

A-Law expert legal briefing note

Brexit, Article 13, and the debate on recognising “animal sentience” in law

28 November 2017

Introduction and summary

On 15 November 2017 a vote took place in the House of Commons on a proposed amendment to the EU (Withdrawal) Bill (**the Withdrawal Bill**). The amendment (referred to as “New Clause 30”, or “**NC30**”) sought to incorporate into UK law Article 13 of the Treaty on the Functioning of the European Union (**TFEU**). Article 13 states that the EU and its member States “*shall, since animals are sentient beings, pay full regard to the welfare requirements of animals*” when formulating and implementing the EU’s policies. NC30 was defeated by 313 to 295 votes. The UK Government whipped its MPs to vote against NC30.

The vote on NC30 has prompted a great deal of comment in newspapers and on social media, mostly critical of the UK Government’s position. Much of this has been inaccurate or based on misunderstandings of the relevant law (which is complex). In particular, the Government were not suggesting that animals lacked sentience (that is to say, unable to feel pain).

Certain statements made by Government Ministers when explaining why the Government did not support NC30 were also legally inaccurate. While the Animal Welfare Act 2006 (an Act of the UK Parliament which applies in England and Wales), and the equivalent Acts applying in Scotland and Northern Ireland, implicitly recognise the sentience of the animals which fall within their scope, those Acts are materially different from Article 13.

- First, the Animal Welfare Acts apply only to certain animals in certain circumstances, namely vertebrates which fall within the statutory definition of a ‘protected animal’ (essentially one which is domesticated in the British Islands, or under the control of a human, or not living in a wild state). Free living animals are therefore excluded, as is anything done lawfully under the authority of the Animals (Scientific Procedures) Act 1986 or in the normal course of fishing. In contrast, Article 13 applies to *all* animals.
- Second, the Animal Welfare Acts prohibit the causing of cruelty to, and the neglect of, protected animals. Article 13 has a very different focus. It imposes a duty on States to pay full regard to the welfare requirements of animals when formulating and implementing policies.

The purpose of this briefing note is to provide an objective legal analysis to inform the public debate and to consider options for providing valuable protections for animal welfare post-Brexit. The key points are these:

- Although much of the media debate has focused on the recognition of the sentience of animals, it is legally questionable whether that focus is appropriate. The question as to whether an animal is sentient is a question of fact. It is nowadays a matter of undisputed scientific opinion that animals (or at least vertebrate animals) are sentient. It is inconceivable that a UK court would take the view that vertebrate animals are not sentient, or that UK law does not already recognise that animals are capable of suffering.
- From a legal standpoint, the key issue is what legal obligations the law (whether UK law or EU law) creates so as to protect the welfare of animals, given their ability to suffer pain and distress, and on whom those obligations are imposed. The specific obligation created in EU law by Article 13 is an obligation for the EU itself (including the EU institutions, such as the Commission) and the EU's Member States to pay full regard to the welfare requirements of animals when formulating and implementing EU policies. No equivalent obligation exists in UK law. After the UK ceases to be an EU Member State, it will no longer be bound by the Treaty and Article 13 will therefore cease to apply in the UK. Unless steps are taken to incorporate an equivalent measure into UK law, animals will therefore lose a degree of legal protection which presently applies to them.
- The UK Government has made some reasonable points about the technical differences between EU and UK legislation. EU treaties and legislation often include 'non-operative' statements setting out the purposes of, or reasons for, the legislation's operative provisions (e.g. the requirements and prohibitions): hence, the words "*since animals are sentient beings*" in Article 13. A UK Act of Parliament is made up entirely of operative provisions, and generally cannot declare certain facts to be true, or state the purposes of, or reasons for, the legislation's operative requirements.¹ It would therefore be difficult to carry the words "*since animals are sentient beings*" directly into UK primary legislation. Thus, if it were thought appropriate for UK legislation to expressly recognise the sentience of animals, then a way would need to be found to do this through an operative requirement, such as creating a statutory duty for public bodies to recognise animal sentience.
- As noted above, however, the significance of Article 13 for animal welfare lies not in its recognition of sentience in isolation, but in its creation of a specific duty for the EU and Member States to pay "*full regard to the welfare requirements of animals*". There is no legal reason why the UK Parliament could not legislate to transpose into UK law the duty to pay full regard to the welfare requirements of animals when formulating and implementing policies so that it would continue to apply to the UK Government. The UK Parliament could also choose to extend the obligation to the devolved administrations of Scotland, Wales and Northern Ireland; or the devolved legislatures could themselves legislate to transpose the duty.
- Creating an enforceable obligation in UK law to pay full regard to the welfare requirements of animals when formulating and implementing policy would be of real importance and significance. In both UK and EU law, animals are generally regarded as 'things', i.e. property. For the purposes of EU law, for example, live farm animals are 'goods' and are therefore subject to the EU rules on the free

movement of goods. It is therefore important that animals' welfare requirements are given particular attention when policies which impact on animal welfare are being formulated and implemented. It is because animals are sentient that it would be incompatible with the moral values of the UK to fail to pay full regard to their welfare needs.

- Article 13 includes a caveat to protect religious and cultural practices. This caveat was created at the insistence of certain EU Member States which wanted to ensure that the Article was not used to erode their ability to continue to make decisions at the national level about religious and cultural practices (such as by permitting bullfighting or the religious slaughter of animals without pre-stunning). Member States did not want EU policy to remove States' autonomy (or 'subsidiarity') in relation to such practices. The UK Parliament may choose not to adopt a similar caveat when legislating to create a statutory duty to pay full regard to animal welfare when formulating and implementing policies affecting animals.

Article 13 of the TFEU

EU law treats animals as 'goods', and farm animals are regarded as a type of agricultural product. The EU rules on free movement of goods therefore apply to farm animals. As a result, the EU Court of Justice has ruled, for example, that Member States cannot prohibit the live export of food animals, and must take proportionate action to ensure that protesters are not allowed to interfere with such exports.

Against this background, during the 1980s and 1990s animal welfare organisations became concerned that there needed to be express recognition by the EU that animals should not be treated as just another form of goods, but should have a special status by virtue of their sentience. In particular, the EU's imperative to remove trade barriers and create a single EU 'internal market' should not be pursued without full regard being paid to the welfare requirements of animals, which should be protected by animal welfare legislation at the EU level.

The United Kingdom was one of the EU Member States that lobbied for the European Community to recognise that animals have a special status by virtue of their sentience.² These efforts resulted in a 'Declaration on the Protection of Animals' being appended to the Maastricht Treaty, calling upon institutions of the EU and Member States to "*pay full regard to the welfare requirements of animals*" when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research. The Declaration did not, however, have the status of law.

In 1999 the Treaty of Amsterdam³ annexed essentially the same text as a protocol to the Treaty of the European Community.

In 2009 essentially the same text became Article 13 of the TFEU. Unlike a declaration or protocol, Article 13 is an operative part of the Treaty and therefore part of the EU's primary law. While the UK remains a member of the EU, the Treaty, and therefore Article 13, is part of UK law. Thus, all emanations of the UK State (including the UK Parliament itself) are legally required to pay full regard to animal welfare when implementing EU policies and legislation, but not when acting outside the scope of EU law (such as when banning foxhunting, which is not something that is regulated by EU law).

The full text of Article 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."

The significance of Article 13 is that:

- it expressly recognises that animals deserve special protection by reason of their sentience; and
- it places a legal obligation upon the EU and Member States to pay full regard to animals' welfare requirements when formulating and implementing policy in the areas listed (i.e. agriculture, fisheries, transport, internal market, research and technological development, and space policies).

The European Commission has stated that Article 13 "*puts animal welfare on equal footing with other key principles mentioned in the same title [of the Treaty], i.e. promotion of gender equality, guarantee of social protection, protection of human health, combating discrimination, promotion of sustainable development, ensuring consumer protection and the protection of personal data*".⁴

It is fair to say, however, that the legal effect of Article 13 is uncertain, and that "*full regard*" is not a legal standard that is well defined in case law. EU policy and legislation permits practices, in both farming and research, which are incompatible with protecting animals fully from pain, suffering and distress. Indeed, EU law permits some practices, such as the force-feeding of geese for foie gras production, which are not permitted in the UK for reasons relating to animal welfare. This does not, however, mean that Article 13 has no value. While it permits animals' welfare requirements to be overridden by competing interests, public bodies must be able to demonstrate that they have taken into account the impact of their policies on animal welfare.

UK legislation

There is nothing in UK legislation that is functionally equivalent to Article 13.

In UK law, animals have the legal status of property. They are, however, afforded certain protections in animal welfare and environmental legislation.

The Animal Welfare Act 2006 makes it a criminal offence to cause unnecessary suffering to, or to neglect, a 'protected animal' (i.e. an animal – such as a farm animal, pet animal, or a wild animal held in captivity – which is under human control).⁵ The definition of 'animal' for the purposes of the Act includes all non-human vertebrates except those in foetal or embryonic form,⁶ but the Act includes provision for its protections to be extended to invertebrate species on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering.⁷ Thus, it is apparent that Parliament intended to protect animals (falling within the scope of this particular piece of legislation) by reason of their sentience.

The Act generally does not apply to wild animals or animals used in research.

The Act does not impose a legal duty upon any Minister or State body to pay regard to animals' welfare requirements.

What does this mean for animal welfare post-Brexit?

In '**Brexit: getting the best deal for animals**'⁸ around forty animal protection charities and campaign groups supported the statement that:

'We underline the importance of preserving Article 13 of the Treaty on the Functioning of the EU, which recognises animals as 'sentient beings' and requires the EU and Member States, when formulating and implementing EU policy on, inter alia, agriculture and transport, to "pay full regard to the welfare requirements of animals".

The recognition of animals as sentient beings and the requirement for the Government and other public bodies to pay full regard to the welfare requirements of animals when formulating and implementing policy in the areas specified by Article 13, must be incorporated into UK law post-Brexit.'

There are essentially two reasons why animal protection groups attach importance to achieving national legislation that is broadly equivalent, in substance, to Article 13.

First, they attach importance to maintaining legal recognition of the principle that, although animals are treated by the law as a form of property, public morality requires that there be a clear recognition in law that full regard must be paid to their welfare requirements. Animals should therefore have a distinct status.

Second, Article 13's use of the words "*full regard*" arguably indicates something as to *the weight* that should be given to animals' welfare requirements when formulating and implementing policy. In other words, it is not enough to *simply* take account of animals' welfare requirements and balance them with economic or other human interests. Instead, animals' welfare requirements should be given particular weight or importance.

It is true that it is difficult to identify specific instances of Article 13 making a difference to animal welfare standards or outcomes in the EU. In reality, the EU compromises animals' welfare requirements by balancing them against economic interests. There are no examples of the European Commission, or EU legislation, being successfully challenged in the EU Court of Justice for failing to give sufficient regard to animals' welfare requirements. Nevertheless, Article 13 fulfils a useful function in recognising that animal welfare deserves to be given particular importance. Further, the EU Court of Justice has relied on Article 13 as an aid to interpreting EU legislation. (The EU Court, when interpreting legislation, pays particular attention to the purposes and objectives of the EU, as discernible from the EU treaties.)

Whilst much EU legislation will be brought into, or preserved in, UK legislation initially, the TFEU will not be brought into UK law. Upon the UK ceasing to be a Member State, the UK will no longer have a legal obligation to pay full regard to animals' welfare when formulating and implementing policy.

UK Government Ministers have broad powers to make and change legislation affecting animal welfare, especially in relation to farm animals, in relation to England. The devolved parliaments and governments make legislation for protecting animal welfare in relation to other parts of the UK. While the UK remains an EU Member State,

however, the ability of UK Ministers and the devolved administrations to change animal welfare standards or requirements is, in practice, highly constrained – especially in relation to farm animal welfare – by the need to maintain compatibility with EU law. Animal welfare requirements for farm animals in particular are very largely set out within EU Directives leaving little or no scope for Member States to add to, or derogate from, those requirements.

After Brexit, it is likely that UK Government Ministers and the devolved administrations will be able to adjust animal welfare standards, whether upwards or downwards. In addition, the UK may begin negotiating trade deals with other countries, and those negotiations may place the UK under pressure to give ground on animal welfare standards in order to achieve equivalence and mutual recognition. It is reasonable for animal protection groups to be concerned that Parliament has not set the framework within which policy choices affecting animal welfare are to be made by whoever is given the power to make those choices after Brexit.

Arguably, animal welfare interests are currently given too little attention within the UK Government when policies are being developed and implemented. Policy areas relating to animal welfare are distributed amongst a number of different UK Government departments, and there is no ministerial post which ensures that animal welfare interests are represented across Government.

The Withdrawal Bill and proposed amendment NC30

The Withdrawal Bill proposes to convert directly applicable EU Regulations into the law of the United Kingdom. This is necessary as the UK leaves the EU to ensure that there are no gaps in the law. Government Ministers will have powers to amend legislation to resolve technical difficulties created by, for example, the fact that UK legislation refers to an EU process or body to which the UK no longer has access.

The Withdrawal Bill's Parliamentary journey began in the House of Commons. During the Committee Stage in the Commons, three different amendments were put down by MPs with a view to preserving something akin to the substantive effects of Article 13 in the UK. However, only one of those amendments – namely, NC30 (which was proposed by the Green MP Caroline Lucas) – was debated and voted on.

NC30 was in the following form:

To move the following Clause—

“EU Protocol on animal sentience

Obligations and rights contained within the EU Protocol on animal sentience set out in Article 13 of Title II of the Lisbon Treaty shall be recognised and available in domestic law on and after exit day, and shall be enforced and followed accordingly.”

Member's explanatory statement

This new clause seeks to transfer the EU Protocol on animal sentience set out in Article 13 of Title II of the Lisbon Treaty into UK law, so that animals continue to be recognised as sentient beings.

Reasonable concerns can be expressed about the drafting of NC30. In particular:⁹

- Whilst we understand the sentiment behind NC30, we note that the proposed clause, if incorporated into the Withdrawal Bill, would arguably be of no practical effect. Article 13 imposes an obligation on the EU and on EU Member States to have full regard to animal welfare requirements when formulating and implementing EU policies. After Brexit, however, the UK will not be a Member State, and it will not be obliged to implement EU policies.
- The “Members’ explanatory statement” suggests that the key feature of Article 13 is that it recognises animals as sentient beings. In fact, the reference to “sentient beings” in Article 13 is explaining the reason for the substantive requirement imposed by that Article, i.e. the “*pay full regard to the welfare requirements of animals*” requirement. It is that substantive requirement which creates a source of legal obligation and which will no longer be part of UK law after Brexit.
- By seeking to incorporate the full text of Article 13 into UK law, NC30 is seeking to incorporate the caveat referring to religious and cultural practices. This – especially when combined with the use of the word “rights” in NC30 – could potentially be relied on by persons seeking to challenge animal welfare policies or secondary legislation directed at enhancing the protection of animals, including in relation to harms caused to them by cultural or religious practices.

The UK Government’s current position

During the Commons debate on NC30, the Government indicated that it did not wish to see any post-Brexit reduction in the protection of animal welfare, but considered that “animal sentience” was already recognised in UK law within the Animal Welfare Act.

On 23 November 2017, the Rt. Hon. Michael Gove MP, Secretary of State for Environment Food and Rural Affairs, made a written statement to Parliament stating:

“It has been suggested that the vote last week on New Clause 30 of the EU Withdrawal Bill somehow signalled a weakening in the protection of animals - that is wrong. Voting against the amendment was not a vote against the idea that animals are sentient and feel pain - that is a misconception.

Ministers explained on the floor of the house that this Government’s policies on animal welfare are driven by our recognition that animals are indeed sentient beings and we are acting energetically to reduce the risk of harm to animals – whether on farms or in the wild. The vote against New Clause 30 was the rejection of a faulty amendment, which would not have achieved its stated aims of providing appropriate protection for animals.

The Prime Minister has made clear that we will strengthen our animal welfare rules. This government will ensure that any necessary changes required to UK law are made in a rigorous and comprehensive way to ensure animal sentience is recognised after we leave the EU. The Withdrawal Bill is not the right place to address this, however we are considering the right legislative vehicle.”

Options now available for requiring that “full regard” to paid to animals’ welfare requirements after Brexit

In A-Law’s legal view, it is questionable whether legislation that simply recognised “animal sentience” would be of any practical significance. The key benefit of Article 13 is not that it recognises that animals are sentient, but that it recognises that, since animals are sentient, their welfare requirements must be afforded particular consideration – indeed, “*full regard*” must be paid to those requirements.

In order to achieve this, the text of Article 13 would need to be adapted so as to place a duty on Government Ministers and/or other public bodies to have full regard to the welfare requirements of animals when formulating or implementing policies that impact on animals’ welfare. (As already noted above, particular attention would need to be given to how the UK legislation would fit with the UK’s devolution arrangements.)

We note that there are a variety of options available for increasing, or giving greater depth, to the statutory duty beyond the relatively vague, and difficult to enforce, standard of “full regard”. It would be possible for a number of these options to be pursued, so they are not alternatives to one another.

- The “full regard” requirement, which currently requires animals’ welfare requirements to be taken into consideration, could be developed into a requirement to consider how to ensure a particular outcome, namely that those welfare requirements are actually met. For example, the duty could be to “*pay full regard to the need to ensure that animals are protected from pain, fear, hunger and distress, and are able to exhibit their natural behaviours*”.
- This duty could be strengthened by imposing on public bodies a duty to undertake and to publish science-based assessments of the impacts of policy proposals on animals’ welfare requirements. (UK legislation often creates specific duties for public bodies to publish impact assessments of policy proposals on which they are consulting.)
- Parliament could decide not to subject the duty to a caveat referring to religious and cultural practices. Arguably, since this caveat was designed to protect EU Member States’ subsidiarity in relation to their national traditions (e.g. bullfighting in Spain), it would not be appropriate to include it in UK legislation.
- Mr Gove has suggested that the Government might create a new environmental protection commission with a remit that would include setting and improving animal welfare standards for farm animals and possibly also for animals in other settings. It would be appropriate for this new body to be created by an Act of Parliament, in order to ensure its independence. The Act creating the new body could set out the body’s statutory *objectives*, which could include, for example, an objective of “*ensuring that animals are protected from pain, fear, hunger and distress, and are able to exhibit their natural behaviours*”.¹⁰

It is a political question to what extent these options can or should be pursued by amendments to the Withdrawal Bill itself, rather than through separate subsequent primary legislation.

Who is A-Law?

The UK Centre for Animal Law (formerly the Association of Lawyers for Animal Welfare) is a registered charity in England and Wales. It is led by lawyers – predominantly practising solicitors and barristers – and works closely with legal academics. Our charitable mission includes promoting knowledge and education about the law relating to animal protection. We are politically neutral and, in particular, take no position on the UK’s withdrawal from the EU. We seek to be a source of objective, independent legal analysis on animal protection law issues. Whilst legal topics are often complex, it is our job to explain them as clearly as possible, so as to increase the effectiveness of UK animal protection organisations collectively, and to promote informed public debate.

¹ Such purposes and reasons can, however, be stated in the explanatory notes to the legislation, which do not have legal effects but can sometimes be referred to as an aid to interpreting the legislation.

² Radford, MR ‘Animal Welfare Law in Britain: Regulation and Responsibility’ (2001) Oxford University Press p105

³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts’, signed 2 October 1997.

⁴ http://ec.europa.eu/food/animal/welfare/policy/index_en.htm ; as cited in Stevenson 2012 : 5

⁵ Animal Welfare Act 2006, s.2 for the definition of ‘protected animals.’

⁶ Ibid, s.1.

⁷ Ibid, s1(3)-(5)

⁸ Brexit: getting the best deal for animals – recommendations for enhancing animal welfare, British industries and consumer confidence and choice in post-Brexit Britain. Co-ordinated by the UK Centre for Animal Law and Wildlife and Countryside Link.

⁹ In addition to these points, a further drafting issue with NC30 is that it refers to Article 13 as an “EU Protocol”. Article 13 is not a protocol but an operative provision of the TFEU. As noted above, prior to 2009 essentially the same text of Article 13 was set out as a protocol to the Treaty on the European Community but this is now a matter of historical detail.

¹⁰ There are many examples of statutory bodies – e.g. the Office of Communications – which are required to carry out their policy formulation and other activities so as to best pursue particular objectives set out in the statute.