



EUROPEAN  
LAW CLINIC

TAIL-DOCKING OF PIGS IN THE  
INTENSIVE LIVESTOCK FARMING  
BUSINESS: DISCREPANCIES BETWEEN  
DUTCH PRACTICE AND EU LAW

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## I. Introduction

For over 40 years, the European Union has been promoting animal welfare by seeking to gradually improve the lives of farm animals. To this end, the European Council has introduced several Directives that seek the protection of animals. These directives contain several provisions to oblige Member States to ensure better welfare conditions of different groups of animals and to recognize that animals are sentient beings.<sup>1</sup> Accordingly, in the following years, all Member States took steps in order to fulfill their obligations under EU law, as did the Netherlands. However, investigations conducted on both European and the national level show that still today, malpractices in the intensive livestock farming business in the Netherlands are the rule rather than the exception. While the Dutch State expressed on many occasions its motivation to improve the lives of animals, it has clearly failed to adopt the necessary legislative and practical measures to fulfill its obligations under EU law.

The client, Foundation Voice of Animals (Stichting Stem voor Dieren), is a foundation with the objective to raise awareness for people's responsibility towards animals and the choices they have as a consumer. The Foundation represented by its lawyer Mr. Zegveld, has asked the European Law Clinic to conduct research as to whether it is possible to hold the Dutch state liable for the animals suffering in the intensive farming. Hence, the report will put forward how the Netherlands is violating EU law and it will investigate the options to render the Dutch State liable for not adequately implementing EU laws in the field of animal welfare.

In particular, the report will focus on the Dutch (illegal) practice of tail-docking of pigs. Whenever pigs are frustrated they tend to turn to other pigs' tails and begin to bite and chew them, ending up in serious injuries. Tail-docking is the procedure under which the tails of the pigs are sliced off/docked in order to avoid this phenomenon. However, as it will be elaborated later in the report, this procedure is prohibited to be carried out routinely under the Council Directive 2008/120/EC. There are many research studies that show how tail-docking is dangerous and painful to pigs, and unacceptable to their welfare.

The aim of this report is to establish that the Dutch State is violating EU law by routinely carrying out the procedure of tail-docking in the intensive livestock farming. In order to reach such a conclusion, the first section of the report shall explain what tail-docking is, why it is contrary to the welfare of pigs and finally how it is practiced in the Netherlands. In the second

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<sup>1</sup> [https://ec.europa.eu/food/animals/welfare\\_en](https://ec.europa.eu/food/animals/welfare_en)

section, the legal framework will be addressed both at EU level and national (Dutch) level. First, a general overview of EU legislation in the field of Animal welfare shall be introduced. The next paragraph shall zoom in on the specific European provisions regarding the tail-docking of pigs, laid down in Council Directive 2008/120/EC. Next, an overview of the Dutch laws and practices in the field of animal welfare shall be discussed. Firstly, the general legal framework in the Netherlands shall be illustrated and then an analysis of the specific provisions with regard to the tail-docking of pigs will follow. The second section will be concluded with a paragraph on the discrepancies between both legal frameworks. The third section of the report shall investigate how to rely on the European provisions in order to render the Dutch State liable by exploring potential routes to file a lawsuit before the Dutch civil court. This section will conclude by considering counter arguments against possible defenses.

## II. Tail-docking of Pigs

Tail-docking is the term given to the surgical removal of parts of the pigs' tails. Scientific research shows that when pigs are stressed and frustrated, they turn to the tails of other pigs and they begin chewing and biting them.<sup>2</sup> For this reason, many farmers choose to dock/slice off part of pig's tail, to reduce tail biting and cannibalism among pigs.<sup>3</sup> However, throughout the years many studies have showed that docking the tail of pigs is not the correct way to prevent them from tail biting, because they endure under a lot of pain during that procedure and it may even cause chronic pain. As a consequence, the Council Directive 2008/120/EC has prohibited *routine* tail-docking since 2003.

Tail-biting is a considerable animal welfare and also economic problem, since it causes painful injuries and often result in carcass losses for producers and reducing weight gain.<sup>4</sup> Moreover, tail-biting can become an entrance for infection resulting in further suffering.<sup>5</sup> However, although docking the tails a few days after birth may reduce the likelihood and severity of tail biting, not only it does not eliminate this phenomenon but it actually has significant drawbacks: it is an acutely painful mutilation and it may cover up the real underlying

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<sup>2</sup> Stolba A. and Woodgush D.G.M, 'The behavior of pigs in a semi-natural environment' Animal Protection (48) (1989), p. 419-425.

<sup>3</sup> <https://www.avma.org/KB/Policies/Pages/Tail-Docking-and-Teeth-Clipping-of-Swine.aspx>

<sup>4</sup> R.B. D'Eath, G. Arnott and others, 'Injurious tail biting in pigs: how can it be controlled in existing systems without tail docking?' Animal 8:9 (2014), p. 1480.

<sup>5</sup> R.B. D'Eath, G. Arnott and others, 'Why are most EU pigs tail docked? Economic and ethical analysis of four pig housing and management scenarios in the light of EU legislation and animal welfare outcomes' Animal 10:4 (2016), p. 688.

problems in housing and management that result in tail biting.<sup>6</sup> Clearly, tail-docking is an unsatisfactory solution to tail-biting. For example, docked pigs can be reared in environments that lack sufficient space and substrate to fully occupy their behavioral need to chew and root.<sup>7</sup> Tail-biting can cause very poor welfare, while tail-docking is very painful, both of these behaviors resulting in short-term and possible long-term pain from neuroma formation.<sup>8</sup> In addition to acute pain, docked pigs may suffer from long-term pain that is also experienced by humans after amputation. A more detailed study on the consequences of tail-biting and tail-docking can be found in the EFSA (European Food and Safety Authority) Journal regarding pig welfare, with particular focus on these two practices.<sup>9</sup> It is important to be mentioned that EFSA study also shows that tail biting is still present in docked pigs, manifesting that tail-docking is insufficient in avoiding the phenomenon.

There are many investigations from different organizations and also reports and examinations from the European Commission carried out in Dutch pig farms, which prove that in 95% of the cases tail-docking is performed on pigs.<sup>10</sup> For example, in 2009 the Wageningen University and Research did a research focused on the attitudes of conventional pig farmers to tail biting and tail docking.<sup>11</sup> It concluded that the conventional sector currently views docking as the main - and most significant - measure for preventing tail biting, and views long tails as a risk factor. It assessed how pig farmers handled tail biting. The researchers interviewed 521 pig farmers of which 487 conventional farmers and 33 biological farmers. The study showed that 35-50% of the interviewed conventional farmers and >50% of the biological farmers said that there was no tail biting on their farm.<sup>12</sup> Conventional pig farmers consider providing additional diversion material less meaningful in order to prevent it. Not more than 3% of the

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<sup>6</sup> R.B. D'Eath, G. Arnott and others, 'Injurious tail biting in pigs: how can it be controlled in existing systems without tail docking?' *Animal* 8:9 (2014), p. 1480.

<sup>7</sup> R.B. D'Eath, G. Arnott and others, 'Why are most EU pigs tail docked? Economic and ethical analysis of four pig housing and management scenarios in the light of EU legislation and animal welfare outcomes' *Animal* 10:4 (2016), p. 688.

<sup>8</sup> The EFSA Journal, 'The risks associated with tail biting in pigs and possible means to reduce the need for tail docking considering the different housing and husbandry systems' 611 (2007), p. 3.

<sup>9</sup> Ibid.

<sup>10</sup> R.B. D'Eath, G. Arnott and others, 'Why are most EU pigs tail docked? Economic and ethical analysis of four pig housing and management scenarios in the light of EU legislation and animal welfare outcomes' *Animal* 10:4 (2016), p. 688.

See also

[https://www.researchgate.net/profile/Johan\\_Zonderland/publication/254848596\\_Attributes\\_of\\_Dutch\\_Pig\\_Farmers\\_Towards\\_Tail\\_Biting\\_and\\_Tail\\_Docking\\_Online\\_First/links/5412018b0cf2fa878ad3951e/Attributes-of-Dutch-Pig-Farmers-Towards-Tail-Biting-and-Tail-Docking-Online-First.pdf?origin=publication\\_detail](https://www.researchgate.net/profile/Johan_Zonderland/publication/254848596_Attributes_of_Dutch_Pig_Farmers_Towards_Tail_Biting_and_Tail_Docking_Online_First/links/5412018b0cf2fa878ad3951e/Attributes-of-Dutch-Pig-Farmers-Towards-Tail-Biting-and-Tail-Docking-Online-First.pdf?origin=publication_detail) "Two-thirds of the farmers reported no recollection of having tried to stop tail docking".

<sup>11</sup> De Lauwere, C. and others, 'Stoppen met couperen? Varkenshouders over staartbijten en staartcouperen', Wageningen UR, rapport 2009-097.

<sup>12</sup> Ibidem, p. 40.

conventional pig farmers uses straw, sawdust or wood shavings, which contributes to abolish tail biting. While in the biological sector tail docking is forbidden and the supply of straw is mandatory, tail biting occurs not more than at the conventional farmers. Financial compensation by the government for the efforts that the conventional sector must make to prevent tail docking was considered more important by the surveyed conventional pig farmers than by organic pig farmers. Also, conventional pig farmers found that research must first show that tail biting can be prevented with pigs with whole tails and that meat from those pigs must yield an additional price. Only a third of the regular pig farmers surveyed had once tried to stop tail docking.<sup>13</sup>

### **III. The Legal Framework**

#### **1. EU Law Framework**

##### **1.1 General overview of EU legislation on Animal Welfare**

The European Union has established a wide range of detailed legislative provisions regarding animal welfare. The first provision enacted in 1974 required animals to be rendered unconscious before slaughter.<sup>14</sup> Then, after numerous changes in the Treaty and after a long European-wide campaign, Member States finally agreed to annex a Protocol on Animal Welfare to the Treaty of Amsterdam, which entered into force in 1999.<sup>15</sup> This was a major step forward to protecting animals, because this Protocol imposed an obligation on the EU institutions and Member States to always consider animal welfare before taking any actions in their policy-making. Moreover, animals were recognized as ‘sentient beings’ rather than a former recognition as ‘agriculture products’, which also increases the importance of treating animals in the right manner across the EU.<sup>16</sup>

On 1 December 2009, the text of the Protocol on Animal Welfare was enshrined in the Treaty of Lisbon, rendering the protection of animal welfare a fundamental obligation under

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<sup>13</sup>Ibidem, p. 7.

<sup>14</sup> Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter. This Directive has now been replaced by the 2009 Slaughter Regulation.

<sup>15</sup> EuroGroup for Animals, ‘*Analysis of Animal Welfare Issues in the European Union*’, Areas of Concern (2010), p.122.

<sup>16</sup> *Ibid.*

Article 13 TFEU.<sup>17</sup> Among other effects, this meant that the Commission has to carry out an ‘animal welfare impact assessment’ as a compulsory part of the impact assessments before adopting any new policies.<sup>18</sup> The European Commission has stated that: “This puts animal welfare on equal footing with other key principles such as promotion of gender equality, guarantee of social protection, protection of human health ...”<sup>19</sup> Most of the EU laws concerning animals are in the form of Directives. The EU has enacted detailed directives on pigs, calves, chickens, as well as the General Farm Animals Directive which applies a range of broad provisions to all farmed animals.<sup>20</sup> The main focus of the next paragraph will be on the Directive regarding pigs, more specifically on the issue of tail-docking.

## **2. Council Directive 2008/120/EC laying down minimum standards for the protection of pigs (the Pigs’ Directive)**

The key aspects of the EU Pigs’ Directive are the following: prohibition of sow stalls and tethering of sows, hunger in sows, prohibition of fully slatted floors for sows, provision of enrichment materials, prohibition of routine teeth clipping and grinding, castration of pigs, early weaning and prohibition of routine tail-docking.<sup>21</sup>

### **a) *Prohibition of routine tail-docking***

Due to the implications and the evidence that tail-docking is not the right measure to prevent pigs from tail-biting indicated in the first chapter of this report, Directive 2008/120/EC has introduced a provision which bans tail-docking on a routine basis:

*“Neither tail docking nor reduction of corner teeth must be carried out routinely but only where there is evidence that injuries to sow’s teats or to other pigs’ ears or tails have occurred. Before carrying out these procedures, other measures shall be taken to prevent tail biting and other*

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<sup>17</sup> *Ibid*, p. 123

<sup>18</sup> *Ibid*.

<sup>19</sup> [https://ec.europa.eu/food/animals/welfare\\_en](https://ec.europa.eu/food/animals/welfare_en)

<sup>20</sup> P. Stevenson, ‘*European Union Legislation on The Welfare Of Farm Animals*’, *Compassion in world farming* (2012), p. 5.

<sup>21</sup> Council Directive 2008/120/EC laying down minimum standards for the protection of pigs.



*vices taking into account environment and stocking densities. For this reason, inadequate environmental conditions or management systems must be changed.”<sup>22</sup>*

Moreover, recital (11) of the Directive clearly states:

*“Tail-docking [...] are likely to cause immediate pain and some prolonged pain to pigs. Those practices are therefore detrimental to the welfare of pigs, especially when carried out by incompetent and inexperienced persons. As consequence, rules should be laid down.”<sup>23</sup>*

In short, EU countries are obliged not to perform tail-docking on a **routine** basis. First there is the rule, which is a prohibition, and then there are certain exceptions to that rule. This means that carrying out tail docking, other measures shall be taken to prevent tail biting, paying particular attention to environment and stocking densities.<sup>24</sup> This means that inadequate environmental conditions must be changed. The Directive lays down that pigs must have permanent access to a sufficient quantity of material to enable proper investigation and manipulation activities, such as straw, hay, wood or a mixture of such, which does not compromise the health of the animals. Hence, improved environmental conditions and enrichment materials should be an alternative to tail-docking. Yet, despite this EU directive, tail-docking is still widely applied in most countries in the EU, with the exception of Finland and Sweden. Tail-docking continues for 95% or more of pigs in the Netherlands.<sup>25</sup> In the next paragraphs, we will zoom in on Dutch laws and practice and their (non) compliance with the Pigs Directive.

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<sup>22</sup> Annex I, Chapter I, art. 8 of the Council Directive 2008/120/EC laying down minimum standards for the protection of pigs.

<sup>23</sup> Recital (11) of the Council Directive 2008/120/EC laying down minimum standards for the protection of pigs.

<sup>24</sup> R.B. D'Eath, G. Arnott and others, 'Why are most EU pigs tail docked? Economic and ethical analysis of four pig housing and management scenarios in the light of EU legislation and animal welfare outcomes' *Animal* 10:4 (2016), p. 688.

<sup>25</sup> *Ibid.*

### 3. The Dutch Law Framework

#### 3.1 General overview of Dutch law on Animal Welfare

Now that the relevant rights and obligations deriving from the European regulatory framework have been identified, it must be assessed whether, and to what extent, these are correctly implemented in the national laws of the Netherlands. In the following section, it will be reviewed whether the Dutch law framework on Animal protection provides an adequate implementation of the European provisions identified in the previous part. The focus will be on the Dutch law on Animal Protection, the Animals Act, and an analysis on the administrative regulations that have been developed on the basis of it will be carried out. In this analysis, particular focus shall be given to the Dutch provisions reflecting EU law obligations in the field of intensive livestock farming and the practice of tail-docking of pigs- as this is the focus of this research and the potential lawsuit.

The Dutch Animals Act (“Wet Dieren”) is effective since 2013 and has been the reorganization of all previous – until then fragmented – laws and regulations in the field of animal welfare in the Netherlands.<sup>26</sup> The Animals Act is designed as a so-called ‘framework’ law. This entails that substantive provisions are laid down mainly in implementing provisions (ministerial regulations and administrative decisions). This choice is partly motivated by the argument that obligations deriving from European laws can be implemented more rapidly and effectively in this way.<sup>27</sup> With regard to animals for intensive livestock farming, these implementing provisions constitute the 2014 Decision holders of animals (“Besluit houders van Dieren”)<sup>28</sup> and the Regulation holders of animals (“Regeling houders van Dieren”).<sup>29</sup>

The preamble of the legislative proposal for the 2013 Act indicates that the rules for animals have been drawn up to implement European obligations and in the interests of animal health and welfare, and in public health [...] with recognition of the intrinsic value of animals. As follows from the parliamentary history adjuvant to the legislative proposal of the Act, the new act “provides an adequate framework for implementing and realizing EU laws and

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<sup>26</sup> In particular: De Gezondheids- en welzijnswet voor dieren, de Wet op de dierenbescherming, de Diergeneesmiddelenwet, de Wet op de uitoefening van de diergeneeskunde 1990 en de Kaderwet diervoeders.

<sup>27</sup> I.E. Boissevain en A.A. Freriks, 'De nieuwe Wet dieren: wie wordt er beter van?', JV 2009-7, p. 12.

<sup>28</sup> Besluit van 5 juni 2014, houdende regels met betrekking tot houders van dieren (Besluit houders van Dieren).

<sup>29</sup> Regeling van de Staatssecretaris van Economische Zaken van 23 juni 2014, nr. WJZ/14101260, houdende regels met betrekking tot het houden van dieren.

obligations". The Act is considered to serve as the basis for the continuance of all existing laws and regulations in the field of animal protection and for the adoption of new ones, deriving either from national or European obligations.<sup>30</sup> The Act allows for the implementation of secondary laws and regulations in the form of administrative decrees and ministerial regulations.

Besides this ambitious integration operation, the 2013 Act also for the first time explicitly includes the notion of the 'intrinsic value of the individual animal' in Article 1.3 of the Act.<sup>31</sup> The Dutch legislator chose to explicitly refer to this highly moral attitude in the law because of 'the power of the signal that emanates from it'.<sup>32</sup> Unfortunately, no concrete normative effect seems to follow from this. The principle, albeit noble, has not been backed up by concrete provisions in the Act nor its implementing provisions to enable the national judge to include the intrinsic value of the animal as a starting point in his decision-making process and thus to develop animal protection law.<sup>33</sup> In addition, the open norms that characterize the Dutch Act do not provide an adequate implementation of EU laws and obligations, as the parliamentary history of the legislative proposal suggests.<sup>34</sup>

This will be evidenced in the following section, by pointing out an example of a concrete practice currently allowed under Dutch law that is contrary to the provisions contained in the EU Directive 2008/120/EC.

### **3.2 Tail-docking of pigs under Dutch law**

The Dutch Animal Act provides for a general prohibition of physical intervention on animals and allows it only in limitative situations. Article 2.8 of the Act lists four situations:

#### *Veterinary activities*

##### *1. It is forbidden:*

*a. to perform physical procedures;*

*b for veterinary medicinal products for which no license as referred to in [Article 2.19, first paragraph](#), has been granted, to be used for animals, or*

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<sup>30</sup> Kamerstukken II 2007/08, 31 389, no. 1, p. 3.

<sup>31</sup> This concept was first introduced in 1981 'Nota Rijksoverheid en Dierenbescherming'.

<sup>32</sup> Kamerstukken II 2007/08, 31 389, no. 3, p. 20-21.

<sup>33</sup> Bordes, 'Intrinsieke waarde voor dieren: een discutabel concept', *NJB* 2010, 273.

<sup>34</sup> Kamerstukken II 2007/08, 31 389, no. 1, p. 3.

*c. to apply veterinary medicinal products in violation of regulations and restrictions as referred to in [Article 2.19 \(3\) \(a\)](#) that are linked to the license issued for that veterinary medicinal product.*

*2. The prohibition referred to in the first paragraph shall not apply in respect of:*

- a. physical procedures for which there is a veterinary necessity;*
- b. physical interventions designated by or pursuant to a general administrative order;*
- c. other bodily and / or legally permissible physical interventions by or pursuant to any statutory regulation, and*
- d. the use of veterinary medicines as referred to in the first paragraph, subsections b and c, in cases designated by or pursuant to a general administrative order.*

Subsequently, the Veterinary Decree lists the types of ‘physical procedures’ that fall under this provision, under which the tail-docking of pig’s tails. Article 2.3 sub b states that docking parts of the pig’s tails is allowed, provided that:

- the animal is not older than four days;*
- lesions of teats in sows or of ears and tails in other pigs have been detected, and*
- measures taken, including the adaptation of environmental factors or management systems, taking into account the environment and the density of pigs, and which have been used to prevent tail biting and other behavioural disorders, have not been effective*

These provisions serve as the implementation of Directive 2008/120/EC. In section 8 of chapter I of annex 1 of the Directive, the Dutch legislator also noted that there is no room for deviation of the European provisions. Apparently, he was aware of the little margin of appreciation of the implementation. The explanation given by the legislator of allowing tail-docking in the ‘Nota van Toelichting’ is as follows: ‘Given the current husbandry system, this docking is for the time being still a defensible intervention to prevent more serious suffering by tail biting, until perspective changes in housing or business management can be implemented that minimizes the risk of tail biting so that tail-docking can be abolished.’<sup>35</sup>

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<sup>35</sup> Besluit van 16 april 2014, houdende regels met betrekking tot diergeneeskundigen (Besluit diergeneeskundigen), para. 2.1.1. (<https://zoek.officielebekendmakingen.nl/stb-2014-162.html>).

In the same explanation, the legislator agreed with the Koninklijke Nederlandse Maatschappij voor Diergeneeskunde (the Dutch professional association of veterinarians), which had remarked that the adaptation of environmental factors or management systems is the responsibility of the pig holder and therefore should not be included in this decision. But it stated that these measures must have taken place before an intervention is allowed and they must have shown ineffective. The “Nederlandse Vakbond Varkenshouder (NVV) already noted that these conditions are impossible in practice.”<sup>36</sup>

#### **4. Discrepancies between Dutch and EU law**

These explanations show a contradiction: paragraph 2.1.1. of the Nota van Toelichting states that tail-docking is defensible because, according to the legislator, no perspective measures can be implemented yet. On the other hand, pig farmers are ought to have taken measures in order to prevent tail-biting before they proceed to tail-docking. Accordingly, the legislator accepts that perspective changes cannot be applied in the current pig farms to prevent tail-biting, for which tail-docking is still allowed. This implicates that tail-docking is permitted until perspective changes are deemed to be possible. This is in clear contrast with Annex I, Chapter I paragraph 8 of Directive 2008/120/EC, which allows for the intervention *only* when other measures have been taken ‘to prevent tail-biting and other vices, taking into account environment and stocking densities’.

EU countries are obliged not to perform tail-docking on a routine basis. The EU Directive explicitly states that before carrying out these procedures, other measures shall be taken to prevent tail biting, paying particular attention to environment and stocking densities.<sup>37</sup> Improved environmental conditions and enrichment materials should be an alternative to tail-docking. The Dutch implementing provisions do not provide for an adequate transposition of these requirements. Although the Dutch decree requires that it must be shown ‘that injuries to sows’ teats or to other pigs’ ears or tails have occurred’, the Dutch law allows tail-docking as soon as other measures preventing tail biting have shown not to be effective. It does not give any explicit obligation to pig farmers to first change the inadequate living circumstances, that causes tail biting, before carrying out the intervention. In combination with the fact that the

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<sup>36</sup> Ibidem, art. 2.3.

<sup>37</sup> R.B. D’Eath, G. Arnott and others, ‘*Why are most EU pigs tail docked? Economic and ethical analysis of four pig housing and management scenarios in the light of EU legislation and animal welfare outcomes*’ *Animal* 10:4 (2016), p. 688.

European prohibition for tail-docking to be performed on a routine basis is absent in the Dutch provision, Dutch law provides for fewer protection than obliged by the Council Directive 2008/120EC. As a result, pig farmers are allowed to practice tail-docking on a routine basis as soon as they can provide evidence that there are injuries and that other measures were not effective.

Furthermore, the Dutch Food Safety Authority, which controls the compliance of the practice at pig farmers with Dutch law, does not check whether measures have been taken in order to prevent tail-biting: interventions as tail-docking are allowed when necessary, when tail injuries have occurred and when pigs are not older than 4 days. Measures to prevent those injuries are not mentioned in the checklist.<sup>38</sup>

It is clear from the above evidence, that Art. 2.3 of the Veterinary Decree does not comply with Annex I, Chapter 1, paragraph 8 of Directive 2008/120/EC and that the Dutch government provides a lower level of protection of pigs than the Directive does, which is the goal of Directive 2008/120/EC (article 1 of the Directive) and it is binding upon the Member States (article 288 Treaty on the Functioning of the European Union). Furthermore, the Dutch government allows and contributes to the continuance of an unlawful practice. As a consequence of the absence of this prohibition in Dutch law, the exception has become the norm: almost 100% of the commercial pigs are tail-docked.<sup>39</sup> Tail-docking is still the usual procedure. It is commonly known that no effective action to comply with Directive 2008/120EC and its predecessor Council Directive 91/630/EEC, which included the same prohibition of routinely tail-docking of pigs, has been taken.

In the Final report of the European Commission of an audit carried out in the Netherlands from 08 May 2017 to 12 May 2017 in order to evaluate member state activities to prevent tail-biting and avoid routine tail-docking of pigs (DG(SANTE) 2017-6125), it is concluded that:

*‘...the Dutch authorities do not enforce the provisions of the pig Directive to stop routine tail-docking of pigs as they are of the view that it is a complex, multifactorial issue that needs a national strategy based on working in partnership with farmers to gradually attain the goal of compliance. Although to date this has not rendered any results in decreasing the number of farms that tail-dock piglets routinely, the pig sector has committed to start work on the design of farm risk assessments before the end of 2017 and to set a deadline for the end to routine*

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<sup>38</sup> Checklist wellbeing pigs, number 10.

<sup>39</sup> Audit of the Commission DG(SANTE) 2017-6125, p. 2.

*tail-docking which if done, will indicate a serious commitment to progress in the effective implementation of the pig Directive.*

*European and national financial measures are not used effectively to reduce tail-biting and avoid routine tail-docking of pigs and there is little incentive to farmers to reduce levels of tail-biting in the current farming and quality assurance systems in the Netherlands.*

*There is ongoing work, including with the sector, to deliver a usable benchmarking inspection tool to address the insufficient instructions and guidance to inspectors in order to reach a harmonised understanding of what constitutes a breach regarding sufficient and suitable enrichment material. The data on past non-compliances obtained from farm inspections and the ones on tail-damage obtained at slaughterhouse level provide opportunities for the competent authority for improving its system (e.g. risk selection of farms, set intervention levels and measuring progress in reducing occurrence of tail-biting) and for using its resources more effectively to reach the objective of reducing systematic tail-docking of pigs.<sup>40</sup>*

Based on the findings of the its investigation, the Commission made several recommendations in the audit where, among others, it was stated that the routinely procedure of tail-docking must be countered.

#### **IV. Possibilities of a lawsuit before the Dutch national court**

Now that the illegalities of the Dutch practice of tail docking with regard to the obligations deriving from Directive 2008/120/EC are established, it will be explored how to render the Dutch state liable for this in a potential lawsuit. This chapter will discuss the possibilities for litigation, in order to have declared that the Dutch State is acting in violation of EU law by allowing/tolerating the structural business of tail-docking in the intensive livestock farming industry.

There are three options for litigation. The first one is to file a suit before the Dutch Civic Court, claiming damages for the incorrect implementation by the Dutch State of the EU directive. The second option is to file a suit before the Dutch Administrative court, claiming liability of the Dutch state for exceeding its discretionary powers with regard to the implementation of the EU Directive. Finally, the third option is to lodge a complaint before the

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<sup>40</sup> Ibidem, p. 12-13.

European Commission, asking it to start an infringement procedure against the Dutch State for incorrectly implementing the EU directive.

In the following paragraphs, the first and the last option shall be elaborated, considering all the important aspects that need to be examined before initiating the given action. We chose to not zoom in on the second option, which is to file a suit before the Dutch administrative court, because this option is less likely to be successful than the others, considering it is hard to prove that the State clearly exceeded its margin of appreciation (if there is any) in its national legislation. In order to have the time and space to effectively consider all the relevant aspects of the other, more promising options, we decided to not dive deeper into this litigation route. Accordingly, the following paragraphs shall discuss the possibility of 1) filing a suite before the Dutch Civic Court and 2) lodging a complaint before the European Commission. Afterwards, possible counter arguments we may face when filing a suit and defenses to adequately respond to them will be considered in the last paragraph.

## **1. Dutch Civil Court**

### **1.1 State liability for incorrect implementation of EU law**

In principle, all provisions of Community law enjoy primacy over all provision of the laws of the EU Member States. Hence, in cases of conflict, EU rules prevail over national law.<sup>41</sup> However, not in all cases private individuals are able to rely on provisions of EU law before national courts. To hold the Dutch State liable for incorrectly implementing Directive 2008/120EC, the latter must have direct effect, i.e. must give individuals like our client rights that they can invoke in national court. In the Van Gend & Loos judgment (case 26/62) the European Court of Justice ruled and set out the conditions under which Community law, independent of the laws of the Member States, may create rights for individuals. For Annex I, chapter 1 paragraph 8 of the Directive 2008/120EC to have direct effect in order for our client to invoke that article, it must be:

1. Sufficiently clear, precise and unconditional and;
2. The period for implementing the Directive into national law has been *expired*.

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<sup>41</sup> Case 6/64, ECLI:EU:C:1964:66 (*Costa Enel*).



Annex I, Chapter 1, paragraph 8:

*‘All procedures intended as an intervention carried out for other than therapeutic or diagnostic purposes or for the identification of the pigs in accordance with relevant legislation and resulting in damage to or the loss of a sensitive part of the body or the alteration of bone structure shall be prohibited with the following exceptions:*

- a uniform reduction of corner teeth of piglets by grinding or clipping not later than the seventh day of life of the piglets leaving an intact smooth surface; boars’ tusks may be reduced in length where necessary to prevent injuries to other animals or for safety reasons,*
- docking of a part of the tail,*
- castration of male pigs by other means than tearing of tissues,*
- nose-ringing only when the animals are kept in outdoor husbandry systems and in compliance with national legislation. Neither tail-docking nor reduction of corner teeth must be carried out routinely but only where there is evidence that injuries to sows’ teats or to other pigs’ ears or tails have occurred. Before carrying out these procedures, other measures shall be taken to prevent tail-biting and other vices, taking into account environment and stocking densities. For this reason, inadequate environmental conditions or management systems must be changed.’*

It is clear from above that tail-docking is allowed only in exceptional cases. Routinely tail-docking is forbidden according to the Directive. Routinely means ‘regularly, as part of the usual way of doing things’ (Cambridge dictionary); it is not the ordinary way of business. The European Commission has further developed this paragraph as:

*‘Routine tail-docking is not permitted. Tail-docking may only be carried out if there is evidence of previous lesions (tail/ears/teats...) and only after all known risk factors mentioned below (see point 6) have been addressed. When an outbreak of tail-biting occurs, all known risk factors should be considered, recorded and suitable management changes should be made in those areas identified as being at risk.’<sup>42</sup>*

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<sup>42</sup> European Commission, ‘Commission Staff Working Document on best practices with a view to the prevention of routine tail-docking and the provision of enrichment materials to pigs. Accompanying the document Commission Recommendation on the application of Council Directive 2008/120/EC laying down minimum standards for the protection of pigs as regards measures to reduce the need for tail-docking’, Brussels, 8.3.2016 SWD(2016) 49 final, p. 11, [https://ec.europa.eu/food/sites/food/files/animals/docs/aw\\_practice\\_farm\\_pigs\\_stfwrkdoc\\_en.pdf](https://ec.europa.eu/food/sites/food/files/animals/docs/aw_practice_farm_pigs_stfwrkdoc_en.pdf)

In addition: ‘*This study visit is part of the Commission's initiative to achieve better implementation of the EU legislation on the protection of pigs which requires that tail docking must not be carried out routinely but only where there is evidence that injuries have occurred. Before carrying out these procedures, other measures shall be taken to prevent tail-biting and other vices, taking into account environment and stocking densities. For this reason, inadequate environmental conditions or management systems must be changed.*’<sup>43</sup>

The European Commission narrowed down the term ‘routinely’ in this context. It is clear from its reports that by prohibiting routinely tail-docking it wants to establish a situation in the European Union where living conditions are being adopted by the farmers that are adapted to the pigs. An inadequate environment causing pigs to bite their tails because of stress, sickness or because they are bored must be avoided by stimulating and giving them the things (like straw) they need. Only when those measures are not effective, other adjustments have been carried out, and there is evidence that the pigs have injuries because of tail biting, then tail-docking is allowed. The European Commission elaborated extensively on the other adjustments that must be carried out before turning to tail-docking (referred to as ‘enrichment materials’) in its staff working document. It provided a chapter about the key qualities of the enrichment materials, how they should be provided, the different types of materials, and a calculation tool to assess whether the pigs have access to sufficient enrichment materials.

In sum, the Commission provided a roadmap to meet the prohibition of docking the pig’s tail routinely that is *sufficiently clear, precise and unconditional*. Accordingly, the first requirement has been met. The second requirement on direct effect of the provision of the directive is that the period to implement the Directive into national law has been *expired*. As Directive 2008/120 has entered into force on 10-03-2009<sup>44</sup>, this condition has also been met. Accordingly, Annex I, Chapter 1, paragraph 8 of Directive 2008/120/EC has direct effect.

## **1.2 Francovich-action for damages**

A second alternative for our client is to sue the Dutch State for *damages*, claiming that her damage is the result of the incorrect transposition of Directive 2008/120/EC by the Dutch

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<sup>43</sup> European Commission, ‘Final report of a study visit carried out in Finland from 25 January 2016 to 29 January 2016 in order to share best practice on rearing pigs with intact tails’, DG(SANTE) 2016-8770 – MR, p. 1.

<sup>44</sup> Article 14 Directive 2008/120EC and Official Journal of the European Union, L47, 18-12-2008.

legislator. This is called a *Francovich action*, named after the case where the European Court of Justice for the first time acknowledged that the State can be held responsible for loss and damage caused to individuals as a result of breaches of EU law.<sup>45</sup>

Following the EU case law on state liability<sup>46</sup>, there are three requirements that must be met for our client to be able to issue a *Francovich action*. Firstly, the rule of EU law that is infringed must have been intended to confer rights upon individuals. Secondly, the breach must be sufficiently serious. Thirdly, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.<sup>47</sup> These are, however, minimum requirements. They do not exclude a Member State from being held liable under less restrictive conditions deriving from national law. Therefore, Dutch liability law should be reviewed in order to establish the requirements that must be met. As it will be demonstrated, the first and the last requirement are likewise included in Dutch Civil law. The second EU requirement however, which entails that the violation must be sufficiently serious, does not apply under Dutch law.<sup>48</sup>

## Dutch liability law

### *Question of admissibility*

According to Article 3:305a of the Dutch Civil Code, a foundation or association with full legal capacity may institute legal proceedings aimed at the protection of similar interests of other persons, insofar as it represents these interests in accordance with its articles of association.<sup>49</sup> *Stem voor Dieren* is a foundation as referred to in paragraph 1 of this article. The objectives of the foundation are formulated in its articles of association. In Article 2 of the Statutes of *Stem voor Dieren*, we see that:

*1. the foundation aims to:*

*Develop educational projects in the Netherlands and other countries, aimed at the prevention of animal suffering in the broadest sense, the organization of information campaigns to*

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<sup>45</sup> Joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich*).

<sup>46</sup> See *inter alia* *Dori, Brasserie du Pecheur Factortame III*.

<sup>47</sup> See *inter alia* joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79 (*Brasserie du Pecheur*), p. 51.

<sup>48</sup> See case of the Hague Court of Appeal of 11 April 2017, ECLI:NL:GHDHA:2017:1251 (*Energy Claim*), p. 26.

<sup>49</sup> Article 3:305 Dutch Civil Law Code.

*stimulate awareness of how animal suffering develops and is maintained, as well as the establishment of healing centers where abused animals can be collected and can recover.*

*2. The foundation seeks to achieve its goal by, among other things, legitimate means that are conducive to the goal.*

Accordingly, the primary goal of Stem voor Dieren is the prevention of animal suffering through education. It does not explicitly include the representation of the interest of animals or specifically pigs, nor to protect them via (inter alia) the issuing of law suits. Therefore, it remains to be seen whether the Dutch Court would find the client admissible in her claims. A possible solution would be to add another foundation like Varkens in Nood as a claimant, as their aim in the statutes is to protect the wellbeing of pigs.<sup>50</sup>

### ***Wrongful act?***

If the Dutch court declares Stem voor Dieren admissible in its suit, it will then assess whether there was a wrongful act within the meaning of article 6:162 of the Dutch Civil Code, which is the Dutch provision for actions for damages. This provision states that he who commits an unlawful act to another person is obliged to compensate the damage that the other party suffers as a result of that act. For the success of a tort action, five requirements must be met: unlawfulness, accountability, damage, causality and relativity.

### ***Relativity requirement***

This last requirement of relativity might prove difficult in our case. Article 6:163 of the Dutch Civil Code states that no obligation to pay damages exists if the breached standard does not serve to protect against the damage suffered by the injured party. This means that the norm violated by the perpetrator (Annex I Chapter 1, paragraph 8 of Directive 2008/120/EC) must have been written to protect the breached interest (the interests of Stem voor Dieren).

There are two difficulties with respect to this requirement. First, the primary aim of Directive 2008/120/EC is the (minimum) protection of pigs in relation to their agricultural purpose- and not specifically the interests of animal welfare groups like our client. This follows

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<sup>50</sup> See also case ECLI:NL:RBBRE:2012:BX5098, consideration 3.7.

from the fact that the Directive is based on the agricultural title of the TFEU.<sup>51</sup> The preamble of the Directive indicates that “the keeping of pigs is an integral part of agriculture. It constitutes a source of revenue for part of the agricultural population”.<sup>52</sup> The common minimum standards developed by the Directive aim “to ensure rational development of production”<sup>53</sup>, and particularly with regard to the practice of tail-docking, “to ensure better practices”.<sup>54</sup> Therefore, it remains to be seen if a Court will accept that also animal welfare organizations, like our client, fall under the protection of the Directive and therefore meet the relativity requirement of Article 6:163. According to settled case law of the Dutch Supreme Court, to this extent “the purpose and the object of the breached standard are to be examined, on the basis of which it is necessary to examine to which persons and to what damage and which methods of arising damage the protection intended for that purpose extends.”<sup>55</sup>

The second difficulty has to do with the specific interests of Stem voor Dieren as in their articles of association. The Court might cast doubt on whether the objectives of Stem voor Dieren serve the interests of the pigs as protected by Directive 2008/120. As we pointed out previously, according to its statutes the primary goal of Stem voor Dieren is the prevention of animal suffering through education. It does not explicitly include the representation of the interest of animals or specifically pigs, nor to protect them via (inter alia) the issuing of lawsuits. Therefore, it remains to be seen whether a Dutch Court would accept that the breached provision of Directive 2008/120/EC was written to protect the interest of Stem voor Dieren.

Nonetheless, it is certainly not impossible to meet the relativity requirement. In the claim, those aspects of Directive 2008/120/EC should be brought to the attention that show a close connection between the objectives of the Directive and the interests of our client. In this regard, it should be mentioned that the preamble of the Directive notes that “pigs should benefit from an environment corresponding to their needs for exercise and investigatory behavior. The welfare of pigs appears to be compromised by severe restrictions of space” and “a balance should be kept between the various aspects to be taken into consideration, as regarding welfare including health, economic and social considerations, and also environmental impact”.<sup>56</sup> If crucial aspects with regard to the welfare of pigs, health and environmental considerations must

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<sup>51</sup> Directive 2008/120/EC has specific regard to Article 37 TEC, now Article 38 TFEU, which falls under title III on Agriculture and Fisheries.

<sup>52</sup> Pigs directive, preamble recital 5.

<sup>53</sup> *Ibid*, recital 7.

<sup>54</sup> *Ibid*, recital 11.

<sup>55</sup> See *inter alia* case of the Hague Court of Appeal of 11 April 2017, ECLI:NL:GHDHA:2017:1251 (*Energy Claim*), p. 32.

<sup>56</sup> Pigs directive, preamble recital 8 and 12.

be taken into account, it must be possible for organizations whose objective it is to protect these exact aspects to have access to Court in a civil procedure. After all, pig farmers who are invariably breaching the law will not do so, nor will pigs themselves...

### ***Langemeijer correction***

If the Court does not accept that the requirements of Article 6:162 – and specifically the relativity requirement of 6:163 of the Dutch Civil Code – have been met, there is another option. *Stem voor Dieren* could also base the claim on the ‘Langemeijer correction’. In case a violation of a standard does not protect against the damage suffered by the claimant, this correction can in certain circumstances contribute to the judgment that an “unwritten standard of care has been breached” and thereby offer protection against the damage. The claimant must indicate specifically that the correction Langemeijer, other than the breached statutory norm, should lead to liability.<sup>57</sup> To this extent, it is necessary to state and prove that the Dutch State has violated a due diligence standard, apart from the legal obligation to (correctly) transpose the EU directive. The final report by the European Commission (see previous chapter) indicating structural malpractices in the Dutch pig holder industry, combined with the absence of adequate laws and regulations to counter this by the Dutch legislator, are definitely important to bring forward here.

## **2. European Commission**

Article 258-260 of the TFEU grants the European Commission the possibility to start infringement proceedings against member states that have failed to fulfill a Treaty obligation. The European Commission can start an infringement proceeding on its own initiative or in response to complaints. Anyone can challenge a Member State by lodging a complaint against a measure or administrative practice they consider incompatible with EU law. If the complaint appears to be founded, the Commission may initiate infringement proceedings.

This proceeding consists of two stages: first, the Commission attempts to generate compliance by approaching the Member State in question about the infringement. This is called the administrative or preliminary stage. If, after a certain period of time, the Commission finds that the Member State has still not restored the infringement, the Commission can take the

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<sup>57</sup> See *inter alia* case of the Dutch Supreme Court of 10 November 2006, ECLI:NL:HR:2006:AY9317, (*AstraZeneca/Menzis*).

matter to the Court of Justice of the EU. At this stage, also referred to as the judicial or litigation stage, the Court of Justice delivers a judgment providing an interpretation of EU law on the matter. Around 5% of all infringement procedures arrive to the judicial stage – most of the cases are solved between the Commission and the Member State before referral to the Court of Justice.<sup>58</sup>

Accordingly, our client could lodge a complaint against the Dutch law and practice on tail docking of pigs, as it considers it to be in breach of EU law. However, the chances of success – namely, to have the Commission (or if needed, the EU Court of Justice) declare that the Dutch State is infringing EU law – are quite low. This has to do with a couple of elements:

- The Commission has 12 months to assess a complaint and if it considers the issue ‘complicated’ even more. Moreover, the Commission has no duty to open an infringement procedure, even if the complaint reveals the presence of a clear infringement. Accordingly, choosing the route of the infringement procedure requests quite some patience and no certainty of an outcome whatsoever.
- Infringement proceedings can only lead to the declaration that a national provision or practice is incompatible with EU law. Complainants cannot uphold their rights and seek for compensation, as only national courts are competent to award damages or grant an injunction against the administration of the State. Thus, the route of the infringement procedure will not lead to any compensation for damages for the client.
- Lastly, it is not likely that the Commission will initiate an infringement procedure in our case. This is because Denmark has already requested the Commission to do so, which the Commission unfortunately refused. The Danish petition was issued by the Danish Animal Welfare Society in 2014 and concerned the routine tail-docking of piglets in Denmark. The Danish organization raised the issue of the lack of implementation in Denmark, as well as in most EU Member States, of Council Directive 2008/120/EC. The Committee on Petitions (PETI) examined the complaint, but the Commission concluded that it did not intend to launch infringement proceedings, stating that it preferred to rely on guidelines for Member States to ensure better implementation of the Directive, on (yet to be developed) e- learning tools and other upcoming initiatives, such as framework legislation on animal welfare.<sup>59</sup>

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<sup>58</sup> See: [https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure\\_en](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en)

<sup>59</sup> Study of the European Parliament, DG For Internal Policies Policy Department C, ‘Routine Tail-Docking Of Pigs’, European Union, Brussels, 2014.

### 3. Possible defenses and counter-arguments

In the Pigs' Directive, it is stated that although tail-docking must not be carried out routinely, it can be an exception *only* where there is evidence that injuries to other pigs' tails have occurred.<sup>60</sup> It continues to highlight that before carrying out this procedure, other measures shall be taken to prevent tail-biting, considering environment and stocking densities.<sup>61</sup> This means that only when farmers have done this, if they still have a tail-biting problem, they are permitted to tail-dock.

Thus, the defendant may argue that the reason why tail-docking is a widespread procedure in the Netherlands, is to protect the other pigs from tail injuries, by providing evidence of these damages. However, as clearly put in the Pigs' Directive, the Netherlands cannot carry out tail-docking without taking into account other measures to prevent the tail-biting injuries. In 2011 there has been an undercover investigation by a Dutch animal rights organisation in 26 pig farms in the country, which shows poor welfare conditions, widespread tail-docking and no access to straw.<sup>62</sup> One of the ways to prevent tail-biting without docking of a part of the tail is to provide pigs access to 'manipulable material', such as straw. The footage in this investigation clearly demonstrates that contrary to the Directive's provision, the Netherlands does not take into account other preventive measures, but routinely performs tail-docking.

Additionally, Compassion in World Farming conducted an investigation in 2008 and 2009 in 74 farms in Germany, Denmark, Hungary, Netherlands, Spain and UK, focused on the welfare of pigs in light of the Directive. It was revealed that most EU farmers ignore the Pigs' Directive and do not provide enrichment materials or plastic objects to pigs, in order to prevent tail-biting.<sup>63</sup> Particularly, the prevalence of tail-docking in the farms visited in the Netherlands was identified 100% and there was no or ineffective environmental enrichment.<sup>64</sup>

More recently, in the final report audit is stated that official controls on pig farms in both 2015 and 2016 high levels of non-compliance for insufficient or inadequate enrichment materials were detected.<sup>65</sup> This report concluded that the Dutch authorities do not enforce the provisions of the Pig Directive to stop routine tail-docking of pigs.

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<sup>60</sup> Annex I, Chapter I, Art. 8 of Council Directive 2008/120/EC laying down minimum standards for the protection of pigs.

<sup>61</sup> *Ibid.*

<sup>62</sup> <https://www.ciwf.org.uk/news/2011/06/dutch-pig-investigation-reveals-eu-law-breaches>

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<sup>64</sup> <https://www.ciwf.nl/media/617332/Persoonlijkverslagvarkens.pdf>

<sup>65</sup> European Commission, 'Final report of an audit carried out in the Netherlands from 08 May 2017 to 12 May 2017 in order to evaluate Member State activities to prevent tail-biting and avoid routine tail-docking of pigs' DG(SANTE) 2017-6125 (2017), p. 11-12.



As it is already emphasized in our report, tail-docking is very painful for pigs and it is not necessary nor acceptable as a remedy to tail-biting. To conclude, the Dutch authorities cannot rely on the exception of the Directive because – while this is prohibited by the Directive – many investigations show that it is carried out on a routine basis and no other measures are not taken into account before carrying out tail-docking.

## **V. Conclusion**

In conclusion, the focus of this report is to answer the question whether the Netherlands is in breach with Council Directive 2008/120/EC (the Pigs' Directive), particularly regarding the provision which prohibits routine tail-docking of pigs. The reason why this procedure is prohibited derives from many studies that explain scientifically how painful and distressing it is for pigs to dock their tail. They also propose other alternative measures such as enrichment materials, plastic objects (straws) and better environmental conditions which prevent tail-biting in a more decent and effective manner than tail-docking.

In the Netherlands tail-docking is carried out routinely in pig farms, as many investigations and reports show. Those farms lack the adequate environmental conditions and no straws are accessible to pigs. So, why should the tail-docking procedure be carried out when no other measures are provided at all? The only way to carry out this procedure is if the exception in the Directive applies, which clearly the Dutch authorities cannot argue that it is the case for the reasons mentioned above. Since 2008 the investigations and reports provide evidences of these poor welfare conditions in pig farms in the country. It has been 10 years since the Directive is implemented and throughout these years no significant action has been carried by the Dutch authorities to prevent routine tail-docking. It is time for action.

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