



## ARTICLES

### THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

*Edited by Evangelia Psychogiopoulou*

#### TAKING STOCK OF ART. 13 TFEU IN EU AGRICULTURE: READING ART. 13 AS A WHOLE

DIANE RYLAND\*

TABLE OF CONTENTS: I. Introduction. – II. Evolution of Animal Welfare Law and policy in EU agriculture. – II.1. Minimum animal welfare standards. – II.2. CJEU interpretation. – III. Art. 13 TFEU: mainstreaming animal welfare in EU agriculture policy. – III.1. Legal effect. – III.2. Limitations and tensions. – IV. CJEU reading. – IV.1. *Halal* Grand Chamber. – IV.2. *Centraal Israëlitisch Consistorie van België* Grand Chamber. – IV.3. An EU market? – IV.4. Art. 13 TFEU: read as a whole. – V. Comments in conclusion.

ABSTRACT: Minimum standards of welfare for farm animals in harmonised EU norms derive from the Treaty Title on Agriculture in the absence of a conferred competence in animal welfare. Subsequently, a competence “of sorts” in animal welfare has been inserted into the Treaties in art. 13 of the Treaty on the Functioning of the European Union (TFEU). Art. 13 TFEU incorporates an integrative stipulation to pay full regard to the welfare requirements of animals as sentient beings in the formulation and implementation of certain EU policies, inclusive of EU agriculture policy, while respecting the customs of Member States relating in particular to religious rites, cultural traditions and regional heritage. Yet, in the constitutional framework of the Treaties there are limitations, and tensions arise between EU policy in agriculture and the non-market objective of animal welfare. Art. 13 TFEU is not driving evolving EU policy in farm animal welfare or EU legislative revision; the legal force of art. 13 TFEU remains in doubt. Concomitantly, recent CJEU Grand Chamber rulings in EU agriculture/animal welfare law read in the light of art. 13 TFEU have recognised the marked social and cultural momentum to improve the welfare of animals in agriculture, and reinforced the constitutional standing of art. 13 TFEU, with positive implications for animal welfare mainstreaming. This *Article* explores the application of art. 13 TFEU in EU agriculture policy, and reasons that the scope exists for the CJEU further to exploit its potential.

KEYWORDS: animal welfare mainstreaming – EU agriculture policy – art. 13 TFEU – CJEU interpretation – common organisation of the market – societal/cultural concern.

\* PhD, University of Lincoln UK, dianeryland@outlook.com.

I thank Evangelia Psychogiopoulou for her very helpful comments on an earlier draft of this *Article*.



## I. INTRODUCTION

The European Union (EU) Member States have not conferred upon the EU a competence with its own Treaty Title in the sphere of animal welfare. Nonetheless, the EU has effectively introduced harmonised welfare provision for animals in agriculture premised on the Agriculture Treaty Title, eradicating poor practices in which farm animals were unable to perform basic natural behaviours. EU legislation derived from the Agriculture Title is concerned with the common organisation of the market in agricultural produce and there is a conflict between animals as products to be traded in agriculture and animals as sentient beings.<sup>1</sup> It is a minimum level of welfare which has been achieved in EU norms for animals farmed in intensive industrial conditions. Yet, during the past few years, there has been an evolving momentum for change in matters of welfare for animals in EU agriculture, from political intent towards a more direct regard for animal welfare, which has coincided with an increasing societal and cultural movement for improved welfare standards.

Section II tracks the momentum towards a Treaty basis for the integration of animal welfare in EU agriculture, with a brief *exposé* of animal welfare minimum legislative standards and their interpretation. These legislative norms were adopted still without a specific Treaty Title from which animal welfare legislation could derive.

A competence “of sorts” in animal welfare then became inserted into the Treaties by means of art. 13 of the Treaty on the Functioning of the EU (TFEU). Art. 13 TFEU incorporates a cross-cutting instruction to the EU and its Member States to pay full regard to the welfare requirements of animals in the formulation and implementation of, *inter alia*, EU agriculture policy, while respecting the customs of Member States relating in particular to religious rites, cultural traditions and regional heritage. Section III considers the legal nature of art. 13 TFEU and its role in driving the contemporary development of animal welfare policy in EU agriculture. It looks at the limitations which exist in the EU Common Agricultural Policy (CAP) and, on closer examination, at the tensions inherent in the support and promotion of quality produce in EU agriculture.

In section IV there will be an analysis of landmark Grand Chamber CJEU rulings which, read in the light of art.13 TFEU, have heeded scientific progress and consumer regard for the welfare of animals sourced for food, acknowledged evolving societal and cultural concern to improve the welfare of animals in agriculture, and consolidated the constitutional standing of art. 13 TFEU. The scope exists to exploit the potential of art.13 read as a whole.

<sup>1</sup> K Sowery, ‘Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law’ (2018) CMLRev 55.

## II. EVOLUTION OF ANIMAL WELFARE LAW AND POLICY IN EU AGRICULTURE

In the absence of a conferred competence in animal welfare,<sup>2</sup> the Agriculture title has provided the legal basis for harmonised measures which reconcile the welfare of certain farm animals with the common organisation of the EU market for agricultural produce,<sup>3</sup> using in particular the concept of minimum harmonisation.<sup>4</sup> For instance, EU legislation derived from arts 43 and 100 of the European Economic Community Treaty (EEC) required farm animals to be stunned by approved methods prior to slaughter, providing that cruelty and unnecessary suffering must be avoided, while not affecting national provisions related to special methods of slaughter which are required for particular religious rites.<sup>5</sup> A further Directive, adopted on the basis of arts 43 and 100 EEC, laid down rules on the protection of animals during international transport.<sup>6</sup> In a Council Decision,<sup>7</sup> the EU approved the Council of Europe Convention on the Protection of Animals kept for Farming Purposes.<sup>8</sup> The joint legal basis for that Decision was that of agriculture in art. 43 EEC, together with art. 100 EEC with the objective of approximating the laws of the Member States to ensure the establishment and functioning of the common market. These developments in the field of animal welfare can be seen to mirror the early extension of Treaty competence in environmental concerns whereby environmental standards were adopted to ensure a competitive level playing field in the EU internal market, in the absence of an environment legal basis in the EEC Treaty.

Legislative minimum welfare standards for certain species of farm animal, adopted on the legal basis for EU agriculture policy, included those for the protection of laying

<sup>2</sup> The limits of Union competence are governed by the principle of conferral. See art. 5(1) of the Treaty on European Union (TEU).

<sup>3</sup> Art. 43 of the European Economic Community Treaty (EEC); Title III art. 43 TFEU: To establish the common organisation of agricultural markets in accordance with art. 40(1) and attain the objectives set out in art. 39 TFEU; case C-68/86 *United Kingdom v Council* ECLI:EU:C:1988:85; JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019); MN Cardwell, *The European Model of Agriculture* (Oxford University Press 2004).

<sup>4</sup> M Dougan, 'Minimum Harmonisation and the Internal Market' (2000) CMLRev 853, 855.

<sup>5</sup> Directive 74/577/EEC of the Council of 18 November 1974 on stunning of animals before slaughter was replaced by Directive 93/119/EEC of the Council of 22 December 1993 on the protection of animals at the time of slaughter or killing, adopted on the basis of art. 43 EC.

<sup>6</sup> Directive 77/489/EEC of the Council of 18 July 1977 on the protection of animals during international transport; Directive 81/389/EEC of the Council of 12 May 1981 established measures for the implementation of Directive 77/489/EEC; Directive 91/628/EEC of the Council of 19 November 1991 on the protection of animals during transport repealed Directives 77/489/EEC and 81/389/EEC; Directive 95/29/EC of the Council of 29 June 1995 amended Directive 91/628/EEC concerning the protection of animals during transport.

<sup>7</sup> Decision 78/923/EEC of the Council of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes.

<sup>8</sup> European Treaty Series n. 87 of the Council of 10 March 1976 European Convention for the Protection of Animals kept for Farming Purposes.

hens kept in battery (barren) cages.<sup>9</sup> Provision for the welfare of calves (bovine animals up to six months old) specified ventilation and space requirements for calves kept in groups, and width and height requirements for calves housed in individual boxes or tethered in stalls, with varying dates for compliance between 1994 to 2007.<sup>10</sup> The EU phased out the keeping of calves after the age of eight weeks in individual boxes<sup>11</sup> and by further amendment incorporated enhanced welfare requirements such as stipulated inspection frequency requirements with provision for sick calves, space within which to express normal behaviour, prohibition of tethering, dietary nutrition with iron to ensure minimum blood haemoglobin level, hot weather water supply and the provision of colostrum after birth.<sup>12</sup> The protection of pigs followed concerning space and the phased prohibition of tethering,<sup>13</sup> with tethering prohibited from 1 January 2006.<sup>14</sup> Minimum requirements for floor surfaces applied to the width of openings in slatted flooring and slat widths, for example.<sup>15</sup> Provision ensued for sows (having farrowed) and gilts (before first farrowing) to be kept in groups starting from four weeks after service to one week before farrowing (giving birth to a litter of piglets), with a derogation for holdings with less than ten sows provided they have space to turn around freely.<sup>16</sup> Knowledge of pigs became a requirement for handling staff.<sup>17</sup> Amended rules<sup>18</sup> incorporated enhanced welfare standards in respect of, *inter alia*, noise levels, lighting, access to a sufficient quantity of material to enable proper investigation and manipulation activities, and strengthened requirements for the castration of pigs over the age of seven days to be performed under anaesthetic with additional prolonged analgesia, without tearing tissues and by a veterinarian.

<sup>9</sup> Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages).

<sup>10</sup> Directive 91/629/EEC of the Council of 19 November 1991 laying down minimum standards for the protection of calves, arts 2(1), 3(1) and (4).

<sup>11</sup> Directive 97/2/EC of the Council of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves.

<sup>12</sup> Decision 97/182/EC of the Commission of 24 February 1997 amending the Annex to Directive 91/629/EEC laying down minimum standards for the protection of calves.

<sup>13</sup> Directive 91/630/EEC of the Council of 19 November 1991 laying down minimum standards for the protection of pigs, art. 3(1) and (2).

<sup>14</sup> Directive 2001/88/EC of the Council of 23 October 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs, art. 3(1) and (3).

<sup>15</sup> *Ibid.* art. 3(2).

<sup>16</sup> *Ibid.* art. 3(4).

<sup>17</sup> *Ibid.* art. 5.

<sup>18</sup> Directive 2001/93/EC of the Commission of 9 November 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs.

The Commission continued to make it clear in relation to the protection of animals that “a uniform basic approach in all Member States” to “rearing conditions” was “imperative” for “the effective functioning of the market organisation”.<sup>19</sup> There was, nevertheless, a momentum for change as a result of scientific knowledge, societal interest and political persuasion.<sup>20</sup> With effect from 1993, Declaration n. 24 annexed to the Treaty on European Union signed at Maastricht on 7 February 1992<sup>21</sup> stated: “The Conference calls upon the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals”. This non-legally binding Declaration was a statement of political intent. In a motion for a resolution, the European Parliament called on the Community “to make provision after Union for further amendment to the Treaties to enable animals to be treated as sentient beings”.<sup>22</sup>

The Treaty of Amsterdam, with effect from 1 May 1999, annexed a Protocol on Protection and Welfare of Animals<sup>23</sup> to the European Community Treaty (EC):

“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”.

Recognising that the Community did not intend to extend its competence, the UK proposed in the Amsterdam negotiations a Protocol placing a formal legal obligation on the institutions to give full regard to consideration of animal welfare in the exercise of their powers on agriculture, transport, research and the single market.<sup>24</sup> The Presidency

<sup>19</sup> Communication COM(93) 384 final from the Commission to the Council and the European Parliament of 22 July 1993 on the protection of animals, 5.

<sup>20</sup> See J McEldowney, W Grant and G Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy* (Routledge 2013).

<sup>21</sup> Treaty of Maastricht on European Union [1992].

<sup>22</sup> Resolution of the European Parliament on the Welfare and Status of Animals in the Community [A3-0003/94] 5.

<sup>23</sup> Protocol n. 33 on protection and welfare of animals annexed to the Treaty establishing the European Community [1997].

<sup>24</sup> Conference of the Representatives of the Governments of the Member States 3887/96 (ANNEX) Brussels of 25 July 1996.

then proposed a draft Animal Welfare Protocol,<sup>25</sup> which led to the formal adoption of the Protocol on Animal Welfare. The Amsterdam Protocol, an integral part of the Treaties,<sup>26</sup> imposed an obligation on the EU institutions and on Member States to pay full regard to the welfare requirements of animals when formulating and implementing certain EU policies, inclusive of agriculture. Animals received recognition for the first time as sentient beings deserving of respect and improved protection, albeit in the recital to, and not in the main body of, the Protocol. Such attribution was symbolically a step forward from their classification as products of livestock, or agricultural goods, in EU policy and law.<sup>27</sup> A price to pay for this legal formula would appear to be a “counter” requirement to respect the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.<sup>28</sup>

## II.1. MINIMUM ANIMAL WELFARE STANDARDS

Resulting minimum EU standards and their interpretation have negated the substantiation of enhanced animal welfare in EU agriculture. A generic horizontal farm animal welfare Directive<sup>29</sup> was followed by a Directive which updated minimum standards for laying hens kept for the production of eggs not intended for hatching in “establishments” housing at least 350 hens.<sup>30</sup> After a phasing out period, this Directive finally prohibited the keeping of laying hens in barren, i.e. non-enriched unfurnished, cage systems from 1 January 2012.<sup>31</sup> A further Directive newly introduced minimum standards of protection for

<sup>25</sup> Conference of the Representatives of the Governments of the Member States 3876/97 (ANNEX) Brussels of 16 April 1997.

<sup>26</sup> Art. 51 TEU.

<sup>27</sup> Art. 32(1)(2) and (3), Annex I EC. now art. 38(1)(2) and (3), Annex I TFEU.

<sup>28</sup> D Ryland and A Nurse, ‘Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market’ (2013) *European Environmental Law Review* 101, 102; G Van Calster and K Deketelaere, ‘Amsterdam, the Intergovernmental Conference and Greening the EU Treaty’ (1998) *European Environmental Law Review* 12, 18.

<sup>29</sup> Directive 98/58/EC of the Council of 20 July 1998 concerning the protection of animals kept for farming purposes.

<sup>30</sup> Directive 1999/74/EC of the Council of 19 July 1999 laying down minimum standards for the protection of laying hens, art. 1(1) and (2).

<sup>31</sup> *Ibid.* ch. II art. 5(1) and (2).

the welfare of chickens produced for meat,<sup>32</sup> known as broilers, housed in intensive farming “systems”.<sup>33</sup> Two separate Directives then consolidated the minimum legislative welfare provision for rearing calves<sup>34</sup> and for rearing and finishing pigs,<sup>35</sup> respectively. Triggered by differences in transposition by Member States and experience gained under Directive 91/628/EEC on the transport of animals, further EU rules became established in a Regulation.<sup>36</sup> Welfare concerns and discrepancies between Member States in implementing the former Directive on the protection of animals at the time of killing, also led to the adoption of the current Regulation.<sup>37</sup>

EU animal welfare standards are the outcome of a process in EU agricultural policy in which the primordial legislative objectives are agricultural revenue, rational development of production and the smooth running of the organisation of the market in food producing animals.<sup>38</sup> Consequently, practices endure which impede animals’ natural behaviour and result in poor welfare. Concern surrounds the welfare of fast-growing strains of chickens prone to lameness and metabolic problems<sup>39</sup> and facing feed restrictions, for example.<sup>40</sup> The calves Directive recites that calves should benefit from an environment corresponding to their needs as a herd-living species and for this reason they should be

<sup>32</sup> Directive 2007/43/EC of the Council of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production.

<sup>33</sup> *Ibid.* recitals (7) and (8). It does not apply to holdings with fewer than 500 chickens, those only breeding, hatcheries, extensive indoor and free-range chickens and organically reared chickens, *ibid.* art. 2.

<sup>34</sup> Directive 2008/119/EC of the Council of 18 December 2008 laying down minimum standards for the protection of calves (repealing Directive 91/629/EEC as amended), art. 1.

<sup>35</sup> Directive 2008/120/EC of the Council of 18 December 2008 laying down minimum standards for the protection of pigs (repealing Directive 91/630/EEC as amended), arts 1 and 2.

<sup>36</sup> Regulation (EC) 1/2005 of the Council of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) n. 1255/97.

<sup>37</sup> Regulation (EC) 1099/2009 of the Council of 24 September 2009 on the protection of animals at the time of killing.

<sup>38</sup> Recitals (5), (6) and (7) of Directive 2008/120/EC cit.; recitals (4), (5) and (6) Directive 2008/119/EC cit.

<sup>39</sup> Commission Staff Working Paper Impact Assessment Accompanying the document 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, para. 97; DM Broom, Animal Welfare in the European Union, Study commissioned by the Policy Department for Citizens’ Rights and Constitutional Affairs upon request of the Committee on Petitions, European Parliament, PE 583.114 [2017] para. 49.

<sup>40</sup> Report of the EU Scientific Committee on Animal Health and Animal Welfare, ‘The Welfare of Chickens Kept for Meat Production’ (21 March 2000). EFSA Panel on Animal Health and Welfare, ‘Scientific Opinion on the Influence of Genetic Parameters on the Welfare and Resistance to Stress of Commercial Broilers’ (2010) EFSA Journal. Report (2016)182 final from the Commission to the European Parliament and the Council of 7 April 2016 on the impact of genetic selection on the welfare of chickens kept for meat production.

reared in groups,<sup>41</sup> yet calves lawfully may be confined in individual boxes up to the age of eight weeks. There are no species-specific competence requirements for animal handlers to keep calves. Pigs raise a number of key welfare issues which continue in the EU, inclusive of confinement.<sup>42</sup> Pigs are social animals and yet individual boxes may be used for the first four weeks of pregnancy<sup>43</sup> in derogation from the general prohibition of use and the requirement otherwise to house sows and gilts in groups.<sup>44</sup> Castration and/or tail-docking of piglets of seven days and under may still be practised without anaesthesia or prolonged analgesia (pain relief) and in the absence of a veterinarian.<sup>45</sup> Tail-biting is prevalent in the EU population,<sup>46</sup> where pigs are raised on floors without straw bedding with a higher proportion of slatted flooring; rearing pigs without enrichment may still be accommodated in EU law.<sup>47</sup> Furthermore, there are no EU minimum animal welfare standards specific to cattle reared for dairy production, for example, although recommendations have been made.<sup>48</sup> Genetic selection for high milk yield and not keeping cows on pasture are major factors causing poor welfare and health in dairy cows.<sup>49</sup> Additionally, at the time of slaughter, EU law allows Member States to derogate from a requirement to stun animals in agriculture prior to killing for reason of religious rites.<sup>50</sup> Live animal transportation journeys are long, and suffering is compounded for pregnant animals and unweaned calves transported for slaughter.<sup>51</sup>

<sup>41</sup> Recital 7, Annex I (11) of Directive 2008/119/EC cit.; EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on the Welfare of Cattle Kept for Beef Production and the Welfare in Intensive Calf Farming Systems' (2012) EFSA Journal Abstract.

<sup>42</sup> Report of the Scientific Veterinary Committee to the European Commission, The Welfare of Intensively Kept Pigs, Doc. XXIV/B3/ScVC/0005 [1997].

<sup>43</sup> Art. 3(4) para. 1 and art. 9 para. 2 of Directive 2008/120/EC cit.

<sup>44</sup> *Ibid.* art. 3(4) para. 2 and art. 9 para. 2.

<sup>45</sup> *Ibid.* Annex 1 ch. 1(8); EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on Welfare Aspects of the Castration of Piglets' (2004) EFSA Journal 1; EFSA Panel on Animal Health and Welfare, 'Scientific Opinion on the Use of Animal-Based Measures to Assess Welfare in Pigs' (2012) EFSA Journal.

<sup>46</sup> EFSA, 'The Risks Associated with Tail Biting in Pigs and Possible Means to Reduce the Need for Tail Docking Considering Different Housing and Husbandry Systems' (2007) EFSA Journal; EFSA, 'Scientific Opinion on a Multifactorial Approach on the Use of Animal and Non-Animal-Based Measures to Assess the Welfare of Pigs' (2014) EFSA Journal.

<sup>47</sup> "or, if no litter is provided" Annex I ch. I (5) of Directive 2008/120/EC cit.

<sup>48</sup> EFSA, 'Scientific Report on the Effects of Farming Systems on Dairy Cow Welfare and Disease' (2009) EFSA Journal 21; DM Broom, Animal Welfare in the European Union, Study commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs upon request of the Committee on Petitions, European Parliament, PE 583.114 cit. para. 54, citing the Petition to the European Parliament on the Welfare of Dairy Cows (PE578.635v01-00 29 February 2016).

<sup>49</sup> EFSA, 'Scientific Report on the Effects of Farming Systems on Dairy Cow Welfare and Disease' cit.

<sup>50</sup> Art. 4(4) of Regulation 1099/2009 cit.

<sup>51</sup> Eurogroup for Animals, 'ANIT Committee Vote: A Missed Opportunity Failing Animals and Citizens' (3 December 2021) [www.eurogroupforanimals.org](http://www.eurogroupforanimals.org); Eurogroup for Animals, 'No Animal Left Behind: Why no Animal Should be Transported Alive' (10 May 2021) [www.eurogroupforanimals.org](http://www.eurogroupforanimals.org).



## II.2. CJEU INTERPRETATION

The interpretative ruling in the case of *Hedley Lomas* established the impossibility of recourse to the Treaty derogation to the free movement of goods in order to protect the health and life of animals in art. 36 TFEU,<sup>52</sup> where a Directive harmonises the measures which are necessary to pursue that article's objectives.<sup>53</sup> Additionally, the CJEU affirmed that Member States could not take it upon themselves unilaterally to act in the interests of protecting animals' welfare in order to preclude any breach of a harmonised EU norm in the Member State of export.<sup>54</sup>

In the calves Directive, the subject of *Compassion in World Farming (CIWF)*,<sup>55</sup> there is the higher standards provision<sup>56</sup> and, according to the EU concept of minimum harmonisation, Member States on notifying the Commission may maintain or apply their stricter animal welfare requirements within their territories, but not extra-territorially. The extent of Member States' "freedom" to protect the welfare of species of farm animals is therefore minimal.<sup>57</sup> In *CIWF* the UK prohibited use of the "veal crate", practising higher than EU standards, but could not restrict calf exports to Spain which practised lower standards compliant with EU rules. In its reasoning, the CJEU considered the wording and context of the Directive,<sup>58</sup> attached weight to the objectives of the Directive, namely the rational development of production and the smooth running of organisation of market in food producing animals with no distortions in competition,<sup>59</sup> and noted that the legislature had sought to reconcile the interests of animal protection with the organisation of the common market in calves and calf products.<sup>60</sup> It followed, therefore, that the Directive laid down exhaustively common minimum standards for the protection of calves confined for the purposes of rearing and fattening.<sup>61</sup> A ban on exports imposed on account of conditions prevailing in other Member States, the Court continued, would fall outside the derogation allowed by the higher standards provision and would "strike at the harmonisation achieved by the Directive".<sup>62</sup> In those circumstances, the fact that Member States are authorised to adopt within their own territory protective measures stricter

<sup>52</sup> Art. 36 TFEU.

<sup>53</sup> Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* ECLI:EU:C:1996:205 para. 21.

<sup>54</sup> *Ibid.* para. 20.

<sup>55</sup> Case C-1/1996 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd. (CIWF)* ECLI:EU:C:1998:113 paras 56-60.

<sup>56</sup> Art. 11 of Directive 2008/119/EC cit.

<sup>57</sup> D Chalmers, G Davies and G Monti, *European Union Law* (Cambridge University Press 2014 third edition) 648.

<sup>58</sup> *Ibid.* paras 50-51.

<sup>59</sup> Recitals (5) and (6) of Directive 2008/119/EC cit.; *CIWF* cit. para. 52.

<sup>60</sup> *CIWF* cit. para. 53.

<sup>61</sup> *Ibid.* paras 54, 56 and 63.

<sup>62</sup> *Ibid.* paras 54, 56, 62 and 63.

than those laid down in a directive does not mean that the Directive has not exhaustively regulated the powers of the Member States in the area of the protection of veal calves. Such harmonisation, furthermore, negated the possibility of relying on the Treaty derogation to the free movement of goods in order to protect the life and health of animals.<sup>63</sup>

The CJEU also ruled out any reliance on art. 36 TFEU for the protection of public “order”<sup>64</sup> or public morality for two reasons. First, public policy and public morality were not being invoked as a separate justification, but as an aspect of the justification relating to the protection of animal health, the subject of the harmonising Directive. The Court further ruled that a Member State could not rely on the views or the behaviour of a section of national public opinion in order unilaterally to challenge a harmonising measure adopted by the EU institutions.<sup>65</sup>

The Court also reasoned on the basis of the Regulation on the common organisation of the market in beef and veal, which expressly limited its scope for action in accordance with the Treaties’ fundamental internal market objectives in prohibiting measures restrictive of intra-Community trade.<sup>66</sup> Besides, at the very outset of its ruling, the CJEU asserted that even in the event that a matter had not been exhaustively regulated, rules which interfered with the proper functioning of a common organisation of the market would be deemed incompatible with it.<sup>67</sup>

A broader scope for animal welfare did not emanate from the CJEU’s ruling in the case of *Jippes*.<sup>68</sup> Paramount to the Court’s reasoning in this case was the fact that ensuring animal welfare was not one of the stated Treaty objectives defined in art. 2 EC. Nor was the protection of animals an explicit objective of the Common Agricultural Policy in the Treaties, as confirmed in the Decision acceding to the Council of Europe Convention for farm animal welfare.<sup>69</sup> The CJEU asserted that it was apparent from the very wording of the Amsterdam Protocol on the protection of animals that it did not lay down any well-defined general principle of EU law which bound the institutions. Although the Protocol provided that “full regard” must be had to the welfare requirements of animals in the formulation and implementation of EU policy, it limited that application to four specific

<sup>63</sup> *Ibid.* paras 63 and 64.

<sup>64</sup> Described as “the framing concept that the Court of Justice chooses (perhaps counter-intuitively for moral and religious questions)” in D Chalmers, G Davies and G Monti, *European Union Law* cit. 935.

<sup>65</sup> *CJWF* cit. para. 67.]

<sup>66</sup> Regulation (EEC) 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal, arts 1 and 22(1); *CJWF* cit. paras 13 and 14.

<sup>67</sup> *CJWF* cit. para. 41 citing case C-218/85 *Cerafel v Le Champion* ECLI:EU:C:1986:440 para. 13 and case C-27/96 *Danisco Sugar v Allmänna Ombudet* ECLI:EU:C:1997:563 para. 24; M Dougan, ‘Minimum Harmonisation and the Internal Market’ cit. 875-6, 884.

<sup>68</sup> Case C-189/07 *Jippes and Others* ECLI:EU:C:2001:420. The first case to use the accelerated (now expedited) procedure, published without the Advocate General’s View, D Ryland, ‘The Advocate General; EU Adversarial Procedure; Accession to the ECHR’ (2016) EHRLR 169, 176.

<sup>69</sup> Fourth recital of Decision 78/923/EEC cit.; *Jippes and Others* cit. para. 72.

spheres of EU activity (notably animal welfare in agriculture was one such sphere) and provided that the legislative or administrative provisions and customs of the Member States must be respected as regards in particular religious rites, cultural traditions and regional heritage.<sup>70</sup> Neither could such a general principle be inferred from the non-binding Council of Europe Farming Convention, the Treaty derogation to the free movement of goods referring to the life of animals, or from EU animal welfare legislation.<sup>71</sup> The CJEU upheld the protection of animals and their health as a requirement of public interest;<sup>72</sup> and as long as measures taken by the EU legislature in the public interest were not deemed to be manifestly inappropriate, the Court would be reluctant to intervene in the exercise of the EU institutions' wide discretion in matters of agriculture policy.<sup>73</sup>

### III. ART. 13 TFEU: MAINSTREAMING ANIMAL WELFARE IN EU AGRICULTURE POLICY

The Treaty of Lisbon, with effect from 1 December 2009,<sup>74</sup> incorporated a horizontal mainstreaming clause in art. 13 TFEU to integrate animal welfare into, *inter alia*, EU policy in agriculture, which provides: "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".<sup>75</sup>

Accordingly, full regard must be paid to the welfare needs of animals as sentient beings in EU agricultural policy, and legislation adopted thereunder, and in Member States' implementation of the same, while respecting the customs particular to Member States detailed in the second limb of this provision. The expression of animals as sentient beings within the "provisions having general application" in Title II of Part One "Principles" of the TFEU contrasts with its former siting in the recital to the Protocol, with potential significance for the future protection of the welfare of sentient animals in EU agriculture. Donald Broom informs of a sentient being's ability "to evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risk, to have some feelings and to have some degree of awareness".<sup>76</sup>

<sup>70</sup> *Jippes and Others* cit. para. 73.

<sup>71</sup> *Ibid.* paras 74-76.

<sup>72</sup> *Ibid.* paras 77 and 78.

<sup>73</sup> E Spaventa, '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' (2002) CMLRev 1159.

<sup>74</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007].

<sup>75</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008].

<sup>76</sup> DM Broom, 'The Evolution of Morality' (2006) *Applied Animal Behaviour Science* 20, 26.

### III.1. LEGAL EFFECT

The TFEU, pursuant to the Lisbon Treaty, obligates the mainstreaming of the “non-market” objectives of social protection (art. 9 TFEU), non-discrimination generally (art. 10 TFEU), and animal welfare (art. 13 TFEU) into certain other EU policies.<sup>77</sup> Consequently, such mainstreaming clauses have spurred academic debate as to their legal nature and the extent to which they direct and achieve obligations of result.<sup>78</sup> Bruno De Witte analyses the “new prominence given, in European constitutional and political discourse, to fundamental rights and non-market values”,<sup>79</sup> and contemplates whether the institutions will use their “competence to protect” these rights and values.<sup>80</sup> He argues that the EU has competence to pursue a number of non-market aims through internal market legislation, that there is a “duty” to do so in many cases, although that duty is “not judicially enforceable”.<sup>81</sup> He distinguishes, for example, “the mildly worded mainstreaming clause for culture”<sup>82</sup> from the “firm duty” to protect and promote fundamental rights, imposed by art. 51(1) of the EU Charter of Fundamental Rights,<sup>83</sup> and explains that some non-market mainstreaming aims have a legal basis in the Treaties while some do not. The absence of a conferred competence, which would be the case with animal welfare, does not act as a barrier to the pursuit of non-market aims using other policies’ derivative Treaty bases.<sup>84</sup> This *Article* draws from De Witte’s interpretative understanding of the “legitimacy” of the EU institutions to pursue non-market aims by means of internal market legislation, in application in this instance to the use of the EU legal basis for agriculture in pursuit of the non-market objective of animal welfare.<sup>85</sup> Robert Garner reasons that animal sentience entitles non-human animals to a right not to suffer guaranteed by the State in a non-ideal world where they are used for the production of food.<sup>86</sup> The competence, and not a legally enforceable right, exists to integrate the full welfare needs of animals into the broader range of EU policies specified in art. 13 TFEU, inclusive of agriculture policy.

<sup>77</sup> 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 University Press 2012) 25-26, 32.

<sup>78</sup> *Ibid.*; see also, for example, D Schiek and others, ‘EU Social and Labour Rights and EU Internal Market Law’ (2015) Study for the European Parliament’s Committee on Employment Affairs; D Ryland and A Nurse, ‘Mainstreaming after Lisbon’ cit.

<sup>79</sup> B De Witte, ‘A Competence to Protect’ cit. 38.

<sup>80</sup> *Ibid.* 44.

<sup>81</sup> *Ibid.* 27.

<sup>82</sup> Art. 167(4) TFEU, B De Witte, ‘A Competence to Protect’ cit. 31-32.

<sup>83</sup> B De Witte, ‘A Competence to Protect’ cit. 32.

<sup>84</sup> *Ibid.* 32-3.

<sup>85</sup> *Ibid.* 27, 31.

<sup>86</sup> R Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press 2013).

Nevertheless, the mainstreaming of the welfare requirements of sentient animals in the EU Treaties' general provisions would appear to signify the advancement of animal welfare as a priority issue in the EU alongside other key integrative objectives such as, for example, environmental protection and promoting sustainable development.<sup>87</sup> EU policy in the sphere of the environment has the reinforcement of a legislative title with the conferred competence to legislate to improve and protect the environment,<sup>88</sup> and EU environmental action programmes, for example, are adopted in legally binding decisions derived from a formally conferred Treaty basis.<sup>89</sup> In the absence of an express competence in animal welfare, the EU has instigated a number of soft law initiatives and policy programmes, "instruments which have not been attributed legally binding force as such".<sup>90</sup> Two EU animal welfare action programmes have been adopted,<sup>91</sup> for example. Although EU action programmes adopted for the protection of the welfare of animals are bereft of the formal level of obligation which underpins EU environmental action programmes, the European Commission (Commission) has been held to account to the European Court of Auditors (ECA) in matters specific to animal welfare in agriculture, which will be discussed in the sub-section below. The second EU Animal Welfare Strategy (2012-2015) is the vehicle from which a number of educative reports and procedural soft law tools have emanated. These include the establishment of EU Animal Welfare Reference Centres<sup>92</sup> and the EU Animal Welfare Platform, which are relevant in contributing to EU policy in animal welfare in agriculture. The EU Platform on Animal Welfare<sup>93</sup> has an extended mandate<sup>94</sup> to assist the Commission and help to hold regular dialogue on EU matters directly related to animal welfare, such as enforcement of the legislation, exchanges of scientific knowledge, innovations and good animal welfare practices, – the Chair of the Platform having the authority to create thematic

<sup>87</sup> Art. 11 TFEU; B Sjøfjell, 'The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability' in F Ippolito, ME Bartolino and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019) ch. 6.

<sup>88</sup> Art. 192 Title XX TFEU cit.

<sup>89</sup> *Ibid.* art. 192(3).

<sup>90</sup> L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 111-113.

<sup>91</sup> Communication COM(2006) 13 final from the Commission to the European Parliament and the Council of 23 January 2006 on a Community Action Plan on the Protection and Welfare of Animals 2006-2010; Communication COM(2012) 06 final from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 15 February 2012 on the European Union Strategy for the Protection and Welfare of Animals 2012-2015.

<sup>92</sup> Implementing Regulation (EU) 2018/329 of the Commission of 5 March 2018 designating a European Union Reference Centre for Animal Welfare; Implementing Regulation (EU) 2019/1685 of the Commission of 4 October 2019 designating a European Union Reference Centre for Animal Welfare for poultry and other small farmed animals.

<sup>93</sup> Decision 2017/C 31/12 of the Commission of 24 of 24 January 2017 establishing the Commission Expert Group 'Platform on Animal Welfare'.

<sup>94</sup> Decision C/2021/3148 of the Commission of 7 May 2021 amending Decision 2017/C 31/12 establishing the Commission Expert Group 'Platform on Animal Welfare'.

sub-groups towards these ends. Six sub-groups focus on: animal transport; the welfare of pigs, poultry, calves and dairy cows, respectively; animal welfare at the time of killing; and labelling.<sup>95</sup> Correspondingly, animal welfare currently features in EU policy for a sustainable agriculture, and animal welfare labelling is a key element of the EU Farm to Fork Strategy for a fair healthy and environmentally-friendly food system.<sup>96</sup> That Strategy operates on the basis that better animal welfare improves animal health and food quality,<sup>97</sup> and is a part of the European Green Deal for sustainable growth.<sup>98</sup>

A “fitness check” accompanying the Farm to Fork Strategy is being undertaken to assess the relevance of existing EU species-specific welfare Directives, the Directive applicable to farm animals generally, and the EU Regulations during transport and at the time of killing.<sup>99</sup> In this process, the Commission has pledged to revise the animal welfare legislation to align it with the latest scientific evidence. Art. 13 TFEU has not been applied in order to revise the minimum legislative standards in animal welfare adopted over 13 years ago. Art. 13 TFEU is not driving these EU policy processes directly or expressly.<sup>100</sup> Consumer interest is strong in the welfare standards in which food-producing animals are raised, and a fundamental factor to countenance for the EU and its Member States in a legislative capacity is that, increasingly, a significant number of EU citizens would prefer a higher regard for animal welfare to be practised generally. The findings of a survey conducted for the Commission<sup>101</sup> established that more than nine in ten EU citizens (94 per cent) believe it is important to protect the welfare of farmed animals, with 82 per cent of Europeans surveyed believing that the welfare of farmed animals should be better protected than it is now. EU citizens are driving EU policy in their ethical concerns to improve animal welfare, evident in the European Citizen’s Initiative (ECI) “Ban the Cage Age”.<sup>102</sup> This ECI,<sup>103</sup> calls for the end of caged

<sup>95</sup> The minutes of the twice yearly meetings of each sub-group are available at: [food.ec.europa.eu](http://food.ec.europa.eu).

<sup>96</sup> Communication COM(2020) 381 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 May 2020 ‘A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system’.

<sup>97</sup> *Ibid.* 8.

<sup>98</sup> Communication COM(2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019, ‘The European Green Deal’.

<sup>99</sup> European Commission, ‘Fitness Check of the EU Legislation on Animal Welfare of Farmed Animals’ (May 2020) [ec.europa.eu](http://ec.europa.eu).

<sup>100</sup> A poignant point discussed generally by B De Witte, ‘Mainstreaming Clauses in the EU’s Decision-Making Process: Legal Duty or Afterthought?’ in Helenic Foundation for European and Foreign Policy (ELIAMEP) Online Workshop, *Horizontal Clauses in EU Law: Normative Implications, Implementation and Potential for Policy Mainstreaming* (8 October 2021).

<sup>101</sup> European Commission, ‘Special Eurobarometer 442: Attitudes of Europeans towards Animal Welfare’ (2016) [op.europa.eu](http://op.europa.eu).

<sup>102</sup> Communication C(2012) 4747 final from the Commission of 30 June 2012 on the European Citizens’ Initiative (ECI) “End the Cage Age”.

<sup>103</sup> European Citizens’ Initiative, *End the Cage Age* [europa.eu](http://europa.eu).

farming in respect of those species for which EU minimum standards have been adopted, and more broadly in application to additional species of farm animals for which specific welfare standards do not exist. It invites the Commission to propose legislation prohibiting the use of: cages for laying hens, rabbits, pullets, broiler breeders, layer breeders, quail, ducks and geese; farrowing crates for sows; sow stalls, where not already prohibited; and individual calf pens, also where not prohibited.<sup>104</sup> The emphasis of both EU public opinion and EU public policy is focusing more on food quality and animal welfare.<sup>105</sup>

### III.2. LIMITATIONS AND TENSIONS

It is well-documented in the context of the internal market and non-market objectives, that there are “unresolved tensions” in the Treaties’ “substantive provisions” between the economic and the social.<sup>106</sup> In a similar vein, limitations to the mainstreaming of animal welfare: *a*) manifest in the EU Common Agricultural Policy (CAP); *b*) remain in the economic/social/ethical balance of pre-policy impact assessments and the quest for a sustainable agriculture; and *c*) result from irreconciled tensions in EU agriculture policy quality.<sup>107</sup>

First, there is no specific mention of animal welfare constituting an objective of the EU CAP in the Treaties. The CAP aims explicitly: *a*) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; *b*) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; *c*) to stabilise markets; *d*) to assure the availability of supplies; and *e*) to ensure that supplies reach consumers at reasonable prices.<sup>108</sup> Member States agree that in working out the CAP and the special methods for its application account must be taken of the particular nature of agricultural policy. This results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions, the need to effect the appropriate adjustments by degrees, and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.<sup>109</sup> To recall, harmonised EU minimum standards of welfare for farm animals derive from the Agriculture Title,

<sup>104</sup> Communication C(2012) 4747 final cit.

<sup>105</sup> European Commission, ‘Special Eurobarometer 473: Europeans, Agriculture and the CAP’ (February 2018) europa.eu.

<sup>106</sup> P Syrpis, ‘Theorising the Relationship Between the Judiciary and the Legislature in the EU Internal Market’ in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 13,14.

<sup>107</sup> D Ryland, *Animal Welfare Governance in EU Agriculture and the Agri-Food Chain: Hybrid Standards, Trade, and Values* (Edward Elgar, forthcoming).

<sup>108</sup> Art. 39(1) (a)-(d) TFEU.

<sup>109</sup> Art. 39(2) (a)-(c) TFEU.

which has the objective “to establish the common organisation of agricultural markets”.<sup>110</sup> The CAP for the period 2014-20 offered the first opportunity to assess the implementation of art. 13 TFEU in the CAP’s support and promotion mechanisms.<sup>111</sup> Animal welfare was not expressed to be an objective of the CAP in the legislative proposals or the adopted instruments for the period 2014-2020. There was no additional budgetary assistance for compulsory good animal welfare practices in the CAP support mechanisms of either Pillar I or II. The CAP (2014-2020 ) was a “missed opportunity” for animal welfare.<sup>112</sup> Prior to the adoption of the CAP instruments for 2014-20, the Commission set out an agenda to optimise the current mechanisms of the CAP, as part of a socially oriented agricultural approach to animal welfare.<sup>113</sup> In examining whether the Second EU Animal Welfare Strategy had been completed and had delivered its results, the ECA observed that the Commission had not reviewed the legislative framework,<sup>114</sup> and that the Commission reports, undertaken as part of its stated objectives, had identified some outstanding animal welfare issues related to the areas covered by the Strategy. On the farm these related to the tail-docking of pigs,<sup>115</sup> diseases affecting the welfare of dairy cattle,<sup>116</sup> and assessment of technical requirements such as ventilation for chickens kept for meat production.<sup>117</sup> During transport, concerns continued over compliance with the rules on long distance transport of live animals, and over the transport of unfit animals<sup>118</sup> prohibited by the legislation. At slaughter, different practices existed in respect of the derogation from the requirement to stun animals before slaughter.<sup>119</sup> Consequently, the ECA strongly recommended that the Commission conduct an evaluation of its 2012-2015

<sup>110</sup> Art. 3 TFEU, in accordance with art. 40(1), and to attain the objectives set out in art. 39 TFEU.

<sup>111</sup> D Ryland, ‘Animal Welfare in the Reformed Common Agricultural Policy: Wherefore art thou?’ (2015) *Environmental Law Review* 22.

<sup>112</sup> Working Document SWD(2021) 76 final of the European Commission of 31 March 2021, ‘Evaluation of the European Union Strategy for the Protection and Welfare of Animals 2012-2015’, para. 5(3)(8).

<sup>113</sup> *Ibid.* 3, 11; Commission Staff Working Paper Impact Assessment SEC(2012) 55 Accompanying the Communication on the European Union Strategy for the Protection and Welfare of Animals 2012-2015 cit.

<sup>114</sup> European Court of Auditors, Special Report n. 31/2018: Animal Welfare in the EU: closing the gap between ambitious goals and practical implementation (2018) paras 22, 28.

<sup>115</sup> European Commission, Directorate-General Health and Food Safety, Overview Report on Study Visits on Rearing Pigs with Intact Tails, DG (SANTE) 2016-8987.

<sup>116</sup> European Commission Overview Report, ‘Welfare of cattle on dairy farms’ DG (SANTE) 2017-6241.

<sup>117</sup> Report COM(2018) 181 final from the Commission to the European Parliament and the Council of 13 April 2018 on the application of Directive 2007/43/EC and its influence on the welfare of chickens kept for meat production, as well as the development of welfare indicators; See also European Commission, Directorate-General for Health and Food Safety, *Study on the Application of the Broiler Directive DIR 2007/43/EC and Development of Welfare Indicators: Final Report* (Publications Office 2017) data.europa.eu.

<sup>118</sup> European Commission, Directorate-General for Health and Food Safety, Overview Report on Systems to Prevent the Transport of Unfit Animals in the EU, DG (SANTE) 2015-8721-MR.

<sup>119</sup> European Commission, Directorate-General for Health and Food Safety, Overview Report of FVO Audits to Evaluate the Official Controls of Animal Welfare at Slaughter, Carried Out in member States in 2013-2015, DG (SANTE) 2015-7213-MR; European Court of Auditors, Special Report, n. 31/2018 cit. para. 35.



Strategy to identify to what extent its objectives have been achieved and if its issued guidance is being applied, also that it reflect on how to address the conclusions of that evaluation (for example, through a new strategy or action plan and/or a review of animal welfare legislation) and to publish the results of its assessment.<sup>120</sup> The Commission concluded its evaluation of the second EU animal welfare Strategy saying: “There is a clear need to further optimise synergies with the CAP for the period 2021-27 and to make better use of the instruments offered by it to strengthen CAP beneficiaries’ awareness on animal welfare requirements, to improve animal welfare standards in animal husbandry, and to mainstream them into the regulatory framework governing agricultural activities”.<sup>121</sup> A key CAP objective in the reformed CAP for the period 2023-2027 is “to improve the response of Union agriculture to societal demands on food and health, including high-quality [...] food produced in a sustainable way, [...] as well as to improve animal welfare [...]”.<sup>122</sup> Nonetheless, the ECA has expressed concern that “in the absence of clear, specific and quantified EU objectives uncertainty is created as to how the Commission will assess Member State’s strategic plans, that achievement of EU objectives cannot be measured, weak incentives exist for performance, and targets could be missed with little impact on EU financing”.<sup>123</sup>

Second, the inclusion of animal welfare within the current EU Farm to Fork Strategy could be seen as a response to the ECA’s concerns and recommendations that the Commission evaluate and put in place concrete actions to see the animal welfare Strategy 2012-2015 reach fruition. In the process, regard for animal welfare and a label linking value-added animal welfare to the informed consumer have become the subject of studies and policy discussion in the context of the EU’s wider agenda for a sustainable agriculture. Situated within the Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, the Commission proposes to *consider options* for animal welfare labelling to contribute to a sustainable consumption and to transmit the added-value of animal welfare through the food chain.<sup>124</sup> This Strategy advocates *a sustainable food labelling framework* to transmit value through the agri-food chain to empower consumers to make sustainable

<sup>120</sup> *Ibid.* Recommendations 1(a)(c).

<sup>121</sup> Working Document SWD(2021) 76 final cit. para 6.

<sup>122</sup> Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) n. 1305/2013 and (EU) n. 1307/2013, art. 6(1)(i).

<sup>123</sup> European Court of Auditors, ‘Opinion n. 7/2018 (pursuant to art. 322(1)(a) TFEU) concerning Commission proposals for regulations relating to the Common Agricultural Policy for the post-2020 period (COM(2018) 392-394 final)’, Overall Conclusion 8; see L Ferraris, ‘The Role of the Principle of Environmental Integration (Article 11 TFEU) in Maximising the “Greening” of the Common Agricultural Policy’ (2018) *Environmental Law Review* 410-423, 421-2.

<sup>124</sup> COM(2020) 381 final cit. 8.

food choices.<sup>125</sup> Consequently, should the designated label apply additionally and more broadly to other factors relevant to the sustainability of agriculture, the animal welfare labelling sub-group has emphasised in its conclusions that there should not be a watering down of animal welfare requirements nor their visibility.<sup>126</sup> Correspondingly, in response to the ECI, the Commission has undertaken a legal and political assessment of the initiative, and has set out the actions it intends to take, its reasons for doing so and an envisaged timeline.<sup>127</sup> Acting within the Farm to Fork Strategy towards more ethical and sustainable farming systems, the Commission purports to phase out and finally prohibit the use of cage systems for all of the species and categories to which the initiative relates, under conditions (including the length of the transition period) to be determined based on scientific reports and an impact assessment. The fact remains that the impact assessment for the legislative proposal will take account not only of the animal welfare benefits, but also the social and economic needs of the EU farming sector including small farmers, international trade, and the environment, – in the transition to cage-free farming,<sup>128</sup> and in assessing the feasibility of working towards the proposed date of 2027.<sup>129</sup>

Third, in the formulation of EU agriculture quality policy, regional traditions and heritage contribute to the survival of practices which conflict with good agricultural practice in animal welfare. One EU quality scheme regulates and promotes protected Products of Designated Origin (PDO) or Products of Geographical Indication (PGI).<sup>130</sup> This regulatory framework provides the basis for identifying the “value-adding characteristics or attributes” of high quality protected PDOs and/or PGIs<sup>131</sup> and for informing the consumer of the value-adding attributes as a result of the farming or processing methods used in the production of protected products.<sup>132</sup> It works on the premise that the quality and diversity of the Union’s agricultural production is one of its important strengths, giving a competitive advantage to the Union’s producers and making a major contribution to its living cultural and gastronomic heritage.<sup>133</sup> To qualify for protection, PDOs and PGIs should be registered in

<sup>125</sup> *Ibid.*

<sup>126</sup> DOC.2021.07202, *Conclusions of the animal welfare labelling subgroup of the EU Animal Welfare Platform* ec.europa.eu para. 48.

<sup>127</sup> Communication C(2012) 4747 final cit., acting in accordance with Regulation (EU) 2019/788 of the European Parliament and the Council of 17 April 2019 on the European citizens’ initiative, art. 15(2).

<sup>128</sup> Communication C(2012) 4747 final cit. 8-10, 15.

<sup>129</sup> Cf R Geyer and S Lightfoot, ‘The Strengths and Limits of New Forms of EU Governance: The Cases of Mainstreaming and Impact Assessment in EU Public Health and Sustainable Development Policy’ (2010) *Journal of European Integration* 339.

<sup>130</sup> Regulation (EU) 1151/2012 of 21 November 2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs.

<sup>131</sup> *Ibid.* art. 1(1) and (2)(a) and (b); Implementing Regulation (EU) 668/2014 of the Commission of 13 June 2014 laying down rules for the application of Regulation 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs.

<sup>132</sup> Art. 1(1) and (2)(b) of Regulation 1151/2012 cit.

<sup>133</sup> *Ibid.* Recital (1).

the publicly accessible EU register<sup>134</sup> and display the relevant EU quality logo.<sup>135</sup> Yet, this quality regime works against the delivery of higher standards of animal welfare in EU agriculture, and two examples, one of a PDO, namely Parma ham, and the second, *foie gras*, an example of a PGI, substantiate the nature and extent of this contradiction. The surgical castration of pigs is scientifically proven to be painful;<sup>136</sup> this EU quality scheme for agricultural produce accommodates such intervention undertaken to avoid the development of boar taint, which is “unavoidable to meet the current quality standards” required in respect of “traditional productions requiring heavier pigs”.<sup>137</sup> In Italy male pigs are castrated, some with analgesia: anaesthesia is not used.<sup>138</sup> “Prosciutto di Parma” is registered and protected as a PDO to Italy<sup>139</sup> and heavy pigs are reared for late slaughter to provide this product, which has a delicate, sweet flavour, according to the specificities.<sup>140</sup>

Furthermore, the process of producing *foie gras* through the forced-feeding of ducks and to a lesser degree geese to produce enlarged livers is an extreme animal welfare concern,<sup>141</sup> in respect of which there are no species-specific EU minimum welfare requirements. To the contrary, EU law promotes and protects the gastronomical qualities of such produce to the detriment of the ducks’ welfare. “Canard à foie gras du Sud-Ouest (Chalosse, Gascogne, Gers, Landes, Périgord, Quercy)” is registered and protected as a PGI,<sup>142</sup> “reflecting the rural, gastronomic culture of South-West France”.<sup>143</sup> Elements of the amended registration include the introduction of a minimum weight for force-fed animals in addition to their average weight, continuous force-feeding *i.e.* of ducks of different ages simultaneously, together with the qualitative aim to achieve a liver weighing 550 grams (minimum size 350 grams).<sup>144</sup>

<sup>134</sup> *Ibid.* arts 11 and 24.

<sup>135</sup> *Ibid.* arts 28 and 64; Regulation 668/2014 cit.

<sup>136</sup> EFSA Panel on Animal Health and Welfare, ‘Scientific Opinion on Welfare Aspects of the Castration of Piglets’ cit. 1; A Prunier and others, ‘A Review of the Welfare Consequences of Surgical Castration in Piglets and the Evaluation of Non-Surgical Methods’ (2006) *Animal Welfare* 277.

<sup>137</sup> *European Declaration on alternatives to surgical castration of pigs* (2010) food.ec.europa.eu.

<sup>138</sup> 97 per cent of male pigs were castrated without analgesia or anaesthesia: Federation of Veterinarians survey (2015) cited in G Backus and others, *Second Progress Report 2015–2017 on the European declaration on alternatives to surgical castration of pigs* (Brussels 2018) 6.

<sup>139</sup> European Commission, *eAmbrosia Database* ec.europa.eu PDO-IT-0067 Registered 21 June 1996.

<sup>140</sup> Implementing Regulation (EU) 1208/2013 of the Commission of 25 November 2013 approving minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indication (Prosciutto di Parma (PDO)), art. 2, Annex II paras 5(2) and 5(3).

<sup>141</sup> I Rochlitz and DM Broom, ‘The Welfare of Ducks During Foie Gras Production’ (2017) *Animal Welfare* 135.

<sup>142</sup> European Commission, *eAmbrosia Database* ec.europa.eu PGI-FR-0034 Registered 27 June 2000.

<sup>143</sup> Publication of an amendment application pursuant to art. 50(2)(a) of Regulation 1151/2012 cit. para. 3.

<sup>144</sup> *Ibid.* para. 4.

These protected products are communicated and connected to the consumer via marketable EU logos.<sup>145</sup> In detracting from the requirement to pay full regard to the welfare requirements of animals as sentient beings, such illustrative practices could perhaps continue to be accommodated in the *proviso* to art. 13 TFEU facilitative of the customs of the Member States relating in particular to cultural traditions and regional heritage – in the interests of European consumers to preserve their national gastronomy. Yet such interpretation runs contrary to EU citizens' expectations to improve animal welfare, and such tension fails to recognise, for example, the movement voluntarily to end interventions pursuant to the European Declaration on alternatives to surgical castration of pigs.<sup>146</sup> The United Kingdom, Ireland, Spain and Portugal have a tradition of producing entire males and other countries, for example The Netherlands and Belgium, have started to do so with France and Germany gradually increasing the number of entire male pigs.<sup>147</sup> Previously, a Ministerial Request on welfare grounds for a revision of the pig Directive<sup>148</sup> was signed by Denmark, Germany, the Netherlands and Sweden in 2015.<sup>149</sup> There is a momentum for welfare standards to improve beyond the EU minimum norms adopted years ago.

#### IV. CJEU READING

Art. 13 TFEU has influenced the CJEU's interpretation of the calves Directive<sup>150</sup> in application to calves confined in dairy farming.<sup>151</sup> National legislation transposing the Directive required the management requirements to apply not only to calves reared for fattening, but also to calves confined for dairy farming. In its reasoning evident in the French translation, the CJEU acknowledged the Directive's objectives of keeping calves as an integral part of agriculture, and guaranteeing the rational development of production. There was no need to refer to the objective of ensuring the smooth running of the common market, freedom of movement not being an issue in this case. The Court accorded an holistic (*manière large*) interpretation to those objectives, as opposed to a restrictive interpretation.<sup>152</sup> To do otherwise, the Court said, would be difficult to reconcile with (*une solution contraire serait, en outre, difficilement conciliable avec*) the sacred principle - the

<sup>145</sup> European Commission, *Geographical Indications and Quality Schemes Explained* ec.europa.eu.

<sup>146</sup> *European Declaration on alternatives to surgical castration of pigs* cit. For a list of the signatories, European Commission, *Alternatives to Pig Castration* ec.europa.eu.

<sup>147</sup> G Backus and others, *Second Progress Report 2015–2017 on the European declaration on alternatives to surgical castration of pigs* cit.

<sup>148</sup> Council Directive 2008/120/EC cit.

<sup>149</sup> Council of the European Union 8596/15 of 5 May 2015, Conference 'Improving pig welfare-what are the ways forward?', Annex, data.consilium.europa.eu.

<sup>150</sup> Directive 91/629/EEC cit.

<sup>151</sup> Case C-355/11 *B Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie* ECLI:EU:C:2012:353.

<sup>152</sup> *Ibid.* paras 41 and 42.

spirit (*principe consacré* of art. 13 TFEU – under which, in the formulation and implementation of EU policy notably in the domain of agriculture, the EU and the Member States are taking (*tiennent*) fully into account the welfare requirements (*exigences du bien-être*) of animals as sentient beings (*des animaux en tant qu'être sensibles*).<sup>153</sup> Art. 13 TFEU motivated the Court to accept an extension to the material scope of the Directive; the Court interpreted the rearing of calves Directive – with its prohibition on tethering – in application to calves kept confined by a farmer in the context of a dairy farming operation for agricultural purposes.<sup>154</sup>

Thereafter, the CJEU's case law demonstrates that its reasoning in *Jippes* is still followed. In *Schaible*,<sup>155</sup> the CJEU affirmed the welfare of animals to be a "legitimate objective in the public interest".<sup>156</sup> In the area of agriculture, the Court confirmed that the EU legislature enjoys a broad discretion, corresponding to the political responsibilities given to it by arts 40 TFEU to 43 TFEU, with review "limited to verifying whether that legislature has manifestly exceeded the limits of its discretion".<sup>157</sup> There was no reference to art. 13 TFEU by the Court, and in later cases the *dicta* of the CJEU assimilate the Amsterdam Protocol with art. 13 TFEU without elaborating upon the concept of sentience.<sup>158</sup>

#### IV.1. HALAL GRAND CHAMBER

In the instance that EU legislation is explicit in its aims of animal welfare, the CJEU is able to pronounce in accordance with the legislature's intentions. In the case of *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) – Halal*,<sup>159</sup> – in interpreting the Regulation on organic production and labelling of organic products,<sup>160</sup> read in the light of art. 13 TFEU, – the Grand Chamber relied on the Regulation's expressed objective of establishing a sustainable management system for agriculture which respects high animal welfare standards and in particular meets animals' species-specific behavioural needs.<sup>161</sup> The Court noted in particular the

<sup>153</sup> *Ibid.* para. 43.

<sup>154</sup> *Ibid.* para. 48.

<sup>155</sup> Case C-101/12 *Schaible* ECLI:EU:C:2013:661.

<sup>156</sup> *Ibid.* para. 35 citing joined cases C-37/06 and C-58/06 *Viamex Agrar Handel and ZVK* ECLI:EU:C:2008:18 para. 22; case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel* ECLI:EU:C:2008:353 para. 27.

<sup>157</sup> *Schaible* cit. para. 48 citing case C-221/09 *AJD Tuna* ECLI:EU:C:2011:153 para. 80; case C-545/11 *Agrar-genossenschaft Neuzelle* ECLI:EU:C:2013:169 para. 43.

<sup>158</sup> Case C-424/13 *Zuchtvieh-Export* ECLI:EU:C:2015:259 para. 35.

<sup>159</sup> Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs* ECLI:EU:C:2019:137, hereinafter referred to as *Halal*.

<sup>160</sup> Regulation (EC) 834/2007 of the Council of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) 2092/91; Regulation (EC) 889/2008 of the Commission of 5 September 2008 laying down detailed rules for the implementation of Regulation 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, as amended by Regulation (EU) 271/2010 of the Commission of 24 March 2010.

<sup>161</sup> Art. 3(a)(iv) and (c) and art. 5(h) of Regulation 834/2007 cit.

stated objective of “maintaining and justifying consumer confidence in products labelled as organic”,<sup>162</sup> and deemed it important, therefore, “to ensure that consumers are reassured that products bearing the organic logo of the EU have actually been obtained in observance of the highest standards, in particular in the area of animal welfare”.<sup>163</sup> The specified obligation to keep animal suffering to a minimum, including at the time of slaughter,<sup>164</sup> “help[ed] to give concrete expression” to that objective.<sup>165</sup> The CJEU, further, underscored the protection of animal welfare to be “the main objective” pursued by Regulation 1099/2009 on the protection of animals at the time of killing, which “protection is as required by art. 13 TFEU”.<sup>166</sup> That Regulation’s provision that “animals shall only be killed after stunning”<sup>167</sup> was considered to establish an obligation, scientific studies having shown that pre-stunning compromises animal welfare the least at the time of killing.<sup>168</sup> A derogation from the requirement of prior stunning is allowed to Member States in which the practice of ritual slaughter is permitted solely in observance of the freedom of religion.<sup>169</sup> However, the Court deemed slaughter without prior stunning to be “insufficient to remove all of the animal’s pain, distress and suffering as effectively as slaughter with pre-stunning” which, in accordance with art. 2(f), read in the light of recital 20, of Regulation 1099/2009 was “necessary to cause a loss of consciousness and sensibility in order significantly to reduce its suffering”.<sup>170</sup> Central to the Court’s reasoning was that the use of a sharp knife, – in the words of recital 43 of that Regulation, “to minimise” animal suffering, “does not allow the animal’s suffering to be kept to a ‘minimum’ within the meaning of art. 14(1)(b)(viii)” of the organic Regulation.<sup>171</sup> It is, therefore, “not tantamount, *in terms of ensuring a high level of animal welfare at the time of killing*” to slaughter without pre-stunning.<sup>172</sup> Consequent upon the expressed objectives of the organic production and labelling Regulation,<sup>173</sup> in arts 3 and 14(1)(b), read in the light of art. 13 TFEU, the Court maintained that it could not be interpreted to authorise the placing of the EU organic logo on produce derived from animals slaughtered without having been stunned in the practise of religious rites in accordance with Regulation 1099/2009.<sup>174</sup>

<sup>162</sup> *Ibid.* Recital 3.

<sup>163</sup> *Halal* cit. para. 51.

<sup>164</sup> Art. 14(1)(b)(viii) of Regulation 834/2007 cit.

<sup>165</sup> *Halal* cit. paras 37 and 40.

<sup>166</sup> *Ibid.* para. 44.

<sup>167</sup> Art. 4(1), read with recital 20 of Regulation 1099/2009 cit.

<sup>168</sup> *Halal* cit. para. 47, citing case C-479/17 *Oeuvre d'assistance aux bêtes d'abattoirs* ECLI:EU:C:2018:747, opinion of AG Wahl, para. 43.

<sup>169</sup> *Halal* cit. para. 48; art. 4(4) read in the light of recital 18 of Regulation 1099/2009 cit.; case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* EU:C:2018:335 paras 55-57.

<sup>170</sup> *Halal* cit. para. 48.

<sup>171</sup> Regulation 834/2007 cit.; *Halal* cit. para. 49.

<sup>172</sup> *Halal* cit. para. 50, emphasis added.

<sup>173</sup> Regulation 834/2007 cit.

<sup>174</sup> In particular art. 4(4), *Halal* cit. 52.

The *Halal* case is the second in a trilogy of Grand Chamber cases concerned with the balance achieved by the legislature in animal welfare and freedom to practise religious rites. The Court had confirmed in the former case of *Liga van Moskeeën en Islamitische Organisaties* that ritual slaughter without stunning may take place only in an approved slaughterhouse.<sup>175</sup> The questions referred to the CJEU in *Liga* concerned the validity of art. 4(4) of Regulation 1099/2009, *i.e.* the derogation from pre-stunning solely to practise religious ritual rites, – read with the obligation to slaughter at a defined slaughterhouse,<sup>176</sup> in the light of freedom of religion<sup>177</sup> and the *provisio* in art. 13 TFEU. The Court's examination of the EU legislative framework did not disclose any issues affecting the validity of the Regulation with regard to both the Charter and art. 13 TFEU.<sup>178</sup> The legislature's intention was to organise and manage from a technical point of view, the freedom to carry out slaughter without prior stunning for religious purposes and not in itself of such a nature as to place a restriction on the right to freedom of religion.<sup>179</sup> The EU legislature had reconciled compliance with the specific methods of slaughter prescribed by religious rites with essential rules for animals' well-being and for consumers' health.<sup>180</sup>

#### IV.2. CENTRAAL ISRAËLITISCH CONSISTORIE VAN BELGIË GRAND CHAMBER

The Grand Chamber in the third instance, in *Centraal Israëlitisch Consistorie van België*,<sup>181</sup> reinforced the Court's deference to the expressed balance between religious rites and animal welfare explicit in Regulation 1099/2009. The contested decree of the Flemish Region in this case ended a derogation which exempted ritual slaughter from the obligation to stun prior to killing, requiring instead reversible stunning which cannot result in the animal's death. It was apparent from the Court's examination of the preparatory documents underpinning the decree, that the Flemish legislature sought to promote animal welfare having started from the premise that slaughtering without stunning causes avoidable suffering to animals. Additionally, the documents showed that the Flemish legislature had considered religious precepts that the animal not be dead at the time of slaughter and be completely drained of blood, which would be respected by reversible stunning.<sup>182</sup>

<sup>175</sup> *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* cit.

<sup>176</sup> Art. 2(k) of Regulation 1099/2009.

<sup>177</sup> Art. 10 of EU Charter of Fundamental Rights (Charter) and art. 9 of European Convention on Human Rights and Fundamental Freedoms (ECHR).

<sup>178</sup> *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* cit. paras 80 and 83. There was, thus, no need for the Court to rule concerning the *provisio* in art. 13 TFEU, see A Peters, 'Religious Slaughter and Animal Welfare Revisited: CJEU, *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen* (2018)' (2019) *The Canadian Journal of Comparative and Contemporary Law* 269.

<sup>179</sup> *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* cit. paras 58, 59, 68.

<sup>180</sup> *Ibid.* paras 62-64.

<sup>181</sup> Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031.

<sup>182</sup> *Ibid.* paras 26 and 27.

Confirming its rulings in *Liga* and *Halal*, the Grand Chamber examined the validity of the first paragraph of art. 26(2)(c) of Regulation 1099/2009 read in the light of art. 10(1) of the Charter. Art. 26(2)(c) provides that Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in the Regulation in relation to “the slaughtering and related operations of animals in accordance with art. 4(4)”; “related operations” are defined within the Regulation to include “stunning”.<sup>183</sup> The Court compared Regulation 1099/2009 with art. 13 TFEU in terms of each reflecting the balance to be achieved by the EU and its Member States in paying full regard for animal welfare while respecting religious rites and freedoms. Continuing to locate its ruling within the regulatory framework of Regulation 1099/2009, the Grand Chamber declared that the balance to be attained between those two “values”, namely animal welfare and the freedom to manifest religion, is a reconciliation which Member States must achieve themselves.<sup>184</sup> It followed that art. 26(2) of Regulation 1099/2009 did not fail to have regard to the freedom to manifest religion and that Member States are afforded the power to adopt additional national rules to ensure greater protection for animal welfare, such as an obligation to stun before slaughter which applies also to slaughter prescribed by religious rites, subject to respecting those fundamental rights enshrined in art. 10(1) of the Charter.<sup>185</sup> Paying regard to the religious precepts which govern ritual slaughter, the Court found that the decree did entail “a limitation” on the right to manifest religion, guaranteed by art. 10(1) of the Charter.<sup>186</sup> This necessitated an examination of whether the decree issued by the Flemish region which obligated reversible pre-stunning not resulting in death during religious slaughter fulfilled the conditions in art. 52 of the Charter, which the Court read in conjunction with art. 13 TFEU.<sup>187</sup> Art. 52(1) provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. The Court found: first, the limitation on the exercise of the right to freedom to manifest religion is provided for by law, namely the decree at issue; and, second, the “interference” resulting from the decree is “limited to one aspect of the specific ritual act of slaughter”, does not prohibit and in effect respects the essence of the religious precepts at the time of killing.<sup>188</sup> Third, according to the Court, the limitation of the right guaranteed in art. 10 of the Charter meets an objective of general interest, that of animal welfare, to which the preparatory documents of the Flemish legislature had evidenced the attachment of

<sup>183</sup> Art. 2(b) of Regulation 1099/2009; *Centraal Israëlitisch Consistorie van België and Others* cit. para. 45.

<sup>184</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 47.

<sup>185</sup> *Ibid.* paras 48-50.

<sup>186</sup> *Ibid.* para. 55, emphasis added.

<sup>187</sup> *Ibid.* para. 59.

<sup>188</sup> *Ibid.* paras 54 and 61.



“great importance” with the “objective to eliminate all avoidable animal welfare suffering”.<sup>189</sup> The CJEU affirmed what is already clear from the Court’s case law<sup>190</sup> and from art. 13 TFEU, that the protection of animal welfare is an objective of general interest recognised by the EU.<sup>191</sup>

Fourth, the Court in its assessment of observance of the principle of proportionality, paid regard to the need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them.<sup>192</sup> The Court’s choice of words is important, arguably attributing as a principle “*animal welfare enshrined in art. 13 TFEU*”.<sup>193</sup> The Court, locating its ruling in the national legislation, declared the Flemish decree laying down the obligation of reversible pre-stunning which must not cause death, in ritual slaughter, to be appropriate for achieving the objective of promoting animal welfare.<sup>194</sup>

An examination followed of the EU legislature’s intention precisely to reflect the lack of consensus among the Member States as to how they perceive ritual slaughter in the adoption of arts 4 and 26 of Regulation 1009/2009; this was evident from recitals 18 and 57 of that Regulation.<sup>195</sup> Situated within the Regulation’s expressed objectives, on the one hand, to leave a “certain flexibility” to Member States to maintain or adopt higher welfare rules dependent upon “national perceptions” towards animals<sup>196</sup> and/or, on the other, of leaving a “certain level of subsidiarity” to each Member State to pre-stun or to derogate therefrom,<sup>197</sup> – the Grand Chamber underscored the EU legislature’s intention to “preserve the specific social context of each Member State” and to give each respective Member State a broad discretion.<sup>198</sup>

As to whether the interference with the freedom to manifest religion resulting from the Flemish decree was *proportionate*, and pivotal to the Court’s ruling was, first, the importance attached to the latest scientific evidence by the EU legislature and the Flemish legislative preparatory documents. According to the scientific opinion of the European Food Safety Authority, cited in recital 6 of Regulation 1099/2009, a scientific consensus has emerged that prior stunning is the optimal means of reducing the animal’s suffering

<sup>189</sup> *Ibid.* para. 62.

<sup>190</sup> *Viamex Agrar Handel and ZVK* cit. para. 27; case C-424/13 *Zuchtvieh-Export* EU:C:2015:259 para. 35.

<sup>191</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 63.

<sup>192</sup> Citing case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114 para. 50; *Centraal Israëlitisch Consistorie van België and Others* cit. para. 65.

<sup>193</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 65, emphasis added. Thank you to the anonymous reviewer for his/her valid comment here.

<sup>194</sup> *Ibid.* para. 66.

<sup>195</sup> *Ibid.* para. 68.

<sup>196</sup> Provided that it does not affect the functioning of the internal market, Regulation 1099/2009 cit. recital 57, *Centraal Israëlitisch Consistorie van België and Others* cit. para. 70.

<sup>197</sup> Regulation 1099/2009 cit. recital 18; *Centraal Israëlitisch Consistorie van België and Others* cit. para. 69.

<sup>198</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 71.

at the time of killing.<sup>199</sup> In addition, the Flemish legislature stated that “the gap between eliminating animal suffering, on the one hand, and slaughtering without prior stunning, on the other, will always be very considerable, even if less radical measures were taken to minimise the impairment of animal welfare”.<sup>200</sup> The Flemish Region “was entitled”, therefore, “without exceeding [its] discretion [...] to consider that the limitation placed by the decree [...] on freedom to manifest religion, by requiring prior stunning which is reversible and cannot result in the animal’s death, [met] the condition of necessity”.<sup>201</sup> The Court attributed to the Finnish legislature the intention to be guided by the express provision in Regulation 1099/2009, in the interpretation of art. 4(4) of that Regulation, to give preference to the most up-to-date authorised killing method, where significant scientific progress has made it possible to reduce the animal’s suffering at the moment of killing, in order to spare animals avoidable pain, distress or suffering.<sup>202</sup>

Second, the Grand Chamber delivered a declaration the significance of which deserves to be underscored in terms of recognising the increasing societal awareness of animal welfare as a value, and in entrenching the constitutional/primary law status of animal welfare to be weighed in the balance in the proportionality assessment:

“[L]ike the ECHR, the Charter is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today with the result that regard must be had to changes in values and ideas, both in terms of society and legislation, in the Member States. Animal welfare, as a value to which contemporary democratic societies have attached increasing importance for a number of years, may, in the light of changes in society, be taken into account to a greater extent in the context of ritual slaughter and thus help to justify the proportionality of legislation such as that at issue”.<sup>203</sup>

Third, in the proportionality assessment, the Court affirmed that the Finish decree did not constitute an interference with the free circulation within its territory of products of animal origin derived from animals which have undergone ritual slaughter without pre-stunning in other EU Member States, according with art. 26(4) of Regulation 1099/2009. Neither was the circulation of such products which originated in third countries prohibited or hindered.<sup>204</sup>

The Grand Chamber’s expressed reference to “*the discretion which EU law confers on Member States as regards the need to reconcile art. 10(1) of the Charter with art. 13 TFEU*” is to be exercised, significantly, “*in an evolving societal and legislative context which is characterised by an increasing awareness of the issue of animal welfare;*” a discretion which the

<sup>199</sup> *Ibid.* para. 72.

<sup>200</sup> *Ibid.* paras 73.

<sup>201</sup> *Ibid.* para. 74, emphasis added.

<sup>202</sup> Recital (2) of Regulation 1099/2009 cit.; *Ibid.* paras 75 and 76.

<sup>203</sup> *Ibid.* para. 77.

<sup>204</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. paras 77 and 78.

Finish legislature had not exceeded.<sup>205</sup> The Grand Chamber declared the measures in the Finish decree to be proportionate, having allowed a fair balance to be struck between the importance attached to animal welfare and the freedom to manifest religion.<sup>206</sup> In relation to primary law, the Court endorsed the “constitutional” status of art. 13 TFEU, a point articulated authoritatively by Yumiko Nakanishi,<sup>207</sup> with implications for the direction which this *Article* develops below.

#### IV.3. AN EU MARKET?

The Grand Chamber of the CJEU upheld the growing societal appreciation of animal welfare as a value to the extent of recognising, if not condoning, a future EU market in which animal welfare is prioritised. According to art. 26(4) of Regulation 1099/2009 Member States may not prohibit or impede the free circulation of products derived from animals which have undergone ritual slaughter without pre-stunning in other EU Member States. At the oral hearing in *Centraal Israëlitisch Consistorie van België* the Court posed a question to the Flemish Region, permissive of responses from all intervening parties also, which envisaged a hypothetical situation in which all EU Member States were to adopt a measure prohibitive of the killing of animals without prior stunning at ritual slaughter.<sup>208</sup> This question leaves open, by implication, the instance of an increasing number of Member States adopting higher animal welfare standards legislation, acting within the discretion accorded to them by Regulation 1099/2009 – to the extent that art. 26(4) of that Regulation is rendered redundant. Advocate General Hogan remarked that the file before the Court in *Centraal Israëlitisch Consistorie van België* indicated that increasing numbers of Member States seek to qualify or limit in a variety of ways the scope of the derogation contained in art. 4(4) of Regulation 1099/2009.<sup>209</sup> Noteworthy, the Hellenic Council of State (Supreme Administrative Court of Greece) annulled a 2017 ministerial decision which, in the context of religious slaughter, allowed animals to be killed without prior stunning, ruling that the Greek State had omitted to aim for a balance between its obligations to protect animals and to respect religious freedom.<sup>210</sup> Furthermore, according to Advocate General Hogen, art. 13 TFEU would imply the adoption of a label for the produce of animals killed in accordance with ritual rites: “Specifically, a state of affairs whereby meat produce resulting from the slaughter of animals according to religious rites is simply allowed to enter the general food chain

<sup>205</sup> *Ibid.* para. 79, emphasis added.

<sup>206</sup> *Ibid.* para. 80.

<sup>207</sup> Y Nakanishi, ‘Case C-336/19 *Centraal Israëlitisch Consistorie van België*: Animal Welfare and Freedom of Religion’ (2021) *Maastricht Journal of European Comparative Law* 687.

<sup>208</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 37.

<sup>209</sup> Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:695, opinion of AG Hogan, para. 64.

<sup>210</sup> Eurogroup for Animals, ‘Religious Slaughter: A Spectacular Win for Animals in Greece’ (29 October 2021) [www.eurogroupforanimals.org](http://www.eurogroupforanimals.org).

to be consumed by customers who are unaware – and who have not been made aware – of the manner in which the animals came to be slaughtered would not comply with either the spirit or the letter of art. 13 TFEU”.<sup>211</sup>

An EU market may no longer exist, nor be served, with animals killed in accordance with religious rites without pre-stunning in EU Member States.

Ultimately, EU Member States must not impede the free circulation of “Halal” produce emanating from third countries; this is apparent from the Grand Chamber ruling in *Centraal Israëlitisch Consistorie van België*.<sup>212</sup> Although the Court referred to art. 52(3) of the Charter, which is intended to ensure consistency with the corresponding rights in the European Convention of Human Rights (ECHR), and the need to follow the European Court of Human Rights’ (ECtHR) decisions as a minimum standard<sup>213</sup> and, in particular, art. 9 ECHR for the protection of religious freedom, the CJEU did not refer directly to the case law of the ECtHR in this regard.<sup>214</sup> According to the ECtHR, there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable, which would not be the case if such meat can easily be obtained from another country.<sup>215</sup> Could the ruling of the CJEU in *Centraal Israëlitisch Consistorie van België*, therefore, signal even more strongly the constitutional status afforded to the welfare needs of animals for which art. 13 TFEU is the vehicle in EU primary law, read in the light of increasing societal awareness, and *vis à vis* other rights and principles in the Charter?

#### IV.4. ART. 13 TFEU: READ AS A WHOLE

The potential implication of the Grand Chamber ruling is not yet apparent, although its declaratory statements would appear to open the gates in a democratic society in which ideas and values change and evolve over time, to the increasingly higher regard for animal welfare being practised by EU Member States in the valid exercise of their discretion to “reconcile art. 10(1) of the Charter with art. 13 TFEU”.<sup>216</sup>

Correspondingly, the scope would exist to interpret constructively and optimistically the *provisio* in art. 13 TFEU to affirm this progressive social/cultural consciousness of animal welfare. The Grand Chamber ruling gives credibility to the positive reading of art. 13 TFEU taken

<sup>211</sup> *Centraal Israëlitisch Consistorie van België and Others*, opinion of AG Hogan, cit. paras 63, 80 and 81.

<sup>212</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 78.

<sup>213</sup> *Ibid.* paras 56 and 57.

<sup>214</sup> ECtHR *Cha’are Shalom Ve Tseddek v France* App. n. 27417/95 [27 June 2000]; A Alemano and NM de Sadeleer, ‘Humanising Animal Slaughter Need Not Infringe Religious Freedom (Amicus Curiae Brief I C-336/19 *Centraal Israëlitisch Consistorie van België and Others*)’ (21 October 2020) HEC Paris Research Paper No. LAW-2021-1417.

<sup>215</sup> *Cha’are Shalom Ve Tseddek v France* cit. paras 80 and 81.

<sup>216</sup> *Centraal Israëlitisch Consistorie van België and Others* cit. para. 79.

as a whole so as to respect the cultural movement on the part of a growing number of EU Member States to ensure a full regard for the welfare needs of animals in EU agriculture.

## V. COMMENTS IN CONCLUSION

Art. 13 TFEU places an unenforceable responsibility on the EU legislature to ensure that a full regard for the welfare requirements of animals as sentient beings becomes mainstreamed in EU agriculture policy. At the same time, art. 13 TFEU empowers the EU legislature to integrate a full regard for animal welfare into the legislative provisions establishing the EU Common Agriculture Policy (CAP), while respecting the customs of Member States relating in particular to religious rites, cultural traditions and regional heritage. EU contemporary policy, *prima facie*, is advancing animal welfare for food producing animals and citizenship expectation of EU agriculture policy is driving this political momentum. There is also a fundamental cultural movement amongst EU Member States towards this end.

This contemporary dynamism does not receive its impetus directly from art. 13 TFEU. There are signs that suppliers in the agri-food chain and policy makers are aware of the societal/cultural movement for improved standards of animal welfare and, it is indirectly, *i.e.* aside from art. 13 TFEU, that animal welfare labelling features as a key element of the EU Farm to Fork (F2F) Strategy. Art. 13 TFEU is not the driving force.

The *Halal* case suggests that the CJEU will accommodate full regard for animals' welfare requirements where there is an explicit commitment by the EU legislature to the animal welfare objective to be attained by the norm adopted on the agriculture legal basis.

The Grand Chamber of the CJEU has interpreted animal welfare as a value in the light of societal and cultural evolution in a democratic society and, arguably, a principle in art. 13 TFEU to be weighed in the balance by Member States *vis à vis* fundamental rights. Taking forward this significant *dicta* of the Grand Chamber in *Centraal Israëlitisch Consistorie van België*, respecting cultural traditions and regional diversity, in accordance with the second limb of art. 13, need not then be viewed as a negative *proviso* in order to limit EU animal welfare in agriculture policy. The fact that a number of EU Member States increasingly are taking a stance in order to improve the welfare of animals in agriculture beyond the minimum norms, demonstrates the ascending legitimate public value status of animal welfare in the EU. The scope exists to respect EU Member States' progressive deviation from the minimum norm where animal welfare opinion has proliferated, in an interpretative reading of art. 13 TFEU. Policy mainstreaming in animal welfare which is driven by an ethical and cultural movement for change for animals reared in agriculture, corroborates a positive reading of art. 13 TFEU as a whole.

