

# Between Trade and Torture: Animals in EU law

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## A. Introduction

Europe is built on pigs. The novel by Robert Menasse, “The Capital”,<sup>1</sup> starts with the scene of a pig running through Brussels. This animal seems to have been the only witness of a homicide and eventually manages to escape from its own slaughter.

In fact, Europe is one of the world’s biggest pig producers and the world’s leading pork exporter.<sup>2</sup> At the third meeting of the EU platform on animal welfare in June 2018, the Bulgarian Council Presidency identified as one of its three priorities the welfare of pigs.<sup>3</sup> So pigs are very important animals for Europe.

The title of my contribution asserts that pigs and other animals in the EU are caught between trade and torture. With “trade” I mean the quality and status of animals as tradable products, as goods which have a price on a market and whose circulation is actually facilitated and encouraged by EU law which, after all, fundamentally aims at the realisation of a common market. My reference to “torture”, on the other hand, alludes to the fact that animals in EU law are recognised as “sentient beings” which feel pain and can suffer. This recognition by EU law stands in a relationship of tension with the animals’ commodification. Before I examine this tension in more detail, I will briefly survey primary and secondary Union law related to animals.<sup>4</sup>

## B. Legal parameters of animal-related EU action

### I. Legal bases, competences, and institutions

Animal protection or animal welfare does not figure as one of the Union’s values and aims set out in Art. 2 and 3 TEU. Neither is animal welfare an independent policy area. The EU must respect the principle of speciality (Art. 1 and 5(2) TEU) and subsidiarity (Art. 5(1) TEU) and may regulate animals only on the basis of a competence title. Indeed, the EU possesses an implicit power to administer animal welfare, ancillary to its powers in the areas of agriculture (a competence shared between the EU and the member states under Art. 4 sec. 2 lit. d) TFEU), internal market (a shared competence under Art. 4 sec. 2 lit. a) TFEU) and under the general clause to reach the Union’s objectives (Art. 352 TFEU). On these grounds, legislation on animals and animal welfare has been chiefly adopted under the heading of the common agricultural policy (Art. 43 TFEU)<sup>5</sup> or as an “approximation of laws” for the functioning of the

1 *Menasse*.

2 Website of the European Commission, Policies information and services, agriculture and rural development, pigmeat, available at: [https://ec.europa.eu/agriculture/pigmeat\\_en](https://ec.europa.eu/agriculture/pigmeat_en) (05/12/2018).

3 EU Platform on Animal Welfare, Third Meeting (21 June 2018), Minutes, p. 1, available at: [https://ec.europa.eu/food/animals/welfare/eu-platform-animal-welfare/meetings\\_en](https://ec.europa.eu/food/animals/welfare/eu-platform-animal-welfare/meetings_en) (05/12/2018).

4 See on animals in EU law seminally *Bolliger*; *Guretzki*.

5 See for a critical assessment of the policy design: *Porta*.

internal market (Art. 26, 114 TFEU). The Directive on the protection of farm animals<sup>6</sup> was adopted on the basis of Article 49 TFEU (right of establishment).

Besides, the EU's exercise of its competences in the common commercial policy, including international trade activity (such as import bans adopted on the basis of Art. 207 TFEU) and EU activities in the field of consumer policy, public health, and environmental policy are apt to deploy incidental effects on animals and animal welfare.

The EU institution mainly occupied with animal welfare politics is the *GD Santé*. Its Unit G 2 bears the title "Animal Health and Welfare". Furthermore, one agency, the European Food Safety Authority (EFSA), seated in Parma, deals with animal welfare and hosts an Animal Health and Welfare Panel.<sup>7</sup>

## II. Secondary law relating to animals

On the basis of the mentioned competences, the EU began legislating on the slaughter of animals in the 1970s. Law-making on a broader protection of animals used in agriculture followed in the 1990s only. The 1998 Council Directive concerning the protection of animals kept for farming purposes lays down minimum standards for the conditions under which animals (other than fish, reptiles or amphibians) are bred or kept.<sup>8</sup> Further directives and regulations were issued on certain animal species, such as pigs in 2008.<sup>9</sup> However, while some animal species are regulated, many agricultural animals such as all types of cows (bulls, beef cows, and milk cows), turkey, and rabbits do not benefit from any detailed rules. In addition, the EU stipulated rules on specific farming related activities, notably animal transport (2005),<sup>10</sup> slaughter (updated last in 2009),<sup>11</sup> and organic production and labelling (2007).<sup>12</sup> Animal experiments are covered by a Directive of 2010.<sup>13</sup> Since 2016, a Regulation on transmissible animal diseases exists, the so-called "Animal Health Law".<sup>14</sup>

6 Fn. 8.

7 The Panel's website can be accessed here: <https://www.efsa.europa.eu/en/panels/ahaw> (05/12/2018).

8 Directive 98/58/EC of 20/07/1998 concerning the protection of animals kept for farming purposes, OJ L 221 of 08/08/1998, p. 23.

9 Directive 2008/120/EC of 18/12/2008 laying down minimum standards for the protection of pigs, OJ L 47 of 18/02/2009, p. 5.

10 Regulation (EC) No 1/2005 of 22/12/2004 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, OJ L 3 of 05/01/2005, p. 1.

11 Regulation (EC) No 1099/2009 of 24/09/2009 on the protection of animals at the time of killing, OJ L 303 of 18/11/2009, p. 1.

12 Regulation (EC) No. 834/2007 of 28/06/2007 on organic production and labelling of organic products and repealing Regulation (EEC) No. 2092/91, OJ L 189 of 20/07/2007, p. 1.

13 Directive 2010/63/EU of the European Parliament and of the Council of 22/09/2010 on the protection of animals used for scientific purposes, OJ L 276 of 20/10/2010, p. 33.

14 Regulation (EU) No. 429/2016 of 09/03/2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health, OJ L 84 of 31/03/2016, p. 1.

## D. Animals as sentient merchandise

Within this legal context, animals have a dual legal status: As sentient beings and as tradable products.<sup>15</sup> They are “sentient merchandise”, to borrow a phrase from Thierry Erniquin.<sup>16</sup>

## I. Trade: Animals as merchandise

First of all, EU law sees animals as a commodity, as a product for which a price is paid on a market. One of the original pillars of the European Union is the freedom of goods in order to create a European-wide market.<sup>17</sup> The Union courts have consistently held “that ‘goods’ for the purposes of that provision [Art. 28 TFEU] means goods which can be valued in money and which are capable, as such, of forming the subject of commercial transactions (...). That definition *includes animals* (...). [T]he provisions of the FEU Treaty on free movement of goods apply irrespective of whether the goods concerned are being transported across national frontiers for the purposes of sale or resale, or rather for personal use or consumption”.<sup>18</sup> In a case involving the enforcement of a Directive on the conservation of wild birds, Advocate General Fennelly found it “hardly open to doubt that specimens of exotic subspecies fall within the scope of Article 30 [then EC, now Art. 36 TFEU] as ‘goods taken across a frontier for the purposes of commercial transactions (...) whatever the nature of those transactions’.”<sup>19</sup> The Advocate General then quoted the proposal for a regulation on possession of and trade in specimens of species of wild fauna and flora which was justified by the Commission on the ground that the “Member States have maintained and taken an increasing number of stricter measures with regard to trade in a great many species *thereby creating trade barriers between themselves which are not compatible with the proper functioning of the internal market* (...)”.<sup>20</sup>

Animals are a commodity not only for purposes of the EU internal market but also on the international market in which the EU participates. The WTO Agricultural

15 Seminally, *Sowery*, CMLRev 2018/55, pp. 55–100.

16 *Erniquin*, RevAffEur 2017, pp. 49–61.

17 Art. 3(3) sentence 1 TEU: “The Union shall establish an internal market.”

18 CJEU, case C-301/14, *Pfotenhilfe–Ungarn e.V. v. Ministerium für Energiewende, Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein*, ECLI:EU:C:2015:793, para. 47 (emphasis added).

19 Opinion of Advocate General Fennelly delivered on 26/10/1995, case C-202/94, *van der Feesten*, ECLI:EU:C:1995:361, para. 55.

20 *Ibid.*, quoting the Commission, emphasis added.

Agreement of 1994, to which the EU is a member, and which governs the EU international trade in agricultural products, also covers live animals.<sup>21</sup>

## II. Torture: Animals as sentient beings

On the other hand, EU law recognises animals as sentient beings. The animal welfare mainstreaming clause, codified in Article 13 of the Treaty on the Functioning of the European Union since the Treaty of Lisbon of 2007<sup>22</sup> reads as follows: “In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, *since animals are sentient beings, pay full regard to the welfare requirements of animals*, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”<sup>23</sup>

“Animal welfare” has also been recognised as a “value” of EU law in the Union’s secondary law.<sup>24</sup> Moreover, the EU Court has qualified animal welfare as a “legitimate objective in the public interest pursued by Union legislation”.<sup>25</sup> Recent polls illustrate the importance of this legally recognised objective among European citizens. A Eurobarometer published in 2016 found that 94 percent of “EU citizens believe it is important to protect the welfare of farmed animals”.<sup>26</sup> And 82 percent “believe the welfare of farmed animals should be better protected than it is now”.<sup>27</sup>

It is worth recalling that the first ever European Citizens’ Initiative under Art. 11 TEU launched in 2012, which (according to the initiators) collected 1.3 million signatures, was against “vivisection”. In its communication on the initiative, issued in

21 See WTO Agricultural Agreement of 1994, Annex 1: “Product coverage”: “1. This Agreement shall cover the following products: (i) HS Chapters 1 to 24 less fish and fish products, (...)“ HS stands for “Harmonized System”, i.e. the “Harmonized Commodity Description and Coding System” of the World Customs Organization, a multipurpose international product nomenclature. In Nomenclatur 2017: “Section I, Live Animals; Animal Products“, we find Chapter 1 on “live animals“. World Customs Organization, HS Nomenclature 2017 edition, Chapter 1, Live animals, 0101-2017E, available at: [http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/0101\\_2017e.pdf?la=en](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/0101_2017e.pdf?la=en) (25/03/2019).

22 Prior provisions were Declaration no. 24 (1992) annexed to the Treaty of Maastricht: “Declaration on the protection of animals” (OJ C 191 of 29/07/1992, p. 103) which did not yet qualify animals as sentient beings, and the Protocol (No. 33) on Protection and Welfare of Animals, annexed to the EU Treaty (OJ C 340 of 10/11/1997, p. 110).

23 Emphasis added.

24 Directive 2010/63, (fn. 13), p. 33; see already consideration 4 of the Regulation 1099/2009, (fn. 11).

25 CJEU, case C-424/13, *Zuchtviieb-Export GmbH v. Stadt Kempten (Landesrechtsanwaltschaft Bayern intervening)*, ECLI:EU:C:2015:259, para. 35; CJEU, case C-101/12, *Herbert Schai-ble v. Land Baden-Württemberg*, ECLI:EU:C:2013:661, para. 35.

26 *TNS opinion & social* (at the request of the European Commission, Directorate-General for Health and Food Safety), Special Eurobarometer 442 November – December 2015, “Attitudes of Europeans towards Animal Welfare”, March 2016, p. 4.

27 Ibid.

2015,<sup>28</sup> the Commission verbally “shares the Citizens’ Initiative’s conviction that animal testing should be phased out. This is the ultimate goal of EU legislation”.<sup>29</sup> At the same time, the Commission saw a danger for the future of biomedical research in Europe when it pointed out that, “[h]owever, a premature ban of research using animals in the EU would likely export the biomedical research and testing outside the EU to countries where welfare standards may be lower and more animals may be needed to achieve the same scientific result.”<sup>30</sup> The example of scientific experiments shows that the economic consideration of the level playing field matters both inside the Union and for the EU as a global actor, as will be illustrated in detail below (sec. D).

Overall, genuine ethical and moral concern for animals and animal welfare, which resonates with the European public, has to some extent become a marker for the European identity. But the legal status of animals as a tradable good considerably weakens the legal power of the EU principle of animal welfare. Katy Sowery deplors the “lack of any discernible impact of the acknowledgment of the ‘sentience’ of animals in the legislative and policy-making practice of the Union”, and raises the question whether the recognition of animal sentience in the Treaty “is a hollow victory.”<sup>31</sup>

To sum up, in EU law as it stands, the animal welfare mainstreaming clause of article 13 TFEU is not strong enough to function as a real juridical counterweight against the legal consequences which follow from the animals’ status as goods – goods which their owners sell, damage, and destroy in order to make their own living.

## C. The dual motivation of EU law-making

### I. Boosting trade with side-effects against torture

Most if not all EU legislation concerning animals treats them *both* as tradeable goods and as sentient beings. It thus operationalises the animals’ dual status. In fact, all relevant EU legislation purports to cater both for animal welfare (reducing torture) and for the economy (boosting trade). The economic rationale (trade) is usually the primary motivation, with the mitigation of torture of animals as a secondary or ancillary consideration.

For example, the very first explicitly animal related piece of legislation (the Farm Animals Directive of 1998) seeks – according to its title – “the *protection* of animals kept for farming purposes”.<sup>32</sup> Its preamble refers to animal welfare.<sup>33</sup> But its equally

28 *European Commission*, Communication from the Commission on the European Citizens’ Initiative “Stop Vivisection”, C (2015) 3773 final (03/06/2015).

29 *Ibid.*, p. 7.

30 *Ibid.*, p. 3.

31 *Sowery*, CMLRev 2018/55, p. 98.

32 Council Directive 98/58, (fn. 8), p. 23.

33 *Ibid.*, consideration 10: “Whereas Declaration No. 24 annexed to the Final Act of the Treaty on European Union calls on the European institutions and the Member States, when drafting and implementing Community legislation, in particular on the common agricultural policy, to pay full regard to the welfare requirements of animals”.

valid consideration is that “differences which may distort conditions of competition interfere with the smooth running of the organisation of the market in animals”<sup>34</sup> should be mitigated by laying down “minimum standards for the protection of animals bred or kept for farming purposes.”<sup>35</sup>

The next example is the Regulation prohibiting the trade with cat and dog fur.<sup>36</sup> Its concern for the functioning of the EU internal market could not be spelled out more clearly than in the Regulation’s preamble which says: “The differences between national measures as regards cat and dog fur constitute barriers to the fur trade in general. Those measures impede the smooth operation of the internal market, since the existence of diverse legal requirements hamper fur production in general and make it more difficult for fur legally imported to, or produced in, the Community to circulate freely within the Community. The diverse legal requirements across the Member States lead to additional burdens and costs for fur traders.”<sup>37</sup>

Another illustration of mixed motives for animal-related legislation is the Directive on the protection of animals used for scientific purposes of 2010.<sup>38</sup> The Directive’s primary objective is to secure the functioning of the internal market. The preamble’s very first consideration is that “disparities [of Member States’ national implementing measures on the protection of animals used for scientific purposes] are liable to constitute *barriers to trade* in products and substances the development of which involves experiments on animals. Accordingly, this Directive should provide for more detailed rules in order to reduce such disparities by approximating the rules applicable in that area and to ensure a *proper functioning of the internal market*.”<sup>39</sup>

Only in the second place, the Directive refers to animals as sentient beings.<sup>40</sup> The Union legislator also points to diverging public attitudes on animal welfare: “Attitudes

34 Ibid., consideration 11.

35 Ibid., Art. 1.

36 Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11/12/2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, OJ L 343 of 27/12/2007.

37 Ibid., consideration 6. See also consideration 1: “(1) In the perception of EU citizens, cats and dogs are considered to be pet animals and therefore it is not acceptable to use their fur or products containing such fur. (...) (3) In response to consumer concern, several Member States have adopted legislation aiming at preventing the production and marketing of fur from cats and dogs. (4) There are differences between Member States’ provisions governing the trade, import, production and labelling of fur and fur products, with the aim of preventing cat and dog fur from being put on the market or otherwise used for commercial purposes. Whilst some Member States have adopted a total ban on the production of fur from cats and dogs by banning the rearing or the slaughter of such animals for fur production purposes, others have adopted restrictions on the production or import of fur and products containing such fur. In some Member States, labelling requirements have been introduced. Citizens’ increasing awareness of the issue is likely to prompt more Member States to adopt further restrictive measures at national level”.

38 Directive 2010/63 on scientific purposes, (fn. 13).

39 Ibid., (fn. 24 ), consideration 1 (emphasis added). Consideration 35 deplores that “[t]here are differences in the requirements for the accommodation and care of animals between Member States, which contribute to the distortion of the internal market”.

40 Ibid., consideration 2: “Animal welfare is a value of the Union that is enshrined in Article 13 of the Treaty on the Functioning of the European Union (TFEU)”.



towards animals also depend on national perceptions, and there is a demand in certain Member States to maintain more extensive animal welfare-rules than those agreed upon at the level of the Union. In the interests of the animals, and provided it does not affect the functioning of the internal market, it is appropriate to *allow the Member States certain flexibility to maintain national rules aimed at more extensive protection of animals* in so far as they are compatible with the TFEU.”<sup>41</sup> The desire to allow for higher national animal welfare standards above the EU minimum is the reason for choosing the legal form of a directive as opposed to a regulation.

The Slaughter Regulation of 2009 is so far the only piece of EU legislation which explicitly mentions ethics: “It is an *ethical duty* to kill productive animals which are in severe pain where there is no economically viable way to alleviate such pain.”<sup>42</sup> This clause relates only to a very specific problem, namely emergency killing (for example after accidents with animals in remote locations). All mentioned legal acts stand for the many others which professes to promote trade and – on top, as an intentional and welcome side-effect – to soften torture.

The duality of motives, both ethical and economic, torture and trade, is not unique to animal-related welfare standards. It is also peculiar to human rights standards and policies as established and pursued by the EU. The classic example is the European provision on equal pay for women which already formed part of the Rome Treaties of 1957.<sup>43</sup> This provision gave rise to the *Defrenne* case of 1974. A Belgian stewardess had filed a claim because she received lower pensions than her male colleagues. Back then, the ECJ decided that the Treaty provision on equal pay had a direct horizontal effect. The motivation of the rule was facially to combat discrimination against women. But the main motivation was to prevent unfair competition created by the fact that certain Member States allowed private or state-run business to pay women unduly low salaries and whose economic operators thus saved costs over those operators in other member states which offered equal wages. The equal pay legislation shows that the original economic rationale of a legal rule might, in line with evolving social attitudes, recede to the background when the ethical argument becomes stronger. Such an evolution has occurred with regard to gender discrimination but not (yet) with regard to animal suffering.

## II. More trade and more torture

In real life, the two objectives of improving trade and mitigating torture cannot easily be pursued effectively at the same time. Rather than going hand in hand, the EU interests in trade on the one hand, and its objective to mitigate the torture-like treatment of European farm animals on the other hand frequently collide. They then need to be balanced against each other.

41 Ibid., consideration 7 (emphasis added).

42 Slaughter Regulation 1099/2009, (fn. 11 ), consideration 12.

43 Originally Art. 119 EEC, now Art. 157 TFEU.



The Directive 2008/120 seeking “the protection of pigs” (as its title says)<sup>44</sup> endorses the balancing technique. Its preamble leans towards the economic rationale: “(5) The keeping of pigs is an integral part of agriculture. It constitutes a source of revenue for part of the agricultural population. (6) Differences which may distort conditions of competition interfere with the smooth running of the organisation of the common market in pigs and pig products. (7) There is therefore a need to establish common minimum standards for the protection of pigs kept for rearing and fattening in order to ensure rational development of production.” After laying out these economic considerations, the Directive states that “[a] *balance* should be kept between the various aspects to be taken into consideration, as regarding *welfare* including health, *economic* and social considerations, and also environmental impact.”<sup>45</sup>

In the current social setting, the balancing undertaken by the legislator and the law-apppliers mostly leads to dismissing the animal welfare considerations. In other words, in the tension between trade and torture, the economic rationale almost always prevails. This is the reason why pigs’ tails are docked, newly hatched male chicks of the layer hen line are routinely shredded alive,<sup>46</sup> why laying hens’ beaks are cut off, and why piglets are castrated without anaesthesia.

### III. More trade and less torture

The crucial question therefore is how to bring animal welfare and market considerations in tune. This is not impossible, notably when animal welfare standards are established strategically as one of many factors constituting the competitive situation.

The most famous example where the economic rationale of trade and the ethical rationale to prevent suffering for animals were in harmony and led to better legislation – better for the economy and better for the animals – is the seals product case. The primary justification of the EU prohibition of the importation of seal products into the EU has been the moral concern for the suffering of seals and sentient beings. The

44 Directive 2002/120, (fn. 9).

45 Ibid., Pigs Directive, consideration 12 (emphasis added).

46 This procedure is called “maceration” and is based on EU Regulation 1099/2009 of 24/09/2009 on the protection of animals at the time of killing, (OJ L 303 of 18/11/2009), Annex I: List of Stunning Methods and related Specifications (as referred to in Article 4), Chapter I: Methods, Table I: Mechanical Methods, “No. 4: ‘Name: Maceration; Description: Immediate crushing of the entire animal; Conditions of use: Chicks up to 72 hours and egg embryos. (...) Chapter II, Specific requirements for certain methods, Point 2. Maceration: This method shall provide instantaneous maceration and immediate death of the animals. The apparatus shall contain rapidly rotating mechanically operated killing blades or expanded polystyrene projections. The capacity of the apparatus shall be sufficient to ensure that all animals are killed instantaneously, even if they are handled in a large number.” This practice has been qualified as “reasonable” and thus legal under German animal welfare law, exactly because it is not profitable for the farmers to raise the male chicks of the laying line. Oberverwaltungsgericht Münster, 20 A 488/15 and 20 A 530/15 (20/05/2016), paras 87-92.

preamble of the seal products regulation of 2009 stated: “The hunting of seals has led to expressions of serious concerns by members of the public (...).”<sup>47</sup>

The second motivation and justification of the regulation was the impending internal distortion of the market as an economic reason. The preamble stated that “several Member States have adopted or intend to adopt legislation regulating trade in seal products by prohibiting the import and production of such products, while no restrictions are placed on trade in these products in other Member States.”<sup>48</sup> In other words, the EU member states’ diverging legislation on the importation of seals products created a trade barrier for the circulation of seal products inside the EU, and legal harmonisation sought to prevent this. The seals products regulation was therefore based on the EU competence title of legal approximation.<sup>49</sup>

Upon complaint by Canada, Iceland, and Norway, the WTO dispute settlement institutions framed and decided the affair not as a market access case but as a case of (indirect) discrimination of foreign seals products. Generally speaking, discrimination can in theory be eliminated either by levelling up or down. The EU complied by levelling up.<sup>50</sup> It did not reduce animal welfare requirements but inversely asked the Inuit hunts to pay “due regard to animal welfare” – in order to create equal competitive conditions for the Canadian and Icelandic Inuit hunters.<sup>51</sup> Importantly, animal welfare is no absolute standard in the new regulation. It plays out only besides “taking into consideration the way of life of the community and the subsistence purpose of the hunt.”<sup>52</sup> Despite this mitigation, it seems fair to say that trade liberalisation here led to a “trading up” of animal welfare concerns.<sup>53</sup>

47 Regulation (EC) No. 1007/2009 of 16/09/2009 on trade in seal products, OJ L 286 of 31/10/2009, p. 36, Preamble consideration 4: “ (...) and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals (...) cause to those animals.” The regulation and implementing had to be amended in 2015, following a lost arbitration before the WTO. See for the law in force below fn. 50.

48 Regulation (EC) No. 1007/2009 of 16/09/2009 on trade in seal products, OJ L 286 of 31/10/2009, p. 36, Preamble consideration 5.

49 Then Art. 95 TEC, now Art. 114 TFEU.

50 Regulation (EU) 2015/1775 of the European Parliament and of the Council of 06/10/2015 amending Regulation (EC) No. 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No. 737/2010, OJ L 262 of 07/10/2015, p. 1 and Commission Implementing Regulation (EU) 2015/1850 of 13/10/2015 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ L 271 of 16/10/2015, p. 1.

51 Regulation (EU) 2015/1775, (fn. 50), Art. 3(1): “Conditions for placing on the market 1. The placing on the market of seal products shall be allowed only where the seal products result from hunts conducted by Inuit or other indigenous communities, provided that all of the following conditions are fulfilled: (a) the hunt has traditionally been conducted by the community; (b) the hunt is conducted for and contributes to the subsistence of the community, including in order to provide food and income to support life and sustainable livelihood, and is not conducted primarily for commercial reasons; (c) the hunt is conducted in a manner *which has due regard to animal welfare*, taking into consideration the way of life of the community and the subsistence purpose of the hunt.” (emphasis added).

52 Ibid.

53 Vogel; Sykes, TEL 2016/5, pp. 55-79.

However, it is doubtful whether the legal development in favour of seals is generalizable. Seal hunt was in the interest of only one member state (Denmark), and moreover only the business of a small ethnic minority with little political leverage. In contrast, any regulation of ordinary agricultural animals faces extremely powerful vested interests and must deal with the well-organised agricultural lobby in Europe, both on the level of Union politics and in each member state. The relatively happy ending of the seal saga can unfortunately not easily function as a model for the regulation of farm animals in Europe.

#### D. Global trade and global torture

The preceding section has shown that the EU seeks to promote animal welfare standards not primarily as a means to reduce animal torture but mainly as a means to level the playing field in the competition of agricultural operators on the internal market.

The problem of competition is repeated (and even exacerbated) on the global market, because the EU has stringent animal welfare regulations, and therefore European farmers face potentially higher production costs than many of their trading partners which will be translated into higher prices for European animal products. From an economic perspective, the gap between European animal welfare standards and those that govern the global competitors may create three types of threats: First, the loss of export markets; secondly, the threat of outsourcing (emigration of business with concomitant losses of jobs and tax-revenue), and, thirdly, substandard imports.<sup>54</sup> The first threat does not seem to stand in the foreground. The second threat, namely the danger of an emigration of business to neighbouring countries, seems less relevant for agriculture than for other industries, but is occasionally invoked. For example, one argument in favour of the prolongation of the phasing out of piglet castration without anaesthesia in the German *Bundestag* was the danger of migration of jobs outside Germany.<sup>55</sup> The major concern for European agricultural operators is the third one, the imports of non-European substandard products.

Against this background, the familiar dual motivation governs EU outbound legislative activity, too. Both motives (trade and torture) seem intertwined, and the order of priorities is susceptible to shifting.

#### I. Mitigating torture and the EU's image in the world

The EU has, starting in 2004 for some products and since 2009 comprehensively, prohibited animal testing for cosmetics.<sup>56</sup> The phasing-out period ended in 2013. At that

54 Seminally *Grethe*, Food Policy 2007/32, pp. 315-333.

55 Bundestags-Drucksache 17/11811, of 11/12/2012, Beschlussempfehlung und Bericht des Ausschusses für Ernährung, Landwirtschaft und Verbraucherschutz (10. Ausschuss) a) zu dem Gesetzentwurf der Bundesregierung – Drucksache 17/10572 – Entwurf eines Dritten Gesetzes zur Änderung des Tierschutzgesetzes, p. 25.

56 Regulation (EC) No. 1223/2009 of the European Parliament and of the Council of 30/7/11/2009 on Cosmetic Products (recast), OJ L 342 of 22/12/2009, p. 59.

point, EU Commissioner for Health and Consumer Policy, Tonio Borg, said that the ban ‘gives an important signal on *the value that Europe attaches to animal welfare*. The Commission is committed (...) to engage with third countries to follow our European approach. This is a great opportunity for Europe to set an example of innovation in cosmetics without any compromise on consumer safety.’<sup>57</sup> Indeed, this approach has effects outside the Union because it precludes the importation of products tested on animals elsewhere. In 2016, the Court of the European Union confirmed, upon request for a preliminary ruling, that the EU prohibition and the import ban is strict – even if such testing is compulsory for a product to enter the markets in states such as Japan or China.<sup>58</sup> The Court thereby confirmed what some call a *de facto* extraterritorial reach of the Union’s legislation. And indeed, the EU regulation has led the big Japanese cosmetic firms to abandon animal testing.<sup>59</sup>

More recently, the Commission solicited a study on the impact of animal welfare rules on the international competitiveness of agricultural operators outside of the EU. In its 2018 report on that study, the Commission stated that “to be sustainable, [a legislative model on animal welfare] should also be disseminated internationally.”<sup>60</sup> The Commission’s idea is to disseminate the high standards and thus to trigger a race to the top. Indeed, the Commission writes: “The overall objective of the Commission’s international activities on animal welfare is promoting EU values regarding animals, (...) and encourage[ing] globally, particularly with EU-trading partners, high animal welfare standards, *reflecting the EU model and principles*. Improving animal welfare standards globally also contributes to ensure a *level playing field* between EU and non-EU operators.”<sup>61</sup> The Commission report continues by stressing that “[n]otwithstanding the above, growing consumer perception of the EU’s sustainable production methods – including high animal welfare standards – can and does improve the market position of EU products.”<sup>62</sup> Both the Union’s approach to cosmetic testing, and the competitiveness report intertwine considerations of “value” and of “trade”. The Union’s identity vis-à-vis the outside world and the enhancement of the EU’s market position seem to be linked.

## II. Mitigating torture and the EU’s competitiveness in global trade

We have seen that the EU is concerned “that its animal welfare standards could be undermined and that it could suffer negative trade effects, since agricultural products

57 European Commissioner in charge of Health and Consumer Policy, Tonio Borg, Press Release of 11/03/2013 (emphasis added).

58 CJEU, case C-592/14, *European Federation for Cosmetic Ingredients/Secretary of State for Business, Innovation and Skills (Cruelty Free International, European Coalition to End Animal Experiments intervening)*, ECLI:EU:C:2016:703.

59 *Nakanishi*, in: Nakanishi (ed.), pp. 101-109.

60 Report from the Commission to the European Parliament and the Council, On the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world, COM (2018) 42 final, p. 1.

61 *Ibid.*, p. 1 (emphases added).

62 *Ibid.*, p. 7.

produced to meet high EU animal welfare standards would run the risk of being edged out of the market by cheaper imports produced under lower standards.”<sup>63</sup>

However, more animal welfare does not inevitably damage EU producers in their global competition for the simple reason that *animal welfare is not the real game changer*. The mentioned Commission report on the competitive effects of European animal welfare standards<sup>64</sup> found, based on a 300 page expert study, that the costs and disadvantages of higher animal welfare standards inside the EU for European farmers do not play a role for their position on the international market: “Overall costs of compliance with animal welfare standards remain very low when compared to other production costs that affect global competitiveness and influence world trade patterns.”<sup>65</sup> The reason is that competing economic players, e.g. in Asia, benefit rather from other production factors such as lower wages and better climatic conditions than from lower animal welfare standards. The additional costs of animal welfare measures are minimal in comparison to the much higher labour costs which distinguish European production from the Asian production.

The second reason why the maintenance or a potential tightening of animal welfare standard does not harm European farmers is that *other types of standards* protect European farmers more effectively for the time being. Take the possibility of importing eggs from Ukraine. Ukraine has much lower animal welfare standards than the EU. One could assume that the Ukrainian egg producers have a clear cost advantage over European eggs. However, due to salmonella control requirements, the potentially cheaper Ukrainian eggs cannot enter the European market. The hygienic prescriptions renders obsolete any potential economic disadvantage which the stricter animal welfare prescriptions might cause for European egg producers. Therefore, the requirement of enriched and bigger cages for hens does not harm EU operators. Consequently, the Commission report of 2018 found that “animal welfare standards are not a key driver of competitiveness on the world market as other factors strongly influence competitiveness (such as proximity of market, other production factors, the type of market segments or the existence or absence of trade agreements).”<sup>66</sup> That in turn implies that freezing or even lowering European animal welfare standards would not change the situation for European farmers vis-à-vis global competitors.

### E. Towards the mitigation of animal torture in EU law

The recognition of the ambivalent relationship between the Union’s two policy objectives of promoting trade and furthering animal welfare and the full weight of Art. 13 TFEU could be exploited by law-makers and law-appliers in internal and external action.

63 Vapnek/Chapman, p. 17.

64 Report from the Commission, (fn. 60).

65 Ibid., p. 9.

66 Ibid., p. 7.

## I. Internal action

### 1. Animal-friendly interpretations

The current dual status of animals in EU law has as a consequence that “EU legislation can be interpreted by the Member States in distinct ways: it either legitimizes the continued exploitation of animals in line with competitiveness concerns or it upholds the need for the high standards of welfare that are associated with new understandings of animal health and well-being.”<sup>67</sup> Currently prevailing interpretations often favour trade. It would however be perfectly possible and doctrinally sound to push novel and animal-friendly interpretations of the extant legal instruments relating to animals. A recent example is the Grand Chamber judgment in the case *OABA* where the Court interpreted – against the General Advocate’s conclusions – the Regulation 834/2007 on organic production and labelling in the light of Art. 13 TFEU as not authorising the use of the EU organic logo for meat which derives from religiously motivated slaughter without stunning of the animal.<sup>68</sup> The main legal argument was that the cutting of the throat of the unstunned animal does not guarantee “a minimum” suffering of the animal in the sense of Art. 14(1)(b)(viii) of said regulation on organic production and labelling.<sup>69</sup>

Such animal-friendly readings are facilitated by the typically sweeping and vague language of the instruments which often does not indicate precise welfare standards. For example, the Directive 98/58 on farm animals prescribes that “[t]he freedom of movement of an animal, having regard to its species and *in accordance with established experience and scientific knowledge*, must not be restricted in such a way as to cause it *unnecessary suffering or injury*. Where an animal is continuously or regularly tethered or confined, it must be given the space appropriate to its physiological and ethological needs *in accordance with established experience and scientific knowledge*.”<sup>70</sup>

The term “unnecessary suffering or injury” is a key concept in animal welfare law. What is “unnecessary” is normally determined against the requirements of the economic use of the animals. The term is mostly applied in a way which ultimately leads to justify the animals’ suffering as “necessary” (for the farmer’s subsistence and to satisfy the consumers’ demands). However, due to its open character, the term could be interpreted dynamically in the direction of strict standards.

67 Sowery, CMLRev 2018/55, p. 94.

68 CJEU (Grand Chamber), case C-497/17, *Œuvre d’assistance aux bêtes d’abattoirs (OABA) v. Ministre de l’Agriculture et de l’Alimentation, Bionoor SARL, Ecocert France SAS, Institut national de l’origine et de la qualité (INAO)*, ECLI:EU:C:2019:137, esp. para. 52.

69 Ibid., para. 49.

70 Farm Animals Directive, (fn. 8 ), Annex, cl. 7 (emphasis added), which is operative through Art. 4 of the Directive: “Members States shall ensure that the conditions under which animals (other than fish, reptiles or amphibians) are bred or kept, having regard to their species and to their degree of development, adaptation and domestication, and to their physiological and ethological needs in accordance with established experience and scientific knowledge, comply with the provisions set out in the Annex”.

The reference to “experience and scientific knowledge” is also typical in animal welfare law, in the EU and elsewhere. This is an inbuilt flexibility mechanism, because knowledge and experience is constantly growing. So far, scientific research on animal welfare has continuously unearthed more complex animal behaviour, needs, and psychology. The laws’ reference to science would allow to translate this new knowledge into novel interpretations of the “unnecessary suffering” standard. This could go in the direction of raising the standards for rearing and confining the animals used in agriculture in their favour.

## 2. Removing animals from the categories of “goods” and “things”

Beyond dynamic interpretation, true progress could be brought about by creating a new policy field of animal welfare and by changing the legal status of animals under EU law.

One element could be the establishment of a fundamental right to be free from torture. Animal rights have been accorded by some lower courts in Argentina<sup>71</sup> and Colombia to apes and a bear<sup>72</sup> confined in zoos. The recognition of rights of animals by EU law would radically transform their legal status from being “goods” to something else, and from thinghood to personhood.

When discussing such radical ideas, we must keep in mind that — doctrinally speaking — the concepts of “good” in the sense of EU law, and “property” and “thing” in the sense of the member states’ private law codes and their laws of property are legally distinct. The concept of „good“ is malleable and indeed has been modified. It has been extended by the European legislator and confirmed by the ECJ so as to include electricity, waste, drugs, and forged money. The concept could therefore be narrowed through interpretation, so as to *exclude* animals.<sup>73</sup> This would allow the member states to adopt legislation to protect animals without having to fear the infringement of the European principle of free circulation of goods. The drawback would be that member states could then choose to not adopt any protection for animals at all.<sup>74</sup>

A different step would be to remove animals from the category of innate things, as a special good (analogously to the provisions in the civil codes of some Member states). This legal strategy has the advantage of not cutting out animals completely from the regime of the free movement of goods. It would also bolster member states’ invocations of the public morals clause of Art. XX lit. a) GATT when they desire to uphold domestic animal welfare standards against imported substandard products.

71 Tercer Juzgado de Garantías, No. P-72.254/15 (03/11/2016): “Presented by A.F.A.D.A. about the chimpanzee ‘Cecilia’ – non human individual”; Cámara Federal de Casación Penal, Sala II, CC 68831/2014/CFC 1, “Orangutana Sandra s/recurso de casación s/HABEAS CORPUS” (18/12/2014).

72 Supreme Court, STL12651-2017, Radicación n. 47924, Acta 29; Supreme Court, AHC4806-2017, Establishment n° 17001-22-13-000-2017-00468-02.

73 Guretzki, p. 88.

74 Ibid., p. 91.



It is submitted that the EU would be allowed, even under the principle of speciality, to harmonise the legal status of animals and to require member states to remove them from the category of “things” in the sense of the national laws of property, or to create a new legal category of “marchandise sensible”. The legal basis in the treaties could be Art. 114 TFEU (harmonisation for the internal market), or the flexibility clause of Art. 352 TFEU. The legal admissibility of such a measure is demonstrated by the fact that the EU has already harmonised numerous areas in the law of contracts via directives, and has proposed a common European sales law.<sup>75</sup>

The EU’s interference with the member states’ law of property can be justified in an analogous fashion as a measure for the approximation of member states’ laws to ensure the functioning of the internal market. Art. 345 TFEU (“The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”) would not preclude such a legislation.

As goods or commodities, animals have a price on the market. And as long as animals remain things in the sense of the law and not persons, they can have no own rights and no dignity.<sup>76</sup> Only as subjects, or persons, they would have – following Immanuel Kant – no price, but possesses a dignity.<sup>77</sup>

## II. International action

On the international scene, the EU could play a more pro-active role to disseminate animal welfare standards in the world.

### 1. Standards for imported products

The EU has a record of protectionism for European farming business, through tariffs and other measures. This is normatively unappealing because it petrifies the production methods and stimulates superfluous production which does not meet the demands of the consumers.

75 *European Commission*, Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final; *European Parliament*, Legislative resolution of 26/02/2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011)0635, OJ C 285 of 29/08/2017, pp. 638–724.

76 “Animal dignity” as codified in Art. 120 of the Swiss Federal Constitution is a “false friend”. It is not absolute like human dignity but subject to balancing. Dignity (only) protects animals from “excessive instrumentalisation”. (Art. 1 and 3 lit. a) of the Swiss Animal Protection Law of 16/12/2005, SR 455.) See on the Swiss concept *Richter*, ZaöRV 2007/67, pp. 319–349.

77 “In the realm of ends everything has either a price or an intrinsic value. Anything with a price can be replaced by something else as its equivalent, whereas anything that is above all price and therefore admits of no equivalent has intrinsic value.”; *Kant*, p. 33. Note that the German original uses the term: “Würde” (dignity), not “intrinsic value”. To possess dignity means to be an end in oneself, and not an object for the ends and purposes of others.

In contrast, it is legitimate and – as a matter of principle – lawful to disseminate European standards through market pressure on producers which seek to sell into the EU. The EU has so far done this in two variants. The stricter variant is to categorically prohibiting the import of goods whose production process outside the EU does not comply with the EU-standard (such as the ban on the importation of pelts gained with leghold traps;<sup>78</sup> the ban on seal products,<sup>79</sup> and the ban on cosmetics containing ingredients tested on animals<sup>80</sup>). The milder way is to require the certification not of an identical but merely of an *equivalent* process and production method in the third country as a prerequisite for the importation of the animal or the derivative product into the EU. The latter strategy is employed by the Slaughter Regulation,<sup>81</sup> the Calves Directive,<sup>82</sup> and the Pigs Directive.<sup>83</sup>

Such a market-based dissemination of the EU standards could be expanded to many more animal welfare issues. This policy is less unilateral, less intrusive on third states if the EU itself refers to international (soft) standards where they exist, for establishing and proving equivalency<sup>84</sup> This strategy is already applied in the Slaughter Regulation.<sup>85</sup> and in the Leghold Trap Regulation.<sup>86</sup>

Of course, animal welfare standards affecting international trade must be in conformity with WTO law.<sup>87</sup> Historically, the WTO has probably deployed a chilling effect on the EU animal welfare policies. The seals product case (see above sec. C II)

78 Council Regulation 3254/91 of 04/11/1991 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 catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ L 308 of 09/11/1991, p. 1, esp. Art. 3.

79 Regulation 2015/1775, (fn. 50).

80 Regulation 1223/2009, (fn. 56 ).

81 Regulation 1099/2009, (fn. 11 ), Art. 12(2).

82 Council Directive 2008/119/EC of 12/12/2008 laying down minimum standards for the protection of calves, OJ L 10 of 15/01/2009, Art. 8: “In order to be imported into the Community, animals coming from a third country must be accompanied by a certificate issued by the competent authority of that country, certifying that they have received *treatment at least equivalent* to that granted to animals of Community origin as provided for by this Directive.” (emphasis added).

83 Directive 2008/120, (fn. 49), Art. 9: “In order to be imported into the Community, animals coming from a third country must be accompanied by a certificate issued by the competent authority of that country, certifying that they have received *treatment at least equivalent* to that granted to animals of Community origin as provided for by this Directive.” (emphasis added).

84 Cf. Cooreman, ICLQ 2016/65, pp. 229-248, at p. 234.

85 Regulation 1099/2009, (fn. 11 ), consideration 37: “The Community seeks to promote high welfare standards in animal livestock populations worldwide, particularly in relation to trade. It supports the specific standards and recommendations on animal welfare of the OIE, including on the slaughter of animals. Such standards and recommendations should be taken into account when *equivalency with Community requirements* under this Regulation needs to be established for the purpose of imports.” (emphasis added).

86 Council Regulation 3254/91, (fn. 78 ), Art. 3 last alternative: The import of pelts is allowed when “the trapping methods used for the species listed in Annex I meet internationally agreed humane trapping standards.”

87 See for an excellent discussion *Ankersmit*.

was a watershed case which might pave the way for a future more dynamic interpretation of the exception clauses. Not only of Art. XX lit. a) GATT (public morals), but also of lit. b) (animal health), and lit. g) (natural resources) could be used as a legal basis for animal welfare measures. The EU could become more proactive in relying on these exceptions when setting high animal welfare standards. More recently, a novel threat of chilling has emerged through the new regional Free Trade Agreements which sometimes copy Art. XX GATT, but for the most part only contain provisions on cooperation and information exchange with regard to animal welfare (see in detail below sec. E. II. 3.).

## 2. Animal welfare guidelines and impact assessments

Soft strategies for disseminating animal welfare standards internationally are guidelines and impact assessments. Again, the EU's active pro-human rights policy linked to its trade activities with third countries might serve as a model. The dual objective of that policy is to allow the EU both to "safeguard its values" on the international scene (as Art. 21(1) and (2) lit. a) TEU prescribes) *and* to level the playing field by stimulating a race to the top. For example, the General Court held (in a case relating to imports of goods possibly originating from the Western Sahara) that the Council of Ministers must examine "carefully and impartially, all the relevant facts in order to ensure that the production of goods for export (...) [does not] entail (...) infringements of fundamental rights"<sup>88</sup> before concluding an agricultural and fisheries agreements with Morocco.<sup>89</sup> The Court thus suggested a human rights impact assessment.

Similar instruments could be developed with regard to animal welfare. Although animal welfare is not explicitly mentioned in Art. 21(1) TEU which prescribes principles for external action of the EU, animal welfare is acknowledged as a Union value in EU law<sup>90</sup> and must therefore guide the Union's action on the international scene. The EU could thus adopt an animal welfare guideline, similar to the so far eleven human rights-related guidelines.<sup>91</sup> Or, the Commission could develop an animal welfare impact assessment for trade related policy initiatives, in analogy to its human rights impact assessments.<sup>92</sup> It would be legally possible to take into account the animal

88 General Court, case T-512/12, *Front Polisario v. Council*, ECLI:EU:T:2015:953, para. 228.

89 At issue was an additional protocol in the context of the EU-Morocco Free Trade Agreement on liberalisation of certain agricultural and fisheries products which also applied to Western Sahara. Overturned by the Court of Justice on procedural grounds (CJEU, case C-104/16 P, *Council v. Front Polisario*, ECLI:EU:C:2016:973).

90 Consideration 2 of Directive 2010/63/EU, (fn. 24 ).

91 The human rights-related guidelines are listed in *Council of the European Union*, EU Annual Report on Human Rights and Democracy in the World 2017, Council Doc. No. 9122/18 (28/05/2018).

92 See *European Commission, Directorate-General for Trade*, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives (19 July 2015), available at: [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf) (05/12/2018).

welfare standards observed in agriculture and fisheries before concluding agreements with third states.

### 3. International cooperation and harmonisation

Next, as a member of the Food and Agriculture Organisation (FAO), of the World Trade Organisation (WTO) and as a partner of the World Organisation for Animal Health (OIE), the EU can address animal welfare in these forums and work towards levelling up. In 2000, the EU submitted the proposal “Animal Welfare and Trade in Agriculture” to the WTO Committee on Agriculture, suggesting that the WTO should directly tackle animal welfare standards.<sup>93</sup> This proposal was defeated. A number of WTO members claimed other policy priorities, others insisted on their regulatory autonomy, and yet others suspected a disguised barrier to trade.<sup>94</sup>

In its proposal, the EU had described three possible strategies: First, the creation of a new multilateral agreement on animal welfare, second, the introduction of a labelling regime pertaining to animal welfare standards for imported foods, or, thirdly, a compensation scheme to enable producers to meet the additional costs of producing food to meet EU animal welfare standards.<sup>95</sup>

Although these ideas had met resistance in 2000, they might be worth reviving, not the least because consumer expectations have meanwhile changed also in other regions of the world. Given the standstill of the WTO, the mentioned strategies could be fed into the new regional trade arrangements to which we turn now.

The Union could and indeed does seek international harmonisation with trade partners and competitors in the direction of establishing stricter standards on animal welfare.<sup>96</sup> A first step towards harmonisation is cooperation. Along that line, the 2013 memorandum of understanding with Brazil,<sup>97</sup> and trade agreements with Korea

93 WTO Document No. G/AG/NG/W/19, European Communities Proposal: Animal Welfare and Trade in Agriculture, 28/06/2000.

94 *Vapnek/Chapman*, Legislative and Regulatory Options for Animal Welfare, p. 17.

95 WTO Document No. G/AG/NG/W/19, European Communities Proposal, (fn. 93 ).

96 See for a critical assessment *Walter*.

97 Administrative Memorandum of Understanding on Technical Cooperation in the Area of Animal Welfare between the Ministry of Agriculture, Livestock and Food Supply of the Federative Republic of Brazil and the Directorate General of Health and Consumers of the European Commission, 24/01/2013, available at: <http://www.itamaraty.gov.br/en/press-rel-eases/16365-acts-signed-on-occasion-of-the-6th-brazil-european-union-summit-brasilia-j-anuary-24#2agreeem> (05/12/2018).

(2010)<sup>98</sup>, New Zealand (2016)<sup>99</sup>, and Japan (2017)<sup>100</sup> contain clauses seeking cooperation in animal welfare matters. In 2018, an agreement of principle on the modernization of the EU – Mexico Global Agreement was reached. The agreement foresees an entire chapter on “Cooperation in Animal Welfare and Anti-Microbial Resistance”. That chapter contains a provision which recognises animals as sentient beings and which refers to OIE animal welfare standards.<sup>101</sup> Should the agreement be concluded as foreseen, it will introduce a novel quality of international animal welfare regulation.<sup>102</sup>

To sum up, various legal strategies are conceivable for improving the fate of animals living and dying in the EU and under the jurisdiction of EU trading partners. The existing options could be exploited for mitigating torture without compromising trade.

### III. Better implementation

The EU also needs to tackle the implementation deficit. This is difficult because implementation – as a general matter – rests with the Member States. In 2017, the EU created an animal welfare platform mandated with proposing activities to improve the

- 98 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, of 06/10/2010, OJ L 127 of 14/05/2011, p. 6: Article 5.9 “Cooperation on animal welfare”: “The Parties shall: (a) exchange information, expertise and experiences in the field of animal welfare and adopt a working plan for such activities; and (b) cooperate in the development of animal welfare standards in international fora, in particular with respect to the stunning and slaughter of animals”. Entry into force on 13/12/2015.
- 99 Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one Part, and New Zealand, of the other Part, Brussels, 05/10/2016, in force since 2017, available at: [https://eeas.europa.eu/headquarters/headquarters-homepage/11172/eu-new-zealand-partnership-agreement-on-relations-and-cooperation\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/11172/eu-new-zealand-partnership-agreement-on-relations-and-cooperation_en) (05/12/2018): “Article 16 Animal welfare: The Parties also reaffirm the importance of maintaining their mutual understanding and cooperation on animal welfare matters, and will continue to share information and cooperate within the Animal Welfare Cooperation Forum of the European Commission and the competent authorities of New Zealand and to work closely together in the OIE on these matters”.
- 100 Art. 18.17 of the Agreement between the European Union and Japan for an Economic Partnership of 17/07/2017, entered into force on 01/02/2019, OJ 330 of 27/12/2018, pp. 4–22.
- 101 The EU Commission published the texts of the Trade Part of the Agreement following the agreement in principle announced on 21/04/2018. The provisional text is: “1. The Parties recognise that animals are sentient beings. 2. The Parties recognise the value of the OIE animal welfare standards, and shall endeavour to improve their implementation while respecting their right to determine the level of their science-based measures on the basis of OIE animal welfare standards. 3. The Parties undertake to cooperate in international fora with the aim to promote the further development of good animal welfare practices and their implementation. The Parties recognise the value of increased research collaboration in the area of animal welfare”.
- 102 *Ghislain*, *Global Trade and Customs Journal* 2018/13, pp. 472–474.

enforcement of animal related legislation.<sup>103</sup> One task of the platform is “to contribute to the promotion of Union standards on animal welfare as to valorise the market value of Union products at global level”.<sup>104</sup> The cooperation with industry and the encouragement of voluntary initiatives and voluntary self-commitments is one key component. This seems to be a start, but needs to be complemented by hard law-making, i.e. the endorsement of a stricter animal welfare standard in regulations and directives, and the adoption of new instruments for further types of animals.

#### **IV. The role of consumer-citizens**

Pursuing those strategies depends on political choices which must ultimately be based on consumer-citizens’ preferences. And in order to properly articulate those, the consumer-citizens need – and actually reclaim<sup>105</sup> – more information about the real situation of animals throughout Europe.

Citing the mentioned 2016 Eurobarometer poll, already “[m]ore than half of all Europeans are prepared to pay more for products sourced from animal welfare-friendly production systems (59 %). More than a third of respondents (35 %) are prepared to pay up to 5 % more, while only a small minority (3 %) are ready to pay more than 20 %. Nevertheless, more than a third of EU citizens (35 %) are not ready to pay more.”<sup>106</sup>

Consumers also need to be informed about the real costs of more animal welfare which dramatically differs from sector to sector. Especially for meat, it is important to know that meat production is, from a business perspective, a coupled production in which many parts of the animals (most part of the meat, bone, fat, etc.) are sold to diverse buyers who are not retailers but who further process those parts (for example making sausage and ready-to-eat meals). These buyers are for the most part no natural persons but firms, and these are not willing to pay an extra price for an “organic” animal part. The end-consumer preferences concentrate on the small portion of noble parts, the meat for human consumption. Consumers must accept disproportionally high extra price for this meat, because the retail price cross-finances the entire production. For example, a German animal-friendly production called “Neuland” is around 30 percent more expensive than the standard production, but the consumer will have to pay 100 percent more for the meat. An average German household which buys meat only from animal friendly production will pay 100 Euro instead of 50 Euro per month, and raise its expenditure for meat from 2 percent of the entire family

103 Commission Decision of 24/01/2017 establishing the Commission Expert Group “Platform on Animal Welfare”, 2017/C 31/12, OJ C 31/61 of 24/01/2017.

104 Ibid., Art. 2 lit. c).

105 Special Eurobarometer 442, (fn. 26), p. 4: “A growing number of EU citizens since the last survey, would like to have more information about the conditions under which farmed animals are treated in their respective countries (64%)”.

106 Ibid, p. 4.

budget to 4 percent.<sup>107</sup> More transparency about the animal production sector would likely further boost the consumers' willingness to pay for animal-friendly products.<sup>108</sup>

## F. Epilogue

In Robert Menasse's prize-winning book "The Capital", an opportunity for presenting the EU as a unified political player, to its citizens and to the world, was missed. In the novel, the Commission had planned to celebrate the non-repetition of Auschwitz as an "event" around which a European identity could coalesce. The fictional work's cultural project failed for various reasons, notably the upsurge of terror in Europe. The "never again"-idea stands for our ethics.

The other joint project mentioned in Menasse's story, a European economic agreement with China, fails as well. In the book, it could not be achieved because the President of the European Pig Producer's Association was stuck in a traffic jam due to a car accident with refugees on a highway in Austria and because the Member States were competing against one another and thus did not manage to agree on a uniform trade quota with China.

Menasse's book is set around the two finalities of Europe: humanist ideals and economic interests. Which should prevail over the other in case of a conflict between the two: The ethical rationale or the economic finality? Trade or torture? It is the task for students of European Union law to creatively think about legal strategies in order to help forging and confirming a European identity, and to consolidate the Union as a global political player.

The ongoing change of the EU membership, with the traditionally very animal-friendly United Kingdom leaving the Union and the more recent membership of Eastern European states with a less clear record of animal protection but weaker economies, does not favour animals in Europe. In this constellation, it is all the more important to carve out with juridical arguments that the Union's responsibility towards animals already forms part of the legal *acquis Européen*. The project of European integration should not – and cannot – be realised on the back of the weakest members of society which are the farm animals in Europe.

107 Grethe/Christen/Balman/Bauhus/Birner/Bokelmann/Gauly/Knierim/Latacz-Lohmann/Nieberg/Qaim/Spiller/Taube/Weingarten/Martinez/Tenhagen, *Berichte über Landwirtschaft* 2015, Sonderheft 221, p. 295, see also p. 201.

108 Cf. also Frey/Pirscher, PLOS ONE, 2018/13: e0202193. Available at: <https://doi.org/10.1371/journal.pone.0202193> (05/12/2018).



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