


# Animal welfare in the reformed Common Agricultural Policy: Wherefore art thou?

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## Abstract

Against the backdrop of the recently reformed Common Agricultural Policy (CAP), this article considers the potential for improved standards of farm animal welfare within the Treaty objectives of the European Union. CAP Reform presents the first real opportunity to assess the impact of the animal welfare Treaty provision emanating from the Lisbon amendments and the extent to which animal welfare has been integrated into the CAP. By linking the projected added value of enhanced farm animal welfare practices with the CAP's broader priorities, its greening initiative and, essentially, the Europe 2020 strategy, an evaluation is undertaken of the potential of raised animal welfare standards in agriculture to contribute towards attaining the CAP instruments' specified objectives in the period 2014–2020. The reformed CAP instruments are disappointing in that they do not aim explicitly and directly to improve farm animal welfare. Acknowledging that the CAP reform process will continue, the improvement of farm animal welfare should be stated expressly to be a priority of the CAP beyond 2020. 'In effect, a new social contract is needed between farmers and society which sees the delivery of public goods as part of a modern approach to agriculture where food, fibre and fuel are supplied in ways that are resource efficient, help address climate change and deliver high levels of biodiversity and farm animal welfare, within the context of diverse and vibrant rural areas.'<sup>1</sup>

## Keywords

Animal welfare, Common Agricultural Policy, cross compliance, direct payments, public good, quality, rural development, Treaty on the Functioning of the European Union, Article 13

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1. European Parliament Directorate General for Internal Policies – Policy Department B: Structural and Cohesion Policies – Agriculture and Rural Development, *What Tools for the European Agricultural Policy to Encourage the Provision of Public Goods?* Study IP/B/AGRI/IC/2010\_094. PE 460.053, 16 June 2011. Available at: [www.ieep.eu/assets/835/PG\\_FINAL.pdf](http://www.ieep.eu/assets/835/PG_FINAL.pdf). Last accessed March 2014 (emphasis added).

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## Introduction

Building on the impetus of two European Union (EU) animal welfare action programmes, this article considers the potential *for* improved standards of *farm animal welfare* within the Common Agricultural Policy (CAP). The recent CAP Reform presents the first real opportunity to assess the impact of the animal welfare Treaty provision emanating from the Lisbon amendments and the extent to which animal welfare has been integrated into the CAP. The scope to foster animal welfare within the stated Treaty objectives of the CAP will be examined. Then, by linking the projected added value of enhanced farm animal welfare practices with the CAP's broader priorities, its greening initiative and, essentially, the Europe Strategy, this article engages in a critical evaluation of the potential *of raised* animal welfare standards in agriculture to contribute towards attaining the CAP instruments' specified objectives in the period 2014–2020.

Three key factors to be considered are: first, the increasing societal demand for raised animal welfare standards in agriculture; second, the economic potential for farmers practising higher standards of animal husbandry; third, the responsibility of governments to incentivise the provision of such a public good. If animal welfare is not yet perceived as a public good in itself, the practice and promotion of high animal welfare standards in agriculture will serve to satisfy consumer demand for animal welfare quality agri-produce; bolster a competitive economy; and contribute to rural development in the EU. The question remains as to how to reconcile the diverse cultural, economic and regional situations in the EU Member States with improvements in animal welfare.

A clearer, more targeted CAP animal welfare focus is needed to ensure that the objectives of the CAP become reconciled with the general competence of the Treaty on the Functioning of the EU, post Lisbon, to integrate the protection of animal welfare into EU agricultural policy. Acknowledging that the CAP reform process will continue, the improvement of farm animal welfare should be stated expressly to be a priority of the CAP beyond 2020.

## Farm animal welfare

The *enhanced* welfare of *farm animals in agriculture*<sup>2</sup> is the focus of this article which is concerned with raising standards of animal welfare on the farm<sup>3</sup> (that is pre-farm gate).<sup>4</sup> The farming sector uses the largest number of live animals for economic purposes; using at least 2 billion birds (chickens, laying hens, turkeys etc.) and 334 million mammals (pigs, sheep, goats, cattle, fur animals).<sup>5</sup> In the absence of an animal welfare policy and a specific animal welfare competence, EU agricultural policy has provided a legal basis<sup>6</sup> spawning secondary legislation concerned with general minimum standards of farm animal welfare<sup>7</sup> and

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2. Biodiversity-related welfare issues, therefore, fall to be considered outside the scope of this article; as does aquaculture and the welfare of farmed fish.
  3. The welfare of animals used in experimentation, performing in circuses, confined in zoos, or of companion animals, for example, is not the concern of this article.
  4. Animal welfare concerns in relation to the transportation of live animals and animal slaughter are also beyond the remit of this work.
  5. European Commission *Staff Working Paper Impact Assessment* (SEC(2012)55 19.01.12) accompanying the Communication on the Second EU Animal Welfare Action Strategy COM (2012) 6, at 2.2.3. Available at: [http://ec.europa.eu/food/animal/welfare/actionplan/docs/impact\\_assessment\\_19012012\\_en.pdf](http://ec.europa.eu/food/animal/welfare/actionplan/docs/impact_assessment_19012012_en.pdf) (citing the Evaluation Report (see n. 34 below) Annexes A1-7-8, with data for 2009, unless unavailable).
  6. Treaty on the Functioning of the EU (TFEU), Art. 43. To establish the common organisation of agricultural markets in accordance with Art. 40(1), and attain the objectives set out in TFEU Art. 39.
  7. Council Directive 98/58/EC (OJ L221/23 8.8.98) concerning the protection of animals kept for farming purposes. Drawn up on the basis of the European Convention on the Protection of Animals kept for Farming Purposes, ETS No. 87, 10 March 1976; approved by Council Decision (EEC) 78/923 (OJ L323/12 17.11.78) concerning the conclusion of the European Convention for the protection of animals kept for farming purposes.

minimum standards of protection for certain species of farm animals, inclusive of calves, pigs, broiler chickens and laying hens.<sup>8</sup>

## An evolving EU animal welfare policy

Animal welfare started to appear on the EU agenda in the 1980s<sup>9</sup> although embedded in policy and, legally, remaining an indirect concern of the EU.<sup>10</sup> A Declaration on the Welfare of Animals,<sup>11</sup> a statement of political intent, was adopted and appended to the Treaty on European Union in Maastricht in 1991. The momentum underway towards a treaty incorporated regard for animal welfare, the Treaty of Amsterdam, with effect from 1 May 1999, annexed an animal welfare Protocol<sup>12</sup> to the European Community Treaty. That Protocol imposed an obligation<sup>13</sup> on both the EU Institutions and Member States to pay full regard to animal welfare when formulating and implementing certain impacting EU policies, inclusive of agriculture. The ‘cost’ of this legal formula would be seen in the proviso of respect for the legislative or administrative provisions and customs of the Member States, relating in particular to religious rites, cultural traditions and regional heritage. Animals, deserving of respect and improved protection, received recognition for the first time as sentient beings, albeit in the recital and not the main body of the Protocol; nevertheless symbolically a step forward, it would appear, from their classification to date as products of livestock, or agricultural goods, in EU policy and law.<sup>14</sup>

## Inhibiting influences

Three significant factors have had a constraining impact on the effective protection of animal welfare in the EU. In the first instance, EU secondary legislative animal welfare requirements are only minimum standards, which have proven inadequate in ensuring good quality animal welfare. Second, EU secondary legislative animal welfare requirements are not all-encompassing, and species-specific standards do not exist, for example, for dairy cows, beef cattle, sheep, goats, turkeys and ducks.<sup>15</sup>

Third, the narrow interpretation by the Court of Justice of the European Union (ECJ) equating minimum EU legislative standards of animal welfare with total harmonisation has had the effect of further limiting the advancement of animal welfare in the EU.<sup>16</sup> In the case of *Compassion in*

8. See for example Council Directive 2008/119/EC (OJ L10/7 15.1.09) laying down minimum standards for the protection of calves.

9. See the Resolution of the European Parliament of 20 February 1987 (OJ C76/185 23.3.87) on animal welfare policy.

10. See D.B. Wilkins, *Animal Welfare in Europe: European Legislation and Concerns* (Kluwer Law International 1997) 127, 129, 131, 132.

11. Declaration No. 24: The Conference calls upon the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals.

12. Protocol No. 33. See T. Camm and D. Bowles, ‘Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union’ (2000) *Journal of Environmental Law* 197.

13. Being ‘an integral part of the Treaties’, Treaty on European Union (TEU), Art. 51.

14. TFEU, Art. 38(2). See D. Ryland and A. Nurse, ‘Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market’ (2013) 22(3) *European Energy and Environmental Law Review* 101 at 101–102.

15. Eurogroup for Animals, *Areas of Concern*, 2010. See www.eurogroupforanimals.org. Established in 1980 on the initiative of the Royal Society for the Prevention of Cruelty to Animals (RSPCA), Eurogroup for Animals is the invited Secretariat of the European Parliament Intergroup on Animal Welfare based in Brussels and is comprised of one representative organisation from each EU Member State – in the United Kingdom this is the RSPCA. See M. Radford ‘Animal passions, animal welfare and European policy making’ in P. Craig and C. Harlow (eds) *Lawmaking in the European Union* (Kluwer Law International, London: 1998) 412 at 414.

16. Case C-5/94 *Hedley Lomas* [1996] ECR I-2553; Case C-1/1996 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* [1998] ECR I-1251, paras 56–60. See M. Cardwell, *The European Model of Agriculture* (Oxford University Press: Oxford, 2004) at 305–307. See also R. Ludwig and R. O’Gorman, ‘A Cock and Bull Story? Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions’ [2008] *Journal of Environmental Law* 363.

*World Farming*,<sup>17</sup> the UK was not able to rely on the higher standards of welfare it practised for the welfare of calves in order to restrict the export of live calves for rearing in Spain, which practised lower standards of welfare compliant with the EU minimum legislative standards. According to the Court, the Directive's provisions, which had the objective of protecting the health of animals, *exhaustively* laid down minimum standards for the protection of calves, which negated the possibility of relying on the Treaty derogation to the free movement of goods to that effect. It remained to be considered whether Article 36 TFEU could be relied on to restrict the export of calves, on the grounds of public policy or public morality, which were not the subject of the Directive. The Court ruled out any reliance on Article 36 for the protection of public order<sup>18</sup> or public morality, in the first instance since public policy and public morality were not being invoked as a separate justification, but as an aspect of the justification relating to the protection of animal health, the subject of this *harmonising* Directive.<sup>19</sup>

It was also evident in the case of *Jippes*,<sup>20</sup> that a broader interpretation of the law facilitative of acceptance of justification on welfare grounds was not forthcoming from the Court at the time of the Animal Welfare Protocol, which did not recognise directly the sentience of animals. As long as measures taken by a Member State in the public interest were not deemed to be *manifestly inappropriate*, the ECJ was reluctant to intervene in the exercise of a Member State's discretion in matters of agricultural policy in order to protect the welfare of individual animals, beyond the application of this proportionality test.<sup>21</sup> There are, thus, lacunae in EU animal welfare protection in law as a result of the way in which the ECJ has deferred to the objectives of the Treaty and to the legislature.

### Some progress

The first EU animal welfare action plan for the period 2006–2010<sup>22</sup> sought to ensure a more consistent and coordinated approach to animal protection and welfare across EU policy areas. Areas identified for action included introducing standardised animal welfare indicators to classify the hierarchy of standards applied (from minimum to higher) to assist the development of improved animal welfare production and husbandry; and ensuring animal handlers and the general public are informed on standards of animal welfare. In its evaluation of this action plan, the European Parliament called for the practical application of the Welfare Quality Project in a trial period for the assessment of EU animal welfare.<sup>23</sup> The key to the Welfare Quality Project<sup>24</sup> is to link informed animal product consumption to animal husbandry practices on the farm; and to market standards of farm animal welfare. According to Welfare Quality:

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17. See Case C-1/1996, above, n. 16.

18. Described as 'the framing concept that the Court of Justice chooses (perhaps counter-intuitively for moral and religious questions)'. D. Chalmers, G. Davies, G. Monti, *European Union Law*, 3rd edn (Cambridge University Press: Cambridge 2014) 935.

19. Second, according to the Court, a Member State could not, in any event, rely on the views or the behaviour of a section of national public opinion, in order unilaterally to challenge a harmonising measure adopted by the EU institutions. Case C-1/1996, above n. 16, paras 64–67.

20. Case C-189/01, *H. Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689.

21. See E. Spaventa, 'Case C-189/01, *H. Jippes v Minister van Landbouw, Natuurbeheer en Visserij*, Judgment of the Full Court of 12 July 2001' (2002) 39 *Common Market Law Review* 1159 (emphasis added).

22. European Commission, *Communication on a Community Action Plan on the Protection and Welfare of Animals 2006–2010*, COM(2006) 13 23.1.06.

23. European Parliament Resolution on evaluation and assessment of the Animal Welfare Action Plan 2006–2010 (2009/2202(INI)) 5 May 2010, paras 47, 49.

24. A five-year EU co-funded (within the Sixth Framework Programme) research programme 2004–2009. Welfare Quality, *Integration of animal welfare in the food quality chain: from public concern to improved welfare and transparent quality*, Available at: [www.welfarequality.net/.../26536/18763/leaflet%20febr%202008.pdf](http://www.welfarequality.net/.../26536/18763/leaflet%20febr%202008.pdf). Last accessed 19 July 2014.

Growing consumer demand both for quality food products and more ethical food production has meant that farm animal welfare is emerging as an area of potential added value for producers, retailers and other food chain actors. Animal welfare is a component of added value.<sup>25</sup>

Welfare Quality established four essential principles to safeguard and improve animal welfare, namely good housing, good feeding, good health and appropriate behaviour. Within these four principles Welfare Quality defined 12 clear criteria which underpin the species-specific welfare assessment systems developed for cattle, pigs and poultry.<sup>26</sup> Ultimately, as a result of the aggregation of measures, an overall score places farms into one of four categories of welfare, namely excellent, enhanced, acceptable and not classified.<sup>27</sup>

### *EU animal welfare policy and law: The Treaty of Lisbon . . .*

The ‘competence to protect’<sup>28</sup> animal welfare is now embedded in Article 13 of the Treaty on the Functioning of the European Union (TFEU), which provides:

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 sentience of animals (i.e. their ability to experience pleasure and pain) is given expression in law. Full regard must be paid to the fact that animals are sentient beings, and not merely agricultural goods or livestock products, when formulating and implementing, inter alia, agricultural policy. The promotion of animal welfare in the provisions having general application in the EU Treaties<sup>29</sup> would appear to signify the elevation of animal welfare as a priority issue in the EU alongside other key objectives, such as, for example, environmental protection and promoting sustainable development.<sup>30</sup> The competence thus exists in EU law to *mainstream* or *integrate* the welfare needs of animals into certain stipulated policies which impact upon animals’ welfare, inclusive of the CAP. What significance does this mainstreaming provision hold for the improvement of animal welfare standards beyond the sparse minimum norms applicable to date in relation to the welfare of animals in agriculture?

As a result of the Treaty of Lisbon amendments, with effect from 1 December 2009, the CAP is stated explicitly to be a competence shared between the EU institutions and the Member States.<sup>31</sup> This corroborates the CAP’s two-Pillar structure with central and decentralised input in meeting the CAP’s objectives. The European Parliament has been accorded an enhanced role as joint legislator in the ordinary legislative procedure applicable to the CAP.<sup>32</sup> Somewhat negatively, constraints are perceived to offset the European Parliament’s powers

25. Welfare Quality, Marketing Farm animal welfare final pdf. Available at: [www.welfarequality.net/everyone/41858/5/0/22](http://www.welfarequality.net/everyone/41858/5/0/22). Last accessed 24 May 2014.

26. Favourably comparing these with EU minimum norms, where these exist. Welfare Quality Principles and criteria of good Animal Welfare, WQ\_Factsheet\_10\_07\_eng2.pdf. Available at: [www.welfarequality.net/everyone/41858/5/0/22](http://www.welfarequality.net/everyone/41858/5/0/22). Last accessed 24 May 2014.

27. Welfare Quality, The Overall On-farm Animal Welfare Score. Available at: [www.welfarequality.net/.../WQ%20\\_1%20Overall%20Scoring%20English.pdf](http://www.welfarequality.net/.../WQ%20_1%20Overall%20Scoring%20English.pdf). Last accessed 27 July 2014.

28. A term borrowed from B. de Witte ‘A competence to protect. The pursuit of non-market aims through internal market legislation’. In Phil Syrpis (ed.) *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press: Cambridge, 2010) 25.

29. TFEU, Title II.

30. *Ibid.*, Art. 11. See Ryland and Nurse, above, n. 14 at 109–110.

31. TFEU, Art. 4.

32. *Ibid.*, Art. 43(2).

as co-legislator in that the Agriculture and Rural Development Committee's membership, with its 'strong agricultural ties, fails to reflect the plurality of interests linked to agricultural and rural policy'.<sup>33</sup> It becomes apparent, nevertheless, that the European Parliament has exercised a positive animal welfare role, albeit indirectly.

### ... and beyond

Progressing, in the second EU animal welfare action programme for the period 2012–2015,<sup>34</sup> the European Commission identifies with the International Organisation for Animal Health's (OIE) definition of animal welfare, meaning how an animal is coping with the conditions in which it lives commensurate with the five freedoms of animal welfare, namely: freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour.<sup>35</sup> OIE guiding principles for animal welfare recognise that the use of animals in agriculture contributes to the wellbeing of people, carrying with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable.<sup>36</sup>

The second EU animal welfare action programme robustly identifies factors affecting the welfare of animals in the EU, inclusive of the fact that animal welfare standards often imply additional costs, which are not necessarily proportionately applied along the food chain. Cultural appreciation of animal welfare is recognised as playing a fundamental role in enhancing respect for animals' welfare.<sup>37</sup> Consumers are found to lack information about methods of production and their impact on animal welfare. Those dealing with animals lack sufficient knowledge about animal welfare and an awareness of alternative practices in production systems leading to resistance to change which could improve animal welfare. There is deemed to be the need for clearer animal welfare principles and improved competence requirements generally for handlers of animals. Lacunae in animal welfare protection are noted to exist in relation to production system design and in respect of specific species of farm animals, for example dairy and beef cattle.<sup>38</sup> The success of the Welfare Quality Project in developing an approach for assessing and measuring farm animal welfare through outcome-based animal welfare indicators receives due regard by the European Commission in its consideration of possible options resulting from this second animal welfare action strategy.<sup>39</sup> It should be noted that any formal adoption of Welfare Quality's recommendations would result, inter alia, in newly recognised EU standards of welfare for cattle, which would be a positive step in the improvement of EU animal welfare standards.

According to the European Commission, the diversity of farming systems, climatic conditions and land realities in the different Member States has led to considerable difficulties in reaching agreement on unitary rules and in ensuring their correct implementation. The European Commission underlines the importance of optimising the current mechanisms of the CAP, in particular through cross-compliance, rural development,

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33. J.F.M. Swinnen, L. Knops, *CAP Reform: Will the European Parliament take the bull by the horns?* Centre for European Policy Studies, Commentary, 7 June 2012. Available at: [www.ceps.eu/book/cap-reform-will-european-parliament-take-bull-horns](http://www.ceps.eu/book/cap-reform-will-european-parliament-take-bull-horns). Last accessed 1 August 2014.

34. European Commission *Communication on the European Union Strategy for the Protection and Welfare of Animals 2012–2015*, COM (2012) 6 19.01.12. See also, GHK Consulting in association with ADAS UK, *Evaluation of the EU Policy on Animal Welfare & Possible Policy Options for the Future*, commissioned by the European Commission, DG Sanco, Final Report December 2010. See [www.eupaw.eu/docs/Final%20Report%20-%20EUPAW%20Evaluation.pdf](http://www.eupaw.eu/docs/Final%20Report%20-%20EUPAW%20Evaluation.pdf). Last accessed 5 July 2014.

35. European Commission (SEC(2012)55 19.01.12), above, n. 5 at 2.1.

36. *International Terrestrial Animal Health Code of the World Organisation for Animal Health (OIE)*. Chapter 7.1 Introduction to the Recommendations for Animal Welfare. See [www.oie.int/en/international-standard-setting/terrestrial-code/access-online/](http://www.oie.int/en/international-standard-setting/terrestrial-code/access-online/).

37. COM(2012)6, above, n. 34 at 4.

38. *Ibid.*, at 4, 5.

39. European Commission, SEC(2012)55, above, n. 5 at 30, 47, 115.

promotional measures, quality policy, organic farming, etc., as part of a socially oriented agricultural approach to animal welfare. It continues to state that '[e]very opportunity to express in economic terms the value added by animal welfare policy should be taken up in order to enhance the competitiveness of EU agriculture, including small farmers'.<sup>40</sup> It will, therefore, be an interesting exercise to examine the extent to which good standards of animal welfare in agriculture are, thus, reinforced for economic and societal gain utilising the CAP's mechanisms.

## Treaty objectives of the CAP and CAP Reform: Scope to locate animal welfare?

The stated Treaty objectives of the CAP in 1957 remain the same in 2014,<sup>41</sup> yet the CAP gradually has evolved.<sup>42</sup> The CAP aims explicitly, inter alia, to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular, labour; and thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture.<sup>43</sup> Member States have continued to agree that in working out the CAP and the special methods for its application, account must be taken of the particular nature of agricultural policy, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions; the need to effect the appropriate adjustments by degrees; and the fact that in the Member States, agriculture constitutes a sector closely linked with the economy as a whole.<sup>44</sup> The CAP has evolved incrementally to address new challenges facing agriculture and the economy,<sup>45</sup> such as EU enlargement, food safety, animal health and welfare, the environment and climate change,<sup>46</sup> using the existing CAP legal basis,<sup>47</sup> premised on its historic objectives.<sup>48</sup> Productivity in the evolution of the policy of the CAP should now be understood, not just in terms of quantity,<sup>49</sup> but in terms of quality production synonymous with ensuring the competitiveness of agriculture.

Daugbjerg explains that the CAP has evolved *substantially* since the early 1990s through a *series of limited* reforms, each reform setting the direction for the future evolution of the CAP.<sup>50</sup> Milestones in CAP reform include the introduction of direct payments under the MacSharry Reform of 1992, which, Daugbjerg submits, 'showed that farmers accepted direct payments. It opened the window for further use of such policy instruments in the future'.<sup>51</sup> The Mid-Term Review 2003 heralded the two-Pillar CAP, the decoupling of

40. Above, n. 34 at 3.

41. TFEU, Articles 39–43.

42. European Commission Communication, *The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future*, COM(2010)672 18.11.10 at 3. See also J.A. McMahon, 'Chasing a Moving Target through a Thick Fog: Questioning the Objectives of the Common Agricultural Policy' in N.N. Shuibhne and L.W. Gormley (eds) *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press: Oxford, 2012) 267.

43. TFEU, Art. 39(1)(a)(b).

44. *Ibid.*, Art. 39(2)(a)–(c).

45. See Cardwell (2004), above, n. 16.

46. See M. Cardwell, 'European Union agricultural policy and practice: the new challenge of climate change' (2011) 13(4) *Environmental Law Review* 271.

47. TFEU, Art. 43(2).

48. 'Efforts to achieve objectives of the common agricultural policy, . . . cannot disregard requirements relating to the public interest . . . , requirements which the Community institutions must take into account in exercising their powers.' Case 68/86 *United Kingdom v Council* [1988] ECR 855, para.12.

49. A degree of reversion to quantity for food security objectives is evident. See COM(2010)672, above, n. 42.

50. C. Daugbjerg, 'Sequencing in Public Policy: The Evolution of the CAP over a Decade' (2009) 16 *Journal of European Public Policy* 395 (emphasis added).

51. *Ibid.*, at 402.

payments from production and the introduction of conditionality criteria known as cross compliance. The 2003 CAP reform resulted in a more market-orientated CAP, addressing consumer concerns in its animal welfare objectives by promoting good animal husbandry, introducing the ‘meeting standards’ payment to help farmers adapt to EU animal welfare standards based on EU minimum legislative requirements,<sup>52</sup> the enhanced animal welfare payment,<sup>53</sup> and, more broadly, an agri-product quality regime.<sup>54</sup> The new Rural Development Regulation in 2005, inter alia, embedded both the meeting standards payment specifically helping farmers to adapt to demanding legislative standards<sup>55</sup> and the animal welfare payment, the latter facilitative of higher animal welfare standards, albeit voluntary and dependent on Member States including an animal welfare commitment in their rural development programmes and committing to co-finance such an objective.<sup>56</sup> Specific support for the practice of enhanced animal welfare standards was fostered in the Direct Payment Regulation of 2009.<sup>57</sup> McMahon contends that ‘[t]he 2003 Mid-Term Review, the 2005 Rural Development Regulation and the 2008 Health Check confirm a new orientation for agriculture within the Union in the form of support for the contribution that agriculture can make to the realization of public goods’.<sup>58</sup> Animal Welfare, it is submitted, is such a public good.

### **CAP Reform. The CAP instruments 2014–2020:<sup>59</sup> An animal welfare focus?**

Following a public debate on the future of the CAP,<sup>60</sup> the European Commission presented policy options for the CAP to 2020 so as to address the food security, natural resources and territorial challenges facing the EU.<sup>61</sup> Therein, the European Commission emphasises the primary role of agriculture in supplying food, together with the fact that EU citizens demand high quality food products which reflect high welfare standards, including local products. The fact that agriculture remains an essential driver of the rural economy in much of the EU is noted, as is the contribution the reformed CAP will make to the EU 2020 Strategy in terms of smart, sustainable and inclusive growth. High value added quality products and the provision of environmental public goods are the focus of smart and sustainable growth strategies, respectively. Unlocking

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52. Council Regulation (EC) No. 1257/1999 (OJ (1999) L160/80) Chapter Va, Articles 21a(a)(b), 21b(1)(2), 21c, as amended by Council Regulation (EC) No. 1783/2003 (OJ (2003) L270/70 21.10.03).

53. *Ibid.*, Arts 22(f) 23, 24.

54. *Ibid.*, Art. 24a–d. See European Commission Communication, *Mid-term Review of the Common Agricultural Policy*, COM (2002)394 10.7.02; M. Cardwell, ‘Current Developments: Agriculture’ (2006) 55 *International and Comparative Law Quarterly* 467 at 471–472.

55. Council Regulation (EC) No. 1698/2005 (OJ L277/1 21.10.05) on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), Art. 20(c)(i). Support contributing partly to costs incurred and income foregone on the part of farmers who have to apply standards, inter alia, in the field of animal welfare. Art. 31(1).

56. *Ibid.*, Art. 40.

57. Council Regulation (EC) No. 73/2009 (OJ L30/16 31.1.09) establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, Art. 68(1)(iv).

58. Above, n. 42 at 283.

59. On CAP reform see, for example, C. Rodgers, ‘Greening European agricultural policy – a step forward?’ (2013) 15(3) *Environmental Law Review* 187; B. Jack, ‘The Reform of the Common Agricultural Policy: Meeting the Environmental Challenge (May 2013). UCD Working Papers in Law, Criminology & Socio-legal Studies Research Paper No. 04/2013. Available at: <http://ssm.com/abstract=2272022>. Last accessed 22 November 2013.

60. European Commission Agriculture and Rural Development, *The Common Agricultural Policy after 2013 Public debate: Summary Report*. Available at: [http://ec.europa.eu/agriculture/cap-post-2013/debate/report/summary-report\\_en.pdf](http://ec.europa.eu/agriculture/cap-post-2013/debate/report/summary-report_en.pdf). A strongly held view, particularly among the general public, was that ‘industrial’ agriculture should have little place in the CAP (p. 7). There was a wide recognition amongst the general public that farmers need to be compensated for providing public goods and benefits because these are not covered via market prices (p. 30), together with numerous responses from the general public arguing that EU welfare standards should be improved (p. 33).

61. COM(2010)672, above, n. 42.



economic potential in rural areas and the development of local markets are deemed significant in terms of inclusive growth. Reform orientation under Pillar I envisages the need to improve the functioning of the food supply chain so as to reverse farmers' steadily decreasing share of the value added generated by the food supply chain.<sup>62</sup> Acting under the Rural Development Pillar, the Commission deems it necessary to further strengthen and simplify the quality (including organic farming) and promotion policies in order to enhance the competitiveness of the agriculture sector.

Proposals for new CAP instruments duly were adopted and considered in accordance with the ordinary legislative procedure, eventually culminating in a political agreement on the reform of the CAP in 2013.<sup>63</sup> Following formal approval by the European Parliament, the Council of Agricultural Ministers adopted four substantive Regulations for the reformed CAP for the period 2014–2020.<sup>64</sup>

This work attempts to analyse the potential for raised animal welfare standards in the reformed CAP instruments, assessing each in turn. It also reasons that integrating improved animal welfare into the economic, environmental and societal development aims of the CAP will not only facilitate the achievement the CAP's stated objectives, but also serve to legitimise the acceptability of the CAP to EU citizens.

### *Direct payments*

The Direct Payments Regulation<sup>65</sup> replaces the single payment scheme with a basic payment<sup>66</sup> based as a general rule on the number of eligible hectares of farmers' land.<sup>67</sup> The basic direct payment is payable to farmers who exercise an agricultural activity in accordance with the Regulation, namely producing, rearing or growing agricultural products,<sup>68</sup> including harvesting, milking, breeding animals, and keeping animals for farming purposes; maintaining an agricultural area in a state which makes it suitable for grazing or cultivation; or carrying out a minimum activity defined by Member States,<sup>69</sup> on agricultural areas naturally kept in a state suitable for grazing or cultivation.<sup>70</sup> Three aspects of the Direct Payments Regulation bear significance, potentially, for animal welfare, namely public goods, the greening payment and modulation.

**Public Goods.** Pillar I of the CAP has embraced as a public good the protection of the environment and climate change mitigation. There is no additional payment for raised animal welfare practices in the revised first Pillar on a par with the new mandatory greening mechanism. It is questionable as to why animal welfare

62. See European Commission Communication, *A better functioning food supply chain in Europe* COM(2009) 591 28.10.09.

63. See European Commission Press Releases: IP/13/613 26.6.13 and IP/13/864 24.9.13. See also European Commission MEMO/13/937, 'CAP Reform – an explanation of the main elements', 25.10.2013.

64. A fifth instrument lays down transitional rules for 2014: Regulation (EU) No. 1310/2013 of the European Parliament and of the Council (OJ L347/865 20.12.13) laying down certain transitional provisions on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) amending Regulation (EU) No. 1305/2013 of the European Parliament and of the Council as regards resources and their distribution in respect of the year 2014 and amending Council Regulation (EC) No. 73/2009 and Regulations (EU) No. 1307/2013, (EU) No. 1306/2013 and (EU) No. 1308/2013 of the European Parliament and of the Council as regards their application in the year 2014.

65. Regulation (EU) No. 1307/2013 of the European Parliament and of the Council (OJ L347/608 20.12.13) establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No. 637/2008 and Council Regulation (EC) No. 73/2009.

66. Also a transitional simplified scheme 'the single area payment scheme'. *Ibid.*, Art., 1(b)(i).

67. *Ibid.*, Chapter 1, Title III.

68. 'Agricultural products' mean 'the products with the exception of fishery products . . . , listed in Annex I to the Treaties'. Direct Payment Regulation, above, n. 65, Art. 4(1)(d).

69. *Ibid.*, Art. 4(1)(c)(2)(b). Circumscribed by a Commission framework, Art. 4(3)(b).

70. *Ibid.*, Art. 4(1)(a)(c).

explicitly is recognised as a public good in the organic farming Regulation<sup>71</sup> and yet is not recognised as constituting a public good in the reformed CAP instruments. It has been acknowledged that '[w]hile farm animal welfare is to some extent a private good because it is associated with healthy livestock and their products, more broadly, society demands higher standards than those that are in the private interest.<sup>72</sup>

It is notable that there is little express reference to the multifunctional role of agriculture<sup>73</sup> in the CAP reform policy documents, let alone any express reference to animal welfare per se. The multifunctional role of agriculture holds out 'the ability of agriculture to provide goods and services valued by society, in addition to the production of marketable food and fibre'.<sup>74</sup> Multifunctionality is premised on:

- (i) The existence of multiple commodity and non-commodity [food and non-food] outputs that are jointly produced by agriculture; and (ii) the fact that some of the non-commodity outputs exhibit the characteristics of externalities or public goods, with the result that markets for these goods do not exist or function poorly.<sup>75</sup>

Arguably, animal welfare is, thus, already accepted as a public good according to the Organisation for Economic Co-operation and Development (OECD) report. Animal Welfare is a non-commodity output of agriculture and is increasingly a public good, reflected in its 'jointness' with agricultural commodity output and the growing societal demand for quality agri-products that have resulted from farming practices favourable to animal welfare. It has been argued elsewhere that the EU institutions are thus obligated to ensure that high standards of agriculture pertain in agriculture to ensure that food of good quality is the end product of an animal welfare friendly supply chain in which any risk of animal disease associated with poor or minimum standards of animal welfare is thereby eliminated.<sup>76</sup> Budgetary constraints and the lack of universal acceptance of raised animal welfare standards, however, may hinder such progress. Grossman explains that '[t]hough some non-commodity outputs may be public goods [to some countries], countries also disagree about the importance of government intervention to ensure that agricultural producers provide those public goods'.<sup>77</sup> The acceptance of CAP payments for farmers' provision of public goods in the form of environmental protection has sown the seeds for a debate on the future recognition of animal welfare as a public good, in respect of which raised mandatory animal welfare requirements<sup>78</sup> and a defined payment mechanism are included in the first Pillar of the CAP.

**Greening payment.** As indicated, one of the objectives of the new CAP is the enhancement of environmental performance through a mandatory 'greening' component of direct payments which will support agricultural practices beneficial for the climate and the environment throughout the EU. The greening payment is a

71. Council Regulation (EC) No. 834/2007 (OJ L189/1, 20.7.2007) on organic production and labelling of organic products and repealing Regulation (EEC) No. 2092/91, as amended by Council Regulation (EC) No. 967/2008 (OJ L264/1 3.10.08), Recital 1.

72. See European Parliament, above, n. 1 at 21.

73. See G.A. Wilson, *Multifunctional Agriculture: A Transition Theory Perspective* (Cab International: 2007).

74. M.R. Grossman, 'Multifunctionality and Non-trade Concerns' in M.N. Cardwell, M.R. Grossman, C.P. Rodgers (eds) *Agriculture and International Trade: Law, Policy and the WTO* (CABI: 2003) 85.

75. Organisation for Economic Co-operation and Development (OECD), *Multifunctionality: Towards an Analytical Framework* (Paris, 2001) at 13.

76. See D. Ryland, 'Advancing Animal Welfare: State, Society and Economy' in *Democratic and Social State under the Rule of Law: Society, Politics, Economy* (The Jagiellonian University and Andrzej Frycz Modrzewski Kraków University Press, Poland, 2014).

77. See Grossman, above, n. 74 at 86.

78. 'With the public goods component becoming the key element in the future CAP, it is increasingly important to have a harmonized legislative baseline with respect to what farmers are required to do.' European Parliament, Directorate General for Internal Policies, Policy Department B: Structural and Cohesion Policies, Agriculture and Rural Development Study, *The Single Payment Scheme after 2013: New Approach—New Targets*, IP/B/AGRI/IC/2009\_038 PE 431.598, Brussels, March 2010.

compulsory element of the direct payment scheme as from 1 January 2015, with a defined budget entitlement of 30% of Member State's national ceilings under the European Agricultural Guarantee Fund (EAGF).<sup>79</sup> Eligible farmers are required to undertake certain agricultural practices beneficial for the climate and the environment, consisting of crop diversification; maintaining existing permanent grassland; and having ecological focus area on the agricultural area; or defined equivalent practices.<sup>80</sup> Given the recognised environmental benefits of the organic farming systems, organic farmers fulfilling the conditions laid down in the Regulation on organic production and labelling of organic products<sup>81</sup> are entitled *ipso facto* to receive, and to benefit from, the greening payment.<sup>82</sup> Member States are empowered to establish simplified schemes for small farmers, pursuant to which small farmers will be exempt from compulsory participation in the new greening initiative.<sup>83</sup>

On first impression there is little scope for animal welfare, which is not explicitly mentioned within the greening initiative, but there may be scope for some incidental animal welfare benefit. There may be the potential to integrate raised standards of animal welfare within the greening mechanism, albeit commensurate with the political, economic and geographical situation in each diverse Member State. The scope may exist for the additional greening payment to be paid to active farmers whose farming activity involves the rearing of farm animals in an environmentally friendly way. Enhanced periods of outdoor grazing with corresponding lower stocking densities reducing the environmental impact of farm animal management would constitute an example of good animal welfare practice also. The greening equivalent practices listed in the Direct Payments Regulation, which are ostensibly environmental measures, include extensive grazing systems<sup>84</sup> as a practice equivalent to the maintenance of permanent grassland and the conversion of arable land into permanent grassland extensively used, as a practice equivalent with ecological focus area.<sup>85</sup> Whilst the potential may be there to integrate animal welfare into the greening objective,<sup>86</sup> there is no requirement<sup>87</sup> to practise enhanced animal welfare husbandry on the farm. Even with reduced stocking densities and increased frequency of outdoor access – or, alternatively, additional space allowance where lower stocking densities are facilitative of natural behavioural practices in indoor housing periods – individual farm animals may be bereft of good standards of species-specific animal welfare tuned to their respective behavioural needs.<sup>88</sup> There should be some additional higher animal welfare conditionality underpinning the green payment entitlement criteria. In this way improved animal welfare standards would be harnessed so as to achieve the environmental aims of extensive farming and the CAP's greening objectives. In this regard, the CAP reforms represent a missed opportunity to integrate enhanced animal welfare objectives into the new greening initiative.

79. Above, n. 65, Art. 47.

80. *Ibid.*, Art. 43(1)–(3).

81. See Council Regulation (EC) No. 834/2007, above, n. 71. See also Commission Regulation (EC) No. 889/2008 (OJ L250/1 18.9.08) laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007 on organic production, labelling and control.

82. Above, n. 65, Art. 43(11).

83. *Ibid.*, Art., 61.

84. Requiring maintenance of permanent grassland and any one or more of the following:

- Extensive grazing (timing, maximum stocking density)
- Shepherding or mountain pastoralism
- Using local or traditional breeds for grazing the permanent grassland.

Annex IX list of equivalent practices referred to in the Direct Payments Regulation, above, n. 65, Art. 43(3) at II.(2).

85. *Ibid.*, I, at III.(8).

86. More particularly as regards biodiversity.

87. Eurogroup for Animals, Briefing on the European Commission proposals on CAP after 2013, October 2011. See [http://eurogroupforanimals.org/files/policies/downloads/77/briefing\\_cap\\_proposals\\_oct2011.pdf](http://eurogroupforanimals.org/files/policies/downloads/77/briefing_cap_proposals_oct2011.pdf). Last accessed 17 February 2014.

88. See RSPCA briefing paper, *Large scale farming*, March 2014. Available at: [www.rspca.org.uk/search?searchKey=Large+scale+farming&x=10&y=9](http://www.rspca.org.uk/search?searchKey=Large+scale+farming&x=10&y=9). Last accessed 31 October 2014.

*Modulation.* In the third instance of potential significance for animal welfare under the Direct Payments Regulation, flexibility between the two Pillars is facilitated, applicable in the first instance from the date of entry into force of the Direct Payments Regulation in January 2014.<sup>89</sup> Member States, throughout the CAP reference period, are given the opportunity to make available up to 15% of their annual direct payment national ceilings as additional support for measures under rural development programming financed under the European Agricultural Fund for Rural Development (EAFRD). As a result, the corresponding amount will no longer be available for granting direct payments. By the same token, however, and an innovation in the reformed CAP, reverse modulation is also enabled. The option is there for those Member States who do not take the former decision to apply instead to transfer monies available for funding from the EAFRD for use as direct payments. In the case of 12 Member States,<sup>90</sup> this could amount to 25% of rural development funding no longer being available for Pillar II objectives; and up to 15% for the remaining Member States. As a result, the corresponding amount will no longer be available for support measures under rural development programming.

This Regulation empowers the transfer of 15% of Pillar I funding in support for Pillar II rural development programmes, without any co-financing commitment on the part of the Member States.<sup>91</sup> It has the potential, positively, to free resources that may, if duly selected by Member States, be used to improve animal welfare in accordance with the Rural Development Regulation. Nevertheless, any beneficial animal welfare attributes of such modulation are offset by the alter-ability of 12 Member States in an exercise in reverse modulation to deprive potential Pillar II objectives of realisation, inclusive of higher animal welfare standards, by otherwise taking a quarter of their rural development entitlement in the form of direct payments. This would apply also to the other 16 Member States, in respect of which 15% of their respective rural development envelope may, in the alternative, be claimed as direct payments. Dependent on the decisions taken by Member States, this effectively negates the potential for animal welfare standards to improve beyond EU minimum norms.<sup>92</sup>

### *Horizontal Regulation*

The second instrument of reform, newly a Horizontal Regulation, confirms that the financing of expenditure under the CAP made by the EAGF and the EAFRD will fall under the general budget of the EU.<sup>93</sup> This Regulation on the financing, management and monitoring of the common agricultural policy lays down general rules relating to the management and control systems to be put in place by Member States. Of note in relation to animal welfare is the fact that the Horizontal Regulation contains the rules on cross compliance

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89. Above, n. 65, Art. 14. The Direct Payments Regulation enters into force on day of its publication in the Official Journal and applies from 1 January 2015, Art. 74.

90. Bulgaria, Estonia, Spain, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Finland, Sweden and the United Kingdom.

91. Press Release IP/13/864, above, n. 63.

92. Voluntary coupled support on the part of Member States to their farmers is made possible for certain sectors and productions inclusive of milk and milk products, sheepmeat and goatmeat, and beef and veal. There is no animal welfare conditionality involved in such payment. Direct Payments Regulation, above, n. 65, Art. 52. Similar specific support existed in former Art. 68(1)(b) of Council Regulation (EC) No. 73/2009 (OJ L30/16 31.1.09) above, n. 57, but in addition specific support for practising enhanced animal welfare standards was also available in a modulation exercise from Pillar I to Pillar II to the sum of up to 10% of a Member State's Direct Payments ceiling, Art. 68(1)(iv). Up until 2011 only the Netherlands was making use of this provision. European Parliament 2011, above, n. 1 at 32.

93. Regulation (EU) No. 1306/2013 of the European Parliament and of the Council (OJ L347/549, 20.12.13) on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No. 352/78, (EC) No. 165/94, (EC) No. 2799/98, (EC) No. 814/2000, (EC) No. 1290/2005 and (EC) No. 485/2008, Art. 3.

and the statutory measures Member States must comply with to receive their direct payment entitlement under Pillar I of the CAP.<sup>94</sup>

*Cross compliance.* In order to be entitled to receive direct payments and also under the Rural Development Regulation the animal welfare payment, inter alia, free of administrative penalty, Member States are obligated to comply with specified statutory management requirements, inclusive of animal welfare norms.<sup>95</sup> A requirement to comply with three EU animal welfare Directives only is stipulated, namely the species-specific Directives laying down minimum standards for the protection of calves<sup>96</sup> and pigs,<sup>97</sup> respectively, and the general farm animals Directive.<sup>98</sup> In calculating the administrative sanction should farmers fail to comply with these stipulated legislative requirements, a first finding of non-compliance may not lead to a reduction but incur instead a warning only, under an early warning system, should Member States so choose.<sup>99</sup> Cases of non-compliance which constitute a direct risk to public or animal health, however, will always lead to a reduction or exclusion of payment.<sup>100</sup>

An exception to the rules on cross compliance is stated to apply to farmers participating in the small farmer's scheme<sup>101</sup> under the Direct Payments Regulation.<sup>102</sup> It is worth quoting from Recital (57) to the Horizontal Regulation as follows:

For farmers participating in the small farmer's scheme referred to in Title V of Regulation (EU) No 1307/2013, the efforts to be made under the cross-compliance system might be considered to exceed the benefit of keeping those farmers under that system. For reasons of simplification, those farmers should therefore be exempted from cross-compliance and in particular from its control system and from the risk of cross-compliance penalties. However, that exemption should be without prejudice to the obligation to respect the applicable provisions of the sectoral law or to the possibility to be checked and to be imposed penalties under that law.

This is a new scheme, albeit voluntarily entered into on the part of Member States, which may potentially operate adversely on animal welfare. Small farmers should not be exempt from the basic minimum EU legislative requirements for animal welfare pursuant to the cross-compliance sanction regime when compliance with such minimum standards is required under EU law. Reasons of regime simplification and/or reduction in administrative burden are inadequate. Such criticism could be said to be tempered by recognition of the fact that these farmers will still be expected to comply with the animal welfare directives the subject of the statutory management requirements, albeit without the additional sanction of cross compliance. But in all reality this is a fallacy, in that in the event of compliance the sanction regime would not be triggered in any case. The unacceptable inconsistency would arise in the event of non-compliance. Member States are under an obligation to take all necessary measures to ensure fulfilment of their obligations under EU law, and failure to transpose the requirements of the minimum standard animal welfare directives into

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94. Such conditionality and administrative control is now dealt with, for the sake of consistency, in a single legal instrument and separate from the Regulation on Direct Payments to farmers.

95. Horizontal Regulation, above, n. 93, Arts 91–93(1)(c); Annex II (SMR 11–13). Newly, these requirements and standards are organised in a single list and grouped by areas and issues, Recital (54).

96. Council Directive 2008/119/EC (OJ L10/7 15.1.09) above, n. 8, Arts 3 and 4.

97. Council Directive 2008/120/EC (OJ L47/5 18.2.09) laying down minimum standards for the protection of pigs. Arts 3 and 4.

98. Council Directive 98/58/EC (OJ L221/23 8.8.98) above, n. 7, Art. 4.

99. Horizontal Regulation, above, n. 93, Art. 99(2) para. 4.

100. *Ibid.*, Art. 99(2) para. 3.

101. *Ibid.*, Art. 92 para. 2.

102. Direct Payments Regulation, above, n. 65, Art. 61.

national law and ensure their application to, amongst others, small farmers should give rise to administrative consideration of infringement proceedings under EU law.<sup>103</sup> The fact that Member States may choose to operate such an exemption for small farmers also ignores the opportunities that potentially would accrue to those farmers in practising good standards of animal welfare going beyond the minimum statutory management requirements.<sup>104</sup>

The lax wording of the cross-compliance regime can be said to be permissive of default. At least, the administrative penalties should be proportionate, effective and dissuasive.<sup>105</sup> Cross-compliance rules should impose significant penalties on non-compliant farms, such as the total withdrawal of payments.<sup>106</sup> This would be dissuasive and would reduce the need for extensive controls and thus the administrative burden associated by some with the CAP cross compliance requirements.<sup>107</sup> It is arguable that the administrative penalties as they exist in the reformed CAP and new Horizontal Regulation may not be strong enough to act as a deterrent to the farmer who acts recklessly in the welfare of his farm animals. Non-compliance with animal welfare standards as a result of negligence is considered to be minor. Such negligence should be penalised immediately on a par with cases of non-compliance which constitute a direct risk to public or animal health.<sup>108</sup> Indicators of poor animal welfare and hygiene inextricably lead to poor health and diseased animals.

Furthermore, the animal welfare statutory management requirements, with which farmers are mandated to comply, are not comprehensive. The cross-compliance criteria do not include the minimum welfare standards of the Laying Hens Directive<sup>109</sup> or those of the Meat Chicken Directive.<sup>110</sup> If animal welfare is not yet recognised as a public good towards which an additional compulsory payment is earmarked out of Member States' respective national direct payment ceiling, at least the basic direct payment should be conditional on compliance with all EU minimal legislative standards of animal welfare. All the more so since 'although in the past poultry farmers generally did not get direct CAP subsidies, with decoupling and calculation of direct subsidies on the basis of area of eligible land, it will become possible'.<sup>111</sup>

There should be some recasting of the administrative penalty scheme to focus on the effectiveness of the penalties, the inclusion of small farmers within its ambit and the comprehensive encompassing of all animal welfare directives.

**Farm advisory system.** Member States must advise farmers eligible to receive CAP funding as to their obligations of compliance with the statutory management requirements listed in the Horizontal Regulation. Towards this end, Member States are required to establish a farm advisory system for advising on land management and farm management.<sup>112</sup> Member States are also required to ensure that advisers working within the farm advisory system are suitably qualified and regularly trained.<sup>113</sup> Positively, Eurogroup for Animals

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103. TFEU, Art. 258.

104. See the discussion of the Rural Development Regulation below.

105. Horizontal Regulation, above, n. 93, Recital (57) (emphasis added).

106. For a critical appraisal, see The European Court of Auditors, Special Report No. 8//2008 *Is Cross Compliance an Effective Policy?* (Luxembourg: Office for Official Publications of the European Communities, 2009). The Report concluded, inter alia, that the sanction system was weak, the resulting reductions to farmers' direct payments were typically low, and flat rates, typically of 1%, were applied. Paras 67, 71, 73, Box 4.

107. Eurogroup for Animals, above, n. 87.

108. Eurogroup for Animals, Briefing March 2012, Horizontal aspects of the future CAP. See [http://eurogroupforanimals.org/files/policies/downloads/77/briefing\\_cap\\_horizontal\\_march\\_2012.pdf](http://eurogroupforanimals.org/files/policies/downloads/77/briefing_cap_horizontal_march_2012.pdf). Last accessed 17 February 2014.

109. Council Directive 1999/74/EC (OJ L203/53 3.8.99) laying down minimum standards for the protection of laying hens.

110. Council Directive 2007/43/EC (OJ L18319 12.7.07) laying down minimum rules for the protection of chickens kept for meat production.

111. Eurogroup for Animals, above, n. 108.

112. Horizontal Regulation, above, n. 93, Art. 12(1).

113. *Ibid.*, Art. 13(1).

welcomes the establishment of the farm advisory system in that the potential exists, through its use, to raise awareness concerning sustainable animal welfare friendly methods of production and thus to improve farm animal welfare generally. Moreover, farmers not receiving support under the CAP may use the farm advisory system on a voluntary basis.<sup>114</sup> Priority access to the farm advisory system may be given to the farmers who have received for the first time an early warning, which goes a small way to offsetting the weaknesses of the cross compliance administrative sanction regime. The fact that the farm advisory system will also be accessible by farmers who have not received CAP support historically, such as poultry farmers, may be facilitative of raising awareness of EU minimum welfare requirements for laying hens and broiler chickens.<sup>115</sup>

### Rural development

In the third instrument of reform, the revised rules governing support for the CAP's rural development objectives remain within a separate Rural Development Regulation<sup>116</sup> thereby maintaining the CAP's two-Pillar structure. It is the Rural Development Regulation which sets out the *objectives* to which rural development policy is to contribute and the relevant EU *priorities* for rural development, on the basis of responsibilities shared between the Member States and the European Commission.<sup>117</sup> The competitiveness of agriculture; the sustainable management of natural resources; and a balanced development of rural economies and communities comprise the stated *objectives* to be achieved through rural development support from the EAFRD.<sup>118</sup> It is noteworthy that the improvement of animal welfare is not given expression as an objective *in itself* to which rural development policy will contribute. Four points with relevance for animal welfare are, however, identified, these being the animal welfare payment, the third priority of the rural development policy, quality schemes and the European Innovation Partnership for Agricultural Productivity and Sustainability.

**Animal welfare payment.** Should Member States decide to include the improvement of animal welfare in their rural development programmes, an annual animal welfare payment may be granted for a renewable period of one to seven years to eligible farmers who undertake voluntarily to carry out operations consisting of one or more animal welfare commitments, which go beyond the EU legislative minimum norms comprising the statutory management requirements listed in the Horizontal Regulation. Payments will be granted on an annual basis compensating farmers for all or part of the additional costs and income foregone and where necessary may cover transaction costs, although this figure is capped. Ultimately, EAFRD support will be limited to the maximum amount of €500 per livestock unit.<sup>119</sup> Member States are required to provide upgraded standards of production in one of the four areas specified in the newly adopted Commission Delegated Regulation<sup>120</sup> to be eligible to receive support under the animal welfare payment. As compared with

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114. *Ibid.*, Art. 14.

115. Eurogroup for Animals, above, n. 108.

116. Regulation (EU) No. 1305/2013 of the European Parliament and of the Council (OJ L347/487 20.12.13) on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No. 1698/2005.

117. *Ibid.*, Art. 1(1).

118. *Ibid.*, Art. 4.

119. *Ibid.*, Art. 33; Annex II.

120. These are: (a) water, feed and animal care in accordance with the natural needs of animal husbandry; (b) housing conditions, such as increased space allowances, flooring surfaces, enrichment materials, natural light; (c) outdoor access; (d) practices which avoid mutilation and/or castration of animals, or in specific cases when mutilation or castration of animals is deemed necessary, provide for the use of anaesthetics, analgesia and anti-inflammatory medication or immunocastration. Commission Delegated Regulation (EU) No. 807/2014 (OJ L227/1 31.7.2014) supplementing Regulation (EU) No. 1305/2013 of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and introducing transitional measures, Art. 10.

its predecessor,<sup>121</sup> which urged the provision of upgraded animal welfare standards in ‘at least’ one of five areas, the fifth having now been deleted<sup>122</sup> its welfare credentials are not as strong.

Rural Development reform has treated animal welfare less favourably than the previous CAP Rural Development Regulation and also in direct comparison to the current Pillar II agri-environment-climate and organic payments, respectively. The former period of entitlement to the animal welfare payment was as a general rule between five and seven years; where necessary and justified, for a determined longer period.<sup>123</sup> Compare the continuing voluntary nature of the current animal welfare payment, renewable annually from one to seven years, with the compulsory agri-environment-climate measure, entitlement to which payment runs for a defined period of at least five to seven years.<sup>124</sup> Moreover, there is a specific budget allocation targeted at agricultural practices positively contributing to the environment and climate change and going beyond EU minimum norms, amounting to 30% of the total EAFRD contribution to Member States’ rural development programmes.<sup>125</sup> There is no such compulsory, budgeted and targeted CAP EAFRD support for farmers practising enhanced standards of animal welfare. There should be. The voluntary character of this measure, and the lack of a specific budget allowance for it, prompted Eurogroup for Animals to question the political willingness to achieve animal welfare improvement through this measure. In the previous CAP reference period, only 21 out of a total of 90 rural development programmes included the animal welfare payment; one region only (Valle d’Aosta, Italy) allocated a significant part of its budget (7.02%) to animal welfare payments.<sup>126</sup>

An animal welfare payment for a renewable period of one to seven years is not a guaranteed and effective incentive to encourage farmers voluntarily to engage with the changes necessary to improve farm animal welfare in the long term. Originally proposed as an annually renewable period only, the duration of the annual renewable period was extended to seven years at the initiative of the European Parliament,<sup>127</sup> but still remains somewhat of a compromise agreement compared with the agri-environment-climate measure and, likewise, the defined minimum period of five to seven years for organic farming support.<sup>128</sup> It should be added that the meeting standards support, albeit degressive aid,<sup>129</sup> has now disappeared.<sup>130</sup>

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121. Commission Regulation (EC) No. 1974/2006 (OJ L368/15 23.10.06) laying down detailed rules for the application of Council Regulation (EC) No. 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), Art. 27(7).
  122. Prevention of pathologies mainly determined by farming practices and/or keeping conditions, *ibid.*, Art. 27(7)(e). See Commission Delegated Regulation (EU) No. 807/2014, above, n. 120, Recital (10).
  123. Council Regulation (EC) No. 1698/2005, above, n. 55, Art. 40.
  124. See Rural Development Regulation, above, n. 116, Art. 28 (1)–(3).
  125. *Ibid.*, Art. 59(6).
  126. Eurogroup for Animals, ‘Overview of the animal welfare payment measure in EU Member States’ rural development programmes 2007–2013, July 2010, Available at: <http://eurogroupforanimals.org/files/policies/downloads/77/capwelfaremeasuresaug2010.pdf>. Last accessed 3 March 2014.
  127. European Parliament Committee on Agriculture and Rural Development, *Draft Report* on the proposal for a regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (COM(2011) 0627-C7-0340/2011-2011/0282(COD)), 24.5.2012. PR\881155EN.doc. PE474.053v01-00, 24.5.12, Amendment 48.
  128. See above, n. 116, Art. 29(1)(2). For commitments going beyond the statutory norms undertaken on a *voluntary* basis to convert to or maintain organic farming practices and methods.
  129. Flat-rate, temporary support granted on an annual basis for a maximum duration of five years from the date the standard became mandatory in accordance with EU legislation. Council Regulation (EC) No. 1698/2005, above, n. 55, Art. 31(2).
  130. Former Arts 20(c)(i) and 31 of Rural Development Regulation (EC) No. 1698/2005, above, n. 55. See Annex I Correlation Table, Commission Regulation (EU) No. 807/2014 of March 2014, above, n. 120.



**Rural development priority 3.** Promoting food chain organisation, including processing and marketing of agricultural products, animal welfare and risk management in agriculture, is prioritised in the third instance in the reformed Rural Development Regulation. This, with a focus on improving the competitiveness of primary producers by better integrating them into the agri-food chain through quality schemes, adding value to agricultural products, promotion in local markets and short supply circuits, producer groups and organisations and inter-branch organisations.<sup>131</sup> There would, thus, appear to be some scope for improving the competitiveness of farmers as producers of enhanced animal welfare agri-produce through quality schemes, adding value to agricultural products, promotion in local markets and short supply chains from the farmer to the consumer.

The way forward for animal welfare in agriculture evidently lies in the role of animal welfare in the agri-food product chain,<sup>132</sup> so as to fulfil consumer credence demand for produce and products emanating from animal welfare friendly farming processes. In spite of the suggested need for greater external cross sectoral interest input, the membership of the Committee on Agriculture and Rural Development perhaps retaining entrenched farming interests,<sup>133</sup> the European Parliament succeeded in augmenting animal welfare agri-product food chain integration into the CAP reform.<sup>134</sup> Advertence to the processing and marketing of agricultural products and animal welfare in the food chain did not appear in the European Commission's initial proposal.<sup>135</sup> References to *improving the competitiveness* of primary producers by better integrating them into the agri-food chain through quality schemes, and *adding value to agricultural products*, were inserted into the adopted Regulation as a direct result of the European Parliament's endeavours to ensure the contribution of the CAP's Rural Development Regulation to the Europe 2020 Strategy.<sup>136</sup> Animal welfare is now explicit, albeit as an *indirect* concern of the CAP's rural development policy, at the initiative of the European Parliament, animal welfare having been dealt an integrative role in promoting food chain organisation.

**Quality.** The Rural Development Regulation continues to bolster support for new participation by farmers in *quality* schemes that are established in EU law,<sup>137</sup> inclusive of the regulation and promotion of products of designated origin or geographical indication,<sup>138</sup> and also organic production, processing and labelling.<sup>139</sup> Support is also available for farmers newly participating in quality schemes, including farm certification

131. Above, n. 116, Art. 5.

132. The potential for integrating animal welfare into the agri-environment rural development priorities four and five, namely preserving ecosystems and resource efficiency, by way of extensive grazing, for example, is tentative. Fostering knowledge transfer in agriculture, according to the draft report of the Committee on Agriculture and Rural Development, would require a focus on improving animal welfare as a fourth indent of this first rural development priority. Such specificity was not to be. See European Parliament Committee on Agriculture and Rural Development, *Draft Report* PR1881155EN.doc. PE474.053v01-00, 24.5.12, Amendment 12. The second priority of enhancing farm competitiveness and farm viability ignores the opportunity to do so expressly by improving animal welfare on the farm.

133. See above, n. 33.

134. Amendments 001-001 by the Committee on Agriculture and Rural Development to the Commission Proposal for a regulation on support for rural development by the European Agricultural Fund for Rural Development (COM(2011)0627–C7-0340/2011-COM(2012)0553–C7-0313/2012-2011/0282(COD)), A7-0361/2013, PE519.385/1, 14.11.2013.

135. European Commission, Proposal for a Regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), COM(2011) 627 final/2, 19.10.11.

136. European Commission, *Europe 2020 Strategy for smart, sustainable and inclusive growth*, COM(2010)2020 3.3.10 (emphasis added).

137. Above, n. 116, Art. 16(1)(a).

138. Regulation (EU) No. 1151/2012 of the European Parliament and of the Council (OJ L343/1 14.12.12) on quality schemes for agricultural products and foodstuffs.

139. Above, nn. 71 and 81.

schemes, recognised by Member States as complying with EU criteria. The specificity of the final product under such schemes must be derived from clear obligations to guarantee specific product characteristics; or specific farming or production methods; or a quality of the final product that goes significantly beyond the commercial commodity standards, as regards public, animal or plant health, animal welfare or environmental protection.<sup>140</sup> Furthermore, farmers newly participating in voluntary agricultural product certification schemes recognised by the Member States as meeting the Union best practice guidelines<sup>141</sup> for the operation of voluntary certification schemes relating to agricultural products and foodstuffs, may be eligible for rural development support.<sup>142</sup> Support may also cover costs arising from information and promotion activities implemented by groups of producers in the internal market, concerning products covered by such quality schemes,<sup>143</sup> and in particular those which draw attention to the specific features of the products concerned, notably the high animal welfare standards linked to the scheme concerned.<sup>144</sup>

There is no specific EU animal welfare quality regime for agricultural products and foodstuffs, when the potential for the same lies within the Rural Development Regulation's wide ambit in relation to agricultural product quality. The CAP's Treaty basis would accommodate such an animal welfare quality scheme.<sup>145</sup> An Animal Welfare Quality Regulation, with its inherent tools, would serve to bolster the Animal Welfare Payment. An animal welfare quality scheme would allow for local/regional diversity in promoting the added animal welfare quality value of agricultural products, facilitative of rural growth. The dual tools of EU governance, namely support for, and promotion of,<sup>146</sup> improved animal welfare agri-products, are sadly lacking; as is an EU communication strategy specific to raised standards of animal welfare. An EU instrument, a Regulation on raised (higher than minimum norms) animal welfare production and product labelling, has been proposed by the European Commission.<sup>147</sup> The momentum for this would appear to have stalled, however, with EU ministers in any case preferring a voluntary, as opposed to a compulsory, animal welfare labelling scheme.<sup>148</sup>

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140. The scheme must be open to all producers; involve binding product specifications, compliance with which is verified by public authorities or by an independent inspection body; and be transparent, assuring complete traceability of products. Rural Development Regulation, above, n. 116, Art. 16(1)(b).

141. Commission Communication *EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs* (OJ C341/5 16.12.10).

142. Above, n. 116, Art. 16(1)(c). Support will be granted as an annual incentive payment determined in accordance with the fixed costs of scheme participation and verification for a maximum duration of five years, with the possibility of information and promotion cost support. Article 16(2)(3). Limited to the maximum support rate laid down in Annex II. Art. 16(4).

143. *Ibid.*, Art. 16(2).

144. Commission Delegated Regulation (EU) No. 807/2014, above, n. 120, Art. 4(2)(b). Cf L.C. Botterill and C. Daugbjerg, 'Engaging with private sector standards: a case study of GLOBALG.A.P.' (2011) 65(4) *Australian Journal of International Affairs*, 488; and C. Daugbjerg and L.C. Botterill, 'Ethical food standard schemes and global trade: Paralleling the WTO?' (2012) 31 *Policy and Society*, 307.

145. 'Measures adopted on the basis of Article 43 of the Treaty may include rules governing conditions and methods of production, quality and marketing of agricultural products.' Case 68/86 *United Kingdom v Council* [1988], above, n. 48, para. 892.

146. See, in the context of other regulated and protected quality regimes, namely products of geographic indication (PGIs), designated origin (PDOs) and of traditional specialties guaranteed (TSGs), European Parliament Directorate General for Internal Policies – Policy Department B: Structural and Cohesion Policies – Agriculture and Rural Development, *The Future of the Quality Policy in the Light of the CAP Post-2013*. Note IP/B/AGRI/IC/2011\_019. PE 460.033, March 2011 at 11. Available at: [http://europa.eu/RegData/etudes/note/join/2011/460033/IPOL-AGRI\\_NT\(2011\)460033\\_EN.pdf](http://europa.eu/RegData/etudes/note/join/2011/460033/IPOL-AGRI_NT(2011)460033_EN.pdf). Last accessed March 2014.

147. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals*, COM(2009) 584 28.10.09.

148. Council of the European Union, Press Release 2995th Council meeting Agriculture and Fisheries, Brussels, 22 February 2010, 6678/10 (Presse 34) Animal welfare labelling and the establishment of a European Network of Reference Centres.

A chosen route, favouring the short food supply chain, maps out the case for a local farming and direct sales labelling scheme.<sup>149</sup> This route emanates from the EU regulated quality schemes for agricultural products and foodstuffs, that is PDOs, PGIs and TSGs,<sup>150</sup> and is bereft of an improved animal welfare quality focus. Eurogroup for Animals has expressed its concern that the quality ‘schemes supported must include standards which go significantly beyond EU minimum legal standards on animal welfare, or beyond national minimum standards, to promote real animal welfare improvements’.<sup>151</sup> This is necessary in order that the consumer is not confused as to what constitutes ‘high’ standards of quality portrayed by the EU quality package for the products promoted therein. How high is ‘high quality’? Consumers seeking high animal welfare quality produce need to have transparent information in this regard.

One way forward may be the organic route. The EU Regulations on organic farming do include higher animal welfare species-specific (behavioural needs) standards for livestock, pig and poultry production.<sup>152</sup> The European Commission has proposed a new Regulation on organic production and labelling of organic products.<sup>153</sup> The fact remains that organic animal production is still extremely limited, accounting for less than 1% of the total EU 27 animal herd in 2010.<sup>154</sup> This serves to reinforce the need to focus on improving animal welfare in agriculture, utilising the CAP instruments and, it should be emphasised, the broader reach of Pillar I measures.

*European innovation partnership for agricultural productivity and sustainability.* Within the remit of the Rural Development Regulation, the European Innovation Partnership for Agricultural Productivity and Sustainability (EIP)<sup>155</sup> is a measure in respect of which funding may also be available from the EAFRD. The EIP aims to promote a resource efficient, economically viable, productive, competitive, low emission, climate friendly and resilient agricultural sector; help deliver a steady and sustainable supply of food; and build bridges between knowledge and farmers, rural communities, business, non-governmental organisations (NGOs) and advisory services. It seeks to achieve its aims by creating added value by better linking research and farming practices and encouraging the wider use of available innovation measures.<sup>156</sup>

The EIP aims to reverse the recent trend of diminishing productivity gains of the agricultural sector by 2020. To develop their full potential, the European Commission advocates, the role of farmers in the supply chain must be strengthened. It is submitted that the added value of improved animal welfare feeding through into high quality agri-produce would be the key to unlocking the economic potential in rural areas, facilitative of inclusive growth, a broader objective of the CAP<sup>157</sup> and of the Europe 2020 Strategy for smart, sustainable and inclusive growth.<sup>158</sup>

149. European Commission, *Report on the case for a local farming and direct sales labelling scheme* COM(2013) 866 6.12.13.

150. Regulation (EU) No. 1151/2012, above, n. 138, Art. 55.

151. Eurogroup for Animals, Contribution to the Debate on the CAP after 2013, May 2010. Available at: <http://eurogroupforanimals.org/files/policies/downloads/77/capcontributionmay2010.pdf>. Last accessed 17 February 2014.

152. Above, n. 71 and n. 81.

153. COM(2014) 180 24.3.14. See European Commission Press Release, ‘Organics: Commission proposal for more and better’ 25.3.14, [http://europa.eu/rapid/press-release\\_IP-14-312\\_en.htm](http://europa.eu/rapid/press-release_IP-14-312_en.htm)

154. European Commission, Agriculture and Rural Development, *Facts and Figures on Organic Agriculture in the European Union*, October 2013 at 35.

155. See European Commission Communication on the *European Innovation Partnership ‘Agricultural Productivity and Sustainability’*, COM(2012)79, 29 02. 12.

156. Above, n. 116, Art. 55.

157. European Commission, COM(2010) 672, above, n. 42.

158. European Commission, COM(2010) 2020, above, n. 136.

The overarching *mission* of rural development policy manifests in its contribution to the Europe 2020 Strategy,<sup>159</sup> by promoting sustainable rural development throughout the EU.<sup>160</sup> In line with the Europe 2020 Strategy, the emphasis of the EIP is on innovation contributing to the competitiveness and sustainability of the agricultural sector in the face of contemporary challenges. The potential for enhanced standards of animal welfare to be the added value – the innovation, enabling farmers to regain their due share of the agri-product market is there, although not expressly stated. It could be said that animal welfare would be one driver needed ‘to shift development patterns towards sustainable growth in agriculture’. The European Council meeting in Göteborg agreed that ‘the CAP and its future development should, among its objectives, contribute to achieving sustainable development by increasing its emphasis on encouraging healthy, high quality products, . . .’.<sup>161</sup> Improved animal welfare should be integrated into the EIP’s programmed aims for the CAP positively to contribute to the EU’s growth objectives within the current reference period.

The current potential for the practice of raised animal welfare standards requires clearer enunciation overall<sup>162</sup> within the CAP’s rural development policy, together with a clearer communication policy to farmers, informing and educating as to the economic agri-product quality opportunities presented by improving animal husbandry on the farm. Moreover, clear EU criteria defining higher animal welfare standards should be established, ‘as a reference point’, in the first instance, ‘for the evaluation of Member States’ assurance schemes supported by the CAP’.<sup>163</sup> The Welfare Quality four defined categories of animal welfare on a scale<sup>164</sup> would fill the current lacuna, in the absence of an alternative and comparable set of clear and transparent EU animal welfare criteria.

The aforementioned CAP instruments are, thus, disappointing in that they do not aim explicitly and directly to *improve* farm animal welfare. This is further compounded by the fact that export refunds continue to be payable under the reformed CAP for *live* bovine pure-bred breeding animals selected for breeding.<sup>165</sup> The granting of these subsidies is stated to be conditional on respect for the minimum standards of animal welfare during transport.<sup>166</sup> The fact remains that there are welfare problems associated with the enforcement of the transportation of live animals Regulation.<sup>167</sup>

### *The reformed CAP instruments: Concluding comments*

Raised animal welfare standards are not mentioned expressly as constituting a compulsory objective of Pillar I, a public good, with a defined budget, as is the new greening initiative. Nor is the improvement

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159. Ibid.

160. Above, n. 116, Art. 3.

161. European Council Presidency Conclusions, SN 2001/01 REV I, 15 and 16 June 2001, paras 19 and 31. Available at: [www.consilium.europa.eu](http://www.consilium.europa.eu).

162. It is notable that there is no stipulation for an animal welfare impact assessment to precede (e.g. investment in intensive farming infrastructure, in order to be eligible for EAFRD support) whereas investment operations are required to be preceded by an assessment of the expected environmental impact . . . where the investment is likely to have negative effects on the environment. Above, n. 116, Art. 45(1).

163. Eurogroup for Animals, above, n. 151.

164. Above, n. 27.

165. Regulation (EU) No. 1308/2013 of the European Parliament and of the Council (OJ L347/671, 20.12.2013) establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007, Annex I, Part XV.

166. Ibid., Art. 200.

167. European Commission, *Report on the impact of Council Regulation (EC) No 1/2005 on the protection of animals during transport* COM(2011)700 10.11.11. Eurogroup for Animals, Briefing April 2012, Commission Proposal for a Regulation establishing a common market organisation (CMO) for agricultural products. Available at: [http://eurogroupforanimals.org/files/policies/downloads/77/briefing\\_cap\\_single\\_cmo\\_17\\_april.pdf](http://eurogroupforanimals.org/files/policies/downloads/77/briefing_cap_single_cmo_17_april.pdf). Last accessed 17 February 2014.

of animal welfare per se included in the Rural Development Pillar's priorities for the CAP in the period 2014–2020.

The Treaty-stated objectives of the CAP have not undergone reform, but this would not be necessary to enable the CAP to embrace new animal welfare initiatives. The CAP has evolved to serve new ends, for example the challenges posed in protecting the environment and mitigating climate change, based on the same Treaty-based CAP objectives. To do so involves a question of interpretation in line with political, economic and societal expectations and demands. Article 13 TFEU, firmly embedded within the provisions having general application in the EU, demonstrates acceptance of the progressive rise of animal welfare as such a valid concern, with its explicit recognition of animal sentience, yet it is devoid of mention in the CAP reform proposal documents.<sup>168</sup> The CAP does not recognise the sentience of animals; merely animal welfare for agricultural products. Animal welfare is not harnessed for its own sake.

New environmental and climate change challenges face the CAP and farmers, which can at the same time be turned around so as to present opportunities for farmers, for society, for the economy and for animal welfare, where there is the political will to do so. It is also evident, however, that farmers and the CAP face a further challenge, namely that of recouping and increasing their share of the food supply chain.

The potential, although tentative, may exist for improved animal welfare within the CAP's new greening mechanism through, for example, extensive agricultural practices. It is becoming apparent, as evidenced in the reformed instruments, however, that the CAP concerning animal welfare is moving in the direction of improved animal welfare quality in the food chain<sup>169</sup> and away from the integration of animal welfare in the land-based agri-environment measures and objectives. The direction, so as to achieve higher animal welfare standards, is the link with the business opportunities for farmers and the added value the practice of higher animal welfare offers to producers in obtaining a premium price for animal welfare agri-products and greater production yields thereof. The initiative of the European Parliament successfully integrated the added value of animal welfare into the EU's competitiveness and growth agenda to 2020 via the agri-food production chain. But the market alone will not sustain the delivery of such a public good, and the farmer meeting consumer societal demand for animal welfare credence attributes of agri-produce merits government support.

In a CAP in which responsibility is shared between the EU and its Member States, the European Commission has argued that 'Member States have a responsibility to make the most of opportunities to set out future strategies for their agricultural sectors that will ensure long term competitiveness and sustainability'.<sup>170</sup> Prioritising in rural development programmes the practice of animal welfare standards that go beyond accepted norms would be one essential element of a Member State's responsibility. In a shared role, the CAP needs to be specifically targeted at animal welfare in the first instance at EU level. A European Commission framework facilitative of this is called for to incentivise Member States to modulate and transfer allowable funds from the first Pillar to the second – if not now possible at the first or second take up, then at the third<sup>171</sup> – to break Member State reliance on direct payments for farmers. There would be scope to do

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168. Compare with the regard paid to the former Animal Welfare Protocol in the Mid-term Review of the CAP, COM(2002)394, above, n. 54 at 9.

169. Cf the existing works of Daugbjerg and Botterill, above, n. 144. Further analysis of this line of inquiry lies beyond the focus of this article.

170. European Commission, *Overview of CAP Reform 2014–2020*, Agricultural Policy Perspective Brief No. 5/December 2013. Available at: [http://ec.europa.eu/agriculture/policy-perspectives/policy-briefs/index\\_en.htm](http://ec.europa.eu/agriculture/policy-perspectives/policy-briefs/index_en.htm)

171. Direct Payments Regulation, above, n. 65, Art. 14. Member States which did not take the decision to modulate funds from Pillar I to Pillar II in the first instance were given a second chance to opt for the years 2015–2019, subject to meeting 1 August 2014 deadline. There is a third opportunity to review from the year 2018, with a need to notify by 2017.

this in this CAP reference period – additionally serving to legitimise the continued existence of the CAP, away from subsidised production per se.

The CAP 2014 2020 reforms represent an opportunity missed on the part of the EU to continue along the path of animal welfare reform advocated by Fischler in 2003 when he said:

We want to make farming subsidies more justifiable, in line with the principle of ‘payment for services rendered’. EU farmers are responsible for the production of many public goods, from the environment and upkeep of the landscape to animal welfare. Though expected by society, these services are not rewarded by the market – hence the need for the CAP to fill the gap.<sup>172</sup>

Additional and effective EU incentives beyond those existing in the Rural Development Regulation are necessary to support farmers to provide products which emanate from enhanced animal welfare systems. In Burrell’s words, ‘[t]he flexible, project-orientated, devolved approach of the second pillar is a more cost-efficient way of securing targeted public goods and addressing rural development needs, which are essentially territorially specific’.<sup>173</sup> Rural development measures are adapted to local needs – hence the need expressly to educate and train in, inform of, effectively incentivise, and promote higher standards of animal welfare. In this way the diverse situations in Member States would be accommodated and balanced with minimum animal welfare standards assured. The path would also be laid for Member States to capitalise on the rural development opportunities presented by farmers engaging with higher animal welfare standards. The CAP’s rural development policy would support those farmers who engage with high standards of animal husbandry, in the absence of full market returns. The fact would still remain, however, that differing views on animal welfare are held in diverse Member States, which awareness and education may only change over time. Solely, locating prioritised support for raised animal welfare in the rural development pillar of the CAP focusing on its advantage as being facilitative of the diverse culture existing in Member States, inevitably would lead to uneven implementation of animal welfare standards in the EU.

Beyond 2020, therefore, it is essential that ‘basic’ standards of animal welfare are driven up under Pillar I of the CAP, by way of an express animal welfare initiative on a par with the new ‘greening’ mechanism (that is, a mandatory animal welfare programme and component of Pillar I) with a defined budgetary allocation. To do so would be to interpret the CAP objectives in line with the Treaty empowerment post-Lisbon firmly to integrate animal welfare in EU agricultural policy. In so doing, the continued existence of the CAP would receive legitimacy vis à vis EU citizens.

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172. Commissioner Fischler, Speech/02/330, *Towards Sustainable Farming: Presentation of the Mid-term Review*, Brussels, 10 July 2002 [cited in Cardwell (2011), above, n. 46 at 275 fn. 29].

173. A. Burrell, ‘The CAP: Looking Back, Looking Ahead’ (2009) 31(3) *Journal of European Integration* 271 at 281.