



## ARTICLES

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

*Edited by Evangelia Psychogiopoulou*

## THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU THROUGH THE LENS OF THE COURT OF JUSTICE

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ABSTRACT: The horizontal clauses of arts 8-13 TFEU address a persistent challenge for the European Union: combining distinct policy objectives across the many areas of Union activity. Whilst they cannot be used as a legal basis for the adoption of EU measures, they legitimize the pursuit of the objectives they set forth, through legal bases that are designed to pursue some other treaty objective. This *Article* explores case law of the Court of Justice of the European Union (CJEU) on the legal nature of arts 8-13 TFEU, as well as their functions and input to judicial review. The analysis examines whether the horizontal clauses, as construed by the CJEU, create a legal obligation for mainstreaming. It also probes their relationship with the exercise of Union competences in the broader areas that they address (save for art. 13 TFEU due to the lack of an EU competence for animal welfare) and their implications for the choice of the legal basis of a mainstreaming measure. This *Article* further sheds light on the CJEU's treatment of the horizontal clauses in cases concerning restrictions of fundamental rights and free movement, it discusses their contribution to the interpretation of EU secondary legislation and examines whether the horizontal clauses may serve to invalidate an EU measure. The analysis overall attests to moderate judicial use of arts 8-13 TFEU but shows that relevant provisions enrich and corroborate the CJEU's reasoning on different accounts.

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## I. INTRODUCTION

The *horizontal clauses* of arts 8-13 TFEU, also known as *mainstreaming clauses* or *integration principles*, are set forth in Title II “Provisions having general application” of Part One of the TFEU, entitled “Principles”. These horizontal clauses have been brought together by the Treaty of Lisbon and focus on gender equality (art. 8 TFEU), social protection (art. 9 TFEU), non-discrimination (art. 10 TFEU), environmental protection (art. 11 TFEU), consumer protection (art. 12 TFEU) and animal welfare (art. 13 TFEU). Although they do not employ identical wording, they all seek to influence the nature of EU measures in various domains of EU policy and activity. They do so by laying down transversal policy objectives and requirements, which are meant to imbue and characterize EU action in general. EU measures adopted on some legal basis in the pursuit of some EU objective as determined by EU primary law are not precluded from integrating the transversal objectives of the horizontal clauses. This is indeed the underlying rationale of the horizontal clauses.

However, arts 8-13 TFEU leave many questions unanswered. Their legal nature and effects are not entirely clear, as the horizontal clauses offer no guidance on what the integration exercise precisely means in law and in practice and how this is to be achieved. The uncertainty created by their vague wording is accentuated by the fact that arts 8-13 TFEU are not unique in EU law. Not only does a wider group of such horizontal clauses exist in the TFEU but also most of the horizontal clauses of arts 8-13 TFEU overlap with other provisions of EU primary law. This raises broader questions about the combination of a range of different Union objectives at once, mainstreaming pressure and competition as well as the normative quality of arts 8-13 TFEU.

This *Article* seeks to work towards a better understanding of arts 8-13 TFEU by focusing on how the Court of Justice of the European Union (CJEU) has been confronted with these clauses in the aftermath of the Treaty of Lisbon. Given the variety of the horizontal clauses available in EU primary law and the abstract formulation of arts 8-13 TFEU, the jurisprudence of the CJEU might help elucidate the legal nature and effects of arts 8-13 TFEU. The next section examines the legal value of arts 8-13 TFEU, as construed by the CJEU. The following sections explore the ways in which arts 8-13 TFEU have been accommodated in CJEU jurisprudence, identifying their functions and input to judicial review. The analysis demonstrates limited judicial use of arts 8-13 TFEU but overall shows that relevant provisions, when used, enrich and corroborate judicial reasoning on different accounts.

## II. ARTS 8-13 TFEU AND OTHER SIMILAR CLAUSES OF EU PRIMARY LAW

Art. 8 TFEU on gender equality provides that “[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”. This echoes

an earlier mainstreaming provision introduced by the Treaty of Amsterdam<sup>1</sup> and addresses gender equality as a negative (*to eliminate*) and a positive (*to promote*) objective to underpin Union activity in its entirety.<sup>2</sup> Art. 8 TFEU is complemented by art. 10 TFEU, which states that “[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”. Enacted with the Treaty of Lisbon, art. 10 TFEU underlines the fight against discrimination on the same list of grounds set forth in art. 19 TFEU (*i.e.* the TFEU legal basis for the adoption of measures to combat discrimination) as a horizontal objective to integrate in the definition and implementation of all EU policies and activities.<sup>3</sup> The horizontal social protection clause of art. 9 TFEU, also adopted with the Treaty of Lisbon, stipulates that “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 guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. The language here is different: art. 9 TFEU points to requirements associated with a wider set of social objectives that should be *taken into account* (rather than *aimed at*) when formulating and implementing EU policies and activities.<sup>4</sup>

<sup>1</sup> Art. 3(2) of the Treaty establishing the European Community (TEC) [1997], inserted by the Treaty of Amsterdam [1997], read: “[i]n all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women”.

<sup>2</sup> On gender mainstreaming, see, amongst others, T Rees, *Mainstreaming Equality in the European Union* (Routledge 1998); M Pollack and E Hafner-Burton, ‘Mainstreaming Gender in the European Union’ (2000) *Journal of European Public Policy* 435; S Mazey, *Gender Mainstreaming in the EU: Principles and Practice* (Kogan 2001); R Guerrina, ‘Gender, Mainstreaming and the EU Charter of Fundamental Rights’ (2003) *Policy and Society* 97; E Caracciolo di Torella, ‘The Principle of Gender Mainstreaming: Possibilities and Challenges’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 45.

<sup>3</sup> On mainstreaming equality, see M Bell, *Racism and Equality in the European Union* (Oxford University Press 2009); B de Witte and others, ‘Legislating after Lisbon: New Opportunities for the European Parliament’ (EUDO Report 2010/1); F Ippolito, ‘Mainstreaming Equality in the EU Legal Order: More than a Cinderella Provision?’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 55; L Waddington and M Priestley (eds), *Mainstreaming Disability Rights in the European Pillar of Social Rights: A Compendium* (Academic Network of European Disability Experts, 2018).

<sup>4</sup> The interplay between market-making and social policy concerns has been the object of extensive scholarly debate. On art. 9 TFEU and the reconciliation of market and social values, see indicatively P Vielle, ‘How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming’ in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 105; MD Ferrara, ‘The Horizontal Social Clause and the Social and Economic Mainstreaming: A New Approach for Social Integration?’ (2013) *European Journal of Social Law* 288; ME Bartoloni, ‘The Horizontal Social Clause in a Legal Dimension’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 83; E Muir, ‘Drawing Positive Lessons From the Presence of “The Social” Outside of EU Social Policy *Stricto Sensu*’ (2018) *EuConst* 81; A Aranguiz, ‘Social Mainstreaming Through the European Pillar of Social Rights: Shielding “the Social” from “the Economic” in EU Policymaking’ (2018) *European Journal of Social Security* 341.

Art. 11 TFEU is admittedly the stronger horizontal provision of the TFEU. It declares that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.<sup>5</sup> Environmental mainstreaming is a long-standing duty of the European institutions. It goes back to the Single European Act, which added art. 130R in the Treaty establishing the European Economic Community (TEEC), affirming *inter alia* that “[e]nvironmental protection requirements shall be a component of other Community policies”.<sup>6</sup> Art. 11 TFEU now qualifies the greening of EU policies and activities<sup>7</sup> by underscoring promotion of sustainable development as the aim to attain – a concept that combines economic growth, social justice and environmental protection, seeking their balance. The horizontal consumer protection clause of art. 12 TFEU is formulated in weaker terms.<sup>8</sup> It states that “[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”. It essentially repeats the horizontal consumer protection clause, inserted in the Treaty establishing the European Community (TEC), by the Treaty of Amsterdam.<sup>9</sup> Art. 13 TFEU, an innovation of the Treaty of Lisbon in the wake of *Protocol n. 33 on protection and welfare of animals*, which was annexed to the TEC by the Treaty of Amsterdam,<sup>10</sup> reads as follows: “[i]n

<sup>5</sup> On environmental mainstreaming, see, amongst others, A Lenschow (ed.), *Environmental Policy Integration: Greening Sectoral Policies in Europe* (Earthscan Publications 2002); N Dhondt, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law Publishing 2003); S Kingston, ‘Integrating Environmental Protection and EU Competition Law: Why Competition Isn’t Special’ (2010) ELJ 780; JH Jans, ‘Stop the Integration Principle?’ (2011) FordhamIntLJ 1533; GM Durán and E Morgera, *Environmental Integration in the EU’s External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012); J Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016); E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Bloomsbury Publishing 2017); B Sjøfjell, ‘The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 105; M Montini, ‘The Principle of Integration’ in M Faure (ed.), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing 2018) 139.

<sup>6</sup> See art. 25 of the Single European Act [1987] and art. 130R(2) TEEC.

<sup>7</sup> Concerning the EU policies and activities involved, the CJEU ruled in case C-594/18 P *Austria v Commission* ECLI:EU:C:2020:742 that the application of art. 11 TFEU in the nuclear energy sector is not precluded by the Euratom Treaty because the latter does not deal exhaustively with environmental issues.

<sup>8</sup> On the horizontal consumer protection clause, see SA de Vries, ‘The Court of Justice’s “Paradigm Consumer” in EU Free Movement Law’ in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 416; F Seatzu, ‘On the Current Meaning and Potential Effects of the Horizontal Consumer Clause of Article 12 of the TFEU’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 123.

<sup>9</sup> Art. 129(A)(2) TEC, as replaced by the Treaty of Amsterdam, read as follows: “[c]onsumer protection requirements shall be taken into account in defining and implementing other Community policies and activities”.

<sup>10</sup> This stipulated that “[i]n 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

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>11</sup> A specific set of EU policies, from agriculture and fisheries to space and the internal market, are thus identified for integrating an animal welfare perspective, with due respect for Member States' customs and legal and administrative frameworks on cultural and religious practices.

Notably, arts 8-13 TFEU form part of a wider set of horizontal clauses laying down transversal objectives and requirements for the EU. Whilst some of these other horizontal clauses overlap with arts 8-13 TFEU, others focus on other policy objectives and requirements. Art. 147(2) TFEU for instance proclaims that "[t]he objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities". Art. 168(1) TFEU states that "[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities". Both provisions partly reflect art. 9 TFEU, which provides that the Union shall take into account requirements *inter alia* "linked to the promotion of a high level of employment" and "a high level of [...] protection of human health", with art. 168(1) TFEU adopting stronger language (*shall be ensured*) than art. 9 TFEU (*shall take into account*). Art. 167(4) TFEU does not match any of the horizontal clauses of arts 8-13 TFEU. It declares that "[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures".<sup>12</sup> Art. 175 TFEU contains a mainstreaming provision for economic, social and territorial cohesion, according to which "[t]he formulation and implementation of Union's policies and actions and the implementation of the internal market shall take into account" cohesion objectives such as "reducing disparities between levels of regional

of the Member States relating in particular to religious rites, cultural traditions and regional heritage". See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Protocol annexed to the Treaty of the European Community, Protocol on protection and welfare of animals [1997].

<sup>11</sup> On the horizontal animal welfare clause, see D Ryland and A Nurse, 'Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market' (2013) *European Energy and Environmental Law Review* 101; J Beqiraj, 'Animal Welfare' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 136; K Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) *CMLRev* 55; L Leone, 'Farm Animal Welfare Under Scrutiny: Issues Unsolved by the EU Legislator' (2020) *European Journal of Legal Studies* 47.

<sup>12</sup> On the horizontal cultural clause, see R Craufurd Smith, 'Community Intervention in the Cultural Field: Continuity or Change?' in R Craufurd Smith, *Culture and European Union Law* (Oxford University Press 2004) 22; E Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Martinus Nijhoff Publishers 2008) and E Psychogiopoulou, 'Cultural Mainstreaming: The European Union's Horizontal Cultural Diversity Agenda and its Evolution' (2014) *ELR* 626.

development and the backwardness of the least favoured regions".<sup>13</sup> Art. 173(3) TFEU focuses on industrial policy. It provides that the Union "shall contribute" to the achievement of the industrial policy objectives of art. 173(1) TFEU,<sup>14</sup> "through the policies and activities it pursues under other provisions of the Treaties". Art. 208(1) TFEU includes a mainstreaming clause for development cooperation. According to this, the Union "shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries", in particular "the reduction and, in the long term, the eradication of poverty".<sup>15</sup>

Arguably, the best known horizontal clause of the TFEU is art. 114(3) TFEU, which requires the European institutions to "take as a base" a high level of health, safety, environmental protection and consumer protection when adopting legislation that has as its object the establishment and functioning of the internal market. Originally introduced with the Single European Act,<sup>16</sup> with reference to European Commission (Commission) proposals, this provision clarified at an early stage that internal market measures should combine a high level of health, safety, environmental and consumer protection with their economic and market-building goals.<sup>17</sup> Art. 169(2) TFEU explains specifically as regards consumer protection that EU internal market measures, adopted on the basis of art. 114 TFEU, "shall contribute to the attainment" of the consumer protection objectives set forth in art. 169(1) TFEU. The latter refers to promoting the interests of consumers and ensuring a high level of consumer protection in particular by "protecting the health, safety and economic interests of consumers" and by "promoting their right to information, education and to organise themselves in order to safeguard their interests".<sup>18</sup>

Whilst part of this broader collection of horizontal clauses in the TFEU, arts 8-13 TFEU, by being grouped together under Part One of the TFEU, make more visible and assertive the transversality of the objectives and requirements they refer to. Their prominent place in the TFEU, even if some long predate it, exemplifies their importance for EU law and policies. The argument has indeed been made that arts 8-13 TFEU provide a *constitutional* basis for incorporating central EU values and objectives into different areas of EU law and

<sup>13</sup> See art. 174(1) TFEU.

<sup>14</sup> Art. 173(1) TFEU refers in particular to speeding up the adjustment of industry to structural changes; encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings; encouraging an environment favourable to cooperation between undertakings; and fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

<sup>15</sup> Other development cooperation objectives derive from the objectives of the Union's external action. See art. 208(1) TFEU.

<sup>16</sup> See art. 18 of the Single European Act cit., inserting art. 100A in the TEEC.

<sup>17</sup> On the non-market objectives of EU internal market legislation, see B de Witte, 'Non-Market Values in Internal Market Legislation' in NN Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar 2006) 61.

<sup>18</sup> See art. 169(1) TFEU.

policy.<sup>19</sup> Both the provisions that should be seen as long-established, consolidated horizontal clauses, *i.e.* arts 8, 11 and 12 TFEU, and the Lisbon-established provisions of arts 9, 10 and 13 TFEU identify *overarching objectives* for EU law and policy-making. So construed, the horizontal clauses, without modifying the Union's competences, widen EU action in the pursuit of equality, social protection, environmental protection and consumer protection, beyond the treaty articles that are specifically devised to attain such objectives. As for animal welfare, this is an area where the EU has no competence. As the Union is under duty to act within the limits of its competences respecting the principle of conferral, art. 13 TFEU does not create any new competences for the Union. What it does is to alert the EU institutions about the animal welfare implications of their action when exercising Union competences in a cluster of areas that come within the Union's purview (agriculture, fisheries, the internal market, etc.), thus supporting the development of animal welfare-friendly policies at EU level.

Having said this, some of the horizontal clauses of arts 8-13 TFEU have a similar provision in the Charter of Fundamental Rights (the Charter) of the Union. Art. 23 of the Charter adopts stronger language than art. 8 TFEU for instance when stipulating that "[e]quality between women and men must be ensured" (rather than *aimed at*) "in all areas, including employment, work and pay". Art. 35 of the Charter proclaims, in a more forceful manner than art. 9 TFEU, that "[a] high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities", matching the language of art. 168(1) TFEU. Art. 37 of the Charter ascertains, similarly to art. 11 TFEU, that "[a] high level of environmental protection", besides 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".<sup>20</sup> By stipulating that "Union policies shall ensure a high level of consumer protection", art. 38 of the Charter recalls art. 12 TFEU in stronger terms. Other provisions of the Charter concerning equality and non-discrimination, social security and assistance, employment and education are also relevant. This is because by means of art. 51(1) the Charter imposes a horizontal duty to mainstream fundamental rights in the exercise of Union competences, to the extent that it requires the European institutions – and the Member States when they implement EU law – not only to respect the rights and observe the principles thereof but also to promote their application "in accordance with their respective powers".<sup>21</sup>

<sup>19</sup> F Ippolito, ME Bartoloni and M Condinanzi, 'Introduction. Integration Clauses: A Prologue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 1.

<sup>20</sup> On the relationship of art. 37 of the Charter with art. 11 TFEU, see E Scotford, 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights' in S Bogojevic and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 133.

<sup>21</sup> See V Kosta, 'Fundamental Rights Mainstreaming in the EU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 14, at 22; and B de Witte,

### III. THE LEGAL VALUE OF THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU

The horizontal clauses of arts 8-13 TFEU address a persistent challenge for the Union: combining distinct policy objectives among the many areas of Union activity. Whilst they cannot be used as a legal basis for the adoption of EU measures, they legitimize the pursuit of the objectives they set forth by using legal bases that are designed to achieve other treaty objectives and thus in the context of various EU policies and activities. Whether or not they create any legal obligations for the EU institutions (and the Member States for that matter) has generated controversy. Other issues requiring clarification have centred around the relationship of the horizontal clauses (if any) with the exercise of Union competences in the broader policy areas that they address (save for art. 13 TFEU, as the Union has no competence in animal welfare as such) and their implications for the “centre of gravity” doctrine when it comes to the choice of a legal basis for the adoption of measures that engage in mainstreaming. The CJEU’s jurisprudence is relatively illuminating on these aspects.

#### III.1. HORIZONTAL CLAUSES AND LEGAL OBLIGATIONS

*Hungary v European Parliament and Council* is enlightening on whether or not the horizontal clauses establish any legal requirements for the Union.<sup>22</sup> The dispute focused on whether or not Directive 2018/957 concerning the posting of workers in the framework of the provision of services<sup>23</sup> had been rightly founded on art. 62 TFEU, in conjunction with art. 53(1) TFEU. Hungary asked the CJEU to annul the directive, with the argument that art. 153 TFEU on social policy should have been its legal basis: the directive’s “only or principal aim”, Hungary claimed, “[was] the protection of workers” – not the removal of obstacles to the freedom to provide services.<sup>24</sup>

The CJEU ascertained that the Directive, which amended Directive 96/71/EC,<sup>25</sup> sought to strike a balance between two distinct interests: guaranteeing that Member States’ undertakings may supply services within the internal market through the posting of workers from where they are established to other Member States; and protecting the rights of the posted workers.<sup>26</sup> The directive accordingly sought to ensure “the freedom to provide services on a fair basis”.<sup>27</sup> When coordinating national rules that could impede the freedom to provide services, it should not be concluded, the CJEU declared, that “the EU

‘Conclusions: Integration Clauses: A Comparative Epilogue’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 181, at 182.

<sup>22</sup> Case C-620/18 *Hungary v European Parliament and Council* ECLI:EU:C:2020:1001.

<sup>23</sup> Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

<sup>24</sup> *Hungary v European Parliament and Council* cit. paras 28-29.

<sup>25</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

<sup>26</sup> *Hungary v European Parliament and Council* cit. para. 50.

<sup>27</sup> *Ibid.* para. 57.



legislature is [...] not bound to ensure respect for [...] the objectives, laid down in Article 9 TFEU".<sup>28</sup> A measure based on arts 53(1) and 62 TFEU should "not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom",<sup>29</sup> covering the interests laid down in art. 9 TFEU, in particular "the promotion of a high level of employment" and "the guarantee of adequate social protection".<sup>30</sup>

*Hungary v European Parliament and Council* is important,<sup>31</sup> not because the CJEU recognized the social dimension of the internal market (such a social dimension is emphasized in art. 3(3) of the Treaty on European Union, TEU<sup>32</sup>), but because the CJEU accepted, with reference to art. 9 TFEU, that the horizontal clauses create a *legal requirement* for the EU legislator: the latter is *bound to ensure respect* for the objectives of the horizontal clauses when taking action to pursue some other EU objective. This legal requirement should essentially be interpreted as avoiding undermining the objectives at issue by *disregarding* them and *going against* them. Interestingly, the CJEU added that the "overarching objectives" of art. 9 TFEU could be safeguarded only if EU legislation could be adapted to take account of changes in circumstances and knowledge.<sup>33</sup> Given the impact of successive EU enlargements and evidence of market segmentation due to differentiation in rules on wages applicable to posted workers and to workers employed by undertakings established in the host Member State,<sup>34</sup> the EU legislature should be allowed to adjust the legal framework created by Directive 96/71/EC to strengthen the rights of posted workers.<sup>35</sup> This indicates that for the CJEU, the pursuit of the EU's "overarching objectives", as reflected in the horizontal clauses, is a continuous task which must mirror the evolution of the Union's socio-economic and other conditions.

Support for this progressive implementation of the mainstreaming duty can also be found in *Association Belge des Consommateurs Test-Achats and others*,<sup>36</sup> where the CJEU held that EU law derogations from gender equality should not last without a limit. In its reference for a preliminary ruling, the Belgian Constitutional Court (BCC) asked the CJEU

<sup>28</sup> *Ibid.* para. 46.

<sup>29</sup> *Ibid.* para. 48.

<sup>30</sup> *Ibid.* para. 46, in conjunction with para. 41.

<sup>31</sup> See also in this respect case C-626/18 *Poland v European Parliament and Council* ECLI:EU:C:2020:1000.

<sup>32</sup> Art. 3(3) TEU on the Union's task to establish an internal market provides inter alia that the EU shall work for the sustainable development of Europe based amongst other issues on "a highly competitive social market economy, aiming at full employment and social progress". It also mentions that the EU "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child" as well as social cohesion.

<sup>33</sup> *Hungary v European Parliament and Council* cit. para. 42, read together with paras 41 and 61.

<sup>34</sup> *Ibid.* paras 62-63 and 68.

<sup>35</sup> *Ibid.* para. 64.

<sup>36</sup> Case C-236/09 *Association Belge des Consommateurs Test-Achats and others* ECLI:EU:C:2011:100.

to rule on the validity of art. 5(2) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.<sup>37</sup> Although Directive 2004/113/EC prescribed gender equality in insurance matters, requiring the Member States to guarantee unisex premiums and benefits following a transitional period, art. 5(2) of the Directive introduced a derogation, which allowed the Member States to permit proportionate differences in individuals' premiums and benefits, using sex as a determining factor in the assessment of risk.

Taking note of the horizontal gender equality clause of art. 8 TFEU, in conjunction with art. 3(3) TEU, which underlines the social facet of the internal market, the CJEU observed that gender equality should be achieved progressively.<sup>38</sup> The EU legislature should determine when to take action, "having regard to the development of economic and social conditions" in the EU.<sup>39</sup> It was therefore permissible for the EU legislature to *gradually* require the application of unisex premiums and benefits. Any action decided upon however should *coherently* contribute to the objective of gender equality.<sup>40</sup> Here, the gender equality derogation had no temporal limitation.<sup>41</sup> It could persist indefinitely, which rendered it incompatible with arts 21 and 23 of the Charter on non-discrimination and equality between women and men respectively.<sup>42</sup>

### III.2. HORIZONTAL CLAUSES AND THE EXERCISE OF UNION COMPETENCES IN THE AREAS CONCERNED

In *Association Belge des Consommateurs Test-Achats and others*, the CJEU held that the competence conferred by art. 19(1) TFEU on the Council to take appropriate action to combat discrimination based *inter alia* on sex should be exercised *in accordance with* the horizontal gender equality clause of art. 8 TFEU.<sup>43</sup> A traditional understanding of mainstreaming suggests that the horizontal clauses of the TFEU are relevant for EU measures that have as their legal basis a treaty provision that enables action to attain some other objective – not the objectives laid down in the horizontal clauses. The CJEU's ruling appears to suggest that art. 8 TFEU is also relevant for EU equality law-making as such. No further guidance, however, is offered on this point. Other rulings of the CJEU depict a more conventional understanding of mainstreaming. This is the case with *Commission v Council (Antarctic MPAs)*,<sup>44</sup> which sheds light on the relationship of the horizontal environmental

<sup>37</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>38</sup> *Association Belge des Consommateurs Test-Achats and others* cit. para. 20.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* para. 21.

<sup>41</sup> *Ibid.* paras 31-32.

<sup>42</sup> *Ibid.* para. 32.

<sup>43</sup> *Ibid.* para. 19.

<sup>44</sup> Joined cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* ECLI:EU:C:2018:925.

protection clause of art. 11 TFEU with the TFEU provisions enabling the adoption of environmental protection measures.<sup>45</sup>

The case focused on two Council decisions approving submission to the competent international body of a set of proposals and a reflection paper for the creation of marine protected areas (MPAs) and special areas for scientific study in the Antarctic, as part of the implementation of the Convention on the Conservation of Antarctic Marine Living Resources,<sup>46</sup> to which the EU is party. The Commission claimed, amongst other issues, that the Council decisions came within the scope of the exclusive competence of the EU in the area of the conservation of marine biological resources under the common fisheries policy.<sup>47</sup> Consequently, the documents concerned should have been submitted on behalf of the EU alone, rather than on behalf of the EU and its Member States as falling within the shared competence of the EU and its Member States in environmental matters. To strengthen its argument, the Commission drew attention to art. 11 TFEU, affirming that the mere fact that a measure was linked to environmental protection did not necessarily mean that it fell within EU environmental competence.<sup>48</sup> The creation of the suggested areas at issue was partly a response to environmental concerns but according to the Commission, the *centre of gravity* of the envisaged measures did not lie on the side of environmental policy.<sup>49</sup>

The CJEU took the view that environmental protection was the main purpose and component of the measures approved by the Council for submission, which meant that they fell within the shared competence of the EU on environmental matters. Such a conclusion, the CJEU noted, could not be called into question by art. 11 TFEU. The CJEU stated: “Whilst the European Union must comply with that provision when it exercises one of its competences, the fact remains that environmental policy is expressly referred to in the Treaties as constituting an autonomous area of competence and that, consequently, when the main purpose and component of a measure relate to that area of competence, the measure must also be regarded as falling within that area of competence”.<sup>50</sup>

The *Antarctic MPAs* exemplifies the usefulness of the horizontal clauses for the exercise of Union competences in areas that do not aim at the objectives of the horizontal clauses. This is in line with earlier pronouncements of the CJEU. Regarding the horizontal environmental clause for instance, the CJEU has ruled that the treaty provisions conferring powers on the Union to undertake specific action in the environmental field and thus develop an environmental policy leave intact its powers under other provisions of the treaty, which can

<sup>45</sup> See art. 191 TFEU ff.

<sup>46</sup> See Convention on the Conservation of Antarctic Marine Living Resources, concluded at Canberra on 20 May 1980 (No 22301) treaties.un.org.

<sup>47</sup> See art. 3(1)(d) TFEU.

<sup>48</sup> *Commission v Council (Antarctic MPAs)* cit. para. 71.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* para. 101.

be used for the adoption of measures that concurrently pursue environmental objectives, in light of the environmental mainstreaming requirements under EU law.<sup>51</sup> However, the fact that the horizontal clauses can contribute to EU policy-making in various areas does not necessarily rule out their relevance for the measures that pursue, as per their legal basis, the *same* objectives as them (art. 13 TFEU excluded). This is what appears to have been hinted at in *Association Belge des Consommateurs Test-Achats and others*. After all, some horizontal clauses expressly refer to integrating their objectives and requirements in *all* Union activities; not all of them do so though and some horizontal clauses specifically refer to “other” Union policies and activities for the purposes of mainstreaming.<sup>52</sup>

### III.3. HORIZONTAL CLAUSES AND THE BOUNDARIES OF AN EU LEGAL BASIS

In accordance with the centre of gravity doctrine, the *Antarctic MPAs* also indicates that when a measure has several purposes or components, if one of these is identified as *main* or *predominant*, whereas the others are merely *incidental*, the measure taken must be founded on a single legal basis; that is, the legal basis corresponding to the main purpose or component.<sup>53</sup> One could argue however that in light of the horizontal clauses, a single legal basis provision could also be used for the introduction of measures that *decisively* combine the objectives of the horizontal clauses with the objectives of the legal basis. There is indeed nothing in the wording of the horizontal clauses mandating the pursuit of the objectives that they determine *only* in an incidental or subsidiary way. What is necessary for mainstreaming is that the EU legislator convincingly demonstrates that the conditions for the use of the chosen legal basis are fulfilled, namely that the measure *genuinely* pursues the objectives of its legal basis. If that is the case, then there should be nothing to prevent reliance on that legal basis on the grounds that the objective of the

<sup>51</sup> See case C-336/00 *Huber* ECLI:EU:C:2002:509 para. 33. In *Huber*, the referring court had asked whether Regulation No 2078/92 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside was valid. The Regulation had been adopted on the basis of what are now arts 42 and 43 TFEU. The CJEU held that the primary purpose of the Regulation, *i.e.* the transition to a more extensive and higher quality cultivation system, did not justify recourse to art. 192 TFEU as an additional legal basis, even if the measure was of a nature such as to promote more environmentally-friendly forms of production (see paras 35-36). See Council Regulation (EEC) 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside.

<sup>52</sup> Art. 8 TFEU refers to all Union activities. Arts 9-11 TFEU generally refer to the definition and implementation of the Union’s policies and activities, without excluding any particular policy or activity. Art. 12 TFEU refers to taking consumer protection requirements into account when defining and implementing *other* Union policies and activities.

<sup>53</sup> *Commission v Council (Antarctic MPAs)* cit. para. 77. For the CJEU, it is only exceptionally that an EU measure must be founded simultaneously on several legal bases. This will be the case when the measure “simultaneously pursues a number of objectives or has several components that are inseparably linked, without one being incidental to the other”, see *Commission v Council (Antarctic MPAs)* cit. para. 78.

horizontal clause is pivotal in the adoption of the measure concerned, alongside the objective pursued by the latter's legal basis.

*Philip Morris Brands and others* corroborates this.<sup>54</sup> The CJEU may have refrained from using the horizontal social protection clause of art. 9 TFEU when assessing the correctness of art. 114 TFEU as the legal basis of Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (the Tobacco Products Directive).<sup>55</sup> However, it has not held back from using art. 168(1) TFEU, a provision that emphasises the health dimension of art. 9 TFEU, and art. 114(3) TFEU, which mandates a high level of health protection in internal market measures,<sup>56</sup> to underline that when the conditions for recourse to art. 114 TFEU as a legal basis are fulfilled, the measure taken cannot be prevented from pursuing *decisively* a high level of health protection.<sup>57</sup>

#### IV. THE FUNCTIONS AND JUDICIAL INPUT OF THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU

CJEU case law on arts 8-13 TFEU generally shows moderate use of relevant provisions. There is a limited number of cases where the CJEU has referred to and built its reasoning on arts 8-13 TFEU. Existing case law yet shows that arts 8-13 TFEU, when used, contribute to CJEU adjudication in various ways. For one thing, they lend support to the significance of certain objectives of general interest that can justify restrictions to fundamental rights and free movement. They also play a decisive role for the interpretation of EU law in ways supportive of their objectives. Thus far, however, they have not served as grounds for the invalidation of EU law.

##### IV.1. HORIZONTAL CLAUSES AND RESTRICTIONS TO FUNDAMENTAL RIGHTS

According to CJEU case law, the horizontal clauses lay down objectives of general interest that may justify restrictions of fundamental rights. *Deutsches Weintor* is a prominent example

<sup>54</sup> Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325.

<sup>55</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

<sup>56</sup> *Philip Morris Brands and others* cit. para. 61.

<sup>57</sup> *Ibid.* para. 60. It has been argued that such a decisive role can be assumed by the horizontal objectives when they cannot be pursued autonomously through sector-specific harmonization measures, for lack of harmonization powers assigned to the EU, and on condition that mainstreaming takes place in the context of EU policies allowing for harmonization. The argument is based on the understanding that the centre of gravity doctrine only applies when the legal basis corresponding to the "main" objective pursued and the legal basis corresponding to the "incidental" objective are "compatible", allowing for instance both for the adoption of harmonization measures. For more details, see 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, 35-36.

of this.<sup>58</sup> The case stemmed from domestic proceedings in Germany concerning the marketing of a wine as “easily digestible”, indicating low acidity levels. Pursuant to secondary EU legislation, health claims, understood as any claim stating, suggesting or implying a relationship between food and health, was prohibited for alcoholic beverages.<sup>59</sup> The question raised with the CJEU was whether such a prohibition was compatible with fundamental rights, in particular art. 15 of the Charter on the freedom to choose an occupation and the right to engage in work and art. 16 of the Charter on the freedom to conduct a business.

The CJEU approached the question put forward as one about the reconciliation of distinct fundamental rights,<sup>60</sup> adding to the equation art. 35 of the Charter,<sup>61</sup> which echoes the requirements of the horizontal social protection clause of art. 9 TFEU regarding a high level of protection of human health in the definition and implementation of Union policies and activities. Drawing in particular on art. 9 TFEU, the CJEU recognized that the protection of public health constitutes an objective of general interest that can justify restrictions of fundamental rights,<sup>62</sup> including the freedom to pursue an occupation and the freedom to conduct a business.<sup>63</sup> The freedom to pursue a trade or profession, the CJEU affirmed, was not an absolute right but should be considered in relation to its social function.<sup>64</sup> Against this background, the CJEU found that the prohibition of health claims at issue was necessary and proportionate for ensuring compliance with art. 35 of the Charter.

The fact that the horizontal clauses set forth objectives that can justify limitations of fundamental rights was confirmed in subsequent case law. *Neptune Distribution*<sup>65</sup> was about the validity of a prohibition under EU secondary legislation to display on the packaging, labels and in advertising misleading claims and indications for the volume of sodium content of natural mineral waters.<sup>66</sup> Mentioning art. 9 TFEU and the horizontal consumer protection clause of art. 12 TFEU, the CJEU held that a high level of human health and consumer protection were legitimate general interest objectives that could justify restrictions to freedom of expression (art. 11 of the Charter) (including commercial speech) and the freedom to conduct a business.<sup>67</sup> Here, mention of arts 9 and 12 TFEU

<sup>58</sup> Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526.

<sup>59</sup> See the first subparagraph of art. 4(3) of Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, according to which health claims are not permitted for alcoholic beverages.

<sup>60</sup> *Deutsches Weintor* cit. paras 46-47.

<sup>61</sup> *Ibid.* para. 45.

<sup>62</sup> *Ibid.* para. 49.

<sup>63</sup> *Ibid.* para. 54.

<sup>64</sup> *Ibid.*

<sup>65</sup> Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.

<sup>66</sup> See art. 9(1) and (2) of Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters, read together with Annex III of the Directive and the annex to Regulation 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

<sup>67</sup> *Neptune Distribution* cit. para. 73, read in conjunction with para. 68.

was combined with reference to an array of mainstreaming proxies: art. 114(3) TFEU, art. 168(1) TFEU, art. 35 of the Charter and art. 38 of the Charter,<sup>68</sup> the latter mandating a high level of consumer protection in Union policies. Framing then the assessment of the disputed prohibition as requiring the balancing of arts 11, 16, 35 and 38 of the Charter, the CJEU held that a fair balance had been struck. Regarding in particular the proportionality of the interference at issue with freedom of expression and freedom to conduct a business,<sup>69</sup> the CJEU observed that the EU legislature should be allowed broad discretion in a complex area for assessment, entailing political, economic and social choices on its part,<sup>70</sup> which implied that art. 9 TFEU may also have a role to play in the context of the proportionality test performed.<sup>71</sup>

The point has been taken up and explored in *Philip Morris Brands and others*<sup>72</sup> in the context of assessing the validity of art. 13(1) of the Tobacco Products Directive,<sup>73</sup> prohibiting the promotion of tobacco consumption on tobacco labelling, packaging and tobacco itself, regarding compliance with art. 11 of the Charter. Considering that judicial review pertained to striking a balance between freedom of commercial speech and the protection of health as a legitimate general interest objective of the EU,<sup>74</sup> the CJEU built on art. 9 TFEU when assessing the proportionality of the interference in question. The discretion enjoyed by the EU legislature, the CJEU ruled, was subject to variation, depending on the general interest objective justifying a restriction of free speech and the nature of the speech activity in question.<sup>75</sup> Art. 9 TFEU, alongside art. 35 of the Charter, art. 114(3) TFEU and art. 168(1) TFEU, pointed to a high level of human health protection as the general interest objective at hand,<sup>76</sup> whilst the speech activity concerned commercial speech.<sup>77</sup> Given the proven harmfulness of tobacco, the former clearly outweighed the interest in the latter.<sup>78</sup>

<sup>68</sup> *Ibid.* para. 73.

<sup>69</sup> *Ibid.* para. 85.

<sup>70</sup> *Ibid.* para. 76.

<sup>71</sup> See ME Bartoloni, 'The Horizontal Social Clause in a Legal Dimension' cit. 97.

<sup>72</sup> *Philip Morris Brands and others* cit.

<sup>73</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (Tobacco Products Directive).

<sup>74</sup> *Philip Morris Brands and others* cit. para. 154, read together with para. 152.

<sup>75</sup> *Ibid.* para. 155.

<sup>76</sup> *Ibid.* para. 157.

<sup>77</sup> *Ibid.* para. 155.

<sup>78</sup> *Ibid.* In *Pillbox* (case C-477/14 *Pillbox* ECLI:EU:C:2016:324), the CJEU similarly held on the basis of art. 9 TFEU, read together with art. 114(3) TFEU, art. 168(1) TFEU and art. 35 of the Charter, that the prohibition of commercial communications and sponsorship for electronic cigarettes and their refill containers, laid down in art. 20(5) of the Tobacco Products Directive, was not a disproportionate interference with the freedom to conduct a business and the right to intellectual property, enshrined in arts 16 and 17(2) of the Charter respectively.

On other occasions, the horizontal clauses contributed to the assessment of Member States' fundamental rights restrictions. *Centraal Israëlitisch Consistorie van België and others* is telling.<sup>79</sup> The case arose from domestic proceedings before the BCC concerning the validity of a Flemish Region decree, putting an end to a derogation that had permitted, for the purposes of respecting religious freedom, animal slaughtering without prior stunning<sup>80</sup> for "slaughter prescribed by a religious rite".<sup>81</sup> Regulation 1099/2009 on the protection of animals at the time of killing,<sup>82</sup> adopted under art. 43 TFEU, provided that an animal should be stunned prior to being killed – a manifestation of animal welfare, enshrined in art. 13 TFEU,<sup>83</sup> in common agricultural policy. With the aim of protecting freedom of religion, safeguarded under art. 10 of the Charter, the Regulation authorized, by way of derogation, animal slaughtering without prior stunning prescribed by religious rites. However, it also allowed Member States to provide for more extensive protection of animals.

Asked to interpret the leeway afforded Member States for more extensive animal protection, the CJEU ruled that the Regulation had not failed to acknowledge both religious freedom and animal welfare. The legal framework introduced reflected the animal welfare requirements of art. 13 TFEU<sup>84</sup> and also gave expression, in accordance with art. 10 of the Charter, to the "positive commitment of the EU legislature to ensure effective observance of freedom of religion", in particular the freedom to manifest religion.<sup>85</sup> The Regulation did not yet struck the balance between animal welfare and religious freedom itself but devolved the task to the Member States,<sup>86</sup> which could go beyond its provisions to enhance animal welfare.

When adopting rules to ensure greater protection for animals, Member States, the CJEU ascertained, were "implementing EU law" within the meaning of art. 51(1) of the Charter and had therefore to respect fundamental rights, including freedom of religion.<sup>87</sup> Considering the Flemish decree to be a limitation on the exercise of the right to manifest one's

<sup>79</sup> Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031.

<sup>80</sup> *I.e.* a method to reduce animal suffering by intentionally causing loss of consciousness and sensibility without pain, including any process resulting in instantaneous death. See art. 2(f) of Council Regulation 1099/2009 of 24 September 2009 on the protection of animals at the time of killing.

<sup>81</sup> *Centraal Israëlitisch Consistorie van België and others* cit. para. 11. The decree provided in art. 3 that "if the animals are slaughtered according to special methods required for religious rites, the stunning must be reversible and the animal's death must not be caused by stunning". The application of reversible, non-lethal stunning during the practice of ritual slaughter had been considered to be a proportionate measure, respecting ritual slaughter in the framework of freedom of religion whilst taking maximum account of animal welfare.

<sup>82</sup> Regulation 1099/2009 cit.

<sup>83</sup> *Centraal Israëlitisch Consistorie van België and others* cit. para. 41.

<sup>84</sup> *Ibid.* para. 47.

<sup>85</sup> *Ibid.* para. 44.

<sup>86</sup> *Ibid.* para. 47.

<sup>87</sup> *Ibid.* paras 48-49.



religion,<sup>88</sup> for being incompatible with Jewish and Islamic religious precepts,<sup>89</sup> the CJEU examined whether the limitation could be justified. Pursuant to art. 13 TFEU, animal welfare was an EU objective of general interest which could justify the limitation at issue.<sup>90</sup> As for proportionality, the CJEU declared that Member States had wide discretion when seeking to balance freedom of religion and animal welfare.<sup>91</sup> Given the absence of European consensus on ritual slaughter and levels of animal welfare protection,<sup>92</sup> the EU legislature had sought, through the rules introduced, to “preserve the specific social context of each Member State [...] and [...] give each Member State a broad discretion” in the field.<sup>93</sup> The CJEU concluded that the Flemish Region was entitled to adopt the decree at issue.

The attention art. 13 TFEU received in *Centraal Israëlitisch Consistorie van België and Others* is remarkable. The horizontal animal welfare clause was found to lay down animal welfare as an EU *value*,<sup>94</sup> a *principle*<sup>95</sup> and an EU *objective of general interest* that can justify restrictions of religious freedom.<sup>96</sup> It was also held to be significant for the assessment of the proportionality of the restriction of religious freedom. The Charter, the CJEU affirmed, constitutes “a living instrument which must be interpreted in the light of present-day conditions” with due consideration to “changes in values and ideas, both in terms of society and legislation”.<sup>97</sup> Given the increasing importance attached by contemporary democratic societies to animal welfare, animal welfare considerations should be able to receive increased consideration vis-à-vis the exercise of freedom of religion and ritual slaughter in particular.<sup>98</sup>

#### IV.2. HORIZONTAL CLAUSES AND RESTRICTIONS TO FREE MOVEMENT

Besides laying down objectives of general interest that can justify restrictions of fundamental rights, the CJEU has also acknowledged that the horizontal clauses lay down objectives that can justify restrictions to free movement as *overriding requirements in the public interest*. In *AGET Iraklis*,<sup>99</sup> a case focused on Greek legislation introducing an administrative authorization regime for collective redundancies, the CJEU drew on art. 9 TFEU to assert that social protection considerations could justify restrictions to freedom of

<sup>88</sup> *Ibid.* paras 53-54.

<sup>89</sup> Jewish and Muslim believers were to consume only meat from animals slaughtered without prior stunning whose blood was drained. See *ibid.* paras 13 and 54.

<sup>90</sup> *Ibid.* paras 58 and 63.

<sup>91</sup> *Ibid.* para. 65.

<sup>92</sup> *Ibid.* paras 68 and 70.

<sup>93</sup> *Ibid.* para. 71.

<sup>94</sup> *Ibid.* para. 41.

<sup>95</sup> *Ibid.* para. 65.

<sup>96</sup> *Ibid.* para. 63.

<sup>97</sup> *Ibid.* para. 77.

<sup>98</sup> *Ibid.*

<sup>99</sup> Case C-201/15 *AGET Iraklis* EU:C:2016:972.

establishment, in addition to restrictions to the freedom to conduct a business under art. 16 of the Charter. Having clarified that the national legislation impacted the ability of undertakings to implement collective redundancies by establishing a requirement of non-opposition by the competent public authority,<sup>100</sup> the CJEU held that the rules adopted were liable to constitute a serious obstacle to freedom of establishment.<sup>101</sup> Freedom of establishment, the CJEU stated, encompasses the freedom to determine the “extent of the economic activity” to carry out in a host Member State, in particular “the size of the fixed establishments and the number of workers required” and “the freedom subsequently to scale down that activity or even the freedom to give up [...] [the] activity and establishment”.<sup>102</sup> Greek legislation affected the capacity of economic operators from other Member States to adjust, once they had entered the Greek market.<sup>103</sup>

The protection of workers and combatting unemployment were both key public interest objectives pursued by domestic legislation.<sup>104</sup> Such overriding reasons in the public interest could justify, according to the CJEU, restrictions on freedom of establishment.<sup>105</sup> The CJEU noted in this regard the requirements deriving from art. 9 TFEU for the promotion of a high level of employment and the guarantee of adequate social protection.<sup>106</sup> It also referred to treaty provisions, such as art. 3(3) TEU on the EU's task to work towards a highly competitive social market economy and the horizontal employment-specific clause of art. 147(2) TFEU.<sup>107</sup> Notwithstanding, in a combined assessment of the proportionality of Greek legislation as a restriction to freedom of establishment and a limitation on the freedom to conduct a business, the CJEU held that national rules infringed art. 49 TFEU and art. 16 of the Charter.<sup>108</sup> This was because the specific criteria upon which the domestic authorities should base their assessment on whether or not to oppose collective redundancies (*i.e.* the “situation of the undertaking” and the “conditions in the labour market”) had been formulated in imprecise and general terms.<sup>109</sup>

#### IV.3. HORIZONTAL CLAUSES AND SUPPORTIVE EU LAW INTERPRETATION

The horizontal clauses have assisted more broadly in the interpretation of EU law. Whilst they have occasionally contributed to finding the issue in the main proceedings as

<sup>100</sup> *Ibid.* para. 54.

<sup>101</sup> *Ibid.* para. 57.

<sup>102</sup> *Ibid.* para. 53.

<sup>103</sup> *Ibid.* paras 55-56.

<sup>104</sup> *Ibid.* para. 71.

<sup>105</sup> *Ibid.* paras 73-75.

<sup>106</sup> *Ibid.* para. 78.

<sup>107</sup> *Ibid.* paras 76-78.

<sup>108</sup> *Ibid.* paras 102-103.

<sup>109</sup> *Ibid.* paras 99-100.

outside the scope of EU law,<sup>110</sup> they have also steered the interpretation of EU secondary legislation in ways that facilitate the attainment of their objectives. Usefully, they have corroborated the interpretation of both legal requirements set forth in EU legislation and derogations foreseen. To illustrate, in *Zuchtvieh-Export*,<sup>111</sup> which focused on the interpretation of Council Regulation 1/2005 on the protection of animals during transport and related operations,<sup>112</sup> adopted on the basis of art. 43 TFEU, the CJEU used the horizontal animal welfare clause of art. 13 TFEU to determine the territorial scope of the rules enacted on matters such as watering and feeding intervals, journey times and resting periods. Noting that the Regulation sought to create a framework “based on the principle that animals must not be transported in a way likely to cause injury or undue suffering [...] for reasons of animal welfare”,<sup>113</sup> the CJEU drew attention to art. 13 TFEU as “a provision of general application”<sup>114</sup> to hold that the obligations deriving from the Regulation applied not only to transport taking place within the territory of the EU but also to transport from the EU to a third country.

*Oeuvre d'assistance aux bêtes d'abattoirs* originated in domestic proceedings against the use of the EU organic logo<sup>115</sup> for products derived from animals slaughtered, in accordance with religious rites, without prior stunning, for failure to comply with high animal welfare standards.<sup>116</sup> The CJEU held that Regulation 834/2007 on organic production and labelling of organic products<sup>117</sup> should be interpreted in the light of art. 13 TFEU and could not therefore be read without taking into account Regulation 1099/2009 on the protection of animals at the time of killing.<sup>118</sup> The aim of Regulation 834/2007 was to create a system of farm management and food production based on high animal welfare standards but none of its provisions expressly defined the most appropriate method for slaughtering of animals to minimize animal suffering.<sup>119</sup> Relevant standards had been

<sup>110</sup> See for instance case C-354/13 *FOA* ECLI:EU:C:2014:2463, where the horizontal equality clause of art. 10 TFEU was used to corroborate the CJEU's finding that EU law does not prohibit discrimination on grounds of obesity as such.

<sup>111</sup> Case C-424/13 *Zuchtvieh-Export* ECLI:EU:C:2015:259.

<sup>112</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) 1255/97.

<sup>113</sup> *Zuchtvieh-Export* cit. para. 36.

<sup>114</sup> *Ibid.* para. 35.

<sup>115</sup> See art. 25 of Regulation (EU) 834/2007 of the Council of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91. See also art. 57 of Regulation (EC) 889/2008 of the Commission of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control.

<sup>116</sup> Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs* ECLI:EU:C:2019:137.

<sup>117</sup> Regulation (EC) 834/2007 cit.

<sup>118</sup> Regulation 1099/2009 cit.

<sup>119</sup> *Oeuvre d'assistance aux bêtes d'abattoirs* cit. para. 41.

defined in Regulation 1099/2009, which laid down as a general rule that an animal should be stunned prior to death, allowing slaughter without pre-stunning prescribed by religious rites, only as a derogation. For the CJEU, a combined reading of Regulations 834/2007 and 1099/2009, in accordance with art. 13 TFEU, should prevent use of the EU organic logo on products from animals slaughtered, in the context of religious rites, without first being stunned because slaughter *without* pre-stunning was not tantamount, in terms of ensuring a high level of animal welfare, to slaughter *with* pre-stunning.<sup>120</sup> Art. 13 TFEU thus served in this case to link Regulation 1099/2009 to Regulation 834/2007, the former giving concrete expression to legal requirements stemming from the latter.

In *Olympiako Athlitiko Kentro Athinon*,<sup>121</sup> a case concerning the interpretation of Council Directive 2000/78/EC on equal treatment in employment and occupation,<sup>122</sup> the horizontal social protection clause of art. 9 TFEU offered guidance on the interpretation of derogations allowed by EU legislation. The CJEU was asked to examine the compatibility with the directive of Greek legislation concerning the placement of employees in the broader public sector in a labour reserve system, prior to retirement. Art. 6(1) of the Directive provided that a difference in treatment on grounds of age shall not constitute discrimination, if, “within the context of national law, [such grounds] are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives”, on condition that the means of achieving that aim are appropriate and necessary. The CJEU held that pursuant to art. 9 TFEU, read together with art. 3(3) TEU, promoting a high level of employment could justify a difference in treatment on grounds of age under the directive.<sup>123</sup> National legislation had been enacted in the context of the severe economic crisis facing the country at the time. Whilst budgetary considerations could not constitute a legitimate aim justifying a difference in treatment, they were a factor influencing the context within which employment policy was conducted.<sup>124</sup> The labour reserve system, the CJEU observed, sought to give effect to the undertakings given by the Greek state to its creditors concerning the reduction in wage costs in the public sector.<sup>125</sup> There was accordingly a clear budgetary objective.<sup>126</sup> However, by targeting older workers, the Greek legislation concurrently protected them by avoiding their dismissal and also contributed to preventing the dismissal of younger workers altogether.<sup>127</sup> According to the CJEU, these were employment-related policy

<sup>120</sup> *Ibid.* paras 50 and 52.

<sup>121</sup> Case C-511/19 *Olympiako Athlitiko Kentro Athinon* ECLI:EU:C:2021:274.

<sup>122</sup> Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>123</sup> *Olympiako Athlitiko Kentro Athinon* cit. para. 39.

<sup>124</sup> *Ibid.* paras 34 and 36.

<sup>125</sup> *Ibid.* para. 31.

<sup>126</sup> *Ibid.* para. 35.

<sup>127</sup> *Ibid.* para. 44.

objectives,<sup>128</sup> which on the basis of art. 6(1) of the Directive, read in conjunction with art. 9 TFEU, could justify a difference in treatment on grounds of age.<sup>129</sup>

#### IV.4. JUDICIAL REVIEW OF COMPLIANCE WITH THE HORIZONTAL CLAUSES

The question of whether or not the horizontal clauses may serve to invalidate an EU measure<sup>130</sup> has been boldly answered by the Commission in the affirmative. In an earlier document dating from the 1990s, the Commission affirmed, with reference to the horizontal environmental protection clause,<sup>131</sup> that “adherence to the integration requirements is in principle subject to judicial control by the European Court of Justice as is the case with the subsidiarity principle”.<sup>132</sup>

Non-compliance with the *integration requirements* can of course be difficult to prove, given the discretionary powers left to the European institutions. The CJEU’s stance has generally been that when the European institutions are required to make complex assessments, they enjoy a wide margin of discretion; judicial review should accordingly be limited to verifying first, that the measure in question is not vitiated by a manifest error or misuse of powers, and secondly, that the competent authority did not manifestly exceed the limits of its discretion. Earlier case law on the protection of the environment and public health,<sup>133</sup> testifying to this hands-off approach of the CJEU, has been recently confirmed in *E.ON Biofor Sverige*.<sup>134</sup>

<sup>128</sup> *Ibid.* paras 39-40.

<sup>129</sup> *Ibid.* paras 39 and 42.

<sup>130</sup> Note that the horizontal clauses have mostly been used as grounds confirming the proportionality of EU measures and thus in support of their validity. See for instance *Philip Morris Brands and others* cit., where art. 9 TFEU, read together with art. 35 of the Charter, arts 114(3) and 168(1) TFEU, served to confirm the validity of arts 7(1) and (7) of Directive 2014/40/EU cit. Relevant provisions prohibited the sale of tobacco products with a characterising flavour or containing flavourings altering the smell, taste or smoke intensity of tobacco products. The CJEU found that they properly weighed the economic consequences of the prohibition with the requirement to ensure a high level of human health protection deriving from the above-mentioned provisions and were therefore proportionate.

<sup>131</sup> See former art. 6 TEC.

<sup>132</sup> Communication COM(1998) 333 final from the Commission to the European Council of June 1998, Partnership for integration. A strategy for integrating environment into EU policies. Cardiff, p. 3.

<sup>133</sup> See for instance case C-405/92 *Mondiet v Armement Islais* ECLI:EU:C:1993:906; case C-180/96 *United Kingdom v Commission* ECLI:EU:C:1998:192; case C-210/03 *Swedish Match* ECLI:EU:C:2004:802.

<sup>134</sup> Case C-549/15 *E.ON Biofor Sverige* ECLI:EU:C:2017:490. The CJEU held that the EU legislator, when establishing a common framework for the promotion of energy from renewable resources (see Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC), had not exceeded its discretion by opting for a “mass balance” system of verification of the sustainability criteria for biofuels identified in relevant legislation. The specific area in which the EU legislator intervened required making complex assessments, particularly of economic and technical factors, in pursuit of the objective set forth in art. 114(3) TFEU for a high level of environmental protection, read in conjunction with the horizontal environmental protection clause of art. 11 TFEU.

Crucially, there have been instances where the CJEU has been called upon to review compliance of EU secondary legislation with the horizontal clauses. Claims contesting the validity of EU law by building directly on the requirements of arts 8 and 10 TFEU and art. 13 TFEU were made in *Z. and Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others* respectively. In *Z.*,<sup>135</sup> the CJEU concluded that the facts of the case did not come within the scope of EU law<sup>136</sup> and therefore it was not necessary to examine the validity of the challenged measures. In *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others*,<sup>137</sup> the claim advanced was not about non-compliance with the animal welfare integration requirements deriving from art. 13 TFEU; it was about failure to comply with the second component of art. 13 TFEU, namely the 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” when mainstreaming animal welfare specifically in common agricultural policy. The CJEU found no breach, for no clear evidence had been provided.<sup>138</sup>

Relevant cases did not lead to the annulment of EU secondary legislation but did not rule out use of the horizontal clauses as a ground for contesting EU law. The argument has indeed been made that *Z.* could be seen as an indirect recognition of the fact that arts 8 and 10 TFEU may serve as a yardstick for the judicial review of EU secondary legislation, provided of course that the disputed provisions are applicable in situations that come within the scope of EU law.<sup>139</sup> The same could be fairly said concerning *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen* and art. 13 TFEU, on condition that there is sufficient substantiation, even if the dispute was not about mainstreaming animal welfare as such. What was at issue here was the balancing of the mainstreamed

<sup>135</sup> Case C-363/12 *Z.* ECLI:EU:C:2014:159.

<sup>136</sup> The CJEU ruled that domestic authorities’ refusal to provide paid leave equivalent to maternity or adoptive leave to a female worker who had had a baby through a surrogacy arrangement did not constitute discrimination on grounds of sex within the scope of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In addition, the condition of the female worker at issue who was unable to bear a child did not come within the concept of “disability” under Directive 2000/78/EC cit. See *Z.* cit. paras 65-66 and 82-83 respectively.

<sup>137</sup> Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* ECLI:EU:C:2018:335.

<sup>138</sup> The case concerned the validity of art. 4(4) of Regulation 1099/2009 cit., read together with art. 2(k) thereof, according to which the practice of ritual slaughter of an animal without prior stunning, authorized by way of derogation, could only take place in certified establishments satisfying certain technical requirements in accordance with EU secondary legislation, with a view to minimizing animal suffering and ensuring food hygiene and safety. The claim was put forward that the EU legislator had failed to comply with Belgian customs regarding religious rituals, given the lack of capacity in approved slaughterhouses but the CJEU took the view that the Belgian legislative and administrative provisions and customs at issue had not been clearly identified.

<sup>139</sup> F Ippolito, ‘Mainstreaming Equality in the EU Legal Order’ cit. 79.

animal welfare requirements with public interest considerations in the Member States pertaining to religious rituals and practices. Mainstreaming animal welfare requirements under the first component of art. 13 TFEU is also about balancing: animal welfare on the one hand and the legitimate public interest objectives pursued by the EU policies engaging in mainstreaming animal welfare on the other.

*Association Belge des Consommateurs Test-Achats and others* may be more illuminating.<sup>140</sup> In this case, the annulment of the provisions of Directive 2004/113/EC providing for a derogation from unisex premiums and benefits for insured women and men went hand in hand with emphasizing the ability of EU legislation to genuinely pursue gender equality: in the absence of a temporal limit, the derogation was to apply perpetually. This could be seen as amounting to a complete *disregard* of gender equality (as the derogation was continuous) and therefore to “a manifest error of appraisal” by the EU legislator, which can be judicially reviewed. A manifest error of appraisal of this kind (*i.e.* totally disregarding the objectives of the horizontal clauses) could perhaps lead to invalidation of an EU act for infringement of the horizontal clauses.

## V. CONCLUSION

The mainstreaming clauses of the TFEU have been a direct consequence of the recognition that action by the Union in some policy fields may not suffice to countervail the possible adverse pressure exerted by other EU policies and actions on the objectives of the former. Intersecting with various areas of Union activity, certain EU goals have been considered to necessitate systematic efforts from the Union for their attainment. The horizontal clauses of arts 8-13 TFEU integrate sensitivity for such objectives in EU action in general and give clear constitutional backing for their pursuit through various EU policies and activities. In doing so, they also exemplify the EU’s non-market facet: most of the cross-cutting objectives laid down in the horizontal clauses are non-economic in nature.<sup>141</sup>

The integration of horizontal objectives in EU policies and actions that are devised to pursue some other EU objective is certainly a complicated venture. The horizontal clauses do not inform on how the mainstreaming exercise is to take place. The objectives involved may be conflicting and their reconciliation may not always be easy or straightforward. The horizontal clauses underline the need to shape the Union’s institutional and procedural structures in ways that may forge positive links between distinct Union objectives. From this perspective, they also support *coherence* in EU action. Action in one EU

<sup>140</sup> *Association Belge des Consommateurs Test-Achats and others* cit.

<sup>141</sup> On this see B de Witte, ‘A Competence to Protect’ cit., who notes that although pursuing those objectives may in fact have an economically beneficial effect, the economic cost/benefit analysis is not their driving force.

policy field should not work against action in another.<sup>142</sup> The variety of horizontal clauses in the TFEU and the variety of the EU policies and activities entrusted with the mainstreaming task is not however without risk. Such variety can trigger competition between horizontal and non-horizontal EU objectives; and between different horizontal objectives identified for mainstreaming. How such competition is to be neutralized is not explained. The vague wording of the horizontal clauses and the differences in language they display further complicate the picture, obstructing a clear understanding of their implications for the Union's legal order.

As an attempt to shed light on the legal value and functions of the horizontal clauses, this *Article* has probed CJEU jurisprudence where use of the horizontal clauses of arts 8-13 TFEU has been made. The CJEU's case law shows moderate use of arts 8-13 TFEU. This should not obscure the distinct ways in which arts 8-13 TFEU have been approached by the CJEU when incorporated in judicial reasoning. The CJEU has construed the mainstreaming exercise as imposing a legal duty on the EU legislator to ensure *respect* for the horizontal objectives when taking action to achieve other legitimate EU goals. The emphasis here has been on not turning a blind eye to what should be seen as overarching objectives of the Union. Arts 8-13 TFEU have also been interpreted as laying down objectives that can justify restrictions of fundamental rights and free movement. Moreover, they have re-orientated rule-interpretation in ways particularly supportive of the attainment of their objectives. So far however they have not been used as grounds for the invalidation of EU law. As a matter of fact, the degree of attention to be given to the horizontal clauses by the EU legislator remains unclear. Their effects on the choice of the legal basis of an EU measure engaging in mainstreaming and their repercussions on the broader policy areas that they address (with the exception of art. 13 TFEU, given that animal welfare objectives cannot be pursued autonomously by the EU institutions) could also benefit from further elucidation.

Perhaps what needs to be stressed by way of conclusion is that single use of the horizontal clauses is rare. In the cases reviewed, the horizontal clauses have been mostly used in conjunction with other similar provisions of the TFEU and the Charter. Considering in particular the CJEU's firm use of the Charter after it acquired binding legal force, one could argue that the overall limited use of arts 8-13 TFEU may have to do with the Charter containing corresponding provisions for most of these clauses. The Charter may have thus had a role to play in diluting their importance – not though the importance of their objectives.

<sup>142</sup> On this see also art. 7 TFEU, which proclaims that “[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”. On art. 7 TFEU, see NN Shuibhne, ‘Deconstructing and Reconstructing Article 7 TFEU’ in F Ippolito, ME Bartoloni and M Condanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 160.