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by

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THE POLLUTER PAYS PRINCIPLE IN EUROPEAN COMMUNITY LAW AND ITS IMPACT ON UNITED KINGDOM FARMERS

MICHAEL CARDWELL*

I. Introduction

Environmental protection is firmly established as a central objective in the regulation of European agriculture. This is illustrated by the fact that in July 2002, when the European Commission laid down the aims of the Mid-term Review of the Common Agricultural Policy, one of these aims was “production methods that support environmentally friendly, quality products that the public wants.”¹ Such emphasis on environmental protection reflects growing public concerns regarding the “negative externalities” generated by intensive farming. For example, agriculture is now the major source of nitrate in European Union waters.² The European Community institutions readily acknowledge the extent to which these public concerns inform agricultural policy. In surveys undertaken by the European Commission, the promotion of respect for the environment features consistently high as a role of the Common Agricultural Policy (CAP); indeed, it ranks second only to food safety.³

Moreover, a key driver behind the Agenda 2000 reforms of the CAP and their Mid-term Review has been the imperative of securing greater public acceptability for the multifunctional “European Model of Agriculture.”⁴ This

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1. European Comm’n, *Mid-term Review of the Common Agricultural Policy*, at 2, COM (2002) 394 final (July 10, 2002) [hereinafter *Mid-term Review*], available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2002/com2002_0394en01.pdf.

2. European Comm’n, *Implementation of Council Directive 91/676/EEC Concerning the Protection of Waters Against Pollution Caused by Nitrates from Agricultural Sources*, at 31-32, COM (2002) 407 final (July 17, 2002) [hereinafter EC, *Implementation*] (stating that the proportion derived from agriculture varies between 50% and 80% depending upon such factors as the watershed concerned).

3. EUROPEAN COMM’N, *EUROPEAN UNION CITIZENS AND AGRICULTURE FROM 1995 TO 2003* (2004).

4. On multifunctionality, see generally Margaret Rosso Grossman, *Multifunctionality and Non-trade Concerns*, in *AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY AND THE WTO 85* (Michael N. Cardwell, Margaret R. Grossman & Christopher P. Rodgers eds., 2003); ORGANISATION FOR ECON. CO-OPERATION & DEV. (OECD), *MULTIFUNCTIONALITY: TOWARDS AN ANALYTICAL FRAMEWORK* (2001), available at <http://www.oecd.org/dataoecd/3/31/1894469.pdf>. On the European Model of Agriculture more specifically see, for example, MICHAEL CARDWELL, *THE EUROPEAN MODEL OF AGRICULTURE* (2004).

model is characterised by its ability to generate both food outputs and non-food outputs, and the conservation of a distinctive rural landscape has featured large among non-food outputs. Accordingly, early in the reform process, the European Commission spoke of the “bad image of the CAP in the minds of the public”;⁵ and this bad image was, to a considerable degree, predicated upon the adverse impact of intensive farming upon natural resources:

[a]n agriculture which pollutes, which contributes inadequately to spatial development and protection of the environment . . . has no chance of long-term survival and cannot justify what it is costing. Making the CAP more acceptable to the citizen in the street, to the consumer, is one of our primary tasks in the years ahead.⁶

One should not, however, perceive such sentiments as confined to the European Community. They are echoed, not least, in the United States. Thus, in *Food and Agricultural Policy: Taking Stock for the New Century* it was unequivocally stated that “Americans consider environmental quality as a kind of ‘non-market’ good that is extremely important in consumer choices.”⁷ It may also be noted that the European Community institutions have considered environmental protection as a fit forum for European Community action. Pollution and other forms of environmental degradation have the capacity to cross national frontiers, and, accordingly, much may be gained in regulating at European Community level rather than at the level of the Member State. Council Directive 91/676 (Nitrates Directive) itself recited that “since pollution of water due to nitrates on one Member State can influence waters in other Member States, action at Community level . . . is therefore necessary.”⁸

In this context, the polluter pays principle has already played a leading role. It is currently enshrined in Article 174(2) of the Treaty Establishing the European Community (EC Treaty), which provides:

Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action

5. European Comm’n, *The Future for European Agriculture* ¶ 1 (1998) (on file with author).

6. *Id.*

7. U.S. DEP’T OF AGRIC., *FOOD AND AGRICULTURAL POLICY: TAKING STOCK FOR THE NEW CENTURY 2* (2001), available at <http://www.usda.gov/news/pubs/farmpolicy01/fpindex.htm>.

8. Council Directive 91/676, pmbll., 1991 O.J. (L 375) 1, 2 [hereinafter Nitrates Directive].

should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.⁹

All four principles also enjoy specific mention in the *Sixth Community Environment Action Programme*, which covers the period until July 2012.¹⁰

That said, given its contemporary importance, it is perhaps surprising that the word “environment” did not appear in the treaty provisions as originally enacted in 1957. Indeed, the environmental protection requirements were not formally incorporated until amendment by the Single European Act, which came into force in 1987.¹¹ On the other hand, both the legislature and the European Court of Justice had showed considerable ingenuity in expanding European Community competence into the environmental arena long before any formal treaty provision. In particular, the European Court of Justice had placed a liberal interpretation upon Article 100, which granted the European Community competence to enact “harmonising” measures, which directly affected the establishment or functioning of the common market.¹² Although first employed in the field of product harmonisation, this Article subsequently served as authority for measures directed to ensuring a “level playing field” between Member States with respect to the environment. Otherwise, to the extent that one Member State imposed heavier environmental protection requirements than another, there was potential for distortion of competition.¹³

The polluter pays principle as applied to agriculture may be addressed with specific reference to two areas: first, liability for nitrate pollution, and, second, the imposition of environmental protection requirements upon farmers as a condition for receipt of direct payments, known as “cross compliance.” Before addressing these specific issues, however, it may be noted as a preliminary point that the agriculture sector has proved fertile ground for exploration of the distinction between (a) the operation of the polluter pays principle and (b) the right to compensation for efforts over and above a baseline to be determined, or the “provider gets principle.” In essence, farmers should generally be

9. Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, art. 174(2), 2002 O.J. (C 325) 1 [hereinafter EC Treaty].

10. Decision No. 1600/2002 of the European Parliament and of the Council, 2002 O.J. (L 242) 1.

11. EC Treaty, *supra* note 9, art. 130r-t (as in effect 1987) (now, with amendment. arts. 174-176). For a thorough analysis of the principles underlying European Community environmental law see, for example, NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES (2002); ALBERT WEALE ET AL., ENVIRONMENTAL GOVERNANCE IN EUROPE (2000).

12. For the current legislation, see EC Treaty, *supra* note 9, art. 94.

13. See, e.g., Case 92/79, European Comm'n v. Italy, 1980 E.C.R. 1115; JOANNE SCOTT, EC ENVIRONMENTAL LAW 4-5 (1998).

regarded as liable for pollution and other “negative externalities” below the standard of good agricultural practice, but as entitled to payment for the provision of “public goods” where they exceed that standard. This distinction has found clear expression in policy documents, such as *Directions Towards Sustainable Agriculture*:

Making the CAP more acceptable to the citizen in the street, to the consumer, is one of our primary tasks in the years ahead. The various roles performed by farmers, in particular in maintaining and conserving the countryside, are increasingly under close scrutiny by society. On the one hand farmers must reach the minimum standard of environmental care demanded by society including observance of compulsory legislation; on the other hand, if society wants farmers to provide environmental services beyond the basic level of good agricultural practice, they should be paid for their costs and income losses in delivering these public benefits.¹⁴

More recently, the European Commission expressly stated that “in application of the Polluter Pays Principle, a farmer may not normally be paid to conform with environmental legislation in place.”¹⁵

Nevertheless, as policy instruments develop, it may become increasingly difficult to preserve a bright-line distinction between the polluter pays principle and the provider gets principle. As this article will discuss in greater detail, cross compliance would not appear capable of characterisation as a clear expression of either principle. Any ensuing legal difficulties are magnified by the fact that in the European Community such obligations have now been extended to the vast majority of direct payments to farmers.¹⁶

Accordingly, Part II of this article will discuss the liability that farmers face for nitrate pollution, including legislation enacted by both the European Community and the United Kingdom. Part III will discuss cross compliance, which, as indicated, involves the conditioning of payments to farmers upon their observance of environmental protection and other measures. This section commences with an examination of early initiatives and then directs its focus to the very considerable expansion of cross compliance under Mid-term Review. Part IV highlights aspects of the ongoing strategy to implement the polluter pays principle within the European Community. It then analyzes the

14. European Comm’n, *Directions Towards Sustainable Agriculture*, COM(1999)22 final, 1999 O.J. (C 173) 2, 17.

15. EUROPEAN COMM’N, *AGRI-ENVIRONMENTAL MEASURES: OVERVIEW ON GENERAL PRINCIPLES, TYPES OF MEASURES, AND APPLICATION 4* (2005) (footnote omitted).

16. Council Regulation 1782/2003, arts. 3-9, 2003 O.J. (L 270) 1, 8-9 [hereinafter 2003 Horizontal Regulation].

extent to which European Community regulation of agriculture applies the polluter pays principle and/or the provider gets principle. In this analysis particular attention is paid to the difficulties which are encountered when seeking to categorise cross compliance.

II. Liability for Nitrate Pollution

A. European Community Legislation

Agriculture's status as the major source of nitrate in rivers and aquifers in Western Europe¹⁷ came about due to heavy application of nitrogenous fertilisers by European Community farmers. For example, in 2000, the average use of such fertilisers reached 34 tonnes per square mile in Germany and the United Kingdom, as opposed to 7.6 tonnes per square mile in the United States.¹⁸

Scientists generally agree that high concentrations of nitrate have a deleterious effect both on drinking water quality and on the aquatic environment.¹⁹ In the latter case, there is danger of eutrophication, where nutrient enrichment leads to "algal blooms."²⁰ These, for example, impact adversely on recreational use of waters and reduce oxygen levels below those required by certain aquatic life.²¹ To address declining standards in drinking water, the European Community enacted Council Directive 75/440, concerning the quality of surface water intended for the abstraction of drinking water,²² and Council Directive 80/778, relating to the quality of water intended for human consumption.²³ These Directives, *inter alia*, limited the maximum nitrate content to fifty milligrams per litre.²⁴ Then, in 1991, the European Community

17. See *supra* note 2 and accompanying text.

18. Court of Auditors, *Special Report No. 14/2000 on "Greening the CAP,"* 2000 O.J. (C 353) 1, 4, available at http://www.eca.eu.int/audit_reports/special_reports/special_reports_agriculture_en.htm.

19. For a useful summary, see, for example, Dep't for Env't, Food & Rural Affairs (DEFRA), *Implementing the Nitrates Directive* § 2 (Dec. 20, 2001) [hereinafter DEFRA, *Implementing the Nitrates Directive*], available at <http://www.defra.gov.uk/environment/consult/nitrate1201/02.htm>.

20. For a definition of eutrophication, see Nitrates Directive, *supra* note 8, art. 2(i). See generally, for example, Margaret Rosso Grossman, *Nitrates from Agriculture in Europe: The EC Nitrates Directive and Its Implementation in England*, 27 B.C. ENVTL. AFF. L. REV. 567, 579-81 (2000).

21. See, e.g., DEFRA, *Implementing the Nitrates Directive*, *supra* note 19, § 1.

22. Council Directive 75/440, 1975 O.J. (L 194) 26.

23. Council Directive 80/778, 1980 O.J. (L 229) 11. This Directive was repealed in 2003, five years after the replacement Council Directive 98/83 came into force. 1998 O.J. (L 330) 32.

24. Council Directive 75/440, Annex II, 1975 O.J. (L 194) 26, 30; Council Directive 80/778, Annex I, 1980 O.J. (L 229) 11, 18.

enacted the Nitrates Directive.²⁵ Although confined to nitrate pollution, it was targeted to control of farming practice, nitrate from agriculture being already identified as “the main cause of pollution from diffuse sources affecting the Community’s waters.”²⁶ In particular, by 20 December 1993 Member States were to identify and then designate nitrate vulnerable zones;²⁷ and by the same date they were to establish action programmes in respect of these zones with the twin objectives of reducing water pollution caused or induced by nitrate from agricultural sources and preventing further such pollution.²⁸ For these purposes, it was not sufficient to identify only waters intended for the abstraction of drinking water.²⁹ Rather, as made very clear by the European Court of Justice in *European Commission v. United Kingdom*,³⁰ the Nitrates Directive obliged Member States to identify all surface freshwaters and groundwaters which have or could have a nitrate concentration in excess of fifty milligrams per litre, and then to designate nitrate vulnerable zones for their protection.³¹ In addition, there was an obligation to establish a code or codes of good agricultural practice.³²

B. United Kingdom Legislation

1. The Pilot Nitrate Scheme and Nitrate Sensitive Areas

The manner in which the United Kingdom has implemented European Community legislation to address nitrate pollution has shed interesting light on the operation of the polluter pays principle. The initial measure, the Pilot Nitrate Scheme, predated the Nitrates Directive.³³ This Scheme was carried into effect under the statutory authority of Section 112 of the Water Act 1989,³⁴ and the implementing secondary legislation in England was the Nitrate Sensitive Areas (Designation) Order 1990.³⁵ Although Section 112 of the Water Act

25. Nitrates Directive, *supra* note 8; *see, e.g.*, NEIL HAWKE & NADIA KOVALEVA, *AGRI-ENVIRONMENTAL LAW AND POLICY* 170-75 (1998); William Howarth, *Agricultural Water Rights*, in *AGRICULTURAL LAW, TAX AND FINANCE* P2.16 (Allan A. Lennon ed., 2005); Grossman, *supra* note 20; William Howarth, *Legal Approaches to the Prevention of Agricultural Water Pollution in England and Wales*, 45 *DRAKE L. REV.* 197 (1997).

26. Nitrates Directive, *supra* note 8, pmb., at 1.

27. *Id.* art. 3, at 3.

28. *Id.* art. 1, at 2, art. 5, at 3-4.

29. *Id.* pmb., at 2 (noting that suggested practices will protect *all* waters).

30. Case C-69/99, 2000 E.C.R. I-10979.

31. *Id.* ¶ 23.

32. Nitrates Directive, *supra* note 8, art. 4, at 3.

33. *See generally* Grossman, *supra* note 20, at 605-07.

34. Water Act, 1989, c. 15, § 112. United Kingdom legislation may be found at <http://www.legislation.hmso.gov.uk>.

35. 1990. S.I. 1990/1013 (as subsequently amended).

1989 also conferred authority for mandatory restrictions, with or without compensation,³⁶ the method of implementation chosen was both voluntary and compensatory. A “basic scheme” and a “premium scheme” were made available, the latter extending to obligations to convert arable land into low intensity grassland. In total, ten pilot areas were designated, and the level of take-up was very high, some 87% of agricultural land within the pilot areas becoming subject to Nitrate Sensitive Area agreements.³⁷

In light of the success of the Pilot Nitrate Scheme, the scope of control was materially expanded in 1994 by the Nitrate Sensitive Areas Regulations 1994, applicable in England.³⁸ The statutory authority to designate nitrate sensitive areas was, by that date, conferred by Sections 94-95 of the Water Resources Act 1991, which replaced, with amendment, Section 112 of the Water Act 1989.³⁹ Significantly, however, this Scheme complied with, in terms of European Community legislation, not the Nitrates Directive but Council Regulation 2078/1992 (Agri-environment Regulation).⁴⁰ The Agri-environment Regulation focused attention on payment to farmers in return for effort beyond a baseline, whereas, as shall be seen, in the case of nitrate vulnerable zones under the Nitrates Directive, the polluter pays principle has been allowed to take full effect. Indeed, the Preamble to the Agri-environment Regulation expressly stated that “the measures must compensate farmers for any income losses caused by reductions in output and/or increases in costs and for the part they play in improving the environment.”⁴¹ Pronouncements by the United Kingdom Government also made this distinction explicit. For example, in a Written Answer on 23 July 1996, the Minister for Rural Affairs declared that, since nitrate vulnerable zones would be “based on good agricultural practice, the question of compensation does not arise”; whereas, in the case of nitrate sensitive areas, “farmers undertake voluntarily to make substantial changes to their farming practices, going significantly beyond good agricultural practice, in return for compensation.”⁴²

In total, twenty-two nitrate sensitive areas were designated,⁴³ and to these were added those in the Pilot Nitrate Scheme on June 1, 1996.⁴⁴ Again there

36. Water Act, 1989, c. 15, § 112(2), (4).

37. News Release No. 373/94, Ministry of Agric., Fisheries & Food (MAFF), Pilot Nitrate Sensitive Areas to Continue (Oct. 17, 1994). MAFF was replaced by DEFRA in June 2001.

38. 1994, S.I. 1994/1729 (as subsequently amended).

39. Water Resources Act, 1991, c. 57, §§ 94-95.

40. 1992 O.J. (L 215) 85.

41. *Id.* pmb., at 85.

42. 282 PARL. DEB., H.C. (6th ser.) (1996) 260, available at <http://www.parliament.uk/index.cfm>; see also, e.g., News Release No. 373/94, MAFF, *supra* note 37.

43. Nitrate Sensitive Areas Regulations 1994, 1994 S.I. 1994/1729, Sched.1.

44. Nitrate Sensitive Areas (Amendment) Regulations 1995, 1995, S.I. 1995/1708.

was a very high level of take-up, with concluded agreements covering 19,600 hectares by April 1996, excluding land still in the Pilot Nitrate Scheme.⁴⁵

2. Nitrate Vulnerable Zones

Accordingly, it was only the third tranche of legislation, the Protection of Water Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996, which carried into effect both the identification and designation of nitrate vulnerable zones under the Nitrates Directive.⁴⁶ In addition to these two functions, the same Regulations laid down procedures for the establishment of action programmes and provided that the relevant paragraphs of the *Code of Good Agricultural Practice for the Protection of Water* should operate as the code of good agricultural practice for the purposes of the Nitrates Directive.⁴⁷ In principle, for the purposes of the Nitrates Directive, farmers should implement any code of good agricultural practice on a voluntary basis.⁴⁸ Importantly, however, it was later decided to base the action programme on the relevant paragraphs of the *Code of Good Agricultural Practice for the Protection of Water*, thus, effectively, rendering these paragraphs compulsory.⁴⁹

Initially, sixty-eight nitrate vulnerable zones were designated in England and Wales, covering approximately 600,000 hectares,⁵⁰ and, in the case of England, this amounted to 8% of the land area.⁵¹ Nonetheless, as has been seen,

45. MAFF News Release No. 122/96, MAFF, NSAs Seek to Build on Success (Apr. 3, 1996).

46. 1996, S.I. 1996/888, reg. 3 & Sched. 1 (as subsequently amended).

47. *Id.* regs. 5-7. The *Code of Good Agricultural Practice for the Protection of Water* was first issued in 1991 under Section 97 of the Water Resources Act 1991, c. 57. A revised edition was issued in October 1998.

48. Nitrates Directive, *supra* note 8, art. 4(1), at 3.

49. Action Programme for Nitrate Vulnerable Zones (Eng. and Wales) Regulations, 1998, S.I. 1998/1202, Sched. The paragraphs currently applicable are ¶¶ 284-295 of the *Code of Good Agricultural Practice for the Protection of Water* as revised in October 1998; Protection of Water Against Agricultural Nitrate Pollution (Eng. and Wales) Regulations 1996, 1996, S.I. 1996/888, reg. 7, amended by the Nitrate Vulnerable Zones (Additional Designations) (Eng.) (No. 2) Regulations 2002, 2002, S.I. 2002/2614.

50. News Release No. 109/00, MAFF, Increased Grant Aid for Farmers in Nitrate Vulnerable Zones (NVZs) (Mar. 30, 2000). Separate legislation designated nitrate vulnerable zones in Scotland and Northern Ireland. In the case of Scotland, see the Protection of Water Against Agricultural Nitrate Pollution (Scot.) Regulations 1996, 1996, S.I. 1996/1564. In the case of Northern Ireland, see the Protection of Water Against Agricultural Nitrate Pollution Regulations (N. Ir.) 1996, 1996, S.R. 1996/217.

51. News Release No. 251/02, DEFRA, Nitrate Controls to Spearhead Long-term Strategy to Improve Water Quality (June 27, 2002). DEFRA News Releases may be found at <http://www.defra.gov.uk/news>.

following the judgment of the European Court of Justice in *European Commission v. United Kingdom* it proved necessary to identify all surface freshwaters and groundwaters which have or could have a nitrate concentration in excess of fifty milligrams per litre, and then to designate nitrate vulnerable zones for their protection.⁵² For the purpose of complying with this judgment, the Department for Environment, Food and Rural Affairs (DEFRA) countenanced two alternative strategies: either applying the action programme to all of England; or applying the action programme within specific designated nitrate vulnerable zones, it being estimated that these would cover approximately 80% of England.⁵³ The former alternative was adopted in Austria, Denmark, Germany, Finland, Luxembourg, and the Netherlands, and enjoyed such advantages as, *inter alia*, simplicity and equal treatment among farmers.⁵⁴ The latter alternative was not only more widely adopted among Member States, but also ensured greater targeting and, overall, lower compliance costs.⁵⁵ Following consultation, the latter alternative was preferred, but the estimate of 80% coverage proved high. Only a further 47% of the land area of England was designated.⁵⁶ Combined with the 8% already designated, the total proportion comprised in nitrate vulnerable zones came to 55%.⁵⁷

Significantly, compensation has never been provided under the United Kingdom legislation implementing nitrate vulnerable zones. This is fully consistent with the polluter pays principle. As has been seen, a contrast may therefore be drawn with nitrate sensitive areas, where the provider gets principle would seem to apply.⁵⁸ That said, it is not always evident that the obligations in nitrate sensitive areas necessarily mark a “step-change” in severity as opposed to those in nitrate vulnerable zones.⁵⁹ The maximum allowable levels of organic nitrogen fertiliser illustrate this point. Under the Nitrate Sensitive Areas Regulations 1994 it is stipulated that, in the case of nitrate sensitive areas, a farmer could not in any twelve month period “apply

52. Case C-69/99, European Comm'n v. United Kingdom, 2000 E.C.R. I-10979.

53. DEFRA, *Implementing the Nitrates Directive*, *supra* note 19, §§ 3.3-3.4.

54. *Id.* §§ 3.8, 3.12.

55. *Id.* § 3.16. For analysis of the position throughout the European Community as of 2000-2001, see EC, *Implementation*, *supra* note 2, at 15 (finding that 38% of European Community territory was comprised within nitrate vulnerable zones, but, based on a European Community assessment, this area was projected to increase to at least 46%).

56. News Release No. 251/02, DEFRA, *supra* note 51.

57. *Id.* For the implementing legislation, see the Nitrate Vulnerable Zones (Additional Designations) (Eng.) (No.2) Regulations 2002, 2002, S.I. 2002/2614.

58. See, e.g., Ian Hodge, *Agri-environmental Policy: A UK Perspective*, in ENVIRONMENTAL POLICY: OBJECTIVES, INSTRUMENTS, AND IMPLEMENTATION 216 (Dieter Helm ed., 2000) (analyzing the difference between the two principles in this context).

59. See, e.g., CARDWELL, *supra* note 4, at 250-51.

organic nitrogen fertiliser in excess of the quantity which would result in the application to the land of 250 kilograms of nitrogen per hectare.”⁶⁰ Yet, in the case of nitrate vulnerable zones, the *Code of Good Agricultural Practice for the Protection of Water* goes so far as to require that farmers should “not apply more than 250 kg/ha of total nitrogen in organic manure in any 12 months.”⁶¹ On the other hand, in the case of nitrate sensitive areas, the “premium scheme” does provide the option of far more onerous undertakings; and the example may be reiterated of converting arable land into low intensity grassland. Nonetheless, the Court of Auditors has not been slow to criticise the extent to which Member States have compensated farmers for relatively light extra effort. In their view, “[a]id should only be given if the farmer’s commitments go beyond levels marked by the Nitrate Directive and good farming practice.”⁶²

In 2002, DEFRA estimated the costs to the English farming industry of complying with the action programme to be approximately £20 million *per annum*.⁶³ That said, the economic impact of the Nitrates Directive has been mitigated by the availability of grants to assist with the disposal of farm waste. Under the initial Regulations enacted for this purpose, the Farm Waste Grant (Nitrate Vulnerable Zones) (England and Wales) Scheme 1996, it was possible to claim capital grants to cover 25% of expenditure incurred in respect of specified works, these including the provision, replacement, or improvement of facilities for the handling and storage of manure, slurry, and silage effluent.⁶⁴ The aggregate amount of any qualifying expenditure was not to exceed £85,000.⁶⁵ The authority in European Community law for these Regulations was not the Nitrates Directive, but Council Regulation 2328/91, directed to improving the efficiency of agricultural structures.⁶⁶ Accordingly, by looking outside the Nitrates Directive, where no compensation is payable, the United Kingdom Government secured a level of support towards meeting the increased legislative burden. The current Regulations for England are the Farm Waste Grant (Nitrate Vulnerable Zones) (England) Scheme 2003, under which the rate of grant has been raised to 40%.⁶⁷ The current authority in European Community law is Council Regulation 1257/1999 (Rural Development Regulation).⁶⁸ It may be highlighted that, with the Rural Development

60. 1994, S.I. 1994/1729, Sched. 2.

61. *Code of Good Agricultural Practice for the Protection of Water*, *supra* note 49, ¶ 284.

62. Court of Auditors, *supra* note 18, at 2.

63. News Release No. 251/02, DEFRA, *supra* note 51.

64. 1996, S.I. 1996/908, reg. 3.

65. *Id.*

66. Council Regulation 2328/91, art. 2, 1991 O.J. (L 218) 1.

67. 2003, S.I. 2003/562, reg. 3.

68. Council Regulation 1257/1999, 1999 O.J. (L 160) 80 [hereinafter Rural Development Regulation]. This Regulation will be replaced for the programming period which commences

Regulation focusing on the provision of remuneration for farmers in respect of extra effort, again the provider gets principle, not the polluter pays principle, would seem to apply.⁶⁹

Notwithstanding this 1996 legislative package, United Kingdom farmers in *Regina v. Secretary of State for the Environment ex parte Standley*⁷⁰ challenged the validity of national implementation of the Nitrates Directive, on the basis that nitrate vulnerable zones were only to be designated if the threshold of fifty milligrams per litre would be exceeded by reason of discharge from *agricultural* sources alone.⁷¹ In other words, the farmers argued that the measures took insufficient account of non-agricultural sources. The counter-arguments were that it was sufficient to trigger designation if agricultural sources made a significant contribution to nitrate levels; that there was no requirement to establish levels solely attributable to agricultural sources; and that, in any event, precise attribution as between agricultural and non-agricultural sources was impossible.⁷²

In the alternative, the farmers argued that, if the interpretation of the Nitrates Directive adopted by the United Kingdom authorities was correct, then the Nitrates Directive itself was invalid, on the basis that it infringed the polluter pays principle, the principle of rectifying environmental damage at source, the principle of proportionality, and the right to property.⁷³

The European Court of Justice held that Member States were not required to determine precisely what proportion of nitrate pollution came from agricultural sources; nor was it necessary that the cause of such pollution be exclusively agricultural.⁷⁴ Rather, it was sufficient if the discharge of nitrate of agricultural origin made a significant contribution to the overall concentration; and, with Member States being afforded a wide discretion in implementing the Nitrates

on January 1, 2007, by Council Regulation 1698/2005, 2005 O.J. (L 277)1.

69. Note also that, within their legislative framework to tackle nitrate pollution, other Member States have employed a variety of different initiatives, not just the imposition of nitrate vulnerable zones. Sweden, for example, has imposed fertiliser taxes. By contrast, in the Netherlands the surplus amount of manure was calculated for each farm; this surplus has been taxed, with an element of structural flexibility conferred by a manure trading system. For a comparative treatment see, for example, Nick Hanley, *Policy on Agricultural Pollution in the European Union*, in ENVIRONMENTAL POLICIES FOR AGRICULTURAL POLLUTION CONTROL 151 (James Shortle & David Abler eds., 2001).

70. Case C-293/97, 1999 E.C.R. I-2603.

71. See generally Grossman, *supra* note 20, at 621-25 (discussing the case).

72. *Standley*, 1999 E.C.R. I-2603, ¶ 18.

73. *Id.* ¶ 17.

74. *Id.* ¶ 30.

Directive, European Community law could not lay down precise criteria for establishing whether there was a significant contribution in each case.⁷⁵

With regard to the validity of the Nitrates Directive itself, the European Court of Justice held that the legislation contained sufficient flexibility to prevent any breach of the principle of proportionality.⁷⁶ For example, action programmes were to address the characteristics of nitrate vulnerable zones, such as soil conditions, soil type, climatic conditions, and rainfall.⁷⁷ More specifically with regard to the polluter pays principle, this was considered to be closely related to the principle of proportionality.⁷⁸ The Nitrates Directive required Member States to take account of sources of nitrate pollution other than agriculture, and did not require farmers to bear the burden of dealing with nitrate pollution to which they had not contributed.⁷⁹ Accordingly, this principle too was not infringed. Like considerations applied in the case of the principle of rectifying environmental damage at source.⁸⁰ Finally, it was held that the right to property was also respected.⁸¹ As consistently asserted by the European Court of Justice, this right is not absolute, but "must be viewed in relation to its social function."⁸² In consequence, it could be restricted to meet an objective of general interest pursued by the European Community, provided that the restrictions did not "constitute a disproportionate and intolerable interference," impairing its very substance.⁸³ In this case, the restrictions related to the protection of public health, an objective of general interest, and in a manner which did not impair the very substance of the right.⁸⁴ Such an approach finds distinct echoes in the United States, where statutory provisions to establish and maintain prescribed soil and water conservation practices have been held constitutional.⁸⁵

75. *Id.* ¶¶ 35, 38.

76. *Id.* ¶¶ 46-50.

77. *Id.* ¶ 47.

78. *Id.* ¶¶ 52.

79. *Id.* ¶¶ 51, 52.

80. *Id.* ¶ 53.

81. *Id.* ¶¶ 54-57.

82. *Id.* ¶ 54.

83. *Id.*

84. *Id.* ¶ 56; *see also* Case 44/79, *Hauer v. Rheinland-Pfalz*, 1979 E.C.R. 3727 (earlier adopting this line of reasoning in the agricultural context). *See generally* J. A. Usher, *Rights of Property: How Fundamental?*, 5 EUR. L. REV. 209 (1980).

85. *See, e.g.*, *Benschoter v. Hakes*, 8 N.W.2d 481, 487 (Iowa 1943); *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 279 (Iowa 1979). *See generally* Neil Hamilton, *Legal Aspects of Farm Tenancy in Iowa*, 34 DRAKE L. REV. 267 (1984-1985); Daryn McBeth, *Public Need and Private Greed — Environmental Protection and Property Rights*, 1 DRAKE J. AGRIC. L. 112 (1996).

III. Cross Compliance

A. Early Developments

For some time, the European Community has sought to promote the protection of the environment by attaching conditions to direct payments to farmers. Early examples of this practice may be found in the context of structural legislation (which would become, with emphasis on rural development, the “Second Pillar” of the CAP), as opposed to legislation governing the common organisations of the market (the “First Pillar” of the CAP).⁸⁶ Thus, when in 1988 the structural legislation introduced the possibility to “set aside” or “idle” land, Member States were given the option to “make it an obligation for the beneficiary to maintain the set-aside land in order to protect the environment and natural resources.”⁸⁷ Further amendment to the structural legislation in 1989 provided that environmental conditions could be attached to the payment of compensatory allowances to farmers in mountain, hill, or less-favoured areas.⁸⁸ The United Kingdom exercised this discretion to attach penalties for overgrazing and, subsequently, for the use of unsuitable supplementary feeding methods.⁸⁹

More significantly, the 1992 MacSharry reforms, and legislation enacted shortly thereafter, extended such cross compliance to direct payments made to farmers under the common organisations of the market. This significance flows from the fact that differing principles would seem to have applied in respect of payments under the structural legislation and in respect of payments under the common organisations of the market. In the case of the structural legislation, the provider gets principle generally held sway. Accordingly, the conditions were imposed upon the receipt of remuneration for the delivery of “positive externalities,” such as the maintenance of farming in hill areas.⁹⁰ On the other hand, as shall be seen, when extending cross compliance to the legislation governing the common organisations of the market, the conditions created a hurdle to be cleared before entitlement to more general price or producer

86. The Rural Development Regulation, *supra* note 68, currently provides the legal framework for the “Second Pillar” of the CAP.

87. Comm’n Regulation 1272/88, art. 4(3), 1988 O.J. (L 121) 36, 37.

88. Council Regulation 797/85, art. 14, 1985 O.J. (L 93) 1, *amended by* Council Regulation 3808/89, 1989 O.J. (L 371) 1.

89. *See* Hill Livestock (Compensatory Allowances) Regulations 1994, 1994, S.I. 1994/2740, regs. 4, 5 (implementing for the first time penalties for both overgrazing and the use of unsuitable supplementary feeding methods).

90. Council Regulation 797/85, art. 14, 1985 O.J. (L 93) 1, *amended by* Council Regulation 3808/89, 1989 O.J. (L 371) 1.

support could be unlocked. Thus, the conditions were more broadly directed to addressing the “negative externalities” generated by intensive farming.

In particular, the 1992 MacSharry reforms saw the “greening” of support in the livestock sector. Most notably, headage payments in the form of suckler cow premium and beef special premium were placed subject to a stocking density limit.⁹¹ This limit was initially fixed at 3.5 livestock units per forage hectare for the 1993 calendar year.⁹² It was then ratcheted down to two livestock units per forage hectare for the 1996 and following calendar years.⁹³ That said, in Member States where extensive beef production was the norm, even a stocking density limit of two livestock units per forage hectare was not burdensome. By way of illustration, in 1995 an empirical survey of 389 United Kingdom beef farmers found that the provisions affected only 9.6% of the sample.⁹⁴ However, in Member States where beef production was more intensive, the impact was more severe. An empirical survey of 101 Danish beef farmers in the same year found that 37.6% had been affected.⁹⁵ This might be regarded as successful targeting of the areas of greatest environmental concern; but specific rules did without doubt dilute the effectiveness of the provisions. Significantly, not all animals were included in the calculation of the stocking density, pigs being but one example, and producers with not more than fifteen livestock units were exempt.⁹⁶

This element of compulsion in the livestock sector was replicated also in the cereals sector. Thus, whereas set-aside had formerly been a voluntary scheme authorised by the structural legislation, under the 1992 MacSharry reforms it became a compulsory element of the common organisation of the market in cereals, with environmental protection as a firm objective. Indeed, Article 7(3)

91. Council Regulation 805/68, art. 4g, 1968 J.O. (L 148) 24, *amended by* Council Regulation 2066/92, 1992 O.J. (L 215) 49. The calculation of stocking density was complex. Account was taken of: male bovine animals and suckler cows for which premium applications had been submitted; sheep and/or goats for which premium applications had been submitted; and, in accordance with prescribed rules, the number of dairy cows required to produce any milk quota allocated to the producer. *Id.* Once the number of animals had been so determined, they were converted into livestock units by reference to a conversion table set out in Annex I to Council Regulation 2328/91, 1991 O.J. (L 218) 1, 19. Bulls, cows, and other bovine animals over two years counted for one livestock unit; bovine animals from six months to two years counted for 0.6 of a livestock unit; and sheep and goats counted for 0.15 of a livestock unit. *Id.*

92. Council Regulation 805/68, art. 4g(2), 1968 J.O. (L 148) 24, *amended by* Council Regulation 2066/92, 1992 O.J. (L 215) 49.

93. *Id.*

94. Erling Andersen et al., *The Beef Regime, in* CAP REGIMES AND THE EUROPEAN COUNTRYSIDE 55, 60 (Floor Brouwer & Philip Lowe eds., 2000).

95. *Id.*

96. Court of Auditors, *supra* note 18, at 10 (reporting that this exemption covered 90% of all cattle holdings in Portugal).

of Council Regulation 1765/92 stipulated as an obligatory requirement that "Member States shall apply appropriate environmental measures which correspond to the specific situation of the land set aside."⁹⁷ This removed any element of discretion previously enjoyed by the Member States.

Further legislation enacted shortly after the 1992 MacSharry reforms saw Member States authorised to attach environmental conditions to headage payments made under the common organisations of the market in the livestock sector.⁹⁸ The application of the polluter pays principle was evident in the requirement that, where Member States introduced such cross compliance, penalties for breach were mandatory. For example, in the context of sheep and goat annual premium, it was stipulated that:

Member States which avail themselves of this possibility shall impose penalties appropriate to and commensurate with the seriousness of the ecological consequences of any breach of these measures. Such penalties may provide for the reduction or, where necessary, the abolition of the benefits linked to the respective premium schemes.⁹⁹

Only two Member States, including the United Kingdom, implemented this form of cross compliance.¹⁰⁰ Penalties were introduced for both overgrazing and the use of unsuitable supplementary feeding methods, which could extend to withholding or recovering on demand the whole of any premium payable or already paid for the marketing year in question.¹⁰¹

As a result, early measures attaching cross compliance conditions to direct payments under the common organisations of the market would not seem to

97. Council Regulation 1765/92, art. 7(3), 1992 O.J. (L 181) 12, 16.

98. See generally HAWKE & KOVALEVA, *supra* note 25, at 117-27; Michael Cardwell, *Common Agricultural Policy Quotas and the Environment*, 45 DRAKE L. REV. 71 (1997).

99. Council Regulation 3013/89, art. 5d, 1989 O.J. (L 289) 1, *amended by* Council Regulation 233/94, 1994 O.J. (L 30) 9. For such provisions in the case of other headage payments, see Council Regulation 805/68, art. 4d(7a), 1968 J.O. (L 148) 24, *amended by* Council Regulation 125/93, 1993 O.J. (L 18) 1 (suckler cow premium); Council Regulation 805/68, art. 4g(4a), 1968 J.O. (L 148) 24, *amended by* Council Regulation 3611/93, 1993 O.J. (L 328) 7 (both suckler cow premium and beef special premium).

100. Court of Auditors, *supra* note 18, at 10, 11 tbls.5 & 6 (the other Member State being Greece).

101. Sheep Annual Premium Regulations 1992, 1992, S.I. 1992/2677, *amended by* Sheep Annual Premium (Amendment) Regulations 1994, 1994, S.I. 1994/2741; Suckler Cow Premium Regulations 1993, 1993, S.I. 1993/1441, *amended by* Suckler Cow Premium (Amendment) Regulations 1994, 1994, S.I. 1994/1528 and Suckler Cow Premium (Amendment) (No.2) Regulations 1995, 1995, S.I. 1995/1446; Beef Special Premium Regulations 1993, 1993, S.I. 1993/1734, *amended by* Beef Special Premium (Amendment) Regulations 1994, 1994, S.I. 1994/3131.

have had major effect. Where compulsory, as in the case of the stocking density limit or set-aside, they did not as a rule constitute an onerous burden; and, where there was capacity to exert greater influence on farming practices, as in the case of headage payments, implementation was at the option of the Member State.

B. The Agenda 2000 Reforms: The Berlin Summit

Such deficiencies were, to a degree, addressed by the Agenda 2000 reforms as agreed at the Berlin Summit of March 1999. In particular, Council Regulation 1259/1999 (1999 Horizontal Regulation),¹⁰² which applied to most direct payments to farmers under the common organisations of the market, obliged Member States to “take the environmental measures they consider to be appropriate in view of the situation of the agricultural land used or the production concerned and which reflect the potential environmental effects.”¹⁰³ These measures could include “support in return for agri-environmental commitments,” “general mandatory environmental requirements,” or “specific environmental requirements constituting a condition for direct payments.”¹⁰⁴ The first-mentioned corresponded most naturally with payments for extra effort on a voluntary basis, which one would expect to find under the “Second Pillar” of the CAP, as newly constituted by the Rural Development Regulation. Besides, the Preamble to the 1999 Horizontal Regulation expressly recited that the environmental measures which it required “should be taken by Member States notwithstanding the possibility of granting aid in return for optional agri-environmental commitments.”¹⁰⁵ The other two measures, by contrast, could be more accurately characterised as imposing cross compliance obligations, and as comprising part of an obligatory framework for environmental protection. Again, Member States were to impose penalties “appropriate and proportionate to the seriousness of the ecological consequences” of non-compliance, and, again, these could extend to the “cancellation of the benefits accruing from the support schemes concerned.”¹⁰⁶

In this context, two factors combined to reduce the efficacy of 1999 Horizontal Regulation. First, the cross compliance conditions were confined to environmental protection. Second, although the environmental protection requirements were mandatory, the manner of their implementation afforded a broad level of discretion to Member States, creating a real danger of distortion in competition. The Committee of the Regions expressly recognized this in its

102. 1999 O.J. (L 160) 113 [hereinafter 1999 Horizontal Regulation].

103. *Id.* art. 3(1), at 114.

104. *Id.*

105. *Id.* pmb1. (3), at 113.

106. *Id.* art. 3(2), at 114.

Opinion on the draft legislation.¹⁰⁷ In consequence, the Committee advocated that “framework rules should be set in place” at European Community level.¹⁰⁸ The Committee also advocated that, in the case of direct payments under the common organisations of the market, the baseline for cross compliance conditions should be good farming practice, with separate payments “made for the provision of additional environmental services.”¹⁰⁹

C. The Mid-term Review

The opportunity to reinforce cross compliance was taken up at the time of the Mid-term Review, regarded by the European Community institutions as constituting a “sea-change” in policy development.¹¹⁰ Thus, when the reforms were agreed on 26 June 2003, Commissioner Fischler declared that “[t]oday marks the beginning of a new era.”¹¹¹ The main policy initiative may have been the rolling up of most direct payments into the single farm payment (SFP), decoupled from production; but a further major initiative was the attachment to not just the SFP but also the vast majority of direct payments of a broad menu of compulsory cross compliance conditions.¹¹² This had the capacity to limit substantially the “negative externalities” of farming, and, indeed, Commissioner Fischler saw “a return to sustainability” as a primary goal of the reforms.¹¹³

As indicated, the Mid-term Review extended cross compliance well beyond environmental protection. The 2003 Horizontal Regulation provides that, as a general rule, the receipt of any direct payment is subject to, first, “statutory management requirements,” and, second, an obligation to maintain all agricultural land “in good agricultural and environmental condition.”¹¹⁴ The former relate to: public, animal, and plant health; the environment; and animal welfare.¹¹⁵ In total, specified provisions of eighteen European Community

107. Opinion of the Committee of the Regions, 1999 O.J. (C 93) 1, ¶ 4.1.

108. *Id.*

109. *Id.*

110. For the policy document initiating the Mid-term Review, see *Mid-term Review*, *supra* note 1. See generally CARDWELL, *supra* note 4, at 159-74; JEREMY MOODY & WILLIAM NEVILLE, *MID TERM REVIEW: A PRACTICAL GUIDE* (2004).

111. Franz Fischler, Comm’r for Agric., Rural Dev. & Fisheries, *The New, Reformed Agricultural Policy*, Speech/03/326 (June 26, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/326&format=HTML&aged=1&language=EN&guiLanguage=en>.

112. 2003 Horizontal Regulation, *supra* note 16, arts. 3-9, at 8-9.

113. Franz Fischler, Comm’r for Agric., Rural Dev. & Fisheries, *CAP Reform and EU Enlargement: The Future of European Agriculture*, Speech/03/515 (Nov. 4, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/515&format=HTML&aged=1&language=EN&guiLanguage=en>.

114. 2003 Horizontal Regulation, *supra* note 16, arts. 3-5, at 8.

115. *Id.* art. 4, at 8.

Regulations and Directives must be observed. These are listed in Annex III to the 2003 Horizontal Regulation, and include Articles 4 and 5 of the Nitrates Directive.¹¹⁶ The draft legislation had proposed cross compliance with specified provisions of thirty-eight Regulations and Directives, with immediate effect.¹¹⁷ Yet, as noted, the reforms as finally agreed reduced this number to eighteen; and, besides, their observance is to be implemented in three annual tranches, commencing on 1 January 2005.¹¹⁸

In addition, Annex IV to the 2003 Horizontal Regulation sets out a European Community framework for “good agricultural and environmental condition,” which takes “into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices, and farm structures.”¹¹⁹ Although Member States enjoy discretion within this framework, the potential for distortion of competition seems to have been reduced. That said, on implementation by the devolved administrations within the United Kingdom, the opportunity was taken to impose slightly different rules as to what amounts to “good agricultural and environmental condition.”¹²⁰

Importantly, the European Community framework is expressed to be “without prejudice to the standards governing good agricultural practices” under the Rural Development Regulation and “to agri-environment measures applied above the reference level of good agricultural practices.”¹²¹ In consequence, the distinction has been preserved between, on the one hand, actions to be taken by farmers as a condition for the receipt of the SFP and most direct payments under the common organisations of the market, and, on the other hand, actions that would justify remuneration for the provision of “public goods.” The baseline seems to be good agricultural practice. Thus, in order for farmers to claim payment for agri-environmental and animal welfare

116. *Id.* Annex III, at 56-57.

117. European Comm’n, *A Long-term Policy Perspective for Sustainable Agriculture*, at 49-51, COM (2003) 23 final (Jan. 21, 2003), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003_0023en01.pdf.

118. 2003 Horizontal Regulation, *supra* note 16, Annex III, at 56-57.

119. *Id.* art. 5(1), at 8.

120. In the case of England, see the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Eng.) Regulations 2004, 2004, S.I. 2004/3196. In the case of Scotland, see the Common Agricultural Policy Schemes (Cross-Compliance) (Scot.) Regulations 2004, 2004, S.S.I. 2004/518. In the case of Wales, see the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Wales) Regulations 2004, 2004, W.S.I. 2004/284. In the case of Northern Ireland, see the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) Regulations (N. Ir.) 2005, 2005, S.R. 2005/6.

121. 2003 Horizontal Regulation, *supra* note 16, art. 5(1), at 8.

commitments under the Rural Development Regulation, those commitments must “involve more than the application of usual good farming practice including good animal husbandry practice.”¹²² This distinction will be further preserved and, moreover, made more explicit when the Rural Development Regulation is replaced by Council Regulation 1698/2005 for the programming period which commences on January 1, 2007.¹²³ Article 39(3) stipulates that agri-environment payments should “cover only those commitments” which go beyond the statutory management requirements and the obligation to maintain all agricultural land in good agricultural and environmental condition, “as well as minimum requirements for fertiliser and plant protection product use and other relevant mandatory requirements established by national legislation and identified in the programme.”¹²⁴

Under the 2003 Horizontal Regulation, substantial penalties back up such cross compliance, whether in relation to the statutory management requirements or the obligation to maintain all agricultural land in good agricultural and environmental condition. In an extreme case, where non-compliance is intentional, the farmer can be excluded “from one or several aid schemes . . . for one or more calendar years.”¹²⁵

In this context, three matters of broader application may be considered. First, the rationale behind enhancing cross compliance was articulated very much in terms of increasing the public acceptability of farm support, but it is far from certain that the public will in fact reap any dividend.¹²⁶ In particular, the statutory management requirements represent pre-existing rules with which farmers should comply in any event. Besides, the United Kingdom Secretary of State for Environment, Food, and Rural Affairs swiftly emphasised that cross compliance will not be a heavy burden on farmers, while at the same time divining advantages for the wider populace.¹²⁷ Thus, in her Written Ministerial Statement of 22 July 2004 she declared that the measures amounted to “a relatively light requirement, representing a mixture of common-sense farming practice and support for existing legislation, which should help drive an improvement in overall performance and deliver public benefit.”¹²⁸ A similar

122. Rural Development Regulation, *supra* note 68, art. 23(2), amended by Council Regulation 1783/2003, 2003 O.J. (L 270) 70.

123. Council Regulation 1698/2005, 2005 O.J. (L 277) 1.

124. *Id.* art. 39(3), at 20. Similar provisions will apply in the case of animal welfare payments. *Id.* art. 40(2), at 20.

125. 2003 Horizontal Regulation, *supra* note 16, art. 7(3), at 9.

126. *See, e.g., Rather Cross Compliance*, FARM LAW, June 2004, at 1, 3.

127. 424 PARL. DEB., H.C. (6th ser.) (2004) 69WS, available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040722/wmstext/40722m03.htm#40722m03.html_sbhd3.

128. *Id.*

conclusion was reached in a 2004 report commissioned by DEFRA to consider the likely impacts of the Mid-term Review on diffuse water pollution from agriculture. This report stated that, “[g]iven pressure to keep cross-compliance conditions to a minimum and agri-environment schemes not being attractive to all farmers, the success of such measures in responding to [diffuse water pollution from agriculture] must be viewed with some degree of caution.”¹²⁹

Nevertheless, the penalties for non-compliance, which may extend to total loss of direct payments for one or more calendar years, are additional to any penalties to be enforced under the various Directives and Regulations which together constitute the statutory management requirements.¹³⁰ As recited in the 2003 Horizontal Regulation, such withdrawal of direct payments “should be without prejudice to sanctions laid down now or in the future under other provisions of Community or national law.”¹³¹ It has even been suggested that this may amount to “double jeopardy.”¹³² Further, although the statutory management requirements may represent pre-existing rules, the obligation to maintain all land in good agricultural and environmental condition is without doubt new. Some of the detailed criteria set out in the European Community framework admittedly do not amount to novel practice. These include for example, “[a]ppropriate machinery use,” and “[a]voiding the encroachment of unwanted vegetation on agricultural land.”¹³³ However, to reflect the fact that receipt of the SFP and most direct payments is not dependent upon production as such, the coverage of the obligation is unusually broad, in that it applies also to land that is not in production, so as to prevent land abandonment.¹³⁴ By way of illustration, the implementing legislation in England specifically requires that, as a general rule, farmers must periodically “cut down any scrub and cut down or graze any rank vegetation” on land which is not in agricultural production.¹³⁵

Second, as with nitrate sensitive areas and nitrate vulnerable zones, it is not always easy to detect the boundary between management obligations which are conditions for receipt of the SFP and most direct payments and management obligations which attract remuneration for their delivery of “public goods.”

129. DEFRA, GFA-RACE PARTNERS LIMITED IN ASSOCIATION WITH IEEP, IMPACTS OF CAP REFORM AGREEMENT ON DIFFUSE WATER POLLUTION FROM AGRICULTURE, EXECUTIVE SUMMARY, 2004, Rep.GRP-P-175, at V, available at <http://www.defra.gov.uk/environment/water/quality/diffuse/agri/pdf/gfa-race-execsumm.pdf>.

130. 2003 Horizontal Regulation, *supra* note 16, art. 7, at 9.

131. *Id.* pmbl. (2), at 3.

132. *Cross Compliance — Not So Cross After All?*, FARM LAW, Mar. 2005, at 15, 20.

133. 2003 Horizontal Regulation, *supra* note 16, Annex IV, at 58.

134. *Id.* pmbl. (3), at 3.

135. Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Eng.) Regulations 2004, 2004, S.I. 2004/3196, Sched., ¶ 7.

Thus, in England, there is considerable similarity between the management obligations required for maintenance of the land in good agricultural and environmental condition — which, as has been seen, are regarded as cross compliance — and the management obligations that are regarded as sufficient to attract specific remuneration under the Entry Level of the Environmental Stewardship (England) Regulations 2005.¹³⁶ Indeed, in emphasising the merits of the Environmental Stewardship Scheme, the United Kingdom Secretary of State for Environment, Food and Rural Affairs highlighted this overlap:

In addition, farmers will be able to receive payment under ELS [Entry Level Stewardship] for positive management of their hedges, as well as for establishing and managing a range of buffer strip options next to the cross-compliance protection zone around hedges and ditches. Since one of the qualifying conditions for the hedgerow management options in ELS will be that farmers leave a minimum uncultivated strip, those farmers entering hedges into ELS will largely be meeting their cross-compliance requirements in this respect.¹³⁷

Third, it is also not immediately evident that the cross compliance conditions attached to the SFP and most direct payments amount to a straightforward application of the polluter pays principle. Strictly speaking, a farmer could forego the payments and be free of the conditions. Yet realistically, the magnitude of the payments leaves little independent choice. On one calculation for 2005-2006, the SFP, net of cross compliance costs, will contribute £66 per acre, as against overall farm profit of £62 per acre.¹³⁸ In consequence, cross compliance may arguably be characterised as a bargain, but one where the farmer has little room for manoeuvre in negotiations.¹³⁹ This legal analysis sits

136. 2005, S.I. 2005/621. These Regulations implement, in particular, the Rural Development Regulation, *supra* note 68, arts. 22-24, amended by Council Regulation 1783/2003, 2003 O.J. (L 270) 70.

137. 424 PARL. DEB., H.C. (6th ser.) (2004) 69WS, available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040722/wmstext/40722m03.htm#40722m03.html_sbhd3. A contrast, generally, may be made between the Schedule to the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Eng.) Regulations 2004, 2004, S.I. 2004/3196, and Schedule 2, Part 2 to the Environmental Stewardship (Eng.) Regulations 2005, 2005, S.I. 2005/621.

138. News Release, Deloitte & Touche LLP, Farmers Predicted to Produce Food at a Loss (Nov. 3, 2005), available at http://www.deloitte.com/dtt/press_release/0,1014,sid%253D9392%2526cid%253D99314,00.html.

139. For such analysis in relation to environmental measures prior to the Mid-term Review, see Christopher P. Rodgers, *Agenda 2000, Land Use, and the Environment: Towards a Theory of 'Environmental' Property Rights*, in 5 LAW AND GEOGRAPHY: CURRENT LEGAL ISSUES 2002, at 239, 251 (Jane Holder & Carolyn Harrison eds., 2003). See also CARDWELL, *supra* note 4,

well with a key objective of the Mid-term Review, that there should be “justification of support through the provision of services that the public expects farmers to provide.”¹⁴⁰ Likewise, as has been seen, the United Kingdom Secretary of State for Environment, Food and Rural Affairs specifically understood cross compliance to deliver public benefit,¹⁴¹ and Commissioner Fischler welcomed any shift away from the perception that farmers are objects of charity. Not least, he declared that the Mid-term Review had the effect of “reconciling agricultural policy with social expectations and clearly establishing the rewards for additional services, thereby justifying budget outlay.”¹⁴² However, as has also been seen, doubts may arise as to whether the form of cross compliance implemented does deliver *additional* services. The farmer must observe conditions up to a baseline of good agricultural practice, but no requirement mandates that the farmer exceed this baseline.

Further, it is also not immediately evident that such cross compliance amounts to a straightforward application of the provider gets principle. No baseline is to be exceeded in order to attract payment, and, moreover, it may be questioned whether even a major function of the SFP is the delivery of “public goods.” Although that function may receive emphasis in policy documents, the 2003 Horizontal Regulation unequivocally describes the new form of subsidy as “income support.”¹⁴³

IV. Conclusion

Both the measures relating to nitrate pollution and those introducing and extending cross compliance are but part of an ongoing programme. Two current initiatives warrant mention. First, Directive 2000/60 of the European Parliament and of the Council (Water Framework Directive) will phase in a river basin approach to water management, which has obvious implications for agriculture as the primary form of land use.¹⁴⁴ Notably, this Directive requires that “Member States shall take account of the principle of recovery of the costs

at 249.

140. *Mid-term Review*, *supra* note 1, at 2.

141. 424 PARL. DEB., H.C. (6th ser.) (2004) 69WS, available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040722/wmstext/40722m03.htm#40722m03.html_sbhd3.

142. Franz Fischler, Comm’r for Agric., Rural Dev. & Fisheries, Adjusting the CAP to Better Meet Its Objectives, Speech/02/412 (Sept. 20, 2002), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/412&format=HTML&aged=1&language=EN&guiLanguage=en>.

143. 2003 Horizontal Regulation, *supra* note 16, art. 1, at 7.

144. Council Directive 2000/60, 2000 O.J. (L 327) 1.

of water services, including environmental and resource costs”; and this requirement is expressly stated to be “in accordance in particular with the polluter pays principle.”¹⁴⁵ The new legislation will not, however, affect the Nitrates Directive. Second, Directive 2004/35 of the European Parliament and of the Council (Environmental Liability Directive) will establish a European Community liability regime directed to the prevention and remedying of environmental damage,¹⁴⁶ and the Preamble expressly recites that implementation should be achieved “through the furtherance of the ‘polluter pays’ principle”:

The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.¹⁴⁷

These initiatives confirm that farmers are widely understood to be a source of “negative externalities.” They also confirm that the policy response is increasingly to apply the polluter pays principle.

Nonetheless, as has been highlighted, in the agricultural context it is not always easy to determine the extent to which the polluter pays principle does indeed apply. In some cases its application would seem relatively clear. In this category would fall, for example, nitrate vulnerable zones under the Nitrates Directive, where restrictions are imposed without compensation and participation is compulsory.¹⁴⁸ In other cases, by contrast, the underlying principle would seem to be that the provider gets rather than that the polluter pays. In this second category would fall, for example, agri-environmental schemes under the Rural Development Regulation. Farmers are again subject

145. *Id.* art. 9(1), at 12; see also DE SADELEER, *supra* note 11, at 30.

146. Council Directive 2004/35, 2004 O.J. (L 143) 56.

147. *Id.* pmb. (2), at 56. That said, the coverage of the Environmental Liability Directive is far from comprehensive. For example, farmers may be broadly liable in the case of “damage to protected species and natural habitats.” *Id.* art. 3(1)(b), at 60. Yet the definition of “protected species and natural habitats” is narrow. *Id.* art. 2(3), at 59. In general, it extends merely to those which fall within the Natura 2000 network (established under Council Directive 79/409, 1979 O.J. (L 103) 1 (commonly known as the “Wild Birds Directive”); and Council Directive 92/43, 1992 O.J. (L 206) 7 (commonly known as the “Habitats Directive”). On one informed estimation, the network will only cover in the region of 10% of European Community territory. European Comm’n, *White Paper on Environmental Liability*, at 19-20, COM (2000) 66 final (Feb. 9, 2000), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2000/com2000_0066en01.pdf.

148. Nitrates Directive, *supra* note 8.

to restrictions, but these are voluntary. They also exceed the reference level of good farming practice and, as a result, produce the “public goods” which justify the remuneration.¹⁴⁹

A third and more difficult category is that exemplified by cross compliance and, in particular, the cross compliance conditions attached to the SFP and most direct payments under the 2003 Horizontal Regulation. In this category, neither the polluter pays principle nor the provider gets principle seems strictly applicable. Payment of support depends upon the observation of the statutory management requirements and the obligation to maintain all agricultural land in good agricultural and environmental condition.¹⁵⁰ However, the 2003 Horizontal Regulation itself concedes that these are “basic standards.”¹⁵¹ Accordingly, on the one hand, they can be distinguished from the higher standards necessary to trigger the provider gets principle under the Rural Development Regulation: as noted, under that Regulation it is expressly provided that “[a]gri-environmental and animal welfare commitments shall involve more than the application of usual good farming practice including good animal husbandry practice.”¹⁵² On the other hand, there is not evident the degree of compulsion necessary for the application of the polluter pays principle. Undeniably, failure to observe the cross compliance conditions may lead to loss of the support that is so essential to financial viability. Yet, as a matter of law, farmers do have the theoretical option of dispensing with the SFP and other direct payments and, with them, any cross compliance under the 2003 Horizontal Regulation.¹⁵³

As suggested, a possible legal analysis is that the imposition on support of environmental and other “multifunctional” conditions forms part of a bargain between the farmer and society. But, for the reasons considered, any such bargain is imperfect. On the one side, the farmer has little choice but to accept the SFP and other direct payments, together with their cross compliance conditions. The financial imperative of support represents a powerful lever. On the other side, from the point of view of society, it may again be questioned whether any substantial dividend is being secured over and above existing obligations. Besides, more generally, there is room for debate whether society

149. Rural Development Regulation, *supra* note 68, arts. 22-24, amended by Council Regulation 1783/2003, 2003 O.J. (L 270) 70.

150. 2003 Horizontal Regulation, *supra* note 16, arts. 3-5, at 8.

151. *Id.* pmb. (2), at 2.

152. Rural Development Regulation, *supra* note 68, art. 23(2), amended by Council Regulation 1783/2003, 2003 O.J. (L 270) 70.

153. It may be reiterated that farmers would remain subject to any sanctions imposed by the various Directives and Regulations, which together constitute the statutory management requirements. 2003 Horizontal Regulation, *supra* note 16, pmb. (2), at 2-3.

should be expected to bargain with farmers for compliance with good farming practice.¹⁵⁴

What can be said with some certainty is that these difficulties of analysis are a function of the “greening” of agriculture and the wider development of a multifunctional European Model of Agriculture. Against such a background, neat compartmentalisation of legal concepts may prove increasingly elusive, as is openly reflected in the relevant European Community legislation. Thus, the 2003 Horizontal Regulation is enacted under the Agriculture Title (Title II), as opposed to the Environment Title (Title XIX), of the EC Treaty; but Article 6 of the EC Treaty stipulates that environmental protection requirements — including the polluter pays principle — are to be integrated into the definition and implementation of, *inter alia*, the CAP. This has caused a distinct element of cross-over in legislative focus. Nonetheless, while cross compliance measures may fall short of clear expression of the polluter pays principle, in the words of Commissioner Fischer Boel, they will at least “do the additional job of making an explicit link between the environmental standards which the public expects and the support which the farmer receives.”¹⁵⁵

154. For early discussion of this aspect see, for example, Daniel W. Bromley & Ian Hodge, *Private Property Rights and Presumptive Policy Entitlements: Reconsidering the Premises of Rural Policy*, 17 EUR. REV. AGRIC. ECON. 197 (1990), available at <http://erae.oxfordjournals.org/cgi/reprint/17/2/197>.

155. Mariann Fischer Boel, Comm’r for Agric. & Rural Dev., CAP Reform and the European Model of Agriculture, Speech/05/345 (June 10, 2005), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/345&format=HTML&aged=1&language=EN&guiLanguage=en>.