Expert opinion on the legal admissibility of the introduction of a national positive list for pet animals with special consideration of constitutional and European law aspects

submitted by
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Bonn, June 2023

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I. Background to the Statement

The keeping of pets in Germany enjoys - as far as can be seen: undisputed - constitutional protection. The European Convention for the Protection of Pets of 1987 (hereinafter: Pets Convention)[1] defines in Article 1 (1) a pet as " any animal kept or intended to be kept by man in particular in his household for private enjoyment and companionship". Thus, particularly central purposes of private pet keeping are at the same time recognized as protected under international law. In addition to this qualitative dimension of pet ownership, the quantitative aspect is also noteworthy: in almost every second household, people live together with cats, dogs and exotic pets such as guinea pigs, ornamental fish or budgies.[2] With the legal implementation of a so-called positive list, this picture would change dramatically: The positive list approach assumes that the keeping of any pet is initially prohibited - and that only those pets that are exceptionally included in the corresponding species list and thus "positively" named there can be exempted from this basic ban on keeping and ownership. This expert opinion examines whether and, if so, what legal limits exist for the introduction of such a positive list.

II. International Law

In accordance with the hierarchy of norms, the following section first examines the framework conditions under

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[1] ETS No. 125; https://rm.coe.int/168007a699 (12.03.2023).
[2] Der deutsche Heimtiermarkt 2022 - Repräsentative Studie des Marktforschungsinstituts Skopos im Auftrag von IVH und ZZF, https://www.zzf.de/marktdaten/heimtiere-in-deutschland (11.04.2023).

international and European Union law, before moving on to the level of constitutional law.

1. Functioning of international law

International law does not entitle or bind private individuals or companies, but only so-called subjects of international law.[3] Apart from a few historically grown exceptions, subjects of international law are states and international organisations.[4] In order for a treaty or convention under international law to be binding on these actors, certain requirements must be met, which are laid down in particular in Art. 11 et seq. of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations ("Vienna Convention").[5]

2. International law on animal keeping

At the level of international law, regulation complexes under animal law are primarily found at the level of species protection. In this respect, CITES law should enjoy particular prominence, although it is conceived as negative list-based species protection law and is therefore - at least directly - not relevant to the present issue.[6]

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[3] Herdegen, Völkerrecht, 22. Ed. 2023, § 7 margin number 1 et seq.
[4] Herdegen, Völkerrecht, 22. Ed. 2023, § 7 margin number 3 et seq.
[5] Federal Gazette 1985 II p. 926.
[6] For the general information on the CITES regime and the indirect consequences of the regulatory approach pursued there, see III.3.a.aa.

a. Pet Convention

Of central importance for pet keeping, however, is the Pet Convention already mentioned above. Contrary to what the name and the origin might suggest, this Convention is not a legal act of the European Union, but of the Council of Europe, which is not part of the European Union. Since Russia's exclusion at the beginning of 2022, the Council of Europe, which was founded in 1949, currently has 46 member states with almost 680 million citizens. Among others, Japan, Canada and the USA have so-called observer status.[7] The Council of Europe is thus indisputably an international organisation that enacts international law.

Art. 17 of the Pet Convention stipulates, against the background of the Vienna Convention, that in order for a state to be bound by the Convention, it must sign it and also ratify, accept or approve it. According to the official list of signatures and ratifications, the Pet Convention applies by virtue of signature and ratification not only to France, Italy and Spain, for example, but also to Germany.[8] This means that the Federal Republic of Germany is bound by the provisions of the Pet Convention under international law.

It is surprising that legal policy statements advocating the introduction of a positive list only mention this central source of international law relating to pet ownership in passing, in order to refer to the pet

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[7] https://www.coe.int/de/web/about-us/our-member-states (16.03.2023).

[8] https://www.coe.int/de/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum=125 (17.03.2023).

definition to be found there.[9] This ultimately gives the - false - impression that it is not a legally binding instrument of international law that deserves further attention. Above all, it completely ignores the fact that international law not only does not consider pet ownership as such to be critical, but on the contrary even wants to promote it in principle. Against this background, it is worthwhile to take a precise look at the legal findings at the level of international law, which will be provided in the following.

b. Objectives of the Pet Convention

The central objectives of the Pet Convention are already comprehensively described in the preamble to the binding text. In this respect, in order to avoid misunderstandings, it must first be made clear that the preamble does not contain legally irrelevant "prefaces", but is rather of central importance for the analysis and interpretation of international conventions. Article 31 (1) and (2) of the Vienna Convention makes this unequivocally clear:

> „1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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[9] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 9 et seq.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[10]

Thus, the normative text in its entirety proves to be a relevant starting point for the interpretation of the treaty under international law, whereby the preparatory work[11] can be taken into account as a complementary factor.[12]

aa. Setting the Course of the Preamble

The preamble to the Pet Convention is not only about the "ethical obligation (of man) to respect all living beings"[13], but also about the avoidance of, for example, hygienic hazards[14], or about the promotion of the health and well-being of pets associated with improved housing conditions.[15] However, in addition to these statements

[10] There is no official German version of the Convention; therefore, a translation prepared by the Austrian Federal Chancellery has been used here: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000684 (05.05.2023).
[11] So-called „travaux préparatoires".
[12] In detail: Heintschel von Heinegg, in: Ipsen (Ed.), Völkerrecht, 7. Ed. 2018, p. 474 et seq.; Herdegen, Völkerrecht, 22. Ed. 2023, p. 146 et seq. See also: Nettesheim, in: Grabitz/Hilf/Nettesheim (Eds.), Das Recht der Europäischen Union, 77. supplement September 2022, AEUV Preamble margin number 14 et seq.
[13] Preamble, recital No. 2.
[14] Preamble, recital No. 5.
[15] Preamble, recital No. 8.

aiming at the protection of pets, there are further recitals in the preamble which are of considerable relevance to the topic of interest here. If one reads the first three recitals of the preamble "in one piece", it becomes clear that the Council of Europe follows a clear regulatory philosophy:

> „The member States of the Council of Europe signatory hereto,
>
> Considering that the aim of the Council of Europe is to achieve a greater unity between ist members;
>
> Recognising that man has a moral obligation to respect all living creatures and bearing in mind that pet animals have a special relationship with man;
>
> Considering the importance of pet animals in contributing to the quality of life and their consequent value to society; (…)"

The first recital of the preamble initially represents "only" a general commitment to the fundamental aims of the Council of Europe and is therefore irrelevant here. The first substantial statements are therefore found in recitals two and three. The second recital places man's ethical obligation to respect all living beings on an equal level with the "special relationship of man to pets". Pets and their keeping are thus not classified as a social aberration or described as inadmissible at the very beginning of the Convention, but on the contrary are recognised as a central component of human existence.

Anyone who doubts this classification will find their doubts completely dispelled in the third recital of the preamble immediately following: On the one hand, animals make a "contribution to the quality of life" and, on the other hand, their "value to society" follows from this. Thus, the Pet Convention naturally addresses the intrinsic value of pets - but just as naturally, it emphasises that pets improve the quality of human life and that the value of pets for society as a whole is to be derived from this contribution to improving the quality of human life.

This classification and location already results in a) an anthropocentric approach of the Pet Convention relevant in the following and b) the claim of the Pet Convention to improve pet keeping from an animal ethics and technical point of view, but otherwise to recognise it and to protect it as far as possible due to fundamental positive aspects for individual humans on the one hand and for society as a whole on the other.

A comparison with the official[16] French version of the Convention shows that this statement at the beginning of the preamble, which determines the entire interpretation, is not a translation error. There it says "Considérant l'importance des animaux de compagnie en raison de leur contribution à la qualité de la vie et, partant, leur valeur pour la société".[17] There can therefore be no serious doubt that the Convention not only aims to improve animal welfare standards, but also protects pet ownership in the light of its individual and societal benefits.

[16] Legally binding are the English and the French versions; vgl. https://www.coe.int/en/web/conventions/-/council-of-europe-european-convention-for-the-protection-of-pet-animals-ets-no-125-translations (17.03.2023).
[17] https://rm.coe.int/168007a684 (17.03.2023).

Beyond this, the preamble also allows statements to be made on the central directions of this instrument of international law. On the one hand, Recital No. 7 mentions the awareness „of the different conditions which govern the acquisition, keeping, commercial and non-commercial breeding and disposal of and the trading in pet animals". The tenth recital concluding the preamble emphasises "that a basic common standard of attitude and practice which results in responsible pet ownership is not only a desirable, but a realistic goal". The Pet Convention thus emphasises a) the ownership of pet animals, b) the possibility of acquiring pet animals, c) the possibility of trade in pet animals, d) the existence of commercial breeding, e) the existence of non-commercial breeding. All of these human behaviours are thus not classified as impermissible under international law, but on the contrary are recognised as fundamentally justified.

bb. Interim result: Protection of the rights of keepers and traders

The disadvantages or even risks for humans and animals resulting from a lack of expertise or poor housing conditions are thus naturally the focus of the Pet Convention (and consequently the subject of the detailed provisions in the legally binding part of the Convention discussed below), but they stand on an equal footing with the rights and interests of keepers and traders and thus do not even begin to lead to the idea of a massive restriction on pet keeping. A fortiori, no ethical or political concepts aiming at such a comprehensive restriction of pet ownership are taken up by the Convention.

cc. Further developments in the provisions of the Convention

The basic positions already clearly laid down in the preamble and the course set are then consistently implemented in the individual provisions of the Pet Convention: The second chapter of the Convention is devoted to the principles for the keeping of pet animals and here specifically to the principles for the welfare of animals[18], central keeping requirements[19], breeding[20], the age limit for acquisition[21], training[22], trade, commercial breeding and keeping and animal shelters[23], the use of animals for advertising and comparable purposes[24], surgical interventions[25], as well as the killing of pet animals.[26] Chapter 3 then contains additional measures for stray animals[27]; Chapter 4 refers to information and education measures.[28] The final chapters, 5 to 7, are more formal and refer to multilateral consultations, the amendment procedure and common[29] contractual final provisions.[30]

The dichotomy of the Pet Convention runs like a red thread through all these provisions and can already be illustrated by the general husbandry requirement of Art. 4: The keeping

[18] Art. 3.
[19] Art. 4.
[20] Art. 5.
[21] Art. 6.
[22] Art. 7.
[23] Art. 8.
[24] Art. 9.
[25] Art. 10.
[26] Art. 11.
[27] Art. 12 et seq.
[28] Art. 14.
[29] Se explicitly the Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), Addendum to CAHPA (86) 13, No. 48.
[30] Art. 15 et seq.

of any pet animal is indeed linked to the condition of observing the ethological needs of the animal[31]; however, a ban on keeping is only considered permissible in two constellations: either it is certain that the basic ethological needs expressly specified as indispensable minimum standards - namely "suitable and sufficient food and water", "adequate opportunities for exercise" and, interestingly, also escape prevention - are not fulfilled[32], or else the "animal (cannot) become accustomed to captivity despite fulfilling these conditions (...)".[33] On the one hand, the Convention wants to ensure that the basic needs of pets are met - on the other hand, the Convention does not realise any maximum positions propagated by animal ethics or animal rights policy. On the contrary, it explicitly recognises that pet animals may be kept even if these minimum standards are met, and that pet animals may be kept "in captivity"[34] for the individual and societal reasons given priority.

This finding is not intended to justify a lack of existence of the broader discussion on animal ethics, nor is it intended to cast doubt on the overriding relevance of animal welfare. However, a legal analysis of applicable international law must always be carried out in accordance with jurisprudential methodology and must therefore meet legal standards so that the results generated in this way are actually legally viable. In the present case, however, such a legal finding is - as explained - unambiguous.

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[31] Art. 4 para. 2.
[32] Art. 4 para. 3 lit. a).
[33] Art. 4 para. 3 lit. b).
[34] In French, the term "captivité" is used accordingly.

Without prejudice to the following remarks on the concept of strengthening protection[35], an unbiased analysis of Art. 4 alone shows that strengthening protection must not lead to de facto bans on keeping pets: the keeping of pets is the explicitly permissible rule and the ban on keeping pets is the exception that requires justification. Thus, although Member States of the Convention could in individual cases expand the catalogue of circumstances justifying the keeping of pets, this could not be done in such a way that the rule-exception relationship would be reversed. Any other view would be incompatible not only with the laws of logic, but also with legal methodology.

As already mentioned, the dichotomy "improvement of the welfare of pets / basic permissibility of pet keeping and trade" characterises the entire Convention and is therefore not only echoed in the preamble or the cardinal norm of Art. 4:

- Art. 5, for example, lays down breeding bans - but at the same time allows everyone to keep pets without any further restriction, provided they are observed.

- Art. 6 sets the age limit for the acquisition of pets at 16 years - and allows e contrario any acquisition by those over 16 years of age.

- Art. 7 prohibits certain forms and methods of training - but considers training as such to be permissible as a matter of course.

[35] See below under c.

- The commercial or commercial-like activities of commercial breeding and keeping, as well as the operation of animal shelters, are subject to notification[36]; the permissibility of the corresponding activities is then linked to sufficient expertise and suitable premises.[37] According to Art. 8 para. 4 sentence 2, a prohibition of such activities can only be considered if the means of official admission, which is considered to be of primary importance, is not effective and the welfare of the animals also makes a prohibition necessary.

- Advertising and comparable measures are not permitted under Art. 9 para. 1 sentence 1 - but this does not apply if the fundamental husbandry requirements of Art. 4 para. 2 are observed, if at the same time it is ensured that the health and welfare of the animals are not impaired.[38]

- Even the killing of pets for purposes other than veterinary medicine is not prohibited without exception.[39]

dd. Interim result

The overall conclusion is that the international Pet Convention - quite rightly - identifies and defines relevant minimum requirements for the welfare of pets. Conversely, however, all relevant human activities involving pets are explicitly classified as permissible.

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[36] Art. 8 para. 1 and 2.
[37] Art. 8 para. 3.
[38] Art. 9 para. 1.
[39] Art. 11.

This applies in particular to private husbandry, private breeding, commercial breeding and trade. The anthropocentric orientation of the legal system is not only not questioned, but on the contrary presupposed and further perpetuated. The remarks on the ownership of pets may suffice as an indication in this respect. A restriction of these owner and trader interests and rights - which are also protected under human and constitutional law[40] - is consequently incompatible with the Pet Convention and thus contrary to international law.

In the legal-political discussion, there are occasional attempts to negate or break through these framework conditions with reference to the possibility of a so-called strengthening of protection. The figure of strengthening protection, which is quite familiar in international law, is therefore the subject of separate considerations in the following.

c. The figure of strengthening protection

As already mentioned in the introduction[41], the part of the legal policy discourse calling for the introduction of a positive list almost completely ignores the Pet Convention. The above remarks should have made it clear that this is not an inadvertent omission, but a deliberate choice, since the Pet Convention makes it sufficiently clear that private pet ownership is a very high value under international law, which in principle should not be touched.

This assumption of a deliberate omission is supported by another indication: Apart from the definition of pet in

[40] See below under III. and IV.
[41] See under II.2.a.

Art. 1 para. 1, only one other provision of the Pet Convention, Art. 2 para. 3, is taken into account by the proponents of a positive list.[42] Art. 2 para. 3 of the Convention reads as follows: "Nothing in this Convention shall affect the liberty of the Parties to adopt stricter measures for the protection of pet animals or to apply the provisions contained herein to categories of animals which have not been mentioned expressly in this instrument." This norm is called "decisive" in the discourse, quoted - and then not given a second thought.[43]

This, of course, creates the - false - impression that the Convention is subject to a more or less arbitrary expansion on the part of the member states via this possibility of strengthening protection by the member states. A closer look, however, shows that such an approach is not in conformity with international law and, moreover, does not reflect the will of the creators of the Convention. In detail:

aa. The Effect of Strengthened Protections in International Law

The strengthening of protection under international law is a "classic" instrument of international law and can therefore be found not only in "animal law" or in environmental law[44], but in a good part of all

[42] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 10.
[43] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 10.
[44] Cf. With regard to CITES: Feichtner, in: Krenzler/Herrmann/Niestedt (Eds.), EU-Außenwirtschafts- und

international conventions. The Council of Europe's Convention on Human Rights and Biomedicine[45], which is dedicated to the protection of human beings in the application of biology and medicine, and thus in particular medical research, is merely an example.[46] Article 27 of the Biomedicine Convention, entitled "Wider Protection", then reads as follows: " None of the provisions of this Convention shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention."

Strengthening protection is thus something that is perfectly self-evident from the point of view of international law. These clauses derive their indisputable raison d'être from the way international law norms function and, in particular, how they come into being. For the establishment of international law is almost without exception preceded by intensive and protracted negotiations between states, which inevitably lead to the fact that a) almost every agreement under international law contains numerous and far-reaching compromises and b) hardly any international treaty finds the unqualified consent of all states.[47]

Due to these circumstances, many treaties under international law are characterised by minimum standards or

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Zollrecht, 20. supplement September 2022, Artenschutz-VO before Art. 1 margin number 36 et seq.

[45] ETS No. 164, https://rm.coe.int/168007d002 (20.03.2023).

[46] Art. 1 para.. 1.

[47] General information on the functions and effects of international law: Herdegen, Völkerrecht, 22. Ed. 2023, § 4.

by a minimum degree of protection of the respective protected goods - such as the environment, culture, human rights, animals, biodiversity, climate, etc.. These legal and atmospheric framework conditions lead to the fact that member states that want to do "more than the minimum" are given corresponding room for manoeuvre. At the same time, this is a reaction to the fact that, depending on the protected good, the previous standard of protection can show extreme deviations from one member state to the next and that, in addition, perceptions about the relative worthiness of protection of certain goods and interests are subject to strong fluctuations.

If a member state wants to "do more" in this sense, however, the corresponding legislative activities are clearly limited by the requirements of the respective convention to be "strengthened". In view of the careful balancing of every international law text described above and the comprehensive and intensive negotiations that precede every international treaty, the negotiation results standardised in the convention must not be thwarted by national "reinforcements of protection". This is because every treaty under international law makes every effort to ensure that all the rights and interests concerned are adequately protected.

For example: Art. 15 et seq. of the above-mentioned Biomedicine Convention regulate scientific research in the biomedical field and, against this background, establish certain (minimum) standards of protection for research participants as a result of extensive consultations and negotiations between the member states. However, the " protection enhancement clause" of Art. 27 of this Convention cannot be used by a member state to prohibit all

biomedical research with the argument that "no research would be the best protection for research participants". From a purely empirical point of view, this effect of a total ban may be true, but by signing and ratifying (and thus bringing into force) the respective convention, the member state is at the same time committing itself to the basic assumptions standardised there - which in the example mentioned include the existence of biomedical research.

Strengthening of protection must therefore necessarily be more detailed and more specific - in the present case, for example, in the form of increased documentary requirements. If a state does not wish to recognise the right to exist of biomedical research as expressed in the Biomedicine Convention, it may not sign and/or ratify the Convention from the outset, or it must - as far as possible - make use of any possible reservations. This is exactly what happened in the case of the Biomedicine Convention: Germany neither signed nor ratified the Biomedicine Convention due to political concerns regarding research on persons incapable of giving consent.

Transferred to the Pet Convention, the following applies: The creators of the Convention have - as stated - recognised private keeping, non-commercial breeding, commercial breeding and trade as worthy of protection. Likewise, the relevance of private pet keeping for humans and for society as such is emphasised. The anthropocentric approach of the legal system is also confirmed and continued. States that do not conform to these assumptions may thus not support the Convention from the outset. However, the Federal Republic of Germany has signed and ratified the Convention and is consequently bound by the

aforementioned basic assumptions negotiated under international law.

bb. In particular: The effect of the prohibition of reservation according to Art. 21 para. 1 sentence 2

In this context, it is also interesting (and quite relevant for consideration) that the Federal Republic of Germany has made use of the reservation option mentioned in Art. 21 para. 1 sentence 1 of the Pet Convention.[48] In this respect, the Federal Republic of Germany has declared that it does not wish to recognise the minimum age limit for the acquisition of pets set out in Art. 6 of the Convention and the ban on docking set out in Art. 10 (1) (a) of the Convention.[49] By these actions, too, the Federal Republic of Germany shows that, as a subject of international law, it otherwise complies with the basic assumptions of the Convention - as a matter of course.

Finally, the reservation clause of Art. 21 provides further insights into the question of interest in this case. For Art. Art. 21 para. 1 of the Pet Convention reads as follows: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations in respect of Article 6 and Article 10, paragraph 1, sub-paragraph a. No other reservation may be made." This means, on the one hand, that reservations must be declared at a certain point in time - at the latest

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[48] https://www.coe.int/de/web/conventions/cets-number-/-abridged-title-known?module=declarations-by-treaty&numSte=125&codeNature=2&codePays=GER (21.03.2023).

[49] https://www.coe.int/de/web/conventions/cets-number-/-abridged-title-known?module=declarations-by-treaty&numSte=125&codeNature=2&codePays=GER (21.03.2023).

when the Convention finally enters into force. This is not only for the sake of legal certainty, but in view of the negotiation procedures of international law described above, it is above all intended to prevent the treaty from being "renegotiated" for an indefinite period of time. On the other hand, it is of particular relevance that Art. 21 para. 1 sentence 2 of the PetCare Convention only considers the age limit and the ban on docking to be subject to reservations and, conversely, explicitly declares all other reservations to be inadmissible.

This fundamental prohibition of reservations in Art. 21 para. 1 sentence 2 may not be circumvented by de facto bans on keeping animals. This is because the drastic reduction (and depending on the species: absolute impossibility) of pet keeping that would inevitably - and intentionally[50] - go hand in hand with a positive list would represent a "maximum reservation" of the Federal Republic of Germany in regulatory and normative terms. By introducing a positive list, the Federal Government would thus acquire possibilities for action that are prohibited to it under Art. 21 para. 1 sentence 2 of the Pet Convention.

cc. The intention of the creators of the Convention: Restriction of Art. 2 para. 3 to guard dogs and the like

The above remarks on the limited effect of the option of strengthening protection in Art. 2 para. 3 are fully confirmed by the intention of the creators of the Pet Convention. Although the unambiguous findings on the textual analysis clearly push the relevance of the

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[50] See Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 2.

historical embedding into the background[51], it should nevertheless be pointed out for the sake of completeness that the Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), which was responsible for the textual work on the Pet Convention, did not declare any reservations or limitations of any kind with regard to the basic legal assumptions elaborated above and, in particular, also took the anthropocentric approach of the Convention for granted.[52]

However, it is of considerable interest to note that Art. 2 para. 3 of the Convention, which - as mentioned - is presented by parts of the legal-political discourse as a supposedly "simple" regulatory possibility for national maximisation of "pet protection" through a positive list, has a completely different background: There was considerable disagreement among CAHPA experts about the inclusion of guard or working animals in the pet definition and thus in the scope of the Convention. These intensive discussions did not subside even after the work on the relevant text parts had actually been completed.[53] Art. 2 para. 3 of the Convention was then created as a compromise. After a detailed description of the disputes between the experts[54], it then finally states:

[51] Heintschel von Heinegg, in: Ipsen (Ed.), Völkerrecht, 7. Ed. 2018, p. 474 et seq.; Herdegen, Völkerrecht, 22. Ed. 2023, p. 146 et seq.
[52] See just Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), Addendum to CAHPA (86) 13, No. 11 und No. 26
[53] Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), CAHPA 86 (12) No. 20.
[54] Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), CAHPA 86 (12) No. 15 – 19.

> „The Committee finally agreed on a proposed amendment to the Article (2) suggested by the Expert from France. Under this amenedment not only individuals but also juridical persons keeping pet animals would be mentioned in paragraph 1, to cover firms employing guard-dogs. A third paragraph would also be added to the article allowing member States to adopt stricter rules for the protection of pet animals the Convention´s provisions to categories of animals not specifically mentioned in it. The Committee agreed to amend ist Explanatory Report accordingly and to delete in particular the references to working animals (draft Explanatory Report paragraph 15) and packs of hounds (paragraph 19)."[55]

Art. 2 para. 3 of the Convention is thus to be seen exclusively embedded in the debate about working animals and in particular guard dogs, which are then consequently also explicitly mentioned again in the concluding Explanatory Report of the CAHPA.[56]

d. Interim result

A national pet positive list would be incompatible with the obligations that the Federal Republic of Germany has imposed on itself under international law with the Pet Convention of the Council of Europe. The Pet Convention not only explicitly recognises the need for protection of private animal husbandry, breeding and trade, it also prohibits national " solo efforts" that run counter to the

[55] Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), CAHPA 86 (12) No. 20.
[56] Ad Hoc Committee of Experts for the Protection of Animals (CAHPA), Addendum to CAHPA (86) 13, No. 15.

basic assumptions of the Convention. The so-called reinforcement of protection in Art. 2 para. 3 of the Convention does not contradict this. On the contrary, the norm only allows for certain fine adjustments in accordance with general standards of international law; in addition, the norm is embedded in a highly specific discourse, especially on the use of guard dogs. A national pet positive list would therefore violate applicable international law.

III. European law

The assessment of a positive list under European law is determined in particular by the so-called fundamental freedoms. In the event of the introduction of such a list at the level of Union law, the Charter of Fundamental Rights of the European Union would also be relevant. Both sets of issues are examined separately below.

1. Fundamental freedoms

The fundamental freedoms of the European Union are rooted in the history of the European Economic Community and the European Coal and Steel Community, which initially aimed at economic cooperation.[57] For decades, in the absence of a catalogue of fundamental rights under Union law, the fundamental freedoms also guaranteed basic protection of the individual against discriminatory measures by individual member states. The catalogue of fundamental freedoms includes the free movement of goods, the free

[57] See just Rossi, Entwicklung und Struktur der Europäischen Union - eine graphische Erläuterung, in: ZJS 2010, 49 et seq.

movement of persons, the free movement of services and the free movement of capital and payments.

a. Free movement of goods

Of particular relevance for the realisation of the internal market is the so-called free movement of goods. Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU) are relevant here:

> „Article 34
>
> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.
>
> Article 35
>
> Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."

In comparison to the comparatively crude interventions in the free movement of goods by means of import or export restrictions, other forms of restriction, which are referred to as "measures having equivalent effect" and on which a rich body of case law of the European Court of Justice has developed, are incomparably more relevant.

The fact that animals are to be regarded as goods in this sense is self-evident in view of the framework conditions of property law that apply in all Member States of the Union, but will only be briefly mentioned here for the sake of clarification. Consequently, in addition to the European

Court of Justice[58], even the proponents of a positive list point out that pets fall under the definition of goods.[59]

aa. Positive list as a measure of equivalent effect

The so-called measures of equivalent effect have been significantly concretised by the European Court of Justice, in particular in its decisions in the Dassonville, Keck and Cassis de Dijon cases. Since the corresponding explanations have already been given elsewhere, reference can be made to the statements made there.[60] Consequently, as the advocates of a positive list also point out[61], it can be considered certain that the use of this regulatory instrument would cause barriers to trade and must therefore be measured against the standard of the free movement of goods. However, there is disagreement on the question of whether this interference with the free movement of goods can be justified. This aspect is the subject of the following considerations.

bb. Possible justifications

Interference in the free movement of goods can be justified under certain conditions. The central normative connecting factor in this respect is Article 36 TFEU:

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[58] ECJ, Case C-67/97, Coll. 1998, I-8033 margin number 13 et seq.

[59] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 15.

[60] Cf. Spranger, Heimtierhaltung und Verfassungsrecht, 2018, p. 131 et seq.

[61] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 15 et seq.

„Article 36

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

aaa. View of the advocates of a positive list

In view of these legal requirements, the advocates of a positive list state apodictically: "There can be no reasonable doubt about the existence of a permissible justification in view of what has been stated above under point I. A positive list would obviously pursue legitimate aims".[62] If one then analyses the statements described as the foundation of this statement, something surprising comes to light: the passages in question do not represent a methodically guided and thus legally correct examination of the individual justification options, but rather a collection of the most diverse statements that are almost irrelevant to Article 36 TFEU. In detail:

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[62] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 17; translation by the author.

Point I of the above-mentioned document, entitled "Facts", first describes alleged disadvantages of keeping pets. Among the ailments of many pets alleged in a few sentences are abnormal behaviour, psychological abnormalities or (auto)aggression[63] - these scientific or veterinary claims are then substantiated by an unpublished legal assessment[64] and thus by secondary sources that are not even scientifically relevant. Such a procedure does not even meet the most basic scientific requirements.

If one also takes the effort to examine the quoted passage of the aforementioned legal opinion to see on which basis which statements are made there, astonishing things come to light. The original, unabridged passage reads as follows:

> „Exotic animals which are brought to Europe to serve as pet animals are taken away from their natural environment and placed in local conditions which are not at all comparable with their original environment. Most private owners of exotic pet animals do not know enough of the natural conditions of the life of the animal in its original environment, about its social structures (life with other animals), its day and night rhythm, its needs and habits of food, of rest and of movement. And even, if they knew, they are normally unable to offer similar conditions to the exotic animal. Furthermore, regularly, owners do not have enough space and other housing possibilities to

[63] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 4.

[64] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 4, footnote 3. Reference is made to Krämer, EU law and a positive list for companion animals, p. 8 et seq.

make the life conditions of exotic animals similar to those of their original space. This is in particular the case, when exotic animals are acquired while they are young and small, as the needs of adult animals - feed, movement, companionship, space etc. - are frequently different.

As a result, exotic animals in captivity - and for an animal, being kept as a pet, means that it is in captivity - frequently suffer from boredom, isolation, inadequate nutrition lack of sunshine and lack of social and medical treatment. Evidence for their suffering is an abnormal behaviour, such as monotone movements, self-mutilation, aggression, stress from loneliness or other signs of negative psychological status. The mortality of exotic pet animals is very high.

The taking of exotic animals from the wild and the subsequent transport to Europe causes supplementary stress and high mortality rates for the animals; some researchers estimate that for one chimpanzee which comes to Europe, some fifty chimpanzees died during capture and transport. Long-term consequences of the stress of capture and transport for the animal are very likely, though not capable of being proven scientifically.

Concluding this section, attention is drawn on the checklist for the welfare of pet animals developed by Schuppli and his co-authors which is widely recognized as establishing an appropriate standard and which clearly shows the considerable requirements that

> owners of pet animals should comply with, in order to ensure an appropriate welfare for their pet animal."[65]

There are only three footnotes in this entire passage, two of which concern the last paragraph and the - here irrelevant - checklist by Schuppli et al. The first paragraph, in which countless assertions are made about various aspects of pet keeping, remains completely unsubstantiated. Consequently, at the end of the second paragraph, there is the only (sic!) footnote by means of which the legal author wants to substantiate what is claimed. This footnote reads unabridged as follows:

> „The British Captive Animals' Protection Society reports that 26 per cent of pet tortoises die within the first year, and 92 per cent within four years, in: Exotic animals are not pets; https://www.captiveanimals.org/wp-content/uploads/2011/02/Exotic-pets-factsheet.pdf. The mortality of reptiles is said to be much higher than of any other pet animals. However, all such figures and statements are disputed among pet shops, breeders, animal welfare groups etc.."[66]

To put it in a nutshell: the other legal opinion cited as a secondary source in a legal opinion to justify alleged animal welfare deficits does not contain any citable sources for animal welfare deficits. Hearsay statements about how reptile husbandry "should" be are also unsuitable to justify state intervention. The open admission by the

[65] Krämer, EU law and a positive list for companion animals, p. 8.
[66] Krämer, EU law and a positive list for companion animals, p. 8, footnote 32.

author of the above-mentioned secondary opinion that some of the alleged effects cannot be scientifically proven and are therefore arbitrary gets to the heart of the matter: not only the proponents of the positive list, but also the secondary source cited there simply lack even the most rudimentary evidence for the alleged animal welfare disadvantages.

This is followed by a few lines on biodiversity, ecosystem protection and climate change[67] in the context of the positive list advocacy, before the economic volume of the animal trade - more precisely: animal smuggling - is addressed.[68] This is followed by a few sentences on the dangers of zoonoses and so-called dangerous or poisonous animals.[69]

It remains a complete mystery how such a compilation of more or less incoherent aspects, which at best are only buzzwords and do not even rudimentarily meet scientific criteria, and which moreover only marginally concern the conventional pet trade, can justify the conclusion that there can be "no reasonable doubt" about the existence of a permissible justification within the meaning of Article 36 TFEU. At least on the basis of generally accepted legal and jurisprudential standards, the aforementioned statements do not even represent an attempt at a proper justification test. Such an examination must first be guided by the

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[67] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 5 et seq.
[68] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 6 et seq.
[69] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 8.

wording of the law and in particular take into account the existing case law. The following explanations provide such a methodically guided analysis.

bbb. Grounds for justification according to Art. 36 TFEU

Art. 36 TFEU names several grounds for justification which, at least on a superficial view, could be used to justify an infringement and which will therefore be analysed separately in the following.

(1) Public security and order

The European Court of Justice understands the concept of public security according to Art. 36 TFEU much more narrowly than is the case in the German legal system. Public security in this sense is only involved when it concerns matters of internal or external security essential to the existence of a state, in particular the "functioning of its economy, [. . .] that of its institutions and its essential public services, and [. . .] the survival of its population."[70] An invocation of public policy within the meaning of Article 36 TFEU can only be considered if there is "a genuine and sufficiently serious threat affecting one of the fundamental interests of society."[71] The concepts of public security and public order are thus clearly not to be equated with the objects of protection under police and security law in German police and public order law.[72]

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[70] ECJ, Coll. 1984, 2727, margin number 34.
[71] ECJ, Case C-36/02, Coll. 2004, I-9609, margin number 30.
[72] Kingreen, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed 2022, Art. 36 margin number 198 et seq.

In the opinion of the European Court of Justice, a question of public security is therefore, for example, regulations to secure the supply of oil.[73] Irrespective of the fact that allegedly dangerous animals in Germany are now almost comprehensively covered by state police and public order law[74], irrespective of the lack of valid proof of danger and ignoring constitutional framework conditions, and for this reason alone no continuing critical "security situation" can be constructed, this example illustrates the dimension of the concept of security covered by Article 36 TFEU. The "risks" caused by keeping chipmunks, zebrafish and other pets have no relevance here.

(2) Protection of health and human life

If the Member States of the European Union wish to justify trade-restrictive measures by reference to the protection of health and life to be granted, it is a matter of general conviction that in this respect recourse to mere presumptions or allegations is prohibited. The European Court of Justice clearly states here:

> „As for the second point, it must be borne in mind that, as the Court has consistently held (see in particular Case 227/82 Van Bennekom [1983] ECR 3883, paragraph 40), it is for the Member States to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty and, in particular, to show that the marketing of the

[73] ECJ, Case 72/83, Coll. 1984, 2727, margin number 34.
[74] Cf. Spranger, Heimtierhaltung und Verfassungsrecht, 2018.

> product in question creates a serious risk to public health."[75]

In this respect, it is rightly pointed out that the degree of the obligation to substantiate as an expression of the principle of proportionality depends in particular on the intensity of the threat of danger in the individual case and the probability of occurrence.[76] It is not necessary that damage has already occurred, because effective protection often requires preventive measures. However, there is an obligation - which must be examined regularly within the framework of necessity - to comprehensibly prove the necessity of the intervention with reference to scientific findings or European/international standards.[77]

The European Court of Justice demands in particular that the existence of a real risk to public health must be determined and assessed, which requires a detailed examination of the possible threatening consequences in each individual case.[78] The member state must therefore carry out a detailed examination of the risk; as a result, the asserted risk to health must be regarded as sufficiently proven on the basis of the latest scientific information available at the time of the adoption of such a ban. In such a context, the subject of the risk assessment

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[75] ECJ, Case C-228/91, Coll. 1993, I-2701, margin number 28.
[76] Kingreen, in: Calliess/Ruffert (Eds.), EUV/AEUV, 5. Ed. 2016, Art. 36 margin number 199; Leible/Streinz, in: Grabitz/Hilf/Nettesheim (Eds.), Das Recht der Europäischen Union, 63. supplement December 2017, Art. 36 margin number 23.
[77] See also the references made by Kingreen, in: Calliess/Ruffert (Eds.), EUV/AEUV, 5. Ed. 2016, Art. 36 margin number 199.
[78] ECJ, Case. C-150/00, decision of. 29.4.2004, margin number 96.

to be carried out by the member state is consequently the assessment of the degree of probability of adverse effects on human health and the severity of those potential effects.[79] It is also important to note in this context that the European Court of Justice has consistently held that the risk alleged must be "assessed on the basis of the most reliable scientific data available and the most recent results of international research".[80]

As a consequence of this case law, a positive list cannot be based on the relevant justification. Irrespective of the question of the type and quality of the literature cited by the positive list proponents in support of the zoonosis thesis[81], it is true that the zoonosis research that has been vigorously pursued in recent years, which is bundled under the umbrella of the National Research Platform for Zoonoses and the Zoonotic Infectious Diseases Research Network[82], shows impressively that pet keeping does not play a decisive role here, either quantitatively or qualitatively. Rather, zoonoses occur primarily in domesticated farm animals as a side effect of the domestication process.[83] And without trivialising the issue inappropriately: challenges associated with zoonoses can usually be avoided by adhering to what are actually

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[79] ECJ, Case. C-95/01, decision of 5.2.2004, margin number 41 et seq.
[80] ECJ, Case C-672/15, decision of 27.4.2017, margin number 48 et seq.
[81] The corresponding statements are mainly based on a non-quotable reader's letter or forum opinion.
[82] https://zoonosen.net/forschungsnetz (21.03.2023).
[83] In detail: ZZF- Stellungnahme zum Risiko von Zoonosen beim Handel mit als Heimtieren gehaltenen Wildtieren, 05.07.2020; https://www.zzf.de/stellungnahme/stellungnahme-des-zzf-zum-risiko-von-zoonosen-beim-handel-mit-als-heimtieren-gehaltenen-wildtieren (11.05.2023).

self-evident basic hygiene measures.[84] Should an individual species of pet animal nevertheless be identified as relevant with regard to zoonoses in the future, the existing law on the prevention of hazards would provide all the necessary instruments. Health and life protection are therefore not suitable grounds for justification.

(3) Protection of animal health and life

Article 36 TFEU also mentions the health and life of animals as a justification for state actions that restrict the free movement of goods. In principle, this covers measures that serve the well-being of animals.[85] Consequently, the state can - at least in the non-harmonised area[86] - prevent activities that are associated with suffering for animals or that can negatively influence their natural behaviour.[87]

In this context, however, a distinction must be made. The European Union allows the keeping of animals for human food production as a matter of course. It is equally self-evident for the Union legislator that animals are killed for purposes of medical research, for example.[88] The

[84] Cf. ZZF- Stellungnahme zum Risiko von Zoonosen beim Handel mit als Heimtieren gehaltenen Wildtieren, 05.07.2020; https://www.zzf.de/stellungnahme/stellungnahme-des-zzf-zum-risiko-von-zoonosen-beim-handel-mit-als-heimtieren-gehaltenen-wildtieren (11.05.2023).
[85] Kingreen, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed 2022, Art. 36 margin number 208.
[86] ECJ, Case C-1/96, margin number 41 et seq.; see also Haltern, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 36 margin number 47.
[87] Kingreen, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed 2022, Art. 36 margin number 208.
[88] This applies irrespective of all refinements of animal protection, in this case, for example, through the transfer

"health and life" of animals and the "welfare" of animals derived from this must therefore of necessity be considered proportionately. No one would dispute that not killing an animal for human meat supply and kept exclusively for this purpose would be better for the welfare of the animal concerned than killing it. Nevertheless, this form of animal husbandry and use is not prohibited throughout the Union. The concept of animal welfare can therefore only ever be seen in relative terms, by placing it in relation to the other rights and interests of all those involved. This explains why, for example, the European Court of Justice considers certain national requirements for crates for fattening calves to be legal - without, of course, declaring fattening calves as such to be unlawful.[89] Animal welfare considerations are therefore not conducive to justifying a regulatory philosophy aimed at a blanket de facto ban on pets.

(a) Interim result

State measures to protect the health and life of animals must thus also meet the usual justification requirements and, in particular, be proportionate. A cross-species positive list cannot be based on information that is not scientifically sound or, for example, only concerns a single species or a few species. Thus, a positive list aimed at pet keeping must be qualified as an inadmissible instrument in principle, because it follows the approach of an undifferentiated "presumption for the ban". The proponents of a positive list try to refute this objection

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of the 3Rs principle into the legal system (cf. Directive 2010/63/EU).

[89] ECJ, Case 143/81, Coll. 1982, I- 01299, margin number 12 et seq.

by referring to a decision of the European Court of Justice on the "Belgian positive list" and quote a short passage of the relevant judgement, which is also highlighted.[90] An analysis of the said judgment requires that the relevant considerations of the Court be presented and analysed in their entirety:

(b) The ECJ and the "Belgian positive list"

In the current discourse, the homonymous use of the term "positive list" gives the impression that the European Court of Justice has "rubber-stamped" national pet positive lists. In fact, however, the aforementioned decision exclusively concerns national supplements to Regulation (EC) No. 338/97, which serves to implement the CITES commitment in the Union and thus exclusively covers the protection of wild animal and plant species.[91]

The Court of Justice states in detail in this regard:

> „According to the Belgian Government, the legislation at issue in the main proceedings, although it hinders the free movement of goods, pursues a legitimate objective, namely the welfare of animals held in captivity. It is based on the finding that the holding of mammals is acceptable only in a limited number of cases, in view of the minimum physiological and ethological needs of those mammals. The Belgian Government submits in that regard that, if it appears, having regard to those needs, that specimens of a

[90] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 17 et seq.

[91] This can even be seen from the official heading of the European Court of Justice.

particular species of mammal may not be held by anyone without jeopardising the welfare of those animals, they may not be included in the positive list and, consequently, they may not be traded in, subject to the derogations provided for in Article 3bis(2) of the animal welfare law. That legislation is therefore justified in the interests of the protection of the health and life of the animals concerned.

Furthermore, according to the Belgian Government, the contested legislation is proportionate to the objective pursued. First, it does not impose an absolute prohibition on the importation of those animals. Under Article 3bis(2) of the animal welfare law, specimens of species or categories other than those included in the list constituting Annex I to the Royal Decree may nevertheless be held inter alia in zoological gardens, laboratories, circuses and travelling exhibitions, but also by private individuals recognised by the Minister responsible for the protection of animals and by firms trading in animals provided that a prior written agreement has been concluded with the natural or legal persons in one of the abovementioned categories.

Secondly, the authorised list was drawn up after the National Council for animal welfare had established objective criteria, inter alia on the basis of contributions from scientists and specialists. Those criteria are as follows. First, the animals must be easy to keep and capable of being given shelter with respect for their fundamental physiological, ethological and ecological needs; secondly, they must not be aggressive in nature or constitute any other

particular danger to human health; thirdly, they may not belong to species in respect of which there are clear indications showing that specimens, once they have escaped into the wild, can continue to exist there and may therefore constitute an ecological threat; and, fourthly, there must be bibliographical data with regard to holding them. Where there is a conflict between the data or the available information on whether specimens of a species may be held, the benefit of the doubt must be given to the animal.

In that regard, it should be noted, first, that the protection of animal welfare is a legitimate objective in the public interest, the importance of which was reflected, in particular, in the adoption by the Member States of the Protocol on the protection and welfare of animals, annexed to the Treaty establishing the European Community (OJ 1997 C 340, p. 110). Moreover, the Court has held on a number of occasions that the interests of the Community include the health and protection of animals (see Joined Cases C-37/06 and C-58/06 Viamex Agrar Handel and ZVK [2008] ECR I-0000, paragraphs 22 and 23, and the case-law cited).

Secondly, it must be borne in mind that, according to Article 30 EC, the provisions of Articles 28 EC and 29 EC are not to preclude prohibitions or restrictions justified on grounds, inter alia, of the protection of the health and life of humans or animals, provided that such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, and that the Court has held that the protection of the health and life of animals constitutes a fundamental

requirement recognised by Community law (see, to that effect, Case C-350/97 Monsees [1999] ECR I-2921, paragraph 24).

As regards the risk that specimens, once they have escaped into the wild, may continue to exist there and may therefore constitute an ecological threat, it must be borne in mind, thirdly, that the Court has consistently held that restrictions on the free movement of goods may be justified by imperative requirements such as the protection of the environment (see Case C-341/95 Bettati [1998] ECR I-4355, paragraph 62, and Case C-314/98 Snellers [2000] ECR I-8633, paragraph 55).

Although the principle of proportionality, which underlies the last sentence of Article 30 EC, requires that the power of the Member States to prohibit imports of animals from other Member States in which they are legally traded should be restricted to what is necessary to achieve the objectives of protection being legitimately pursued (see, to that effect, inter alia, Harpegnies, paragraph 34), it is necessary, for the application of that principle in a context such as that of the case in the main proceedings, to take into account the specific nature of the species concerned and the interests and requirements noted in paragraphs 27 to 29 of this judgment.

The fact that one Member State imposes less stringent rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law. The mere fact that a Member State has chosen a system of protection

different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted (see, inter alia, Case C-108/96 Mac Quen and Others [2001] ECR I-837, paragraphs 33 and 34).

Contrary to the submission of the applicants in the main proceedings, a negative list system – which entails limiting the prohibition to the species of mammals included in that list – might not suffice to achieve the objective of protecting or complying with the interests and requirements mentioned in paragraphs 27 to 29 of this judgment. Reliance on such a system could mean that, as long as a species of mammal is not included in the list, specimens of that species may be freely held even though there has been no scientific assessment capable of guaranteeing that that holding entails no risk to the protection of those interests and requirements (see, by analogy, Joined Cases C-154/04 and C-155/04 Alliance for Natural Health and Others [2005] ECR I-6451, paragraph 70).

However, the Court has consistently held that legislation, such as that referred to in the main proceedings, which makes the holding of mammals subject to the prior inclusion of the species to which they belong in a positive list and which also applies to specimens of species which are legally held in other Member States is in compliance with Community law only if a number of conditions are satisfied (see, by analogy, inter alia, Case C-344/90 Commission v France [1992] ECR I-4719, paragraphs 8 and 16, and Case C-24/00 Commission v France, paragraph 25).

First, the drawing up of such a list and the subsequent amendments to it must be based on objective and non-discriminatory criteria (see, to that effect, inter alia, Case C-192/01 Commission v Denmark [2003] ECR I-9693, paragraph 53).

Secondly, that legislation must make provision for a procedure enabling interested parties to have new species of mammals included in the national list of authorised species. The procedure must be one which is readily accessible, which presupposes that it is expressly provided for in a measure of general application, and can be completed within a reasonable time, and, if it leads to a refusal to include a species – it being obligatory to state the reasons for that refusal – the refusal decision must be open to challenge before the courts (see, by analogy, Case C-344/90 Commission v France, paragraph 9, and Case C-24/00 Commission v France, paragraphs 26 and 37).

Lastly, an application to obtain the inclusion of a species of mammal in that national list may be refused by the competent administrative authorities only if the holding of specimens of that species poses a genuine risk to the protection of or compliance with the interests and requirements mentioned in paragraphs 27 to 29 of this judgment (see, by analogy, inter alia, Case C-344/90 Commission v France, paragraph 10, and Case C-24/00 Commission v France, paragraph 27).

In any event, an application to have a species included in the list of species of mammal which may be held may be refused by the competent authorities only on the basis of a full assessment of the risk posed to

the protection of the interests and requirements mentioned in paragraphs 27 to 29 of this judgment by the holding of specimens of the species in question, established on the basis of the most reliable scientific data available and the most recent results of international research (see, by analogy, inter alia, Alliance for Natural Health and Others, paragraph 73).

Where it proves impossible to determine with certainty the existence or extent of the risk envisaged because of the insufficiency, inconclusiveness or imprecision of the results of the studies conducted, but the likelihood of real harm to human or animal health or to the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.

Furthermore, derogations such as those provided for in Article 3bis(2) of the animal welfare law must not lead to the favouring of domestic products, because that would constitute arbitrary discrimination against or a disguised restriction on products imported from other Member States (see, inter alia, Case 27/80 Fietje [1980] ECR 3839, paragraph 14).

As regards specifically conditions such as those set out in Article 3bis(2)(3)(b) and (6) of the animal welfare law, in relation to the holding by private individuals or firms trading in animals of specimens of mammals not referred to in the list attached as an Annex to the Royal Decree, it is important to establish that such conditions are objectively justified and do not go beyond what is necessary to

achieve the objective pursued by the national legislation as a whole.

It is clear that the assessment to be made of the proportionality of a body of rules such as that at issue in the main proceedings, in particular as regards the question whether the objective sought could be achieved by measures having less effect on intra-Community trade, cannot be carried out in the present case without additional information on that body of rules and on the implementation thereof. The assessment of the criteria established and of their application, of the scope of the derogations provided for in Article 3bis(2) of the animal welfare law and of the characteristics of the procedure for inclusion in the list, such as its accessibility and the possibilities of review where there is a refusal to include a species, requires a specific analysis on the basis, inter alia, of the various applicable provisions, previous practice and scientific studies, it being for the national court to make that analysis (see, to that effect, Tridon, paragraph 58).

In the light of the foregoing, the answers to the questions referred for a preliminary ruling must be that Articles 28 EC and 30 EC, read separately or in conjunction with Regulation No 338/97, do not preclude national legislation, such as that at issue in the main proceedings, under which a prohibition on importing, holding or trading in mammals belonging to species other than those expressly referred to in that legislation applies to species of mammals which are not included in Annex A to that regulation, if the protection of or compliance with the interests and

requirements referred to in paragraphs 27 to 29 of this judgment cannot be secured just as effectively by measures which obstruct intra-Community trade to a lesser extent.

It is for the national court to determine:

– whether the drawing up of the national list of species of mammals which may be held and subsequent amendments to that list are based on objective and non-discriminatory criteria;

– whether a procedure enabling interested parties to have species of mammals included in that list is provided for, readily accessible and can be completed within a reasonable time, and whether, where there is a refusal to include a species, it being obligatory to state the reasons for that refusal, that refusal decision is open to challenge before the courts;

– whether applications to obtain the inclusion of a species of mammal in that list or to obtain individual derogations to hold specimens of species not included in that list may be refused by the competent administrative authorities only if the holding of specimens of the species concerned poses a genuine risk to the protection of the abovementioned interests and requirements; and

– whether the conditions for the holding of specimens of mammals not referred to in that list, such as those set out in Article 3bis(2)(3)(b) and (6) of the animal welfare law, are objectively justified and do not go

> beyond what is necessary to achieve the objective pursued by the national legislation as a whole." [92]

A precise reading of the unabridged considerations of the Court of Justice thus yields astonishing results:

First of all, the fact that the judgment deals with a tightening of Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein[93] deserves particular attention. According to the clarification in Art. 2 lit. b) and the recitals, this regulation in turn aims to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[94] Without further elaborating on the CITES regime, it is undisputed that the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora - as its name suggests - is an instrument of species protection and accordingly differentiates in its annexes primarily according to the degree of endangerment.

In line with this objective, Regulation (EC) No. 338/97 is primarily devoted to imports and exports[95] and only deals with special constellations, such as regulatory deviations for captive-born and bred or artificially propagated specimens, on a secondary basis.[96] The species protection nature of the standard also explains the clarification in Recital No. 3 that, without prejudice to the provisions of this Regulation, member states may adopt or maintain more

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[92] ECJ, Case C-219/07, decision of 19.06.2008, margin number 24 et seq.
[93] OJ No. L 061 of 3.3.1997, p. 1 et seq.
[94] See recitals No. 1 and 2 of Regulation (EC) No. 338/97.
[95] Cf. Art. 4 and Art. 5.
[96] Art. 7 No. 1.

stringent measures in compliance with the Treaty, in particular with regard to the possession of specimens of species covered by this Regulation. However, this protection of endangered species specified in international environmental law and specifically addressed in corresponding annexes has nothing to do, factually or legally, with the establishment of a positive list, based on animal ethics, for common domestic animals that are not endangered and are not covered under international law in the instrument in question. Rather, these "regulatory worlds" are so far apart that there can be no serious talk of the ECJ "endorsing a pet-based positive list approach". Consequently, the European Court of Justice explicitly points out that "the particular nature of the species in question" is decisive for its decision.[97]

The European Court of Justice's comments on animal welfare and environmental protection then take the form of "reminders".[98] The ECJ does not choose this form of presentation when it is announcing something "sensationally new", but rather when it wants to refer to what is well known, i.e. "reminded". Accordingly, the relevant passages do not contain anything new, but merely reflect the Court's established case law, in particular on animal welfare in the context of the free movement of goods, which has already been presented above.

The ECJ then comments on the regulatory instrument of the negative list and states that such an approach "may not be

[97] ECJ, Case C-219/07, decision of 19.06.2008, margin number 30.
[98] ECJ, Case C-219/07, decision of 19.06.2008, margin number 27 - 29.

sufficient to achieve the objective of protection".[99] However, the expansion of the CITES regime sought by the Belgian government at the time makes it clear what the Court's assumption is based on. This is because the import in the sense of Art. 4 of Regulation (EC) No. 338/97, which took place through trade, brought new and partly completely unknown species onto the market. Therefore, under no circumstances can it be said that the European Court of Justice a) considers a positive list approach in the field of animal husbandry to be fundamentally preferable or b) would have approved of or even considered such an approach for pet animal husbandry. On the contrary, directly following this consideration, the European Court of Justice clearly points out that there can be no question of an ethically motivated exaggeration of animal welfare, at least when legal standards are applied:

> „However, the Court has consistently held that legislation, such as that referred to in the main proceedings, which makes the holding of mammals subject to the prior inclusion of the species to which they belong in a positive list and which also applies to specimens of species which are legally held in other Member States is in compliance with Community law only if a number of conditions are satisfied (see, by analogy, inter alia, Case C-344/90 Commission v France [1992] ECR I-4719, paragraphs 8 and 16, and Case C-24/00 Commission v France, paragraph 25)."[100]

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[99] ECJ, Case C-219/07, decision of 19.06.2008, margin number 32.

[100] ECJ, Case C-219/07, decision of 19.06.2008, margin number 33.

The requirements for a positive list then laid down by the European Court of Justice - which, significantly, are not even mentioned by the proponents of transferring this approach to the pet sector in the context in question - are, on closer inspection, " tough": In the opinion of the Court of Justice, the following is required

- the list criteria are objective and non-discriminatory[101],

- those affected must be enabled to add to the list in a generally valid legal act - i.e. by law[102],

- this procedure must be "easily accessible"[103],

- the corresponding procedure must be completed within a reasonable period of time and thus must not be unnecessarily prolonged by the authorities[104],

- the decision of the authorities may be challenged in a judicial procedure[105],

- the "keeping of specimens of this species actually constitutes a risk to the preservation or observance" of the above-mentioned protected interests[106], and

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[101] ECJ, Case C-219/07, decision of 19.06.2008, margin number 34.
[102] ECJ, Case C-219/07, decision of 19.06.2008, margin number 35.
[103] ECJ, Case C-219/07, decision of 19.06.2008, margin number 35.
[104] ECJ, Case C-219/07, decision of 19.06.2008, margin number 35.
[105] ECJ, Case C-219/07, decision of 19.06.2008, margin number 35.
[106] ECJ, Case C-219/07, decision of 19.06.2008, margin number 36.

- an application for keeping or listing may only be rejected by the authorities if the decision justifying a risk is "made on the basis of the most reliable scientific data available and the latest results of international research".[107]

Only if

„it proves impossible to determine with certainty the existence or extent of the risk envisaged because of the insufficiency, inconclusiveness or imprecision of the results of the studies conducted, but the likelihood of real harm to human or animal health or to the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures."[108]

Thus, the precautionary principle enshrined in Article 191 para. 2 sentence 2 TFEU in primary law - as a recognised cardinal principle of European environmental law[109] - only comes into play, following its usual preconditions, if a preventive reaction to a relevant suspected risk is to be taken in a situation of scientific uncertainty. Since the precautionary principle is probably one of the best-studied principles of European Union law, which was also fanned out in detail and in a way that is relevant for legal practice in a landmark Communication of the European Commission decades ago[110], a fundamental presentation can be dispensed

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[107] ECJ, Case C-219/07, decision of 19.06.2008, margin number 37.
[108] ECJ, Case C-219/07, decision of 19.06.2008, margin number 38.
[109] See Spranger, Die „history of safe use" im europäischen Gentechnikrecht, in: NuR 2021, 746 (747 et seq.).
[110] Of 2.2.2000, KOM (2000) 1 final.

with in the present context and reference made instead to the canon of precautionary research. As a legal principle, the precautionary principle is in any case tied to the existence of essential preconditions with regard to the opening of its scope of application and with regard to the options for action that may arise.

Therefore, the precautionary principle neither justifies a regulation based on "general suspicion" in the field of animal husbandry, nor does it exempt from the necessity of scientific analysis and evaluation. Above all, however, it must be emphasised in this context that the European Court of Justice - methodologically completely correct - allows the precautionary principle to be applied explicitly and exclusively at the level of risk management in the present decision.[111]

This has the consequence that all other criteria mentioned above - which in fact do not aim at risk management, but at the realisation and enforceability of the rights of the persons concerned and are thus based on human rights or the rule of law - must of course also be fulfilled in a "precautionary situation". In other words, even in the case of a risk that cannot be excluded in a legally relevant sense, the precautionary principle would only allow for precautionary regulation - which, however, would have to be correctable and justiciable in the sense described, among other things.

In this context, another misunderstanding on the side of the positive list proponents must also be eliminated. It is argued there that it is precisely the situation of "lack of

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[111] ECJ, Case C-219/07, decision of 19.06.2008, margin number 37 et seq.

scientific knowledge" that would justify inclusion in a positive list.[112] This maximally truncated view does not correspond to the traditional principles of application of the precautionary principle, as they are also applied by the European Court of Justice:

1. it is impossible to determine the risk,

2. there is nevertheless a probability of actual harm to human or animal health or to the environment.

The judgment also contains relevant statements with regard to the proportionality of state measures. First of all, the Court explicitly[113] refers to paragraph 49 of its decision in the Tridon case with regard to proportionality considerations. There, in turn, it is stated that state prohibitions are to be regarded as stricter measures within the meaning of the proportionality doctrine.[114] With regard to the specific case of the Belgian species protection positive list to be decided, it is then worth mentioning that the Court of Justice did not assume the proportionality of the regulation. On the contrary, the judgment explicitly states

> „that the assessment to be made of the proportionality of a body of rules such as that at issue in the main proceedings, in particular as regards the question whether the objective sought could be achieved by

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[112] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 19 und p. 20.

[113] ECJ, Case C-219/07, decision of 19.06.2008, margin number 19.

[114] ECJ, Case C-510/99, decision of 23.10.2001, margin number 49; see also ECJ, Case C-219/07, decision of 19.06.2008, margin number 20 and 23.

> measures having less effect on intra-Community trade, cannot be carried out in the present case without additional information on that body of rules and on the implementation thereof. The assessment of the criteria established and of their application, of the scope of the derogations provided for in Article 3bis(2) of the animal welfare law and of the characteristics of the procedure for inclusion in the list, such as its accessibility and the possibilities of review where there is a refusal to include a species, requires a specific analysis on the basis, inter alia, of the various applicable provisions, previous practice and scientific studies, it being for the national court to make that analysis (see, to that effect, Tridon, paragraph 58)."[115]

The referring national court is then given a number of instructions to examine on the spot whether, and if so to what extent, the Belgian national rules meet the requirements of the principle of proportionality.[116]

(c) Interim results

The following relevant interim results can thus be noted:

The decision of the European Court of Justice on the "Belgian positive list", which is prominently referred to by proponents of a positive pet list, concerns Regulation (EC) No. 338/97, which is aimed at the implementation of CITES, and is therefore neither actually nor legally

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[115] ECJ, Case C-219/07, decision of 19.06.2008, margin number 41.

[116] ECJ, Case C-219/07, decision of 19.06.2008, margin number 43.

transferable to the constellation of ubiquitous pet keeping that is of interest here.

But even if one wants to assume such transferability, accepting systematic and logical breaks, a not only selective analysis of the judgement shows that the ECJ has by no means made an animal welfare-related breakthrough of general justification standards for interventions in the free movement of goods. On the contrary, in view of the focus of the decision on species protection, general requirements for permissibility are laid down, which are intended to ensure the rights of those affected.

The proportionality of a positive list approach is not conclusively assessed by the ECJ. In this regard, quite decisive information on the absolutely necessary protection of the affected persons was missing, the examination of which the Court imposed on the referring court. Conversely, however, the absence of such safeguards indicates the disproportionality of a positive list in any case.

Following general dogma, the precautionary principle is by no means abused by the Court of Justice as a regulatory carte blanche, but is linked to the existence of a real risk, to the actual probability of damage occurring and to the lack of sustainable and scientifically valid information. Then - and only then - may the precautionary principle be applied.

If these findings are applied to the issue of interest in the present case, it becomes clear that the comments of the European Court of Justice on the Belgian species protection positive list for a national pet positive list cannot justify an interference with the free movement of goods for

reasons of animal welfare. Irrespective of this, the ECJ emphasises in the above-mentioned decision quite the contrary, the anthropocentric orientation of Union law as well as the full validity of all framework conditions of the free movement of goods also in dealing with animals. The Court also sets strict limits of proportionality.

(4) Environmental protection and biodiversity

Finally, environmental protection is of interest in the present case as an established justification in the case law of the ECJ. The court states in this respect:

> „The Court has already held in its judgment of 7 February 1985 in Case 240/83 Procureur de la République v Association de défense des brûleurs d' huiles usagées ((1985)) ECR 531 that the protection of the environment is "one of the Community' s essential objectives", which may as such justify certain limitations of the principle of the free movement of goods . That view is moreover confirmed by the Single European Act . (…) In that regard, it must be pointed out that in its aforementioned judgment of 7 February 1985 the Court stated that measures adopted to protect the environment must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection."[117]

Unlike in the case of legislative measures against invasive species, which at least indirectly aim to protect the

[117] ECJ, Case 302/86, Coll 1988, I-4607, margin number 8 et seq.

environment, the relevant legislation on keeping pets is not designed to develop environmental protection effects.

It is questionable whether environmental protection in this sense also includes the protection of biological diversity. In fact, the proponents of a positive list of pets also point out the benefits to be expected for biological diversity.[118] It is true that the information provided in this context is highly specific and, moreover, hardly documented[119], so that in fact it is extremely doubtful that a German pet list could be expected to have any advantages at all for global biodiversity protection; In the interest of a comprehensive treatment of all legally relevant aspects, however, the legal viability of such a justification option should nevertheless be examined in more detail.

In the literature, the view is occasionally taken, with reference to the case law of the European Court of Justice, that the protection of biodiversity is a suitable justification in the context of the free movement of goods.[120] An analysis of the two judgments of the European Court of Justice referred to provides clarity in this respect. Because the first decision mentioned is about the

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[118] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 2 und p. 5 et seq.

[119] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 2 und p. 5 et seq.

[120] Haltern, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 36 margin number 47, there, however, by establishing a connection to the "health and life of animals and plants". Cf. also Müller-Graff, in: von der Groeben/Schwarze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed 2015, Art. 36 AEUV margin number 61.

cross-border movement of bovine semen as part of agricultural production and about securing a sufficiently broad gene pool for breeding cattle, which is aimed at with certain specifications:

> „Rules of a Member State which require private economic operators importing into its territory quantities of bovine semen from another Member State to store it, subject to a charge, in an authorized centre which enjoys an exclusive concession with regard to storage of the semen and insemination constitute such a barrier to imports. Since that requirement applies at the stage immediately following importation and imposes an economic burden on importers, it is liable to restrict the volume of imports.
>
> Article 36 of the Treaty provides that the prohibition of restrictions on imports, exports and goods in transit is not to preclude measures of this nature if they are justified on grounds of the protection of health and life of humans and animals (see the judgment in Case 35/76 Simmenthal [1976] ECR 1871, paragraph 10).
>
> However, the Court has consistently held that where, in application of Article 100 of the EEC Treaty, Community directives provide for the harmonization of the measures necessary to ensure inter alia the protection of animal and human health and establish Community procedures to check that they are observed, invoking Article 36 is no longer justified and the appropriate checks must be carried out and protective measures adopted within the framework outlined by the

harmonizing directive (see the judgments in Case 5/77 Tedeschi v Denkavit [1977] ECR 1555, paragraph 15, Case 148/78 Ratti [1979] ECR 1629, paragraph 36, Case 251/78 Denkavit [1979] ECR 3369, paragraph 14, and Case 190/87 Moormann [1988] ECR 4689, paragraph 10).

The French Government, relying on that case-law, claims that its rules are justified by the need to improve bovine stock genetically and by considerations of health.

As regards the reasons relating to the genetic improvement of bovine stock, it should be borne in mind that Article 2(1) of Directive 87/328, which is designed to remove zootechnical obstacles to intra-Community trade in bovine semen, requires Member States to remove all barriers to entry into, or use within, their territory of bovine semen imported from other Member States in accordance with the conditions laid down in Article 4 of the directive (see paragraph 9 above). Secondly, Article 2 of Directive 91/174 provides that marketing of semen of pure-bred animals may not be prohibited, restricted or impeded on pedigree grounds. It follows from those provisions that zootechnical and pedigree requirements have been fully harmonized at Community level.

So far as health considerations are concerned, they are the subject of Directive 88/407, Article 1 of which provides that the directive is to apply to intra-Community trade in, and imports from third countries of, deep-frozen semen of domestic animals of the bovine species. Article 3 of the directive and Annex C, which lay down the general conditions

applicable to intra-Community trade in bovine semen, mention only the collection and processing of semen in the Member State of dispatch and transport to the State of destination. Thus, no provision in the directive deals with the storage or use of semen in the State of destination.

It follows that health conditions in intra-Community trade in bovine semen have not yet been fully harmonized at Community level in relation to the State for which the semen is destined. Member States may therefore rely on health grounds in impeding the free movement of bovine semen, provided that the restrictions on intra-Community trade are in proportion to the aim in view.

In order to ascertain that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products (see the judgment in Case C-169/91 B & Q [1992] ECR 1-6635, paragraph 15).

Article 2(3) of the French Decree of 24 January 1989 imposes an obligation requiring only imported semen to be stored in approved centres. However, according to the explanations provided by the French Government at the hearing and not contested by the other intervening parties, a similar obligation exists in relation to semen produced within France owing to the monopoly held by the insemination centres, since only those

centres are authorized to produce and store semen in France.

So far as the practical effects of the obligation regarding the storage of semen are concerned, it cannot be ruled out that, even though this restriction applies without distinction to domestic and imported products, the latter may be placed at a disadvantage in relation to domestic production. Since in the present case the national legislation does not lay down provisions governing the conditions of storage and, in particular, the price to be paid by the importer to the approved centre, and since this price is generally fixed on a flat-rate basis, there are no provisions preventing the approved centres from applying unreasonable conditions for storage of semen imported by individuals.

The question whether the operation of the approved centres, so far as the conditions for storing semen are concerned, entails in practice discrimination against the imported product is one of fact which the national court must determine.

The answer to the second question must therefore be that Articles 30 and 36 of the Treaty, considered together, Article 2 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species and Article 4 of Council Directive 87/328/EEC of 18 June 1987 on the acceptance for breeding purposes of pure-bred breeding animals of the bovine species must be interpreted as not precluding national rules that require economic operators who import semen from a Member State of the Community to

> deliver it to an approved insemination or production centre."[121]

The second judgment also relates to aspects that are aimed exclusively at securing food production. The case there concerned prior state authorization for the release of oysters from other member states and mussels of native species, and here in particular the question of whether the intended conservation of the relevant biological diversity and conservation of fish species in the interests of fisheries aim at the "protection of animal life" within the meaning of Art. 36 TFEU.[122]

Both decisions therefore relate to an issue of animal husbandry in the area of agricultural production that falls within the competence of the Union and here in particular aspects of the genetic diversity of livestock for food production. This does not even begin to address a question that affects the concept of biodiversity in the sense of the Convention on Biological Diversity. Art. 2 of this international environmental law convention, which characterizes the legal protection of biodiversity, defines "biological diversity" as follows:

„"Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

[121] ECJ, Case C-323/93, decision of 05.10.1994, margin number 29 et seq.
[122] ECJ, Case C-249/07, decision of 04.12.2008.

Irrespective of the fact that this term gives rise to sometimes intensive discourses in relation to all of its components in scientific discourse and without all the legal implications of this concept of use having to be further fanned out here, it can be stated for the question of interest here that "biological diversity" in the maximum sense of international environmental law cannot be equated with the highly specific "genetic diversity" in the sense of agricultural law.

b. Other Fundamental Freedoms

The free movement of goods is rightly the focus of the examination under Union law. However, it must not be forgotten that a national positive list of pets would also affect other fundamental freedoms. This applies in particular to the freedom to provide services.

aa. Freedom to provide services

Article 56 et seq. TFEU defines services as all services that are generally provided for a fee.[123] According to Art. 57 para. 2 TFEU, services in this sense are in particular: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. The freedom to provide services covers all cases of cross-border active and passive, but also the virtual provision of services, i.e. ultimately all aspects of the supply of and demand for the corresponding services.[124]

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[123] Art. 57 para. 1 TFEU.
[124] Streinz, Europarecht, 10. Ed. 2016, margin number 943 et seq.

It should go without saying that a national positive list of pets, which would largely "dry up" the German pet market, would also have dramatic consequences for service providers from other EU countries, since previously permitted services in relation to certain species due to a lack of inclusion in the positive list should no longer be offered or provided. With a view to sufficiently specialized service providers, a national positive list can thus prove to be a de facto national ban on providing services.

Since similar criteria apply to the justification of state restrictions for all fundamental freedoms, a uniform examination process is usually assumed for all market freedoms.[125] Since the lack of a viable justification was already addressed in the context of the statements on the free movement of goods, there is no need to go into more detail here. The violation of the free movement of goods described here also indicates a violation of the freedom to provide services.

bb. Freedom of movement of capital

The freedom of capital movements is addressed in Art. 63 et seq. TFEU. In this context, the freedom of movement of capital includes, above all, the freedom to invest effectively.[126] It is probably indisputable that a national pet positive list would have a lasting impact on foreign investments in the German pet market. Given the volumes of certain market segments, investments from other EU

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[125] Herdegen, Europarecht, 24. Ed. 2023, § 18 II.
[126] Cf. https://www.europarl.europa.eu/factsheets/de/sheet/39/der-freie-kapitalverkehr (03.05.2023).

countries cannot be dismissed as a purely theoretical phenomenon either. For the reasons already mentioned, there would also be no viable justification for intervention with regard to the free movement of capital, with the consequence that a violation of this fundamental freedom must be assumed.

2. Charter of Fundamental Rights

In addition to market freedoms, the Charter of Fundamental Rights of the European Union (CFR)[127] provides fundamental rights barriers for measures of the Union. The Charter is legally equivalent to the primary law of the Treaties[128], but applies to the institutions and bodies of the Union in compliance with the principle of subsidiarity and to the Member States when implementing Union law.[129] This shows that the Charter of Fundamental Rights would not be a central standard for a national positive list, but would rather come into play if the European legislator were to take action. Accordingly, it will be considered separately in the context mentioned.[130]

3. Supplementary: Union positive list?

The above comments exclusively referred to the question of whether a national pet positive list would be compatible with higher-ranking Union law. This question was answered negatively for the reasons explained in more detail. Even if the mandate focuses on the constellation of a national positive list, for reasons of completeness, the question

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[127] OJ No. C-364 of 18.12.2000, p. 1 et seq.
[128] Art. 6 para. 1 TEU.
[129] Art. 51 para. 1 CFR.
[130] See below under c.

must also be addressed as to whether the European Union would be authorised to independently implement a pet positive list with comparable results. However, such an approach would fail for at least two reasons:

a. Lack of legislative competence for animal welfare

European primary law mentions animal welfare in a prominent place. Already in Part One of the TFEU, Art. 13 states:

> "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."

This provision represents a central component for the recognition of animal welfare as an objective in the general interest, as also reflected in the aforementioned decision of the European Court of Justice on the Belgian list of protected species.[131] However, according to the prevailing opinion, this recognition does not imply a legislative competence of the European Union.[132] Neither from Art. 13 TFEU nor from the overall view with other provisions of the TFEU can an independent competence of the

[131] ECJ, Case C-219/07, decision of 19.06.2008, margin number 27 et seq.

[132] Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 13 AEUV margin number 19 et seq.

EU for animal protection be derived.[133] As was already the case before the entry into force of the Treaty of Lisbon, animal protection measures are thus to be based exclusively on sectoral competence norms - namely in the field of agricultural policy (Art. 43 TFEU).[134] Accordingly, the European Commission also strictly points out that the Union has no competence at all, for example, to regulate the use of animals in competitions, animal shows, cultural and sporting events such as bullfights, dog fights or dog races.[135]

Overall, however, this means that the path to a Union-wide positive list in the pet animal sector would be doomed to failure already due to the Union's lack of legislative competence in this area.

[133133] Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 13 AEUV margin number 19; Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 13 margin number 12; Nettesheim, in: Grabitz/Hilf/Nettesheim (Eds.), Das Recht der Europäischen Union, 78. supplement January 2023, Art. 13 AEUV margin number 8; see also Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 11.

[134] Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 13 marfin number 12; Nettesheim, in: Grabitz/Hilf/Nettesheim (Eds.), Das Recht der Europäischen Union, 78. supplement January 2023, Art. 13 AEUV margin number 8. Cf. also the European Commission's assessment in this regard: https://food.ec.europa.eu/animals/animal-welfare_en#introduction (22.03.2023). See also Broom, Animal Welfare in the European Union, edited by the Directorate General for Internal Policies, Policy Department C: Citizens´ Rights and Constitutional Affairs, 2017.

[135] Streinz, in: Streinz (Ed.), EUV/AEUV, 3. Ed 2018, Art. 13 AEUV margin number 9 with reference to Breier, in: Lenz/Borchardt (Eds.), AEUV, 5. Ed. 2010, Art. 13 margin number 9.

aa. In particular: Regulation (EC) No. 338/97 in the light of Art. 193 TFEU

The proponents of a pet positive list also point out the lack of legislative competence of the Union for animal protection law[136], but then first present Regulation (EC) No. 338/97 under the heading "no conflicting Union law"[137] before discussing the "strengthening of protection, Art. 193 TFEU".[138] The quintessence of this line of thought is then as follows:

> "Article 193 TFEU and the third recital of Regulation (EC) No 338/97 thus in principle authorise the Member States to take enhanced protection measures in relation to the Regulation on the protection of species.
>
> This authorisation concerns all animal species covered by the Endangered Species Regulation; it is not limited to mammal species, for example.
>
> For the animal species not covered by the Species Protection Regulation, the Member States - in the absence of relevant secondary Union law - have an original regulatory power for "pet keeping" from the

[136] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 11; Without author (Fratini Vergano European Lawyers), Establishing an EU positive list: a feasible legal basis, 2. December 2022, p. 4.
[137] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 11 et seq.
[138] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 13 et seq.

> outset. However, here too - just as with regard to the animal species covered by the Species Protection Regulation - primary law and, in this respect, in particular the compatibility of national measures in the form of positive lists with the principle of the free movement of goods must of course be taken into account".[139]

This line of argumentation reveals several contradictions and distortions with methodological and dogmatic foundations. For example, it is not possible to construct recitals of a secondary legal act of the European Union - regardless of the relevance of recitals for the interpretation of norms[140] - as an " authorisation basis".[141] Thus, it would have been necessary to at least address Art. 11 para. 1 of Regulation (EC) No. 338/97, which at least transforms the idea of stricter member state measures into the legally binding part of the regulation.

Regardless of such fundamental questions, however, it can be stated that the view presented would result in a supposed legislative competence of the Union for "exotic" pet animals. This is because a member state extension of the CITES regime to species not covered by Regulation (EC) No. 338/97 could, if interpreted extensively by a national legislator, under certain circumstances be used to regulate an almost unforeseeable range of "exotic" pet animals with reference to the described reading of Art. 193 TFEU and to

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[139] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 14; translation by the author.
[140] Wegener, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 19 EUV margin number 32.
[141] Gumpp, Stellenwert der Erwägungsgründe in der Methodenlehre des Unionsrechts, in: ZfPW 2022, 446 et seq.

describe the corresponding requirements as necessary under species protection law. In fact, the proponents of a positive pet list therefore also use species protection narratives to support their own position and complain that not enough species are covered by the CITES regime and that demand needs to be reduced.[142] Against this background, it is necessary to fundamentally address the prerequisites and limitations of member states' leeway according to Article 193 TFEU, which will be done in the following.

bb. On the limitations of the strengthening of protection within the meaning of Article 193 TFEU

Art. 193 TFEU reads as follows:

> "The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission."

The referenced Article 192 TFEU then recalls the objectives set out in Article 191 TFEU. As the cardinal norm of the Union's environmental policy, Art. 191 TFEU finally stipulates the following:

> "1. Union policy on the environment shall contribute to pursuit of the following objectives:
>
> - preserving, protecting and improving the quality of the environment,

[142] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 7.

- protecting human health,

- prudent and rational utilisation of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,

- environmental conditions in the various regions of the Union,

- the potential benefits and costs of action or lack of action,

- the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

The room for manoeuvre opened up by Article 193 TFEU for special approaches by member states is tied to various preconditions or is subject to specific restrictions:

aaa. Restriction to specific environmental protection objectives

The wording and rationale of Art. 193 TFEU mean that the pursuit of other, additional objectives to those in the secondary legislation in question is inadmissible.[143] It is therefore not possible to invoke the provision with recourse to other objectives, such as consumer or health

[143] ECJ, Case C-43/14, decision of 26.2.2015, margin number 25; Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 193 AEUV margin number 27.

protection.[144] The melange of different aspects of climate protection, health protection, public safety or biodiversity protection[145] constructed by the proponents of a pet positive list is thus diametrically opposed to an activation of Article 193 TFEU.

The provision thus clearly - and as far as can be seen: undisputedly - does not represent a normative Trojan horse for the member states, by means of which all possible policies may be realised under the guise of environmental protection. Rather, a clear focus on the environmental policy objective of the secondary legislation to be "strengthened" is required, with strict adherence to the scientific principle of Article 191 para. 3, first indent, TFEU. Thus, member states could use Art. 193 TFEU - exclusively - to pursue recognised CITES objectives on a scientific basis by means of supplementary measures. A general positive pet list could therefore not be justified with reference to Article 193 TFEU.

bbb. Absence of a legal act to be strengthened

A point of view that is comparable in terms of its orientation, but methodologically correct and to be considered in a differentiated manner, concerns the necessity of a secondary legal act to be reinforced. For the question of the objectives that can be permissibly

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[144] ECJ, Case C-43/14, decision of 26.2.2015, margin number 25; Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 193 AEUV margin number 27; Epiney, in: Landmann/Rohmer (Eds.), Umweltrecht, Werkstand: 99. Supplement September 2022, Art. 193 AEUV margin number 16.

[145] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 3 et seq.

pursued by recourse to Art. 193 TFEU is not congruent with the question of the quality of the legal source of the legal act to be reinforced or whether a legal act in the narrower sense is required at all.

The fact is that Art. 193 TFEU refers to the ordinary legislative procedure of Art. 192 TFEU, which then has to implement the environmental focus of Art. 191 TFEU. From this it is concluded - as far as can be seen: undisputed - that regulation on the part of the European Union is required in any case.[146]

[146] Krämer, in: von der Groeben/Schwartze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 193 AEUV margin number 5; Epiney, in: Landmann/Rohmer (Eds.), Umweltrecht, 99. supplement September 2022, Art. 193 AEUV margin number 16.

(1) Union law

As explained above[147], the law of the European Union does not know any specific animal protection law (for which there would also be no legislative competence), but only area-specific regulations on animal protection. Thus, there is already no Union legal act that could be strengthened. Theoretically, it would only be conceivable to supplement the CITES regime - which is strictly required under species protection law and thus scientifically proven - but not to extend the CITES regime to a general pet positive list under the guise of Regulation (EC) No. 338/97. Union law therefore does not know of any suitable secondary legislation to be reinforced via Article 193 TFEU.

(2) Obligations of the Union under international law

Beyond original secondary legal acts of the European Union, the prevailing opinion assumes that international conventions to which the European Union is a party also constitute regulations that may be reinforced by member states via Art. 193 TFEU.[148] This brings the international Pet Convention of the Council of Europe, already discussed in the introduction[149], back into the focus of further considerations. However, whereas previously the question was what effects the general possibility of strengthening protection under international law in the form of Article 2 para. 3 of the Pet Convention would have on a German pet

[147] See above under a.
[148] Krämer, in: von der Groeben/Schwartze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 193 AEUV margin number 5; Scherer/Heselhaus, in: Dauses/Ludwigs (Eds.), Handbuch des EU-Wirtschaftsrechts, 57. supplement August 2022, Chapter O Umweltrecht, margin number 165.
[149] See under II.2.a.

positive list, it is now necessary to clarify whether the possibility of strengthening protection under EU law, which is specifically focused on environmental protection, under Article 193 TFEU extends to the Pet Convention and thus opens up possible regulatory leeway for the Member States of the Union.

In view of the specifics of Art. 193 TFEU, but also against the background of the completely different regulatory subject matter of the Pet Convention compared to the CITES regime, for example, this is a question that is similar in normative terms, but different in detail. However, the details of this specificity do not need to be elaborated further in the present case. The European Union has refrained from signing and ratifying the Pet Convention.[150] Irrespective of the fact that the Convention does not even have any significant political relevance in the legal area of the European Union[151], it is in any case not a legal act of the European Union or not a regulation that could be reinforced by Member States by way of Article 193 TFEU.

(3) Interim result

Thus, with regard to the issue of a pet positive list that is of interest here, there is already no European Union regulation, however localisable, that could be reinforced by way of Article 193 TFEU.

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[150] https://www.coe.int/de/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum=125 (28.03.2023).

[151] Cf. Follow up to the European Parliament resolution on the establishment of an EU legal framework for the protection of pets and stray animals, adopted by the Commission on 26 September 2012, https://oeil.secure.europarl.europa.eu/oeil/spdoc.do?i=21848&j=0&l=en (29.03.2023).

ccc. Prohibition of alternative protection concepts

The question of whether or under which conditions Article 193 TFEU allows not only quantitative but also qualitative increases in protection and what effects this in turn has on the member state's commitment to protection concepts under Union law is the subject of an extremely detailed and multi-faceted discussion[152], which does not need to be reproduced here in all its finer details, since certain basic convictions - as far as can be discerned - are undisputed. For example, it is generally accepted that Article 193 TFEU aims at a higher standard of protection, but does not open the door to a supposed "right of experimentation" by the member states.[153] Thus, only decentralised regulations with optimising content are permissible.[154]

This assessment is also followed by the European Court of Justice in its constant case law, which considers minor fine-tuning, e.g. in terms of liability law, to be permissible[155], but otherwise points out that concepts not provided for in the regulation to be strengthened may not

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[152] Krämer, in: von der Groeben/Schwartze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 193 AEUV margin number 7; Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 193 AEUV margin number 30 et seq; Epiney, in: Landmann/Rohmer (Eds.), Umweltrecht, 99. supplement September 2022, Art. 193 AEUV margin number 17 et seq.
[153] Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 193 AEUV margin number 30; Epiney, in: Landmann/Rohmer (Eds.), Umweltrecht, 99. supplement September 2022, Art. 193 AEUV margin number 17.
[154] Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 193 AEUV margin number 7.
[155] ECJ, Case C-534/13, decision of 4.3.2015, margin number 61.

be implemented.[156] Even simple "limit values and measurement criteria provided for in a national measure (under Article 193 TFEU) (must) follow the same orientation towards environmental protection as (the secondary legislation)".[157] According to the Court of Justice, it is thus essential that the national measure under Art. 193 TFEU "pursues the same objectives"[158] as the secondary act in question and is also otherwise "consistent" with it.[159] In case of doubt, the decisive factor here is whether the national measure in question is consistent with the environmental policy objective of the secondary act or whether it runs counter to it.[160]

The only secondary legislation named by the proponents of a pet positive list - and which, on closer examination, has at least homoeopathic points of contact with the topic of interest - is Regulation (EC) No. 338/97. It has already been explained that the focus of this CITES regime is of a completely different nature than the considerations used in the context of the positive list discussion. Merely for the sake of completeness, it should be pointed out that the environmental policy objective of Regulation (EC) No. 338/97 is indeed defined in a very specific and thus narrow manner. In a prominent place, recitals 1 and 2 to the Regulation state the following:

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[156] ECJ, Case C-534/13, decision of 4.3.2015, margin number 62.

[157] ECJ, Case C-6/03, decision of 14.4.2005, margin number 41.

[158] ECJ, Case C-6/03, decision of 14.4.2005, margin number 49; ECJ, Case C-2/10, decision of 21.7.2011, margin number 50.

[159] ECJ, Case C-6/03, decision of 14.4.2005, margin number 52.

[160] Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 193 AEUV margin number 31.

> "(1) Whereas Regulation (EEC) No 3626/82 (4) applies the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the Community with effect from 1 January 1984; whereas the purpose of the Convention is to protect endangered species of fauna and flora through controls on international trade in specimens of those species;
>
> (2) Whereas, in order to improve the protection of species of wild fauna and flora which are threatened by trade or likely to be so threatened, Regulation (EEC) No 3626/82 must be replaced by a Regulation taking account of the scientific knowledge acquired since its adoption and the current structure of trade; whereas, moreover, the abolition of controls at internal borders resulting from the Single Market necessitates the adoption of stricter trade control measures at the Community's external borders, with documents and goods being checked at the customs office at the border where they are introduced".

Even more clearly, in the legally binding part of Regulation (EC) No 338/97, Article 1 defining the objectives states:

> "The object of this Regulation is to protect species of wild fauna and flora and to guarantee their conservation by regulating trade therein in accordance with the following Articles."

The Annexes then formulated in accordance with Art. 3 of Regulation (EC) No. 338/97 subsequently follow the negative listing approach, in that the free tradability of species is only restricted if a corresponding listing has been

made. Looking at this framework in the light of the prohibition of alternative concepts of protection, two key findings emerge:

(1) Everyman-based pet focus as an impermissible alternative conception of protection

The detachment from the specific requirements for dealing with (potentially) endangered species under the regulatory umbrella of the CITES regime, which would go hand in hand with a pet positive list, would already prove to be an inadmissible alternative conservation concept. For CITES

- addresses trade and not other forms of handling

- covers not only animals but also plants

- aims to protect in situ occurrences

- identifies species to be protected on an ad hoc basis

- follows the anthropocentric focus of the law without restriction and thus also covers trade in products derived from protected species, such as ivory, caviar, wood products, medicines or taxidermied animals.

A positive list concerning pet keeping in general, not based on endangerment status but on animal welfare aspects, would therefore not be an extension of this regime in any way, but structurally something completely different[161], an "aliud" in the legal sense.

[161] With regard to this criterion: Scherer/Heselhaus, in: Dauses/Ludwigs (Eds.), Handbuch des EU-Wirtschaftsrechts,

(2) Positive list approach as an inadmissible alternative concept of protection

Regardless of the structural distortions described above, which in themselves already bear the condemnation of an inadmissible alternative concept of protection, it is important to point out another aspect that would also lead to a pet positive list going beyond the limits of what is permissible under Article 193 TFEU. The Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora contains three annexes dedicated to animal and plant species that require different levels of protection: Annex I contains species threatened with extinction, Annex II is intended to counteract actions that could endanger the continued existence of the species in question, and Annex III deals with species that enjoy protection in (at least) one contracting state, which is why the state in question wishes to use the CITES regime.[162] Currently[163], CITES covers 6,610 animal species and 34,310 plant species.[164]

The listing of a species in one of the annexes triggers clear legal obligations. All imports, exports, re-exports and marine movements of species covered by the Convention must be authorised under a permit system. Each Party to the Convention must designate one or more enforcement authorities to administer this permit system, as well as one or more scientific authorities to advise it on the impact of trade on the status of species.[165]

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57. supplement August 2022, Chapter O Umweltrecht, margin number 166.

[162] https://cites.org/eng/disc/how.php (30.03.2023).

[163] Status: 23.02.2023.

[164] https://cites.org/eng/disc/species.php (30.03.2023).

[165] https://cites.org/eng/disc/how.php (30.03.2023).

Thus, the Annex system of the CITES regime indisputably follows a negative-listing approach. Trade is thus inadmissible or restricted exclusively with regard to the species listed in the Appendices. Conversely, all non-listed animal and plant species and the products derived from them can be traded without restriction from a species conservation perspective. CITES thus pursues the approach of free tradability of all animal and plant species, which can only be broken in exceptional cases and in the manner described. The approach of a comprehensive ban with a reservation of exceptions that goes hand in hand with a pet positive list therefore actually follows a completely "reversed system".[166]

It is not only recognised in German administrative and constitutional law that the legal effects of these two different approaches are conceivably large and, above all, different.[167] Also in the light of the free movement of goods, but also under WTO law, a ban with freedom of permission is by definition a maximum encroachment on the rights of the individuals and traders concerned. A pet positive list thus follows a completely different regulatory philosophy compared to the current approach of the CITES regime. This change in regulatory philosophy represents nothing other than a completely different

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[166] See also Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 12.

[167] Stück, Datenschutz = Tatenschutz? Ausgewählte datenschutz- und arbeitsrechtliche Aspekte nach DSGVO sowie BDSG 2018 bei präventiver und repressiver Compliance, in: CCZ 2020, 77 et seq.

conception of protection[168] - which, as described, is inadmissible under the umbrella of Art. 193 TFEU.

ddd. Compatibility with the Treaties

Art. 193 sentence 2 TFEU requires full compatibility of "protection-enhancing measures" with the Treaties. In this respect, the free movement of goods is particularly relevant.[169] The fact that a national pet positive list would be incompatible with the free movement of goods and other fundamental freedoms has already been stated elsewhere[170], so that reference can be made here to the corresponding statements. Thus, in the event of the introduction of a national pet positive list, the requirements of Article 193 sentence 2 TFEU are also not met.

eee. Other: Notification requirement and breach of contract

Art. 193 sentence 3 TFEU establishes a notification requirement vis-à-vis the Commission in the event that Member States make use of the option under Art. 193 TFEU. The notification procedure is declaratory in nature; however, in the event of a violation of Art. 193 sentence 3 TFEU, there is the threat of infringement proceedings.[171]

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[168] See also Krämer, in: von der Groeben/Schwartze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 193 AEUV margin number 8.
[169] Krämer, in: von der Groeben/Schwartze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 193 AEUV margin number 11; Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 193 AEUV margin number 11. See also Kahl, in: Streinz (Ed.), EUV/AEUV, 3. Ed. 2018, Art. 193 AEUV margin number 22.
[170] See under III.1.
[171] Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 193 AEUV margin number 15.

What is relevant in this context, however, is the statement that the Commission and other Member States can also have it clarified by way of infringement proceedings whether - which would be the case here - a member state has wrongly invoked Art. 193 TFEU.[172]

fff. Interim result

As an interim result, it can thus be stated that Art. 193 TFEU could not be activated in the case of a pet positive list for a variety of reasons. In particular, there is no legal act "capable of being reinforced" and the fundamental paradigm shift openly communicated by the representatives of a positive list represents an inadmissible exchange of regulatory philosophy under the umbrella of Art. 193 TFEU. Art. 193 TFEU is thus completely inapplicable in the present case, which incidentally reflects the general realisation that Art. 193 TFEU hardly has any practical relevance.[173] If the Federal Republic of Germany - as comprehensively explained above: wrongly - were to invoke Art. 193 TFEU in order to introduce a national pet positive list, the initiation of infringement proceedings, in particular by the Commission, would be preordained.

[172] Kahl, in: Streinz (Ed.), EUV/AEUV, 3. Ed. 2018, Art. 193 AEUV margin number 28.

[173] Krämer, in: von der Groeben/Schwartze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 193 AEUV margin number 15; Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 193 AEUV margin number 2.

b. No internal market harmonisation

It is occasionally pointed out that Art. 114 TFEU would provide a viable basis for a Union-wide pet positive list.[174] On closer examination, however, this is not the case.

Article 114 para. 1 TFEU[175] reads as follows:

> "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

The referenced Art. 26 TFEU[176] then addresses the internal market. Article 26 para. 1 TFEU reads as follows:

> "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the

[174] Without author (Fratini Vergano European Lawyers), Establishing an EU positive list: a feasible legal basis, 2. December 2022, p. 7. The fact that an introductory footnote in this opinion points out that the document in question was prepared exclusively on the basis of information provided by the commissioning Eurogroup for Animals and that all publications cited were also provided exclusively by the commissioning party is extremely unusual, but will not be discussed further here.
[175] Ex Art. 95 ECT.
[176] Ex Art. 14 ECT.

internal market, in accordance with the relevant provisions of the Treaties."

Art. 114 TFEU thus proves to be a general law approximation competence for the realisation of the internal market.[177]

aa. No analogy to the seal trade case-law

The statements of the European Court of Justice in Case C-398/13 P on trade in seal products[178] are considered[179] decisive for the applicability of Art. 114 TFEU. In this judgment, the European Court of Justice fully confirms the considerations of the Court of First Instance („General Court“)[180] of the European Union in Case T-526/10[181], so that for further considerations, both decisions are to be taken as a whole; however, since the assessments of the Court of First Instance are significantly more detailed than the statements of the Court of Justice, the findings of the Court of First Instance are of particular interest.

First of all, it is true that it is irrelevant in purely quantitative terms how many member states have already adopted trade-relevant regulations or at least plan to do so; thus, no minimum quorum is required in order to be able to affirm the possibility of internal market relevance.[182] It is also true that the economic scope of the activities

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[177] See Korte, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 114 AEUV margin number 11.

[178] ECJ, Case C-398/13 P, decision of 3.9.2015.

[179] Without author (Fratini Vergano European Lawyers), Establishing an EU positive list: a feasible legal basis, 2. Dezember 2022, p. 7.

[180] Art. 256 TFEU.

[181] General Court, Case T-526/10, decision of 25.4.2013.

[182] General Court, Case T-526/10, decision of 25.4.2013, margin number 49 et seq.

in question does not have to be of a minimum size either.[183] However, according to the case law of the European Court of Justice, "appreciable distortions of competition" are required - "if this condition were not met, there would be practically no limits to the competence of the Community legislature.[184]

Without having to make the necessary delimitations in detail in this case, the derivation of a legislative competence for a Union-wide positive list from Article 114 TFEU is, however, fundamentally ruled out for overriding reasons. The decisive factor here is the fact that, according to settled case law, Article 114 TFEU only comes into play if trade-related regulations are actually involved. The Court of Justice of the European Union states the following in this respect:

> "It is also settled case-law that the object of measures adopted on the basis of Article 95(1) EC must genuinely be to improve the conditions for the establishment and functioning of the internal market. While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC as a legal basis, the Union legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal

[183] General Court, Case T-526/10, decision of 25.4.2013, margin number 55.
[184] ECJ, Case C-376/98, decision of 5. 10. 2000, margin number 107.

market (Case C-58/08 Vodafone and Others [2010] ECR I-4999, paragraph 32 and the case-law cited).

Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (Vodafone and Others, paragraph 28 above, paragraph 33 and the case-law cited).

However, it must be borne in mind that recourse to Article 95 EC is not justified where the measure to be adopted has only the incidental effect of harmonising market conditions within the Union (Case C-209/97 Commission v Council [1999] ECR I-8067, paragraph 35 and the case-law cited)."[185]

With all the understanding shown for the concerns of animal welfare[186], the court comes to a clear conclusion apodictically with regard to the regulations on trade in seal products:

"In the present case it is clear from the basic regulation that its principal objective is not to safeguard the welfare of animals but to improve the functioning of the internal market."[187]

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[185] General Court, Case T-526/10, decision of 25.4.2013, margin number 28 et seq.

[186] General Court, Case T-526/10, decision of 25.4.2013, margin number 42.

[187] General Court, Case T-526/10, decision of 25.4.2013, margin number 35.

The Court based this assessment very substantially on the recitals to the relevant Regulation (EC) No. 1007/2009 on trade in seal products[188], in which animal welfare aspects are mentioned, but which are in themselves "neutral for the internal market" and only trigger a need for harmonisation because "the hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals"[189] and for this reason there has been regulatory "fragmentation of the internal market"[190], which has also posed particular challenges to consumers because confusingly similar parallel products have been on the market: "The existence of such diverse provisions may further discourage consumers from buying products not made from seals, but which may not be easily distinguishable from similar goods made from seals, or products which may include elements or ingredients obtained from seals without this being clearly recognisable, such as furs, Omega-3 capsules and oils and leather goods."[191]

bb. Preliminary: internal market and commodity quality of animals

The latter aspect in particular is extremely interesting for the context of interest in the present case, because while the court confirms that national regulations enacted for animal protection reasons, which lead to a relevant trade barrier and thus to an internal market problem, are

[188] OJ No. L 286 of 31.10.2009, p. 36 et seq.
[189] Recital No. 4.
[190] Recital No. 10..
[191] Recital No. 7.

"open to harmonisation" provided that the further conditions are met - at the same time, however, the "commodity quality" of animals and the products derived from animals is not only not criticised as such, but quite the contrary is even explicitly confirmed: If animals were not goods, there would be no possibility of trade and thus no potential internal market relevance.

In other words, anyone who wants to base a Union positive list on internal market harmonisation must hereby explicitly acknowledge the anthropocentric orientation of existing law on the one hand and, above all, the commodity quality of animals on the other. This may explain why prominent voices in the German positive list discussion explicitly do not (sic!) refer to Art. 114 TFE[192] and, conversely, the proponents of using Art. 114 TFEU explicitly emphasise that this norm only represents " feasible legal basis for adopting an EU positive list having as its primary objective the improvement of the conditions for the establishment and the functioning of the internal market."[193] From the point of view of the proponents of a pet positive list, Article 114 TFEU is likely to prove to be an argumentative boomerang, as its application would lead to a normative cementing of the quality of animals and products derived from animals.

Nevertheless, a closer analysis of Union case law shows that the applicability of Art. 114 TFEU is out of the question anyway for various reasons.

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[192] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022.

[193] Without author (Fratini Vergano European Lawyers), Establishing an EU positive list: a feasible legal basis, 2. Dezember 2022, p. 7.

cc. No "indignation of consumers and governments".

Although animal welfare aspects and related consumer interests were decisive for the regulatory fragmentation of the internal market in the manner described, the assumption to be derived from this that differently regulated animal welfare aspects allow recourse to Article 114 TFEU would be erroneous. The Court of Justice of the European Union and, following it, the European Court of Justice rightly emphasise the impairment of the internal market, which is indispensable for an activation of Art. 114 TFEU. The fact that normatively different concepts of pet animal protection are pursued in different member states is clearly not sufficient in this respect. Rather, animal welfare-related distortions are required that reach a significant level in terms of internal market law.

The Court of First Instance of the European Union therefore rightly refers to the recitals to Regulation (EC) No 1007/2009, which explicitly refer to the "indignation" of "citizens and governments" in reaction to the seal killings.[194] In fact, protests by the French actress Brigitte Bardot led to the issue of the seal hunt becoming known to a wider public (only) since 1976; the killing of seals, which are beaten to death with so-called hakapiks, has since received enormous media attention[195], especially since opponents of the seal hunt claim that young seals are skinned alive.[196] Against this background, it is completely understandable that many consumers did not want to buy seal products - for example in the form of omega 3 capsules -

[194] General Court, Case T-526/10, decision of 25.4.2013, margin number 38.
[195] Cf. https://de.wikipedia.org/wiki/Robbenjagd (20.04.2023).
[196] https://de.wikipedia.org/wiki/Robbenjagd (20.04.2023).

and that the indistinguishability of these products from many others had a very significant effect on purchasing behaviour. In addition, EU law attaches particular importance to consumer protection[197] and the European Court of Justice has created the legal concept of the "informed consumer".[198] It cannot be seriously argued that private pet ownership leads to similar "outrage" on the part of consumers or governments. On the contrary, it is obvious, even on a purely quantitative basis, that private pet keeping is so widespread throughout Europe that it is not the keeping, but the positive list-related restriction on keeping that gives rise to outrage.

dd. No risk of confusion

In the case law of the Court of First Instance of the European Union and the European Court of Justice, which is of interest in the present case, the internal market effects of the existing likelihood of confusion of incriminated products on the one hand and products considered to be uncritical on the other hand are very significantly taken into account.[199] It is pointed out several times that consumers are deprived of the possibility of making an informed purchase decision because there is a lack of clear distinguishability.[200] The question of whether a far-reaching ban on incriminated products in such a constellation is actually the right reaction of the legislator does not need to be of further interest in the present case. Rather, what is relevant is the fact that

[197] Art. 169 para. 1 TFEU, Art. 38 CFR.
[198] Recently: ECJ, Case C-595/21, decision of 01.12.2022.
[199] General Court, Case T-526/10, decision of 25.4.2013, margin number 44, 45, 47.
[200] General Court, Case T-526/10, decision of 25.4.2013, margin number 44, 45, 47.

case law - based on the legal concept of the "informed consumer"[201] - states that the distortions of the internal market that occur in such a constellation are, as it were, the "straw that breaks the camel's back".

If one transfers these basic considerations to the constellation of interest in the present case, it becomes apparent that no risk of confusion can be identified. With the exception of the established and functioning CITES law, all pet animals are in principle freely tradable. In other respects, too, no distortions are discernible that could be remedied by means of a pet positive list. Anyone who is critical of the private keeping of pets, for whatever reason, simply does not buy a pet in the first place. In this respect, there is no need for "education" or protection of critical consumers who need to be "educated" due to the lack of differentiation.

ee. No internal market focus

Probably the most important argument against the viability of Art. 114 TFEU, however, arises from a closer look at the interaction between Art. 114 para. 1 TFEU and the Art. 26 para. 1 TFEU mentioned there. For Art. 26 para. 1 TFEU explicitly aims at "realising" - i.e. promoting as far as possible - the internal market. Against this background, complete or far-reaching bans on certain products or goods are not logically excluded, but they are diametrically opposed to the protection of the internal market and therefore require special analysis:

[201] Recently: ECJ, Case C-595/21, decision of 01.12.2022.

> "(T)he approximation (must) contribute to the realisation, i.e. the improvement of the internal market. This requirement of a positive internal market effect can no longer be derived from Article 3 para. 1 (h) ECT, but at least from Article 26 para. 1 TFEU, since its regulatory mandate is limited to the "necessary measures". It requires an overall view, so that the secondary legislation does not have to lead to complete liberalisation, but can also contain prohibitions in implementation of social or environmental policy concerns, depending on their scope or subject matter. However, there is no positive internal market effect if the harmonisation of laws is neutral, peripheral or even obstructive to the internal market in toto, especially because it only reacts to the risk or possibility of an impairment of fundamental freedom or distortion of competition by national law. What is needed is an actual measurable, not pretended, contribution to the realisation of the internal market".[202]

This assessment is not only shared by the European Court of Justice[203], but also - as far as can be seen - meets with exclusive agreement in the literature.[204] However, if it is a mandatory prerequisite for the activation of Article 114 TFEU that the legal provisions based on it "are intended to

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[202] Korte, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 114 AEUV margin number 50 with further references.

[203] ECJ, Case C-491/01, decision of 10.12.2002, margin number 60; ECJ,Case C-434/02, decision of 14.12.2004, margin number 30.

[204] Herrnfeld, in: Schwarze/Becker/Hatje/Schoo (Eds.), EU-Kommentar, 4. Ed. 2019, Art. 114 AEUV margin number 8 et seq.; Tietje, in: Grabitz/Hilf/Nettesheim (Eds.), Das Recht der Europäischen Union, 78. supplement January 2023, Art. 114 AEUV margin number 102 et seq.

improve the conditions for the establishment and functioning of the internal market and must actually pursue this objective by contributing to the removal of obstacles to the free movement of goods or services or to the elimination of distortions of competition", then it follows from this for an activation of Article 114 TFEU that the legal provisions based on it "are intended to improve the conditions for the establishment and functioning of the internal market and must actually pursue this objective by contributing to the elimination of obstacles to the free movement of goods or services or to the elimination of distortions of competition"[205], the following results from this for a "realisation of the internal market by means of prohibitions"[206]:

Prohibitions do not represent a fundamentally and without exception inadmissible means of maintaining the internal market, but can in certain cases certainly be an appropriate means of optimising the internal market. However, the mandate to be taken from the internal market promotion requirement of Article 26 TFEU and the fundamental direction of action of prohibitions mean that prohibitions are only capable of "realising" the internal market in rare exceptions[207] and, moreover, must produce a liberalisation gain when viewed as a whole.[208] To put it in a nutshell: by definition, bans regularly constitute obstacles to free trade and not its basis.

[205] Cf. ECJ, Case C-491/01, decision of 10.12.2002, margin number 60.

[206] Fundamentally: Classen, Verbote im Binnenmarktrecht, in: EuZW 2015, 854 et seq.

[207] Classen, Verbote im Binnenmarktrecht, in: EuZW 2015, 854 (855).

[208] Classen, Verbote im Binnenmarktrecht, in: EuZW 2015, 854 (857).

If this hurdle can - exceptionally - be overcome, the relevant prohibition clauses must have a clear internal market focus. Although bundles of motives do not prevent such a focus, the internal market effect must not occur by chance or as an "accepted" side effect of completely differently motivated actions, or even be merely pretended. It should also be pointed out that according to the established case law of the European Court of Justice, the mere finding of differences between national legal systems does not per se justify their harmonisation.[209] The case law on seal products has expressly endorsed this assessment.[210]

Applied to the case of a pet positive list, this shows a complete incompatibility with the idea of the internal market. As already shown, the proponents of such a list put forward a potpourri of very different objectives to be pursued with such a regulatory approach[211] - the dismantling of trade barriers or the improvement of the internal market are decidedly not among them. On the contrary, there is naturally a certain reluctance to even recognise the tradability of pets. In fact, the widespread drying up of trade in pet animals that would go hand in hand with a Union positive list (and, as a consequence, also the very predominant collapse of all markets for pet-related products and services) would have dramatic detrimental effects on the internal market. Art. 114 is inapplicable for this reason in particular.

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[209] ECJ, Case C-376/98, decision of 5.10.2000, margin number 83.
[210] General Court, Case T-526/10, decision of 25.4.2013, margin number 28.
[211] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 3 et seq.

ff. Interim result

All bases of authorisation or competences in favour of the Union, which are even remotely possible, do not apply in the case of the establishment of a Union-wide EU positive list. Thus, there is already no viable basis of competence for action by the Union.

c. Binding to fundamental freedoms and rights

In addition to the lack of legislative competence, there are further obstacles of a substantive nature. The decisive factor here is the fact that the Union is bound in its actions by both the Charter of Fundamental Rights (hereinafter: CFR)[212] and the fundamental freedoms. At first glance, the second part of this finding may seem surprising, since the fundamental freedoms were originally conceived as protective mechanisms against member state measures that impede the internal market. However, the European Court of Justice quickly cleared the way for the Union institutions themselves to be bound[213], which at the same time reflects the fundamental rights-like character of the fundamental freedoms. Without having to go into the finer details of this approach here, the above considerations on fundamental freedoms would also apply without restriction to a positive pet list initiated by the European Union. Such a list would therefore also be materially contrary to primary law for the reasons already mentioned.

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[212] Art. 51 para. 1 CFR.

[213] ECJ, Case C-114/96, decision of 25.06.1997, margin number 27.

While the fundamental freedoms have already been the subject of the explanations, the corresponding explanations are still required with regard to the fundamental rights of the Charter. In the event of the introduction of a positive list by the Union, it would be conceivable that there would be conflicts with the freedom to choose an occupation, the guarantee of property and the protection against discrimination.

aa. Professional freedom

Art. 15 para. 1 CFR guarantees every person the right to work and to pursue a freely chosen or accepted profession. This provision, which protects both natural and legal persons[214], presupposes a comprehensive and uniform freedom of occupation.[215] Furthermore, according to Art. 15 para. 2 CFR, all Union citizens have the freedom to seek employment, to work, to establish themselves or to provide services in any Member State. Interference in the area protected in this way can be of a direct and indirect nature, whereby it must be taken into account that, for

[214] Folz, in: Vedder/Heintschel von Heinegg (Eds.), Europäisches Unionsrecht, 2. Ed. 2018, Art. 15 GrCh margin number 5; Grabenwarter, in: Grabenwarter. (Ed.), Europäischer Grundrechtsschutz, 2014, § 13 margin number 12; Kühling, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar, 1. Ed. 2017, Art. 15 GrCh margin number 6; Schubert, in: Franzen/Gallner/Oetker (Eds.), Kommentar zum europäischen Arbeitsrecht, 4. Ed. 2022, Art. 15 GrCh margin number 13.

[215] Differentiations between access to and practice of the profession familiar to German law therefore play no role; cf. Wollenschläger, in: von der Groeben/Schwarze/Hatje (Eds.), Europäisches Unionsrecht, 7. Ed. 2015, Art. 15 GrCh margin number 40; Kühling, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar, 1. Ed. 2017, Art. 15 GrCh margin number 8; Schubert, in: Franzen/Gallner/Oetker (Eds.), Kommentar zum europäischen Arbeitsrecht, 4. Ed. 2022, Art. 15 GrCh margin number 14.

teleological reasons, a broad understanding of interference is used as a basis.[216]

The central standards of the justification of encroachment are laid down by Art. 52 para.1 CFR.[217] Any restriction on the exercise of the rights and freedoms recognised in the Basic Law must be provided for by law and respect the essence of these rights and freedoms (Art. 52 para. 1 sentence 1 CFR). In compliance with the principle of proportionality, restrictions may only be made if they are necessary and actually correspond to the objectives of the common good recognised by the Union or to the requirements of the protection of the rights and freedoms of others (Art. 52 para. 1 sentence 2 CFR). This results in a triad of tests, which includes a general legal reservation, the reference to relevant public interest objectives, as well as a proportionality test.[218]

Whether the freedom to conduct a business under Article 16 CFR is to be considered of independent importance alongside the freedom to exercise an occupation under Article 15 CFR still requires final clarification. In particular, the case law of the ECJ does not yet provide a clear line of reasoning on the question of whether Art. 16 CFR is to be examined as an original provision or only in conjunction

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[216] Kühling, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar, 1. Ed. 2017, Art. 15 GrCh margin number 15 et seq.
[217] In general: Bühler, Einschränkungen von Grundrechten nach der Europäischen Grundrechtecharta, 2005; Besselink, The Protection of Human Rights post-Lisbon, in: Laffranque (Ed.), The Protection of Fundamental Rights Post-Lisbon, 2012, p. 63 et seq.; Riedel, Die Grundrechtsprüfung durch den EuGH, 2020.
[218] Cf. Jarass, in: Jarass. (Ed.), Charta der Grundrechte der EU, 4. Ed. 2021, Art. 15 margin number 13 et seq.

with Art. 15 CFR.[219] It would probably be more appropriate to refer to Art. 15 CFR in relation to personality-related measures and to place Art. 16 CFR in the foreground of the examination in relation to company-related restrictions.[220] In any case, it is a fact that Art. 16 CFR and Art. 15 CFR are almost completely parallel.[221]

The violation of the fundamental freedoms examined above, which was affirmed in the result, certainly has a certain indicative effect for Art. 15 and 16 CFR, for an impairment of professional activities that are contrary to Union law and which are to be attributed to the fundamental freedoms can hardly be classified as justified in the light of the Charter. Consequently, Recital 3 to the Charter of Fundamental Rights explicitly refers to the fundamental freedoms of the TFEU; building on this, the following Recital 4 then clarifies that the Charter wishes to "make more visible" the fundamental rights inherent in the fundamental freedoms. Thus, the fundamental rights themselves, by their very objective, take up the ongoing guarantee of the fundamental freedoms.[222] In particular, the

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219 See: Kühling, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar, 1. Ed. 2017, Art. 15 GrCh margin number 22 and 25; see also Everson/Gonçalves, in: Peers/Hervey/Kenner/Ward (Eds.), The EU Charter of Fundamental Rights, 2014, Art. 16 margin number 16.01 ff. and 16.11 ff.

220 Grabenwarter, in: Grabenwarter. (Ed.), Europäischer Grundrechtsschutz, 2014, § 13 margin number 25; Jarass, in: Jarass (Ed.), Charta der Grundrechte der EU, 4. Ed. 2021, Art. 15 margin number 4.

221 Kühling, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar, 1. Ed. 2017, Art. 16 GrCh margin number 13; Jarass, in: Jarass (Ed.), Charta der Grundrechte der EU, 4. Ed. 2021, Art. 15 margin number 5; Schubert, in: Franzen/Gallner/Oetker (Eds.), Kommentar zum europäischen Arbeitsrecht, 4. Ed. 2022, Art. 15 GrCh margin number 1.

222 Frenz, Annäherung von europäischen Grundrechten und Grundfreiheiten, in: NVwZ 2011, 961 (963); Skouris, Die

measure of a positive list would therefore also be disproportionate in the sense of Art. 52 para. 1 CFR. Since the proportionality test of Art. 52 para. 1 CFR is structurally identical to the constitutional proportionality test[223], reference can be made to the following statements in order to avoid repetitions.[224]

bb. Guarantee of Property

The right to property granted by Article 17 CFR has, due to its pan-European roots, a structure that differs in detail from the concept of property in Article 14 of the Basic Law. The protection of the established and exercised business appears therefore rather doubtful within the framework of Art. 17 CFR.[225] What is undoubtedly protected, however, are "pecuniary rights from which, with regard to the legal system, a secure legal position arises which enables an independent exercise of these rights by and for the benefit of their holder".[226] Furthermore, all rights in rem in movable and immovable property are covered by the protection, in particular property in rem[227], which, according to the European Court of Justice, also includes ownership of animals.[228]

Rolle der Grundfreiheiten in der Europäischen Wirtschaftsverfassung und ihr Verhältnis zur Grundrechte-Charta, in: Ellger/Schweitzer (Eds.), Die Verfassung der europäischen Wirtschaft, 2018, p. 53 (68).

[223] Jarass, in: Jarass (Ed.), Charta der Grundrechte der EU, 4. Ed. 2021, Art. 17 margin number 34 et seq.

[224] See under IV.4.

[225] Cf. Jarass, in: Jarass (Ed.), Charta der Grundrechte der EU, 4. Ed. 2021, Art. 17 margin number 13.

[226] ECJ, Case C-283/11, decision of 22.01.2013, margin number 34.

[227] Jarass, in: Jarass (Ed.), Charta der Grundrechte der EU, 4. Ed. 2021, Art. 17 margin number 9.

[228] ECJ, Case C-20/00 and C-64/00, decision of 10.07.2003, margin number 67 et seq.

Art. 17 para. 1 CFR specify various criteria for the deprivation and modification of property positions:

> "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

The European Court of Justice points out in this respect that in the case of deprivations, the requirements of Article 52 para. 1 CFR must also be fulfilled[229], because otherwise there would be distortions in the structure of fundamental rights. Thus, above all, the principle of proportionality must be observed. In the case of "mere" restrictions on use, on the other hand, Article 52 para. 1 CFR is the sole standard of review[230]; as a result, however, all justification tests are largely consistent.[231]

The manifold effects of a positive list on concrete property positions - from the ownership of animals themselves to the already existing stock of goods of various service providers - would naturally be extensive and severe. It is conceivable that individual facets of a positive list would deprive specific individual items, whereas other components of the measure would act more as a

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[229] ECJ, Case C- 235/17, decision of 21.05.2019, margin number 88.

[230] ECJ, Case C-258/14, decision of 13.06.2017, margin number 53.

[231] Kühling, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar, 1. Ed. 2017, Art. 17 GrCh margin number 25.

restriction on use. In the absence of a concretely assessable measure by the Union legislator, no more specific statements are possible at present. However, as already mentioned with regard to the freedom of occupation, it must be pointed out that the infringement of fundamental freedoms associated with a Union list would certainly "spill over" to the level of fundamental rights, so that the assumption of an infringement of Art. 17 CFR is justified in various respects.

cc. Protection against Discrimination

Whereas Art. 20 CFR establishes a general principle of equality, Art. 21 CFR contains specific prohibitions of arbitrariness. In the jurisprudence of the European Court of Justice, these rights are usually combined into a uniform principle of equal treatment/prohibition of unequal treatment.[232] Since the core of any equality test is the identification of the comparative groups considered relevant by the legislator and, based on this, the analysis of the different categories of cases, there is a lack of sufficiently concrete indications for a detailed test here as well. Of central importance, however, is the realisation that Art. 20 and 21 CFR, as relevant standards of review, would set the appropriate limits to measures of the Union,

[232] On this and on the criticism voiced in the literature in this respect: Heselhaus, in: Pechstein/Nowak/Häde (Eds.), Frankfurter Kommentar EUV/GRC/AEUV, 1. Ed. 2017, Art. 20 GrCh margin number 15.

IV. Constitutional law

The constitutional parameters of dealing with pets have already been comprehensively described elsewhere, so that reference can be made to the corresponding basic principles.[233] However, a more in-depth discussion is required here of those arguments of a constitutional nature that have been developed or are being put forward specifically with regard to the discussion on the introduction of a pet positive list. The following explanations are initially chronologically oriented to the corresponding contributions to the discussion, so that conversely questions of the methodological correctness of this order are not taken up.

1. Constitutional requirement for action under Article 20a of the Basic Law

In the discussion on the introduction of a pet positive list, the assessment is made that legislative action is unavoidable because the constitutional framework conditions would ultimately result in a "reduction of discretion to zero":

> "This means that the German legislator cannot only act against the background of international and Union law by means of a positive list for the legal keeping of "pets". Its scope for action in this regard is also significantly reduced by the precautionary principle and Article 20a of the Basic Law, § 1 of the Animal

[233] Spranger, Heimtierhaltung und Verfassungsrecht, 2018.

> Protection Act (TierSchG) to a requirement for appropriate action".[234]

Such a construction is, of course, not sustainable from a legal point of view. Irrespective of the fact that it is already dogmatically impossible to mix the precautionary principle enshrined in EU law, a constitutional state objective provision and a federal provision of special administrative law - and thus legal acts of the most diverse character and provenance - for the purpose of creating a supposed legal principle, the following may be stated in the required brevity:

The precautionary principle contained in Art. 191 TFEU is indeed legally binding, but according to - as far as can be seen - completely undisputed opinion not in a directly applicable manner.[235] Neither does an EU citizen have a right to legislative action based on Art. 191 TFEU, nor are specific legal standards imposed on the legislator. Rather, the EU institutions have a wide margin of appreciation and creative freedom in the implementation of environmental policy.[236] The guarantee of absolute, immediate and global environmental protection is therefore not required in the light of Art. 191 TFEU.[237]

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[234] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 29, whereby the relevant words are additionally emphasised by bold type in the original; translation by the author.

[235] Streinz, in: Streinz (Ed.), EUV/AEUV, 3. Ed. 2018, Art. 191 AEUV margin number 47.

[236] Streinz, in: Streinz (Ed.), EUV/AEUV, 3. Ed. 2018, Art. 191 AEUV margin number 49.

[237] Streinz, in: Streinz (Ed.), EUV/AEUV, 3. Ed. 2018, Art. 191 AEUV margin number 49.

With regard to Article 20a of the Basic Law, the result is no different. First of all, it can be stated that Article 20a of the Basic Law transforms basic ideas of the precautionary principle into the national constitutional order[238], so that the statements made on the precautionary principle also require application here. Article 20a of the Basic Law is a constitutional value decision[239] that is to be concretised primarily by the legislature.[240] Here, the legislature has a broad prerogative of assessment, so that the obligations under Article 20a of the Basic Law are hardly justiciable in practice and the limit of what is permissible is only exceeded if the legislative measures are completely unsuitable.[241]

The derivation of concrete legislative mandates from Article 20a GG can thus be considered excluded.[242] If this already applies in general, it is all the more impossible to construct a "legislative mandate" when it concerns a highly specific subject of regulation, for the regulation of which a completely new regulatory philosophy[243] is to be

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[238] Jarass, in: Jarass/Pieroth (Eds.), Grundgesetz für die Bundesrepublik Deutschland, 17. Ed. 2022, Art. 20a margin number 1; Calliess, in: Dürig/Herzog/Scholz, Grundgesetz-Kommentar, 99. supplement September 2022, Art. 20a margin number 109.

[239] Jarass, in: Jarass/Pieroth (Eds.), Grundgesetz für die Bundesrepublik Deutschland, 17. Ed. 2022, Art. 20a margin number 1.

[240] Schultze-Fielitz, in: Dreier (Ed.), Grundgesetz-Kommentar, 3. Ed. 2015, Art. 20a margin number 67; Rux, in: Epping/Hillgruber (Eds.), BeckOK Grundgesetz, 54. supplement, 15.02.2023, Art. 20a margin number 27.

[241] Schultze-Fielitz, in: Dreier (Ed.), Grundgesetz-Kommentar, 3. Ed. 2015, Art. 20a margin number 71; Rux, in: Epping/Hillgruber (Eds.), BeckOK Grundgesetz, 54. supplement, 15.02.2023, Art. 20amargin number 30 et seq.

[242] Schultze-Fielitz, in: Dreier (Ed.), Grundgesetz-Kommentar, 3. Ed. 2015, Art. 20amargin number 71.

[243] See above under III.3.a.

developed and implemented, breaking with traditional regulations. Therefore, there is no legislative requirement for the introduction of a positive pet list.

2. Freedom of occupation under Article 12 para. 1 of the Basic Law

With regard to the cardinal fundamental right of freedom of occupation, the proponents of a pet positive list make the following assessment:

> "In accordance with the mandate, the present expert opinion "only" examines the admissibility of a positive list for the keeping of "pets". Accordingly, the proposed regulation concerns the keeping of animals for private purposes and consequently only affects the trade in "pets".
>
> The keeping of and trade in animals for commercial purposes are therefore not addressed, so that the fundamental right of freedom of occupation under Article 12 para. 1 of the Basic Law is not affected with regard to zoos and the like, for example, and there is no need for an exemption in this respect.
>
> This also applies to "animal traders". They can still trade in animals of species that are not on the positive list but are to be kept for commercial purposes. However, the regulation to be adopted should provide criteria that enable the trader to effectively verify the proof of commercial keeping (...).
>
> The occupational profile of the "animal trader" is therefore not affected to a large extent, so that it

is already questionable whether the regulation proposed here would even have a tendency to regulate the profession and whether the scope of protection of Article 12 para. 1 of the Basic Law would be infringed at all.

Even if one were to assume this here with a view to the future inadmissibility of trade in animals of species that are on a positive list and are to be kept as "pets", the following applies:

The fundamental right of freedom of occupation under Article 12 para. 1 of the Basic Law, as a fundamental economic right, is dependent on legislative design. This means that the legislature can shape and change freedom of occupation. This is expressly recognised for freedom of occupation with the power to regulate occupational profiles.

Accordingly, the legislature can restrict the commercial trade in "pets" that are to be kept for private purposes. In doing so, it is (solely) bound by the standard of proportionality of the regulation.

The state objective of animal protection is part of the constitutional order. However, it is not compatible with Article 20a of the Basic Law if animal species are kept as "pets" that are not suitable for this purpose (...). In view of the overriding reasons of animal protection as well as the protection of species and biodiversity and the protection of human health and public safety, which are decisive here,

> there is nothing apparent for a disproportionality of the intended regulation."[244]

These constitutionally surprising submissions require a step-by-step analysis, which is provided below:

a. On the scope of protection of professional freedom

The attempt to fragment the scope of protection of freedom of occupation by means of unrealistic tricks in order to "talk down" the effects on the activities and fields of action protected by Article 12 para. 1 of the Basic Law is already irritating. Irrespective of the fact that not only the trade in animals for zoos and comparable institutions, but of course also the trade in pets for commercial purposes takes place[245], the cited statements follow a relativising narrative according to which many activities would remain unaffected by a pet positive list, and that "only" the pet trade for private individuals would be affected. From a quantitative and economic point of view, it must be made clear that the trade in zoo animals is negligible compared to the trade in pets:

Protected zoo animals are regularly transferred between zoos and the receiving zoo usually bears the transport costs. In some cases, however, the transport costs are also borne by the zoo that transfers the animal to another zoo. A real "trade" in the sense of professional law does not take place here from the outset. Only small zoo animals

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[244] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 34 et seq. with further references; translation by the author.

[245] In fact, no semantic misunderstanding seems to be decisive for the corresponding remarks.

that are not protected are bought by zoos from traders, e.g. in the field of aquaristics. However, there are no surveys on this and the figures are hardly measurable in comparison to the conventional pet trade.

However, qualitative considerations of the applicable constitutional law are incomparably more relevant for the constitutional assessment. According to the established jurisprudence of the Federal Constitutional Court, freedom of occupation extends to any gainful activity that is of a permanent nature and serves to create and maintain a livelihood.[246] In principle, any professional activity is covered.[247] Trade in pets therefore enjoys the full protection of freedom of occupation - the same applies, of course, to the production of and trade in pet food, accessories or other products and services designed for pet keeping, but also, of course, to commercial breeding, the services offered by veterinarians, dog schools, pet exchanges, pet boarding kennels, etc.. All these pet-related activities enjoy constitutional protection via Article 12 para. 1 of the Basic Law. The reference to the legislature's general power to regulate the structure of professions[248] does not change this finding in the slightest. In particular, it does not change the requirement for a "clean" fundamental rights examination.

For the sake of completeness, it should be pointed out that the case law of the Federal Constitutional Court cited to

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[246] Instead of many: BVerfG, NJW 2004, 2363 with further references.

[247] Instead of many: BVerfG, NJW 2004, 2363 with further references.

[248] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 35.

justify the "power to regulate occupational profiles" is by no means evidence of legislative carte blanche. On the contrary. For example, the cited decision on the Hufbeschlaggesetz states:

> "The complainants, who have chosen the profession of farrier or hoof technician, run schools for hoof care and hoof technology or teach at such schools, have had their right to free choice of profession violated by the challenged provisions of the recast Farriery Act 2006 (HufBeschlG 2006), which is protected by Article 12 para. 1 of the Basic Law, to the extent that the professions they practise are subjected to the licensing requirements for farriers.
>
> By the Farriery Act 2006, the legislature unified the professions of farrier, farrier technician and farrier into a single profession.
>
> When unifying several professions, it must be taken into account that the definition of occupational profiles and the establishment of subjective admission requirements interfere with the freedom of choice of occupation protected by Article 12 para. 1 of the Basic Law (...).
>
> With the new regulation, the legislator also pursues the goal of protecting a particularly important common good, namely to promote animal welfare by ensuring the quality of hoof care.
>
> However, the subjective professional licensing requirements that have been created with the merger of

the professions place an unreasonable burden on the complainants.

By reserving barefoot care to state-approved farriers, the new regulation abolishes the professions of farrier and hoof technician for the future.

The intensity of this interference in the freedom of choice of profession is out of proportion to the advantages that can be achieved by merging the professions for the benefit of improved animal welfare by ensuring the quality of hoof care.

The quality of hoof care can also be ensured by making access to the profession of hoof carer as well as hoof technician dependent on the acquisition and proof of the theoretical knowledge necessary to select the respective indicated method from the entire spectrum of care and thus including hoof protection materials including iron shoeing, to advise animal owners accordingly and, if necessary, to refer them to farriers.

It violates the principle of proportionality if a professional applicant is required to have knowledge and skills that are disproportionate to the planned activity (...).

The violation of the complainants' freedom of profession leads to the nullity of the essential (...) challenged provisions."[249]

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[249] BVerfGE 119, 59 ff, Guideline sentences 1 and 2; translation by the author.

A look at this decision of the Federal Constitutional Court shows two things:

- Any permanent action in dealing with animals aimed at creating a financial livelihood enjoys the protection of freedom of occupation under Article 12 para. 1 of the Basic Law.

- Animal welfare considerations do not constitute a legislative carte blanche, but must be sufficiently normatively implemented to meet the requirements of Article 12 para. 1 of the Basic Law.

All attempts to minimise the effects of a pet positive list on the manifold activities covered by the scope of protection of Article 12 para. 1 of the Basic Law are therefore unconvincing.

b. The tendency to regulate professions

Since almost every state action has some effect on some profession, it is undisputed that there is a need for a corrective to prevent the unrestrained application of freedom of occupation.[250] Consequently, the Federal Constitutional Court expresses in constant case law:

> "Art. 12 para.1 GG guarantees the freedom of professional activity. On the one hand, the protection of this fundamental right is comprehensive, as shown by the explicit mention of the choice of occupation, the choice of place of training and workplace, and the

[250] See just: Kämmerer, in: von Münch/Kunig (Eds.), Grundgesetz-Kommentar, 7. Ed. 2021, Art. 12 margin number 89.

> practice of one's profession. On the other hand, however, it only protects against impairments that are specifically related to professional activity. It is therefore not sufficient that a legal norm or its application has repercussions on professional activity under certain circumstances. Article 12 para. 1 of the Basic Law only has a protective effect against such norms or acts which either relate directly to professional activity or which at least have an objective tendency to regulate professional activity"[251]

Differences in judgement, which become apparent when analysing the case law on the tendency to regulate professions[252], lead to criticism of the legal concept, as does the fact that the constitutional protection of Article 12 para. 1 of the Basic Law must not be weakened. This is because the "multitude of purposes that today can be associated with a certain state measure and are associated with it, but also the variety of means of shaping public policy, particularly in the area of economic policy, prohibit a reduction of the defence effect under fundamental rights to certain forms of state intervention".[253] However, without these rather academic discussions having to be fanned out further, the relevance of Article 12 para. 1 of the Basic Law can nevertheless be attested. For on the one hand, there is a tendency to regulate the profession; on the other hand, the serious

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[251] BVerfGE 129, 208 (266 f.) with further references; translation by the author. See also in general: Spranger, Heimtierhaltung und Verfassungsrecht, 2018, p. 57 et seq.

[252] Kämmerer, in: von Münch/Kunig (Eds.), Grundgesetz-Kommentar, 7. Ed. 2021, Art. 12 margin number 89 et seq.

[253] Manssen, in: von Mangoldt/Klein/Starck (Eds.), Grundgesetz, 7. Ed. 2018, Art. 12margin number 75.

side-effects of state action that are accepted are regarded as alternative proof of an encroachment on the freedom to exercise one's profession.

aa. On the existence of a tendency to regulate the profession

According to the case-law of the Federal Constitutional Court, an occupation-regulating tendency exists at any rate if a provision, according to the history of its creation and its content, primarily concerns activities that are typically exercised in an occupation.[254] It is therefore not sufficient that a legal norm or its application only has repercussions on professional activities under certain circumstances.[255] Therefore, compulsory memberships linked to economic activities, the general authorisations of general security and regulatory law or claims for damages under civil law are uncritical because they are "profession-neutral".[256]

This shows that a pet positive list is inevitably accompanied by a tendency to regulate the profession. Whether it is the trade in animals, the trade in pet products, the holding of trade events such as fairs, the provision of pet-related services or veterinary examinations of pets: all these activities are typically, and in some cases even necessarily, carried out exclusively on a professional basis. The effects of a pet positive list

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[254] BVerfGE 97, 228 (254); agreeing: Mann/Worthmann: Berufsfreiheit (Art. 12 GG) – Strukturen und Problemkonstellationen, in: JuS 2013, 385 (389).
[255] BVerfGE 106, 275 (299).
[256] Mann/Worthmann: Berufsfreiheit (Art. 12 GG) – Strukturen und Problemkonstellationen, in: JuS 2013, 385 (389) with further references.

would also exclusively[257] affect the members of these professions and would thus not be a constitutionally irrelevant reflex. Such reflexes would be relevant, for example, if a freelance journalist were able to publish fewer texts related to pets as a result of a new legal regulation and the resulting insolvency of some trade journals. The differences are obvious, as such a constellation relates to the "suppliers" of the professions concerned. On the other hand, the entire "pet industry" would be directly affected by a positive list.

It should only be mentioned in addition that the proponents of a positive pet list point out in a proposed regulation that a new section 13 of the Animal Protection Act would also have to contain "requirements for the proof of commercial keeping".[258] Likewise, it is freely conceded that the positive list is about "restricting the commercial trade in "pets" to be kept for private purposes."[259]

Not only the requirements for commercial keeping situations, but the entire positive list would therefore even qualify as final professional regulation.[260] The same applies, for example, to trade fair organisers or private breeders who sell at least some of the animals they breed. As explained[261], Article 12 para. 1 of the Basic Law protects activities aimed at making a profit even if they

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[257] This applies, for example, with regard to the required licence for veterinarians..

[258] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 34.

[259] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 35.

[260] Kämmerer, in: von Münch/Kunig (Eds.), Grundgesetz-Kommentar, 7. Ed. 2021, Art. 12 margin number 90.

[261] See above under a.

are merely a secondary activity or part of a hobby activity accompanied by financial incentives. A positive list covering private pet keeping would therefore necessarily also cover such private breeding, which constitutes a further final occupational regulation.

bb. Interim result

A pet positive list would constitute a final professional regulation. With regard to all the effects of a positive list for the various stakeholders of the "pet industry", a tendency to regulate the profession would have to be affirmed as a substitute.

cc. On the figure of foreseeable serious impairments

In additio[262] to the legal figure of a tendency to regulate the profession, there is also the figure of foreseeable serious impairments of the freedom of profession of the affected companies. The Federal Administrative Court has consistently held that severe impairments of the freedom to pursue an occupation, which are not intended but are ultimately "tolerated" by state measures, constitute an encroachment on Article 12 para. 1 of the Basic Law:

> "Art. GG Article 12 para. 1 of the Basic Law protects, inter alia, free entrepreneurial activity serving profit-making purposes. Within the framework of the existing economic order, the conduct of the entrepreneur in competition is a component of this entrepreneurial activity (cf. BVerwGE 87, 37 (39) = NJW 1991, 1766). A comparative product test, such as

[262] Mann, in: Sachs (Ed.), Grundgesetz, 9. Ed. 2021, Art. 12 margin number 95.

the one conducted by the defendant, can have a lasting influence on the competitive position of the entrepreneurs affected by it. In its judgement of 18 April 1985 (BVerwGE 71, 182 (194)) on the publication of pharmaceutical transparency lists, the Senate considered official information of the kind in question here to be relevant to fundamental rights if it is clearly aimed at an adverse effect on the side of the entrepreneurs and does not merely entail this effect as a side effect. In the further development of this consideration, the Senate expressed its conviction in the judgement of 18 October 1990 (BVerwGE 87, 37 (43f.) = NJW 1991, 1766) on the publication of a list of wines contaminated with glycol that the scope of protection of Art. 12 is not only affected when such publications are made with a tendency to regulate the profession, but that the protection of Art. 12 also extends to state announcements which, as an unintended but foreseeable and accepted side effect, cause a serious impairment of the freedom of professional activity. The Senate adheres to this interpretation of the law. This means that a product test carried out and published by the Chamber of Agriculture is also to be measured against Article 12 of the Basic Law. The negative outcome of such a test has a serious damaging effect on the reputation of the product in question. The plaintiff's submission that the downgrading of its product in the test which triggered the legal dispute led to considerable sales losses has remained uncontradicted."[263]

[263] BVerwG, NJW 1996, 3161; translation by the author.

The situation is no different with regard to the introduction of a pet positive list. The prohibitive character explicitly inherent in a positive list, in conjunction with the reversal of the rule-exception relationship towards the inadmissibility of private pet keeping as a rule, has the effect that massive effects would inevitably affect all parts of the pet industry - and this is not only accepted by the legislator, but ultimately pursued as an equal goal and thus intended.

c. On the "step doctrine" of the Federal Constitutional Court

On the part of the proponents of positive lists, it is argued, as explained, that the legislature can restrict the commercial trade in "pets" that are to be kept for private purposes. This statement has already been refuted or relativised above. In this context, however, the reference to the limits that are to be shown to the legislator in this respect deserves special attention:

> "In doing so, it is (solely) bound by the standard of proportionality of the regulation."[264]

This statement is surprising. After all, the so-called "Stufenlehre" (doctrine of steps) developed in the so-called Pharmacy Ruling of the Federal Constitutional Court[265] and since then been continued in constant case law, that encroachments on the freedom to exercise one's profession can take place in different ways - namely as

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[264] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 35 et seq.; translation by the author.
[265] BVerfGE 7, 377 ff.

regulations on the exercise of one's profession, as subjective barriers to admission and as objective barriers to admission - and that, depending on the level of intervention, completely different justification requirements must be fulfilled[266], also has an effect in the present case. Thus, it is easily conceivable that trade-related regulations in the environment of a positive list would constitute a (de facto) professional ban and thus an objective admission barrier. It is also possible that requirements of expertise are implemented, which are among the "classic" examples of subjective barriers to admission. In both cases, however, a pure proportionality test - as far as can be seen: undisputed - would not suffice to justify intervention.

Since the proponents of a pet positive list would like to delegate the detailed regulations of the relevant approach to the ordinance level[267], the conceivable variety of corresponding restrictions cannot even be guessed at present. In view of the fundamental bandwidth of state instruments, however, it can be considered impossible that a corresponding ordinance would be content with "mere" regulations on the exercise of the profession. The principle of proportionality would therefore - irrespective of the question of its possible violation[268] - definitely not be a generally suitable, conclusive standard of review.

[266] In detail: Spranger, Heimtierhaltung und Verfassungsrecht, 2018, p. 52 et seq.
[267] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren“, 1. August 2022, p. 32 et seq.
[268] See below under d.

d. Interim result

In view of the multitude of professional activities in the field of pet keeping, the introduction of a pet positive list would lead to multiple violations of the freedom of occupation protected by Article 12 para. 1 of the Basic Law.

3. General freedom of action under Article 2 para. 1 of the Basic Law

In the current discourse on a pet positive list, the so-called general freedom of action under Article 2 para.1 of the Basic Law also plays a certain role.[269] This is surprising, at least at first glance, as this right is a so-called catch-all fundamental right. However, it is precisely this - subordinate - role assigned to Article 2 para. 1 of the Basic Law in constant case law that explains the emphasis on Article 2 para. 1 of the Basic Law in the present context, since the broadness of the scope of protection is accompanied by an almost unlimited range of possible justifications.[270]

The fundamental right under Article 2 para.1 of the Basic Law is therefore of absolutely secondary importance for the constitutional analysis of the positive list issue; rather, the serious violations of fundamental rights are fed by entirely different, incomparably more relevant sources, which will be dealt with in detail above and below. Nevertheless, it is necessary to deal briefly with the

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[269] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 36 et seq.
[270] Spranger, Heimtierhaltung und Verfassungsrecht, 2018, p. 29.

statements made by the proponents of positive lists with regard to the general freedom of action, because the analysis of these evaluations allows conclusions to be drawn about certain constitutional deficits, even with regard to very fundamental issues. Literally, it states:

> "According to this, the scope of protection of Article 2 para.1 of the Basic Law is indeed broadly defined, so that an encroachment on the scope of protection can in principle be present by any state action burdening the holder of the fundamental right by means of prohibitions or prohibitions. However, conduct that falls within the scope of protection of Article 2 para. 1 of the Basic Law must be made considerably more difficult or impossible for the person concerned.
>
> This is already doubtful in the present case. Because "pet keeping" as such is not prohibited. Its permissibility is merely restricted to certain animal species.
>
> Moreover, the general freedom of action is by no means guaranteed without limits. It is subject to constitutional limitations. This means that general freedom of action is only granted, among other things, if it does not lead to violations of the constitutional order.
>
> And here too, the state goal of animal protection is part of the constitutional order. However, it is not compatible with Article 20a of the Basic Law if animal

> species are kept as "pets" which are not suitable for this purpose (...)."[271]

Only the following in this regard:

- The general freedom of action protects - according to the established case law of the Federal Constitutional Court - "every form of human activity without regard to the importance of the activity for the development of personality".[272] It therefore makes no difference whatsoever whether a state ban covers a complete area of life or leaves those entitled to fundamental rights with a torso of permitted residual activity. In other words, every state ban is by definition an encroachment on fundamental rights. Exclusively cosmetic terms such as "limited authorisation" cannot change this.

- Regardless of the - as mentioned: generally accepted - breadth of the possibilities of justification, it is not sufficient to prove justification if another constitutional norm merely recognises a legal right. Rather, it must be proven that the protection of this conflicting legal good actually takes place and, moreover, is of higher priority. The assertion that "animal species are kept as "pets" that are not suitable for this purpose" is in this generality first of all no more than an unproven assumption and would have to be substantiated for each animal species concerned by means of empirical data that at least meet basic requirements of good scientific practice. In its present

[271] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 36 et seq.; translation by the author.
[272] Since BVerfGE 80, 137 et seq., margin number 62 at Juris.

form, the above statement ultimately says nothing more than that "pets must not be kept because they must not be kept", which as a tautology does not constitute a viable justification.

- The statement that "the general freedom of action (...) is only granted, among other things, if it does not lead to violations of the constitutional order" obviously confuses the levels of the opening of the scope of protection on the one hand and the justification of encroachment on the other. Every right to freedom is usually examined in three steps: Opening of the scope of protection, encroachment, justification of encroachment.[273] The question of the opening of the scope of protection is devoted to the examination of whether the act in question is covered by the scope of application of a specific right of freedom and whether the person in question can invoke this right; the examination of the encroachment is concerned with whether the act protected by fundamental rights is made impossible or the starting point for a state sanction; the justification of encroachment is then devoted to the question of whether the certified encroachment can be justified on the basis of the written and unwritten barriers to fundamental rights. The fundamental right of Article 2 para.1 of the Basic Law is thus not "granted" if it "does not result in infringements". Rather, the Basic Law already grants this fundamental right - and the state is obliged to demonstrate that it may exceptionally restrict the validity of the fundamental right.

[273] Instead of many: Graf Kielmansegg, Die Grundrechtsprüfung, in: JuS 2008, 23 et seq.; Dreier, in: Dreier (Ed.), Grundgesetz-Kommentar, 3. Ed. 2013, preliminary remarks Art. 1 GG, margin number 119 et seq.

The positive list proponents' explanations of Article 2 para.1 of the Basic Law are therefore altogether incapable of developing any persuasive force. The fact that there are more important constitutional rights beyond the points discussed above, which would be violated, is the subject of the explanations above[274] and below.[275]

4. Principle of proportionality

The principle of proportionality, which can be derived from various constitutional rights[276] and which, as a right equivalent to a fundamental right, is in the end undisputed, must be examined in four steps according to the established case law of the Federal Constitutional Court[277]: Legitimate purpose, suitability, necessity, appropriateness (also referred to as "proportionality in the narrower sense"). The following explanations map this sequence of examination.

a. Legitimate purpose

The question of a legitimate purpose is addressed by the proponents of a pet positive list in a wide variety of contexts, but in the context of the principle of proportionality it is treated rather neglectfully.[278] However, this restraint is (exceptionally) harmless, because case law and practice actually tend towards a broad

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[274] See abobe under 2.f.
[275] See below under 4.
[276] Grzeszick, in: Dürig/Herzog/Scholz, Grundgesetz-Kommentar, 99. supplement September 2022, Art. 20 margin number 110 with further references.
[277] Recently: BVerfGE 124, 300 (331).
[278] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 18 et seq.

understanding of legitimate purposes: The purpose pursued can only become significant if it is (constitutionally) legitimate.[279] Legitimate is a public interest that is not constitutionally excluded, which also depends on the respective fundamental right.[280] With regard to the objectives to be legitimately pursued, it can thus be said that the state has extreme leeway here and only completely unsuitable or unobjective purposes are deemed to be inappropriate connecting factors. There is no lack of a legitimate purpose, since - at least superficially - aspects of biodiversity protection and animal welfare within the meaning of Article 20a of the German Basic Law are just as important. Whether these rights or positions are correctly represented or understood in this respect is initially irrelevant at the level of legitimate purpose.

b. Suitability

Similarly, the requirement of appropriateness tends to be under-complex. A means is already suitable in the constitutional sense if the desired success can be promoted with its help, whereby the possibility of achieving the purpose is sufficient.[281] Suitability is lacking (only) if the achievement of the purpose is not promoted at all or is even hindered, the suitability ceases to exist, or the

[279] Cf. Jarass, in: Jarass/Pieroth (Eds.), Grundgesetz für die Bundesrepublik Deutschland, 17. Ed. 2022, Art. 20 margin number 117 with further references.
[280] Cf. Jarass, in: Jarass/Pieroth (Eds.), Grundgesetz für die Bundesrepublik Deutschland, 17. Ed. 2022, Art. 20 margin number 117 with further references.
[281] Permanent jurisdiction; cf. BVerfGE 134, 204 et seq,, margin number 79.

addressee is not capable of the measure.[282] This criterion of the proportionality test - which, as mentioned above, is usually to be affirmed - does, however, acquire a certain significance in the present case. As already mentioned[283], the proponents of a pet positive list rely on a considerable bundle of motives and reasons to justify the alleged necessity of such an instrument. In particular - without claiming to be exhaustive - the following are invoked

- the suffering of many pets[284],

- the protection of biodiversity[285],

- ecosystem protection[286],

- climate change[287],

- the fight against animal smuggling[288],

[282] Jarass, in: Jarass/Pieroth (Eds.), Grundgesetz für die Bundesrepublik Deutschland, 17. Ed. 2022, Art. 20 margin number 118.
[283] III.1.a.bb.aaa.
[284] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 4.
[285] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 5 et seq.
[286] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 5 et seq.
[287] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 5 et seq.
[288] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 6 et seq.

- security with regard to zoonoses[289],

- security with regard to dangerous or poisonous animals.[290]

All these rather shotgun-like objectives, as just described, certainly represent legitimate purposes of state action in themselves. Within the framework of the suitability test, however, it must be proven that these "high-quality" purposes, which are conceivably different in terms of normative anchoring and direction of effect, can actually be promoted.

In other words, the success sought with a state measure does not have to be complete, especially not in every individual case, nor does it have to be highly probable. There is also no optimisation requirement in the sense that the most effective means must be used. Nevertheless, suitability can only be assumed if the probability of the desired success is increased, i.e. if the success can be promoted.[291]

How a comprehensive de facto ban on private pet keeping in Germany can contribute to combating climate change, have the effect of reducing animal smuggling in view of the already existing CITES legal framework, or optimise ecosystem protection - however this may be specified - is not clear. With regard to the other, possibly somewhat closer objectives, it is also necessary from a

[289] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 8.
[290] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 8.
[291] Siehe zu all dem nur: Sachs, in: Sachs (Ed.), Grundgesetz, 9. Ed. 2021, Art. 20 margin number 150.

constitutional point of view to demand that, in addition to the seemingly arbitrary assertion of various advantages, a causal justification is provided. Otherwise, a positive list regulation is not even suitable for achieving the objective, with the consequence that the instrument is already unconstitutional in this respect.

c. Necessity

Comparatively much effort is expended in defending the positive list approach with regard to the necessity of the measure. According to the established case law of the Federal Constitutional Court, necessity means that the mildest means of equal effectiveness must be used to achieve success.[292] In this respect, it is evident that negative lists, according to general assessment, lead to significantly greater encroachments on fundamental rights compared to positive lists.[293] However, in the form of negative lists, a regulatory instrument is fundamentally available which, from a constitutional point of view, has a milder effect. Against this background, the following attempts to prove the lesser suitability of the negative list approach can be explained in order to justify why the mildest possible means[294] should not be used with a positive list:

> "Negative lists are inevitably always reactive. They are based on restricting or banning the trade and

[292] Recently: BVerfGE 142, 268 et seq., margin number 71et seq.

[293] Even so Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 12.

[294] The fact that a horizontally effective negative list approach for pets would also be problematic does not need to be further elaborated in the present context.

keeping of certain animal species. The trade and keeping of animal species that are not on the negative list are therefore not addressed at all. This is not only, but especially relevant with regard to reptiles, amphibians and fish, which actually make up a large part of the animals in the "pet trade".

For many wild animal species in trade, there is also a lack of (sufficient) scientific knowledge about their biology, which is why they would already not be included in a negative list.

Furthermore, a negative list that includes all species of the various animal groups (mammals, birds, reptiles, amphibians, fish, insects, arachnids, etc.) that are not suitable for private keeping for reasons of animal, species and nature protection as well as for reasons of health protection and public safety would be extremely long, it would probably contain thousands of species and would thus hardly be suitable for enforcement.

In addition, continuous updates would be required - also because the range of species in trade varies constantly, the taxonomy is constantly updated and newly described species would have to be taken into account."[295]

[295] Ziehm, Rechtliche Zulässigkeit und Gebotenheit einer nationalen Positivliste für die legale Haltung von „Heimtieren", 1. August 2022, p. 18 et seq.; translation by the author.

In detail:

aa. On the "reactive character" of negative lists

The reference to the fact that negative lists are necessarily always reactive and that trade in and keeping of animal species not listed on the negative list are not addressed at all is flawed for several reasons and not sufficiently sustainable to serve as support for the claimed necessity. This applies on the one hand with regard to the problem of reactivity, and on the other hand with regard to the consequences resulting from non-addressing.

Law is - as far as can be seen: undisputed - without exception reactive.[296] Thus, there is always a time gap between certain social, political, technological or other practical developments on the one hand and the reaction of the law on the other. In order to minimise legal vacuum, existing norms are sometimes applied analogously in these situations; in no case, however, is it possible to create new and appropriately adapted law ad hoc. The legislative measures taken in the wake of the Corona pandemic provide an illustrative example in this respect: over a period of two years, the federal and state legislatures repeatedly passed entire sets of norms in cascade, which were supplemented by an unmanageable variety of substantive norms (for example in the form of municipal bylaws).

[296] See just: Spranger, Recht und Bioethik, 2010, p. 63; Advocat General at the ECJ, Case C-526/19, concluding remarks of 9. 7. 2020, margin number 69 et seq.; Krebs, in: Dauner-Lieb/Langen (Eds.), BGB Schuldrecht, 4. Ed. 2021, § 242 BGB margin number 8; Feneberg/Pettersson, Schutz vor extremer Armut – Asylrechtsfortbildung durch Verwaltungsgerichte, in: NVwZ 2022, 1519 et seq.; Kuntz, Künstliche Intelligenz, Wissenszurechnung und Wissensverantwortung, in: ZfPW 2022, 177 et seq.

The same applies to every area of law: inheritance law reacts to the decades-long discrimination against children born out of wedlock, civil service pension law reacts to the existence of registered civil partnerships, agricultural law reacts to the death of insects, nature conservation law reacts to invasive species, immission control law reacts to gas shortages, etc.. Even if and to the extent that law at first glance sets "incentives" for certain actions or omissions on the part of citizens, these incentives invariably represent reactions to certain other developments. The promotion of the installation of heat pumps is therefore only a reaction to climate change and above all to the corresponding demands of the Federal Constitutional Court on politics.[297]

The alleged reactive character of negative lists therefore does not exist. Rather, the reactive character is inherent in every legal act and every legal regulatory approach. On closer examination, even a pet positive list would be reactive in nature, as it would not be allowed to be "cemented", but would in turn - reactively - require constant adaptation. The European Court of Justice has emphasised this - interestingly enough in the decision on the species protection law positive list in Belgium, which is treated very prominently, although the content is wrong[298], by the proponents of a pet positive list:

> "Secondly, that legislation must make provision for a procedure enabling interested parties to have new species of mammals included in the national list of authorised species. The procedure must be one which is readily accessible, which presupposes that it is

[297] BVerfGE 157, 30 et seq.
[298] See under III.1.a.bb.bbb.(3)(b).

> expressly provided for in a measure of general application, and can be completed within a reasonable time, and, if it leads to a refusal to include a species – it being obligatory to state the reasons for that refusal – the refusal decision must be open to challenge before the courts (see, by analogy, Case C-344/90 Commission v France, paragraph 9, and Case C-24/00 Commission v France, paragraphs 26 and 37)." [299]

The assumption that positive lists would be less effective than negative lists due to a selectively reactive nature of the latter is therefore erroneous and cannot be used to justify necessity.

bb. On the lack of scientific data

Equally unsuitable is the argument that the lack of scientific knowledge about the biology of animal species would stand in the way of inclusion in a negative list. This is because the legal system of at least Western countries and also of the EU is based on the scientific principle: state bans or prohibitions must be scientifically substantiated. Especially in the field of environmental policy, this is even laid down in primary law. Art. 191 para. 3 1st indent TFEU reads as follows:

> "In preparing its policy on the environment, the Union shall take account of available scientific and technical data".

A lack of scientific data therefore does not speak in favour of one or the other regulatory method, but rather -

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[299] ECJ, Case. C-219/07, decision of 19.06.2008, margin number 35.

beyond the precautionary principle discussed elsewhere and not relevant here[300] - makes state restrictions inadmissible in the first place.

Just for the sake of completeness, the decision of the European Court of Justice on the Belgian species protection list should be recalled in this context. The court emphasises in the clearest possible terms that (delisting) is not possible without scientific data, even in the positive list area:

> "In any event, an application to have a species included in the list of species of mammal which may be held may be refused by the competent authorities only on the basis of a full assessment of the risk posed to the protection of the interests and requirements mentioned in paragraphs 27 to 29 of this judgment by the holding of specimens of the species in question, established on the basis of the most reliable scientific data available and the most recent results of international research (see, by analogy, inter alia, Alliance for Natural Health and Others, paragraph 73)."[301]

The alleged lack of scientific data thus not only stands in the way of inclusion in a negative list, but also in the way of inclusion in a positive list and ultimately in the way of any form of state restriction. Thus, a positive list does not represent "the mildest means of equal effectiveness" from this point of view either.

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[300] See under III.1.a.bb.bbb.(3)(b).
[301] ECJ, Case C-219/07, decision of 19.06.2008, margin number 37.

cc. The length / enforceability of a negative list

Rather irritating is the reference to the expected "extreme length" of a negative list and the resulting lack of enforceability.

On the one hand, it should be pointed out that the alleged enforcement deficit is not a unique feature of so-called negative lists, but a characteristic of the entire European and national environmental law. In fact, even the term "enforcement deficit" has its origins in environmental law.[302] Consequently, the "dark chapter of enforcement" of European environmental law was once described as the "dark side of the balance sheet for the realisation of the internal market".[303] The over-complexity of the standards to be enforced is, on closer inspection, the least of the problems: The spectrum of the enforcement deficit ranges from the late or omitted transposition of EU directives to their incomplete or incorrect transposition to incorrect application practice.[304]

The causes for this phenomenon are manifold. They include "the economic priorities in the Member State administrations responsible for enforcement, the limited human and financial resources of the environmental

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[302] Hansmann/Röckinghausen, in: Landmann/Rohmer (Eds.), Umweltrecht, 96. supplement September 2021, § 52 BImSchG margin number 1 et seq.

[303] Pernice, Gestaltung und Vollzug des Umweltrechts im europäischen Binnenmarkt - Europäische Impulse und Zwänge für das deutsche Umweltrecht, in: NVwZ 1990, 414 (423); Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 192 AEUV, margin number 38.

[304] Kahl, in: Streinz (Ed.), EUV/AEUV, 3. Ed. 2018, Art. 192 AEUV, margin number 68 et seq.; Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 192 AEUV, margin number 38.

administrations in the Member States, the often considerable financial burden resulting from the enforcement of EU environmental law, the lack of transparency in the rule-making and implementation process, as well as the fact that environmental law is not aimed at the specific (and thus usually subjectivised) interests of a group of people and their organisations, but at the general interest - represented at best by comparatively weakly organised environmental associations - which quickly falls behind in the pluralistic competition between associations".[305] As far as can be seen, the controversial "law on dangerous animals", for example, is also characterised by a high level of political pressure, which is then, however, followed by an at best selective review by the authorities. The lack of suitability for enforcement is thus inherent in every environmental law instrument and thus also in a positive list.

Secondly, the conclusion drawn from the length of a negative list to its suitability for implementation is not convincing. As is well known, it is not only Union law that has countless highly complex and extremely comprehensive regulations, which are nevertheless not seriously denied their suitability for enforcement. One example is the so-called REACH Regulation[306], which shapes the Union's

[305] Krämer, in: Lübbe-Wolff (Eds.), Der Vollzug des europäischen Umweltrechts, 1996, p. 7 (28 et seq.); Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 6. Ed. 2022, Art. 192 AEUV, margin number 41; see also Mentzinis, Die Durchführbarkeit des europäischen Umweltrechts, 2000, p. 193 et seq.; Albin, Die Vollzugskontrolle des europäischen Umweltrechts, 1999, p. 321 et seq.

[306] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council

chemicals law and whose original version of 851 pages of text is not exactly slim. Quite independently of this, however, the brevity of a standard is unfortunately no proof of its suitability for implementation.

In this respect, too, it is clear that there is no question of a positive list being "under-complex". Evidence for the necessity of this regulatory approach is therefore also lacking from this point of view.

dd. The need to update negative lists

The last argument put forward for the necessity of a positive list approach also comes to nothing on closer examination. When it is claimed that a negative list - in contrast to a positive list - would require continuous updating "because the range of species on the market varies constantly, the taxonomy is updated again and again and newly described species would have to be taken into account", this is not a phenomenon that occurs exclusively with negative lists. As has just been sufficiently explained[307], the corresponding updates would also be necessary for a positive list.

ee. Interim result

As an interim result, it can be stated that there is no evidence whatsoever that a positive pet list would be necessary in the constitutional sense. This is because the regulatory instrument of a negative list would provide a

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Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ No. L 396 of 30.12.2006, p. 1 et seq.

[307] See in particular under aaa. and bbb.

means - already established in international environmental law - that would not only be less burdensome for the affected holders of fundamental rights, but would also be at least as suitable as a positive list.

To avoid misunderstandings, however, the following must be pointed out: The above statements do not mean that a general negative list of pets would be constitutional and, in particular, proportionate. Rather, it has merely been demonstrated that the negative list approach would provide an instrument that is just as suitable as the positive list, but less restrictive. Whether other possible regulations could be thought of and found that would be more lenient than a negative list is not the subject of this expert opinion and is therefore left out.

d. Adequacy

Appropriateness, also referred to as "proportionality in the narrower sense", represents an end-means relationship: according to the established case-law of the Federal Constitutional Court, the means employed must not be disproportionate to the end pursued.[308] Thus, an overall balancing is required, in which conflicting goods of constitutional rank are of particular importance.[309]

The above explanations should have made it sufficiently clear that any regulation of pet ownership affects a wide variety of different fundamental rights: In addition to the general right of personality or the general freedom of

[308] See just BVerfGE 80, 103 et seq., margin number 15 at Juris.
[309] Sachs, in: Sachs (Ed.), Grundgesetz, 9. Ed. 2021, Art. 20 margin number 154 et seq. with further references.

action of the owners, the freedom of occupation of the various actors in the pet ownership environment, but also the prohibition of discrimination and the principle of proportionality should be mentioned here. In addition, there are violations of international law standards, but also of fundamental freedoms and EU fundamental rights. These qualitatively high-ranking legal interests then affect millions of owners and tens of thousands of businesses, service providers and employees, so that the qualitative aspect is supplemented by an enormous quantitative dimension.

Any restriction of these rights would have to be based on the substantiated or substantiable protection of higher-ranking goods. The thin melange of various unrelated interests and goods presented by the positive list proponents does not meet these requirements. This is especially true in view of the fact that a scientific substantiation of even a single "justification approach" has not yet been provided and will not be provided in the future, because it cannot be provided for lack of objective reasons. If this objection ultimately applies to any conceivable horizontal regulation of pet keeping, a positive list that reverses the rule-exception relationship of permissible pet keeping into its opposite is particularly likely to violate the core content of protected legal positions.

Consequently, the introduction of a positive list for pets would also be inappropriate in the constitutional sense and therefore disproportionate and unconstitutional for this reason as well.

5. Other constitutional rights omitted from the discussion

The above explanations should already have made it sufficiently clear that the legal arguments put forward by the proponents of positive lists are highly selective. This at best glaring illumination of the legal challenges also continues with regard to constitutional law, since numerous constitutional rights whose relevance in the current debate can hardly be ignored remain completely unmentioned. The following remarks therefore endeavour to fill in the gaps, at least in a cursory manner.

a. Property guarantee under Article 14 para. 1 of the Basic Law

The guarantee of property under Article 14 para. 1 of the Basic Law is, according to undisputed opinion, one of the most important rights of freedom under the Basic Law. Since the basic principles of Article 14 para. 1 of the Basic Law as well as the "classical" questions of delimitation with regard to the freedom of occupation of Article 12 para. 1 of the Basic Law and the existing possibilities of justification have already been sufficiently fanned out elsewhere[310], reference can be made to the corresponding remarks in order to avoid repetition.

It should be clear that a de facto ban on keeping pets, which would have a horizontal effect, would by no means only diminish the future earning opportunities of various economic actors, but would also lead to a massive meltdown of already existing businesses and business areas. Thus, not "only" the acquisition attributable to Article 12 para.

[310] See under IV.2. and IV.5.a.

1 of the Basic Law would be affected, but above all also what has already been "acquired" and thus the cardinal norm of Article 14 para. 1 of the Basic Law. Some of these encroachments would probably have to be examined on the basis of the figure of the "established and exercised business enterprise". However, even beyond this, a wide variety of effects on positions protected under property law would be likely, which cannot be specifically examined in the present case in the absence of a concrete legislative measure. However, the experience gained in other areas of animal-specific legislation allows the assumption that far beyond the "mere" content and limitation provision, there is a threat of expropriation or expropriation-like interventions that do not meet the constitutional requirements.

b. General right of personality under Article 2 para. 1 of the Basic Law in conjunction with Article 1 para. 1 of the Basic Law

The importance of pet ownership for the individual and society can hardly be overestimated. The manifold and multi-faceted psychological effects of human-animal interaction, which have been well studied scientifically[311], can only be mentioned here as examples. It is therefore appropriate and consistent that Recital 3 of the Preamble to the Council of Europe's Pet Convention explicitly recognises the "importance of pets because of their contribution to the quality of life and their consequent value to society".

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[311] Recently: Amiot/Gagné/Bastian, Pet ownership and psychological well-being during the COVID-19 pandemic, in: Scientific Reports 2022, doi: https://doi.org/10.1038/s41598-022-10019-z.

The fact that this central importance of pet ownership for the development of personality justifies at the same time that the rights of owners are not "only" to be seen in the light of the general freedom of action under Article 2 para. 1 of the Basic Law, but also to be measured on the basis of the general right of personality under Article 2 para. 1 in conjunction with Article 1 para. 1 of the Basic Law, has already been comprehensively explained elsewhere[312] and therefore does not need to be repeated here. Of relevance to the discussion of concrete interest, however, is the fact that this importance of the general right of personality, which is not to be neglected, is not mentioned at all by the proponents of positive lists.

c. Prohibition of arbitrariness under Article 3 para. 1 of the Basic Law

The reversal of the rule-exception relationship, which applies in favour of pet ownership, associated with the positive list approach, leads to particularly strict requirements for the compilation of the corresponding list. Which pets are subject to the general ban on keeping and which animals may be kept by way of exception would therefore not be left to chance. In view of the fact that a ban on keeping animals is the strictest form of state regulation imaginable, all differentiation criteria would have to withstand a strict arbitrariness test. This was explicitly stated by the European Court of Justice on the occasion of its decision on the Belgian species protection positive list:

[312] Spranger, Heimtierhaltung und Verfassungsrecht, 2018, p. 26 et seq.

> "First, the drawing up of such a list and the subsequent amendments to it must be based on objective and non-discriminatory criteria (see, to that effect, inter alia, Case C-192/01 Commission v Denmark [2003] ECR I-9693, paragraph 53)."[313]

Since the introduction of a pet positive list is currently only being discussed in general abstract terms, no detailed examination can be carried out at this point in time. It is nevertheless noticeable that this central landmark of the constitutional law landscape has been virtually ignored in the discourse to date. In the event of a further concretisation of the positive list idea, each individual (de-)listing would in any case have to satisfy the requirements of the prohibition of discrimination.

V. Summary of the main results

The introduction of a national positive list for pets would comprehensively violate various requirements of international, European and constitutional law.

The European Convention for the Protection of Pets, as a document of international law, binds the Federal Republic of Germany by virtue of signature and ratification. Since the Convention, in addition to various animal protection-related provisions, also contains a commitment to private animal husbandry, animal breeding and animal trade, and in this context explicitly emphasises the "importance of pets because of their contribution to the quality of life and their consequent value to society", a national, de facto

[313] ECJ, Case C-219/07, decision of 19.06.2008, margin number 34.

horizontal ban on pet ownership would constitute a violation of the Convention.

Art. 2 para. 3 of the Convention does not change this assessment. This is because the instrument of strengthening protection - which is very familiar to international law - allows for more detailed regulations in certain areas, but not a departure from the regulatory system of the relevant international law text. Art. 21 of the Convention confirms this assessment, as does the fact that Art. 2 para. 3 was only included in the Convention to respond to certain discourses in the field of guard dog use.

At the level of EU law, a national positive list constitutes an infringement of fundamental freedoms and here in particular of the free movement of goods. In this respect, there is no viable justification for the so-called "measure of equivalent effect".

The alleged dangers posed by "dangerous animals" do not meet the requirements that the European Court of Justice has attached to the protection of "public security and order". Similarly, the abstract reference to zoonoses is not capable of justifying a national positive list with reference to the protection of health and human life. Finally, general animal welfare considerations do not justify a departure from the anthropocentric regulatory philosophy that otherwise characterises Union law.

Contrary to what is sometimes portrayed in public discourse, the case law of the European Court of Justice on the "Belgian positive list" does not reinterpret animal welfare considerations in this respect. On the contrary, this case law is diametrically opposed to a national pet

positive list. This is because the judgments in question are based on Regulation (EC) No. 338/97 and thus on species protection law according to CITES; for this reason alone, transferability to pet keeping is ruled out. Irrespective of this, the Luxembourg judges emphasise above all a whole series of considerable legal requirements that a positive list would have to fulfil due to the massive encroachment on fundamental rights that this would entail.

In this context, the court also states - in accordance with general precautionary doctrine - that the precautionary principle of Article 191 para. 2 sentence 2 TFEU neither permits regulations based on "general suspicion" nor exempts them from the need for scientific justification. In particular, regulations "into the blue" are therefore also inadmissible from a precautionary point of view.

Aspects of biodiversity protection are also not suitable to justify interventions in the free movement of goods. Irrespective of the fact that there is no evidence for positive biodiversity effects of a positive list, the case law of the European Court of Justice shows that the term biodiversity is understood in a highly specific way in the sense of genetic diversity of certain livestock breeds. Biodiversity protection therefore only plays a role in the context of the free movement of goods when it comes to the protection of agricultural animal husbandry in the sense of EU agricultural policy.

In addition to a violation of the free movement of goods, a violation of the freedom to provide services is also to be attested as soon as service providers from other EU countries are no longer allowed or able to offer corresponding pet keeping services in Germany. Should a

national positive list also have negative effects on investments from other EU countries, the free movement of capital would also be violated.

It is not possible for the German legislator to circumvent the legal limits described above through the alternative implementation of an EU positive list. In particular, the European Union already lacks a viable legislative competence for animal protection. Rather, the Union's competences in animal protection law exist only as a supplement to sectoral competence standards, especially in the area of agricultural policy.

Nor can a Union competence be derived from Regulation (EC) No 338/97 in conjunction with Article 193 TFEU. This is because the so-called strengthening of protection within the meaning of Article 193 TFEU is already limited to specific environmental objectives. Above all, however, there is no legal act to be strengthened: Union law itself does not know any general animal protection law and the Council of Europe's Pet Convention - despite its balanced consideration mentioned in the introduction - was neither signed nor ratified by the EU itself.

Furthermore, Article 193 TFEU - as far as can be seen: undisputed - prohibits the implementation of alternative concepts of protection. However, the public-based pet focus of a positive list differs from the negative list-based assessment of the trade-regulating CITES regime in numerous respects. The use of Art. 193 TFEU is also unlawful for this reason.

If the Federal Republic of Germany were to invoke Art. 193 TFEU in order to introduce a national pet positive list,

the initiation of infringement proceedings, in particular by the Commission, would be inevitable.

An EU positive list cannot be based on Art. 114 TFEU either. In particular, the seal trade case law of the European Court of Justice does not lead to a different result. First of all, the ECJ emphasises the quality of the goods and thus the fundamental tradability of animals. Secondly, the Court's justifications of "general indignation" and the risk of confusion in pet keeping do not come into play. Above all, however, the ECJ emphasises that the relevant regulations must have a genuine (and not just a pretended) internal market focus. Accordingly, EU regulations must primarily aim at facilitating trade in animals.

An EU-wide positive list also violates the freedom of occupation according to Art. 15 and 16 CFR, as well as, depending on the concrete design, potentially also the guarantee of property according to Art. 17 CFR and the prohibition of discrimination according to Art. 20 and 21 CFR.

Thus, a pet positive list is contrary to European law regardless of whether the German legislator or the European Union itself is the author of such a list.

Furthermore, a national positive list violates various fundamental rights and constitutional principles of the Basic Law. The corresponding violations cannot be based on a constitutional requirement for action under Article 20a of the Basic Law, as this is a purely state objective provision.

On the one hand, the freedom of occupation under Article 12 para. 1 of the Basic Law is violated. The case-law of the Federal Constitutional Court on the Hufbeschlaggesetz does not lead to a different result here. The attempts to deny that a positive list has a tendency to regulate the profession are not convincing in the light of established case law. The relevance of Article 12 para. 1 of the Basic Law results independently from the case law on so-called foreseeable serious impairments.

On the other hand, a pet positive list causes unjustified encroachments on the general right of personality (Article 2 para. 1 in conjunction with Article 1 para. 1 of the Basic Law), as well as (depending on the concrete legal form) on the guarantee of property (Article 14 para. 1 of the Basic Law) and the general principle of equal treatment or prohibition of discrimination (Article 3 para. 1 of the Basic Law).

Furthermore, a national pet positive list is disproportionate. There is already a lack of appropriateness, as the proponents of this regulatory approach present an impressive bundle of motives, but fail to provide evidence of at least the possible occurrence of success in the constitutionally required sense.

In addition, the disproportionality of a national positive list results from the lack of necessity of the measure, since - if one wants to assume a need for regulation at all - milder means of equal effectiveness are available. The disadvantages of so-called negative lists, which have been put forward in this context, do not exist when viewed objectively: positive lists also have a "reactive character" and presuppose the use of scientific data. Nor

can the "mild character" of a positive list be constructed from the viewpoints of suitability for enforcement and the need for updating.

In addition to the lack of suitability and necessity, the appropriateness of a national positive list is also not given, so that "proportionality in the narrower sense" is also violated.

Acknowledgements

This expert opinion was prepared on behalf of the Zentralverband Zoologischer Fachbetriebe Deutschlands e.V. (ZZF) and with the kind financial support from

- Industrieverband Heimtierbedarf e.V. (IVH)
- European Pet Organization (EPO)
- Bundesverband für fachgerechten Natur-, Tier- und Artenschutz e.V. (BNA)
- Deutsche Gesellschaft für Herpetologie und Terrarienkunde e.V. (DGHT)
- Verband für das Deutsche Hundewesen e.V. (VDH)
- Verband der Zoologischen Gärten e.V. (VdZ)
- Citizen Conservation Foundation gGmbH (CC)
- Zoo Leipzig
- Wirtschaftskammer Wien
- Wirtschaftsgemeinschaft Zoologischer Fachbetriebe (WZF)