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*European Energy and Environmental Law Review*

The European Energy and Environmental Law Review invites the submission of unsolicited articles from scholars, practitioners and students of energy and environmental law. The Editors are willing to consider proposals for articles but is unable to make any commitment as to publication prior to submission of the final script. Book reviews are also welcome. Letters in response to articles can only be considered for publication if they do not exceed a maximum of 500 words.

*Aims and Scope*

European Energy and Environmental Law Review is a bimonthly journal which presents comprehensive coverage of the latest developments in energy and environmental law throughout Europe. In addition to this, European Energy and Environmental Law Review contains concise, accessible articles which explore and analyse significant issues and developments in energy and environmental law and practice throughout Europe.

European Energy and Environmental Law Review enables the reader to keep abreast of significant and topical aspects of energy and environmental law, including the legal issues relating to renewables, energy security, energy efficiency, energy competition law, energy liberalisation process, electricity and gas markets, climate change; sustainable energy, land, air, fresh water, oceans, noise, waste management, dangerous substances, and nature conservation. Its succinct, practical style makes it ideal for the busy professional, while the authority, scope,and topicality of its coverage make it an invaluable research tool.

# Advancing Animal Welfare in the EU Internal Market

## Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market

*Diane Ryland**
*Dr Angus Nurse***

***Abstract***
***This article traces the evolution of EU animal welfare law and policy. What scope do Member States have to protect the welfare of animals? Two recent United Kingdom judgments are considered in which animal welfare was condoned as providing a justifiable reason for restricting the free movement of goods. In the absence of an EU animal welfare policy underpinned by a legal basis on which to adopt animal welfare laws, to what extent have the EU institutions legislated in order to protect the welfare of animals. Post Lisbon, what is the significance of the incorporation of animal welfare as a value on which the EU is premised? To what extent can the internal market provision be utilised to legislate for animal welfare? What potential does mainstreaming animal welfare hold for the development of EU animal welfare policy and law, for the CJEU and for compliance with EU animal welfare standards?***

## I. Introduction

Against the backdrop of the newly inserted Treaty provision on animal welfare in the European Union (EU),[1] this article traces the evolution of EU animal welfare law and policy in terms of the procedural competence of the EU, as opposed to engaging in an evaluation of the substantive content of specific secondary EU animal welfare laws. The scope of the interpretative role of the Court of Justice of the EU (CJEU) in relation to animal welfare will be appraised. In particular, the Court's ruling in the case of *Jippes*[2] will be analysed and placed in its pre-Lisbon context. How much leeway do Member States have to protect the welfare of animals *vis à vis* an EU fundamental freedom? In this latter context, *inter alia*, consideration will be given to two recent judgments in the United Kingdom (UK)[3] in which animal welfare was condoned as providing a justifiable reason for restricting the free movement of goods, inclusive of animals, in the EU internal market. In the absence of an explicit EU animal welfare policy underpinned by an express legal basis on which to adopt animal welfare laws, consideration will be given to the extent to which the EU institutions have legislated in order to protect the welfare of animals in the Member States of the EU. Post Lisbon, what is the significance of the Treaty incorporation of animal welfare as a value on which the EU is premised? To what extent can the internal market legal basis be utilised in order to legislate in the EU in respect of the non-market objective of animal welfare? What potential does the mainstreaming of animal welfare hold for the further development of EU animal welfare policy and secondary animal welfare laws; for the interpretive role of the CJEU; and for compliance with, and enforcement of, EU animal welfare standards?

## II. History and Background

Animal Welfare has, to date, been dealt with as an indirect concern of the EU. The first attempt to insert a Treaty reference to animal protection linked with environmental policy by the European Parliament in 1984 was unsuccessful. The German government then proposed, in 1991, that the protection of farm and laboratory animals should be expressed in the Treaty as an objective of the European Community (ECT). The European Parliament, at the same time, suggested including two references to animal protection in the Treaty; first, as one of the objectives of the environmental policy, and, second, as one of the factors to be taken into account in implementing the objectives of the common agricultural policy. At the suggestion of the UK Foreign and Commonwealth Office the Declaration on the protection of animals,[4] albeit a statement of political intent, was adopted and appended to the Treaty on European Union in *Maastricht* in 1991. The Declaration acknowledged the potential to affect animal welfare of certain areas of EU activity, and also the tentative role of both the EU institutions and the Member States in giving full

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[1] Article 13 of the Treaty on the Functioning of the European Union (TFEU) inserted by the Treaty of Lisbon 2007 with effect from 1 December 2009.

[2] Case C-189/01 *H Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689.

[3] *Regina (Countryside Alliance and Others) v Attorney General and Another* and *Regina Derwin and others v Same* [2008] 1 AC 719 (HL) and *The Queen on the application of Petsafe Limited and the Electronic Collar Manufacturers Association and The Welsh Ministers* [2010] EWHC 2908, [2011] Eur LR 270.

[4] Declaration (No 24): *The Conference calls upon the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals.*

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consideration to animal welfare, whenever EU legislation in those particular areas was formulated and implemented.[5] In preparation for the Amsterdam Intergovernmental Conference, Eurogroup for Animal Welfare[6] suggested the incorporation of a Treaty Title and Article promoting animal welfare.[7] With effect from 1 May 1999, the Treaty of Amsterdam annexed an animal welfare Protocol[8] to the ECT. The legal status of the Protocol,[9] in itself an upward move for animal welfare as compared with the prior non-legally binding Declaration, imposed an obligation on both the EU Institutions and Member States to pay full regard to animal welfare when formulating and implementing certain impacting EU policies. A price to pay for this legal formula would appear to be the additional counter requirement also to respect the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage. The Protocol originated it seems in a proposal of the UK[10] supported by Austria[11] for a Protocol providing for animal welfare to be taken into account in EU policies on agriculture, transport, the internal market, and research. The reference to the customs and traditions of the Member States was included subsequently at the Amsterdam Intergovernmental Conference, purportedly to "pass the unanimity hurdle".[12] Animals as sentient beings deserving of respect and improved protection, nevertheless, received recognition for the first time, albeit in the recital and not the main body of the Protocol, but symbolically a step forward from their classification to date as products of livestock, or agricultural goods, in EU policy and law.

## III. Interpretation by the CJEU

The Protocol's obligation to pay full regard to animal welfare in the formulation and implementation of the relevant policies clearly extended beyond the EU legislative process; into the development of EU policy, and into other areas, particularly into the translation of EU obligations through judicial interpretation and through implementation at national level.[13] In its interpretation of the status of animal welfare in EU law, and under the Protocol, the CJEU in *Jippes*[14] took pains at the beginning of its assessment to state that animal welfare did not feature among the objectives of the Treaty.[15] According to the CJEU: animal welfare was not mentioned as one of the Treaty or Common Agricultural Policy (CAP) objectives; the wording of the Protocol, which was limited only to four fields of EU activity and provided for exceptions, made it apparent that it did not lay down any general principle of EU law which was binding on the institutions; and there was no indication in the case law that the CJEU had accepted any plea of animal welfare justification based on the protection of animals derogation contained in article 36 TFEU.[16]

[5] David B Wilkins *Animal Welfare in Europe European Legislation and Concerns* (Kluwer Law International 1997) 127,129,131, 132.

[6] Established in 1980 on the initiative of the RSPCA; comprised of one animal welfare organisation per Member State; and invited secretariat of the European Parliamentary Intergroup on Animal Welfare. Mike Radford "Animal Passions, animal welfare and European policy making" in Paul Craig and Carol Harlow (eds) *Lawmaking in the European Union* (Kluwer Law International 1998) 412, 414.

[7] Wilkins (n 5) 132.

Title XVI bis ANIMAL WELFARE Art. 130t bis

1. Community policy on agriculture, transport, the internal market and research shall pay full regard to the welfare requirements of the animals used or produced in these sectors.
2. Live animals, although included in the terms "goods" or "products" in the Treaty shall be considered as sentient beings and be treated accordingly in Community legislation.
3. Legal basis Article 189c.
4. The measures adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures to protect the welfare of animals. Such measures must be compatible with this Treaty. They shall be notified to the Commission.

[8] Protocol (No. 33) *THE HIGH CONTRACTING PARTIES* DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings
HAVE AGREED upon the following provision which shall be annexed to the Treaty establishing the European Community.
In formulating and implementing the Community's agricultural, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

[9] Being "an integral part of the Treaties', Article 51 TEU.

[10] Draft Treaty of the Irish Presidency, CONF 2500/96 CAB, 5 December 1996, 135.

[11] 20 September 1996, CONF/3917/96.

[12] G Van Calster and K Deketelaere "Amsterdam, the Intergovernmental Conference and Greening the EU Treaty (1998) 9 *EELR* 12, 18.

[13] Tara Camm and David Bowles "Animal Welfare and the Treaty of Rome – A legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union" (2000) JEL 197, 202.

[14] Case C-189/01, *H Jippes* (n 2).

[15] In *Jippes*, a narrow interpretation was accorded to animal welfare under the Amsterdam negotiated Protocol of 1997, Rasso Ludwig and Roderic O'Gorman "A cock and bull story? Problems with the protection of animal welfare in EU law and some proposed solutions" [2008] JEL 363.

[16] Para 75 of the CJEU's ruling statesˆSimilarly, Article 30 EC refers to the "life of … animals" only by way of exception to the prohibition of measures having equivalent effect, and there is nothing in the Court's case law to indicate that the Court has accepted any plea of justification based on that provision.¤ Elanor Spaventa "Case C-189/01, *H Jippes v Minister van Landbouw, Natuurbeheer en Visserij*, Judgment of the Full Court of 12 July 2001" (2002) 39 *CMLRev* 1159, 1161, 1162.

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The case of *Jippes* raised the question as to whether animal welfare was to be considered one of the general principles of EU law. The CJEU refused to countenance a general principle of animal welfare in spite of the ability of the CJEU to interpret general principles of EU law in the absence of an explicit EU objective. Costs and the fact that the adopted non-vaccination policy to eradicate foot and mouth disease was designed to guarantee, on the basis of a high level of health, the free movement of goods in an internal market, were decisive factors underpinning the CJEU's decision, at that time. It was evident that exceptions (endangered species) to the non-vaccination policy were sanctioned for conservation reasons and the individual welfare of Ms Jippe's animals did not entitle them to such treatment as an alternative to culling.[17]

In the CJEU's view, the protection of animals and their health was a requirement of public interest reinforced by the Protocol, the fulfilment of which depended on the proportionality of the measure. It was necessary to verify that the EU had taken full account of the requirements of animal welfare in adopting the contested measures and in accordance with its previous case law on the CAP, the CJEU applied the test of manifest inappropriateness in order to assess the proportionality of the measures taken. The EU enjoying a wide margin of discretion in matters of the CAP, the CJEU refused to substitute its judgement for that of the European Commission.[18]

The issue of animal protection has arisen before the CJEU,[19] as has the public interest ground to be taken into account in the exercise of discretion in agriculture cases.[20] The former really concerned the health and life of animals and species conservation; not the welfare of the individual animal *per se*. It is questionable whether article 36 TFEU would apply in respect of an individual animal's welfare.[21] Furthermore, resort cannot be made to article 36 TFEU when an approximated provision of secondary EU law has been adopted.[22] Neither may Member States resort to article 36 TFEU purportedly regarding the treatment of animals in another Member State.[23] It is relevant to recall *Jippes*, in which case one of CJEU's grounds for not upholding animal welfare as a general principle of EU law was that there was no indication in the case law that the CJEU had accepted any plea of animal welfare justification based on the protection of animals' derogation contained in article 36 TFEU.

The public interest assessment to be taken into account appertained to the exercise of discretion particular to agriculture cases. The CJEU recognised animal welfare as constituting one of the conflicting interests which have to be taken into account by the EU institutions when exercising discretion. After examining the difference between a general principle and a public interest, Spaventa concluded that the CJEU's ruling reflected the dominant minimalist approach which sees the protection of animals from unnecessary suffering as an aspect of public morality; and that when the measure affects a legally recognised right (or interest), the scrutiny of the CJEU goes much further and the assessment of proportionality involves a substantial review as to how the balance between that legally recognised right and the public interest has been struck.[24] This is because "the protection for certain recognized interests – generally those such as traditionally protected civil liberties and human rights, and other *legally* acknowledged values and interests – is recognized as a judicial task."[25] It was observed that the level of protection afforded to animals varies considerably across the EU; that there seems not to be any consensus on the fact that animals have autonomous rights; that the principle of animal welfare more properly rests on public morality, i.e. on the idea shared across the EU that unnecessary cruelty must be avoided, with different Member States having different views as to when animal suffering is deemed necessary.[26]

This view was borne out in *Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgische Staat*,[27] decided without an Opinion of an Advocate General. The CJEU delivered a ruling which only cursorily upheld the protection of animal welfare as being a legitimate objective in the public interest, as reflected in the Amsterdam Protocol, while at the same time confirming that EU interests include the health and protection of animals.

## IV. Adoption of EU Animal Welfare Initiatives

In the absence of an express Treaty basis for the adoption of animal welfare initiatives, animal welfare secondary legislation has, increasingly, been derived from other Treaty objectives, for example: the

[17] *Jippes,* paras. 49, 89, 91, 133, 134 of the CJEU's ruling.
[18] See Case C-331/88 *Fedesa and others* [1990] ECR I-4023, para 21. Spaventa (n 16) 1162, 1163.
[19] See, for example, Cases C-5/94 *The Queen v MAFF, ex parte Hedley Lomas* [1996] ECR I-2553; Case C-196 *Compassion in World Farming* [1998] ECR I-1251; Case C-350/97 *Monsees* [1999] ECR I-292; Case C-67/97 *Criminal Proceedings against Bluhme* [1998] ECR I-8033.
[20] See Case C- 180/96 *UK v Commission* [1998] ECR I-2265.
[21] Camm and Bowles (n 13) 198.
[22] See, for example, Cases C -5/94 *Hedley Lomas* [1996]; C-196 *Compassion in World Farming* [1998] (n 19).
[23] Ludwig and O'Gorman (n 15) 376.
[24] Spaventa (n 16) 1164, 1165.
[25] Gráinne De Búrca "The principle of proportionality and its application in EC law" (1993) 13 YEL 105, 107. (emphasis added). Cited in Spaventa *ibid.*
[26] *Re Wedgwood,* [ 1915] Ch 113 (CA). Spaventa (n 16) 1166.
[27] Case C-219/07 [2008] ECR I-4475.

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common agricultural policy;[28] the internal market;[29] the common commercial policy;[30] environmental policy;[31] other Treaty objectives "catch-all" provision.[32] The piecemeal and largely uncoordinated animal welfare legislative achievements have been acknowledged,[33] as has the fragmentary nature of EU animal welfare law and the fact that an extensive use of the internal market harmonisation competence in non-market areas has not been practised in the animal welfare field, so harmonised rules exist in strictly confined areas and in the agricultural area concerning certain specific animals.[34] The first EU Animal Welfare Action plan 2006-2010[35] has received criticism for its "almost exclusive focus on farm animals."[36]

## V. Animal Welfare v Free Movement of Goods

The disparate nature of the EU's twenty seven Member States inevitably creates varying standards of animal welfare, reflecting cultural, political and legislative differences. How may those Member States who wish to promote the welfare of animals do so in an internal market in which there must be no barriers to trade; and in respect of which there is no approximated secondary EU law;[37] or if there is, but the transposition period has not yet expired?[38] The UK Courts were asked to consider whether national legislation promoting animal welfare infringed EU fundamental primary legislation and/or whether it was justified and proportionate in so doing, in two cases of significance, namely, *Regina (Countryside Alliance and Others) v Attorney General and Another* and *Regina Derwin and others v Same*[39] and *The Queen on the application of Petsafe Limited and the Electronic Collar Manufacturers Association and The Welsh Ministers*,[40] The customary grounds of the protection of the life and health of animals in accordance with article 36 TFEU, or of a specific mandatory requirement justified in the public interest,[41] did not feature in these two cases. Instead, the public policy derogation in the aforementioned Treaty article provided the mainstay on which to base an animal welfare justification, should that be deemed necessary.

The Hunting Act 2004 prohibits the hunting of wild mammals with dogs in England and Wales. It was alleged, *inter alia*, that the effect of the 2004 Act was to inhibit the free movement of goods across national borders within the EU, contrary to the Treaties.[42] The claimants, including Irish breeders and dealers in hunters and greyhounds which they formerly sold into the English market, and English dealers buying hunters in Ireland, sought to rely on article 34 TFEU prohibiting, as between Member States, all measures having equivalent effect to quantitative restrictions on imports. The claimants did not suggest that the issues of EU law were capable of being resolved without any element of doubt. To the contrary, they requested that the issues raised be referred to the CJEU for a preliminary ruling in accordance with the Treaties,[43] and the case of *CILFIT*.[44] Lord Bingham found

[28] For example: Council Directive 91/629/EEC laying down minimum standards for the protection of calves [1991] OJ L 340/28; Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 [2005] OJ L3/1; Council Directive 98/58/EC concerning the protection of animals kept for farming purposes [1998] OJ L221/23 .

[29] For example, Directive 86/609/EEC on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes [1986] OJ L358/1; Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Article 25(1) [2006] OJ L396/1.

[30] For example, Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community, and the introduction into the Community of pelts and manufactured goods, of certain wild animal species originating in countries which do not meet international trapping standards [1991] OJ L308.

[31] For example: Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61; Council Directive 1999/22/EC relating to the keeping of wild animals in zoos [1999] OJ L94.

[32] For example, Council Directive 83/129/EEC concerning the importation of skins of certain seal pups and products derived therefrom [1983] OJ L91/30.

[33] Camm and Bowles (n 13) 199.

[34] Ludwig and O'Gorman (n 15) 382, 383.

[35] European Commission, Community Action Plan on the Protection and Welfare of Animals 2006-2010, COM(2006) 13 final, 23 January 2006.

[36] Resolution of the European Parliament (2006/2046(INI), 12 October 2006). For an analysis of the first EU animal welfare action plan 2006-2010, see Ludwig and O'Gorman (n 15) 387, 388.

[37] See, for example, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553 (Council Directive 74/577/EEC on stunning of animals before slaughter [1974] OJ L316/10); Case C-1/1996 *Compassion in World Farming Ltd* [1998] ECR I- 1251 (Council Directive 91/629/EEC laying down minimum standards for the protection of calves [1991] OJ L340/28).

[38] Case C-350/97 *Monsees* [1999] ECR I-2921 (Council Directive 95/29/EC, amending Directive 91/628/EEC on the protection of animals during transport [1995] OJ L148/52).

[39] [2008] 1 AC 719 (HL). The joined cases will be referred to as *Countryside Alliance*.

[40] [2010] EWHC 2908, [2011] Eur LR 270 (High Court, QB Div, Admin).

[41] Case 120/78 *Rewe v Bundesmonopolverwaltung (Cassis de Dijon)* [1979] ECR 649.

[42] *Countryside Alliance* [2008] 1 AC 719 (HL).

[43] Article 267 TFEU.

[44] Case C-283/81 *Srl CILFIT V Ministry of Health* [1982] ECR 3415, paras 16-20. The obligation on the Supreme

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difficulty in recognising the ban on hunting as a trading or product rule.[45] He felt inclined to conclude that the 2004 Act did not engage EU law on the free movement of goods while at the same time expressly stating that he found it hard to say, on the present state of the CJEU's case law as he understood it, that this conclusion was clear beyond the bounds of reasonable argument. He continued to say, however, that if it were necessary to decide this question to enable the Court to give judgment, he would regard it as incumbent on the Court to seek a definitive ruling from the CJEU.[46] Approaching the issue of justification,[47] Lord Bingham applied the ruling of the CJEU in *Omega*,[48] in particular, the fact that as a derogation to a fundamental freedom, the concept of public policy must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions; and the fact that by analogy with the free movement of workers, public policy may only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society. Moreover, the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.[49] Lord Bingham believed Parliament considered the real killing of foxes, deer, hares and mink by way of recreation to infringe a fundamental value expressed in numerous statutes, culminating in the 2004 Act, and was, accordingly justifiable in EU law,[50] without the need for a referral to the CJEU. Lord Hope of Craighead agreed also that it was not clear beyond reasonable doubt that the 2004 Act did not engage the provisions of the Treaties on the free movement of goods.[51] He asked the rhetorical question as to whether it could be said that the Treaties would be engaged because the legislation prevents or substantially restricts access to the English market of Irish products. Continuing, he referred to the fact that two recent opinions by the Advocates General in cases that still awaited judgment, suggested that it was unclear as to what the answer of the Court of Justice would be to that question. These were the respective opinions of Advocates General Léger and Kokott in the cases of *Commission v Italy (Trailers)*,[52] and *Åklagaren v Mickelsson (Jet Skis)*.[53] The parties in the former case were, at that time, invited to submit written pleadings to be heard in the Grand Chamber on the question as to what extent should national measures which govern the use of products be considered to be measures having equivalent effect to quantitative restrictions on imports. Lord Hope decided that as matters stood, pending a decision by the Grand Chamber in that case, the issue could not be regarded as *acte clair*. He concluded, nevertheless, that no good purpose would be served by seeking a preliminary ruling on this matter if it was clear that the Court would be bound to hold, applying the relevant test, that any such restrictions as result from the ban imposed by the Act were justified on grounds of public policy under article 36 TFEU and were proportionate.[54] Lord Hope considered the condition of justification to have been met in that it was open to Parliament, acting within its margin of discretion and within the limits imposed by EU law, to conclude that the activities prohibited by the 2004 Act gave rise to unnecessary suffering and that, if they were engaged in for sport, they were cruel. Lord Hope acknowledged the fact that it was not suggested that the legislative aim could have been achieved by measures which were less restrictive of intra-Union trade; that due weight must of course be given to the Freedoms guaranteed by the Treaty; and that he was in no doubt that the prohibitions satisfied the principle of proportionality in accordance with EU law.

*cont.*
Court, to refer a question of EU law which it is necessary to decide in order to determine the outcome of the case and which is not *acte clair*. See Takis Tridimas "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure" [2003] 40 *CMLRev* 9; Morten Broberg "*Acte Clair* Revisited: Adapting the *Acte Clair* Criteria to the Demands of the Times" [2008] 45 CMLRev 1383; Thomas de la Mare and Catherine Donnelly "Preliminary Rulings and EU Legal Integration: Evolution and Statsis" in Paul Craig and Gráinne De Búrca (eds) *The Evolution of EU Law* (2nd edn, OUP 2011) 363; Morten P Broberg and Niels Fenger "Preliminary references as a right – but for whom? The extent to which preliminary reference decisions can be subject to appeal" [2011] *ELR* 276.

[45] The same could have been said of the effective ban on imports of bee species in Case C-67/97 *Criminal Proceedings against Bluhme* [1998] ECR I-8033, for example, or that discussed by the Advocate General in Cases C-142/05 *Åklagaren v Mickelsson and Roos* (prohibition on use of jet skis) [2009] ECR I-4273, in which cases article 34 TFEU was held to apply actually or potentially.

[46] [2008] 1 AC 719, para 31, 750.

[47] Article 34 TFEU as qualified by article 36 TFEU shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants . . . .

[48] Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, paras 28-31.

[49] *Ibid*, Case 41/74 *Van Duyn v Home Office* [ 1974] ECR 1337, para 18 and Case 30/77 *Bouchereau* [1977] ECR 1999, paras 33 and 43.

[50] In *Omega*, the German authorities considered, and the CJEU accepted, that "the exploitation of games, involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity". Case C-36/02 (n 48) paras 32 and 40.

[51] [2008] 1 AC 719, 762, para 68.

[52] Case C-110/05, 5 October 2006, para 40.

[53] Case C-142/05, 14 December 2006, paras 66-67.

[54] (2008) 1 AC 719, 762, paras 69, 70, 73.

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The judgment and the reasoning therein, ultimately, were compliant with the *CILFIT* criteria, even though it was not clear beyond reasonable doubt that the Act did not fall foul of the prohibition of restrictions on the use of a product; the subject of the CJEU's imminent rulings in the *trailers* and *jet skis* cases.[55] This much was agreed by the Court, as was the fact that an unequivocal ruling on this question of EU law was not necessary in order to enable the case in hand to be decided. The question of justification on grounds of public policy was decided correctly, in so far as Parliament acted within the permissible margin of appreciation accorded by EU law, and in so far as animal suffering must be recognised as constituting a viable restriction to the free movement of goods. That said, it is submitted that the decision as it stands further muddies the waters of the not so clear distinction between discriminatory restrictions on intra-Union trade and those applicable without distinction also to domestic products. Basically, the question which is left open is whether animal welfare is justified as being a mandatory requirement in the public interest, if the means adopted to secure that aim are reasonable;[56] or, alternatively, whether is it subsumed within the public policy derogation in accordance with the Treaties? The classic application of the former would be in respect of those measures which apply indistinctly to imported products and domestically produced and marketed goods, as does the 2004 Act; and the latter would apply in respect of discriminatory bans and measures having equivalent effect on imported and exported products only and not in application to goods produced domestically. The CJEU has, admittedly, mixed up the application of the respective justifications in its environmental jurisprudence,[57] resulting in the call for an abolition of the two separate and distinctive applications of the law justifying restrictions to the free movement of goods.[58] An unequivocal ruling to this effect has not yet been given by the CJEU in its environmental decisions;[59] the CJEU itself basing its jurisprudence on the outcome of the proportionality of the measure.[60]

This uncertainty has been perpetuated, it is submitted, by the Welsh High Court's resort to *Countryside Alliance* and its subsumed application of animal welfare as a public policy justification, in respect of an indistinctly applicable measure, namely the prohibition of the use of certain electronic training aids for companion animals in *The Queen on the application of Petsafe Limited and the Electronic Collar Manufacturers Association and The Welsh Ministers*.[61] The issue in this case was whether the Welsh Ministers were entitled to prohibit the use on cats and dogs of any electronic collar designed to administer an electric shock, as they had done by enacting the Animal Welfare (Electronic Collar (Wales) Regulations 2010.[62] The 2010 Regulations were made under section 12 of the Animal Welfare Act 2006,[63] which empowers "the appropriate national authority", in Wales the Welsh Ministers, to make regulations "for the purpose of promoting the welfare of animals for which a person is responsible, or the progeny of such animals."[64] In that case, Mr Justice Beatson explained that the use of electronic collars and similar devices was a controversial issue; that a number of groups had been campaigning for some time to ban them because they were considered to be cruel and unnecessary, potentially having adverse consequences for animals; whereas others maintained that the scientific evidence did not support a ban or regulation, and that the devices helped to avoid injury to animals on roads.[65] The two claimants challenged the legality of the Regulations, contending, *inter alia*, that the decision to ban electronic collars was disproportionate to the aim of promoting animal welfare, contrary to the

[55] Case C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519 (CJEU (Grand Chamber)) and Case C-142/05 *Aklagaren v Mickelsson (Jet skis)* [2009] ECR I-4273.

[56] Case 120/78 *Rewe v Bundesmonopolverwaltung (Cassis de Dijon)* [1979] ECR 649.

[57] Case C-2/90 *Commission v Belgium* [1992] ECR I-4431; Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-389/96 *Aher-Waggon* [1998] ECR I-4473; Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

[58] F Jacobs "The role of the European Court of Justice in the protection of the environment" (2006) *JEL* 185, 192.

[59] The Court referred to both article 36 TFEU derogations and the mandatory requirement justification of environmental protection in C-142/05 *Aklagaren v Mickelsson* [2009] ECR I-4273, paras 31-33.

[60] Case C-320/03 *Commission v Austria* [2005] ECR I-9871.

[61] [2010] EWHC 2908, [2011] Eur LR 270 (High Court, QB Div, Admin.). Hereinafter referred to as *electronic collars*.

[62] SI 2010/934. By the 2010 Regulations, the use of such a collar in Wales is an offence punishable with up to 51 weeks imprisonment and /or a fine not exceeding Level 5 on the standard scale. The Regulations prohibit the use of three categories of devices which deliver an electric shock to the animal wearing the collar, namely: remote training collars operated manually by the trainer via a remote-control transmitter; devices which operate automatically in response to a dog barking; devices activated at a boundary line marked by buried wire which interacts with the collar to keep the animal within a defined area.

[63] The Animal Welfare Act 2006 applies to England and Wales.

[64] Animal Welfare Act 2006 s 62(1).

[65] The issues here indicate conflicting views of those, such as the RSPCA and Kennel Club who promote high animal welfare standards and best practice in the treatment of dogs and who were opposed to electronic collars as being potentially harmful; and the views of some animal trainers and behaviourists that collars are quick, efficient and humane and cause no adverse effects. See DEFRA (2000) The Consultation on an Animal Welfare Bill: Analysis of the Replies, London: DEFRA. See further, Companion Animal Welfare Council, The Use of Electronic Pulse Training Aids (EPTAs) in Companion Animals, June 2012, http://www.cawc.org

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prohibitions in article 34 TFEU prohibiting unjustified restrictions on the free movement of goods.

The Welsh Ministers had issued four codes of practice dealing with the welfare, respectively, of cats, dogs, equines and rabbits, setting out the welfare needs of such companion animals detailed under five headings[66] in order to meet the duty to ensure welfare imposed by the Animal Welfare Act 2006, section 9.[67] A breach of the provisions of the Codes would not in itself amount to an offence, but a court would look at such non-compliance in order to determine whether an offence under section 9 had been committed. The Codes thus provide a guide to interpreting the law and clarify expected legal standards of animal welfare under the Act. The Code of Practice for the Welfare of Dogs in Wales expresses the need for dogs to be able to exhibit normal behaviour patterns. It states that "All dogs should be trained to behave well, ideally from a very young age using only positive reward based training and avoiding harsh, potentially painful or frightening training methods."[68] The Office of the Chief Veterinary Officer for Wales explained[69] that the Animal Welfare Act 2006, section 9, places a statutory duty on the person responsible for an animal to ensure its welfare; and that allowing the continued use of electronic devices would be inconsistent with this duty given the evidence of harm being presented by both the animal welfare organisations, registration societies and indeed the industry.[70]

The starting point for the High Court of Wales was to consider whether article 34 TFEU was engaged, which the court answered in the affirmative in the light of the decision of the Grand Chamber of the CJEU in *Commission v Italy (Trailers)*.[71] Mr Justice Beatson quoted from the judgment of the CJEU in that case, stating that article 34 TFEU "reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of [Union] products to national markets".[72] The free movement of goods provision thus engaged, the issue to decide in the *electronic collars* case was whether the ban was justified, i.e. whether the measure was suitable to achieve a legitimate aim and whether it was necessary/proportionate. It was accepted as common ground between the parties that the promotion of animal welfare was a legitimate aim for the purposes of article 34 TFEU. The suitability of the ban as a means for protecting animal welfare was questioned; in part because other aversive training methods were not banned, e.g. food deprivation or force, and because it was disproportionate because other less restrictive measures, e.g. licensing or a training requirement, had not been adopted. In emphasising that it was for the Welsh Ministers to demonstrate that its rules were appropriate and necessary to attain the legitimate objective pursued, Mr Justice Beatson condoned the liberal[73] test of proportionality laid down in *Commission v Italy (Trailers)*, namely that the "burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions."[74] He judged it to be clearly evident that those considering the policy did balance the perceived advantages of collars as put by those supporting them with their perceived disadvantages because of the evidence of harm and the impact on the welfare of the relevant animals. A licensing system would not address two of the reasons put forward for the ban, namely the fact that the collars inevitably involve the administration of an electric shock and that they do not address the underlying cause of the unwanted behaviour; they merely suppress it. As authority for the decision of the Welsh Ministers as to the level at which they wish to ensure animal welfare, Mr Justice Beatson referred to *Commission v Italy (Trailers)*, in which the CJEU stated that in the absence of fully harmonised

[66] Need: for a suitable environment; for a suitable diet; to be able to exhibit normal behaviour patterns; to be housed with, or apart from, other animals; and to be protected from pain, suffering, injury and disease.

[67] Duty of person responsible for animal to ensure welfare
(1) A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.

[68] Code of Practice for Dogs, s 3, para 8. The Council of Europe, European Convention for the Protection of Pet Animals 1987 (ETS N0. 25), which entered into force 1 May 1992. http://conventions.coe.int/Treaty/en/Treaties/Html/125.htm Article 7 Training provides: "No pet animal shall be trained in a way that is detrimental to its health and welfare, especially by forcing it to exceed its natural capacities or strength or by employing artificial aids which cause injury or unnecessary pain, suffering or distress'. As of 5 January 2013, this Convention has been ratified by 17 EU Member States; notably not signed, nor ratified, by the UK. The English Code of Practice for the Welfare of Dogs, published by DEFRA in December 2009, states in s 3: The need to be able to Exhibit Normal Behaviour Patterns – Making sure your dog behaves normally – "only use positive reward-based training. Avoid harsh, potentially painful or frightening training methods." www.defra.gov.uk/wildlife-pets/pets/cruelty/index.htm

[69] Part 2 of the Explanatory Memorandum to the 2010 Regulations.

[70] This would appear to refer to the electronic collar manufacturing industry according to the Explanatory Memorandum to the Regulations.

[71] Case C-110/05 [2009] ECR I-519.

[72] [2009] ECR I-519, para 34.

[73] See Elanor Spaventa "Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Micklesson and Roos" [2009] ELR 914; Catherine Barnard "Trailing a new approach to free movement of goods (2009) CLJ 288, 290.

[74] Case C-110/05 [2009] ECR I-519, para 66.

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provisions of EU law, "it is for the Member States to decide upon the level at which they wish to ensure road safety in their territory whilst taking account of the requirements of free movement of goods within the [EU]" and in the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such protection and the way in which that degree of protection is to be achieved and that the degree of protection may vary from one Member State to another and that Member States cannot be denied the possibility of attaining an objective such as road safety "by the introduction of general and simple rules which will be easily understood and applied ... and easily managed and supervised by the competent authorities."[75] Mr Justice Beatson concluded that while the question as to whether there is a restriction within article 34 TFEU is not subject to a *de minimis* principle, the extent of restriction has a part to play in the assessment of proportionality. In assessing whether the ban had been justified, *Countryside Alliance* was again of assistance in that Lord Bingham stated in that case that the issue is one in which "respect should be shown" to what the legislators had decided. In other words the Courts should not substitute their judgement for the moral and political judgement of the legislator. To do otherwise would be liable to subvert the democratic process.[76] Mr Justice Beatson continued to state that given the fact that the prohibition of use of certain electronic training aids was a measure of social policy aimed at animal welfare and not aimed at intra-Union trade the situation was broadly similar to that in *Countryside Alliance*. Any impediment on trade between Member States was a minor and unintended consequence which bore more hardly on those within Wales than in other Member States. He used this in order to demonstrate that the Regulations satisfied the requirement of proportionality under EU law.

The High Court of Wales relied on *Countryside Alliance*, arguably a tentative authority concerning the basis in EU law for an animal welfare justification for the reasons explained above. At least, in the interim period between the two UK cases, the CJEU in *Commission v Italy (Trailers)*[77] had confirmed the fact that a prohibition on the use of a product engages the free movement of goods provisions and in particular the prohibition on restricting market access of a product. What the latter case did not decide was the extent to which lesser explicit limitations on, or regulation of, use might be taken to restrict market access,[78] so as to engage article 34 TFEU, as was the case in question in *Countryside Alliance* concerning the effect of the Hunting Act 2004. Leading commentators are divided in their respective interpretations of the CJEU's judgment on market access in *Commission v Italy (Trailers)*. On the one hand, identification of a high threshold of hindrance,[79] was accepted as being the defining criterion, based on the dicta of the CJEU in *Commission v Italy (Trailers)* when it referred to the "considerable influence" that a prohibition on the use of a product has on the behaviour of consumers, which in its turn, affects the access of that product to the market of that Member State.[80] On the other hand, a contrary opinion voiced; "... the Court makes no such attempt: rather, *any (other) measure which hinders access of products originating in other Member States to the market of a Member State* is to be considered a measure having equivalent effect in need of justification. Thus, not only is there no threshold to be met before the measure might come under the Court's scrutiny;[81] but also, the definition embraces *all* rules and not only *market* or *market-related* rules."[82] Such a position would have implications for the Hunting Act 2004 in *Countryside Alliance* in terms of it falling within the scope of the Treaties and engaging the free movement provisions, despite its non-commercial objective. It has been asserted that in such a case, however, "the Court must be careful in not overstepping its judicial function by calling into question what are genuine policy choices of the regulator."[83] Amends, nevertheless, were made in light of the CJEU's "light scrutiny of the proportionality of the rules under consideration,"[84] as evidenced in *Commission v Italy (Trailers)* when the CJEU ruled that a Member State exercising a margin of appreciation may determine the degree of protection which it wishes to apply in order to achieve its public policy objective and the way in which that degree of protection is to be achieved.[85] Thus, in *electronic collars,* it was not for the national court to question the legislative initiative. As a result of *Commission v Italy (Trailers)*, a liberal proportionality test was applied, enabling the Welsh High Court to accord a broad margin of appreciation to the Assembly's legislative restriction, namely to ban the use of the product as opposed to, for example, imposing a mere licensing requirement.In accordance with

[75] [2009] ECR I-519, paras 61 and 67.
[76] [2010] EWHC 2908, paras 73 and 74.
[77] Case C-110/05 [2009] ECR I-519 (CJEU (Grand Chamber)).
[78] Spaventa (2009) (n 73) 922, 923.
[79] Barnard (2009) (n 73) 288, 289. P Wenneras and KB Moen "Selling Arrangements, keeping Keck" (2010) *ELR* 387, 395.
[80] Case C-110/05 [2009] ECR I-519, para 56.
[81] See now C-142/05 *Aklagaren v Mickelsson* [2009] ECR I-4273, para 28. The CJEU included national regulations which had the effect of preventing use or "greatly restricting" use as falling within article 34 TFEU.
[82] Spaventa (2009) (n 73) 922, 924. Confirmed in C-142/05 *Aklagaren v Mickelsson* [2009] ECR I-4273, para 26.
[83] Spaventa (2009) *ibid,* 925.
[84] *Ibid.*
[85] Case C-110/05 [2009] ECR I-519, para 65.

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Directive 98/34/EC,[86] the draft regulations had been notified to the European Commission.

Both of the aforementioned judgments are consistent with the UK Courts' historical views that promoting animal welfare is of public benefit,[87] and, it is acknowledged, the *CILFIT* criteria were adhered to in practice. In principle, however, since there were unanswered questions in each case, a respective referral and consequential interpretation of EU law would, potentially, have facilitated a preliminary ruling providing a sound basis on which to develop further EU wide animal welfare standards, with the potential to go some way towards ameliorating the current diverse standards of animal welfare which persist. It could be said that prior to Lisbon the CJEU would have been faced with the situation in relation to animal welfare concerns reflected in the fact that animals were merely livestock products commensurate with the CAP, and under a Protocol that did not legally recognise the sentience of animals. In *Jippes*, the CJEU is deferring to the legislature and to the Treaty provisions of the CAP. Prior to the Lisbon amendments it would have been difficult for the CJEU to interpret animal welfare concerns, given the complexity in gaining consensus amongst Member States whose intentions were not clear.[88] A preliminary ruling post Lisbon would serve to confirm the status of animal welfare as an objective policy justification in its own right; in respect of which both judicial and policy attitudes are changing to reflect popular moral opinion in the EU in a way that recognises effective animal welfare as an important aspect of public policy, and, the authors contend, as now having an enhanced legal status. Guidance for the CJEU would exist in the decisions of the European Court of Human Rights" (ECtHR) rulings on animal welfare.[89] Decisions of the CJEU are generally compatible with those of the ECtHR, the Charter of Fundamental Rights of the EU providing for the consistent interpretation of ECHR rights where these accord with EU Charter rights.[90] "Animal welfare concerns could be used – like any other product standards – to hide protectionist intentions and tendencies of national regulations. Yet, arguably animal welfare concerns should be treated differently from other product standards. A special position of animals in European law warranting a differential treatment as opposed to non-sentient goods is at least in a general way acknowledged …"[91] in article 13 TFEU. The authors submit that this consolidated Treaty acknowledgement on the part of twenty seven Member States will provide a certain base on which the CJEU can now rule with reasoning on the status of animal welfare as constituting a justifiable restriction on intra-union trade.

## VI. Animals as Sentient Beings: A Constitutional Basis

By mainstreaming animal welfare in the formulation and implementation of an increasing number of EU policy objectives, article 13 TFEU[92] is very significant indeed for the enhancement of animal welfare generally within the EU. Twenty seven EU Member States are in agreement that animals are sentient beings; accordingly the EU shall, or in other words must, pay full regard to the welfare requirements of animals in formulating and implementing its policies on agriculture, fisheries, transport, internal market, research and technological development and space, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage. The fact that the promotion of animal welfare is incorporated in the "constitutional" provisions[93] of the EU Treaties signifies the elevation of animal welfare as a priority issue in the EU, alongside other key objectives, such as, for example environmental protection and promoting sustainable development.[94] It is a milestone in the evolution of EU law and animal welfare that animals are no longer perceived in law solely as goods, the free movement of which is ensured in an internal market of twenty seven Member States. They are recognised, expressly in a Treaty article, as sentient beings, and, as such, the EU's stated aim is to ensure that animals do not endure avoidable pain or suffering. Certain areas of animal welfare remain the responsibility of the Member States, for example, the use of animals in competitions, shows, cultural or sporting events and

[86] Directive 98/34/EC of the European Parliament and of the Council of June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, Article 8 [1998] OJL 204/37.
[87] *Re Wedgwood, Allen v Wedgwood* [1915] I Ch 113.
[88] Phil Syrpis "Theorising the relationship between the judiciary and the legislature in the EU internal market" in Phil Syrpis (ed) *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2010) Chapter 1, 3, 18.
[89] Following the UK Court's decisions on the legality of the Hunting Act 2004 the ECtHR considered arguments that the Act and its ban on hunting with dogs breached human rights legislation, but concluded that any interference with the rights to a private and family life, freedom of association or the protection of property, were permissible given that "the bans had been designed to eliminate the hunting and killing of animals for sport in a manner causing suffering and being morally objectionable." *Friend v. the United Kingdom (application no. 16072/06)* and *Countryside Alliance and Others v. the United Kingdom (no. 27809/08)*.
[90] Article 52(3) EU Charter [2007] OJ C303/01.
[91] Ludwig and O'Gorman (n 15) 389.
[92] The provisions of which apply to England, Northern Ireland, Scotland and Wales.
[93] Title II TFEU Provisions having general application. Worded the same as art. III-121 of the Treaty establishing a Constitution for Europe.
[94] Article 11 TFEU.

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the management of stray dogs and cats.[95] There is not, to date, a specific animal welfare policy and consequential legal basis on which to adopt animal welfare legislation. Would it be a good thing if there were? Maybe such an individual basis would result in agreement only as to the lowest common denominator of animal welfare standards in an enlarged EU.[96] Progress in the field of animal welfare depends, therefore, on the ability of the EU law/policy making institutions to utilise the competences/powers conferred upon them by the Member States. It is worth noting that non-legally binding Environmental Action Programmes preceded, in the first instance, a legal basis for environmental protection in the EU Treaties,[97] and in the second instance, a policy in the sphere of the environment.[98] Furthermore, the EU does not have a human rights policy underpinned by a legal basis in the Treaties. Nevertheless, the cross reference to the Charter of Fundamental Rights of the EU, which has the same value as the Treaties,[99] will ensure the CJEU interprets the Charter's provisions in its legally binding preliminary rulings, and now commensurate with the judgments of the ECtHR concerning animal welfare at least to a minimum consistency. The EU, arguably, would have the competence to support educational[100] programmes aimed at promoting animal welfare; and to encourage cooperation between Member States, raising standards by highlighting best practice initiatives, and issuing guidelines, in animal welfare. Once diverse standards of animal welfare are raised through a system of education and exchange of best practice any potential animal welfare legislative/policy basis would start with an initial higher base standard.

Pursuant to the Lisbon Treaty amendments, animal welfare now has a legal status *in situ* within the general provisions of the Treaties; with the sentience of animals also legally acknowledged by all EU Member States. It is, thus, submitted that Lisbon has succeeded in taking animal welfare "from the realm of "politics" ... to the realm of legally protected "interests" upon which the Court can legitimately adjudicate."[101] That legal status subsists not as a general principle of EU law transcending the written Treaties, but as a twenty seven Member State agreement that animal welfare constitutes one of the legally recognised values of the EU. The Treaty entrenchment of animal welfare and acknowledgement of the sentience of animals attributes a generic legal status to animal welfare distinctly removed now from sector-specific EU agricultural policy in accordance with which animals are livestock products and in respect of the exercise of which a mere policy assessment of discretion ensues. Moreover, although apparently falling short of the all encompassing integration requirement pertinent to environmental protection, this latter should be placed in its historical context, according to which discussions prior to the Amsterdam Treaty focused on the incorporation of environmental considerations into specific chapters, for example agriculture. This was objected to by the sectors concerned as being too precise, resulting in the general integration principle.[102] The significance of the requirement to mainstream the welfare requirements of animals into policies which impact upon animals' welfare should not be underestimated, nor should the fact that procedural non-compliance, equally to that of environmental integration, has the potential to engage the CJEU in judicial review.

## VII. Animal Welfare: A Progressive Trend

There is evidence of an accompanying progressive trend in promoting animal welfare amongst Member States, which can be followed through in consequential amendments to earlier Directives. For example, March 2013 marks the end of the transitional period of "grace" in respect of animal testing of cosmetic ingredients;[103] reinforcement of the three R's (reduction, refinement, replacement) and the 2010 amendments to the scientific experimentation Directive are scheduled to be implemented by 2013 in Member States;[104] grass roots drive for amendments to ameliorate the transportation of live animals for economic reasons is evident, as is increased consumer awareness and group pressure using EU institutional processes to bring about strengthened animal welfare requirements.[105] Moral attitudes across Europe are changing and EU citizens increasingly are in favour of good standards of animal welfare.[106]

[95] http://ec.europa.eu/food/animal/welfare/policy/index_en.htm Concern does exist in the EU in respect of feral cats and dogs, Wilkins (n 5) 84-89. See further the Belgian Presidency Council Conclusions 2010 (n 117).

[96] Ludwig and O'Gorman (n 15) 363, 385, citing Robert Garner *Animals Politics and Morality* (2nd edn, Manchester University Press 2004) 204.

[97] Inserted by the Single European Act 1986.

[98] Inserted by the Treaty on European Union 1992.

[99] Article 6 TEU.

[100] Article 165 TFEU.

[101] Spaventa (2002) (n 13) 1165.

[102] Ludwig Krämer *EU Environmental Law* (7th edn, Sweet and Maxwell 2011) para 1.24.

[103] Regulation (EC) No 1223/2009 of the European Parliament and of the Council on Cosmetic Products [2009] OJ L 342//59.

[104] Directive 2010/63/EU of the European Parliament and of the Council on the Protection of Animals used for Scientific Purposes [2010] OJ L 276/33.

[105] European Parliament adopts the Report of Janusz Wojciechowski MEP on the protection of animals during transport. Issue 34, January 2013, Animals in Europe, Eurogroup for Animals, www.eurogroupfornimals.org

[106] "Surveys suggest that there is a significant public interest in animal welfare issues and there were high levels of public engagement in EU consultations linked to reviews of legislation." European Commission (2010) Evaluation of

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Beyond the requirement to have full regard to animal welfare consequentially intensifying the proportionality review on the part of the CJEU, the legal empowerment to mainstream animal welfare will, it is submitted, have a consequential positive effect on the interpretative stance taken by the CJEU. This should be read in conjunction with the extension of the policy areas which impact, and the consequential increased scope to legislate, on animal welfare; albeit with provision for derogation on cultural/religious grounds. Significantly, the latter cultural diversity proviso should not be viewed as an obstacle to legislating to protect animal welfare on the part of the majority of Member States.[107] To the contrary it should be viewed positively in that regard; working towards assuaging animal welfare peer pressure and the upward benchmarking of higher animal welfare standards throughout the EU as a whole. If the "price" to pay for forging ahead with animal welfare initiatives on the part of the majority is a concession on cultural, religious, regional grounds to a minority, this should not be looked at negatively. Take the example of the Regulation on trade in seal products, in which the placing on the market of seal products which result from hunts traditionally conducted by the indigenous Inuit community which contribute to its subsistence is allowed.[108] Nevertheless the Regulation forges ahead in its objective of protecting seals from cruel hunting methods by otherwise prohibiting the importation into the EU of seal products in accordance with its rules.

Animal Welfare is on an upward trend. It is important also not to view the ruling of the CJEU in *Jippes* as a damp squib, but to contextualise the ruling in relation to the application made, at the time of the animal welfare Protocol, and to acknowledge the justification in the CJEU's reasoning, in particular in relation to the accepted fact that a general principle of animal welfare does not exist in EU law. At the same time, the authors contend that it is probably too strong to allude, somewhat negatively, to the lack of consensus on the animal rights position in the EU and to the lack of animals' legal standing *per se*. There is a difference between animal rights and a legal entitlement to good animal welfare. There is a position in between for animal protection; and, moreover, between animal protection existing as general principle of EU law and the existence of a legal entitlement to improved animal welfare, monitored for compliance against established EU animal welfare standards. Step by step, improvements in animal welfare may evolve into rights for animals.[109] In the interim, good reason and increasing societal pressure for improving animal welfare standards on the part of the Member States in the EU has been incorporated into the Treaties as a result of the Lisbon amendments, which do entrench a legal entitlement to good animal welfare for all animals as sentient beings. Mainstreaming animal welfare is a root and branch evolution in raising the animal welfare profile and incrementally reducing the detrimental impact of other relevant policies. Thus a steady evolution of animal welfare in an EU of economic interests will become apparent. EU level regulation, furthermore, will serve to limit the potential for domestic protectionist measures masquerading as animal welfare concerns.[110]

## VIII. The Second EU Animal Welfare Action Programme 2012-2015

The second EU action programme for the protection and welfare of animals 2012-2015,[111] currently, is considering possible options for furthering the EU's animal welfare strategy, including the adoption of a general framework animal welfare law overarching current specific pieces of legislation, setting out generic animal welfare standards and principles.[112] A horizontal approach to animal welfare is contemplated, thus moving away from the farm sector initiatives[113]

*cont.*
the EU Policy on Animal Welfare & Possible Options for the Future: Executive Summary, 1.1.4, para. 1, http://europa.eu/food/animal/welfare/actioplan/2%20Executive%20Summary%20_%20SANCO%20_%20Animal%20Welfare%20Evaluation%20final.pdf

[107] It is relevant that on 28 July 2011 Catalonia's regional parliament banned bull fighting. *The Economist* 29 July 2011, http://www.Economist.com/node/16706413

[108] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products [2009] OJL 286/36.

[109] See further Robert Garner "A Defense of a Broad Animal Protectionism" 103 and "A Discussion Between Francione and Garner" 175 in Gary L Francione and Robert Garner *The Animal Rights Debate Abolition or Regulation?* (Colombia University Press 2010). Garner sees "[improved] welfare reform as moving incrementally toward the recognition of the right of animals not to suffer in unacceptable ways." 176.

[110] Ludwig and O'Gorman (n 15) 389.

[111] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, COM (2012) 6 final, http://ec.europa.eu/food/animal/welfare/actionplan/docs/aw_strategy_19012012_en.pdf

[112] Accompanying Commission Staff Working Paper, Impact Assessment, SEC (2012) 56 final, SEC (2012) 55 final, 19 January 2012, http://ec.europa.eu/food/animal/welfare/actionplan/docs/impact_assesment_19012012_en.pdf

See also, European Parliament Resolution on the results of the 2006 Action Plan and on the prospects for a new strategy on animal welfare, 5 May 2010, P7_TA(2010)0130.

[113] For example: Council Directive 98/58/EC concerning the protection of animals kept for farming purposes [1998] OJ L221/23; Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens [1999] OJL 203/53; Council Directive 2008/119/EC laying down minimum standards for the protection of calves [2009] OJ L10/7;

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adopted by the EU to-date. "Animal welfare" is defined by the World Organisation for Animal Health (OIE):[114] "Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear and distress." The concept of the five freedoms developed by OIE so as to define the essential elements of ensuring proper welfare to the animals are stated as follows: Freedom from hunger, thirst and malnutrition; Freedom from fear and distress; Freedom from physical and thermal discomfort; Freedom from pain, injury and disease; Freedom to express normal patterns of behaviour.

The proposed new EU strategy on animal welfare would have two general objectives, namely: to give animals a level of protection and welfare that reflects European societal concerns; and to ensure fair competition for the EU animal sector in the context of the internal market. Specific objectives of the new strategy would be: to improve the enforcement of EU legislation in a consistent approach across Member States; to provide for open and fair competition for EU business operators that implement or go beyond EU requirements; to improve the knowledge and awareness of EU business operators regarding animal welfare; to improve the coherence of animal welfare across animal species, i.e. to move beyond sector specific regulation. Four main options are identified, reflecting EU and Member State level action, including non-legislative and legislative tools. Taking no action at EU level has been excluded, *inter alia,* because of the likely failure thereby to address a number of potential or critical animal welfare issues taking place on a large scale in respect of dairy cows, turkeys, dogs and cats in certain EU Member States. Likewise, a sector based approach amending sector-specific legislation has been discarded. Such an approach would require the change of at least eight specific legislative acts, while the work could be performed with one act, ensuring better coherence, consistency and dissemination of research outcomes. Sector-based reform would also make it very difficult to use a market based approach. The adoption of a framework law is strongly supported by the European Parliament.[115] Producers' organisations are mostly in favour of improving enforcement through non-legislative tools, while NGOs consider that new laws would be necessary, combined with more non-legislative action. Member States are uniformly supportive of better enforcement. There is also wide support for the establishment of a European network of reference centres for animal welfare, provided it is not creating a new structure.[116]

The fourth option, on which emphasis is placed, would consist of streamlining requirements for competence and using animal welfare indicators, both of which would be subsumed in one EU general framework animal welfare law. Requirements for competence on the part of all animal handlers would be integrated in a single common text in which the possibility of using animal welfare indicators would also be introduced as an alternative to compliance with the functional and somewhat technical requirements of existing sector specific legislation. It is foreseen that the competence requirements for animal handlers would include, *inter alia,* the need to: understand the ethical principles of the human-animal relationship; show general knowledge and understanding of animal behaviour; identify and understand the signs of pain, suffering, distress and fear in animals; and show knowledge of the legal obligations related to the protection and welfare of animals. This would imply replacing the Directive on farm animals with the new law, introducing additional and alternative compliance mechanisms, namely the use of validated animal-based animal welfare indicators. A more flexible system of animal welfare standards is envisaged. This option, in itself, would be limited to categories of animals currently covered by specific pieces of legislation (calves, pigs, laying hens, broilers, transport and killing of animals, experimental and zoo animals). Nevertheless, the strategy additionally envisages investigating the possibility of extending the scope of the proposed EU framework animal welfare law. Documented evidence substantiates the fact that animal welfare problems exist in various scales in species where the EU has not provided particular rules for their protection. This complementary option would address the EU relevance of extending the scope of the proposed EU framework animal welfare law to other animals where animal welfare problems have been identified (dairy cows, beef cattle, rabbits, turkeys) as well as to dogs and cats.[117] The investigation will, it is projected,

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Council Directive 2008/120/EC laying down minimum standards for the protection of pigs [2009] OJ L47/5; Council Directive 93/119/EC on the protection of animals at the time of slaughter or killing [1993] OJ L340/21. This text will be replaced in 2013 by the application of Council Regulation (EC) No 1099/2009 [2009] OJ L303/1.

[114] See *International Terrestrial Animal Health Code of the World Organisation for Animal Health (OIE)*, Chapter 7.1. http://www.oie.int/en/international-standard-setting/terrestrial-code/access-online/

[115] Committee on Agricultures and Rural Development, Rapporteur: Marit Paulsen, Report on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, A7-0216/2012, 27.6.2012.

[116] Report from the Commission, "Options for animal welfare labelling and the establishment of a European Network Reference Centre for the protection and welfare of animals" COM (2009) 584 final, 28 October 2009.

[117] Member States have acknowledged the need: for approximated measures at EU level for the breeding of companion animals; for a compatible EU system for the registration and identification of dogs and cats; for more

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consist of launching a series of studies for assessing whether welfare problems identified by scientists are significant at EU level and whether they affect the functioning of the internal market or other EU objectives (public health).[118]

The significance of the second EU animal welfare strategy is the projected adoption of horizontal or generic secondary animal welfare legislation using the Treaty internal market legal basis, as one potential option. Such a framework measure, would, if adopted, move beyond a sector specific focus. It would introduce flexible animal welfare output standards against which to monitor compliance with EU animal welfare requirements generally. It would, thus, bolster enforcement actions for non-compliance with both existing technical requirements and these newly articulated at EU level requiring more responsible treatment of animals in the Member States. It is submitted that the CJEU would be informed by such agreed standards of animal welfare akin to setting down a duty of care on the part of handlers of animals. It is to be hoped that the purported new generic framework Animal Welfare Directive with its suggested animal welfare standards/output indicators will take on a role comparable or equivalent to that of the visible benchmarking of EU citizen's fundamental rights, as well as facilitating greater compliance, not least underpinning increased enforcement actions. A concern has been expressed that these general animal welfare indicators do not water down existing substantive requirements.[119] To the contrary, the authors contend that these would be facilitative of compliance and would be taken into account additionally by the CJEU and the EU institutions when determining if there has been a breach of existing animal welfare legislation in the event that output indicators of animal welfare standards are not being applied.

## IX. Mainstreaming Animal Welfare and Resort to the Internal Market Legal Basis

The proposed framework animal welfare law would, potentially, be adopted on the legal basis enabling the approximation of laws for the attainment of the internal market, namely article 114 TFEU. The Treaty of Lisbon has empowered such action by its insertion of the animal welfare mainstreaming clause in article 13 TFEU. The extent to which it is possible to base a non-market objective on the internal market legal basis still deserves to be circumscribed by the Court's judgment in the first Tobacco case,[120] albeit within defined limits. That case was the first case in which the CJEU annulled an EU internal market measure for the reason that it did not, contrary to the objectives of article 114 TFEU, contribute to either the establishment (free movement) or the functioning (an appreciable impact on competition) of the EU internal market. The case bore directly on the question of the competence[121] of the EU to act and not as to the correctly chosen legal basis on which to base a provision of secondary EU law. The CJEU declared that article 114 TFEU did not give the EU institutions a general power to regulate the internal market.[122] The fact remains that if secondary EU legislation does have an internal market objective in accordance with article 114 TFEU, which it did not in the first *Tobacco* case, then the internal market provision may be the basis on which to achieve additional aims. Since that case, it is evident that the CJEU in its case law "generously finds an adequate contribution to the functioning of the internal market."[123]

It is legitimate to approximate Member States' laws in order to achieve both internal market objectives and also the non-market objective of the welfare of animals, and indeed there is now "a duty to do so" ... "in the context of the overall constitutional framework of the EU as revised by the Lisbon Treaty."[124] The role of the CJEU, De Witte continues,

*cont.*
extensive education on responsible cat and dog ownership; to support national information campaigns on the negative impact of non-curative surgical interventions on the welfare of dogs and cats. Council of the European Union, Presidency Conclusions, Brussels, 15620/10, 15 November 2010. http://register.consilium.europa.eu/pdf/en/10/st15/st156

[118] Accompanying Commission Staff Working Paper, Impact Assessment, SEC (2012) 56 final, SEC (2012) 55 final, 19 January 2012, http://ec.europa.eu/food/animal/welfare/actionplan/docs/impact_assesment_19012012_en.pdf

See also, European Parliament Resolution on the results of the 2006 Action Plan and on the prospects for a new strategy on animal welfare, 5 May 2010, P7_TA(2010)0130.

[119] Opinion of the Committee on Petitions for the Committee on Agriculture and Rural Development on the EU Strategy for the Protection and Welfare of Animals 2012-2015, Rapporteur: Victor Bostinaru.

[120] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419. The authors thank Panos Koutrakos for his comments on an earlier draft.

[121] See Gráinne de Búrca "The Tobacco Advertising Saga: Political Aspirations and Constitutional Constraints" University of Cambridge Centre for European Legal Studies (2001) CELS Occasional Paper No. 5, 5; Stephen Weatherill "Competence Creep and Competence Control" (2004) 23 YEL 1, 13; "Editorial Comments: Taking (the Limits of) Competence Seriously" [2000] 37 CMLR 1301.

[122] Case C-376/98 *Germany v European Parliament and Council* (n 120) para. 83.

[123] Stephen Weatherill "The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a 'Drafting Guide'" (2011) Vol 12 No. 3 GLJ 827, 843.

[124] "even though this is not judicially enforceable." Bruno De Witte "A Competence to protect. The pursuit of non-market aims through internal market legislation" in Phil Syrpis (ed) *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2010) Chapter 2, 25, 26, 27.

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> is to set the broad framework in which the internal market competence must be exercised without constraining too much the space for democratic deliberation, and to interpret single items of internal market legislation in the light of the regulatory mix which the legislature sought to achieve in them.

In pursuing the non-market goal of animal welfare the internal market legislature must respect two constitutional limits, namely: the "threshold requirement" and the principle of subsidiarity.[125] The threshold limit mandates that the measure must adequately contribute to improve the conditions for the establishment and functioning of the internal market; even if animal welfare is in fact the main reason why the internal market measure was proposed and adopted. Pursuant to the Lisbon Treaty, exercise of the competence to adopt internal market laws is subject to the subsidiarity principle, the internal market being deemed to be a shared competence. The EU institutions will have to establish that the EU is better suited than the Member States acting individually to legislate in respect of market activities whilst taking fully into account animal welfare concerns. De Witte concludes,

> [o]ne of the interesting questions of the current post-Lisbon period is the extent to which the increased insistence of the Treaty text on non-market values will have a measurable effect on the actual content of the internal market laws adopted by the EU institutions – in other words whether the EU institutions will actually use their "competence to protect" ... other non-market values.

A practical example of mainstreaming animal welfare using the internal market legal basis is, for example, the Regulation on trade in seal products in the EU.[126] Here, it should be recalled that the welfare of seals, together with safeguarding the cultural practices of the indigenous Inuit tribes necessary for their subsistence, were overriding factors in adopting the Regulation on the basis of the internal market provision. Nevertheless the Regulation, at the same time, approximated Member States' laws in prohibiting trade in seal products within the EU, for the most part, thus satisfying the internal market requirements of the Treaties.

A second example of mainstreaming animal welfare, using the internal market legal basis is the Directive on animals used for scientific purposes[127] which alludes to the fact that further disparities between Member States have emerged in the level of protection afforded to animals used for scientific purposes, likely to constitute barriers to trade in products the development of which involve experiments on animals. Accordingly, the Directive seeks to reduce such disparities by approximating Member States' laws to ensure a proper functioning of the internal market. Animal welfare is stated to be a value of the Union that is enshrined in article 13 TFEU and the capacity of animals to sense and express pain, suffering, distress and lasting harm is acknowledged. It is significant that respect for the intrinsic value of animals and the ethical concerns of the public are expressed. The practical application of the mainstreaming clause and the second EU animal welfare strategy are, thus, manifest commensurate with the view that the Lisbon Treaty amendments provide "plenty of scope for post-Treaty dynamics to unfold."[128]

## X. Concluding Comments

"The Union is not only a market to be regulated, but also has values to be expressed."[129] As a result of the Treaty of Lisbon amendments, the promotion of animal welfare is now a stated value of the European Union enshrined within the Treaty itself. It is contended that the constitutional acknowledgement on the part of twenty seven EU Member States that full regard shall be paid to the welfare requirements of animals in formulating and implementing, *inter alia*, EU internal market policies, together with their express acknowledgement of the status of animals as sentient beings, calls out now for a CJEU ruling on the relationship between animal welfare and the free movement of goods. The authors contend that there is broad scope, cultural considerations notwithstanding, for the CJEU to rule on cases so as to advance concerns for animal welfare over considerations of trade in an internal market.

Post Lisbon, there is an animal welfare Treaty provision in which the mainstreaming of animal welfare is expressed as a general objective of the EU and which, also significantly, accords legal recognition to the sentience of animals, embodying the scope to move away from sector specific regard to particular animals. In conjunction with, and pursuant to, the dominant drive of the second EU animal welfare strategy, the policy drafters are exercising and exerting a much stronger generic animal welfare policy in respect of animals as sentient beings; this in the absence of an express legal basis but as empowered to do by the Treaties' mainstreaming clause. Post Lisbon

[125] *Ibid.*

[126] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products [2009] OJL 286/36.

[127] Directive 2010/63/EU of the European Parliament and of the Council on the protection of animals used for scientific purposes [2010] OJL 276/33. Recitals 1, 2, 6 and 12.

[128] D Benson and A Jordan, "A Grand Bargain or an Incomplete Contract¤? European Union Environmental Policy after the Lisbon Treaty" (2008) EEELR 280, 288.

[129] Case C-34/10 *Oliver Brüstle v Greenpeace* judgment of the Court (Grand Chamber) 18 October 2011, Advocate General Bot's Opinion delivered on 10 March 2011, paras 45 and 46.

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there is now a reinforced legal commitment to utilise the internal market legal provision to achieve both internal market and animal welfare objectives, with scope for the balance to weigh disproportionately in favour of the latter as long as there is a genuine internal market aim also. Embedded, thus, in the constitutional provisions of the Treaties by the agreement of twenty seven EU Member States, the CJEU has been given the impetus to interpret EU policy as the Member States intended in accordance with the consensus thus achieved, and also commensurate with the stated balance expressed by the EU institutions in each ensuing separate legal instrument. Extending beyond the legislative process and judicial interpretation, an increased role is envisaged for the CJEU in its enforcement jurisdiction, incrementally reinforcing implementation and enforcement of improved EU animal welfare standards at national level.