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Greening Farm Payments under the 2013 CAP Reforms: A Major Stride towards "Sustainable Agriculture"?

Michael Cardwell
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THE EU'S POLITICAL AND CONSTITUTIONAL SYSTEM

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Preface

An important aspect of the 2013 reform of the Common Agricultural Policy (CAP) was the greening agenda, by which a specific "greening component" was introduced to make agricultural practices more beneficial for the climate. In the present report the authors address this issue by looking at what "sustainability" as a concept may entail, by examining the relevant regulatory provisions, and by analysing to what extent the reform package has met stated aims.

They conclude that there are good grounds for maintaining that the 2013 CAP reforms do constitute a step forward in developing the sustainability agenda, even though the legislative framework since then may have fallen short of earlier environmental aspirations. Moreover, they suggest a number of overarching policy issues that ought to be considered, for instance that the EU should consider adopting a more holistic approach towards the realisation of a sustainable agriculture as well as a long-term policy horizon. The long-term perspective is especially powerful regarding measures to promote biodiversity and combat climate change, with regard to its capacity to enhance delivery of sustainability objectives.

In view of the impact of agriculture on the climate and the environment, attempts to promote a greener European agricultural policy may have a deep impact on the future sustainability of resources. This report analyses the extent to which the agenda has reached its goals and proposes further steps that ought to be considered in the years to come.

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Director

About the authors

Michael Cardwell is Professor of Agricultural Law at the University of Leeds, UK, having previously been a solicitor in practice with Burges Salmon, Bristol. His research interests focus on the Common Agricultural Policy and agriculture in world trade, with publications including: *The European Model of Agriculture* (OUP, 2004); *The Regulation of Genetically Modified Organisms: Comparative Approaches* (OUP, 2010) (co-edited with Luc Bodiguel); and *Research Handbook on EU Agriculture Law* (Edward Elgar, 2015) (co-edited with Joe McMahon). He also acted as Consultant Editor of the Agricultural Production and Marketing title (2008) in *Halsbury's Laws of England* and contributed to the *Agriculture Report* during the Balance of Competences Review. In 2013, he was elected Assistant Delegate General of the European Council for Rural Law. More recently, he has been engaged with a number of activities relating to Brexit, including the provision of Oral Evidence to the All Party Parliamentary Group on Agroecology and Written Evidence to the House of Lords EU Energy and Environment Sub-Committee Inquiry on *Brexit: Agriculture*.

Alicia Epstein is a Researcher at the University of Leeds, UK, where she has recently submitted her PhD thesis (entitled *The European Approach to Sustainable Food Security: What Role for the Common Agricultural Policy?*). Her academic interests are situated at the intersection of European Union and transnational agricultural and environmental law and are generally framed around questions relating to food security and the ecological implications of production agriculture. Elements of this research have been published in edited volumes and, in 2013, she acted as National co-Rapporteur for the UK at the XXVII European Congress on Rural Law. In 2014, she received a research mobility grant to visit the New Zealand Centre for Environmental Law at the University of Auckland.

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List of abbreviations

CAP:	Common Agricultural Policy
COMAGRI:	Committee on Agriculture and Rural Development
CJEU:	Court of Justice of the European Union
DEFRA:	Department for Environment, Food and Rural Affairs
EC Treaty:	Treaty Establishing the European Community
EEA:	European Environment Agency
EFA:	ecological focus area
EIP:	European Innovation Partnership for Agricultural Productivity and Sustainability
EU:	European Union
FAO:	Food and Agriculture Organization
GAEC:	good agricultural and environmental condition
GHG:	greenhouse gas
NGO:	non-governmental organisation
OECD:	Organisation for Economic Co-operation and Development
TFEU:	Treaty on the Functioning of the European Union
UAA:	utilised agricultural area
UN:	United Nations
WTO:	World Trade Organization

Executive summary

The greening agenda has been central to the 2013 Common Agricultural Policy (CAP) reforms. In particular, they saw the introduction of a specific 'greening component' in respect of agricultural practices beneficial for the climate and the environment, which accounts for 30 per cent of the national envelope for direct payments of each Member State. While this may be regarded as a continuation of the direction of travel towards 'sustainable agriculture' which the European Union (EU) institutions have pursued over a period of decades, the core focus on 'sustainability' would now appear even more pronounced. Not least, it was very much the watchword of *The CAP Towards 2020*, the Communication from the European Commission which gave the reform process its initial impetus. During that process, following the Treaty of Lisbon, new ground was also broken by the enhanced role accorded to the European Parliament in the enactment of agricultural legislation, 'consultation' having been replaced by fuller participation under the 'ordinary legislative procedure'.

This Report addresses the greening of farm payments in four stages. First, a preliminary inquiry is conducted into what 'sustainability' as a concept may entail. Precise definition has proved elusive, there also being potential overlap with 'sustainable development' and the more recent paradigm of 'sustainable intensification'. And these uncertainties would seem to have survived into the 2013 CAP reforms, when it was noteworthy that the words 'sustainable' and 'sustainability' were employed extensively in the policy documentation, yet were largely absent when those policies were carried into effect by the legislation itself. In this context, it is suggested that, while any interpretation of 'sustainable agriculture' will inevitably ascribe importance to the delivery of food security, the provision of food security in the longer term is dependent upon maintaining the productive capacity of the ecological resource base.

Secondly, the embedding of sustainability requirements within the CAP is traced from early initiatives through to the legislative process of the 2013 reforms, concluding with the Political Agreements of 26 June 2013 and 24 September 2013. Particular attention is devoted to the positions adopted by the three key actors (the European Commission, the Council and the European Parliament), so as to assess the degree to which the Council and the European Parliament were successful in securing amendments to the original proposals from the European Commission.

Thirdly, there is examination of the relevant regulatory provisions as enacted. The emphasis is on direct payments under Pillar I of the CAP (market management and direct payments), with the most significant provisions being undoubtedly those which govern the greening component introduced by Regulation

(EU) 1307/2013 (Direct Payments Regulation). The new measures on crop diversification, permanent grassland and ecological focus areas (EFAs) are each addressed in some detail. However, specific consideration is also given to: the revised cross-compliance regime under Regulation (EU) 1306/2013 (Horizontal Regulation), consequent upon which farmers are now obliged to observe a different range of environmental and other obligations in order to receive most direct payments; and the greening of Pillar II of the CAP (rural development) under Regulation (EU) 1305/2013 (Rural Development Regulation).

Finally, there is wider discussion of the extent to which these aspects of the reform package have met their stated aims. In any such discussion, since the greening component only came into effect on 1 January 2015, conclusions must remain very tentative. Consensus would nonetheless already seem to be building that the 2013 CAP reforms have encountered difficulties in making the leap from policy into practice, with a particular difficulty being lighting upon a sufficiently precise and justiciable definition of what constitutes 'sustainable agriculture' so as to be able to identify clear *legislative* objectives and outcomes. Arguably, there is scope for a more holistic approach extending further beyond land use.

For the time being, the greening component is apprehended specifically to militate against climate change and promote biodiversity and, in these respects, positive features may be discerned: for example, the extent to which the new payment covers the utilised agricultural area (UAA) of the EU and its status as the first express climate change measure to be implemented under Pillar I. On the other hand, during the course of the reform process there is some evidence of retreat from earlier ambitions: for example, the replacement of crop rotation with crop diversification as the first element of the greening component; the expansion of the range of exemptions (including a threshold of 15 hectares of arable land before the EFA obligation would apply); and the preference of Member States, when implementing the EFA obligation, for forms of land use which not only continue production, but also have less beneficial effects on biodiversity (with particular reference to areas with nitrogen-fixing crops). Moreover, early data would suggest that the greening component has not given rise to major changes in how farmers actually farm the land, it being projected that there will be no more than a slight increase in permanent grassland, fallow land and protein crops. While this may restrict the effects in terms of enhancing biodiversity, the consequent maintenance of production levels may nonetheless be regarded as contributing positively to food security (although, as indicated, such a contribution would only meet notions of 'sustainable agriculture' if the natural resources upon which agriculture depends are also safeguarded).

In addition, a factor overhanging any support measure to promote greening continues to be World Trade Organization (WTO) compatibility; yet at the time of the 2013 CAP reforms such WTO ramifications would seem to have enjoyed a relatively low profile, on the basis that the greening component would

be exempt from WTO domestic support reduction commitments by reason of its being decoupled from production. Whether this is indeed the case may need to be examined carefully in light of the detailed provisions of the EU legislative framework: by way of illustration, farmers can unlock their entitlement to the greening component through the production of specified crops on EFAs (such as areas with catch crops and areas with nitrogen-fixing crops); and, more broadly, the receipt of direct payments under the Direct Payments Regulation is, for the time being, dependent upon satisfaction of the 'active farmer' requirement.

In conclusion, the European Commission must be given credit for seeking to 'raise the bar' in terms of the environmental credentials of the CAP; and, even though the legislative framework as subsequently enacted may have fallen short of original aspirations, there are good grounds for maintaining that the 2013 CAP reforms do constitute a step forward in developing the sustainability agenda. Looking to the future, three overarching policy issues for consideration may be suggested. First, there is an increasingly strong case in favour of a yet more holistic approach towards the realisation of a sustainable agriculture. Secondly, the adoption of a long-term policy horizon has the capacity to enhance delivery of sustainability objectives, with this being especially apt in the case of measures to promote biodiversity and combat climate change. Thirdly, an imperative in any implementation of greening measures will be to strike the right balance between, on the one hand, a targeted approach which both accommodates individual conditions on the ground and is directed to specific outcomes and, on the other hand, the realisation of a regulatory framework which is administratively workable and proportionate. Finding the optimal point in this balancing exercise between 'narrow and deep' and 'broad but shallow' will be no easy task. For the present, the 2013 CAP reforms would caution against a move towards a greater level of generality; and there are also robust reasons for believing that farmers are more favourably disposed towards schemes offering specific incentives which are demonstrably relevant to their own individual circumstances, as opposed to across-the-board measures couched in terms of restrictions.

1 Introduction

As the 2013 reforms of the Common Agricultural Policy (CAP) gained momentum, Commissioner Cioloș unequivocally stated that its aim was to achieve the right balance between three strategic objectives: 'economic sustainability, environmental sustainability and social acceptability'.[1] And subsequently, following completion of the legislative process, Erjavec *et al* affirmed that greening to adapt to climate change could be regarded as 'a kind of meta-element of all the discourses employed in the actual CAP reform'.[2] Central to this agenda has been the greening of farm payments through, in particular, the introduction of a specific payment in respect of agricultural practices beneficial for the climate and the environment (the 'greening component'). Indeed, when the measure was first proposed, it was described by Tangermann as 'the **most novel element**' of the reform package,[3] while Matthews saw it not only in similar terms as 'the major *structural* novelty' but also as having the capacity to be 'the defining legacy of this CAP review'.[4] Alongside such a step-change in terms of policy development, the greening component also enjoys great importance in purely financial terms. It accounts for some 30 per cent of the national envelope for direct payments of each Member State and required a total appropriation in the 2016 European Union (EU) Budget of 12,239,000,000 Euros.[5] The scale of the commitment may also be judged by setting it against a total appropriation commitment of 18,671,922,495 Euros for all rural development expenditure under Pillar II.[6]

The greening of farm payments under the 2013 CAP reforms must, however, be set against a background of the promotion of a more 'sustainable agriculture' over a period of decades. For example, agriculture featured prominently in the Fifth European Community Environmental Action Programme, *Towards Sustainability*;[7] and even greater sectoral focus was subsequently supplied in the 1999 Communication from the European Commission, *Directions Towards Sustainable Agriculture*, where it was clearly stated that, since agriculture relies

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1 Commissioner Cioloș, SPEECH/12/112, *Meeting the Challenge*, Birmingham, 21 February 2012.

2 E. Erjavec, M. Lovec and K. Erjavec, 'From "Greening" to "Greenwash": Drivers and Discourses of CAP 2020 "Reform"', in J. Swinnen (ed.), *The Political Economy of the 2014-2020 Common Agricultural Policy: an Imperfect Storm* (Rowman & Littlefield International Ltd, London, 2015) 215, 232.

3 S. Tangermann, *Direct Payments in the CAP Post 2013 – Note* (European Parliament, Brussels, 2011) 23 (emphasis in original).

4 A. Matthews, *Environmental Public Goods in the New CAP: Impact of Greening Proposals and Possible Alternatives - Note* (European Parliament, Brussels, 2012) 17 (emphasis in original).

5 Definitive Adoption (EU, Euratom) 2016/150 of the European Union's General Budget for the Financial Year 2016, [2016] OJ L48/1, Section III: Commission, Chapter 05 03.

6 *Ibid*, Chapter 05 04.

7 European Commission, *Towards Sustainability*, [1993] OJ C138/5, 35-37.

upon natural resources, it has the capacity to place them under environmental pressure in their exploitation.[8] That said, during the 2013 CAP reforms 'sustainability' would seem to have acquired new status as a key principle which will hereafter underpin the CAP. Thus, even as the European Commission commenced these reforms with the issue of *The CAP Towards 2020*, it identified the 'sustainable management of natural resources and climate action' as one of their three objectives.[9] In like vein, the document concluded with the statement that 'the future CAP should become a more sustainable, more balanced, better targeted, simpler and more effective policy, more accountable to the needs and expectations of the EU citizens'.[10]

Further impetus for this direction of travel might have been expected from the European Parliament. Following the Treaty of Lisbon, agriculture now falls under the 'ordinary legislative procedure', enhancing the role of the European Parliament beyond that of consultation.[11] And, prior to the formal commencement of the 2013 CAP reforms, the indications were that the European Parliament would adopt a green agenda. More precisely, its Resolution of 8 July 2010 advocated both a 'sustainable' and 'green' CAP, with firm understanding that there must be 'greater emphasis on sustainability by providing proper economic incentives for farmers to optimise the delivery of eco-system services and further improve the sound environmental resource management of EU farmland'.[12]

This Report will address such greening of farm payments in four stages. First, a preliminary inquiry will be conducted into what 'sustainability' as a concept may entail. Precise definition has proved elusive, there also being potential overlap with 'sustainable development' and the more recent paradigm of 'sustainable intensification'. And these uncertainties would seem to have survived into the 2013 CAP reforms, when it was noteworthy that the words 'sustainable' and 'sustainability' were employed extensively in the policy documentation, yet were largely absent when those policies were carried into effect by the legislation itself. By way of illustration, in the main legislative measure on direct payments, Regulation (EU) 1307/2013 (Direct Payments Regulation), there is only a single reference to 'sustainable development',[13] and none to 'sustainable agriculture'. Secondly, the embedding of sustainability requirements within the CAP will

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8 COM (99) 22.

9 European Commission, *The CAP Toward 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future*, COM (2010) 672, 7.

10 *Ibid*, 13.

11 Treaty on the Functioning of the European Union (TFEU), Article 43. For the earlier 'consultation procedure', see Treaty Establishing the European Community (EC Treaty), Article 37.

12 European Parliament, *European Parliament Resolution of 8 July 2010 on the Future of the Common Agricultural Policy After 2013* (2009/2236(INI)), paragraph 53.

13 Regulation (EU) 1307/2013 of the European Parliament and of the Council of 17 December 2013 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, [2013] OJ L347/608, Preamble (46).

be traced from early initiatives through to the legislative process of the 2013 reforms, concluding with the Political Agreements of 26 June 2013 and 24 September 2013. Particular attention will be devoted to the positions adopted by the three key actors (the European Commission, the Council and the European Parliament), so as to assess the degree to which the Council and the European Parliament were successful in securing amendments to the original proposals from the European Commission. That said, inter-institutional decision-making is not the central focus of this Report and has already been addressed most effectively elsewhere.[14] Thirdly, there will be examination of the relevant regulatory provisions as enacted. The emphasis will be on direct payments under Pillar I of the CAP (market management and direct payments), with the most significant provisions in this context being undoubtedly those which govern the new greening component introduced by the Direct Payments Regulation.[15] However, consideration will be given also to: the revised cross-compliance regime under Regulation (EU) 1306/2013 (Horizontal Regulation),[16] consequent upon which farmers are now obliged to observe a different range of environmental and other obligations in order to receive most direct payments; and the greening of Pillar II of the CAP (rural development) under Regulation (EU) 1305/2013 (Rural Development Regulation).[17] Finally, there will be wider discussion of the extent to which these elements of the reform package have met their stated objectives, although conclusions must remain very tentative since the greening component only came into effect on 1 January 2015. This part of the Report will commence with consideration of 'broad' and 'narrow' interpretations of sustainability, including the difficulty in lighting upon a sufficiently precise and justiciable definition of what constitutes 'sustainable agriculture' so as to be able to identify clear *legislative* objectives and outcomes. It will then move on to consider the effectiveness of the 2013 CAP reforms in terms of delivering sustainability with specific reference to, on the one hand, climate change and biodiversity loss and, on the other, food security, before also examining potential World Trade Organization (WTO) implications of the revised direct payments regime.

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[14] For excellent works on this aspect, see, eg, A. Greer and T. Hind, 'Inter-institutional decision-making: the case of the Common Agricultural Policy', (2012) 31 Policy and Society 331; A. Matthews, 'Greening agricultural payments in the EU's Common Agricultural Policy', (2013) 2(1) Bio-based and Applied Economics 1; L. Knops and J. Swinnen *et al*, *The First CAP Reform under the Ordinary Legislative Procedure: a Political Economy Perspective* (European Parliament, Brussels, 2014); and Swinnen (ed.) (n 2) *passim*.

[15] Direct Payments Regulation (n 13) Articles 43-47.

[16] Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 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, [2013] OJ L347/549, Articles 91-95 and Annex II.

[17] Regulation (EU) 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, [2013] OJ L347/487.

2 Greening and the objective of ´sustainable agriculture´

2.1 General

'Sustainable agriculture' has come to be regarded as a key objective of the CAP and, as indicated, it gained heightened priority on commencement of the 2013 CAP reforms when the European Commission issued its communication *The CAP Towards 2020*.[18] Further, and importantly, greening is understood to be central to the delivery of this objective, Commissioner Cioloş in clear fashion declaring that it 'fosters sustainable agricultural practices at EU level'.[19] Nevertheless, 'sustainable agriculture' remains vaguely defined in policy documents and is largely absent in the legislation as enacted; and, in the latter context, this is especially challenging in that it complicates the task of measuring outcomes against intended purposes. Accordingly, by way of preliminary inquiry, an attempt will be made to explore what 'sustainable agriculture' might entail. And this discussion will highlight some of the dominant understandings of the term which have often centred around issues relating to food security together with, increasingly, the growing need to safeguard the ecological resources that underpin agricultural production and productivity.

2.2 'Sustainable agriculture'

2.2.1 Introduction

An extensive and diverse body of literature exists on the topic of 'sustainable agriculture' and an overview of the debate reveals that a multitude of actors, stakeholders and experts have contributed to it in various ways.[20] With specific regard to academic contributions, researchers have considered the question from a wide range of disciplinary and inter-disciplinary perspectives. Thus, commentary

[18] European Commission (n 9).

[19] Commissioner Cioloş, SPEECH/14/33, *A Modern Farming Sector, Producing in Line with Society's Expectations*, Berlin, 16 January 2014.

[20] For a full and recent survey of the literature, see S.Velten *et al*, 'What is sustainable agriculture? A systematic review', (2015) 7 Sustainability 7833 (the Supplementary information listing publications by focus and discipline). See also, eg, E. Underwood *et al*, *Options for Sustainable Food and Agriculture in the EU: Synthesis Report Summary of the STOA Project Technology Options for Feeding 10 Billion People* (Institute for European Environmental Policy, London, 2013); and T. Kaphengst, *Towards a Global Definition of Global Sustainable Land Use? A Discussion on Theory,Concepts and Implications for Governance: Discussion Paper AP 3.1Produced within the Research Project "GLOBALANDS – Global Land Use and Sustainability"* (Ecologic, Berlin, 2014).

may be found in, for example, the fields of agro-ecology,[21] environmental sciences more generally[22] and development studies[23] to name but a few, with each discipline often employing its own methodological and epistemological approaches. Although this has undoubtedly allowed the debate to flourish, it has also militated against any unified definition of 'sustainable agriculture': as observed by Velten *et al*, 'like the notion of sustainable development itself, the concept of sustainable agriculture is ambiguous in its meaning. This characteristic has led to the emergence of a great variety of different discourses, views or paradigms of sustainable agriculture and rendered the discussion and implementation of this idea extremely difficult'.[24] And difficulties of definition are enhanced by the emergence of alternative paradigms, with various degrees of alignment, including 'sustainable intensification'[25] and 'agro-ecology'.[26]

That said, Velten *et al* also recommend that the complexity of sustainable agriculture is embraced on the basis that, '[f]or complex problems of the modern world such as sustainability challenges in agriculture, ambiguous terms may indeed be more useful than precise and supposedly unambiguous concepts':[27] they allow for connections between areas of expertise and provide the basis for the interdisciplinary work which is necessary to provide practical solutions. Further, for the purposes of ascertaining the extent to which greening *farm payments* under the 2013 CAP reforms contributed to the objective of sustainable agriculture, it would seem legitimate to focus on measures affecting primary production as opposed to, for example, the promotion more broadly of food chain organisation (although it should also be noted that this might likewise benefit from CAP support, under rural development programmes).[28] In particular, when considering notions of sustainability in the context of primary production, links are consistently established between the twin imperatives of

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[21] See, eg, L.G. Firbank, 'Commentary: pathways to global sustainable agriculture', (2012) 10(1) International Journal of Agricultural Sustainability 1; and T.G. Benton, 'Managing agricultural landscapes for production of multiple services: the policy challenge', (2012) 1 PAGRI 7 (available at http://ageconsearch.umn.edu/bitstream/130373/2/Benton.pdf, last accessed on 29 June 2017).

[22] See, eg, P.C. West *et al*, 'Leverage points for improving global food security and the environment', (2014) 345(6194) Science 325.

[23] See, eg, J. Pretty, 'Participatory learning for sustainable agriculture', (1995) 23(8) World Development 1247.

[24] Velten *et al* (n 20) at 7834 (footnote references omitted).

[25] For a full discussion of the nature of 'sustainable intensification', see, eg,T. Garnett and H.C.J. Godfray, *Sustainable Intensification in Agriculture: Navigating a Course Through Competing Food System Priorities* (Food Climate Research Network and the Oxford Martin Programme on the Future of Food, Oxford, 2012); and see also, eg, J. Pretty, C. Toulmin and S. Williams, 'Sustainable intensification in African agriculture', (2011) 9(1) International Journal of Agricultural Sustainability 5; and H.C.J Godfray, 'The debate over sustainable intensification', (2015) 7(2) Food Security 199.

[26] For a full discussion of the nature of 'agro-ecology', see, eg, L. Silici, *Agroecology: What it is and What it has to Offer* (International Institute for Environment and Development, London, 2014).

[27] Velten *et al* (n 20) at 7857.

[28] See, eg, Rural Development Regulation (n 17) Article 5(3).

food security and sustaining the productive capacity of the ecological resource base; and these twin imperatives will now be further explored.

2.2.2 The role of food security

Any inquiry into what constitutes 'sustainable agriculture' inevitably requires an examination of the role of food security, it being hard to displace the primary function of agricultural activity as being the production of food.[29] In the European arena, this has been reflected in a strong historic focus on high levels of productivity, aimed at securing the internal food supply through price support and, increasingly in later years, producer support.[30] Moreover, food security has again risen up the CAP agenda following the global food crisis of 2007-2008 and ensuing market instability. Not least, its importance permeated institutional commentary in the aftermath of the crisis, just as the European Commission was first mapping out its vision of the CAP towards 2020. For instance, the European Parliament Resolution of 13 January 2009 stressed that 'the recent surge in food prices should be a wake-up call for governments throughout the world that agricultural production is not to be taken for granted' and that 'global food security is a question of the utmost urgency for the EU'.[31] Similarly, the European Economic and Social Committee has since stated that the 'issue of food security should be placed at the heart of the EU's policies as a prerequisite for a strategy for global stability'.[32]

The 2007-2008 food crisis also served to bring to the fore some of the geo-political projections which have the potential seriously to affect food security in the coming decades. By way of illustration, in order to accommodate the expected growth of the global population, which is currently predicted to increase by almost a third to 9 billion by 2050,[33] estimates suggest that global agricultural output will need to rise by anywhere between 30 per cent and

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[29] See, eg, Foresight, *The Future of Food and Farming,* Final Project Report (*Foresight Report*) (Government Office for Science, London, 2011) 31; and see generally, eg, R.L. Naylor (ed.), *The Evolving Sphere of Food Security* (Oxford University Press, Oxford, 2014). That said, it should be noted from the outset that agricultural production represents only one part (albeit a major one) of the food security matrix: see, eg, A. Sen, *Poverty and Famines: an Essay on Entitlement and Depravation* (Oxford University Press, Oxford, 1981).

[30] This notion of food security is very evident in the Treaty objectives of the CAP: see TFEU, Article 39(1).

[31] European Parliament, *European Parliament Resolution of 13 January 2009 on the Common Agricultural Policy and Global Food Security* (2009/2153 (INI)), Preamble, paragraph S, 1. See also T. Haniotis, 'Achievements and Constraints of the 2013 CAP Reform', in Swinnen (ed.) (n 2) 139.

[32] European Economic and Social Committee, *Opinion of the European Economic and Social Committee on 'Food security and bioenergy' (own-initiative opinion)* (2013/C 341/04), paragraph 1.1.

[33] H.C.J. Godfray *et al*, 'Food security: the challenge of feeding 9 billion people', (2010) 327(5967) Science 812. According to United Nations (UN) projections, the global population is expected to grow by almost 4 billion between the years 2009 and 2100, at which point the total is expected to reach 10.9 billion: see, eg, K. Andreev, V. Kantorava and J. Bongaarts, *Demographic Components of Future Population Growth*, Technical Paper 2013/3, Population Division, United Nations Department of Economic and Social Affairs, 4.

100 per cent by 2050.[34] This was likewise acknowledged by the European Commission in *The CAP Towards 2020*, which emphasised the importance for the CAP to improve its production capacity in order to 'contribute to world food demand'.[35] And, consistent with this objective, as from 2013 the EU has been the largest agri-food exporter.[36] On the other hand, figures from the Food and Agriculture Organization (FAO) reveal that cereal production levels have tended to exceed utilisation levels, leading at present to relatively high stocks, which would suggest that distribution and poverty issues remain to the fore.[37] In addition, it is notable that the EU sees its contribution towards world food demand as being delivered, in part at least, through its strong position as an exporter of processed and high value-added agricultural products, on the basis that much of the impending demand is expected to emanate from increases in wealth and purchasing power in developing countries.[38] Yet, considering that these commodities are beyond the reach of most low-income earners, it is not immediately clear how a strong prioritisation of such high value production can contribute towards lasting food security in a meaningful way.

At the same time, there has also been growing acknowledgement that 'increasing productivity is necessary but not sufficient to ensure food security, reduce poverty [or] improve nutrition'.[39] With specific reference to land use, there has been greater recognition that both ongoing food security and the long-term productive capacity of agriculture are dependent upon maintaining and sustaining the underlying ecological resource base. In this light, the drive to stimulate greater output and productivity within European agriculture could effectively reduce the prospects for future food security if, in the process, it induces trade-offs which impact adversely on the benefits derived from ecological processes and systems.[40] It follows that many serious questions remain as to how these substantial increases in output can be realised 'sustainably'.

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[34] See, eg, D. Tilman *et al*, 'Global food demand and the sustainable intensification of agriculture', (2011) 108 (50) PNAS 20260, 20261.

[35] European Commission (n 9) 4.

[36] See, eg, European Commission, *MAP 2016-1: Agri-food Trade in 2015: China Boosts EU Exports* (European Commission, Brussels, 2016) (available at http://ec.europa.eu/agriculture/trade-analysis/map/2016-1_en.pdf, last accessed on 29 June 2017).

[37] See, eg, FAO, *Crop Prospects and Food Situation - No 2: June 2016* (FAO, Rome, 2016) 7: '[a]t their newly predicted level, world stocks would be barely 1.8 million tonnes below their all-time high opening level'.

[38] European Commission (n 9) 4. See also M. Hirschnitz-Gabers *et al*, 'Key drivers for unsustainable resource use: categories, effects and policy pointers', (2016) 132 Journal of Cleaner Production 13.

[39] J. Sayer and K.G. Cassman, 'Agricultural innovation to protect the environment', (2013) 110 (21) PNAS 8345.

[40] Institute for Agro-Ecology and Biodiversity, *Common Agricultural Policy Reform from 2014-Perspectives for more Biodiversity and Environmental Benefits of Farming,* (Institute for Agro-Ecology and Biodiversity, 2012) 2 (available at https://www.bfn.de/fileadmin/MDB/documents/themen/landwirtschaft/CAPEnvironment-study-results-nov2012en_Fin.pdf, last accessed on 2 June 2017). See also European Commission, *Commission Communication on the European Innovation Partnership 'Agricultural Productivity and Sustainability',* COM (2012) 79, 3.

2.2.3 Sustaining the productive capacity of the ecological resource base

In response to such concerns, considerable attention has been devoted towards devising strategies and measures aimed at reducing the impacts of conventional agriculture 'by minimising the use of the external inputs, by optimising the use of internal resources, or by combinations of both'.[41] For instance, Foley *et al* have listed a number of efficiency gains (both environmental and economic) that can be derived on the supply side, including a reduction of excessive use of fertiliser, the improvement of manure management and wetland restoration.[42] At the same time, on the demand side, recent studies have highlighted the role that dietary and other consumer preferences can have on the environmental 'footprint' of agriculture, [43] while there are also potentially huge gains to be made by reducing waste along the food chain, a state of affairs from which the EU is not immune.[44]

Emphasis on resource efficiency and optimisation has gained particular traction in light of the limited possibilities that exist for bringing additional land into production, whether in the EU or other parts of the world.[45] The situation is further exacerbated by the fact that the conversion of new land to agriculture can frequently have negative greenhouse gas (GHG) implications, which precludes as an optimal solution wide-scale land conversion in regions where it would otherwise be physically possible to do so.[46] In consequence, some commentators have been prompted to consider certain forms of intensification (as opposed to extensification) as the primary means of meeting growing food demand.[47] Not least, attention has been given to maximising yields through 'sustainable intensification', which is characterised as 'producing more food from the same area of land while reducing the environmental impacts [of such production]'.[48] Importantly, this approach is also reflected in EU policy documentation, which notes that increased productivity will require 'improved resource efficiency in order to produce with less water, energy, fertilisers (especially phosphorus and

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[41] J. Pretty, J. Thompson and F. Hinchcliffe, *Sustainable Agriculture: Impacts on Food Production and Challenges for Food Security*, (International Institute for Environment and Development, 1996) 5 (available at http://pubs.iied.org/pdfs/6106IIED.pdf, last accessed on 29 June 2017).

[42] J.A.Foley *et al*, 'Solutions for a cultivated planet', (2011) 478 Nature 337, 340.

[43] See, eg, D.Tilman and M. Clark, 'Global diets link environmental sustainability and human health', (2014) 515 Nature 518.

[44] Foley *et al* (n 42) at 341.

[45] The Royal Society, *Reaping the Benefits: Science and the Sustainable Intensification of Global Agriculture* (Royal Society, London, 2009) 6-7.

[46] H.C.J. Godfray and T. Garnett, 'Food security and sustainable intensification', (2014) 369 (1639) Philosophical Transactions of the Royal Society B, 5.

[47] Foley *et al* (n 42) at 339.

[48] Godfray *et al* (n 33) at 813 (Buckwell *et al* stressing that the prime motive is not intensification *per se*, but rather 'to improve the resource efficiency of agriculture': see A. Buckwell *et al*, *The Sustainable Intensification of European Agriculture*, (RISE Foundation, Brussels, 2013) 28). See also *Foresight Report* (n 29) at 34-35.

nitrogen), and pesticides',[49] while increased and sustainable agricultural output is seen as an objective which will only be achieved through major research and innovation efforts at all levels.[50]

Nevertheless, considering the substantial rates at which yields have risen in the past century, there is a degree of consensus that it will prove impossible to maintain the historically upward trajectory of agricultural output.[51] At the same time, there is concern that the very agricultural practices which greatly increased global food supply 'had inadvertent, detrimental impacts on the environment and on ecosystem services, highlighting the need for more sustainable agricultural methods'.[52] As stated by the Organisation for Economic Co-operation and Development (OECD), 'the pursuit of environmental sustainability may not always be consistent with raising food production'.[53]

In light of the ostensible uncertainties involved with further intensifying production, academic attention has increasingly been devoted to considering how non-production-related adaptation may contribute to reducing some of the pressures that are currently being placed on the ecological resource base. For example, there has been focus on the demand side and the potential benefits that may be derived from behavioural and consumer changes. As has been seen, Tilman and Clark have brought to the fore the links between dietary choices, environmental sustainability and human health.[54] More precisely, they argue that altering global diets and reducing the demand for meat protein from ruminants (and other sources of high GHG emissions) could significantly mitigate the 80 per cent increase in GHG emissions which they expect would otherwise stem from food production over the coming decades.[55] Further, in the European context, where meat consumption is still far above the global average,[56] such alterations in diet could have heightened effect.[57] Likewise, initiatives to reduce food waste are gaining traction. Thus, in January 2012 the European Parliament passed its Resolution on food waste,[58] while a year earlier the European Commission had already set as a target to halve the disposal of edible food waste in the EU by 2020.[59] And, at the global level, the Sustainable Development Goals include a

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[49] European Commission, COM (2012) 79 (n 40) 3.

[50] *Ibid*.

[51] See, eg, R. Licker *et al*, 'Mind the gap: how do climate and agricultural management explain the "yield gap" of croplands around the world?', (2010) 19(6) Global Ecology and Biogeography 769.

[52] D. Tilman *et al*, 'Agricultural sustainability and intensive production practices', (2002) 418 Nature 671, 672.

[53] OECD, *Global Food Security: Challenges for the Food and Agricultural System* (OECD, 2013) 34.

[54] Tilman and Clark (n 43).

[55] *Ibid*, 521.

[56] Buckwell *et al* (n 48) at 19.

[57] H. Westhoek *et al*, 'Food choices, health and environment: effects of cutting Europe's meat and dairy intake', (2014) 26 Global Environmental Change 196.

[58] European Parliament, *European Parliament Resolution of 19 January 2012 on How to Avoid Food Wastage: Strategies for a More Efficient Food Chain in the EU* (2011/2175(INI).

[59] European Commission, *Roadmap to a Resource Efficient Europe,* COM (2011) 571, 18.

target, by 2030, to 'halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses'.[60]

On the other hand, it remains unclear as to what extent in the future the CAP will aim to address such demand-side issues (and consumer–related issues more generally).[61] There may also be some doubt as to whether the CAP would be the best vehicle to do so in that, as expressed in the European Parliament Resolution, waste at the stage agricultural production is but one facet of a far more extensive problem.[62] A policy response would be to develop a more holistic approach to both this issue of food waste and other demand-side issues which engages all the links in the food chain, in which regard there have already been calls for a 'Common Sustainable Food Policy' to replace the CAP. [63] For the present, however, so radical a response is not on the immediate legislative agenda, and raises questions beyond the scope of this Report.

2.2.4 Conclusion

What would in any event seem evident is that the notion of 'sustainability' in the context of agriculture is a broad one, as is well captured in the *Foresight Report*:[64]

> The principle of sustainability implies the use of resources at rates that do not exceed the capacity of the earth to replace them. Thus water is consumed in water basins at rates that can be replenished by inflows and rainfall, greenhouse gas (GHG) emissions are balanced by carbon fixation and storage, soil degradation and biodiversity loss are halted, and pollutants do not accumulate in the environment. Capture fisheries and other renewable resources are not depleted beyond their capacity to recover. Sustainability also extends to financial and human capital; food production and economic growth must create sufficient wealth to maintain a viable and healthy workforce, and skills must be transmitted to future generations of producers. Sustainability also entails resilience, such that the food system, including its human and organisational components, is robust to transitory shocks and stresses. In the short- to

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[60] UN, *Transforming Our World: the 2030 Agenda for Sustainable Development* A/RES/70/1 (UN, 2015) Sustainable Development Goals, Target 12.3.

[61] The European Environment Agency (EEA) has, however, recently stressed the need further to integrate these matters into relevant policies, with the CAP being of primary significance in this regard: EEA, *The European Environment: State and Outlook 2015* (Chap 6: Understanding the Systematic Challenges Facing Europe) (available at http://www.eea.europa.eu/soer-2015/synthesis/report/6-systemchallenges, last accessed 29 June 2017).

[62] European Parliament (n 58) Preamble R.

[63] See, in particular, A. Bailey, T. Lang and V. Schoen, *Does the CAP Still Fit?*, Food Research Collaboration Policy Brief (Food Research Collaboration, London, 2016) (available at http://foodresearch.org.uk/does-the-cap-still-fit/, last accessed on 29 June 2017).

[64] *Foresight Report* (n 29) at 72.

> medium term non-renewable inputs will continue to be used, but to achieve sustainability the profits from their use should be invested in the development of renewable resources.

What would also seem clear is that no single policy measure will be sufficient to deliver a 'sustainable agriculture': as is again well captured in the same *Foresight Report*, interconnected policy-making is of 'critical importance', with it being necessary to implement measures beyond the food system to cover also, for example, energy, water supply and land use.[65] For the present, nevertheless, it may be reiterated that the greening of farm payments is widely regarded as the EU's most significant recent innovation insofar as *land use* towards attaining its long-term goal of sustainable agriculture: in particular, the measures engage closely with production agriculture, while at the same time seeking to maintain the ecological resource base by which such production is underpinned. And both the manner in which greening has been implemented and the extent to which it has met its ambitions will now be considered.

[65] *Ibid*, 12.

3 The legislative process

3.1 The starting point

3.1.1 Early measures

As highlighted, the greening of the CAP under the 2013 CAP reforms would not properly be regarded as a new initiative, but rather as the continuation of an long-established direction of travel.[66] Indeed, even before the protection of the environment became incorporated within the EC Treaty by virtue of the Single European Act,[67] the need to address the negative externalities of agriculture was being recognised both in policy documents and in legislation itself.[68] Thus, as far back as Council Directive 75/268/EEC on mountain and hill farming and farming in certain less-favoured areas, a growing preoccupation could be detected with the conservation of the countryside (although the Directive may nonetheless be regarded as in large part a measure to maintain the incomes of farmers so as to prevent land abandonment).[69] Further, by 1985 agriculture and the environment could be identified as a 'challenge for the future' in the European Commission Green Paper, *Perspectives for the Common Agricultural Policy*;[70] and the same policy document saw early division of measures into those which regulated and controlled practices harmful for the environment (where the 'polluter pays principle' would generally apply) and those which actively promoted practices friendly to the environment (where the production of a public good might justify specific payment).[71] The year 1985 also saw the introduction of a scheme to protect environmentally sensitive areas under Article 19 of Council Regulation (EEC) 797/85 on improving the efficiency of

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[66] See, eg, D. Baldock, J. Dwyer and J. Sumpsi Vinas, *Environmental Integration and the CAP* (Institute for European Environmental Policy, London, 2002); Matthews (n 14); and G. Alons, 'Enviromental policy integration in the EU's common agricultural policy: greening or greenwashing?', (2017) 24(11) Journal of European Public Policy 1604. For analysis by the European Court of Auditors, see European Court of Auditors, *Special Report No 14/2000 on "Greening the CAP" Together with the Commission's Replies* (European Court of Auditors, Luxembourg, 2000), [2000] OJ C353/1.

[67] The Single European Act added a new Treaty Title on 'Environment' (Article 130r-130t), coming into force on 1 July 1987.

[68] For the negative impact of the CAP on natural resources generally, see, eg, B. Jack, *Agriculture and EU Environmental Law* (Ashgate, Farnham, 2009) 21-49.

[69] Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in certain less-favoured areas, [1975] OJ L128/1; and see, in particular, the recital in the Preamble that 'it is necessary that steps be taken to ensure the continued conservation of the countryside in mountain areas and in certain other less-favoured areas'.

[70] European Commission, *Perspectives for the Common Agricultural Policy,* COM (1985) 333, Part IV; and see, in particular, *ibid*, Part IV, paragraph 5: '[t]he role of agriculture in a modern industrialized economy is increasingly perceived to include not only the strategic, economic and social functions mentioned before, but also the conservation of the rural environment'.

[71] *Ibid*, Part IV, paragraphs 8 and 13.

agricultural structures.[72] More precisely, Member States were granted authority to implement special national schemes in these areas 'in order to contribute towards the introduction or continued use of agricultural practices compatible with the requirements of conserving natural habitat' (although again there was reference to the need to ensure adequate incomes).[73] In return for payment, farmers were required to undertake (at the least) to refrain from further intensification of agricultural production and to ensure that the stock density and level of intensity of agricultural production were compatible with the specific environmental needs of the area concerned. At the same time, outside the formal boundaries of the CAP, environmental concerns were being tackled by measures which had the capacity to affect land use by farmers;[74] and prominent among these measures were the Wild Birds Directive,[75] the Nitrates Directive[76] and the Habitats Directive.[77]

3.1.2 Environmental protection requirements at the commencement of the 2013 CAP reforms

By the time of the commencement of the 2013 CAP reforms, the European Commission could therefore build upon many years of greening, with Article 11 of the TFEU also mandating that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. The need to take this obligation seriously in the agricultural context had already been affirmed by the Court of Justice of the European Union (CJEU) when called upon to adjudicate upon its precursor (Article 6 of the EC Treaty) in the 2009 case of *The Queen (on the application of Mark Horvath) v. Secretary of State for Environment, Food and Rural Affairs*.[78] The CJEU held that the requirements relating to environmental protection were 'one of the essential objectives of the Community' and that 'such protection must be regarded as an objective which

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[72] Council Regulation (EEC) 797/85 of 12 March 1985 on improving the efficiency of agricultural structures, [1985] OJ L93/1. It may be noted that, at that date, the measures were formally characterised as 'structural' as opposed to 'environmental'. See also generally, eg, M. Whitby (ed.), *Incentives for Countryside Management: the Case of Environmentally Sensitive Areas*' (CAB International, Wallingford, Oxon., 1994).

[73] Council Regulation (EEC) 797/85, [1985] OJ L93/1, Article 19(1).

[74] See, eg, M. Cardwell, *The European Model of Agriculture* (Oxford University Press, Oxford, 2004) 37-40.

[75] Council Directive 70/409/EEC of 2 April 1979 on the conservation of wild birds, [1979] OJ L103/1. See now Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, [2009] OJ L20/7.

[76] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, [1991] OJ L375/1.

[77] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L206/7.

[78] Case C-428/07, [2009] ECR I-6355; and see also, eg, M. Cardwell and J. Hunt, 'Public rights of way and level playing fields', (2010) 12 Environmental Law Review 291.

also forms part of the common agricultural policy'.[79] Even more explicitly, the Advocate General in the same case had gone so far as to state that '[i]t therefore cannot be ruled out that in certain situations the protection of the environment can take precedence over the other aims of the CAP'.[80] Moreover, both the CJEU and the Advocate General were clear that greening measures could be implemented under the Agriculture Title to the Treaty without recourse also to the Environment Title.[81]

In the development of this environmental agenda within the CAP, three aspects may be emphasised. First, notions of 'sustainability' were *ab initio* central to policy-making. In the Fifth European Community Environmental Action Programme, *Towards Sustainability*, agriculture was one of five selected target sectors, with unequivocal assertion that '[i]t is not only environmentally desirable, …but also makes sound agricultural, social and economic sense to seek to strike a more sustainable balance between agricultural activity, other forms of rural development and the natural resources of the environment'.[82] This approach was consistent with earlier identification of 'the dual role of farmers as food producers and guardians of the countryside' in the European Commission 1991 Reflections Paper, *The Development and Future of the CAP*;[83] and by the turn of the Millennium such sentiments were being even more clearly articulated in the European Commission 1999 Communication on *Directions Towards Sustainable Agriculture*:[84] indeed, the document included the statement that '[t]he desired relationship between agriculture and the environment can be captured by the term "sustainable agriculture"'.[85]

Subsequently, in the Sixth European Community Environment Action Programme, *Environment 2010: Our Future, Our Choice*, importance was also placed on the role of sustainable agriculture in the international context,[86] while in the Seventh General Union Environment Action Programme to 2020, *Living Well, Within the Limits of Our Planet*, reference was made to its potential contribution to inter-generational equity, on the basis that '[a]n essential element in sustainable agriculture is farming with a sense of responsibility for future generations, while at the same time remaining resource-efficient and

[79] Case C-428/07, *The Queen (on the application of Mark Horvath) v. Secretary of State for Environment, Food and Rural Affairs*, [2009] ECR I-6355, Judgment, paragraph 29. See also Joined Cases C-333/15 and C-334/15, *Planes Bresco v Comunidad Autónoma de Aragón*, Judgment of 9 June 2016, ECLI:EU:C:2016:426, paragraph 46.
[80] Case C-428/07, [2009] ECR I-6355, Opinion, paragraph 56.
[81] *Ibid*, Judgment, paragraph 29; and Opinion, paragraphs 54 and 55.
[82] European Commission, *Towards Sustainability*, [1993] OJ C138/5, 15.
[83] COM (91) 100, 13.
[84] COM (99) 22.
[85] *Ibid*, 6.
[86] COM (2001) 31, 37.

productive'.[87] In any event, by the time that the 2013 CAP reforms formally commenced with the issue in 2010 by the European Commission of *The CAP Towards 2020*, sustainability could be identified as their watchword.[88] Thus, as already observed, one of the three objectives was 'sustainable management of natural resources and climate action'; and this objective is seen in terms of 'taking care of the environment and agriculture's resilience to climate change and the countryside, and maintaining the production capacity of the land'.[89]

Secondly, greening has come to be seen as an enterprise of immediate relevance for both Pillars of the CAP, with Pillar I (as a general rule) encompassing measures up to a baseline of good agricultural practice and Pillar II (as a general rule) encompassing measures beyond that baseline.[90] The former, therefore, might be equated with the 'polluter pays principle', with farmers being expected to undertake the regulatory burden of their actions which have a negative impact upon the environment.[91] By contrast, the latter might be equated with the 'provider gets principle', with farmers receiving specific payment for actions which have a positive impact on the environment, so generating 'public goods'.

While there may now be focus on the environmental credentials of both Pillars, the original focus of the greening agenda would, however, seem to have been on targeted programmes under which farmers received financial support for additional efforts, such as the environmentally sensitive area scheme introduced under Council Regulation (EEC) 797/85 and the agri-environment scheme introduced under the 1992 'Agri-environment Regulation'.[92] Accordingly, reflecting the 'provider gets principle', the latter justified the need to provide remuneration to the agricultural sector on the grounds that 'higher' environmental practices were being undertaken, it being recited that 'the measures must compensate farmers for any income losses caused by reductions

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87 Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', [2013] OJ L354/171, Annex, paragraph 20.

88 COM (2010) 672 (n 9).

89 *Ibid*, 10.

90 See, eg, Council Regulation (EC) 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (2005 Rural Development Regulation) [2005] OJ L277/1, Preamble (35): 'these [agri-environmental] payments should cover only those commitments going beyond the relevant mandatory standards'.

91 On the 'polluter pays principle' generally, see, eg, N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002) 21-60; and, for its application more specifically in the agricultural context, see, eg, M. Cardwell, 'The polluter pays principle in European Community law and its impact on United Kingdom farmers', (2006) 59 Oklahoma Law Review 89.

92 Council Regulation (EEC) 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, [1992] OJ L L215/ 85. See generally, eg, Jack (n 68) at 113-114; and H. Buller, 'The Agri-environmental Measures (2078/92)', in F. Brouwer and P. Lowe (eds.), *CAP Regimes and the European Countryside* (CABI Publishing, Wallingford, Oxon., 2000) 199.

in output and/or increases in costs and for the part they play in improving the environment'.[93]

Further, when rural development was formally constituted as Pillar II of the CAP under the Agenda 2000 reforms, agri-environment measures were the only ones to become compulsory in national programming by Member States.[94] At the same time, the implementing European Community legislation was explicit that, if the farmers were to be entitled to this remuneration under Pillar II, the agri-environment commitments were to 'involve more than the application of usual good farming practice'; and the distinction from Pillar I support was likewise made explicit by the stipulation that the farmers concerned were to 'provide for services which are not provided for by other support measures, such as market support or compensatory allowances'.[95] The importance of commitments going beyond mandatory requirements was then carried forward into the legislation in force immediately prior to the commencement of the 2013 CAP reforms, with the Preamble to the 2005 Rural Development Regulation again reiterating the link with sustainability by recital that 'agri-environmental payments should continue to play a prominent role in supporting the sustainable development of rural areas and in responding to society's increasing demand for environmental services'.[96]

Such entrenchment of greening within the legislative framework of Pillar II was matched by relatively high levels of funding as compared to other Pillar II measures. Agri-environment measures alone accounted for nearly 20 billion Euros of EU expenditure over the programming period 2007-2013, 22 per cent of the total sum for rural development.[97] Moreover, this proportion was even greater in some Member States: for example, in the United Kingdom during 2013, payments linked to agri-environment schemes reached £535 million (which compared very favourably with the rural development measure attracting the next highest level of funding, namely support for less-favoured areas, which accounted for £94 million).[98]

Notwithstanding that the history of greening under Pillar I has been somewhat shorter than in the case of Pillar II, the attachment of environmental conditions to Pillar I direct payments has had the capacity to provide broader coverage than the more targeted agri-environment measures within rural development

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[93] Agri-environment Regulation (n 92) Preamble.

[94] Council Regulation (EC) 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, [1999] OJ L160/80, Article 43(2).

[95] *Ibid*, Article 23(2).

[96] 2005 Rural Development Regulation (n 90) Preamble (35) and Article 39(3).

[97] European Commission, *Agri-environment Measures* (2014) (available at http://ec.europa.eu/agriculture/envir/measures/index_en.htm, last accessed on 29 June 2017).

[98] Department for Environment, Food and Rural Affairs (DEFRA) *et al*, *Agriculture in the United Kingdom 2013* (DEFRA, London, 2014) 62.

programming. An early instance of such eco-conditionality may be found in the application by 1992 legislation of stocking density limits to claims for suckler cow and beef special premiums.[99] And shortly thereafter Member States were authorised more widely to attach environmental conditions to the payment of premiums in the livestock sector: for example, in the sheep and goatmeat sector, Member States became entitled to apply 'appropriate environmental protection measures', in respect of which they were to 'impose penalties appropriate to and commensurate with the seriousness of the ecological consequences of any breach', with it being possible for these penalties to extend to the loss of all benefits linked to the sheepmeat and goatmeat schemes.[100] While this terminology is consistent with the 'polluter pays principle', the efficacy of such measures would appear to have been somewhat blunted as a result of low levels of implementation by Member States. By way of illustration, the European Court of Auditors found that by 2000 only Greece and the United Kingdom had definitely opted to do so (Greece under the sheepmeat and goatmeat common organisation of the market and the United Kingdom under both the sheepmeat and goatmeat and beef and veal common organisations of the market). [101]

From these beginnings, environmental protection requirements under Pillar I without doubt acquired enhanced prominence under the Agenda 2000 reforms and their subsequent 2003 Mid-term Review. In particular, following the 2003 Mid-term Review receipt of direct payments became dependent upon observing a range of measures which included, and extended beyond, the protection of the environment, the objective being to support '[t]he enforcement of "good farming practices"'.[102] More precisely, a farmer was obliged to respect: 19 statutory management requirements in relation to (i) public, animal and plant health, (ii) environment and (iii) animal welfare; minimum requirements for good agricultural and environmental conditions (GAECs) defined by Member States on the basis of a European Community framework; and a measure to

[99] See, eg, M. Cardwell, 'Common Agricultural Policy quotas and the environment', (1997) 45 Drake Law Review 71; N. Hawke and N. Kovaleva, *Agri-environmental Law and Policy* (Cavendish, London, 1998) 117-127; and European Court of Auditors (n 66) *passim*. For the legislation introducing these stocking density limits, see Regulation (EEC) 805/68 of the Council of 27 June 1968 on the common organisation of beef and veal, [1968] JO L148/24, Article 4g (as amended by Council Regulation (EEC) 2066/92 of 30 June 1992, [1992] OJ L215/49).

[100] Council Regulation (EEC) 3013/89 of 25 September 1989 on the common organization of market in sheepmeat and goatmeat, [1989] OJ L289/1, Article 5d (as amended by Council Regulation (EC) 233/94, [1994] OJ L30/9).

[101] European Court of Auditors (n 66) paragraph 24 and Tables 5 and 6.

[102] European Commission, *Mid-term Review of the Common Agricultural Policy*, COM (2002) 394, 21.

maintain permanent pasture.[103] In addition, Member States were to ensure the maintenance of land under permanent pasture.[104] A matter of some significance is that the baseline nature of the minimum requirements for GAECs was emphasised by their express distinction from the agri-environment measures within rural development programmes which operated 'above the reference level of good agricultural practices'.[105] However, their green nature was also emphasised by the fact that, although it was originally proposed that the measure should merely be to maintain land 'in good agricultural condition', the legislation as subsequently enacted included a wider obligation to maintain it 'in good agricultural and environmental condition'.[106]

Definitely, such cross-compliance has been understood to be a key policy instrument in terms of promoting sustainability. Perhaps of greatest importance, it has the capacity to link environmental measures with the act of production itself and, indeed, the Seventh General Union Environment Action Programme to 2020 affirmed that 'cross-compliance is particularly important in contributing to the sustainability of agriculture, by promoting the protection of vulnerable ecosystems, such as water bodies, soil and habitats for species'.[107] On the other hand, this form of legal instrument would not appear to be a strict application of the 'polluter pays principle'. Compliance with the various obligations is a condition for the receipt of direct payments, but the farmer enjoys (in theory, at least) the option to operate free of the obligations by foregoing the payments. Accordingly, there is an element of 'bargain'. That said, up until the 2013 CAP reforms the size of the payments to be foregone arguably restricted any real

[103] Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, [2003] OJ L270/1, Articles 3-5 and Annexes III (as amended by Council Regulation (EC) 21/2004 of 17 December 2003, [2004] OJ L5/8) and IV (as amended by Council Regulation (EC) 864/2004 of 29 April 2004, [2004] OJ L161/48). The statutory management requirements were introduced in three tranches, the first applicable as from 1 January 2005 and the last applicable as from 1 January 2007. Originally, it was proposed that the statutory management requirements would cover also occupational safety requirements: European Commission, COM (2002) 394 (n 102) 21; but these did not find their way into the legislation as enacted.

[104] Council Regulation (EC) 1782/2003 (n 103) Article 5(2).

[105] *Ibid*, Article 5(1).

[106] See European Commission, COM (2002) 394 (n 102) 21. For full discussion of these measures, see, eg, D. Bianchi, 'Cross compliance: the new frontier in granting subsidies to the agricultural sector in the European Union', (2007) 19 Georgetown International Environmental Law Review 817; and European Court of Auditors, *Special Report No 8/2008: Is Cross Compliance an Effective Policy?* (European Court of Auditors, Luxembourg, 2008).

[107] Decision 1386/2013/EU of the European Parliament and of the Council (n 87) Annex, paragraph 12.

freedom of choice on the part of the farmer,[108] with intentional non-compliance leading potentially to total exclusion from aid schemes for one or more calendar years.[109] Furthermore, the farmer would as a matter of law be subject to the statutory management requirements in any event, the cross-compliance regime merely introducing an additional (yet potent) sanction for their breach. This would also seem to be expressly recognised in the implementing legislation itself, where it was recited that the withdrawal of direct payments for breach of cross-compliance obligations 'should be without prejudice to sanctions laid down now or in the future under other provisions of Community or national law'.[110] In the case of these other sanctions, the 'polluter pays principle' could apply with full force; and, in this regard, an illustration may be furnished by the Nitrates Directive, whose provisions appear among the statutory management requirements and which has been held by the CJEU, outside the context of the CAP, to be fully in conformity with the 'polluter pays principle'.[111]

Thirdly, even by the time of the commencement of the 2013 CAP reforms, the scope of greening had already been expanded to increase emphasis on measures to combat the 'new challenge' of climate change.[112] In particular, the 'Health Check' of the CAP, initiated in 2007, saw such measures integrated into Pillar II. As from 1 January 2010, Member States were required to include operations having climate change as a priority within their rural development programmes; and an indicative list of such operations and their potential effects was provided. [113] By way of illustration, both measures for the modernisation of agricultural holdings and agri-environment payments could improve efficiency of nitrogen fertiliser use and thereby reduce methane (CH_4) and nitrous oxide (NO_2) emissions and agri-environment payments could support soil management practices (including tillage methods, catch crops and diversified crop rotations) and thereby reduce NO_2 emissions and promote both carbon sequestration and adaptation to the effects of climate change on soil. Moreover, although with regard to Pillar I there may have been less in terms of concrete measures, the Preamble to Council

[108] There are already indications that, in the case of certain elements of the 2013 CAP reforms, it may be rational for a number of farmers to forego payment and retain their 'freedom to farm': see, eg, K. Louhichi *et al*, *An EU-Wide Individual Farm Model for Common Agricultural Policy Analysis (IFM-CAP): First Application to Crop Diversification Policy* (Joint Research Centre, Seville, 2015) (in respect of the crop diversification measure).

[109] For the provisions in force immediately prior to the 2013 CAP reforms, see Council Regulation (EC) 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003, [2009] OJ L30/16, Article 24(3).

[110] Council Regulation (EC) 1782/2003 (n 103) Preamble (2).

[111] Case C-293/97, *The Queen v Secretary of State for the Environment and Minister of Agriculture, Fisheries and Food, ex parte Standley*, [1999] ECR I-2603; and see generally, eg, M.R.Grossman 'Nitrates from agriculture in Europe: the EC Nitrates Directive and its implementation in England', (2000) 27 Boston College Environmental Affairs Law Review 567, 621-625.

[112] European Commission, *Preparing for the "Health Check" of the CAP Reform*, COM (2007) 722, 3.

[113] 2005 Rural Development Regulation (n 90) Article 16a and Annex II (as amended by Council Regulation (EC) 74/2009 of 19 January 2009, [2009] OJ L30/100).

Regulation (EC) 73/2009 made express reference to the challenges of climate change, while the protection and management of water was addressed through bolstering the requirements for maintaining the land in good agricultural and environmental condition.[114]

3.2 From the European Parliament Resolution of 8 July 2010 to political agreement

3.2.1 The European Parliament Resolution of 8 July 2010

Prior to the European Commission formally commencing the 2013 CAP reforms, the European Parliament on 8 July 2010 passed its Resolution on the future of the Common Agricultural Policy after 2013.[115] The importance of this Resolution was heightened by the fact that, following the Treaty of Lisbon, the role of the European Parliament in the reform process would no longer be confined to one of consultation. Instead, both the establishment of the common organisation of agricultural markets and other provisions necessary for the pursuit of the objectives of the CAP would be governed by the 'ordinary legislative procedure',[116] in which the European Parliament would enjoy a degree of participation equating to that of the Council.[117]

Intimations of 'sustainability' permeated this Resolution: indeed, the enlarged powers of the European Parliament were understood to be a force to drive the CAP towards such a objective, it being recited that:

> with the entry into force of the Lisbon Treaty, the European Parliament has gained the power to shape the Union's agricultural policy, not only as regards multiannual agricultural programmes but also by amending the annual budget for agriculture, thus giving Parliament responsibility for ensuring a fair and sustainable common agricultural policy.[118]

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[114] Council Regulation (EC) 73/2009 (n 109) Preamble (9) and Annex III (the additional requirements being that farmers should establish buffer strips along water courses and, where water use for irrigation was subject to authorisation, comply with authorisation procedures).

[115] European Parliament (n 12). The Resolution drew upon the June 2010 'Lyon Report' on 'The Future of the Common Agricultural Policy after 2013', prepared for the Committee on Agriculture and Rural Development (COMAGRI) (George Lyon MEP being the Rapporteur).

[116] See TFEU, Article 43(2): '[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy'.

[117] For the ordinary legislative procedure, see TFEU. Article 294; and, for a helpful description of its operation, see European Parliament, *Ordinary Legislative Procedure – Complete Texts* (available at http://www.europarl.europa.eu/external/appendix/legislativeprocedure/europarl_ordinarylegislativeprocedure_complete_text_en.pdf, last accessed on 29 June 2017). For further helpful commentary in the agricultural context, see, eg, Greer and Hind (n 14).

[118] European Parliament (n 12) Preamble AA.

Furthermore, the final recital concluded that 'the CAP must be geared to the maintenance and development of multifunctional, area-wide, sustainable agriculture in Europe'.[119]

The Resolution also adopted a broad interpretation of 'sustainability', which was seen as encompassing economic, social and environmental viability in the long term;[120] and the CAP was closely associated with the 'leading role' which agriculture could play in tackling climate change.[121] In this context, a specific instrument envisaged to achieve climate change objectives was the introduction of 'an EU-funded top-up payment', which would operate through multiannual contracts to reward farmers for reductions in carbon emissions per unit of production and/or increased sequestration of carbon in the soil.[122] Together with advocacy of a 'sustainable' CAP was advocacy of a 'green' CAP, the two being regarded as inextricably linked.

A matter of some significance, nevertheless, was that the European Parliament saw Pillar II-type measures as the primary engine for delivering this green dividend (as opposed to, for example, enhanced cross-compliance under Pillar I). In particular, it called for 'the CAP to provide the opportunity for the vast bulk of agricultural land to be covered by agri-environmental schemes to reward farmers for the delivery of additional eco-system services while encouraging more sustainable, lower-input production models such as organic farming, integrated agriculture, the development of high-nature-value farming and sustainable intensive agricultural practices'.[123] Accordingly, there was evidence from an early stage that the European Parliament would not privilege the greening of Pillar I direct payments; and it was also significant that a degree of priority would seem to have been accorded to food security over the environment. Food security, food safety and the nutritional value of agricultural produce were described as 'first-generation' public goods 'which should continue to constitute the primary raison d'être for the CAP, corresponding to its essence and representing the first concern of Europe's citizens'; by contrast, the environment, land management or animal welfare were cited as instances of 'second-generation' public goods which, 'while also objectives of the CAP, are complementary to the first-generation goods and should therefore not replace them'.[124]

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[119] *Ibid*, Preamble AE.
[120] *Ibid*, paragraph 31.
[121] *Ibid*, paragraph 48.
[122] *Ibid*, paragraph 71.
[123] *Ibid*, paragraph 77.
[124] *Ibid*, paragraph 6. For discussion of the limited appetite for structural change displayed by the Resolution, see, eg, K. Hart, 'The Fate of Green Direct Payments in the CAP Reform Negotiations', in Swinnen (ed.) (n 2) 245.

3.2.2 The European Commission Communication: The CAP Towards 2020

Following this Resolution of the European Parliament, the European Commission issued *The CAP Towards 2020,*[125] which, as already observed, very much adopted the language of 'sustainability', the word 'sustainable' itself appearing no less than 16 times in its 13 pages. It may also be reiterated that one of the three objectives advocated for the reforms was the sustainable management of natural resources and climate action, itself comprising three subsidiary objectives:

- to guarantee sustainable production practices and secure the enhanced provision of **environmental public goods** as many of the public benefits generated through agriculture are not remunerated through the normal functioning of markets.
- to foster **green growth** through **innovation** which requires adopting new technologies, developing new products, changing production processes, and supporting new patterns of demand, notably in the context of the emerging bioeconomy.
- to pursue **climate change** mitigation and adaptation actions thus enabling agriculture to respond to climate change. Because agriculture is particularly vulnerable to the impact of climate change, enabling the sector to better adapt to the effects of extreme weather fluctuations, can also reduce the negative effects of climate change.[126]

In terms of proposed measures to carry these objectives into effect, arguably the most innovative was the mandatory greening component to be incorporated within the Pillar I direct payments regime, primarily to address climate and environmental concerns. This measure 'could take the form of simple, generalised, non-contractual and annual environmental actions' and, importantly, these actions would 'go beyond cross-compliance'.[127] In consequence, there was the potential for a blurring of the distinction between Pillar I and Pillar II, in that there was more than a suggestion of the 'provider gets principle' which has underpinned the rural development regime. Similarly, other Pillar I measures would be introduced with a view to providing additional income support to promote the 'sustainable development' of agriculture in rural areas with specific natural constraints, a scheme close in purpose to the long-established less-favoured area scheme under Pillar II. That said, the Communication re-affirmed that the overall architecture of the CAP should remain the two Pillar structure, with Pillar I addressing support delivered to all farmers on an annual basis and Pillar II support being directed on a multiannual and contractual basis to deliver specific objectives identified in Member State programming. Indeed, it was expressly declared that 'the separation between the two pillars should bring

[125] European Commission, COM (2010) 672 (n 9).
[126] *Ibid*, 7 (emphasis in original).
[127] *Ibid*, 8-9.

about clarity, each pillar being complementary to the other without overlapping and focussing on efficiency'.[128]

The Communication concluded by identifying three broad policy options: the 'adjustment scenario' (which would provide for continuity, change being limited to gradual improvements in existing measures); the 'integration scenario' (which would enhance targeting); and the 'refocus scenario' (which would have a strong focus on environmental and climate change objectives and which would move away, over time, from both income support and most market measures). Significantly, the 'integration scenario' was explicitly understood to develop a 'more sustainable' policy.[129]

3.2.3 The 2011 proposed regulations

On issue by the European Commission of proposed regulations in October 2011, the 'integration scenario' was the preferred policy option.[130] It was considered to be the 'most balanced in progressively aligning the CAP with the EU's strategic objectives';[131] and central to the reform agenda was the introduction of 'a strong greening component into the first pillar of the CAP for the first time thus ensuring that all European Union farmers in receipt of support go beyond the requirements of cross compliance and deliver environmental and climate benefits as part of their everyday activities'.[132] The significance of this greening component was reinforced by the requirement that some 30 per cent of direct payments be tied to observation of the agricultural practices which it mandated.

The European Commission found support for this approach, not least, in the Commission Staff Working Paper, *Impact Assessment: Common Agricultural Policy Towards 2020* (*Impact Assessment*),[133] and in the European Parliament Resolution

[128] *Ibid*, 11-12.

[129] *Ibid*, 12.

[130] For the proposed regulations, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy*, COM (2011) 625; *Proposal for a Regulation of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products (Single CMO Regulation)*, COM (2011) 626; *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; and *Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy*, COM (2011) 628. In addition, there was a proposal to address the application of direct payments to farmers for the transitional year of 2013: COM (2011) 630. For full discussion, see, eg, J.-C. Bureau *et al*, 'The Common Agricultural Policy after 2013', (2012) 47 Intereconomics 316; and Matthews (n 14).

[131] See, eg, European Commission, COM (2011) 625 (n 130) Explanatory Memorandum, 6.

[132] See, eg, *ibid*, Explanatory Memorandum, 3.

[133] European Commission, SEC (2011) 1153.

of 23 June 2011.[134] The former document, while emphasising that great care would be needed in both the design of measures and their implementation by Member States, concluded that the 'integration scenario' would best safeguard territorial balance by addressing the long-term sustainability of agriculture and rural areas.[135] The latter document expressly affirmed that there should be a closer link between the protection of natural resources and direct payments and, therefore, called for:

> the introduction, through a greening component, of an EU-wide incentivisation scheme with the objective of ensuring farm sustainability and long-term food security through effective management of scarce resources (water, energy, soil) while reducing production costs in the long term by reducing input use.[136]

In addition, adopting an approach which closely foreshadowed the reforms as finally enacted, the European Parliament took the view that further greening should be carried into effect through a 'priority catalogue' of measures fully financed by the EU, with each farmer required to implement a certain number of measures on a national or regional list established at Member State level on the basis of a broader EU list (examples of such measures including support for low carbon emissions and measures to limit or capture GHG emissions, buffer strips and permanent pasture).[137]

In the proposed direct payments regulation, the greening component encompassed three agricultural practices beneficial for the climate and the environment to which, as indicated, would be devoted 30 per cent of national ceilings for direct payments.[138] First, a crop diversification measure would require farmers to cultivate at least three different crops where their arable land extended to more than three hectares.[139] None of the three crops was to cover less than 5 per cent of the arable land and the main crop was not to exceed 70

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[134] European Parliament, *Resolution of 23 June 2011 on the CAP Towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future*, (2011/2051(INI)). The Resolution drew upon the May 2011 'Dess Report' on 'The CAP Towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future', prepared for COMAGRI (Albert Dess MEP being the Rapporteur).

[135] European Commission, SEC (2011) 1153 (n 133) 79. The *Impact Assessment*, however, was based upon the measures outlined in *The CAP Towards 2020* (European Commission, COM (2010) 672) as opposed to the proposed regulations: Knops and Swinnen *et al* (n 14) 84; and it did not address in great depth the potential for the proposed measures to secure a green dividend: see, eg, K. Hart, A. Buckwell and D. Baldock, *Learning the Lessons of the Greening of the CAP* (Institute for European Environmental Policy, London, 2016) 25.

[136] European Parliament (n 134) paragraph 30.

[137] *Ibid*, paragraph 34; and see further Matthews (n 14) at 18.

[138] European Commission, COM (2011) 625 (n 130) Articles 29-33.

[139] This requirement would not apply if the arable land was entirely used for grass production (sown or natural), entirely left fallow or entirely cultivated with crops under water for a significant part of the year.

per cent. However, as subsequently observed in the Opinion of the Committee on the Environment, Public Health and Food Safety, this crop diversification measure would not have the same environmental benefits as one imposing crop rotation, the latter having the advantage of preventing monoculture, improving biodiversity and lowering the need for pesticide use.[140] Secondly, farmers were to maintain as permanent grassland the areas of their holdings declared as permanent grassland for the 2014 claim year. That said, they were to be allowed to convert up to 5 per cent of such reference areas, with further flexibility on the basis that the limit was not to be applicable in the case of *force majeure* or exceptional circumstances. At the same time, as noted by the European Court of Auditors, to fix a reference date in the future could prompt farmers to plough their permanent grassland prior to 2014.[141] Thirdly, farmers were to ensure that at least 7 per cent their eligible hectares (with the exception of areas under permanent grassland) formed an 'ecological focus area' (EFA). Illustrations of practices which would meet this requirement were 'land left fallow, terraces, landscape features, buffer strips and afforested areas', so generating criticism that the reforms would reduce production levels at the very time when food security had moved rapidly up the policy agenda.[142] Thus, Copa-Cogeca stated that 'it does not make sense to prohibit production on as much as 7% of land on each farm when the world needs more food and governments are trying to encourage a more bio-based economy'.[143] By contrast, Commissioner Cioloș countered that '[t]his is not set-aside!', instead regarding it as a measure to preserve biodiversity and make better use of existing landscape features.[144]

In addition to the greening component, clear notions of sustainability were to be found in reforms both to cross-compliance and to the legislative framework for Pillar II. Thus, in the proposed horizontal regulation, the 'climate change dimension' of cross-compliance was to be enhanced;[145] and, in particular, farmers were to be required to observe provisions of the Water Framework Directive

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[140] Committee on the Environment, Public Health and Food Safety, *Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on Agriculture and Rural Development on the Proposed Direct Payments Regulation*, (2011/0280(COD)) (September 2012) (Dan Jørgensen MEP being the Rapporteur). On pesticide use, generally, see, eg, O. Hamlyn, 'Sustainability and the failure of ambition in European pesticides regulation', (2015) 27 Journal of Environmental Law 405.

[141] European Court of Auditors, *Opinion No 1/2012 on Certain Proposals for Regulations Relating to the Common Agricultural Policy for the Period 2014-2020* (European Court of Auditors, Luxembourg, 2012) paragraph 124.

[142] There was no precise clarity as to how the 7 per cent figure was reached: see, eg, House of Commons Environment, Food and Rural Affairs Committee, *Greening the Common Agricultural Policy: First Report of Session 2012-13*, HC 170, paragraph 60.

[143] Copa-Cogeca, 'The Common Agricultural Policy After 2013: the Reaction of EU Farmers and Agri-Cooperatives to the Commission's Legislative Proposals' (Copa-Cogeca, Brussels, 2011) 6 (Copa-Cogeca being the pan-EU body representing farmers and agri-cooperatives).

[144] Commissioner Cioloș, SPEECH/12/112, *Meeting the Challenge*, Birmingham, 21 February 2012.

[145] See, eg, European Commission, COM (2011) 628 (n 130) Explanatory Memorandum, 7.

and the Pesticides Directive.[146] That said, the overall focus of these revisions would appear rather to have been as much the promotion of simplification.[147] For example, the number of cross-compliance obligations under the Habitats Directive would be reduced, while the optional GAEC in relation to appropriate machinery use to maintain soil structure was to be removed.[148] Further, with specific reference to the Water Framework Directive and the Pesticides Directive, farmers would not be required to observe any of their provisions until such time as the Directives had been implemented by all Member States and the obligations which were directly applicable to farmers had been identified.[149]

In the case of rural development, the proposed rural development regulation would reinforce existing climate change measures (as established at the time of the 'Health Check' of the CAP).[150] Not least, 'agri-environment-climate payments' were to replace the earlier 'agri-environment payments'.[151] And the broader sustainability agenda was also to be taken forward by the introduction of the 'European Innovation Partnership for Agricultural Productivity and Sustainability' (EIP). This was to:

a. promote a resource efficient, productive, low emission, climate friendly and resilient agricultural sector, working in harmony with the essential natural resources on which farming depends;
b. help deliver a steady supply of food, feed and biomaterials, both existing and new ones;
c. improve processes to preserve the environment, adapt to climate change and mitigate it;
d. build bridges between cutting-edge research knowledge and technology and farmers, businesses and advisory services.[152]

At the same time, the proposed rural development regulation countenanced 'sustainability' more broadly in social and economic as well as environmental terms. Indeed, the rural development regime was understood '[t]o ensure the

[146] Respectively, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, [2000] OJ L327/1; and Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides, [2009] OJ L309/71.

[147] See, eg, European Commission, COM (2011) 628 (n 130) Explanatory Memorandum, 7.

[148] *Ibid*, Annex II. For its inclusion under the earlier regime, see Council Regulation (EC)73/2009 (n 109) Annex III.

[149] European Commission, COM (2011) 628 (n 130) Article 93.

[150] European Commission, COM (2011) 627 (n 130). On rural development aspects of the proposed regulations, see, eg, J. Dwyer, 'Transformation for sustainable agriculture: what role for the second Pillar of CAP?', (2013) 2(1) Bio-based and Applied Economics 29.

[151] European Commission, COM (2011) 627 (n 130) Article 29: *cf* 2005 Rural Development Regulation (n 90) Article 39.

[152] European Commission, COM (2011) 627 (n 130) Article 61(1).

sustainable *development* of rural areas',[153] with social and economic concerns being directly behind such measures as those to provide basic services and village renewal in rural areas.[154]

On the other hand, a factor which had the capacity to militate against a more environmental focus was the proposal to revise the mechanism governing the transfer of funds between the two Pillars of the CAP. When the ability to effect these transfers was first introduced under the Agenda 2000 reforms,[155] a defining feature of the new initiative was that it was envisaged as a means of boosting funds for agri-environment and similar measures, therefore being confined to transfers from Pillar I to Pillar II, and not *vice versa*.[156] The proposed direct payments regulation, by contrast, envisaged changes which could see the budget for Pillar II reduced.[157] First, any transfers would be at the discretion of Member States, whereas under the mechanism applicable immediately prior to the 2013 CAP reforms sizeable funds were being generated for rural development programmes by compulsory transfers to Pillar II at the rate of 10 per cent (with an additional 4 per cent for amounts over 300,000 Euros).[158] Secondly, Bulgaria, Estonia, Finland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom would be able to 'reverse transfer' up to 5 per cent of Pillar II support to Pillar I.

3.2.4 Inter-institutional decision-making

As indicated, under the ordinary legislative procedure, the European Parliament enjoyed a substantially greater role in determining the form of the regulations as finally enacted.[159] And this influence was arguably most evident in the case of the

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[153] *Ibid*, Preamble (5) (emphasis added).

[154] *Ibid*, Article 21.

[155] For the legislation under the Agenda 2000 reforms first introducing transfers from Pillar I to Pillar II on an optional basis, see Council Regulation (EC) 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the common agricultural policy, [1999] OJ L160/113, Articles 4-5; and for the legislation later rendering them compulsory at the time of the 2003 Mid-term Review, see Council Regulation (EC) 1782/2003 (n 103) Article 10. Such transfers were often at that stage, and also subsequently, referred to as 'modulation': see, eg, European Commission, *Mid-term Review of the Common Agricultural Policy*, COM (2002) 394, *passim*.

[156] See, eg, Council Regulation (EC) 1782/2003 (n 103) Preamble (18).

[157] European Commission, COM (2011) 625 (n 130) Article 14.

[158] Council Regulation (EC) 73/2009 (n 109) Article 7. In addition, voluntary transfers in excess of 10 per cent had earlier been authorised by Council Regulation (EC) 378/2007 of 27 March 2007 laying down rules for voluntary modulation of direct payments provided for in Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and amending Regulation (EC) No 1290/2005, [2007] OJ L95/1. In the case of England, this led to an overall rate of 19 per cent for the period 2009-2012: Common Agricultural Policy Single Payment and Support Schemes Regulations 2005, SI 2005/219, Regulation 11 (as amended by SI 2007/3182).

[159] On inter-institutional decision-making in the context of the 2013 CAP reforms, see generally, eg, Greer and Hind (n 14); Matthews (n 14); Knops and Swinnen *et al* (n 14); and Swinnen (ed.) (n 2).

proposed direct payments regulation. Thus, in the decision of 13 March 2013 on the opening of inter-institutional negotiations, the European Parliament advocated amendments to the greening component which had the capacity to limit its effect and two examples may be given.[160] First, as has been seen, the original proposal of the European Commission would require farmers to cultivate at least three different crops where their arable land extended to more than three hectares, whereas the position adopted by the European Parliament was that there should be no crop diversification requirement unless their arable land extended to 10 hectares or more. Further, even if that higher threshold were reached, the European Parliament considered that the cultivation of at least two different crops would be sufficient unless the arable land of the farmer extended to more than 30 hectares (when the originally proposed requirement to cultivate at least three different crops would become applicable). Secondly, the European Commission had proposed that farmers should devote to EFAs at least 7 per cent of their eligible hectares (with the exception of areas under permanent grassland), whereas the position adopted by the European Parliament was that initially EFAs should be restricted to at least 3 per cent of their eligible hectares (with the exception of areas of permanent grassland and permanent pasture and permanent crops). The proportion would rise to 5 per cent as from 1 January 2016, but the full 7 per cent would not be reached until 2018, and then only after the European Commission had presented an evaluation report and the necessary legislative proposals to the European Parliament and the Council, with account to be taken of the impact on the environment and agricultural production. Moreover, the European Parliament did not regard the EFA obligation as necessary at all unless the arable land of the farmer covered more than 10 hectares and, in response to fears of a return to set aside, an amendment was put forward expressly to permit farmers to use EFAs for production, provided that there was neither use of pesticides nor fertiliser application. A similar approach could also be detected in the case of cross-compliance under the proposed horizontal regulation, where the European Parliament was in favour of deleting a GAEC relating to the protection of wetland and carbon rich soils, including a ban of first ploughing.[161] And, indeed, this measure did not find its way through to the Horizontal Regulation as enacted.[162]

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[160] *European Parliament Decision of 13 March 2013 on the opening of, and on the mandate for, interinstitutional negotiations on the proposal for a regulation of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy* (available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0084+0+DOC+XML+V0//EN&language=EN, last accessed on 29 June 2017). See also, *Agra-Europe*, No. 2557, 19 March 2013, *European Parliament Opts to Sit on the Fence over CAP 'Equivalence'*, 1 and 3.

[161] *European Parliament Decision of 13 March 2013 on the opening of, and on the mandate for, interinstitutional negotiations on the proposal for a regulation of the European Parliament and of the Council on the financing, management and monitoring of the CAP* (available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-87, last accessed on 29 June 2017).

[162] Horizontal Regulation (n 16) Annex II. That said, as will be considered later, the legislation as enacted did see some protection for wetland and carbon-rich soils within the greening component: see the Direct Payments Regulation (n 13) Article 45(1).

Accordingly, notwithstanding earlier indications of support by the European Parliament for sustainable agriculture (as found, not least, in the European Parliament Resolution of 8 July 2010), its stance towards the more specific greening agenda both as laid out in the proposed regulations and subsequently during the course of inter-institutional decision-making was somewhat more 'conservative'. Indeed, Greer and Hind at the time noted the strength of the agricultural interests in COMAGRI and predicted no major shift in agricultural policy:

> Despite the changes ushered in by the Lisbon Treaty, it is not yet evident that they will presage a radical alteration in the direction of agricultural policy and outcomes. While the [European Parliament] has a greater formal role in the decision-making process, this does not mean that the policy arena has been substantially opened-up or that it will be increasingly contentious. It is entirely possible that giving the [European Parliament] a greater role in the CAP might reinforce the status quo around the state-assisted paradigm and agricultural *exceptionalism*.[163]

Moreover, a more 'conservative' approach could also be detected in the positions adopted by the Council. When the General Approach towards the proposed regulations was agreed by the Agriculture and Fisheries Council on 18-19 March 2013, shortly after the decisions of the European Parliament, the stance again taken was that the EFA measure should be relaxed.[164] In particular, under the General Approach it would only become applicable where the eligible agricultural area of a holding excluding areas under permanent grassland covered more than 15 hectares, a potentially higher threshold than the 10 hectares of arable land proposed by the European Parliament;[165] and further weakening of the measure was intimated by the proposed amendment that 50 per cent of EFA requirements should be applied at regional level and/or collectively by groups of farmers. However, whereas the European Parliament advocated an initial EFA rate of 3 per cent, the Agriculture and Fisheries Council opted for a higher proportion,

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[163] Greer and Hind (n 14) at 338-339 (emphasis in original). See also J.F.M. Swinnen and L. Knops, 'CAP Reform: Will the European Parliament Take the Bull by the Horns?' (CEPS Commentary, 7 June 2012) (available at http://www.ceps.eu/book/cap-reform-will-european-parliament-take-bull-horns, last accessed on 29 June 2017); and K. Hart, 'The Fate of Green Direct Payments in the CAP Reform Negotiations', in Swinnen (ed.) (n 2) 245.

[164] See, eg, European Council, Press Release, 3232nd Council Meeting – Agriculture and Fisheries – Brussels, 18-19 March 2013 (available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/agricult/136310.pdf, last accessed on 29 June 2017); and, for important proposed amendments, see, eg, http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%207539%202013%20INIT (last accessed on 29 June 2017).

[165] It should be noted that the threshold proposed by the European Parliament was set by reference only to 'arable land', whereas in the case of both the European Commission and the Agriculture and Fisheries Council reference was made respectively to more broadly defined 'eligible hectares' and 'eligible agricultural areas of a holding', excluding only areas under permanent grassland.

5 per cent, albeit still less than the 7 per cent originally proposed by the European Commission.[166]

In addition, the Agriculture and Fisheries Council was less equivocal than the European Parliament with regard to the contentious issue of 'double funding'.[167] A major concern was that the greening component could result in farmers obtaining receipt of payment for the same activities under both Pillar I and Pillar II: for example, a farmer who entered into an agri-environment-climate scheme under the rural development programme of their Member State might well thereby be undertaking forms of land management necessary to comply with the provisions for EFAs. The General Approach of the Agriculture and Fisheries Council accepted the possibility of such double funding, in contrast to the more nuanced position within the European Parliament: COMAGRI in its vote of January 2013 was in favour, but the Plenary Vote of the European Parliament itself in March 2013 was against.[168]

A matter of importance in this context is that the General Approach of the Agriculture and Fisheries Council, and arguably the inter-institutional negotiations more generally, would seem in part at least to have been pre-empted by the earlier Conclusions of the European Council on the Multiannual Financial Framework.[169] Those Conclusions had extended beyond establishing annual ceilings on commitment appropriations by category of expenditure, as required by Article 312(3) TFEU, so as to address also more detailed CAP issues which would generally be regarded as the preserve of the ordinary legislative procedure with its enhanced role for the European Parliament.[170] And, in the words of Matthews, 'the issues on which the European Council had pronounced in its MFF conclusions were given a privileged status by the Agriculture Council negotiators in the trilogue discussions'.[171] More specifically with reference to greening, the Conclusions had stated that '[t]he requirement to have an ecological focus area (EFA) on each agricultural holding will be implemented

[166] Similarly to the European Parliament, it was foreseen that this proportion would again rise, if appropriate, to 7 per cent as from 2018 following an evaluation report from the European Commission.

[167] For a full discussion of this aspect, see, eg, K. Hart, *Principles of Double Funding*: Briefing for the UK Land Use Policy Group (Institute for European Environmental Policy, London, 2013); and K. Hart, 'The Fate of Green Direct Payments in the CAP Reform Negotiations', in Swinnen (ed.) (n 2) 245.

[168] See, eg, I. Fertő and A. Kovacs, *Analysis of the European Parliamentary Amendments to the Legislative Proposals for the 2013 CAP Reform* (Budapest, 2014) (available at https://www.ceps.eu/system/files/EP_Amendment_Analysis%20Case%20Study.pdf, last accessed on 29 June 2017), Annex II; and I. Fertő and A. Kovacs, 'Parliamentary Amendments to the Legislative Proposals of the 2013 CAP Reform', in Swinnen (ed.) (n 2) 379.

[169] European Council, Conclusions: Multiannual Financial Framework (7-8 February 2013) (available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2037%202013%20INIT, last accessed on 29 June 2017).

[170] For excellent discussion of this aspect, see A. Matthews, 'The Multi-annual Financial Framework and the 2013 CAP Reform', in Swinnen (ed.) (n 2) 169.

[171] *Ibid*, at 179.

in ways that do not require the land in question to be taken out of production and that avoids unjustified losses in the income of farmers'.[172] Such a statement would seem to prioritise food security (and, indeed, more narrowly production) over preservation of the productive capacity of the ecological resource base. And the vision of sustainability which it projected was not dissimilar to that of the European Parliament when distinguishing between 'first-generation' and 'second-generation' public goods. In this light, there were weighty forces in play militating against the enactment and implementation of ambitious greening measures, although it must at the same time be recognised that there were significant tensions within the European Parliament and among the Member States as to the degree of environmental additionality which should be delivered by the reform process: for example, the level of ambition was distinctly greater in the 'Stockholm Group' of Member States.[173]

3.2.5 Political agreement

Following extensive trilogues, the European Commission, the European Parliament and the Council on 26 June 2013 reached political agreement on most issues of the CAP reforms, including the bulk of the greening agenda.[174] And much of the credit for the fact that this could be reached at all may be attributed to the diplomatic skills of the Irish Presidency and, more precisely, the Irish Minister for Agriculture, Food and Marine, Simon Coveney, and his staff.[175] The agreement was hailed by Commissioner Cioloș as 'making direct payments fairer and greener'; and he also emphasised that, in consequence, the CAP would 'play a key part in achieving the overall objective of promoting smart, sustainable and inclusive growth'.[176] Central to these claims was the introduction of the greening component which, as foreseen in the proposed direct payments regulation,

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[172] European Council, Conclusions: Multiannual Financial Framework (7-8 February 2013) (available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2037%202013%20INIT, last accessed on 29 June 2017) paragraph 67.

[173] See, eg, Hart, Buckwell and Baldock (n 135) 7 (finding that the influence of the 'Stockholm Group' upon the formally approved position of the Agriculture and Fisheries Council was relatively limited).

[174] European Commission, IP/13/613, *Political Agreement on New Direction for Common Agricultural Policy*, Brussels, 26 June 2013; and European Commission, MEMO/13/621, *CAP Reform – an Explanation of the Main Elements*, Brussels, 26 June 2013. Among the issues which remained to be resolved were the transfer of funds between Pillars (which had the potential to impact materially on the funding of agri-environment-climate schemes under Pillar II); compulsory 'degressivity' and voluntary 'capping' of direct payments; and convergence in the level of direct payments as between Member States. A matter of note is that all of these being issues had been covered in the Conclusions of the European Council on the Multiannual Financial Framework: see Matthews, 'The Multi-annual Financial Framework and the 2013 CAP Reform', in Swinnen (ed.) (n 2) 169; and they were subsequently agreed on 24 September 2013: European Commission, IP/13/864, *Reform of the Common Agricultural Policy (CAP): Political Agreement Reached on Last Remaining Points*, Brussels, 24 September 2013.

[175] See, eg, A. Matthews, *A Triumph for the Irish Presidency – a Damp Squib for CAP Reform* (27 June 2013) (available at http://capreform.eu/a-triumph-for-the-irish-presidency-a-damp-squib-for-cap-reform/, last accessed on 29 June 2017).

[176] European Commission, IP/13/613, *Political Agreement on New Direction for Common Agricultural Policy*, Brussels, 26 June 2013.

accounted for 30 per cent of Pillar I national ceilings. At the same time, the basic structure of the greening component was retained, with separate provisions to institute crop diversification, the maintenance of permanent grassland and EFAs. That said, in terms of the detail, there was considerable watering down of all three measures, this being particularly apparent if close comparison were drawn with the proposed direct payments regulation. For example, under the proposed regulation EFAs were initially to extend to at least 7 per cent of all eligible hectares with the exception of permanent grassland, whereas under the political agreement this proportion was reduced to 5 per cent, and then only in respect of arable land (again excluding permanent grassland), with full exemption below a threshold of 15 hectares. On the other hand, reflecting the earlier positions adopted by both the European Parliament and the Agriculture and Fisheries Council, there was provision for the percentage to rise to 7 per cent after a European Commission report in 2017 and a legislative proposal.

Beyond the greening component, cross-compliance was 'simplified' by excluding 'rules where there are no clear and controllable obligations for farmers', while it was confirmed that the Water Framework Directive and the Pesticides Directives would only be incorporated into the cross-compliance system once it had been demonstrated that they had been properly applied in all Member States and that obligations to farmers had been clearly identified.[177] Further, as noted, among the issues which were not resolved in the political agreement of 26 June 2013 was that of the transfer of funds between Pillars. However, in the second political agreement of 24 September 2013, this issue was likewise settled.[178] Member States would be able to transfer up to 15 per cent of Pillar I support to Pillar II and they would also have the option of 'reverse transferring' up to 15 per cent of Pillar II support to Pillar I (with the possibility of increasing the rate to up to 25 per cent in the case of Member States with less than 90 per cent of the EU average for direct payments).

[177] European Commission, MEMO/13/621, *CAP Reform – an Explanation of the Main Elements*, Brussels, 26 June 2013.

[178] European Commission, IP/13/864, *Reform of the Common Agricultural Policy (CAP): Political Agreement Reached on Last Remaining Points*, Brussels, 24 September 2013; and European Commission, MEMO/13/937, *CAP Reform – an Explanation of the Main Elements*, Brussels, 25 October 2013.

4 The implementing legislation

4.1 Introduction

The Regulations of the European Parliament and of the Council to implement the political agreements were issued on 17 December 2013 and, in the context of greening direct payments, three enjoy particular resonance: the Direct Payments Regulation itself; the Horizontal Regulation; and the Rural Development Regulation. Each of these will be considered in turn, together with the Commission Regulations which supplement and implement them.

4.2 Direct Payments Regulation

A notable feature of the greening component as enacted in the Direct Payments Regulation is that the provisions are substantially longer than those proposed by the European Commission.[179] As indicated by the Irish Minister for Agriculture, Food and the Marine, this may be regarded as a function of the need to strike a balance between and accommodate the respective interests of the Member States, the European Parliament and the European Commission.[180] Major areas of legislative expansion included the measures governing the extent to which existing practices would satisfy the criteria for the greening component and the measures to prevent double-funding. The proposed direct payments regulation had, for example, provided that organic farmers should in the correct circumstances enjoy entitlement *ipso facto*, becoming 'green by definition';[181] but the regime in the Direct Payments Regulation is far more extensive. Thus, while it too confers on organic farmers such *ipso facto* entitlement,[182] detailed provisions in the new

[179] Each of the five Articles is of greater length and the Direct Payments Regulation also includes two new Annexes of relevance (Annex IX and Annex X). In addition, for subsequent legislative activity by the European Commission, see, eg: Commission Delegated Regulation (EU) 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation, [2014] OJ 181/1 (as amended by Commission Delegated Regulation (EU) 1001/2014 of 18 July 2014 amending Annex X to Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, [2014] OJ L281/1); and Commission Implementing Regulation (EU) 641/2014 of 16 June 2014 laying down rules for the application of Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, [2014] OJ L181/74.

[180] See, eg, Simon Coveney, Irish Minister for Agriculture, Food and the Marine, Press Release, *Historic Day for the Common Agricultural Policy as Irish Presidency Steers European Institutions to Landmark Reform Deal*, Dublin 26 June 2013 (available at http://www.agriculture.gov.ie/press/pressreleases/2013/june/title,70845,en.html, last accessed on 29 June 2017).

[181] European Commission, COM (2011) 625 (n 130) Article 29(4).

[182] Direct Payments Regulation (n 13) Article 43(11).

Annex IX lay down a range of practices which are considered equivalent to crop diversification, the maintenance of permanent grassland and EFAs, on the basis that they yield an equivalent or higher level of benefit for the climate and the environment: by way of illustration, both ecological set-aside and the conversion of arable land into permanent grassland (so long as it is extensively used) are practices 'equivalent' to EFAs.[183]

That said, it should also be re-emphasised that the basic structure of the greening component as enacted remains essentially the same as in the proposed direct payments regulation, with specific requirements in respect of crop diversification, the maintenance of permanent grassland and EFAs.[184] Each of these will be addressed in turn, but as a preliminary matter it may be noted that the Direct Payments Regulation provided greater scope for the use of both transfers from Pillar I to Pillar II and transfers from Pillar II to Pillar I. Thus, Article 14 ('flexibility between pillars') permits Member States to transfer up to 15 per cent of national ceilings from Pillar I to Pillar II (as opposed to the 10 per cent earlier proposed), while in the case of 'reverse transfers' from Pillar II to Pillar I the change is even greater: as a general rule, the proportion transferred may reach 15 per cent, but for Bulgaria, Estonia, Spain, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Finland, Sweden and the United Kingdom it may reach 25 per cent (as opposed to the 5 per cent limit earlier proposed, and then only for Bulgaria, Estonia, Spain, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Finland, Sweden and the United Kingdom). The subsequent decisions of the Member States have, nonetheless, served to limit the potentially negative impact on rural development programmes.[185] Over the claim years 2014-2015 to 2019-2020, eleven Member States have decided to transfer funds from Pillar I to Pillar II, with the United Kingdom opting for as high as 10.8 per cent in each claim year, while five Member States (Croatia, Malta, Poland, Slovakia and Hungary) have decided to make 'reverse transfer', with Poland opting for the full 25 per cent in each claim year. In total, over the six-year period, transfers from Pillar I to Pillar II will amount to 6.4 billion Euros and 'reverse transfers' will amount to 3.4 billion Euros, leaving a net inflow to rural development programmes of 3 billion Euros.[186] Further, to the extent that sums have been transferred from Pillar II to Pillar I, 30 per cent becomes attributable to the greening component and arguably therefore still contributes to the sustainability agenda.

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[183] *Ibid*, Annex IX, III(1) and (8).

[184] As with the proposed direct payments regulation, the greening component is likewise not applicable to those participating in the new Small Farmers Scheme: Direct Payments Regulation (n 13) Article 61(3). For the Small Farmers Scheme, see *ibid*, Articles 61-65.

[185] See, eg, European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 4; and European Commission, *Mapping and Analysis of the Implementation of the CAP: Final Report* (European Commission, Brussels, 2016) (*2016 Implementation Report*)14.

[186] The sums to be transferred are subject to review in the case of the calendar years 2018 onwards: Direct Payments Regulation (n 13) Article 14(1).

4.2.1 Crop diversification

Notwithstanding wide consensus that crop rotation would generate greater environmental dividends,[187] the legislation as enacted continues with crop diversification. This policy choice may, in part at least, be explained by the administrative difficulties which would accompany any obligation upon farmers to undertake crop rotation. By its very nature, such an obligation would extend over several years whereas, in the words of the European Commission, crop diversification 'is better suited for Pillar I as an annual measure'.[188] That said, as noted by Matthews, these administrative difficulties had not earlier precluded the inclusion of standards of crop rotation as an optional GAEC.[189] Further, the detailed rules governing crop diversification rules are somewhat less stringent than the European Commission proposed. As has been seen, under the proposed direct payments regulation, farmers would have been required, in principle, to cultivate at least three different crops where their arable land extended to more than three hectares, with none of the three crops to cover less than 5 per cent of the arable land and the main crop not to exceed 70 per cent of the arable land. And it has also been seen that the European Parliament was in favour of some retreat from that position. In the event, Article 44(1) of the Direct Payments Regulation provides that, where the arable land of the farmer covers between 10 and 30 hectares, then as a general rule at least two different crops must be grown, with the main crop not to cover more than 75 per cent of the arable land; and, where the arable land covers more than 30 hectares, then as a general rule at least three different crops must be grown, the main crop not to cover more than 75 per cent of the arable land (and the two main crops together not to cover more than 95 per cent).[190] Notably, the legislation as enacted in several material ways privileges grassland and land lying fallow, a feature which has the capacity to reap environmental dividends, although at the expense of losing the simplicity to be found in the proposed direct payments regulation. Thus, bespoke rules apply to holdings where grasses or other herbaceous forage or land lying fallow cover more than 75 per cent of the arable land;[191] and complete exemptions from the crop diversification requirements are extended to, *inter alia*, 'farms that already fulfil the objectives of crop diversification as a result of being covered to

[187] See, eg, Committee on the Environment, Public Health and Food Safety (n 140). It may be observed, however, that certain forms of crop rotation are regarded as an 'equivalent practice' to crop diversification: Direct Payments Regulation (n 13) Annex IX, I(2).

[188] *Impact Assessment* (n 133) Annex 2, 10.

[189] A. Matthews,, *Environmental Public Goods in the New CAP: Impact of Greening Proposals and Possible Alternatives - Note* (European Parliament, Brussels, 2012) 48. For the relevant legislation, see Council Regulation (EC) 73/2009 (n 109) Annex III.

[190] In both cases, special provision is made for arable land cultivated with crops under water for a significant part of the year or for a significant part of the crop cycle.

[191] Direct Payments Regulation (n 13) Article 44(2).

a significant extent by grassland or fallowland'.[192] On the other hand, the general rules are relaxed in the case of holdings which are situated in areas north of 62nd parallel or certain adjacent areas. In their case, the legislation simply requires that, where the arable land extends to more than 10 hectares, there must be at least two crops on that land, with no crop to cover more than 75 per cent (unless the main crop is grasses or other herbaceous forage, or land lying fallow).[193]

For these purposes, provision is also made as to what qualifies as a 'crop', the definition being found in Article 44(4):

a. a culture of any of the different genera defined in the botanical classification of crops;
b. a culture of any of the species in the case of *Brassicaceae*, *Solanaceae*, and *Cucurbitaceae*;
c. land lying fallow;
d. grasses or other herbaceous forage.[194]

And arguably the rigour of the regime is again relaxed by permitting winter crops and spring crops to be considered distinct crops, even if of the same genus (although the supplementary Commission Delegated Regulation does provide that, where a main crop is under-sown with a second crop, the area is to be considered as covered only with the main crop).[195]

What would now seem relatively clear is that the introduction of the crop diversification requirement has had limited impact on farming practice. For example, analysis on the basis of the IFM-CAP model by the Joint Research Centre in 2015 found that agricultural income at the level of the Member State decreases by less than 1 per cent and that the proportion of reallocated land represents less than 0.5 per cent of the total agricultural area, although individual farmers could see a significant fall in income in excess of 10 per cent.[196] And similar analysis on the basis of the IFM-CAP model by the European Commission concluded that, when comparing the difference between a *status*

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[192] *Ibid*, Preamble (41). The detailed provisions are found in Article 44(3)(a) and (b), under which the crop diversification requirement does not apply to holdings '(a) where more than 75 % of the arable land is used for the production of grasses or other herbaceous forage, is land lying fallow, or is subject to a combination of these uses, provided that the arable area not covered by these uses does not exceed 30 hectares'; or '(b) where more than 75 % of the eligible agricultural area is permanent grassland, is used for the production of grasses or other herbaceous forage or for the cultivation of crops under water for a significant part of the year or for a significant part of the crop cycle, or is subject to a combination of these uses, provided that the arable area not covered by these uses does not exceed 30 hectares'.

[193] *Ibid*, Article 44(3)(d).

[194] For the level of detail which this may require, see, in the case of England, DEFRA, *What Counts as a 'Crop' for the Crop Diversification Rules?* (DEFRA, London, 2014) (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368520/cap-reform-october-2014-diversification-v2.pdf, last accessed on 29 June 2017).

[195] Commission Delegated Regulation (EU) 639/2014 (n 179) Article 40(3).

[196] Louhichi *et al* (n 108) 60.

quo policy assumption and greening in 2025, the area reallocated by reason of the crop diversification requirement represents 0.8 per cent of arable area and 0.6 per cent of utilised agricultural area (UAA) in the EU-27.[197] The specific response of the European Commission to the latter analysis has, however, been positive. In its view, the figures indicate that most farmers are already operating in compliance with the crop diversification requirement, which is seen rather as a measure successfully targeting those who undertake monoculture.[198]

4.2.2 Permanent grassland

The maintenance of permanent grassland is understood in the implementing legislation to confer environmental benefits with particular reference to carbon sequestration.[199] Indeed, consistent with this understanding, the pre-existing cross-compliance regime contained an obligation to maintain permanent pasture,[200] while it may be reiterated that the proposed horizontal regulation foresaw the introduction of a new GAEC relating to the protection of wetland and carbon rich soils, including a ban of first ploughing. Following the 2013 CAP reforms, the delivery of environmental benefits through permanent pasture/grassland effectively ceased to be the province of the cross-compliance regime, instead becoming one of the functions of the greening component. More precisely, the Direct Payments Regulation imposes two separate obligations in this regard.[201]

First, farmers are not permitted to convert or plough permanent grassland situated in areas designated by Member States.[202] Such designation is compulsory in the case of permanent grasslands which are 'environmentally sensitive' in areas covered by the Habitats Directive and the Wild Birds Directive (the Natura 2000 network) and which need strict protection in order to meet the objectives of

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[197] European Commission, *Commission Staff Working Document – Review of Greening After One Year*, SWD (2016) 218 (*Review of Greening*) Annex 4, 31.

[198] *Ibid*, 14-15. Others take a different view: see, eg, A. Matthews, *Scrap the Crop Diversification Greening Requirement and Find a Sensible Replacement* (4 August 2015) (available at http://capreform.eu/scrap-the-crop-diversification-greening-requirement-and-find-a-sensible-replacement/, last accessed on 29 June 2017).

[199] Direct Payments Regulation (n 13) Preamble (42).

[200] Council Regulation (EC) 73/2009 (n 109) Article 6(2).

[201] Direct Payments Regulation (n 13) Article 45. What constitutes 'permanent grassland' is defined in Article 4(1)(h): '"permanent grassland and permanent pasture" (together referred to as "permanent grassland") means land used to grow grasses or other herbaceous forage naturally (selfseeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for five years or more; it may include other species such as shrubs and/or trees which can be grazed provided that the grasses and other herbaceous forage remain predominant as well as, where Member States so decide, land which can be grazed and which forms part of established local practices where grasses and other herbaceous forage are traditionally not predominant in grazing areas'. For a decision of the CJEU on the necessary degree of permanence required under the earlier cross-compliance regime, see Case C-47/13, *Martin Grund v Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein*, Judgment of 2 October 2014, ECLI:EU:C:2014:2248 (in respect of 'permanent pasture').

[202] Direct Payments Regulation (n 13) Article 45(1).

those Directives. Significantly, in this context, specific reference is made to peat and wetlands. Over and above this compulsory designation, and so as ensure the protection of 'environmentally valuable permanent grasslands', Member States may also designate sensitive areas outside the Natura 2000 network, including permanent grasslands on carbon-rich soils.

Secondly, if the percentage of permanent grassland decreases by more than 5 per cent as compared to the total agricultural area (at national, regional or sub-regional level), then as a general rule the Member State concerned must impose obligations at holding level to reconvert land into permanent grassland for those farmers who have land at their disposal which has been converted from permanent pasture or permanent grassland to other uses.[203] By contrast, the earlier cross-compliance obligation to maintain permanent pasture applied at national or regional level and, in duly justified circumstances, Member States could derogate from this obligation by up to 10 per cent.[204]

Accordingly, the greening component saw potentially a degree of tightening of the EU rules, but at a general level it may be noted that the sustainability credentials of permanent grassland are not unalloyed in that there are trade-offs to be made. On the one hand, such land use operates as a carbon sink and conversion to arable cropping is widely understood to have very negative climate change implications.[205] On the other hand, permanent grassland is the natural environment for livestock rearing and CH_4 emissions from the livestock sector have attracted attention as a source of GHG emissions: not least, in the report by the Food and Agriculture Organization (FAO), *Livestock's Long Shadow: Environmental Issues and Options*, the sector was regarded as responsible for 18 per cent of GHG emissions in CO_2 equivalent.[206]

4.2.3 EFAs

Article 46(1) of the Direct Payments Regulation saw implementation of EFAs as from 1 January 2015; and, above a threshold of 15 hectares of arable land on

[203] Direct Payments Regulation (n 13) Article 45(2)-(4). These obligations are not imposed where the decrease is the result of afforestation, but only where the afforestation is compatible with the environment and does not include plantations of short rotation coppice, Christmas trees or fast growing trees for energy production. For calculation of the reference ratio against which the 5 per cent figure is applied, see *ibid*, Article 45(2).

[204] For the detailed provisions, see Council Regulation (EC) 73/2009 (n 109) Article 6(2); and Commission Regulation (EC) 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector, [2009] OJ L316/65, Article 3(2).

[205] See, eg, P. Smith *et al*, 'Agriculture, Forestry and Other Land Use (AFOLU)', in *IPCC, 2014: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York, 2014) 811.

[206] FAO, *Livestock's Long Shadow: Environmental Issues and Options* (FAO, Rome, 2006) xxi.

a holding, they extend to 5 per cent of the arable land, albeit with an extension of coverage to at least 7 per cent envisaged subject to a legislative act of the European Parliament and of the Council.[207] The more precise form of regulation adopted is similar to that advocated by the European Parliament Resolution of 23 June 2011, namely a EU list describing various forms of land use from which Member States choose those which they wish to qualify as EFAs in their territory. The EU list is as follows:

a. land lying fallow;
b. terraces;
c. landscape features;[208]
d. buffer strips;
e. hectares of agro-forestry that receive, or have received, support under the rural development regime;
f. strips of eligible hectares along forest edges;
g. areas with short rotation coppice where there has been no use of mineral fertiliser and/or plant protection products;
h. afforested areas which had given a right to payment under the Single Payment Scheme in 2008 and which had received rural development support;
i. areas with catch crops, or green cover established by the planting and germination of seeds (but subject to weighting factors); and
j. areas with nitrogen-fixing crops.[209]

As a preliminary matter, it may be highlighted that this form of regulation was not the one preferred in the *Impact Assessment* which went so far as to state that, '[f]or the greening to be effective, it is key not to go for a "menu" approach with a list of measures, offering choice to Member States and/or farmers', since 'such an approach would very much water down the greening effect, especially if the payment does not match the efforts required by farmers, leading them to choose the measures with which they comply already or the measures with the least cost, thus bringing less environmental benefits'.[210] At the same time, there was fear that the extent of the choice would generate difficulties in ensuring coherence with cross-compliance measures and Pillar II, the preference rather being for 'an approach to greening with only a few measures which yield significant environmental benefits'.[211]

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[207] The political agreement of 26 June 2013 foresaw this extension as from 2018: European Commission, IP/13/613, *Political Agreement on New Direction for Common Agricultural Policy*, Brussels, 26 June 2013.

[208] What constitutes a 'landscape feature' may be substantially limited at the discretion of Member States: Commission Delegated Regulation (EU) 639/2014 (n 179) Article 45(4).

[209] Direct Payment Regulation (n 13) Article 46(2).

[210] *Impact Assessment* (n 133) Annex 2, 9.

[211] *Ibid*. For full discussion of this aspect, see Hart, Buckwell and Baldock (n 135) 6-7.

Four more specific aspects of the EFA regime as enacted may also be highlighted. First, when compared with the proposed direct payments regulation, there is considerable scope to engage in production (such as catch crops, green cover and nitrogen-fixing crops). This would seem to address some of the earlier criticism that EFAs would have the effect of reducing output at a time of increasing food insecurity; and indeed, the European Commission in its *Review of Greening* expressly acknowledges these concerns.[212] At the same time, the legislation itself expressly acknowledges that certain practices may have merely indirect benefits for biodiversity, these indirect benefits being achieved through reduced use of inputs;[213] and, accordingly, Member States are authorised to apply conversion and/or weighting factors so as ensure that such practices deliver the full environmental/climate change dividend, with the provisions being mandatory in circumstances which include the growing of catch crops or green cover and areas with nitrogen-fixing crops.[214] For example, areas with catch crops and green cover have a weighting factor of 0.3, while buffer strips, which are understood to deliver an enhanced benefit, have a weighting factor of 1.5; and, notably, areas with nitrogen-fixing crops were initially accorded a weighting factor of 0.3, but this has subsequently been increased to 0.7.[215]

In the event, when making their selection from this list of options, Member States have shown a strong preference for land uses which will permit the continuation of production.[216] As at June 2016, the most dominant option (chosen in every Member State with the exception of Denmark) was areas with nitrogen-fixing crops, which adds significance to the increase in their weighting factor; and production may also occur, for example, in the case of short rotation coppice (chosen in 21 Member States) and catch crops or green cover (chosen in 20 Member States).[217] Further, the option which proved most popular after areas

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[212] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 13.

[213] Direct Payment Regulation (n 13) Preamble (44).

[214] *Ibid*, Article 46(3); and, for the Table of conversion and/or weighting factors, Annex X, replaced by Commission Delegated Regulation (EU) 639/2014 (n 179) (as amended by Commission Delegated Regulation (EU) 1001/2014 (n 179)).

[215] *Ibid*.

[216] European Commission, *Report from the Commission to the European Parliament and to the Council on the Implementation of the Ecological Focus Area Obligation under the Green Direct Payment Scheme*, COM (2017) 152 (*EFA Report*) (which includes material for both 2015 and 2016, finding that there were few changes in 2016: 13). The *EFA Report* made considerable reference to data supplied by an 'EFA calculator', a modelling tool developed by the University of Hertfordshire with Joint Research Centre co-ordination: *ibid*, 4. See also, eg, R. Henke *et al*, *Implementation of the First Pillar of the CAP 2014-2020 in the EU Member States* (European Parliament, Brussels, 2015) Table 1.13.

[217] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 15. In the case of short rotation coppice, see Case T-662/14, *Hungary v Commission*, Judgment of 1 June 2016, ECLI:EU:T:2016:328, where it was held legitimate to restrict planting to indigenous species on the basis that 'the planting of species which are clearly not indigenous does not necessarily contribute towards the safeguarding of the natural environment or the ecosystem of agricultural land': paragraph 31; and, for the relevant legislation, see Article 45(8) of Commission Delegated Regulation (EU) 639/2014 (n 179).

with nitrogen-fixing crops was land lying fallow (chosen in every Member State with the exception of the Netherlands and Romania) and this form of land use was already an established component of crop rotations. Indeed, the European Commission has found that a key criterion for Member States when making their selection was the ability for farmers to exploit their 'usual practices'.[218] In this light, it is perhaps not surprising that initial findings by the European Commission revealed that, not just the EFA regime, but also the greening component more generally, had 'been implemented without any significant short-term effect on production levels';[219] and that, with specific reference to EFAs, the main potential changes in land use were a greater proportion of fallow land and of protein crops (8.9 per cent and 4.4 per cent respectively),[220] while a particularly significant statistic is that by 2015 EU leguminous crop areas had increased by 20 per cent since 2013.[221]

Accordingly, in terms of delivering 'sustainable agriculture', the EFA regime would appear to have had little impact on the production element of the equation, while it is yet early days to judge the extent to which it has preserved the productive capacity of the ecological resource base, as conceded in the initial findings of the European Commission.[222] For the present, it may also be observed that, consistent with the production imperative, a 2015 review of nine Member States reported, in the case of nitrogen-fixing crops, the Netherlands to be the only Member State to have banned the use of fertilisers; and, in the case of catch crops and green cover, only Germany to have banned both fertilisers and pesticides, with the Netherlands also banning pesticide use.[223] Moreover, with reference to all the Member States, European Commission data for the same year found that only four Member States had imposed environmental restrictions on inputs for catch crops and only one for nitrogen-fixing crops, with these differential burdens generating some concerns as to the maintenance of a 'level playing field' across the EU.[224]

Secondly, as with crop diversification, there are material exemptions which focus on grassland. The EFA requirements do not apply where more than 75 per cent of the arable land is used for the production of grasses or other herbaceous forage, is lying fallow or is used for cultivation of leguminous crops (or is subject to a combination of those uses), provided that the arable area not so covered is

[218] European Commission , *EFA Report*, COM (2017) 152 (n 216) 7.
[219] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 14.
[220] *Ibid*, 15.
[221] European Commission, *EFA Report*, COM (2017) 152 (n 216) 8.
[222] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 15.
[223] K. Hart, *Green Direct Payments: Implementation Choices of Nine Member States and Their Environmental Implications* (Institute for European Environmental Policy, London, 2015) iii (the Member States concerned being: France, Germany, Italy, Hungary, the Netherlands, Poland, Romania, Spain and all four regions of the UK).
[224] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 12-13; and European Commission, *EFA Report*, COM (2017) 152 (n 216) 7.

not in excess of 30 hectares.[225] And they likewise do not apply where more than 75 per cent of the eligible agricultural area is permanent grassland, is used for the production of grasses or other herbaceous forage or for the cultivation of crops under water, whether for a significant part of the year or a significant part of the crop cycle (or is subject to a combination of those uses), provided again that the arable area not so covered is not in excess of 30 hectares.[226]

Thirdly, a further innovation as compared to the proposed direct payments regulation is that Member States may opt to allow farmers whose holdings are in close proximity to undertake 'collective implementation', so long as the EFAs concerned are contiguous.[227] This should provide the opportunity for greater connectivity of habitats which is regarded as an important factor in promoting biodiversity,[228] with multidisciplinary research indicating that 'clustering' environmental action can generate additional environmental benefits without high economic cost.[229] Limitations on such implementation are, however, imposed: in particular, the number of participating farmers must not exceed ten. And only two Member States (the Netherlands and Poland) are taking advantage of this option.[230]

Fourthly, and finally, Member States with more than 50 per cent of their total land surface area covered by forest may elect that the EFA requirements are not to apply to holdings situated in areas designated by those Member States as areas facing 'natural constraints', provided that more than 50 per cent of the relevant 'unit' is covered by forest and there is more than three times as much forest land as agricultural land.[231] Five Member States meet these criteria, of which four have elected to apply the exemption (Estonia, Finland, Latvia and Sweden).[232]

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[225] Direct Payments Regulation (n 13) Article 46(4)(a).

[226] *Ibid*, Article 46(4)(b).

[227] *Ibid*, Article 46(6).

[228] See, eg, J.-C. Bureau, *The Biodiversity Consequences of Killing Ecological Focus Areas* (1 March 2013) (available at http://capreform.eu/the-biodiversity-consequences-of-the-killing-of-the-ecological-focus-area-measure-by-the-council-and-the-comagri/, last accessed on 29 June 2017).

[229] See, eg, K. Prager, M. Reed and A. Scott, 'Encouraging collaboration for the provision of ecosystem services at a landscape scale - Rethinking agri-environmental payments', (2012) 29 Land Use Policy 244; and J. Leventon *et al*, 'Collaboration or fragmentation? Biodiversity management through the common agricultural policy', (2017) 64 Land Use Policy 1.

[230] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 14 (but see also Henke *et al* (n 216) Table 1.13, where it is indicated that the region of Flanders has opted for collective implementation) .

[231] Direct Payments Regulation (n 13) Article 46(7). Designation by the Member State of areas facing natural constraints is to be undertaken in accordance with Article 32(1)(a) or (b) of the Rural Development Regulation (n 17); and identification of the relevant 'unit' is to be undertaken in accordance with Article 46(7) second sub-paragraph of the Direct Payments Regulation (n 13).

[232] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 14. For useful data on forest area, see, eg, World Bank, *Forest Area (% of Land Area)* (available at http://data.worldbank.org/indicator/AG.LND.FRST.ZS, last accessed on 29 June 2017) (revealing, for example, that in 2012 69.2 per cent of Sweden was 'forest area').

4.3 Horizontal Regulation

The Horizontal Regulation, by virtue of Articles 91-101 and Annex II, lays down the current regime governing cross-compliance for the vast majority of direct payments.[233] In itself, this is a departure from the earlier legislative framework under which separate provision was made in respect of Pillar I and Pillar II.[234] And a change of substance, as opposed to legislative form, is that the original focus of the cross-compliance regime on, *inter alia*, environment has been replaced by a broader focus on 'environment, climate change and the good agricultural condition of the land'.[235] Nevertheless, consistent with the simplification agenda already mentioned,[236] the detailed provisions as enacted do not mark any step-change in terms of rigour. For example, following the pattern of the proposed horizontal regulation, the number of cross-compliance provisions under the Habitats Directive has actually been reduced, while the GAEC mandating appropriate machinery use to maintain soil structure has been removed. Further, in terms of incorporating the Water Framework Directive and the Pesticides Directive, the most which could be achieved at this stage was a Joint Statement by the European Parliament and the Council which invites the European Commission to monitor their transposition and implementation by the Member States and, 'where appropriate', to come forward, once they have been implemented in all Member States and the obligations directly applicable to farmers identified, with a legislative proposal to include the relevant provisions.[237]

At the same time, it may be highlighted that beneficiaries participating in the newly introduced Small Farmers Scheme are exempt from cross-compliance.[238] Although this Scheme is not mandatory, to be implemented only at the discretion of individual Member States, it is now in place in some 15 Member States.[239] However, despite 41 per cent of farmers being so exempted, the practical consequences may not be so great, in that findings by the European Commission

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[233] Horizontal Regulation (n 16); and see also Commission Delegated Regulation (EU) 640/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance, [2014] OJ L181/48; and Commission Implementing Regulation (EU) 809/2014 of 17 July 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system, rural development measures and cross compliance, [2014] OJ L227/69.

[234] In respect of Pillar I, see Council Regulation (EC) 73/2009 (n 109) Articles 4-6 and Annexes II and III; and, in respect of Pillar II, see 2005 Rural Development Regulation (n 90) Article 50*a* and Article 51(1)-(4) (as amended by Council Regulation (EC) 74/2009 of 19 January 2009, [2009] OJ L30/100).

[235] Horizontal Regulation (n 16) Article 93(1)(a).

[236] See, eg, European Commission, COM (2011) 628 (n 130) Explanatory Memorandum, 7.

[237] Horizontal Regulation (n 16) at [2013] OJ L347/607.

[238] *Ibid*, Article 92. For the Small Farmers Scheme, see Direct Payments Regulation (n 13) Articles 61-65.

[239] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 11.

indicate that only 5 per cent of the total agricultural area benefiting from direct payments is affected.[240] On the other hand, there is no objective reason why small farms should be inherently less valuable in terms of their contribution to biodiversity: indeed, the increased number of boundary features and reduced scope for intensive agriculture might argue the opposite.

4.4 Rural Development Regulation

The Rural Development Regulation recites that '[t]he Union's priorities for rural development should be pursued in the framework of sustainable development and the Union's promotion of the aim of protecting and improving the environment, as set out in Article 11 TFEU, taking into account the polluter pays principle'.[241] And, in the main body of the Regulation, it is stated that the overall mission of the European Agricultural Fund for Rural Development (EAFRD) is to 'contribute to the Europe 2020 Strategy by promoting sustainable rural development throughout the Union in a manner that complements the other instruments of the CAP, the cohesion policy and the common fisheries policy'.[242] Accordingly, focus is extended to wider *sustainable development* (as opposed to *sustainable agriculture*), but this would be consistent with a Regulation whose title includes express reference to 'support for rural *development*'.[243]

As foreshadowed in the proposed rural development regulation, there is a broad sweep to the three objectives which are to realise the overall mission of the EAFRD, namely:

a. fostering the competitiveness of agriculture;
b. ensuring the sustainable management of natural resources, and climate action;
c. achieving a balanced territorial development of rural economies and communities including the creation and maintenance of employment.[244]

While only the second is formally defined in terms of sustainability, both the third and, to a lesser extent, the first could also be interpreted as contributing to longer-term goals through *economic and social* development. The same pattern

[240] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 9. The overall figures do mask significant variations: for example, the Small Farmers Scheme in Malta covers more than 75 per cent of farmers.

[241] Rural Development Regulation (n 17) Preamble (5).

[242] *Ibid*, Article 3. This largely echoes the earlier provision in Article 3 of the 2005 Rural Development Regulation (n 90): '[t]he EAFRD shall contribute to the promotion of sustainable rural development throughout the Community in a complementary manner to the market and income support policies of the common agricultural policy, to cohesion policy and to the common fisheries policy'.

[243] Emphasis added.

[244] Rural Development Regulation (n 17) Article 4.

can be found in the new six 'priorities' for rural development. Replacing the earlier four 'axes', these again range from the demonstrably environmental (such as restoring, preserving and enhancing ecosystems) to the more economic (such as promoting food chain organisation), the complete list being as follows:[245]

1. fostering knowledge transfer and innovation in agriculture, forestry, and rural areas
2. enhancing farm viability and competitiveness of all types of agriculture in all regions and promoting innovative farm technologies and the sustainable management of forests
3. promoting food chain organisation, including processing and marketing of agricultural products, animal welfare and risk management in agriculture
4. restoring, preserving and enhancing ecosystems related to agriculture and forestry
5. promoting resource efficiency and supporting the shift towards a low carbon and climate resilient economy in agriculture, food and forestry sectors
6. promoting social inclusion, poverty reduction and economic development in rural areas.

With regard more specifically to the greening agenda, three aspects of the new Rural Development Regulation may be highlighted. First, as a general rule, at least 30 per cent of the total EAFRD contribution to the rural development programme is to be reserved for measures in relation to: environment and climate related investments; investments in forest area development and improvement of the viability of forests; agri-environment-climate measures; organic farming; Natura 2000 payments; payments to areas facing natural or other specific constraints; and forest-environmental and climate services and forest conservation.[246] This is a significant proportion of the rural development budget, but could not be regarded as different in scale when compared with the earlier legislation. Under the 2005 Rural Development Regulation, 25 per cent of EAFRD funding was to be allocated to improving the environment and the countryside under Axis 2;[247] and, importantly, further funds were to be contributed under Axis 1 to finance such measures as improving the economic value of forests which would now also seem to fall within the 30 per cent minimum expenditure requirement. Likewise, the effect in practice may not be so great: as has been seen, over the previous

[245] *Ibid*, Article 5. For the earlier four 'axes', see 2005 Rural Development Regulation (n 90) Title IV (improving the competitiveness of the agricultural and forestry sector; improving the environment and the countryside; the quality of life in rural areas and diversification of the rural economy; and the Leader initiative).

[246] Rural Development Regulation (n 17) Article 59(6). This provision was not included in the proposed rural development regulation, as noted by Matthews (n 14).

[247] 2005 Rural Development Regulation (n 90) Article 17(1).

programming period 2007-2013 agri-environment measures alone had already accounted for some 22 per cent of the total sum for rural development.[248]

Secondly, as again foreshadowed in the proposed rural development regulation, climate change objectives have become more clearly articulated and are more specifically addressed. In particular, agri-environment-climate payments have been introduced and a matter of some importance is that, just as with the earlier agri-environment payments, their inclusion within national and/or regional rural development programmes is mandatory.[249] Participation by individual farmers, however, remains voluntary. In addition, similar to the earlier regime, it is expressly stipulated that the payments only extend to commitments which go beyond the relevant mandatory standards in respect of cross-compliance (and certain other requirements), as opposed to beyond the requirements of the greening component. [250] That said, in order to address the concerns expressed during the legislative process, new provisions are included to prevent any double funding of the same practices.[251]

Thirdly, the proposed EIP has been carried into effect;[252] and by February 2014 steps were already in train to form the 'Operational Groups', comprising, *inter alios*, farmers, researchers, advisors and businesses, which will drive the innovative projects.[253] Although a voluntary measure, by 2016 some 26 Member States had implemented the EIP initiative, to be found in 96 out of a possible 111 Rural Development Programmes,[254] while 100 Operational Groups had

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[248] European Commission, *Agri-environment Measures* (2014) (available at http://ec.europa.eu/agriculture/envir/measures/index_en.htm, last accessed on 29 June 2017). The overall figures do, however, obscure significant variations: for example, in England agri-environment measures have been accorded highest priority, with particular reference to the Environmental Stewardship Scheme, whereas in Scotland the focus of rural development expenditure has been less-favoured area measures: for the respective funding over the period 2010-2013, see DEFRA *et al, Agriculture in the United Kingdom 2014* (DEFRA, London, 2015) Table 10.4.

[249] Rural Development Regulation (n 17) Article 28. See also Commission Delegated Regulation (EU) 807/2014 of 11 March 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 provisions, [2014] OJ L227/1, Article 7.

[250] Rural Development Regulation (n 17) Article 28(3).

[251] *Ibid*, Article 28(6); and Commission Delegated Regulation (EU) 807/2014 (n 249) Article 9. For full discussion of this aspect, see K. Hart, 'The Fate of Green Direct Payments in the CAP Reform Negotiations', in Swinnen (ed.) (n 2) 245.

[252] Rural Development Regulation (n 17) Article 55. For the website of the organisation, see http://ec.europa.eu/eip/agriculture/en, last accessed on 29 June 2017).

[253] See, in particular, Rural Development Regulation (n 17) Article 56(1): 'EIP operational groups shall form part of the EIP for agricultural productivity and sustainability. They shall be set up by interested actors such as farmers, researchers, advisors and businesses involved in the agriculture and food sector, who are relevant for achieving the objectives of the EIP'. See also, eg, eip-agri, Press Article, *Farmers Looking for Partners to Set Up Innovative Projects* (18 February 2014) (available at http://ec.europa.eu/eip/agriculture/sites/agri-eip/files/2015-press-20150218-calls_operational_groups_fin.pdf, last accessed on 29 June 2017).

[254] Coffey *et al*, *Evaluation Study of the Implementation of the European Innovation Partnership for Agricultural Productivity and Sustainability: Final Report* (European Commission, Brussels, 2016) x.

already been launched by April of the same year.[255] Particular significance may be attached to this policy development with its express focus on the achievement of 'sustainable agriculture' and, in contrast to the Direct Payments Regulation, notions of sustainability permeate not only the policy documentation, but also the relevant provisions of the Rural Development Regulation itself. Thus, the Regulation recites that the 'EIP for agricultural productivity and sustainability should contribute to the achievement of the Europe 2020 objectives of smart, sustainable and inclusive growth';[256] and its aims include helping to 'deliver a steady and sustainable supply of food, feed and biomaterials, including existing and new types'.[257] Further, there is clear enunciation of the delicate balance between the act of production and the maintenance of the productive capacity of the ecological resource base, the aims of the EIP also including the promotion of 'a resource efficient, economically viable, productive, competitive, low emission, climate friendly and resilient agricultural and forestry sector, working towards agro-ecological production systems and working in harmony with the essential natural resources on which farming and forestry depend'.[258] Indeed, the EIP has the potential to extend these notions of sustainability beyond land use to encompass a range of innovative practices, such as agricultural informatics and even robotics.[259]

As noted, initial research reveals an encouraging take-up by Member States of what is a voluntary measure and, significantly, there is also evidence that '**EIP's bottom-up and farmer-led approach is truly distinctive** and **highly appreciated by stakeholders**'.[260] Nonetheless, areas where there is scope for improvement have also been identified. For example, Coffey *et al* find that there could be more effective dissemination of the lessons emerging from the Operational Groups, so as to increase their impact on the broader farming community; and that access to third party brokering and facilitation would encourage more farmers to lead EIP projects.[261]

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[255] Eip-agri, *Agrinnovation* (2016, Issue 3) 4.

[256] Rural Development Regulation (n 17) Preamble (41).

[257] *Ibid*, Article 55(1)(b).

[258] *Ibid*, Article 55(1)(a).

[259] For a technological approach to delivering sustainability, see, eg, the United Kingdom 'Agri-Tech Strategy': HM Government, *A UK Strategy for Agricultural Technologies* (2013) (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227259/9643-BIS-UK_Agri_Tech_Strategy_Accessible.pdf, last accessed on 29 June 2017) (which sees this strategy as key to delivering 'the underlying goal' of sustainable intensification of the agricultural sector: at 5).

[260] Coffey *et al*, (n 254) x (emphasis in original). Early reports included, for example, EIP-AGRI Focus Group, *Benefits of Landscape Features for Arable Crop Production* (European Commission, 2016).

[261] Coffey *et al* (n 254) xiii-xiv.

5 Discussion

5.1 General

There can be little doubt that the language of sustainability suffuses the 2013 CAP reforms. There may, however, be some doubt as to the extent to which the reforms have materially advanced 'sustainable agriculture' in practice. To adopt the words of de Sadeleer, the question is whether the leap has been successfully made from 'political slogans' to 'legal rules'.[262] In this regard, it may be recalled that a contrast can be drawn between the frequent reference to sustainability in policy documents, such as the European Commission Communication *The CAP Towards* 2020, and the relative invisibility of the term in the Direct Payments Regulation itself, where the term 'sustainable' is to be found only once, and then in the context of the promotion of 'the sustainable development of agriculture in areas with specific natural constraints', a voluntary measure which has only been implemented in Denmark.[263] In this respect, parallels could perhaps be drawn with the term 'multifunctionality' which dominated policy discourse at the time of the Agenda 2000 reforms, but which likewise did not find significant concrete expression in the legislative texts.[264]

A particular hurdle to be cleared in making this leap from policy to practice is the difficulty of reaching a sufficiently precise and justiciable definition of what constitutes 'sustainable agriculture' so as to be able to identify clear *legislative* objectives and outcomes for the greening agenda. Indeed, the European Court of Auditors observed that the proposed Direct Payments Regulation did not contain a clearly formulated statement as to the objectives of direct payments (with the Regulation as enacted making little change in this regard).[265] And these criticisms have subsequently been echoed by Hart, Buckwell and Baldock, who also highlight that the success of the measures can only be effectively assessed when their objectives have been clearly articulated.[266]

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[262] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules (*Oxford University Press, Oxford 2002).

[263] Direct Payments Regulation (n 13) Preamble (46); and European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) Table 2.

[264] For an interesting analysis, see K. Erjavec and E. Erjavec, 'Changing EU agricultural policy discourses? The discourse analysis of Commissioners' speeches 2000-2007', (2009) 34 Food Policy 218; and see also, eg, M. Cardwell, 'Stretching the Boundaries of Multifunctionality? An Evolving Common Agricultural Policy within the World Trade Legal Order', in J.A. McMahon and M.G. Desta, (eds.), *Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law* (Edward Elgar, Cheltenham, 2012) 272.

[265] European Court of Auditors, *Opinion No 1/2012 on Certain Proposals for Regulations Relating to the Common Agricultural Policy for the Period 2014-2020* (European Court of Auditors, Luxembourg, 2012) paragraph 82.

[266] Hart, Buckwell and Baldock (n 135) 26.

5.2 'Broad' and 'narrow' sustainability

While no comprehensive definition of what constitutes 'sustainable agriculture' may emerge from the 2013 CAP reforms, in the context of the greening component it may be said with some certainty that focus is on the supply side and, more specifically, land use. And this pattern is to an extent followed in the case of the Rural Development Regulation: for example, 30 per cent of EU rural development funding must be reserved for agri-environment-climate and similar measures. On the other hand, there are intimations of a broader vision, since the rural development programmes of Member States may encompass also socio-economic concerns, such as the setting up and operation of national rural networks;[267] and, perhaps most significantly, EIPs have been introduced expressly to promote 'agricultural productivity and sustainability' through not only helping to deliver a steady and sustainable supply of food, feed and biomaterials, but also scientific innovation and other initiatives.[268]

Accordingly, within the legislative framework introduced by the 2013 CAP reforms, there is already explicit recognition of the multi-faceted nature of a 'sustainable agriculture', but it may be unrealistic to expect the CAP in anything like its present form to be able to extend its reach beyond the farm gate to address such demand-side issues as food waste. [269] Its sphere of action is rather *agriculture* as the first link in the food chain and its major contribution is therefore likely to be the management of land, while respecting the Treaty obligation to integrate environmental concerns into the design and implementation of its legislative framework.

In the specific context of greening farm payments, it would likewise seem inevitable that there will be a focus on land use, at least for the present, but even within this more restricted context there is also arguably scope to adopt a more expansive approach which gives greater priority to preservation of the resource base. At the global level, Rockström *et al* have highlighted that there are finite 'planetary boundaries' which cannot be crossed if ecological integrity is to be preserved; and it is notable that each of the three boundaries which the same authors consider to have already been traversed enjoy particular resonance in the agricultural sector, namely climate change, the rate of biodiversity loss and the

[267] See, eg, Rural Development Regulation (n 17) Preamble (43).

[268] *Ibid*, Article 55(1).

[269] For advocacy therefore of a 'Common Sustainable Food Policy' to replace the CAP, see Bailey, Lang and Schoen (n 63); and, for the role of diet in delivering sustainability, see, eg, T. Garnett, *What is a Sustainable Healthy Diet? A Discussion Paper* (Food Climate Research Network, 2014) (available at http://www.fcrn.org.uk/sites/default/files/fcrn_what_is_a_sustainable_healthy_diet_final.pdf, last accessed on 29 June 2017).

rate of interference with the nitrogen cycle.[270] In like vein, there is also increasing concern as to the future availability of phosphorous reserves for fertilisers.[271]

Definitely, the need for a broader vision has been articulated by the European Environment Agency (EEA).[272] With reference to the greening measures introduced under the 2013 CAP reforms, it stated that 'a more ambitious and long-term approach would be needed to address the resource efficiency of the agricultural sector in terms of productivity, land take, carbon capture, water use, and dependence on mineral fertilisers and pesticides'.[273] And, in order to deliver this broader vision, two specific matters may be highlighted. First, even following the reforms, a *lacuna* may be identified in respect of water resources. The cross-compliance regime does continue to include a statutory management requirement in respect of the Nitrates Directive, while there are also three 'water-related' GAECs.[274] Further, as a new initiative, the Horizontal Regulation lays down detailed provisions on information in the field of the protection of water which is to be provided by the Farm Advisory Service.[275] Yet the Water Framework Directive currently remains outside the cross-compliance regime, despite this being considered by the European Environment Agency to be 'highly important'.[276] Instead, as already noted, the legislative process only went so far as to include a Joint Statement by the European Parliament and the Council which invites the European Commission to monitor the transposition and implementation by the Member States of the Water Framework Directive and, 'where appropriate', to come forward with a legislative proposal once implementation by all Member States is complete and the obligations directly applicable to farmers have been identified.[277] Such relative absence of water and water-related measures also sits somewhat uneasily with their high priority in several Southern Member States. For example, in Greece, Portugal and Spain, potential water shortages, falling aquifer levels and salt-water intrusion are often a result of agricultural production and irrigation

[270] J. Rockström *et al*, 'Planetary boundaries: exploring the safe operating space for humanity', (2009) 14(2) Ecology and Society 32 (available at http://www.ecologyandsociety.org/vol14/iss2/art32/, last accessed on 29 June 2017).

[271] In the case of phosphorous reserves, see, eg, D. Cordell and T-S.S. Neset, 'Phosphorus vulnerability: a qualitative framework for assessing the vulnerability of national and regional food systems to the multi-dimensional stressors of phosphorus scarcity', (2014) 24 Global Environmental Change 108.

[272] EEA, *The European Environment: State and Outlook 2015* (n 61) (Chap 6: Understanding the Systematic Challenges Facing Europe).

[273] *Ibid*, Box 6.2.

[274] Horizontal Regulation (n 16) Annex II.

[275] *Ibid*, Article 12(3)(d) and Annex I.

[276] EEA, *European Waters: Current Status and Future Challenges - Synthesis Report 9/2012* (EEA, Copenhagen, 2012) 28.

[277] Horizontal Regulation (n 16) at [2013] OJ L347/607.

practices.[278] In addition, and more generally, the climate change implications of water management are now generally accepted.[279]

Secondly, in the case of plant protection products there is still only one statutory management requirement, with incorporation of the Pesticides Directive into the cross-compliance regime being subject to the same Joint Declaration as the Water Framework Directive. As observed by the European Court of Auditors, the timetable of that Joint Declaration 'implies that the implementation of a very important policy decision could be very slow', the Court also attaching particular priority to the need to develop fully integrated pest management within the CAP.[280] A matter of some interest is that this hesitancy occurred even as the potentially negative impact of pesticide usage by farmers was rising in the public consciousness. For example, Friends of the Earth were promoting their flagship 'Bee Cause' campaign which saw neonicotinoid pesticides as a primary danger to the bee population,[281] while the EU was itself legislating to ban specified neonicotinoids on the precise basis of their high acute risks for bees.[282] Admittedly, the scientific rationale for the ban remains contested,[283] but there would now seem to be greater consensus that the survival of an adequate population of pollinators is a prerequisite for sustainable agriculture: indeed, it has been estimated that over 80 per cent of the crops grown in the EU rely on wild pollinators for maintaining yields.[284]

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[278] The EEA during the reform process suggested that crop-specific support for cotton should be discontinued in such countries by reason that irrigation requirements are likely to hamper adaptation to water scarcity: EEA *The European Environment: State and Outlook 2015* (n 61) (Chap 6: Understanding the Systematic Challenges Facing Europe).

[279] See, eg, Smith *et al* (n 205).

[280] European Court of Auditors, *Integration of EU Water Policy Objectives with the CAP: a Partial Success*, *Special Report No 4* (European Court of Auditors, Luxembourg, 2014) 27.

[281] Friends of the Earth, *About the Bee Cause* (2016) (available at https://www.foe.co.uk/page/the-bee-cause-about, last accessed on 29 June 2017).

[282] Commission Implementing Regulation (EU) 485/2013 of 24 May 2013 amending Implementing Regulation (EU) No 540/2011, as regards the conditions of approval of the active substances clothianidin, thiamethoxam and imidacloprid, and prohibiting the use and sale of seeds treated with plant protection products containing those active substances, [2013] OJ L139/12.

[283] In this regard, it may also be noted that recent research would tend to confirm that neonicotinoids do have negative impact on wild bees: see, eg, M. Rundlöf *et al*, 'Seed coating with a neonicotinoid insecticide negatively affects wild bees', (2015) 521 Nature 77; B.A. Woodcock *et al*, 'Impacts of neonicotinoid use on long-term population changes in wild bees in England', (2016) 7 Nature Communications 12459; and B.A. Woodcock *et al*, 'Country-specific effects of neonicotinoid pesticides on honey bees and wild bees', (2017) 356(6345) Science, 1393.

[284] G. Zulian, J. Maes and M. L. Paracchini, 'Linking land cover data and crop yields for mapping and assessment of pollination services in Europe', (2013) 2 Land 472, 473.

5.3 Delivering sustainability: Climate change and biodiversity loss

5.3.1 Introduction

The greening of farm payments under the 2013 CAP reforms is apprehended specifically to address both the climate change and biodiversity dimensions of sustainable agriculture. Indeed, the greening component itself is described as 'payment for agricultural practices beneficial for the climate and the environment', while in the Rural Development Regulation climate action is unequivocally stated to be one of the main objectives to be pursued within the rural development framework of the CAP.[285] Moreover, at the commencement of the reform process, the European Commission in *The CAP Towards 2020* affirmed that '[t]he active management of natural resources by farming is one important tool to maintain the rural landscape, to combat biodiversity loss and contributes to mitigate and to adapt to climate change'.[286]

Such prioritisation is consistent with overarching EU policy imperatives. Agriculture has been identified by the IPCC as a sector which is particularly vulnerable to climate change at both the global and European levels;[287] and the EU institutions have expressed particular concern at its potential not only to exacerbate water scarcity and soil erosion in the South of Europe,[288] but also to increase precipitation and flooding in the North.[289] Alongside this vulnerability, the agricultural sector has also been characterised as 'part of the problem' through its contribution to anthropogenic GHG emissions. According to reported figures from the European Commission, GHG emissions generated by the agriculture sector in 2007 amounted to 9.2 per cent of the total for the EU-27 (although this did represent a fall from 11 per cent in 1990); and, notably, agriculture was the most important source of both N_2O and CH_4, which notwithstanding their more limited quantities still accounted respectively for in the region of 5 per cent

[285] Rural Development Regulation (n 17) Article 4(b).

[286] European Commission (n 9) 2. This statement would seem, however, to recognise that active management of natural resources is not the only means of securing such objectives.

[287] See, eg, R.S. Kovats *et al*, 'Europe', in *IPCC, 2014: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York, 2014) 1267.

[288] See, eg, European Court of Auditors (n 280).

[289] See, eg, European Commission, *Adaptation to Climate Change Impacts on Human, Animal and Plant Health,* SWD (2013) 136, 6 (accompanying the document *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Strategy on Adaptation to Climate Change*, COM (2013) 216)). The overall position may, however, be more nuanced in that production in some Northern Member States is likely to benefit from longer growing seasons: for fuller discussion see, eg, D. Blandford and K. Hassapoyannes, 'The Common Agricultural Policy in 2020: Responding to Climate Change', in J.A. McMahon and M.N. Cardwell (eds.), *Research Handbook on EU Agriculture Law* (Edward Elgar, Cheltenham, 2015) 170.

and 4.2 per cent of total European emissions.[290] Against such background, the greening of farm payments may fairly be regarded as an important response to the call for climate change adaptation 'to be **mainstreamed** into EU policies'.[291]

Likewise, the need to address biodiversity loss is high up the policy agenda, with responsibility for this loss attributed, in part at least, to land-use changes and farm management practices which have caused both the destruction and fragmentation of wildlife habitats across Europe. Concerns over reduced numbers of pollinators have already been mentioned and, despite an extensive history of policy initiatives, targets and instruments recognising the vital contribution of biodiversity, current indications are less than positive.[292] For example, reports reveal that significant populations of wild and farmland birds are still negatively affected by agricultural practices even after the introduction of the Wild Birds Directive and the Habitats Directive, together with cross-compliance measures aimed at bolstering their implementation.[293] Indeed, with specific regard to Natura 2000 sites, the European Commission noted during the course of the reform process that that only 17 per cent of species and habitats and 11 per cent of key ecosystems protected under EU legislation enjoy favourable conservation status.[294] Accordingly, as with climate change, the European Commission has advocated the integration of biodiversity needs into the CAP.[295] More specifically, 'Target 3A' is by 2020 to 'maximise areas under agriculture across grasslands, arable land and permanent crops that are covered by biodiversity-related measures under the CAP', with this objective being very much couched in terms of sustainability.[296] And, in order to achieve the target, a significant role is ascribed to farm payments, reference being made to the proposals by the

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[290] European Commission, *The Role of European Agriculture in Climate Change Mitigation*, SEC (2009) 1093, 7. In addition, it has been argued that such figures do not reveal the full magnitude of GHG emissions in that they do not include those associated with the extra-territorial production of animal feed (for example, CO_2 released by land clearing): J. Bellarby *et al*, 'Livestock greenhouse gas emissions and mitigation potential in Europe', (2013) 19(1) Global Change Biology 3.

[291] European Commission, *Adapting to Climate Change: Towards a European Framework for Action*, COM (2009) 147, 8 (emphasis in original).

[292] It may be noted that the Seventh Environment Action Programme cites the weak implementation by Member States of EU conservation legislation as a significant factor in this continued decline: [2013] OJ L354/171, Annex, paragraph 6.

[293] See, eg, BirdLife International, *Europe-Wide Monitoring Schemes Highlight Declines in Widespread Farmland Birds* (2013) (presented as part of the BirdLife State of the World's Birds website, available at http://www.birdlife.org/datazone/sowb/casestudy/62, last accessed on 29 June 2017).

[294] European Commission, *Our Life Insurance, Our Natural Capital: an EU Biodiversity Strategy to 2020 (EU Biodiversity Strategy)*, COM (2011) 244, 1. See also Seventh Environment Action Programme , [2013] OJ L354/171, Annex, paragraph 6; and European Commission , *Impact Assessment* (n 133) Annex II, 4.

[295] See, eg, European Commission, *EU Biodiversity Strategy*, COM (2011) 244 (n 294) 5.

[296] *Ibid*, 6.

European Commission that CAP direct payments should reward the delivery of environmental public goods that go beyond cross-compliance and that GAEC standards should be improved and simplified.[297] Indeed, EFAs are expressly understood to fit with Target 3A,[298] which is fully consistent with the recital in the Preamble to the Direct Payments Regulation that they 'should be established, in particular, in order to safeguard and improve biodiversity on farms'.[299]

5.3.2 Positive features of the 2013 CAP reforms

In the context of climate change and biodiversity, a first positive feature of the 2013 CAP reforms, and one much emphasised by the European Commission,[300] is that both the greening component and the cross-compliance regime have the capacity to affect a large proportion of the UAA of the EU. Data for 2015 would indicate that this is indeed the case, 72 per cent of the EU agricultural area being subject to at least one green direct payments obligation.[301] Moreover, an interesting development is that the percentage of EFA areas declared by farmers has been almost twice the required 5 per cent at farm level: thus, in 2016, 8,130,000 hectares of land was declared as EFA, accounting for 15 per cent of arable land falling under the obligation, and 10 per cent after applying the weighting factor, so prompting the European Commission in 2017 not to propose an increase in the percentage of EFA.[302] On the other hand, in 2015 over a quarter of the agricultural area was not subject to any green direct payments obligation, by reason that the area either: (i) fell entirely outside the direct payments regime (11 per cent of total EU agricultural area); (ii) was under permanent crops (6 per cent of total EU agricultural area); or (iii) was exempt (whether under the Small Farmers Scheme, through being 'green by definition' or by reason of falling below a hectarage threshold).[303] Moreover, the proportion of beneficiaries subject to at least one greening obligation was only 36 per cent.[304]

Such figures would, accordingly, tend to confirm that the reform process has in practice led to a material relaxation of the original proposals; and in this context two particular amendments may be highlighted. First, the threshold for the crop diversification measure was raised from to 3 to 10 hectares of arable land, while

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[297] *Ibid*, Annex, Action 8. It may be observed that reference was made to the possibility of including 'the Water Framework Directive within the scope of cross-compliance once the Directive has been implemented and the operational obligations for farmers have been identified in order to improve the state of aquatic ecosystems in rural areas'.

[298] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 3.

[299] Direct Payments Regulation (n 13) Preamble (44).

[300] See, eg, European Commission, *Overview of CAP Reform 2014-2020: Agricultural Policy Perspectives Brief No 5** (European Commission, Brussels, 2013) 7.

[301] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 5-6.

[302] European Commission, *EFA Report*, COM (2017) 152 (n 216) 8 and 14.

[303] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 5-6. These exemptions included a certain amount of overlap: thus, a farmer may both qualify for the Small Farmers Scheme and have an amount of arable land which falls below a hectarage threshold.

[304] *Ibid*, 5.

a threshold of 15 hectares of arable land was introduced for the EFA measure. Secondly, where this 15 hectare threshold was exceeded, initial coverage of EFAs was to be only 5 per cent of arable land, albeit with provision for an increase from 5 per cent to 7 per cent subject to a legislative act of the European Parliament and of the Council. As a matter of law, therefore, the EFA measure as enacted is less rigorous, but it may be reiterated that in practice farmers have declared as EFAs substantially more arable land than the minimum required.[305] Nonetheless and more generally, there is no specific correlation between the land which is subject to at least one of the greening direct payment obligations and its value in terms of contribution to mitigation of climate change or prevention of biodiversity loss.

A second positive feature is that the greening component is backed up by significant financial resources, together with sanctions for non-compliance. It accounts for some 30 per cent of the national envelope for direct payments of each Member State, with a total appropriation in the 2016 EU Budget of over 12 billion Euros. And, while it may be widely assumed that the 30 per cent green funding comes at a cost for farmers in that they are required to undertake additional responsibilities in terms of agricultural practices beneficial for the climate and the environment, early in the reform process Matthews argued persuasively that such a conclusion 'is based on the counterfactual assumption that farmers would continue to receive the proposed direct payments envelope even in the absence of the greening measures'; rather the political context was that:

> the greening proposals are a quid pro quo for the retention of the 2013 level of direct payments. While no-one can predict with total certainty what would happen to the CAP budget if the greening element were removed, there must be a strong presumption that the legislature would then find it much more difficult to justify continuing CAP spending at its previous levels.[306]

Accordingly, it is quite possible to consider the 30 per cent allocation to be, in reality, 'new' resources with a strong sustainability focus.

At the same time, 'green' financial entrenchment may be found in the rural development context by reason of the requirement that, as a general rule, at least 30 per cent of the total EAFRD contribution be reserved for measures in relation to, *inter alia*: environment and climate related investments; agri-environment-climate measures; organic farming; Natura 2000 payments; and payments to areas facing natural or other specific constraints. That said, as has been seen, this proportion is not dissimilar to the 25 per cent of EAFRD funding which was

[305] European Commission, *EFA Report*, COM (2017) 152 (n 216) 8.
[306] Matthews (n 4) 23.

previously to be allocated to improving the environment and the countryside under Axis 2 of the 2005 Rural Development Regulation.[307]

Again with reference to financial matters, a concern during the reform process was that the introduction of the option to effect 'reverse transfers' from Pillar II to Pillar I would see a significant reduction in funding for rural development programmes with their greater capacity to implement more targeted climate change and environmental measures. In the event, however, the level of 'reverse transfers' has not generally matched the earlier level of concern. Only five Member States have decided to effect 'reverse transfers', with only Poland opting for the full 25 per cent in each claim year; and, taking into account transfers both ways, there will remain over the period 2014-2020 a net inflow to rural development programmes of 3 billion Euros. In addition, as indicated, there is a respectable argument that the sustainability agenda is fostered by the fact that, of the sums transferred from Pillar II to Pillar I, 30 per cent becomes attributable to the greening component.

In terms of enforcement and sanctions, the system now in place is significantly more comprehensive, and indeed more complex, than earlier measures to impose eco-conditionality.[308] The detailed provisions are to be found in delegated legislation,[309] which, as with the earlier measures, states that the administrative penalties must have regard to the 'principle of proportionality'.[310] In a development new to the 2013 CAP reforms, however, reference is also made to the 'principle of dissuasiveness';[311] and a defining feature of the political agreement is that, in the correct circumstances, it is possible for a farmer in respect of the greening component to lose not only up to the full amount of that payment, but also, commencing as from 2018, up to a further 25 per cent by reason of an administrative penalty.[312] For this reason, the greening component is regarded by the European Commission as 'compulsory',[313] but arguably farmers still have scope to choose to forego the payment and to incur the administrative

[307] And, as has also been seen, to this 25 per cent was to be added further funding under Axis 1 for such measures as improving the economic value of forests which would now also seem to fall within the 30 per cent minimum expenditure requirement.

[308] For a full discussion which explores these complexities, see A. Matthews, *Scrap the Crop Diversification Greening Requirement and Find a Sensible Replacement* (4 August 2015) (available at http://capreform.eu/scrap-the-crop-diversification-greening-requirement-and-find-a-sensible-replacement/, last accessed 29 June 2017).

[309] Commission Delegated Regulation (EU) 640/2014 (n 233).

[310] *Ibid*, Preamble (19).

[311] *Ibid*.

[312] *Ibid*, Articles 22-29. The further administrative penalty may be recovered from any other payments under the Direct Payments Regulations: see, eg, European Commission, *Review of Greening*, SWD (2016) 218 (n 197) Annex 1, 10.

[313] See, eg, European Commission, MEMO/13/621, *CAP Reform – an Explanation of the Main Elements*, Brussels, 26 June 2013 (stating that greening 'is compulsory and failure to respect the Greening requirements will result in penalties which go beyond the Greening payment, i.e. after a transition offenders will also lose up to 125% of their Greening payment').

penalty, with early research indicating that some may indeed see this as a viable economic option in the case of the crop diversification requirement.[314]

Thirdly, while reference was made to climate change in the earlier Council Regulation (EC) 73/2009 (particularly in the Preamble),[315] the greening component may justifiably be regarded as the first climate change *measure* to be implemented under Pillar I. In particular, the European Commission on issue of the proposed regulations saw all three elements of the component as contributing to climate change adaptation, affirming that: 'these payments will ensure that all farms deliver environmental and climate benefits through the retention of soil carbon and grassland habitats associated with permanent pasture, the delivery of water and habitat protection by the establishment of ecological focus areas and improvement of the resilience of soil and ecosystems through crop diversification'.[316] In like vein, the *Impact Assessment* foresaw crop rotation/diversification as benefiting, *inter alia*, soil organic matter and structure so as to promote climate change mitigation and adaptation and biodiversity, with similar positive benefits flowing from land left fallow in EFAs.[317] And both the *Impact Assessment* and the legislation itself attached especial importance to the ability of permanent grassland to provide carbon sequestration.[318] Thus, in the provision requiring Member States to designate permanent grasslands which are environmentally sensitive in areas covered by Natura 2000 network, there is express mention of peat and wetlands; and, in the case of discretionary designation outside the areas covered by the network, there is express mention of permanent grasslands on carbon-rich soils.[319] Further, with regard to the separate obligation on Member States to ensure maintenance of the ratio of permanent grassland as against the total agricultural area, the earlier cross-compliance regime has been strengthened in two respects, in that the obligation to reconvert may also now be triggered at the sub-regional level, as opposed to just national or regional level; and the 'margin of appreciation' in terms of reduction of that ratio is now 5 per cent, as opposed to 10 per cent. From early data it appears that environmentally sensitive permanent grassland which must be designated amounts to 16 per cent of all permanent grassland, although the overall figure masks significant variation between Member States. [320]

That said, the climate change dividend would not seem to be unalloyed. For example, there is no obvious distinction in the legislation between high-nature-

[314] Louhichi *et al* (n 108); and see, generally, eg, Cardwell (n 91); and A. Matthews, *How to Interpret Cross-compliance* (17 April 2014) (available at http://capreform.eu/how-to-interpret-cross-compliance/, last accessed 29 June 2017).
[315] See, eg, Council Regulation (EC) 73/2009 (n 109) Preamble (9).
[316] European Commission, COM (2011) 625 (n 130) Explanatory Memorandum, 3.
[317] *Impact Assessment* (n 133) 68-69.
[318] See, eg, Direct Payments Regulation (n 13) Preamble (42).
[319] *Ibid*, Article 45(1).
[320] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 9 and Annex 2, 25-29.

value grasslands and re-seeded grassland, the latter likely have lesser climate change and environmental benefits.[321] In this context, reference may be made to the decision of the CJEU in *Grund*, albeit with respect to the earlier regime, which held that 'permanent pasture' was to be 'interpreted as covering agricultural land which is currently, and has been for five years or more, used to grow grass and other herbaceous forage, even though that land has been ploughed up and seeded with another variety of herbaceous forage'.[322] At the same time, it may be reiterated that inherent in the maintenance of permanent grassland is the maintenance of livestock production which, as highlighted in *Livestock's Long Shadow*,[323] has the capacity to generate negative climate change externalities through primarily CH_4 emissions.[324] Similar considerations would also seem to apply in the case of voluntary coupled support, in that the 2013 CAP reforms have afforded Member States greater scope to provide targeted subsidy for the livestock sector. As a general rule, voluntary coupled support can now account for 8 per cent of national envelopes for Pillar I direct payments, with substantial derogations which in the correct circumstances may substantially increase this percentage;[325] and, significantly, out of total foreseen expenditure of 4.1 billion Euros per year, the majority is destined for livestock production, with beef and veal alone accounting for 42 per cent.[326] That said, as also expressly recognised in the legislation, in certain regions there may be no realistic alternative to farming in this way, with the result that the measure could be regarded as an instance where productivist and social concerns are to be legitimately accorded priority in the sustainability equation. Moreover, it could also be argued that real environmental concerns are being addressed in so far as the support may prevent land abandonment.[327] Accordingly, in this measure may be found a very clear illustration of the delicate balances to be achieved in the holistic delivery of sustainable agriculture, with it being important when striking such balances to ensure that the full range of factors are taken into account: again by way of illustration, in the view of research conducted for the FAO, the most effective form of climate change mitigation in the livestock sector is to be achieved not so much from changes in agricultural practices on the land as from 'the transfer

[321] See Direct Payments Regulation (n 13) Article 4(1)(h); and see also generally, eg, K. Hart and D. Baldock, *Greening the CAP: Delivering Environmental Outcomes Through Pillar One* (Institute for European Environmental Policy, London, 2011) 11.

[322] C-47/13, *Martin Grund v Landesamt für Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein***,** Judgment of 2 October 2014, ECLI:EU:C:2014:2248, paragraph 40.

[323] FAO (n 206).

[324] European Commission, *2016 Implementation Report* (n 185) 143.

[325] Direct Payments Regulation (n 13) Articles 52-55.

[326] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 8-9.

[327] See, eg, the limitation contained in Article 52(3)of the Direct Payments Regulation (n 13): '[c]oupled support may only be granted to those sectors or those regions of a Member State where specific types of farming or specific agricultural sectors that are particularly important for economic, social or environmental reasons undergo certain difficulties'.

and use of existing technologies that increase production efficiency', such as optimising feed digestibility.[328]

Fourthly, there are strong arguments in favour of the introduction of collective implementation of EFAs so as to promote greater connectivity between sites of high nature value (for example, wildlife corridors). A like approach is also being adopted in the case of both agri-environment-climate schemes and organic schemes, where an enhanced rate of payment is available if the commitments are undertaken by groups of farmers (or, in the case of agri-environment-climate schemes, groups of farmers and other land managers).[329] All these initiatives sit well with current thinking on the advantages of 'clustering' so as to realise enhanced environmental biodiversity benefits;[330] and, accordingly, it may be regarded as somewhat of a disappointment that only the Netherlands and Poland have opted for collective implementation of EFAs across their territory.[331]

Fifthly, under the rural development regime one of the three objectives is to ensure 'the sustainable management of natural resources, and climate action',[332] while agri-environment payments have been replaced by agri-environment-climate payments. Indeed, a broader interpretation of sustainability may be detected more generally across Pillar II, as evidenced by the focus also on social and economic concerns and the creation of an EIP which is specifically directed to agricultural productivity and sustainability. Importantly, the first aim of the EIP maps closely onto definitions of 'sustainable agriculture' discussed above (for example, in the *Foresight Report*), being the promotion of:

> a resource efficient, economically viable, productive, competitive, low emission, climate friendly and resilient agricultural and forestry sector, working towards agro-ecological production systems and working in harmony with the essential natural resources on which farming and forestry depend.[333]

And what may also be regarded as significant is that the EIP does not operate primarily through direct payments to farmers. Rather support is to be provided to EIP operational groups and the EIP network which extend to include the research community and 'stakeholders'.[334]

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[328] P.J. Gerber *et al*, *Tackling Climate Change through Livestock: a Global Assessment of Emissions and Mitigation Opportunities* (FAO, Rome, 2013) 86.

[329] Rural Development Regulation (n 17) Article 28(6) and Article 29(4).

[330] See, eg, Bureau (n 228); Prager, Reed and Scott (n 229); and Leventon *et al* (n 229).

[331] See also Henke *et al* (n 216) Table 1.13, where it is indicated that the region of Flanders has also opted for collective implementation.

[332] Rural Development Regulation (n 17) Article 4(b).

[333] *Ibid*, Article 55(1)(a). Interestingly, the legislation as enacted makes express reference to 'agro-ecology'.

[334] See, eg, *ibid*, Article 53(2)(b) (in respect of the EIP network)

5.3.2 Instances of retreat from earlier ambition?

5.3.2.1 Climate change

The detailed rules as finally enacted to govern the greening component have arguably somewhat blunted the potential contribution of the reformed CAP towards climate change mitigation and adaptation. For example, crop diversification has been enacted as opposed to crop rotation, notwithstanding wide agreement that the latter has the capacity to generate greater environmental benefits.[335] And this may be regarded as an inherent weakness of Pillar I in achieving long-term goals since, as highlighted by the European Commission, a multi-annual requirement such as crop rotation is no easy matter to administer in an annualised system.[336] In addition, the reforms saw the removal of the earlier optional GAECs in relation to standards for crop rotations and appropriate machinery use to maintain soil structure, while the proposed GAEC for the protection of wetland and carbon rich soils, including a ban of first ploughing, did not survive the legislative process,[337] instead finding more limited expression in the greening requirement to maintain permanent pasture.[338] Further, while the cultivation of nitrogen-fixing crops within EFAs might be expected to have positive climate change implications, late amendment to this part of the regime is liable to reduce the green dividend: under Commission Delegated Regulation (EU) 1001/2014, the weighting factor ascribed to areas with nitrogen-fixing crops was increased from 0.3 to 0.7, so materially reducing the footprint necessary to meet the EFA requirement, with the basis for the amendment being 'discussions with the European Parliament and the Council'.[339]

More generally, legitimate concerns may be raised as to the overall effect of the various exemptions and thresholds applicable in the case of the greening component. Early data would suggest that each of these individually may not be of great importance: for example, the Small Farmers Scheme was found to represent only 5 per cent of the total agricultural area benefiting from direct payments (although 41 per cent of farmers).[340] Yet cumulatively, on the basis of the same data, it could be concluded that the effect of green direct payments on land use (and agricultural production, which will be considered later) 'is generally projected to remain very low over the medium term' when compared to the situation without green direct payments, the only noticeable exception being 'a slight increase in the share of permanent grassland, fallow land and

[335] See, eg, Committee on the Environment, Public Health and Food Safety (n 140).
[336] European Commission, *Impact Assessment* (n 133) Annex 2, 10.
[337] European Commission, COM (2011) 628 (n 130) Annex II.
[338] On this aspect, see, in particular, K. Hart, 'The Fate of Green Direct Payments in the CAP Reform Negotiations', in Swinnen (ed.) (n 2) 245.
[339] Commission Delegated Regulation (EU) 1001/2014 (n 179) Preamble (4).
[340] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 9. On the other hand, it may be noted that some 15 per cent of the total agricultural area is exempt under the Small Farmers Scheme in Poland: European Commission, *2016 Implementation Report* (n 185) 159.

protein grain production'.[341] And the extent of forward momentum may be especially limited in the case of the crop diversification requirement. As already observed, a study by the Joint Research Centre has estimated that the proportion of reallocated land represents less than 0.5 per cent of the total agricultural area,[342] while the European Commission, in comparing a *status quo* policy assumption and greening in 2025, found that the area reallocated would represent 0.8 per cent of arable area and 0.6 per cent of UAA in the EU-27.[343] In the view of the European Commission, this may be regarded as locking in good practice,[344] but arguably it is also a relatively poor return for the level of funding involved.[345]

As with the EU regulatory framework, climate change imperatives would also seem to have been downgraded in the implementation of the 2013 CAP reforms by the Member States; and this would seem to be acknowledged in the *2016 Implementation Report* prepared for the European Commission, which concluded that '[o]verall, the choices made under all three greening measures are considered to be moderately relevant to address the priorities identified for GHG emissions, maintaining carbon stocks and/or increasing carbon sequestration'.[346] More specifically, the significant recourse to voluntary coupled support may have an adverse effect on CH_4 emissions, with other examples of less 'climate-friendly' outcomes being: the decision of only five Member States to designate areas outside the Natura 2000 network as environmentally sensitive permanent grassland;[347] and the decision of most Member States to permit the use of fertiliser on cover crops.[348]

5.3.2.2 Biodiversity loss

With regard to biodiversity loss, there would currently seem to be a degree of consensus that it is yet too soon to make clear judgments as to the efficacy of the greening component.[349] Nevertheless, there would also seem to be a degree of consensus that the greening component will not prove to be a major factor in halting biodiversity loss. For example, Pe'er *et al* see various forms of land use in EFAs as likely to contribute little to biodiversity unless more prescriptive management guidelines are introduced, while urging greater differentiation

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[341] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 15.

[342] Louhichi *et al* (n 108) 60.

[343] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) Annex 4, 31.

[344] *Ibid*, SWD (2016) 218, 14-15.

[345] See, eg, A. Matthews, *Scrap the Crop Diversification Greening Requirement and Find a Sensible Replacement* (4 August 2015) (available at http://capreform.eu/scrap-the-crop-diversification-greening-requirement-and-find-a-sensible-replacement/, last accessed on 29 June 2017).

[346] European Commission, *2016 Implementation Report* (n 185) 141.

[347] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) Annex 2, 29.

[348] European Commission, *2016 Implementation Report* (n 185) 141.

[349] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 8 (stating that '[t]he impact on biodiversity of the EFA requirement is difficult to assess precisely at this stage'); and see also K. Hart, *Green Direct Payments: Implementation Choices of Nine Member States and Their Environmental Implications* (Institute for European Environmental Policy, London, 2015) i.

between grassland types and greater connectivity between existing semi-natural grassland parcels.[350] Perhaps the greatest criticism has been reserved for the ability to satisfy the EFA requirement by the growing of nitrogen-fixing crops, the biodiversity benefits of which crops remain, in the view of environmental NGOs, 'unconvincing'.[351] Indeed, the European Commission has conceded that, together with catch crops, they generate 'the lowest coefficient for biodiversity'; and figures for 2015 indicate that only 26.9 per cent of the physical area of EFAs is devoted to the most beneficial elements for the environment, such as hedges, trees, ponds, ditches, terraces, stone walls and other landscape features.[352] Against this background, a promising and recent EU policy initiative has been to propose a general ban of the use of plant protection products on productive EFAs, a ban on use of pesticides on EFAs being specifically 'considered a most effective requirement from the environmental perspective'.[353] If this measure is implemented, and on 14 June 2017 the European Parliament voted in favour,[354] it would constitute a considerable advance on the earlier position in 2015 when only four Member States imposed environmental restrictions on inputs in respect of catch crops and only one Member State did so in respect of nitrogen-fixing areas. Moreover, a direct consequence would be greater harmonization across the EU, thereby creating a more level 'playing field'.

At the same time, an inherent difficulty in securing effective protection of biodiversity is the generation of baseline indicators against which progress can be measured. Recognition of this is very evident in the *EU Biodiversity Strategy* which is founded on the 2010 Biodiversity Baseline and updated Biodiversity Indicators,[355] while similar initiatives are being undertaken at national and regional level. Thus, in England since 2012-2013 the Farm Business Survey has collected data on fertiliser usage, with questions extending, *inter alia*, to the

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[350] G. Pe'er *et al*, 'EU agricultural reform fails on biodiversity', (2014) 344(6188) Science 1090. For helpful comment on this article, see A. Matthews, *The 2013 CAP Reform and Biodiversity* (12 June 2014) (available at http://capreform.eu/the-2013-cap-reform-and-biodiversity/, last accessed on 29 June 2017); and for earlier consideration of biodiversity issues with focus on the CAP, see, eg, B. Jack, 'The European Community and biodiversity loss: missing the target?', (2006) 15 Review of European, Comparative and International Environmental Law 304.

[351] Arche Noah *et al*, *Implementation of Ecological Focus Areas and Impacts on Biodiversity: Letter to Commissioner Hogan* (Brussels, 29 June, 2015) (available at http://www.eeb.org/?LinkServID=A3D2ACB7-5056-B741-DBA15EE8F0203F82&showMeta=0&aa, last accessed on 29 June 2017).

[352] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 8.

[353] See, eg, Speaking Points for Commissioner Phil Hogan at Meeting of COMAGRI, Tuesday 19 July 2016 (available at http://ec.europa.eu/agriculture/commissioner-speeches/pdf/hogan-2016-07-19-comagri.pdf, last accessed on 29 June 2017). For the proposed regulation, see C(2017) 735 (15 February 2017).

[354] See, eg, Euractiv, 'Parliament Narrowly Adopts Pesticide Ban for "Ecological Areas"' (15 June 2017) (available at https://www.euractiv.com/section/agriculture-food/news/parliament-narrowly-adopts-pesticide-ban-for-ecological-areas/, last accessed on 29 June 2017).

[355] See, in particular, *EU Biodiversity Strategy* (n 294) 4; and the Biodiversity Information System for Europe (available at http://www.biodiversity.europa.eu/, last accessed on 29 June 2017).

carrying out of precision farming techniques to guide fertiliser application,[356] a practice apprehended to contribute significantly to sustainable agriculture.[357]

Nevertheless, at the broadest level, the scope for improvement in terms of biodiversity would seem to be restricted by the evidence noted earlier that the 2013 CAP reforms have had no transformational effect in terms of how farmers farm their land.[358] As already highlighted with respect to climate change, the European Commission foresees the effect of green direct payments on land use as remaining very low over the medium term.[359] Positive changes include an increased area of permanent grassland, projected to be 3.2 per cent higher in 2025 than would have been the case in the absence of green direct payments, and a greater area of protein crops, which are the only crops expected to increase by more than 5 per cent.[360] However, while these changes are beneficial for biodiversity, and are likely to be even more beneficial if pesticide use is banned on nitrogen-fixing crops, the concrete advances on the ground may fall somewhat short of the ambition which may be required to meet the concerns expressed in the 2015 *The Mid-term Review of the EU Biodiversity Strategy to 2020* which observed that species linked to agricultural ecosystems continued to decline and called for greater efforts.[361] For this purpose, the 2013 CAP reforms were regarded as providing a menu of relevant instruments, but their broader take-up would be required; rather, arguably greater successes were to be found in agri-environmental and Natura 2000 measures under Pillar II, with some 19.1 per cent of total agricultural land being under management contracts supporting biodiversity and/or landscapes, albeit with considerable variation as between Member States.[362]

5.4 Delivering sustainability: Food production, productivity and production potential

On the other side of the sustainability equation, there would seem to be growing acceptance that greening under the 2013 CAP reforms has not resulted in material impacts on food production. Thus, the European Commission in its

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[356] See, eg, DEFRA, *Fertiliser Usage on Farms: Results from the Farm Business Survey, England 2014/15* (5 May 2016) (available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/520867/fbs-fertiliseruse-statsnotice-05may2016.pdf, last accessed on 29 June 2017). In that year, it was understood that use of such techniques has increased to 21 per cent.

[357] See, eg Commissioner Hogan, *"Europe's Opportunity in Digital Agriculture"* (14 January 2016, Brussels) (available at http://ec.europa.eu/agriculture/commissioner-speeches/pdf/hogan-digital-agriculture-workshop-14-01-2016_en.pdf, last accessed on 29 June 2017).

[358] See also generally, eg, A. Matthews, *What Biodiversity Benefits Can We Expect From EFAs?* (11 October 2015) (available at http://capreform.eu/what-biodiversity-benefits-can-we-expect-from-efas/, last accessed on 29 June 2017).

[359] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 15.

[360] *Ibid*, 15.

[361] European Commission, *The Mid-term Review of the EU Biodiversity Strategy to 2020*, COM (2015) 478, 4 and 9.

[362] *Ibid*, 9-10.

Review of Greening found that '[g]reen direct payments have been implemented without any significant short-term effect on production levels'.[363] Further, according to the CAPRI model, even in the medium-term it was not envisaged that there would be changes in agricultural production throughout the EU of more than ±1.5 per cent.[364] This would seem consistent with the statement in the Conclusions of the Council on the Multiannual Financial Framework that EFAs should be implemented 'in ways that do not require the land in question to be taken out of production and that avoids unjustified losses in the income of farmers'.[365] Besides, since completion of the 2013 CAP reforms, such priority would seem to be retained: in the words of Commissioner Hogan, '[f]ood production is the primary role of farmers and the delivery of high-quality traceable food should be seen as a public good'.[366]

In terms of the more detailed provisions of the greening component, the maintenance of agricultural output again might be explained by the relatively small adjustments in land use, the main changes having been a marginal increase in the proportion of permanent grassland, fallow land and protein grain production as compared to the position without green direct payments.[367] Further, and importantly, the reform process saw the introduction of productive crops within the menu of options available for Member States when implementing EFA, and these have proved popular. As has been seen, three of the five options which were most highly selected in 2015 gave rise to production (areas with nitrogen-fixing crops, short rotation coppice and catch crops).[368] And yet all three were absent from the proposed direct payments regulation. At the same time, at least for the present, it is only in a limited number of Member States that there are green restrictions on inputs in the cultivation of areas with nitrogen-fixing crops and catch crops.

In this context, a distinction may also be drawn between 'production', 'productivity' and 'production potential', all of which terms find expression in EU documentation. For example, the Council was concerned in its Conclusions on the Multiannual Financial Framework to ensure that 'production' continues throughout the EU. However, this term would not seem to capture the full nuances of 'sustainable agriculture' as effectively as either 'productivity' or 'production potential'. In the words of Garnett and Godfray, 'productivity' is to

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[363] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 14.

[364] *Ibid*, 15.

[365] European Council, Conclusions: Multiannual Financial Framework (7-8 February 2013) (available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2037%202013%20INIT, last accessed on 29 June 2017) paragraph 67.

[366] Commissioner Hogan, *Rural Affairs, Climate Change and Environment Committee* (Edinburgh, 18 June 2015) (available at http://ec.europa.eu/agriculture/commissioner-speeches/pdf/hogan-scottish-parliamant-18-06-2015_en.pdf, last accessed on 29 June 2017).

[367] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 15.

[368] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 15.

be distinguished from increasing the volume of production, in that it looks to 'increasing yields per unit of inputs (including nutrients, water, energy, capital and land) as well as per unit of "undesirable" outputs (such as greenhouse gas emissions or water pollution)'.[369] Such an interpretation resonates strongly with notions of 'sustainability' as earlier discussed and, indeed, it may be recalled that 'productivity' and 'sustainability' are the twin objectives of the EIP. That said, although these twin objectives may be similar, they remain differentiated in the title of the Partnership;[370] and, perhaps because 'productivity' is often seen through the lens of competitiveness,[371] 'sustainability' may be yet more closely bound with 'production potential'. Thus, in *The CAP Towards 2020* the European Commission highlighted public approval for preservation of 'food production potential on a sustainable basis throughout the EU, so as to guarantee long-term **food security** for European citizens'.[372] And, more recently, the European Commission asserted that the greening component was directed to '[t]he maintenance of the long-term production potential of EU agriculture by safeguarding the natural resources on which agriculture depends'.[373]

5.5 WTO

A factor overhanging any measures to promote greening continues to be their WTO compatibility; yet at the time of the 2013 CAP reforms such WTO considerations would seem to have enjoyed a lower profile than during, for example, the 1992 MacSharry reforms or the 2003 Mid-term Review.[374] An explanation for this may be sought in the understanding by the EU that the level of its domestic support to farmers has fallen well below WTO ceilings. In particular, the Single Farm Payment has been considered to be 'decoupled income support', which by virtue of paragraph 6 of Annex 2 to the Agreement on Agriculture would be Green Box compatible and therefore exempt from WTO domestic support reduction commitments. Consistent with this understanding, as the 2013 CAP reforms gained momentum, it was stated in the *Impact Assessment* that '[t]oday more than 90% of direct payments are decoupled and qualify for WTO green box (with no or limited trade distorting effects)'.[375] And, while doubts have been expressed as to whether the Single Farm Payment, and now the Basic Payment, are truly decoupled from production so as to meet the

[369] Garnett and Godfray (n 25) 14

[370] See also, eg, *Foresight Report* (n 29) 12 (advocating as a key action that '[t]he political and economic governance of the food system must be improved to increase food system productivity and sustainability').

[371] See, eg, European Commission (n 9) 5.

[372] *Ibid*, 2 (emphasis in original) (although admittedly the same document did also see as a key objective the maintenance of agricultural *production* across the whole EU: 6).

[373] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 4.

[374] For excellent discussions of this aspect, see, eg, F. Smith, 'Mind the Gap: "Greening" Direct Payments and the World Trade Organization', in McMahon and Cardwell (eds.) (n 289) 412; and A. Swinbank, 'The WTO: No Longer Relevant for CAP Reform?', in Swinnen (ed.) (n 2) 193.

[375] European Commission (n 133) 32; and see also the 2017 WTO notification of the EU, G/AG/N/EU/34, 8 February 2017 (in respect of the 2013/2014 marketing year).

Green Box criteria, the 2013 CAP reforms would appear to have proceeded on such a basis.[376]

With specific reference to the greening component, the *Impact Assessment* addressed directly its WTO compatibility as follows:

> To retain the WTO green box nature of Pillar I payments, the 'greening' component will need to be a decoupled, fixed payment applying to all farmers in a specific area (Member State or region); in this respect, care should be exercised in rewarding specific types of production e.g. through a grassland premium, and certainly not production *per se*.[377]

Similarly, in Annex 2 to the same document, it was affirmed as follows:

> To qualify for the Green Box (WTO) the decoupled nature of the greening component must be safeguarded. In this respect, any link to production per se or to types of production, for instance by requiring the presence or absence of certain crops as part of the green cover or crop rotation even if environmentally justified should be avoided.[378]

Accordingly, it would appear that the greening component is to qualify for Green Box exemption as 'decoupled income support' under paragraph 6 of Annex 2 to the Agreement on Agriculture as opposed to, for example, 'payments under environmental programmes' by of virtue paragraph 12.[379] Indeed, that paragraph 12 would not be applicable is accepted by the European Commission by reason of the new payments not satisfying the criterion that their amount be calculated on the basis of costs incurred/income foregone.[380] More generally, it may be doubted whether there is satisfaction of the further criterion that eligibility should be determined 'as part of a clearly-defined government environmental or conservation programme'.[381]

Qualification as decoupled income support may also prove problematic. For example, in the *Impact Assessment* the European Commission was concerned lest compatibility be precluded by any requirement for 'the presence or absence of certain crops', since in the case of decoupled income support under the

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[376] For these doubts, see, eg, A. Swinbank and R. Tranter, 'Decoupling EU farm support: Does the new Single Payment Scheme fit within the Green Box?' (2005) 6 The Estey Centre Journal of International Law and Trade Policy 47 (in relation to the Single Farm Payment) .

[377] European Commission (n 133) 72. It may at the same time be noted that the section on 'International impacts' in the 85 page document (excluding annexes) extends to less than ten lines.

[378] *Ibid*, Annex 2, 17. See also WTO, G/AG/N/EU/35, 8 February 2017.

[379] *Ibid*, European Commission (n 133) Annex 2, 17, n 8.

[380] *Ibid*, Annex 2, 17, n 8. See also Swinbank (n 374) at 209.

[381] See, eg, M. Cardwell and F. Smith, "Renegotiation of the WTO Agreement on Agriculture: accommodating the new big issues', (2013) 62 International and Comparative Law Quarterly 865.

Agreement on Agriculture it is necessary that '[t]he amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period'.[382] This provision was broadly interpreted by the WTO Appellate Body in *United States – Subsidies on Upland Cotton*;[383]and, in the words of Smith, '[i]t is the payment's impact on the production decisions of the farmer which seems to be key to determining whether the payment is decoupled or not under paragraph 6(b)'.[384] Accordingly, the detailed criteria attached to decoupled income support may present difficulties in respect of the WTO compatibility of the greening component, with particular reference to the fact that farmers may support their entitlement to payment by the production of specified crops on EFAs (such as areas with catch crops and areas with nitrogen-fixing crops). In this context, it may be recalled that, although the evidence is that the effect of green direct payments on agricultural production has been relatively marginal, the most significant change has been an increase in protein crops, suggesting that the EFA rules have had at least some impact on the planting decisions of farmers.[385]

Aside from the greening component, the increase in ceilings for voluntary coupled support under the 2013 CAP reforms may have further negative implications from a world trade perspective in that, as a general rule, any support directly tied to production would fall within the Amber Box and count against total permitted levels of domestic support under the Agreement on Agriculture.[386] Awareness of this potential danger can similarly be detected in the *Impact Assessment*, which highlighted that 'the extent of coupled support would need to remain within clearly defined limits';[387] yet the outcome of the 2013 CAP reforms has been that 4.1 billion Euros per year of direct payments is coupled,[388] and there is at least an arguable case that this may not meet the criteria for production-limiting

[382] Agreement on Agriculture, Annex 2, paragraph 6(b).

[383] *United States – Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R, paragraphs 318-331.

[384] Smith (n 374) at 425-426.

[385] An interesting question is whether the scale of change is so small as to be insufficient to breach the 'fundamental requirement' which must be met by all Green Box measures under paragraph 1 of Annex 2 to the Agreement on Agriculture, namely that 'they have no, or at most minimal, trade-distorting effects or effects on production'.

[386] Exceptions would be where the level of support is *de minimis* or where the payment is made under a production-limiting programme (and so falling within the 'Blue Box'): Article 6(4) and (5) of the Agreement on Agriculture; and, for the overall structure of the domestic support regime, see generally, eg, J. A. McMahon, *The WTO Agreement on Agriculture: A Commentary* (Oxford University Press, 2006) 63-88.

[387] European Commission (n 133) 71.

[388] European Commission, *Direct Payments 2015-2020: Decisions taken by Member States: State of Play as at June 2016 - Information Note* (European Commission, Brussels, 2016) 9.

programmes so as to secure exemption within the Blue Box.[389] On the other hand, as Swinbank observes, the level of 'headroom' available to the EU is far in excess of that figure (provided always that the EU is correct in its interpretation that measures such as the Single Farm Payment, and now the Basic Payment, are indeed Green Box compliant).[390]

A further and more general consideration is that, in order to be eligible to receive any direct payments under the Direct Payments Regulation, it is necessary to meet the 'active farmer requirement'.[391] In which regard, one of the criteria is that the recipient must not be a natural or legal person, or group of natural or legal persons, 'whose agricultural areas are mainly areas naturally kept in a state suitable for grazing or cultivation and who do not carry out on those areas the minimum activity' as more precisely defined by their respective Member State.[392] In consequence, while there are legitimate questions as to when inactivity ends and activity begins,[393] the requirement tends towards a positive obligation to produce, which might again preclude qualification as decoupled income support, by reason of paragraph 6(e) of Annex 2 to the Agreement on Agriculture, stipulating that '[n]o production shall be required in order to receive such payments'. This danger was expressly countenanced in the *Impact Assessment*, which noted that '[m]any of the criteria that could be used to define who is an "active farmer" could be problematic from a WTO point of view' and, more specifically, that 'the elements used to define an "active farmer" would need to respect WTO green box criteria (in particular they cannot imply an obligation to produce)'.[394]

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[389] In the Direct Payments Regulation (n 13), Article 52(6) provides that 'coupled support shall take the form of an annual payment and shall be granted within defined quantitative limits and be based on fixed areas and yields or on a fixed number of animals', which would seem to track the criteria for Blue Box exemption laid down by Article 6(5) of the Agreement on Agriculture. Indeed, Preamble (5) of Commission Delegated Regulation (EU) 639/2014 (n 179) expressly recites that '[c]oupled support should respect the requirements to be considered as falling within the "Blue Box" of [the Agreement on Agriculture]'. On the other hand, Article 52(5) of the Direct Payments Regulation also expressly provides that '[c]oupled support may only be granted to the extent necessary to create an incentive to maintain current levels of production in the sectors or regions concerned', which may not be easy to equate with a production-limiting programme. See also WTO, G/AG/N/EU/35, 8 February 2017.

[390] Swinbank (n 374) at 199; and see also B. O'Connor, 'The Impact of the Doha Round on the European Union's Common Agricultural Policy', in McMahon and Cardwell (eds.) (n 289) 387. The 2017 WTO notification of the EU, G/AG/N/EU/34, 8 February 2017 (in respect of the 2013/2014 marketing year) states that Amber Box support amounted to only 5,971.7 million Euros, as against a total permitted level of domestic support of 72,378 million Euros.

[391] Direct Payments Regulation (n 13) Article 9.

[392] *Ibid*, Article 9(1).

[393] For example, it would not seem immediately clear how much activity would be required on open moorland or semi-natural grassland.

[394] European Commission (n 133) 66 and 71-72. Significantly, under the proposed 'Omnibus Regulation', Member States would be granted discretion to dispense with the 'active farmer' requirement: COM(2016) 605, Preamble (227) and Article 269.

Moreover, at a broader level, the potential WTO problems faced by the greening agenda would seem to flow from an Agreement on Agriculture which was negotiated nearly 25 years ago at a time when surplus production was a major concern and the environmental dimension was less developed.[395] On the one hand, 'environmental' exemption from domestic support reduction commitments was reserved for targeted measures forming part of a clearly-defined government environmental or conservation programme; and, while this criterion would seem adequate to capture, for example, agri-environment-climate payments under rural development programmes, the European Commission has effectively conceded that it is not met by a payment whose *raison d'être* is to cover the vast majority of the UAA of the EU. On the other hand, the detailed provisions governing agricultural practices beneficial for the climate and the environment may reach such a point in terms of their prescription of land use as to put in question qualification of the support as 'decoupled'. In this regard, it may yet be hoped that an Agreement on Agriculture more sensitive to such initiatives may result from the Doha Development Round negotiations, thereby freeing 'green' policy space for legislators and the agricultural sector alike.

5.6 Some final thoughts

The European Commission must be given credit for seeking to 'raise the bar' in terms of the green credentials of the CAP: as recited in the Direct Payments Regulation itself, '[o]ne 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 applicable throughout the Union'.[396] Accordingly, even though the legislative framework as subsequently enacted may have fallen short of earlier environmental aspirations, there are good grounds for maintaining that the 2013 CAP reforms do constitute a step forward in developing the sustainability agenda (although perhaps not a major stride). Further, the reform process saw curtailment of a number of initiatives which had the capacity to blunt the impact of the new legislative framework, a clear example of this being the decision to preclude double funding. At the same time, and importantly, the fate of the greening component may be regarded as consistent with that of other more radical proposals for CAP reform, and does not dispel hope for the future, as highlighted by Matthews:

> The principle that at least a share of a farmer's direct payment should be justified by environmentally-friendly management practices is now established even if the impact on the ground of the new green payment in the coming period will be extremely limited. Looking back at the history of innovation in the CAP, there is a pattern whereby a Commission

[395] See, eg, Cardwell and Smith (n 381).
[396] Direct Payments Regulation (n 13) Preamble (37) (emphasis added).

> proposal is often initially accepted in a very watered-down version only to be strengthened in later reforms. Perhaps greening will follow this path in the future.[397]

Review mechanisms embedded within the 2013 CAP reform package already facilitate such an approach.[398] For example, the European Commission was under an obligation to evaluate the scope of EFAs by 31 March 2017, in the event deciding that there was no need to expand the percentage of arable land included by reason that areas declared by farmers were almost double the initial 5 per cent required.[399] And an initial report by the European Commission in respect of more general monitoring and evaluation of the CAP is to be presented by 31 December 2018.[400] Nonetheless, despite such studies, there is also general consensus that, with particular reference to biodiversity and carbon sequestration, the true impact of the 2013 CAP reforms is unlikely to be revealed for some time.[401]

In any such further reforms, three overarching policy issues for consideration may be suggested. First, there is an increasingly strong case in favour of a yet more holistic approach towards the realisation of a sustainable agriculture.[402] Greening under the 2013 CAP reforms has raised the bar in respect of land use, but a significant omission was the absence of immediate integration into cross-compliance of measures under the Water Framework Directive and the Pesticides Directive. Further, in May 2014 the Commission took the decision not to take forward a proposal for a Soil Framework Directive, notwithstanding that that 2015 would be the International Year of Soils and that the proposal was itself couched very much in the language of sustainability. Indeed, it expressly advocated an integrated approach and long-term perspective, having the objective of:

> establishing a common strategy for the protection and sustainable use of soil based on the principles of integration of soil concerns into other policies, preservation of soil functions within the context of sustainable use, prevention of threats to soil and mitigation of their effects, as well

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[397] A. Matthews, *The Ciolos CAP Reform* (17 December 2013) (available at http://capreform.eu/the-ciolos-cap-reform/, last accessed on 29 June 2017). Comparison may be drawn with the less than full incorporation of product sectors within the Single Farm Payment under the 2003 Mid-term Review, only for the majority of the excluded sectors (such as fruit and vegetables) to be incorporated over the ensuing years.

[398] For full discussion, see, eg, R. Moehler, 'Is There a Need for a Mid-term Review of the 2013 CAP Reform?', in Swinnen (ed.) (n 2) 531.

[399] Direct Payments Regulation (n 13) Article 46(1); and European Commission, *EFA Report*, COM (2017) 152 (n 216) 8 and 14.

[400] Horizontal Regulation Article (n 16) Article 110.

[401] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 8; European Commission, *EFA Report*, COM (2017) 152 (n 216) 3; and Hart, Buckwell and Baldock (n 135) 31.

[402] See also, eg, S. Whitfield *et al*, 'Sustainability spaces for complex agri-food systems', (2015) 7 Food Security 1291.

as restoration of degraded soils consistent at least with the current and approved future use.[403]

Likewise, a broad interpretation of sustainability would offer greater scope to address future constraints on the availability of key inputs, in which context the limited availability of phosphorous reserves has already been identified as an area of particular concern.[404] And there are also compelling reasons to seek to embed the sustainability agenda more closely within wider rural development policy, although this might bring under closer scrutiny the extent to which agriculture should remain the dominant beneficiary of Pillar II funding.[405]

Secondly, the adoption of a long-term policy horizon has the capacity to enhance delivery of sustainability objectives, with this being especially apt in the case of measures to promote biodiversity and combat climate change. Thus, biodiversity loss may occur rapidly, as when set-aside land was returned to cultivation during the 2007-2008 food crisis, whereas the reconstruction of habitats may take decades, with attendant difficulties in quantifying the extent of positive developments, at least over the short-term. Further, the European Commission has highlighted with specific reference to EFAs that the most 'stable features' (including hedges, trees, ponds and terraces) are those which are liable to generate the greatest biodiversity benefits in that they constitute 'green infrastructure',[406] while the limitations of Pillar I measures administered on an annual basis were revealed by the decision to opt for a crop diversification rather than a crop rotation requirement.[407]

All such factors indicate that the longer time-span of Pillar II-type measures may be more appropriate to meeting current policy ambitions for the CAP, at the same time locking in gains which have been achieved. Options to this effect are already being widely canvassed. For example, Hart, Buckwell and Baldock propose as two (out of four) possible avenues to explore: (i) a wholesale shift of the greening measures from Pillar I to Pillar II; and (ii) 'an integrated option', under which the CAP would be 'redesigned as a single integrated set of measures structured in a tiered hierarchy'.[408] More precisely, this latter option is considered to 'pursue more sustainable management in a synergistic and streamlined way,

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[403] European Commission, COM (2006) 232, Explanatory Memorandum, 2.

[404] See, eg, Cordell and Neset (n 271).

[405] For full discussion of rural development policy post-2020, see, eg, T. Dax and A. Copus, 'The Future of Rural Development', in A. Matthews *et al*, *Research for Agri-Committee – CAP Reform Post-2020 – Challenges in Agriculture: Workshop Documentation* (European Parliament, Brussels, 2016) 221.

[406] European Commission, *Review of Greening*, SWD (2016) 218 (n 197) 8; and see also E.Underwood and G. Tucker, *Ecological Focus Area Choices and Their Potential Impacts on Biodiversity* (Institute for European Environmental Policy, London, 2016).

[407] European Commission, *Impact Assessment* (n 133) Annex 2, 10.

[408] Hart, Buckwell and Baldock (n 135) 35.

whilst giving due weight to targeted approaches'.[409] Such a tiered regime has also been advocated by Matthews, with a single pillar structure administered on a multi-annual basis, including specific tiers for shallow and higher-level environmental payments.[410]

Thirdly, an imperative in any implementation of greening measures will be to strike the right balance between, on the one hand, a targeted approach which both accommodates individual conditions on the ground and is directed to specific outcomes and, on the other hand, the realisation of a regulatory framework which is administratively workable and proportionate.[411] The on-going need to find a resolution between these potentially competing factors has been re-iterated in the Cork 2.0 Declaration 2016 which states, *inter alia*, that '[m]easures to reward the delivery of environmental public goods and services should reflect the variety of local circumstances'; and that '[p]roportionality in requirements and sanctions is important'.[412] Matthews likewise advocates a 'targeted' model for the future of direct payments, with 'a clear results orientation'.[413] Indeed, the more closely agricultural policy is implemented at farm scale, the higher are likely to be the sustainability dividends; and it is notable that the 2017 European Commission *EFA Report* concluded that the environmental benefits flowing from EFAs 'depend not only on their quantity but also on their quality, linked to specific conditions and management requirements'.[414] Consensus is thus developing on the merits of a results-driven, targeted approach, combined with full recognition of the hurdles to be overcome if this policy is to be realised in a manner which is cost-effective and, moreover, 'sustainable' in terms of administration (including monitoring and evaluation). At present, the drive

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[409] *Ibid*, 58.

[410] A. Matthews, 'The Future of Direct Payments', in Matthews *et al* (n 405) 3, 65-80. It may be noted that a tiered system has been operated under the Countryside Stewardship Scheme in England. See also generally A. Buckwell *et al, CAP: Thinking Out of the Box. Further Modernisation of the CAP. Why, What and How?* (RISE Foundation, Brussels, 2017).

[411] In this regard, see, eg, the House of Commons Environment, Food and Rural Affairs Committee, *Greening the Common Agricultural Policy*, First Report of Session 2012-13, HC 170, paragraph 22: '[t]he Commission must balance the often conflicting pressures of designing a policy that will deliver positive environmental outcomes with the need for a policy that can actually be implemented and delivered for a reasonable cost'.

[412] Cork 2.0 Declaration 2016 (available at http://ec.europa.eu/agriculture/sites/agriculture/files/events/2017/cork-declaration-berlin/cork-declaration-2-0_en.pdf, last accessed on 29 June 2017), Points 4 and 9. See also the Meeting of the OECD Committee for Agriculture at Ministerial Level, 7-8 April 2016, *Declaration on Better Policies to Achieve a Productive, Sustainable and Resilient Global Food System* (OECD, 2016) (available at http://www.oecd.org/agriculture/ministerial/declaration-on-better-policies-to-achieve-a-productive-sustainable-and-resilient-global-food-system.pdf, last accessed on 29 June 2017) and, in particular, paragraph 5, which declares that policies need to '[b]e transparent (with explicit objectives and intended beneficiaries), targeted (to specific outcomes), tailored (proportionate to the desired outcome), flexible (reflecting diverse situations and priorities over time and space), consistent (with multilateral rules and obligations) and equitable (within and across countries), while ensuring value for money for scarce government resources'.

[413] See, eg, A. Matthews, 'The Future of Direct Payments', in Matthews *et al* (n 405) at 65.

[414] European Commission, *EFA Report*, COM (2017) 152 (n 216) 13.

to simplify the CAP is moving up the policy hierarchy, with President Juncker stating that simplification and modernisation will be 'the key words and primary objective' of the Communication on the future of the CAP to be adopted by the end of 2017.[415] Nonetheless, as has been seen, many of the perceived weaknesses of greening under the 2013 CAP reforms have been attributed to prioritising of administrative simplicity (such as exemption of the Small Farmers Scheme from cross-compliance and the greening component). Implementing 'sustainable agriculture' closer to individual farm level would inevitably incur higher initial costs as specific outcomes are identified and bespoke measures to achieve them are put in place. In addition, on a continuing basis there would likely be need of a more extensive monitoring regime. Yet, while recognising that any valuation of outcomes in this context is notoriously difficult, there may be scope to explore more fully the oppertunities for targeted schemes to deliver a greater 'green dividend' proportionate to expenditure as compared to those with less tight focus.

Finding the optimal point in this balancing exercise between 'narrow and deep' and 'broad but shallow' will be no easy task, although the 2013 CAP reforms would caution against a move towards a greater level of generality. Further, there are robust reasons for believing that farmers are more favourably disposed towards schemes offering specific incentives which are demonstrably relevant to their own individual circumstances, as opposed to across-the-board measures couched in terms of restrictions.[416] And 'win-win' opportunities can yet be revealed. For example, it has already been highlighted that the 'clustering' of environmental schemes across a range of landholdings can realise enhanced biodiversity benefits,[417] with recent research also suggesting that such initiatives may be designed so as to generate savings in terms of monitoring and enforcement costs.[418] In which light, it is encouraging that the 2013 CAP reforms introduced the option of collective implementation of EFAs, together with enhanced financial reward for farmers taking concerted action under both agri-environment-climate schemes and organic schemes. And it is further encouraging that this direction of travel would not yet appear to be exhausted, as evidenced by the more recent streamlining of the administration of agri-environment-climate schemes where claims are made collectively.[419]

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[415] European Commission, *President Juncker Announces a Communication in 2017 on the Future of the Common Agricultural Policy* (6 December 2016) (available at https://ec.europa.eu/agriculture/newsroom/315_en, last accessed on 29 June 2017).

[416] See, eg, B.B. Davies and I.D. Hodge 'Farmers' preferences for new environmental policy instruments: determining the acceptability of cross compliance for biodiversity benefits', (2006) 57(3) Journal of Agricultural Economics 393; and A. Matthews, 'The Future of Direct Payments', in Matthews *et al* (n 405) at 70.

[417] See, eg, Bureau (n 228); Prager, Reed and Scott (n 229); and Leventon *et al* (n 229).

[418] A. Bell *et al*, 'Scaling up pro-environmental agricultural practice using agglomeration payments: Proof of concept from an agent-based model', (2016) 126 Ecological Economics 32.

[419] Commission Implementing Regulation (EU) 809/2014 (n 233) Article 14*a* (as amended by Commission Implementing Regulation (EU) 2015/2333 of 14 December 2015, [2015] OJ L329/1).

Svensk sammanfattning

Ett hållbart jordbruk har stått högt upp på EU:s agenda i många årtionden. Vad som är nytt sedan 2013 är att begreppet har fått en ny status: idag är hållbarhet en nyckelprincip som vägleder den gemensamma jordbrukspolitiken (GJP). Den nya och centrala komponenten i den senaste reformen är således att miljökrav kopplas till direktstöden (också kallade ”gårdsstöd”). Ambitionen är att ge EU:s jordbrukspolitik bättre förutsättningar att möta framtida utmaningar, såsom klimatförändringar och en säker livsmedelsförsörjning.

I den här rapporten granskas miljöanpassningen av jordbruksstöden i fyra steg.

För det första tittar rapportförfattarna på begreppet ”hållbarhet”. Efter att ha studerat den gemensamma jordbrukspolitikens utveckling konstaterar de att det saknas en exakt definition. Osäkerheten kring vad som egentligen avses tycks ha funnits kvar även i 2013 års reform av GJP. Begreppen ”hållbar” och ”hållbarhet” förekommer flitigt i Europeiska kommissionens vitbok ”Den gemensamma jordbrukspolitiken mot 2020” men är i stort sett frånvarande i själva lagtexterna. Oavsett vilken tolkning som är giltig för vad som avses med ”hållbart jordbruk” så omfattar begreppet även den långsiktiga livsmedelssäkerheten, som i sin tur är beroende av att man kan säkerställa fortsatt produktionskapacitet baserad på ekologiska resurser.

För det andra går författarna igenom på vilket sätt hållbarhetskrav lever vidare i lagstiftningsprocessen i 2013 års reformer. I rapporten går de också igenom de positioner som intogs av de tre nyckelaktörerna (kommissionen, rådet och parlamentet) genom förhandlingarnas gång. I det sammanhanget diskuterar de betydelsen av att Europaparlamentet har fått en starkare roll i EU:s jordbrukspolitik i och med att Lissabonfördraget trädde i kraft.

För det tredje granskas reglerna såsom de till slut antogs av lagstiftarna. Fokus ligger här på direktstöden i den gemensamma jordbrukspolitikens första pelare (marknads- och direktstöd). De viktigaste bestämmelserna är utan tvivel de som styr den så kallade förgröningen av direktstödet, vilka infördes genom förordning (EU) 1309/2013 (direktstödsförordningen). Författarna granskar i detalj de nya åtgärderna för diversifiering av grödor, bibehållandet av permanent gräsmark och inrättandet av ekologiska fokusarealer (EFA). De uppmärksammar även revideringen av tvärvillkoren i förordning (EU) 1306/2013, enligt vilken bönderna nu är skyldiga att följa ett antal miljömässiga och andra åtaganden för att kvalificera sig för fullt direktstöd, samt miljöanpassningen av den gemensamma jordbrukspolitikens andra pelare i landsbygdsutvecklingsförordningen (EU) 1305/2013.

För det fjärde och sista innehåller rapporten en allmän diskussion om hur nära de ursprungliga ambitionerna med reformen man egentligen hamnade. Slutsatserna är givetvis preliminära, inte minst i ljuset av att reformen trädde ikraft först den 1 januari 2015. Det saknas dock fortfarande en definition av vad ett ”hållbart jordbruk” är, vilket är nödvändigt för att identifiera tydliga mål och utfall.

Sammanfattningsvis anser författarna att Europeiska kommissionen tydligt har försökt höja ribban genom att förgröna den gemensamma jordbrukspolitiken. Även om den efterföljande lagstiftningen inte har nått upp till målen kan det på goda grunder hävdas att reformen från 2013 var ett steg i rätt riktning för att utveckla ett hållbart europeiskt jordbruk.

När det gäller framtiden identifierar författarna tre övergripande politiska utmaningar. Om ett hållbart jordbruk ska kunna förverkligas krävs det först och främst ett mer helhetsorienterat tänkande. Det kan till exempel handla om en samordning med åtgärder inom andra områden, såsom vattendirektivet och direktivet om bekämpningsmedel. Om EU:s hållbarhetsmål ska kunna ge bättre resultat behövs vidare ett mer långsiktigt perspektiv i den gemensamma jordbrukspolitiken. Detta är särskilt viktigt när det gäller att stärka den biologiska mångfalden och motverka klimatförändringarna. Slutligen gäller det att hitta den rätta balansen mellan specifika och allmänna insatser – mellan å ena sidan individuella villkor och specifika utfall och å andra sidan ett administrativt fungerande och proportionerligt regelverk. Att hitta den optimala balansen är inte lätt, men enligt författarna är det i nuläget motiverat att prioritera specifika insatser, det vill säga insatser som är anpassade till de naturliga förutsättningarna för jordbruk i olika miljöer.

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"For the present, the 2013 CAP reforms would caution against a move towards a greater level of generality; and there are also robust reasons for believing that farmers are more favourably disposed towards schemes offering specific incentives which are demonstrably relevant to their own individual circumstances, as opposed to across-the-board measures couched in terms of restrictions."

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