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## ADVANCING ANIMAL WELFARE: STATE, SOCIETY AND ECONOMY

### INTRODUCTION

This chapter considers farm animal welfare as a public good<sup>1</sup> and examines the role of legislators and public bodies in adopting animal welfare legislation and standards in accordance with the democratic process. The focus is on the European Union (EU), a regional entity, and its pioneer status in advancing animal welfare law. Alongside, private animal welfare policies have evolved, for example Marks and Spencer's corporate 'Farming for the Future' animal welfare standards; the consequence a public private 'divide'?

The assurance of farm animal welfare as a result of good agricultural practices beyond, and in the absence of, baseline norms is the ultimate focus of this work in which the emphasis is on the achievement of raised animal welfare standards. Consideration is given to the increasing societal concerns of the ethical consumer and the market demand for quality<sup>2</sup> agricultural produce sourced from a supply chain throughout which

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<sup>1</sup> See: Organisation for Economic Cooperation and Development (OECD), *Multifunctionality Towards an Analytical Framework*, 2001.

<sup>2</sup> 'As advances in science, increases in wealth and *evolving societal concerns* with respect to the environment, sustainability and *animal welfare* put greater fo-

the enhanced welfare of farm animals in life and in death, free from unnecessary suffering, is ensured.

Higher animal welfare standards, it would appear, increasingly are specified in private collective accredited codes of good agricultural practice, stipulated in privately certified schemes drawn up by multinational retailers, or in independently certificated standards of charitable non-governmental organisations, each with scope to further economic growth.

Private *prima facie* voluntary standards of animal welfare co-exist alongside public standards or as substitutes in the absence of the latter. Vital questions arise, *inter alia*, as to the extent to which the EU may defer to private standardisation institutions in such matters of public concern as animal welfare and food quality, be this by benchmarking to private standards, or delegating / outsourcing the setting of such standards and assurance accreditation. To what extent does the EU have the competence to regulate the standardisation of private animal welfare certification schemes? Does it have a constitutional mandate to do so? Should the EU regulate directly, in what way[s] and when, so as to ensure conformity with principles of good governance and legitimate process based on the rule of law?

#### ANIMAL WELFARE AND PUBLIC STANDARDS

Animal welfare means how an animal is coping with the conditions in which it lives commensurate with the five freedoms of animal welfare of the International Organisation for Animal Health (OIE), namely: freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour.<sup>3</sup> OIE guiding principles for animal welfare recognise that the

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cus on a wider range of food *quality attributes*, both private firms and public institutions find themselves responding increasingly to consumer and societal demands for *higher quality* food.' G. Smith, *Interaction of Public and Private Standards in the Food Chain*, "OECD Food, Agriculture and Fisheries Working Papers" 2009, No. 15, para. 4 (*emphasis added*).

<sup>3</sup> Adopted by the European Commission in its *Communication to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012–2015*, COM (2012) 6, 19 January 2012, [www.ec.europa.eu/food/animal/welfare/actionplan/docs/impact\\_assessment\\_19012012\\_en.pdf](http://www.ec.europa.eu/food/animal/welfare/actionplan/docs/impact_assessment_19012012_en.pdf).

use of animals in agriculture contributes to the wellbeing of people carrying with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable.<sup>4</sup> Animals are used by humans but deserve respect and a state of wellbeing commensurate with their sentience, i.e. ability to experience pleasure and pain.

Animal welfare concerns have a basis in intensive farming,<sup>5</sup> animal slaughter, selective and unregulated breeding, and transportation of live animals.<sup>6</sup> Due responsibility for the fact that continued disregard for the basic standards of farm animal wellbeing either physical or stress related, can result in poor health and disease in animals and the associated risk of transposition into the human food chain,<sup>7</sup> must be undertaken at EU level literally at the grass roots of higher approximated standards of farm animal welfare. Eurogroup for Animals<sup>8</sup> has expressed concern in that the two entities of animal health and animal welfare are inextricably linked and some indicators of poor welfare are also indicators of poor health,<sup>9</sup> inclusive of body damage and disease. A specific concern, for example, is stated to relate to genetic selection in dairy cattle together with the practice of feeding concentrates in order to increase milk yields, which has increased the incidence of metabolic diseases, mastitis and lameness.<sup>10</sup> Despite the fact that such conditions only affect animals and do not generally cause disease in humans, the 'diagnosis' which associates poor animal health and welfare as a private problem for farmers,<sup>11</sup> ignores the other inextricable link between ani-

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<sup>4</sup> *International Terrestrial Animal Health Code of the World Organisation for Animal Health (OIE)*, Chapter 7.1, Introduction to the Recommendations for Animal Welfare, [www.oie.int/en/international-standard-setting/terrestrial-code/access-online](http://www.oie.int/en/international-standard-setting/terrestrial-code/access-online).

<sup>5</sup> A contributory factor being earlier incentives to increase agricultural production in accordance with the European Union (EU) Common Agricultural Policy (CAP), (former Article 39 (1) of the European Community Treaty).

<sup>6</sup> See: Eurogroup for Animals, *Areas of Concern*, 2010, [www.eurogroupforanimals.org](http://www.eurogroupforanimals.org)

<sup>7</sup> See: Compassion in World Farming, *Zoonotic Diseases, Human Health and Farm Animal Welfare*, May 2013, [www.ciwf.org.uk/includes/documents/cm-docs/2013/z/zoonoses\\_16page\\_report.pdf](http://www.ciwf.org.uk/includes/documents/cm-docs/2013/z/zoonoses_16page_report.pdf) [accessed 7 October 2013].

<sup>8</sup> The secretariat of the European Parliamentary inter-group an animal welfare [www.eurogroupforanimals.org](http://www.eurogroupforanimals.org).

<sup>9</sup> Citing D.M. Broom, K.G. Johnson, *Stress and Animal Welfare*, Kluwer 1993.

<sup>10</sup> *Eurogroup for Animals*, 2010, , *op. cit.*, p. 11.

<sup>11</sup> J. McEldowney, W. Grant, G. Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy*, Routledge 2013. Whereas food safety issues are deemed to be a matter of public health concern.

mal health/welfare and rural development. That is the multifunctional role of agriculture in meeting societies demand for good quality agricultural produce emanating from good animal welfare practices and the necessary in-put in support from the EU and its Member States.<sup>12</sup> In proposing a framework of analysis and a 'working definition' of multifunctionality 'relevant especially in agriculture', the Organisation for Economic Cooperation and Development (OECD) proposes one approach that associates multifunctionality with particular characteristics of the agricultural production process and its outputs.<sup>13</sup> Animal welfare is a non-commodity output of agriculture and is, this author submits, increasingly a public good reflected in its 'jointness' with agricultural commodity output<sup>14</sup> and the growing societal demand for quality agri-products that have resulted from farming practices favourable to animal welfare. EU institutions are, thus, obligated to ensure that high standards of animal welfare pertain in agriculture in order to ensure food of good quality is the end product of an animal welfare friendly supply chain in which any risk of animal disease associated with poor or minimum standards of animal welfare is eliminated.

The EU has been a pioneer in adopting animal welfare legislation in the absence of an animal welfare policy and a specific animal welfare competence.<sup>15</sup> This, in an EU underpinned by an internal market in which there are no barriers to trade<sup>16</sup> and in which goods, inclusive of livestock produce,<sup>17</sup> accordingly move freely between Member States. In this economically driven environment, EU agricultural policy has provided a legal basis,<sup>18</sup> spawning secondary legislation concerned with the general welfare of farm animals to ensure against unnecessary

<sup>12</sup> Under the EU Common Agriculture Policy; see below. This, despite the debate as to whether agriculture is perceived as a public good in itself meriting state intervention owing to the multifunctional role of agriculture overriding perceptions of protectionism. C. Potter, M. Tilzey, *Agricultural multifunctionality, environmental sustainability and the WTO: Resistance or accommodation to the neoliberal project for agriculture?*, "Geoforum" 2007, No. 38, p. 1290, 1292.

<sup>13</sup> OECD (2001), , *op. cit.*, pp. 7–9.

<sup>14</sup> *Ibidem*, pp. 9–13.

<sup>15</sup> See: T. Camm, D. Bowles, *Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union*, "Journal of Environmental Law" 2000, p. 197.

<sup>16</sup> Treaty on the Functioning of the European Union (TFEU), Article 26.

<sup>17</sup> TFEU, Article 38.

<sup>18</sup> TFEU, Article 43 (2), to establish the common organisation of agricultural markets in accordance with Article 40 (1), and attain the objectives set out in Article 39, TFEU.

suffering,<sup>19</sup> baseline standards of transportation and slaughter, and also minimum standards of protection in respect of certain species of farm animals, inclusive of calves, pigs, broiler chickens and laying hens.<sup>20</sup>

Regardless of the adoption of minimum animal welfare requirements in legal instruments and public standards,<sup>21</sup> concerns still exist as to the adequacy of these baseline measures in ensuring good animal welfare practices. Acting in accordance with the EU ordinary legislative process,<sup>22</sup> with voting in the Council representing the diverse interests of a qualified majority of EU Member States, in spite of the predisposition of a cross party of the European Parliament towards the adoption of animal welfare laws, it is inevitable that minimum standards will pertain. Likewise, consensual decision making within the auspices of the OIE's intergovernmental and international standardisation process is likely to lead to standards of the 'lowest common denominator.'<sup>23</sup> The Court of Justice of the EU (CJEU) has, through its rulings, restricted Member States' discretion and ability to rely on Treaty derogations to the free movement of goods in order to ensure their higher animal welfare standards have cross-border EU territorial scope. The Court's narrow interpretation equating minimum EU legislative standards of animal welfare with total harmonisation has had the effect, thus, of limiting the advancement of animal welfare in the EU.<sup>24</sup> Moreover, as long as measures taken by a Member State in the public interest are not

<sup>19</sup> Council Directive 98/58/EC concerning the protection of animals kept for farming purposes [1998] OJ L 221/23.

<sup>20</sup> See for example: Council Directive 2008/119/EC laying down minimum standards for the protection of calves [2009] OJ L10/7.

<sup>21</sup> OIE recommended animal welfare standards have been adopted in relation to, *inter alia*, the transport of animals by sea, land and air; the slaughter of animals; and the killing of animals for disease control purposes; with a specific chapter addressing the welfare aspects of beef cattle production systems. Chapters 7.2–7.6 and 7.9 OIE – Terrestrial Animal Health Code (2011), [www.oie.int/index.php?id=169&L=0&hymfile=chapitre\\_1.7.9.htm](http://www.oie.int/index.php?id=169&L=0&hymfile=chapitre_1.7.9.htm) [accessed 24 April 2013].

<sup>22</sup> TFEU, Article 294.

<sup>23</sup> L. Botterill, C. Daugbjerg, *Engaging with private sector standards: a case study of GLOBALG.A.P.*, "Australian Journal of International Affairs" 2011, Vol. 65, No. 4, p. 488, 499.

<sup>24</sup> Case C-5/94 *Hedley Lomas* [1996] ECR I-2553 (export of live sheep for slaughter); Case C-1/1996 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* [1998] ECR I-1251, paras. 56–60 (export of veal – minimum standard compliance). See: M. Cardwell, *The European Model of Agriculture*, Oxford 2004, p. 305–307. See also: R. Ludwig, R. O'Gorman, *A cock and bull story? Problems with the protection of animal welfare in EU law and some proposed solutions*, "Journal of Environmental Law" 2008, p. 363.

deemed to be *manifestly inappropriate* the CJEU has been reluctant to intervene in the exercise of a Member State's discretion in matters of agricultural policy, in order to protect the welfare of individual animals beyond the application of this proportionality test.<sup>25</sup> Not only are EU legislative standards minimum standards they are not all encompassing. There are, thus, lacunae in EU animal welfare protection particular to certain species of farm animals.

The consolidated Treaty on the Functioning of the European Union (TFEU) newly embeds a fundamental 'competence to protect'<sup>26</sup> animal welfare, one in which the sentience of animals is recognised in law, when formulating, *inter alia*, internal market and agricultural policies.<sup>27</sup> The promotion of animal welfare incorporated in the 'constitutional' provisions<sup>28</sup> of the EU Treaties signifies the elevation of animal welfare as a priority issue in the EU, alongside other key objectives, such as, for example, environmental protection and promoting sustainable development.<sup>29</sup> The significance of the *competence to mainstream* the welfare needs of animals into policies which impact upon animals' welfare should not be underestimated, nor should the fact that procedural non-

<sup>25</sup> See: E. Spaventa, 'Case C-189/01, *H Jippes v Minister van Landbouw, Natuurbeheer en Visserij*, Judgment of the Full Court of 12 July 2001', "Common Market Law Review" 2002, No. 39, p. 1159. So that a Member State's non-vaccination policy adopted in order to eradicate an outbreak of foot and mouth disease could not be overridden in order to protect Ms Jippe's individual animals from culling. It should be noted that one question raised before the Court in this case was whether animal welfare was to be considered a general principle of EU law, and at the time when there was no provision in the Treaty itself on animal welfare or animal sentience. Protocol 33 negotiated at Amsterdam in 1997 was attached to the European Community Treaty. See: R. Ludwig, R. O'Gorman, *op. cit.*, p. 369, 370.

<sup>26</sup> B. de Witte, *A Competence to protect. The pursuit of non-market aims through internal market legislation*, [in:] P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge 2010, Chapter 2, p. 25.

<sup>27</sup> 'In formulating and implementing the Union's *agriculture*, fisheries, transport, *internal market*, research and technological development and space policies, the Union and the Member States shall, *since animals are sentient beings*, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.' Consolidated version of the Treaty on the Functioning of the European Union (TFEU), Article 13 [2010] OJ C83/1.

<sup>28</sup> Title II TFEU Provisions having general application.

<sup>29</sup> TFEU, Article 11.

compliance has the potential to engage the CJEU in judicial review. EU law has evolved with respect to animal welfare in that animals are no longer perceived in law solely as goods, the free movement of which is ensured in an internal market of twenty eight Member States. They are recognised, expressly in a Treaty article, as sentient beings, and, as such, the EU's stated aim is to ensure that animals do not endure avoidable pain or suffering.<sup>30</sup> Animal welfare provision in the TFEU was a factor influencing the CJEU's interpretation of the calves' Directive in application to calves confined by a farmer in the context of a dairy farming operation for agricultural purposes, signifying a shift from animals as goods in the EU internal market to animals as sentient beings worthy of protection in themselves within the EU's agricultural policy.<sup>31</sup> Pursuant to the Treaty of Lisbon amendments the European Commission has released the EU's second animal welfare strategy.<sup>32</sup> This author would seek to encourage inter-institutional dialogue, in terms of reinforced animal welfare commitment on the part of the EU, between those responsible for the EU's *separate* animal health strategy,<sup>33</sup> the common organisation of the agricultural market and also the establishment and functioning of the internal market.

The significance of the promotion of animal welfare and the potential for the multifunctional role of agriculture<sup>34</sup> to achieve both raised standards of animal welfare and rural development, merit evaluation within the *reforming* EU Common Agricultural Policy (CAP).<sup>35</sup> It is essential that '[a]nimal health and welfare considerations ... fit within

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<sup>30</sup> See: D. Ryland, A. Nurse, *Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market*, "European Energy and Environmental Law Review" 2013, No. 22 (3), p. 101, 109–110.

<sup>31</sup> Case C-355/11 *B Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie*, judgment of the Court of 14 June 2012 [2012] OJ C227/6. See: Eurogroup for Animals, *The Animal Framework Law: An Ultimate Opportunity to Build a Europe that Cares for Animals*, July 2013, p. 7.

<sup>32</sup> European Commission, *Communication on the European Union Strategy for the Protection and Welfare of Animals 2012–2015*, COM (2012) 6, *op. cit.*

<sup>33</sup> European Commission, *Communication on a new Animal Health Strategy for the EU (2007–2013) where 'Prevention is better than cure'*, COM (2007) 539, 19 September 2007.

<sup>34</sup> See: G.A. Wilson, *Multifunctional Agriculture*, CABI International 2007; OECD 2001, *op. cit.*

<sup>35</sup> This chapter pre-dates the adopted CAP instruments for the period 2014–2020.

the mix of agri-environmental concerns<sup>36</sup> in EU agricultural policy to 2020.<sup>37</sup> Public provision facilitative of the ‘added value’ of significantly higher animal welfare standards, pre-dating the Lisbon Treaty amendments, exists under the rural development pillar of the EU common agricultural policy (CAP).<sup>38</sup> In order to be eligible for rural development funding, government schemes are required to go *beyond* EU legal baseline requirements.<sup>39</sup> The EU thus empowers governments, within the CAP, to incentivise *higher* animal welfare standards in *rural development* initiatives. Rewarding higher animal welfare practices feeding through into *pro rata* quality products furthers the EU’s 2020 common agricultural policy priorities;<sup>40</sup> one fundamental aim being to support farming communities that provide European citizens with quality, value and diversity of food produced sustainably, in line with animal health and welfare requirements.<sup>41</sup> The European Commission recognises the need to improve the functioning of the food supply chain. Long term, i.e. sustainable, prospects for agriculture and the farming community will improve if the public demand for high animal welfare sourced produce is met, the returns boosting rural economies. Thus, corroborating the fact that consumer concerns feed into ‘added value’ animal welfare ini-

<sup>36</sup> J. McEldowney, *op. cit.*, p. 167. This is a contemporary topic for debate and policy discourse which this author will engage with beyond the confines of this chapter.

<sup>37</sup> See: M. Cardwell, *European Union agricultural policy and practice: the new challenge of climate change*, “Environmental Law Review” 2011, p. 271; C. Rodgers, *Greening European agricultural policy – a step forward?*, “Environmental Law Review” 2013, p. 187.

<sup>38</sup> Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (Articles 36(a)(v), 40 Animal welfare payments) [2005] OJ L277/1.

<sup>39</sup> Whereas, under the CAP’s first pillar concerned with Direct Payments a cross-compliance mechanism ties EU support for farmers to compliance with *minimum* standards of animal welfare, penalising farmers who infringe *EU norms* of animal welfare with a reduction in their income support, in accordance with Council Regulation (EC) No. 73/2009 establishing common rules for direct support schemes for farmers under the CAP 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 L 30/16.

<sup>40</sup> European Commission Communication, *Europe 2020: A strategy for smart sustainable and inclusive growth*, COM (2010) 2020, 3 March 2010.

<sup>41</sup> European Commission Communication, *The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future*, COM (2010) 672, 18 November 2010.

tiatives, as opposed to a merely facilitative CAP regime: serving societal consumer demands for higher animal welfare produced quality produce for the benefit of the rural community.

In the current CAP reforms process agreement has been reached confirming the possibility for Member States to transfer up to 15% of their national envelope for Direct Payments to their Rural Development envelope and the fact that these amounts will not need to be co-funded.<sup>42</sup> Eurogroup for Animals 'calls on Member States to use the possibility of transferring up to 15% of pillar 1 funds to pillar 2 to ensure enough money is available for more sustainable methods of farming in the period 2014 to 2020.'<sup>43</sup> The extent to which *higher* animal welfare standards are material requirements under government schemes facilitative of rural development merits further scrutiny.

#### PRIVATE ANIMAL WELFARE STANDARDS

Within the overall frame of enhancing farm animal welfare, it is noticeable that private, purportedly higher, animal welfare standards increasingly are being introduced by major retailers into codes of practice for their suppliers of agricultural produce and products.<sup>44</sup> The EU initiative of EurepG.A.P., set up by European retailers in 1997, has, since 2007, become GlobalG.A.P.<sup>45</sup>, the multilateral private *collective*<sup>46</sup> standard of good agricultural practice.<sup>47</sup> Marks and Spencer's animal welfare farm assurance scheme, 'Farming for the Future',<sup>48</sup> and the Royal Society for the Prevention of Cruelty to Animals' (RSPCA) 'Freedom Food' animal

<sup>42</sup> European Commission, *CAP Reform – an explanation of the main elements*, MEMO/13/937, Brussels, 25 October 2013.

<sup>43</sup> [www.eurogroupforanimals.org/news/no-change-for-animal-welfare-under-common-agriculture-policy-deal](http://www.eurogroupforanimals.org/news/no-change-for-animal-welfare-under-common-agriculture-policy-deal) [accessed 7 March 2013].

<sup>44</sup> A. Tallontire, *CSR and regulation: towards a framework for understanding private standards initiatives in the agri-food chain*, "Third World Quarterly" 2007, No. 28 (4), p. 775.

<sup>45</sup> "In 1997, a group of supermarkets, food retailers, non-governmental organisations (NGOs), consumer groups and others formed the Euro Retailer Produce Working Group (EUREP). EUREPG.A.P., and later GLOBALG.A.P., served to 'add value in the mind of the consumer'." L. Botterill, C. Daugbjerg, *op. cit.*, pp. 491–492.

<sup>46</sup> A. Tallontire, *op. cit.*, p. 777.

<sup>47</sup> GlobalG.A.P., *Private standards of good agricultural practice*, [www1.globalgap.org](http://www1.globalgap.org).

<sup>48</sup> Marks and Spencer, *Farming for the Future Animal Welfare Standards*, [www.corporate.marksandspencer.com/](http://www.corporate.marksandspencer.com/)

welfare assurance standards,<sup>49</sup> provide examples of private corporate animal welfare standards and those of a non-governmental charity, respectively.

GlobalG.A.P. is a private sector body that sets voluntary standards for the certification of production processes of agricultural products around the world. The GlobalG.A.P. standard is designed primarily to reassure consumers how food is produced on the farm, i.e. pre farm gate; animal welfare is one of its four objectives. It is a business to business label open to any fee paying organisation agreeing to its terms of reference,<sup>50</sup> which organisation may duly acclaim its affiliation in its corporate credentials. Marks and Spencer, a multinational retailer, has its own independently certified farm assurance animal welfare standards. Its animal welfare mission is to ensure the highest standards of animal welfare are followed, and continuously improved, in Marks and Spencer's produce supply chains, on the farm, during transport and at the place of slaughter.<sup>51</sup> Marks and Spencer, it is submitted in an exercise in corporate social responsibility, may be reaching out to its consumers and providers with the objective of demonstrating its separate corporate animal welfare achievements, linked also to increasing sales of its own label foods.

The central aim of the RSPCA's Freedom Food animal welfare standards is to improve animal welfare and to *increase* the proportion of farm animals reared under higher animal welfare systems in the United Kingdom (UK). It achieves its objectives by creating a commercial incentive for producers and retailers. Its scheme, communicated to consumers via its product Freedom Food label, focuses purely on animal welfare. It assesses suppliers' credence, namely farms, hauliers and abattoirs, by reference to its higher standards.<sup>52</sup> These private animal welfare standards of this animal welfare non-governmental organisation operate without a profit motive,<sup>53</sup> the RSPCA being solely concerned with the interests of animals' wellbeing. Its Freedom Food animal welfare standards have

<sup>49</sup> Royal Society for the Protection of Cruelty to Animals (RSPCA) Farm Assurance and Food Labelling Scheme, [www.freedomfood.co.uk](http://www.freedomfood.co.uk).

<sup>50</sup> [www.globalgap.org](http://www.globalgap.org) [accessed 12 August 2013].

<sup>51</sup> [www.corporate.marksandspencer.com](http://www.corporate.marksandspencer.com) [accessed 12 August 2013].

<sup>52</sup> The McNair Report; an independent enquiry and report commissioned by the RSPCA into the Freedom Food animal welfare assurance scheme, May 2013, [www.freedomfood.co.uk](http://www.freedomfood.co.uk) [accessed 12 August 2013].

<sup>53</sup> Freedom Food Limited is a company with charitable status, the sole shareholder of which is the RSPCA. The RSPCA is also the UK's representative in Eurogroup for Animals.

evolved in application to an increasing number of farm animal species, inclusive of, *inter alia*, beef and dairy cattle, sheep, turkeys and ducks; beyond and in the absence of EU minimum animal welfare norms.

What are the (potential) strengths and weaknesses of private animal welfare standards and / or privately accredited certification schemes, to consumers; producers; retailers, and to public regulators? In the absence of EU animal welfare baseline standards, the potential exists for retailers to inject a valuable animal welfare input; also to exceed those minimum standards in place. Increasingly, concerns are being expressed that private standard schemes of good agricultural practice may, to an extent, potentially duplicate public legislative requirements, act as barriers to market access and distort competition.<sup>54</sup>

#### QUESTIONS OF COMPETENCE, LEGITIMACY AND GOVERNANCE

Public and private standards exist alongside each other; the inter-relationship between these standards and their respective inter-institutional balance is uncertain in law.<sup>55</sup> In what ways do the EU institutions have a (potential) role in the regulation of animal welfare standards through accreditation<sup>56</sup> of third party certification, in an increasing era of market based private standards, as the means for addressing problems,<sup>57</sup> in the EU internal market? “The credibility of a standard to ensure specific product or process characteristics relies on the procedures to enforce and verify them”<sup>58</sup>. Retailers in ‘requiring’ suppliers to adhere to third party certification so as to monitor prior compliance with specific animal welfare standards as a precursor to their agricul-

<sup>54</sup> A. Burrell, ‘Good agricultural practices’ in the agri-food supply chain, “Environmental Law Review” 2011, p. 251. This author will explore these concerns outside the limits of this chapter.

<sup>55</sup> G. Smith *op. cit.*; L. Botterill, C. Daugbjerg, *op. cit.* See, also: S. Henson, T. Reardon, *Private agri-food standards: Implications for food policy and the agri-food system*, “Food Policy” 2005, No. 30, p. 241, 250, 251.

<sup>56</sup> ‘Accreditation is the process by which an authoritative organization gives formal recognition that a particular third-party certifier is competent to carry out specific tasks.’ See: M. Hatanaka, C. Bain, L. Busch, *Third-party certification in the global agri-food system*, “Food Policy” 2005, No. 30, p. 354, 357.

<sup>57</sup> L. Botterill C. Daugbjerg, *op. cit.*, p. 490. Such as, for example, misleading information; labelling when complying with normative minimum standards as required to do so in law.

<sup>58</sup> L. Fulponi, *Private voluntary standards in the food system: The perspective of major food retailers in OECD countries*, “Food Policy” 2006, No. 31(1), p. 1, 8.

tural produce / products being sourced, may succeed in passing the cost of so doing to their suppliers.<sup>59</sup> Is this ability of the private sector to reallocate costs of compliance an influential factor in the passive acceptance of private animal welfare schemes by public bodies? The costs of having to comply with numerous diverse corporate retailers' animal welfare codes, and across borders, perpetuate consequential burdens of economies of scale for producers and suppliers.<sup>60</sup> To what extent should this practice continue unregulated; the EU having issued best practice *guidelines* for voluntary certification schemes for agricultural products and foodstuffs?<sup>61</sup>

An inventory compiled for the European Commission<sup>62</sup> identified over 400 diverse voluntary certification schemes for agricultural products and foodstuffs providing assurance through a certification mechanism that certain specified characteristics or attributes of a product or its production method have been complied with. Potential benefits of certification schemes were perceived to accrue to producers, in increasing market access, market share and profit in respect of certified products; and to consumers by providing reliable information on product and process attributes. On the other hand the European Commission acknowledges that such schemes may pose threats to the EU internal market by constituting barriers to trade. Issues of transparency potentially arise, causing confusion to consumers who are not clearly informed as to the standards portrayed, for example, baseline or higher standards and if the latter, in what way[s]? Producers may be placed at a disadvantage in terms of duplicated costs and burdens of compliance with different schemes and problems of market access or retention. Best practice guidance is provided with reference to the existing EU legal framework comprised of the prohibition of quantitative restrictions and measures having equivalent effect; intellectual property law; undistorted competition; and consumer protection from misleading

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<sup>59</sup> M. Hatanaka, C. Bain, L. Busch, *op. cit.*, p. 360.

<sup>60</sup> G. Smith, *op. cit.*, para. 80.

<sup>61</sup> European Commission, *EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs*, 2010, OJ C341/5. Separately to agricultural products, Regulation (EC) No. 765/2008 of the European Parliament and Council sets out the requirements for accreditation and market surveillance relating to the marketing of products [2008] OJ L218/30.

<sup>62</sup> Study conducted by Areté for DG AGRI in 2010, available at [www.ec.europa.eu/agriculture/quality/index\\_en.htm](http://www.ec.europa.eu/agriculture/quality/index_en.htm).

information.<sup>63</sup> The European Commission takes pains to state that these are guidelines and are not intended to have legal effect; at the same time emphasising the interpretative role of the CJEU. The Commission reiterates the conclusion reached in its Communication on agricultural product quality, that *in the light of private sector developments and initiatives, legislative action is not warranted in order to address potential weaknesses in certification schemes at this stage.*<sup>64</sup>

An EU framework regulates quality schemes for agricultural products and foodstuffs, which provides the basis for identifying the 'value-adding characteristics or attributes' of, *inter alia*, high quality products of designated origin and/or defined geographical indication.<sup>65</sup> The Quality Scheme Regulation's objective of *informing* the consumer as to the value-adding attributes as a result of the farming or processing methods used in their production<sup>66</sup> does not require specified animal welfare criteria to have been met.<sup>67</sup>

The European Commission does implement a food quality certification scheme for *organic* agriculture, inclusive of raised animal welfare criteria and an organic label.<sup>68</sup> This author will examine the reasons why there is an EU / private divide and a lacuna in the EU regulation of private third party certification schemes controlling conformity

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<sup>63</sup> European Commission, *EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs*, *op. cit.*

<sup>64</sup> (*Emphasis added*) European Commission, *Communication on agricultural product quality policy*, COM (2009) 234, 28 May 2009. See further the impact assessment annexed to the Communication, *Certification schemes for agricultural products and foodstuffs*, [www.ec.europa.eu/agriculture/quality/policy/com2009\\_234/ia\\_annexden.pdf](http://www.ec.europa.eu/agriculture/quality/policy/com2009_234/ia_annexden.pdf).

<sup>65</sup> Regulation (EU) No. 1151/2012 of the European Parliament and of the Council on Quality Schemes for Agricultural Products and Foodstuffs, [2012] OJ L343/1. The breadth and depth of animal welfare conformity criteria in these schemes merit further appraisal.

<sup>66</sup> Regulation (EU) No. 1151/2012, Article 1(2)(b).

<sup>67</sup> Beyond the potential for the Commission to adopt delegated acts concerning restrictions and derogations with regard to the slaughtering of live animals or the sourcing of feed (Article 5 (4)). The breadth and depth (and lack) of animal welfare conformity criteria in these schemes merit further appraisal.

<sup>68</sup> Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products [2007] OJ L189/1, which this author will explore beyond this chapter's constraints. See also Commission Regulation (EC) No. 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control [2008] OJ L250/1.

with private animal welfare standards and the absence, to date, of an EU framework for animal welfare labelling.<sup>69</sup> In attempting to address the questions as to whether the EU should take on more roles directly, monitor more closely, or intervene at all in private sector animal welfare assurance standardisation schemes, this author would argue that the positive link with animal health of enhanced standards of animal welfare mandates the EU's oversight of agricultural product quality in which the assured animal welfare credence attributes of a product are made known to the informed consumer.

The EU seems to be engaging with the 'trend... towards shifting more responsibility for ensuring food quality to the private sector based on private standard protocols and certification of system compliance by independent third parties.'<sup>70</sup> Are there advantages for the EU institutions in engaging in a cooperative relationship with private setters and /or accredited certifiers of animal welfare standards?<sup>71</sup> Daugbjerg and Botterill suggest that it is possible for 'competing values to co-exist in parallel institutions and in a commensalistic relationship which protects the values base of each institution while giving expression to both materialistic and postmaterialistic understandings of the nature of food.'<sup>72</sup> Some 'complementarity'<sup>73</sup> would, thus, appear to exist.

To what extent are the boundaries of the public / private interface circumscribed in EU law? Are the standards and certification criteria challengeable in accordance with legal rules of review?<sup>74</sup> Are they clear and transparent? Are the setting bodies accountable? Who participates in the setting of the standards? What gives the standards, and their certifiers, legitimacy? Is the question of the relationship between the EU and private accreditors of animal welfare standards ultimately a question of interpretation for judges to decide; should regulatory oversight be

<sup>69</sup> European Commission *Communication on agricultural product quality policy*, *op. cit.*, p. 12. See: *Report from the Commission on Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals*, COM (2009) 584, 28 October 2009.

<sup>70</sup> G. Smith, *op. cit.*, para. 40.

<sup>71</sup> A. Tallontire, *op. cit.*, pp. 779, 780, 786, 787.

<sup>72</sup> C. Daugbjerg, L. Botterill, *Ethical food standard schemes and global trade: Paralleling the WTO?*, "Policy and Society" 2012, No. 31, p. 307.

<sup>73</sup> G. Smith, *op. cit.*, para. 10.

<sup>74</sup> See: R. Van Gestel, H.-W. Micklitz, *European Integration through Standardization: How Judicial Review is Breaking Down the Clubhouse of Private Standardization Bodies*, "Common Market Law Review" 2013, No. 50, p. 145.

a matter for the EU legislator; or above as a 'constitutional issue'<sup>75</sup> collectively<sup>76</sup> vested with the heads of government of Member States? To what extent may the EU institutions delegate or outsource the setting and assurance of animal welfare standards to private entities?<sup>77</sup> Van Gestel and Micklitz comment on the fact that it was not the legal status of private standards but that of the bodies which set the standards, which was at issue in a preliminary ruling before the CJEU.<sup>78</sup> In the case of *Fra.bo* the CJEU was faced with the question as to whether a private certification body (*DVGW*) that monitored compliance with technical standards was or could be in breach of Article 34 of the Treaty on the Functioning of the EU (TFEU) prohibiting quantitative restrictions or measures having equivalent effect. This, it answered in the affirmative, when determining whether 'in the light of *inter alia* the legislative and regulatory context in which it operates, the activities of a private-law body such as the *DVGW* has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State'.<sup>79</sup> By virtue of the private standardisation body's authority to certify the products in question, the CJEU ruled that in reality it held the power to regulate the entry into the market of an EU Member State.<sup>80</sup>

An immediate consequence of this ruling is that Member States are not able to avoid their Treaty obligations on the free movement of goods in the event that they outsource standardisation roles to private bodies, now adjudged to be acting akin to a public body in restricting market access. Uncertain outcomes remain to be answered, for example, the extent to which private standardisation bodies are required to comply with public governance obligations of transparency and access to information reinforced by the amendments to the EU Treaties, post Lisbon.<sup>81</sup> Moreover, the extent to which the EU institutions, actively or

<sup>75</sup> *Ibidem*, pp. 146, 152, 153.

<sup>76</sup> R. Schütze, *European Constitutional Law*, Cambridge 2012, p. 62.

<sup>77</sup> Since Article 290 TFEU is concerned with the delegation of law making powers to the executive – the European Commission, R. Van Gestel, H.-W. Micklitz, *op. cit.*, pp. 146, 147, 151.

<sup>78</sup> Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas-und Wasserfaches eV (DVGW)*, [2012] 3 C.M.L.R. 38. See also the Opinion of Advocate General Trstenjak, delivered on 28 March 2012.

<sup>79</sup> *Ibidem*, para. 26.

<sup>80</sup> *Ibidem*, para. 31.

<sup>81</sup> The Treaty of Lisbon 2007 inserted Article 15 TFEU and gave legal status to the Charter of Fundamental Rights of the Union, Article 42. See: R. Van Gestel, H.-W. Micklitz, *op. cit.*, pp. 146, 159, 160, 168, 169.

passively, have the competence to delegate to, and / or to monitor the private contractual relations of, animal welfare standardisation bodies merit examination.<sup>82</sup> These are issues which this author will explore further.

Who (are required to) follow the standards and certification process? Fulponi comments that '[m]any of the private voluntary standards schemes are becoming global standards as the food system becomes interlinked across the world.'<sup>83</sup> Do these private standards have voluntary, or *de facto* mandatory, status?<sup>84</sup> Botterill and Daugbjerg hypothesise that if, for example, 'GLOBALG.A.P. standards become the *de facto* standards for exports to a particular market because they are universally applied by all retailers in a market, there may be a case to be made that the standards are restricting market access for producers who do not produce under the GLOBALG.A.P. standards.'<sup>85</sup>

Adherence to third party certification of animal welfare credentials at the behest of major retailers, increasingly 'may become less about gaining a competitive edge and more about simply remaining in the marketplace.'<sup>86</sup>

McEldowney *et al* are right in their conclusions that market devices alone<sup>87</sup> cannot deal with the oversight of animal health and welfare; that 'agricultural practice is the most important means for delivering sustainable animal health and welfare' but that it must operate within a *regulatory* framework underpinned by science.<sup>88</sup>

#### CONCLUDING COMMENTS

The aim of this chapter has been to highlight the fact that human use of animals in agriculture brings with it an obligation to ensure the enhanced wellbeing of each farm animal throughout its life and during its death. Focusing on the EU, which has been proactive in adopting certain norms of farm animal welfare it is apparent that minimum standards only are prescribed in respect of some farm animals, while others are not protected. Animal welfare has been an *indirect* concern of the EU,

<sup>82</sup> *Ibidem*, pp. 147, 178.

<sup>83</sup> L. Fulponi, *op. cit.*, p. 4.

<sup>84</sup> G. Smith, *op. cit.*, para. 30.

<sup>85</sup> L. Botterill, C. Daugbjerg, 2011, *op. cit.*, p. 499.

<sup>86</sup> M. Hatanaka, C. Bain L. Busch, *op. cit.*, p. 361.

<sup>87</sup> J. McEldowney, W. Grant, G. Medley, *op. cit.*, pp. 167–168.

<sup>88</sup> *Ibidem*, p. 168.

the primordial concern of which is the unrestricted flow of agricultural produce and products, as goods, in the EU internal market.

The constitutional acceptance of the sentience of animals and the newly inserted legal recognition of the need to protect the welfare of animals in, *inter alia*, the adoption and implementation of the EU's agricultural policy has the potential to advance animal welfare as a *direct* concern of the EU. It is to be hoped that full advantage will be taken of this *mainstreaming* provision, and that pursuant to the re-incentivised rural development pillar of the EU's common agricultural policy (CAP) 2014 – 2020 Member States' governments will introduce incentive schemes and programmes rewarding farm animal welfare practices which go '*significantly beyond*' EU baseline norms and lack of animal welfare provision. The potential for advancing higher animal welfare standards in agriculture exists in the EU acting in accordance with the EU's democratic process and the rule of law.

Increasingly the ethical consumer's societal preference for quality agricultural produce emanating from an animal welfare friendly supply chain seemingly has resulted in retailers setting purportedly higher private collective and / or individual corporate animal welfare standards, fuelling the potential economic advantage to retailers. The apparent practice of EU institutions deferring, delegating or outsourcing to private accreditors of private animal welfare standards requires further scrutiny. Indeed, should it do so where public matters of animal health and welfare are so inextricably linked with good quality agricultural produce in the eyes of society? The competence of the EU to engage in the regulation of private standardisation bodies in the sphere of animal welfare standards warrants examination. Questions of competence, legitimacy and governance remain to be addressed<sup>89</sup> in this 'blurred' EU / private 'division' of assuring conformity with high standards of animal welfare.

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<sup>89</sup> In this author's PhD thesis.

