

The Double-Edged Sword: International Law and Its Effects on EU Farm Animal Welfare Legislation

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Introduction

Current EU farm animal welfare legislation has its origins in three Council of Europe (CoE) conventions on animal protection. To date, the EU is the only jurisdiction to have enacted legislation that gives force to the CoE Conventions on farm animal protection, the net result of which has been to establish the current regulatory framework for farmed animal welfare in the EU.

However, in integrating the CoE farm animal welfare standards, the EU has primarily sought to harmonize agricultural production standards in a rapidly-expanding European free-trade area – the EU Single Market – now composed of 27 countries and 500 million consumers. Today, EU farm animal welfare standards chiefly serve as regulatory tools for ensuring fair competition between producers, rather than to protect animals. As a result, these regulatory tools have not, so far, meaningfully advanced the interests of the animals used by humans in agriculture.

Furthermore, the EU has interpreted World Trade Organization (WTO) rules from a market-liberalizing standpoint, which has reinforced the pro-industry bias of EU farm animal welfare legislation. As a result, the majority of EU standards do not apply to imported animal-source food products from outside the EU. International rules governing the trade of animals within the EU, and between the EU and third countries, therefore tend to substantially subvert regulatory efforts that seek to grant animals even the most basic levels of protection.

The potential to improve animal welfare came to the fore though in 2015 with the EU's adoption of the Paris Agreement. The Paris Agreement, an international climate change treaty, compelled the EU to propose a sweeping series of environmental measures known as the "European Green Deal." As part of the Green Deal, the EU has identified the

enhancement of farm animal welfare standards as a way to alleviate agriculture's environmental footprint and reduce animal suffering.

The upcoming reform of EU farm animal welfare legislation presents an opportunity to advance the interests of animals beyond the harmonization of production standards. The EU Legislature will also have the chance to bring farm animal welfare legislation in alignment with the EU's constitutional treaties. This slate of upcoming reforms therefore may offer increased opportunities to steer the legislative process away from an animal welfarist paradigm, which has, so far, been overwhelmingly supportive of industry interests.

The first part of this article analyzes the positive role of international cooperation, facilitated by the CoE, in the enactment of EU farm animal welfare legislation. This article will then look at the limitations that such international legal tools face in adequately regulating the market forces that routinely abuse animals. Finally, with an eye to more recent international legal initiatives, this article will attempt to formulate legal strategies to improve the treatment and welfare of animals, where past international efforts have failed. The European Green Deal will be of particular interest as this article concludes that the proposals therein fall short of adequately protecting farm animals.

1 International Law as a Driver of EU Animal Welfare Legislation

1.1 The Council of Europe Conventions as a Basis for EU Farm Animal Welfare Legislation

1.1.1 The Council of Europe's Convention on Farm Animal Protection

EU animal welfare legislation has largely been influenced by the adoption of three conventions on animal protection by the Council of Europe (CoE), an international organization of 46 European member countries, including European countries like Turkey, as well as all 27 EU Member States. The CoE derives competence to enact conventions on animal welfare from its mandate to foster legal cooperation among the CoE's 47 member states on matters pertaining to biological safety and the "use of animals." The CoE's attempts to standardize farm animal welfare rules have stalled since the late 2010s.¹

¹ The Council of Europe does not report any meeting of the Standing Committee of the European Conventions for the Protection of Animals kept for Farming Purposes ("T-AP") taking place after 2010.

The main achievements of the CoE fall between 1968 and 1979, when it adopted three Conventions pertaining to the protection of farmed animals (CoE Conventions):²

- The European Convention for the Protection of Animals During Transport³
- The European Convention for the Protection of Animals Kept for Farming Purposes⁴
- The European Convention for the Protection of Animals for Slaughter⁵

These three conventions are binding in the EU to the extent that almost all the EU Member States have ratified them, and the EU itself signed them as a non-State signatory.

While the CoE conventions are limited by vague language throughout, which is a consequence of finding consensus among 47 nations, the Member States of the CoE have identified the pressing issue of mass-scale animal suffering on industrial farms through their intent to protect animals “particularly in modern intensive stock-farming systems.”⁶

Furthermore, the Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes – an expert group composed of representatives from all 47 Council of Europe member countries – has added further specifications to the general rules of this Convention by way of “Recommendations.” These twelve species-specific recommendations,⁷ including for farmed fish and ostriches, counterbalance the more general wording of the Conventions for the Protection of Animals Kept for Farming Purposes. These recommendations, which have the same legal value as the Convention, and which are binding in any jurisdiction that ratifies them, also bring the Convention in closer alignment with its intended purpose to protect animals in industrial agricultural settings. And while these recommendations rarely contain specific engineering or performance

² These Conventions were adopted by the European Committee on Legal Co-operation (CDCJ), which was established in 1963, and whose mandate is to set standards with a wide scope of competence in the field of public and private law.

³ Council of Europe, European Convention for the Protection of Animals During Transport, Nov. 6, 2003, E.T.S. 193.

⁴ Council of Europe, European Convention for the Protection of Animals Kept for Farming Purposes, March 10, 1976, E.T.S. 87.

⁵ Council of Europe, European Convention for the Protection of Animals for Slaughter, May 10, 1979, E.T.S. 102.

⁶ Preamble, Council of Europe, European Convention for the Protection of Animals Kept for Farming Purposes, March 10, 1976, E.T.S. 87.

⁷ A list of these recommendations is available online: https://www.coe.int/t/e/legal_affairs/legal_cooperation/biological_safety_and_use_of_animals/farming/A_texts_documents.asp - TopOfPage (last visited January 3rd, 2021)

standards, they still provide a baseline for farm animal welfare standards within the 47 CoE Member countries.

By ratifying each of these three CoE Conventions, and most of the CoE Recommendations, the EU has integrated a substantial international legal foundation for shaping its farm animal welfare legislation. Of the CoE Member countries, the EU remains one of the only jurisdictions to have complied with its international obligations by implementing the CoE Conventions and some of its recommendations into law. The CoE Conventions have thus formed the basis of one of the most developed bodies of animal welfare legislation in the world.

1.1.2 The Codification of the Council of Europe’s Conventions into EU Law

The EU had enacted just one piece of farm animal welfare legislation, in 1973,⁸ prior to its implementation of the CoE Conventions. However, following the CoE Conventions, the EU became much more proactive in enacting animal welfare laws to protect animals used for food production.⁹

In 1977, the EU codified the 1968 CoE Convention for the Protection of Animals During Transport by way of a directive¹⁰ on the protection of animals during international transport (later revised into a regulation in 2005).¹¹ In 1993, the EU executive further revised the directive on the protection of animals at slaughter (later revised into a regulation in 2009),¹² to bring this directive into alignment with the 1979 CoE Convention for the Protection of Animals for Slaughter. The EU also adopted an additional directive in 1998¹³ establishing

⁸ Council Directive (EEC) 74/577 on stunning of animals before slaughter [1974] OJ L316/10–11.

⁹ *Also see* Katy Sowery, ‘Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law’ [2018] *Common Market Law Review*, 7.

¹⁰ Directives and Regulations are the two types of legislative acts in EU law. Directives lay down objectives that the Member States must achieve by enacting national law (“transposition”). Regulations lay down precise standards and are directly binding, thereby not requiring transposition. Both types have the same legal value – they are both binding.

¹¹ Council Directive (EEC) 77/489 on the protection of animals during international transport [1977] OJ L200/10–16. Amended and repealed by Council Regulation (EC) 1/2005 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation 1255/97 (Transport Regulation) [2004] OJ L/1–44.

¹² Council Directive (EC) 93/119 on the protection of animals at the time of slaughter or killing [1993] OJ L340/21–34. Amended and repealed by Council Regulation (EC) 1099/2009 on the protection of animals at the time of killing (Slaughter Regulation) OJ L 303/1–30.

¹³ Council Directive (EC) 98/58 concerning the protection of animals kept for farming purposes [1998] OJ L221/ 23–27.

minimum animal welfare standards for all farmed animals, thus codifying the 1976 CoE Convention for the Protection of Animals Kept for Farming Purposes. All three directives thus refer to the CoE Conventions in their recitals as an impetus for their legislation.

In addition to measures spurred by CoE conventions, EU law further contains species-specific legislative acts. As early as 1986, the EU adopted a directive on the welfare of egg-laying hens (Egg-Laying Hens Directive),¹⁴ later revised in 1999.¹⁵ The EU subsequently adopted a Directive on welfare standards for pigs in 1991 (Pigs Directive),¹⁶ later revised in 2000¹⁷ and 2008.¹⁸ The EU adopted two additional species-specific directives on broiler chickens²⁰ and calves in 2007 and 2008 respectively.²¹ These four species-specific acts for egg-laying hens, pigs, broiler chickens, and calves (respectively: Directives 1999/74, 2008/120, 2007/43, and 2008/119) find their antecedent in the CoE Convention for the Protection of Animals Kept for Farming Purposes (1976) and some of the Standing Committee's species-specific Recommendations.²²

The legacy of the three CoE Conventions put forth in 1968, 1976, and 1979 also remains noticeable in the three other legislative acts which comprise present day EU farm animal welfare legislation. The EU's one general legislative act covering "any animal (including fish, reptiles or amphibians) bred or kept for the production of food, wool, skin or fur or for other farming purposes" (Directive 98/58)²³ can be traced back to the CoE Convention for the Protection of Animals Kept for Farming Purposes (1976) as well. Finally, the two regulations regulating specific stages of production, which are transport and killing – *i.e.* the slaughter

¹⁴ Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages [1986] OJ L 95/45–48.

¹⁵ Council Directive (EC) 1999/74 laying down minimum standards for the protection of laying hens (Egg Laying Hens Directive) [1999] OJ L 203/53–57.

¹⁶ Council Directive (EEC) 91/630 laying down minimum standards for the protection of pigs [1991] OJ L 340/33–38

¹⁷ Council Directive (EC) 2001/88 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs [2001] OJ L316/1–4.

¹⁸ Council Directive (EC) 2008/120 of 18 December 2008 laying down minimum standards for the protection of pigs (Pigs Directive) [2008] OJ L 47/5–13.

²⁰ Council Directive (EC) 2007/43/EC laying down minimum rules for the protection of chickens kept for meat production (Broilers Directive) [2007] OJ L 182/19–28.

²¹ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Calves Directive) [2008] OJ L 10/7–13.

²² While the EU did not codify all of the CoE Standing Committees' recommendations, EU species-specific standards are often very similar to the standards in the CoE Recommendations. For example, the 2008 Calves Directive uses similar language as the provisions contained in the CoE Standing Committee's Recommendations concerning cattle.

²³ Article 2, Council Directive (EC) 98/58 concerning the protection of animals kept for farming purposes [1998] OJ L 221/ 23.

of animals, euthanasia, and depopulation (respectively Regulation 1/2005 and 1099/2009) grew out of the CoE Conventions for the Protection of Animals During Transport (1976) and the CoE Conventions for the Protection of Animals for Slaughter (1979).

In some instances, EU standards have built upon the CoE Recommendations to become even more ambitious. One example of this can be found in the CoE Recommendations concerning cattle,²⁴ which do not impose a limit on the duration of the use of individual pens for calves, and do not require that calves be able to see and touch one another. Building upon this initial CoE Recommendations, the EU's Calves Directive provides that "no calf shall be confined in an individual pen after the age of eight weeks" and that "individual pens for calves [...] must have [...] perforated walls which allow the calves to have direct visual and tactile contact."²⁵

1.2 The EU's Gradual Integration of a Constitutional Duty to Safeguard Animals' Interests

In tandem with developing farm animal welfare legislation via CoE Conventions, the EU Legislature has also gradually integrated language into the EU constitutional treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – that recognizes the interests of animals as sentient beings. This development is particularly significant because EU law applies directly to the national laws of EU Member States, making the EU treaties a powerful international legal vehicle to advance the interests of animals in the law.

The interests of animals are first mentioned in the 1992 Maastricht Treaty which implemented one of the EU's constitutional treaties, the TEU. The EU Member States then signed a Declaration on the protection of animals, appended to the Maastricht Treaty.²⁶ The Declaration calls "the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the

²⁴ European Convention for the Protection of Animals Kept for Farming Purposes Recommendation Concerning Cattle, Appendix C [1993].

²⁵ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Calves Directive) [2008] OJ L 10/8.

²⁶ Treaty on European Union, Declaration on the Protection of Animals [1992] O.J. C 191/0103. For the legislative history of this Declaration, see Katy Sowery, 'Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law' [2018] Common Market Law Review, 9

welfare requirements of animals.” However, a significant limitation to this provision is that the duty to take into account the welfare of animals only applies to a closed list of laws and policies: agriculture, transport, internal market (*i.e.* inter-state trade), and research. But this provision does not apply to two of the most central policies that impact animals: trade and environmental policies.

In 1997, the EU constitutional treaties²⁷ underwent another reform by way of the Treaty of Amsterdam. At this time, the EU Legislature also adopted a “Protocol on protection and welfare of animals” annexed to the Treaty of Amsterdam. The Protocol states 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.”²⁸ Thus, for the first time, the EU recognized animals as “sentient beings,” influenced by a pathocentric approach whereby living beings are entitled to basic levels of protection almost exclusively on account of their sentience – that is, their “capacity to of conscious suffering and/or enjoyment.”²⁹

It is important to note however that the 1997 Protocol was not an altogether positive step toward building a constitutional duty to protect animals. With this Protocol, the EU Legislature granted an exemption to the enactment of rules accounting for the welfare of animals when used in religious, cultural, and regional practices.³⁰

The EU treaties were most recently amended in 2007 by way of the Lisbon Treaty, which entered into force in 2009. The Lisbon Treaty amends the TFEU to include the 1997 Protocol (No 33) on protection and welfare of animals, by way of article 13, TFEU (new).³¹ Article 13, TFEU thus contains the same wording as the 1997 Protocol but enlarges the material scope

²⁷ Both the Treaty of Rome and the Treaty of Maastricht

²⁸ Treaty Establishing the European Community, Protocol (No 33) on Protection and Welfare of Animals [1997] O.J. C 321E/314. For an analysis of the wording of the Protocol, *see also* Tara Camm and David Bowles, ‘Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union’ [2000] *Journal of Environmental Law*, 200 – 201.

²⁹ Gary Varner, ‘Sentience’ in Lori Gruen (ed.) *Critical Terms for Animal Studies* (University of Chicago Press 2018)

³⁰ Tara Camm and David Bowles, ‘Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union’ [2000] *Journal of Environmental Law*, 203.

³¹ Consolidated Version of the Treaty on the Functioning of the European Union [2009] O.J. C 326/54.

of the provision to fisheries, technological development, and space policies, in addition to agriculture, transport, internal market, and research.

2 International Trade Law as an Obstacle to High Levels of Legal Protections for Farm Animals in the EU

The CoE Conventions have played a central role in the enactment of EU Farm Animal Welfare Legislation, and international efforts undertaken by EU Member States have yielded robust language in support of animal protection in the EU constitutional treaty. However, though there has been some success in the treaties, efforts undertaken by the international European community to protect animals from industrial abuse have not translated well into the substance of EU Farm Animal Welfare Legislation. This latter shortcoming has resulted in large part due to the lack of consistency between international efforts to improve farm animal welfare on account of animal sentience on the one hand, and the economic regulation of animals as tradable products in a liberal economy at both EU (A) and international levels (B) on the other.

2.1 Intra-EU Market Trade Rules as a Factor Undermining High Protection Standards for Farmed Animals

2.1.1 The EU's Market Regulation as a Means of Regulating Animal Welfare

Even though animals are recognized as sentient beings in the TFEU,³² that same treaty categorizes them as “agricultural products.”³³ This contradiction is reflected in EU farm animal welfare laws and is typical of a “welfarist regime.”³⁴

More specifically, this disconnect manifests in the EU's regulatory substance concerning farm animal welfare. The EU's regulatory measures have followed a liberal, pro-trade approach, disregarding the recognition of animal sentience established in Article 13, TFEU.

³² Article 13, Consolidated Version of the Treaty on the Functioning of the European Union [2009] OJ C 326/54.

³³ Annex I, Consolidated Version of the Treaty on the Functioning of the European Union [2009] OJ C 326/333. For more on the duality of the legal status of animals in E.U. law, see Katy Sowery, ‘Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law’ [2018] Common Market Law Review

³⁴ This expression comes from the name of a research project in law at Helsinki University, description available online: <https://www2.helsinki.fi/en/researchgroups/animals-under-a-welfarist-regime/people>. Katy Sowery, ‘Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law’ [2018] Common Market Law Review, 13.

The main reason for this disconnect is that EU constitutional treaties – the TFEU and the TEU – do not list animal protection as a field of competence of the EU,³⁵ nor do they list the promotion of animal welfare as an objective that EU law should pursue.³⁶

In the absence of an animal welfare objective or competence in EU law, the EU Legislature has regulated farm animal welfare through its competence in regulating agriculture.³⁷ Such a situation has resulted in the regulation of the welfare of farm animals only to the extent that such welfare is a factor to be adjusted to ensure fair competition and “eliminate distortions of competition” on the single market.³⁸

The EU’s indirect competence in regulating farm animal welfare has been confirmed in two rulings, in 2001³⁹ and 2017,⁴⁰ by the European Court of Justice (ECJ). In these rulings, the ECJ confirmed that there was no general principle of animal welfare in EU law. The Court further specified that the EU’s legal and policy interventions in the field of animal welfare were strictly limited to the design and implementation of the Union’s agriculture, fisheries, transport, internal market, research, technological development, and space policies, as determined in Article 13 of the TFEU.⁴¹

Even though the EU’s competence in agriculture can and has resulted in the adoption of legislative acts that establish minimum animal welfare standards for farmed animals, these acts have been primarily motivated by the adoption of “common rules on competition” in

³⁵Articles 3 - 6, Consolidated Version of the Treaty on the Functioning of the European Union [2009] OJ C 326/51-53.

³⁶ Article 3, Consolidated Version of the Treaty on European Union [2012] OJ C 326/17.

³⁷ Article 4, Consolidated Version of the Treaty on the Functioning of the European Union [2009] OJ C 326/51. *See also* Katy Sowery, ‘Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law’ [2018] Common Market Law Review; Vincent Bouhier, ‘Le difficile développement des compétences de l’Union européenne dans le domaine du bien-être des animaux’ [2013], *Revue Semestrielle de droit animalier*, 361-364 (2013). Bouhier also notes that the mere presence of a general policy objective is not enough to form the basis of an EU competence as per article 5(2), TEU, which requires that a competence be specific enough.

³⁸ Katy Sowery, ‘Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law’ [2018] Common Market Law Review, 7-8.

³⁹ C-189/01, *Jippes and Others* [2001] ECR I-5718, para 73.

⁴⁰ T-361/14, *H.B. contre Commission*, [2017] ECLI:EU:T:2017:252.

⁴¹ C-189/01, *Jippes and Others* [2001] ECR I-5718, para 73. T-361/14, *H.B. contre Commission*, [2017] ECLI:EU:T:2017:252., para 37.

agriculture,⁴² on the basis of article 39 of the TFEU.⁴³ Further establishing the locus of EU competence regarding animal welfare, a 1988 ECJ case, in which the UK challenged the competence of the then-EU to enact egg laying hens welfare rules, confirmed that the adoption of rules concerning the welfare of egg-laying hens “was made essentially with a view to eliminating unequal conditions of competition in that field.”⁴⁴ The Court further noted that while “it [was] true that the [Directive] was also conceived with a view to ensuring better treatment for laying hens, [...] it must be emphasized that [...] varying national rules regarding agricultural products which may affect the proper functioning of a common organization of the market, such as, in this case, differing conditions for the keeping of laying hens, may be harmonized on the basis of Article 43 of the Treaty [on the common agricultural policy] alone.”⁴⁵

Such an order of priority is reflected in the recitals of EU farm animal welfare legislative acts, where the Legislature states the interests of animals as an impetus for legislation *after* fair competition objectives.⁴⁶ However, such consideration for animal welfare is virtually always disregarded in the substance of the act. For instance, the Pigs Directive’s recitals recognize that “keeping sows in continuous close confinement should [...] be prohibited” and that the “tail-docking, tooth-clipping and tooth-grinding are likely to cause immediate [and prolonged] pain.” At the same time, the provisions in the Directive allow the use of gestation and farrowing crates and mutilations on piglets.⁴⁷

The subordination of the EU’s competence to act in the field of farm animal welfare thus explains why farm animal welfare rules in EU law are derived in large part and codified from common practices on industrial farms. These common practices involve the use of cages,

⁴² Article 40, TFEU. *See also* Katy Sowery, Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals under Union Law, 7–8, *Common Market Law Review* (2018). *Contra* Fabien Marchadier, La protection du bien-être de l’animal par l’Union européenne, 251, *RTD Eur.* (2018) (in French).

⁴³ Note that the regulation of the welfare of animals other than farmed animals are based on articles 114 (approximation of law), 168(4) (public health), article 191 and following (environmental policy), or article 207 (trade policies) of the TFEU.

⁴⁴ C-131/86, *United Kingdom of Great Britain and Northern Ireland contra Council of the European Communities*, [1988], ECLI:EU:C:1988:86, para 26.

⁴⁵ *Ibid.* 27.

⁴⁶ One exception is the Transport Regulation. Recitals, Council Regulation (EC) 1/2005 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation 1255/97 (Transport Regulation) [2004] OJ L/1–4.

⁴⁷ Article 3 and Annex I, Chapter 1, point 8, Council Directive (EC) 2001/88 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs [2001] OJ L316/6–7 and 10.

extreme density levels, routine mutilations, etc.⁴⁸ At best, a few of the standards contained in EU farm animal welfare legislation, such as the mandatory stunning of animals before slaughter, do improve the treatment of animals to a slight degree. But these benefits are ancillary, only afforded to animals when such measures make them better products, or advance human interests such as food and occupational safety.⁴⁹

2.1.2 The Primacy of EU Trade Rules on National Farm Animal Welfare Laws

While it is true that EU laws which benefit animals come as a happy accident, ancillary to laws and regulations whose primary concern is the functioning of the market, EU farm animal welfare legislation is only meant to provide the bare minimum of protection to animals. Member States then have the ability to build upon those baseline standards in accordance with their own national values.⁵⁰

Some EU Member States have exercised their ability to adopt legislation with higher standards for farm animals than those contained in EU law. For instance, Austria, Germany, Luxembourg, Czechia, and Slovakia ban the use of battery cages for egg-laying hens, whereas such a use is allowed in EU law.⁵¹ Similarly, Sweden, Finland, and Lithuania prohibit tail docking on pigs, although this practice is not prohibited by EU law.⁵² Sweden also prohibits the use of gestation and farrowing crates for sows, a measure also above and beyond EU law.⁵³

However, these cases remain exceptional at the scale of the 27 Member States because EU law prevents national jurisdictions from raising trade barriers to limit imports and exports between EU Member States with different standards. In theory, Article 36, TFEU allows

⁴⁸ For an exhaustive analysis of the standards contained in EU Farm Animal Legislation, see The European Institute for Animal Law & Policy, *For a More Humane Union: A Legal Analysis of E.U. Farm Animal Welfare Legislation* (White Paper) (2022).

⁴⁹ Katy Sowery, 'Sentient Beings and Tradable Products: the Curious Constitutional Status of Animals Under Union Law' [2018] *Common Market Law Review*, 17.

⁵⁰ As specified in the Directives, for instance, Article 11, Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Calves Directive) [2008] OJ L 10/9.

⁵¹ Communication from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age," June 30 2021, 3, C(2021) 4747, available online: [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2021\)4747&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2021)4747&lang=en)

⁵² Nancy De Briyne *et al.*, 'Phasing Out Pig Tail Docking in the EU: Present State, Challenges and Possibilities,' 2, *Porcine Health Management* [2018].

⁵³ Communication from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age," June 30 2021, 3, C(2021) 4747, available online: [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2021\)4747&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2021)4747&lang=en)

restrictions on imports and exports “on grounds of public morality” and “protection of health and life [...] animals.”⁵⁴ However, neither the EU Legislature, nor the European Courts, have interpreted that provision to enable more progressive Member States to protect their domestic markets from crueler methods of production.⁵⁵

Such pro-trade bias in EU legislative-making has created the following situation: even though Austrian, German, Luxembourgish, and Czech farm animal welfare legislation prohibits the use of cages in these respective jurisdictions’ territory, national legislation does not go as far as banning imports of eggs originating from hens kept in cages produced in other Member States due to the rules on the “prohibition of quantitative restrictions between Member States.”⁵⁶

The ECJ case law has also adopted a “lenient approach”⁵⁷ regarding the legality of trade barriers erected on the grounds of animal welfare, confirming the primacy of free trade within the single market over national animal welfare considerations in two rulings, both in 1996. These two ECJ cases related to the export of live animals from the UK to other EU Member States. In one case, an exporter challenged the British government for refusing to issue export licenses for live sheep to Spain.⁵⁸ The English authorities’ refusal was grounded on the fact that Spanish law, unlike English law, did not mandate the stunning of animals prior to their killing – Spain being a major producer of halal meat. The second case was brought by the Royal Society for the Prevention of Cruelty Against Animals (RSPCA) and Compassion in World Farming (CIWF) which challenged the export of live calves from the UK to EU Member States, including to jurisdictions allowing the use of veal crates, when such a practice had been banned in British law.⁵⁹ In both cases, the then-ECJ ruled that a discrepancy between two respective sets of national farm animal welfare laws did not justify

⁵⁴ Article 36, Consolidated Version of the Treaty on the Functioning of the European Union, O C 326/61 [2009].

⁵⁵ See also Rasso Ludwig and Roderic O’Gorman, ‘A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions’ [2008] *Journal of Environmental Law*, 371–373 and 375-376.

⁵⁶ Chapter 3, Consolidated Version of the Treaty on the Functioning of the European Union, O C 326/61 [2009].

⁵⁷ Rasso Ludwig and Roderic O’Gorman, ‘A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions’ [2008] *Journal of Environmental Law*, 370 – 371. See also, generally Iyan Offor, ‘Animals and the Impact of Trade Law and Policy: A Global Animal Law Question’ (2020) *Transnational Environmental Law* 239, 249.

⁵⁸ Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd* [1996], ECR I-02553.

⁵⁹ Case C-1/96, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd*. [1996], ECR I-01251.

a limitation on trade between Member States, provided both Member States complied with EU minimum standards.

With these pro-free trade legal precedents at EU level, unilateral moves to protect farm animal welfare on the part of individual Member States put their national industry at a competitive disadvantage. This is especially evident when considering trade competition. Producers from Member States who can legally resort to cheaper, and crueller, production methods will virtually always be able to offer their products at a lower cost to the consumer within the single market. Furthermore, domestic producers in jurisdictions with enhanced legal protection for farm animals may seek to externalize their processing (such as fattening and slaughter) to other jurisdictions with laxer standards to save on production costs. Thus, overall, the primacy of EU trade rules on national farm animal welfare laws creates an unfair playing field between producers who must abide more robust animal welfare standards and those who do not face such requirements.

To deprive a jurisdiction of its ability to erect trade barriers is a practice not commonly found in other free trade areas. For example, in the United States of America (US), federal legislation grants individual US states the right to ban imports of agricultural products from producers in other states who do not abide by the standards of the importing state.⁶⁰ California⁶¹ and Massachusetts,⁶² which have both prohibited the use of cages in animal agriculture, thus also impose a ban on imports of eggs, veal, and pork from caged animals, thereby excluding products which do not meet the standards of the importing market, even though such products do comply with federal rules.

2.2 International Trade Policy Rules as an Obstacle to More Progressive Protection Standards for Farm Animals in the EU

The same internal EU market phenomenon described above is similarly taking place among EU Member States and non-EU countries. This is due in large part to the EU's overwhelming

⁶⁰ For more on farm animal welfare legislation and the US Commerce Clause, see Ann Linder, Legislative Analysis of H.R. 4879: The "Protect Interstate Commerce Act of 2018" (2018) Harvard Law School, Animal Law & Policy Program, available online: <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-PICA-Report-1.pdf>.

⁶¹ Draft Bill, Prevention of Cruelty to Farm Animals Act, 2018 (California, U.S.A.).

⁶² Bill S.2603, An Act further regulating hen welfare and establishing uniform cage-free standards (Massachusetts, U.S.A.).

tendency to interpret World Trade Organization (WTO) rules in a conservative manner. The EU retains exclusive competence in negotiating the Union's common trade policy and the European Commission's pro-liberal interpretation of WTO rules has had a bearing upon three crucial areas for farm animal protection: market access to extra-EU products, labeling of extra-EU products, and rules on EU agricultural subsidies.

2.2.1 The Undermining Effects of Extra-EU Imports on EU Farm Animal Welfare Legislation

While EU trade policy within the EU market hampers the improvement of animal welfare standards by allowing EU nations to undercut one another, the EU's trade policy creates a similar scenario between EU Member States and non-EU countries. The EU allows non-EU countries to sell their products within the EU single market without having to abide by animal welfare standards that EU Member States must maintain. This puts producers from EU Member States at a competitive disadvantage against non-EU countries, which can resort to cheaper, crueler methods, while still enjoying the privilege of EU market access.

This situation becomes particularly puzzling in light of the EU's history of regulating imports on animal welfare grounds. For example, the EU has adopted trade restrictions on products derived from seals,⁶³ in addition to animal products obtained via cruel leghold traps.⁶⁴ Similarly, EU law prohibits the importation of cat and dog fur,⁶⁵ as well as cosmetic products that have been tested on animals.⁶⁶

Furthermore, there also exists three notable exceptions to the EU's non-application of animal welfare standards on animal source food products coming from non-EU countries. The first two exceptions pertain to the import of live pigs and calves, respectively, to the EU

⁶³ Regulation (EC) 1007/2009 on Trade in Seal Products [2009] OJ L 286/36–39. *Also see* Katie Sykes, *Animal Welfare and International Trade Law, The Impact of the WTO Seal Case* (2021) 121 - 154, and Iyan Ofor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 247.

⁶⁴ Council Regulation (EEC) No 3254/91 of 4 November 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 [1991] OJ L 308/1–4. Although the efficacy of this regulation should be nuanced, as noted in Iyan Ofor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 255.

⁶⁵ Regulation (EC) No 1523/2007 of 11 December 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 [2007] OJ L 343/1–4.

⁶⁶ Directive 2010/63/EU of 22 September 2010 on the protection of animals used for scientific purposes [2010] OJ L 276/33–79.

from non-EU countries. In this situation, non-EU countries must comply with the animal welfare standards set forth in the Calves⁶⁷ and Pigs Directives,⁶⁸ even though EU imports of live pigs and calves are negligible.⁶⁹ The third exception to the EU's non-application of animal welfare standards on animal source food products from non-EU countries concerns meat imports, which must come from animals slaughtered in compliance with the provisions in the Slaughter Regulation. Even though the EU imports large volumes of meat,⁷⁰ the extra-territoriality of the Slaughter Regulation is rooted in sanitary reasons, as opposed to animal protection.⁷¹ Overall though, animal-source products EU standards on farm animal welfare produce very limited extraterritorial effects.⁷²

In response to this contradiction - the political willingness to ban imports on certain animal source products, but not those produced via cruel farming methods - the European Commission, which is the executive branch of the EU, has put forth the reasoning that they do not wish the EU to run afoul of WTO rules.⁷³ However, a series of decisions by the WTO's Dispute Settlement Body have clarified the rules on trade restrictions on animal products based on animal welfare considerations, offering the possibility for jurisdictions to craft trade restrictions that would be WTO compliant.⁷⁴ Therefore, in light of these precedents,

⁶⁷ Article 8, Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Calves Directive) [2008] OJ L 10/8.

⁶⁸ Article 9, Council Directive (EC) 2008/120 of 18 December 2008 laying down minimum standards for the protection of pigs (Pigs Directive) [2008] OJ L 47/5–13.

⁶⁹ For the year 2019, the EU imported the equivalent of approximately 9 tonnes in live piglets compared to a yearly production of 23 million tonnes in pig meat. Sources: European Commission, Pigmeat Dashboard, 2021, 1, available online: https://agridata.ec.europa.eu/Reports/Pigmeat_Dashboard.pdf and European Commission, Pigmeat Trade Data, <https://agridata.ec.europa.eu/extensions/DashboardPigmeat/PigmeatTrade.html>. For the year 2019, the EU imported the equivalent of 8.7 tonnes of live cattle compared to 7.2 millions of veal and beef. Sources: European Commission, Beef Dashboard, 2021, available online: <https://agridata.ec.europa.eu/extensions/DashboardBeef/Dashboard.html#> and European Commission, Beef Trade Data, <https://agridata.ec.europa.eu/extensions/DashboardBeef/BeefTrade.html>.

⁷⁰ For example, the EU imported around 300 million tonnes of beef in 2021. European Commission, Beef Trade Data, <https://agridata.ec.europa.eu/extensions/DashboardBeef/BeefTrade.html>.

⁷¹ Article 12, Council Directive (EC) 93/119 on the protection of animals at the time of slaughter or killing [1993] OJ L340/21–34. Amended and repealed by Council Regulation (EC) 1099/2009 on the protection of animals at the time of killing (Slaughter Regulation) OJ L 303/11.

⁷² Iyan Offor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 256.

⁷³ Iyan Offor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 257.

⁷⁴ Katie Sykes, *Animal Welfare and International Trade Law, The Impact of the WTO Seal Case* (2021) 113 and 115; Robert Howse, Johanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products (2005) *George Washington International Law Review*.

the EU's stated hesitancy to infringe upon WTO rules appears over-cautious and increasingly less tenable.⁷⁵

Along with the EU's purportedly cautious approach within the realm of multilateral trade policy, the EU has also balked when it comes to the inclusion of equivalence provisions on farm animal welfare standards in bilateral trade agreements. While the EU announced it would use bilateral agreements to advance animal welfare,⁷⁶ so far, the inclusion of provisions on animal welfare in bilateral agreements have been minimal, limited to cooperation provisions, with little binding force and negligible effects in improving production methods.⁷⁷

As a result of such pro-liberal trade measures, the EU remains largely open to imports from non-EU countries that do not comply with the animal welfare standards to which EU producers are held. For instance, EU egg, veal, and beef producers suffer from competition from Ukraine, Argentina, and North America respectively, where animal welfare standards are lower than in the EU.⁷⁸ Further weakening prospects for improved farm animal welfare, the EU has lifted tariffs on on pork⁷⁹ and beef⁸⁰ imports without requiring importers to comply with EU farm animal welfare standards.

⁷⁵ Katie Sykes, *Animal Welfare and International Trade Law, The Impact of the WTO Seal Case* (2021) 114-115; Iyan Ofor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 257; Kate Cook and David Bowles, 'Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules' (2010) *Review of European Community and International Environmental Law*.

⁷⁶ Iyan Ofor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 247-248.

⁷⁷ For instance, the Free Trade Agreement signed between the EU and Mexico. Source: European Commission, Directorate General for Trade, EU-Mexico Trade Agreement Factsheet, 5, April 2018, available online: https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156757.pdf.

⁷⁸ Iyan Ofor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 250-251; Clémentine Baldon *et al.*, *How Can We Stop the Import of Food Produced Using Banned Practices in Europe? A European Regulation to Protect the Environment and Our Farmers*, Fondation Nicolas Hulot, Institut Veblen, Interbev (2021) 6.

⁷⁹ Iyan Ofor, 'Animals and the Impact of Trade Law and Policy: A Global Animal Law Question' (2020) *Transnational Environmental Law* 239, 254.

⁸⁰ Commission Implementing Regulation (EU) No 481/2012 of 7 June 2012 laying down rules for the management of a tariff quota for high-quality beef [2012] OJ L 148/9-14. Ironically, this regulation defines as "high quality" beef meat from cattle raised on feedlots where they are fed a concentrated grain diet. This intensive method of production is marginal in continental Europe, where the overwhelming majority of cattle is almost entirely grass-fed.

2.2.2 Barriers to High Quality Consumer Information

Along with a hesitancy to erect trade barriers, the EU likewise creates a favorable climate for cruelly produced, non-EU products by falling short in the sphere of consumer information. The most significant example of such a shortcoming would be the EU's refusal to adopt method-of-production labeling on all animal-source food products, including imports. Method-of-production labeling informs consumers on the treatment of farmed animals by disclosing, for instance, whether animals have been raised in extreme confinement, such as cages, and whether animals have had access to the outdoors. Proponents of method-of-production labeling advocate for the disclosure in the use of high-yield breeds, the duration of transportation from the farm to the slaughterhouse, as well as the slaughtering method employed to kill the animals.⁸¹ Method-of-production labeling is probably the least ambitious reform measure as labeling remains within the purview of market-based solutions that do not challenge existing laws and regulations, or even market access to sub-standards imports. However, given the low standards in the EU Egg Laying Hens Directive, mandatory method-of-production labeling has been the most efficient way in EU law to improve the welfare of laying hens, since it is largely responsible for the massive shift away from cage use in egg production in the EU.⁸²

And despite labeling posing no barrier to the functioning of current trade systems, the EU has systematically expressed caution to generalizing method-of-production labeling on all animal-source food products on the grounds that such a labeling system might be at odds with WTO rules.⁸³ However, a close look at the WTO applicable rules, in the Technical

⁸¹ See for example, 'Etiquette bien-être animal' in France, <http://www.etiquettebienetreanimal.fr/> (last visited January 31st 2022).

⁸² Alice Di Concetto, *Food Labeling and Animal Welfare* (2021), The European Institute for Animal Law & Policy, 10, available online: <https://animallaweurope.com/wp-content/uploads/2022/01/Animal-Law-Europe-Research-Note-2.pdf> ; Alice Di Concetto and Marine Friant-Perrot, *Le bien-être animal et l'information des consommateurs* (2021) *Revue de l'Union européenne*, Dalloz, 4 (in French); European Commission, *Evaluation of Marketing Standards Contained in the CMO Regulation, the "Breakfast Directives" and CMO Secondary Legislation* (2019) 84.

⁸³ European Commission, Directorate General for Health and Consumer Protection, *Feasibility study on animal welfare labelling and establishing a Community Reference Centre for Animal Protection and Welfare Part 1: Animal Welfare Labelling*, 33-34 (2009) and Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Options for Animal Welfare Labelling and the Establishment of a European Network of Reference Centres for the Protection and Welfare of Animals*, 7 (2009). The latest report by the European Commission no longer refers as method-of-production labelling as a regulatory option, and instead only considers option for a positive, animal welfare label that would only signal good practices to consumers (European Commission, *Study on Animal Welfare Labelling* (2022)). Similarly, the DG SANTE's Platform on Animal Welfare's Sub-

Barriers to Trade Agreement (TBT Agreement), reveals no blocking points to the implementation of method-of-production labeling on food products sold in the EU.

The initial indication that there would be no obstacle, as far as the WTO is concerned, to implementing method-of-production labeling on animal-source products would be that the EU already imposes a mandatory label indicating the method of production on all shell eggs,⁸⁴ as well as the catching method for all fresh fish⁸⁵ sold on the EU market. Such required labeling also applies to imports,⁸⁶ and the EU's trade partners have never challenged the EU before the WTO on the grounds that such a label would violate the TBT Agreement.

Furthermore, an assessment of the rules in the TBT Agreement as interpreted by the WTO's Dispute Settlement Body shows no reasonable obstacle to implementing a method-of-production labeling on animal-source food commercialized in the EU. On the contrary, this label would easily satisfy the different requirements set in the TBT Agreement for the following key reasons.⁸⁷

Firstly, method-of-production labeling satisfies the non-discriminatory requirement under Article 2.2. of the TBT Agreement⁸⁸ since it applies to all animal-source food products regardless of their country of origin. Method-of-production labeling will thus not treat non-EU products less favorably than domestic products. In fact, certain EU products might

Group on Labelling recommended the adoption of a voluntary animal welfare label in 2021, as opposed to extending method-of-production labelling to other products than table eggs (Source: European Commission, *Conclusions of the animal welfare labelling subgroup of the EU Animal Welfare Platform*, DOC.2021.07202 (2021) p. 4, paras 28-29).

⁸⁴ Article 12, Commission Regulation (EC) No 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs [2008] OJ L 163/12.

⁸⁵ Article 35(1), Regulation 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products [2013] OJ L 354/12.

⁸⁶ Article 30(3), Commission Regulation (EC) No 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs [2008] OJ L 163/12. This marking only applies to shell eggs sold in retail. In practice, most shell eggs sold in the E.U. are produced in the E.U.; Article 35(1), Regulation 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products [2013] OJ L 354/12.

⁸⁷ On the application of the TBT Agreement to a method-of-production label and on the likeness of two products with differentiated methods of production, see Iyan Offor, *Method-of-Production Labeling: The Way Forward to Sustainable Trade*, Eurogroup for Animals (2019) and Clémentine Baldon et al., *How Can We Stop the Import of Food Produced Using Banned Practices in Europe? A European Regulation to Protect the Environment and Our Farmers*, Fondation Nicolas Hulot, Institut Veblen, Interbev (2021) 56 -58.

⁸⁸ Article 2.2, Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10.

benefit from such a method-of-production labeling, such as poultry products from Brazil and Thailand, where chickens are raised outdoors and in lower stocking densities than in the EU.⁸⁹

Secondly, the method of production label would pursue a legitimate regulatory purpose, in accordance with the open list of legitimate objectives provided in Article 2.2. of the TBT Agreement.⁹⁰ Thus, a method-of-production label could be justified by the EU to pursue the protection of animal life or health, the protection of the environment, the protection of public morals – as interpreted in relation to animal welfare in the Seals decision. The EU could further justify the adoption of a method-of-production label to pursue the prevention of deceptive practices, which is another legitimate objective listed in Article 2.2. of the TBT Agreement. On the basis of the prevention of deceptive practices, the Dispute Settlement Body found that “objectives relating to consumer information or consumer protection can in principle constitute a legitimate objective under the WTO covered agreements.”⁹¹ The WTO Dispute Settlement Body further recognized the implementation of a label on animal-source products as pursuing a legitimate regulatory purpose within the meaning of Article 2.2. TBT.⁹² Although this case referred to country-of-origin labeling on beef and pork, such conclusions would likely apply to a method-of-production label to the extent that consumer information is also the primary objective of such a label.

Lastly, the method-of-production label would satisfy Article 2.2.’s TBT “necessity test,” which consists of ensuring that a potentially restrictive trade measure contributes to the

⁸⁹ In Thailand, the best practices in the voluntary guide for good agricultural practice enacted by the government become requirements for all farms exporting their products abroad. Although the housing systems are closed, stocking density on these farms is 34 kg per m², which is slightly above the EU’s *de jure* minimum, but *de facto* lower given that 66% of broiler chickens in the EU are kept at much higher stocking densities than the maximum allowed in the Directive. Broiler chickens raised in Brazil are mostly kept in houses where they have access to natural light and fresh air, and where stocking densities do not exceed 38 kg per m². In the E.U., industrial broiler production uses indoor housing, and close to one third of holdings has a stocking density of 42 kg per m². Sources: Peter L. M. van Horne, ‘Competitiveness of the EU poultry Meat Sector, Base Year 2017, International Comparison of Production Costs’, 13 (2018) Wageningen Economic Research, available online: <http://library.wur.nl/WebQuery/wurpubs/514230> and European Commission, ‘Report from the Commission to the European Parliament and the Council on the Application of Directive 2007/43/EC and its Influence on the Welfare of Chickens Kept for Meat Production, as well as the development of Welfare Indicators’ (2018), 4. Also see generally Marc Brake (ed.), *Animal Welfare in a Global Perspective* (2009) Wageningen UR Livestock Research, 240.

⁹⁰ Article 2.2, Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10.

⁹¹ WTO, *United States – Certain Country of Origin Labelling (COOL) Requirements – Report of the Appellate Body*, 29 juin 2012, WT/DS384/AB/R; WT/DS386/AB/R (US – COOL), para. 438.

⁹² WTO, *United States – Certain Country of Origin Labelling (COOL) Requirements – Report of the Appellate Body*, 29 juin 2012, WT/DS384/AB/R; WT/DS386/AB/R (US – COOL), para. 445.

designated legitimate regulatory objective and is proportionate to the pursuance of such an objective.⁹³ In this case, method-of-production labeling would directly contribute to the objective of consumer information *per se*, or indirectly contribute to animal and health protection, provided such a label provides meaningful information⁹⁴ that would enable consumers to become aware of the types of production methods used to produce animal source food.

2.2.3 The Constraints of the WTO Agreement on Agriculture under the EU’s Agricultural Policy

Along with the EU’s aforementioned pro-industry interpretation of WTO rules, there are also WTO agreements themselves which pose a similar barrier for improving animal welfare. One notable WTO agreement which does this is the Agreement on Agriculture (AoA), which regulates the distribution of agricultural subsidies to ensure such subsidies do not distort competition between trade partners.

The AoA regulates potentially trade-distorting subsidies by imposing a cap on the amount of subsidies that a particular jurisdiction can give in the production of food products.⁹⁵ As laid out in Part IV, GATT Schedule of Concession,⁹⁶ the WTO classifies trade-distorting subsidies under their “Amber Box” legal taxonomy, which gathers all the trade-distorting subsidies. Based on that classification, the AoA imposes a limit on the amount of subsidies classified in the Amber Box jurisdictions may disburse. “Coupled payments,” which are payments afforded to producers based on their production levels, are listed in the Amber Box as they are considered to be trade distorting to the extent that they incentivize production, which in turn can lead to overproduction and dumping on the international markets.⁹⁷ By contrast, Part IV, GATT Schedule of Concession classifies “decoupled”

⁹³ Article 2.2, Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10.

⁹⁴ In attempting to verify the meaningfulness of consumer information, the Appellate Body in US-COOL, provides standards to satisfy the necessity test, WTO, *United States – Certain Country of Origin Labelling (COOL) Requirements – Report of the Appellate Body*, 29 juin 2012, WT/DS384/AB/R; WT/DS386/AB/R (US – COOL), para. 454-491.

⁹⁵ Article 6, Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2. For a detailed explanation of the relationship between animal welfare and the WTO’s Agreement on Agriculture, see Charlotte E. Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (2019) Oxford University Press, 149 - 152.

⁹⁶ Part IV Domestic support and export subsidies on agricultural products, General Agreement on Tariffs and Trade, Schedules of Concessions.

⁹⁷ Article 6 and Annex 2, Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2.

payments under the “Blue Box” and “Green Box.” Because these payments do not affect production levels, or minimally so, the AoA does not impose a maximum on decoupled subsidies.⁹⁸

A significant constraint upon animal welfare reform in the EU is that the EU’s agricultural policy – the Common Agricultural Policy (CAP) – supports animal welfare practices through what is implicitly considered as coupled payments under the AoA. For the 2014 - 2020 financial period, the EU earmarked 2.5 billion euros to be distributed, via the CAP, to producers who voluntarily undertake measures to improve farm animal welfare.⁹⁹ The constraint thus lies in the limitations WTO rules place upon coupled subsidies for the specific purpose of improving farm animal welfare.

The reason the WTO classifies animal welfare payments under the Amber Box – as coupled payments – stems from an uncertainty regarding the status of payments specific to improving animal welfare practices on farms. Because the AoA does not refer to animal welfare payments, not even as an example of Green Box payment, the WTO and the EU have considered this type of payment to be trade-distorting to the extent that it “aims to stimulate the production of high-welfare products.”¹⁰⁰ As a result, this payment has been subjected to limits in the total amount the EU can allocate to animal welfare subsidies.¹⁰¹

In 2002, in light of the uncertainty on the classification of animal welfare payments under the CAP, the EU submitted a statement to the WTO seeking to list animal welfare payments as a Green Box subsidy.¹⁰² However, this request has remained unaddressed by the WTO to this day, and the fact that the WTO is treating the EU’s statement as a proposal confirms, in

⁹⁸ *Ibid.*

⁹⁹ European Court of Auditors, *Animal Welfare in the EU: Closing the Gap Between Ambitious Goals and Practical Implementation*, (2018) 13.

¹⁰⁰ Charlotte E. Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (2019) Oxford University Press, 151.

¹⁰¹ Although, to be fair, these payments are not fully utilized by Member States and there exists serious doubt as to their efficacy to produce tangible effects on the treatment of animals. In 2018, the European Court of Auditors found beneficiaries of these payments to be in violation of EU farm animal welfare legislation – far from implementing practices beyond legal standards. Source: European Court of Auditors, *Animal Welfare in the EU: Closing the Gap Between Ambitious Goals and Practical Implementation*, (2018) 13-14, 44.

¹⁰² Charlotte E. Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (2019) Oxford University Press, 151.

the eyes of the WTO, that the EU's animal welfare payments are considered distorting, and as such, subject to a cap.¹⁰³

3 Sustainable Development Policy Goals Under the European Green Deal as a Way to Advance Animal Protection?

The European Green Deal presents the EU Legislature with an opportunity to ameliorate much of the disconnect between the rhetoric of animal protection and the reality of economic regulations, although such changes would still remain within the constraint of a welfarist legal regime where farm animals are classified as agricultural products.

3.1 The Implementation of the Paris Agreement and the European Green Deal as a Means to Improving the Treatment of Farm Animals Under EU Law

The 2015 Paris Agreement¹⁰⁴ is an international climate change treaty. Paris Agreement signatory jurisdictions have pledged to limit greenhouse gas emissions, in addition to setting and meeting other ecological targets, as a way to combat climate change.

The EU has begun to implement the Paris Agreement through its five-year work program, entitled "The European Green Deal,"¹⁰⁵ the objectives of which were released in December of 2019. Chief among the Green Deal objectives is the achievement of climate neutrality in Europe by 2050. In addition to bringing EU Member States in alignment with the Paris Agreement, the European Green Deal also seeks to implement the United Nations' Sustainable Development Goals.¹⁰⁶ The Green Deal thus covers a large array of policy areas,

¹⁰³ Charlotte E. Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (2019) Oxford University Press, 151.

¹⁰⁴ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015), 16-1104 – TIAS.

¹⁰⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal* (12 December 2019) COM/2019/640 final. The reference to US former President Franklin Delano Roosevelt's New Deal remains unclear and unquestioned in EU policy literature.

¹⁰⁶ United Nations - Department of Economic and Social Affairs Sustainable Development, 'Sustainable Development Goals' <<https://sdgs.un.org/goals>> accessed 6 February 2022. On the links between animal welfare and the United Nations' Sustainable Development Goals, see Linda Keeling *et al.*, 'Animal Welfare and the United Nations Sustainable Development Goals' (2019) *Frontier Veterinary Science*, and Elien Verniers, 'Bringing Animal Welfare Under the Umbrella of Sustainable Development: A Legal Analysis' (2021) *Review of European Community and International Environmental Law*.

including agriculture (detailed in a sub-strategy called the “Farm-to-Fork Strategy”)¹⁰⁷ and public health (detailed in a sub-strategy called the “Beating Cancer Plan”).¹⁰⁸

In the Green Deal’s Farm-to-Fork strategy, the EU’s Directorate General for Agriculture and Rural Development and the Directorate General for Health and Food Safety have outlined a series of reforms concerning animals. These reforms, if carried out properly, would make EU farm animal welfare legislation more consistent with Article 13, TFEU. Key among the Farm-to-Fork aims is the revision of “the animal welfare legislation, including on animal transport and the slaughter of animals, to align it with the latest scientific evidence, broaden its scope, make it easier to enforce and ultimately ensure a higher level of animal welfare” as well as improving consumer information by considering “options for animal welfare labelling to better transmit value through the food chain” and by proposing “harmonised mandatory front-of-pack nutrition labelling.”¹⁰⁹

The European Commission has announced these animal welfare revisions would include two central measures: the end of cages (which has been achieved in large degree due to significant, sustained public pressure)¹¹⁰ and new species-specific legislation, including for dairy cows and fish at slaughter.¹¹¹ Also of note in the Farm-to-Fork strategy, and in the Beating Cancer Plan, the European Commission has highlighted the necessity to “shift to a more plant-based diet, with less red and processed meat and other foods linked to cancer risks and more fruit and vegetables.”¹¹²

¹⁰⁷ European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System* (May 2020), COM/2020/381 final, 10, available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0381&from=EN>

¹⁰⁸ *Ibid.* 10.

¹⁰⁹ *Ibid.* 14.

¹¹⁰ European Commission, *Commission Decision (EU) 2018/1222 of 5 September 2018 on the Proposed Citizens’ Initiative Entitled “End the Cage Age,”* (2018) C(2018) 5829.

¹¹¹ European Commission, *Inception Impact Assessment – Revision of EU Animal Welfare Legislation* (July 2021) available for download: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12950-Animal-welfare-revision-of-EU-legislation_en

¹¹² European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System* (May 2020), COM/2020/381 final, 13, available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0381&from=EN> and Communication from the Commission to the European Parliament, and the Council, *Europe’s Beating Cancer Plan* (February 2021) SWD(2021) 13 final, 11, available online: https://ec.europa.eu/health/system/files/2021-02/eu_cancer-plan_en_o.pdf

However, while many of the Paris Agreement and Green Deal goals look great on paper, the difficulty lies with implementation. The newly revised CAP regulations are oftentimes not in alignment with such ecological, health, and animal welfare goals, which casts doubt upon the feasibility in achieving such goals in the absence of robust implementation mechanisms through agricultural law. For instance, the newly revised CAP has not changed any of the measures that would improve compliance with animal welfare legislation or provide producers with incentives to adopt better practices for animals - despite the limited efficacy of these measures.¹¹³ Such an alignment between ecological, health, and animal welfare goals and EU agricultural policy is crucial if changes in production methods and consumption patterns hope to be achieved, particularly in an industry where government subsidies play such a large and determinative role.

3.2 Limits and Opportunities in EU Trade Policy in Light of the European Green Deal

The implementation of the European Green Deal in the EU's Trade Policy with non-EU countries presents lawmakers with significant opportunities to improve the treatment of farm animals given the pivotal role of EU Trade Policy in ensuring high levels of farm animal welfare standards. However, significant uncertainties and limits remain as to the alignment of the EU Common Trade Policy and the purported farm animal protection objectives in the Green Deal.

The first of these limitations in the implementation of the European Green Deal into EU trade policy concerns the labeling of food products. As part of the Green Deal's Farm-to-Fork strategy, the EU announced the creation of an animal welfare food labeling system for food products.¹¹⁴ However, the European Commission has expressed the position that this label would only apply to domestic products produced using methods that go above and

¹¹³ Alice Di Concetto, *Animals in the EU Agricultural Policy, Research Note #3*, The European Institute for Animal Law & Policy (2021), 18 -21 available online: <https://animallaweurope.com/wp-content/uploads/2022/01/Animal-Law-Europe-Research-Note-3.pdf>.

¹¹⁴ European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System* (May 2020), COM/2020/381 final, 10, available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0381&from=EN>

beyond EU farm animal welfare requirements.¹¹⁵ Furthermore, this labeling scheme is voluntary, meaning that even producers who exceed the EU's farm animal welfare requirements do not necessarily have to include such a label on their products.¹¹⁶ Therefore, because not all producers will be subject to this label, consumers still will not have a clear idea of which products abide by even the minimum EU animal welfare standards.

Another significant limitation of EU trade policy in light of the Green Deal is the uncertainty regarding extraterritoriality of EU farm animal welfare legislation. While the European Commission is considering requiring non-EU importers to comply with EU farm animal welfare rules “in particular as regards the use of cages,”¹¹⁷ the European Parliament has indicated that business operators selling their products on the EU market, or exporting live animals from the EU, will not have to comply with farm animal welfare standards applicable to live animals during transport outside EU borders.¹¹⁸ In other words, the codification of the 2015 ECJ ruling in *Zuchtvieh*, in which the Court had decided that the EU Transport Regulation should apply outside the EU's borders for all convoys departing from EU territory,¹¹⁹ remains uncertain. Because the overwhelming majority of farm animals are transported, sometimes for days in countries where the chain of production is segmented across vast territories,¹²⁰ with significant risks posed to the animals, the failure to impose domestic and non-domestic producers to comply with rules equivalent to that of the EU would represent undoubted, significant harm to the welfare of animals.

While the application of EU farm animal welfare standards to all imports seems uncertain at the moment, there does appear to be opportunities to improve farm animal welfare standards in compliance with the Green Deal objectives through bilateral trade agreements. One measure in particular is promising: the inclusion of so-called “Mirror Clauses,” which

¹¹⁵ Council of the European Union, *Conclusions of the Animal Welfare Labeling Subgroup of the EU Animal Welfare Platform* (2021) 4, available online: https://ec.europa.eu/food/system/files/2021-06/aw_platform_plat-conc_awl-subgroup-conclusion.pdf.

¹¹⁶ *Ibid.*

¹¹⁷ European Commission, *Inception Impact Assessment – Revision of EU Animal Welfare Legislation* (July 2021) available online: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12950-Animal-welfare-revision-of-EU-legislation_en.

¹¹⁸ European Parliament's Committee of Inquiry on the Protection of Animals during Transport, *Report on the investigation of alleged contraventions and maladministration in the application of Union law in relation to the protection of animals during transport within and outside the Union* (February 2022) ((2020/2269(INI)).

¹¹⁹ Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2005] ECLI:EU:C:2015:259.

¹²⁰ For example, Canada and the US, from which the EU imports beef, allow much longer journey periods with resting periods in their legislation, compared to the EU Transport Regulation 1/2005.

are equivalence clauses negotiated bilaterally among trade partners, wherein the non-EU trade partners agree to comply with EU production standards.¹²¹ Such mirror clauses are promising in the way that they may induce jurisdictions that have lower farm animal welfare rules to comply with EU minimal standards, an improvement which may be achieved through bilateral negotiations, bypassing the political gridlock in the EU Legislature.

Mirror clauses, though, are no easy task to secure. For trade agreements that have already taken effect, such as the EU-Canada one, or those which are far in the negotiation and ratification process, such as the EU-Mercosur one, re-opening new negotiation rounds in view of obtaining significant accommodations seems diplomatically difficult.¹²² Furthermore, WTO rules allow trade partners that do not comply with EU standards, and do not have access to the EU market as a result, to retaliate against the EU, which makes the adoption of mirror clauses challenging.¹²³

If, however, EU negotiators are able to secure mirror clauses with their non-EU counterparts, this could lead to substantial change in EU trade doctrine, away from unconditional liberalization, and towards the inclusion of sustainability and animal protection objectives. Mirror clauses in trade agreements therefore have the potential to set EU farm animal welfare legislation in the direction of progress, as does with the prohibition of cages in EU animal agriculture.

¹²¹ Clémentine Baldon *et al.*, *How Can We Stop the Import of Food Produced Using Banned Practices in Europe? A European Regulation to Protect the Environment and Our Farmers*, Fondation Nicolas Hulot, Institut Veblen, Interbev (2021) 56 -58.

¹²² Although not impossible: In 2016, Wallonia, one of the Belgian provinces, had obtained concessions from Canada during the ratification process at national level. Source: Clémence Dehut, *Accords de libre-échange, politique commerciale agricole et stratégie environnementale de l'UE: Enjeux et perspectives pour l'agriculture française* (Octobre 2021) 86 (in French).

¹²³ Clémence Dehut, *Accords de libre-échange, politique commerciale agricole et stratégie environnementale de l'UE: Enjeux et perspectives pour l'agriculture française* (Octobre 2021) 82 (in French).