

Animal Welfare Article of the Treaty on the Functioning of the European Union is Undermined by Absence of Access to Justice



The failure of the European Commission to secure proper implementation of EU legislation leads to many pigs being reared in unlawful conditions

Article 13 TFEU

Title II of the Treaty on the Functioning of the European Union lists a number of key principles that should be respected by the EU. Article 13 (part of Title II) of the Treaty provides that 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”.

The European Commission explains that “This puts animal welfare on equal footing with other key principles mentioned in the same title 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”.¹

This provision is important in two respects:

- it recognises animals as “sentient beings”; and
- it requires the Union and its Member States, in (i) formulating and (ii) implementing the Union’s policies in certain key areas, to pay “full regard to the welfare requirements of animals”.

Formulation and implementation

Article 13 places two separate and distinct legal obligations on the Union and the Member States both of which must be met i.e. a requirement to pay full regard to the welfare requirements of animals first during the formulation and then during the implementation of policy in a number of specified areas.

Policy not just legislation

The legal obligation goes beyond a duty to pay full regard to the welfare requirements of animals during the preparation and adoption of legislation. Article 13 refers to “policy” which includes but is wider than legislation. Policy includes *inter alia*:

- decisions as to whether or not to introduce legislation in a particular field e.g. whether existing legislation needs to be amended to address certain concerns
- soft law such as codes of practice
- Council Conclusions
- reports and resolutions of the European Parliament
- fiscal policy such as the impact of subsidies and taxation
- public procurement.

The ‘full regard’ test

The obligation to pay “full regard” applies both when the Union and the Member States are dealing directly with animal welfare and when they are addressing other matters that are likely to have a direct or indirect impact on animal welfare. It obliges the Union and the Member States to take animal welfare into account in a comprehensive, thorough and serious manner in formulating and implementing their policy in specified fields. It does not require that animal welfare should necessarily be given precedence over other policy considerations such as economic factors. However, the Union and the Member States should be able to demonstrate what consideration was given to animal welfare in the formulation and implementation of a particular policy and, where a relatively low priority has been accorded to animal welfare, the reasons and justification for so doing. For example, the Union and the Member States should state which scientific studies and reports by advisory bodies were taken into account and why, if that is the case, certain conclusions and recommendations have not been followed.

This paper examines the failure of the European Commission to respect Article 13. It then goes on to consider the inability of animal welfare organisations to challenge the Commission's failure at the Court of Justice of the European Union.

Long distance transport of animals

For over 25 years the Commission's attention has regularly been drawn to the welfare problems that are inherent in long distance transport. In June 2012 Animals' Angels presented a petition to the Commission with over one million signatures calling for a maximum overall limit of 8 hours to be placed on the transport of animals for slaughter. The petition was signed by citizens from all Member States.

Earlier in the year, on 15 March 2012, the European Parliament adopted Written Declaration 49/2011, which "calls on the Commission and the Council to review Regulation 1/2005 [on the protection of animals during transport] to establish a maximum 8-hour limit for the journeys of animals transported for the purpose of being slaughtered". In all, 395 MEPs signed the Declaration.

A 2011 study carried out for the Commission concluded that "for the main groups of animals there are no indications that animal welfare during transport has improved substantially with the introduction of Regulation (EC) 1/2005".ⁱⁱ In its November 2011 report on animal transport the Commission acknowledged that "the available information shows that severe animal welfare problems during transport persist".ⁱⁱⁱ

Despite this, the Commission's report concluded that an amendment of Regulation 1/2005 would not be the most appropriate approach to address the identified problems. The Commission said that rather than strengthening the legislation, enforcement of existing rules should be the priority.

Breaches of legislation are common during transport



Overcrowding: particularly harmful when combined with high summer temperatures, lack of water and inadequate ventilation

Insufficient headroom: animals forced to stand in unnatural position and circulation of air impeded



Photos © Animals' Angels

Hungry bovine eating dung off truck floor



Inadequate water supply



Photos © Animals' Angels

1n August 2012 Animals' Angels wrote to the Commission stating that in its view the Commission's position did not respect Article 13 TFEU. Animals' Angels stressed its belief that the Commission's obligations under Article 13 require it both to work towards improved enforcement and to give proper consideration to the benefits of proposing amendments to the legislation to place a reasonably short maximum limit on journeys to slaughter.^{iv}

The letter cited a number of reports, scientific studies and recitals to Regulation 1/2005 that recognise that long distance transport often entails severe animal welfare problems and further that long journeys are likely to have more detrimental effects on the welfare of animals than short ones. These included the 2004 Opinion on the welfare of animals during transport of the Scientific Panel on Animal Health and Welfare of the European Food Safety Authority (EFSA) which stated that:

"A variety of stressors involved in transport are key factors that strongly contribute to poor welfare in transported animals and they also increase the susceptibility to infection of transported animals and the shedding of infectious agents in already infected animals. ... Transport should therefore be avoided wherever possible and journeys should be as short as possible".^v

The EFSA Opinion makes it clear that longer journeys lead to poorer welfare, stressing that:

"With increasing duration of journey, the welfare of animals generally gets worse because they become more fatigued, incur a steadily increasing energy deficit if they do not get sufficient food, become more susceptible to existing infections, and may become diseased because they encounter new pathogens" and "... after a few hours of transport, welfare tends to become poorer as journey length increases.

The animal welfare benefits of avoiding long journeys are recognised by the veterinary profession. The Federation of Veterinarians of Europe states that "Animals should be reared as close as possible to the premises on which they are born and slaughtered as close as possible to the point of production".^{vi}

Animals' Angels' letter pointed out that improved enforcement and stronger legislation are not mutually exclusive and that both approaches are needed to address what the

Commission's 2011 report describes as continuing "severe animal welfare problems during transport".

The letter stated "In Animals' Angels' view Article 13 requires the Commission to give consideration to both improved enforcement and stronger legislation. Article 13 provides that the Union must pay full regard to the welfare requirements of animals both when it formulates and when it implements EU policies on agriculture and transport.

"Our understanding is that 'implementation' includes enforcement and thus the Commission rightly seeks to improve enforcement. However, attempts to improve enforcement do not fulfil the Commission's obligation to pay full regard to the welfare requirements of animals in "formulating" EU agriculture and transport policies. The formulation of policy is concerned, inter alia, with questions such as whether existing legislation needs to be amended to address certain concerns."

The Commission's reply merely re-iterated its earlier decision not to propose a change to the legislation and made no attempt to respond to the detailed arguments made by Animals' Angels.

A key point is that the Commission had been presented with detailed scientific evidence (see above) that the welfare problems that arise during the very long journeys currently permitted by Regulation 1/2005 could be substantially reduced by shortening journey times. Despite this the Commission failed to give proper consideration to the arguments in favour of placing a reasonably short maximum journey time on transport to slaughter. We believe this contravenes its duty under Article 13 to pay full regard to animal welfare in the formulation of agriculture and transport policies.

Poor level of enforcement of Regulation on protection of animals during transport

The Commission repeatedly stressed that it wished to focus on improved enforcement of the existing rules rather than proposing strengthened legislation. Despite this, the Commission has done little to secure improved enforcement.

The Commission has known about the problem of poor enforcement since the 1990's but has failed to take effective action to improve the situation. In 2010 Compassion in World Farming, Eurogroup for Animals and Animals' Angels sent a detailed paper on enforcement to the Commission. This set out the main welfare problems and breaches of the legislation that occur during long distance transport; these were identified by analysing reports by the Commission's Food and Veterinary Office and investigations by animal welfare organisations. The paper then detailed the actions Member States could take - under their existing powers - to address these breaches through improved enforcement.

To the best of our knowledge no use has been made of this paper nor has the Commission taken any effective and reasonably comprehensive steps to achieve improved enforcement by the Member States. A few Member States have improved enforcement but in general enforcement of Regulation 1/2005 remains poor across much of the EU. The Commission's long-term failure to take effective action to achieve a proper level of enforcement by the Member States contravenes Article 13 as it has not paid full regard to the welfare requirements of animals in implementing Union policy on transport and agriculture.

Export of live animals from the EU to the Middle East, North Africa and Turkey

The EU exports around 1.8 million sheep and cattle a year to the Middle East, North Africa and Turkey. In addition to the welfare problems encountered in long journeys, animals exported to this region experience severe suffering at slaughter. Investigations have been carried out into slaughter conditions in many of these countries. In every slaughterhouse that was visited extremely poor slaughter practices resulting in great animal suffering were

witnessed. These practices were generally in breach of the World Organisation for Animal Health (OIE) international standards on welfare at slaughter.

Lebanon: sheep are dragged away from the rest of the flock by a rear leg. They are dragged some distance to the end of the line of slaughtered sheep, where they are thrown down and their throat is cut



The problems entailed in the export of animals to third countries have been drawn to the Commission's attention many times over the last 20 years. In particular several letters have been sent to the Commission during 2014 providing detailed film and written evidence of the utterly inhumane slaughter practices in the countries that import EU animals. Compassion in World Farming and other animal welfare organisation have regularly made practical suggestions as to how to address these problems. These include:

- the EU should replace the export of live animals to third countries with meat exports
- while this trade continues, the EU should take responsibility for the welfare of its animals when they reach third countries. We have several times suggested to the Commission that it should adopt a scheme similar to Australia's 'Exporter Supply Chain Assurance System'. This requires livestock exporters to ensure that when Australian animals reach the importing country they are handled and slaughtered in conformity with the OIE standards on animal welfare.
- the EU should also offer destination countries practical assistance in improving their slaughter standards.

The EU has not taken these or any other steps to address the problems involved in the export of EU cattle and sheep. The one exception is that the Commission is planning to hold a workshop on welfare at slaughter in Lebanon; this is welcome but is only a modest start when one considers the extent and severity of the problems in the Middle East and North Africa. Moreover, we fear that some Directorates-General of the Commission have been encouraging these exports despite having been informed of the cruelty involved.

The Commission's failure to take effective action is in breach of both limbs of Article 13. Its failure, following receipt of evidence of extreme animal suffering, to re-consider the EU policy of permitting, and indeed in some cases encouraging, the export of live animals to the Middle East, North Africa and Turkey together with its failure to encourage the live trade to

be replaced by a meat trade clearly does not pay full regard to animal welfare in the *formulation* of agriculture and transport policy.

The Commission's failure to take effective steps (such as the Australian scheme) to reduce the suffering experienced during the long journeys and at slaughter fails to pay full regard to animal welfare in the *implementation* of agriculture and transport policy.

Welfare of farmed fish

Since 2002 the Commission has sought to promote the growth of EU aquaculture.^{vii} In 2011 the Commission proposed a Regulation to reform the Common Fisheries Policy (CFP). This included a substantial section aimed at promoting the development of aquaculture.

Compassion in World Farming wrote to the Commission saying that although Recital 11 of the proposed Regulation provided that the CFP "should pay full regard, where relevant, to animal health [and] animal welfare", it was not followed up in the main body of the proposed Regulation which made no reference to the welfare of farmed fish. The letter stressed that this was disappointing bearing in mind that the TFEU provides that the Union and the Member States shall, in formulating and implementing their policies on fisheries, pay full regard to the welfare requirements of the animals. The letter said that this Treaty obligation cannot be met merely by a Recital but should be reflected in the substantive provisions of the proposed Regulation.

The letter continued: "the EU has certain obligations as a member of the OIE and a party to the European Convention for the Protection of Animals kept for Farming Purposes. The EU should give effect to the Recommendation concerning the welfare of farmed fish that has been adopted under the European Convention.

"The OIE Guiding Principles on farmed fish stress that the "use of fish carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable". The EU should implement the OIE Recommendations concerning the welfare of farmed fish during transport and at slaughter."

A lengthy correspondence with the Commission followed. However, the Commission refused to support the inclusion of substantive provisions on the welfare of farmed fish in the CFP Regulation. Nor has the Commission taken any other effective steps regarding the welfare of farmed fish. Moreover, the EU is not giving effect to the Council of Europe and OIE Recommendations referred to above. In light of these factors the Commission and the Member States involved in aquaculture cannot be said to be meeting their obligation under Article 13 TFEU to pay full regard to the welfare of farmed fish in formulating and implementing the Union's policies on fisheries.

There is a substantial body of scientific research on which the Commission could draw in developing its policies on the welfare of farmed fish (though this research is less extensive than in the case of terrestrial animals). In 2008 EFSA produced Scientific Reports on the welfare of six of the main fish species farmed in the EU and in 2009 it produced Scientific Opinions on the welfare at slaughter of eight farmed fish species.

Council Regulation 1099/2009 on the protection of animals at the time of killing provides in Article 27 that "No later than 8 December 2014, the Commission shall submit to the European Parliament and to the Council a report on the possibility of introducing certain requirements regarding the protection of fish at the time of killing taking into account animal welfare aspects as well as the socioeconomic and environmental impacts. This report shall, if appropriate, be accompanied by legislative proposals with a view to amending this Regulation, by including specific rules regarding the protection of fish at the time of killing". It will be interesting to see if the Commission produces this report.

Common Agricultural Policy

The core element of EU agriculture policy is the Common Agricultural Policy (CAP) and this must meet the Treaty obligation to pay full regard to animal welfare. Despite this Treaty obligation, very little regard is paid to animal welfare in the formulation or the implementation of the CAP.

In 2012, during the formulation of the current CAP regime Compassion in World Farming and Eurogroup for Animals wrote to the Presidents of the Commission, the Council and the Parliament drawing their attention to the need for the CAP after 2013 to do more to improve the animal welfare standards of the livestock sector. The letter pointed out that just 0.1% of the then CAP budget of €55 billion per year was being spent on supporting improved animal welfare.

The letter contrasted this with a study by the PBL Netherlands Environmental Assessment Agency.^{viii} This stated that the persistent problems of sustainability in the livestock sector - including poor animal welfare - require a major change in production systems. It estimated that it would take 5-10% of the CAP budget to support investments in the improved animal housing systems and management practices that are needed to address these problems.

Moreover, some of the CAP budget is spent in ways that are detrimental to animal welfare. Researchers have analysed the use of subsidies based on Rural Development farm modernisation measures in Germany.^{ix} They report that in 40% of pig housing facilities built with these subsidies, the welfare of the pigs deteriorated. Accordingly, the modest proportion (0.1%) of the CAP budget spent on supporting animal welfare must be revised downwards to account for that part of the CAP expenditure which results in reduced welfare.

It is unlikely that the proportion of the CAP budget that is aimed at improving animal welfare will substantially increase in the new CAP as the weight given to animal welfare in the CAP has not been significantly changed. In addition, the danger remains that funding granted under Rural Development measures will continue in some cases to result in lower animal welfare as modernisation continues to be an important priority for rural development and, as indicated above, modernisation can in some cases be inimical to animal welfare. Moreover, the CAP legislation does not contain any effective mechanism aimed at ensuring that funding does not undermine animal welfare.

The pressing need for the CAP to help farmers improve animal welfare standards can be seen from the fact that much of the EU pig, meat chicken and dairy sectors operate in ways that fall far short of the recommendations on animal welfare contained in scientific reports by the European Food Safety Authority (EFSA).

The failure of the CAP to:

- allocate sufficient funds to help farmers to adopt housing systems and management practices that enable them to operate in accordance with the recommendations on animal welfare contained in scientific reports by EFSA
- prevent some CAP funding to be used in ways that have a detrimental impact on animal welfare

means that the CAP contravenes Article 13 in that it is not paying full regard to animal welfare in formulating and implementing Union agriculture policy.

Foie gras

Foie gras production involves force-feeding ducks and geese by placing a long tube down the birds' oesophagus and pumping an excessive quantity of food into their stomach. This process contravenes paragraph 14 of the Annex to Council Directive 98/58/EC concerning the protection of animals kept for farming purposes which provides that "No animal shall be provided with food or liquid in a manner ... which may cause unnecessary suffering or injury".

Force feeding for foie gras production



Force feeding clearly causes suffering and injury.^x In its 1998 report the European Commission's Scientific Committee on Animal Health and Animal Welfare (SCAHAW) concluded that, as a result of force feeding, normal liver structure and function is "severely altered and compromised".^{xi} The SCAHAW stressed that force feeding, as currently practised, "is detrimental to the welfare of the birds".^{xii}

Their report also pointed out the potentially damaging and distressing effects of the insertion of the feeding tube into the oesophagus.^{xiii} This can result in accumulated scar tissue in, and serious injury to, the oesophagus of ducks.^{xiv} In particular, insertion of the tube can result in inflammation of the bird's neck, and bruising and even perforation of the oesophagus.^{xv}

In October 2012 Compassion in World Farming and other animal welfare organisations submitted a Formal Complaint to the Commission. This argued that in light of the health and welfare problems inflicted on ducks and geese by force feeding, this practice appears to be in clear contravention of the prohibition in Directive 98/58 on providing food "*in a manner ... which may cause unnecessary suffering or injury*".

In the lengthy correspondence that followed the Commission went to considerable lengths to protect foie gras production. A letter from the Commission dated 27 May 2014 stated that "the Commission services recognise that force-feeding as currently practised in some Member States is difficult to reconcile with many of the provisions of the Directive ... including in particular paragraphs 7 and 14 (both sentences) of the Annex to Directive 98/58/EC".

However, the Commission, apprehensive of taking on the foie gras might of France, took refuge in an unconvincing argument as to why force feeding for foie gras production, though in its own words "difficult to reconcile" with the 1998 Directive does not in fact contravene its prohibition on providing food "*in a manner ... which may cause unnecessary suffering or injury*". The Commission argued that a Council of Europe Recommendation concerning Muscovy ducks^{xvi} in effect provides a derogation from the 1998 Directive's requirements.

Article 24 of the Recommendation provides that "countries allowing foie gras production shall encourage research on its welfare aspects and on alternative methods which do not include gavage [force feeding]" and "until new scientific evidence on alternative methods and their

welfare aspects is available, the production of foie gras shall be carried out only where it is current practice”. However, it is difficult to believe that the Recommendation (which was adopted in 1999) can retrospectively provide a derogation from provisions in Council Directive 98/58 (which was adopted in 1998).

Despite this, the Commission has refused to take any effective action in respect of force feeding. This appears to contravene Article 13 TFEU’s requirement that full regard must be paid to animal welfare in the implementation of EU agriculture policy.

Welfare of dairy cows

Compassion in World Farming and other animal welfare organisations have since 2011 been pressing the Commission to propose legislation to protect the welfare of dairy cows. They have pointed out that the EU has detailed Directives on the welfare of pigs, laying hens, chickens reared for meat and calves but no species-specific legislation on the welfare of dairy cows despite the serious welfare problems experienced by dairy cows. These problems were detailed by EFSA in 2009 in a Scientific Report and a number of Scientific Opinions each on a different aspect of dairy welfare.

The animal welfare organisations have also pointed out to the Commission that addressing dairy welfare is a matter of some urgency as the EU dairy sector is industrialising with cows being pushed to ever higher milk yields and a increasing proportion being ‘zero-grazed’ i.e. kept indoors throughout the year. These trends are happening despite the fact that EFSA’s overall Scientific Opinion contains high priority conclusions stressing that:

- “Long term genetic selection for high milk yield is the major factor causing poor welfare, in particular health problems, in dairy cows”, and
- “The genetic component underlying milk yield has also been found to be positively correlated with the incidence of lameness, mastitis, reproductive disorders and metabolic disorders”.

In addition, in what they also characterized as a high priority conclusion, EFSA stressed that “If dairy cows are not kept on pasture for parts of the year, i.e. they are permanently on a zero-grazing system, there is an increased risk of lameness, hoof problems, teat tramp, mastitis, metritis, dystocia, ketosis, retained placenta and some bacterial infections.”^{xvii}



Pressures on high yielding cows are so great that many are utterly worn out after just three or four milk cycles and are prematurely culled

Barren, overcrowded, often filthy conditions



Despite the considerable body of scientific evidence showing serious welfare problems in the dairy sector the Commission has refused to propose legislation to safeguard the welfare of dairy cows. It has also failed to take any other action to address these welfare issues.

Compassion in World Farming has written to the Commission stressing that, if they are not prepared to propose legislation, they should consider other ways of tackling dairy welfare. It has suggested that the Commission could:

- produce guidelines advising how the provisions of Directive 98/58 apply to dairy cows and on implementation of the Recommendations on cattle made under the Council of Europe Convention for the protection of animals kept for farming purposes. This Convention is part of EU law.
- explore ways in which a multi-stakeholder initiative could work together to enhance dairy welfare, for example, by using the assessment protocols and practical strategies for improving welfare produced by the *Welfare Quality* project and implementing the recommendations of the *European Animal Welfare Platform* on dairy welfare. Both the *Welfare Quality* project and the *European Animal Welfare Platform* are Commission initiatives

However, the Commission has not taken these or any other steps to address dairy welfare.

The Commission has helpfully pointed out in correspondence that dairy welfare is covered by two important, connected pieces of legislation:

- Council Directive 98/58 concerning the protection of animals kept for farming purposes
- the Recommendation concerning cattle adopted by the Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes.^{xviii} The Commission points out that since the EU has ratified the European Convention, the Recommendation concerning cattle “is legally binding to the Member States. The provisions laid down in the recommendation shall thus be applied on dairy holdings within the EU.”

Again, however the Commission has taken no effective steps to press the Member States to apply this legislation.

In declining to take any steps, legislative or otherwise, to address dairy welfare the Commission is failing to respect Article 13 TFEU as it is not paying full regard to animal welfare in the formulation of the Union’s agriculture policy. In not taking any effective steps

to press or even encourage the Member States to apply Directive 98/58 and the Recommendation concerning cattle made under the European Convention the Commission is failing to respect Article 13 TFEU as it is not paying full regard to animal welfare in the implementation of the Union's agriculture policy.

Access to justice: the difficulty of challenging the Commission at the Court of Justice

In a number of Member States civil society organisations are entitled to bring 'judicial review' proceedings in which a court reviews the lawfulness of a decision, action or failure to act by a public body. Judicial review is concerned only with the lawfulness of the decisions and acts (including omissions) of public bodies; it is not the court's role to substitute its own judgment for that of the decision maker.

In order to be able to bring judicial review proceedings a civil society organisation has to establish its 'standing'. In the UK, for example, the Senior Courts Act 1981 requires an applicant to having "sufficient interest" in the matter. This term has been interpreted broadly and well-established animal welfare organisations have often been recognised by the Courts in the UK as fulfilling this test.

Compassion in World Farming (Compassion) has brought judicial review proceedings in the UK on three occasions since 1990. This indicates that judicial review is used only sparingly and very much as a last resort. In each case Compassion's standing was accepted. Indeed, its standing has not been challenged by the Government, other interested parties or High Court or Court of Appeal judges.

Compassion successfully established its standing by, inter alia, setting out its long history of serious engagement with issues of farm animal welfare, the respect it commands from academics in this field, its regular meetings with Government at both official and Ministerial level and its constructive relationships with many MPs.

Although Compassion has not succeeded in the judicial review challenges that it has brought, it was recognised in each case that the issues of lawfulness raised by Compassion were important and legitimate.

Challenges brought by animal welfare organisations against a Member State Government may be considered by the Court of Justice of the EU if the national court considers that an aspect of the case raises an important issue of European law. In this circumstance the national court may refer that aspect to the Court of Justice.

At the EU level, however, the Court of Justice has for many years interpreted the Treaty provisions as not allowing civil society organisations to institute proceedings at the Court to challenge the legality of Commission actions or inactions. As a result the Commission knows it can act with impunity in ignoring certain TFEU provisions.

TFEU provisions and interpretation by Court of Justice

Under Article 263 TFEU the European Parliament, the Commission, the Council or a Member State may bring an action asking the Court of Justice to review the legality of certain acts of the Parliament, the Commission and the Council where those acts are "intended to produce legal effects *vis-à-vis* third parties". Such actions may be brought "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". The above EU institutions are often referred to as 'privileged applicants'.

Article 263 provides that individuals and bodies other than the EU institutions may only institute proceedings “against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”. Such ‘non-privileged’ applicants have to establish standing to challenge an act of an EU institution. The wording of Article 263 and wording in its predecessor Articles in earlier Treaties is narrow, a problem compounded by restrictive interpretations over many years by the Court of Justice of this wording.^{xix} As a result it is probably impossible for an animal welfare organisation to establish standing to challenge an act of the Commission at the Court of Justice.

Article 265 deals with failure to act. It provides that Member States and EU institutions may bring an action before the Court of Justice in respect of the failure of EU institutions to act in infringement of the Treaties. The action is only admissible if the institution or body, concerned has first been called upon to act. If, within two months of being so called upon, it has not defined its position, the action may be brought within a further period of two months.

Article 265 provides that individuals and bodies other than the EU institutions may complain to the Court that an institution or body “has failed to address to that person any act other than a recommendation or an opinion”.

Article 265 is cast very narrowly. A body may only bring proceedings in respect of a failure by an EU institution “to address to that person any act”. Moreover, the EU institution is only required to ‘define its position’; it is not required to act. It is most unlikely that an animal welfare organisation could institute proceedings under Article 265 to challenge the Commission’s failure to respect Article 13 TFEU.

In practice animal welfare organisations are more likely to wish to challenge the lawfulness of a failure to act than an act. It is the failure to pay full regard to animal welfare in formulating and implementing Union policy in the areas specified by Article 13 that animal welfare organisations would generally wish to challenge. The fact that under Article 265 the Commission would simply need to ‘define its position’ in order to halt the action makes this a largely ineffective remedy.

To sum up, the effect of the narrow wording and interpretations of Articles 263 and 265 is that civil society organisations that protect the interests of a group of persons are unable to seek judicial review at the Court of Justice of the legality of acts or failures to act by the Commission. The only exception to this is for environmental organisations and even here (as discussed below) their ability to establish standing is very limited.

The Aarhus Convention

The Aarhus Convention requires its Parties to guarantee rights of access to information, public participation in decision-making, and access to justice in environmental matters. Regulation (EC) No 1367/2006 of the European Parliament and of the Council applies the Aarhus Convention to EU institutions and bodies.

Article 9(3) of the Aarhus Convention provides for access to judicial or other review procedures for challenging acts and omissions by public authorities which contravene provisions of law relating to the environment.

Recital 20 of EU Regulation 1367/2006 provides that “non-governmental organisations active in the field of environmental protection that meet certain criteria, in particular in order to ensure that they are independent and accountable organisations that have demonstrated that their primary objective is to promote environmental protection, should be entitled to request internal review at Community level of acts adopted or of omissions under

environmental law by a Community institution or body, with a view to their reconsideration by the institution or body in question”.

Recital 21 provides “Where previous requests for internal review have been unsuccessful, the non-governmental organisation concerned should be able to institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.”

Article 10 of Regulation 1367/2006 is arguably narrower than foreseen by Recital 20. It provides that a non-governmental organisation (NGO) is entitled to make a request for internal review to the Community institution or body that has adopted an “administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act”.

The definitions in Article 2 make it clear that Article 10 does not apply to an institution or body when it is acting in a judicial or legislative capacity. Article 2(g) defines an ‘administrative act’ as any “measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects”. An ‘administrative omission’ is defined as “any failure of a Community institution or body to adopt an administrative act as defined in (g)”.

Article 12 of Regulation 1367/2006 provides that a NGO that made a “request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty”.

In a 2012 judgment the General Court of the Court of Justice (formerly known as the Court of First Instance) considered the validity of the limitation in Regulation 1367/2006 of the right to request an internal review to measures “of individual scope”.^{xx} The Court noted that Regulation 1367/2006 is intended to meet the EU’s international obligations under the Aarhus Convention.

The Court pointed out that the use of the word “acts” in the Aarhus Convention was not defined and that there is no reason to construe the concept of ‘acts’ in Article 9(3) of the Aarhus Convention as covering only acts of individual scope. The Court held that “an internal review procedure [such as that provided for by Regulation 1367/2006] which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified”. The Court held that limitation of the right to request internal review to measures of individual scope “is not compatible with Article 9(3) of the Aarhus Convention”.

The Court’s judgment has been appealed by the Commission.

It should be noted that even if the Court of Justice upholds this judgment, environmental NGOs will still face significant hurdles in establishing standing to institute judicial review proceedings at the Court of Justice as Article 12 of Regulation 1367/2006 provides that such proceedings must be “in accordance with the relevant provisions of the Treaty”. As indicated earlier, the ability of NGOs to establish such standing is extremely limited under the Treaty.

Impact of inability of civil society organisations to challenge Commission

The inability (apart from the limited possibilities under Regulation 1367/2006) of civil society organisations to challenge the lawfulness of a Commission act or failure to act is “incompatible with fundamental rights such as the right of access to a court or ... to an effective remedy”.^{xxi}

Judicial review plays a crucial role in providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. Judicial review cannot fulfil this crucial role unless it is, in practice, possible to challenge decisions of public bodies which may be unlawful. The rule of law cannot be vindicated unless there is someone who can facilitate the vindication. The result of restricting standing to those who have a direct interest is that, if in a particular case no-one has such an interest, a questionable decision or act will go unchallenged.

The situation of there being no-one with the necessary standing to bring an action at the Court of Justice is particularly marked in the case of animal welfare. It is inherent in such cases that there may well be no person or body with a direct interest in the matter. As a result the lawfulness of decisions, acts or omissions of the Commission or other EU institutions affecting animal welfare is not open to challenge.

This has arguably led to a certain insouciance in the Commission as regards its obligations under Article 13 TFEU as it knows that it cannot be challenged. In contrast Ministers in Member States that recognise the standing of civil society organisations are aware that unlawful or irrational decisions or acts are vulnerable to judicial review challenge and this perhaps results in greater care being taken to ensure that public bodies act lawfully.

It is unacceptable that in certain categories of Commission acts and omissions, such as those affecting animal welfare, there is no person or body with the requisite standing to make public interest judicial review claims.

Conclusion

The Commission and the other EU institutions should put in place well-defined arrangements to ensure that full regard is paid to the welfare requirements of animals when EU policy (including legislation) in the areas specified by Article 13 TFEU is being (i) formulated and (ii) implemented.

The Commission and the other EU institutions should publish detailed reports that set out what steps were taken to pay full regard to the welfare requirements of animals when EU policy (including legislation) in the areas specified by Article 13 TFEU was being (i) formulated and (ii) implemented. These reports should provide a reasoned explanation and justification as to why in any particular case less weight has been given to animal welfare than might reasonably be expected on the basis of scientific evidence and ethical considerations. The requirement to produce a report would apply:

- both to acts and omissions such as a decision not to act
- both when animal welfare is the principal consideration at issue and when animal welfare may be indirectly affected by acts or decisions.

The Treaty should be amended to allow civil society organisations to institute judicial review proceedings at the Court of Justice to challenge the lawfulness of acts and omissions by the Commission and other EU institutions. The Treaty should in particular enable civil society organisations to bring proceedings in circumstances where otherwise there is likely to be no other challenger because no person or body is directly and individually affected by the act or omission in question.

In the meantime the Commission should on a voluntary basis establish internal review procedures that enable civil society organisations to demand review of Commission acts and omissions by an independent and impartial body.

ⁱ http://ec.europa.eu/food/animal/welfare/policy/index_en.htm

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- ⁱⁱ Baltussen W *et al* 2011. Study on the impact of Regulation (EC) No 1/2005 on the protection of animals during transport. http://ec.europa.eu/food/animal/welfare/transport/docs/study_report_en.pdf
- ⁱⁱⁱ Report from the Commission to the European Parliament and the Council on the impact of Council Regulation (EC) No 1/2005 on the protection of animals during transport, 2011. COM(2011) 700 final. http://ec.europa.eu/food/animal/welfare/transport/docs/10112011_report_en.pdf
- ^{iv} Copies of all correspondence referred to in this paper can be obtained from the author peter.stevenson@ciwf.org
- ^v EFSA, 2004. The welfare of animals during transport. Scientific Report of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to the welfare of animals during transport. <http://www.efsa.europa.eu/en/scdocs/doc/44ax1.pdf>
- ^{vi} FVE position paper, 2008. The welfare of animals during transportation. http://www.fve.org/uploads/publications/docs/fve_08_016_transport.pdf
- ^{vii} Communication from the Commission on a Strategy for the Sustainable Development of European Aquaculture - COM(2002) 511. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0511&from=EN>
- ^{viii} PBL Netherlands Environmental Assessment Agency, 2012. Greening the CAP: an analysis of the effects of the European Commission's proposals for the Common Agricultural Policy 2014-2020. <http://www.pbl.nl/sites/default/files/cms/publicaties/pbl2012-greening-the-cap-500136007.pdf>
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- ^x European Commission's Scientific Committee on Animal Health and Animal Welfare's report on the Welfare Aspects of the Production of Foie Gras in Ducks and Geese. 16 December 1998, Brussels, Belgium. http://www.europa.eu.int/comm/food/fs/sc/scah/out17_en.html
- ^{xi} *Id.* section 5.5.
- ^{xii} *Id.* conclusion.
- ^{xiii} *Id.* Summary, section II (2).
- ^{xiv} *Id.* section 5.4.6 and Summary, section II (6).
- ^{xv} Forced feeding: An inquiry into the welfare of ducks and geese kept for the production of foie gras. Produced by Advocates for Animals and the World Society for the Protection of Animals. Carol McKenna, February 2000.
- ^{xvi} Recommendation concerning Muscovy ducks (*cairina moschata*) and hybrids of Muscovy and domestic ducks (*Anas platyrhynchos*) of the Standing Committee of the European Convention for the protection of animals kept for farming purposes
- ^{xvii} Scientific Opinion of the Panel on Animal Health and Welfare on a request from European Commission on welfare of dairy cows. *The EFSA Journal* (2009) 1143, 1-38.
- ^{xviii} Recommendation concerning cattle adopted on 21 October 1988 by the Standing Committee of the European Convention for the protection of animals kept for farming purposes. http://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/farming/Rec%20cattle%20E.asp#TopOfPage
- ^{xix} Inuit Tapiriit Kanatami, Appeal against an order of the General Court of the EU, Case C-583/11 P, 3 October 2013 <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d530696f82c84545558e26ada017e21fb8.e34KaxiLc3eQc40LaxqMbN4Obh4Pe0?text=&docid=142607&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=520891>
- ^{xx} Judgment of the General Court, 14 June 2012, in Case T-338/08, Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission
- ^{xxi} Wyatt, Dashwood and others (ed), *Wyatt and Dashwood's European Union Law* (6th Edn, Hart 2011) 173