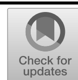
ERA Forum (2020) 20:691–705
https://doi.org/10.1007/s12027-019-00588-4

ARTICLE



Animal welfare before the Court of Justice of the European Union

Vojtěch Vomáčka[1]

Published online: 20 November 2019
© Europäische Rechtsakademie (ERA) 2019

Abstract This article provides a brief commentary on the landmark judgments of the European Court of Justice concerning animal welfare. In particular, it elaborates on the position of the animal welfare principle in European Union law and its relationship with European Union environmental policy, as well as on the findings of the European Court of Justice concerning the applicability of European Union rules beyond the Union's borders and on conflicts between the regulation of ritual slaughter and the freedom of religion.

Keywords Animal welfare · Court of Justice · Environmental law · Case-law

1 Introduction

At the very beginning of his memorable opinion in the *Masterrind* case (C-469/14)[1] concerning the protection of animals during transport, Advocate General Wahl referred to a popular saying that "the greatness of a nation and its moral progress can be judged by the way its animals are treated."[2] He added that "if that is the case, then the matter under consideration warrants particular attention."[3]

[1] Case C-469/14 *Masterrind*, EU:C:2016:609.

[2] Opinion C-469/14 *Masterrind*, EU:C:2016:47, para. 1.

[3] *Ibid*.

JUDr., Ph.D., LL.M. V. Vomáčka is legal advisor of Supreme Administrative Court of the Czech Republic and assistant professor of Masaryk University.

✉ JUDr. V. Vomáčka
vomacka@mail.muni.cz

1 Masaryk University, Veveri 70, 602 00 Brno, Czech Republic

Judged from a global perspective, the efforts of the European Union to improve the living conditions of the farming animals merit respect. Since the 1970s, the Union has developed a significant body of animal welfare-related legislation with positive results across Europe and beyond. Nowadays, farming activities are covered by five directives which impose minimum standards, while the transport and the killing of animals are covered by regulations which set up similar requirements for all Member States. Animal welfare is embedded in the Treaty on the Functioning of the European Union (TFEU), which requires in its Art. 13 that the welfare of animals must be taken into account in the Union's policy on internal market, research, and agriculture, *inter alia*.

In comparison to established European Union policies, however, animal welfare regulation resembles an unwanted child, which is sometimes invited to the table but more often prepares the meal for other family members and their guests. While many measures on animal welfare have been adopted, there is not yet a direct legal basis for animal welfare measures in European Union primary law. This sheds some confusion on its relationship with European Union policies. And for this particular reason, animal welfare-related regulation often seems to escape the attention of legal professionals.

Nevertheless, it would be a mistake to ignore a specific field of law such as this which generates a number of thought-provoking questions regarding its role in European Union law and, on a broader level, the implications of the moral imperative which lies behind its technical legal norms. The corresponding case-law of the Court of Justice (CJEU) provides guidance which is relevant even for other European Union policies including environmental policy. Therefore, in this contribution, I will provide a brief commentary on landmark judgments of the European Court of Justice concerning animal welfare and emphasise their relevance for European Union environmental law.

2 The *Jippes* case and the principle of animal welfare in European Union law

The first directives on animal welfare were based on Art. 43 of the Treaty establishing the European Economic Community (EEC) (now Art. 43 TFEU) on the common agricultural policy), often in combination with Art. 100 EEC (now Art. 115 TFEU) concerning approximation of national laws which directly affect the establishment or functioning of the internal market). Their main goals were to limit disparities between existing national laws on the protection of animal welfare and secure the proper functioning of the common market.

Over the course of the years, the approach to animal welfare changed. The European Union signed the European Convention for the Protection of Animals Kept for Farming Purposes in 1979[4] and the European Convention for the Protection of Animals During International Transport of 1968 in 2004.[5]

[4] Decision 88/306/EEC of the Council of 16 May 1988 on the conclusion of the European Convention for the Protection of Animals for Slaughter [1988] OJ 1988 L137/25.

[5] Decision 2004/544/EC of the Council of 21 June 2004 on the signing of the European Convention for the protection of animals during international transport [1988] OJ 2004 L241/21.

The Treaty of Maastricht of 1992 was accompanied by a declaration concerning the protection of animals and later on, a Protocol on the Protection and Welfare of Animals was annexed to the Treaty of Amsterdam. It stated that

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

The Protocol originated from a number of efforts to have animal welfare specifically enumerated as an area of Community competence.[6]

In *Jippes* (C-189/01),[7] the European Court of Justice had its first chance to elaborate on the position of animal welfare in European Union law. The appellants challenged the vaccination ban and asserted that it was contrary to a general principle of Community law, requiring all appropriate measures to be taken in order to ensure animal welfare and to guarantee that animals are not unnecessarily exposed to pain or suffering and that no unnecessary harm is done to them. The European Court of Justice emphasised that "ensuring the welfare of animals does not form part of the objectives of the Treaty, as defined in Article 2 EC, and that no such requirement is mentioned in Article 33 EC, which sets out the objectives of the Common Agricultural Policy."[8] According to the European Court of Justice, it was not possible to infer any principle of general application from the Convention since it did not impose any clear, precisely defined and unqualified obligation, or from Declaration No 24, which had been superseded by the Protocol and the wording of which was even less binding than that of the Protocol.[9] Since the wording of the Protocol was limited only to four fields of Union activity and provided exceptions, it did not lay down any general principle of law.

The Court did attach some importance to the protection of animals as a requirement of public interest, the fulfilment of which could be assessed by considering the proportionality of a measure. However, the findings of the European Court of Justice were perceived as disappointing, undermining the Protocol and the strong signal that animal welfare should be considered in European Union law.[10]

The *Jippes* conclusions were repeated by the European Court of Justice later on in *Viamex* (C-37/06 and C-58/06),[11] a case concerning the validity of detailed rules of application for export refund arrangements as regards the welfare of live bovine

[6] *See* Van Calster, G., Deketelaere, K.: Amsterdam, the intergovernmental conference and greening the EU Treaty. European Energy and Environmental Law Review (1998).

[7] Case C-189/01 *Jippes and Others*, EU:C:2001:420.

[8] *Ibid.*, para. 71.

[9] *Ibid.*, para. 74.

[10] See Ludwig, R., O'Gorman, R.: A Cock and Bull Story? Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions. Journal of Environmental Law (2008).

[11] Joined Cases C-37f/06 and C-58/06 *Viamex Agrar Handels GmbH and Zuchtvieh-Kontor GmbH* (*ZVK*) *v Hauptzollamt Hamburg-Jonas*, EU:C:2008:18, para. 22.

animals during transport,[12] and in *Andibel* (C-219/07),[13] a case concerning the prohibition on the importing, holding or trading of certain endangered species.

The last case is in particular worthy of attention since the applicable European Union law affected by animal welfare concerns at the national level aims to protect biodiversity (following the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). It does not, *per se*, deal with animal welfare. In national animal welfare law, Belgium introduced more stringent protective measures than the rules regarding the holding of specimens of species covered by European Union law[14] for the sake of the welfare of animals held in captivity and "based on the finding that the holding of mammals is acceptable only in a limited number of cases, in view of the minimum physiological and ethological needs of those mammals."[15] As a result, a list of species that could be held was drawn up by the national authority. The specimens of species or categories other than those included in the list may only be held *inter alia* in zoological gardens, laboratories, circuses and travelling exhibitions, but also by private individuals recognised by the Minister responsible for the protection of animals and by firms trading in animals provided that a prior written agreement has been concluded with the natural or legal persons in one of the above-mentioned categories.[16] The Court of Justice concluded that such restriction might be justified on grounds of the protection of the health and life of animals under Art. 30 TEC (Art. 36 TFEU), and left its final assessment to the national court.[17] The findings of the European Court of Justice imply that animal welfare requirements may, if proportionate to the objective pursued, present reasons for more stringent environmental regulation within the meaning of Art. 193 TFEU (concerning environmental policy).

The above-mentioned case-law predates the adoption of the Lisbon Treaty and introduction of Article 13 TFEU which elevated the principle of animal welfare from a simple declaration to a legally binding provision in the first part of that Treaty, which is devoted to principles. According to Article 13,

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

As Sowery points out, "Article 13 TFEU purports to reshape the existing understanding of animal welfare in EU law. But, in practice, this shift creates clear tensions with

[12] For more case-law on the export refund arrangements, see Case C-207/06 *Schwaninger*, EU:C:2008:414, Case C-455/06 *Heemskerk and Schaap*, EU:C:2008:650, Case C-277/06 *Interboves*, EU:C:2008:548.

[13] Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, EU:C:2008:353.

[14] Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1996] OJ L 61.

[15] Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, EU:C:2008:353, para. 24.

[16] *Ibid.*, para. 25.

[17] *Ibid.*, para. 43.

the previous status of, and protections for, animals as "products" under Union law."[18] The wording of Art. 13 is very similar to the Protocol and the scope of the provision remains limited to certain areas of Union activity, with the same religious and cultural exceptions. It is thus not surprising that the European Court of Justice holds the view it does of the status of animal welfare requirements in European Union law. Most notably, in *Schaible* (C-101/12)[19] and *Zuchtvieh* (C-424/13),[20] the European Court of Justice once again stated that animal welfare goals constitute "legitimate objectives in the public interest pursued by Union legislation".[21]

The power of the European Union to improve animal welfare by making laws and enforcing them is therefore limited to the policy areas listed exhaustively in Art. 13 TFEU. The key topic of animal welfare stays within the Health and Agriculture portfolios. However, European Union environment policy, although not listed in Art. 13 TFEU, can become an additional basis for animal welfare regulation. As the Commission points out,

> "Union legislation on the welfare of animals has therefore so far been adopted on the basis of what are now Articles 43(2) TFEU—Common Agricultural Policy, 114 TFEU—Internal Market and 192 TFEU—Protection of the Environment, as the adopted legislation contributed to the advancement of the specific objectives of these respective policies."[22]

From this perspective, the essential instruments of environmental protection may also take into account animal welfare criteria since their scope extends beyond the environment in a narrow sense. However, in European Union environmental law, farming animals are mostly considered products or a source of emissions, and not as sentient beings.

For example, large installations[23] for the intensive rearing of poultry or pigs are subject to an environmental impact assessment procedure according to the Environmental Impact Assessment Directive, which was adopted in 2011 and amended in 2014.[24] Other intensive farming installations, fish farming installations[25] and installations for the slaughter of animals[26] are assessed if they meet criteria established by the Member States. Article 3 of the Directive stated that an environmental impact assessment should identify, describe and assess the direct and indirect effects of a

[18] Sowery, K.: Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals Under Union Law. Common Market Law Review (2018).

[19] Case C-101/12 *Schaible*, EU:C:2013:661.

[20] Case C-424/13 *Zuchtvieh-Export GmbH*, EU:C:2015:259.

[21] Case C-101/12 *Schaible*, EU:C:2013:661, para. 35, Case C-424/13, Zuchtvieh-Export GmbH, EU:C:2015:259, para. 35.

[22] Commission's reply stating the reasons for refusal of registration of the European citizens' initiative *Our concern for insufficient help to pet and stray animals in the European Union*. C(2013)7645 final.

[23] Of equal or higher capacity than 85 000 places for broilers, 60 000 places for hens; 3000 places for production pigs (over 30 kg); or 900 places for sows.

[24] Annex I(17).

[25] Annex II(1)(e, f).

[26] Annex II(7)(c).

project on, *inter alia*, fauna and flora.[27] In practice, however, fauna and flora translated merely to *wild* fauna and flora, in their particular region or habitat. This became more evident after the Directive was amended in 2014. Its Article 3 now requires an assessment of impacts on "biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC".[28]

The same applies to the strategic environmental assessment procedure (which regulates assessment of plans and programmes) pursuant to the Strategic Environmental Assessment Directive[29] which itself refers to the Convention on Biological Diversity, the Habitats Directive[30] and the Birds Directive[31] in its own recital 10. These two Directives create provisions for the protection of certain species of flora and fauna when they occur in the wider natural environment.

Similarly, the Industrial Emissions Directive adopted in 2010[32] requires a specific permit for large industrial installations including those for the intensive rearing of poultry or pigs[33] and slaughterhouses operating at a large capacity.[34] The permit must take into account the whole environmental performance of the plant and the permit conditions including emission limit values must be based on the Best Available Techniques (BAT). The Best Available Techniques conclusions for the intensive rearing of poultry or pigs[35] focus on the prevention of waste, noise, dust and odour, and on the efficient use of water and energy. There is no doubt that animals may benefit from these aspects, but animal welfare is not a goal of the Best Available Techniques. In contrast, some prescribed measures may conflict with animal welfare, *e.g.*, decreasing the temperature of the indoor environment, or decreasing the airflow and its velocity in order to deal with excessive odour. The welfare requirements of sectoral mandatory regulations interact with the integrated approach of the Industrial Emissions Directive but do not complement it.[36] From the environmental protection perspective, animals are considered a source of emissions.[37]

[27] Article 3(a).

[28] Article 3(a). Annex IV(4) concerning information for the EIA report was amended accordingly.

[29] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197.

[30] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended [1992] OJ L 206.

[31] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L 20.

[32] Replaced Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L 257.

[33] Annex I(6.6): Intensive rearing of poultry or pigs: (a) with more than 40 000 places for poultry; (b) with more than 2 000 places for production pigs (over 30 kg), or (c) with more than 750 places for sows.

[34] Annex I(6.4)(a): Operating slaughterhouses with a carcass production capacity greater than 50 tonnes per day.

[35] Commission Implementing Decision (EU) 2017/302 of 15 February 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for the intensive rearing of poultry or pigs [2017] OJ L 43.

[36] See Pellini, T., Morris, J.: A framework for assessing the impact of the IPPC directive on the performance of the pig industry. Journal of Environmental Management (2001).

[37] See recital 20 of the Industrial Emissions Directive: "*The intensive rearing of poultry and cattle contributes significantly to emissions of pollutants into air and water. With a view to meeting the objectives set*

One may argue that there is no place for animal welfare considerations in the integrated permitting and impact assessment procedure since the protection of animals is achieved independently, through the requirements of animal welfare legislation. All the installations of intensive farming must fulfil these requirements, regardless of their size or environmental impact. Nevertheless, there is a significant difference in the way the proportionality principle is used in both regimes: The welfare schemes prescribe the minimum standard of care which should keep the individual animal healthy, comfortable and able to express its innate behaviour. In general, they do not take into account the size and above all the necessity of farming in the particular case. The requirements of reasonableness and proportionality usually only appear in the general provisions which stipulate that no one may inflict pain, suffering or harm on any animal without a reasonable cause.[38]

Meanwhile both the Environmental Impact Assessment Directive and the Industrial Emissions Directive consider the complex situation in the area concerned, in particular the overall burden of the project, considering the cumulative effects with other existing or approved projects, taking into account existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources. This sort of balancing of public interests is missing in animal welfare regulation but is present in the protection of endangered species and birds which allows for derogations in the event of the existence of reasons of overriding public interest and in the absence of an alternative solution.[39]

Other permitting procedures may also take into account the needs of livestock, and animal welfare concerns may serve the role of a restriction as described in the *Andibel* case. Such an approach raises difficult questions of ethics and moral responsibility, unless we think that a life span of six weeks provides billions of broiler chickens reared in the European Union each year with a comfortable, happy life.

To provide an example, the Nile crocodile (*Crocodylus niloticus*) is considered a farming animal in the Czech Republic. It can be raised as a farm animal in a tiled room and killed in a slaughterhouse afterwards. The legislative amendments that placed crocodiles in the same category as pigs and cows in 2013[40] were fuelled by a dubious business plan, not by a lack of meat on the market. Despite the fact that butchers in that country had no experience with killing such animals, approximately 160 young crocodiles were slaughtered. Only a small part of their meat found a buyer, leading to plans to market the crocodile meat to high cuisine restaurants fading away. Despite that, the amended legislation remains in force.

---

out in the Thematic Strategy on Air Pollution and in Union law on water protection, it is necessary for the Commission to review the need to establish differentiated capacity thresholds for different poultry species in order to define the scope of this Directive and to review the need to establish the most suitable controls on emissions from cattle rearing installations."

[38] See judgment of the German Federal Administrative Court of 13 June 2019, BVer wG 3 C 28.16, which implies that the practice of killing of male chicks shortly after hatching should no longer be considered reasonable once a gender determination of the chicken eggs is possible.

[39] See Art. 6(4) of Directive 92/43/EEC and Art. 9 of Directive 2009/147/EC.

[40] Decree of the Czech Ministry of Agriculture No. 34/2013 Coll. of 6 February 2013 on animal health requirements for the slaughter of crocodiles and the further processing of meat and animal products derived from crocodiles.

3 Mayotte (C-132/14 to C-136/14) and exceptions for the outermost regions

Mayotte is an overseas department and region of France located between north-western Madagascar and north-eastern Mozambique. In 2013, the European Union adopted a directive[41] according to which, *inter alia*, Mayotte could keep laying hens reared in unenriched cages for a longer period than the other regions. Otherwise, up from January 2012, rearing of laying hens in "traditional battery cages" would be prohibited pursuant to Directive 1999/74/EC laying down minimum standards for the protection of laying hens,[42] as well as the trade, import and export of eggs resulting from these kinds of methods of rearing.

The prohibition on using unenriched cages in Mayotte was postponed for a period of up to 48 months due to considerable investment and preparatory work being needed for its implementation. In order to prevent distortions of competition, eggs derived from establishments using unenriched cages could be marketed only on the local market of Mayotte. To facilitate the necessary controls, eggs produced in unenriched cages had to bear a distinctive mark.[43] Furthermore, the Directive introduced similar exceptions in the fields of environment, agriculture, social policy and public health.[44]

In Joined Cases C-132/14 to C-136/14,[45] the Parliament and the Commission put forward a single plea, to the effect that the Council, by adopting the contested acts concerning the situation in Mayotte on the basis of Art. 349 TFEU, had chosen the wrong legal basis. The Commission submitted that Art. 349 TFEU applies only where a derogation from the application of primary law to the outermost regions is involved. Where there is no such derogation, the legal basis for an act that merely adopts a policy to those regions, as was the case in respect of the contested acts, should be sought in the provisions relating to that policy. The European Court of Justice concluded that

> "Article 349 TFEU empowers the Council to adopt specific measures aimed at laying down the conditions of application to those regions not only of the provisions of the Treaties but also of provisions of secondary legislation (...) that article does not restrict the Council's decision-making power to a particular category of measures."[46]

The Council therefore could justify the amendments generally by the need to take account of the particular situation in Mayotte regarding the considerable investment

---

[41] Council Directive 2013/64/EU of 17 December 2013 amending Council Directives 91/271/EEC and 1999/74/EC, and Directives 2000/60/EC, 2006/7/EC, 2006/25/EC and 2011/24/EU of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union [2013] OJ L 353.

[42] Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens [1999] OJ L 203.

[43] Art. 2 of Directive 2013/64.

[44] Pursuant to Council Decision 2012/419/EU of 11 July 2012, Mayotte ceased, from 1 January 2014, to be one of the overseas countries and territories within the meaning of Art. 355(2) TFEU and became an outermost region within the meaning of Art. 349 TFEU.

[45] Joined Cases C-132/14 to C-136/14 *Parliament v Council* (*Mayotte*), EU:C:2015:813.

[46] Paras. 79–81.

required to replace unenriched cages for hens and the state of the environment, which needed to be considerably improved for it to comply with environmental objectives laid down by Union law, and for which additional time was needed.[47]

Numerous Member States also claimed various technical difficulties in the implementation of the Directive, which proved to be an excellent example of the challenges associated with enforcement of European Union animal welfare legislation—and a rare case of Member States actually being taken before the European Court of Justice.

In 2003, the Commission sent formal notice to several Member States regarding implementation of the Directive. Three Member States were referred to the European Court of Justice. The cases of Austria (C-362/03) and Italy (C-392/03) were removed from the Court register and Belgium (C-389/03) was found to have failed to fulfil its obligations.[48] It had explained its delay in implementation, on the one hand, by the need to obtain the prior agreement of the regional governments concerned and, on the other hand, by the fact that a consensus had not yet been reached on the mode of dealing with laying hens, some regional governments wanting a literal transposition of the protection standards in the Directive, other bodies having advocated the adoption of stricter standards.[49] The European Court of Justice, however, did not find these arguments relevant since the technical difficulties encountered by the Member States did not affect their obligation to implement the Directive.[50]

As regards the ban on unenriched cages, the Member States had been given a twelve year transition period to take the necessary steps to comply with it. Thirteen Member States received letters from the Commission requesting them to correctly implement the Directive[51] and eventually, Italy and Greece were brought before the European Court of Justice. Other infringement proceedings were closed in 2015.[52] In C-339/13 (*Commission v Italy*)[53] and C-351/13 (*Commission v Greece*),[54] the European Court of Justice confirmed a significant number of farms in Italy and Greece continued to use unenriched cages. According to the EU Commission, when the ban entered into force, there were still on the Italian territory 239 farms rearing 11,729,854 laying hens in non-enriched traditional cages. In Greece, 2,990,857 hens in 232 holdings continued to be kept in undeveloped cages in August 2012.[55] As a result, the Member States which had implemented the Directive early had had to compete against farmers from Member States which had implemented it late, which had

[47] Ziller, J.: Institutional Balance, Territorial Scope and Derogations to EU Law: Parliament & Commission v. Council (Mayotte). Common Market Law Review (2017).

[48] Case C-389/03 *Commission v Belgium*, EU:C:2004:426.

[49] *Ibid.*, para 7.

[50] See Case C-68/11 *Commission v Italy*, EU: C: 2012: 815, para. 62–63.

[51] Commission Press Release: Animal welfare: Commission refers Greece and Italy to Court for failure to enforce ban on cages for laying hens (2013), MEMO/13/366.

[52] Infringement no. 20150052 (France).

[53] Case C-339/13 *Commission v Italy*, EU:C:2014:353.

[54] Case C-351/13 *Commission v Greece*, EU:C:2014:2150.

[55] *Ibid.*, para. 8.

lower production costs, due to the ongoing usage of battery cages and the postponing of the investment costs to change their production system.[56]

4 Transport and cosmetic tests: protection of animals beyond the EU borders

The media coverage of farming animals transported in horrible conditions across Member States and outside the European Union had stirred up a wider public discussion of the insufficiencies of welfare regulation. The case-law of the European Court of Justice concerning transport of farming animals has ultimately achieved the same result among legal professionals in the last decade.

The common aspect of the cases the European Court of Justice has dealt with is the scope of European Union legislation. In *ZVK* (C-300/05),[57] the European Court of Justice interpreted the term 'travel', referred to in the Directive on the protection of animals during transport from 1991,[58] as to be interpreted as including the time taken to load and unload the animals, because that definition of transport corresponds to the objectives of the Directive which "are to ensure a satisfactory level of protection for the animals and, for reasons connected with their welfare, to reduce their transport over long distances as far as possible."[59] Such emphasis on uniform interpretation is typical for the European Court of Justice case-law in environmental matters.[60]

In *Danske Svineproducenter* (C-491/06[61] and C-316/10[62]), the European Court of Justice was called upon to answer whether the Member States are, despite the existence of harmonised rules[63] on the transport of pigs, still allowed to adopt national rules which lay down detailed numerical standards as regards, first, the internal height of compartments intended for animals, secondly, the inspection of animals during a journey, and, thirdly, the surface area available per animal. The European Court of Justice identified the objective of European Union regulation on the transport of pigs as being twofold: first, the elimination of technical barriers and secondly, the protection of animals during transport, which is the main objective.[64] According to the European Court of Justice, the detailed national rules must comply with the standards laid down by European Union legislation, must be proportionate to the objective of protecting animals during transport and must not go beyond what is necessary to

[56] Appleby, M.C.: The European Union Ban on Conventional Cages for Laying Hens: History and Prospects. Journal of Applied Animal Welfare Science (2003).

[57] Case C-300/05 *ZVK*, EU:C:2006:735.

[58] Point 48(4)(d) of the Annex to Council Directive 91/628/EEC.

[59] Para. 19.

[60] See Case C-72/95 *Kraaijeveld and Others*, EU:C:1996:404, para. 28, Case C-470/16 *North East Pylon Pressure Campaign and Sheehy*, EU:C:2018:185, para. 50, Case C-444/15 Associazione Italia Nostra Onlus, EU:C:2016:978, para. 66.

[61] Case C-491/06 *Danske Svineproducenter*, EU:C:2008:263.

[62] Case C-316/10 *Danske Svineproducenter*, EU:C:2011:863.

[63] Regulation No 1/2005.

[64] Case C-316/10, para. 44.

achieve it. They should not result in additional costs or technical difficulties which disadvantage either producers in the Member State which have adopted the rules or producers from other Member States who wish to export their goods to or via that Member State.

In *Zuchtvieh-Export* (C-424/13),[65] the European Court of Justice concluded that the conditions of transport also apply to part of the journey outside the Union. In consequence, for a journey which begins within the territory of the Union and continues outside that territory, the journey planner must present a journey log which is realistic from the point of view of that journey and allows the presumption that compliance with the provisions of European Union rules shall take place in the territory of a third country. This conclusion was in contrast with the Opinion of the Advocate General[66] which argued that "the EU legislature intended, at least at this stage in the development of Union law, to confine the scope *ratione loci* of Regulation No 1/2005 to the territory of the European Union."[67] The European Court of Justice opted for a wider reading of the Regulation and explained that the examination should not be limited to

> "an isolated reading of the first part of Article 1(1) of Regulation No 1/2005, according to which that regulation applies to the transport of animals carried out within the European Union. In particular, the second part of that provision, referring to the specific checks to be carried out by officials on consignments entering or leaving the customs territory of the European Union, takes into consideration the external dimension of that territory that such transport may entail. In that context, Article 2(i) of Regulation No 1/2005 provides a definition of the term 'exit point' as referring to the place where the animals leave the territory of the European Union."[68]

It could be argued that protection during the journey will in no way help protect animals in their destination countries. However, increased transport costs may result in fewer (suffering) animals being transported for slaughter, or it no longer being worthwhile slaughtering animals far away from the Union's external borders.

The European Court of Justice demonstrated a similar approach to the interpretation of European Union welfare legislation in *European Federation for Cosmetic Ingredients* (C-592/14).[69] On first sight, the regulation of the marketing of cosmetic products[70] is not intended to protect animals but to protect the health of consumers. However, as the European Court of Justice pointed out, it also contains provisions aimed at introducing a level of protection of animals in the cosmetics industry which exceeds that of other sectors, and the European Union legislature wanted to take account of animal welfare, in particular by actively promoting the use of alternative methods which do not use animal experiments to ensure the safety of cosmetic

[65] Case C-424/13 *Zuchtvieh-Export*, EU:C:2015:259.

[66] Opinion Case C-424/13 *Zuchtvieh-Export*, EU:C:2014:2216.

[67] *Ibid.*, para. 94.

[68] Para. 38.

[69] Case C-592/14 *European Federation for Cosmetic Ingredients*, EU:C:2016:703.

[70] Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products [2009] OJ L 342.

products—use which should be broader than other sectors.[71] It concluded that European Union law protects the European market against cosmetic products containing ingredients which have been tested on animals. Where such tests have been carried out outside the Union for the purpose of selling the product in third countries and the results of those tests have been used to demonstrate the safety of the product, the placing of the product on the Union market of that product may be prohibited. Once again, the Court examined the questions referred for a preliminary ruling in an unusually open interpretative situation: the prohibition in question was interpreted differently by the France, the Commission, the United Kingdom, Greece, the intervening parties and the Advocate General.

Unlike the requirements for the transport of farming animals, the ban on cosmetic products containing ingredients which have been tested on animals protects even animals that have never been to the European Union. Advocate General Bobek even explicitly referred to a highly probable scenario where, given the different interpretations of the contested provisions, the tests could be carried out primarily with regard to the Chinese market, but also with a view to the possible future sale of the products in question in Europe.[72] It can be added that in China, animal testing of cosmetics is still mostly mandatory before they are launched on the Chinese market, so the idea of using the results of these tests when placing goods on the Union market is definitely not fictional. In fact, the ban on the placing on the Union market of products thus tested has already had a significant impact on producers in non-European Union countries. For example the largest cosmetic company in Japan, Shiseido, announced that they would stop animal testing for cosmetics and quasi-pharmaceutical products.[73]

Once again, there seem to be certain parallels in the case-law in environmental matters. For example, in *Commission v. Germany* (C-131/93)[74] and *Bluhme* (C-67/97),[75] the European Court of Justice regarded import restrictions on bees aimed at preserving the pure bee population in a location in a Member State as compatible with European Union law. And most notably, protection of the environment, consumer protection and animal welfare merged in the restrictions on the importation and marketing of seal products which were held to be subject to judicial review in *Inuit Tapiriit Kanatami* (C-398/13 P[76]). The restrictions were triggered by serious concerns by members of the public and governments about animal welfare aspects of the killing and skinning of seals[77] and to a large extent aimed at the protection of seals (wild animals) outside the European Union.

Furthermore, in European Union environmental legislation, it is possible to identify several pieces of legislation that leave no doubt regarding the aim of protecting

[71] Para. 33–34.

[72] Opinion Case C-592/14 *European Federation for Cosmetic Ingredients*, EU:C:2016:179, para. 42.

[73] Nakanishi, Y.: The Principle of Animal Welfare in the EU and Its Influence in Japan and the World. In: Nakanishi, Y. (ed.) Contemporary Issues in Environmental Law: The EU and Japan. Springer (2016).

[74] Case C-131/93 *Commission v. Germany*, EU:C:1994:290.

[75] Case C-67/9 *Bluhme*, EU:C:1998:584.

[76] Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission*, EU:C:2015:535.

[77] See recitals 4 to 7 and 14 in the preamble to the Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286.

the environment outside the European Union. One example is Art. 36 of the Waste Shipment Regulation,[78] which prohibits *inter alia* the export of waste for recovery in countries not covered by the OECD Decision, waste which the competent authority of dispatch has reason to believe will not be managed in an environmentally sound manner in the country of destination concerned. Environmentally sound management can in principle be presumed if the standards for the protection of human health and the environment generally comply with the standards laid down by European Union legislation.[79]

As regards the possibility of taking into account the state of environmental protection in another Member State, it is necessary to take account of the specific situation in the Member State concerned and to respect the principle of proportionality as mentioned above. In *the Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* (C-1/96),[80] the Court considered a derogation from European Union legislation used by the United Kingdom to prohibit veal crate husbandry systems and in effect, to ban exports of calves to other Member States, where they would be reared in veal crates. The measures followed the 1988 Recommendation concerning Cattle, drawn up in order to apply the principles of the European Convention on the Protection of Animals kept for Farming Purposes. According to the European Court of Justice, such a derogation would be in line with European Union rules on the common market provided that it was limited to the territory of the Member State, and that it complied with all Treaty provisions. The ban on exporting calves went beyond the scope of the derogation, and would adversely impact the harmonisation achieved by the Directive. The UK therefore could not "rely on Article 36 of the EC Treaty and, in particular, on the grounds of public morality, public policy or the protection of the health or life of animals laid down in that article, in order to justify restrictions on the export of live calves".[81]

5 Ritual slaughter and freedom of religion

The debate surrounding halal and kosher slaughter has been ongoing in European Union Member States for the past two decades. In particular, concerns have been raised regarding the ethical issues which seem to contravene animal welfare principles if the animals are not stunned before the slaughter. At the moment, there is no European legislation defining and governing the requisite specifications for ritual slaughter, whether kosher or halal. A European Union regulation of 2009[82] states that animals must be stunned before slaughter but allows countries to make a derogation regarding animals being slaughtered for religious communities.

[78] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L 190.

[79] *Ibid.*, Art. 49.

[80] Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming*, EU:C:1998:113.

[81] *Ibid.*, operative part.

[82] Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L 303.

In 2018, the European Court of Justice confirmed that ritual slaughter without stunning may take place only in approved slaughterhouses.[83] It considered the obligation to use an approved slaughterhouse neutral since it applies to any party irrespective of any connection with a specific religion.[84] However, as Peter points out,

> "it might deploy a disproportionate negative impact on Muslims, because this is the only group which needs or wants to slaughter during a feast and for which this act forms part of their belief. Only this group has an increased demand during four days of the year."[85]

In this particular case, she adds, the regulation meets all three aspects of the usual three-pronged test: legal basis, legitimate aim, and proportionality (broadly conceived).[86] The European Court of Justice pronounced that the interference with the freedom of religion was both necessary and proportionate. The measure in question was applied in a non-discriminatory manner and it did not prohibit ritual slaughter but, gave "expression to the positive commitment of the EU legislature to allow the ritual slaughter of animals without prior stunning in order to ensure effective observance of the freedom of religion".[87]

In *Oeuvre d'assistance aux bêtes d'abattoirs* (C-497/17),[88] the European Court of Justice ruled that meat from animals slaughtered without first being stunned can not be certified 'organic farming' since the ritualistic practices do not minimise the animal's pain enough. Therefore the practice of ritual slaughter fails to observe the highest animal welfare standards required for the Organic production logo. The Regulation on organic production and labelling of organic products[89] reflects the development of animal welfare standards which are placed on the same level with environmental practices, a high level of biodiversity and the preservation of natural resources. They all contribute to an important societal role.[90]

6 Conclusion

The legal framework of animal welfare protection lacks both a solid basis and coherence, given the dual status of animals as both products and sentient beings. The commercial value of animals to the agricultural sector as well as competitiveness concerns for industries have been a strong factor in the development of European Union

[83] Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, EU:C:2018:335.

[84] *Ibid.*, para. 61.

[85] Peters, A. De-humanisation? CJEU, Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen on Religious Slaughter (2018). Available at: https://www.ejiltalk.org/de-humanisation-cjeu-liga-van-moskeeen-en-islamitische-organisaties-provincie-antwerpen-on-religious-slaughter/.

[86] *Ibid.*

[87] Para. 56.

[88] Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs*, ECLI:EU:C:2019:137.

[89] Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 [2007] OJ L 189.

[90] *Ibid.*, recital 1 in the preamble.

animal welfare standards. The existing legislation therefore demonstrates the Union's preference for minimum harmonisation. In the future, it seems, the pressure for effective enforcement of animal welfare and its further development will strengthen. Currently, the European Parliament is seeking the gradual replacement of live animal transport and a more regional model of livestock production,[91] while the European Court of Auditors is calling for more effective spending of animal welfare funds and improved enforcement efforts.[92] This pressure will inevitably result in new case-law before the European Court of Justice. It is evident from this brief summary of recent cases that the European Court of Justice recognises animal welfare to be an objective which is a legitimate public interest for Union legislation to pursue. As an objective, it is taken into account in a similar way to the objective of the protection of the environment when it comes to interpreting technical requirements concerning the treatment of farm animals. Given their protective character, both regimes meet in the area of the common market—and their approximation is likely to continue, despite their differing legal bases.

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

[91] Report of the Parliament on the implementation of Council Regulation No 1/2005 on the protection of animals during transport within and outside the EU [2019] 2018/2110(INI).

[92] European Court of Auditors. Special Report: Animal welfare in the EU: closing the gap between ambitious goals and practical implementation (2018) Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR18_31/SR_ANIMAL_WELFARE_EN.pdf.