



## ARTICLES

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

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#### UNRAVELLING THE COMPLEXITIES OF THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: AN EXPLANATION OF THE *SPECIAL SECTION*

Certain policy objectives are horizontal by nature, transcending sectoral policy boundaries. Their pursuit requires combined action in various policy fields. For instance, to fight climate change and green our economies, action is needed across a range of policy areas which extend beyond environmental policy in the strict sense. In his keynote speech at the Lustrum Symposium of the Dutch Financial Law Association in December 2022, Frank Elderson, Member of the Executive Board of the European Central Bank (ECB) and Vice-Chair of the Supervisory Board of the ECB, spoke about the ways in which the ECB takes into account the climate neutrality objectives set forth in the European Climate Law,<sup>1</sup> adopted on the basis of art. 192(1) of the Treaty on the Functioning of the European Union (TFEU) (environment), when defining and implementing monetary policy and when exercising its supervisory competences.<sup>2</sup> In doing so, he noted, the ECB is complying with its obligations under art. 11 TFEU, which requires the *integration* of environmental protection requirements into the policies and activities of the Union. Ignoring the European Climate Law, he stated, would be a violation of art. 11 TFEU. Still, art. 11 TFEU does not prescribe *how* the ECB should integrate environmental requirements into the performance of its duties. This, he said, allows the ECB a degree of discretion.

Recital 25 of the European Climate Law states that the transition to climate neutrality does indeed require changes across the entire policy spectrum. It also points to the conclusions of the European Council of 12 December 2019, according to which “[a]ll relevant EU legislation and policies need to be consistent with, and contribute to, the ful-

<sup>1</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’).

<sup>2</sup> Keynote speech by Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, *The European Climate Law and the European Central Bank*, Lustrum Symposium organised by the Dutch Financial Law Association, Amsterdam, 1 December 2022.



filment of the climate neutrality objective”.<sup>3</sup> However, the EU Climate Law does not mention art. 11 TFEU in its body. What it does mention is art. 37 of the Charter of Fundamental Rights of the EU (the Charter),<sup>4</sup> a provision similar to art. 11 TFEU. Art. 37 of the Charter states that a high level of environmental protection, plus the improvement of the quality of the environment, must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

On the financial support side, the EU budget makes an important contribution to the fight against climate change through “climate mainstreaming”, as the European Commission (Commission) puts it.<sup>5</sup> Over the course of the 2014-2020 multiannual financial framework, EU funding programmes in all policy areas were required to consider climate priorities in their design, implementation and evaluation, with a spending target set at 20%.<sup>6</sup> In the context of the 2021-2027 multiannual financial framework, changes have been made to strengthen the financing of actions relating to climate change, including a spending target of 30%. As a result, a broad range of EU funding programmes support the fight against climate change, ranging from the European Recovery and Resilience Facility to the European Agricultural Guarantee Fund, the European Regional and Development Fund, the Cohesion Fund, Horizon Europe, the Just Transition Fund, InvestEU and others. The Commission explains that climate and environmental policy is at the heart of EU policymaking. This, it underlines, is in line with the Treaties that define environmental protection as a *core task* of the EU by means of art. 11 TFEU and other provisions.<sup>7</sup>

Art. 11 TFEU, which the Commission considers to lay out a core task of the EU, is surrounded by TFEU provisions that can also be seen as setting forth other *core tasks* of the EU. Art. 8 TFEU focuses on gender equality. It provides: “[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”.<sup>8</sup> Art. 10 TFEU is about the fight against discrimination more broadly. It states: “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.<sup>9</sup> Art. 9 TFEU addresses various elements in the social domain. It declares: “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guar-

<sup>3</sup> European Council Conclusions of 12 December 2019.

<sup>4</sup> See Recital 6 of the European Climate Law.

<sup>5</sup> European Commission, Financing of Horizontal Policy Priorities in the EU Budget, [commission.europa.eu](https://commission.europa.eu).

<sup>6</sup> *Ibid.*

<sup>7</sup> Commission Staff Working Document of 20 June 2022, Climate Mainstreaming Architecture in the 2021-2027 Multiannual Financial Framework.

<sup>8</sup> See art. 8 TFEU.

<sup>9</sup> See art. 10 TFEU.

antee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”.<sup>10</sup> Art. 12 TFEU pertains to consumer protection. It states: “[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”.<sup>11</sup> Animal welfare is the focus of art. 13 TFEU. This provides: “[i]n 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>12</sup>

Arts 8-13 TFEU, which are sometimes referred to as mainstreaming or integration clauses, have been brought together by the Treaty of Lisbon. They come under Title II “Provisions having general application” of Part One of the TFEU “Principles”. Some of them precede the Treaty of Lisbon, others feature among its innovations; but all of them lay down – in the Commission’s language – *core tasks* for the EU to integrate into its actions. The integration of *horizontal* tasks of this sort into EU policies and activities is inherent to the idea of efficient and well-designed EU policy-making. Arts 8-13 TFEU encourage the articulation of *integrated* EU policies for gender equality, non-discrimination, social protection, environmental protection, consumer protection and animal welfare. The underlying premise of arts 8-13 TFEU as horizontal clauses is that gender equality, non-discrimination, social protection, environmental protection, consumer protection and animal welfare cannot be attained through single policies; they require concerted efforts. From this perspective, arts 8-13 TFEU take significant steps towards improving the EU’s performance in these areas.

However, arts 8-13 TFEU leave a good deal in need of clarification. To begin with, arts 8-13 TFEU do not all use the same wording, although they do all employ vague and abstract formulations. This hampers an easy understanding of their legal nature and effects. Do arts 8-13 TFEU create any legal obligations? If yes, what is the nature of these obligations and on whom are they imposed? If no legal obligations derive from arts 8-13 TFEU, then what is their legal function? Also, what is their relationship to the principle of conferral? In terms of implementation, how should gender equality, non-discrimination, and requirements for social protection, environmental protection, consumer protection and animal welfare be integrated into EU policies and activities? How has such integration been achieved so far? Arts 8-13 TFEU do not elaborate on the ways in which the requirements they lay down are to be incorporated into EU policies and activities. As a matter of fact, they do not even explain what these requirements are. The fact that arts 8-13 TFEU are

<sup>10</sup> See art. 9 TFEU.

<sup>11</sup> See art. 12 TFEU.

<sup>12</sup> See art. 13 TFEU.

not the only horizontal clauses of this sort in EU primary law further compounds the problem. The European Climate Law, as indicated above, does not reference the horizontal environmental protection clause of art. 11 TFEU. Rather, it mentions art. 37 of the Charter, which is a clear proxy. Does it make a difference that the reference made is to art. 37 of the Charter and not art. 11 TFEU? Should art. 11 TFEU be seen as duplicating art. 37 of the Charter (or vice versa)? What does the European Climate Law's failure to reference art. 11 TFEU say about art. 11 TFEU and its implementation? Overall, what is the legal value and concrete contribution of arts 8-13 TFEU to EU law- and policy-making? These are the central questions that this *Special Section* seeks to address.

The *Articles* presented in this *Special Section*, which are based on the contributions discussed in a 2021 workshop entitled "Horizontal Clauses in EU Law: Normative implications, implementation and potential for policy mainstreaming", seek to deepen our understanding of the horizontal clauses of arts 8-13 TFEU. They ask what the horizontal clauses of arts 8-13 TFEU are in legal terms, how they have been interpreted and implemented, and how they may function to bolster the attainment of their objectives. The *Special Section* thus aspires to contribute, with fresh insights, to earlier stock-taking exercises vis-a-vis arts 8-13 TFEU<sup>13</sup> and assess their ability to deliver EU policies that pursue gender equality, non-discrimination, social protection, environmental protection, consumer protection and animal welfare in a coherent and comprehensive manner.

The first *Article*, by Evangelia Psychogiopoulou, sets the scene by examining how the Court of Justice of the EU (CJEU) has approached arts 8-13 TFEU. Psychogiopoulou reflects on the legal nature of arts 8-13 TFEU and their input to judicial review by discussing CJEU cases where arts 8-13 TFEU have formed part of the CJEU's reasoning. The *Article* sheds light on the interpretation of arts 8-13 TFEU by the CJEU and explores the ways in which they have been used by the CJEU in cases concerning limitations on the exercise of fundamental rights, restrictions to free movement, the interpretation of EU secondary law and challenges brought to the validity of EU measures. The analysis shows moderate judicial use of arts 8-13 TFEU, most often in conjunction with various proxies when these exist.

The second *Article*, by Elise Muir, Victor Davio and Lucia van der Meulen, focuses on arts 8 and 10 TFEU on gender equality and non-discrimination. The *Article* looks in particular at the role these two articles play in protecting and enhancing equality, examining their function in – and relevance to – the integration of equality considerations into areas of EU competences other than EU equality law *and* into EU equality law itself. The analysis thus moves beyond a traditional understanding of equality mainstreaming, which is confined to the integration of equality considerations into EU law- and policy-making into areas other than equality. Contradistinguishing them from the various existing equality and non-discrimination provisions in EU law, the authors argue that arts 8 and 10 TFEU are

<sup>13</sup> See F Ippolito, ME Bartoloni, M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge, 2018).

best understood as guidance clauses for the development of EU law and explore their use by the CJEU and the EU institutions in the performance of their activities.

The third *Article*, by Sybe de Vries and Rik de Jager, discusses the horizontal social protection clause of art. 9 TFEU. Taking the view that, despite its limited use by the CJEU and the EU legislator, art. 9 TFEU constitutes a legal tool designed to reinforce the social dimension of EU policies and activities, the authors examine how it could strengthen, in particular, the social prerogatives of the EU single market. The story told is one of hope and fear. On the one hand, the authors argue that art. 9 TFEU can contribute to the EU internal market becoming more socially sensitive, and explore the different ways it could do so. On the other hand, they acknowledge that delivering the social promise of the internal market may not be that straightforward. This relates to legal constraints deriving from – and transcending – art. 9 TFEU.

The fourth *Article*, by Vassiliki (Vicky) Karageorgou, looks at the horizontal environmental protection clause of art. 11 TFEU. Karageorgou elaborates on the legal nature and functions of art. 11 TFEU, paying close attention to its procedural and substantive meanings in EU law, in conjunction with the concept of sustainable development. This is because, pursuant to art. 11 TFEU, the integration of “environmental protection requirements” into the policies and activities of the Union shall aim to promote sustainable development. The analysis then expands on the implementation of art. 11 TFEU, especially following the adoption of the European Green Deal (EGD)<sup>14</sup> and the avalanche of regulatory initiatives the EGD has triggered. The *Article* approaches the EGD as a multidimensional regulatory project and examines the incorporation of environmental and climate objectives in a range of EU policies (e.g. energy, industry, agriculture, transport) and EU funding instruments that target sustainable finance and investment. The evident variation in the extent to which environmental and climate considerations are incorporated in the measures studied reflects the “balancing compromises” that are often struck in law-making.

The fifth *Article*, by Federica Casasora, is devoted to the horizontal consumer protection clause of art. 12 TFEU which, despite originating in an earlier provision dating back to the Treaty of Amsterdam, is essentially inactive. As Casasora explains, art. 12 TFEU is one of the horizontal clauses of the TFEU that is less frequently invoked in EU law- and policy-making. This is due both to the limits set by the wording itself of art. 12 TFEU, and to the availability of other legal channels for mainstreaming consumer protection, especially in internal market legislation. Still, art. 12 TFEU could prove particularly helpful for the development of consumer-friendly EU policies beyond the internal market. Indeed, the dormant horizontal consumer protection clause seems to be awakening in order to link consumer protection to sustainable development and environmental protection policy.

<sup>14</sup> Communication COM(2019) 640 from the Commission of 11 December 2019, The European Green Deal.

The last *Article*, by Diane Ryland, is about the horizontal animal welfare clause of art. 13 TFEU. Ryland examines the legal implications of art. 13 TFEU for EU action on animal welfare against the backdrop of the lack of a proper animal welfare competence entrusted on the EU. Similarly to the other horizontal clauses examined in this *Special Section*, animal welfare can be viewed as an integrative objective to be pursued in a set of EU policies (here specified by the TFEU). Unlike arts 8-12 TFEU, however, animal welfare lacks a legal basis in the TFEU for its protection and enhancement as such. Against this background, the *Article* delves into the animal welfare dimension of the EU policy on agriculture. It explores the nature and breadth of animal welfare considerations in relevant measures and initiatives, assesses the contribution of art. 13 TFEU in this respect and, in the wake of *encouraging* CJEU jurisprudence, advocates a “positive” reading of ar. 13 TFEU that would enhance animal welfare standards in EU law and policy-making.

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