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Animal Welfare, Public Procurement and The EU Internal Market

- A Recurrent Dilemma in Swedish Policy Making?

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Summary

On the basis of an article recently authored by the Swedish Minister for Public Administration, the main purpose of this thesis is to examine whether contracting authorities are allowed to refer to ‘Swedish’ standards of animal welfare (whether explicitly or not) when purchasing foodstuffs, without infringing the EU rules on free movement. In making this assessment, the thesis identifies three recent developments that could be expected to have an impact on the discretion of contracting authorities. *First*, EU secondary animal welfare legislation has become increasingly harmonised over the years. This could possibly point towards a *lower* margin of discretion. *Second*, the Lisbon Treaty introduced an article on animal welfare in Article 13 TFEU. This could instead point towards a *wider* margin of discretion. *Third*, the Union recently adopted a package of new Public Procurement Directives. This, too, could point towards a *wider* margin of discretion.

By way of introduction, the thesis points out that express references to ‘Swedish’ standards of animal welfare would *not* be in compliance with EU law. Such references would be contrary to the free movement provisions and the general principles of EU law (especially the principle of non-discrimination) and go against Article 42(4) of the new Public Sector Directive, which provides that Member States shall not refer to a “specific origin” when drafting the technical specifications. This conclusion gains support from the decisions in *Skåne* and *Halland*, where the Swedish courts found that references to the Swedish Animal Welfare Act were not allowed.

When it comes to less discriminatory requirements, the thesis argues that one has to make a distinction between different areas of animal welfare. As far as certain species of animals are concerned (calves, pigs, hens and so on), these are all governed by *minimum harmonising directives containing a free movement clause*. Based on the Court’s decision in *CIWF*, this means that Member States are allowed to impose more demanding national measures against their *own* producers, but not so as to impede the free movement of goods. As far as other types of requirements are concerned (transport, slaughter and antibiotics), these are instead governed by *regulations*. Generally speaking, this means that Member States are not allowed to impose any stricter requirements than those laid down in the regulation itself. All in all, this suggests that the scope for more demanding measures in the field of animal welfare remains very small. Based on the judgements in *Medipac* and *Commission v Greece*, the thesis argues that the same kind of reasoning should apply to contracting authorities as well.

Finally, the thesis considers that neither the introduction of Article 13 TFEU, nor the adoption of the new Procurement Directives could be expected to ‘trump’ the greater harmonisation of EU secondary animal welfare legislation. This means that the impact of these changes on public purchasers’ discretion will remain rather limited as things stand today.

Sammanfattning

Med utgångspunkt i en artikel skriven av den svenska civilministern, syftar uppsatsen till att undersöka huruvida det är förenligt med EU-rätten att hänvisa till 'svenska' djurskyddskrav (uttryckligen eller inte) vid offentlig upphandling av livsmedel. Uppsatsen syftar särskilt till att undersöka i vilken utsträckning tre aktuella reformer skulle kunna tänkas påverka handlingsutrymmet för upphandlande myndigheter. *För det första* har EU:s lagstiftning på djurskyddsområdet blivit alltmer harmoniserad de senaste åren. Det skulle kunna tala för ett *mindre* handlingsutrymme. *För det andra* förde Lissabonfördraget med sig en hänvisning till djurskydd i artikel 13 FEUF. Det skulle kunna tala för ett *större* handlingsutrymme. *För det tredje* antog EU nyligen tre nya upphandlingsdirektiv. Det skulle också kunna tala för ett *större* handlingsutrymme för upphandlande myndigheter.

Det konstateras inledningsvis att uttryckliga hänvisningar till "svenska" djurskyddskrav inte skulle vara förenliga med EU-rätten. Sådana krav skulle strida mot reglerna om fri rörlighet och EU:s allmänna rättsprinciper (framförallt icke-diskrimineringsprincipen) och komma i konflikt med artikel 42(4) i det nya upphandlingsdirektivet, som föreskriver att upphandlande myndigheter inte får hänvisa till ett "särskilt ursprung" i de tekniska specifikationerna. En sådan slutsats får också stöd av domarna i *Skåne* och *Halland*, där förvaltningsrätterna konstaterade att det inte är tillåtet att hänvisa till vissa bestämmelser i den svenska djurskyddslagen.

Vad beträffar krav som inte uttryckligen hänvisar till "svenska" bestämmelser, argumenteras i uppsatsen för att det är nödvändigt att skilja mellan olika *typer* av djurskyddsregler. Det konstateras att specifika djurarter (såsom kor, grisar och fjäderfän) generellt omfattas av *minimiharmoniserande direktiv som innehåller en fri rörlighetsklausul*. Det innebär, mot bakgrund av EU-domstolens dom i *CIWF*, att medlemsstater har möjlighet att införa strängare krav gentemot sina *egna* producenter, men inte så att den fria rörligheten inom unionen försvåras. Vad beträffar andra typer av krav (såsom transport, slakt och antibiotika) konstateras att dessa områden generellt omfattas av *förordningar*. Det innebär, enligt unionens fasta rättspraxis, att medlemsstater är förhindrade att införa strängare krav såvida det inte uttryckligen anges i själva lagtexten. Sammantaget talar det för att utrymmet för strängare nationella regler på djurskyddsområdet är mycket litet. Mot bakgrund av EU-domstolens domar i *Medipac* och *Kommissionen mot Grekland*, argumenteras i uppsatsen för att samma regler ska gälla också på upphandlingsområdet.

Det konstateras avslutningsvis att varken införandet av artikel 13 FEUF eller de nya upphandlingsdirektiven torde kunna 'slå ut' graden av EU-rättsharmonisering på djurskyddsområdet. Det betyder att dessa reformer inte kan förväntas ha någon större betydelse för upphandlande myndigheters handlingsutrymme, såsom situationen ser ut just nu.

Preface

Some economics, some political science and a lot of EU law. It is my hope that this thesis will reflect my time in Lund.

Before I leave, I would like to thank my supervisor Prof. Jörgen Hettne for encouraging me right from the start and for providing me with interesting, valuable and progressive views in the course of this work. I have really appreciated all the interesting discussions about EU law!

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Abbreviations

AG	Advocate General
CAP	Common Agricultural Policy
CIWF	Compassion in World Farming
EC	European Community
ECJ	European Court of Justice
EP	European Parliament
EPPPL	European Procurement & Public Private Partnership Law Review
EU	European Union
EUR	Euro
FAWC	Farm Animal Welfare Committee
FEUF	Funktionsfördraget (Treaty on the Functioning of the European Union)
GDP	Gross Domestic Product
GPA	Agreement on Government Procurement
LCC	Life Cycle Costing
LRF	Lantbrukarnas Riksförbund (The Federation of Swedish Farmers)
MEAT	Most Economically Advantageous Tender
MEQR	Measures having Equivalent Effect to Quantitative Restrictions
LOU	Lagen om Offentlig Upphandling (Swedish Public Procurement Act)
OIE	World Organisation for Animal Health
OUP	Oxford University Press
SJVFS	Statens Jordbruksverks Föreskrifter och Allmänna Råd (The Swedish Board of Agriculture's Regulations)
SME	Small and Medium Enterprises
SOU	Statens Offentliga Utredningar (Swedish Government Official Reports)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
R&D	Research and Development
UK	United Kingdom
WTO	World Trade Organisation

1 Introduction

1.1 Background

On 4 June 2015, the Swedish government launched its proposal for a new Public Procurement Act.¹ While the primary objective of this revision was to incorporate the Public Procurement Directives recently adopted by the European Union (Directive 2014/24/EU on public sector procurement, Directive 2014/25/EU on utilities procurement and Directive 2014/23/EU on concession contracts) into Swedish law,² the ambitions did not stop there. According to the minister in charge of the reform, Ardalan Shekarabi, another important objective of the new law was to make sure that contracting authorities took full account of ‘Swedish’ standards of animal welfare when purchasing foodstuffs.³ In an article published in *Dagens Nyheter*, Shekarabi announced that the government would commission the National Agency for Public Procurement to draw up non-binding recommendations, encouraging authorities to impose requirements at least as high as those set out in the Swedish Animal Welfare Act.⁴ According to Shekarabi, this would not only guarantee the quality of the products, but also compensate Swedish farmers for the additional costs they often incur.⁵

However, shortly after the article was put forward, Andrea Sundstrand, Professor in Law at Stockholm University, submitted a counter article, saying that the proposed measure was in conflict with EU law, most notably with the principle of non-discrimination on grounds of nationality and the rules on free movement.⁶ According to Sundstrand, the initiative went against the very idea of the European Union, which is to create an internal market in which goods and services can move freely.⁷

At the time of writing, no recommendations have as yet been put forward by the National Agency for Public Procurement. However, the proposal for a New Public Procurement Act has been referred to the Swedish Council on Legislation and is expected to enter into force by January 2017. It can be observed that this is *after* the implementation period for the Public Procurement Directives has expired, which means that some of the provisions might have direct effect as from 18 April 2016.⁸

¹ Lagrådsremiss *Nytt regelverk om upphandling*, Stockholm 4 June 2015.

² Lagrådsremiss, p. 1.

³ E Olsson, ‘Djurskyddet kan bli krav vid upphandling’ (2015-06-05) *Dagens Nyheter* (Olsson 2015a).

⁴ A Shekarabi and H Jonsson, ‘Svenska livsmedel ska gynnas i upphandlingar’ (2015-06-28) *Dagens Nyheter* (‘Shekarabi and Jonsson’).

⁵ Shekarabi and Jonsson. Referred to as the ‘Swedish proposal’ or ‘Minister’s proposal’.

⁶ E Olsson, ‘Expert: Frihandeln dör med regeringens förslag’ (2015-06-29) *Dagens Nyheter* (‘Olsson 2015b’).

⁷ Olsson 2015b.

⁸ N Söderlund, ‘Ardalan Shekarabi: Nya LOU kommer först 2017’ (2016-01-13) <http://upphandling24.se/ardalan-shekarabi-nya-lou-kommer-forst-2017>.

1.2 Aim and Research Questions

In light of the above, the main purpose of this thesis is to examine whether contracting authorities are allowed to refer to ‘Swedish’ standards of animal welfare (whether explicitly or not) when purchasing foodstuffs, without infringing the EU rules on free movement. In other words, the main research question reads as follows:

- *What scope do contracting authorities have to refer to ‘Swedish’ standards of animal welfare (whether explicitly or not) when purchasing foodstuffs, without infringing EU law?*

In making this assessment, some additional focus will be put on three recent factors that could be expected to have an impact on the discretion of contracting authorities. *First*, EU secondary animal welfare legislation has become increasingly harmonised over the years. In the early 2000s, the Transport Directive and the Slaughter Directive were both turned into regulations.⁹ Moreover, on 1 June 2015, the European Parliament (EP) and the Council reached a political agreement on the so-called ‘Animal Health Law’¹⁰, which sets out detailed rules for the prevention and control of transmissible animal diseases, including antibiotic resistance.¹¹ Finally, the Union is currently considering the adoption of a ‘General Framework Law on Animal Welfare’¹², which (if adopted) would be based on the internal market legal basis Article 114 TFEU and apply to *all* animals kept in the context of an economic activity.¹³ While this greater harmonisation of laws could be expected to raise the status of animal welfare within the Union, it could also lead to a *lower* margin of discretion for contracting authorities.

Second, the Lisbon Treaty, entering into force on 1 December 2009, brought with it an express reference to animal welfare amongst the general provisions of the Treaty itself.¹⁴ It now follows from Article 13 TFEU that the Union and the Member States shall “pay full regard to the welfare requirements of animals” when implementing the Union’s policies. In contrast to the greater harmonisation of laws, Article 13 TFEU could therefore point towards a *wider* margin of discretion for public purchasers.

⁹ Regulation 1/2005 on the protection of animals during transport and related operations (the ‘Transport Regulation’), replacing Directive 91/628/EEC; Regulation 1099/2009 on the protection of animals at the time of killing (the ‘Slaughter Regulation’), replacing Directive 93/119/EC.

¹⁰ COM(2013) 260 final: Proposal for a Regulation of the European Parliament and of the Council on Animal Health (the ‘Animal Health Law’).

¹¹ Animal Health Law, Recital 29.

¹² SEC(2012) 55 final: Commission Staff Working Paper Impact Assessment.

Accompanying the document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015.

¹³ D Ryland and A Nurse ‘Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market’ (2013) *European Energy and Environmental Law Review* (‘Ryland and Nurse’), p. 113.

¹⁴ See Ryland and Nurse, p. 109.

Third – and perhaps most importantly – the Union in February 2014 adopted a package of new Public Procurement Directives. In the legal doctrine, these Directives have generally been considered to *increase* the discretion of Member States to pursue various non-economic policies,¹⁵ such as for example animal welfare. All in all, this means that the main research question is accompanied by three sub-questions:

- a) *What significance does the greater harmonisation of EU secondary animal welfare legislation hold for the discretion of contracting authorities?*
- b) *What significance does the introduction of Article 13 TFEU hold for the discretion of contracting authorities?*
- c) *What significance do the new Public Procurement Directives hold for the discretion of contracting authorities?*

1.3 Delimitations

As was stated above, the main purpose of this thesis is to examine whether contracting authorities are allowed to refer to Swedish standards of animal welfare in the context of public procurement. This means that focus will be on the intersection between animal welfare and public procurement law, and how the two areas of law relate to the proposal put forward by the Minister.

What this thesis does *not* aim at is to give a full and exhaustive review of the rules on animal welfare or the rules on public procurement. Instead, each of the areas will be reviewed in so far as it is relevant to the main research question and the three sub-questions. This means, among other things, that there will be no deeper investigation into the EU's international commitments, such as the WTO Agreement on Government Procurement (GPA). Nor will there be any review of the Swedish legislation in this area, which is the Swedish Public Procurement Act (LOU).

Moreover, it is worth emphasising that the purpose of this thesis is to establish what the law *is* (*de lege lata*), not what the law should be (*de lege ferenda*). This means that, although there will be some comments about where the Swedish legislator needs to go in order to comply with the European rules, deliberating on the desirability of the EU legal framework itself is not a separate aim of this thesis. Having said that, the thesis will nonetheless look into the economic rationale for regulating animal welfare and the costs and benefits of using public procurement as a policy tool compared to other regulatory techniques, such as laws and taxes. It will also put forward some ideas about the future course of action of the Union.

¹⁵ See, *inter alia*, R Caranta 'The changes to the public contract directives and the story they tell about how EU law works' (2015) *CML Rev* ('Caranta 2015'), p. 457 *in fine*.

1.4 Method and Materials

In order to establish what the law *is*, this thesis will use a traditional legal dogmatic method, taking particular account of the EU sources of law (primary law, secondary law and supplementary law) and the methods of interpretation applied by the European Court of Justice (ECJ). In addition, the thesis will use an economic perspective to explain *why* there is a need for regulation in the field of animal welfare and how public procurement fits into the picture. It should be noted that the purpose of this second perspective is not to be exhaustive, but to provide a more holistic view of the issue at hand and to pave the way for the legal parts of the analysis.

In view of the rather ‘Swedish’ character of this topic, the thesis will be based on a combination of Swedish and English language material. As far as the Swedish material is concerned, it consists of three Inquiries issued by the Swedish government – the Animal Welfare Inquiry of 2011¹⁶, the Public Procurement Inquiry of 2013¹⁷, and the Competition Inquiry of 2015¹⁸ – as well as a number of cases decided by the Swedish administrative courts. As far as the English language material is concerned, it consists of judgements by the ECJ, Opinions by Advocates General (AGs), and a wide range of literature, covering the two fields of animal welfare and public procurement.

1.5 Research Status and Novelty

In recent years, public procurement law has attracted a great deal of attention from legal scholars.¹⁹ One of the areas that has been the most researched and discussed is the use and regulation of non-economic policies.²⁰ Today, there is a significant legal literature, in particular in English. Amongst the most cited authors in this area are Sue Arrowsmith, Peter Kunzlik and Roberto Caranta.

However, as far as the more specific question of public procurement and animal welfare is concerned, it mainly seems to be a Swedish interest.²¹ To the author’s knowledge, there is no international literature to speak of and the question has not (as yet) come before the ECJ. By contrast, the topic has been dealt with by a number of Swedish scholars, most notably Kristian Pedersen²², Niklas Bruun²³ and Christina Möll²⁴. It has also come before the Swedish courts on a number of occasions, ranging from 2010 to 2013.²⁵

¹⁶ SOU 2011:75 *Ny djurskyddslag*.

¹⁷ SOU 2013:12 *Goda affärer – en strategi för hållbar offentlig upphandling*.

¹⁸ SOU 2015:15 *Attraktiv, innovativ och hållbar – strategi för en konkurrenskraftig jordbruks- och trädgårdsnäring*.

¹⁹ B J Drijber and H Stergiou, ‘Public Procurement and Internal Market Law’ (2009) *CML Rev* (‘Drijber and Stergiou’), p. 805-806.

²⁰ S Arrowsmith and P Kunzlik, *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) (‘Arrowsmith and Kunzlik’), p. 10.

²¹ See SOU 2013:12, p. 387.

²² K Pedersen, ‘Upphandlingskrönika – djurskyddshänsyn vid livsmedelupphandlingar’ (2011) *Europarättslig tidskrift* (‘Pedersen’).

Having said that, the question now seems to have become even more important following the three changes outlined above (the greater harmonisation of EU secondary animal welfare legislation, the introduction of Article 13 TFEU, and the adoption of the new Public Procurement Directives). Moreover, the article recently put forward by the Swedish Minister for Public Administration shows that this is not merely a theoretical or academic discussion, but a very real question with significant practical implications. All in all, this suggests that the time has come for another study on this interesting topic.

1.6 Structure

In order to answer to the main research question and the three sub-questions, this thesis will be divided into six chapters. The *second* chapter, next, will describe the economic rationale for regulating animal welfare and the costs and benefits of using public procurement as a policy tool compared to other regulatory techniques, such as laws and taxes. Besides paving the way for the legal part of the analysis, the purpose of this chapter is to give a broader view on the question of animal welfare and public procurement.

The *third* chapter will then turn to the legal framework on public procurement. It will examine the provisions of primary law, the general principles of EU law and secondary law and apply them to the Swedish proposal. It will also have a closer look at the different stages of the procurement process and try to find out where the Swedish proposal fits in.

The *fourth* chapter will then turn to the legal framework on animal welfare. It will start by examining the two frameworks of EU and Sweden separately, before making a comparison between two in terms of level of protection. Based on this outcome, it will then discuss whether one Member State is allowed to enforce its own (higher) standards against another. It will also look at the impact of Article 13 TFEU on contracting authorities' discretion.

Having examined the two frameworks of animal welfare and public procurement separately, the *fifth* section will then make an effort to combine the two. It will start by discussing the question of whether contracting authorities should be subject to the 'general' rules on free movement or whether they should only be subject to a 'lighter' regime. It will then turn to a number of Swedish cases in the area, ranging from 2010 to 2013.

Finally, the *seventh* section will provide a conclusion. It will also put forward some ideas about the future course of action of the Union.

²³ N Bruun, 'Rättsutlåtande om djurskydds krav i offentlig upphandling' (2011), Miljöstylningsrådet Rapport ('Bruun').

²⁴ C Möll, 'Därför kan djurskydds krav ställas vid livsmedelsupphandlingar' (2011) Lantbrukarnas Riksförbund (LRF) Rapport.

²⁵ See section 5.3.

2 An Economic Perspective

2.1 Introduction

Before turning to the legal aspects of the Swedish proposal, it might be useful to have an idea of *why* it is necessary to regulate animal welfare in the first place. In other words, why cannot the market take care of these questions by itself? In this regard, it might also be interesting to see how public procurement fits into the picture. What are the objectives of public procurement regulation? And what are the costs and benefits of using public procurement as a policy tool compared to other, more traditional, regulatory techniques, such as laws and taxes? In order to answer these questions, this section will start by discussing some of the key concepts in economic theory, such as ‘negative externalities’ and ‘public goods’. It will then have a closer look at the use of public procurement as a policy instrument.

2.2 Economic Concepts

2.2.1 Negative Externalities

In economics, food can be considered a good just like any other with supply and demand interacting to determine a market price (P_M).²⁶ However, while this price represents what consumers are willing to pay and producers are willing to sell for at a competitive market, it does not take account of all the negative side effects of food production, such as air and water pollution, hazardous waste and so on.²⁷ These negative side effects or costs, which are not included in the market price but nevertheless impose a burden on society as a whole, are commonly referred to as ‘negative externalities’.²⁸ In the specific context of animal welfare, it has been observed that poor levels of animal welfare could give rise to a number of problems, such as loss of production, reduced food safety, spread of disease, farm animal suffering and antibiotic resistance.²⁹ These problems, which will not primarily be borne by the individual producer or consumer, but rather by society as a whole, could arguably be seen as negative externalities of food production in much the same way as air and water pollution are to be considered negative externalities of other industrial production.³⁰

²⁶ See, *inter alia*, T Tietenberg and L Lewis, *Environmental & Natural Resource Economics*, 4th edn (Boston, Pearson, 2012) (‘Tietenberg and Lewis’), p. 24.

²⁷ M Burda and C Wyplosz, *Macroeconomics – a European Text*, 5th edn (Oxford, OUP, 2009) (‘Burda and Wyplosz’), p. 444.

²⁸ Tietenberg and Lewis, p. 25; Burda and Wyplosz, p. 444.

²⁹ Farm Animal Welfare Committee (FAWC), ‘Economics and Farm Animal Welfare’ (2011), paras 19–21 and FAWC, ‘Opinion on Policy Instruments for Protecting and Improving Farm Animal Welfare’ (2008), para 3.

³⁰ FAWC (2011), para 19.

2.2.2 Public Goods

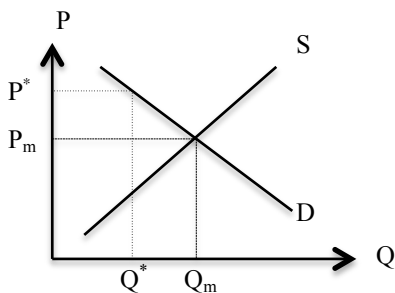
In economic theory, negative externalities are often associated with the use of ‘public goods’, that is goods which are ‘non-rival’ in the sense that consumption by one does not make them less available to others, and ‘non-excludable’, meaning that once available, everyone can use the freely.³¹ Common examples of public goods include clean air and water.³² According to Ryland, also animal welfare should in principle be considered a public good. In support of this view, she states that:

Animal welfare is a non-commodity output of agriculture and is increasingly a *public good*, reflected in its ‘jointness’ with agricultural commodity output and the growing societal demand for quality agri-products that have resulted from farming practices favourable to animal welfare.³³

Moreover, Ryland argues that the classification of animal welfare as a public good puts the EU institutions under an obligation to promote animal welfare in their various policies, such the Common Agricultural Policy (CAP).³⁴ Regardless of whether one approves with this reasoning or not, it is clear that animal welfare presents significant public good characteristics in that it benefits society as a whole but is difficult to value in terms of money.

2.2.3 Market Failures

In economic theory, negative externalities and public goods are common sources of ‘market failures’, meaning that the allocation of goods and services will not be optimal from society’s point of view.³⁵ As far as animal welfare is concerned, it can be assumed that the market price on food (responsible for animal suffering, antibiotic resistance, spread of disease and so on) (P_M) will be *lower* than what is socially optimal (P^*), and that the quantity of food produced (Q_M) will be *higher* than what is optimal from society’s point of view (Q^*). For this reason, there is – in the eyes of an economist – a case for government intervention.³⁶ Such intervention can take a number of forms, some of which will be considered below.



³¹ Burda and Wyplosz, p. 444-445.

³² Burda and Wyplosz, p. 444-445.

³³ D Ryland, ‘Animal welfare in the reformed common agricultural policy: wherefore art thou?’ (2015) *Environmental Law Review* (‘Ryland 2015’), p. 31 (emphasis added).

³⁴ Ryland 2015, p. 31.

³⁵ Tietenberg and Lewis, p. 25; Burda and Wyplosz, p. 444.

³⁶ Tietenberg and Lewis, p. 31 *in fine*; Burda and Wyplosz, p. 444.

2.3 Policy Instruments

2.3.1 Laws and Regulations

In view of the market's failure to provide the sufficient amount of animal welfare, the government needs to intervene. One way of doing this is by means of laws and regulations,³⁷ sometimes referred to as 'administrative policy instruments'.³⁸ In practice, this category of measures includes everything from primary and secondary law to guidelines and non-binding recommendations.³⁹ As far as the EU is concerned, one example of a primary source can be found in Article 13 TFEU, which obliges the Union and the Member States to "pay full regard to the welfare requirements of animals" when formulating and implementing the Union's policy.⁴⁰ In addition, the EU has adopted a large amount of secondary legislation, laying down more specific rules concerning transport and slaughter conditions and welfare requirements for different species of animals, such as calves, pigs and hens.⁴¹ Finally, the Commission has issued a number of non-binding communications, setting out the Union's strategy for the protection of animals in the future.⁴² From society's point of view, administrative policy instruments are often the best option when it comes to achieving a clearly defined goal,⁴³ such as for example a ban on the beak trimming of hens.

2.3.2 Taxes and Subsidies

Turning then to taxes and subsidies – sometimes referred to as 'economic policy instruments'⁴⁴ – these are often used by governments to reduce a harmful substance to the lowest possible level.⁴⁵ So for example, it has been suggested that a tax on antibiotics could be an efficient way of dealing with the growing problem of antibiotic resistance.⁴⁶ Generally speaking, the basic idea behind this kind of taxation is that by imposing a tax equal to the negative externality, the producers and consumers will be forced to take the costs of antibiotic resistance, spread of disease and so on into account when making their decisions.⁴⁷ However, as with all forms of state intervention, taxation generally distorts the market mechanism, something that may result in a loss of welfare to both producers and consumers.⁴⁸

³⁷ Burda and Wyplosz, p. 462.

³⁸ SOU 2013:12, p. 394.

³⁹ See FAWC (2008), paras 5-6.

⁴⁰ See section 4.6.

⁴¹ See section 4.2.2

⁴² See, *inter alia*, COM(2012) 6 final/2: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Strategy for the Protection and Welfare of Animals 2012-2015.

⁴³ SOU 2013:12, p. 395.

⁴⁴ SOU 2013:12, p. 394.

⁴⁵ SOU 2013:12, p. 395.

⁴⁶ See I Vågsholm and S Höjgård, 'Antimicrobial sensitivity – A natural resource to be protected by a Pigouvian tax?' (2010) *Preventive Veterinary Medicine*.

⁴⁷ Burda and Wyplosz, p. 446-449.

⁴⁸ Burda and Wyplosz, p. 447.

As far as subsidies are concerned, these are often used by governments to shield certain industries from the discipline of the market.⁴⁹ A well known (and highly criticised) example is the CAP, which sets out a system of agricultural subsidies within the Union.⁵⁰ While the political attitudes towards subsidies differ, economists seem to agree that the ultimate effects of these policies are to raise prices above the competitive level and that consumers will have to pay the price.⁵¹ Moreover, as Peter Trepte, Senior Fellow of Public Procurement Law at the University of Nottingham, points out, subsidies risk coming into conflict with the EU rules on state aid, set out in Articles 107-109 TFEU.⁵² According to Trepte, it is sometimes difficult to draw the line between ‘selective’ state measures, which are caught by the state aid rules, and ‘general’ measures, which are not.⁵³ All in all, this suggests that subsidies are not a very good way of dealing with market failures, such as those arising in the context of animal welfare.

2.3.3 Promoting Private Markets

Rather than to intervene in the market directly, governments may seek to promote private markets in supplying the goods and services themselves.⁵⁴ In practice, this ‘promotion’ can take a number of forms, ranging from rather harmless systems, such as voluntary labelling schemes and ‘welfare codes’ to more protectionist methods, such as tariffs on foreign goods, quotas on imports and various ‘Buy National’ campaigns (generally not in compliance with the EU rules on free movement).⁵⁵ Another – and perhaps less obvious – way in which a government may seek to promote private markets is through its procurement policy.⁵⁶ Generally speaking, public procurement is the process whereby public bodies purchase things that they need to carry out their particular functions.⁵⁷ While the primary goal of this process is to acquire the goods and services in question, public bodies may also wish to promote other non-economic objectives,⁵⁸ such as high levels of animal welfare. Given that public procurement accounts for over 15 per cent of GDP in most countries,⁵⁹ ‘regulation through procurement’ is a potentially powerful instrument.⁶⁰ In the following sections, the use of public procurement as a policy tool will be considered in more detail.

⁴⁹ Burda and Wyplosz, p. 464.

⁵⁰ See N De Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014) (‘De Sadeleer’), p. 167. See also Ryland (2015), p. 26-27.

⁵¹ Burda and Wyplosz, p. 464.

⁵² P Trepte, *Regulating procurement – understanding the ends and means of public procurement regulation* (Oxford, OUP, 2004) (‘Trepte 2004’), p. 160.

⁵³ Trepte 2004, p. 159.

⁵⁴ FAWC (2008), para 34.

⁵⁵ FAWC (2008), para 34. See also Burda and Wyplosz, p. 464.

⁵⁶ FAWC (2008), para 35. See also Burda and Wyplosz, p. 464.

⁵⁷ Arrowsmith and Kunzlik, p. 9 and 13.

⁵⁸ Arrowsmith and Kunzlik, p. 13.

⁵⁹ Trepte 2004, p. 11; De Sadeleer, p. 32; Arrowsmith and Kunzlik, p. 9.

⁶⁰ Trepte 2004, p. 137.

2.4 Public Procurement as a Policy Tool

2.4.1 The Objectives

At a first glance, there are two ‘natural’ objectives of public procurement regulation: to obtain good value for money for the citizen and to achieve an efficient allocation of production resources.⁶¹ However, as far as the EU is concerned, most legal scholars seem to agree that it is *not* an objective of either the free movement rules or the Public Procurement Directives to ensure that Member States achieve value for money *per se*.⁶² Rather the main objective is to create an internal market in which goods and services can move freely. In this regard, Trepte states as follows:

Despite the more frequent use by the regulator of terms such as efficiency and best value for money, these are not the objectives originally pursued by the Directives. The Directives have a much more specific task of ensuring the existence (or completion) of a common procurement market within the framework of the Treaty and secondary legislation.⁶³

It can be observed that internal market integration right from the start played an important role in the EU regulation on public procurement.⁶⁴ In the *1992 Single Market Programme*⁶⁵ public procurement was mentioned as “one of the most evident barriers to the achievement of a real internal market”⁶⁶ and the Commission emphasised the need for a revision of the public procurement directives so as to allow for a greater participation of non-national suppliers. According to Albert Sánchez Graells, Senior Lecturer in Law at the University of Bristol, this specific aim of creating an internal market has then been renewed on every occasion the EU has revised its Public Procurement Directives.⁶⁷ Moreover, as Roberto Caranta, Professor in Law at the University of Turin, points out, all Directives so far have been based on the internal market legal basis set out in Article 114 TFEU,⁶⁸ which can be seen as mainly trade oriented.⁶⁹

⁶¹ G Spagnolo ‘Public Procurement as a Policy Tool’ in the Swedish Competition Authority (ed), *The Costs of Different Goals of Public Procurement* (2012) (‘Spagnolo’), p. 25.

⁶² Arrowsmith and Kunzlik, p. 31; Spagnolo, p. 25.

⁶³ P Trepte ‘The Contracting Authority as a Purchaser and Regulator’ in G Skogsvaard Ølykke, C Risvig Hansen and C Tvarnø (eds), *EU Procurement Directives – Modernisation, Growth and Innovation* (Copenhagen, DJØF, 2012) (‘Trepte 2012’), p. 88.

⁶⁴ J Hettne, ‘Strategic Use of Public Procurement – Limits and Opportunities’ (2013) www.sieps.com (‘Hettne 2013a’), p. 1.

⁶⁵ COM(85) 310: Completing the Internal Market: White Paper from the Commission to the European Parliament, para 81.

⁶⁶ COM(85) 310: Completing the Internal Market: White Paper from the Commission to the European Parliament, paras 82-84.

⁶⁷ A Sánchez Graells ‘Are the Procurement Rules a Barrier for Cross-border trade within the European Market?’ in G Skogsvaard Ølykke, C Risvig Hansen and C Tvarnø (eds), *EU Procurement Directives – Modernisation, Growth and Innovation* (Copenhagen, DJØF, 2012) (‘Sánchez Graells’), p. 107-108.

⁶⁸ Caranta 2015, p. 394-395.

⁶⁹ I Maletić, *The Law and Policy of Harmonisation in Europe’s Internal Market* (Northampton, Edward Elgar, 2013) (‘Maletić’), p. 18-19.

However, with the adoption of the new Public Procurement Directives in 2014, the situation appears to have changed somewhat.⁷⁰ While the Directives are still based on Article 114 TFEU, their stated aim is now to “increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals.”⁷¹ So, while national rules still have to comply with the rules on free movement,⁷² public procurement is now said to pursue a number of ‘complementary objectives’,⁷³ such as a wise expenditure of taxpayers’ money. This has led to critical reactions among a number of legal scholars. According to Totis Kotsonis, practicing lawyer at a private law firm, the new Directives “appear capable of changing fundamentally the philosophy that underpins current legislation and creating a more expansive and rigid regulatory regime.”⁷⁴ Moreover, Kotsonis considers that some of the ideas put forward in the new Directives could not be implemented without undermining the Treaty’s free movement provisions and without renegotiating the EU’s international commitments, such as the Agreement on Government Procurement (GPA).⁷⁵ Another critical comment is provided by Dacian C. Dragos and Bogdana Neamtu, both Professors in Law at Babes Bolyai University, who argue that the “sustainability paradigm is almost taking over the realm of public procurement”⁷⁶ and that “it is marketed as a major ‘selling point’ of the new legislation.”⁷⁷

Regardless of whether one agrees with this criticism or not, it is clear that in addition to the two ‘natural’ objectives of public procurement regulation – that is to obtain good value for money and to achieve an efficient allocation of resources – and the more ‘EU specific’ objective of creating an internal market – there is now a third important objective to count on: the promotion of environmental and societal policies. In this sense, procurement measures are to some extent comparable with other regulatory measures, such as laws and taxes (set out in section 2.3).⁷⁸ Indeed, this brings us to the next question: what are the costs and benefits of using public procurement as a policy tool compared to other regulatory instruments?

⁷⁰ Caranta 2015, p. 395. Compare Sánchez Graells, p. 109.

⁷¹ Directive 2014/24/EU, Recital 2.

⁷² Directive 2014/24/EU, Recital 1.

⁷³ Caranta 2015, p. 396.

⁷⁴ T Kotsonis, ‘Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market’ (2011) *Public Procurement Law Review*, NA 56 (‘Kotsonis’).

⁷⁵ Kotsonis, NA 57-58.

⁷⁶ D Dragos and B Neamtu ‘Sustainable public procurement in the EU: experiences and prospects’ in F Lichère, R Caranta, and S Treumer (eds) *Modernising public procurement: the new directive* (Copenhagen, DJØF, 2014) (‘Dragos and Neamtu’), p. 302.

⁷⁷ Dragos and Neamtu, p. 302

⁷⁸ Arrowsmith and Kunzlik, p. 21.

2.4.2 The Costs and Benefits

According to most legal scholars, the main disadvantage of using public procurement as a policy tool is that contracting authorities will not gain any direct economic benefits from doing so.⁷⁹ Rather, they will face additional costs in terms of higher prices on goods and services, an increasing number of complaints, and more work to monitor compliance.⁸⁰ However, as Arrowsmith and Kunzlik point out, these costs will have to be weighted against the benefits of including such policies in the public tenders.⁸¹

Another problem, highlighted by Trepte,⁸² as well as by Arrowsmith and Kunzlik,⁸³ is the ‘extra-territorial dimension’ of public procurement. As was found in section 2.4.1, environmental and social policies in this case appear as a form of regulation (comparable to laws or taxes) and it might be asked whether it is justifiable to ‘regulate’ firms that are generally outside domestic jurisdiction.⁸⁴ Applying this reasoning to the Swedish proposal, it could indeed be discussed whether the government should be able to impose ‘Swedish’ standards of animal welfare on farmers operating in other States.

This brings us to a third problem, highlighted by Trepte, which relates to the fact that public procurement regulation is contract specific.⁸⁵ In the context of negative externalities (such as those flowing from poor standards of animal welfare), this means that contracting authorities will not be in a position to address the whole of the externality problem.⁸⁶ According to Trepte, such ‘piecemeal action’, is unlikely to restore equilibrium prices ($P^M \rightarrow P^*$) and will rather lead to further market distortions.⁸⁷

However, in spite of these problems, there are several advantages to ‘regulation through procurement’.⁸⁸ The first group of arguments relates to the effectiveness of the policy: procurement may in some fields be a more effective policy instrument than other instruments.⁸⁹ According to Trepte, this is for example so in the field of research and development (R&D).⁹⁰

⁷⁹ S Treumer, ‘Green Public Procurement and Socially Responsible Public Procurement: An Analysis of Danish Regulation and Practice’ in R Caranta and M Trybus (eds) *The law of green and social procurement in Europe* (Copenhagen, DJØF, 2010), p. 55. See also Arrowsmith and Kunzlik, p. 127-130; Trepte 2004, p. 175. Compare Spagnolo’s argument that there is still some uncertainty as to whether public procurement is a more or less costly instrument than other policy instruments, p. 28.

⁸⁰ Arrowsmith and Kunzlik, p. 128.

⁸¹ Arrowsmith and Kunzlik, p. 94 and 129 *in fine*.

⁸² Trepte 2004, p. 172.

⁸³ Arrowsmith and Kunzlik, p. 121.

⁸⁴ Arrowsmith and Kunzlik, p. 121.

⁸⁵ Trepte 2004, p. 176.

⁸⁶ Trepte 2004, p. 176.

⁸⁷ Trepte 2004, p. 176.

⁸⁸ See Arrowsmith and Kunzlik, p. 118.

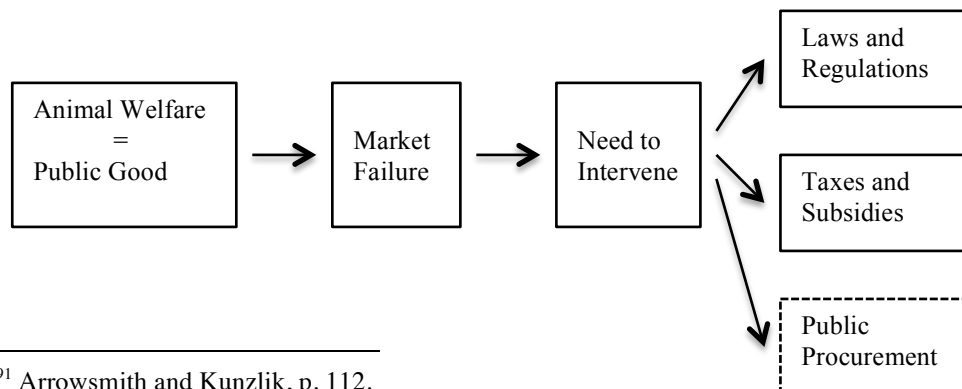
⁸⁹ Arrowsmith and Kunzlik, p. 118.

⁹⁰ Trepte 2004, p. 144.

As far as the second group of justifications is concerned, it is based on political rather than economic arguments. *First*, governments may want to ensure that they are associated with the highest possible standards, both to set an example and to avoid public criticism.⁹¹ This is especially so in politically high charged areas, such as for example animal welfare. *Second*, governments may want to achieve a ‘level playing field’, in which all producers are able to compete on the same merits.⁹² As will be seen in section 4.3.1, this argument appears to have a special bearing on the Swedish situation, where the higher standards on animal welfare are often seen as a major disadvantage to Swedish farmers. *Third*, governments may want to ensure that government funds are used in an appropriate way.⁹³ After all, the government is not ‘any’ buyer, but a buyer whose activities are financed by taxpayers’ money.⁹⁴ In this regard, it can be observed that one of the arguments behind the Swedish proposal is that *all* citizens (including the children, the elderly and the sick) should get access to the best food.⁹⁵

2.5 Conclusion

To sum up, it has been found that the main reason for regulating animal welfare is that there is a market failure: the levels of animal welfare achieved by the market will not be optimal from society’s point of view. In essence, this is because the costs of poor standards of animal welfare are not reflected in the market price of the product. In order to remedy this market failure, governments have a wide range of policy instruments at their disposal. One option would be to include animal welfare standards in the procurement policies. The main benefits of doing so are that governments will be associated with the highest possible standards, that all farmers will be able to compete on the same merits and that taxpayers’ money will be used in an appropriate way. However, some of the disadvantages are that it will lead to higher costs, that it can be used to regulate firms outside domestic jurisdiction and that it may not be a very effective way of dealing with negative externalities. All in all, this shows that public procurement is just one policy instrument among many, and that governments will have to make a decision on what instrument to use. With these views in mind, the next section will turn to the legal aspects of the issue at hand.



⁹¹ Arrowsmith and Kunzlik, p. 112.

⁹² Arrowsmith and Kunzlik, p. 112.

⁹³ Arrowsmith and Kunzlik, p. 113.

⁹⁴ Arrowsmith and Kunzlik, p. 17.

⁹⁵ See Shekarabi and Jonsson.

3 The Legal Framework on Public Procurement

3.1 Introduction

Having identified public procurement regulation as one of the policy instruments available to governments to address market failures, this section will have a closer look at the legal framework itself. As was found in the previous section, the main goal of the EU regulatory framework in this area is to create an internal market in which goods and services can move freely. Legally speaking, this objective finds expression in two sets of provisions.⁹⁶ *First*, there are the free movement provisions of the TFEU – commonly referred to as *primary law* – and the general principles of EU law derived therefrom. These apply to all public contracts, provided they are of a ‘certain cross-border interest’. *Second*, relevant for contracts above certain financial thresholds is *secondary law*, in the form of directives. With effect from 18 April 2016, the current directives are Directive 2014/24, which governs most major public contracts (the ‘Public Sector Directive’) and Directive 2014/25, which applies to certain sectors (the ‘Utilities Directive’). In the following sections, these provisions will be considered hierarchically.

3.2 Primary Law

3.2.1 Scope

The EU Treaties do not include any specific provisions dealing with Member States’ procurement.⁹⁷ However, given that public procurement involves the acquisition of goods and services, the provisions on free movement of goods (Article 34 TFEU), freedom to provide services (Article 56 TFEU) and freedom of establishment (Article 49 TFEU) come into play.⁹⁸ As was mentioned above, these provisions apply to *all* public contracts (also those not covered by the Directives) provided they are of a ‘certain cross-border interest’. According to Sundstrand, this means that the contract should be of *potential* interest to a company located in another Member State, for example because of its value or its location.⁹⁹ Today, with increased mobility of citizens and products, very few contracts seem to lack such an interest,¹⁰⁰ which means that the proposal recently put forward by the Swedish Minister would unarguably be subject to Article 34 TFEU.

⁹⁶ Arrowsmith and Kunzlik, p. 29 *in fine*.

⁹⁷ Arrowsmith and Kunzlik, p. 56; F Lichère, R Caranta, and S Treumer (eds), *Modernising public procurement: the new directive* (Copenhagen, DJØF, 2014), p. 30.

⁹⁸ Arrowsmith and Kunzlik, p. 56.

⁹⁹ A Sundstrand, *Offentlig upphandling – primärrättens reglering av offentliga kontrakt* (Stockholm, Jure, Förlag AB, 2012) (‘Sundstrand’), p. 140; Drijber and Stergiou, p. 812.

¹⁰⁰ Drijber and Stergiou, p. 815-816.

3.2.2 Article 34 TFEU

Turning then to Article 34 TFEU, it prohibits ‘all quantitative restrictions on imports and all measures having equivalent effect’.¹⁰¹ The original definition of measures having equivalent effect (MEQRs) can be found in the Court’s decision in *Dassonville*¹⁰², which reads as follows:

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions.¹⁰³

As far as the Swedish proposal is concerned, the first limb of the *Dassonville* formula – ‘all trading rules’ – is of particular interest. It follows from the Court’s case-law, that the said concept does not only cover legally binding rules (such as laws and regulations) but also non-binding practices and policies that show ‘a certain degree of consistency and generality’.¹⁰⁴ Arguably this means that the guidelines potentially drawn up by the National Agency for Public Procurement would be subject to the prohibition laid down in Article 34 TFEU, regardless of their non-binding character.

Moreover – what is perhaps the more interesting – is that the Court, in the specific context of public procurement, has held that the concept of ‘all trading rules’ does not only cover general laws and practices, but also individual procurement decisions, such as specific contract awards.¹⁰⁵ While Arrowsmith and Kunzlik criticise this approach for going against traditional EU law notions,¹⁰⁶ they recognise that:

[...] this approach may have been adopted to allow the ECJ to deal with states that do not regulate procurement through formal rules, but restrict access to the market through persistent practices that may be hard to prove.¹⁰⁷

As far as the Swedish proposal is concerned, the Court’s approach, equating individual procurement decisions with general state measures, means that contracting authorities – making use of the guidelines – would *themselves* be subject to Article 34 TFEU. With this in mind, the next section will try to classify the proposal under one of the categories *within* Article 34 TFEU.

¹⁰¹ C Barnard, *The Substantive Law of the EU: the Four Freedoms*, 4th edn (Oxford, OUP, 2013) (‘Barnard’), p. 74.

¹⁰² C-8/74 *Dassonville*.

¹⁰³ *Dassonville*, para 5.

¹⁰⁴ See, in particular C-249/81 *Buy Irish*. See also Barnard, p. 75.

¹⁰⁵ See, in particular C-234/03 *Contse*; C-346/06 *Rüffert*. See also Arrowsmith and Kunzlik, p. 57.

¹⁰⁶ Arrowsmith and Kunzlik, p. 57. See also P Kunzlik, ‘Green Public Procurement – European Law, Environmental Standards and ‘What to Buy’ Decisions’ (2013) *Journal of Environmental Law* (‘Kunzlik 2013’), p. 187.

¹⁰⁷ Arrowsmith and Kunzlik, p. 57.

3.2.3 Different Categories of Measures

When applying the *Dassonville* formula, the Court has traditionally made a distinction between, on the one hand, measures that discriminate directly against imports ('distinctly applicable measures') and, on the other hand, measures that only indirectly affect imports ('indistinctly applicable measures'). In recent case-law, the Court has paid less attention as to whether a certain rule is discriminatory or not, focusing instead on whether it creates an obstacle to market access (the 'market access test').¹⁰⁸ In the following sections, these categories of measures will be considered in turn.

3.2.3.1 Distinctly Applicable Measures

Starting with the category of 'distinctly applicable measures', it catches those rules and practices that are discriminatory both in *law* and in *fact*, meaning that they place conditions on imported goods only, or demand higher standards from foreign producers than from domestic ones.¹⁰⁹ In the specific context of public procurement, the Court has held that national rules requiring suppliers to purchase certain quantities of the domestic product fall under this category.¹¹⁰ So for example in *Du Pont de Nemours*¹¹¹, the Court held that an Italian rule, requiring suppliers to purchase at least 30 per cent of their supplies from companies established in Southern Italy was to be considered distinctly applicable.¹¹² Another example can be found in *Preussen Elektra* (further considered in section 4.6.3), where the Court held that a German law, requiring suppliers to purchase renewable energy from producers in the region, was an MEQR, although justifiable.¹¹³ However, as far as the proposal put forward by the Swedish Minister is concerned, it would probably *not* be classified as distinctly applicable, so long as it does not encourage the purchase of 'Swedish' meat or meat from local farms.

3.2.3.2 Indistinctly Applicable Measures

Turning then to the category of 'indistinctly applicable measures', it catches those rules and practices that in *law* apply to both domestic and imported products, but in *fact* have a particular burden on the imported ones.¹¹⁴ In essence, this is due to the fact that the national producer only has to satisfy one set of rules (that of the home state), while the foreign producer has to satisfy two sets of rules (those of the home state *and* the host state).¹¹⁵ In the context of public procurement, an illustrative example is provided by *Dundalk*¹¹⁶, in which a contracting authority required suppliers of

¹⁰⁸ Barnard, p. 81.

¹⁰⁹ Barnard, p. 81; Arrowsmith and Kunzlik, p. 58-59.

¹¹⁰ Barnard, p. 84.

¹¹¹ C-21/88 *Du Pont de Nemours*.

¹¹² Arrowsmith and Kunzlik, p. 58.

¹¹³ Barnard, p. 84; Arrowsmith and Kunzlik, p. 48.

¹¹⁴ Barnard, p. 90.

¹¹⁵ Barnard, p. 90.

¹¹⁶ C-45/87 *Dundalk*.

construction material to comply with an Irish standard. While *in law* the requirement applied equally to domestic and foreign producers, *in fact* it had a greater impact on foreign producers given that only one firm (an Irish one) produced material according to that standard.¹¹⁷ In its judgement, the Court stated that although contracting authorities were entitled to refer to national standards when purchasing products, they were required to recognise foreign standards as equivalent to their own. Otherwise, the requirement would constitute a *prima facie* breach of Article 34 TFEU.¹¹⁸

Indeed, this last line of reasoning corresponds to the principle of ‘mutual recognition’ laid down in *Cassis de Dijon*.¹¹⁹ In this landmark judgement, the Court stated that goods lawfully produced in one Member State *in principle* should be admitted for sale in another Member without further restriction.¹²⁰ However, this presumption could be rebutted if the host state showed that its requirements were justified under Article 36 TFEU or one of the mandatory requirements, and that the steps taken were proportionate.¹²¹ Applying this reasoning to the Swedish proposal, it suggests that contracting authorities are under a *prima facie* obligation to recognise foreign standards of animal welfare as equivalent to their own, and so that the Swedish proposal would be in conflict with Article 34 TFEU unless justified.

3.2.3.3 The Market Access Approach

Turning then to the ‘market access approach’, it suggests that the Court should pay less attention as to whether a certain rule is discriminatory or not, focusing instead on whether it ‘impedes’, ‘hinders’ or creates an ‘obstacle’ to intra-Union trade.¹²² The leading case in this line of case-law is *Trailers*¹²³, where the Court held that an Italian rule prohibiting motorcycles from pulling trailers had the effect of hindering access to the Italian market.¹²⁴ Moreover, recent case-law suggests that the market access test has worked its way into the field of public procurement as well. So for example, in *Contse*¹²⁵, delivered in 2005, the Court stated that an obligation to have an office open in a certain city was “liable to hinder or make less attractive”¹²⁶ the exercise of the fundamental freedoms. Another example is *Rüffert*¹²⁷, delivered in 2008, where the Court held that an obligation to comply with collective agreements constituted an “impediment to market access.”¹²⁸ All in all, this suggests that the Swedish proposal would fall within the scope of Article 34 TFEU, also when applying a market access test.

¹¹⁷ Arrowsmith and Kunzlik, p. 59.

¹¹⁸ *Dundalk*, para 21.

¹¹⁹ C-120/78 *Cassis de Dijon*.

¹²⁰ Barnard, p. 93.

¹²¹ Barnard, p. 93.

¹²² Barnard, p. 103.

¹²³ C-110/05 *Trailers*.

¹²⁴ *Trailers*, para 58.

¹²⁵ C-234/03 *Contse*.

¹²⁶ *Contse*, para 33.

¹²⁷ C-346/06 *Rüffert*.

¹²⁸ *Rüffert*, para 14.

3.2.3.4 The *Keck* Exception

Before turning to the question of justification, it is worth mentioning that the Court in *Keck*¹²⁹ exempted ‘certain selling arrangements’ (that is rules concerning the time, place and marketing of products) from the scope of Article 34 TFEU.¹³⁰ While this does not have any obvious bearing on the Swedish proposal, it can be observed that Arrowsmith and Kunzlik have relied on the *Keck* exception in support of a theory they call ‘excluded buying decisions’, suggesting that certain non-discriminatory decisions taken by contracting authorities should fall outside the scope of the free movement rules altogether.¹³¹ This will be further discussed in section 5.2.3.

3.2.4 Justification

Turning then to the question of justification, it has already been recognised that an otherwise unlawful measure may be held compatible with Article 34 TFEU provided it is justified by one of the grounds set out in Article 36 TFEU or one of the mandatory requirements developed through case-law. In addition, the measure must be suitable for attaining the objective pursued and not go beyond what is necessary.¹³²

As far as animal welfare is concerned, it is one of the grounds explicitly mentioned in Article 36 TFEU.¹³³ As to date, it has been invoked in support of a wide range of national rules, relating to the importation of bees,¹³⁴ certain slaughter methods,¹³⁵ and transport conditions.¹³⁶ Given the variety of these issues, there is no reason to believe that the Swedish government could not rely on the animal welfare derogation in Article 36 TFEU *per se*.

However, what is more problematic is that Article 36 TFEU (or one of the mandatory requirements) can only be invoked in so far as the relevant field has not been fully harmonised by Union law. In other words, as soon as directives or regulations fully replace national standards, Member States lose the possibility of relying on Article 36 TFEU.¹³⁷ While the complex relationship between animal welfare and harmonisation will be extensively dealt with in section 4.5, it can already now be noted that EU law makes a distinction between *exhaustive harmonisation*, leaving no room for Member State action,¹³⁸ and *minimum harmonisation*, allowing for more stringent national measures so long as they are compatible with the Treaty.¹³⁹

¹²⁹ Joined cases C-267 and 268/91 *Keck*.

¹³⁰ Barnard, p. 119.

¹³¹ Arrowsmith and Kunzlik, p. 68-69.

¹³² Barnard, p. 93.

¹³³ See Barnard, p. 167.

¹³⁴ C-67/97 *Bluhme*.

¹³⁵ C-1/96 *Compassion in World Farming (CIWF)*; C-356/92 *Hedley Lomas*.

¹³⁶ C-350/97 *Monsees*.

¹³⁷ De Sadeleer, p. 287-288; Barnard, p. 155.

¹³⁸ Barnard, p. 658.

¹³⁹ Barnard, p. 662.

3.3 General Principles of EU Law

3.3.1 Scope

In addition to the free movement provisions, *all* public contracts – also those not covered by the Directives – are subject to the general principles of EU law.¹⁴⁰ These principles are derived mainly from the laws of the Member States,¹⁴¹ and are said to have two main functions: to define and refine the Treaty (gap-filling function),¹⁴² and to provide a self-standing ground for judicial review.¹⁴³ As far as the specific context of public procurement is concerned, five principles have proved particularly important, namely the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.¹⁴⁴ These principles are all mentioned in Recital 1 of the Public Sector Directive and are commonly referred to by the Court in its case-law.¹⁴⁵ In the following sections, these will be considered in turn.

3.3.2 The Principle of Equal Treatment

Starting with the principle of equal treatment, it can be seen as the fundamental pillar upon which the free movement provisions and the legal framework on public procurement is based.¹⁴⁶ In essence, it requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.¹⁴⁷ Translated into the specific context of public procurement, it means that all suppliers should be treated equally, both when formulating their tenders and when being assigned the contract.¹⁴⁸

An example of the application of the principle of equal treatment can be found in *Medipac*¹⁴⁹ (further considered in section 5.2.2). In this case, a Greek hospital carried out a public procurement of medical equipment. In the technical specifications, it stated that products had to comply with the Medical Device Directive.¹⁵⁰ Despite this, it later rejected a tender that complied with the Directive, on the grounds that it was not safe. In its judgement, the Court stated that such conduct was contrary to the principle of equal treatment, given that an authority had to accept its own criteria.¹⁵¹

¹⁴⁰ Arrowsmith and Kunzlik, p. 56.

¹⁴¹ T Tridimas, *The General Principles of EC Law* (Oxford, OUP, 1999) ('Tridimas'), p. 4.

¹⁴² Tridimas, p. 9 and 17.

¹⁴³ Tridimas, p. 19.

¹⁴⁴ Sundstrand, p. 42.

¹⁴⁵ Sundstrand, p. 42-43.

¹⁴⁶ Sundstrand, p. 43-44.

¹⁴⁷ Arrowsmith and Kunzlik, p. 85; Tridimas, p. 40-41.

¹⁴⁸ Sundstrand, p. 44.

¹⁴⁹ C-6/05 *Medipac*.

¹⁵⁰ Arrowsmith and Kunzlik, p. 64.

¹⁵¹ *Medipac*, para 55. See however section 5.2, where it is argued that the Court's judgement could also be explained by the level of harmonisation achieved by EU law.

3.3.3 The Principle of Non-Discrimination

Turning then to the principle of non-discrimination on grounds of nationality, codified in Article 18 TFEU, it can be seen as a specific expression of the principle of equal treatment. However, in contrast to the principle of equal treatment, which covers *all* types of discrimination, the principle of non-discrimination covers only one specific type.¹⁵²

In *Beentjes*¹⁵³, the Court stated that an obligation to employ long-term unemployed persons could violate the principle of non-discrimination on grounds of nationality “if it became apparent that that such a condition could be satisfied only by tenderers from the State concerned or that tenderers from other Member States would have difficulty in complying with it”.¹⁵⁴ It thus made it clear that the principle of non-discrimination does not only cover distinctly applicable measures but also those that are indistinctly applicable. Indeed, this conclusion gains support from the Court’s later decision in *Contse*¹⁵⁵, discussed in sections 3.2.3.3 and 5.2.2.

3.3.4 The Principle of Mutual Recognition

Turning then to the principle of mutual recognition (touched upon in section 3.2.3.2) it requires that goods lawfully produced in one Member State *in principle* should be admitted to others. In the specific context of public procurement, it also means that contracting authorities should add the words ‘or equivalent’ when referring to a specific make or trademark.¹⁵⁶

It can be observed that the principle of mutual recognition was at issue in one of the Swedish cases on animal welfare and public procurement, further considered in section 5.3. In *Halland*¹⁵⁷, delivered in 2010, two municipalities in the south-west of Sweden stated that foodstuffs had to be produced in accordance with Articles 2 and 4 of the Swedish Animal Welfare Act.¹⁵⁸ Following the contract award, one producer asked for judicial review, arguing that the criteria were unfair and discriminatory. In its judgement, the court found that the legal framework on animal welfare had not been exhaustively harmonised and that Member States were allowed to impose more demanding measures so long as they were compatible with the Treaty and the general principles of EU law. However, given that the contracting authorities in this case had failed to comply with the principle of mutual recognition, all of the requirements were in the end rejected.¹⁵⁹

¹⁵² Sundstrand, p. 45.

¹⁵³ C-31/87 *Beentjes*.

¹⁵⁴ *Beentjes*, para 30.

¹⁵⁵ C-234/03 *Contse*, para 36.

¹⁵⁶ C-359/93 *UNIX*, para 27. See also *Dundalk*, para 21.

¹⁵⁷ The administrative court in Gothenburg, judgement of 15 June 2010, no 8169-20; later appealed to the administrative court of appeal in Gothenburg, judgement of 16 December 2010, no 2921-2922-10 (‘Halland’).

¹⁵⁸ The administrative court in *Halland*, p. 2.

¹⁵⁹ The administrative court in *Halland*, p. 2-3.

3.3.5 The Principle of Proportionality

Turning then to the principle of proportionality, codified in Article 5 TEU, it requires that Member State measures are proportionate to the aim they wish to pursue.¹⁶⁰ It follows from the Court's case-law that the principle of proportionality usually comprises a three-stage test.¹⁶¹ *First*, it should be established whether the measure is justified by a legitimate objective (such as animal welfare). *Second*, it should be established whether the measure is suitable to achieve that objective (suitability). *Third*, it should be established whether the measure is necessary or whether the same objective could be achieved by less restrictive means (proportionality *stricto sensu*).¹⁶² Applied to the specific context of public procurement, it implies that contracting authorities should not impose higher requirements than necessary, considering the nature and the value of the contract.¹⁶³

3.3.6 The Principle of Transparency

Turning finally to the principle of transparency, it derives (like the principle of non-discrimination on grounds of nationality) from the principle of equal treatment.¹⁶⁴ In essence, it aims at ensuring that the principle of equal treatment is actually complied with.¹⁶⁵ To this end, it imposes an obligation on public authorities to advertise the contracts.¹⁶⁶ Moreover, as was stated by the Court in *Wienstrom*¹⁶⁷, it requires that contracting authorities should be able to verify whether the information contained in a tender is accurate.¹⁶⁸

It can be observed that the verification requirement played a decisive role in several of the Swedish cases on animal welfare and public procurement. So for example in *Stockholm*¹⁶⁹, delivered in 2011, the administrative court deemed certain transport conditions incompatible with EU law, on the ground that they were not possible to verify.¹⁷⁰ In *Sigtuna*¹⁷¹, delivered in 2012, on the other hand, the administrative court of appeal found that the verification requirement set out in *Wienstrom* was in fact complied with, given that the contracting authorities had contractual rights to perform inspections on the premises and to make requests from the suppliers.¹⁷² These divergent judgements will be further dealt with in section 5.3.

¹⁶⁰ Tridimas, p. 91.

¹⁶¹ See, *inter alia*, *Contse*, paras 39-41.

¹⁶² See Tridimas, p. 91-92, who only mentions the two last steps.

¹⁶³ Sundstrand, p. 47.

¹⁶⁴ Sundstrand, p. 46; Arrowsmith and Kunzlik, p. 83.

¹⁶⁵ C-324/98 *Teleaustria*, para 61.

¹⁶⁶ *Teleaustria*, para 62.

¹⁶⁷ C- 448/01 *Wienstrom*.

¹⁶⁸ C- 448/01 *Wienstrom*, paras 50-52.

¹⁶⁹ The administrative court in Stockholm, judgement of 18 January 2011, no 46844-10 ('Stockholm').

¹⁷⁰ Stockholm, p. 12.

¹⁷¹ The administrative court of appeal in Stockholm, judgement of 23 February 2012, no 2841-11 ('Sigtuna').

¹⁷² *Sigtuna*, p. 12-13.

3.4 Secondary Law

3.4.1 Scope

In addition to the free movement provisions and the general principles of EU law, public contracts above certain financial thresholds are governed by secondary legislation in the form of directives.¹⁷³ When applicable, these directives operationalise the free movement provisions, for example by requiring contracting authorities to advertise the contracts EU-wide, to follow certain specified procurement methods and to provide information.¹⁷⁴

As was mentioned in section 2.4.1, the public procurement directives were recently subject to a major reform. In 2011, the Commission published a *Green Paper on the modernisation of EU public procurement policy – towards a more efficient European Procurement Market*¹⁷⁵, with proposals for new public procurement directives.¹⁷⁶ These directives were adopted by the EP and the Council in February 2014, and the Member States then had until April 2016 to transpose the new rules into national law.¹⁷⁷ Following the reform, the directive governing most public sector contracts is Directive 2014/24/EU (the ‘Public Sector Directive’) repealing Directive 2004/18/EC (the ‘old Public Sector Directive’). In addition, certain specific sectors – such as water, energy, transport and postal services – are governed by Directive 2014/25/EU, repealing Directive 2004/17/EC.

Importantly, a contract is only subject to the Directives in so far as it meets or exceeds certain thresholds. It follows from the Public Sector Directive that the current thresholds are EUR 134 000 for contracts awarded by central government authorities (such as courts, agencies or universities),¹⁷⁸ and EUR 207 000 for contracts awarded by sub-central contracting authorities (such as municipalities).¹⁷⁹ Applying these figures to the Swedish proposal, it can be observed that between 2009 and 2013, Swedish contracts on foodstuffs had an average value of around EUR 5 000 000.¹⁸⁰ This means that most contracts covered by the Swedish proposal would be subject to the Public Sector Directive. For those contracts, every stage of the procurement process is strictly regulated.¹⁸¹ This will be further considered below.

¹⁷³ Kunzlik 2013, p. 180; Arrowsmith and Kunzlik, p 88.

¹⁷⁴ Kunzlik 2013, p. 181; Arrowsmith and Kunzlik, p. 89-90.

¹⁷⁵ COM(2011)15 final: Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient Procurement Market.

¹⁷⁶ See Caranta 2015, p. 393.

¹⁷⁷ European Commission: ‘New rules on public procurement and concession contracts as of April 2016’, http://ec.europa.eu/growth/single-market/public-procurement/new/index_en.htm (last accessed 2016-01-06).

¹⁷⁸ Directive 2014/24/EU, Article 4(b) and Annex I (Sweden).

¹⁷⁹ Directive 2014/24/EU, Article 4(c).

¹⁸⁰ The Swedish Competition Authority, ‘Offentlig upphandling av mat. En kartläggning av Sveriges offentliga upphandling av livsmedel och måltidstjänster’, Rapport 2015:1, p. 15.

¹⁸¹ Kunzlik 2013, p. 181.

3.4.2 The Public Procurement Process

3.4.2.1 Contract Specifications

Starting with the first stage of the procurement process, it can be said to comprise two separate tasks: the definition of the subject-matter of the contract and the drafting of the technical specifications.¹⁸² As far as the first task is concerned, legal scholars seem to agree that contracting authorities have a rather wide freedom in deciding *what* to purchase.¹⁸³ So for example, it is for the authority to decide whether it wants to purchase poultry meat or pork for school meals.¹⁸⁴ As far as the second task is concerned, it has to do with *how* these requirements are to be formulated.¹⁸⁵ This is where EU law comes into play.¹⁸⁶ It follows from Recital 1 of the Public Sector Directive that all criteria set out by the contracting authorities have to comply with the free movement provisions and the general principles of EU law.¹⁸⁷ Moreover, it follows from Article 42 (2) and (4) that technical specifications shall afford equal access to all producers and that they shall *not*:

refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a *specific origin or production* with the effect of favouring or eliminating certain undertakings or certain products.¹⁸⁸

It can be observed that by prohibiting references to a ‘specific origin or production’, the Public Sector Directive in a rather incontestable way precludes express references to ‘Swedish’ standards of animal welfare. Furthermore, it follows from Article 42(1) that technical specifications should be ‘linked to the subject matter of the contract’.¹⁸⁹ This means that contracting authorities are only allowed to impose conditions that relate to the actual thing being purchased, and not to the producers’ business practices in general.¹⁹⁰ So for example, if a contracting authority wants to purchase poultry meat, it cannot impose conditions that relate to the treatment of cows and calves, given that such conditions are not related to the poultry meat being purchased.¹⁹¹ As Arrowsmith and Kunzlik point out, the link to the subject-matter of the contract therefore constitutes an important limitation on contracting authorities’ discretion.¹⁹²

¹⁸² M Burgi, ‘Specifications’ in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law – Public Procurement and Beyond* (Brussels, Éditions Bruylant, 2014) (‘Burgi’), p. 38.

¹⁸³ Burgi, p. 38. R Caranta, ‘Sustainable Procurement in the EU’ in R Caranta and M Trybus (eds) *The law of green and social procurement in Europe* (Copenhagen, DJØF, 2010) (‘Caranta 2010’), p. 28. Arrowsmith and Kunzlik, p. 59-60.

¹⁸⁴ See Arrowsmith and Kunzlik, p. 60

¹⁸⁵ Burgi, p. 40.

¹⁸⁶ Burgi, p. 40.

¹⁸⁷ Directive 2014/24/EU, Recital 1.

¹⁸⁸ Directive 2014/24/EU, Article 42(4) (emphasis added).

¹⁸⁹ Directive 2014/24/EU, Article 42(1).

¹⁹⁰ Kunzlik 2013, p. 182-183.

¹⁹¹ Kunzlik, 2013, p. 183.

¹⁹² Arrowsmith and Kunzlik, p. 106.

However, what is interesting to note is that Article 42(1) now allows for contracting authorities to refer to the ‘production process’ of a product when drafting the technical specifications. It can be read that:

Those characteristics may also refer to the *specific process or method of production* or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.¹⁹³

Indeed, this is a major change compared to the old Public Sector Directive, under which this was only allowed on an exceptional basis.¹⁹⁴ The former Article 23(8) read as follows:

Unless justified by the subject-matter of the contract, technical specifications shall *not* refer to a specific make or source, or a *particular process*, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.¹⁹⁵

While the wording of the new provision primarily refers back to the case-law on *environmental* production standards,¹⁹⁶ there is no reason to believe that the same reasoning could not apply in the context of animal welfare as well. As will be seen in section 4.4, most of the requirements on animal welfare (such as a ban on tail-docking or a prohibition on the use of antibiotics in veterinary medicine) are essentially concerned with the production process of meat. This means that Article 42(1) of the New Public Sector Directive could possibly point towards an *increased* discretion for contracting authorities to pursue higher standards of animal welfare.

3.4.2.2 Selection Criteria

Turning then to the second stage of the procurement process – commonly referred to as the qualification process – it aims at ensuring that the producers competing for the contract have the necessary qualifications to carry out their obligations.¹⁹⁷ It follows from Articles 57 and 58 of the Public Sector Directive that contracting authorities have the possibility, and sometimes the obligation, to exclude producers on the grounds that they are not suitable, not financially stable or do not have the sufficient technical capability.¹⁹⁸ However, given that this process does not have anything to do with the Swedish proposal, it will not be further dealt with in this thesis.

¹⁹³ Directive 2014/24/EU, Article 42(1) (emphasis added).

¹⁹⁴ Caranta 2015, p. 418; Burgi, p. 55-56.

¹⁹⁵ Directive 2004/18/EC, Article 23(8) (emphasis added).

¹⁹⁶ Burgi, p. 56.

¹⁹⁷ M Steinicke ‘Qualification and shortlisting’ in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law – Public Procurement and Beyond* (Brussels, Éditions Bruylant, 2014), p. 105. See also Arrowsmith and Kunzlik, p. 104.

¹⁹⁸ Directive 2014/24/EU, Articles 57-58.

3.4.2.3 Award Criteria

Turning then to the third stage of the procurement process, it follows from Article 67 of the Public Sector Directive that once a contracting authority has received its final offers it must evaluate them against the award criteria.¹⁹⁹ Under the old Public Sector Directive, this could be done either on the basis of the ‘lowest price only’ or the ‘most economically advantageous tender’ (MEAT).²⁰⁰ However, following the reform, Article 67(1) stipulates that “contracting authorities *shall* base the award of public contracts on the most economically advantageous tender”. As pointed out in the legal doctrine, this suggests that MEAT now has become the main rule.²⁰¹ In contrast to the ‘lowest price’ basis, which leaves no scope for horizontal policies, the MEAT-criteria can include such policies provided they are linked to the subject-matter of the contract and comply with the free movement provisions and the general principles of EU law.²⁰² In this sense, the reform can be seen as way of *increasing* public authorities’ discretion.

Another novelty of the new Public Sector Directive is the concept of life cycle costing (LCC), laid down in Article 68. The idea behind LCC is that when calculating the price of a product (for example a kilo of beef), account should be taken to *all* of the costs incurred in producing the product.²⁰³ According to Article 68(1), this includes, in particular, “environmental externalities linked to the product.”²⁰⁴ According to Dragos and Neamtu, the wording of Article 68 raises the question of whether “there are other types of externalities that can be factored in, leaving aside environmental costs.”²⁰⁵ While Dragos and Neamtu primary refers to social costs, the concept of LCC could possibly have a bearing on the Swedish proposal as well. As was found in section 2.2.1, poor levels of animal welfare may give rise to a number of negative externalities, such as antibiotic resistance and spread of disease. By internalising these costs into the LCC analysis, they would be given a monetary value and thus become part of the economic process.

Finally, it should be mentioned that an important point about award criteria as compared to technical specifications is that producers who do not satisfy them are not *excluded* completely from the contract.²⁰⁶ For this reason, award criteria are in general considered less restrictive on trade than technical specifications, something that could have an impact when it comes to the justification and proportionality assessment under Article 36 TFEU.²⁰⁷

¹⁹⁹ Directive 2014/24/EU, Article 67. See also Arrowsmith and Kunzlik, p. 106.

²⁰⁰ Directive 2004/18/EC, Articles 53(1)(a) and (b).

²⁰¹ Directive 2014/24/EU, Articles 67(1) and (2). See M Franch and M Grau, ‘Contract award criteria’ in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law – Public Procurement and Beyond* (Brussels, Éditions Bruylant, 2014), p. 128 and 161-162.

²⁰² Directive 2014/24/EU, Article 67(3). See also Kunzlik 2013, p. 182.

²⁰³ Directive 2014/24/EU, Article 68(1)(a). See also Caranta 2015, p. 397-398.

²⁰⁴ Directive 2014/24/EU, Article 68(1)(b).

²⁰⁵ Dragos and Neamtu, p. 326.

²⁰⁶ Kunzlik 2013, p. 183.

²⁰⁷ J Hettne ‘Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go Beyond the Requirements of EU Law’, SOU 2013:12, Bilaga 12 (Hettne 2013b), p. 1-2 and 36.

3.4.2.4 Contract Performance Conditions

Turning finally to the last stage of the procurement process – the contract performance conditions – its role is to determine *how* the contract has to be performed.²⁰⁸ According to Article 70 and Recital 98 of the Public Sector Directive, these conditions may include a wide range of horizontal policies, including animal welfare.²⁰⁹ Despite this, it seems as if the contract performance conditions are of little relevance for the present purposes.

3.5 Conclusion

To sum up the section on public procurement, it has been found that the Minister’s proposal would indeed be subject to the prohibition laid down in Article 34 TFEU, regardless of whether applying a discrimination approach (*Dundalk*) or a market access approach (*Contse*). Moreover, it has been found that although the current proposal could – at least in theory – be justified by the animal welfare derogation set out in Article 36 TFEU, the actual scope for more demanding national measures will be highly dependent on the level of harmonisation achieved by EU law.

As far as the general principles of EU law are concerned, it has been established that the principle of equal treatment as well as the principle of non-discrimination on grounds of nationality probably preclude express references to ‘Swedish’ standards of animal welfare. Another principle that could prove important in this context is the principle of transparency, which (according to *Wienstrom*) requires that contracting authorities should be able to verify whether the information contained in a tender is accurate or not.

Finally, it has been found that most Swedish contracts on foodstuffs cover such a great value that they would also be subject to secondary law. In view of the fact that the government proposal has not been put forward yet, it is too early to tell whether the requirements would be classified as technical specifications or award criteria. However, given that the Swedish Minister talks about ‘requirements’ it could be assumed that the standards set out by the contracting authorities would be *mandatory* in nature. This means that they would be classified as technical specifications. With this assumption in mind, it can be observed that Article 42(1) of the Public Sector Directive now allows for contracting authorities to refer to the ‘production process’ of a product when drafting the technical specifications. Given that animal welfare standards are essentially concerned with the production process of meat, this could point towards a *wider* margin of discretion than was the case before. However, as will be seen in the next section, the margin of discretion left for contracting authorities ultimately depends on the level of harmonisation achieved by EU secondary animal welfare legislation and the wording of the relevant provisions.

²⁰⁸ R Caranta, ‘Sustainable procurement’ in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law – Public Procurement and Beyond* (Brussels, Éditions Bruylant, 2014), p. 185 *in fine* (original emphasis).

²⁰⁹ Directive 2014/24/EU, Article 70 and Recital 98.

4 The Legal Framework on Animal Welfare

4.1 Introduction

Having considered the legal rules on public procurement, this section will turn to the rules on animal welfare. The term ‘animal welfare’ has by the World Organisation for Animal Health (OIE) been defined as follows:

Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if [...] it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear and distress.²¹⁰

In addition, the OIE has developed the concept of the ‘five freedoms’ so as to define the basic needs of farm animals. These are freedom from hunger, thirst and malnutrition, freedom from fear and distress, freedom from physical and thermal discomfort, freedom from pain, injury and disease and freedom to express normal patterns of behaviour.²¹¹ These principles have been widely accepted,²¹² and were recently written into the Commission’s *Second Action Plan for Animal Welfare*²¹³. However, in spite of these common principles, the level of animal welfare still differs significantly across the Union.²¹⁴ As the Commission recognises in its action plan, this is not only because of different farming systems, climate conditions and land realities, but also because of different cultural and political attitudes in general.²¹⁵

So, against this background, the purpose of this chapter is to establish what is meant by ‘Swedish’ standards of animal welfare. Do they correspond to those of the rest of the EU or are they more or less demanding? To what extent can Sweden impose its own standards against other Member States? In order to answer these questions, this section will start by reviewing the two frameworks of EU and Sweden separately. It will then make a comparison between the two, while finally considering the possibilities for one Member State to impose its own standards against another, taking particular account of the level of harmonisation achieved by EU law.

²¹⁰ The World Organisation for Animal Health (OIE), ‘The International Terrestrial Animal Health Code’ (2015), Chapter 7(1)(1).

²¹¹ OIE, The International Terrestrial Animal Health Code (2015), Chapter 7(1)(1).

²¹² See Ryland 2015, p. 27.

²¹³ SEC(2012) 55 final: Commission Staff Working Paper, Impact Assessment.

Accompanying the document COM(2012) 6 final/2: Communication from the Commission to the EP, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, p. 9.

²¹⁴ Ryland and Nurse, p. 104; Ryland 2015, p. 27 *in fine*.

²¹⁵ COM(2012) 6 final/2: Communication from the Commission to the EP, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, p. 4.

4.2 European Union

4.2.1 Historical Evolution

As far as the EU is concerned, animal welfare initially played a rather secondary role.²¹⁶ Most of the rules were passed under what is now Article 43 TFEU, implementing the Common Agricultural Policy (CAP), and the legal status of animals was equivalent to that of goods or agricultural products.²¹⁷ The only significant language relating to animal welfare was found in Article 36 TFEU, a provision which according to the Court's case-law should be interpreted restrictively.²¹⁸

However, beginning with the adoption of the *Maastricht Treaty*²¹⁹ in 1992, the situation appears to have changed.²²⁰ The Maastricht Treaty brought with it the non-binding *Declaration on the Protection of Animals*²²¹, which called upon the Member States 'to pay full regard to the welfare requirements of animals' when drafting and implementing Union legislation in certain areas, such as agriculture, transport and the internal market.²²²

The next upward move for animal welfare came with the *Amsterdam Treaty*²²³ in 1997. With effect from 1 May 1999, the Treaty brought with it, as an 'integral part of the Treaties', *Protocol (No 33) on the Protection and Welfare of Animals*²²⁴. In contrast to the non-binding Declaration, which could mainly be seen as a statement of political intent,²²⁵ the Protocol thereby created legally binding obligations on both the EU institutions and the Member States.²²⁶ Moreover, the Protocol recognised for the first time animals as 'sentient beings'.²²⁷ As Ryland and Nurse point out, this reference can be seen as an important step away from the former classification of animals as goods or agricultural products.²²⁸ Moreover, as recognised by Camm and Bowles, the reference to 'sentient beings' "emphasises the focus on *individual animals* rather than on conservation, environmental health or species health concerns."²²⁹

²¹⁶ Ryland 2015, p. 24; Ryland and Nurse, p. 101.

²¹⁷ T Camm and D 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* ('Camm and Bowles'), p. 197.

²¹⁸ Camm and Bowles, p. 197.

²¹⁹ Treaty of Maastricht, signed at Maastricht on 7 February 1992.

²²⁰ Camm and Bowles, p. 198.

²²¹ Declaration (No 24) on the protection of animals.

²²² Camm and Bowles, p. 198.

²²³ Treaty of Amsterdam amending the Treaty on European Union, signed at Amsterdam on 2 October 1997.

²²⁴ Protocol (No 33) on protection and welfare of animals.

²²⁵ Camm and Bowles, p. 198.

²²⁶ Ryland and Nurse, p. 102; Camm and Bowles, p. 200.

²²⁷ Ryland and Nurse, p. 102; Camm and Bowles, p. 201.

²²⁸ Ryland and Nurse, p. 102.

²²⁹ Camm and Bowles, p. 201 (emphasis added).

Building on the language of the Protocol, the *Lisbon Treaty*²³⁰ of 2004, entering into force on 1 December 2009, then inserted an express reference to animal welfare in the Treaty itself.²³¹ Article 13 TFEU 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.

In the legal doctrine, Article 13 TFEU has been considered a major step forward. According to Ryland and Nurse, the incorporation of animal welfare as one of the “constitutional” provisions of the Treaty “signifies the elevation of animal welfare as a priority issue in the EU, alongside other key objectives, such as, for example, environmental protection and promoting sustainable development”²³². Indeed, this opinion gains support from Ludwig and O’Gorman who consider that “[w]hile this step may be understood as a mere formality [...] the signal for the consideration of animal welfare in European law is a strong one”²³³. The impact of Article 13 TFEU on contracting authorities’ discretion will be dealt with in section 4.6.

Finally, it should be mentioned that, in addition to the Treaty amendments, the EU has adopted two subsequent ‘Animal Welfare Action Plans’, one for the period of 2006 to 2010²³⁴ and one for 2012 to 2015²³⁵. As far as the first action plan is concerned, it mainly sets out strategic guidelines and describes further action.²³⁶ However, as far as the second action plan is concerned, it is (currently) considering the highly interesting option of adopting a ‘EU General Framework Law’, based on Article 114 TFEU.²³⁷ If adopted, such a law would take a horizontal approach and apply to *all* animals kept in the context of an economic activity.²³⁸ However, at the time of writing, no proposal has as yet been put forward by the Commission.²³⁹

²³⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007.

²³¹ Ryland and Nurse, p. 113.

²³² Ryland and Nurse, p. 109. See also Ryland 2015, p. 25.

²³³ R Ludwig and R 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*, p. 365.

²³⁴ COM (2006)13 final: Communication from the Commission to the EP and the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010.

²³⁵ COM (2012)6 final/2: Communication from the Commission to the EP, the Council and the European Economic and the Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015.

²³⁶ COM (2006)13 final, p. 2-3.

²³⁷ SEC (2012)55 final, p. 36. See also Ryland and Nurse, p. 113.

²³⁸ COM (2012)6 final/2, p. 6-7. See also Ryland and Nurse, p. 113. It can be observed that although Article 114 TFEU does not in *itself* suggest a preference for either minimum or exhaustive harmonisation, it is reasonable to expect that Member States would *not* be able to impose higher standards than those provided for therein, see Maletić, p. 63 and 175.

²³⁹ Personal communication by e-mail and meeting with My Sahlman, veterinarian at LRF and working in the EP, 27 January - 2 February 2016 (‘Sahlman’).

4.2.2 Legislation

Over the years, the EU has adopted a wide range of legal rules concerning animal welfare. As was stated above, most of them have been adopted on the basis of Article 43 TFEU, implementing the CAP. This includes the Transport Regulation, the Slaughter Regulation and the Calves Directive (considered below). Over the years, some rules have also emerged via Article 207 TFEU, implementing the common commercial policy and Article 191 TFEU, concerning the environment.²⁴⁰ Moreover, as can be seen from the second animal welfare action plan, the EU is now considering the adoption of a ‘General Framework Law’ based on Article 114 TFEU.

Initially, most of the secondary legislation in this area took the form of *minimum harmonising directives*, meaning that Member States were allowed to impose more stringent measures so long as they were compatible with the Treaty.²⁴¹ The most important directives are the following:

- Directive 1998/58/EC concerning the protection of animals kept for farming purposes (the ‘General Directive’);
- Directive 1999/74/EC laying down minimum standards for the protection of laying hens (the ‘Hens Directive’);
- Directive 2007/43/EC laying down minimum rules of chickens kept for meat production (the ‘Chickens Directive’);
- Directive 2008/119/EC laying down minimum standards for the protection of calves (the ‘Calves Directive’);
- Directive 2008/120/EC laying down minimum standards for the protection of pigs (the ‘Pigs Directive’).

However, in recent years, there has been a move towards using *regulations* rather than directives in the field of animal welfare.²⁴² In contrast to directives, regulations are directly applicable in the Member States, which means that they must be applied in their entirety.²⁴³ Moreover, unless explicitly provided for in the legal text, Member States are normally *not* allowed to impose more demanding national rules than those set out therein.²⁴⁴ As to date, the most important regulations are the following:

- Regulation 1831/2003 on additives for use in animal production;
- Regulation 1/2005 on the protection of animals during transport and related operations (the ‘Transport Regulation’);
- Regulation 1099/2009 on the protection of animals at the time of killing (the ‘Slaughter Regulation’).
- Proposal for a regulation on animal health (COM(2013) 260 final) (the ‘Animal Health Law’).

²⁴⁰ Camm and Bowles, p. 198-199; Ryland and Nurse, p. 103-104.

²⁴¹ Barnard, p. 662.

²⁴² SOU 2011:75, p. 204-205.

²⁴³ SOU 2011:75, p. 205.

²⁴⁴ SOU 2011:75, p. 184 and 205.

4.3 Sweden

4.3.1 Historical Evolution

As far as Sweden is concerned, it acquired a leading position in the field of animal welfare with the adoption of the *Swedish Animal Welfare Act*²⁴⁵ in 1988.²⁴⁶ In contrast to other Member States – which saw animals rather as means of production – the Swedish legislation was based on an idea that animals should be able to express their natural behaviour, for example by having access to bedding and be kept at pasture during summer.²⁴⁷

From the beginning, the higher Swedish standards did not pose any major economic problems to Swedish farmers.²⁴⁸ The level of self-sufficiency in food was high and the farming industry was to a large extent sheltered from external competition. This meant that the additional costs, incurred as a result of the higher standards, could be compensated for in terms of higher prices on food.²⁴⁹ However, following the agricultural liberalization reform in 1990 and Sweden's accession to the European Union in 1995, the competitive situation changed dramatically.²⁵⁰ Swedish farmers were now faced with competition from all over Europe and different levels of protection became more important.²⁵¹ Gradually, this led to a situation where Swedish livestock production fell significantly and imports from the EU and third countries increased.²⁵² Today, imports account for approximately 30 to 50 per cent of all food consumed in Sweden.²⁵³

In the public debate, it is often maintained that today's difficult economic situation facing Swedish farmers is due to the higher standards of animal welfare.²⁵⁴ In more general terms, this is sometimes referred to as 'reverse discrimination,' meaning that producers established in countries with *high* levels of protection suffer a competitive disadvantage compared to producers established in countries with *lower* levels of protection.²⁵⁵ In theory, there are different ways to deal with this problem. One option would be to do what the Swedish government does: by again sheltering Swedish farmers from external competition, one could (probably) expect their profitability to increase. However, another option – put forward by the

²⁴⁵ SFS 1988:534 *Djurskyddslag*.

²⁴⁶ B Dahlén and H Kättström, 'Sveriges första femton år som medlem i EU – Djurskydd', Jordbruksverket, Rapport 2012:28 ('Dahlén and Kättström'), p. 1. See also SOU 2011:75, p. 198.

²⁴⁷ Dahlén and Kättström, p. 1.

²⁴⁸ Dahlén and Kättström, p. 1.

²⁴⁹ SOU 2015:15, p. 77; SOU 2011:75, p. 203-204.

²⁵⁰ SOU 2011:75, p. 204.

²⁵¹ SOU 2015:15, p. 23.

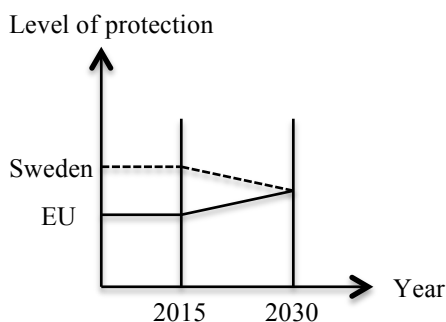
²⁵² SOU 2015:15, p. 23.

²⁵³ SOU 2015:15, p. 77.

²⁵⁴ See, *inter alia*, Å Rutegård and M Wierup, 'Stränga djurskydds krav bakom ökade köttimporten' (2014) *Dagens Nyheter* 12 October.

²⁵⁵ Barnard, p. 663-666.

Swedish Competition Inquiry of 2015²⁵⁶ – would be to work towards higher standards in the EU generally, while at the same time lowering the Swedish ones.²⁵⁷ The Inquiry illustrates this reasoning by the following graph:²⁵⁸



So, while there is no easy solution to this problem, it can be observed that there are different options available.

4.3.2 Legislation

As was mentioned above, the Swedish legal framework on animal welfare is based on the *Swedish Animal Welfare Act*²⁵⁹, which applies to the care and treatment of *all* animals kept in captivity, including farm animals, pets, show animals, zoo animals and laboratory animals.²⁶⁰ Generally speaking, it provides that animals shall be treated well and that they shall be protected from unnecessary suffering and disease.²⁶¹ Moreover, animals shall be accommodated and handled in an environment that is appropriate for them and which enables them to exercise their natural behaviour.²⁶²

The general provisions of the Swedish Animal Welfare Act are supplemented by the *Swedish Animal Welfare Ordinance*²⁶³, which is issued by the government.²⁶⁴ It lays down more detailed requirements concerning for example spatial requirements,²⁶⁵ transport conditions,²⁶⁶ slaughter conditions,²⁶⁷ and certain surgical procedures and injections to animals.²⁶⁸ Moreover, there are a number of regulations issued by the *Swedish Board of Agriculture*, which lays down even more detailed provisions.²⁶⁹

²⁵⁶ SOU 2015:15 *Attraktiv, innovativ och hållbar – strategi för en konkurrenskraftig jordbruks- och trädgårdsnäring*.

²⁵⁷ SOU 2015:15, p. 23.

²⁵⁸ See SOU 2015:15, p. 85.

²⁵⁹ SFS 1988:534 *Djurskyddslag*. For an English translation, see Michigan State University, ‘Swedish Animal Welfare Act’, <http://www.animallaw.info/statute/sweden-cruelty-sweden-animal-welfare-act> (last accessed 2016-01-11).

²⁶⁰ The Swedish Animal Welfare Act, para 1.

²⁶¹ The Swedish Animal Welfare Act, para 2.

²⁶² The Swedish Animal Welfare Act, para 4.

²⁶³ SFS 1988:539 *Djurskyddsförordning*.

²⁶⁴ SOU 2011:75, p. 174.

²⁶⁵ The Swedish Animal Welfare Ordinance, paras 1b-6b

²⁶⁶ The Swedish Animal Welfare Ordinance, para 22.

²⁶⁷ The Swedish Animal Welfare Ordinance, para 30.

²⁶⁸ The Swedish Animal Welfare Ordinance, paras 25-29.

²⁶⁹ See SOU 2011:75, p. 175.

4.4 Comparison between EU and Sweden

4.4.1 Introduction

Having examined the two frameworks of EU and Sweden separately, this section will make a comparison between the two. As was mentioned in section 4.1, the main purpose is to examine what is meant by ‘Swedish’ standards of animal welfare and how they differ from those of the EU in general. Based on this outcome, the next section will then discuss whether Sweden is allowed to impose those standards against other Member States, taking account of the level of harmonisation achieved by Union law.

4.4.2 Cows and Calves

Starting with the protection of cows and calves, it can be observed that there is only one piece of EU legislation that applies specifically to this area: the Calves Directive. By contrast, there is no species-specific legislation for dairy cows and cattle.²⁷⁰ As far as Swedish law is concerned, it provides for a number of binding rules in this area. Amongst other things, it follows from the Swedish Animal Welfare Ordinance that cows and cattle older than six months should have a right to ‘grazing’, meaning that they should be able to go outdoors during the summer.²⁷¹ Arguably, this means that Swedish law in this area is to be considered *more demanding* than that of the EU.

4.4.3 Pigs

Turning then to the protection of pigs, an important difference between Sweden and the EU, is the time at which piglets may be weaned (separated) from the sow.²⁷² While it follows from the Pigs Directive that piglets may in some cases be weaned from the sow after 21 days,²⁷³ the corresponding period set out in Swedish law is at least four weeks.²⁷⁴ Another area of difference concerns the practice of ‘tail-docking’, which means that part of the pig’s tail is removed so as to prevent injury. While such practice is completely banned under Swedish law,²⁷⁵ it is still permissible under the Pigs Directive so long as it is not carried out routinely.²⁷⁶ All in all, this means that the Swedish provisions are to be considered *more demanding* than those of the EU, also in this area.

²⁷⁰ SOU 2011:75, p. 190.

²⁷¹ SJVFS 2010:15 (Statens jordbruksverks föreskrifter och allmänna råd om djurhållning inom lantbruket), para 26; Swedish Animal Welfare Ordinance, paras 10-11. See also SOU 2015:15, p. 79, where the Inquiry considers that the grazing requirement costs Swedish farmers approximately EUR 100 per cow per year.

²⁷² H Svensson, ‘De ekonomiska verkningarna av de svenska djurskyddsreglerna för grisar’ (2011) Jordbruksverket Rapport (‘Svensson’), p. 5.

²⁷³ Directive 2008/120/EC, Annex I, Chapter II, Article C(3) second sentence.

²⁷⁴ Statens jordbruksverks föreskrifter och allmänna råd (SJVFS 2010:15) om djurhållning inom lantbruket m.m., Chapter 3, para 4.

²⁷⁵ SOU 2011:75, p. 261; Svensson, p. 5.

²⁷⁶ Directive 2008/120/EC, Annex I, Chapter I, Article 8, second sentence.

4.4.4 Hens and Chickens

Turning then to hens and chickens, they are protected by the Hens Directive and the Chickens Directive, respectively. As far as hens are concerned, it follows from the Hens Directive that Member States may grant permission for ‘beak trimming’, which means that part of the beak is removed so as to prevent the hens from eating each other.²⁷⁷ By contrast, such practice is completely banned under Swedish law.²⁷⁸ As far as chickens are concerned, another important difference concerns the ‘maximum stocking density’, which refers to the total weight of chickens that may be present in a house at the same time.²⁷⁹ Under the Chickens Directive, the stocking density shall not exceed 42 kilograms per square metre.²⁸⁰ The corresponding figure set out in Swedish law is 20 kilograms per square metre or, if the producer has been affiliated to a certain monitoring programme, 36 kilograms per square metre.²⁸¹ Therefore, Swedish law is *more demanding*, also in this area.

4.4.5 Transport

Turning then to transport conditions, these rules are – in contrast to the species-specific legislation considered above – laid down in a *regulation*, more precisely the Transport Regulation. As was found in section 4.2.2, this means that Member States (as a general rule) are not allowed to impose more demanding national rules than those set out therein.²⁸² However, as far as the Transport Regulation is concerned, it explicitly allows for more demanding national rules so long as the transport takes place *entirely within the territory of a Member State*. Article 1(3) reads as follows:

This Regulation shall not be an obstacle to any stricter national measures aimed at improving the welfare of animals during transport taking place entirely within the territory of a Member State or during sea transport departing from the territory of a Member State.²⁸³

It can be observed that Sweden has made use of this possibility by imposing an ‘absolute top limit’ of eight hours on all transports.²⁸⁴ While this time limit corresponds to the main rule set out in the Transport Regulation,²⁸⁵ the Regulation allows for longer journeys provided certain conditions are met.²⁸⁶ This means that the Swedish rules are to be considered *more demanding*, also in this area.

²⁷⁷ Directive 1999/74/EC, Annex, Article 8 second sentence.

²⁷⁸ SOU 2011:75, p. 189; SOU 2015:15, p. 77.

²⁷⁹ Directive 2007/43/EC, Article 2(1)(i).

²⁸⁰ Directive 2007/43/EC, Article 3(5).

²⁸¹ SOU 2015:15, p. 77.

²⁸² SOU 2011:75, p. 184 and 205.

²⁸³ Regulation 1/2005, Article 1(3).

²⁸⁴ Föreskrifter om ändring i Djurskyddsmyndighetens föreskrifter och allmänna råd (DFS 2004:10) om transport av levande djur, para 6.

²⁸⁵ Regulation 1/2005, Annex I, Chapter V, Article 1(2).

²⁸⁶ Regulation 1/2005, Annex I, Chapter V, Article 1(3).

4.4.6 Slaughter

Turning then the slaughter conditions, these rules are – like the rules on transport – laid down in a *regulation*, namely the Slaughter Regulation. As concerns the possibility of laying down stricter national rules, Article 26(1) of the Slaughter Regulation provides that:

This Regulation shall not prevent Member States from maintaining any national rules aimed at ensuring more extensive protection of animals at the time of killing in force at the time of entry into force of this Regulation.²⁸⁷

In other words, Member States are allowed to *maintain* more demanding national rules, provided they were already in place when the Slaughter Regulation entered into force, that is on 1 January 2013.²⁸⁸ It follows from the same article that such stricter rules shall be notified to the Commission, which shall then bring them to the attention of other Member States.²⁸⁹ In addition, it follows from Article 26(2) that Member States are allowed to *adopt* more demanding national rules in the event of special circumstances, such as when the slaughter takes place outside a slaughterhouse²⁹⁰ or when particular methods of slaughter are prescribed by religious rites.²⁹¹ As far as Swedish law is concerned, it imposes an *absolute requirement* that all animals should be stunned before slaughter.²⁹² In this sense, it can be seen as *more demanding* than that of the EU, which allows for exceptions under certain conditions.²⁹³ It can be observed that Sweden has been allowed to maintain these stricter rules due to efforts taken by the slaughter industry.²⁹⁴

4.4.7 Antibiotics

Turning finally to the use of antibiotics in veterinary medicine, this area was originally governed by a number of directives and guidelines at EU level. However, due to the growing problem of antibiotic resistance, the Commission in 2007 launched an *Action plan against the rising threats from antimicrobial resistance*.²⁹⁵ On the basis of this Action Plan, the Commission in 2013 tabled proposals for a single, comprehensive ‘Animal Health Law’²⁹⁶ (taking the form of a *regulation*), replacing the largely uncoordinated animal health rules currently in place. This proposal was finally adopted by the EP and the Council on 1 June 2015.²⁹⁷

²⁸⁷ Regulation 1099/2009, Article 26(1).

²⁸⁸ Regulation 1099/2009, Article 30, second sentence. See also SOU 2011:75, p. 187.

²⁸⁹ Regulation 1099/2009, Article 26(1) second sentence.

²⁹⁰ Regulation 1099/2009, Article 26(2)(a).

²⁹¹ Regulation 1099/2009, Article 4(4).

²⁹² The Swedish Animal Welfare Act, para 13; The Swedish Animal Welfare Ordinance, para 30.

²⁹³ Dahlén and Kättström, p. 6; SOU 2011:75, p. 185-186.

²⁹⁴ Dahlén and Kättström, p. 6; SOU 2011:75, p. 185-186.

²⁹⁵ COM(2011) 748: Action plan against the rising threats from antimicrobial resistance.

²⁹⁶ COM(2013) 260 final: Proposal for a Regulation of the EP and of the Council on Animal Health.

²⁹⁷ European Commission, Statement: ‘Commissioner for Health and Food Safety Vytenis Andriukaitis welcomes the political agreement on animal health’, Brussels 1 June 2015.

In addition, the Commission recently set out proposals for a Medicated Feed Regulation²⁹⁸ and a Veterinary Medicinal Products Regulation²⁹⁹, supplementing the provisions of the Animal Health Law. According to My Sahlman, veterinarian at The Federation of Swedish Farmers (LRF), these proposals, which will be voted on by the EP later this year, can be expected to have a larger impact on Member States' discretion than the Animal Health Law itself.³⁰⁰ However, given that the final texts have not been adopted yet, it is too early to come to any firm conclusions.

As concerns the possibility for Member States to impose more demanding national measures, Article 257 of the Animal Health Law reads as follows:

Member States may apply additional or more stringent measures within their territories than those laid down in this Regulation concerning only:

- a) responsibilities for animal health [...];
- b) notification within Member States [...];
- c) surveillance [...]
- d) registration, approval, record keeping and registers [...]
- e) traceability requirements [...].

Arguably, this means that Member States are *not* allowed to impose more demanding national measures, except for in rather limited areas. Such an interpretation gains support from the fact that the Animal Health Law as well as the two recent proposals take the form of *regulations* and are based on the internal market legal basis Article 114 TFEU.

As far as Sweden is concerned, it has had a long tradition of restricting the use of antibiotics in food production. In 1986, it became the first country in the world to introduce a ban against the use of antibiotics as 'growth-promoters'.³⁰¹ Moreover, it follows from Swedish law that antibiotics should not be given to a large number of animals at the same time and only as prescribed by a veterinarian.³⁰² For this reason, Sweden has currently one of the lowest use rates of antibiotics in the EU.³⁰³

4.4.8 Conclusion

To sum up, it has been found that the Swedish rules on animal welfare are *more demanding* than those of the EU. This was also the conclusion by the Animal Welfare Inquiry of 2011³⁰⁴ and the Competition Inquiry of 2015.³⁰⁵ Against this background, the next section will turn to discuss whether Sweden can impose those standards against other Member States.

²⁹⁸ COM(2014) 556 final: Proposal for a Regulation on the manufacture, placing on the market and use of medicated feed.

²⁹⁹ COM (2014) 558 final: Proposal for a Regulation on Veterinary Medicinal Products.

³⁰⁰ Personal communication with My Sahlman, 27 January - 2 February 2016.

³⁰¹ SOU 2011:75, p. 253.

³⁰² See SJVFS 2013:42 Statens jordbruksverks föreskrifter om läkemedel.

³⁰³ SOU 2011:75, p. 253.

³⁰⁴ SOU 2011:75, p. 203-205.

³⁰⁵ SOU 2015:15, p. 77-79.

4.5 Animal Welfare and Harmonisation

4.5.1 Introduction

Having established that the Swedish rules on animal welfare are to be considered *more demanding* than those of the EU, this section will examine to what extent Sweden is allowed to impose those higher standards against other Member States. As was touched upon in section 3.2.4, this is only possible in so far as the EU has not fully harmonised a particular field (commonly referred to as full, exhaustive or complete harmonisation).³⁰⁶ However, in order to know whether that is the case, it is often necessary to carefully consider the wording and the context of the legal instrument.³⁰⁷ So for example, it is possible that a directive or a regulation covers only some aspects of an issue or only certain products.³⁰⁸ Moreover, it is possible that a directive – although *minimum* in nature – fully harmonises certain fields, and correspondently that a regulation – although *exhaustive* in nature – explicitly allows for more demanding national rules under certain conditions.³⁰⁹ In the following sections, some of the most important issues in the field of animal welfare and harmonisation will be discussed.

4.5.2 Free Movement Clauses

As will be recalled from the previous section, most of the directives in the field of animal welfare take the form of *minimum harmonising directives*, allowing for more stringent national rules so long as they are compatible with the Treaty. However, what is important to note is that the Calves Directive³¹⁰, the Pigs Directive³¹¹ and the Hens Directive³¹² all contain a so-called ‘free movement clause’³¹³, limiting the application of more stringent national rules to conditions within the country’s *own* territory. Generally speaking, this means that Member States are allowed to impose more demanding national rules in relation to their *own* products or producers, but not so as to impede the free movement of goods.³¹⁴ By way of illustration, Article 11 of the Calves Directive provides as follows:

Member States may, in compliance with the general rules of the Treaty, maintain or apply *within their territories* stricter provisions for the protection of calves than those laid down in this Directive. They shall inform the Commission of any such measures.³¹⁵

³⁰⁶ Barnard, p. 155; De Sadeleer, p. 287.

³⁰⁷ Hettne 2013a, p. 6; p. 32; De Sadeleer, p. 288.

³⁰⁸ De Sadeleer, p. 288.

³⁰⁹ M Dougan, Minimum Harmonization and the Internal Market’ (2000) *CML Rev* (‘Dougan’), p. 867; De Sadeleer, p. 287.

³¹⁰ Directive 2008/119/EC, Article 11.

³¹¹ Directive 2008/120/EC, Article 12.

³¹² Directive 2007/43/EC, Article 13(2).

³¹³ See Dougan, p. 867; Barnard, p. 663 *in fine*.

³¹⁴ Dougan p. 867.

³¹⁵ Directive 2008/119/EC, Article 11 (emphasis added).

It can be observed that the precise meaning of Article 11 of the Calves Directive was the subject of the Court's ruling in *Compassion in World Farming* ('*CIWF*')³¹⁶, delivered in 1998. In this case, the UK had introduced a ban against the 'veal crate system' of calf-rearing (a system in which calves are kept in tiny wooden crates so as to limit their freedom of movement),³¹⁷ even though it remained compatible with the Calves Directive and was still practiced in many Member States.³¹⁸ The question referred to the ECJ for a preliminary ruling was whether the UK authorities could rely on the animal welfare derogation set out in Article 36 TFEU to justify a ban on the export of calves to Member States in which the veal crate system was still allowed.³¹⁹

The case was first dealt with by Advocate General Léger. In his Opinion, he found that the proposed measure constituted a quantitative restriction on exports within the meaning of Article 34 TFEU.³²⁰ He then stated that the UK could only rely on Article 36 TFEU in so far as the relevant area had not been fully harmonised by EU law.³²¹ Turning then to the degree of harmonisation achieved by the Calves Directive, AG Léger found that some of the requirements set out therein had not yet entered into force.³²² According to AG Léger, this meant that the Calves Directive did not (as yet) amount to exhaustive harmonisation and so that the UK could (still) rely on Article 36 TFEU until that date had expired.³²³

This line of reasoning was, however, not accepted by the ECJ. In its judgement, the Court stated that the temporary derogations set out in the Calves Directive did *not* preclude it from being an exhaustively harmonising directive.³²⁴ On the contrary, the Court found that the Calves Directive laid down "exhaustively common minimum standards" for the protection and fattening of calves.³²⁵ Moreover, as far as Article 11 was concerned, the Court found that it only allowed for more demanding national measures in so far as they satisfied two conditions: *first*, they were limited to strictly territorial boundaries, and *second*, they were compatible with the Treaty.³²⁶ Therefore, given that an export ban would be imposed on the basis of conditions prevailing in *other* Member States, it would fall outside the derogation allowed by Article 11 and could not be justified.³²⁷ All in all, this meant that the UK authorities could *not* rely on the animal welfare derogation set out in Article 36 TFEU.³²⁸

³¹⁶ C-1/96 *Compassion in World Farming* ('*CIWF*').

³¹⁷ *CIWF*, paras 22-23.

³¹⁸ *CIWF*, para 24. See also Barnard, p. 664-665.

³¹⁹ *CIWF*, para 29(g)(1).

³²⁰ Opinion of AG Léger of 15 July 1997 in *CIWF*, para 44.

³²¹ Opinion of AG Léger in *CIWF*, para 48.

³²² Opinion of AG Léger in *CIWF*, paras 62-63.

³²³ Opinion of AG Léger in *CIWF*, para 70.

³²⁴ *CIWF*, paras 55-57.

³²⁵ *CIWF*, para 56.

³²⁶ *CIWF*, para 59.

³²⁷ *CIWF*, para 62.

³²⁸ *CIWF*, para 64.

4.5.3 Failures by other Member States

While *CIWF* was concerned with the question of whether a Member State is allowed to impose an export ban against another Member State *complying* with a minimum harmonising directive (but by means of lower standards than the first state), *Hedley Lomas*³²⁹, delivered a few years earlier, was instead concerned with the question of whether a Member State is allowed to impose an export ban against another Member State *not complying* with a directive. In this case, it was again the UK that wanted to introduce an export ban for live animals, this time because it considered their treatment in Spanish slaughterhouses to be contrary to the Slaughter Directive³³⁰, now repealed and replaced by the Slaughter Regulation.³³¹ The argument put forward by the UK was that the Slaughter Directive did not set out any compliance mechanisms, and so did not amount to exhaustive harmonisation. Therefore, recourse to Article 36 TFEU was still possible.³³²

This case too was first dealt with by AG Léger. In his Opinion, he took the view that the lack of compliance mechanisms did (in fact) prevent the Slaughter Directive from being a fully harmonising directive.³³³ However, given that Article 36 TFEU did not have *extra-territorial application*, he found that it could not be invoked in order to protect animals from possible breaches taking place *within the territory of other Member States*.³³⁴ For this reason, it could not be relied upon by the UK in this case.³³⁵

The ECJ, on the other hand, took a somewhat different approach. In contrast to AG Léger, it found that the lack of compliance mechanisms did *not* prevent the Slaughter Directive from being an exhaustively harmonising directive.³³⁶ According to the Court, it only meant that Member States were under an obligation to “take all measures necessary to guarantee the application and effectiveness of Community law.”³³⁷ Turning then to the alleged failure by Spain to comply with the Slaughter Directive, the Court stated that “[a] Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law”³³⁸. In other words, it was not possible for the UK to rely on Article 36 TFEU on the *sole ground* that Spain was not complying with its obligations.³³⁹ For this reason, the export ban could not be justified.

³²⁹ C-5/94 *Hedley Lomas*.

³³⁰ Directive 74/577/EEC of 18 November 1974 on stunning animals before slaughter (the ‘Slaughter Directive’).

³³¹ *Hedley Lomas*, para 3.

³³² *CIWF*, paras 4 and 13. See also Ludwig and O’Gorman, p. 372.

³³³ Opinion of AG Léger of 20 June 1995 in *Hedley Lomas*, paras 18-21.

³³⁴ Opinion of AG Léger in *Hedley Lomas*, paras 22-25 (original emphasis).

³³⁵ Opinion of AG Léger in *Hedley Lomas*, para 22 (original emphasis).

³³⁶ *Hedley Lomas*, para 19.

³³⁷ *Hedley Lomas*, para 19.

³³⁸ *Hedley Lomas*, para 20.

³³⁹ *Hedley Lomas*, para 21 (emphasis added).

4.5.4 Transposition period has not yet expired

Turning then to another case in the area – *Monsees*³⁴⁰ delivered in 1999 – it was concerned with the Transport Directive³⁴¹, now repealed and replaced by the Transport Regulation³⁴². The background to this case was that Austria in its national legislation laid down more demanding national rules for the transport of live animal to slaughter (journey times, distances and so on).³⁴³ Among other things, it made it obligatory for international transport companies to stop in Austria for the animals to be killed.³⁴⁴ Mr Monsees, a haulage contractor, which was charged with an offence under that law, argued that the rule was in conflict with the EU rules on free movement.³⁴⁵

Also this time, the case was first dealt with by AG Léger. In his Opinion, he found that the Austrian law amounted to an MEQR within the meaning of Article 34 TFEU.³⁴⁶ As far as the degree of harmonisation was concerned, AG Léger found that the implementation period for the Transport Directive had not yet expired.³⁴⁷ According to AG Léger, this meant that Austria could still rely on the animal welfare derogation set out in Article 36 TFEU provided that the measure was proportionate.³⁴⁸ However, turning then to the proportionality of the measure, AG Léger found that the aim of the Austrian law could have been achieved by less restrictive means.³⁴⁹ For this reason, it did not pass the proportionality assessment and could not be justified.³⁵⁰

This time, the ECJ fully went with AG Léger. In its judgement, the Court found that the transposition period for the Transport Directive had not yet expired and that, until then, Member States could still rely on Article 36 TFEU.³⁵¹ As far as the proportionality assessment was concerned, the Court found that the effect of the Austrian law was, in fact, “to make all international transit by road of animals for slaughter almost impossible in Austrian.”³⁵² For this reason, the measure could not be justified.³⁵³

³⁴⁰ C-3350/97 *Monsees*.

³⁴¹ Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport (the ‘Transport Directive’).

³⁴² Regulation 1/2005 on the protection of animals during transport and related operations (the ‘Transport Regulation’).

³⁴³ *Monsees*, para 14.

³⁴⁴ *Monsees*, para 14.

³⁴⁵ *Monsees*, paras 16-18.

³⁴⁶ Opinion of AG Léger of 17 December 1998 in *Monsees*, para 24.

³⁴⁷ Opinion of AG Léger in *Monsees*, para 29.

³⁴⁸ Opinion of AG Léger in *Monsees*, para 29.

³⁴⁹ Opinion of AG Léger in *Monsees*, para 37.

³⁵⁰ Opinion of AG Léger in *Monsees*, para 43.

³⁵¹ *Monsees*, para 27.

³⁵² *Monsees*, para 29.

³⁵³ *Monsees*, para 31.

4.5.5 Analysis

In the legal doctrine, the above cases have encountered a lot of criticism. In particular, they have been accused of broadening the notion of what constitutes exhaustive harmonisation.³⁵⁴ So for example, Ryland argues that the “narrow interpretation by [the Court], equating minimum EU legislative standards of animal welfare with total harmonisation has had the effect of further limiting the advancement of animal welfare in the EU”³⁵⁵. This view gains support from Ludwig and O’Gorman who consider that:

[...] the ECJ has taken an excessively lenient approach when ruling on whether [Union] legislation constitutes exhaustive regulation in the area of animal protection, and in this way has curtailed the ability of individual Member States to enact higher domestic welfare standards.³⁵⁶

In this regard, Ludwig and O’Gorman agree that the stricter approach taken by AG Léger in *CIWF* and *Hedley Lomas* (not finding exhaustive harmonisation) “both secures a higher standard of animal welfare and is more consistent with [Union] law”³⁵⁷.

As far as the Swedish proposal is concerned, the Court’s judgement in *CIWF* is probably the most important. In fact, it suggests that in *all those areas governed by a minimum harmonising directive containing a free movement clause* (that is the Calves Directive, the Pigs Directive and the Hens Directive) Sweden is precluded from imposing more demanding national standards except in relation to its own producers. In this sense, there is actually no great difference between a *regulation*, such as the Transport Regulation, and a *minimum harmonising directive*, such as the Calves Directive, both limiting the application of more stringent national measures to conditions within the Member State’s own territory. Provided that the same rules apply in the context of public procurement as well, the Court’s decision in *CIWF* will have the effect of significantly limiting public purchasers’ discretion to pursue higher standards of animal welfare.

However, the question as to whether contracting authorities should be subject to the ‘general’ rules on harmonisation (such as minimum / exhaustive harmonisation and free movement clauses) is not without controversies. While some legal scholars consider contracting authorities to be part of the State – thus applying the ‘general’ rules on harmonisation – there are others who argue that contracting authorities should be seen as private entities operating on a competitive market – thus enjoying a much wider margin of discretion in deciding ‘what to buy’. Before discussing this question in more detail, the next section will have a look at the impact of Article 13 TFEU on contracting authorities’ discretion.

³⁵⁴ See Ludwig and O’Gorman, p. 370-371; Ryland 2015, p. 24 *in fine*; Ryland and Nurse, p. 103; Dougan, p. 875; Barnard, p. 665.

³⁵⁵ Ryland 2015, p. 24 *in fine*. See also Ryland and Nurse, p. 103.

³⁵⁶ Ludwig and O’Gorman, p. 370-371.

³⁵⁷ Ludwig and O’Gorman, p. 371.

4.6 The Impact of Article 13 TFEU

4.6.1 Introduction

Having established that the Swedish rules on animal welfare are *more demanding* than those of the EU, and that Sweden is prevented from enforcing such measures in all those areas governed by regulations or directives containing a free movement clause, this section will have a look at the impact of Article 13 TFEU on contracting authorities' discretion. It will start by looking specifically at Article 13 TFEU, before applying the environmental integration clause laid down in Article 11 TFEU *by analogy*.

4.6.2 Article 13 TFEU

As to date, Article 13 TFEU has only been invoked in a very limited number of cases, none of which relates directly to public procurement.³⁵⁸ Arguably the most important case so far is *Zuchtvieh Export*³⁵⁹, delivered in 2015. In this case, Germany had refused to give clearance for an animal transport to take place between Germany and Uzbekistan, on the ground that the transport company did not comply with the rules set out in the Transport Regulation (resting, watering, feeding and so on).³⁶⁰ What was particularly interesting about this case was that Germany referred to that part of the journey that took place *between the outer boundaries of the EU* (in this case Poland) *and the country of destination* (Uzbekistan). In other words, the question referred for a preliminary ruling was whether the Transport Regulation should be given *extra-territorial application*, in the sense that it applied to third countries as well, when the journey started out in the EU.

The case was first dealt with by Advocate General Bot.³⁶¹ In his Opinion, he took the view the Transport Regulation could *not* be interpreted as having extra-territorial application.³⁶² While AG Bot recognized that Article 13 TFEU could indeed be invoked in favour of a geographically broad interpretation,³⁶³ he did not consider it to change the outcome of this case.³⁶⁴

Quite surprisingly, the ECJ took the opposite view. In its judgement, it found that the Transport Regulation was based on *Protocol (No 33) on the protection and welfare of animals*, the substance of which is now to be found in Article 13 TFEU.³⁶⁵ Proceeding then to a detailed analysis of the aim and the wording of the Transport Regulation, the Court found that it applied to that part of the journey that took place outside the EU as well.³⁶⁶

³⁵⁸ This conclusion was reached by searching the EU databases for article 13 TFEU.

³⁵⁹ C-424/13 *Zuchtvieh Export*.

³⁶⁰ *Zuchtvieh Export*, para 18.

³⁶¹ Opinion of AG Bot of 11 September 2014 in *Zuchtvieh Export*.

³⁶² AG Bot in *Zuchtvieh Export*, para 47.

³⁶³ AG Bot in *Zuchtvieh Export*, para 93.

³⁶⁴ AG Bot in *Zuchtvieh Export*, para 94.

³⁶⁵ *Zuchtvieh Export*, para 35.

³⁶⁶ *Zuchtvieh Export*, para 56.

4.6.3 Article 11 TFEU *by analogy*

While *Zuchtvieh Export* gives some guidance as to the importance of Article 13 TFEU, it might also be useful to have a look at another integration clause set out in the Treaty, namely Article 11 TFEU, which provides as follows:

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

At the outset, it should be observed the wording of Article 11 TFEU differs somewhat from that of Article 13 TFEU.³⁶⁷ While the environment must be 'integrated' into the various policies, Member States should only 'pay full regard' to the welfare of animals. According to Nicholas Sadeleer, Professor of EU law at the University of St-Louis, this suggests that Article 11 TFEU lays down a 'stronger commitment' than the other integration clauses, such as Article 13 TFEU.³⁶⁸ In fact, this view gains support from Arrowsmith and Kunzlik, who consider the environment to be a 'special case' because of Article 11 TFEU.³⁶⁹ Nevertheless, it seems as if the interpretation of Article 11 TFEU could still be of interest for its weaker cousin Article 13 TFEU.

According to De Sadeleer, there are a number of issues that are of particular interest to the legal status of Article 11 TFEU (and to some extent Article 13 TFEU).³⁷⁰ *First*, it occupies a symbolic position amongst the general provisions of the Treaty. This could possibly have an impact when it comes to the hierarchy of norms and the balancing of different interests. *Second*, Article 11 TFEU is binding upon the Member States ('must'). Indeed, this is also true for Article 13 TFEU ('shall'). According to De Sadeleer, this suggests that the integration clauses impose a concrete obligation on Member States to act. *Third*, the material scope of Article 11 TFEU is particularly wide ('the Union's policies and activities'). While the scope of Article 13 TFEU is somewhat narrower ('agriculture, fisheries, transport, internal market, research and technological development and space policies'), it is clear that both provisions should apply to a large number of areas, and not just to those traditionally associated with environmental / animal welfare issues. Moreover, as pointed out by Jörgen Hettne, Associate Professor in EU Law at Lund University, the integration clauses show that a certain interest (such as animal welfare) is not only a concern of a Member State, but rather something that the Union as a whole wishes to promote.³⁷¹ According to Hettne, this could arguably have an impact when it comes to the burden of proof under Article 36 TFEU.³⁷² All in all, this suggests that, *at least in theory*, these clauses could have an important role to play.

³⁶⁷ De Sadeleer, p. 24.

³⁶⁸ De Sadeleer, p. 24.

³⁶⁹ Arrowsmith and Kunzlik, p. 48.

³⁷⁰ See De Sadeleer, p. 25-26.

³⁷¹ J Hettne, 'Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?' (2013) *European Procurement & Public Private Partnership Law Review* ('EPPPL') ('Hettne 2013c'), p. 38.

³⁷² Hettne 2013c, p. 38.

Turning then to the Court's case-law, it can be observed the Article 11 TFEU figures much more frequently than Article 13 TFEU, also in the specific context of public procurement. The most prominent example so far is probably *Concordia Bus Finland*³⁷³, further considered in section 5.2.3. In this case, the city of Helsinki carried out a public procurement of buses. In the tender documents, it specified that additional points were to be awarded to producers whose buses did not exceed certain levels of nitrous emissions and noise (eco-friendly buses). Following the contract award, one undertaking asked for judicial review, arguing that the criteria were unfair and discriminatory. In its judgement, the ECJ referred to what is now Article 11 TFEU to conclude that the Public Procurement Directives did *not* "exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender."³⁷⁴ A similar approach can be found in *Preussen Elektra*³⁷⁵ and *Wienstrom*³⁷⁶. In these two cases, which both concerned criteria giving preference to electricity produced from renewable energy sources, the ECJ as well as the AG's relied on Article 11 TFEU to conclude that the environment was a 'high priority' within the EU, and so that the criteria set out by the authorities were in compliance with EU law.³⁷⁷ All in all, this suggests that the integration clauses can have the effect of significantly *increasing* contracting authorities' discretion.³⁷⁸

4.6.4 Analysis

To sum up, it has been found that animal welfare now occupies a symbolic position amongst the 'constitutional' provisions of the Treaty. This could probably have an impact when it comes to the hierarchy of norms and the proportionality assessment of the Court. Moreover, the Court's recent judgement in *Zuchtvieh Export* shows that Article 13 TFEU can have an important (and sometimes decisive) role to play in interpreting EU secondary legislation, such as the Transport Regulation. Finally, it follows from the Court's case-law regarding Article 11 TFEU that this reasoning should apply to procurement measures as well. However, what potentially reduces the significance of Article 13 TFEU is the greater harmonisation of EU secondary animal welfare legislation. In so far as Article 13 TFEU cannot 'trump' the level of harmonisation achieved by Union law (for example by making regulations less stringent or free movement clauses more lenient), its role remains confined to those areas that are *not* subject to either a minimum harmonising directive containing a free movement clause (such as the Calves Directive) or to a regulation (such as the Transport Regulation). As was found in the previous section, there are very few such areas left, which means that the impact of Article 13 TFEU on contracting authorities' discretion remains rather limited as things stand today.

³⁷³ C-513/99 *Concordia Bus Finland*.

³⁷⁴ *Concordia Bus Finland*, para 57.

³⁷⁵ C-379/98 *Preussen Elektra*.

³⁷⁶ C-448/01 *Wienstrom*.

³⁷⁷ *Wienstrom*, para 42; *Preussen Elektra*, para 72.

³⁷⁸ Arrowsmith and Kunzlik, p. 47.

5 Animal Welfare and Public Procurement

5.1 Introduction

Having examined the legal framework for public procurement and that for animal welfare separately, this section will make an effort to combine the two. As was found in section 4.5.5, one of the key questions when it comes to the discretion of contracting authorities is whether they should be bound by the ‘general’ rules on free movement (discrimination / market access approach) and the ‘general’ rules on harmonisation (minimum / exhaustive harmonisation, free movement clauses and so on). For this reason, this section will start by analysing two different approaches – the ‘internal market perspective’ and the ‘multi policy perspective’ – and by discussing the Court’s case-law. Having done that, it will then look at a number of Swedish cases in the area, ranging from 2010 to 2013. In particular, it will examine what types of requirements have been imposed by the contracting authorities and how these have been assessed by the national courts. Finally, it will discuss whether the courts have adopted an internal market or a multi policy perspective when ruling on the various matters.

5.2 The Legal Status of Public Purchasers

5.2.1 Introduction

Before discussing the legal status of contracting authorities in more detail, it should be recalled from section 3.2.2 that the Court has consistently applied the free movement rules, including Article 34 TFEU, to individual decisions taken by contracting authorities. Generally, this is because such decisions have been considered ‘measures’ within the meaning of Article 34 TFEU.³⁷⁹ Despite this, there has been a debate among legal scholars as to whether *all* decisions taken by contracting authorities should be considered ‘hindrances to trade’ or whether some decisions – commonly referred to as ‘excluded buying decisions’ – should be excluded from the scope of the free movement rules altogether. In order to clarify the legal situation, the Swedish Procurement Inquiry of 2013³⁸⁰ asked Jörgen Hettne, Associate Professor in EU Law at Lund University to conduct a legal analysis. This was then commented on by Peter Kunzlik, Professor in Law at the University of East Anglia and Roberto Caranta, Professor in Law at the University of Turin. On the basis of this, the Inquiry distinguished two different approaches, which they named the ‘internal market perspective’, and the ‘multi policy perspective’, further considered below.

³⁷⁹ Kunzlik 2013, p. 187.

³⁸⁰ SOU 2013:12 *Goda affärer – en strategi för hållbar offentlig upphandling*.

5.2.2 Internal Market Perspective

Starting with the internal market perspective – of which Hettne is a representative – it takes the view that *all* decisions taken by contracting authorities should be subject to EU law, provided they have an effect on the free movement of goods and services and are of a cross-border interest.³⁸¹ This view gains support from Sundstrand who considers that “*all* of the conditions set [out] in an award procedure for a public contract, constitutes a limitation to the fundamental rights of individuals in the TFEU.”³⁸²

In support of this reasoning, Hettne and Sundstrand rely on the Court’s judgement in *Contse*³⁸³, delivered in 2005. In this case, the National Health Institute of Spain carried out a public procurement of home respiratory treatment and other assisted breathing techniques.³⁸⁴ In the technical specifications, it *required* public purchasers to have an office open in the capital where the contract was to be performed (technical specifications).³⁸⁵ Moreover, *additional* points were to be awarded to producers that had various facilities within 1 000 kilometres of the same capital (award criteria).³⁸⁶ Following the contract award, a number of producers brought proceedings against the Institute, arguing that the call for tender was in breach of Articles 49 and 56 TFEU.³⁸⁷ In its judgement (which was decided without the Opinion of an Advocate General) the Court stated that:

[...] national measures liable to *hinder or make less attractive* the exercise of fundamental freedoms guaranteed by the Treaty must, according to settled case-law, fulfil four conditions in order to comply with [Articles 49 and 56 TFEU]: they must be *applied in a non-discriminatory manner*, they must be *justified by imperative requirements* in the general interest, they must be *suitable* for securing the attainment of the objective which they pursue, and they must *not go beyond what is necessary* in order to attain it.³⁸⁸

The Court thus found that decisions taken by contracting authorities that were “liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty” should fulfil four conditions, namely:

- 1) they must be non-discriminatory;
- 2) they must be justified by a legitimate objective;
- 3) they must be suitable;
- 4) they must not go beyond what is necessary.

By doing so, the Court applied the *same kind of reasoning* to an individual contract award as to general measures affecting access to the internal market. Therefore, *Contse* supports the internal market perspective.

³⁸¹ Hettne 2013b, p. 31.

³⁸² Sundstrand, p. 344 (emphasis added).

³⁸³ C-234/03 *Contse*. See also sections 3.2.3.3 and 3.3.3.

³⁸⁴ *Contse*, para 6.

³⁸⁵ *Contse*, paras 9 and 20. See also Kunzlik 2013, p. 187.

³⁸⁶ *Contse*, paras 12 and 20. See also Kunzlik 2013, p. 187.

³⁸⁷ *Contse*, para 17.

³⁸⁸ *Contse*, para 25 (emphasis added).

Another – more recent – judgement that could be invoked in support of the view that *all* decisions taken by contracting authorities should be subject to the free movement rules is *Rüffert*³⁸⁹, delivered in 2008. In this case, German authorities carried out a public procurement of building works.³⁹⁰ In the technical specifications, they required producers to comply with the collective agreements currently in force and, more specifically, with the clause regarding minimum wage.³⁹¹ Following the contract award, a German undertaking (using a Polish sub-contractor to carry out the work) brought proceedings, arguing that the obligation contravened Article 56 TFEU.³⁹²

The case was first dealt with by Advocate General Bot.³⁹³ In his Opinion, AG Bot took the view that the obligation to comply with German collective agreements constituted a restriction on the freedom to provide services within the meaning of Article 56 TFEU.³⁹⁴ However, in so far as the measure was based on social rather than economic considerations, AG Bot considered it to be potentially justified.³⁹⁵

As far as the ECJ was concerned, it adopted a similar approach, stating that the requirement to comply with the clause regarding minimum wage:

[...] may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that *may prohibit, impede or render less attractive the provision of their services in the host Member State*. Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of [Article 56 TFEU].³⁹⁶

The Court thus found that requirements of complying with ‘German’ rates of pay would cause undertakings established in other Member States (such as Poland) to lose a competitive advantage they would otherwise have had as a result of their lower wages.³⁹⁷ According to the Court, this would “prohibit, impede or render less attractive” the exercise of Article 56 TFEU.³⁹⁸ In other words, the Court in this case applied the *same kind* of ‘market access test’ to an individual contract award as to general measures affecting access to the internal market. This means that there are now two recent cases in a row (*Contse* and *Rüffert*) that support the view of the internal market perspective. This brings us to the question of harmonisation, which (it goes without saying) is closely related to the application of the free movement rules in the first place.

³⁸⁹ C-346/06 *Rüffert*. See also section 3.2.3.3.

³⁹⁰ *Rüffert*, para 10.

³⁹¹ *Rüffert*, para 10.

³⁹² *Rüffert*, para 13.

³⁹³ Opinion of AG Bot of 20 September 2007 in *Rüffert*.

³⁹⁴ AG Bot in *Rüffert*, para 102.

³⁹⁵ AG Bot in *Rüffert*, paras 111-115.

³⁹⁶ *Rüffert*, para 37.

³⁹⁷ See Arrowsmith and Kunzlik, p. 2.

³⁹⁸ See Arrowsmith and Kunzlik, p. 2.

Turning then to the question of harmonisation, representatives of the internal market perspective consider contracting authorities to be fully bound by the ‘general’ rules.³⁹⁹ In support of this reasoning, Hettne relies on *Medipac*⁴⁰⁰, delivered in 2007 and *Commission v Greece*⁴⁰¹, delivered in 2009. In these two cases, a Greek hospital carried out a procurement of medical equipment.⁴⁰² In the specifications, it stated that products had to comply with the Medical Devices Directive⁴⁰³ which is a ‘new approach directive’, setting out a number of ‘essential requirements’ for products to obtain the CE marking.⁴⁰⁴ At the same time, products complying with these standards must be admitted for sale in all Member States and the only way to derogate from this is by invoking the safeguard procedure set out in the Directive.⁴⁰⁵ Despite this, the hospital later rejected a tender complying with the Medical Devices Directive, on the ground that it was not safe enough.⁴⁰⁶

The case of *Medipac* was first dealt with by AG Sharpston.⁴⁰⁷ In her Opinion, she emphasised that the Greek hospital fell within the notion of ‘the State’ and was therefore under a duty to comply with the provisions of the Medical Devices Directive.⁴⁰⁸ For this reason, it could not reject a tender bearing the CE marking without invoking the safeguard procedure.⁴⁰⁹

This line of reasoning was fully endorsed by the ECJ, which stated that:

[...] not only the wording of [the Medical Devices Directive] but also the purpose of the *harmonisation system* established by it preclude a contracting authority from being entitled to reject, outside that safeguard procedure and on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for by that directive.⁴¹⁰

The Court thus found that the Greek hospital, acting in its capacity as a contracting authority, was bound to comply with the safeguard procedure set out in the Medical Devices Directive. By doing so, the Court applied the *same rules on harmonisation* to a contracting authority, as it would normally do to a Member State. It can be observed that this approach gains support from the Court’s later judgement in *Commission v Greece*, where it found that the practices of the same Greek hospital demonstrated such a “degree of consistency and generality” that they should be subject to the rules laid down in the Medical Devices Directive.⁴¹¹ With these views in mind, the next section will turn to consider the multi policy perspective.

³⁹⁹ Hettne 2013b, p. 38; Hettne 2013c, p. 33.

⁴⁰⁰ C-6/05 *Medipac*. See also section 3.3.2.

⁴⁰¹ C-489/06 *Commission v Greece*.

⁴⁰² *Medipac*, para 21.

⁴⁰³ Directive 93/42/EEC of 14 June 1993 concerning medical devices.

⁴⁰⁴ Arrowsmith and Kunzlik, p. 64.

⁴⁰⁵ Arrowsmith and Kunzlik, p. 64.

⁴⁰⁶ *Medipac*, para 23.

⁴⁰⁷ Opinion of AG Sharpston of 21 November 2006 in *Medipac*.

⁴⁰⁸ AG Sharpston in *Medipac*, para 75.

⁴⁰⁹ AG Sharpston in *Medipac*, para 75.

⁴¹⁰ *Medipac*, para 50 (emphasis added).

⁴¹¹ *Commission v Greece*, para 53.

5.2.3 Multi Policy Perspective

Turning then to the multi policy perspective, it is largely based on the book *Social and Environmental Policies in EC Procurement Law*⁴¹², published in 2009, of which Kunzlik, together with Sue Arrowsmith, Professor of Public Procurement Law and Policy at the University of Nottingham, is a co-editor. In this book, Arrowsmith and Kunzlik put forward the theory of ‘excluded buying decisions’, suggesting that “decisions on *whether* to make a purchase and *what* to purchase should not generally be treated as hindrances to trade, even when they are discriminatory in effect.”⁴¹³ More precisely, Arrowsmith and Kunzlik argue that the concept of ‘excluded buying decisions’ covers *first*, the initial decision on *whether* to go ahead with an activity, for example whether to purchase additional food for school meals rather than to use the funds for other purposes.⁴¹⁴ *Second*, it applies to decisions on *what* exactly to purchase to meet a certain need, for example whether to purchase poultry meat rather than beef for school meals.⁴¹⁵ *Third* – and perhaps not controversially – it covers *substantive product characteristics*, such as environmental features, even where such characteristics are more common in domestic than in imported products.⁴¹⁶ According to Arrowsmith and Kunzlik, such decisions do not restrict access to the market, but merely establish what the market *is*, for example one for poultry meat or beef.⁴¹⁷

In support of their reasoning, Arrowsmith and Kunzlik rely on the Court’s judgement in *Concordia Bus Finland*⁴¹⁸, delivered in 2002. In this case, the city of Helsinki carried out a public procurement of transportation services.⁴¹⁹ In the tender documents, it specified that the contract was to be awarded to the undertaking whose tender was the *most economically advantageous* to the city.⁴²⁰ This would, among other things, be assessed by reference to levels of nitrous oxide emissions and noise of the buses.⁴²¹ The city of Helsinki received eight tenders, out of which HKL (a Finish operator) eventually was awarded the contract.⁴²² Following the contract award, another undertaking asked for judicial review, arguing that the criteria were unfair and discriminatory, because in practice only one operator, namely HKL, could comply with them.⁴²³

⁴¹² S Arrowsmith and P Kunzlik, *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009). See also section 2.3.3.

⁴¹³ Arrowsmith and Kunzlik, p. 25 (emphasis added).

⁴¹⁴ Arrowsmith and Kunzlik, p. 59 *in fine*.

⁴¹⁵ Arrowsmith and Kunzlik, p. 59-60.

⁴¹⁶ Arrowsmith and Kunzlik, p. 60.

⁴¹⁷ Arrowsmith and Kunzlik, p. 60.

⁴¹⁸ C-513/99 *Concordia Bus Finland*. See also section 4.6.3.

⁴¹⁹ *Concordia Bus Finland*, para 20.

⁴²⁰ *Concordia Bus Finland*, para 21.

⁴²¹ *Concordia Bus Finland*, para 27. See also Arrowsmith and Kunzlik, p. 63.

⁴²² *Concordia Bus Finland*, paras 25-26.

⁴²³ *Concordia Bus Finland*, para 27.

The case was first dealt with by Advocate General Mischo.⁴²⁴ In his Opinion, he took the view that contracting authorities were entitled to include environmental criteria in their public tenders, so long as they complied with the fundamental principles of EU law, in particular with the principle of non-discrimination and the four freedoms.⁴²⁵ As far as the principle of non-discrimination was concerned, AG Mischo found that “in the present case [...] the two undertakings were treated differently only because they were not in identical situations. One of them was able to offer the fleet requested and the other was not.”⁴²⁶ In other words, given that the undertakings were not in a comparable legal and factual situation, the principle of non-discrimination was not infringed.

The ECJ took a similar approach. In its judgement, the Court stated that contracting authorities were entitled to take environmental criteria into account, provided they were linked to the subject-matter of the contract, did not confer an unrestricted freedom of choice, were mentioned in the tender documents and complied with the principle of non-discrimination.⁴²⁷ As far as the principle of non-discrimination was concerned, the Court found that:

[...] the fact that one of the criteria [...] could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment.⁴²⁸

In other words, just because the criteria could only be satisfied by a small number of undertakings (one of which was HKL) the principle of non-discrimination was not infringed. According to the Court, all of the criteria were therefore in compliance with EU law.⁴²⁹

According to Arrowsmith and Kunzlik, the Court’s rather lenient approach in *Concordia Bus Finland* (being based solely on the principles of non-discrimination and proportionality) should be equally applied to other cases involving horizontal policies as well.⁴³⁰ However, in the author’s view, there are two objections to this. *First*, *Concordia Bus Finland* was concerned with *environmental* criteria. As was seen in section 4.6.3, such criteria appear to be a special case because of the wording of Article 11 TFEU, which lays down a stronger commitment than the other integration clauses, such as Article 13 TFEU. *Second*, *Concordia Bus Finland* was concerned with *award criteria*. As was found in section 3.4.2.3 such criteria are in general considered less restrictive on trade than technical specifications, given that producers are not excluded from the process altogether. For this reason, the Court’s reasoning in *Concordia Bus Finland* cannot, without further ado, be transposed into the context of animal welfare.

⁴²⁴ Opinion of AG Mischo of 13 December 2001 in *Concordia Bus Finland*.

⁴²⁵ AG Bot in *Concordia Bus Finland*, para 117.

⁴²⁶ AG Bot in *Concordia Bus Finland*, para 150.

⁴²⁷ *Concordia Bus Finland*, para 64.

⁴²⁸ *Concordia Bus Finland*, para 85.

⁴²⁹ *Concordia Bus Finland*, para 86.

⁴³⁰ Arrowsmith and Kunzlik, p. 63.

As far as the question of harmonisation is concerned, the multi policy perspective strongly rejects the idea of contracting authorities' discretion being limited by harmonising measures. According to Kunzlik, "a general rule preventing public purchasers from specifying that their purchasers must meet standards higher than those stated in harmonising legislation [...] would, for two reasons in particular, be perverse."⁴³¹ *First*, the internal market is supposed to be a single market in which competition is not distorted. By precluding public purchasers from requiring 'higher-than-harmonised-standards', innovative firms would be put at a competitive disadvantage compared to less innovative firms.⁴³² *Second*, such a rule would seriously harm the *Europe 2020 strategy*⁴³³, which identifies public procurement as important tool for attaining the EU's environmental goals.⁴³⁴

Furthermore, Arrowsmith and Kunzlik argue that the Court's judgement in *Medipac* does *not* prevent contracting authorities from imposing higher standards than those set out in EU harmonised secondary legislation.⁴³⁵ According to the authors, *Medipac* merely shows that contracting authorities cannot, without infringing the principles of non-discrimination and transparency, reject a tender which satisfies the requirements set out in the tender notice.⁴³⁶ Therefore, when looking at the question of harmonisation from the view of Arrowsmith and Kunzlik, the key question is not whether an area has been fully harmonised or not, but rather whether a certain criterion is to be considered an 'excluded buying decision' or not.

5.2.4 Conclusion

To sum up this discussion, it has been found that there are now two recent cases in a row – *Contse* and *Rüffert* – which provide support for the view that the 'general' rules on free movement (discrimination / market access approach) are equally applicable to contracting authorities. Moreover, the Court's judgements in *Medipac* and *Commission v Greece*, suggest that this reasoning should extend to harmonising measures as well. In support of this view, the Opinion of AG Sharpston in *Medipac* is particularly clarifying: given that contracting authorities fall within the notion of the 'State', they should also comply with the 'general' rules set out in the Union legislative acts. While in *Medipac*, this happened to be the safeguard procedure provided for in the Medical Devices Directive, it is reasonable to expect that the same kind of reasoning would apply to other harmonising measures (such as the free movement clauses set out the Calves Directive, the Pigs Directive and the Hens Directive) as well. With these views in mind, the next section will turn to a number of Swedish cases in the area.

⁴³¹ Kunzlik 2013b, p. 6.

⁴³² Kunzlik 2013b, p. 6.

⁴³³ COM(2010) 2020 final: Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth.

⁴³⁴ Kunzlik 2013b, p. 7. See also Kunzlik 2013a, p. 174.

⁴³⁵ Arrowsmith and Kunzlik, p. 64-65. See also Kunzlik 2013b, p. 5.

⁴³⁶ Arrowsmith and Kunzlik, p. 64. It can be observed that Arrowsmith has somewhat modified this view following *Commission v Greece*, see Hettne 2013c, p. 33 *in fine*.

5.3 The Swedish Cases

5.3.1 Introduction

Having established that contracting authorities are subject to the 'general' rule on free movement (discrimination / market access approach) and the 'general' rules on harmonisation (minimum / exhaustive harmonisation, free movement clauses and so on) this section will turn to a number of Swedish cases in the area, ranging from 2010 to 2013. The purpose is to examine what types of requirements that have been imposed by the contracting authorities and how these have been assessed by the national courts. It will also be discussed whether the courts have adopted an internal market perspective or a multi policy perspective when ruling on the various matters.

5.3.2 Skåne

5.3.2.1 Background

In *Skåne*⁴³⁷, delivered in 2010, six municipalities in the south of Sweden carried out a public procurement of foodstuffs, including fresh and cured meats, chicken products and eggs.⁴³⁸ In the technical specifications, they stated that products had to be produced in accordance with Articles 2 and 4 of the Swedish Animal Welfare Act which, among other things, provide that animals shall be treated well and shall be protected from unnecessary suffering and disease.⁴³⁹ Following the contract award, one undertaking asked for judicial review, arguing that obligation to comply with Articles 2 and 4 of the Swedish Animal Welfare Act violated the general principles of non-discrimination and equal treatment.⁴⁴⁰ The municipalities, on the other hand, argued that these articles laid down the *same level of protection* as EU law, and so that the criteria should not be considered discriminatory.⁴⁴¹

5.3.2.2 The Administrative Court

The case was first dealt with by the administrative court in Malmö. In its judgement, the court found that a contracting authority could not, without infringing the principle of non-discrimination, refer to Articles 2 and 4 of the Swedish Animal Welfare Act.⁴⁴² However, given that the producer had not succeeded in proving any economic harm, it was not necessary to recomplete the contract.⁴⁴³

⁴³⁷ The administrative court in Malmö, judgement of 4 May 2010, no 3616-3621-10; later appealed to the administrative court of appeal in Gothenburg, judgement of 16 December 2010, no 2216-2221-10 ('Skåne').

⁴³⁸ The administrative court in *Skåne*, p. 2.

⁴³⁹ The administrative court in *Skåne*, p. 8.

⁴⁴⁰ The administrative court in *Skåne*, p. 4.

⁴⁴¹ The administrative court in *Skåne*, p. 6 (emphasis added).

⁴⁴² The administrative court in *Skåne*, p. 8.

⁴⁴³ The administrative court in *Skåne*, p. 9.

5.3.2.3 The Administrative Court of Appeal

The case was later appealed to the administrative court of appeal in Gothenburg, which handed down its judgement a couple of months later. In its judgement, the court found that the EU legal framework on animal welfare had not been exhaustively harmonised and that Member States were allowed to impose more demanding rules so long as they were compatible with the Treaty.⁴⁴⁴ As far as Articles 2 and 4 of the Swedish Animal Welfare Act were concerned, the court found that they laid down *more demanding* rules than those provided for by EU law. The obligation to comply with these standards there constituted an MEQR within the meaning of Article 34 TFEU.⁴⁴⁵ Turning then to the question of justification, the court found that the contracting authorities had not shown that the measure could be justified on the basis of Article 36 TFEU.⁴⁴⁶ For this reason, the measure was not in compliance with EU law, and the contract had to be recompleted.

5.3.3 Halland

5.3.3.1 Background

In *Halland*⁴⁴⁷, delivered in 2010, two municipalities in the southwest of Sweden carried out a public procurement of foodstuffs. Just as in *Skåne*, they stated that products had to be produced in accordance with the Swedish Animal Welfare Act.⁴⁴⁸ Following the contract award, one producer asked for judicial review, invoking the same grounds as those referred to above.⁴⁴⁹

5.3.3.2 The Administrative Court

The case was first dealt with by the administrative court in Gothenburg. In its judgement (which largely took its inspiration from the decision in *Skåne*) the court found that the EU legal framework on animal welfare had not been exhaustively harmonised and that Member States were allowed to impose more demanding measures so long as they were compatible with the principle of mutual recognition.⁴⁵⁰ As far as the question of justification was concerned, the court found that the contracting authorities had not succeed in proving that the measure could be justified on the basis of the animal welfare derogation set out in Article 36 TFEU.⁴⁵¹ For this reason, the requirements were not in compliance with EU law.⁴⁵² However, given the lack of economic harm, it was not necessary to recomplete the contract.⁴⁵³

⁴⁴⁴ The administrative court of appeal in *Skåne*, p. 5.

⁴⁴⁵ The administrative court of appeal in *Skåne*, p. 5-6.

⁴⁴⁶ The administrative court of appeal in *Skåne*, p. 6.

⁴⁴⁷ The administrative court in Gothenburg, judgement of 15 June 2010, no 8169-20; later appealed to the administrative court of appeal in Gothenburg, judgement of 16 December 2010, no 2921-2922-10 ('Halland').

⁴⁴⁸ The administrative court in *Halland*, p. 2.

⁴⁴⁹ The administrative court in *Halland*, p. 2.

⁴⁵⁰ The administrative court in *Halland*, p. 2. See also section 3.3.4.

⁴⁵¹ The administrative court in *Halland*, p. 2.

⁴⁵² The administrative court in *Halland*, p. 3.

⁴⁵³ The administrative court in *Halland*, p. 3.

5.3.3.3 The Administrative Court of Appeal

The case was later appealed to the administrative court of appeal in Gothenburg. Before the case came before the court of appeal, some of the requirements had been removed and what was left was a requirement concerning the *maximum journey time for animals during transport*.⁴⁵⁴ In its judgement, the court found that this requirement went beyond the level of protection provided for by EU law and that it was to be considered an MEQR.⁴⁵⁵ Given that the contracting authorities had shown that the measure could be justified, the court found it necessary to recompetete the contract.

5.3.4 Stockholm

5.3.4.1 Background

In *Stockholm*⁴⁵⁶, delivered in 2011, two municipalities in Stockholm carried out a public procurement of foodstuffs. In the technical specifications, they stated that producers had to comply with the following requirements:⁴⁵⁷

- Antibiotics may only be used as prescribed by a veterinary surgeon and when medically justified;
- Journey time for animals shall not exceed eight hours;
- The accommodation for pigs must be constructed in such a way as to allow the animals to have access to a lying area and a separate area for litter. All pigs must have access to a sufficient quantity of materials, such as straw. Tail-docking is not allowed;
- Beak trimming and castration of chickens are not allowed.

5.3.4.2 The Administrative Court

The case was dealt with by the administrative court in Stockholm. In its judgement, the court mainly focused on the decision in *Wienstrom*, which provides that in order for a requirement to be held compatible with the general principles of equal treatment and transparency, it must be possible to verify. Because the municipalities in this case had not succeeded in proving how this should be done, the requirements were not in compliance with EU law.⁴⁵⁸ According to the court, it was therefore necessary to recompetete the contract.⁴⁵⁹ The case was later appealed to the administrative court of appeal in Stockholm, which however rejected the appeal.⁴⁶⁰

⁴⁵⁴ The administrative court of appeal in *Halland*, p. 4 (emphasis added). See also See N Bruun, 'Rättsutlåtande om djurskyddskrav i offentlig upphandling' (2011) Miljöstyvningsrådet Rapport ('Bruun'), p 8.

⁴⁵⁵ The administrative court of appeal in *Halland*, p. 4.

⁴⁵⁶ The administrative court in Stockholm, judgement of 18 January 2011, no 46844-10 and 46958-10 ('Stockholm').

⁴⁵⁷ The administrative court in *Stockholm*, p. 7-8.

⁴⁵⁸ The administrative court in *Stockholm*, p. 12.

⁴⁵⁹ The administrative court in *Stockholm*, p. 13.

⁴⁶⁰ See M Sihlén, 'Offentlig upphandling – kriterier och rättsfall' (2011) Miljöstyvningsrådet Rapport, p. 7.

5.3.5 Sigtuna

5.3.5.1 Background

In *Sigtuna*⁴⁶¹, delivered in 2011, the municipality of Sigtuna carried out a public procurement of foodstuffs. In the technical specifications, it stated that producers had to comply with the following requirements:

- Antibiotics may only be used as prescribed by a veterinary surgeon and when medically justified;
- Journey time for animals shall not exceed eight hours;
- Animals shall only be killed after stunning.

As can be seen from the above, the requirements set out in *Sigtuna* largely correspond to those set out in *Stockholm*. Despite this, the court in this case reached a somewhat different conclusion.

5.3.5.2 The Administrative Court

The case was first dealt with by the administrative court in Uppsala. In its judgement, the court carried out a detailed analysis of the various requirements. As far as the requirement on antibiotics was concerned, the court found that it was *more demanding* than that provided for by EU law. Because the rules on antibiotics were laid down in a *regulation*, more precisely Regulation 1831/2003 on additives for use in animal nutrition (the ‘Additives Regulation’) the area was fully harmonised and the requirement was not allowed.⁴⁶² As far as the requirement on transport was concerned, the court found that these rules were laid down in the Transport Regulation. While it follows from the Regulation that journey time shall not *as a general rule* exceed eight hours, this period can be extended provided certain conditions are met. For this reason, the requirement laid down by the municipality of Sigtuna – imposing an *absolute ban* on journeys longer than eight hours – was more demanding than that provided for by EU law. Because the rules on transport were laid down in a regulation, this was not allowed.⁴⁶³ As concerned, finally, the requirement on stunning before slaughter, the court found that these rules were laid down in the Slaughter Directive (now repealed and replaced by the Slaughter Regulation). Because the Directive took the form of a *minimum harmonising directive*, contracting authorities were allowed to impose more demanding requirements so long as they were compatible with the Treaty. However, in this case the requirement fully corresponded to the one set out in Swedish law. For this reason, it did not comply with the principle of non-discrimination and it was necessary to recomplete the contract.⁴⁶⁴

⁴⁶¹ The administrative court in Uppsala, judgement of 29 April 2011, no 8227-10; later appealed to the administrative court of appeal in Stockholm, judgement of 23 February 2012, no 2841-11 (‘Sigtuna’).

⁴⁶² The administrative court in *Sigtuna*, p. 16-17.

⁴⁶³ The administrative court in *Sigtuna*, p. 17.

⁴⁶⁴ The administrative court in *Sigtuna*, p. 17-19.

5.3.5.3 The Administrative Court of Appeal

The case was later appealed to the administrative court of appeal in Stockholm. Interestingly the court of appeal took a radically different approach as compared to the administrative court. In its judgement, the court found that the fact that an area had been fully harmonised by EU law, only meant that a *Member State* in its *national legislation* could not impose more demanding measures. However, it did not mean, that a *contracting authority* in an *individual contract award* was prohibited from doing so.⁴⁶⁵ According to the court of appeal, a contracting authority should have rather wide margin of discretion in deciding 'what to buy' so long as the requirements were linked to the subject-matter of the contract and were compatible with the general principles of EU law.⁴⁶⁶ Turning then to the various requirements set out by the contracting authority, the court found that the requirements on antibiotics and transport went beyond the level of protection provided for by EU law. However, given that they were applied in a non-discriminatory manner, they were compatible with the general principles of EU law.⁴⁶⁷ As far as the requirement on stunning before slaughter was concerned, the court found that it was fully consistent with the main rule set out in EU law. For this reason, it should also be accepted.⁴⁶⁸ As far as the possibilities of verifying the requirements were concerned, the court found that the contracting authority had contractual rights to carry out inspections on the premises and to request and to obtain certificates from the producers. According to the court, this was enough to satisfy the verification requirement in *Wienstrom*.⁴⁶⁹ Therefore, all of the criteria were accepted.

5.3.6 Rättvik

5.3.6.1 Background

In *Rättvik*⁴⁷⁰, delivered in 2011, the municipality of *Rättvik* carried out a public procurement of foodstuffs. In the technical specifications it stated that producers had to comply with the following requirements:

- Antibiotics may only be used as prescribed by a veterinary surgeon and when medically justified;
- Journey time for animals shall not exceed eight hours;
- Animals shall only be killed after stunning.
- Cows and calves shall have access to grazing;
- Beak trimming of chickens is not allowed
- All pigs should have access to a lying area, a separate area for litter and sufficient quantity of material, such as straw.

⁴⁶⁵ The administrative court of appeal in *Sigtuna*, p. 8 (emphasis added).

⁴⁶⁶ The administrative court in appeal in *Sigtuna*, p. 8.

⁴⁶⁷ The administrative court in appeal in *Sigtuna*, p. 9.

⁴⁶⁸ The administrative court in appeal in *Sigtuna*, p. 10.

⁴⁶⁹ The administrative court in appeal in *Sigtuna*, p. 12.

⁴⁷⁰ The administrative court in Falun, judgement of 1 August 2011, no 5694-10; later appealed to the administrative court of appeal in Sundsvall, judgement of 22 December 2011, no 2091-11 ('Rättvik').

5.3.6.2 The Administrative Court

The case was first dealt with by the administrative court in Falun. In its judgement, the court initially found that a general requirement of complying with 'Swedish' standards of animal welfare would not be in compliance with EU law.⁴⁷¹ However, as far as more specific requirements were concerned, the court took the view that contracting authorities should have a rather wide margin of discretion in deciding 'what to buy'. Moreover, the court recognized that Article 13 TFEU could have a role to play in this regard.⁴⁷² All in all, the court found that all of the requirements were drafted in a non-discriminatory manner and that they were justified on grounds of the protection of animals.⁴⁷³ They were also possible to verify.⁴⁷⁴ For this reason, the court considered them to be in compliance with EU law.

5.3.6.3 The Administrative Court of Appeal

The case was later appealed to the administrative court of appeal in Sundsvall. In its rather short judgement, the court focused exclusively on the verification requirement laid down in *Wienstrom*. It found that neither the inspections carried out by contracting authorities, nor the certificates obtained from the producers were sufficient to satisfy the principle of equal treatment.⁴⁷⁵ It was therefore necessary to recompile the contract.

An overview of the Swedish cases:

Case	Requirement	Administrative court	Administrative court of appeal
<i>Skåne</i>	Articles 2 and 4 Swedish Animal Welfare Act	Rejected	Rejected
<i>Halland</i>	Articles 2 and 4 Swedish Animal Welfare Act + Transport	Rejected	Rejected
<i>Stockholm</i>	Antibiotics, Transport, Slaughter, Beak trimming	Rejected (not proportionate + difficult to verify)	Did not review
<i>Sigtuna</i>	Antibiotics, Transport, Slaughter	Rejected (pre-emptive effect of harmonisation)	Accepted, (harmonisation only applies to legislative acts)
<i>Rättvik</i>	Antibiotics, Transport, Slaughter, Grazing time etc.	Accepted (Art 13 TFEU + non-discriminatory + proportionate)	Rejected (difficult to verify)

⁴⁷¹ The administrative court in *Rättvik*, p. 6.

⁴⁷² The administrative court in *Rättvik*, p. 7.

⁴⁷³ The administrative court in *Rättvik*, p. 8.

⁴⁷⁴ The administrative court in *Rättvik*, p. 8-9.

⁴⁷⁵ The administrative court of appeal in *Rättvik*, p. 8.

5.3.7 Analysis

On the basis of the above cases, it is possible to distinguish two lines of case-law.⁴⁷⁶ In the first line of case-law – *Skåne* and *Halland* – the contracting authorities have imposed general requirements of complying with ‘Swedish’ standards of animal welfare. These have consistently been rejected by the courts. In the second line of case-law – *Stockholm*, *Sigtuna* and *Rättvik* – the contracting authorities appear to have learned their lesson. Without making any explicit references to ‘Swedish’ standards, they specify that producers have to comply with a number of detailed requirements, such as a prudent use of antibiotics, a maximum journey time of eight hours and that all animals shall be stunned before killed. While these requirements have been rejected by some of the courts, most notably the administrative court in *Sigtuna*, they have been accepted by others, such as the administrative court of appeal in *Sigtuna* and the administrative court in *Rättvik*. This means that there – *within* the second line of case-law – is possible to draw another line between those courts that consider contracting authorities to be part of the State, thus applying the ‘general’ rules on free movement and harmonisation, and those courts that consider contracting authorities to be something else, granting them a much wider margin of discretion in deciding ‘what to buy’. In this sense, the Swedish cases provide a very good illustration of the conflict between the internal market perspective and the multi policy perspective, outlined above.⁴⁷⁷

Indeed, this conflict becomes particularly clear when looking at the two judgements in *Sigtuna*. As far as the administrative court is concerned, it makes a clear distinction between those areas that are governed by *regulations*, such as transport conditions and antibiotics, and those areas that are governed by *directives*, such as slaughter conditions (at that time governed by the Slaughter Directive). For the first category of measures, the court considers there to be *no room* for more demanding measures, regardless of whether they comply with the principles of non-discrimination and proportionality, given that the area has been fully harmonised. For the second group of measures, the court considers the requirements set out by the contracting authorities to be *measures having equivalent effect to a quantitative restriction (MEQRs)* within the meaning of Article 34 TFEU. This means that the requirements may be held compatible with EU law, provided they are linked to the subject-matter of the contract, are justified by a legitimate interest (animal welfare) and are suitable and necessary to achieve that aim. Today, with the Slaughter Directive being replaced by the Slaughter Regulation, the court would probably apply the *same kind of reasoning* to all three requirements, leaving no room for more demanding national measures at all. In this way, the court can be said to adopt a typical *internal market perspective*.

⁴⁷⁶ See N Bruun, ‘Rättsutlåtande om djurskydds krav i offentlig upphandling’ (2011) Miljöstylningsrådet Rapport (‘Bruun’) p. 9.

⁴⁷⁷ See K Pedersen, Upphandlingskrönika – djurskyddshänsyn vid livsmedelupphandlingar’ (2011) *Europarättslig tidskrift*, p. 791-792.

As far as the administrative court of appeal in *Sigtuna* is concerned, it takes a radically different approach. In a rather incontestable way, it states that the fact that an area has been fully harmonised by EU law only means that a Member State in its *national legislation* cannot impose more demanding measures. However, it does not mean that a contracting authority in an *individual contract award* is prevented from doing so. According to the administrative court of appeal, contracting authorities should have a rather wide margin of discretion in deciding 'what to buy'. In this way, the court of appeal can be said to adopt a typical *multi policy perspective*.

In the author's view, the reasoning of the administrative court in *Sigtuna* (internal market perspective) makes the most sense. As was found in section 5.2.2, the ECJ has in two recent cases (*Contse* and *Riiffert*) applied the 'general' rules on free movement to decisions taken by contracting authorities. Moreover, the Court's decisions in *Medipac* and *Commission v Greece* suggest that this reasoning should apply to harmonising measures as well. In response to this, one could argue that the Court in *Concordia Bus Finland* applied a low level of review (based solely on the principles of non-discrimination and proportionality) to decisions taken by contracting authorities. However, as was argued in section 5.2.3 this can probably be explained by the fact that environmental criteria are a 'special case' because of the wording of Article 11 TFEU and that award criteria are to be considered less restrictive on trade than technical specifications.

As far as Article 13 TFEU is concerned, it is only dealt with in brief by the administrative court in *Rättvik*. In rather vague terms, the court states that Article 13 TFEU is of relevance for the present assessment and should be taken into consideration by the court.⁴⁷⁸ It then proceeds directly to an assessment based on the principles of non-discrimination and proportionality (low level of judicial review). On the basis of these judgements, Niklas Bruun, Professor in Law at the University of Helsinki, argues that the Swedish courts have failed to take sufficient account of Article 13 TFEU when ruling on the various matters.⁴⁷⁹ According to Bruun, it is for example clear that *transport conditions* should be held compatible with EU law, especially since there is a huge consumer demand in the area.⁴⁸⁰ However, in the author's view, there are two objections to this. *First*, it has been established that Article 13 TFEU could only have a role to play in those areas that have *not* been subject to exhaustive harmonisation, either in the form of a regulation or a minimum harmonising directive containing a free movement clause. As was found in sections 4.4 and 4.5, there are very few such areas left, which means that the role of Article 13 TFEU remains rather limited. *Second*, it can be observed that the rules on transport are laid down in a regulation (the Transport Regulation), which explicitly precludes more demanding national measures unless the transport takes place entirely within the territory of a Member State. Therefore, if there are any types of requirements that could *not* be justified, it is probably those on transport.

⁴⁷⁸ The administrative court in *Rättvik*, p. 7

⁴⁷⁹ Bruun, p. 10.

⁴⁸⁰ Bruun, p. 10 *in fine* (emphasis added).

6 Conclusion and the Future

6.1 Introduction

Having gone through all the areas of interest, this chapter will summarize and clarify the conclusions made in the previous chapters. In order to make the review as clear as possible, it will start by answering the main research question, before turning to the three sub-questions raised in the beginning.

6.2 Question 1

What scope do contracting authorities have to refer to 'Swedish' standards of animal welfare (whether explicitly or not) when purchasing foodstuffs?

As far as the main research question is concerned, it has been found that express/general references to 'Swedish' standards of animal welfare would *not* be in compliance with EU law. Such references would be contrary to the free movement provisions and the general principles of EU law (especially the principle of non-discrimination on grounds of nationality) and go against Article 42(4) of the new Public Sector Directive which provides that Member States should not be allowed to refer to a "specific origin" when drafting the technical specifications. This conclusion gains support from the decisions in *Skåne* and *Halland*, where the Swedish administrative courts found that requirements of complying with Articles 2 and 4 of the Swedish Animal Welfare Act were *not* in compliance with EU law.

Turning then to the question of more 'specific' requirements (concerning for example transport, slaughter and antibiotics) the situation becomes more complex. *First*, it has to be established whether contracting authorities are subject to the 'general' rules on free movement (discrimination / market access approach) and the 'general' rules on harmonisation (minimum / exhaustive harmonisation, free movement clauses and so on). While some legal scholars consider contracting authorities to be part of the State – thus applying the 'general' rules of the Treaty – there are others who argue that contracting authorities should be seen as private entities operating on a competitive market – thus enjoying a much wider margin of discretion in deciding 'what to buy'. On the basis of the Court's judgements in *Contse* and *Rüffert*, this thesis has come to the conclusion that contracting authorities should indeed be subject to the 'general' rules on free movement. Moreover, the Court's judgement in *Medipac* suggests that this reasoning should apply to harmonising measures as well. With this in mind, the *second* step has been to establish what types of requirements would be imposed by contracting authorities, whether they are subject to harmonising measures at EU level and whether Member States are allowed to impose their own (higher) standards against one another. In the following sections, the different areas of animal welfare will be considered separately.

6.2.1 Cows and Calves, Pigs, Hens and Chickens

As far as certain species of animals are concerned, these are all governed by minimum harmonising directives containing a free movement clause. It follows from the Court's judgement in *CIWF*, that this means that Member States are allowed to impose more demanding measures within their *own* territories or in relation to their *own* producers, but not so as to impede the free movement of goods. According to some legal scholars, this has had the effect of turning minimum harmonisation into exhaustive harmonisation, leaving virtually no scope for more demanding measures at all. As far as the Swedish cases are concerned, it can be observed that the municipalities in *Stockholm*, *Rättvik* and *Sigtuna* imposed a wide range of requirements. Among other things, they required that cows and calves should be able to go outdoors during summer, that small pigs should not have their tails cut and that hens and chickens should not be subject to beak trimming or castration. While these requirements correspond to the main rules set out in the Calves Directive, the Pigs Directive, the Hens Directive and the Chickens Directive, the EU acts allow for exceptions in certain cases. This means that the requirements set out by the contracting authorities are to be considered *more demanding* than those of the EU. Given the existence of the free movement clauses, this thesis has come to the conclusion that such requirements would *not* be in compliance with EU law as it stands today.

6.2.2 Transport and Slaughter

Turning then to transport conditions and the protection of animals at the time of killing, these rules are – in contrast to the species-specific legislation considered above – laid down in *regulations*. This means that Member States (as a general rule) are prevented from imposing more demanding national measures unless explicitly provided for in the legal text itself. As far as transport conditions are concerned, the municipalities in *Stockholm*, *Rättvik* and *Sigtuna* imposed an 'absolute top limit' of eight hours for all transports. While this figure corresponds to the main rule set out in the Transport Regulation, the Regulation allows for longer journeys provided certain conditions are met. This means that the requirements set out by the contracting authorities are to be considered *more demanding* than those set out in EU law. Given that the Transport Regulation only allows for more demanding measures in so far as the transport takes place *entirely within the territory of a Member State*, such a requirement cannot be held compatible with EU law. As far as slaughter is concerned, the municipalities in the above cases required that all animals should be stunned before killing. While again this corresponds to the main rule set out in the Slaughter Regulation, the Regulation allows for exceptions in the case of religious rites. This means that also the requirement on slaughter is to be considered *more demanding* than that of EU law. Given that the Slaughter Regulation only allows for more demanding measures provided they were already in place when the Regulation entered into force on 1 January 2013, also such a requirement would be difficult to reconcile with EU law.

6.2.3 Antibiotics

Turning then to use of antibiotics in veterinary medicine, this is probably the most complex of all areas. Due to the growing problem of antibiotic resistance, a large number of EU directives have recently been replaced by a smaller number of *regulations*, most notably the ‘Animal Health Law’, which was adopted by the EP and the Council on 1 June 2015. As was found in the previous section, this means that Member States (as a general rule) are precluded from imposing more demanding national measures. In this case, it also follows from Article 257(1) of the Animal Health Law that Member States are only allowed to impose more demanding national measures within their *own* territories and only in rather *limited* areas. However, what is more problematic is whether the requirements laid down by the authorities in the above cases (stating that antibiotics may only be used as prescribed by a veterinary surgeon and when medically justified) are in fact *more demanding* than those provided for by EU law. Given that the final texts of the new Regulations have not been adopted yet, and that a number of detailed rules still are to be laid down by the Commission by means of delegated acts, it is probably too early to come to any firm conclusions. However, in so far as the requirements were to be considered more demanding, they would probably *not* be in compliance with EU law.

6.3 Question 1 a)

What significance does the greater harmonisation of EU secondary animal welfare legislation hold for the discretion of contracting authorities?

Turning then to the first sub-question raised in the beginning, it can be observed that EU secondary animal welfare legislation has become increasingly harmonised over the years: the Transport Directive and the Slaughter Directive have both been turned into regulations, the EP and the Council recently voted in favour of the ‘Animal Health Law’ (taking the form of a *regulation*) and the EU is currently considering the adoption of ‘General Framework Law’ on animal welfare, based on Article 114 TFEU. In so far as contracting authorities are to be bound by the ‘general’ rules on harmonisation (which this thesis considers them to be), this will inevitably have the effect of limiting their discretion. As was seen in the previous section, the Transport Regulation and the Slaughter Regulation have both had the effect of making the scope for more demanding national measures in these areas virtually non-existent. The same will probably be seen with respect to antibiotics. As far as the protection of certain species of animals is concerned, the margin of discretion already remains very limited due to the free movement clauses. With the adoption of a ‘General Framework Law’, this would probably be reduced even further. For this reason, the greater harmonisation of laws might well have the effect of turning animal welfare and public procurement into a ‘non-question’, thereby making higher standards within the Union generally the only possible option. This was also the argument put forward by the Swedish Competition Inquiry of 2015.

6.4 Question 1 b)

What significance does the introduction of Article 13 TFEU hold for the discretion of contracting authorities?

Turning then to the second sub-question, it can be observed that animal welfare now figures amongst the ‘constitutional’ provisions of the Treaty. This could probably have an impact when it comes to the hierarchy of norms and the proportionality assessment of the Court. Moreover, the ruling in *Zuchtvieh Export* suggests that Article 13 TFEU can have an important role to play in interpreting EU secondary legislation, such as the Transport Regulation. However, what reduces the significance of Article 13 TFEU is the greater harmonisation of EU secondary animal welfare legislation. In so far as Article 13 TFEU cannot ‘trump’ the level of harmonisation achieved by EU law (for example by making regulations less stringent or free movement clauses more lenient) its role remains confined to those areas that are *not* subject to any harmonising measures. Arguably, this means that the importance of Article 13 TFEU remains rather limited as things stand today.

6.5 Question 1 c)

What significance do the new Public Procurement Directives hold for the discretion of contracting authorities?

Turning finally to the third sub-question, it can be observed that Article 42(1) of the new Public Sector Directive now allows for contracting authorities to refer to the ‘production process’ when drafting the technical specifications. Given that animal welfare standards are concerned with the production process of meat, this could point towards a *wider* margin of discretion. However, what (again) reduces the significance of this reform is the greater harmonisation of EU secondary animal welfare legislation. In so far as the ‘general’ rules on harmonisation are equally applicable in the context of public procurement as well (which this thesis considers them to be and which *Medipac* and *Commission v Greece* provide support for) a revision of Article 42(1) will not be able to change this. This means that the impact of the new Procurement Directives remains rather limited as well.

6.6 Conclusion

To sum up this thesis in a few words, it has been found that the proposal put forward by the Swedish Minister – encouraging contracting authorities to require ‘Swedish’ standards of animal welfare when purchasing foodstuffs – would *not* be in compliance with EU law. While express references to ‘Swedish’ standards would be contrary to the principle of non-discrimination, more specific references would go against the level of harmonisation achieved by EU law. Neither Article 13 TFEU, nor the new Public Procurement Directives can change the outcome of this assessment.

6.7 The Future

The overall conclusion of this thesis may not seem very optimistic: contracting authorities are not allowed to refer to higher standards of animal welfare except for in very limited circumstances. Ultimately, this means that the market failure problem arising in the context of animal welfare (set out in section 2.2.3) will have to be addressed in a different manner.

The most obvious way, touched upon in section 6.3, would be to work towards higher standards of animal welfare within the Union generally. The first preparations for this work have already begun with the adoption of the 'Animal Health Law' and the possible adoption of a 'General Framework on Animal Welfare'. However, in order for these reforms to be more than a political gesture, it is important to ensure that they are binding upon the Member States. As things stand today, both the Transport Regulation and the Slaughter Regulation have as their *main rule* a very ambitious level of protection (transports shall not exceed eight hours and all animals shall be stunned before killed), while the actual level of protection is considerably lower. Therefore, if the EU wants to avoid a 'regulatory gap' in the Member States, it must ensure a high a level of protection *in practice*.

In achieving this goal, the newly inserted Article 13 TFEU could probably have an important role to play. Although it does not increase the possibilities for Member States to derogate from already harmonised European standards, it constitutes an instruction to the legislator to 'pay full regard' to the welfare of animals when implementing the EU's policies. Therefore, Article 13 TFEU could arguably be used to support a high level of protection when it comes to *common* legislation enacted at Union level.

Another, and perhaps less cumbersome, way by which the Union could work towards higher standards of animal welfare is by including specific 'public procurement clauses' in the various directives and regulations.⁴⁸¹ So for example, it follows from Article 6 of Regulation (EC) No 106/2008 on a Community energy-efficiency labelling programme for office equipment, that contracting entities shall specify energy-efficiency requirements at least as high as those set out in common legislation. By including this kind of clauses in the relevant legal acts (such as the Calves Directive or the Transport Regulation), the EU could find a workable middle-way as compared to raising the level of protection more widely. Ambitious Member States would then be able to impose higher standards of animal welfare in the context of public procurement as long as they treat all suppliers equally.

Therefore, even if Member States may not be able to deal with the animal welfare market failure by means of public procurement (at least as the law stands today) there are certainly other ways forward for the EU as a whole.

⁴⁸¹ See J Hettne, 'Strategisk upphandling – stärkt miljöskydd och socialt ansvar på en konkurrenskraftig inre marknad?' in A B Engelbrekt, L Oxelheim and T Persson (eds) *Europaperspektiv 2013* (Stockholm, Santérus Förlag, 2013), p. 257.

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