 382.

contained in its last phrase, which states that the EU institutions and the Member States shall nevertheless “[respect] the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage” when regulating animal welfare matters.²⁸⁰ This is an exact copy-paste of what was provided by Protocol No. 33.

It should be stressed that Article 13 TFEU does not grant the EU a general competence to regulate animal welfare matters.²⁸¹ Consequently, secondary legislation in this field must still be linked with other policies where the EU does have competence to harmonize, such as the internal market policy (Article 114 TFEU), the common agricultural policy (Article 43 TFEU) or the environmental policy (Article 192 TFEU).²⁸² Thus, the EU does not have a *carte blanche* when adopting animal welfare legislation. Instead, Article 13 TFEU calls upon the EU institutions and the Member States to consider the effects of their actions on the well-being of animals, and to opt for animal friendly policy developments.²⁸³

1.2: An animal welfare integration clause

Article 13 TFEU is placed at the very beginning of the TFEU, under the ‘provisions having general application’. This makes of Article 13 TFEU a so-called integration clause.²⁸⁴ These clauses contain objectives of general interest – in the case of Article 13 TFEU animal welfare protection – and label these objectives as priority issues for the EU.²⁸⁵ Their aim is to harmonize the EU’s action in such way as to ensure the pursuit of these higher objectives throughout the Union’s policies, giving these objectives a transversal character.²⁸⁶

²⁸⁰ Article 13 TFEU.

²⁸¹ K. SOWERY, “Sentient beings and tradable products: the curious constitutional status of animals under Union law”, *Common Market Law Review*, 2018, 57.

²⁸² *Ibid.*

²⁸³ E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7, No. 3, 1363.

²⁸⁴ F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI, “Integration clauses – a prologue” in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 1.

²⁸⁵ E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7, No. 3, 1369; D. RYLAND and A. NURSE, “Mainstreaming after Lisbon: Advancing animal welfare in the internal market”, *European Energy and Environmental Law Review*, 2013, 109.

²⁸⁶ F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI, “Integration clauses – a prologue” in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 1; E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7, No. 3, 1362.

The placement of the animal welfare objective under the provisions having general application is remarkable from a political perspective. The other objectives pursued under this Title are equality between women and men (Article 8 TFEU), social protection (Article 9 TFEU), non-discrimination (Article 10 TFEU), environmental protection and the promotion of sustainable development (Article 11 TFEU) and consumer protection (Article 12 TFEU). As all integration clauses are considered to be equally important,²⁸⁷ it could be argued that the status of animal welfare within the European Union has risen significantly by grouping it with these other objectives.

§2: Relevant secondary law on animal welfare protection

Since 1974, the European Union has adopted multiple legislative acts on the protection of animal well-being. As awareness about animal welfare increased over time, so did this animal welfare *acquis*. Hereafter follows a brief overview of the Union's legislation on the protection of farm animal welfare (2.1), the welfare of wild animals (2.2) and the welfare of companion animals (2.3), followed by an analysis of the deficiencies of the animal welfare *acquis* (2.4) and the possibility for Member States to develop their own national animal welfare policies (2.5).

2.1: The protection of farm animal welfare

The primary focus of the EU's animal welfare strategy *anno* 2023 is still the protection of farm animal welfare, especially for animals kept in intensive stock-farming systems.²⁸⁸ In this regard, the Union has adopted multiple acts based on Article 43 TFEU, within the framework of the CAP. These include minimum standards on livestock husbandry (2.1.1), rules on the slaughtering of animals (2.1.2) and rules on the transportation of living animals (2.1.3).

2.1.1: Minimum standards on livestock husbandry

One of the main aspects of the EU's animal welfare *acquis* is the protection of livestock during their stay on the farm. The main act in this regard is Council Directive 98/58/EC concerning

²⁸⁷ T. VAN LAER, "The European Court of Justice and the Justification of Trade Restrictions for the Benefit of Animal Welfare: A Change of Mind?", *ELNI Review*, 2011, vol. 1, 42; European Parliament, Joint motion for a resolution on a new animal welfare strategy for 2016-2020, 2015/2957(RSP), 25 November 2015, §4.

²⁸⁸ K. WAUTERS and J. VAN BELLE, "La compétence en matière de bien-être animal aux niveaux européen et national" in P. DELVAUX (ed.), *Le droit des animaux: Perspectives d'avenir*, Brussels, ELS Belgium, 2019, 197.

the protection of animals kept for farming purposes²⁸⁹ ('Farm Animals Directive'), which provides a set of welfare standards covering all farmed animals in the EU.²⁹⁰ More precisely, it ensures the implementation of the five freedoms of animal welfare, by providing, *i.e.*, minimum standards concerning nutrition, the accommodations in which animals are kept, the possibility to move around comfortably, and the use of certain equipment with the animals.²⁹¹ Nevertheless, these provisions do not go as far as to prohibit all practices that are proven to be adverse for the well-being of animals, such as continuous tethering.²⁹² Although these standards provide just a minimum level of protection, Member States can only apply national standards going above this minimum within their respective territories, in compliance with the Treaties.²⁹³ Importantly, the aim of the Farm Animals Directive is to implement the European Convention for the Protection of Animals kept for Farming Purposes.²⁹⁴ This is of crucial importance, as the provisions of the directive are legally binding upon the Union and the Member States and are directly applicable before the European Courts,²⁹⁵ contrary to the provisions of the Convention.²⁹⁶

Besides this general protection regime, the EU also adopted a series of directives specifically targeting the protection of pigs, calves, broilers, and laying hens, aiming to concretise and level-up the standards provided by the Farm Animals Directive. For example, Council Directive 2009/120/EC laying down minimum standards for the protection of pigs²⁹⁷ ('Pigs Directive') provides for the prohibition of the tethering of pigs,²⁹⁸ the duty to keep pigs in group instead of placing them in individual sow stalls,²⁹⁹ and, given the investigatory nature of pigs,³⁰⁰ the

²⁸⁹ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, *OJ L* 221, 8 August 1998, 23-27.

²⁹⁰ Article 1 of the Farm Animals Directive.

²⁹¹ Article 4 *j*° the Annex of the Farm Animals Directive.

²⁹² Point 7 paragraph 2 of the Annex of the Farm Animals Directive.

²⁹³ Article 10(2) of the Farm Animals Directive.

²⁹⁴ Commission of the European Communities, "Proposal for a Council Directive concerning the protection of animals kept for farming purposes", COM(92)192, 15 May 1992, 2. See also Article 5 of the Farm Animals Directive.

²⁹⁵ This was not the case prior to the adoption of the Farm Animals Directive. See in that regard judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113, §35-36.

²⁹⁶ B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law*, 2017, Vol. 3, 552.

²⁹⁷ Council Directive 2009/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs, *OJ L* 47, 18 February 2009, 5-13.

²⁹⁸ Article 3(3) of the Pigs Directive.

²⁹⁹ Article 3(4) of the Pigs Directive.

³⁰⁰ P. STEVENSON, "European Union Legislation on the Welfare of Farm Animals", *Compassion in World Farming*, 2012, accessed 30 March 2023 at < <https://www.animallaw.info/article/european-union-legislation-welfare-farm-animals>>.

obligation to provide access to manipulable materials so the pigs can carry out their innate behaviours.³⁰¹ Similarly, Council Directive 2008/199/EC laying down minimum standards for the protection of calves³⁰² ('Calves Directive') prohibits the tethering of calves,³⁰³ the use of the veal crate system as soon as the calf is eight weeks old,³⁰⁴ the prohibition to keep calves in permanent darkness,³⁰⁵ and the obligation to provide an appropriate and nutrient diet.³⁰⁶ Regarding the welfare of chickens kept for farming purposes, both Council Directive 2007/43/EC laying down minimum rules for the protection of chickens kept for meat production³⁰⁷ ('Broilers Directive') and Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens³⁰⁸ ('Laying Hens Directive') provide minimum requirements for the housing of chickens³⁰⁹ – having phased out the use of battery cages since 2012 – and contain the obligation to provide litter so the chickens can carry out their natural pecking and scratching behaviour.³¹⁰ Equally to the Farm Animals Directive, the standards provided by these specific directives only serve as a minimum level of protection, but Member States can only adopt more stringent rules within their own territories insofar as these are in compliance with the Treaties.³¹¹

2.1.2: Minimum standards on the slaughter of animals

The first ever Union act regulating animal welfare concerns was the Slaughter Directive of 1974.³¹² After multiple amendments to address the concerns of EU citizens, the former directive was repealed and replaced by Council Regulation No. 1099/2009 on the protection of animals at the time of killing³¹³ ('Slaughter Regulation'). In pursuit of its overall objective to

³⁰¹ Article 3(5) of the Pigs Directive.

³⁰² Council Directive 2008/199/EC of 18 December 2008 laying down minimum standards for the protection of calves, *OJ L 10*, 15 January 2009, 7-13.

³⁰³ Annex I, point 8 of the Calves Directive.

³⁰⁴ Article 3(1)(a) of the Calves Directive.

³⁰⁵ Annex I, point 5 of the Calves Directive.

³⁰⁶ Annex I, point 11 of the Calves Directive.

³⁰⁷ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, *OJ L 182*, 12 July 2007, 19-28.

³⁰⁸ Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, *OJ L 203*, 3 August 1999, 53-57.

³⁰⁹ Article 3 of the Broilers Directive; Article 5 of the Laying Hens Directive.

³¹⁰ Annex I, point 3 of the Broilers Directive; Article 6(1)(c) of the Laying Hens Directive.

³¹¹ Article 12 of the Pigs Directive; Article 11 of the Calves Directive; Article 13(2) of the Laying Hens Directive.

³¹² Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, *OJ L 316*, 26 November 1974, 10-11.

³¹³ Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, *OJ L 303*, 18 November 2009, 1-30.

spare animals from any pain, distress and suffering,³¹⁴ the Slaughter Regulation provides for an extensive list of obligations that must be followed during the killing of animals and any related operations. Its cornerstone is the obligation to properly stun animals *before* slaughter, and to keep them stunned until the procedure is fully over and the animal is dead.³¹⁵ Additionally, persons operating in slaughterhouses must have an appropriate level of competence to handle the animals,³¹⁶ the construction of slaughterhouses and the equipment used therein must comply with certain minimum standards,³¹⁷ animals cannot be restrained in ways that cause injury and are considered cruel,³¹⁸ and each slaughterhouse must have an animal welfare officer that checks and ensures compliance with the Slaughter Regulation.³¹⁹ These requirements only provide for a minimum level of protection, meaning that the Member States are allowed to adopt more stringent measures.³²⁰ However, these national rules cannot impede the internal market.³²¹

An important exception from the obligation of prior stunning is the slaughter of animals in accordance with religious rites.³²² This exception ensures that the Slaughter Regulation complies with the freedom of religion as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union³²³ ('Charter') and with Protocol No. 33,³²⁴ which was still in force at the time of the adoption of the regulation. However, this deviation can only be carried out if the ritual slaughter takes place in a slaughterhouse that complies with the other provisions of the Slaughter Regulation.³²⁵ Importantly, Member States are allowed to derogate to a considerable extent from this exception, as was confirmed by the Court of Justice in *Centraal Israëlitisch Consistorie van België*.³²⁶

³¹⁴ Article 3(1) of the Slaughter Regulation. See also judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and others*, C-336/19, EU:C:2020:1031, §42.

³¹⁵ Article 4(1) of the Slaughter Regulation.

³¹⁶ Article 7 of the Slaughter Regulation.

³¹⁷ Article 14 of the Slaughter Regulation.

³¹⁸ Article 15(3) of the Slaughter Regulation.

³¹⁹ Article 17 of the Slaughter Regulation.

³²⁰ Article 26(1) of the Slaughter Regulation.

³²¹ Article 26(4) of the Slaughter Regulation.

³²² Article 4(4) of the Slaughter Regulation.

³²³ Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, 391-407.

³²⁴ Protocol No. 33 stated that full regard must be paid to the welfare requirements of animals "while respecting the legislative or administrative provisions and customs of the Member States relating [...] to religious rites".

³²⁵ Article 4(4) of the Slaughter Regulation.

³²⁶ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and others*, C-336/19, EU:C:2020:1031, §42.

2.1.3: Minimum standards on the transportation of living animals

A final set of welfare standards for farm animals is provided by Council Regulation No. 1/2005 on the protection of animals during transport and related operations³²⁷ ('Animal Transport Regulation'). Its main features are minimum standards for vehicles used to transport animals,³²⁸ the obligation to unload the animals every so often,³²⁹ and the prohibition to transport injured or other unfit animals.³³⁰ Additionally, the transportation of animals can only be carried out by persons who are certified to do so,³³¹ and this cannot include transporters who recently infringed animal welfare laws.³³² As with the other legislative acts on farm animal welfare, Member States are only allowed to adopt more stringent measures for animal transport that takes place entirely within their own territory.³³³

2.2: The protection of the welfare of wild animals

Besides farm animal welfare, the EU has also, to a limited extent, harmonised the protection of the well-being of wild animals. These measures focus on the prohibition of cruel hunting methods not only within the Union, but also in third countries via the introduction of import bans on products that don't comply with the Union's welfare standards.³³⁴ More specifically, the EU has regulated the use of leghold traps for all animals living in the wild (**2.2.1**) and the hunting of seals (**2.2.2**).

2.2.1: The ban on leghold traps

In 1991, the EU introduced Council Regulation No. 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries that catch them by means of leghold traps or trapping methods that do not meet international humane trapping standards³³⁵

³²⁶ Article 4(1) of the Slaughter Regulation.

³²⁷ Council Regulation (EC) No. 1/2005 of 22 December 2004 on the protection of animals during transport and related operations, *OJ L 3*, 5 January 2005, 1-44.

³²⁸ Annex I, Chapter II of the Animal Transport Regulation.

³²⁹ Annex I, Chapter V of the Animal Transport Regulation.

³³⁰ Annex I, Chapter I of the Animal Transport Regulation.

³³¹ Article 6 of the Animal Transport Regulation.

³³² Article 10(1)(c) of the Animal Transport Regulation.

³³³ Article 1(3) of the Animal Transport Regulation.

³³⁴ J. BEQIRAJ, "Animal welfare", in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 139.

³³⁵ Council Regulation (EEC) No. 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal

(‘Leghold Trap Regulation’), which aims at protecting fur-bearing animals from suffering caused by leghold traps. These traps contain metal jaws that close tightly around the animal’s paw, cutting deep into the flesh and potentially breaking bones in the process.³³⁶ Not uncommonly, the animal remains trapped for days, being left in pain until the trap is manually removed.³³⁷ Given the unnecessary suffering that leghold traps cause to the trapped animals, the Leghold Trap Regulation forbids their use within the European Union.³³⁸ Additionally, it prohibits the importation from third countries of fur from certain animal species obtained by using these traps.³³⁹

As made clear by its preamble, the Leghold Trap Regulation primarily aims at the conservation of endangered species rather than to address the moral concerns about the use of these traps.³⁴⁰ That is also why it has its legal basis in Article 192 TFEU, within the environmental policy. Nevertheless, its positive effects on animal welfare were recognized by the European Commission, which in its proposal for the Leghold Trap Regulation included a reference to animal welfare protection in the regulation’s preamble.³⁴¹ However, this was not included in the final text that was eventually adopted. Still, the regulation is considered by many scholars to be part of the EU’s animal welfare *acquis*.³⁴²

2.2.2: The ban on seal products

The most recent legislative act on animal welfare is Regulation No. 1007/2009 on trade in seals products³⁴³ (‘Seal Products Regulation’). Based on Article 114 TFEU, the Seals Products Regulation aims at the smooth functioning of the internal market³⁴⁴ by prohibiting the placing

species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, *OJ L 308*, 9 November 1991, 1-4.

³³⁶ A. NOLLKAEMPER, “The legality of moral crusades disguised in trade laws: an analysis of the EC ‘ban’ on furs from animals taken by leghold traps”, *Journal of Environmental Law*, 1996, Vol. 8(2), 240.

³³⁷ *Ibid.*

³³⁸ Article 2 of the Leghold Trap Directive.

³³⁹ Article 3(1) of the Leghold Trap Directive.

³⁴⁰ Read, for example: “Whereas the abolition of the leghold trap will have a positive effect on the conservation status of threatened or endangered species of wild fauna [...]”.

³⁴¹ Commission of the European Communities, Proposal for a Council Regulation (EEC) on the importation of certain furs, 26 April 1989, COM(89)198 final, 4.

³⁴² See for example R. O’GORMAN, “Of eggs, and seals, and leghold traps: Internal and external public morality as a factor in European Union animal welfare legislation” in J.A. MCMAHON and M.N. CARDWELL, *Research Handbook on EU Agriculture Law*, Cheltenham, Edward Elgar Publishing, 2015.

³⁴³ Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *OJ L 286*, 31 October 2009, 36-39.

³⁴⁴ Recitals 6 and 8 of the Seals Products Regulation.

on the market of seal products, except if the hunts were conducted by Inuit or other indigenous communities.³⁴⁵ This act was deemed necessary, as multiple Member States were adopting unilateral measures to respond to their citizens' concerns about the complications of seal hunting for animal welfare.³⁴⁶ As the matter is now harmonised at Union level, Member States are not allowed to restrict the free movement of seal products that comply with the Seal Products Regulation.³⁴⁷

The adoption of the Seal Products Regulation was not spared from any controversies. Numerous Inuit challenged its legitimacy claiming that it was adopted on the wrong legal basis,³⁴⁸ violated the principles of proportionality and subsidiarity,³⁴⁹ infringed multiple fundamental rights protected under the Charter,³⁵⁰ and that the European Commission abused its powers.³⁵¹ Nevertheless, both the General Court of the European Union ('General Court') and the Court of Justice dismissed these arguments.³⁵²

The criticism on the Seal Products Regulation did not stay within the boundaries of the EU judiciary. Both the Canadian and the Norwegian government challenged the regulation before the Appellate Body of the World Trade Organization ('WTO') for its adverse impact on trade in seal products.³⁵³ Interestingly, the European Commission invoked the protection of public morality in its defence to justify the import ban under Article XX(a) of the General Agreement on Tariffs and Trade³⁵⁴ ('GATT').³⁵⁵ This defence is very similar to the arguments raised by the United Kingdom in *Compassion in World Farming*.³⁵⁶ Contrary to the Court of Justice in

³⁴⁵ Article 3(1) of the Seals Products Regulation.

³⁴⁶ Recital 5 of the Seal Products Regulation. See also R. O'GORMAN, "Of eggs, and seals, and leghold traps: Internal and external public morality as a factor in European Union animal welfare legislation" in J.A. MCMAHON and M.N. CARDWELL, *Research Handbook on EU Agriculture Law*, Cheltenham, Edward Elgar Publishing, 2015, 324.

³⁴⁷ Article 4 of the Seal Products Regulation.

³⁴⁸ Judgment of 25 April 2013, *Inuit Tapiriit Kanatami and Others v Commission*, T-526/10, EU:T:2013:215, §26.

³⁴⁹ *Ibid*, §79.

³⁵⁰ *Ibid*, §104.

³⁵¹ *Ibid*, §120.

³⁵² *Ibid*, §132; judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others v Commission*, C-398/13 P, EU:C:2015:535, §69.

³⁵³ WTO Appellate Body, 18 June 2014, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R.

³⁵⁴ WTO, General Agreement on Tariffs & Trade 1994, 1867 United Nations Treaty Series, 190, 33 I.L.M. 1153, 1994.

³⁵⁵ WTO Appellate Body, 18 June 2014, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, §2.134.

³⁵⁶ J. BEQIRAJ, "Animal welfare", in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 157.

Compassion in World Farming, the Appellate Body of the WTO concluded that the moral issues of a part of the EU citizens *do* justify a trade restriction.³⁵⁷ Nevertheless, the Seal Products Regulation contained an exception for the importation of seal products obtained from hunts performed by the Inuit, even if their hunting methods had an adverse effect on the welfare of the seals. Given this exception, the Appellate Body found that the Seal Products Regulation nevertheless violated the GATT, as the exception constituted an arbitrary discrimination.³⁵⁸ Following this decision, the European Commission introduced an additional requirement for the importation of seal products originating from the Inuit: their hunting methods must now also have due regard to the welfare of seals for their products to be allowed onto the European market.³⁵⁹

2.3: The protection of the welfare of companion animals

Notwithstanding the little competence to legislate the well-being of companion animals,³⁶⁰ the EU adopted Regulation No. 1523/2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur³⁶¹ ('Cat and Dog Fur Regulation'). As EU citizens have moral concerns against the killing of animals that are considered as pets in European society, they want to refrain from trading in cat and dog fur.³⁶² However, cat and dog fur was often imported into the EU under false labels, presenting it as being synthetic fur or fur from other fur-bearing animals.³⁶³ Consequently, EU citizens could unknowingly be in possession of cat and dog fur, despite their ethical concerns against it.³⁶⁴ Member States therefore took matters into their own hands and individually legislated trade in cat and dog fur, which fragmented the internal market.³⁶⁵ With the Cat and Dog Fur Regulation, the EU regulated this aspect of consumer protection to ensure the free circulation

³⁵⁷ WTO Appellate Body, 18 June 2014, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, §5.290.

³⁵⁸ *Ibid.*, §5.339.

³⁵⁹ Article 3(1)(c) of the Seal Products Directive.

³⁶⁰ C. VIAL and F. PICOD, "L'animal en droit européen", *Revue des affaires européennes*, 2017, Vol. 1, 10.

³⁶¹ Regulation (EC) No. 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, *OJ L 343*, 27 December 2007, 1-4.

³⁶² Recital 1 of the Cat and Dog Fur Regulation.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ L. DONNELLAN, "The Cat and Dog Fur Regulation: A Case Study on the European Union's Approach to Animal Welfare", *Liverpool Law Review*, 2018, Vol. 39, 74.

of fur and fur products within the Union,³⁶⁶ which is why it has its legal basis in Article 114 (and Article 207) TFEU. Although the regulation is mainly aimed at the protection of European consumers, it also addresses the welfare concerns linked with the production of cat and dog fur.³⁶⁷ Therefore, this regulation is considered³⁶⁷ by scholars to be part of the EU's animal welfare *acquis*.³⁶⁸

2.4: Current weaknesses of the EU's animal welfare *acquis*

Anno 2023, the EU has one of the most comprehensive legal frameworks in the world to protect the well-being of animals.³⁶⁹ Over the years, it phased out multiple practices that were found to be detrimental to the welfare of animals, such as the universal use of battery cages,³⁷⁰ veal crates,³⁷¹ and sow stalls.³⁷² Still, it is considered that the animal welfare *acquis* fails to pay full regard to the welfare requirements of animals as required by Article 13 TFEU and its predecessor, Protocol No. 33.³⁷³ For example, the Laying Hens Directive still allows the use of enriched cages, which only provide for little extra space and facilities to carry out innate behaviours than battery cages do.³⁷⁴ As such, these cages do not really improve the welfare

³⁶⁶ *Ibid*, 80.

³⁶⁷ See for example Recital 11 of the Cat and Dog Fur Regulation, which explains why an importation ban also benefits the welfare of cats and dogs kept in fur farms in third countries.

³⁶⁸ See for example R. O'GORMAN, "Of eggs, and seals, and leghold traps: Internal and external public morality as a factor in European Union animal welfare legislation" in J.A. MCMAHON and M.N. CARDWELL, *Research Handbook on EU Agriculture Law*, Cheltenham, Edward Elgar Publishing, 2015.

³⁶⁹ N.K. PEDERSEN, "Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn", Michigan State University College of Law, 2009, consulted 29 March 2023 at < <https://www.animal.law.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn>>.

³⁷⁰ The Scientific Veterinary Committee of the European Commission considered that "[i]t is clear that because of its small size and its barrenness, the battery cage [...] has inherent severe disadvantages for the welfare of hens". Commission of the European Communities, "Communication from the Commission on the protection of laying hens kept in various systems of rearing", 11 March 1998, COM(1998)135 final, 9.

³⁷¹ The Scientific Veterinary Committee of the European Commission considered that "[t]he welfare of calves is very poor when they are kept in small individual pens with insufficient room for comfortable lying, no direct social contact and no bedding or other material to manipulate". Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament on the welfare of calves", 15 December 1995, COM(95)711 final, 11.

³⁷² P. STEVENSON, "European Union Legislation on the Welfare of Farm Animals", *Compassion in World Farming*, 2012, accessed 30 March 2023 at < <https://www.animallaw.info/article/european-union-legislation-welfare-farm-animals>>.

³⁷³ See for example European Parliament, Motion for a resolution on a new Animal Welfare Strategy for 2016-2020, 24 November 2015, 2015/2957(RSP), point 3; K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 65.

³⁷⁴ P. STEVENSON, "European Union Legislation on the Welfare of Farm Animals", *Compassion in World Farming*, 2012, accessed 30 March 2023 at < <https://www.animallaw.info/article/european-union-legislation-welfare-farm-animals>>.

of laying hens compared to the situation when they are kept in battery cages.³⁷⁵ Also, the bans on veal crates and sow stalls contain a number of exceptions that still allow for their usage.³⁷⁶ All of these practices raise doubts as to their compatibility with the animal's freedom of discomfort and freedom to carry out natural behaviours.

Additionally, the legislative initiatives have been very fragmented and uncoordinated.³⁷⁷ For example, certain farm animal species are only to a limited extent covered by the animal welfare *acquis*, despite being commonly farmed in the EU.³⁷⁸ This includes dairy cows, beef cattle, sheep, goats, turkeys, rabbits, geese, and ducks.³⁷⁹ Due to the absence of stronger species-specific standards for these animals (as have pigs, calves, broilers and laying hens), they only enjoy the minimum guarantees provided by the Farm Animals Directive. However, the standards of the Farm Animals Directive do not sufficiently protect these animals. For example, force feeding ducks and geese is difficult to reconcile with the prohibition under the Farm Animals Directive to provide food in a manner that may cause unnecessary suffering or injury,³⁸⁰ given its detrimental effects on the health and welfare of the animals.³⁸¹ Nevertheless, this is still a common practice in the EU to produce foie gras.³⁸² As such, the Farm Animals Directive fails to respect the freedom of these animals from hunger and thirst, as it does not preclude diets that do not keep the animals in full health and vigour. Another illustration is widespread practice of tethering dairy cows in narrow cubicles that do not allow them to move comfortably,³⁸³ which violates the freedom of movement as provided by the

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ J. BEQIRAJ, "Animal welfare", in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 140.

³⁷⁸ L. LEONE, "Farm animal welfare under scrutiny: issues unsolved by the EU legislator", *European journal of legal studies*, 2020, Vol. 12(1), 49.

³⁷⁹ D. RYLAND, "Animal welfare in the reformed Common Agricultural Policy: Wherefore art thou?", *Environmental Law Review*, 2015, Vol. 15(1), 24.

³⁸⁰ Point 14 of the Annex of the Farm Animals Directive.

³⁸¹ Scientific Committee on Animal Health and Animal Welfare, "Welfare Aspects of the Production of Foie Gras in Ducks and Geese", 16 December 1998, 48 and 65.

³⁸² Eurogroup for Animals, "Force-feeding for foie gras: new investigation reveals this inhumane practice still occurs in the EU, despite high sanctions in most Member States", 21 February 2023, accessed 1 April 2023 at <<https://www.eurogroupforanimals.org/news/force-feeding-foie-gras-new-investigation-reveals-inhumane-practice-still-occurs-eu-despite>>.

³⁸³ E. NALON and P. STEVENSON, "Protection of Dairy Cattle in the EU: State of Play and Directions for Policymaking from a Legal and Animal Advocacy Perspective", *Animals*, 2019, 4 and 6.

Farm Animals Directive³⁸⁴ yet often occurs within the EU.³⁸⁵ This is clearly contrary to the freedom of discomfort and the freedom to express normal behaviours. Additionally, a considerable number of dairy cows in the EU has been found to regularly suffer from foot injuries and other diseases,³⁸⁶ which is contrary to the freedom from pain, injury or disease, as also provided by the Farm Animals Directive.³⁸⁷ In conclusion, it appears to be that none of the five freedoms of animal welfare are sufficiently respected for farm animal species that do not enjoy protection from sector-specific measures. Furthermore, also the animal welfare regime for wild animals has been criticized for being too selective. Why ban leghold traps, but not equally detrimental hunting methods such as drowning traps?³⁸⁸ Or why ban the importation of harmfully obtained dog, cat, and seal fur, but not that of animals with less to no 'cuddliness factor'?³⁸⁹

A second problem with the Union's animal welfare *acquis* is its lack of enforcement.³⁹⁰ Even though the European Commission is aware of this problem,³⁹¹ it generally refrains from triggering an infringement procedure under Article 258 TFEU to bring non-compliant Member State before the Court of Justice.³⁹² Consequently, Member States are not given any incentives to level-up their animal welfare policies and ensure the enforcement of the EU's animal welfare *acquis* within their territories. This is regrettable, as Member States are not allowed to take matters into their own hands by withdrawing from trading with non-compliant Member States, as displayed in the cases of *Hedley Lomas*³⁹³ and *Compassion in World*

³⁸⁴ Point 7 of the Annex of the Farm Animals Directive. Although the continuous tethering of animals is principally allowed, the animals must be given the space appropriate to their physiological and ethological needs.

³⁸⁵ E. NALON and P. STEVENSON, "Protection of Dairy Cattle in the EU: State of Play and Directions for Policymaking from a Legal and Animal Advocacy Perspective", *Animals*, 2019, 4 and 6.

³⁸⁶ European Commission, "Overview report of the Directorate-General for Health and Food Safety on a series of audits carried out in 2016 in order to evaluate Member State controls and use of indicators to ensure the welfare of cattle on dairy farms", 17 November 2017, DG(SANTE)2017-6241, 5-6; European Parliament Research Service, "The EU dairy sector: Main features, challenges and prospects", 17 December 2012, 10.

³⁸⁷ Article 3 of the Farm Animals Directive.

³⁸⁸ A. NOLLKAEMPER, "The legality of moral crusades disguised in trade laws: an analysis of the EC 'ban' on furs from animals taken by leghold traps", *Journal of Environmental Law*, 1996, Vol. 8(2), 241.

³⁸⁹ B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law*, 2017, vol. 3, 554.

³⁹⁰ L. DONNELLAN, "The Cat and Dog Fur Regulation: A Case Study on the European Union's Approach to Animal Welfare", *Liverpool Law Review*, 2018, Vol. 39, 79.

³⁹¹ European Commission, "Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, 19 January 2012, COM(2012)6 final, 8.

³⁹² L. DONNELLAN, "The Cat and Dog Fur Regulation: A Case Study on the European Union's Approach to Animal Welfare", *Liverpool Law Review*, 2018, Vol. 39, 80.

³⁹³ Judgment of 23 May 1996, *Hedley Lomas*, C-5/94, EU:C:1996:205.

*Farming*³⁹⁴. However, in 2017, the EU adopted Regulation 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products³⁹⁵ ('Official Controls Regulation'), which provides for the creation of European Union reference centres for animal welfare.³⁹⁶ These centres must help both the European Commission and the Member States with the application and enforcement of the animal welfare *acquis* and the development of animal welfare protection.³⁹⁷ As of 2023, the European Commission has already designated reference centres for animal welfare focussing on pigs,³⁹⁸ poultry and other small farmed animals,³⁹⁹ and ruminants (such as cattle, sheep, and goats) and equines.⁴⁰⁰ Additionally, the European Commission announced the creation of a Fish Welfare Reference Centre in December 2022 at the 12th EU Platform on Animal Welfare.⁴⁰¹ Although no reports on their effect on the enforcement of animal welfare laws are available yet, animal welfare organisations have been positive about their creation and their potential impact on better enforcement.⁴⁰²

2.5: A limited scope for Member States to adopt national animal welfare laws

As set out in Part 2, one of the main problems with the Union's animal welfare protection regime prior to the Lisbon Treaty was the impossibility for Member States to invoke Article 36 TFEU to try and justify their national animal welfare protection laws.⁴⁰³ This was because most

³⁹⁴ Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113.

³⁹⁵ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, *OJ L 95*, 7 April 2017, 1-142.

³⁹⁶ Article 95 of the Official Controls Regulation.

³⁹⁷ Articles 95 and 96 of the Official Controls Regulation. See also European Commission, "EU Reference Centres for animal welfare", accessed 1 April 2023 at < https://food.ec.europa.eu/animals/animal-welfare/eu-reference-centres-animal-welfare_en>.

³⁹⁸ Commission Implementing Regulation (EU) 2018/329 of 5 March 2018 designating a European Union Reference Centre for Animal Welfare, *OJ L 63*, 6 March 2018, 13-14.

³⁹⁹ Commission Implementing Regulation (EU) 2019/1685 of 4 October 2019 designating a European Union Reference Centre for Animal Welfare for poultry and other small farmed animals, *OJ L 258*, 9 October 2019, 11-12.

⁴⁰⁰ Commission Implementing Decision (EU) 2021/755 of 6 May 2021 designating a European Union Reference Centre for Animal Welfare for ruminants and equines, *OJ L 163*, 10 May 2021, 5-6.

⁴⁰¹ Eurogroup for Animals, "European Commission announces creation of Fish Welfare Reference Centre", 7 December 2022, accessed 1 April 2023 at < <https://www.eurogroupforanimals.org/news/european-commission-announces-creation-fish-welfare-reference-centre>>.

⁴⁰² See for example Eurogroup for Animals, "EU Platform on Animal Welfare", 9 November 2020, accessed 2 April 2023 at < <https://www.eurogroupforanimals.org/news/eu-platform-animal-welfare>>.

⁴⁰³ See Part 2, Chapter 2, §3 at page 26.

of the Union's rules on animal welfare, especially within the sphere of farm animal welfare, were considered to exhaustively harmonize animal welfare considerations. *Anno* 2023, the Union's legislative framework still provides few possibilities for Member States to introduce their own animal welfare protection laws with regard to certain species. Again, this restrictive approach mainly applies to the protection of farm animals.

The European Union adopted a rather extensive legislative framework for the protection of farm animal welfare. Even though all of these acts leave the possibility for the Member States to adopt more stringent measures, these national laws cannot pose any restrictions on the internal market. From a strict EU law perspective, this is a logical decision, as all of these EU acts were adopted to ensure "*the smooth running of the organisation of the common market in [agricultural products]*".⁴⁰⁴ The application of national standards to animals or products coming from other Member States would introduce barriers on the internal market, going against the market objective of these acts. Nevertheless, this is regrettable for the enhancement of animal welfare protection, especially since the majority of the Union's animal welfare *acquis* does not sufficiently protect animals as sentient beings,⁴⁰⁵ as illustrated above. This is even more so for farmed animals that do not have their own species-specific standards and thus do not enjoy a higher level of protection at EU level. For these animals, Member States can only apply the poor standards of the Farm Animals Directive *vis-à-vis* other Member States.

Also the provisions of the Seal Products Regulation and the Cat and Dog Fur Regulation principally do not provide any leeway to Member States to adopt more stringent national measures. The Seal Products Regulation, for example, explicitly provides that the "*Member States shall not impede the placing on the market of seal products which comply with [the] Regulation*".⁴⁰⁶ Nevertheless, Article 114 TFEU gives Member States the possibility to maintain or introduce more stringent national rules, if a set of conditions is fulfilled. To maintain pre-existing national measures, it suffices for the Member State to demonstrate that the measures

⁴⁰⁴ Preamble of the Farm Animals Directive. See also recital 6 of the Pigs Directive; recital 5 of the Calves Directive; recital 6 of the Broilers Directive; recital 6 of the Laying Hens Directive; recital 5 of the Slaughter Regulation, and recital 2 of the Animal Transport Regulation.

⁴⁰⁵ K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 65.

⁴⁰⁶ Article 4 of the Seal Products Regulation.

are necessary to protect one of the objectives of Article 36 TFEU, such as the protection of the health and life of animals.⁴⁰⁷ Introducing new national measures after harmonization at Union level is harder, and seems difficult to invoke for animal welfare laws. That is because new measures may only be adopted to pursue the protection of the environment or the working environment.⁴⁰⁸ As such, only animal welfare measures linked to the protection of biodiversity can be adopted after harmonization at EU level. Additionally, these measures must be based on new scientific evidence, and must tackle a problem that is specific to that Member State that arose after the adoption of the harmonization measure,⁴⁰⁹ giving a very limited scope to the Member States to adopt such measures. However, contrary to the farm animal welfare framework, these findings do currently not necessarily disadvantage animal welfare protection. The Seal Products Regulation already prohibits all seal products originating from hunting where animal welfare requirements were not met.⁴¹⁰ Similarly, the standards set by the Cat and Dog Fur Regulation are sufficiently high as to not require Member States to adopt more stringent measures to protect cats and dogs against fur farming, as it imposes a complete ban on the production and importation of these products.⁴¹¹ The Leghold Trap Regulation, on the other hand, does not provide for a fully effective protection regime, as it only prohibits the importation of the pelts of certain animal species. Nevertheless, as this regulation is based on Article 192 TFEU, Member States are by virtue of Article 193 TFEU allowed to take more stringent measures, if those can be justified under Article 36 TFEU.

In conclusion, the possibilities to adopt more stringent national rules on animal welfare do not appear to be much different from the regime prior to the Lisbon Treaty. Not only were no modernized animal welfare acts adopted since the entry into force of Article 13 TFEU, but the current legal framework also codifies the jurisprudence of the Court of Justice as set out in Part 2. Member States are allowed to act on farm animal welfare, but only if this has no effect on animals and products coming from other Member States or the common organisation of the markets in agricultural products. On the other hand, rules on the welfare of wild animals

⁴⁰⁷ Article 114(4) TFEU.

⁴⁰⁸ Article 114(5) TFEU.

⁴⁰⁹ *Ibid.*

⁴¹⁰ Article 3 of the Seal Products Regulation.

⁴¹¹ Article 3 of the Cat and Dog Fur Regulation.

that are adopted within the environmental policy continue to benefit from the treaty-prescribed minimum harmonization under what is currently Article 193 TFEU.

§3: Limitations to animal welfare measures by fundamental human rights

With the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union became a source of primary EU law.⁴¹² Accordingly, it now has the same legal value as the Treaties. Therefore, the Charter must be respected by both the EU institutions and the Member States when adopting and implementing Union law.⁴¹³ This also has an influence on the adoption of legislation on animal welfare matters,⁴¹⁴ as the rights and freedoms provided by the Charter cannot be restricted to an unnecessary and disproportional extent when doing so.⁴¹⁵

This section will examine clashes between animal welfare protection within the realm of the free movement of animals and animal products on the one hand, and the fundamental rights and freedoms laid down in the Charter on the other. Where relevant, this will be read in light of the European Convention on Human Rights⁴¹⁶ ('ECHR') and the relevant case law of the European Court on Human Rights ('ECtHR'), as these principally serve as a minimum level of protection offered by the Charter.⁴¹⁷ The fundamental rights that clash with the free movement of animals and animal products are the freedom of religion (**3.1**) and the right to property (**3.2**).

3.1: The freedom of religion and the ritual slaughter of animals

In recent years, the Court of Justice has had two occasions to rule on the balance to be struck between animal welfare protection on the one hand and the freedom of religion as provided by Article 10 of the Charter on the other.⁴¹⁸ Both cases were raised in the context of the ritual slaughter of animals, a practice that exists both in Islam and in Judaism, where animals

⁴¹² Article 6(1) TEU.

⁴¹³ Article 51(1) of the Charter.

⁴¹⁴ European Commission, "Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, 19 January 2012, COM(2012)6 final, 6.

⁴¹⁵ Article 52(1) of the Charter.

⁴¹⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

⁴¹⁷ Article 52(3) of the Charter.

⁴¹⁸ Judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335; judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

intended for meat production are slaughtered in accordance with religious rites and observances. If these rites have been performed successfully, the meat derived therefrom will be considered halal (in Islam) or kosher (in Judaism), making it fit to be consumed by Muslim and Jewish believers respectively. One of the requirements for religious slaughter in both religions is the absence of prior stunning of the animals.⁴¹⁹ This is because both religions require the animal to be in perfect health when being slaughtered, and for the animal to die from bleeding out for the meat to be considered halal or kosher.⁴²⁰

As explained above, the Slaughter Regulation imposes the duty to properly stun animals prior to their killing.⁴²¹ This obligation is deemed necessary to effectively protect the well-being of the animals involved, as scientific research has shown that prior stunning is the best possible way to reduce suffering at the time of killing.⁴²² However, certain techniques of prior stunning may cause the stunned animal to die before it is actually slaughtered.⁴²³ If this happens, the meat obtained from this animal cannot be considered halal or kosher, as the animal died from the prior stunning instead of bleeding out, and as it was not alive and in perfect health anymore at the time the ritual slaughter was performed. Therefore, the Slaughter Regulation contains an exception to the duty of prior stunning when an animal is slaughtered in accordance with religious rites to ensure compliance with freedom of religion.⁴²⁴ Nevertheless, this practice must be performed in an authorised slaughterhouse and must respect all other requirements of the Slaughter Regulation.⁴²⁵

Under Article 26(2)(c) of the Slaughter Regulation, Member States are allowed to adopt more stringent measures regarding the ritual slaughter of animals than those provided by the regulation, but these measures must also be in conformity with Article 10 of the Charter.⁴²⁶

⁴¹⁹ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §13.

⁴²⁰ *Ibid.*

⁴²¹ Article 4(1) of the Slaughter Regulation.

⁴²² Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §41.

⁴²³ For an analysis of the (ir)reversible character of different stunning methods, see M. RIAZ, F. IRSHAD, N. RIAZ and J. REGENSTEIN, "Pros and cons of different stunning methods from a Halal perspective: a review", *Translational Animal Science*, 2021, 1-15.

⁴²⁴ Article 4(4) of the Slaughter Regulation; judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §44.

⁴²⁵ Article 4(4) of the Slaughter Regulation.

⁴²⁶ Article 51(1) of the Charter; judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §49.

An important case on this matter is *Centraal Israëlitisch Consistorie van België*, on the Flemish prohibition on the ritual slaughter without prior stunning.⁴²⁷ Instead, the Flemish decree on animal welfare prescribes that animals slaughtered in accordance with religious rites must receive a reversible form of stunning that is not in itself capable of killing the animal.⁴²⁸ The question was raised whether this decree was in accordance with the freedom of religion, as it prevented Jewish and Muslim believers from performing the act of ritual slaughter. According to the Court, the Flemish decree limits the freedom of Jews and Muslims to manifest their religion,⁴²⁹ but this limitation is deemed proportionate in accordance with Article 52(1) of the Charter. Firstly, there was little doubt that the limitation was provided for by law, as the prohibition flows from a decree.⁴³⁰ Secondly, the prohibition respects the essence of the right to freedom, as it only prohibits one aspect of the act of ritual slaughtering, namely the absence of prior stunning.⁴³¹ Thirdly, the Court acknowledged that animal welfare protection is an objective of general interest recognized by the EU that may limit the exercise of fundamental rights.⁴³² Lastly, the Flemish prohibition was proportionate, as it still allows for the importation of meat products derived from animals that have undergone ritual slaughter without prior stunning in other Member States or even third countries.⁴³³ In conclusion, the Flemish government was allowed to require a prior reversible stunning procedure for the ritual slaughtering of animals.⁴³⁴

The Court's judgment in *Centraal Israëlitisch Consistorie* contains a clear limitation on the competence of both the EU and the Member States to regulate the slaughter of animals. More precisely, it is not possible to impose a complete prohibition on the importation of meat derived from animals that were slaughtered in accordance with ritual rites without being

⁴²⁷ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

⁴²⁸ Article 15(2) of the Belgian law of 14 August 1986 on the protection and the welfare of animals (Wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren), *Belgisch Staatsblad* 3 December 1986, 16382, as amended by the Flemish Decree of 7 July 2017 amending the law of 14 August 1986 on the protection and the welfare of animals, regarding the permitted methods for the slaughter of animals (Decreet van 7 juli 2017 houdende wijziging van de wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren, wat de toegelaten methodes voor het slachten van dieren betreft), *Belgisch Staatsblad* 18 July 2017, 73317.

⁴²⁹ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §55.

⁴³⁰ *Ibid*, §60.

⁴³¹ *Ibid*, §61.

⁴³² *Ibid*, §63.

⁴³³ *Ibid*, §78.

⁴³⁴ *Ibid*, §81.

priorly stunned. Doing so would disproportionately restrict the freedom of religion of both Muslims and Jews, as the ECtHR recognized the halal and kosher diets as components of the manifestation of one's religion.⁴³⁵ Thus, practising Muslims and Jews must always have access to foodstuffs complying with their respective religious practices, even if these practices adversely affect the well-being of the animals concerned. Nevertheless, the freedom of religion does not go so far as to grant individuals the right to take part in the performance of ritual slaughter themselves.⁴³⁶ That is why both the EU and the Member States may prohibit the practice itself from being carried out in their respective territory without infringing the freedom of religion.

3.2: The right to property and the prohibition of cruel farming practices

The EU's animal welfare *acquis* phased out and eventually prohibited the use of battery cages and similar restrictive caging systems. In a similar vein, the European Citizens Initiative 'Fur Free Europe' proposes a ban on the exploitation of fur farms within the EU.⁴³⁷ These initiatives are promising for the interests of animals subjected to these practices, but they potentially conflict with the right to property of the owners of these farms, as they lose their right to use, exploit, and potentially benefit from the property in which they invested when its use was still allowed. In these cases, a thorough balance must be struck between the right to property of the owners of these farms, and the protection of the welfare of animals. The Court of Justice has not yet had the opportunity to deal with this issue in relation to animal welfare laws, but there have been a few occasions where the national courts of the Member States have been presented with this question in relation to national animal welfare rules. The most interesting case in this regard is a case of the Dutch Supreme Court,⁴³⁸ as it is the only case where the balance struck between the right to property and animal welfare was carefully examined.

Under the right to property enshrined in Article 17(1) of the Charter, everyone has the right to own, use, dispose of, and bequeath of their lawfully acquired possessions. Nevertheless,

⁴³⁵ ECtHR, 27 June 2000, *Cha'are Shalom Ve Tsedek v France*, No. 27417/95, §73.

⁴³⁶ *Ibid*, §82.

⁴³⁷ The collection of signatures for 'Fur Free Europe' closed on 1 March 2023. 1.701.892 European citizens supported the initiative, meaning that the European Commission must review the proposal. See Eurogroup for Animals, "European Citizens' Initiative Fur Free Europe", accessed 5 May 2023 at < <https://www.eurogroupforanimals.org/fur-free-europe>>.

⁴³⁸ Dutch Supreme Court (Hoge Raad der Nederlanden), 16 December 2016, *de vereniging Nederlandse Federatie van Edelpelsdierenhouders e.a. t. de Staat der Nederlanden*, No. 16/00921, NL:HR:2016:2888.

this is not an absolute right, meaning that its exercise may be limited.⁴³⁹ Article 17(1) of the Charter provides that “[t]he use of property may be regulated by law in so far as is necessary for the general interest”. This must be interpreted in light of Article 52(1) of the Charter and the jurisprudence accompanying this provision,⁴⁴⁰ which state that the limitation must be provided for by law, must genuinely pursue an objective of general interest, and must respect the essence of the right to property.⁴⁴¹ The notion of ‘regulating the use of property’ as provided by Article 17(1) of the Charter is interpreted broadly by the Court of Justice.⁴⁴² It therefore includes all measures that limit the exercise of one’s right to property, including limitations imposed by normative measures.⁴⁴³ As such, a prohibition on the use of battery cages or a ban on fur farms falls within the scope of this notion. Consequently, the use of these animal-unfriendly farming methods can only be restricted by the Union if these measures comply with the conditions of Articles 17(1) j° Article 52(1) of the Charter.

There is no doubt that the criteria of being provided for by law is fulfilled, given that the EU’s animal welfare *acquis* consists of legally binding regulations and directives, and it is likely that future similar restrictions will do so as well. Additionally, there is no doubt that animal welfare protection is a general interest recognized by the Union. The Court of Justice has labelled it as a public interest of the EU for multiple years already, and recently confirmed in a case on the freedom of religion that this means that animal welfare is a general interest in the sense of Article 52(1) of the Charter.⁴⁴⁴ Thus, animal welfare issues are a sufficiently serious concern to limit the exercise of the right to property. However, more doubtful is the question of whether these restrictions constitute a disproportionate interference impairing the substance of the right to property. Here, two distinct situations should be separated from each other. On the one hand, there is the situation where the animal welfare laws do not prohibit the farming of animals as such, but only regulate the conditions in which this activity must be exercised. The prohibitions on battery cages, veal crates and sow stalls, for example, do not prohibit keeping

⁴³⁹ Judgment of 8 September 2022, *Ministerstvo zivotniho prostredi*, C-659/20, EU:C:2022:642, §63.

⁴⁴⁰ F. WOLLENSCHLÄGER, “Article 17(1)” in S. PEERS, T. HERVEY, J. KENNER and A. WARD, *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, 2014, 481, §17(1).43.

⁴⁴¹ Article 52(1) of the Charter.

⁴⁴² F. WOLLENSCHLÄGER, “Article 17(1)” in S. PEERS, T. HERVEY, J. KENNER and A. WARD, *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, 2014, 477, §17(1).28.

⁴⁴³ *Ibid.*

⁴⁴⁴ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §63.

hens, calves, or pigs, but they only regulate the housing requirements of these animals. In the context of environmental protection, the Court of Justice has already recognized that restrictions that still allow for the main activity to be carried out, albeit in a restricted manner, do not disproportionately impair the essence of the right to property.⁴⁴⁵ As such, restrictions of this kind are allowed under EU law, even if no compensation was provided to the effected owners.⁴⁴⁶ When applying this reasoning to the animal welfare *acquis*, the ban on cruel caging systems can be considered as being legitimate under Article 17(1) of the Charter, even if the owners of the farms are not compensated for their losses.

This is different for regulations that prohibit the practice of farming, such as the ban on fur farms as proposed by the European Citizens Initiative ‘Fur Free Europe’. If such a regulation were adopted, then fur farmers would be prevented from continuing their activities, so the above reasoning does not apply in this context. In the Netherlands, a law similar to the ‘Fur Free Europe’ initiative was adopted in 2013, providing for the phasing out of Dutch fur farms between 2013 and 2024.⁴⁴⁷ This law was challenged before the Dutch national court, as it did not provide for a compensation to rectify the damages lost by the prohibition.⁴⁴⁸ However, the Supreme Court of the Netherlands dismissed this argument and maintained the prohibition on fur farms.⁴⁴⁹ It held that the law does not entail a *de facto* expropriation in the sense of Article 1 of the First Protocol to the ECHR (which corresponds with Article 17(1) of the Charter)⁴⁵⁰, but that it merely regulates the use of one’s property, as the owner of the fur farms can still use their premises for other purposes.⁴⁵¹ As such, the mere existence of a derogation period to gradually phase out fur farms was sufficient to respect the right to property, even if no monetary compensation was offered to the owners of the farms.⁴⁵² According to the Dutch judges, this derogation period ensured a fair balance between the right to property and animal welfare interests, as it provided an opportunity to limit the damages

⁴⁴⁵ Judgment of 27 January 2022, *Satini-S*, C-238/20, EU:C:2022:57, §35.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ A. VANHELLEMONT and G. VAN HOORICK, “Dierenwelzijn: een luis in de pels van de bescherming van eigendom?”, *Nieuw Juridisch Weekblad*, 2017, Vol. 364, 430.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Dutch Supreme Court (Hoge Raad der Nederlanden), 16 December 2016, *de vereniging Nederlandse Federatie van Edelpelsdierenhouders e.a. t. de Staat der Nederlanden*, No. 16/00921, NL:HR:2016:2888.

⁴⁵⁰ Article 52(3) of the Charter; Explanations relating to the Charter of Fundamental Rights, *OJC* 303, 14 December 2007, 23.

⁴⁵¹ Dutch Supreme Court (Hoge Raad der Nederlanden), 16 December 2016, *de vereniging Nederlandse Federatie van Edelpelsdierenhouders e.a. t. de Staat der Nederlanden*, No. 16/00921, NL:HR:2016:2888, §3.4.2.

⁴⁵² *Ibid.*, §3.5.2.

of the ban by allowing fur farmers to continue their activities for eleven more years.⁴⁵³ Arguably, the same reasoning can be applied under Article 17(1) of the Charter. When there is only a regulation on the use of property, rather than an actual deprivation thereof, there is no obligation under Article 17(1) of the Charter to provide a compensation for the potential losses.⁴⁵⁴ Instead, similar to the Dutch law, a European prohibition on fur farms could be allowed under the right to property if it provides for a derogation period during which the farm owners could recuperate their potential losses. Additionally, this approach arguably does not disrespect the essence of the right to property, as it merely regulates the modalities of its exercise and does not actually prohibit the owners from using their property as such.⁴⁵⁵ This reasoning is also followed by the European Commission. When the Flemish government decided to ban fur farms on its territory, they provided a derogation period and a compensation for the 17 Flemish fur farms that were still in business at the time.⁴⁵⁶ The European Commission objected to the provision of a compensation, as the ban was not a *de facto* expropriation.⁴⁵⁷ Therefore, it considered the compensation to be an illegal granting of state aid to the agricultural sector in violation of EU law.⁴⁵⁸ Interestingly, none of the 17 Flemish fur farm owners challenged the fur farm ban before the Belgian Constitutional Court, most likely because the inclusion of a derogation period (and a compensation) removed any successful arguments concerning the right to property.⁴⁵⁹ Similarly, also the German ban on fur farms did not trigger any court cases, as it also provided for a transition period to gradually phase out these activities.⁴⁶⁰

In conclusion, the right to property under Article 17(1) of the Charter does not prevent the EU legislator from adopting animal welfare laws that restrict certain farming practices for the benefit of animal welfare protection. Nevertheless, in cases where these regulations prevent farm owners from continuing their activities (for example in the prohibition of fur farms),

⁴⁵³ *Ibid*; A. VANHELLEMONT and G. VAN HOORICK, “Dierenwelzijn: een luis in de pels van de bescherming van eigendom?”, *Nieuw Juridisch Weekblad*, 2017, Vol. 364, 430.

⁴⁵⁴ Judgment of 27 January 2022, *Satini-S*, C-238/20, EU:C:2022:57, §30.

⁴⁵⁵ F. WOLLENSCHLÄGER, “Article 17(1)” in S. PEERS, T. HERVEY, J. KENNER and A. WARD, *The EU Charter of Fundamental Rights: A commentary*, Hart Publishing, 2014, 485, §17(1).55.

⁴⁵⁶ E. VERNIERS, “Dierenwelzijn in de rechtspraak van het Grondwettelijk Hof”, *Rechtskundig Weekblad*, 2021, Vol. 18, 691.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ *Ibid*.

⁴⁵⁹ *Ibid*

⁴⁶⁰ Eurogroup for Animals, “Germany shuts down its last fur farm”, 5 April 2019, accessed 14 May 2023 at <<https://www.eurogroupforanimals.org/news/germany-shuts-down-its-last-fur-farm>>.

these laws must include a derogation period of multiple so the owners can try to recuperate (part of) their losses.

§4: No role for Article 13 TFEU in the animal welfare *acquis*

The current animal welfare *acquis* does not sufficiently protect the welfare of animals as living creatures, as it fails to safeguard the five freedoms of animal welfare and does not acknowledge a great number of animal species. This finding is in sharp contrast with the wording of Article 13 TFEU that prescribes the protection of animals as sentient beings. To a limited extent, this lack of protection is due to the protection of fundamental human rights, which prohibit, for example, a ban on meat derived from animal that were not stunned during slaughter, or a prohibition of cruel farming practices without providing for a derogation period of multiple years. Nevertheless, most insufficiencies are not the result of these fundamental rights, meaning that there is a potential to level-up the current framework. Interestingly, the pre-Lisbon animal welfare *acquis* has not been substantially updated since the entry into force of the Lisbon Treaty. Article 13 TFEU has thus not been a driver for change.

A second problem with the current legal framework is the difficulty to correctly implement it in the national legal orders of the Member States. As such, certain Member States fail to protect even these insufficient welfare standards. Regrettably, the farm animal welfare *acquis* does not allow the Member States to adopt more stringent national measures with regard to farm animals that have any effect on trade with other Member States. Consequently, the insufficient EU standards cannot be raised when animals or animal-derived products are traded between Member States, and Member States cannot remedy the violation of the *acquis* by other Member States via trade restrictions. As such, the current animal welfare rules are a codification of the pre-Lisbon approach of the Court of Justice.

It is also observed that the Union's animal welfare *acquis* predominantly focusses on the protection of farm animals. Although this is not an illogical strategy given the restrictive potential for Member States to adopt their own rules for these animals, it is regrettable that other legal bases, such as Article 114 and 192 TFEU, remain quasi untapped even after the entry into force of Article 13 TFEU. This is a missed opportunity to address the criticism that the Union's animal welfare *acquis* leaves many species in the dark.

Chapter 2: The status of animal welfare in the EU legal order: public interest or general principle of EU law?

Under Protocol No. 33, animal welfare was to be considered as a public interest of the EU.⁴⁶¹ The introduction of Article 13 TFEU with the Lisbon Treaty has raised the question of whether the EU legislator wanted the Court of Justice to raise the status that animal welfare enjoys in the EU legal order by qualifying it as a general principle of EU law.⁴⁶² This difference in qualification would play a significant role in the protection of animal welfare concerns within the European Union. This Chapter aims to demonstrate the current status of animal welfare in EU law and the effects thereof on the secondary EU law and the proportionality test in internal market law. Firstly, it will be explained what general principles of EU law are, and what their function is compared to public interests (§1). Then, it will be assessed whether animal welfare could, *anno* 2023, be considered as a general principle of EU law (§2). This will be followed by an interim conclusion on the status of animal welfare in the EU legal order post-Lisbon (§3).

§1: General principles of EU law: *quid*?

Before being able to examine whether Article 13 TFEU might have triggered the classification of animal welfare as a general principle of EU law, it must first be determined what these principles are. Without aiming to be exhaustive on the matter, this section will briefly frame the characteristics of general principles of EU law (1.1), how the Court of Justice ‘discovers’ them (1.2) and what their function is compared to ‘mere’ public interests in relation to both primary and secondary EU law (1.3) and the functioning of the EU internal market (1.4).

1.1: The characteristics of general principles of EU law

It is generally accepted, by both legal scholars and Advocates General at the Court of Justice, that there is no universal concept or definition to determine what exactly general principles

⁴⁶¹ Judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, §77.

⁴⁶² See for example R. LUDWIG and R. O’GORMAN, “A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions”, *Journal of Environmental Law*, 2008, Vol. 3, 380; T. ERNIQUIN, “Les animaux vivants et la libre circulation: un statut de marchandises sensibles”, *Revue des affaires européennes*, 2017, No. 1, 51.

of EU law are.⁴⁶³ The Court of Justice uses a variety of terms to label them,⁴⁶⁴ their recognition is piecemeal, and it is often difficult to situate their existence and function vis-à-vis other norms,⁴⁶⁵ making these principles a somewhat vague source of EU law. Nevertheless, it is possible to derive a number of general characteristics that these principles have in common.

Firstly, general principles of EU law are norms that are ‘discovered’ and identified by the Court of Justice.⁴⁶⁶ That is because, in principle, general principles do not have a written legal basis within the primary or secondary law of the Union. General principles of EU law therefore have a gap-filling function:⁴⁶⁷ where the Treaties leave lacunae, the principles come into play to fill in the void.⁴⁶⁸ To identify how these gaps should be filled, the Court of Justice will look at the rules that the constitutional traditions of the Member States have in common to identify a norm that should also apply in the EU legal order (see *infra*).⁴⁶⁹ However, a strong nuance has to be made with regard to the unwritten nature of general principles. Firstly, previously recognized principles can be codified into primary or secondary law, without such codification concealing their nature as a general principle of EU law.⁴⁷⁰ This happened, for example, with the numerous fundamental rights that were recognized as a general principle prior to the introduction of the Charter of Fundamental Rights.⁴⁷¹ Such codification aims at making the content of the principle more detailed and concrete.⁴⁷² Secondly, the Court has occasionally

⁴⁶³ C. SEMMELMANN, “General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification”, *Pittsburgh Papers on the European Union*, 2013, 13.

⁴⁶⁴ They have already been called ‘general principles’, ‘fundamental principles’, ‘particularly important principles’, ‘essential principles’, ‘overarching principles’, ‘basic principles of law’ etc. See P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 9.

⁴⁶⁵ *Ibid*, 9-11.

⁴⁶⁶ *Ibid*, 15.

⁴⁶⁷ *Ibid*, 18.

⁴⁶⁸ M. HERDEGEN, “General Principles of EU Law - the Methodological Challenge” in U. BERNITZ, J. NERGELIUS and C. CARDNER (eds.), *General Principles of EC Law in a Process of Development: Reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies*, Kluwer Law International, 2008, 344.

⁴⁶⁹ A. ARNULL, “What is a General Principle of EU Law?” in R. DE LA FERIA and S. VOGENAUER (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, 2011, 8.

⁴⁷⁰ P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 14.

⁴⁷¹ *Ibid*.

⁴⁷² S. BESSON, “General Principles and Customary Law in the EU Legal Order” in S. VOGENAUER and S. WEATHERILL (eds.), *General Principles of Law: European and Comparative Perspectives*, Hart Publishing, 2017, 112.

been found to explicitly refer to primary and secondary EU law when recognizing a general principle of EU law for the first time (see *infra*). This practice questions whether the unwritten nature can still be considered as an inherent characteristic of general principles of EU law.

Secondly, as their name gives away, general principles of EU law have a general and comprehensive character.⁴⁷³ However, there is a lot of debate in legal doctrine as to what exactly this requirement of generality entails. One theory states that general principles must apply to all areas of EU law and must thus have significance within the entire EU legal order.⁴⁷⁴ However, others argue that general principles can be limited to a selected number of policy areas of the EU, as long as within that area, the principle is applicable to an undetermined number of situations.⁴⁷⁵ The former theory sets the threshold for a norm to be recognized as a general principle of EU law significantly higher. However, the Court of Justice seems to follow the latter theory, as it has recognized principles of specific substantive fields of EU law as a general principle of EU law. However, not all authors agree with this approach.⁴⁷⁶

Thirdly, general principles of EU law are considered to be norms of a fundamental character.⁴⁷⁷ More specifically, they stem from and express the values that the national legal systems of the Member States have in common,⁴⁷⁸ and are considered to be derived from the rule of law.⁴⁷⁹ This characteristic justifies the fact that the objectives enshrined in the principles

⁴⁷³ Judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, §42 and §50; see also S. WEATHERILL, *Law and Values in the European Union*, Oxford, Oxford University Press, 2016, 131.

⁴⁷⁴ P.J. NEUVONEN and K.S. ZIEGLER, "General principles in the EU legal order: past, present and future directions" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 12.

⁴⁷⁵ S. PLATON, "The principle of institutional balance: rise, eclipse and revival of a general principle of EU constitutional law" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 140.

⁴⁷⁶ P.J. NEUVONEN and K.S. ZIEGLER, "General principles in the EU legal order: past, present and future directions" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 12.

⁴⁷⁷ *Ibid*, 13.

⁴⁷⁸ E. SPAVENTA, "Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.", *Common Market Law Review*, 2002, 1166; T. KONSTADINIDES, "The rule of law as the constitutional foundation of the general principles of EU law" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 289.

⁴⁷⁹ E. SPAVENTA, "Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.", *Common Market Law Review*, 2002, 1166.

become legally protected rights by qualifying them as general principles of EU law.⁴⁸⁰ A clear example of the fundamental character of general principles of EU law are the numerous fundamental rights that have been qualified as such.

Lastly, general principles of EU law do not impose a detailed rule on individuals, Member States or EU-institutions.⁴⁸¹ Instead, they embody a broad, vaguely formulated concept that needs to be concretized by the Court of Justice.⁴⁸² Their application therefore necessitates a thorough assessment of the specific facts of the case at hand, giving a concrete interpretation to the principle and balancing it with the other principles and norms at stake.⁴⁸³

1.2: Determination of general principles of EU law

As stated above, general principles of EU law usually do not have a legal basis in primary or secondary law, and must therefore be identified by the Court of Justice.⁴⁸⁴ However, the Court cannot simply make up any principle when it feels like doing so. Instead, it must illustrate the legitimacy of a newly recognized principle by demonstrating its inherent nature in the common constitutional traditions of the Member States.⁴⁸⁵ To do this, the Court has multiple sources of inspiration at its disposal.

A first important source for the Court to ‘discover’ general principles of EU law is the national legal orders of the Member States.⁴⁸⁶ If the laws of the Member States are found to have a

⁴⁸⁰ *Ibid*, 1165.

⁴⁸¹ O. WIKLUND and J. BENGOTXEA, “General Constitutional Principles of Community Law” in U. BERNITZ and J. NERGELIUS (eds.), *General Principles of European Community Law*, 2000, The Hague, Kluwer Law International, 122.

⁴⁸² P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 11.

⁴⁸³ S. BESSON, “General Principles and Customary Law in the EU Legal Order” in S. VOGENAUER and S. WEATHERILL (eds.), *General Principles of Law: European and Comparative Perspectives*, Hart Publishing, 2017, 112.

⁴⁸⁴ P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 15.

⁴⁸⁵ E. SPAVENTA, “Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.”, *Common Market Law Review*, 2002, 1166.

⁴⁸⁶ Judgment of 3 May 2005, *Berlusconi and Others*, C-387/02, EU:C:2005:270, §67-68. See also P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 16.

common value, this could become a general principle within the EU legal order.⁴⁸⁷ National constitutional law and the corresponding national jurisprudence play an important role in this regard.⁴⁸⁸ However, there is no clear and explicit test stating how widely a potential principle must be recognized among the Member States before it becomes a general principle of EU law.⁴⁸⁹ Interestingly, the Court will not just seek to apply the average position or the lowest common denominator of the national standards when recognizing a general principle of EU law.⁴⁹⁰ Instead, it will determine the most appropriate interpretation that fits best within the objectives of the Treaties.⁴⁹¹ In principle, it is not necessary for all Member States to unanimously embrace the potential principle.⁴⁹² Nevertheless, if the Court finds that there are important differences between the national legal systems, it will be more careful when determining whether or not there exists a general principle of EU law.⁴⁹³ Usually, the existence of a general principle will only be recognized if the most appropriate interpretation of the principle is supported by a majority of the Member States.⁴⁹⁴

Another source of inspiration for the identification of general principles of EU law is international treaties concluded by the Member States.⁴⁹⁵ These treaties do not necessarily

⁴⁸⁷ O. WIKLUND and J. BENOETXEA, "General Constitutional Principles of Community Law" in U. BERNITZ and J. NERGELIUS (eds.), *General Principles of European Community Law*, 2000, The Hague, Kluwer Law International, 123.

⁴⁸⁸ K. LENAERTS and J.A. GUTIERREZ-FONS, "The Role of General Principles of EU Law" in A. ARNULL, C. BARNARD, M. DOUGAN and E. SPAVENTA (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011, 179.

⁴⁸⁹ P.J. NEUVONEN and K.S. ZIEGLER, "General principles in the EU legal order: past, present and future directions" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 16.

⁴⁹⁰ A. ARNULL, "What is a General Principle of EU Law?" in R. DE LA FERIA and S. VOGENAUER (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, 2011, 9.

⁴⁹¹ H. KUTSCHER, "Methods of interpretation as seen by a judge at the Court of Justice", Court of Justice of the European Communities: Judicial and Academic Conference 27-28 September 1976 Reports, 29. See also K. LENAERTS and J.A. GUTIERREZ-FONS, "The Role of General Principles of EU Law" in A. ARNULL, C. BARNARD, M. DOUGAN and E. SPAVENTA (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011, 183.

⁴⁹² S. BESSON, "General Principles and Customary Law in the EU Legal Order" in S. VOGENAUER and S. WEATHERILL (eds.), *General Principles of Law: European and Comparative Perspectives*, Hart Publishing, 2017, 112.

⁴⁹³ K. LENAERTS and J.A. GUTIERREZ-FONS, "The Role of General Principles of EU Law" in A. ARNULL, C. BARNARD, M. DOUGAN and E. SPAVENTA (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011, 182.

⁴⁹⁴ M. HERDEGEN, "General Principles of EU Law - the Methodological Challenge" in U. BERNITZ, J. NERGELIUS and C. CARDNER (eds.), *General Principles of EC Law in a Process of Development: Reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies*, Kluwer Law International, 2008, 346.

⁴⁹⁵ Judgment of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429, §35. See also M. HERDEGEN, "General Principles of EU Law - the Methodological Challenge" in U. BERNITZ, J. NERGELIUS and C. CARDNER

have to be legally binding upon the EU itself, as is demonstrated by the fact that the ECHR has always played a key role in the discovery of general principles even before the Charter of Fundamental Rights was created.⁴⁹⁶ When relying on international treaties, a thorough assessment will be needed to determine which Member States have signed and ratified the respective agreement and whether or not it has entered into force already.⁴⁹⁷

More questionable is the role of EU law itself in the determination of general principles. Once a certain norm is codified in EU law, there is undoubtedly a consensus among the Member States in which a general principle of EU law can be found. However, given the gap-filling function of these principles, would their recognition not become redundant once there is a codified rule?⁴⁹⁸ Still, the Court has been found to refer to primary and even secondary law to support the recognition of a new general principle of EU law.⁴⁹⁹ Moreover, it has been argued that even the protocols and joint declarations annexed to the Treaties can serve as a source of inspiration for the recognition of general principles of EU law.⁵⁰⁰

1.3: The influence of general principles on primary and secondary EU law

General principles of EU law are part of the Union's primary law,⁵⁰¹ giving them a constitutional status.⁵⁰² Consequently, they have a threefold function in the EU legal order. Firstly, They can be relied upon to interpret not only provisions of secondary law, but also Treaty provisions.⁵⁰³ More precisely, they indicate the preferred interpretation of a norm of

(eds.), *General Principles of EC Law in a Process of Development: Reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies*, Kluwer Law International, 2008, 349-350.

⁴⁹⁶ Judgment of 14 May 1974, *Nold KG v Commission*, C-4/73, EU:C:1974:51, §12.

⁴⁹⁷ C. SEMMELMANN, "General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification", *Pittsburgh Papers on the European Union*, 2013, 22.

⁴⁹⁸ P.J. NEUVONEN and K.S. ZIEGLER, "General principles in the EU legal order: past, present and future directions" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 17.

⁴⁹⁹ *Ibid*, 15. See for example judgment of 19 January 2010, *Küçükdeveci*, C-555/07, EU:C:2010:21, §21; judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, §22.

⁵⁰⁰ M. HERDEGEN, "The Origins and Development of the General Principles of Community Law" in U. BERNITZ and J. NERGELIUS (eds.), *General Principles of European Community Law*, 2000, The Hague, Kluwer Law International, 19.

⁵⁰¹ A. ARNULL, "What is a General Principle of EU Law?" in R. DE LA FERIA and S. VOGENAUER (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, 2011, 12.

⁵⁰² Judgment of 15 October 2009, *Audiolux and Others*, C-101/08, EU:C:2009:626, §63.

⁵⁰³ A. ARNULL, "What is a General Principle of EU Law?" in R. DE LA FERIA and S. VOGENAUER (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, 2011, 12.

EU law.⁵⁰⁴ Secondly, as general principles of EU law are binding on the EU institutions, they can be relied upon to challenge secondary EU law.⁵⁰⁵ If an act of secondary EU law is found to breach a general principle of EU law, it shall be annulled by the Court of Justice.⁵⁰⁶ Lastly, as the Member States are also bound by the general principles of EU law, these principles can also be invoked to challenge national measures that fall under the scope of EU law.⁵⁰⁷ If the national law is found to be in breach of a general principle, it must be set aside by the national court.⁵⁰⁸

In judicial review cases, the general principles of EU law affect the proportionality examination made by the Court of Justice.⁵⁰⁹ More precisely, the Court will perform a thorough, substantial review on how the individual right and the general principle must be balanced to take the best possible measure, as they are legally protected interests.⁵¹⁰ ‘Mere’ public interests, on the other hand, are subject to the policy choices made by the EU institutions.⁵¹¹ Given the wide margin of discretion granted to the institutions, public interests can only lead to the annulment of legislative provisions if the policy choices that were made are manifestly inappropriate in light of these interests,⁵¹² thus significantly limiting the possibility for the action for annulment to succeed.

1.4: General principles and the justification of internal market barriers

General principles of EU law can be invoked before the Court of Justice to justify restrictions of the fundamental freedoms. A set of general principles that is occasionally invoked for this

⁵⁰⁴ P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 19.

⁵⁰⁵ A. ARNULL, “What is a General Principle of EU Law?” in R. DE LA FERIA and S. VOGENAUER (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, Hart Publishing, 2011, 12.

⁵⁰⁶ K. LENAERTS and J.A. GUTIERREZ-FONS, “The Role of General Principles of EU Law” in A. ARNULL, C. BARNARD, M. DOUGAN and E. SPAVENTA (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011, 179.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ E. SPAVENTA, “Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.”, *Common Market Law Review*, 2002, 1164.

⁵¹⁰ *Ibid.*, 1164-1165.

⁵¹¹ *Ibid.*, 1164.

⁵¹² *Ibid.*

purpose are fundamental rights.⁵¹³ This raises the question of how general principles must be balanced with the economic objectives of the EU internal market. However, the Court's approach when performing this balancing exercise seems to be inconsistent.⁵¹⁴ For example, in the case of *Schmidberger*, the Court stated that in this exercise, "*the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests*".⁵¹⁵ This approach runs parallel with the balancing exercise to be made in judicial review cases when a general principle of EU law is at stake. However, in other case where fundamental rights were weighed against the fundamental freedoms, the Court abandoned the *Schmidberger*-approach and instead opted to perform the same version of the proportionality assessment as it did when mere public interests were at stake.⁵¹⁶ This inconsistent and evolving case law makes it difficult to state the exact role of general principles in these assessments.⁵¹⁷ However, legal doctrine tends to prefer the *Schmidberger*-approach, as it better displays the importance of general principles such as fundamental rights.⁵¹⁸

§2: Animal welfare: public interest or general principle of EU law?

In 2001, shortly after the introduction of Protocol No. 33, the Court ruled in *Jippes* that animal welfare was a public interest of the Union, rather than a general principle of EU law.⁵¹⁹ However, this decision has been questioned since animal welfare was put into the actual body of the Treaties.⁵²⁰ This section will first take a closer look at the case of *Jippes* to examine why

⁵¹³ See for example judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333; judgment of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614.

⁵¹⁴ N. N. SHUIBHNE, "Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?" in P. KOUTRAKOS and J. SNELL (eds.), *Research Handbook on the Law of the EU's Internal Market*, 2017, Northampton, Edward Elgar Publishing, 221.

⁵¹⁵ Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, §81. Emphasis added.

⁵¹⁶ N. N. SHUIBHNE, "Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?" in P. KOUTRAKOS and J. SNELL (eds.), *Research Handbook on the Law of the EU's Internal Market*, 2017, Northampton, Edward Elgar Publishing, 218.

⁵¹⁷ J. SNELL, "General principles in free movement law: applicability and application" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 401.

⁵¹⁸ *Ibid*, 398; N. N. SHUIBHNE, "Fundamental rights and the framework of internal market adjudication: is the Charter making a difference?" in P. KOUTRAKOS and J. SNELL (eds.), *Research Handbook on the Law of the EU's Internal Market*, 2017, Northampton, Edward Elgar Publishing, 218.

⁵¹⁹ Judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420.

⁵²⁰ See for example R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, Vol. 3, 380; T. ERNIQUIN, "Les animaux vivants et la libre circulation: un statut de marchandises sensibles", *Revue des affaires européennes*, 2017, No. 1, 51.

the Court of Justice, at that time, refused to recognize animal welfare as a general principle of EU law (2.1). These findings will then be compared with the situation *anno* 2023, to check whether Article 13 TFEU could bring the Court to raise the status of animal welfare from a public interest to a general principle of EU law (2.2). Lastly, an interim conclusion will be given on the implications of this Chapter's findings for the free movement of animals and animal products post-Lisbon (2.3).

2.1: *Jippes*: animal welfare as a public interest

In *Jippes*, the Court of Justice was asked to rule on the validity of a directive in light of its alleged negative effects on the welfare of the animals covered by it.⁵²¹ More specifically, the directive prohibited to vaccinate animals located in certain areas against foot-and-mouth disease.⁵²² The Applicant argued that this vaccination ban was contrary to the principle of animal welfare,⁵²³ as recognized by the European Union through the adoption of the animal welfare *acquis*, Protocol No. 33, and the conclusion of the European Convention for the Protection of Animals kept for Farming Purposes.⁵²⁴ Therefore, the Applicant argued that EU law must be applied in such a way as to avoid the exposure of animals to unnecessary pain and suffering, and to prevent their health and welfare from being impaired.⁵²⁵ This standard was allegedly not met, as the vaccination ban had as its sole objective the profitability of stock farming.⁵²⁶

The Court, however, held that there was no principle of animal welfare in the EU legal order, despite the adoption of Protocol No. 33.⁵²⁷ This conclusion was based on multiple findings. Firstly, the protection of animal welfare was neither an objective of the Treaty itself, nor an objective of the common agricultural policy.⁵²⁸ The Council of the EU also confirmed this finding when it concluded the European Convention for the Protection of Animals kept for

⁵²¹ Judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420.

⁵²² *Ibid*, §15.

⁵²³ *Ibid*, §36.

⁵²⁴ *Ibid*, §48.

⁵²⁵ *Ibid*, §51.

⁵²⁶ *Ibid*, §52.

⁵²⁷ *Ibid*, §73.

⁵²⁸ *Ibid*, §71.

Farming Purposes on behalf of the EU.⁵²⁹ Secondly, Protocol No. 33 contained a double limitation on the obligation to pay full regard to animal welfare concerns. Not only was this duty applicable to just four Union policies, but it also could not go against the legislative and administrative provisions and customs of the Member States.⁵³⁰ Thirdly, the adoption by the EU of the European Convention for the Protection of Animals kept for Farming Purposes could not create a principle of animal welfare, as this Convention did not contain any clear and precise obligations and was thus not legally binding upon the EU.⁵³¹ Fourthly, none of the cases on the free movement of animals where animal welfare considerations were invoked under Article 36 TFEU had succeeded in justifying national measures on the well-being of animals.⁵³² And lastly, even though the EU legislator had adopted multiple acts of secondary law on the protection of animal welfare, none of these acts indicated that animal welfare should be considered as a general principle of EU law.⁵³³ Instead, animal welfare was a public interest of the European Union,⁵³⁴ meaning that the directive could only be annulled if the Court found it to be manifestly inappropriate in light of animal welfare concerns.⁵³⁵

The Court's decision in *Jippes* was received with mixed opinions in legal doctrine. On the one hand, it has been argued that the Court was incorrect in giving a narrow interpretation to the obligations under Protocol No. 33.⁵³⁶ According to LUDWIG and O'GORMAN, Protocol No. 33 could not be considered as a codification of the pre-Amsterdam case law of the Court of Justice, as the preamble of Protocol No. 33, for the first time, qualified animals as sentient beings.⁵³⁷ They argue that this wording introduced an increased level of animal welfare protection in the European Union.⁵³⁸ On the other hand, other authors, are of the opinion that the Court's ruling was consistent with the sources and functions of general principles of EU

⁵²⁹ *Ibid*, §72. The Preamble of Council Decision 78/923/EEC of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes, *OJ L* 323, 17 November 1978, 12-13, reads: "Whereas the protection of animals is not in itself on of the objectives of the Community [...]".

⁵³⁰ Judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, §73.

⁵³¹ *Ibid*, §74.

⁵³² *Ibid*, §75.

⁵³³ *Ibid*, §76.

⁵³⁴ *Ibid* §77.

⁵³⁵ *Ibid*, §83.

⁵³⁶ R. LUDWIG and R. O'GORMAN, "A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions", *Journal of Environmental Law*, 2008, Vol. 3, 367.

⁵³⁷ *Ibid*, 368.

⁵³⁸ *Ibid*.

law.⁵³⁹ They argue that animal welfare could not be recognized as a general principle, as the level of protection offered to animals varies considerably between the Member States,⁵⁴⁰ and as the animal welfare *acquis* offered insufficient protection to find an animal welfare value in these rules.⁵⁴¹

2.2: Animal welfare *anno* 2023: a general principle of EU law?

The introduction of animal welfare protection into the actual body of the Treaties has raised the question of whether the *Jippes* judgment still stands for the interpretation of Article 13 TFEU, or would the Court now recognize animal welfare as a general principle of EU law? This section will first reassess the Court's considerations in *Jippes* against the current legal and societal context, to check if there are indications that the Court would today come to a different conclusion than it did in *Jippes* (2.2.1). Secondly, the application by the Court of Justice of the integration clauses will be examined, to assess whether the obligations under Article 13 TFEU are equal to those imposed by general principles of EU law (2.2.2). Lastly, special attention will be given to the judgment of *Centraal Israëlitisch Consistorie van België*, as this judgment has potentially altered the Court's approach regarding the status of animal welfare in the EU legal order (2.2.3).

2.2.1: The Jippes-criteria anno 2023

In *Jippes*, the Court gave five arguments to demonstrate why animal welfare, at that time, could not be recognized as a general principle of EU law. However, since then, animal protection laws in both the EU and the Member States have undergone changes following the increasing awareness on animal welfare in European society. It is therefore relevant to assess whether these changes are significant enough to alter the five *Jippes*-criteria and potentially elevate animal welfare from a public interest to a general principle of EU law.

Firstly, animal welfare is still not an objective of the EU under Article 3 of the Treaty on European Union⁵⁴² ('TEU'), nor is it an objective of the common agricultural policy under

⁵³⁹ E. SPAVENTA, "Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.", *Common Market Law Review*, 2002, 1165.

⁵⁴⁰ *Ibid*, 1166.

⁵⁴¹ *Ibid*, 1167.

⁵⁴² Consolidated version of the Treaty on European Union, *OJ C 326*, 26 October 2012, 13-390.

Article 39 TFEU. Article 13 TFEU also cannot be considered as granting animal welfare protection the status of an objective of the EU, as confirmed by the General Court in the case of *HB* of 2017.⁵⁴³

Secondly, Article 13 TFEU contains the same double limitation as Protocol No. 33. Even though the list of policies in which due regard must be given to animal welfare concerns has been slightly enlarged under Article 13 TFEU, it still only makes up a fraction of the Union's policies and excludes multiple areas that could have a significant impact on animal welfare, such as the environmental policy and the common commercial policy.⁵⁴⁴ This suggests that the duty to pay full regard to the welfare of animals does not necessarily apply to all EU policies, at least not according to the text of the provision. Additionally, Article 13 TFEU states that it shall not preclude national customs and legislative or administrative provisions relating to religious rites, cultural traditions, and regional heritage. As such, it also cannot be considered that animal welfare protection is applicable to an *undetermined* number of situations within the exhaustively mentioned policy areas. Therefore, it seems that the characteristic of generality, which is inherent to principles of EU law, is not met, no matter what interpretation of this characteristic is followed. Moreover, the prevalence of national customs and legislative or administrative provisions was included in Article 13 TFEU because, without this limitation, a number of Member States did not want to include the provision in the Treaties.⁵⁴⁵ Given this, there is little chance that the Court of Justice would find a principle inherent to the constitutional provisions of the Member States, as the disparities between the Member States on the importance of animal welfare protection are even displayed in the EU's own 'constitutional' animal welfare clause.

Thirdly, the protection granted to animals by the European Convention on the Protection of Animals kept for Farming Purposes has not increased since *Jippes*, as its provisions still lack direct effect and do thus still not impose legally binding obligations upon the Union.⁵⁴⁶ On the contrary, the argument relating to the Convention only seems to deny the existence of a general principle of animal welfare even more. At the time of *Jippes*, all then Member States

⁵⁴³ Judgment of 5 April 2017, *HB and Others v Commission*, T-361/14, EU:T:2017:252, §37.

⁵⁴⁴ See Part 3, Chapter 1, Title 1.1 at page 40.

⁵⁴⁵ K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 66.

⁵⁴⁶ B. DRIESSEN, "Fundamental Animal Rights in European Law", *European Public Law*, 2017, Vol. 3, 552.

had signed and ratified the Convention.⁵⁴⁷ However, with the ‘big bang’ expansion of the EU in 2004, multiple countries that had not ratified it joined the Union, some of which are still not party to the Convention in 2023.⁵⁴⁸ Given this, it seems unlikely that the Court would find a tradition common to all Member States on the basis of the Convention, as not even all Member States ratified it independently from the EU.

Fourthly, there have still not been any cases within the realm of internal market law where animal welfare considerations were successfully invoked to justify national measures that restrict free movement law. The seemingly more open approach in the cases of *Andibel*⁵⁴⁹ and *Commission v Belgium*⁵⁵⁰, where the Court at least examined the national laws in light of Article 36 TFEU, was a consequence of the different legal basis of the harmonizing regulation, rather than a difference in the EU’s mindset on animal welfare considerations.⁵⁵¹ Moreover, in both *Andibel* and *Commission v Belgium*, the national measures were nevertheless deemed disproportional, thus also making the invocation of animal welfare grounds in these cases unsuccessful.

Lastly, there are still no stipulations in the Union’s animal welfare *acquis* that animal welfare should be regarded as a principle of the EU. Since *Jippes*, the EU legislator has undoubtedly made use of stronger phrasings when it comes to animal welfare concerns, calling it “*a value of the Union that is enshrined in Article 13 [TFEU]*”.⁵⁵² This new formulation has recently also been acknowledged by the Court of Justice in *Centraal Israëlitisch Consistorie van België*.⁵⁵³ Nevertheless, this still does not seem significant enough to give it the status of a general principle of EU law. Compare the mere usage of the word “value”, for example, with the recitals of Council Directive 2000/78/EC establishing a general framework for equal treatment

⁵⁴⁷ Council of Europe, “Chart of Signatures and Ratifications of Treaty 087”, accessed 12 April 2023 at < <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=087> >.

⁵⁴⁸ *Ibid.* Both Romania and Slovakia neither signed nor ratified the Convention. Estonia signed it in 2008, but did not ratify it yet.

⁵⁴⁹ Judgment of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353.

⁵⁵⁰ Judgment of 10 September 2009, *Commission v Belgium*, C-100/08, EU:C:2009:537.

⁵⁵¹ See Part 2, Chapter 2, Title 3.4 at page 36.

⁵⁵² Recital 2 of Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, *OJ L 276*, 20 October 2010, 33-79. See also recital 4 of the Slaughter Regulation

⁵⁵³ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §47 and §77.

in employment and occupation.⁵⁵⁴ This directive points to the *principle* of equal treatment (which is a general principle of EU law)⁵⁵⁵ as being linked with the founding principles of the Union,⁵⁵⁶ fundamental rights,⁵⁵⁷ and even the objectives of the EU.⁵⁵⁸ Additionally, as was argued by SPAVENTA, the current animal welfare *acquis* still aims at limiting mistreatment of animals rather than completely eliminating it, which is another clue that animal welfare should still be considered as a public interest.⁵⁵⁹

In conclusion, it appears that none of the *Jippes*-criteria have been fulfilled since the entry into force of Article 13 TFEU. It is therefore unlikely that the Court of Justice would find that Article 13 TFEU codifies a general principle of animal welfare, despite the increasing social and legislative attention that animal welfare receives. The different views of the Member States on the importance of animal welfare protection are still too significant to find a common constitutional tradition. Additionally, not all the characteristics of general principles of EU law can be found in Article 13 TFEU, as animal welfare protection still does not have a general and comprehensive character. Moreover, it is questionable whether animal welfare protection constitutes a norm of fundamental character. Although animal welfare is now being called a value of the Union, the EU's animal welfare *acquis* is still based on the animal welfare theory rather than the animal rights theory.⁵⁶⁰ This means that the interests of animals can easily be set aside for the human interest,⁵⁶¹ arguably contradicting the fundamental character of these animal protection rules. The absence of a general principle of animal welfare is also endorsed by the Court of Justice, which keeps referring to animal welfare as an "*objective in the public interest*" even after the adoption of the Lisbon Treaty.⁵⁶²

⁵⁵⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L* 303, 2 December 2000, 16-22.

⁵⁵⁵ C. TOBLER, "General principles of equal treatment in EU non-discrimination law" in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 351.

⁵⁵⁶ Recital 1 of Directive 2000/78/EC.

⁵⁵⁷ Recitals 4-6 of Directive 2000/78/EC.

⁵⁵⁸ Recital 11 of Directive 2000/78/EC.

⁵⁵⁹ E. SPAVENTA, "Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.", *Common Market Law Review*, 2002, 1166-1167.

⁵⁶⁰ K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 59.

⁵⁶¹ See Part 1, Chapter 1, Title 2.3 at page 11.

⁵⁶² Judgment of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, §35; judgment of 23 April 2015, *Zuchtvieh-Export*, C-424/13, EU:C:2015:259, §35.

2.2.2: Article 13 TFEU as an alternative for a general principle of EU law?

It can thus be assumed that there is currently no general principle of animal welfare in the EU legal order. Nevertheless, it must be questioned whether this is actually a regrettable lacuna, or does Article 13 TFEU offer a satisfying alternative without being a general principle? To answer this question, it must be examined how Article 13 TFEU, and by extension the other integration clauses under Part One, Title II of the TFEU,⁵⁶³ influences the interpretation (2.2.2.1) and the challenging (2.2.2.2) of EU law and national measures, and the justification of restrictions on free movement law (2.2.2.3).

2.2.2.1: The interpretation of EU law

Since the introduction of the Lisbon Treaty, the Court of Justice has been asked on multiple occasions to interpret the animal welfare *acquis*. Among them were a number of interesting cases where the Court, through its interpretative competence, stretched animal welfare protection to a considerable extent by relying on Article 13 TFEU.

In the case of *Brouwer*, the Court had to rule on the material scope of the predecessor of the Calves Directive.⁵⁶⁴ The English language version of this Directive states that its provisions are applicable to “calves confined for rearing and fattening”.⁵⁶⁵ However, other language versions are more restrictive. The Dutch and Bulgarian versions, for example, limit its applicability to the *breeding* and fattening of calves,⁵⁶⁶ and the Slovenian version only mentions the breeding of calves, staying silent on calves kept for fattening.⁵⁶⁷ This raised the question if the Directive was only applicable to calves reared for meat production, or also to calves kept on dairy farms.⁵⁶⁸ The Court gave a broad interpretation to the material scope of the Directive and concluded that all calves are protected by it, no matter their agricultural purpose,⁵⁶⁹ as a

⁵⁶³ As all integration clauses are on an equal footing, the same reasoning applies to all of these provisions.

⁵⁶⁴ Judgment of 14 June 2012, *Brouwer*, C-355/11, EU:C:2012:353, §30.

⁵⁶⁵ Article 1 of Council Directive 91/629 of 19 November 1991 laying down minimum standards for the protection of calves, OJ L 340, 11 December 1991, 28-32.

⁵⁶⁶ Judgment of 14 June 2012, *Brouwer*, C-355/11, EU:C:2012:353, §38.

⁵⁶⁷ *Ibid*, §39.

⁵⁶⁸ *Ibid*, §30.

⁵⁶⁹ *Ibid*, §44.

different conclusion would be contrary to Article 13 TFEU.⁵⁷⁰ This is a fundamental judgment, as the EU's animal welfare *acquis* only offers limited protection to dairy cattle.⁵⁷¹

Article 13 TFEU has also been used to broadly interpret the geographical scope of the EU's animal welfare rules. In *Zuchtvieh-Export*, the question was raised whether the Animal Transportation Regulation only applies to transportation within the territory of the Union, or if it also applies to the parts of the journey taking place in third countries when the transportation departed in the EU.⁵⁷² Relying on Article 13 TFEU and the animal welfare objectives of the Animal Transportation Regulation,⁵⁷³ the Court held that the latter interpretation was correct.⁵⁷⁴ This means that the provisions of the Animal Transportation Regulation must also be respected in third countries the same way as they should be respected during the parts of the journey taking place within the EU, even if the majority of the journey takes place in those third countries.

As the above judgments show, the Court adopts a rather progressive approach when interpreting secondary EU law in light of animal welfare protection. A third case that shows this trend is *Oeuvre d'assistance aux bêtes d'abattoirs*, where the Court was asked whether kosher and halal meat products could be labelled with the European 'organic farming' logo, given that the absence of stunning inherent to the ritual slaughter of animals adversely affects the welfare of these animals.⁵⁷⁵ The Court answered this question in the negative, as Article 14(1)(b) of Regulation 834/2007 on organic production and labelling of organic products⁵⁷⁶ expresses the intention of the EU legislator to include animal welfare protection as one of the characteristics of organically farmed products. As slaughter without prior stunning is detrimental for the welfare of animals,⁵⁷⁷ Regulation 834/2007 read in light of Article 13 TFEU prohibits granting the logo to kosher and halal meat products,⁵⁷⁸ even if the other requirements of Regulation 834/2007 are fulfilled. This judgment is the first one where the

⁵⁷⁰ *Ibid*, §43.

⁵⁷¹ See Part 3, Chapter 1, Title 2.4 at page 51.

⁵⁷² Judgment of 23 April 2015, *Zuchtvieh-Export*, C-424/13, EU:C:2015:259, §33.

⁵⁷³ *Ibid*, §35-36.

⁵⁷⁴ *Ibid*, §47.

⁵⁷⁵ Judgment of 26 February 2019, *Oeuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137, §33.

⁵⁷⁶ Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products, *OJ L* 189, 20 July 2007, 1-23.

⁵⁷⁷ Judgment of 26 February 2019, *Oeuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137, §48.

⁵⁷⁸ *Ibid*, §52.

Court highlighted the importance European society attaches to the prior stunning of animals during slaughter, a stance that would later form the basis for the Court’s ground-breaking judgments on the balancing of animal welfare protection and the freedom of religion.⁵⁷⁹

Interestingly, the interpretative function of Article 13 TFEU does not appear to be limited to the specific policies listed in the provision. In *One Voice*, the Court had to rule on the compatibility with the Birds Directive of lime traps used to catch wild birds.⁵⁸⁰ Even though the arguments of the Applicants against the use of these traps were limited to elements relating to the protection of biodiversity, the Court additionally relied on Article 13 TFEU to agree with the Applicants, stating that “*in formulating and implementing the European Union’s policies, the European Union and the Member States are to pay full regard to the welfare requirements of animals*”.⁵⁸¹ No nuance is made that the environmental policy, in which the Birds Directive has its legal basis, is not mentioned in Article 13 TFEU. This suggests that the explicitly listed policy areas might not be exhaustive.

In conclusion, similar to the general principles of EU law, Article 13 TFEU serves as a tool to interpret secondary EU law in an animal welfare-friendly manner. Its interpretative function even has a considerably large reach, as it has been used to open up the scope of the Calves Directive and the Animal Transportation Regulation, and has even been used to interpret secondary law in policies that are not explicitly mentioned in Article 13 TFEU. Whether or not Article 13 TFEU – or any integration clause – can also be used to interpret primary law has not been answered yet by the Court. However, Advocate General Tanchev suggested this possibility in his opinion in *Egenberger* in relation to the application of Article 10 TFEU.⁵⁸² If the Court would follow his stance, Article 13 TFEU could, for example, be used when interpreting Article 36 TFEU, especially since the Union’s internal market policy is explicitly listed in Article 13 TFEU.

⁵⁷⁹ See Part 3, Chapter 1, Title 3.1 at page 57.

⁵⁸⁰ Judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux*, C-900/19, EU:C:2021:211, §27.

⁵⁸¹ *Ibid*, §39. Emphasis added.

⁵⁸² Opinion of Advocate General Tanchev of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, §93. See also E. MUIR, V. DAVIO and L. VAN DER MEULEN, “The Horizontal Equality Clauses (Arts 8 & 10 TFEU) and their Contribution to the Course of EU Equality Law: Still an Empty Vessel?”, *European Papers*, 2022, Vol. 7(3), 1392.

2.2.2.2: Challenging secondary EU law and national measures

The Court of Justice has not yet had the opportunity to rule on the compatibility of secondary EU law or national measures with Article 13 TFEU or any of the other integration clauses. This raises doubts as to the judicial nature of the obligations provided in these provisions, and the role they play in judicial proceedings.⁵⁸³ Legal scholars are conflicted on the matter, with one group arguing that integration clauses are not capable of challenging EU law as they do not lay down any precise rights or obligations,⁵⁸⁴ and another group recognizing that integration clauses can be invoked in these proceedings.⁵⁸⁵

The Court of Justice has confirmed that the integration clauses pose the obligation on the EU institutions to respect the objectives of these clauses when defining and implementing the Union's policies.⁵⁸⁶ For Article 13 TFEU, this obligation is extended to the Member States by virtue of the very wording of the provision, which states that "*the Union and the Member States shall [...] pay full regard to the welfare requirements of animals*".⁵⁸⁷ Arguably, this indicates that non-compliance with the integration clauses during the adoption of legislation can be invoked before the Court of Justice to challenge this legislation.⁵⁸⁸ However, it is important to note that Article 13 TFEU does not bind the EU institutions and the Member States to always give priority to animal welfare concerns, as it only obliges them "*to pay full regard*" to it.⁵⁸⁹ Consequently, it would be difficult to actually obtain an annulment based on

⁵⁸³ F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI, "Integration clauses – a prologue" in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 1.

⁵⁸⁴ See for example K. LENAERTS, T. CORTHAUT and P. VAN NUFFEL, *EU Constitutional Law*, Oxford, Oxford University Press, 2022, 83, point 5.008; E. MUIR, V. DAVIO and L. VAN DER MEULEN, "The Horizontal Equality Clauses (Arts 8 & 10 TFEU) and their Contribution to the Course of EU Equality Law: Still an Empty Vessel?", *European Papers*, 2022, Vol. 7(3), 1390; Opinion of Advocate General Wahl of 26 September 2013, Z, C-363/12, EU:C:2013:604, §112.

⁵⁸⁵ S. WEATHERILL, *Law and Values in the European Union*, Oxford, Oxford University Press, 2016, 137; E. PSYCHOGIOPOULOU, "The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice", *European Papers*, 2022, Vol. 7(3), 1377; see by analogy Commission of the European Communities, Communication from the Commission to the European Council – Partnership for integration – A strategy for Integrating Environment into EU Policies, COM(1998)333 final, 27 May 1998, 3.

⁵⁸⁶ Regarding Article 9 TFEU, see judgment of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, §46; judgment of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, §51. See also E. PSYCHOGIOPOULOU, "The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice", *European Papers*, 2022, Vol. 7(3), 1365.

⁵⁸⁷ Emphasis added.

⁵⁸⁸ S. WEATHERILL, *Law and Values in the European Union*, Oxford, Oxford University Press, 2016, 135.

⁵⁸⁹ K. SOWERY, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", *Common Market Law Review*, 2018, 70.

Article 13 TFEU, because the EU legislator enjoys a wide margin of discretion when it makes complex policy assessments,⁵⁹⁰ like it does when adopting animal welfare measures. Accordingly, the authors that argue that integration clauses can be used to challenge secondary EU law state that the Court of Justice will only annul the measures if they are manifestly inappropriate in light of the animal welfare objective,⁵⁹¹ for example if it was completely disregarded by the legislator.⁵⁹² It is argued here that the actual function of the integration clauses lays in the middle ground of both theories in the legal doctrine. It seems that the objectives of the clauses can be invoked in annulment procedures, but only as an element to take into account in the proportionality assessment. As such, it is not a potential principle of animal welfare that would challenge the measure of secondary law, but rather the principle of proportionality with animal welfare as one of the interests at stake. That is why the ‘manifestly inappropriate’ test would still apply, like it was in the case of *Jippes*.

In conclusion, it remains to be seen to what extent the legal obligations under Article 13 TFEU would influence the outcome of actions challenging secondary EU law and national measures. Nevertheless, even if it appears that integration clauses can indeed be invoked in these actions, it is likely that this will only be successful if the respective measure manifestly disregards the objectives of these clauses. This is equal to the approach followed by the Court in *Jippes*, where animal welfare concerns could only justify the annulment of a measure if that measure manifestly disregarded the protection of animal welfare. Thus, Article 13 TFEU would most likely not offer a sufficient alternative to a general principle of EU law when it comes to the annulment of animal welfare measures.

2.2.2.3: The justification of internal market barriers

Since the introduction of Article 13 TFEU, there have not been any cases on restrictions of free movement law by national animal welfare measures. However, in *AGET Iraklis*, a different

⁵⁹⁰ This is not only the case for Article 13 TFEU, but for all integration clauses. See E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7(3), 1377. See also judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, §50.

⁵⁹¹ E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7(3), 1377; S. WEATHERILL, *Law and Values in the European Union*, Oxford, Oxford University Press, 2016, 137. See also judgment of 22 June 2017, E.ON Biofor Sverige, C-549/15, EU:C:2017:490, §50.

⁵⁹² E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7(3), 1379.

integration clause (Article 9 TFEU) was invoked in justification of an internal market barrier, and this plea was then examined by the Court of Justice.⁵⁹³ This acknowledges that the objectives laid out in the integration clauses can be a mandatory requirement in the sense of the *Cassis de Dijon*⁵⁹⁴ judgment.⁵⁹⁵ This does not change anything for animal welfare protection, as this already fell under Article 36 TFEU prior to the entry into force of Article 13 TFEU.⁵⁹⁶ Nevertheless, Article 13 TFEU thus forms a safety net if the Court were to alter its pre-Lisbon case law by arguing that animal welfare matters that do not coincide with animal health do not fall under Article 36 TFEU.⁵⁹⁷

After finding an overriding objective in the public interest, it must be examined whether the restriction of free movement law is proportionate. In *AGET Iraklis*, the Court followed the standard version of the proportionality test under EU free movement law, rather than the more enhanced balancing exercise as was applied in *Schmidberger*⁵⁹⁸. Of course, one must be careful when drawing general conclusions on the basis of one single judgment, but the application of the classic proportionality test would run parallel with the above finding that integration clauses do not impose an obligation to carefully weigh all interests in judicial review cases. In conclusion, if animal welfare objectives are invoked to justify restrictions of the fundamental freedoms, the same proportionality test will be used as prior to the introduction of Article 13 TFEU. As such, it is doubtful whether the pre-Lisbon case law on the proportionality assessment when animal welfare considerations are at stake would today be altered.

2.2.3: *Centraal Israëlitisch Consistorie van België: a change of mind?*

The above analysis demonstrates that, from a theoretical perspective, animal welfare protection still constitutes a public interest of the European Union rather than a general principle of EU law. However, in the case of *Centraal Israëlitisch Consistorie van België*⁵⁹⁹ of

⁵⁹³ Judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972.

⁵⁹⁴ Judgment of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

⁵⁹⁵ Judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, §75-78. See also E. PSYCHOGIOPOULOU, “The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice”, *European Papers*, 2022, Vol. 7(3), 1373.

⁵⁹⁶ See Part 2, Chapter 2, Title 1.1 at page 21.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, §81.

⁵⁹⁹ Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031.

2020, the Court of Justice seems to have opened the door to recognize animal welfare as a general principle of EU law. When asked to balance the freedom of religion with animal welfare, the Court began by recalling that animal welfare is a general interest of the Union.⁶⁰⁰ This statement was backed with references to four judgments,⁶⁰¹ dated both before and after the entry into force of the Lisbon Treaty, where animal welfare was qualified as a public interest of the Union.⁶⁰² However, two paragraphs later, the Court held that “[w]here several fundamental rights and principles enshrined in the Treaties are at issue, such as [...] [the freedom of religion] and animal welfare enshrined in Article 13 TFEU, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them”.⁶⁰³ What followed was a thorough examination of how both concepts should be weighed against each other, eventually restricting the freedom of religion to let animal welfare protection prevail.⁶⁰⁴ This is a very remarkable statement. Not only did the Court refer to animal welfare as a *principle* enshrined in the Treaties, but it also conducted the same proportionality assessment as performed when general principles of EU law are at stake.

So far, the only follow-up case where Article 13 TFEU was invoked is the case of *One Voice*⁶⁰⁵ of 2021. In this case, Article 13 TFEU was just briefly mentioned to strengthen the main argument, that was based on the protection of biodiversity. As such, animal welfare protection was not part of the balancing exercise made in the proportionality assessment, so the Court did not get the opportunity to confirm or deny the potentially increased strength of animal welfare in EU law. However, it is remarkable that Article 13 TFEU was invoked by the Court in *One Voice*, as this case was situated in the sphere of environmental law. As mentioned above,⁶⁰⁶ Article 13 TFEU itself does not provide for an obligation to have due regard to animal

⁶⁰⁰ *Ibid*, §63.

⁶⁰¹ Judgment of 17 January 2008, *Viamex Agrar Handel and ZVK*, joined cases C-37/06 and C-58/06, EU:C:2008:18, §22; judgment of 19 June 2008, *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, C-219/07, EU:C:2008:353, §27; judgment of 10 September 2009, *Commission v Belgium*, C-100/08, EU:C:2009:537, §91; judgment of 23 April 2015, *Zuchtvieh-Export*, C-424/13, EU:C:2015:259, §35.

⁶⁰² Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, §63.

⁶⁰³ *Ibid*, §65. Emphasis added.

⁶⁰⁴ *Ibid*, §79-80.

⁶⁰⁵ Judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux*, C-900/19, EU:C:2021:211.

⁶⁰⁶ See Part 3, Chapter 1, Title 1.1 at page 40.

welfare in the environmental policy, as the text of the provision stays silent on this policy area. By explicitly stating that Article 13 TFEU applies to all Union policies,⁶⁰⁷ the Court seems to give a general scope to animal welfare protection, which is one of the characteristics of general principles of EU law.⁶⁰⁸ Nevertheless, it should be reminded that animal welfare was not the main argument in *One Voice*. It is unclear if the Court would also apply Article 13 TFEU if animal welfare protection would be the main argument in an environmental case, and not a mere side argument to strengthen the central plea.

As it stands today, it is difficult to answer whether *Centraal Israëlitisch Consistorie van België* recognized animal welfare as a general principle of EU law. From a theoretical perspective, Article 13 TFEU arguably still embodies a public interest rather than a general principle. Nevertheless, the final say on the recognition of general principles of EU law is with the Court of Justice,⁶⁰⁹ so *Centraal Israëlitisch Consistorie van België* could be an overruling of *Jippes*⁶¹⁰. If this were indeed the case, then this would have a significant impact on animal welfare protection in the European Union. Firstly, animal welfare consideration would play a bigger role in actions for annulment of secondary EU law and the disapplication of national measures implementing EU law. Instead of following the ‘manifestly inappropriate’-test, animal welfare should, as a general principle, be carefully weighed against the other rights and principles relevant to the legislation at stake, lowering the threshold to annul secondary EU law.⁶¹¹ Arguably, this would for example be capable of altering the Court’s judgment in *Compassion in World Farming*⁶¹², as the EU legislator would then have to adopt the best possible rules on animal welfare protection.⁶¹³ Secondly, a recognition of animal welfare as a general principle of EU law would arguably increase the role of animal welfare arguments when justifying restrictions on the free movement of goods. However, this would only be so if the Court were

⁶⁰⁷ Judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux*, C-900/19, EU:C:2021:211, §39.

⁶⁰⁸ See Part 3, Chapter 2, Title 1.1 at page 65.

⁶⁰⁹ P.J. NEUVONEN and K.S. ZIEGLER, “General principles in the EU legal order: past, present and future directions” in K.S. ZIEGLER, P.J. NEUVONEN and V. MORENO-LAX (eds.), *Research handbook on general principles in EU law: constructing legal orders in europe*, 2022, 15.

⁶¹⁰ Judgment of 12 July 2001, *Jippes and others*, C-189/01, EU:C:2001:420.

⁶¹¹ E. SPAVENTA, “Case C-189/01, H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij, Judgment of the Full Court of 12 July 2001, nyr.”, *Common Market Law Review*, 2002, 1164-1165.

⁶¹² Judgment of 19 March 1998, *Compassion in World Farming*, C-1/96, EU:C:1998:113.

⁶¹³ Judgment of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, §80.

to follow the *Schmidberger*⁶¹⁴ reasoning on the role of general principles in the proportionality assessment in free movement law. If the Court were to do so, then it would arguably become easier for Member States to justify the trade-restrictive effects of national animal welfare laws. However, this would still only be relevant in cases where the Court actually proceeds to the proportionality assessment. So, the case law of the Court where Article 36 TFEU cannot be invoked if there is harmonization within the common organization of the markets in agricultural products would not be altered despite a general principle of animal welfare.

Nevertheless, it remains to be seen how the Court will tackle animal welfare considerations in future cases. The qualification of animal welfare as a public interest, with all its consequences, is in line with the animal welfare theory. As explained in Part 1, the animal welfare theory defends that the interests of animals are just one of the interests that should be balanced, without giving special importance to these animal interests.⁶¹⁵ The recognition of a general principle of animal welfare would suggest that the EU must follow the animal rights theory, which mandates a thorough assessment of animal interests in the same way as we apply fundamental human rights in proportionality assessments.⁶¹⁶ As secondary EU law on animal welfare is still based on the welfare theory and not on the animal rights theory,⁶¹⁷ it seems unlikely that the Court of Justice would continue its approach of *Centraal Israëlitisch Consistorie van België*.

§3: The dubious status of animal welfare in EU law *anno* 2023

It is currently rather unclear what the status of animal welfare is in the EU legal order. After a theoretical assessment, it does not seem plausible that Article 13 TFEU could bring the Court to recognize animal welfare as a general principle of EU law, as the *Jippes*-criteria remain unfulfilled. This conclusion is in line with the nature of general principles of EU law, as animal welfare protection does not fulfil all of their inherent characteristics and does not constitute a constitutional tradition common to the national legal orders of the Member States. Additionally, Article 13 TFEU does not ensure an equally effective protection as a general principle of EU law would provide. The animal welfare clause has a far-reaching effect on the

⁶¹⁴ Judgment of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333.

⁶¹⁵ See Part 1, Chapter 1, Title 2.3 at page 11.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

interpretation of secondary EU law, but the same cannot be said for actions challenging secondary EU law and actions concerning the disapplication of national measures. Arguably, Article 13 TFEU only justifies the annulment of secondary law or the disapplication of national measures if they are found to be manifestly inappropriate in light of animal welfare protection. This approach is equally restrictive as it was at the time of *Jippes*. The same arguably applies to the role of animal welfare considerations in the proportionality test in internal market law, as Article 13 TFEU does not seem to require the Court to carry out a more thorough examination where a fair balance must be sought between the fundamental freedoms and animal welfare considerations.

However, it remains to be seen whether *Centraal Israëlitisch Consistorie van België* will alter the status of animal welfare in the EU legal order. A continuation of the approach of this case does not seem realistic from a theoretical perspective, as this approach supports the animal rights theory rather than the animal welfare theory. Nevertheless, it is the Court of Justice that has the final say on the recognition of general principles of EU law, so if the Court would find sufficient support to recognize animal welfare as a general principle, a new era for animal welfare protection within the EU is about to start.

Chapter 3: The consequences of Article 13 TFEU on the adoption of secondary law harmonizing animal welfare protection

As the Member States are still only offered little leeway to regulate animal welfare matters that touch upon the EU internal market, the EU's animal welfare *acquis* plays a significant role in the protection of European animals. These measures must be pursued within the common agricultural policy (Article 43 TFEU), the environmental policy (Article 192 TFEU), and the internal market (Article 114 TFEU), as the European Union does not have a general competence to regulate animal welfare matters.⁶¹⁸ The internal market policy offers a great potential, yet not unlimited, legislative margin to the EU legislator to adopt a new generation of animal welfare laws.⁶¹⁹ This Chapter aims to clarify the boundaries of the legislative power

⁶¹⁸ See Part 3, Chapter 1, Title 1.1 at page 40.

⁶¹⁹ T. VANDAMME, "Tabaksreclame" in T. BEUKERS and H. VAN HARTEN, *Het recht van de Europese Unie in 50 klassieke arresten*, The Hague, Boom Juridische uitgevers, 2010, 281.

within the framework of the internal market. First, it will be explained how the internal market harmonization clause was applied prior to the introduction of the Lisbon Treaty (§1). Next, it will be examined what role the integration clauses play in internal market harmonization post-Lisbon (§2). Finally, two suggested initiatives to harmonize animal welfare standards via Article 114 TFEU will be addressed (§3). This will be followed by an interim conclusion on the missed potential of Article 114 TFEU to advance animal welfare protection in the EU (§4).

§1: Internal market harmonization pre-Lisbon: the *Tobacco Advertising*-test

Article 114 TFEU allows the EU legislator to harmonize any national measures of the Member States, if this is required to ensure the establishment and the functioning of the EU internal market.⁶²⁰ Prior to the introduction of the Lisbon Treaty, the Court of Justice explained what was meant by this requirement in the *Tobacco Advertising* case.⁶²¹ This section will first elaborate on these *Tobacco Advertising* criteria to frame the limits of internal market harmonization (1.1). Next, it will be explained how the EU legislator used these criteria as a ‘drafting guide’⁶²² when adopting measures under Article 114 TFEU (1.2).

1.1: Limitations to internal market harmonization: *Tobacco Advertising*

Prior to the Lisbon Treaty, Article 114 TFEU did not offer an unrestricted legal basis for the EU legislator to approximate the national laws of the Member States, as this would have jeopardized the principle of conferral.⁶²³ Instead, measures adopted under Article 114 TFEU had to genuinely improve the establishment and the functioning of the internal market.⁶²⁴ In this regard, the mere finding that there were disparities between the national rules did not suffice to justify recourse to this legal basis, even if those disparities could impede any of the four freedoms.⁶²⁵

In *Tobacco Advertising*,⁶²⁶ the Court of Justice developed a three-step approach to assess the appropriateness of the use of Article 114 TFEU as a legal basis for harmonization measures.

⁶²⁰ S. WEATHERILL, “The limits of legislative harmonization ten years after tobacco advertising: how the Court’s case law has become a ‘drafting guide’”, *German Law Journal*, 2011, 831.

⁶²¹ Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544.

⁶²² S. WEATHERILL, “The limits of legislative harmonization ten years after tobacco advertising: how the Court’s case law has become a ‘drafting guide’”, *German Law Journal*, 2011.

⁶²³ Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, §83.

⁶²⁴ *Ibid*, §84.

⁶²⁵ *Ibid*.

⁶²⁶ *Ibid*.

This approach is also known as the *Tobacco Advertising*-test. Firstly, measures adopted under the internal market legal basis had to have as their aim the prevention of distortions to competition or the prevention of the emergence of obstacles to trade in the Union.⁶²⁷ More precisely, this meant that there had to be (future) disparities in the national laws of the Member States, and these disparities had to affect the internal market in a negative way.⁶²⁸ Secondly, the emergence of these distortions or obstacles to the four freedoms had to be likely.⁶²⁹ This meant that certain Member States had to have adopted, or had to be considering adopting national measures that would adversely affect the internal market.⁶³⁰ And lastly, the harmonization measure had to be designed in such a way to prevent these distortions or the emergence of these obstacles.⁶³¹ As such, the measure had to address the interests that were invoked by the Member States when they were adopting or were about to adopt their national laws. The EU legislator could only harmonize national laws under Article 114 TFEU without violating the principle of conferral if all three criteria were fulfilled.

These criteria seem relatively constraining on the Union's competence to harmonize under the internal market legal basis. However, subsequent case law has somewhat nuanced the *Tobacco Advertising* approach.⁶³² For example, in *Inuit Tapiriit Kanatami* – a case concerning the legality of the Seal Products Regulation – the Court held that recourse to Article 114 TFEU was possible even if trade in the products covered by the harmonization measure was relatively small.⁶³³ Another illustration is the adoption of marketing bans under Article 114 TFEU, such as the Seal Products Regulation or the Cat and Dog Fur Regulation. From the perspective of the internal market, these bans did not contribute to the smooth functioning of the internal market, as they imposed a universal barrier to trade within the EU.⁶³⁴ Nevertheless, the Court had no problem with these marketing bans.⁶³⁵

⁶²⁷ *Ibid*, §86.

⁶²⁸ C. BARNARD, *The substantive law of the EU: the four freedoms*, Oxford, Oxford University Press, 2019, 566.

⁶²⁹ Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, §86.

⁶³⁰ C. BARNARD, *The substantive law of the EU: the four freedoms*, Oxford, Oxford University Press, 2019, 566.

⁶³¹ Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, §86.

⁶³² I. MALETIC, *The Law and Policy of Harmonisation in Europe's Internal Market*, Cheltenham, Edward Elgar, 2013, 29.

⁶³³ Judgment of 3 September 2015, *Inuit Tapiriit Kanatami*, C-398/13 P, EU:C:2015:535, §39.

⁶³⁴ V. DELHOMME, "Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption", *College of Europe Research Papers in Law*, 1/2018, 14.

⁶³⁵ *Ibid*, 15: Judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, §34.

1.2: Tobacco Advertising as a ‘drafting guide’ to adopt harmonization measures

Prior to the Lisbon Treaty, the EU legislator has been found to address the *Tobacco Advertising*-criteria in the recitals of measures adopted under Article 114 TFEU.⁶³⁶ By doing so, the legislator aimed to prevent the annulment of a measure by explicitly demonstrating *ex ante* the fulfilment of the *Tobacco Advertising*-criteria.⁶³⁷ This careful drafting technique is also visible in the Seal Products Regulation, which has its legal basis in Article 114 TFEU. In its recitals, the Seal Products Regulation first mentions the existence and potential emergence of distortions of competition and obstacles to trade in seal products due to animal welfare concerns:

*“In response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals [...] several Member States have adopted or intend to adopt legislation regulating trade in seal products by prohibiting the import and production of such products, while no restrictions are placed on trade in these products in other member States”.*⁶³⁸

*“There are therefore differences between national provisions governing the trade, import, production and marketing of seals products. Those differences adversely affect the operation of the internal market [...]”.*⁶³⁹

Then, the legislator continued by clarifying that the aim of the Seal Products Regulation is to prevent the disturbance of the internal market by harmonizing trade in seal products:

*“The measures provided for in this Regulation should therefore harmonise the rules across the Community [...] and thereby prevent the disturbance of the internal market in the products concerned [...]”.*⁶⁴⁰

Finally, the legislator explained in detail how the Seal Products Regulation will eliminate and prevent the emergence of obstacles on the internal market:

“To eliminate the present fragmentation of the internal market, it is necessary to provide for harmonised rules while taking into account animal welfare considerations. In order to counter barriers to the free movement of products concerned in an effective

⁶³⁶ S. WEATHERILL, “The limits of legislative harmonization ten years after tobacco advertising: how the Court’s case law has become a ‘drafting guide’”, *German Law Journal*, 2011, 843.

⁶³⁷ *Ibid*, 844.

⁶³⁸ Recital 5 of the Seal Products Regulation. Emphasis added.

⁶³⁹ Recital 6 of the Seal Products Regulation. Emphasis added.

⁶⁴⁰ Recital 8 of the Seal Products Regulation. Emphasis added.

*and proportionate fashion, the placing on the market of seal products should, as a general rule, not be allowed in order to restore consumer confidence while, at the same time, ensuring that animal welfare concerns are fully met. Since the concerns of citizens and consumers extend to the killing and skinning of seals as such, it is also necessary to take action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals. [...]*⁶⁴¹

*“It is also clear that other forms of harmonised rules, such as labelling requirements, would not achieve the same result. [...] Conversely, the measures contained in this Regulation will be easier to comply with, whilst also reassuring consumers”.*⁶⁴²

In short, as several Member States were adopting national measures prohibiting the production and commercialization of seal products, given the animal welfare issues attached to these products, it was better to regulate the matter at Union level by adopting trade regulations that fully take into account animal welfare concerns. As such, both the functioning of the internal market and the welfare concerns of EU citizens, are addressed by the Seal Products Regulation. Thus, the EU legislator concluded:

*“Since the objective of this Regulation, namely the elimination of obstacles to the functioning of the internal market by harmonising national bans concerning the trade in seal products at Community level, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in [Article 5 TEU]. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective”.*⁶⁴³

The approach of the EU legislator is often criticized, as it only vaguely assessed the *Tobacco Advertising*-criteria instead of carrying out an in-depth analysis.⁶⁴⁴ Nevertheless, the Court of Justice did not seem to have a problem with this approach. In *Inuit Tapiriit Kanatami*, the Inuit community argued that the EU legislator failed to demonstrate the necessity of the Seal Products Regulation to guarantee the functioning of the internal market, as the regulation’s recitals only vaguely assert the disparities in the internal market instead of explicitly mentioning the specific Member States that had adopted more stringent measures.⁶⁴⁵ The

⁶⁴¹ Recital 10 of the Seal Products Regulation. Emphasis added.

⁶⁴² Recital 12 of the Seal Products Regulation. Emphasis added.

⁶⁴³ Recital 21 of the Seal Products Regulation.

⁶⁴⁴ S. WEATHERILL, “The limits of legislative harmonization ten years after tobacco advertising: how the Court’s case law has become a ‘drafting guide’”, *German Law Journal*, 2011, 844.

⁶⁴⁵ Judgment of 3 September 2015, *Inuit Tapiriit Kanatami*, C-398/13 P, EU:C:2015:535, §19.

Court held that the exact number of Member States that had national measures prior to the harmonization was not, in itself, a decisive factor in assessing whether the regulation could be based on Article 114 TFEU.⁶⁴⁶ As such, the EU legislator could not be criticized for only generally setting out the divergences between the national rules instead of concretizing the number of Member States that had acted on the matter.⁶⁴⁷ Thus, the Seal Products Regulation fulfilled the *Tobacco Advertising*-test and could legitimately be based on Article 114 TFEU.⁶⁴⁸ This stance of the Court broadened the leeway given to the EU legislator to approximate national measures under the internal market legal basis.

§2: The role of integration clauses in internal market harmonization post-Lisbon

The inclusion of the integration clauses, such as Article 13 TFEU, in the Treaty of Lisbon has raised the question of what their role is in the harmonization process under Article 114 TFEU. More specifically, it is asked whether the pursuit of non-market aims by the integration clauses will have a measurable effect on the content of internal market laws adopted by the Union.⁶⁴⁹ This section will first frame the theories regarding the role of the integration clauses in the adoption of harmonizing measures (2.1), whereafter it will be assessed what their influence is in practice (2.2).

2.1: Internal market harmonization in theory: a bigger role for non-market aims

Integration clauses are meant to complement the objectives of the European Union set out in Article 3 TEU,⁶⁵⁰ one of which states that “[t]he Union shall establish an internal market”.⁶⁵¹ As such, the EU institutions must consider the non-market values enshrined in these integration clauses when acting in the internal market policy.⁶⁵² It is argued that this new legal framework introduced by the Lisbon Treaty should be reflected in secondary law adopted on

⁶⁴⁶ *Ibid*, §24.

⁶⁴⁷ *Ibid*, §29.

⁶⁴⁸ *Ibid*, §32.

⁶⁴⁹ B. DE WITTE, “A competence to protect: the pursuit of non-market aims through internal market legislation” in P. SYPRIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, 44.

⁶⁵⁰ K. LENAERTS, T. CORTHAUT and P. VAN NUFFEL, *EU Constitutional Law*, Oxford, Oxford University Press, 2022, 82, point 5.007.

⁶⁵¹ Article 3(3) TEU.

⁶⁵² I. GOVAERE, “Internal Market Dynamics: on Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU” in S. GARBEN and I. GOVAERE (eds.), *The Internal Market 2.0*, 2020, Hart Publishing, 84.

the basis of Article 114 TFEU.⁶⁵³ In particular, the fact that the establishment of the internal market is an objective on its own, combined with the shared competence for the internal market policy and the introduction of the integration clauses, suggests that the Court of Justice should abandon its *Tobacco Advertising*-test.⁶⁵⁴ Instead, the EU legislator should now have the competence to harmonize non-market aims under Article 114 TFEU even when the Member States are not necessarily envisaging to adopt laws that might restrict the internal market.⁶⁵⁵ This approach would allow the EU to actively prevent potential barriers on the internal market, whereas under *Tobacco Advertising*, the EU had to wait until the Member States adopted or planned to adopt national legislation before the EU legislator could remedy the barriers imposed on the internal market by these national laws. As such, the legislative framework introduced by the Lisbon Treaty clearly removes the focus from the economic objective of the EU, which was prominently put at the forefront before 2009.⁶⁵⁶ Instead, the Treaty now supports the integration of non-economic objectives in combination with the EU's economic rationale.⁶⁵⁷ This seems to be an acknowledgement of the need to reconcile the conflicting interests of economic integration and the protection of welfare-related aims.⁶⁵⁸

One of the purposes of Article 13 TFEU is thus to influence the nature of EU measures in, *inter alia*, the internal market policy. As such, the EU legislator gained the 'competence to protect' animal welfare protection by embedding it in internal market harmonization measures.⁶⁵⁹ Harmonization under Article 114 TFEU should thus not only contribute to the functioning of the internal market, but also to the shaping of an animal welfare policy.⁶⁶⁰ Moreover, it is

⁶⁵³ I. GOVAERE, "De Lissabon internemarkt doelstelling en de 'horizontale' burger- en dienstenrichtlijnen: implicaties voor de Belgische rechtsorde" in I. GOVAERE (ed.), *Europees recht: moderne interne markt voor de praktijkjurist*, Mechelen, Kluwer, 2012, 14.

⁶⁵⁴ I. GOVAERE, "Internal Market Dynamics: on Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU" in S. GARBEN and I. GOVAERE (eds.), *The Internal Market 2.0*, 2020, Hart Publishing, 89.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ N. BOEGER, "Minimum harmonisation, free movement and proportionality" in P. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, 68.

⁶⁵⁷ I. GOVAERE, "The Future Direction of the EU Internal Market: on Vested Values and Fashionable Modernism", *The Columbia Journal of European Law*, Vol. 16(1), 70.

⁶⁵⁸ N. BOEGER, "Minimum harmonisation, free movement and proportionality" in P. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, 68.

⁶⁵⁹ B. DE WITTE, "A competence to protect: the pursuit of non-market aims through internal market legislation" in P. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, 44.

⁶⁶⁰ S. WEATHERILL, "The competence to harmonise and its limits" in P. KOUTRAKOS and J. SNELL (eds.), *Research Handbook on the Law of the EU's Internal Market*, Cheltenham, Edward Elgar Publishing, 2017, 85.

argued that Article 13 TFEU allows for the actual objective of a harmonization measure under Article 114 TFEU to even disproportionately weigh in favour of animal welfare protection, as long as a link with the internal market can be established.⁶⁶¹

2.2: Internal market harmonization in practice: *Tobacco Advertising* in continuation

Despite the potential provided by the post-Lisbon legal framework to pursue non-market objectives under Article 114 TFEU, it seems that the Court of Justice is still holding onto its *Tobacco Advertising*-doctrine.⁶⁶² This is not different for the harmonization of animal welfare standards under Article 114 TFEU. Since the entry into force of Article 13 TFEU, only one new animal welfare measure has been adopted within the internal market policy: Directive 2010/63/EU on the protection of animals used for scientific purposes⁶⁶³ ('Laboratory Animals Directive'). The EU legislator justified its recourse to Article 114 TFEU for the adoption of this directive by stating that:

“Certain Member States have adopted national implementing measures that ensure a high level of protection of animals used for scientific purposes, while others only apply the minimum requirements laid down in [the predecessor of the Laboratory Animals Directive]. These disparities are liable to contribute barriers to trade in products and substances the development of which involves experiments on animals. Accordingly, this Directive should provide for more detailed rules in order to reduce such disparities by approximating the rules applicable in that area and to ensure a proper functioning of the internal market”.⁶⁶⁴

So, the EU legislator concludes:

“Since the objective of this Directive [...] cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of

⁶⁶¹ D. RYLAND and A. NURSE, “Mainstreaming after Lisbon: Advancing animal welfare in the internal market”, *European Energy and Environmental Law Review*, 2013, 115.

⁶⁶² I. GOVAERE, “Internal Market Dynamics: on Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU” in S. GARBEN and I. GOVAERE (eds.), *The Internal Market 2.0*, 2020, Hart Publishing, 77.

⁶⁶³ Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, *OJ L 276*, 20 October 2010, 33-79.

⁶⁶⁴ Recital 1 of the Laboratory Animals Directive. Emphasis added.

proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective".⁶⁶⁵

This final recital of the Laboratory Animals Directive reads almost identically to the final recital of the Seal Products Regulation. This confirms that the Laboratory Animals Directive was clearly drafted keeping in mind the *Tobacco Advertising*-test. The adherence to the *Tobacco Advertising*-test is regrettable for the protection of animal welfare (and, by extension, other non-market aims) in the European Union, as the EU legislator is now still dependent on the national legislators to be able to harmonize animal welfare issues under Article 114 TFEU. This removes the possibility for the Union to proactively improve animal welfare standards where the Member States fail to do so.

§3: Potential animal welfare initiatives under Article 114 TFEU

The integration clauses do not enlarge the scope for the EU legislator to harmonize under the internal market policy. As such, these harmonization measures must still fulfil the *Tobacco Advertising* test for the Union to be able to act under Article 114 TFEU. However, even in the cases where potential animal welfare measures do fulfil this test, the European Commission has been reluctant to expand the animal welfare *acquis* via the internal market legal basis. Since the adoption of the Lisbon Treaty, there have been a few calls for the EU to adopt new animal welfare measures that would have an impact on the free movement of animals and animal products. This section will explore two of these ideas that could be based within the internal market policy, namely an EU-wide ban on fur farming (**3.1**), and a horizontal Animal Welfare Framework Law (**3.2**).

3.1: An EU-wide ban on fur farming

In March 2022, the animal protection lobby group Eurogroup for Animals launched the European Citizens' Initiative 'Fur Free Europe'.⁶⁶⁶ The initiative calls upon the EU to ban not only fur farms in the EU, but also the importation and marketing of products containing fur from fur farms in third countries.⁶⁶⁷ As of today, the only animal welfare directive that is

⁶⁶⁵ Recital 56 of the Laboratory Animals Directive.

⁶⁶⁶ Press Release of the European Commission, 'Fur Free Europe': Commission decides to register new European Citizens' Initiative on banning fur in the EU, 16 March 2022.

⁶⁶⁷ Eurogroup for Animals, European Citizens' Initiative Fur Free Europe, accessed 12 May 2023 at < <https://www.eurogroupforanimals.org/fur-free-europe>>.

applicable to these farms is the Farm Animals Directive,⁶⁶⁸ which does not succeed in sufficiently protecting the welfare needs of animals.⁶⁶⁹ Consequently, these farms generally fail to safeguard the five freedoms of animal welfare, resulting in inhumane living conditions for the animals that are kept there.⁶⁷⁰ The main objective of the fur farm ban would therefore be to improve the welfare of fur-bearing animals, besides the additional positive impact of this ban on public health concerns and the protection of biodiversity.⁶⁷¹

In March 2023, Eurogroup for Animals closed its campaign with a little over 1.7 million collected signatures.⁶⁷² Therefore, it is now up to the European Commission to review the initiative and potentially propose a legislative act on the matter.⁶⁷³ Eurogroup for Animals proposes to use Article 114 TFEU as a legal basis for this regulation.⁶⁷⁴ They argue that recourse to this legal basis is justified, as multiple Member States have adopted national bans on fur farms.⁶⁷⁵ These national bans create distortions of the internal market, as fur farmers from countries where no ban applies gain a competitive advantage when other countries ban fur farming in their territories.⁶⁷⁶ As such, the European Commission has the competence to approximate the national laws of the Member States under Article 114 TFEU.⁶⁷⁷

⁶⁶⁸ Article 1(1) of the Farm Animals Directive; Eurogroup for animals, *Fur Free Europe: Why we need to ban fur farming and the placement of farmed fur products on the European market from public health, legal, environmental and ethical perspectives*, 2022, 36, accessed 12 May 2023 at < https://www.eurogroupforanimals.org/files/eurogroupforanimals/2022-10/Fur_Free_Europe_Master_Report.pdf>.

⁶⁶⁹ See Part 3, Chapter 1, Title 2.1.1 at page 43.

⁶⁷⁰ Animals reared in fur farms are kept in wire-mesh battery cages, are prevented from carrying out their innate behaviour and natural social interactions, and are fed innutritious diets. This results in abnormal repetitive behaviour, self-inflicted injuries and, in extreme cases, even in resort to cannibalism. See Eurogroup for animals, *Fur Free Europe: Why we need to ban fur farming and the placement of farmed fur products on the European market from public health, legal, environmental and ethical perspectives*, 2022, 6-14, accessed 12 May 2023 at < https://www.eurogroupforanimals.org/files/eurogroupforanimals/2022-10/Fur_Free_Europe_Master_Report.pdf>.

⁶⁷¹ *Ibid.*

⁶⁷² Eurogroup for Animals, *European Citizens' Initiative Fur Free Europe*, accessed 12 May 2023 at < <https://www.eurogroupforanimals.org/fur-free-europe>>.

⁶⁷³ K. LENAERTS, T. CORTHAUT and P. VAN NUFFEL, *EU Constitutional Law*, Oxford, Oxford University Press, 2022, 538, point 17.013.

⁶⁷⁴ Eurogroup for animals, *Fur Free Europe: Why we need to ban fur farming and the placement of farmed fur products on the European market from public health, legal, environmental and ethical perspectives*, 2022, 36, accessed 12 May 2023 at < https://www.eurogroupforanimals.org/files/eurogroupforanimals/2022-10/Fur_Free_Europe_Master_Report.pdf>.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

However, it is important to note that Article 114 TFEU can be used to approximate the national laws of the Member States in function of the internal market, “[s]ave where otherwise provided in the Treaties”.⁶⁷⁸ In other words, Article 114 TFEU functions as a residual provision that can only be used if no more appropriate legal basis can be found to base the legislative measure on.⁶⁷⁹ As the regulation of farm animal welfare falls within the scope of the common agricultural policy, these measures should in principle be based on Article 43 TFEU, as this provision serves as a *lex specialis* that principally excludes the application of Article 114 TFEU.⁶⁸⁰ Nevertheless, it is possible that one and the same harmonization measure simultaneously raises issues falling under Article 114 TFEU and under another legal basis.⁶⁸¹ For example, certain farm animal welfare measures could potentially have an impact on the free circulation of animals or animal-derived products.⁶⁸² In these situations, it is up to the EU legislator to perform an examination of the predominant purpose of the measure, and to base it on the appropriate harmonization clause.⁶⁸³ For the potential regulation on fur farming, the European Commission carried out this examination when it registered the ‘Fur Free Europe’ initiative. If the final proposal would only focus on banning fur farms within the European Union, the measure should be adopted under Article 43 TFEU, as this would exclusively fall within the CAP.⁶⁸⁴ However, if the regulation would go a step further by also banning the importation and commercialization of products containing fur from fur farms in third countries, then the European Commission opts to use Article 114 TFEU as a legal basis.⁶⁸⁵

⁶⁷⁸ Article 114(1) TFEU.

⁶⁷⁹ P. CRAIG and G. DE BURCA, *EU Law: Text, Cases, and Materials*, 7th edition, Oxford, Oxford University Press, 2020, 661.

⁶⁸⁰ C. BARNARD, *The substantive law of the EU: the four freedoms*, Oxford, Oxford University Press, 2019, 573.

⁶⁸¹ *Ibid.*

⁶⁸² T. ERNIQUIN, “Les animaux vivants et la libre circulation: un status de marchandises sensibles”, *Revue des affaires européennes*, 2017, vol. 1, 50.

⁶⁸³ V. DELHOMME, “Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption”, *College of Europe Research Papers in Law*, 1/2018, 6.

⁶⁸⁴ Recital 4 of Commission Implementing Decision (EU) 2022/482 of 16 March 2022 on the request for registration of the European citizens’ initiative entitled ‘Fur Free Europe’ pursuant to Regulation (EU) 2019/788 of the European Parliament and of the Council, *OJ L 98*, 25 March 2022, 82-83.

⁶⁸⁵ *Ibid.*

3.2: A horizontal Animal Welfare Framework Law

In 2012, the European Commission mentioned the idea of introducing an Animal Welfare Framework Law.⁶⁸⁶ This act, which would likely have its legal basis in Article 114 TFEU, would offer a horizontal framework that harmonizes animal welfare concerns, distortions of competition in the internal market, and the monitoring of compliance with animal welfare standards.⁶⁸⁷ The European Parliament openly welcomed this idea and called on the European Commission to present a concrete proposal.⁶⁸⁸ However, the European Commission has been silent about it ever since, with no concrete legislative proposal having been presented as of 2023.

The European Commission's idea was to adopt general animal welfare principles that would apply to all animals.⁶⁸⁹ These principles would be adopted in a legislative framework that would follow a holistic approach.⁶⁹⁰ The European Commission suggested that this Framework Law include, *inter alia*, a more science-based procedure to assess animal well-being, the creation of reference centres for animal welfare to support the implementation of the animal welfare *acquis*, and a tool to provide adequate information to consumers on animal welfare.⁶⁹¹ The European Parliament responded to this idea with a list of more precisely formulated suggestions to include in the legislative framework.⁶⁹² For example, it proposed to include an EU definition of 'animal welfare', based on the definition of the World Organisation for Animal Health.⁶⁹³ This definition should then be combined with a set of animal welfare objectives that are based on scientific research.⁶⁹⁴ Additionally, the European Parliament suggested including a set of tools to improve the implementation and enforcement of the

⁶⁸⁶ European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, COM(2012)6 final, 19 January 2012, 5.

⁶⁸⁷ J. BEQIRAJ, "Animal welfare" in F. IPPOLITO, M.E. BARTOLONI and M. CONDINANZI (eds.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, Routledge, 2018, 147.

⁶⁸⁸ European Parliament, resolution of 4 July 2012 on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, 2012/2043(INI), 4 July 2012, §61.

⁶⁸⁹ European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, COM(2012)6 final, 19 January 2012, 5-6.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*, 6-7.

⁶⁹² European Parliament, resolution of 4 July 2012 on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, 2012/2043(INI), 4 July 2012, §61-68.

⁶⁹³ *Ibid.*, §68(a).

⁶⁹⁴ *Ibid.*

animal welfare *acquis* (for example, through guidelines for staff of public authorities to identify animal welfare issues),⁶⁹⁵ a duty for the Member States to report the implementation of the animal welfare *acquis* to the European Commission and to provide a roadmap on how to continue ensuring compliance in the future,⁶⁹⁶ and the possibility to take actions against Member States who do not submit these reports or carry out inspections on compliance with the welfare standards.⁶⁹⁷

Although the idea for the framework law is only briefly explained by the European Commission, it is clear that it would solve a number of issues that currently exist in the animal welfare *acquis*. The most significant novelty of the Animal Welfare Framework Law is that it would apply to *all* animals, no matter their species or purpose.⁶⁹⁸ This addresses the criticism that the current animal welfare *acquis* is too piecemeal and predominantly focusses on farm animals.⁶⁹⁹ Additionally, the ideas put forth by the European Parliament have the potential to solve the long-lasting problem of the implementation and enforcement issues.⁷⁰⁰ By requiring the Member States to submit implementation reports and roadmaps, and by coupling this obligation with the possibility to take actions against Member States who do not comply with this duty, the European Commission will have sufficient information at its disposal to supervise the effective implementation of the minimum welfare standards, and will be provided with tools to take action if necessary.

Nevertheless, there seems to be one big problem with an Animal Welfare Framework Law based on Article 114 TFEU: it will most likely not allow Member States to adopt more stringent national measures. That is because Article 114 TFEU is designed to support the establishment and the functioning of the internal market.⁷⁰¹ Measures of minimum harmonization do not fully contribute to this market objective, as Member States can easily introduce new barriers on the internal market by introducing more stringent national measures.⁷⁰² As such, a measure

⁶⁹⁵ *Ibid*, §68(c).

⁶⁹⁶ *Ibid*, §68(e).

⁶⁹⁷ *Ibid*, §68(f).

⁶⁹⁸ European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, COM(2012)6 final, 19 January 2012, 6.

⁶⁹⁹ See Part 3, Chapter 1, Title 2.4 at page 51.

⁷⁰⁰ *Ibid*.

⁷⁰¹ V. DELHOMME, "Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption", *College of Europe Research Papers in Law*, 1/2018, 14.

⁷⁰² *Ibid*.

of minimum harmonization is arguably not designed to prevent the emergence of distortions of competition or barriers to trade, so it does not fulfil the *Tobacco Advertising*-test. Consequently, measures adopted under Article 114 TFEU will generally be a maximum harmonization instead.⁷⁰³ However, the best legislative approach for protecting non-market aims (such as animal welfare) is through minimum harmonization, as this allows Member States to address their particular concerns through the adoption of more stringent national rules that are also applicable to products coming from other Member States.⁷⁰⁴ The only possibility to maintain national measures that offer a higher level of animal welfare protection would be under Article 114(4) TFEU, if these measures can be justified under Article 36 TFEU. However, doing so will most likely not be an easy task. As stated in Part 2, animal welfare considerations have never successfully been invoked under Article 36 TFEU to justify national rules on animal welfare protection,⁷⁰⁵ and the approach of the Court will arguably not be different nowadays despite the adoption of Article 13 TFEU.⁷⁰⁶ Additionally, Article 114(4) TFEU can only be used to maintain national measures that were already in force when the harmonization measure was adopted. Introducing new national measures under Article 114(5) TFEU will most likely not be possible, as this can only be done to protect either the environment or the working environment.⁷⁰⁷ Moreover, even if national measures would be allowed under Article 114(4) or (5) TFEU, these Member States would still be confronted with the common organisation of the markets for agricultural products when their measures touch upon farm animal welfare. There is no indication that national measures that may affect this common organisation of the markets for agricultural products would suddenly be allowed under EU law.

§4: The missed potential of animal welfare protection under Article 114 TFEU

The Lisbon Treaty introduced a new legal framework in relation to Article 114 TFEU that arguably enlarged the EU's competence to protect animal welfare, even when the Member States have not acted themselves and are not planning to do so. However, the Court of Justice still holds onto the *Tobacco Advertising*-test, despite this new legal framework. Consequently,

⁷⁰³ *Ibid.*

⁷⁰⁴ M. DOUGAN, "Minimum harmonization and the internal market", *Common Market Law Review*, 2000, 855.

⁷⁰⁵ Part 2, Chapter 2 at page 20.

⁷⁰⁶ Part 3, Chapter 2, Title 2.2.2.3 at page 83.

⁷⁰⁷ Article 114(5) TFEU.

the EU legislator must still rely on the Member States to be able to harmonize animal welfare standards under the internal market harmonization clause. But even when the EU institutions can act under Article 114 TFEU, they generally refrain from doing so. As a result, there are barely any measures within the internal market policy that regulate animal welfare concerns connected to the free movement of animals and animal products.

The greatest potential for Article 114 TFEU is to adopt marketing bans for products that were manufactured in animal-cruelty ways. Examples of this approach are the ban of fur from fur farms as proposed by the European Citizens' Initiative 'Fur Free Europe', or the ban of seal products as provided by the Seals Regulation. Other measures, on the other hand, do not seem to fit within the framework of Article 114 TFEU. That is because, under the internal market policy, the approximation of the national laws of the Member States will generally be obtained through a maximum harmonization. As such, Member States will not be allowed to introduce more stringent national measures than the animal welfare standards adopted under Article 114 TFEU.

CONCLUSION

Prior to the introduction of the Lisbon Treaty, multiple problems plagued the protection of animal welfare within the internal market. First and foremost, the harmonized standards adopted by the EU did not sufficiently protect animals as sentient beings. They allowed the use of multiple cruel practices, such as confining animals in narrow battery cages, veal crates, and sow stalls, in violation of the European Convention on the Protection of Animals kept for Farming Purposes. Despite the violation of this Convention, the Court of Justice found that it could not annul these standards for their adverse effects on the animals subjected to these practices. Secondly, it was difficult for Member States to individually remedy the issues with the Union's animal welfare standards. This was mainly because of the common organization of the markets in agricultural products, established under the CAP. As soon as the EU had harmonized farm animal welfare standards, Member States were precluded from adopting national measures impeding the free movement of agricultural products, as Article 36 TFEU seized to apply after such harmonization. Consequently, Member States only had the possibility to adopt a stricter farm animal welfare protection regime if this was strictly limited to their own territory. For animals other than farm animals, Member States could rely on Article 36 TFEU to justify national rules, but all attempts to do so failed to fulfil the proportionality test. Thus, there have been no cases in the pre-Lisbon era where animal welfare considerations were successfully invoked to maintain national measures that restricted the free movement of animals and animal products.

The Treaty of Lisbon introduced Article 13 TFEU, the EU's 'constitutional' animal welfare clause. Legal scholars in animal law had high hopes for the impact of this provision on the EU's animal welfare policy, but it seems that it did not introduce the changes that were hoped for. A first striking observation is that no new animal welfare measures have been introduced in relation to the free movement of animals and animal products since the Treaty of Lisbon entered into force. In the broader picture, the only new animal welfare measure that has been adopted since the Lisbon Treaty is the Laboratory Animals Directive of 2010. This is regrettable, as the current legal framework (which still dates from the pre-Lisbon era) does not sufficiently protect the welfare of animals as sentient beings.

Moreover, Article 13 TFEU arguably did not change the weight of animal welfare considerations in the proportionality assessments to annul secondary EU law or set aside national measures, or to justify restrictions of the fundamental freedoms. That is because, from a theoretical analysis, animal welfare can most likely not be qualified as a general principle of EU law. Additionally, the integration clauses do not have the same functions as general principles of EU law, so Article 13 TFEU does not provide for an alternative to these principles, as its only shared function with the general principles is its role in the interpretation of EU law. Given these findings, it is unlikely that the Court of Justice is going to change its pre-Lisbon case law, despite the adoption of Article 13 TFEU. Nevertheless, the final say on the recognition of new general principles of EU law rests with the Court of Justice. In the case of *Centraal Israëlitisch Consistorie van België*, the Court seemed to have opened the door for such a recognition. However, it is too early to draw any conclusions from this case, as there have not yet been any follow-up cases where the Court has had the opportunity to either confirm or deny this potential recognition.

Lastly, Article 13 TFEU does not alter the legislative procedure under Article 114 TFEU. Consequently, the EU legislator is still dependent on the national legislators of the Member States when it wants to adopt animal welfare standards under the internal market policy. However, it is observed that even in those cases where the EU legislator can act under Article 114 TFEU, it generally refrains from doing so. This is regrettable, as Article 114 TFEU offers an interesting legal basis to ban the marketing of products that do not comply with animal welfare standards. However, when it comes to the adoption of minimum welfare standards, Article 114 TFEU is less interesting, as it only provides limited possibilities for Member States to adopt more stringent national measures.

Given all of the above, it can be concluded that Article 13 TFEU only has a limited impact on the free movement of animals and animal products. More precisely, it only impacts the interpretation of the relevant provisions of EU law. This resulted in a few interesting judgments of the Court of Justice that had a positive impact on animal welfare protection within the EU. Nevertheless, this is not sufficient to address the issues of the pre-Lisbon era. Firstly, Member States are still to a significant extent prevented from adopting (more stringent) national measures on animal welfare protection where the Union has already acted on the matter. More precisely, Member States can generally only act if the national measure

has no effect on trade within the internal market. As such, Member States are generally prohibited from refusing the importation of products that don't comply with their national rules, or from refusing the exportation of living animals to countries where the animals will receive fewer protection. This approach may tempt Member States to not adopt more stringent national rules, as this would put their country at a competitive disadvantage compared to Member States that do not have stricter animal welfare rules. Secondly, the animal welfare standards at EU level have not been improved since the entry into force of Article 13 TFEU. The EU legislator does not seem to prioritize animal welfare protection, despite the adoption of the animal welfare clause. Attempts to challenge the animal welfare *acquis* for its lack of protection will most likely fail, as the Court will arguably still apply the 'manifestly inappropriate'-test in these cases. In conclusion, the current Treaty framework still prioritizes economic interests rather than the interests of animals subjected to economic processes, despite the adoption of Article 13 TFEU.

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