

**Animal Welfare Governance in EU Agriculture
and the Agri-Food Chain
Public and Private Standards of Relative Assurance?**

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The candidate confirms that the work submitted is her own, except where work which has formed part of jointly-authored publications has been included. The contribution of the candidate and the other authors to this work has been explicitly indicated below. The candidate confirms that appropriate credit has been given within the thesis where reference has been made to the work of others.

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Abstract

The European Union (EU) has been a pioneer in adopting farm animal welfare legislation directed to ensuring minimum standards in the absence of an animal welfare policy. Subsequent regard for the welfare of animals as sentient beings, situated in the EU Treaties, leans towards the integration of animal welfare in EU agricultural policy and promotion under the EU Common Agricultural Policy.

In its external relations, the EU plays an influential role in animal welfare standard-setting within the World Organisation for Animal Health, adopted in the International Terrestrial Animal Health Code. Animal welfare remains a complex issue, with societal, trade and policy dimensions, and a legal framework forging the assurance of high standards of farm animal welfare endures as a focal objective.

Private farm assurance schemes have evolved and co-exist with public standards. Private standards are adopted outside the framework of legal principles applicable to States and, potentially, provoke regulatory challenges. Equally, higher private thresholds of animal welfare may pose opportunities to be exploited. A comparative analysis of selected leading private standards is overdue, engendering transparent information and private animal welfare labelling which will assure the credence consumer of agri-food of higher welfare standards practised on the farm.

The relative nature of public and private standards of assurance and the relationship between the standard-setters are uncertain in law. Yet the emergence of hybridity is evident and the extent to which there should be regulation or market freedom is central. This thesis explores interrelations between the major public and private animal welfare standard-setters based on mutual interests and reciprocity of obligations. Through recourse to soft law in a proposed hybrid model of governance, applying concepts of legitimacy and the theory of institutional commensalism, it endeavours to promote the prospects of elevated welfare for food-producing animals in EU agriculture and the agri-food chain.

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Chapter 6.7. Introduction to the recommendations for controlling antimicrobial resistance

Section 7. ANIMAL WELFARE

Chapter 7.1. Introduction to the recommendations for animal welfare

Chapter 7.9. Animal welfare and beef cattle production systems

Chapter 7.10. Animal welfare and broiler chicken production systems

Chapter 7.11. Animal welfare and dairy cattle production systems

Chapter 7.13. Animal welfare and pig production systems

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List of Abbreviations

AMR	Antimicrobial Resistance
B2B	Business-to-Business
B2C	Business-to-Consumer
BBFAW	Business Benchmark for Farm Animal Welfare
BSE	Bovine Spongiform Encephalopathy
CAP	Common Agricultural Policy
CEJA	European Council of Young Farmers
CIPRO	Certification Integrity Programme
CIWF	Compassion in World Farming
CJEU	Court of Justice of the European Union
Commission	European Commission
COPA/COGECA	The united voices of farmers and agri-cooperatives in the EU
CPCC	Control Points and Compliance Criteria
DG AGRI	Directorate-General for Agriculture and Rural Development
DG SANTE	Directorate-General for Health and Food Safety
EA	European co-operation for Accreditation
EAFRD	European Agricultural Fund for Rural Development
EAGF	European Agricultural Guarantee Fund
ECA	European Court of Auditors
EC	European Community
ECJ	Court of Justice of the European Union
EEC	European Economic Community
EFSA	European Food Safety Authority
EIP	European Innovation Partnership
EP	European Parliament
EU	European Union
EUREP	Euro-Retail Produce Working Group
F2F	Farm to Fork
FAI	Food Animal Initiative
FAO	Food and Agriculture Organization of the United Nations
FAQs	Frequently Asked Questions
GAP	Good Agricultural Practice
GFSI	Global Food Safety Initiative

GGN	GLOBALG.A.P. Number
GLOBALG.A.P.	Global Partnership of Good Agricultural Practice
IAF	International Accreditation Forum
IFA	Integrated Farm Assurance
ISEAL	Code of Good Practice for Setting Social and Environmental Standards
ISO	International Organization for Standardization
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
NTWGs	National Technical Working Groups
OECD	Organisation for Economic Cooperation and Development
OIE	World Organisation for Animal Health
PDO	Products of Designated Origin
PGI	Products of Geographic Indication
PPM	Parts per million
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SMI	Sustainable Meat Initiative
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	Sanitary and Phytosanitary Committee
SSAFE	Safe Supply of Affordable Food
STAG	Standards Technical Advisory Group
TC	Technical Committee
T/S	Technical Specification
TAHC	Terrestrial Animal Health Code
TBT Agreement	Agreement on Technical Barriers to Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSG	Traditional Specialties Guaranteed
UKAS	United Kingdom Accreditation Service
WHO	World Health Organization
WTO	World Trade Organization

Introduction

1.1 Overview

The aim of this thesis is to suggest a legal framework for raising standards of animal welfare practised on the farm in European Union (EU) agriculture for animals reared for food. Central, is the pivotal role played by the EU in driving standards of animal welfare in agriculture and the scope for the EU Common Agricultural Policy (CAP) to enhance the welfare of animals pre-farm-gate.¹ The role and responsibilities of the EU to the EU citizen in the provision and promotion of animal welfare in agriculture with an associated animal welfare label are elemental. Its interest lies further in animal welfare governance in an era in which both public and private bodies set standards by which animals are raised and sourced for food in a global market for agricultural produce, 'one which crosses national borders.'² Originality exists in its analysis of the emerging relations between major public and private standard-setters for the welfare of farm animals and in its promotion of a soft law hybrid model of governance in the domain of animal welfare in agriculture and the agri-food chain.

The EU has been a pioneer in enacting animal welfare legislative norms derived from an agriculture Treaty basis with resort to the concept of harmonisation, in the absence of a formally conferred Treaty competence and Title in animal welfare. Essentially, EU animal welfare standards provide an effective minimum legislative floor of protection for animals in agriculture reared for food below which Member States cannot go. This progressive approach of the EU has also given rise to a number of policy / soft law initiatives in animal welfare outside, and in the absence of, a legally bestowed policy in the sphere of animal welfare. In the exercise of its external relations in animal welfare, the EU further maintains an influential role in standard-setting with the World Organisation for Animal Health (OIE),³ the international intergovernmental standard-setter for animal welfare in agriculture. The consensus recommendations and principles of the OIE are acceptable more broadly to developing and developed countries seeking to supply agricultural produce to the global agri-food chain, in the progress of which the EU plays an active role to raise animal welfare awareness. Together, EU legislative norms and the animal welfare standards adopted in the OIE Terrestrial Animal Health Code (TAHC)⁴ provide a valuable foundational progression of

¹ Welfare concerns regarding the transportation of live animals and animal slaughter sit outside the focal aims of this thesis.

² Burkard Eberlein and others, 'Transnational business governance interactions: Conceptualization and framework for analysis' (2014) 8(1) Regul Govern 1, 2.

³ The Office International des Épizooties became the World Organisation for Animal Health keeping its historical acronym OIE.

⁴ OIE International Terrestrial Animal Health Code (TAHC) (28th edn, 2019). (Given the COVID-19 pandemic, the OIE 88th General Session scheduled for May 2020 is postponed until 2021) <http://www.oie.int/standard-setting/terrestrial-code/>.

welfare standards for specific species of farm animals.⁵ EU / OIE cooperative relations in animal welfare underpin the public standards dimension of this thesis.

Private farm assurance standard and certification schemes have evolved alongside public standards, the consequence of which is a public / private 'divide.' Good agricultural practice⁶ in a growing number of private standard schemes includes additional on-farm stipulations relating to animal welfare,⁷ and *prima facie* voluntary private standards co-exist with public standards or act as substitutes in the absence of the latter. Questions arise as to the extent to which the standards of assurance are private and higher than EU legislative norms. Reservations relate to whether scheme-holders can justify their authority to determine standards of animal welfare in agricultural produce to stakeholders external to the business regime. The potential may exist for private standards to be able to steer the agri-food chain and impact unfavourably on stakeholders affected by, and / or interested in,⁸ the standards of welfare for food-producing animals, such as the small agricultural producer in a developing country seeking a market outlet for example, or the credence consumer of animal welfare agri-produce in the value chain. Besides, there may be positive prospects presented by private standardisation and in the event that private standards establish a verifiably higher threshold of welfare for animals in EU agriculture than that prevailing in the legislative norms, such an opportunity essentially should be harnessed. In this regard there is some evidence of a blurring of the public / private dichotomy of standards.

The operation of corporate private standard schemes and the emerging evidence of hybridity in public / private standard-setting gives rise to two particular questions of concern which this thesis seeks to address. First, the legitimacy of the private standards to determine animal welfare in the agri-food chain is in doubt *vis à vis* two key stakeholders, namely the consumer and the State. Second, the relationship is uncertain in law between the public and private institutions and their respective animal welfare standards.⁹ These two crucial issues remain in relatively uncharted territory in the domain of animal welfare governance in EU agriculture and in respect of agri-produce which serves an agri-

⁵ European Commission Animal Welfare https://ec.europa.eu/food/animals/welfare_en.

⁶ FAO, Development of a Framework for Good Agricultural Practices, Committee on Agriculture (2003) <http://www.fao.org/3/y8704e/y8704e.htm>.

⁷ Alison Burrell, "Good agricultural practices' in the agri-food supply chain" (2011) 13(4) *Env L Rev* 251, 252.

⁸ Diedre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38(1) *J L Soc* 163, 168-9.

⁹ Spencer Henson and Thomas Reardon (2005) 'Private agri-food standards: Implications for food policy and the agri-food system' 30 *Food Pol* 241, 250.

food chain¹⁰ operative in a 'transnational regulatory space',¹¹ where private animal welfare assurance schemes have proliferated. Equally, private standard schemes may potentially operate to serve 'collective interests',¹² a positive prospect which should be contemplated.

The welfare of animals reared for food has become of interdisciplinary, political and societal interest,¹³ the global regulation of which has economic significance for domestic economies.¹⁴ Significantly, an increasing concern for the welfare of animals in agriculture has moved beyond the views of a minority of society.¹⁵ It is relevant therefore to consider the societal interests of the EU citizen and particularly of the ethical consumer in the market demand for quality¹⁶ agricultural produce sourced from a supply chain in which the enhanced welfare of farm animals is ensured.¹⁷ The extent to which these societal concerns shape both public and private standards of animal welfare is a key question which permeates this thesis' aims for animal welfare labelling and informed consumer choice. A legal solution will be proposed facilitative of the achievement of raised animal welfare in EU agriculture and the agri-food chain as a result of good agricultural practices going beyond present baseline norms.

¹⁰ 'Agrifood chains are the linked events in the agricultural production of food – the process being a chain of events from production to processing, trading, distribution and consumption. Literally "from field to fork". Food and Agricultural Organization (FAO) [Agri-Food Chain](#) .

¹¹ Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36(4) U Pennsylvania J Int L 101, 113.

¹² Colin Scott, Fabrizio Caffagi, Linda Senden, 'The Constitutional Challenge of Transnational Private Regulation' (2011) 38(1) J L Soc 1, 3.

¹³ John McEldowney, Wyn Grant, Graham Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy* (Routledge 2013) 4, 5.

¹⁴ Linda C Botterill and Carsten Daugbjerg, 'Engaging with private sector standards: a case study of GLOBALG.A.P.' (2011) 65(4) Australian J Int Aff 488, 489.

¹⁵ Ian Robertson, *Animals, Welfare and the Law* (Earthscan from Routledge 2015) 276.

'The public concern about animal welfare is increasing and retailers and governments are well aware of this,' Bas Kemp and Martin Verstegen 'Foreword' in Wilson Pond and others (eds), *Animal Welfare in Animal Agriculture* (CRC Press Taylor and Francis Group 2012) ix.

¹⁶ 'As advances in science, increases in wealth and evolving societal concerns with respect to the environment, sustainability and animal welfare put greater focus 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'. Garry Smith, 'Interaction of Public and Private Standards in the Food Chain' (OECD Food, Agriculture and Fisheries Working Paper No 15 2009) para 4.

¹⁷ Diane Ryland, 'Advancing Animal Welfare: State, Society and Economy' in Państwo Demokratyczne, Prawne I Socjalne, Andrzej Frycz Modrzewski Kraków University and the Jagiellonian University, Kraków, Poland (2014) vol 4 851.

This thesis, therefore, contemplates the positive prospects of animal welfare being a competitive issue and as such a reason for the private sector to engage in a cooperative relationship in matters of animal welfare with the public sector. Equally, the perceived need for commercially-driven objectives to be captured in the process leads to the ultimate question as to the type and degree of regulatory control to which private standard schemes can, and should, be subject. The cooperative relations between the EU and the OIE constitute the public dimension in the direction to be taken forward. A soft law governance model will be sought which bridges the public / private dichotomy and which satisfies the interests of key players in the agri-food chain. The extent of the role of the consumer in the determination of animal welfare in agriculture will be evaluated and the question addressed as to how the credence consumer may drive the enhancement of animal welfare in both public and private standards of relative assurance.

1.2 Methodology

The methodology employed is both doctrinal and empirical in conducting a search of the available information on selected leading public, corporate and non-governmental organisations' websites, which details the standards of animal welfare for certain species of farmed animal and applicable compliance criteria. The empirical element will address details of the standards within each scheme and the doctrinal element will operate horizontally in analysis.

Doctrinal Research

Primordially, this thesis will explore the regional animal welfare norms of the EU located within and beyond the State in extending across the territory of the EU Member States. The EU has played a pivotal role in adopting animal welfare norms in agriculture where historically mixed motives for decision making were documented. Early EU legislation, for example, prohibited the use of the narrow veal crate for the transportation of calves, alleviated the conditions in which sows were confined during pregnancy and birth in banning the farrow crate and proscribed the use of barren unenriched cages for laying hens. Public farm animal welfare standards in EU legislation provide a valuable and necessary legal floor below which farming practices in EU Member States may not go.¹⁸ Further, the linkage will be pursued between the EU and the international intergovernmental standard-setter in animal welfare for terrestrial farm animals in their respective production systems, the OIE. The research draws upon official documents illustrative of policy formulation, commissioned research studies, primary law and legislation, codes and standards and barometers of public perceptions, which are accessible through desk-based doctrinal research. Secondary academic literature also contributes rich textual information and knowledge, some of which documents the results of empirical studies. Public

¹⁸ The significance of which becomes apparent in the possibility for lower standards to be adopted in the UK. 'The Implications of 'Brexit' for UK Agriculture' A Report by the Farmer Scientist Network for the Yorkshire Agricultural Society (2016) <https://yas.co.uk/brexit/>. Analysis of the UK Agriculture Act 2020 c.21 would take this thesis beyond its stated focus. The UK was subject to EU law until 31 December 2020 (European Union (Withdrawal Agreement) Act 2020 c.1).

standards of animal welfare and not animal health on the part of the EU and the OIE form the focus of this thesis. This will not serve to derogate from an endorsement of the essential link between animal welfare and animal health, since poor welfare can culminate in ill health and disease in animals farmed in intensive production systems and *vice versa*: hence the necessity of basing both animal health and animal welfare standards on science.¹⁹ The link between animal health and welfare is important to the objectives of the OIE and to this thesis' direction.²⁰ The central focus is on animal welfare governance, albeit it is relevant in context to resort proportionately to interdisciplinary materials, for example the European Food Safety Authority (EFSA) scientific opinions on animal welfare and to germane economic concepts. Soft law tools of governance will be utilised to reach a viable solution to the current impasses identified. This doctrinal element is further underpinned by three regulatory perspectives, notably regulatory theory, the hypothesis of institutional commensalism and regulatory competition. The relevance of each to this thesis' aims will be substantiated in chapters five and six.

Doctrinal and Empirical Analysis

Animal welfare is stipulated in private corporate and non-governmental standards of good agricultural practice, with produce certified²¹ in accordance with the scheme's requirements, from which standards consumers may be distanced to differing degrees. Three private animal welfare assurance schemes have been selected to ascertain the nature, depth and breadth attributed to increasing consumer ethical concerns over animal welfare and the standards for processes on the farm by which animals become food products for human consumption. The methodology employed is both desk-based doctrinal and empirical research. The source of this researched material will be document-based through resort to, and critical analysis of, the available information on the standard schemes' websites. There will also be an empirical element in drawing upon three nominated private animal welfare schemes, the choice of which has been influenced by the differing missions of each of the institutions which own these schemes and for the reason that each private standard-setter is a leader in its respective domain. The empirical analysis undertaken will contribute to knowledge through the three case studies which explore, for example, the legitimacy / acceptance of the scheme

¹⁹ McEldowney and others (n 13); 'The combining of animal health and welfare expertise into a single panel gives EFSA a unique capacity to address such complex, interactive issues' European Food Safety Authority (EFSA), *The use of animal-based measures to assess the welfare of animals* (EFSA J (2012)10(6) 2767) 3.

²⁰ To engage with the broader link of animal health and welfare to human health and food safety would take this thesis outside its focal objectives .

²¹ 'a procedure by which a third party gives written assurance that a product, process or service is in conformity with certain standards' (ISO Guide 2, 1996). Certification is defined as 'a form of communication along the supply chain, demonstrating to the buyer that the supplier complies with certain standards'. Pascal Liu, FAO, Paper presented at the WTO Workshop on Environment-related Private Standards, Certification and Labelling Requirements, Geneva, 9 July 2009, para 2.7.

http://www.fao.org/fileadmin/templates/est/AG_MARKET_ANALYSIS/Standards/Private_standards_Trade_Liu_WTO_wkshp.pdf.

according to conventional notions of good governance. What is original is this thesis' close engagement with the governance regimes as revealed on each scheme's website, viewed and assessed through the eyes of a lawyer.

Private Farm Assurance Schemes

The three designated private farm assurance schemes are, respectively: 'Marks and Spencer Select Farm Assurance';²² 'RSPCA Assured';²³ and the 'Integrated Farm Assurance Livestock (IFA) Standard'²⁴ and 'Animal Welfare Add-On Modules'²⁵ of GLOBALG.A.P., the global partnership of good agricultural practices. These private standards are all multilevel in their application and implementation in the agri-food chain which transcends national borders. As Tetty Havinga notes, even '[n]ational private certification schemes cross borders and become global or transnational'²⁶ and thereby encroach into the transnational regulatory space of the agri-food chain. Each scheme contributes to this thesis' goals in accordance with its distinct purpose and relationship with the scheme's owner.

Marks and Spencer Select Farm Assured is a principal private individual retailer-adopted standard and certification scheme, in effect between it and the producers from whom it sources the agri-produce certified as meeting its standards and supplied by Marks and Spencer in the agri-food chain. Animal welfare is one focal aspect of the corporate mission and portrayal of the quality of the Marks and Spencer brand of produce in its Annual Plan A Report, as is environmental impact, sustainability, food safety / traceability and worker health and safety.²⁷

The IFA Livestock Standard of GLOBALG.A.P. is a leading international private collective farm assurance Certificate and Standard, operational between GLOBALG.A.P. and its members in partnership comprised of an ascending number of agri-food retailers, food service providers and producers of agri-produce to the supply chain. GLOBALG.A.P. does not source or supply agri-food directly. It is a profit-making enterprise commensurate with its corporate membership and associated membership registration and certification fees. GLOBALG.A.P.'s Standard epitomises good agricultural practice in social

²² <https://corporate.marksandspencer.com/sustainability/quick-reads/from-field-to-fork-our-farming-standards>.

²³ <https://www.rspcaassured.org.uk/farm-animal-welfare/rspca-welfare-standards/>.

²⁴ https://www.globalgap.org/uk_en/for-producers/globalg.a.p./integrated-farm-assurance-ifa/livestock/.

²⁵ https://www.globalgap.org/uk_en/for-producers/globalg.a.p.-add-on/animal-welfare/.

²⁶ Tetty Havinga, 'Private Regulation of Food Safety by Supermarkets' (2006) 28(4) Law Policy 515, 529.

²⁷ <https://corporate.marksandspencer.com/documents/reports-results-and-publications/plan-a-reports/2020/plan-a-report-2020.pdf>

responsibility, food safety and traceability, environmental protection, as well as animal welfare, in the safe and sustainable sourcing and supply of agri-food.

While each is functionally diverse in terms of its individual / collective status and the nexus of the standards' owner to the food sourced and supplied in the agri-food chain, what is also significant to the selection is that the private corporate schemes of Marks and Spencer and GLOBALG.A.P., respectively, are categorised as business-to-business (B2B) standard and certification schemes. According to Pascal Liu, 'Private standard schemes may target two broad categories of customers: corporate clients ('business to business' or B2B schemes) and final consumers ('business to consumer' or B2C schemes)',²⁸ with Linda Fulponi affirming that '[m]ost of the food safety, traceability and good agricultural practice standards are B2B'.²⁹ A private certification scheme does not have to be either / or and can be both; '[s]ome of them target both corporate clients and final consumers'.³⁰ To the extent that they further communicate the animal welfare credentials of their respective certified produce to consumers, these two assurance schemes may potentially be classified additionally as business-to-consumer (B2C) standard schemes, in respect of which a critical analysis will ensue.

B2C standard schemes 'signal the specific qualities of the product to consumers through the use of a label to be affixed on the product' and 'product quality and ethical standards usually belong in the B2C category'.³¹ RSPCA Assured standards differ from the two aforementioned corporate schemes in this regard. RSPCA Assured is a recognised, established and independent non-governmental, not-for-profit, ethical animal welfare B2C assurance scheme. Its standards of animal welfare are communicated to the consumer by independent providers of food compliant with RSPCA Assured standards, who pay a nominal levy to apply the RSPCA Assured trade-mark logo to their certified agri-produce.

Chapter five will expand further upon the methodology for the choice of each of these private farm assurance schemes and engage in a deeper explanation of their respective relevance in delivering this thesis' aims. It is anticipated that the comparative analysis undertaken will take forward the research questions identified and in so doing will advance scholarship in private standards of animal welfare in agriculture.

²⁸ Liu (n 21) para 2.3.

²⁹ Linda Fulponi, OECD, *Private Standards and the Shaping of the Agro-Food System* (AGR/CA/APM(2006)9/FINAL) para 39; see also paras 13-15.

³⁰ Liu (n 21) para 2.3.

³¹ *ibid.*

1.3 Chapter Outline

The following chapter outline is intended to provide a skeletal structure and mode of delivery of the stated aims of this thesis.

Chapter 1

An evaluation will be undertaken of the EU's regulatory strategy in animal welfare starting with the evolution of EU law and legislation applicable to the animal welfare of food-producing animals during their life on the farm, where the duration of poor welfare pre-farm-gate perpetuates its effects.³² The EU Member States have not conferred upon the EU a competence with its own Treaty Title in the sphere of animal welfare. Nonetheless, the EU has been at the vanguard in introducing welfare provision for animals in agriculture, initially premised on the Treaty Title on Agriculture and in adopted harmonised measures thereunder. EU legislation under the Agricultural Title is concerned with the common organisation of the market in agricultural produce and there is a tension between animals as products to be traded in agriculture and animals as sentient beings. Through a process of incremental development an animal welfare Declaration became appended to the EU Treaties, which was later replaced by a stronger Protocol on animal welfare. In the stead of both instruments a competence of sorts in animal welfare has been incorporated into the Treaties, notably in an integrative requirement to pay full regard to animal welfare in the adoption and implementation of EU agriculture policy.³³

In the exercise of its external relations the EU has supported the development of animal welfare standards by the OIE for the specific species of farm animal for which a chapter has been adopted in the OIE TAHC. OIE welfare standards for certain species' production systems prioritise the achievement of measured welfare outcomes (termed 'measurables') based on science,³⁴ referred to in this thesis as animal-based outcome measures. Due comparison of OIE versus EU standards of welfare must therefore be undertaken. EU standards of welfare, also based on science, currently where they do exist tend to be more prescriptive in requiring the input of resources to sustain the environmental and management conditions in which species of farm animal are raised. This thesis adopts the scientific opinion of the EFSA in accordance with which in order to ensure good welfare it is necessary to reduce the risk of poor welfare by using resource-based and management-based inputs related to the conditions of farming.³⁵ Such inputs include housing provision and management, for example, floor type or space together with documented staff training records. In conjunction, how the

³² Donald M Broom, 'Animal Welfare in the European Union' European Parliament Policy Group C, PE 583.114. (2017) 51.

³³ TFEU, art 13.

³⁴ 'The Terrestrial Animal Health Standards Commission (the Code Commission) is responsible for ensuring that the TAHC, which contains trade standards for terrestrial animals and their products, reflects current scientific information', [overview](#).

³⁵ EFSA, Statement on the use of animal-based measures to assess the welfare of animals (EFSA Journal (2012)10(6) 2767) 23.

animal responds to the input factors, i.e. actual welfare, must be monitored using animal-based measurements, which comprise of observations made and measures taken from the animal such as, for example, behaviour or body condition.³⁶ The EFSA recommends that '[b]oth animal-based measures and input factors (resource-and management-based-measures) should be used in combination when monitoring animal welfare'.³⁷ To venture further into the science of animal welfare would take this thesis in a direction which exceeds its focus on the governance of animal welfare in agriculture.

Consideration will be given to the minimum level of welfare achieved in EU legislative norms for animals farmed in intensive industrial conditions and the nature of EU enforcement and compliance. An evaluation will follow of the effectiveness of Article 13 of the Treaty on the Functioning of the EU (TFEU) in ensuring the welfare needs of animals in EU agriculture. Crucially, this research contests the basis of science as a sole concept for both public and private standards of welfare in intensive farming and additionally develops the essential role of values in the adoption and promotion of animal welfare good agricultural practices on the farm.³⁸ Science is essential as an evidence base³⁹ and, this thesis argues, to pitch standards of animal welfare. In addition, consumer concern over the welfare experienced by animals raised for food on-farm is increasing and ethical consumer values, which elevate standards of welfare for animals in agriculture to a higher level than those determined by science alone, are fundamental to the direction which this thesis pursues.

Chapter 2

Soft law and policy documents have played a fundamental role in EU animal welfare protection. This chapter will undertake an analysis of key soft law initiatives and policy instigated by the EU which, within a hierarchy, directly advance this thesis' focal purposes. Other initiatives may be classified as miscellaneous, yet are relevant procedurally in taking forward an agenda in which the welfare of farm animals features as a contemporary EU policy priority.

There is not a Treaty Title in animal welfare and yet the EU has engaged in a number of policy / soft law strategies which propose to advance the welfare animals in EU agriculture and the agri-food chain. Attention initially will be given to the EU funded Welfare Quality Project, which recognised the need for science and society to work together for value-added animal welfare produce. The EU has also adopted and published two EU Action Programmes for the protection of animal welfare which will receive consideration. The Second EU Strategy on Animal Welfare for the period 2012-2015 produced a number of educative and best practice policy reports and led to the establishment of EU reference centres

³⁶ *ibid*, s 1.2., 8-10.

³⁷ *ibid*, 23.

³⁸ David Fraser, 'Science, Values and Animal Welfare: Exploring the Inextricable Connection' (1995) 4(2) *Anim Welf* 103. (emphasis added).

³⁹ McEldowney and others (n 13) 6.

for the advancement of knowledge and scientific research in species-specific animal welfare. The EU further established an Animal Welfare Platform for the exchange of dialogue between key actors in animal welfare in agriculture. Fundamental to this thesis is the concept of benchmarking, i.e. of aligning with a set of credible and verifiable criteria in animal welfare involving both public and private standard-setting bodies. Such an approach appeared as a key component of the EU's policy agenda in animal welfare indicated in its second Strategy and accompanying impact assessment. This chapter will also engage with the EU's considered turn to the adoption and utilisation of animal-based outcome measures with which to monitor farm animal welfare. Regard will be paid to the European Court of Auditors' (ECA) special report with its focus on the respective roles of the Member States and the European Commission in animal welfare in agriculture. There is no legally binding obligation to follow through the indications documented in an EU animal welfare action programme and the ECA has issued recommendations in this regard.

Fundamental to this thesis' purpose is the adoption of an EU animal welfare label which links the value-added produce to the informed ethical consumer in a value chain for agri-food. Chapter two will trace EU progress towards this end documented in EU policy documents. The process by which animals are raised is defined in information economics as a credence attribute of a product.⁴⁰ How does the credence consumer of agricultural produce sourced and supplied in the agri-food chain know the conditions under which the animals farmed are raised? The credence consumer is interested in, and affected by, the animal welfare credibility of agri-food, but is not adequately informed as to the welfare needs of farm animals nor of the standards of animal welfare practised per species of animal raised for food. Analysis will be offered as to whether the EU's stated former position regarding the adoption of an EU animal welfare logo holds relevance today. This will involve recourse to the significant recent EU Farm to Fork Strategy in which animal welfare and in particular an animal welfare label feature high in the EU's policy priorities. EU policy developments also explored extend to the current 'fitness check' or assessment of EU animal welfare norms and an ambitious programme of updated animal-based outcome measures with which to monitor animal welfare in which initiative the EFSA will play a key role.

Chapter 3

Chapter three explores the role of the EU CAP for the programming period 2014-20 in the provision and promotion of enhanced animal welfare in agriculture. This will involve a closer consideration of animal welfare within the specific provisions of the support regimes in the two pillars of the CAP. Pillar I is concerned with making direct EU payments to farmers for targeted EU objectives, subject to cross-compliance with a range of statutory requirements which include animal welfare. Pillar II rural development support offers more flexibility to Member States to engage with socio-economic rural development programmes, the financing of which operates on a shared basis with EU and Member State co-

⁴⁰ Meike Janssen and Ulrich Hamm, 'Product labelling in the market for organic food: Consumer preferences and willingness-to-pay for different organic certification logos' (2012) 25 Food Qual Prefer 9.

funding. The animal welfare payment facilitative of specific animal welfare schemes in Member States is also subject to the cross-compliance regime.

Animal welfare in agriculture is characterised as a public good⁴¹ substantiating the role of the EU legislature to ensure a good welfare experience for animals reared for food on-farm, since the public expect the CAP to support animal welfare in EU agriculture.⁴² Consideration will be given as to how far expenditure should be 'ear-marked' for animal welfare practices going above the statutory minimum floor. To engage in detail with the question of the payment of subsidies in an animal welfare context as a non-trade concern under the World Trade Organization (WTO) Agreement on Agriculture would be taking this thesis beyond its focal scope. It will, however, be premised upon subsidies for enhanced animal welfare being paid on the basis of expenditure incurred and income foregone, mirroring the principles applicable to payments for non-trade concerns, albeit questionably decoupled from production, falling under the WTO green box.⁴³ Consideration will be given to the role of cross-compliance as a lever to ensure good practice.⁴⁴

Under rural development Pillar II and additional to the animal welfare payment, it would appear that animal welfare provision in the CAP is moving towards an association with the agri-food chain. There will be an exploration of the EU quality schemes for agricultural produce and foodstuffs focusing on the support offered for protected products of designated origin and of geographic indication and the extent to which these quality schemes deliver enhanced animal welfare. The EU organic quality regime will be visited and assessed for its potential to improve and promote enhanced animal welfare specifically and more generally under the EU CAP. The role for an EU targeted animal welfare scheme under Pillar II will receive particular analysis. Support for the promotion of quality schemes more widely will then be explored. Further attention is paid to the potential for farmers to receive Pillar II support for engaging voluntarily with farm assurance certification schemes, where a degree of hybridity is evident.

Although there is a momentum underway for an EU animal welfare label there is, as yet, no provision for the communication of good agricultural practice in agri-

⁴¹ See Organisation for Economic Co-operation and Development, *Multifunctionality Towards an Analytical Framework* (Paris 2001).

⁴² European Court of Auditors, Special Report No 31, *Animal welfare in the EU: closing the gap between ambitious goals and practical implementation* (Luxembourg, 2018). This researcher was an invited member of the panel which met to discuss within the terms of reference of the audit prior to the Report.

⁴³ Fiona Smith, 'Mind the Gap: 'Greening' Direct Payments and the World Trade Organization' in Joseph A McMahon and Michael N Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar 2015) 412.

⁴⁴ European Court of Auditors, Special Report No 26, *Making cross-compliance more effective and achieving simplification remains challenging* (Luxembourg, 2016).

food via an animal welfare logo outside of the multifactorial organic regime.⁴⁵ Nor is there an independent EU animal welfare quality scheme. This thesis argues for the provision of such a link from an associated enhanced animal welfare scheme to the credence consumer more generally in EU agriculture to cultivate belief in the provision of value-added animal welfare on the farm. Overall, an analysis will be offered as to the extent to which Article 13 TFEU has integrated a full regard for animal welfare into the EU CAP 2014-20, with a brief excursion into the CAP reform post-2020.

Chapter 4

Chapter four explores the drivers of private animal welfare standards in an endeavour to ascertain whose interests determine animal welfare standard and certification schemes. The public / private dichotomy has become increasingly blurred⁴⁶ fuelled by the growth of private farm assurance and certification schemes and their role in the agri-food chain. Private standards of animal welfare are adopted and implemented outside the constitutional frameworks and associated principles of good governance applicable to public standards, with the consequence that the implications of standardisation as a marketing tool merit analysis. Voluntary / *de facto* mandatory private animal welfare standard and certification schemes ostensibly raise regulatory issues in the agri-food supply chain. Supermarkets have gained large market shares in that chain and private standards merely may be market differentiation tools which impose costs. Private standards of animal welfare could conceivably upset the fine balance achieved in the public norms which cater for animal welfare and the integral interests in trade and market access on the part of producers in developing and developed countries. Furthermore, it should be contemplated whether private farm assurance standards ought readily to be transparent to the consumer and the scheme-holders accountable for the welfare claims they make. Private standards increasingly impact upon consumers who are affected by, and interested in, the welfare of animals raised in agriculture and who are bereft of a voice in the standards which are adopted and implemented.

The question of the legitimacy of private standard and certification schemes for the purposes of location within the multilateral regime of the WTO again falls outside the focal objectives of this thesis, as does competition / anti-trust law in general.⁴⁷ It may be noted though that there are uncertainties as to the application of the legal rules of the WTO Agreement on the Application of Sanitary

⁴⁵ Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No. 2092/91 [2007] OJ L189/1 as amended by Council Regulation (EC) No 967/2008 [2008] OJ L264/1; Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production, labelling and control [2008] OJ L250/1.

⁴⁶ G/SPS/GEN/746, para 10.

⁴⁷ Petros C Mavroidis and Robert Wolfe, 'Private Standards and the WTO: reclusive no more' (2017) 16(1) World Trade Rev 1, 4, 5. Furthermore, this thesis explores the EU CAP which operates in accordance with its rules on the common organisation of the market in agricultural produce, TFEU, arts 42, 43(2).

and Phytosanitary Measures (SPS Agreement)⁴⁸ and the Agreement on Technical Barriers to Trade⁴⁹ (TBT Agreement) to private standards and private standard schemes. Given this, attention will be directed to the concerns expressed within the relevant WTO committee such as, for example, key stakeholders' contentions that private standards impact unfavourably on trade in agri-produce but are not subject to WTO rules, in order to advance the objectives which this thesis pursues. In this process chapter four will also look at the steps being taken to alleviate the capacity for private standards of animal welfare to undermine the international animal welfare standards of the OIE.

Yet there are perceivably opportunities presented by private standards of animal welfare with positive prospects for key stakeholders in the agri-food chain. Private standards may feasibly raise standards of animal welfare and be endorsed by, and be to the advantage of, producers in both developed and developing countries, for example. The value-added market for enhanced animal welfare agri-produce offers the potential to open up market access along an extended agri-food chain with economies of scale so as to recoup the expenses incurred in improving animal welfare on the farm.⁵⁰ Private standards may offer higher standards of welfare which is what the credence consumer of agri-food wants.

Chapter 5

Chapter five will conduct a comparative analysis of the three identified private standard schemes of animal welfare assurance in agriculture to ascertain the extent to which private standards of good agricultural practice are specific to animal welfare, are determinate of a higher welfare experience for farm animals and are communicated to the consumer. There will also be a comparison of the private standards vis á vis EU norms in order to seek to determine how transparent and elevated are private animal welfare standards. As indicated, the three selected schemes are: Marks and Spencer Select Farm Assurance; RSPCA Assured; and the IFA Livestock Standard and Animal Welfare Add-on Modules of GLOBALG.A.P.. The selection is premised upon the fact that the schemes of Marks and Spencer and GLOBALG.A.P. are categorised as B2B schemes which are distanced from consumers to differing degrees. Conversely, RSPCA Assured is a B2C farm assurance scheme which links its standards of welfare through a key logo and series of explanatory logos to consumers of RSPCA Assured agri-produce. Fundamental to the selection criteria are the respective missions and functional operation of the schemes in the agri-food chain. The internal governance regimes of each organisation pertaining to animal

⁴⁸ World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS (1994) 493. Ming Du, 'WTO regulation of transnational private authority in global governance' (2018) 67(4) ICLQ 867.

⁴⁹ World Trade Organization Technical Barriers to Trade Agreement, 1868 UNTS (1994) 120. Alessandra Arcuri, 'The TBT Agreement and Private Regulation' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 485.

⁵⁰ International Finance Corporation, 'Good Practice Note Improving Animal Welfare in Livestock Operations,' 11 (World Bank Group 2014).

welfare standards will be explored since this thesis deems it essential that private standards schemes are accepted by the credence consumer. A relative appraisal will assess the overall design of the respective schemes.

It will not be possible within constraints to compare all species and the focus will be on the welfare standards for chickens, pigs and calves and - in the absence of EU species-specific norms - on private standards for dairy cows, where welfare problems persist. Selected key strengths of the respective standards will demonstrate instances of good animal welfare practice per species. Instances where there is scope for improvement will be highlighted and recommendations will be made. Conventional notions of governance arise for consideration in an assessment of the acceptability of the standard schemes to stakeholders external to the business regime and in particular to the credence consumer. Questions arise concerning the interests which the schemes serve, participation in standard-setting and the legitimacy and transparency of the standards adopted and implemented. In the event that private standards of welfare are verifiably higher and broader than EU norms, this raised threshold may present opportunities in a market for value-added agri-food. Could a case be made therefore for the private welfare labelling of produce to the informed ethical consumer which would be acceptable to trigger confidence in, and demand for, enhanced animal welfare agri-food along a value chain?

Chapter 6

Chapter six will progress the mutual and reciprocal interests and obligations of the major public and private animal welfare standard-setters in the domain of animal welfare in agriculture. It will develop the evolving interrelations between the OIE (in cooperation with which the EU retains an active role) and GLOBAL.G.A.P., in which soft law tools of governance will bridge the increasingly blurred public / private divide in farm animal welfare assurance.

Two interrelated questions are integral to this thesis' purpose, notably whether and how private standard schemes should operate in market conditions and / or the extent to which there should be operative regulation of private schemes? The legal relationship between public and private standard-setters and their respective standards of animal welfare for food-producing animals is core to this thesis' aims. Recalling the evidence of hybridity which is starting to emerge arguably effectively for animal welfare in the EU's interface with private standard schemes, this chapter will contemplate the extent to which there can, or should, be EU regulation of private standard-setters and their standards.⁵¹ The type of model which would be appropriate remains a focal aspect as does the necessity for a regime of transnational animal welfare governance in EU agriculture, one which reins in the challenges and harnesses the opportunities arising from private animal welfare standardisation in the agri-food chain.

⁵¹ 'The private role in regulation is no longer a matter internal to a nation state but increasingly both in scope and intensity, a matter for the transnational (and supranational) levels of governance', Curtin and Senden (n 8) 164.

Cognisant of the cooperative relationship between the EU and the OIE in standards of animal welfare, their interrelations will fortify the public dimension of the direction this thesis takes forward. It is fundamental that private standards gain the legitimacy of the State, defined to include the regional entity of the EU and the intergovernmental organisation, the OIE. In promoting such public / private interrelations this thesis will add to the literature on transnational business governance interactions in several domains,⁵² notably, for example, forestry,⁵³ fisheries,⁵⁴ climate change,⁵⁵ biofuels,⁵⁶ marine shipping⁵⁷ and food safety.⁵⁸ A soft law legitimising model of animal welfare governance will maximise the prospects presented by private standardisation⁵⁹ for key stakeholders in a global market for animal welfare value-added agri-food, elevating good animal welfare practices in EU agriculture and along an extended supply chain. This bridge will be constituted through resort to soft law tools underpinned with core public interest principles. The hybrid model of animal welfare governance proposed will be one which unleashes a market in value-added animal welfare prompting a potential upward-trajectory in enhanced public and private standards of welfare in EU agriculture and the agri-food chain.

Concluding Comments will follow. This thesis will attempt to state the relevant law and standards of animal welfare as at 31 December 2020.⁶⁰

⁵² Eberlein and others (n 2) 1.

⁵³ Christine Overdevest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (2014) 8 *Regul Govern* 22.

⁵⁴ Margaret Young, *Trading Fish, Saving Fish* (CUP 2011); Lars Gulbrandsen, 'Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs' (2014) 8(1) *Regul Govern* 74.

⁵⁵ Kenneth Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2014) 3 *TEL* 57.

⁵⁶ Yoshiko Naiki, 'Trade and bioenergy: explaining and assessing the regime complex for sustainable bioenergy' (2016) 27 *EJIL* 129.

⁵⁷ Joanne Scott and others, 'The Promise and Limits of Private Standards in Reducing Greenhouse Gas Emissions from Shipping' (2017) 29(2) *JEL* 231.

⁵⁸ Tetty Havinga and Paul Verbruggen, 'The Global Food Safety Initiative and State Actors: Paving the Way for Hybrid Food Safety Governance' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 183.

⁵⁹ This research interest in the role of standardisation resulted in nominated membership of the International Organization for Standardization (ISO) working group 16 which convened at the OIE Headquarters in Paris, the outcome of which was ISO Technical Specification (T/S) 34/700 'Animal welfare management-general requirements and guidance for organisations in the food supply chain' [December 2016]. Documented research will be based on materials in the public domain.

⁶⁰ Websites were last accessed between 20-22 February 2021.

Chapter 1 EU Regulatory Strategy in Animal Welfare

‘The greatness of a nation and its moral progress can be judged by the way its animals are treated’.¹

1.1 Introduction

EU agriculture farms a large number of livestock for economic purposes notably in 2018, for example, 148 million pigs, 87 million bovine animals including beef and dairy cattle and 98 million sheep and goats.² Annually, around six billion chickens are raised in the EU³ and 400 million laying hens are kept for their eggs.⁴ Farm animal welfare legislation has derived from the EU Treaty Title and competence in agriculture. Acting thereunder the EU has been at the forefront in eradicating poor practices in which farm animals were unable to perform basic natural behaviours.⁵ In the absence of a conferred EU competence to legislate specifically in animal welfare,⁶ the EU initially employed harmonised provisions in animal welfare constructively derived from an agriculture legal basis in the Treaties. This pioneering EU role in animal welfare can be seen to mirror the early extension of Treaty competence in environmental concerns whereby environmental standards were adopted to ensure a competitive level playing field in the EU internal market, in the absence of an environment legal basis in the European Economic Community (EEC) Treaty. There has been an evolving momentum for change in matters of welfare for animals farmed in EU agriculture, from political intent towards a more direct regard for animal welfare, which has

¹ Anonymous. Frequently attributed to Mahatma Gandhi. Philip Johnson, 13 September 2013 <https://animalsmatteredtoday.com/2013/09/13/mahatma-gandhi-hoax-quote-greatness-of-a-nation-and-its-moral-progress-can-be-judged-by-the-way-that-its-animals-are-treated/>.

² Eurostat 2019 https://ec.europa.eu/eurostat/statistics-explained/index.php/Agricultural_production_-_livestock_and_meat.

³ European Commission *Overview Report to Evaluate the Official Controls on the Welfare of Chickens kept for Meat Production using Slaughterhouse Data to Establish Farm Checks* (2016-8999).

⁴ Marie-Laure Augère-Granier, European Parliamentary Research Service *The EU poultry meat and egg sector Main features, challenges and prospects* PE 644.195 (November 2019).

⁵ Donald M Broom, ‘Animal Welfare in the European Union’ European Parliament Policy Group C, PE 583.114. (2017) 28-37. European Court of Auditors Background Paper, *Animal Welfare in the EU* (2018).

⁶ One was envisaged in 1983 as a sub-section of ‘Man and Nature’, entitled Animal Protection – ‘The Union will pursue an independent animal protection policy to the extent necessary for reasons relating to trade and competition or on moral grounds’. European Parliament Working Documents 1983-84 Report concerning the substance of the preliminary draft Treaty establishing the European Union, Coordinating Rapporteur Mr Altiero Spinelli (PE 83.326/fin/c).

coincided with an increasing consumer interest in farm animal welfare practices.⁷ A great deal of progress has been made in legislative provisions to alleviate the poor welfare of farm animals generally and of certain species in particular reared for economic means.

The order of strategy will be first to introduce the early EU route of locating a basis for farm animal welfare legislative norms in EU agriculture policy, the latter having a formal Title and legal basis in the Treaties. This direction worked in conjunction with the use of harmonised minimum standards applicable to all EU Member States. Second, chapter one will track the momentum through an Animal Welfare Declaration followed by an Animal Welfare Protocol towards a Treaty basis for the integration of animal welfare in EU agriculture. In the third instance, there will be an evaluation of animal welfare minimum legislative standards which were adopted still without a specific Treaty Title from which animal welfare legislation could derive. Fourth, chapter one will analyse the effect of Article 13 of the Treaty on the Functioning of the European Union (TFEU), which authorises the integration of full regard for the welfare of animals as sentient beings in agriculture policy.⁸

Consideration will be given to EU external activity in animal welfare in cooperation with the World Organisation for Animal Health (OIE), which role constitutes a key component of the EU's animal welfare regulatory strategy. The international reference standards for animal welfare adopted by the OIE are contained in the species-specific chapters of its Terrestrial Animal Health Code (TAHC).⁹ The Council of Europe, the OIE and the EU committed to providing mutual support and to cooperating on all aspects of animal welfare.¹⁰ The EU has confirmed its continuing support for the standard-setting work of the OIE and for the implementation of OIE animal welfare standards.¹¹ Chapter one will explore the evolution and status of OIE animal welfare principles and standards for terrestrial animals. It will engage in a comparative analysis to highlight some key differences and linkages between EU minimum legislative welfare norms and the standards adopted in the OIE TAHC. The OIE prioritises the scientific method of assessment whereby animal-based measurables are used to monitor animal welfare. EU legislative norms are also based on science and it is the conclusions of the European Food Safety Authority (EFSA) which are adopted for this thesis'

⁷ European Commission Special Eurobarometer 442 Report, Attitudes of Europeans towards Animal Welfare November-December 2015 (2016).

⁸ [2012] OJ C326/54.

⁹ OIE International Terrestrial Animal Health Code (TAHC) (28th edn, 2019) <http://www.oie.int/standard-setting/terrestrial-code/>.

¹⁰ Council of Europe, Joint Declaration on Animal Welfare in Europe: achievements and future prospects (Strasbourg 2006) https://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/seminar/CoE_EU_OIE_Final-Declaration_final.24.11.06.pdf.

¹¹ Report, Tenth Meeting of the OIE Animal Welfare Working Group (June 2011) <http://www.oie.int/doc/ged/D11313.PDF>.

objectives. The EFSA emphasises the merits of, and the need for, the three scientifically assessed components of resource-based inputs, management-based inputs and animal-based outcome measures to attain good welfare.

An analysis ensues of the limitations of EU minimum, and OIE consensus, science-based and indispensable public standards of animal welfare in agriculture. Intensive industrial farming continues to be practised in the EU and globally whereby poor welfare results in poor health and the large-scale administration of antimicrobial medicines to farm animals. Issues have arisen with the enforcement of EU animal welfare legislative standards and an explanation will be offered as to the inability of the Court of Justice of the EU (CJEU)¹² to accord weight to animal welfare in its interpretative role. Consideration will follow of the potential to integrate and improve the welfare of farm animals as sentient beings in EU agriculture in the light of Article 13 TFEU. After all the EU citizen increasingly holds an ethical regard for the welfare of animals sourced for food.¹³

1.2 A Basis for Farm Animal Welfare in EU Agricultural Policy

In the absence of a Treaty Title with a conferred competence in animal welfare,¹⁴ the EU Treaty Title on Agriculture has provided a legal basis reconciling the welfare of certain farm animals with the common organisation of the EU market for agricultural produce.¹⁵ In conjunction, there has been an expansive use of the EU concept of harmonisation, in particular that of minimum harmonisation,¹⁶ which will be discussed below.

¹² The new title of Court of Justice of the European Union (CJEU) will be adopted to refer to the Court after 1 December 2009 in accordance with Article 19 of the Treaty on European Union (TEU), as amended by the Treaty of Lisbon. The title of European Court of Justice (ECJ) will be used to refer to the rulings delivered by the Court prior to that date. Paul Craig and Gráinne De Búrca, *EU Law Text, Cases and Materials* (6th edn) (OUP, 2015) New to this Edition.

¹³ European Commission Special Eurobarometer 442 (n 7).

¹⁴ The limits of Union competence are governed by the principle of conferral, Treaty on European Union (TEU), art 5(1).

¹⁵ TFEU, art 43 'To establish the common organisation of agricultural markets in accordance with art 40(1) and attain the objectives set out in art 39 TFEU'; Title III TFEU. Case 68/86 *United Kingdom v Council* [1988] ECR 855. See Joseph A McMahon *EU Agricultural Law and Policy* (Edward Elgar 2019); Joseph A McMahon *EU Agricultural Policy* (OUP 2007); Michael N Cardwell *The European Model of Agriculture*, Oxford Studies in European Law (OUP 2004); John A Usher *EC Agricultural Law* (2nd edn, OUP 2001).

¹⁶ Michael Dougan, 'Minimum Harmonisation and the Internal Market' (2000) 37(4) CML Rev 853, 855.

In a Council Decision, as early as 1978,¹⁷ the EU approved the Council of Europe Convention on the Protection of Animals kept for Farming Purposes.¹⁸ The joint legal basis for the Decision was that of agriculture in Article 43 EEC, together with Article 100 EEC with the objective of approximating the laws of the Member States to ensure the establishment and functioning of the EEC common market. The Council of the European Communities explained¹⁹ that ‘the European Convention had been drawn up with the aim of protecting animals kept for farming purposes, particularly in modern intensive production systems’ and emphasised that ‘the protection of animals was not in itself one of the objectives of the Community’. It acknowledged that there were ‘disparities between existing national laws on the protection of animals kept for farming purposes which may give rise to unequal conditions of competition and which may consequently have an indirect effect on the proper functioning of the common market’. Recognising that ‘the Convention dealt with matters covered by the common agricultural policy’, the Council continued, ‘it would therefore seem that Community participation in the Convention was necessary for the attainment of the objectives of the Community’.²⁰ There were thus mixed motives underlying the EU endorsement of the European Convention on the protection of farm animals. Animal welfare in agriculture was not an EU objective directly. Rather, the goal of achieving a level playing field in rules relevant to animal welfare in EU Member States free of distortions of competition was the point at which the EU and the Council of Europe’s Convention coincided.

1.3 The Evolution of EU Animal Welfare Law and Legislation

Animal welfare started to appear more autonomously on the EU agenda in the 1980s when the European Parliament (EP) called on the European Commission (Commission) to draw up a proposal for a Directive to embody the European Convention on the protection of animals kept for farming purposes within the EU.²¹ Additionally the EP expressed concerns over the keeping of battery hens and sought species-specific animal welfare Directives²² to address welfare issues identified in the intensive rearing and diets of calves and the intensive rearing of pigs. Living conditions in intensively farmed units restrictive of

¹⁷ Council Decision (EEC) 78/923 of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes [1978] OJ L323/12.

¹⁸ ETS No 87, 10 March 1976.

¹⁹ In the recitals to Council Decision (EEC) 78/923 (n 18).

²⁰ In particular, art 39(1)(a) EEC ‘to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production’. European Commission Communication, The Protection of Animals COM (93)384 final, 22 July 1993, 4.

²¹ Resolution of the European Parliament of 20 February 1987 on animal welfare policy (A2-211/86) [1987] OJ C76/185.

²² A Directive, through the process of transposition, results in national implementation in accordance with Member States’ obligation to achieve the Directive’s objectives, TFEU, art 288.

movement and ability to exercise normal behaviour, which subject animals to productive pressure were (and still are) the source of concern.²³ Legally, in the hierarchy of EU law and notably bereft of a conferred Treaty basis, animal welfare remained an indirect concern of the EU,²⁴ where minimum legislative standards of protection for certain species of farm animal became adopted on the legal basis for EU agriculture policy.

Minimum EU standards were adopted for the protection of laying hens kept in battery (barren) cages.²⁵ A battery cage means any enclosed space for laying hens in a battery system which is an arrangement of cages beside and / or on top of each other.²⁶ From 1 January 1988 all newly built cages and cages brought into use for the first time were required at least to comply with the Directive's minimum requirements concerning cage area space for each hen, feeding, water, height, floor support and general requirements.²⁷ From 1 January 1995 these minimum requirements applied to all battery cages.²⁸

The welfare of calves (bovine animals up to six months old) received protection in EU minimum standards specifying ventilation and space requirements for calves kept in groups, and width and height requirements for calves housed in individual boxes or tethered in stalls, with varying dates for compliance between 1994 to 2007.²⁹ As amended, for specified holdings from 1 January 1988 and all holding from 31 December 2006, no calf can be confined in an individual pen after the age of eight weeks unless certified / approved by a veterinary surgeon, with revised minimum space requirements.³⁰ By further amendment an Annex³¹ incorporated enhanced welfare requirements such as, for example, stipulated inspection frequency requirements with provision for sick calves, space within which to express normal behaviour, prohibition of tethering, dietary nutrition with iron to ensure minimum blood haemoglobin level, hot weather water supply and the provision of colostrum after birth.

²³ David Wilkins, *Animal Welfare in Europe. European Legislation and Concerns* (Kluwer Law Int 1997) 10.

²⁴ *ibid* 129.

²⁵ Council Directive 88/166/EEC of 7 March 1988 laying down minimum standards for the protection of laying hens kept in battery cages [1988] OJ L74/83.

²⁶ *ibid*, art 2(2)(3),

²⁷ *ibid*, art 3(a), art 4, Annex.

²⁸ *ibid*, art 3(2).

²⁹ Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves [1991] OJ L340/28, arts 2(1), 3(1)(4).

³⁰ Council Directive 97/2/EC of 20 January 1997 [1997] OJ L25/24 amending Directive 91/629/EEC laying down minimum standards for the protection of calves, art 3(3) (b).

³¹ Commission Decision of 24 February 1997 amending the Annex to Directive 91/629/EEC laying down minimum standards for the protection of calves, [1997] OJ L 76/30.

The protection of pigs followed in EU minimum standards concerning space and the phased prohibition of tethering which continued to be allowed in existing units until the end of 2005,³² amended to apply to all holdings with tethering prohibited from 1 January 2006.³³ Minimum requirements for floor surfaces became applicable to the width of openings in slatted flooring and slat widths, for example.³⁴ Provision ensued for sows (having farrowed) and gilts (before first farrowing) to be kept in groups starting from four weeks after service to one week before farrowing (giving birth to a litter of piglets), with derogation for holdings with less than ten sows provided they have space to turn around freely.³⁵ Knowledge of pigs became requirements for handling staff.³⁶ An amended Annex³⁷ incorporated enhanced welfare standards in respect of, *inter alia*, noise levels, lighting, access to a sufficient quantity of material to enable proper investigation and manipulation activities and strengthened requirements for the castration of pigs over the age of seven days to be performed under anaesthetic with additional prolonged analgesia, without tearing tissues and by a veterinarian.

The Commission continued to make it clear in relation to the protection of animals that 'a uniform basic approach in all Member States' to 'rearing conditions' was 'imperative' for 'the effective functioning of the market organisation'.³⁸ The Commission deemed legislation on the protection of animals 'necessary' having three objectives. First, the aim to improve the protection of animals marked a positive development for animal welfare within agricultural policy. The second objective was to contribute to the implementation of the common agricultural policy, in particular to guarantee free movement of animals and products in the single market and the equal treatment of producers.³⁹ Third, a necessary accompaniment of equal conditions of competition required a uniform basic approach to rules on the protection of animals in all Member States. Much was achieved in advancing the welfare of specific species of farmed animal where diverse motives underscored the agriculture legal basis on which the Directives were adopted. The EU phased out the keeping of calves after the age of eight

³² Council Directive 91/630/EEC of 19 November 1991 laying down minimum standards for the protection of pigs [1991] OJ L340/33, art 3(1)(2). The United Kingdom's pig welfare standards phased out by 1999 both individual sow boxes and tethers. The Welfare of Pigs Regulations 1991 (UK SI 1991 No 1477).

³³ Council Directive 2001/88/EC of 23 October 2001 [2001] OJ L316/1 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs, art 3(1)(3).

³⁴ *ibid*, art 3(2).

³⁵ *ibid*, art 3(4).

³⁶ *ibid*, art 5.

³⁷ Commission Directive 2001/93/EC of 9 November 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs [2001] OJ L 316/36.

³⁸ COM (93)384 final (n 20) 5.

³⁹ *ibid*.

weeks in individual boxes⁴⁰ and remedied inadequate diets for calves.⁴¹ There was a momentum for change as a result of scientific knowledge, societal interest and political persuasion,⁴² which will be developed below.

1.3.1 Animal Welfare Declaration

In the negotiations preceding the Maastricht Treaty on European Union (TEU), the German delegation proposed an additional Treaty article and legislative basis for animal welfare to ensure better protection of farm animals from pain, suffering or harm.⁴³ Besides, the UK and German delegations jointly circulated for adoption a draft Declaration on Animal Welfare.⁴⁴

Consequently, the European Council in Maastricht in 1991 formally adopted the Declaration on the welfare of animals (albeit bereft of animals' status as sentient beings and less broad in its application as compared with the UK and German initiative⁴⁵):

The Conference calls upon the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals.⁴⁶

Its non-legally binding status should be heeded; this Declaration was a statement of political intent. In a motion for a resolution the EP called on the Community 'to make provision after Union for further amendment to the Treaties to enable animals to be treated as sentient beings'.⁴⁷ This call recognised animal

⁴⁰ The 'veal crate' container of individual calves was prohibited earlier in the UK, from 1 January 1990. The Welfare of Calves Regulations 1987 (UK SI 1987 No 2021).

⁴¹ Council Directive 97/2/EC of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves [1997] OJ L25/24.

⁴² John McEldowney, Wyn Grant, Graham Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy* (Routledge 2013).

⁴³ CONF-UP 1766/91, Brussels, 15 March 1991.

⁴⁴ 'The Conference, noting that Community legislation on a wide range of subjects can affect the welfare of animals, calls upon the Council, the Commission and the Parliament to ensure that the Community, when taking any action which affects animals, shall pay full regard to their welfare requirements and their status as sentient beings' CONF-UP 1841/91, Brussels, 28 October 1991.

⁴⁵ *ibid.*

⁴⁶ Declaration No 24 on the protection of animals, annexed to the Treaty on European Union signed at Maastricht on 7 February 1992 [1992] OJ C191/103.

⁴⁷ European Parliament Resolution on the Welfare and Status of animals in the Community (A3-0003/94) 5 [1994] OJ C44/206. Report of the Committee on the

sentience, i.e. an animal's 'capacity for awareness of itself and its relationship with its environment'⁴⁸ and pressed for an express regard for animal welfare in the EU Treaties. Although a formal Treaty location for animal welfare was eventually forthcoming, this cannot be said for the second limb of the 1994 resolution. This latter would have provided for the establishment of the protection of animal welfare in dual Treaty bases: First, among the environmental policy objectives in the environment title of the Treaties and second, among the factors which the EU Common Agricultural Policy (CAP) must take into account under the Treaties' agriculture objectives.⁴⁹

1.3.2 Animal Welfare Protocol

The Treaty of Amsterdam, with effect from 1 May 1999, annexed a Protocol on Protection and Welfare of Animals⁵⁰ to the European Community Treaty:

THE HIGH CONTRACTING PARTIES,

DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings,

HAVE AGREED UPON the following provision which shall be annexed to the Treaty establishing the European Community,

In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The Animal Welfare Protocol originated in a memorandum circulated by the UK⁵¹ wishing to build on the Declaration appended to the Maastricht TEU and to signal the Community's commitment to animal welfare by introducing legally binding wording into the Treaty. Recognising that the Community did not intend to extend its competence, the UK proposed a Protocol placing a formal legal obligation on the institutions to give full regard to consideration of animal welfare in the exercise of their powers on agriculture, transport, research and the single market. The

Environment, Public Health and Consumer Protection, Rapporteur Mr Gianfranco Amendola (1994).

⁴⁸ Broom (2017) (n 5) 36.

⁴⁹ EP Resolution (A3-0003/94) (n 47) 5.

⁵⁰ Protocol No 33 on protection and welfare of animals, annexed to the Treaty establishing the European Community [1997] OJ C340/173. Tara Camm and David Bowles, 'Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union' (2000) 12 JEL 197.

⁵¹ CONF 3887/96 (ANNEX) CAB, Brussels, 25 July 1996.

Presidency proposed a draft Animal Welfare Protocol,⁵² which led to the formal adoption of the Protocol on Animal Welfare in the Amsterdam negotiations.

The Amsterdam Protocol being an integral part of the Treaties⁵³ imposed an obligation on the EU Institutions and on Member States to pay full regard to animal welfare when formulating and implementing certain EU policies, inclusive of agriculture. It is significant to note that animals received recognition for the first time as sentient beings deserving of respect and improved protection, albeit in the recital to, and not in the main body of, the Protocol. Such attribution was symbolically a step forward from their classification to date as products of livestock, or agricultural goods, in EU policy and law.⁵⁴ A price to pay for this legal formula would appear to be the additional 'counter' requirement also to respect the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.⁵⁵

1.3.3 Further EU Animal Welfare Legislation

EU welfare legislation for farm animals continued to be adopted on the legal basis in the Treaty Title of agriculture in the sustained absence of a conferred animal welfare competence. This was a feat on the part of the EU and its Member States in the legislative process. A generic farm animal welfare Directive was followed by a new Directive with minimum standards of protection for the welfare of chickens produced for meat known as broilers. Two separate Directives consolidated the minimum legislative welfare provision for rearing calves and for rearing and finishing pigs, respectively. These Directives, discussed below, constitute a minimum floor of welfare standards beneath which Member States cannot go.

1.3.3.1 General Farm Animals Directive

This horizontal Directive newly laid down minimum standards for the protection of animals bred or kept for farming purposes, applicable without prejudice to any species-specific animal welfare provisions.⁵⁶ Member States are placed under a duty to ensure that owners and keepers take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not

⁵² CONF/3876/97 (ANNEX IV) CAB, Brussels, 16 April 1997.

⁵³ TEU, art 51.

⁵⁴ TFEU, art 38(1)(2)(3) Annex I.

⁵⁵ Diane Ryland and Angus Nurse, 'Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market' (2013) 22(3) Eur Energy Env L Rev 101, 102. Geert Van Calster and Kurt Deketelaere, 'Amsterdam, the Intergovernmental Conference and Greening the EU Treaty (1998) 7(1) Eur Env L Rev 12, 18.

⁵⁶ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes [1998] OJ L221/23. Drawn up on the basis of the European Convention on the Protection of Animals kept for Farming Purposes ETS No 87, 10 March 1976.

caused any unnecessary pain, suffering or injury. Inspections are required to be carried out in order to monitor compliance with the Directive's general requirements to provide housing, food, water and care appropriate to the physiological and ethological needs of the animals bred or kept,⁵⁷ in accordance with established experience and scientific knowledge.⁵⁸

1.3.3.2 Laying Hens Directive

Laying hens kept for the production of eggs not intended for hatching in 'establishments' housing at least three hundred and fifty hens received updated minimum standards protection in a Directive⁵⁹ which, after a phasing out period in which feed, drink, (updated) space and height stipulations continued to apply, finally prohibited the keeping of laying hens in barren, i.e. non-enriched unfurnished cage systems since 1 January 2012.⁶⁰ New requirements have applied to the rearing of hens in enriched furnished cages from 1 January 2002 which mandate, for example, that each laying hen has at least seven hundred and fifty square centimetres of cage area.⁶¹ Additional requirements to have, for example, a nest, litter for pecking and scratching, appropriate perches, water and feed facilities apply in respect of enriched caged⁶² and non-caged establishments, since the Directive also lays down minimum welfare requirements for alternative systems to caged production. In barn environments, for example, stocking density must not exceed nine laying hens per square metre of usable area, requiring at least one nest for every seven hens and adequate perches.⁶³ Mandatory labelling for the method of production of eggs allows consumers to see if the eggs they are buying have been laid in a cage, barn, free-range or organic system.⁶⁴

⁵⁷ Animals (other than fish, reptiles or amphibians (Art 4)) bred or kept for the production of food, wool, skin or fur or for other farming purposes, Directive 98/58/EC, *ibid*, art 2(1).

⁵⁸ Pursuant to the Directive's Annex, *ibid*, arts 1-3.

⁵⁹ Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens [1999] OJ L203/53, art 1(1)(2).

⁶⁰ *ibid*, ch II art 5(1)(2).

⁶¹ *ibid*, ch III art 6(1).

⁶² *ibid*, art 6(1)-(5).

⁶³ *ibid*, ch I art 1(1)(c)(d)(4).

⁶⁴ Commission Regulation (EC) No 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 1234/2007 as regards marketing standards for eggs [2008] OJ L163/6, as amended by Commission Delegated Regulation (EU) 2017/2168 of 20 September 2017 [2017] OJ L306/6.

1.3.3.3 Chickens Directive

A Directive newly applied to chickens produced for meat⁶⁵ and housed in intensive farming 'systems'.⁶⁶ Welfare requirements are detailed in respect of water, food, ventilation / heating, noise levels, light, litter, hygiene, inspection, record-keeping and prohibited surgical interventions.⁶⁷ A maximum stocking density⁶⁸ is specified of thirty three kilograms total weight of chickens per square metre of usable area in holdings / houses as a general rule.⁶⁹ A maximum stocking density of thirty nine kilograms per square metre is allowed on compliance with more stringent requirements regarding ventilation.⁷⁰ Member States are permitted to increase that stocking density by a maximum of three kilograms per square metre conditional on fulfilling further criteria.⁷¹ Certified compliance with requisite training or attested equivalent experience are mandatory for keepers of chickens, inclusive of knowledge of animal behaviour and the concept of stress.⁷² Member States must monitor compliance through inspection, ensure appropriate procedures are maintained for determining stocking densities and provide penalties for infringement of the Directive's resource and management requirements.⁷³ This Directive incorporates the measurement system of welfare based upon welfare indicators, a concept referred to in this thesis as animal-based outcome measures, whereby Member States are required to submit to the Commission monitoring data on mortality rates collected at slaughter in the cases where stocking densities exceed the lower density threshold.⁷⁴

1.3.3.4 Calves Directive

Consolidated minimum EU standards protect calves confined for rearing and fattening.⁷⁵ This codified Directive prohibits the use of confined individual pens (the veal crate) for calves after having reached the age of eight weeks in all

⁶⁵ Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production [2007] OJ L183/19, art 2(1)(e).

⁶⁶ *ibid*, recitals (7)(8). It does not apply to holdings with fewer than 500 chickens, those only breeding, hatcheries, extensive indoor and free-range chickens and organically reared chickens, *ibid*, art 2.

⁶⁷ *ibid*, art 3(1), Annex I.

⁶⁸ 'the total weight of chickens present in a house at the same time per square metre of usable area' *ibid*, art 2(1)(i).

⁶⁹ *ibid*, art 3(2).

⁷⁰ *ibid*, art 3(3)(4), Annex II.

⁷¹ *ibid*, art 3(5), Annex V.

⁷² *ibid*, art 4, Annex IV.

⁷³ *ibid*, arts 7, 9, Annex I

⁷⁴ *ibid*, art 3(1) Annex III, art 6(2)(3).

⁷⁵ Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves [2009] OJ L10/7, art 1, repealing and replacing Directive 91/629/EEC, as amended (n 30).

holdings.⁷⁶ It specifies minimum requirements for individual pens (no solid walls, with perforated walls which allow visual and tactile contact) ⁷⁷ and for space allowance for each calf kept in groups.⁷⁸ 'Conditions for rearing' prescribe hygiene, health and safety, environmental conditions⁷⁹ such as insulation, heating, ventilation and dust level, light, space and surface area, to be monitored by inspection and on the spot checks.⁸⁰ Tethering of calves is prohibited.⁸¹ Calves must be fed according to their age, weight, behavioural and physiological needs and at least twice a day⁸² Their food must contain sufficient iron content,⁸³ a minimum daily ration of fibre for each calf over two weeks old, with a raised threshold applying to calves between the ages of eight to twenty weeks. A sufficient quantity of clean water / liquid fluid intake must be available at all times.⁸⁴

1.3.3.5 Pigs Directive

EU legislation for the protection of pigs has also been repealed and replaced by one codified Directive which provides minimum standards of protection commensurate with the defined status of a pig - a sow, gilt or piglet,⁸⁵ for example, while noting that pigs being live animals are included in the list of products annexed to the Treaties.⁸⁶ Welfare standards for rearing and fattening pigs govern allowable unobstructed floor area, stocking densities, quality of the floor surface and maximum and minimum widths of usable slatted floors.⁸⁷ Tethering of sows has been prohibited since 1 January 2006.⁸⁸ In intensive production systems,⁸⁹ with effect from 1 January 2013, pregnant sows are

⁷⁶ *ibid*, art 3(1)(a) (2).

⁷⁷ *ibid*, art 3(1)(a).

⁷⁸ *Ibid*, art 3(1)(b).

⁷⁹ *ibid*, Annex I (10) Appropriate bedding must be provided for all calves less than two weeks old.

⁸⁰ *ibid*, art 4, Annex I.

⁸¹ With the exception of group-housed calves which may be tethered for periods of not more than one hour at the time of feeding milk or milk substitute, *ibid*, Annex I (8).

⁸² *ibid*, Annex I (12).

⁸³ to ensure a minimum average blood haemoglobin level of at least 4.5 mmol/litre, *ibid*, Annex I (11).

⁸⁴ *ibid*, art 4, Annex I (12).

⁸⁵ Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs [2009] OJ L47/5 arts 1, 2, (repealing Directive 91/630/EEC (n 33) as amended).

⁸⁶ *ibid*, recital 4.

⁸⁷ *ibid*, art 3(1)(2).

⁸⁸ *ibid*, art 3(3).

⁸⁹ Sows raised on holdings with fewer than 10 sows may be kept individually during that period provided they can turn around easily in their boxes, *ibid*, art 3(4) para 2.

required to be kept in groups (with exception). Sows and gilts must be kept in groups during a period starting from four weeks after the service to one week before the expected time of farrowing.⁹⁰ In the week before the expected farrowing time and during farrowing, sows and gilts can be kept out of sight of other pigs.⁹¹ Conditions for rearing pigs must comply with noise levels, lighting, and environmental, temperature and social conditions specified in the Directive's Annexes. A permanent supply of water is required as is the provision of enrichment materials facilitative of pigs' natural investigative and manipulative (rooting) characteristics,⁹² or, if no litter is provided, the maintenance of safe flooring.⁹³ Not providing enrichment is allowed therefore corroborating the scope for weaker standards to be practised here. In similar vein, in the week before the expected farrowing time sows must be given suitable nesting material in sufficient quantity unless it is not technically feasible for the slurry system used in the establishment.⁹⁴ Tail-docking or reduction of corner teeth must not be carried out routinely but can be undertaken only where there is evidence that injuries to sows' teats or to other pigs' ears or tails have occurred. Before carrying out these procedures other measures must be taken to prevent tail-biting and other vices considering environment and stocking densities, with a requirement to change inadequate environmental conditions or management systems.⁹⁵ Surgical interventions, including the castration of male pigs (over seven days of age), must be undertaken by veterinarians only in accordance with applied techniques with appropriate means (i.e. use of anaesthesia and analgesia) and under hygienic conditions.⁹⁶ Concerns remain over mutilation inclusive of surgical castration and particularly since castration and / or tail-docking of piglets of seven days and under may still be practised without anaesthesia and prolonged analgesia in the absence of a veterinarian.⁹⁷ This will be discussed further below. A minimum weaning age of twenty eight days is stipulated for piglets, with weaning at twenty one days possible if conditions in housing and hygiene are met.⁹⁸ Member States are required to make sure that any person who employs or engages persons to attend to pigs ensures the person attending to the animals has received

⁹⁰ *ibid*, art 3(4) para 1.

⁹¹ *ibid*, Annex I ch I (3).

⁹² Sows and gilts must have permanent access to manipulable material at least complying with Annex I requirements, *ibid*, art 3(5) such as straw, hay, wood, sawdust, mushroom compost, peat or a mixture of such, which does not compromise the health of the animals, Annex I ch I (4).

⁹³ Notwithstanding art 3(5), in accordance with Annex I ch I (5) Directive 2008/20/EC (emphasis added).

⁹⁴ *ibid*, Annex I ch II B (3) (emphasis added).

⁹⁵ *ibid*, Annex I ch I (8).

⁹⁶ *ibid*, art 4, Annex I ch I (8) (emphasis added).

⁹⁷ *ibid*, Annex I ch I (8) (emphasis added).

⁹⁸ *ibid*, Annex I ch II C (3).

instructions and guidance on the Directive's requirements. Training courses focusing on welfare must be available in Member States.⁹⁹

These three substantive Directives establish a floor of minimum welfare standards for certain species in EU agriculture which is a considerable achievement having preceded the culmination of the political process to embed regard for animal welfare in a Treaty setting.

1.3.4 Animal Welfare in the EU Treaties

Pursuant to the Treaty of Lisbon amendments an authorisation to integrate animal welfare into EU policy in agriculture is now embedded in Article 13 TFEU which provides:

*In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.*¹⁰⁰

The expression of animals as sentient beings within the general provisions of the Treaties contrasts with its former siting in the recital to the Protocol, with potential significance for the future protection of the welfare of animals in EU agriculture. Donald Broom informs of a sentient being's ability 'to evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risk, to have some feelings and to have some degree of awareness'.¹⁰¹ It should be emphasised that full regard must be paid to animals as sentient beings (and not merely agricultural goods or livestock products¹⁰²) when formulating and implementing agricultural policy. The promotion of animal welfare in the provisions having 'general application' in the EU Treaties¹⁰³ would appear to signify the elevation of animal welfare as a priority issue in the EU alongside other key integrative objectives such as, for example, environmental protection and promoting sustainable development.¹⁰⁴

⁹⁹ *ibid*, art 6.

¹⁰⁰ (emphasis added).

¹⁰¹ Donald M Broom, 'The evolution of morality' (2006) 100 *Appl Anim Behav Sci* 20, 26.

¹⁰² TFEU, art 38(1)(2)(3), Annex I.

¹⁰³ TFEU, Title II.

¹⁰⁴ TFEU, art 11. Ryland and Nurse (2013) (n 55) 109,110. See Luchino Ferraris, 'The role of the principle of environmental integration (Article 11 TFEU) in maximising the "greening" of the common agricultural policy' (2018) 43(3) *ELRev*, 410.

Robert Garner reasons that animal sentience entitles non-human animals to a right not to suffer guaranteed by the State in a non-ideal world where non-human animals are used for the production of food.¹⁰⁵ The competence, if not a right, exists in EU law to integrate the welfare needs of animals into certain stipulated policies inclusive of agricultural policy, which this thesis will develop .

1.4 EU External Relations in Animal Welfare with the OIE

There is an external dimension to EU animal welfare protection which is a key aspect of its regulatory approach. The EU has played a prominent role together with EU Member States in raising global awareness of animal welfare.¹⁰⁶ Its multilateral activities support the standard-setting activities of the OIE in a cooperative relationship established initially through an Exchange of Letters,¹⁰⁷ further embedded in a Memorandum of Understanding between the EU and the OIE.¹⁰⁸ In the exercise of its external relations and bereft of a vote the EU continues to play an active role in OIE standard-setting in animal welfare in agriculture in coordinating the EU Member States to speak with one voice.¹⁰⁹ Further, the EU promotes its science-based legislative model and principles and those of the OIE worldwide.¹¹⁰ It is to the competitive advantage of the countries both Members to the EU and to the OIE that the OIE Member Countries¹¹¹ implement at least the animal welfare standards of the OIE. This would be so that these latter countries are not in a position to maintain a competitive advantage in the global supply chain through less costly rearing of agricultural produce in comparison, with consequential cheaper lower animal welfare standard agri-produce in circulation.¹¹² The Commission has confirmed that, '[a] level playing

¹⁰⁵ Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Non-ideal World* (OUP 2013).

¹⁰⁶ European Commission, Report on the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world (COM(2018) 42 final, 26 January 2018).

¹⁰⁷ Exchange of Letters between the Commission of the European Communities and the Office International des Épizooties, 24 February 2004 [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22004A0827\(01\)&rid=4](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22004A0827(01)&rid=4).

¹⁰⁸ Memorandum of Understanding between the European Commission and the World Organisation for Animal Health (OIE) concerning their general relations [2011] OJ C241/01.

¹⁰⁹ https://ec.europa.eu/food/safety/international_affairs/standard_setting_bodies/oie_en. OIE Final Report, 86th General Session, 86 GS/FR-PARIS (May 2018) paras 262, 264. Council of the European Union Conclusions on animal welfare - an integral part of sustainable animal production 14975/19 (Brussels, 16 December 2019) conclusion 15.

¹¹⁰ https://ec.europa.eu/food/animals/welfare/international-activities_en.

¹¹¹ Of which there are one hundred and eighty two <http://www.oie.int/about-us/>.

¹¹² European Commission Communication, Animal Welfare Legislation on farmed animals in Third Countries and the Implications for the EU COM (2002)626 final, 18 November 2002.

field on animal welfare is important at international level to ensure global competitiveness of EU operators'¹¹³ and has affirmed the prioritisation¹¹⁴ of EU active cooperation so as to ensure understanding and implementation of the international animal welfare guidelines of the OIE.¹¹⁵

1.4.1 The Evolution and Status of OIE Animal Welfare Standards

The OIE has had a mandate to develop animal welfare standards since 2002 when the *ad hoc* Group on animal welfare believed the OIE to be well placed to provide international leadership on animal welfare. It noted the OIE's seventy five year history of achievement as the international reference organisation for animal health with an established infrastructure and international recognition and acknowledged the essential link between animal health and animal welfare.¹¹⁶ A permanent Working Group on Animal Welfare became established.¹¹⁷ Science-based animal welfare standards¹¹⁸ have been adopted by the Member Countries of the OIE acting in accordance with that Organisation's democratic and transparent procedures. There is only one pathway for the adoption of OIE standards, which is approval by the World Assembly of Delegates designated by the governments of all Member Countries meeting annually at the OIE General Session.¹¹⁹ OIE animal welfare standards are intergovernmental standards reached in accordance with the consensus of participating countries. They are not mandatory standards. Nonetheless, the expectation is that Member Countries implement all the standards in the TAHC inclusive of those related to animal welfare in the production systems of certain species.¹²⁰ This embedding of the animal welfare remit of the OIE holds relevance for this thesis' intentions.

¹¹³ European Commission Communication on the EU Strategy for the Protection and Welfare of Animals 2012-2015, COM (2012) 6/2, 15 February 2012, 10.

¹¹⁴ European Commission Staff Working Paper, Second Animal Welfare Strategy for the period 2012-2015 'Impact Assessment' (SEC (2012)55, 19 January 2012) 34.

¹¹⁵ *ibid*, 43, Annex 5C, 108. A role confirmed by Commissioner Andriukaitis, Health and Food Safety (17 June 2019) https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20190617_min.pdf.

¹¹⁶ OIE Resolution No XIV, Animal Welfare Mandate of the OIE (May 2002) <http://www.oie.int/about-us/key-texts/basic-texts/new-mandates/>.

¹¹⁷ OIE Resolution No XXVI, Animal Welfare, 72 GS/FR-Paris (May 2004).

¹¹⁸ 'The scientific basis of OIE animal welfare standards provides the foundation for creating a consensus amongst all OIE Member Countries to support their adoption'. OIE Animal Welfare Fact Sheet (2015)

http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Fact_sheets/AW_EN.pdf

¹¹⁹ Procedures used by the OIE to set Standards and Recommendations for International Trade, with a Focus on the Terrestrial and Aquatic Animal Health Codes http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_OIE_procedures_standards_2016.pdf.

¹²⁰ Report, Thirteenth Meeting of the OIE Animal Welfare Working Group (June 2014) http://www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/AWWG_Reports/A_AWWG_June_2014.pdf

Speaking previously from a private perspective, Michael Robach deemed there to be 'no explicit recognition by the World Trade Organization of the OIE's international standards for animal welfare'.¹²¹ It should be added for clarity that the 1995 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) does make explicit reference to the international standards of the relevant international organisation the OIE¹²² and specifically to animal health and zoonoses standards, guidelines and recommendations.¹²³ Certain specific animal welfare standards and guiding principles have evolved subsequently commensurate with the OIE's successive mandate which alongside animal health standards form a part of the OIE TAHC.

1.4.1.1 OIE Animal Welfare General Principles

Animal welfare according to the OIE TAHC means the physical and mental state of an animal¹²⁴ in relation to the conditions in which it lives and dies. It is 'generally considered' that an animal experiences good welfare if the animal is healthy, comfortable, well nourished, safe, is not suffering from unpleasant states such as pain, fear and distress and is able to express behaviours that are important for its physical and mental state.¹²⁵ Good animal welfare is stated to require disease prevention and appropriate veterinary treatment, shelter, management and nutrition, a stimulating and safe environment, humane handling and humane slaughter or killing. While *animal welfare refers to the state of the animal*, the treatment an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment.¹²⁶

The OIE TAHC also contains guiding principles for animal welfare understanding that there is a critical relationship between animal health and animal welfare¹²⁷ and emphasising that the internationally recognised 'five freedoms' provide valuable guidance in animal welfare.¹²⁸ These principles first emanated from the

¹²¹ Michael Robach, 'A Private Sector Perspective on Private Standards – Some approaches that could help to reduce current and potential future conflicts between public and private standards', OIE 78th General Session World Assembly 78 SG/9 (23-28 May 2010) 1-6, summary s 2.

¹²² WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS (1994) 493, Recital 6, art 1(2)(3).

¹²³ *ibid*, Annex A3(b).

¹²⁴ Animal means a mammal, reptile, bird or bee – Glossary, TAHC (2019) <http://www.oie.int/index.php?id=169&L=0&htmfile=glossaire.htm>.

¹²⁵ OIE TAHC (2019) ch 7.1. Introduction to the Recommendations for Animal Welfare, art 7.1.1, paras 1, 2 http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_aw_introduction.htm.

¹²⁶ *ibid*, art 7.1.1, para 3 (emphasis added).

¹²⁷ *ibid*, art 7.1.2.1.

¹²⁸ *ibid*, art 7.1.2.2.

UK Farm Animal Welfare Council (FAWC) in 1973,¹²⁹ to be re-asserted in the Brambell Report commissioned in the UK to enquire into the welfare of intensively farmed livestock¹³⁰ and are endorsed as EU principles of animal welfare,¹³¹ 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’.

OIE guiding principles explain that the scientific assessment of animal welfare involves diverse elements which need to be considered together and that selecting and weighing these elements often involves value-based assumptions which should be made as explicit as possible.¹³² They recognise that the use of animals in agriculture makes a major contribution to the wellbeing of people, carrying with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable,¹³³ and that improvements in farm animal welfare can often improve productivity and food safety and hence lead to economic benefits.¹³⁴ Equivalent outcomes based on performance criteria, rather than identical systems based on design criteria, are stated to be the basis for comparison of animal welfare standards and recommendations.¹³⁵

Welfare is expressed to be a broad term which includes the many elements which contribute to an animal’s quality of life inclusive of those referred to in the five freedoms and it is the scientific assessment of animal welfare which has progressed rapidly in recent years which forms the basis of the OIE animal welfare recommendations.¹³⁶ Accordingly, some measures of animal welfare involve assessing the degree of impaired functioning associated with injury, disease, and malnutrition, whereas other measures provide information on animals’ needs and affective states such as hunger, pain and fear, often by measuring the strength of animals’ preferences, motivations and aversions. Others assess the physiological, behavioural and immunological changes or effects that animals show in response to various challenges. It is stated further that such measures can lead to criteria and indicators which help to evaluate how different methods of managing animals influence their welfare.¹³⁷

¹²⁹ Report on Farm Animal Welfare in Great Britain: Past, Present and Future, October 2009 [FAWC Report](#).

¹³⁰ Francis Rogers Brambell, Report of the Technical Committee to enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems (Cmnd 2836, 1967).

¹³¹ (SEC (2012)55 (n 114) 9.

¹³² OIE TAHC (2019) art 7.1.2.4.

¹³³ *ibid*, art 7.1.2.5-6.

¹³⁴ *ibid*, art 7.1.2.7.

¹³⁵ *ibid*, art 7.1.2.8.

¹³⁶ *ibid*, art 7.1.3.1-2.

¹³⁷ *ibid* art 7.1.3.3-4.

The OIE TAHC prioritises the use of animal-based measures to assess animal welfare outcomes. Guiding principles provide that for the OIE animal welfare standards to be applicable globally they should emphasise favourable outcomes for the animals and outcomes are generally measured by assessing the extent to which animals experience the five freedoms. Additionally, recommendations should whenever possible define explicit targets or thresholds that should be met for animal-based measures. Such target values should be based on relevant science and experience of experts. It is acknowledged that in some circumstances it may be necessary to recommend specific conditions of the animal's environment and management.¹³⁸ Where, in addition to animal-based measures, resource-based and management-based measures are used, these should be defined on the basis of science and expert experience showing that a welfare outcome is clearly linked to a resource or to a management procedure. Users of an OIE species-specific chapter and welfare standard are encouraged to use an animal-based measure listed in the standard allowing outcomes to be measured by an assessment of individual animals or animal groups, or a representative sample of either. Users of an OIE standard may consider changes to resource or management needed to improve outcomes.¹³⁹ General principles have also been agreed for the welfare of animals in livestock production systems.¹⁴⁰

1.4.1.2 OIE Species-Specific Welfare Chapters

The OIE has adopted measures for the assessment of the welfare of beef and dairy cattle where these do not exist in EU law. OIE TAHC chapters address the

¹³⁸ *ibid*, art 7.1.4.1, 3.

¹³⁹ *ibid*, art 7.1.4.4-6.

¹⁴⁰ 1. Genetic selection should always take into account the health and welfare of animals. 2. Animals chosen for introduction into new environments should be suited to the local climate and able to adapt to local diseases, parasites and nutrition. 3. The physical environment, including the substrate (walking surface, resting surface, etc.), should be suited to the species so as to minimise risk of injury and transmission of diseases or parasites to animals. 4. The physical environment should allow comfortable resting, safe and comfortable movement including normal postural changes, and the opportunity to perform types of natural behaviour that animals are motivated to perform. 5. Social grouping of animals should be managed to allow positive social behaviour and minimise injury, distress and chronic fear. 6. For housed animals, air quality, temperature and humidity should support good animal health and not be aversive. Where extreme conditions occur, animals should not be prevented from using their natural methods of thermo-regulation. 7. Animals should have access to sufficient feed and water, suited to the animal's age and needs, to maintain normal health and productivity and to prevent prolonged hunger, thirst, malnutrition or dehydration. 8. Diseases and parasites should be prevented and controlled as much as possible through good management practices. Animals with serious health problems should be isolated and treated promptly or killed humanely if treatment is not feasible or recovery is unlikely. 9. Where painful procedures cannot be avoided, the resulting pain should be managed to the extent that available methods allow. 10. The handling of animals should foster a positive relationship between humans and animals and should not cause injury, panic, lasting fear or avoidable stress. 11. Owners and handlers should have sufficient skill and knowledge to ensure that animals are treated in accordance with these principles. *ibid*, art 7.1.5.

welfare of beef cattle,¹⁴¹ broiler chickens,¹⁴² dairy cattle¹⁴³ and pigs¹⁴⁴ in their respective commercial production systems. The welfare recommendations in each chapter are informative and the advice educative of specific species' environmental and management / handling needs, inclusive of competence training and expertise and of species-specific welfare problems. Each species-specific recommendation is accompanied with outcome-based criteria or measurables with which to assess animal welfare, as opposed to requiring environmental input so as to engender positive outcome-measurements of good animal welfare. The OIE TAHC endorses an assessment of how an animal is coping with the intensive conditions in which it is reared and prioritises science-based animal-based output measurements of welfare.

Animal-based output measures are valuable scientific indicators of welfare¹⁴⁵ and the EFSA has concluded:

Animal-based measures are the most appropriate indicators of animal welfare and a carefully selected combination of animal-based measures can be used to assess the welfare of a target population in a valid and robust way.¹⁴⁶

The standards adopted for the welfare of beef and dairy cattle in production systems provide a science-based measurement of welfare in the absence of EU adopted standards for these species. Yet it is relevant to ascertain how far OIE animal welfare standardisation where it does take place differs from the methods adopted by the EU in its internal animal welfare strategy. Both the OIE and the EU base their animal welfare standards on science, but it becomes apparent that the OIE chooses to focus on outcomes rather than on inputs.

1.5 Animal-Based Outcome Measures of Assessment

The approach to animal welfare has changed radically over the last decade and the use of animal-based measures (ABMs) to assess animal welfare has been introduced. Animal-based measures are also known as output indicators and are the subject of more recent EU animal welfare legislation, for example the

¹⁴¹ *ibid*, ch 7.9. Animal Welfare and Beef Cattle Production Systems (2012, revised 2013).

¹⁴² *ibid* ch 7.10 Animal Welfare and Broiler Chicken Production Systems (2013, last revised 2016).

¹⁴³ *ibid* ch 7.11 Animal Welfare and Dairy Cattle Production Systems (2015, revised 2017).

¹⁴⁴ *ibid* ch 7.13 Animal Welfare and Pig Production Systems (2018, revised 2019).

¹⁴⁵ Broom (2017) (n 2) 15.

¹⁴⁶ EFSA, The use of animal-based measures to assess the welfare of animals (EFSA J (2012)10(6) 2767) Conclusions, para 1, 23.

Directive on minimum standards of welfare for chickens.¹⁴⁷ The EFSA explains that '[p]revious assessments relied mainly on resource-and management-based parameters ("input assessments"), while the use of ABMs aims to measure the actual welfare status of the animal directly ("outcome assessment") and thus include the effect of the resource—and management-based factors'.¹⁴⁸ The EFSA defines an animal-based measure as 'a response of an animal or an effect on an animal used to assess its welfare. It can be taken directly on the animal¹⁴⁹ or indirectly¹⁵⁰ and includes the use of animal records'.¹⁵¹ A response which can result from a specific event, for example an 'injury' or 'mortality', or alternatively a 'body condition' for example 'lameness' which is the cumulative outcome of many days, weeks, or months, would each be classified as an animal-based measure.¹⁵² The EFSA notes that credible and verifiable indicators would evidence the welfare per species of farm animal on the farm and that the welfare outcome assessment would provide transparent information to interested and affected stakeholders.¹⁵³

The EU asked the EFSA to produce a series of scientific opinions on the use of animal-based measures to assess the welfare of dairy cattle,¹⁵⁴ pigs,¹⁵⁵ and poultry (broilers).¹⁵⁶ The EFSA has further issued guidance on the selective use of appropriate animal-based measures from a 'toolbox' to assess the welfare of a particular species of farm animal, highlighting the fact that the systematic recording of a few standardised valid and robust animal-based measures could be part of an animal welfare surveillance scheme.¹⁵⁷ The Panel concluded:

¹⁴⁷ Directive 2007/43/EC [2007] (n 65). European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2007/43/EC and its influence on the welfare of chickens kept for meat production, as well as the development of welfare indicators (COM(2018) 181 final, 13 April 2018).

¹⁴⁸ EFSA Technical Report, The use of animal-based measures to assess animal welfare in the EU – state of the art of 10 years of activities and analysis of gaps (6 November 2015) 1.1.1. <http://www.efsa.europa.eu/en/supporting/pub/884e>.

¹⁴⁹ A blood sample for example, EFSA, The use of animal-based measures to assess the welfare of animals (2012) (n 146).

¹⁵⁰ Records of water-consumption for example, *ibid.*

¹⁵¹ EFSA Technical Report (2015) (n 148) Glossary.

¹⁵² *ibid.*

¹⁵³ *ibid.*, 3.3.2, Summary.

¹⁵⁴ EFSA, The use of animal-based measures to assess welfare of dairy cows (EFSA J (2012)10(1) 2554).

¹⁵⁵ EFSA, The use of animal-based measures to assess welfare in pigs (EFSA J (2012)10(1) 2512).

¹⁵⁶ EFSA, The use of animal-based measures to assess welfare of broilers (EFSA J (2012)10(7) 2774).

¹⁵⁷ EFSA, The use of animal-based measures to assess the welfare of animals (2012) (n 146).

Animal-based measures are the most appropriate indicators of animal welfare.¹⁵⁸

In order to ensure good welfare in animals, we need both to reduce the risk of poor welfare, by using resource-based and management based-measures, and to monitor actual welfare, by using animal-based measures.¹⁵⁹

The Panel further recommended:

Both animal-based measures and input factors (resource-and management-based measures) should be used in combination when monitoring animal welfare.¹⁶⁰

This thesis adopts the conclusion and recommendation of the EFSA which characterises good animal welfare as welfare achieved through resource-based and management-based inputs which enhance welfare per species' needs. In conjunction animal-based outcome measures are taken in order to monitor actual welfare on-farm.

1.5.1 OIE Recommendations versus EU Norms

OIE consensus standards based on science plausibly may be 'lowest common denominator'¹⁶¹ standards and due comparative analysis may be warranted *vis à vis* EU standards of welfare. OIE animal welfare standards are not prophylactic, nor are they prescriptive and neither is there a requirement to monitor their application and implementation. In contrast, EU minimum legislative standards currently are stronger in stipulating resource and management input provision and in requiring the prevention of practices in order to raise welfare on a scale from poor to good, the application and implementation of which are subject to inspection and enforcement procedures. It is apparent that resource-input measures are the subject of general recommendations only and fall short of mandatory requirements in crucial aspects in OIE consensus standards compared with EU norms.

By way of illustration, OIE broiler chicken welfare recommendations and outcome-based measurables extend to production systems in which chickens are

¹⁵⁸ (n 146)

¹⁵⁹ EFSA, The use of animal-based measures to assess the welfare of animals (EFSA J (2012)10(6) 2767) Conclusions, para 4, 23.

¹⁶⁰ *ibid*, Recommendations, para 3, 23.

¹⁶¹ Linda C Botterill and Carsten Daugbjerg, 'Engaging with private sector standards: a case study of GLOBALG.A.P.' (2011) 65(4) Australian J Int Aff 488, 499.

confined in poultry houses without environmental control, and behavioural responses include heavy panting and wing spreading indicative of heat stress or poor air quality such as high levels of ammonia.¹⁶² There are no stated requirements to factor into the chickens' environmental conditions. In contrast, EU welfare requirements are detailed in respect of water, food, ventilation / heating, noise levels, light, litter, hygiene, inspection, record-keeping and prohibited surgical interventions.¹⁶³ OIE standards do not stipulate minimum stocking densities for example, which are the subject of specified requirements in the EU Directive. A maximum EU stocking density¹⁶⁴ of thirty three kilograms total weight of chickens per square metre of usable area in holdings / houses is specified as a general rule,¹⁶⁵ with a stocking density of thirty nine kilograms per square metre allowed, for example, on compliance with more stringent EU ventilation requirements.¹⁶⁶ Neither do the OIE recommendations require or monitor the handling and management practices of the personnel in animal production systems. Certified compliance with requisite training or attested equivalent experience are mandatory for keepers of chickens in EU law, inclusive of knowledge of animal behaviour and the concept of stress.¹⁶⁷ Member States must monitor compliance through inspection, ensure appropriate procedures are maintained for determining stocking densities and provide penalties for infringement of the Directive's resource and management requirements.¹⁶⁸

OIE calves' recommendations are bereft of stipulated nutrition requirements inclusive of the provision of iron and roughage in feed provision which are essential to the development of calves' rumens, their welfare and their health. Listed outcome-based criteria include mortality rates, morbidity rates, behaviour; changes in weight and body condition, growth rate and vocalisation.¹⁶⁹ Contrast EU legislative requirements that calves must be fed according to their age, weight, behavioural and physiological needs and at least twice a day.¹⁷⁰ Their food must contain sufficient iron content,¹⁷¹ a minimum daily ration of fibre for

¹⁶² OIE TAHC Ch 7.10, art 7.10.3.6.c.

¹⁶³ Directive 2007/43/EC (n 65), art 3(1), Annex I.

¹⁶⁴ 'the total weight of chickens present in a house at the same time per square metre of usable area' *ibid*, art 2(1)(i).

¹⁶⁵ *ibid*, art 3(2).

¹⁶⁶ *ibid*, art 3(3)(4), Annex II.

¹⁶⁷ *ibid*, art 4, Annex IV.

¹⁶⁸ *ibid*, arts 7, 9, Annex I

¹⁶⁹ *ibid*, art 7.11.17 (2).

¹⁷⁰ Directive 2008/119/EC (n 75) Annex I (12).

¹⁷¹ to ensure a minimum average blood haemoglobin level of at least 4.5 mmol/litre, *ibid*, Annex I (11).

each calf over two weeks old, with a raised threshold applying to calves between the ages of eight to twenty weeks.¹⁷²

OIE listed outcome-based criteria for pigs measure defined stereotypical behaviour (repetitive – caused by frustration) and apathetic behaviour (abnormal or maladaptive behaviour in ceasing to respond to stimuli that would normally elicit response).¹⁷³ Resource-input measures are not prescribed in the OIE TAHC which would be facilitative of pigs' specific behavioural needs in key problem areas. Animal-based outcome measures are prioritised as indicators of welfare following intervention, for example, post-procedure infection and swelling post-surgical castration. Options are only indicated in relation to these procedures, for example refinement – providing analgesia or anaesthesia under veterinary recommendation supervision.¹⁷⁴ The EU Directive states that surgical interventions including the castration of male pigs (over seven days of age) must be undertaken by veterinarians only, in accordance with applied techniques with appropriate means (i.e. use of anaesthesia and analgesia) and under hygienic conditions.¹⁷⁵ Albeit it serves to reiterate the concerns which arise in relation to pigs seven days old or younger, also in EU law. Practices which result in poor welfare are not prohibited in the OIE pig chapter, for example the continuous confinement of sows in stalls / crates. In contrast, EU law provides that sows and gilts must be kept in groups during a period starting from four weeks after the service to one week before the expected time of farrowing.¹⁷⁶

OIE consensus is premised upon the 'free from' five freedoms and a science base, but it is necessary positively to fulfil an animal's behavioural needs to achieve good welfare.¹⁷⁷ Broom explains that 'a need is a requirement, that is part of the basic biology of an animal, to obtain a particular resource or respond to a particular environmental or bodily stimulus'.¹⁷⁸ Users of an OIE standard need only to *consider* changes to resource or management factors even if these are necessary to improve welfare outcomes.¹⁷⁹ It is conceivable that countries with diverse economies, cultures and environmental conditions face difficulties in reaching a consensus and in this regard the OIE has resolved that '[a]nimal welfare is a complex, multi-faceted, international and domestic public policy issue, with important scientific, ethical, economic, cultural, and political and trade

¹⁷² *ibid*, art 4, Annex I (12).

¹⁷³ Ch 7.13, arts 7.13.1.4.

¹⁷⁴ OIE TAHC, ch 7.13, art 7.13. 8.

¹⁷⁵ *ibid*, Directive 2008/120/EC (n 85) art 4, Annex I ch I (8).

¹⁷⁶ Directive 2008/120/EC (n 85), art 3(4) para 1.

¹⁷⁷ 'The concept of welfare as a state that varies from the good or positive to the poor or negative is important if welfare is to be scientifically assessed'. Broom (2017) (n 5) 14.

¹⁷⁸ Donald M Broom, 'Welfare assessment and relevant ethical decisions: key concepts' *Annu Rev Biomed Sci* (2008)10 T79, T81.

¹⁷⁹ OIE TAHC, ch 7.1, art 7.1.4.6. (emphasis added).

policy dimensions'.¹⁸⁰ The President of the OIE Code Commission has affirmed the priority accorded to the science base of OIE standards without distinction and that 'the OIE animal welfare chapters are science-based, while avoiding being prescriptive, so that members have the flexibility to adapt to their situations'.¹⁸¹

There is thus a tension in that the OIE generally focuses on outcomes which would seem to have considerable merit in policy terms, as highlighted by EFSA.¹⁸² The EU current emphasis on prescriptive actions, nevertheless, may have advantages in line with the conclusion and recommendation of the EFSA¹⁸³ which are adopted by this thesis.

1.6 Limiting Influences in EU Farm Animal Welfare

Five significant factors constrain the effective protection of animal welfare in the EU's regulatory strategy, each of which will be discussed in turn. First, EU legislative provisions prescribe and accommodate minimum animal welfare standards. Second, there are *lacunae* in that the standards are not comprehensive and there are farm animals in respect of which there are no species specific welfare norms. Third, farming systems have become industrialised units in which large numbers of animals are produced in restrictive conditions, a contributory factor in the EU being earlier incentives to increase agricultural production in accordance with the EU CAP.¹⁸⁴ In combination the prevalent practice in intensively farmed units is to administer large amounts of antimicrobials to farmed animals in order to prevent and to treat disease resulting from inadequate hygiene and the psychological stress of being intensively farmed where animal welfare is poor.¹⁸⁵ Fourth, diversity in the implementation and enforcement of EU farm animal welfare legislative norms has not ensured a level field of compliance by Member States in practice.¹⁸⁶ Fifth, the ECJ has been measured in its interpretation and application of the EU Treaty and EU animal

¹⁸⁰ OIE Resolution No 28 Animal Welfare, 83 GS/FR-PARIS (May 2015) and Resolution No 31 Animal Welfare, 85 GS/FR-Paris (May 2017).

¹⁸¹ OIE 86 GS/FR-PARIS (May 2018) (n 109) para 264, 12th indent.

¹⁸² (n 146).

¹⁸³ (n 159) (n 160).

¹⁸⁴ TFEU, art 39(1). Brambell (n 131). Timothy Robinson and others, 'Accounting for Intensive Livestock Production' in Global Livestock Production Systems 43, Food and Agriculture Organization of the United Nations and International Livestock Research Institute, Rome 2011.

¹⁸⁵ World Health Organization <https://www.who.int/antimicrobial-resistance/global-action-plan/optimize-use/antimicrobials/en/>.

¹⁸⁶ Matt Rayment and others, Evaluation of the EU Policy on Animal Welfare and Possible Policy Options for the Future: Final Report (GHK Consulting in association with ADAS UK Food Policy Evaluation Consortium (London, UK 2010). European Court of Auditors, Special Report No 31 Animal welfare in the EU: closing the gap between ambitious goals and practical implementation (Luxembourg, 2018).

welfare legislative norms. These influences forestall the achievement of an acceptable echelon of standards of animal welfare in EU agriculture and the agri-food chain, each of which will be explored below.

1.6.1 EU Minimum Animal Welfare Standards

EU legislative welfare requirements for farm animals are minimum standards. They are the outcome of a process in EU agricultural policy in which welfare continues to be balanced against the primordial legislative objectives of agricultural revenue, rational development of production and the smooth running of the organisation of the market in food producing animals.¹⁸⁷ Practices endure which impede natural behaviour and result in poor welfare as illustrated, for example, in relation to calves, chickens and pigs.

EU legislation has to an extent improved the welfare of calves through dietary provision and prohibition of the narrow veal crate¹⁸⁸ pursuant to earlier research,¹⁸⁹ but there is scope for improvement. The Directive recites that calves should benefit from an environment corresponding to their needs as a herd-living species and for this reason they should be reared in groups.¹⁹⁰ Yet calves lawfully may be confined in individual boxes up to the age of eight weeks. The Directive is also bereft of species-specific competence requirements for animal handlers to keep calves. Updated scientific opinion on the welfare of calves kept in intensive farming systems considers '[m]ajor hazards for white veal calves ... to be iron-deficiency anaemia, a direct consequence of dietary iron restriction, enteric diseases linked to high intakes of liquid feed and inadequate intake of physically effective fibre, discomfort and behavioural disorders linked to inadequate floors and floor space'.¹⁹¹ This post-dates the consolidated calves Directive's requirements which have not been revised.

Derogations are built into the chickens Directive¹⁹² which could detract *pro rata* from the purported protection of lower maximum stocking density requirements (thirty three kilogrammes per square metre) stated to apply to holdings in the first instance.¹⁹³ There are potential safeguards in the stated application of more

¹⁸⁷ Recitals (5)(6)(7) Directive 2008/120/EC (pigs) (n 85); recitals (4)(5)(6) Directive 2008/119/EC (calves) (n 75).

¹⁸⁸ Directive 2008/119/EC (n 75) art 3(4) para 1.

¹⁸⁹ EFSA, The risks of poor welfare in intensive calf farming systems (EFSA J (2006)366).

¹⁹⁰ Directive 2008/119/EC (n 75) recital 7, Annex I, point 11.

¹⁹¹ EFSA, The welfare of cattle kept for beef production and the welfare in intensive calf farming systems (EFSA J (2012)10(5) 2669) Abstract.

¹⁹² Directive 2007/43/EC (n 65) art 3(3)(4) allows a maximum stocking density of 39 kg per square metre, subject to additional compliance with Annex II; art 3(5) permits up to 43 kg per square metre, subject to fulfilment of criteria in Annex V.

¹⁹³ *ibid*, art 3(2), Annex I.

stringent welfare criteria were stocking densities to be increased to the allowable maximum allowances.¹⁹⁴ Monitoring requirements comprise of the collection and recording of data at the point of slaughter¹⁹⁵ and chickens' welfare consequently depends on the reporting procedures in place and the extent to which remedial action is taken as a result on the farm for future stock.¹⁹⁶ Concern also surrounds the welfare of fast-growing strains of birds prone to lameness and metabolic problems¹⁹⁷ also facing feed restrictions.¹⁹⁸ The EFSA affirmed that most of the welfare problems present in broilers are caused by genetic factors and there is an increased mortality (sudden death syndrome) associated with faster growth rates. The major diseases with welfare implications namely leg problems, contact dermatitis conditions, ascites (excess abdominal fluid) and have been exacerbated by intense selection for fast growth rate and increased feed efficiency. Additionally, interactions between the chickens' environment and genetic traits can seriously affect welfare in areas such as lighting, litter management, dietary deficiencies and air quality. A particular environmental hazard is considered to be high stocking density.¹⁹⁹

Pigs raise a number of key welfare issues which still continue in the EU, inclusive of confinement.²⁰⁰ Pigs are social animals and yet individual boxes may be used for the first four weeks of pregnancy²⁰¹ and as general practice on small holdings with fewer than ten sows, in derogation from the general prohibition of use and the requirement otherwise to house sows and gilts in groups.²⁰² The weaning of piglets can take place at an early age of twenty one days.²⁰³ A careful reading of the EU Directive laying down minimum standards for the protection of pigs confirms the existence of a loophole whereby castration and / or tail-docking of

¹⁹⁴ of 39 kg per square metre or 43 kg per square metre, respectively (n 192).

¹⁹⁵ Under the supervision of the official veterinarian, *ibid*, art 3(1)(b), Annex III (1).

¹⁹⁶ European Commission, Study on the application of the Broilers Directive (Directive 2007 43/EC and Development of Welfare Indicators Final Report (February 2017) para 41.

¹⁹⁷ SEC (2012)55 (n 114) 97. Broom (2017) (n 5) 49.

¹⁹⁸ EU Scientific Committee for Animal Health and Animal Welfare Report, The Welfare of Chickens kept for Meat Production (2000).

¹⁹⁹ EFSA, The influence of genetic parameters on the welfare and resistance to stress of commercial broilers EFSA J (2010)8(7) 1666. Commission Report to the European Parliament and the Council on the impact of genetic selection on the welfare of chickens kept for meat production COM (2016)182 final, 7 April 2016.

²⁰⁰ EU Scientific Veterinary Committee Report, The Welfare of intensively Kept Pigs (XXIV/B3/ScVC/0005/1997).

²⁰¹ Directive 2008/120/EC (n 85) art 3(4) first indent, art 9 second indent.

²⁰² *ibid*, art 3(4) second indent, art 9 (second indent).

²⁰³ *ibid*, Annex I ch II C (3). EFSA, The welfare of weaners and rearing pigs: effects of different space allowances and floor types (EFSA J (2005) 268); Moa JL Näsström, 'Farm Animal Welfare in the European Union – a critical analysis' PhD Thesis University of Leeds (2016).

piglets of seven days and under may still be practised without anaesthesia or prolonged analgesia (pain relief) and in the absence of a veterinarian. The relevant provision states:

If castration or docking of tails is practised after the seventh day of life, it shall only be performed (without the tearing of tissues) under anaesthetic and additional prolonged analgesia by a veterinarian.²⁰⁴

Surgical castration of male pigs and piglets continues to be a pervasive animal welfare concern.²⁰⁵ Castration is practised to avoid the development of undesirable sexual or aggressive behaviour and boar taint in the taste and odour of pig meat. Different alternatives to surgical castration are applied within and outside the EU, such as the rearing of entire males or vaccination (immunocastration).²⁰⁶ Given this, a voluntary undertaking was drawn up to end the surgical castration of pigs by 1 January 2018.²⁰⁷ This EU Declaration on alternatives to surgical castration of pigs was drafted by representatives of European farmers, meat industry, retailers, scientists, veterinarians and animal welfare non-governmental organisations (NGOs). It extended an open invitation to every actor in the pig sector and to European retailers to endorse this voluntary initiative.²⁰⁸ The Declaration acknowledges that it has been proven scientifically that surgical castration is a painful intervention even when performed on very young animals.²⁰⁹ The signatories agreed that surgical castration, if carried out, would be performed with prolonged analgesia and / or anaesthesia with methods mutually recognised. A first progress report documents the varied differences in

²⁰⁴ Directive 2008/120/EC (n 85), Annex 1 ch 1 (8) final sentence (emphasis added).

²⁰⁵ EFSA, Welfare aspects of the castration of piglets (EFSA J (2004) 91 1; EFSA, The use of animal-based measures to assess welfare in pigs (2012) (n 155).

²⁰⁶ 'Immunocastration, a technique to replace surgical castration of piglets, consists of two consecutive vaccinations to induce antibodies which transiently suppress testicular functions and avoid boar taint', Kevin Kress and others, 'Sustainability of Pork Production with Immunocastration in Europe' (2019) 11 Sustainability 3335.

²⁰⁷ EU Declaration on alternatives to surgical castration of pigs (2010) http://ec.europa.eu/food/animals/docs/aw_prac_farm_pigs_cast-alt_declaration_en.pdf.

²⁰⁸ https://ec.europa.eu/food/animals/welfare/practice/farm/pigs/castration_alternatives_en for a list of the signatories.

²⁰⁹ Armelle Prunier and others, 'A review of the welfare consequences of surgical castration in piglets and the evaluation of non-surgical methods' (2006) 15 Anim Welf 277, 286.

practice in the EU Member States.²¹⁰ A second progress report²¹¹ informs that there are still marked differences between countries. The United Kingdom, Ireland, Spain and Portugal have a tradition of producing entire males and other countries, for example The Netherlands and Belgium, have started to do so with France and Germany gradually increasing the number of entire male pigs. In most of the other countries there is still no or little sense of urgency to achieve the ambition of the European Declaration.

Boredom and stress in barren concrete or slatted floor enclosures with high stocking densities can result in outbreaks of fighting, as well as increasing the risk of abnormal behaviours such as tail-biting prevalent amongst weaners and growing pigs.²¹² Hazards which are major risk factors for tail-biting with a high prevalence in the EU population include maintaining pigs in systems on floors without straw bedding, with a higher proportion of slatted flooring. Most of the pigs in Europe belong to the docked population. The amount of straw (full bedding) and its form (long straw) are important. Further hazards for tail-biting are competition for feed and / or inadequate feed intake, health and air flow.²¹³ Subsequent research concludes, '[t]he ability to control the risk of tail-biting through correct identification and alleviation of the predisposing animal, environmental and management factors on that farm is essential when aiming to avoid tail-docking'.²¹⁴ Straw (and no other manipulable material) gave consistent reduction in tail-biting across both weaner and rearing pigs. Additionally, animal-based outcome measures suggestive of the presence of a risk factor indicate the need for further investigation.²¹⁵ Continued practices of docking pigs' tails led to the Commission Recommendation²¹⁶ urging Member States to take account of the best practice guidance²¹⁷ based on the scientific knowledge to act to reduce

²¹⁰ Gé Backus and others, First progress report from the European declaration on alternatives to surgical castration of pigs (16/12/2010) Report from the Expert Group on ending the surgical castration of pigs (2012-2014) (Brussels October 2014) http://ec.europa.eu/food/animals/docs/aw_prac_farm_pigs_cast-alt_declaration_progress-report_20141028.pdf.

²¹¹ Gé Backus and others, Second Progress Report 2015–2017 on the European declaration on alternatives to surgical castration of pigs (2018) <https://www.boarsontheway.com/wp-content/uploads/2018/08/Second-progress-report-2015-2017-final-1.pdf>.

²¹² EFSA, The risks associated with tail biting in pigs and possible means to reduce the need for tail docking considering different housing and husbandry systems (EFSA J (2007) 611); EFSA, A multifactorial approach on the use of animal and non-animal-based measures to assess the welfare of pigs (EFSA J (2014)12(5) 3702).

²¹³ EFSA (2007) *ibid*, 3, 9, 10.

²¹⁴ EFSA (2014) (n 212) 3.

²¹⁵ *ibid*.

²¹⁶ Commission Recommendation (EU) 2016/336 on the application of Council Directive 2008/120/EC laying down minimum standards for the protection of pigs as regards measures to reduce the need for tail-docking [2016] OJ L62/20, paras 1-7.

²¹⁷ European Commission Staff Working Document on best practices with a view to the prevention of routine tail-docking and the provision of enrichment materials to pigs, SWD

tail-biting in the first instance. Member States are urged to ensure that risk assessments are carried out on-farm and to make legislative compliance criteria publicly and electronically available.²¹⁸ Checks to be carried out include the enrichment materials provided, pigs' health and thermal comfort, competition for food and space, with management changes considered to rectify risk factors.²¹⁹ Detailed provision explains the relevance of enrichment materials facilitative of the fulfilment of pigs' essential needs,²²⁰ albeit bereft of a reference to straw.²²¹

Should best practice be disseminated and practised the Recommendation would fulfil its objectives. As an instrument, a Recommendation is not an adequate substitute for requirements laid down as a minimum legislative floor which would end or lead to a reduction in tail-docking. To remind, the rearing of pigs without enrichment may still be accommodated in EU law.²²² There is a momentum for change on the part of an appreciable number of Member States evidenced in the Ministerial Request for a revision of the pig Directive, signed by Denmark, Germany, the Netherlands and Sweden in 2015.²²³ Priority areas for urgent address include:

The need to reduce tail-docking;

To provide piglets with anaesthesia and analgesia when surgical castration is unavoidable;

Group housing for sows throughout their productive lives;

Increasing minimum space allowance;

Provision of enrichment; and

The move away from fully slatted floors.²²⁴

(2016)⁴⁹ final. See European Commission Overview Report on a Series of Study Visits carried out between 25 January and 8 April 2016 in order to share good practice on rearing pigs with intact tails (DG SANTE 2016-8987).

²¹⁸ Commission Recommendation (EU) 2016/336 (n 216) para 2(a)(b).

²¹⁹ *ibid*, para 3.

²²⁰ *ibid*, paras 4-7.

²²¹ David Fraser and others, 'Effects of straw on the behaviour of growing pigs (1991)' *30 Appl Anim Behav Sci* 307; Violet Beattie and others, 'Influence of environmental enrichment on welfare-related behavioural and physiological parameters in growing pigs' (2000) *70 Anim Sci* 443.

²²² 'or, if no litter is provided', Directive 2008/120/EC (n 85) Annex I ch I (5).

²²³ Council of the European Union, 8596/15 (Brussels, 5 May 2015) Conference 'Improving pig welfare-what are the ways forward?' (Copenhagen, Denmark, 29-30 April 2015) Annex: Germany, the Netherlands, Sweden and Denmark signed position paper requesting a revision of Council Directive 2008/120/EC.

<https://data.consilium.europa.eu/doc/document/ST-8596-2015-INIT/en/pdf>.

²²⁴ *ibid*.

There is thus a movement for welfare standards to improve beyond the EU minimum norms adopted over twelve years ago.

1.6.2 Omissions in Animal Welfare Standards

A second shortcoming in protection becomes evident in gaps in the EU's regulatory strategy internally and externally: EU animal welfare legislative requirements and OIE animal welfare chapters do not encompass all farm animals. There are no EU individual species' welfare standards, for example, for dairy cows, beef cattle, sheep, turkeys and ducks, the sole requirements currently in existence being general in nature and difficult to apply in instances of an actual species' needs.²²⁵ Such is the nature of the general farm animals Directive which in broad terms places Member States under a duty to ensure that owners and keepers take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering or injury.²²⁶ The Directive generally requires the provision of housing, food, water and care appropriate to the physiological and ethological needs of the animals bred or kept, in accordance with established experience and scientific knowledge.²²⁷ Broom is critical of the 'outdated reference to needs' in the Directive, in that 'the needs themselves are in the brain so are not physiological or ethological. It is the fulfilment of the needs which requires physiological change or a certain behaviour to be shown'.²²⁸ The consequence is that the physical and psychological needs of all farm animals are not being met; their welfare is therefore poor with a consequential link to poor health and propensity to disease.²²⁹

EU minimum animal welfare standards specific to cattle reared for dairy production are absent although recommendations have been made.²³⁰ Issues identified by welfare organisations include filthy and crowded conditions with hard and uncomfortable floors causing cows to limp.²³¹ European dairy production stems from specialised intensive farming in which genetic selection for high milk yield is the major factor causing poor welfare and health in dairy cows. If cows

²²⁵ COM (2012)6/2 (n 113) 3.

²²⁶ Directive 98/58/EC (n 56) art 3.

²²⁷ Pursuant to the Directive's Annex *ibid*, art 4.

²²⁸ Broom (2017) (n 5) 17 (emphasis added).

²²⁹ McEldowney and others (n 42) 6; EFSA, The use of animal-based measures to assess the welfare of animals (EFSA Journal (2012)10(6) 2767).

²³⁰ EFSA, The effects of farming systems on dairy cow welfare and disease (EFSA J (2009) 1143) 2, 21; Broom (2017) (n 5) 54, citing the Petition to the EP on the Welfare of Dairy Cows by eighteen animal welfare protection societies (2015).

²³¹ European Parliament, Petition No 0392/2015 by P S (British) on behalf of the organisation 'Compassion in World Farming', including signatures of 18 organisations promoting animal welfare; welfare of dairy cows (PE578.635v01-00 29 February 2016).

are not kept on pasture for parts of the year there is an increased risk of lameness, hoof problems, mastitis and bacterial infection, for example.²³² Broom informs that high numbers of dairy cows producing milk in large quantities are affected by at least one of these disorders and 'live with poor welfare for a substantial part of their lives'.²³³

In relation to the EU's cooperative relations with the OIE, the chapters of the OIE TAHC do not contain welfare standards for the production systems of many species of farm animals inclusive of ducks, turkeys, sheep and laying hens, for example. While the OIE has broadened the protection afforded in its recommendations for the welfare of dairy cattle,²³⁴ these are not prescriptive concerning the conditions of dairy production systems. Slatted flooring without enrichment for dairy cattle is permissible for example, social environmental factors may be premised on intensive production systems and dairy cattle may be tethered in-house and outdoors.

1.6.3 Intensive Farming

The United Nations Food and Agricultural Organization (FAO) predicts that food production must increase by seventy per cent to feed the growing world population and on this basis further industrialisation of livestock production is necessary to feed a world population, which is expected to reach 9.6 billion by 2050.²³⁵ Timothy Robinson and others inform that '[g]lobally, livestock production has responded to increasing demand, primarily through a shift from extensive small-scale, subsistence, mixed crop and livestock production systems towards more intensive, large-scale, geographically concentrated, commercially-orientated, specialized production units'.²³⁶

EU legislative norms refer broadly to 'establishment',²³⁷ 'system',²³⁸ and / or 'conditions of rearing' or 'rearing systems'.²³⁹ The EU Directive on minimum standards for the protection of chickens, for example, applies to intensively farmed chickens.²⁴⁰ OIE welfare standards are applicable to 'production

²³² EFSA (2009) (n 230).

²³³ Broom (2017) (n 5) 49, 50.

²³⁴ OIE TAHC, ch 7.11.

²³⁵ Nikos Alexandratos and Jelle Bruinsma, Food and Agriculture Organization World Agriculture towards 2030/2050. The 2012 Revision <http://www.fao.org/docrep/016/ap106e/ap106e.pdf>.

²³⁶ Robinson and others (2011) (n 184) .

²³⁷ Directive 1999/74/EC (n 59).

²³⁸ Directive 2007/43/EC (n 65).

²³⁹ Directive 2008/119/EC (n 75); Directive 2008/120/EC (n 85).

²⁴⁰ Directive 2007/43/EC (n 65) recitals (7)(8)

systems'. Such concepts are not one and the same as the nostalgic view of the farm as a customary term²⁴¹ which conjures up images of animal life in a rural setting. Yet there is good reason to believe that this latter actuality is sought by the credence consumer and by farmers seeking to secure a return for higher-standard animal welfare produce. It is pertinent therefore to ensure that this positive prospect for animal welfare materialises in practice with benefits for key stakeholders in the agri-food chain. The widespread practice of industrial intensive farming is not conducive to the positive wellbeing of food-producing animals or to the fulfilment of their inherent behavioural needs.²⁴² Intensification presents challenges for animal welfare²⁴³ reinforcing the need to raise standards of animal welfare in a sustainable global food chain which remains the focal point herein.²⁴⁴ The RSPCA asserts that it is not necessarily the scale of production in itself which impacts poorly on welfare, but the conditions in which animals are managed in intensive production systems which do not cater for the normal behavioural expression of each individual animal.²⁴⁵ In combination, the scale of antimicrobial use in industrial livestock farming because of the poor welfare conditions in which intensively farmed animal are kept is a factor for change.²⁴⁶ This thesis is concerned with the root cause of antimicrobial use, namely poor animal welfare resulting in poor animal health and susceptibility to disease.²⁴⁷ Tolerated stocking densities in agricultural practice generally continue to be such that animals' behavioural needs are not fulfilled and welfare continues to be poor. Indicators of poor animal welfare inextricably lead to poor health and diseased animals,²⁴⁸ consequently antibiotic treatment is perpetuated. The practice of intensively rearing animals for food production in agriculture is accommodated

²⁴¹ Filiep Vanhonacker and Wim Verbeke, 'Public and Consumer Policies for Higher Welfare Food Products: Challenges and Opportunities' (2014) 27 J Agr Environ Ethics 153, 160.

²⁴² Rogers Brambell (1967) (n 130). Ruth Harrison *Animal Machines* (Vincent Stuart, London 1964).

²⁴³ Greenpeace, 'Feeding the Problem The Dangerous Intensification of Animal Farming in Europe' (2019) <https://www.greenpeace.org/eu-unit/issues/nature-food/1803/feeding-problem-dangerous-intensification-animal-farming/>.

²⁴⁴ To delve into the subject of sustainable intensification would be to follow a different direction to this thesis' stated objectives. Literature advocates diversification in diet towards substituting plant-based food for livestock produce, with the call to eat less but better welfare quality meat. Walter Willett and others, 'Food in the Anthropocene' The Lancet Commission (2019)393(10170) 447.

²⁴⁵ RSPCA Large Scale Farming (2018).

²⁴⁶ EFSA/ECDC Report, The European Union summary report on antimicrobial resistance in zoonotic and indicator bacteria from humans, animals and food in 2014 (EFSA J (2016) 14(2) 4380).

²⁴⁷ McEldowney and others (n 42). The implications for human antimicrobial resistance and human health of excessive antimicrobial use in intensively farmed livestock lies outside this thesis' margin.

²⁴⁸ McEldowney and others (n 42) 6. Broom (2017) (n 5) 60.

legally. It is 'lawful and only becomes unlawful when practised in a way that fails to comply with existing law'.²⁴⁹

The EU consistent with its vanguard role banned the use of antibiotics for growth promotion in livestock as early as 2006.²⁵⁰ An EU Regulation²⁵¹ further imposes a ban on the routine application of antimicrobials to farm animals, or the use of antimicrobial medicine to compensate for poor hygiene, inadequate animal husbandry or lack of care or to compensate for poor farm management.²⁵² This Regulation embeds their proscribed use for the purposes of growth promotion or to increase yield.²⁵³ Prophylactic use is prohibited other than in exceptional defined cases.²⁵⁴

The Council of the EU stresses that good animal welfare in general improves animal health and reduces the need to use antibiotics and consequently reduces antimicrobial resistance.²⁵⁵ An important consequence of better animal welfare is that animals are more resistant to pathogens,²⁵⁶ which reduces the need for medication and therefore contributes to the fight against antimicrobial resistance. The World Health Organization (WHO) indicates that the bulk of antimicrobials administered worldwide is given to animals, including cattle, sheep and chicken, for the purposes of food production and '[a]ntimicrobials are used to treat disease in sick animals, prophylactically to avoid disease in animals at high risk and most controversially as growth promoters in order to raise larger animals for the same amount of animal feed and investment'.²⁵⁷ Robinson and others draw on recent findings which estimate conservatively that global consumption of antimicrobials in livestock production will increase by two-thirds from 2010 to 2030, and the livestock sector in China could consume one third of the antibiotics produced

²⁴⁹ Ian A Robertson, *Animals, Welfare and the Law* (Earthscan from Routledge 2015)122, 132, 252-3.

²⁵⁰ Regulation (EC) No 1831 of 22 September 2003 on additives for use in animal nutrition, replacing Directive 70/524/EEC on additives in feeding-stuffs [2003] OJ L/268/29.

²⁵¹ (wef from 28 January 2022). Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products and repealing Directive 2001/82/EC, [2019] OJ L4/43, art 160. Cf OIE TAHC, ch 6.7 in which guidance is given to Member Countries to address the emergence of the spread of resistant bacteria from the use of antimicrobial agents in animals and to contain antimicrobial resistance through controlling the use of antibacterial agents.

²⁵² *ibid*, art 107(1).

²⁵³ *ibid*, art 107(2).

²⁵⁴ *ibid*, art 107(3)(4).

²⁵⁵ Council of the European Union 14975/19 (n 109) conclusion 2.

²⁵⁶ EMA and EFSA joint scientific opinion on measures to reduce the need to use antimicrobial agents in animal husbandry in the European Union, and the resulting impacts on food safety (EFSA J (2017) 15 (1) 4666.

²⁵⁷ World Health Organization (n 185).

worldwide by 2030.²⁵⁸ The authors endorse the fact that many stakeholders have a role, ‘...antimicrobial resistance is also a multisectoral issue that involves consumers of animal source foods, the retail industry, farmers in livestock ... whose livelihoods rely on the ability to keep healthy animals’.²⁵⁹ Behavioural change is essential in order to move away from intensively produced agri-produce and its available supply in the agri-food chain which presupposes resort to antimicrobials on such an industrial scale.

1.6.4 Enforcement

Variations in compliance with, and enforcement of, EU animal welfare legislation by Member States undermine the uniform achievement of farm animal welfare in the EU, weakening the standards’ objective of reducing distortions in competition in the EU internal market.²⁶⁰ According to the Commission, ‘[t]he diversity of farming systems, climatic conditions, land realities in the different Member States has led to considerable difficulties in agreeing on unitary rules on animal welfare and in ensuring their correct implementation’.²⁶¹ This is compounded by a lack of enforcement of EU legislation by the Member States in which ‘insufficient measures are taken to inform stakeholders, to train official inspectors, to perform checks and to apply sanctions’.²⁶² Further, the general standards in the farm Directive²⁶³ lead to difficulties in application which impact negatively on enforcement of the Directive’s provisions. ²⁶⁴ It is the responsibility of each Member State to ensure that EU law is implemented within its territory. Member States unilaterally may not seek to enforce compliance with EU animal welfare norms in other EU Member States, the ECJ famously ruling in *Hedley Lomas* that ‘Member States must rely on trust in each other to carry out inspections on their respective territories’.²⁶⁵ Member States are obligated in accordance with Article

²⁵⁸ Timothy Robinson and others ‘Animal production and antimicrobial resistance in the clinic’ *The Lancet* (2016) 387 (10014) e1–e3 [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)00730-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)00730-8/fulltext) fn7 citing Van Boekel, T.P. and others ‘Global trends in antimicrobial use in food animals, *Proc Natl Acad Sci USA* 2015; 112: 5649-54.

²⁵⁹ *ibid.*

²⁶⁰ Rayment and others (2010) (n 186) 36-38.

²⁶¹ *ibid.*

²⁶² *ibid.*, 4. The separate EU CAP sanctions regime of cross-compliance will be discussed in chapter three.

²⁶³ Council Directive 98/58/EC (n 56).

²⁶⁴ COM (2012)6/2 (n 113) 3.

²⁶⁵ Case C-5/94 (n) [19] [20]. Cardwell (2004) (n 15) 305; Rasso Ludwig and Roderick O’Gorman ‘A cock and bull story? Problems with the protection of animal welfare in EU law and some proposed solutions’ (2008) 20(3) *JEL* 363, 372-6.

4(3) TEU²⁶⁶ and the third paragraph of Article 267 TFEU²⁶⁷ ‘to take all measures necessary to guarantee the application and effectiveness of [Union] law’.²⁶⁸ The cost of inspection activities associated with the enforcement of EU farm animal welfare standards²⁶⁹ is borne by the public administrations in Member States.

Member States have a duty annually to inspect against the criteria in each of the EU animal welfare norms and to send this data to the Commission in accordance with the Official Inspections Regulation,²⁷⁰ the Commission noting that ‘the considerable differences in Member States’ reporting make the interpretation and comparison of the data generally more difficult’.²⁷¹ The data reported continues to be incomplete, inconsistent, unreliable or insufficiently detailed to draw conclusions on compliance and the Commission has committed to improve the quality and consistency of data reported.²⁷² The European Court of Auditors (ECA) found insufficient evidence of Member States performing inspections on a risk analysis basis as required to target animal welfare problems in an effective and cost-effective manner, through undertaking unannounced inspections for example.²⁷³ The Commission has launched an extensive series of infringement procedures against Member States since 2012 mainly concerning the housing of sows.²⁷⁴ The ECA nevertheless recommended that the Commission develop an enforcement strategy to reduce the time for implementing the Commission’s recommendations by Member States, finding that weaknesses in compliance

²⁶⁶ The principle of sincere cooperation.

²⁶⁷ The preliminary ruling procedure and a mandatory reference from a court against whose decision there is no judicial remedy, when a ruling on a question of EU law is necessary in order to determine the outcome of the case.

²⁶⁸ Case C- 5/94 Hedley Lomas [1996] ECR I-2553 [19].

²⁶⁹ Estimated annually at €53 million for farm inspections and €13 million in administrative costs, based on the available data for 27 Member States (2008). In comparison the Commission’s expenditure on animal welfare annually was estimated at €4 million. Rayment and others (n 183) 1.11.

²⁷⁰ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [2017] OJ L95/1.

²⁷¹ European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Council Directive 98/58/EC concerning the protection of animals kept for farming purposes (COM (2016)558 final, 8 September 2016, 2.

²⁷² European Court of Auditors (2018) (n 183) para 33.

²⁷³ *ibid*, para 51. Member States’ management of their official inspection systems evidenced weaknesses in their control and audit systems, paras 47-63. See Council of the European Union Conclusions on European Court of Auditors’ Special Report No 31/2018, 11073/19 (Brussels, 2019).

²⁷⁴ European Court of Auditors (2018) (n 186) para 39.

and enforcement persisted in relation to the routine tail-docking of pigs. 275 Problems in maintaining a level playing field of animal welfare standards across the EU Member States still persists even though the harmonisation of standards remains a key EU objective.

1.6.5 Constraints in the Interpretation of EU Animal Welfare Law

A fifth inhibiting feature is the ECJ's arguably justifiable interpretation of EU agricultural legislation and the EU Treaties, which has made it difficult for Member States to invoke the Treaty derogation to the free movement of goods in order to protect the health and life of animals.²⁷⁶ The early landmark ruling in the case of *Hedley Lomas* established that EU law:

precludes a Member State from invoking Article 36 of the Treaty to justify a limitation of exports of goods to another Member State on the sole ground that, according to the first State, the second State is not complying with the requirements of a Community harmonising directive which pursues the objectives which Article 36 is intended to protect.²⁷⁷

This case concerned the UK authorities' refusal to license live sheep for export to Spain alleging failure on the part of Spanish slaughterhouses to comply with the provisions of the EU Directive on the stunning of animals before slaughter.²⁷⁸ The Court's classification of the Directive as a harmonising measure was not affected by the fact that it was bereft of any procedure for monitoring the application of its provisions and of any penalties in the event of their breach.²⁷⁹ The Court's ruling is in contrast to the Opinion of Advocate General Léger who quoted from the Court's ruling in *Van Bennekom*:

It is only when Community directives, ..., make full provision for the full harmonisation of all measures needed to ensure the protection of human and animal life and institute Community procedures to monitor compliance therewith that recourse to Article 36 ceases to be justified.²⁸⁰

²⁷⁵ *ibid*, paras 41-46.

²⁷⁶ TFEU, art 36.

²⁷⁷ Case C-5/94 *Hedley Lomas* (n 268) [21]. Cardwell (2004) (n 15)305-307; Ludwig and O'Gorman (n 265) 363.

²⁷⁸ Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter, [1974] OJ L316/10.

²⁷⁹ Case C-5/94 *Hedley Lomas* (n 268) [20].

²⁸⁰ Case 227/82 *Van Bennekom* [1983] ECR 3883 [5]. Case C- 5/94 *Hedley Lomas* (n 268) [point 16].

The ECJ affirmed that Member States could not take it upon themselves unilaterally to act in the interests of protecting animals' welfare in order to preclude any breach of a harmonised EU norm in the Member State of export.²⁸¹ This is because '[i]n essence, harmonisation involves replacing the multiple and divergent national rules on a particular subject with a single EU rule', from which Member States may not diverge.²⁸² If an EU harmonising measure has not been adopted, the Treaty prohibition not to restrict the free movement of goods in the EU internal market applies,²⁸³ but Member States are free to derogate in accordance with the express grounds exhaustively laid down in Article 36 TFEU, or for reasons justified in the public interest.²⁸⁴

According to the EU concept of *minimum harmonisation*, Member States on notifying the Commission may maintain or apply their *stricter* animal welfare requirements *within their territories*, but not extra-territorially. The extent of Member States' 'freedom' to protect the welfare of species of farm animals for which EU provision is made is therefore minimal.²⁸⁵ Michael Dougan provides a classic definition of minimum harmonisation:

Member States are permitted to maintain and often to introduce more stringent regulatory standards than those prescribed by Community legislation, for the purposes of advancing a particular social or welfare interest, and provided that such additional requirements are compatible with the Treaty. National competence is not completely ousted: the applicable Community legislation sets a floor, the Treaty itself sets a ceiling and the Member States are free to pursue an independent domestic policy between these two parameters.²⁸⁶

The ECJ has interpreted as *exhaustive harmonisation* minimum EU legislative standards of animal welfare in agriculture which incorporate a higher standards provision.²⁸⁷ In the case of *Compassion in World Farming* ²⁸⁸ the UK, having prohibited the use of veal crates in calf rearing, was not able to rely on the higher

²⁸¹ Case C-5/94 Hedley Lomas (n 268) [20]. The Commission did not pursue infringement proceedings against Spain.

²⁸² Catherine Barnard, *The Substantive Law of the EU The Four Freedoms* (6th edn, OUP 2019) 583.

²⁸³ TFEU, arts 34, 35. The EU internal market extends to agriculture and trade in agricultural products, inclusive of stock-farming and live animals, TFEU, art 38(1)(3), Annex I.

²⁸⁴ Case 129/78 Cassis de Dijon [1979] ECR 649 [8].

²⁸⁵ Damian Chalmers, Gareth Davies, Georgio Monti, *European Union Law* (3rd edn, CUP 2014) 648.

²⁸⁶ Dougan (n 16) 855.

²⁸⁷ Directive 2008/120/EC (n 85) art 12, for example.

²⁸⁸ Case C-1/1996 CIWF [56-60].

standards²⁸⁹ of welfare it practised for the welfare of calves within its national territory to restrict the export of live calves for rearing in Spain. The UK complied with and exceeded the higher standards of the Council of Europe Convention on the Protection of Animals kept for Farming Purposes and associated 1988 Recommendation concerning Cattle.²⁹⁰ Spain applied lower standards of welfare than those of the Convention, albeit compliant with EU minimum legislative thresholds on the permissible specifications for the veal crate. The ECJ ruled that the Convention's provisions were indicative only, the Recommendation not being directly applicable in, nor containing legally binding obligations for, Member States.²⁹¹ The Court upheld its prior ruling in *Hedley Lomas*,²⁹² specifically the impossibility of recourse to Article 36 TFEU where Directives harmonise the measures necessary to achieve the objectives pursued.²⁹³ In the rearing of calves Directive there is the higher standards provision that was not in the animal slaughter Directive the subject of *Hedley Lomas*. In its reasoning the ECJ paid regard to the protection of the welfare of calves in considering the wording and context of the Directive.²⁹⁴ It attached weight to the objectives of the Directive specified in the fifth and sixth recitals guided by the need to eliminate differences which by distorting conditions of competition 'interfere with the smooth running of the organisation of the common market in calves and calf products', also 'to establish common minimum standards for the protection of rearing calves or calves for fattening in order to ensure rational development of production'.²⁹⁵ Due recognition was given to the fact that the legislature had sought to reconcile the interests of animal protection and those of the smooth running of the organisation of the common market in calves and calf derived products.²⁹⁶ It followed therefore that the Directive laid down exhaustively common minimum standards for the protection of calves confined for the purposes of rearing and fattening.²⁹⁷ As such this negated the possibility of relying on the Treaty derogation to the free movement of goods in order to protect the life and health of animals.²⁹⁸ It followed from the express wording of the higher provision clause in the Directive that Member States were not entitled to adopt stricter measures for the protection of calves other than provisions applying

²⁸⁹ Directive 91/629/EEC [1991] OJ L 340/28, art 11(2), permitted the Member States, acting in compliance with the Treaty, to maintain or apply within their territories stricter provisions for the protection of calves than those laid down in the Directive.

²⁹⁰ In particular Appendix C Special provisions for calves (1993) 3. If calves are to be kept in individual pens, these shall be sited and constructed to allow the calf sight of other calves or other animals. 4. The dimensions of the individual pen or stall shall be appropriate to the size of the animal at the end of its stay in that pen or stall.

²⁹¹ Case C-1/1996 CIWF (n 288) [34-6].

²⁹² Case C-5/94 (n 268).

²⁹³ Case C-1/1996 CIWF (n 288) [47].

²⁹⁴ *ibid* [50-1].

²⁹⁵ Recitals (5) (6) Directive 2008/119/EC (n 75) *ibid* [52].

²⁹⁶ *ibid* [53].

²⁹⁷ *ibid* [54][56].

²⁹⁸ *ibid* [64].

within their territory. Thus a ban on exports imposed on account of conditions prevailing in other Member States would fall outside the derogation allowed by the higher standards provision and would 'strike at the harmonisation achieved by the Directive'.²⁹⁹ In those circumstances the fact that Member States are authorised to adopt within their own territory protective measures stricter than those laid down in a directive does not mean that the Directive has not exhaustively regulated the powers of the Member States in the area of the protection of veal calves.³⁰⁰

In its determination of the Directive as a measure of exhaustive harmonisation, the ECJ deferred to the primordial objectives of the EU legislature, namely the organisation of the common market in calves and derived products and the establishment of common minimum standards of protection to ensure rational development of production.³⁰¹ This preceded and also influenced its interpretation of the higher standards provision, otherwise a minimum harmonisation clause by another name. Significantly, 'those circumstances' which led to the Court's decision were also driven by the EU CAP's objective of the common organisation of the market in beef and veal, the provisions of which prohibited measures restrictive of intra-Community trade.³⁰² Besides, at the very outset of its ruling the ECJ asserted that even in the event that a matter had not been exhaustively regulated, rules which interfered with the proper functioning of a common organisation of the market would be deemed incompatible with it.³⁰³ Dougan's analysis placed the ruling of the ECJ in the context of the 'wider regulatory landscape to which the Calves Directive itself belongs'.³⁰⁴ In other words, 'the effect of a minimum harmonization clause depends not only on its express terms but also on the limits implied by virtue of the wider regulatory context in which it is located'.³⁰⁵

The ECJ then considered whether Article 36 TFEU could be relied on to restrict the export of calves on the grounds of public policy or public morality. The Court ruled out any reliance on Article 36 for the protection of public 'order'³⁰⁶ or of public morality in the circumstances of the present case for two reasons. First,

²⁹⁹ *ibid* [62].

³⁰⁰ *ibid* [63].

³⁰¹ (n 291). Cardwell (2004) (n 15) 307.

³⁰² Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal, arts 1, 22(1) [1968] OJ L148/24. Case C-1/1996 *CIWF* (n 288) [13, 14].

³⁰³ Case C-1/1996 (n 288)[41] citing Case 218/85 *Cerafel v Le Campion* [1986] ECR 3513 [13] and Case C-27/96 *Danisco Sugar v Allmänna Ombudet* [1997] ECR I-000 [24].

³⁰⁴ Dougan (n 16) 875-6.

³⁰⁵ *ibid*, 884.

³⁰⁶ Described as 'the framing concept that the Court of Justice chooses (perhaps counter-intuitively for moral and religious questions)'. Chalmers and others (n 285) 935.

public policy and public morality were not being invoked as a separate justification, but as an aspect of the justification relating to the protection of animal health which was the subject of this harmonising Directive.³⁰⁷ Second, the export of calves to face rearing contrary to the higher standards of the Council of Europe Convention on the Protection of Animals kept for Farming Purposes and associated 1988 Recommendation concerning Cattle³⁰⁸ was considered to be cruel and immoral by animal welfare organisations and a considerable body of public opinion, supported by authoritative scientific veterinary opinion, in the UK.³⁰⁹ Nonetheless, the ECJ ruled that a Member State could not rely on the views or the behaviour of a section of national public opinion in order unilaterally to challenge a harmonising measure adopted by the EU institutions. ³¹⁰

The ECJ's interpretation was justified as to the priority accorded to a textual interpretation of the regulatory objectives of the EU's agricultural policy over the ability of the ECJ to balance Member States' higher social-value objectives in derogation to the free movement of animals as goods. The ECJ reasoned on the basis of EU legislative acts, namely the Regulation on the common organisation of the market in beef and veal and the calves Directive inclusive of the express terms in the higher standards' clause. The Regulation expressly limited its scope for action in accordance with the Treaties' fundamental internal market objectives, and the ECJ likewise circumscribed the capacity of the Member States' to adopt higher standards acting 'only in compliance with the general rules of the Treaty.'³¹¹

Resort to the health and life of animals' derogation in Article 36 TFEU can be disputed in application to cases involving animal welfare. Animal welfare concern is a matter of morals, of credence. It was in *Hedley Lomas* and in *Compassion in World Farming*. A case can be made for the ECJ to have taken greater pains to distinguish public policy / order from public morality each constituting a separate Treaty derogation to that of public health; public morality being singularly applicable in the context of the internal market free movement of goods, albeit in the absence of harmonising legislation. Damien Chalmers and others maintain that historically they have been treated differently in case law; public policy 'protecting the fundamental interests of a society,'³¹² whereas 'public morality has been concerned to secure the central values of a society.'³¹³ Questions

³⁰⁷ Case C-1/1996 CIWF (n 288) [66, 68].

³⁰⁸ (n 286).

³⁰⁹ Case C-1/1996 CIWF (n 288) [29].

³¹⁰ *ibid* [67].

³¹¹ *Ibid* [59].

³¹² Chalmers and others (n 285) 933, 934, citing Case C-100/01 *Ministre de l'Intérieur v Olazabal* [2002] ECR I-10981.

³¹³ *ibid*, 934, citing Case 34/79 *R v Henn and Darby* [1979] ECR 3975 (obscene materials): '[i]n principle, it is for each Member State to determine in accordance with its

essentially about the moral standards of society arise in instances concerning the freedom of movement to provide and / or to receive services, where there is no express public morality derogation. Here public policy³¹⁴ is resorted to and more recently interchangeably with the concept of public order.³¹⁵ It is noteworthy that outside the regulatory margins of EU agricultural policy the ECJ adopts a 'marginal appraisal' of the measures taken by Member States to protect the 'central interest, symbols and values of their societies.'³¹⁶

A broader interpretation of the law facilitative of acceptance of justification on welfare grounds was not forthcoming from the ECJ in the case of *Jippes*.³¹⁷ Ms Jippes as a hobby kept four sheep and two goats at her home. This was at the time of the registered outbreak of foot and mouth disease, in respect of which a ban was adopted on the vaccination of animals against contracting the disease and a culling strategy implemented as a control measure to eradicate the disease. The reference for a preliminary ruling³¹⁸ from the national court, in which Ms Jippes contested the refusal of the Dutch authorities to grant her an exemption from the vaccination ban, questioned the Directive laying down EU policy to control foot and mouth disease³¹⁹ and the scope of the Amsterdam Protocol on the protection and welfare of animals.³²⁰ The vaccination ban was questioned as being contrary to an asserted 'general principle of EU law' requiring all appropriate measures to be taken in order to ensure animal welfare and to guarantee that animals are not exposed unnecessarily to pain or suffering or to unnecessary harm.

In its assessment, the ECJ refuted the existence of such a general principle of EU law and drew upon several supporting justifications for its ruling. Paramount was the fact that ensuring animal welfare was not one of the stated Treaty objectives defined in Article 2 EC. Nor was the protection of animals an explicit

own scale of values and in the form selected by it the requirements of public morality in its territory' [15].

³¹⁴ Case C-36/02 *Omega* [2004] ECR I-9609 (prohibition of violent laser game).

³¹⁵ Case C-137/09 *Josemans* [2010] ECR I-13019 (prohibition of drug tourism).

³¹⁶ Member States are accorded a margin of discretion in the case of gambling, in the 'context of moral, religious or cultural factors', acting in accordance with the EU principle of proportionality, Case C-258/08 *Ladbrokes* [2010] ECR I-4757 [19, 20], *Chalmers and others* (n 285) 934, 935.

³¹⁷ Case C-189/01 *H Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689.

³¹⁸ The first case to use the accelerated (now expedited) procedure, which was published without the Advocate General's View. Diane Ryland, 'The Advocate General, EU Adversarial Procedure and Accession to the ECHR' (2016) 2 EHRLR 169, 176.

³¹⁹ Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease, as amended by Council Directive 90/423/EEC [1990] OJ L224/13.

³²⁰ Protocol No 33 on protection and welfare of animals (1997) annexed to the Treaty establishing the European Community [2006] OJ C321E/314.

objective of the CAP in the Treaties, as confirmed in the Decision acceding to the Council of Europe Convention of Farm Animal Welfare.³²¹ The ECJ asserted that it was apparent from the very wording of the Protocol that it did not lay down any well-defined general principle of EU law which bound the institutions. Although the Protocol provided that ‘full regard’ must be had to the welfare requirements of animals in the formulation and implementation of EU policy, it limited that application to four specific spheres of EU activity and provided that the legislative or administrative provisions and customs of the Member States must be respected as regards in particular religious rites, cultural traditions and regional heritage.³²² Neither could such a general principle be inferred from the non-binding Council of Europe Farming Convention, the Treaty derogation to the free movement of goods referring to the life of animals, or from EU animal welfare legislation.³²³

The ECJ upheld the protection of animals and their health as a requirement of public interest³²⁴ which was *reinforced* by the Protocol,³²⁵ the fulfilment of which depended on the proportionality of the measure.³²⁶ It worded this public interest requirement ambiguously. First, the ECJ quoted from previous authority in which the public interest is located in the protection of the health and life of humans and animals, citing the case of *United Kingdom v Council*.³²⁷ Second, and it could be argued interchangeably, the ECJ acknowledged that the Protocol sought to *reinforce* the obligation to take the health and protection of animals into consideration *by providing that full regard must be had to the welfare requirements of animals* in the formulation and implementation of the Community’s policy.³²⁸ The Court’s *dicta* could be read as the Protocol reinforcing the protection of animals and their welfare. Whichever reading of the public interest requirement prevails, - the interest in the health and life of animals, or progressively the interest in their welfare, - the ultimate determinant of the scope of an EU norm derived from the agriculture title would be the objectives of the CAP in respect of which the EU institutions are accorded a wide margin of appreciation. As long as measures taken by the EU legislature in the public interest were not deemed to be manifestly inappropriate the ECJ would be reluctant to intervene in the exercise of the EU institutions’ wide discretion in matters of the CAP in order to protect the welfare of individual animals, beyond

³²¹ According to the fourth recital of Council Decision 78/923/EEC. Case C-189/01 (n 317) [72].

³²² Case C-189/01, *ibid* [73].

³²³ *ibid* [74-76].

³²⁴ *ibid* [77, 78].

³²⁵ *ibid* [79] (emphasis added).

³²⁶ *ibid* [80].

³²⁷ Case 131/86 [1988] ECR 905 [17] (emphasis added). Citing also Case C-5/94 *Hedley Lomas* (n 268) and Case C-1/96 *CIWF* (n 288).

³²⁸ Case C-189/01 *Jippes* (n 317) [79] (emphasis added).

the application of this proportionality test.³²⁹ Costs were a decisive factor as was the fact that the adopted non-vaccination policy to eradicate foot and mouth disease was designed to guarantee, on the basis of a high level of health,³³⁰ the free movement of goods in an internal market.³³¹ It was also relevant that the Council was obligated to have regard to the general state of health of all livestock rather than that of certain individual animals.³³² Potential exceptions (endangered species) to the non-vaccination policy evidently could be sanctioned for conservation reasons. Conversely, the individual welfare of Ms Jippe's animals did not entitle each of them to such treatment as an alternative to culling.³³³

Drawing on the recital to the Protocol, its stated purpose being to 'ensure improved protection' of animal welfare, Rasso Ludwig and Roderick O'Gorman submitted that far from being a codification of existing principles the Protocol should have been interpreted as a 'new departure' in the protection of animal welfare in the EU.³³⁴ Elsewhere, O'Gorman compares the animal welfare disposition of the ECJ which 'demonstrates little patience for arguments based on moral concerns regarding animal welfare expressed in individual Member States', with that demonstrated by the WTO Dispute Panel in the interests of the welfare of seals.³³⁵ He refers to what would appear to be 'a dual standard' on the part of the EU and its institutions in that 'a major component of the EU's argument in the Seal Products dispute was that it was legislating for the moral concerns of its citizens'.³³⁶ O'Gorman asserts that 'this area is absolutely dependent on the political choices made by the EU legislature while animal welfare legislation is being formulated', which will be adhered to 'rigidly' by the CJEU and concludes '[t]here is no room for moral preference once this legislation

³²⁹ Eleanor Spaventa 'Case C-189/01 H Jippes v Minister van Landbouw, Natuurbeheer en Visserij Judgment of the Full Court of 12 July 2001' (2002) 39 (5) CML Rev 1159-1170.

³³⁰ The Agriculture Title, also unlike the Approximation of Laws and the Environment Titles, 'does not contain an express 'higher standards' provision', Cardwell (2004) (n 15) 307.

³³¹ Case C-189/01 (n 317) [89-91].

³³² *ibid* [99].

³³³ *ibid* [133-135].

³³⁴ Ludwig and O'Gorman (n 265) 367.

³³⁵ Roderick O'Gorman 'Of Eggs and Seals and Leghold Traps: Internal and External Public Morality as a factor in EU Animal Welfare Legislation' in Joseph A McMahon and Michael N Cardwell Research Handbook on EU Agriculture Law (Edward Elgar 2015) 323, 334. European Communities – Measures prohibiting the importation and marketing of seal products Appellate Body, Reports, WT/DS400/AB/R and WT/DS401/AB/R, 22 May 2014.

³³⁶ O'Gorman *ibid*, 338.

is laid down'.³³⁷ A suggestion as to how this inconsistency may be resolved will be made in the setting of the CAP within chapter three.

1.7 Article 13 TFEU

It is germane to ascertain the potential significance which Article 13 TFEU holds for EU farm animal welfare beyond the minimum norms applicable to animals in agriculture adopted to-date, also in relation to the CJEU's interpretation of the same. The inclusion of the obligation placed upon the EU and its Member States to pay full regard to animals as sentient beings is no longer stated within a Protocol appended to the Treaties, having been inserted into the provisions of the Treaty with General Application. Article 13 TFEU implies the potential to elevate regard for animal welfare in legislation adopted on the basis of EU agricultural policy, which legislation currently is the outcome of a process in EU agriculture policy in which welfare continues to be balanced against agricultural revenue, rational development of production and the smooth running of the organisation of the market in food-producing animals.³³⁸ The species-specific Directives establishing minimum standards of welfare for chickens, pigs and calves are all located within the wider regulatory context of the EU CAP Regulation establishing a common organisation of the markets in agricultural products.³³⁹

Article 13 TFEU has proven a relevant factor influencing the CJEU's interpretation of the rearing of calves Directive³⁴⁰ in application to calves confined in dairy farming.³⁴¹ National legislation transposing³⁴² / implementing the Directive required the management requirements to apply not only to calves reared for fattening, but also to calves confined for dairy farming. In its reasoning evident in the French translation, the CJEU acknowledged the Directive's objectives of keeping calves as an integral part of agriculture and guaranteeing the rational development of production, in the fourth and sixth recitals respectively. There was no need to refer to the objective of ensuring the smooth running of the common market, freedom of movement not being an issue in this case. The Court proceeded to accord an holistic (*manière large*) interpretation to the Directive's

³³⁷ *ibid.*

³³⁸ TFEU, art 43. See, for example, recitals (4) – (6) Directive 2008/119/EC (n 76).

³³⁹ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L347/671, as amended.

³⁴⁰ Council Directive 91/629/EEC [1991] OJ L340/28.

³⁴¹ Case C-355/11 B Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie EU:C:2012:353 reported in the French and Dutch languages. Case commentary by Olivier Dubos (2012) 1 RSDA 142.

³⁴² In accordance with TFEU, art 288, in order to achieve the Directive's objectives.

objectives, as opposed to a restrictive interpretation.³⁴³ To do otherwise, i.e. a contrary solution, would be difficult to reconcile with the sacred principle - the spirit of Article 13 TFEU - under which, in the formulation and implementation of the EU's policy notably in the domain of agriculture, the EU and the Member States take (are taking) fully into account the need for the welfare of animals as sentient beings.³⁴⁴ The CJEU interpreted the calves Directive, according to which the conditions relating to the rearing of calves must comply with the provisions set out in the Annex inclusive of the prohibition on tethering, to be applicable to calves kept confined by a farmer in the context of a dairy farming operation for agricultural purposes.³⁴⁵ This is an interesting case for its interpretive accommodation of animal welfare read in the light of Article 13 TFEU, in application to a Member State's implementation of the rearing of calves Directive with 'full regard' for the welfare of calves in agriculture. It is significant that Article 13 was facilitative of the Court's interpretation which placed weight on the welfare of dairy calves in the absence of species-specific legislation. This case was not concerned with intra-Union trade in animals or their derived products where, in a circular argument, the CJEU is bound by the expressed intentions of the legislature in the policy of agriculture and the common organisation of the market in agricultural produce.

Thereafter, the CJEU's case law demonstrates that its reasoning in *Jippes* is still followed. In *Schaible*,³⁴⁶ for example, the CJEU affirmed the welfare of animals to be a legitimate objective in the public interest.³⁴⁷ The Court was reluctant to see the legislature's powers easily fettered:

In the area of agriculture, the European Union legislature enjoys, *inter alia*, such a broad discretion, corresponding to the political responsibilities given to it by Articles 40 TFEU to 43 TFEU. Consequently, review by the Court is limited to verifying whether that legislature has manifestly exceeded the limits of its discretion. 348

³⁴³ Case C-355/11 Brouwer (n 341) [41,42].

³⁴⁴ '... une solution contraire serait, en outre, difficilement conciliable avec le principe consacré à l'article 13 TFUE, selon lequel, lorsqu'ils formulent et mettent en oeuvre la politique de l'Union, notamment, dans le domaine de l'agriculture, l'Union européenne et les États membres tiennent pleinement compte des exigences du bien-être des animaux en tant qu'être sensibles'. *ibid* [43].

³⁴⁵ *ibid* [48].

³⁴⁶ Case C-101/12, EU:C: 2013 661.

³⁴⁷ *ibid* [35] citing Joined Cases C-37/06 and C-58/06 Viamex Agrar Handel and ZVK [2008] ECR I-69 [22]; Case C-219/07 Nationale Raad van Dierenkwekers en Liefhebbers and Andibel [2008] ECR I-4475 [27].

³⁴⁸ Case C-101/12 Schaible (n 344) [48] citing Case C-221/09 AJD Tuna [2011] ECR I-1655 [80]; Case C-545/11 Agrargenossenschaft Neuzelle [2013] ECR [43].

In later cases the *dicta* of the CJEU assimilate the Amsterdam Protocol with Article 13 TFEU without elaborating upon the concept of sentience.³⁴⁹ In the case of *Masterrind GmbH*, Advocate General Wahl tempers his Opinion in which he adverts to ‘Article 13 TFEU, according to which animals are sentient beings’ by affirming that ‘[w]hether an EU measure takes sufficient account of animal welfare is a matter reviewable in the context of the principle of proportionality’.³⁵⁰ Case law post-dating Article 13 TFEU has continued to reserve a power of review subject to the broad discretionary powers of the legislature in the area of agriculture.

But in the instance that EU legislation expressed a priority for animal welfare, namely in the organic sphere of agriculture, the CJEU pronounced in a landmark ruling concerning Article 13 TFEU. In *Hala*³⁵¹ the CJEU ruled to the effect that a high level of animal welfare which reduces suffering in accordance with scientific knowledge [in other words a full level of protection in the wording of Article 13 TFEU] is prioritised over religious rites for the purposes of labelling to promote the animal welfare quality of the organic produce. The CJEU declared:

Regulation No 834/2007,³⁵² in particular Article 3 and Article 14(1)(b)(viii) thereof, read in the light of Article 13 TFEU, must be interpreted as not authorising the placing of the Organic logo of the EU on products derived from animals which have been slaughtered in accordance with religious rites without first being stunned.³⁵³

The Court relied on the Regulation’s explicit objective of establishing a sustainable management system for agriculture which respects high animal welfare standards and in particular meets animals’ species-specific behavioural needs,³⁵⁴ noting particularly the recital’s objective of ‘maintaining and justifying consumer confidence in products labelled as organic’.³⁵⁵ The CJEU continued:

in that regard, it is important to ensure that consumers are reassured that products bearing the organic logo of the EU have actually been obtained

³⁴⁹ See Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten*, EU:C:2015:259 [35].

³⁵⁰ Citing Case C-189/01 *Jippes and Others* (n 317) [79, 85]. Case C-469/14 *Masterrind GmbH* Opinion delivered on 21 January 2016 [point 29 n 7] EU:C:2016:47.

³⁵¹ Case C-497/17 *Oeuvre d’assistance aux bêtes d’abattoirs (OABA) v Ministre de l’Agriculture et de l’Alimentation* EU:C:2019:137.

³⁵² Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products [2008] OJ L264/1.

³⁵³ ‘where such slaughter is conducted in accordance with the requirements laid down by Regulation No 1099/2009, in particular Article 4(4) thereof’, Case C-497/17 *OABA* (n 351) [52].

³⁵⁴ Regulation (EC) No 834/2007 (n 352) art 3(a)(iv).

³⁵⁵ *ibid*, recital (3).

in observance of the highest standards, in particular in the area of animal welfare.³⁵⁶

A fundamental factor to countenance for the EU and its Member States in a legislative capacity is that, increasingly, a significant number of EU citizens would prefer a higher regard for animal welfare to be practised, which the legislature explicitly recognised in the legislation and which the Court in turn upheld in its ruling.

1.8 Questioning Resort to Science without the Role of Values

This thesis advocates an essential role for citizens' values alongside a firm science base to raise the bar of animal welfare standards in EU agriculture for a value chain in agri-food. A comprehensive floor of science-based animal welfare standards is deemed a necessary pre-requisite for good animal welfare in EU agriculture. Yet, the sole role and effectiveness of science as the determinant of animal welfare norms and tools of assessment is insufficient. There is the need for the supplementary and essential role of social values / perceived moral preferences to effect standards of animal welfare in EU agriculture and the agri-food chain.

Science is needed as a basis for all animal welfare standards since there is a strong correlation between animal health and animal welfare. Indeed, 'disease in farmed livestock ... can be considered as anything that affects an animal's wellbeing and welfare'.³⁵⁷ John McEldowney and others emphasise 'that sound science is intrinsic to a better understanding of risk management'³⁵⁸ and that an animal welfare regulatory system 'must be evidence based'.³⁵⁹ The vital role of science as an evidence base for standards of animal welfare is underscored by McEldowney and others, by the EU and by the OIE. A scientific base for species-specific animal welfare needs is crucial and for the purposes of this thesis science-based resource and management input criteria and animal-based output measures of assessment are indispensable.³⁶⁰

But science-based criteria solely do not capture animal welfare concerns completely. There is a complementary and fundamental role for values³⁶¹ in enhancing standards of animal welfare in EU agriculture and the agri-food chain.

³⁵⁶ Case C-497/17 OABA (n 351) [51].

³⁵⁷ McEldowney and others (n 42) 1.

³⁵⁸ *ibid*, 15, 167.

³⁵⁹ *ibid*, 163.

³⁶⁰ EFSA, The use of animal-based measures to assess the welfare of animals (2012) (n 159) (n 160) 23.

³⁶¹ David Fraser, 'Science, Values and Animal Welfare: Exploring the Inextricable Connection' (1995) 4(2) *Anim Welf* 103.

Croney and Anthony maintain 'that values, not just science, drive animal care, use, and policy decisions.'³⁶² They uphold the conviction that the ultimate decision as to what is the acceptable level of the animal-based threshold resorted to in an instance, for example, cannot be determined by science alone. There is a role also for social values.³⁶³

Three reasons may be illustrated as to why on its own a scientific basis for animal welfare albeit essential is not enough. First, it can be said that the science applied to determine a standard of animal welfare constitutes a 'value judgement', in that there are arguably at least three separate conceptions of animal welfare and it will depend on the subjective view held as to the most appropriate criterion, which will then determine the science upon which the adopted standard is based.³⁶⁴ Drawing upon the work of David Fraser, scientific opinion may differ – it may overlap or diverge - according to which animal welfare criterion is, or criteria are, deemed appropriate based on three concepts of animal welfare. These are: One, basic health and functioning (productivity) free from disease and injury; two, the 'affective' state of the animal and experiences of, for example, fear, hunger, pain, pleasure; and / or three, living a natural life.³⁶⁵ Conflict inevitably ensues. For example, a scientific decision based on being free from injury and supportive of conditions in intensively farmed units would not be synonymous with a scientific assessment of animal welfare based on living a natural life, with more space and natural light. Fraser contends that '[f]or actions to be widely accepted as achieving high animal welfare, in addition to being based on good welfare science, they will need to make a reasonable fit to the major value positions about what constitutes a good life for animals'.³⁶⁶ Second, and closely related, science can determine the best course of action based on the evidence (and potentially that based on a mixture of all three animal welfare conceptions, where that is possible), but a scientific opinion will not be capable of taking a moral stance based on the highest values of animal welfare.³⁶⁷ Third, scientific research may not have kept abreast of welfare needs in respect of which account should be taken pre-standard³⁶⁸ and which a values perspective would inject. This is a

³⁶² C Croney and R Anthony, 'Engaging science in a climate of values: tools for animal scientists tasked with addressing ethical problems' (2010) 88 J Anim Sci (E. Suppl) E75, E75.

³⁶³ *ibid*, E80.

³⁶⁴ David Fraser, 'Understanding Animal Welfare' (2008) 50(Suppl 1) SI Acta Veterinaria Scandinavica 1, 1.

³⁶⁵ *ibid*.

³⁶⁶ *ibid*, 7.

³⁶⁷ Fraser (1995) (n 361) 103.

³⁶⁸ Helena Telkanranta and Anna Valros, 'Could Pigs Have Unidentified Behavioural Needs That Warrant Inclusion in Future Welfare Assessments' in Proceedings of the 7th International International Conference on the Assessment of Animal Welfare at Farm and Group Level (Wageningen Academic Publishers 2017) 220.

view which receives support.³⁶⁹ Citizen / consumer values and perceptions progressively complement and transcend a necessary science base.

1.8.1 Citizen / Consumer Credence

Additional momentum with which to drive standards of animal welfare may be forthcoming in that there is expressed consumer preference for farm animals to experience good welfare on the farm and to be informed of the standards of welfare practised. EU citizens increasingly are interested in animal welfare in the production process as demonstrated in the numerous Eurobarometers undertaken to assess their views.

A European Barometer concerned with citizens' attitudes towards animal welfare in 2007 showed that seventy seven per cent of surveyed EU citizens felt that animal welfare is important and that their respective authorities should do more to improve farm animal welfare in their country.³⁷⁰ A subsequent survey was undertaken to gauge citizens' reactions towards the EU CAP. An overwhelming majority of respondents were found to be supportive of the new objectives for agriculture and rural development in linking the financial support farmers receive with compliance with rules regarding environmental protection, food safety and animal welfare (eighty seven per cent) and encouraging farmers to produce what markets demand (eighty five per cent).³⁷¹ Consumer interest in the welfare standards in which food-producing animals are raised evidently is strong and this is increasing. The findings of a survey conducted for the Commission published in a more recent Special Eurobarometer Report³⁷² established that more than nine in ten EU citizens (ninety four per cent) believe it is important to protect the welfare of farmed animals, with eighty two per cent of Europeans surveyed believing that the welfare of farmed animals should be better protected than it is now. A growing number of EU citizens (sixty four per cent) would like to have more information about the conditions under which farmed animals are treated in their respective countries. The relative majority of European respondents thought the welfare of farmed animals should be handled jointly between businesses and public authorities (forty three per cent), with an additional forty per cent believing that animal welfare is a matter for all citizens, which should be regulated by public authorities.

³⁶⁹ Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée, Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (OUP 2008) 705; Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' (2009) 62(1) *Current Legal Problems* 242.

³⁷⁰ European Commission Special Eurobarometer 270, *Attitudes of EU citizens towards Animal Welfare*, September-October 2006 (March 2007).

³⁷¹ European Commission Special Eurobarometer 336, *Europeans, Agriculture and the Common Agricultural Policy* (March 2010).

³⁷² European Commission, *Special Eurobarometer 442* (2016) (n 7).

Consumer interest in selecting high welfare products is clearly evident from a 2015/16 Eurobarometer in that more than half of the respondents said that they looked for labels identifying such products.³⁷³ According to a Eurobarometer in 2018 the emphasis of both public opinion and public policy has shifted to focus more on food quality and animal welfare.³⁷⁴ More recently Commissioner Andriukaitis indicated that animal welfare was listed as one of the top EU priorities by European citizens in the online consultation on the future of Europe.³⁷⁵

Spencer Henson notes that '[c]onsumers have increasingly focused on a broader array of food ...process attributes when assessing food product quality... encompass[ing] the manner in which products are produced (for example...animal welfare) – which are credence characteristics'.³⁷⁶ The value-added credence attribute of animal welfare matters to the consumer of agricultural produce affected by the quality of life experienced by farm animals. With consumer expressed preference for animal welfare agri-produce evident, the challenge remains as how best to translate consumer credence into animal welfare agri-produce purchasing decisions in the agri-food chain.

1.9 Concluding Comments

The EU in its regulatory strategy in animal welfare has been at the vanguard in the development of EU legislative norms and has played an influential role in the adoption of OIE TAHC recommendations. Together these science-based criteria provide a valuable foundational progression of welfare standards for specific species of animals in agriculture, but due responsibility endures with the EU to provide a comprehensive floor of approximated standards of animal welfare for all farm animals as sentient beings.

Science-based EU and OIE animal welfare standards do not prioritise an animal's welfare needs in contemporary industrial systems of farming and doubts surface as to the extent to which the wellbeing of animals reared for food in intensive conditions is sustained by these public standards of animal welfare. They are not synonymous with animal welfare as a value, a fact which becomes amplified when approximately 'two in every three farm animals (over fifty billion every year) are factory farmed.'³⁷⁷ It is evident that a high level and broad application of welfare in minimum / consensus public standards has been difficult to achieve in a market for animals as products of agriculture.

³⁷³ *ibid.* Broom (2017) (n 5) 39.

³⁷⁴ Special Eurobarometer 473 'Europeans, Agriculture and the CAP' (February 2018) 28.

³⁷⁵ (n 115).

³⁷⁶ Spencer Henson, 'The Role of Public and Private Standards in Regulating International Food Markets' (2008) 4 *J Int Agri Trade Develop* 63, 67.

³⁷⁷ <http://www.ciwf.org.uk/factory-farming/>.

EU citizens' concern for the animal welfare of food-producing animals has been upheld in the jurisprudence of the CJEU in *Halal* where the EU and its Member States acting in a legislative capacity endorsed this societal objective in the express terms of the organic legislation. Further, the '*proviso*' in Article 13 TFEU should, rather than counter-intuitively, be interpreted positively in light of this societal interest and in order to respect the cultural movement on the part of a growing number of EU Member States to raise the bar of animal welfare above the EU minimum norms, which significant point this thesis will reinforce and take forward in chapter three.

Standards of welfare ought positively to contribute beyond the fulfilment of an animal's species-specific needs to enable all species of farm animal further to experience a 'better life' or a 'life worth living'.³⁷⁸ This thesis seeks to engage with the market for value-added agri-produce in which consumer values will be the primordial driver for change.

³⁷⁸ David J Mellor, 'Updating Animal Welfare Thinking: Moving beyond the "Five Freedoms" towards "A Life Worth Living"' (2016) 6(3) *Animals* 21.

Chapter 2 EU Soft Law and Policy Initiatives

‘Legislation is not the only means by which animal welfare can be promoted, and a number of voluntary measures are available, such as quality standards and animal welfare programmes’.¹

2.1 Introduction

The EU has been active in instigating a number of soft law initiatives and policy programmes, which have further advanced the protection and promotion of animal welfare in EU agriculture and the agri-food chain. These can be seen to form a fluid hierarchy comprised of major animal welfare policy documents which may result in adopted legislative acts in time, EU funded projects and EU research reference centres and educative best practice reports. Two EU animal welfare action programmes have been adopted, for example, which can be described as policy documents although they do not derive from a formal legal Title in animal welfare in the Treaties. EU action programmes adopted for the protection of the welfare of animals are bereft of the formal level of obligation which underpins EU environmental action programmes adopted in legally binding decisions derived from a formally conferred Treaty Title.² The European Commission (Commission) has been held to account to the European Court of Auditors (ECA) in matters specific to animal welfare in agriculture and animal welfare concerns currently feature high in public priorities.

A number of key programmes concerned with animal welfare in EU agriculture have been funded or formulated and governance tools contemplated by the EU. These initiatives comprise: the Welfare Quality Project; the first Community Action Plan on the Protection and Welfare of Animals; the second EU Strategy for the Protection and Welfare of Animals and the EU Farm to Fork Strategy for a sustainable agriculture. Three key policy directions hold relevance for this thesis’ aims: First, the concept of benchmarking involving the voluntary tool of standardisation and public / private standards of animal welfare; second, the current momentum towards an EU animal welfare label in order to communicate the animal welfare credentials of agri-food to the credence consumer; and third, the EU trend towards animal-based outcome measures with which to monitor animal welfare. The approach taken engages in an evaluation of the EU funded Welfare Quality Project (2004-2009), followed by a brief look at the first EU Animal Welfare Action Programme (2006-2010). The EU Second Animal Welfare Strategy (2012-2015) will then be considered which is relevant as the vehicle from which a number of educative reports and procedural soft law tools have emanated. Regard will be paid to the establishment of EU Animal Welfare Reference Centres and the EU Animal Welfare Platform in contributing to the

¹ Council of the European Union Conclusions on animal welfare - an integral part of sustainable animal production 14975/19 (Brussels, 16 December 2019) preamble (12).

² TFEU, art 192 (3) Title XX Environment.

EU's policy agenda in animal welfare. This Second Animal Welfare Strategy is also significant in its contemplated recourse to an EU legal framework in which benchmarking will be practised and in which there will be an element of hybridity with private standard schemes. Its impact assessment further indicated a potential EU framework of animal-based outcome measures with which to monitor animal welfare in agriculture. Further, consideration will be given to the ECAs' singular Special Report following its first audit of animal welfare in the exercise of EU agricultural policy. Animal welfare labelling features as a key element of the EU Farm to Fork (F2F) Strategy for a fair, healthy and environmentally-friendly food system³ and in its own right.⁴ Fundamentally, therefore, this chapter's attention will be directed to this key policy currently being driven forward in the EU's (F2F) Strategy (2020-2024), in which animal welfare and an animal welfare label are intrinsic to the EU's stated policy priorities. This resonates positively compared with the EU response to a proposed animal welfare label in 2009. This section will trace the route towards an EU animal welfare label and offer an analysis of the perceived barriers, noting signs of positive prospects in line with this thesis' aims. The route towards an EU animal welfare label receives consideration in the joint initiative of EU Member States, which will be followed by a discussion of the prioritisation of an EU animal welfare label under the German Presidency of the Council of the EU and the approval of the Council conclusions to be taken further forward in EU policy. This newly-driven momentum in animal welfare is evident in the EU Fitness Check of existing EU farm animal welfare legislative standards and the mandates directed to the European Food Safety Authority (EFSA) under the auspices of the F2F Strategy, both of which will be discussed in turn.

2.2 Welfare Quality

The Welfare Quality programme was an EU funded research project entitled 'Integration of animal welfare in the food quality chain: from public concern to improved welfare and transparent quality,' the consumer relevance of which is integral to this thesis' aims.⁵ European citizens were found to regard the welfare status of animals as an important aspect of overall food quality but remained unclear as to the assurances of actual farm animal welfare quality. Welfare Quality worked from the premise that the increasing consumer demand for both quality food products and ethical food production has led to the emergence of farm animal welfare as a component of 'potential added value' for producers,

³ European Commission COM(2020) 381 final, 20 May 2020 https://ec.europa.eu/food/sites/food/files/safety/docs/f2f_action-plan_2020_strategy-info_en.pdf.

⁴ Agriculture Council approved(15-16 December 2020): Council of the European Union Conclusions on an EU-wide animal welfare label 13691/20 (Brussels, 7 December 2020).

⁵ A five year (2004-2009) co-funded EU research programme within the 6th Framework Programme. Harry [Blokhuys](#) and others (eds), *Improving farm animal welfare Science and society working together: the Welfare Quality approach* (Wageningen Academic Press 2013). European Commission CORDIS <https://cordis.europa.eu/article/id/31359-eu-project-sets-new-standards-in-animal-welfare>.

retailers and other actors in the food chain.⁶ Extensive consultations were undertaken with consumers, industry, farmers, legislators and scientists to assess the extent to which new welfare strategies might be achievable in practice, as a result of which Welfare Quality developed transparent and credible indicators of assessment of farm animal welfare. Four essential principles were established to safeguard and improve animal welfare, namely: good housing; good feeding; good health; and appropriate behaviour. Within these four principles, Welfare Quality defined twelve clear criteria which underpin the species-specific welfare assessment systems developed:

Animals should not suffer from prolonged hunger, i.e. they should have a sufficient and appropriate diet.

Animals should not suffer from prolonged thirst, i.e. they should have a sufficient and accessible water supply.

Animals should have comfort around resting.

Animals should have thermal comfort, i.e. they should neither be too hot nor too cold.

Animals should have enough space to be able to move around freely.

Animals should be free of physical injuries.

Animals should be free of disease, i.e. farmers should maintain high standards of hygiene and care.

Animals should not suffer pain induced by inappropriate management, handling, slaughter, or surgical procedures (e.g. castration, dehorning).

Animals should be able to express normal, non-harmful, social behaviours, e.g. grooming.

Animals should be able to express other normal behaviours, i.e. it should be possible to express species-specific natural behaviours such as foraging.

Animals should be handled well in all situations, i.e. handlers should promote good human-animal relationships.

Negative emotions such as fear, distress, frustration or apathy should be avoided whereas positive emotions such as security or contentment should be promoted.⁷

The practical assessment systems developed measure each of these criteria in seven livestock species notably, dairy cattle, beef cattle, veal calves, sows,

⁶ Welfare® Quality, Marketing Farm Animal Welfare

http://www.welfarequalitynetwork.net/media/1041/fact_sheet_marketing_farm_animal_welfare_final.pdf.

⁷ Welfare® Quality Science and society improving animal welfare, Principles and Criteria of Good Animal Welfare
http://www.welfarequalitynetwork.net/media/1084/wq_factsheet_10_07_eng2.pdf.

fattening pigs, laying hens and broilers.⁸ The assessment scheme places emphasis on animal-based measures taken on animals, for example bodily condition, injuries, fear, in its assessment of the degree of fulfilment of those twelve welfare criteria. It is to that degree independent of the rearing systems. Additionally, relevant resource-based (e.g. space, temperature) and management-based (e.g. handling, record-keeping) measures are also included.⁹ Welfare Quality broke the twelve welfare criteria down into between thirty and fifty measurements for the seven livestock species.

Three steps are to be taken to reach the overall score per farm. In the first step, measurements collected on-farm are transformed into scores on a value scale (0 = worst; 100 = best) to reflect the compliance of a given farm with each of the twelve welfare criteria. Poor welfare, for example lameness for a small number of a given species on a weighted scale, can bring down the overall score even when there are instances of best practice with an absence of body injury for a greater number of animals. Second, each of the measured scores are fitted into the most relevant of the four essential principles of good housing, good feeding, good health and appropriate behaviour, i.e. there is a level of aggregation. The third stage is the classification stage based upon the overall scores attained per four essential principles, which places each farm into one of four categories of welfare entitled excellent, enhanced, acceptable (i.e. minimum) or not classified.¹⁰ Welfare Quality deemed it important for the final classification to reflect what can realistically and practically be achieved:

Therefore, a farm is considered 'excellent' if it scores more than 55 on all principles and more than 80 on two of them while it is considered 'enhanced' if it scores more than 20 on all principles and more than 55 on two of them. Farms with 'acceptable' levels of animal welfare score more than 10 on all principles and more than 20 on three of them. Farms that do not reach these minimum standards are not classified'.¹¹

Collectively, such measures are perceived helpful to assess the welfare status of farm animals, to identify causes of poor welfare¹² and to farmers to identify aspects of welfare requiring their attention. The categorisation of farms could enable a range of possible uses: farms certified as 'enhanced' could qualify for a

⁸ Welfare® Quality, Towards a Welfare Quality Assessment System http://www.welfarequalitynetwork.net/media/1043/fact_sheet_towards_a_welfare_quality_assessment_system_-_english.pdf.

⁹ Welfare® Quality, Principles and Criteria of Good Animal Welfare (n 7).

¹⁰ Welfare® Quality, The Overall On-farm Animal Welfare Score http://www.welfarequalitynetwork.net/media/1067/wq_overall_scoring_english.pdf.

¹¹ *ibid.*

¹² Welfare® Quality, Principles and Criteria of Good Animal Welfare (n 7).

general quality label; 'excellent' would classify products intended for a higher quality market.¹³

The Commission endorsed Welfare Quality's recommendations and stressed that the information obtained from the assessment would be used to assess current levels of animal welfare throughout the EU as well as providing useful information for EU citizens on the provenance of the meat products they buy and the welfare of the animals.¹⁴ Formal EU adoption of the assessment standards would result in newly recognised EU animal-based outcome measures of welfare for beef and dairy cattle. The EFSA commented, however, that the Welfare Quality project differed from EFSA opinions in that Welfare Quality did not aim to identify factors resulting in good or poor welfare. Rather, Welfare Quality focused primarily on animal-based measures capable of monitoring and use during a single short farm visit by an independent inspector to assess current levels of welfare, i.e. as measures of welfare outcome at a particular point in time, translatable into one of four informed categories or labels.¹⁵

2.3 Community Action Plan on the Protection and Welfare of Animals 2006-2010

The first EU Animal Welfare Action Plan¹⁶ sought to ensure a more consistent and coordinated approach to animal protection and welfare across EU policies acting in line with scientific evidence taking account of the socio-economic impact of any new measure. Societal and economic aspects of animal welfare initiatives were factors to be considered with the science base for animal welfare standards. The introduction of animal welfare indicators, known as animal-based outcome measures, was foreseen as a communication tool and one in accordance with which animal welfare standards could be raised. Ensuring improved husbandry with knowledgeable and informed animal handlers was a key area for action, as was working with retailers and producers towards improved consumer trust and awareness of farming practices by having more information on which to base purchasing decisions. EU continued support for international initiatives was indicated to raise awareness and create a greater consensus on animal welfare.¹⁷

In its evaluation of this action plan, the EP called on the Commission and the Member States to identify cases of non-compliance and to ensure greater

¹³ Welfare® Quality, The Overall On-farm Animal Welfare Score (10).

¹⁴ European Commission CORDIS (n 5).

¹⁵ EFSA, *The use of animal-based measures to assess the welfare of animals* (EFSA J (2012)10(6) 2767), 7.

¹⁶ European Commission Communication, *Community Action Plan on the Protection and Welfare of Animals 2006-2010*, COM (2006)13, 23 January 2006.

¹⁷ *ibid*, 3, 4.

compliance with the Directive laying down minimum standards for the protection of pigs.¹⁸ It expressed regret at the lack of a clear communication strategy on the value of products complying with EU animal welfare standards and urged the Commission to introduce measures to tackle the loss of competitiveness of EU producers and livestock farmers faced with the costs of animal welfare measures.¹⁹

2.4 EU Strategy for the Protection and Welfare of Animals 2012-2015

The theme of 'shared responsibility' permeates the second EU Strategy for the Protection and Welfare of Animals for the period 2012-2015.²⁰ In this Strategy the Commission adopted a twofold approach based first on the possibility of a revised simplified single legislative framework in which science-based animal welfare outcome indicators would be introduced. The Commission deemed there to be the need for simplicity with clearer animal welfare principles and improved competence requirements generally for handlers of animals.²¹ Second, the Commission proposed to reinforce EU action in animal welfare in four strategic areas. First, tools would be developed to strengthen compliance. The Commission acknowledged that 'animal welfare conditions in the EU fall short of a level playing field which is required to sustain the enormous economic activity that drives the treatment of animals in the EU' and recognised that 'cultural appreciation of animal welfare plays a fundamental role in respect for the spirit and letter of the legislation'.²² Second, emphasis was placed on support for international cooperation in animal welfare.²³ Third, the Commission proposed action to inform the consumer.²⁴ A fourth focus contemplated optimising effects for animal welfare under the EU CAP.

2.4.1 Soft Law Tools

As indicated, the Second Animal Welfare Strategy foresaw the introduction of a number of studies, reports and procedural tools with which to bring about compliance with EU animal welfare norms. The Commission has published a report on a series of study visits carried out in order to share good practice on

¹⁸ European Parliament Resolution on evaluation and assessment of the Animal Welfare Action Plan 2006-2010, 2009/2202(INI) (5 May 2010) para 12.

¹⁹ *ibid*, para 17.

²⁰ European Commission, Strategy for the Protection and Welfare of Animals 2012-2015 (COM (2012)6/2, 15 February 2012).

²¹ *ibid*, 5, 7, 8.

²² *ibid*, 4, 5.

²³ *ibid*, 6, 10.

²⁴ *ibid*.

rearing pigs with intact tails²⁵ and established a Platform on Animal Welfare with an initial mandate to 31 December 2019,²⁶ extended to 30 June 2021.²⁷ The Platform's task is to assist the Commission with the development and exchange of coordinated actions to contribute to the implementation and application of EU animal welfare legislation and the understanding within and outside the Union of this legislation as well as international standards on animal welfare. A further task is to facilitate the development and use of voluntary commitments on animal welfare improvement by businesses.²⁸ A pig sub-group of the Platform on Animal Welfare was established to advise how Member States could better assess and manage tail-biting to avoid routine tail-docking. It has concluded that more work needs to be done to develop practical and validated compliance criteria and guidelines for EU legal requirements and recommended that the EU reference centre for pig welfare²⁹ dedicate resources to health, diet and space and resource competition.³⁰ The Commission has designated a second reference centre with responsibility for the welfare of poultry and other small farmed animals.³¹ Their tasks, in accordance with Articles 95 and 96 of the Official Controls Regulation,³² are to provide the competent authorities and the Commission with scientific and technical expertise in the development of animal welfare indicators and good practices needed to facilitate the correct application of legislation and verification of compliance.³³

2.5 Benchmarking

The EU envisaged a legal framework empowering the benchmarking of private certification schemes' standards with species-specific animal welfare claims which would consist of a system voluntarily to benchmark, register at EU level

²⁵ European Commission (DG SANTE 2016-8987).

²⁶ Commission Decision of 24 January 2017 establishing the Commission Expert Group 'Platform on Animal Welfare' [2017] OJ C31/61.

²⁷ Commission Decision of 29 November 2019 amending Decision 2017/C 31/12 establishing the Commission Expert Group 'Platform on Animal Welfare' [2019] OJ L405/5.

²⁸ *ibid*, art 2(a)(b).

²⁹ Commission Implementing Regulation 2018/329 of 5 March 2018 [2018] OJ L63/13.

³⁰ European Commission Animal Welfare Platform Pig Sub-Group, 'Indicators for tail biting risks relating to compliance criteria on health, dietary factors and space and competition' Draft Report (DOC/12476/2019).

³¹ Commission Implementing Regulation (EU) 2019/1685 of 4 October 2019 [2019] OJ L258/11.

³² Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [2017] OJ L95/1.

³³ Council of the European Union (14975/19) (n 1) preamble 7.

and publish such certification schemes.³⁴ In this strategy, EU registered schemes could possibly be business-to-business farm assurance schemes (between farmers and retailers) and / or operate in the context of animal welfare assurances directly communicated to consumers (with specific animal welfare logos or as general brands with animal welfare claims).³⁵ Instead of the EU adopting higher standards in command and control legislation, EU animal welfare criteria could be specified as a benchmark in an anticipated EU Regulation as target standards, to which the agri-food sector would both align and market their private standards within a transparent process. The validation of the EU benchmark and the registration process would be performed by the Commission with the opinion of a multi-stakeholders committee (farmers, food processors, retailers, food services, certification scheme owners, scientists and animal welfare organisations).³⁶ EU registered schemes would be allowed to have decreased official controls if they provided sufficient guarantees that their respective scheme goes beyond EU standards and presents a higher level of compliance with EU legislative norms. Sectors not covered by species-specific EU legislation, for example dairy cattle farmers, would also be able to use this EU scheme. The Commission considered that the establishment of such a voluntary EU benchmarking structure for EU registered private schemes potentially would increase market opportunity and price premiums for EU producers who engaged with higher animal welfare standards, as well as efficiency gains in utilising one EU benchmark.³⁷

Benchmarking is a mode of governance,³⁸ a definition of which would include the concepts of 'learning, information sharing, and the adoption of best practices to improve performance.'³⁹ The growth of private farm assurance and certification schemes, their role in determining standards of animal welfare in the agri-food chain and the potential scope for an EU role in the governance of the process of benchmarking are considered elements of this thesis.

2.6 Simplified EU Legislative Framework of Animal-Based Outcome Measures?

The EU Animal Welfare Strategy (2012-2015) anticipated a legislative proposal which would streamline / integrate the requirements for competence on the part of those handling farm animals into a single common text, within which the

³⁴ European Commission Staff Working Paper, Second Animal Welfare Strategy for the period 2012-2015 'Impact Assessment' (SEC (2012)55, 19 January 2012) 34, 41, Annex 5C, 107-8.

³⁵ (SEC (2012)55 *ibid*, Annex 5C, 107-8.

³⁶ *ibid*, 34.

³⁷ *ibid*, 32, 34, 41-2, Annex 5C, 107-8.

³⁸ Lisa Jack, *Benchmarking in Food and Farming*, (Gower 2009).

³⁹ Lisa Jack and Julie Boone 'Sustainable Change and Benchmarking in the Food Supply Chain' in Jack *ibid* 1, 6.

'possibility of using animal welfare indicators will be introduced as an alternative to compliance with functional requirements of existing legislation.'⁴⁰ The implication was that the horizontal farm Directive⁴¹ would be replaced with a general law introducing similar principles but with the additional possibility for operators to comply through the use of validated animal-based welfare indicators,⁴² known as animal-based outcome measures. The Commission endorsed the success of the Welfare Quality Project in developing an approach for assessing and measuring farm animal welfare through animal-based measures⁴³ and envisaged that the integration of animal welfare indicators could open the way for a more flexible system of standards in relation to the management of farm animals. An example was given of the EU legislative definition of the maximum width of openings for concrete slatted floors for pigs as well as the minimum slat, the purpose of which is the avoidance of animals becoming trapped and suffering injury, whereby the considered general law could introduce the possibility of compliance through the regular monitoring of scientifically validated animal-based requirements, for example the number of foot lesions. The methodology would be based on the twelve criteria developed by the Welfare Quality project.⁴⁴ An extended option would investigate the relevance of broadening the scope of this initiative in application to other animals where welfare problems have been identified, for example dairy and beef cattle where EU standards do not exist. The EFSA at the invitation of the EU produced a series of scientific opinions on the use of animal-based measures to assess the welfare of farm animals, namely dairy cattle,⁴⁵ pigs,⁴⁶ and poultry (broilers).⁴⁷

The Commission anticipated a more flexible legal framework which may decrease compliance costs, with a shift from a prescriptive approach to one which foresees the use of animal-based outcome measures for compliance.⁴⁸ Animal welfare organisations have expressed reservations over potential divergencies in

⁴⁰ Option 4, SEC (2012)55 (n 34) 36, para 4.4.

⁴¹ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes [1998] OJ L221/23.

⁴² SEC (2012)55 (n 34) 114, Annex 5F.

⁴³ *ibid*, 30, 47, 115.

⁴⁴ *ibid*, 115. Welfare® Quality, Principles and Criteria of Good Animal Welfare (n 7).

⁴⁵ EFSA, The use of animal-based measures to assess welfare of dairy cows (EFSA Journal (2012)10(1) 2554).

⁴⁶ EFSA, Scientific Opinion on the use of animal-based measures to assess welfare in pigs (EFSA Journal (2012)10(1) 2512).

⁴⁷ EFSA, Scientific Opinion on the use of animal-based measures to assess welfare of broilers (EFSA Journal (2012)10(7) 2774). European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2007/43/EC and its influence on the welfare of chickens kept for meat production, as well as the development of welfare indicators (COM(2018) 181 final, Brussels, 13 April 2018). European Commission, Study on the application of the Broilers Directive (Directive 2007/43/EC and Development of Welfare Indicators Final Report (February 2017).

⁴⁸ SEC (2012) 55 (n 34) 51.

interpretation and difficulties for inspections to demonstrate non-compliance to which resort to animal-based outcome measures could give rise, as compared with a prescriptive approach.⁴⁹ An impact evaluation undertaken of the legislative status quo implied there would be no change to the diets of calves, to feed restriction and hunger associated with genetic selection of chickens, to castration without anaesthesia of piglets, to a lack of manipulable materials for pigs and to their routine tail-docking / teeth-clipping.⁵⁰ These welfare problems would remain in the event that the current species-specific legislative norms are not updated to require reinforced resource inputs. There are questions concerning compliance and whether compliance monitored in accordance with animal-based outcome measures will take priority over the current species-specific norms' requirements and whether these latter will be retained.

2.7 The European Court of Auditors' Special Report and Recommendations

One of the strategic goals of the ECA is to examine performance in areas where EU action matters to citizens. The aim of the audit carried out by the ECA, the first specific to animal welfare, was to assess the actions taken by the Commission and the Member States to improve the welfare of farmed animals following the launch of the EU Strategy for Animal Welfare (2012-2015) ⁵¹. The ECA focused on two key objectives identified in that Strategy: to improve compliance with animal welfare legislation; and to optimise synergies with the CAP through cross-compliance and rural development objectives.⁵² In examining whether the EU Strategy had been completed and had delivered its results,⁵³ the ECA observed, *inter alia*, that the Commission had not reviewed the legislative framework.⁵⁴ The ECA noted that the Commission reports undertaken as part of its stated objectives had identified some outstanding animal welfare issues related to the areas covered by the Strategy, notably on the farm: tail-docking of pigs;⁵⁵ diseases affecting the welfare of dairy cattle;⁵⁶ and assessment of technical requirements such as ventilation for chickens kept for

⁴⁹ *ibid*, 53, 55.

⁵⁰ *ibid*, 97, 96.

⁵¹ ECA, Special Report No 31/2018 'Animal Welfare in the EU: closing the gap between ambitious goals and practical implementation' (Luxembourg, 2018).

⁵² *ibid*, para 20. This latter objective will be discussed in the context of the CAP in chapter three.

⁵³ *ibid*, para 22. See P8 TA(2015)0417 European Parliament resolution of 26 November 2015 on a new animal welfare strategy for 2016-2020 (2015/2957(RSP)).

⁵⁴ European Court of Auditors (2018) (n 51) para 28.

⁵⁵ European Commission (DG SANTE, 2016-8987) (n 25).

⁵⁶ European Commission overview report 'Welfare of cattle on dairy farms' (DG SANTE, 2017-6241).

meat production.⁵⁷ The ECA strongly recommended that the Commission conduct an evaluation of its 2012-2015 Strategy to identify to what extent its objectives have been achieved and if the guidance it has issued is being applied, also that it reflect on how to address the conclusions of that evaluation (for example, through a new strategy or action plan and / or a review of animal welfare legislation) and to publish the results of its assessment. Target dates were established, in 2020 and 2021, respectively.⁵⁸ The Commission has embarked upon an evaluation of its Animal Welfare Strategy, which will assess the extent to which the Strategy has delivered its objectives and whether they are relevant and consistent today.⁵⁹ The external study has been concluded and publication of the Commission Staff Working Document is scheduled for 2021.⁶⁰

2.8 Animal Welfare Label

There has not been until most recently an operative direction for an EU animal welfare label with which to inform consumers of the animal welfare attributes of EU agricultural produce. The Commission stated in 2009:

Improved information to consumers offers the prospect of a virtuous cycle where consumers create a demand for food products sourced in a more animal welfare friendly manner which is transmitted through the supply chain back to the primary producer, who may be able to receive a premium price for their product and thus recoup a portion of any associated higher production costs.⁶¹

The overall goal of policy in this area is to make it easier for consumers to identify and choose welfare-friendly products and thereby give an economic incentive to producers to improve the welfare of animals.⁶² Considered options for improving the communication to consumers of animal welfare related to livestock products were:

⁵⁷ European Commission COM(2018) 181 final (n 47). European Court of Auditors (2018) (n 51) para 35.

⁵⁸ European Court of Auditors (2018) (n 51) Recommendations 1(a) (c).

⁵⁹ https://ec.europa.eu/food/animals/welfare/strategy/evaluation_strategy_en.

⁶⁰ Andrea Gavinelli, Head of Unit 'Animal Welfare, Antimicrobial resistance' https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20201103_pres-02.pdf.

⁶¹ European Commission Report *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, 2.

⁶² *ibid*, 3. Food Chain Evaluation Consortium, Feasibility Study on Animal Welfare Labelling (2009) viii (copy on file)

Mandatory labelling of the welfare standards under which products of animal origin are produced;

Mandatory labelling of the farming system under which products of animal origin are produced;

Mandatory labelling of compliance with EU minimum standards or equivalents;

Establishment of requirements for voluntary use of animal welfare claims;

Establishment of a voluntary EU animal welfare label open for all to use if they meet the criteria;

Drafting of guidelines for animal welfare labelling and quality schemes.⁶³

The options which were considered the most feasible were harmonised requirements for voluntary animal welfare claims and / or an EU animal welfare label.⁶⁴

Council conclusions documented Ministers' agreement that information about animal welfare in livestock production could enable consumers to make informed purchasing decisions and help EU farmers to obtain the desired recompense for their efforts. At the same time, Ministers made it clear that any welfare information system would have to be simple and easy to understand as well as in line with the rules of the WTO and highlighted the need to avoid an increase in production costs as well as administrative and control burdens. Many Ministers argued in favour of a label to recognise animal welfare levels going beyond EU minimum norms, several of whom insisted that a label should not result in a downgrading of food produced in accordance with legal minimum requirements nor lead to confusion with existing organic standards. Most Ministers expressed a strong preference for a voluntary animal welfare labelling scheme as opposed to one being compulsory.⁶⁵ A majority of Ministers agreed that more research was needed to obtain scientifically sound and reliable indicators enabling labelling to allow consumers to distinguish between different animal welfare levels. They supported the creation of the European Network of Reference Centres which could facilitate sharing of information and provide technical support for the development and implementation of such indicators.⁶⁶

⁶³ Commission Staff Working Document – Impact Assessment Report accompanying COM (2009) 584, 20 October 2009 (SEC(2009)1432/1).

⁶⁴ Commission Staff Working Document Summary of the Impact Assessment Report accompanying COM (2009) 584, 28 October 2009 (SEC(2009) 1433).

⁶⁵ 2995th Agriculture and Fisheries Council (Brussels, 22 February 2010) 6678/10 (Presse 34) 7.

⁶⁶ *ibid*, 8.

There were several reasons expressed as to why a compulsory system of labelling in relation to animal welfare was not taken forward by the EU. 67 According to the Commission, consumer studies⁶⁸ have shown that although concerns for animal welfare are manifest consumers are unlikely to change their buying behaviour should products display an additional EU animal welfare logo, implying that consumers instead would be more likely to retain trust in, and therefore reliance on, brand named or organic products. The Commission contended that production methods alone do not necessarily provide better welfare conditions to the animals, moving away from the focus on production processes and by analogy labels to that effect. The impetus leaned towards 'aspects of welfare related to the management of the animals rather than the design of the production process'.⁶⁹ To this it was added that to establish a mandatory system for labelling pig and poultry produce would require amending legislation to establish categories of production methods.⁷⁰ Additionally, labelling related to production processes would increase production costs for producers, food processors and retailers, directly. Some reluctance was expressed to the adoption of a compulsory EU label by stakeholders in established animal welfare standard schemes who have developed their own animal welfare standards and invested in promoting their logos or brands, fearing that an EU labelling system would affect their market.⁷¹

Welfare Quality's research infers that food producers and suppliers would welcome increased recognition of animal welfare as a component of product differentiation but would not support an animal welfare label, for the reason that: 'Across Europe, clear differences emerge with French and Italians often favouring gastronomic qualities while the northern countries more often link welfare with environmental concerns'.⁷² Welfare Quality claimed that its assessment would offer a flexible tool clearly underpinned by animal-based measures complementary of the market's diverse welfare commitments.⁷³ It may be noted that this research is dated and that Welfare Quality's flexible accommodation of geographical preferences for agri-food is an approach which accommodates gastronomic / regional culture reasons, and may work against the welfare of food-producing animals.

⁶⁷ SEC (2012)55 (n 34) 21, Annex 5D, 109.

⁶⁸ 'Are labels the answer? Barriers to buying higher animal welfare products. A report for Defra' (September 2010), *ibid.*

⁶⁹ SEC (2012)55 (n 34) Annex 5D, 109.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² Welfare Quality, 'Marketing Farm Animal Welfare' (n 6).

⁷³ *ibid.*

2.8.1 Are the Perceived Barriers to Effective Labelling Surmountable?

An EU animal welfare label ought effectively to translate consumer demand into increased purchasing power for animal welfare value-added produce, such that consumers would trust this animal welfare label.⁷⁴ Consumer stated willingness-to-pay for enhanced animal welfare produce does not always manifest in practised attitudes.⁷⁵ John McInerney asserts, however, that in a functional market for products with enhanced animal welfare certain methodologies could underestimate the economic value of the welfare characteristics. It is only the willingness-to-pay of those who actually buy the product which is captured in this manner and there remains an element of 'unrevealed' willingness-to-pay which is not measured and 'which is still an integral component of the valuation society places on the welfare standards'.⁷⁶ There are other citizens who value the welfare of animals, such as non-consumers and low-income people. Added to this, McInerney contends that 'there is a strong argument for not treating animal welfare as a 'private good', a benefit which can be made available and paid for to the extent that people want it according to their personal preferences'.⁷⁷ Harper and Henson advocate '[t]he cost of improved animal welfare may need to be viewed as the cost for a public good which, although paid for by the taxpayer, is subsumed under general agricultural financial support rather than differentiated product prices'.⁷⁸ This factor together with dedicated animal welfare payments under Pillar II are stated aims of this thesis to be taken forward in chapter three. McInerney further cautions that willingness-to-pay survey-based techniques can be premised upon assumptions that preferences are fully formed⁷⁹ and concerns arise as to the level of awareness or knowledge of on-farm livestock production processes informing the valuation and declared preference.⁸⁰

⁷⁴ Emma Tonkin and others, 'The process of making trust related judgements through interaction with food labelling' (2016) 63 Food Pol 1.

⁷⁵ Beth Clark and others, 'Citizens, consumers and farm animal welfare: A meta-analysis of willingness-to-pay studies' (2017) 68 Food Pol 112; Marta E Alonso and others, 'Consumer Concerns and Perceptions of Farm Animal Welfare' (2020) 10 Animals 385, 388-390. Although Ellen Van Loo and others demonstrate consumer willingness-to-pay more for a free-range / animal welfare label on chicken, 'Consumers' valuation of sustainability labels on meat' (2014) 49(1) Food Pol 137.

⁷⁶ John McInerney, 'Animal Welfare, Economics and Policy' Report on a study undertaken for the Farm and Animal Health Economics Division of Defra (London, 2004) 35, 39.

⁷⁷ Ibid.

⁷⁸ Gemma Harper and Spencer Henson, 'Consumer Concerns about Animal Welfare and the Impact on Food Choice' EU FAIR CT98-3678, Centre for Food Economics Research, The University of Reading (2001) 10.

⁷⁹ Filep Vanhonacker and Wim Verbeke, 'Public and Consumer Policies for Higher Welfare Food Products: Challenges and Opportunities' (2014) 27 J Agr Environ Ethics 153, 164.

⁸⁰ McInerney (n 76) Exec summary, paras 15, 16; Report 40, 41.

Lacunae do exist in the levels of information available to the credence agri-food consumer of farm animal's needs per species and, from a positive perspective, the associated conditions in which animals are raised. A gap exists in the instrument of a functional animal welfare label for value-added agri-produce. There is a discerning consumer who will be active in consulting produce labels to assuage his / her interest in order to determine the decision taken whether or not to purchase agri-produce, based upon knowledge of welfare experienced on the farm. Leading agri-food retailers trusted for their animal welfare enhanced produce, for example Waitrose and Marks and Spencer, demonstrate that animal welfare-enhanced agri-food is competitive. Some people do act according to their expressed preferences and attitudes⁸¹ in trusting those quality assurance systems whereby farm animal welfare is 'mobilised and included in their brand'.⁸² There will be consumers who do not hold the knowledge with which to make an informed decision until this is given to them⁸³ in a manner with which they will choose to relate. There are ambivalent outlooks, such that 'the market may fail to produce adequate information', and / or the consumer may 'lack the expertise required to render technical data useful'.⁸⁴ This thesis rejects the perspective that 'individuals are not necessarily competent to undertake informed choices', in favour of the opinion that the circumspect consumer 'should be placed in a position to exercise informed choice', ⁸⁵ and associates with the positive view that 'the public response is not in fact characterised by ... passivity'.⁸⁶ As Gemma Harper and Spencer Henson maintain '[a]s more consumers become more informed about animal production, demand for more extensively produced food may increase, subject to affordable prices and comprehensive labelling',⁸⁷ albeit not to be subjected to information overload especially at the point of purchase on the label - preferably a logo.⁸⁸ Disassociation presents the most difficulties because of consumers' unwillingness to acknowledge welfare problems; information which shocks would not be constructive and labels such as 'free-range' should have legislative meaning.⁸⁹ This is reason for the EU to

⁸¹ Broom DM, 'Animal Welfare in the European Union' European Parliament Policy Group C, PE 583.114. (2017) 39.

⁸² Mara Miele, 'Report concerning consumer perceptions and attitudes towards farm animal welfare', European Animal Welfare Platform 'Progressing animal welfare through the food chain' (2010) 9

⁸³ *ibid*, 2. Vanhonacker and Verbeke (n 79) 165.

⁸⁴ Robert Baldwin, Martin Cave, Martin Lodge, *Understanding Regulation* (2nd edn, OUP 2012) 18.

⁸⁵ *ibid*, 352-3.

⁸⁶ Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' (2009) 62(1) CLP 242, 245.

⁸⁷ Harper and Henson (n 78) 6.

⁸⁸ *ibid*, 5, 6, 10, 29, 30. Vanhonacker and Verbeke (n 79) 166.

⁸⁹ Harper and Henson (n 78) 29. 'Reserved terms' play a role in the EU legislation adopted to market eggs, in which there are four permitted production system labels in respect of organic eggs, free-range eggs, barn eggs and eggs from caged hens, and which sets out the requirements for each system. Commission Regulation (EC) No 589/2008 of 23 June 2008 laying down detailed rules for implementing Council

reconsider its expressed disinclination to re-legislate to address different production methods for pigs and poultry. 'Indoor-reared', 'outdoor-bred' and 'outdoor-reared' are concepts which currently receive no mandatory enunciation in EU law.⁹⁰

Regarding the EU concern to be WTO-compliant were an EU animal welfare label to be adopted, reason to claim compatibility with the WTO Agreement on Technical Barriers to Trade (TBT Agreement)⁹¹ can be taken from the Appellate Body decision in *US – Tuna II*.⁹² This dispute concerned a technical regulation which laid down the mandatory criteria with which voluntary labels indicating 'dolphin-safe' tuna were required to comply. The TBT Agreement defines a technical regulation as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.⁹³

Following the decision of the Appellate Body in *US-Tuna II*, it is possible that a technical regulation which 'sets out conditions for the use of the label'⁹⁴ could be permitted, in the absence of discrimination⁹⁵ in accordance with Article 2.1 of the TBT Agreement.⁹⁶ Joseph McMahon maintains that this decision, that of the

Regulation (EC) No 1234/2007 as regards marketing standards for eggs [2008] OJ L163/6, as amended by Commission Delegated Regulation (EU) 2017/2168 of 20 September 2017 [2017] OJ L306/6, Annex II.

⁹⁰ Marketing standards exist in respect of poultry, in respect of which *optional* terms for defined farming methods may be used on a voluntary basis so long as there is compliance with the specifications. Commission Regulation (EC) No 543/2008 of 16 June 2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultry meat [2008] OJ L157/46, art 11 (a) 'Fed with ... % ...'; (b) 'Extensive indoor' ('Barn-reared'); (c) 'Free range'; (d) 'Traditional free range'; (e) 'Free range — total freedom', conforming with Annex V. (COM (2009) 584 (n) 9.

⁹¹ WTO, Technical Barriers to Trade Agreement, 1868 UNTS (1994) 120.

⁹² Appellate Body Report *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)* WT/DS381/AB/R, 13 June 2012.

⁹³ TBT Agreement (n 91) Annex 1.1.

⁹⁴ WTO *US - Tuna II* Appellate Body Report (n 92) [195].

⁹⁵ *ibid.* Gabrielle Marceau, 'The New WTO TBT jurisprudence in US-Clove Cigarettes, WTO US-Tuna II, and US-COOL (2013) 8(1) Asian J WTO Int Heal 1, 5,6.

⁹⁶ (n 91). See the further discussion at (n 123) to (n 127) in chapter 4 of this thesis.

Appellate Body in *US – Clove Cigarettes*⁹⁷ and subsequent decisions⁹⁸ ‘suggest that Members may regulate labelling requirements relating to a product’s process and production methods so long as any resulting discrimination (both *de facto* and *de jure*) is justified on the basis of a legitimate regulatory objective’.⁹⁹

Should the EU label be a voluntary label, then it would be classified as a standard for the purposes of the application of the TBT Agreement in which a standard is defined as a:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹⁰⁰

In this instance the applicability of the TBT Agreement to a voluntary label would deserve further analysis as to whether, acting in accordance with Article 4.1 of the TBT Agreement, the EU has fulfilled its obligation to ensure compliance with the Code of Good Practice for the Preparation, Adoption and Application of Standards laid down in Annex 3 to the Agreement.¹⁰¹ To this Ming Du adds that the EU should also accord third countries ‘certain procedural rights’, which ‘would not unreasonably constrain the EU’s legitimate regulatory objective’.¹⁰² These would include the need for third-country process and production methods and any unique circumstances to be adequately and fairly considered in the process of awarding the animal welfare label.¹⁰³

⁹⁷ WT/DS406/AB/R [182].

⁹⁸ *US – COOL (Article 21.5 – Canada and Mexico)* WT/DS384/AB/RW and WT/DS386/AB/RW; *US – Tuna II (Mexico) (Article 21.5 – Mexico)* WT/DS381/AB/RW; *Australia – Tobacco Plain Packaging (Cuba)* WT/DS458/R and *Australia – Tobacco Plain Packaging (Indonesia)* WT/DS467/R.

⁹⁹ In accordance with art 2.2. (n 91). Ryland D and McMahon JA, ‘Promoting Better Animal Welfare post-Brexit: Looking for a Different Path’ (draft article on file) 8, 9. Michael N Cardwell and Fiona Smith ‘Contemporary problems of climate change and the TBT Agreement: Moving beyond eco-labelling’ in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 391.

¹⁰⁰ (n 91) Annex 1.2

¹⁰¹ Ming Du, ‘Voluntary Ecolabels in International Trade Law: A Case Study of the EU Ecolabel’ (2021) 33(1) JEL, 1-28 doi: 10.1093/jel/eqaa022, 18, 19.

¹⁰² *ibid*, 24.

¹⁰³ *ibid*, 27.

2.8.2 EU Farm to Fork Strategy: An EU Animal Welfare Label

There would appear to be some regeneration in EU policy with a positive approach to animal welfare labelling evident under the EU F2F Strategy for a fair, healthy and environmentally-friendly food system'¹⁰⁴, taken forward consequent to the German Council Presidency in the latter half of 2020.

In its Conclusions on animal welfare - an integral part of sustainable animal production, approved on 16 December 2019, the Council invited the Commission to assess the need for, and impact of, an EU regulatory framework with criteria for animal welfare labelling schemes taking into account national experience.¹⁰⁵ In the interim, the Council also took note of the information provided by the German delegation supported by the Belgian, Danish, French, Italian, and Lithuanian delegations on an EU animal welfare label.¹⁰⁶ These EU Member States emphasised their preference for an EU-wide animal welfare label for food having been produced according to animal welfare standards exceeding the minimum legal requirements and expressed their conviction that this would significantly increase consumer confidence in the labelling of animal products¹⁰⁷ It is relevant to quote from their stated objectives:

Many consumers are in principle willing to pay higher prices for food of animal origin if they can credibly rely on the food having been produced to animal welfare standards that clearly exceed the minimum legal requirements. A legally framed labelling of food of animal origin based on animal welfare criteria enables consumers to base their purchasing decisions on whether a product has complied with such criteria. A transparent and harmonised EU animal welfare label could meet rising consumer expectations regarding the availability of products produced to higher animal welfare standards. A label such as this would also open up a new market for farmers to sell products produced to higher animal welfare standards and would lead to an improvement of animal welfare in livestock husbandry.¹⁰⁸

In its following Conclusions approving the F2F Strategy, the Council of the EU invited the Commission to assess the impact of an EU regulatory framework with criteria for an animal welfare labelling scheme which would contribute to enhanced animal welfare, greater market transparency, better consumer choice and fairer compensation for livestock under higher animal welfare levels, as well as a level playing field, and pointed out that national experience should be taken

¹⁰⁴ COM(2020) 381 final (n 3).

¹⁰⁵ 14975/19 (n 1) conclusion 12.

¹⁰⁶ Agriculture and Fisheries Council 5556/20 (Brussels, 27 January 2020).

¹⁰⁷ Council of the European Union, 5346/1/20 REV 1 (Brussels, 24 January 2020) point 8.

¹⁰⁸ *ibid* point 1.

into account and additional administrative burden reduced as much as possible.¹⁰⁹

The F2F Strategy advocates that better animal welfare improves animal health and food quality and reduces the need for medication which is what citizens want,¹¹⁰ coinciding with the establishment of a new EU unit on animal welfare and antimicrobial resistance.¹¹¹ Situated within the F2F Strategy, the Commission proposes to consider options for animal welfare labelling to contribute to a sustainable consumption and to transmit value through the food chain,¹¹² with a study to be launched early in 2021.¹¹³

A new sub-group of the EU Animal Welfare Platform has been created on animal welfare labelling with a mandate¹¹⁴ to consider how the EU can better inform consumers on animal welfare in relation to eggs, dairy produce and fresh meat, and to seek the experience and opinions of the EU's trading partners. Objectives to be realised by the sub-group include identifying certification schemes with animal welfare attributes, to analyse and compare them based on common criteria, to assess their contribution to the welfare of animals, to propose EU actions and to establish a baseline and indicators.¹¹⁵ It is recognised at ministerial level that legislation is not the only means by which animal welfare can be promoted and that a number of voluntary measures are available, such as quality standards and animal welfare programmes, but that the transparency and credibility of such schemes needs to be ensured.¹¹⁶ Consideration for animal welfare and an animal welfare label to transmit value through the agri-food chain have become subsumed within the goal of a sustainable food labelling framework to empower consumers to make sustainable food choices, scheduled for 2024.¹¹⁷ There appears to be some linkage with the Commission's earlier

¹⁰⁹ 12099/20 (Brussels, 19 October 2020).

¹¹⁰ COM(2020) 381 final (n 3) 8.

¹¹¹ Gavinelli (n 60).

¹¹² COM(2020) 381 (n 3) 8.

¹¹³ Gavinelli (n 60).

¹¹⁴ Denis Simonin, https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20200615_pres-04.pdf.

¹¹⁵ ibid. Denis Simonin https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20201103_pres-04.pdf.

¹¹⁶ Council of the EU (14975/19) (n 1) preamble 12.

¹¹⁷ Andrea Gavinelli (15 June 2020) https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20200615_pres-02.pdf.

declared strategy of benchmarking¹¹⁸ in that the current discussions envisage a future role for private animal welfare assurance schemes.

2.8.3 German Presidency 2020: Impetus for an Animal Welfare Label

In the meantime, at the onset of its term the German Presidency of the Council of the EU provided the Member States with a questionnaire on the possible introduction of an EU animal welfare label.¹¹⁹ Twenty five Member States replied, ninety two per cent of which consider a harmonised EU animal welfare label useful as a measure to improve animal welfare in livestock husbandry. The animal species deemed most important to be considered comprise pigs, broiler chickens, beef cattle, calves, dairy cows and laying hens. Fifteen out of twenty five Member States prefer the means of implementation of an EU animal welfare label to be achieved through EU legislation. Five Member States favour dedicated EU guidelines instead. Two Member States regard either option as feasible and two Member States see no need for an EU approach, with one Member State remaining undecided. Seventy five percent of the EU Member States which replied favour a voluntary as opposed to a mandatory (twenty five per cent) EU label (as for eggs). Sixteen Member States opted for the requirements for an EU animal welfare label to go beyond the minimum legal requirements; five Member States said no to this. Nevertheless, twenty two Member States would support the creation of a standard EU logo. It is significant for this thesis' aims that twenty one of the responding Member States (eighty four per cent) expressed approval for an EU animal welfare-specific label with animal welfare criteria only; four out of 25 Member States (sixteen per cent) favourably view including information on origin, regionality or other sustainability criteria, with one Member State remaining undecided.

Regarding existing animal welfare labels, thirteen of the twenty five Member States (fifty two per cent) would allow other national, regional or private-sector animal welfare labels to (continue to) exist alongside an EU animal welfare label; six Member States (twenty four per cent) oppose this idea, with six Member States (twenty four per cent) undecided on this issue.

When asked whether specific criteria should be drawn up for an EU animal welfare label or whether a framework should be created at EU level into which existing national animal welfare label could be integrated, fifty per cent chose the former specific EU criteria; twenty nine per cent selected an EU framework for the integration of national animal welfare labels and twenty one per cent were undecided.¹²⁰ Measured in comment, the German Presidency stated 'the EU is

¹¹⁸ (SEC (2012)55 (n 34) Annex 5C, 107-8.

¹¹⁹ (21 July 2020). German Presidency priorities regarding animal welfare https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20201103_pres-01.pdf.

¹²⁰ *ibid*.

only at the beginning of a process that can take a long time, a questionnaire can only give first information'.¹²¹

The Agricultural and Fisheries Council, meeting on 15-16 December 2020 approved the draft Conclusions on an EU-wide animal welfare label.¹²² The Council considered it important to enable consumers to recognise food produced according to these requirements; emphasised that it is necessary to respond to consumer demands for an improved well-being of farmed animals; drew attention to the already successfully established voluntary animal welfare labels in some EU Member States; and stressed that the overall purpose of an EU-wide animal welfare label should be to improve animal welfare for as many food producing animals as possible as well as allowing for market recognition and better remuneration of the additional efforts made by producers, in particular farmers. The Council invited the Commission to consider the following aspects before submitting the corresponding proposal:

- (a) the development of a tiered transparent labelling scheme allowing for sufficient incentives for producers to improve animal welfare;
- (b) the development of EU-wide harmonised relevant, measurable and verifiable criteria which go beyond current EU legal requirements on animal welfare, take into account Member States' geographical and climatic specificities and include criteria achievable by all of them, and would have to be at least fulfilled in order to be able to use the EU animal welfare label and the protected terms;
- (c) that such a label should not disadvantage Member States which have animal welfare legislation in place which is stricter than current EU legal requirements;
- (d) the gradual inclusion of all livestock species, covering their entire lifetime, including transport and slaughter, and giving due consideration to all their living conditions; priority should be given to species for which EU legal requirements on animal welfare have already been set;
- (e) the creation of a standardised EU logo and the determination of easily understandable protected terms;
- (f) the animal welfare provisions laid down in Regulation (EU) 2018/848 on organic production and labelling of organic products¹²³ and in Regulation (EU) 1308/2013 on the common organisation of the markets in agricultural

¹²¹ *ibid.*

¹²² Council of the European Union, 13691/20 (n 4).

¹²³ Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L 150/1.

products¹²⁴ and their adequate integration in an EU-wide animal welfare label, where relevant;

(g) the interplay between the existing national and the EU-wide animal welfare labels; (h) the possible administrative burden related to the EU-wide animal welfare label.¹²⁵

The European Commissioner for Agriculture Janusz Wojciechowski is reported as saying ‘the animal welfare label scheme the EU executive is set to propose will only be voluntary’.¹²⁶

2.9 Farm to Fork Strategy; Fitness Check; EFSA Mandates

A ‘fitness check’¹²⁷ accompanying the F2F Strategy¹²⁸ is being undertaken of existing EU animal welfare legislation to assess the extent to which the legislation is still relevant to pursue a high level of animal welfare and the EFSA has been given mandates to undertake updated scientific assessments of the EU welfare Directives on pigs, chickens, laying hens and calves. The Commission plans to ‘revise the animal welfare legislation, ... , to align it with the latest scientific evidence, broaden its scope, make it easier to enforce and ultimately ensure a higher level of animal welfare.’¹²⁹ Commissioner Andriukaitis has confirmed the EU direction of resort to animal-based outcome measures through an ambitious two year project on animal welfare indicators.¹³⁰

The fitness check will assess the extent to which EU legislative norms for the welfare of food-producing animals: were relevant to address the problems identified at the time of adoption; are still relevant to pursue the objective of ensuring a high level of animal welfare in the context of the F2F Strategy; have

¹²⁴ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products [2013] OJ L 347/671.

¹²⁵ 13691/20 (n 4) conclusion (12).

¹²⁶ Trade Perspectives <http://www.fratinivergano.eu/en/trade-perspectives/1-january-2021/>.

¹²⁷ European Commission *Fitness check of the EU legislation on animal welfare of farmed animals* (May 2020) https://ec.europa.eu/food/sites/food/files/animals/docs/aw_fitness-check_roadmap.pdf.

¹²⁸ https://ec.europa.eu/food/farm2fork_en.
https://ec.europa.eu/food/animals/welfare/strategy/evaluation-eu-legislation-welfare-farmed-animals_en.

¹²⁹ F2F Strategy, COM(2020) 381 final (n 3) 8

https://ec.europa.eu/food/sites/food/files/safety/docs/f2f_action-plan_2020_strategy-info_en.pdf.

¹³⁰ (17 June 2019) https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20190617_min.pdf.

delivered on the intended objectives; whether they did so in an efficient manner, having regard to the costs and benefits generated; have ensured the intended level of protection of farmed animals; have taken new scientific evidence and knowledge emerging after their adoption into account; are comprehensive and allow uniform implementation by stakeholders and enforcement by Member States' authorities; provide a coherent and comprehensive set of rules and are coherent with other EU actions and policies (including with other agri-food legislation); allow for coordination and complementarity with EU actions and with Member States' actions in animal welfare; and have contributed to the competitiveness of EU farmers and producers in the global market. The fitness check will look, *inter alia*, at the results of the evaluation of the EU Animal Welfare Strategy, case law of the ECJ / CJEU and OIE animal welfare standards. The completion date is scheduled for the fourth quarter of 2021 with the results intended to be used to review the animal welfare acquis and other Commission initiatives in the area.¹³¹

In the framework of the EU F2F Strategy, the EFSA will support the Commission in its comprehensive evaluation of EU animal welfare legislation by providing scientific opinions concerning the protection of pigs (June 2022), the protection of chickens produced for meat (December 2022) and the protection of calves (March 2023).¹³² Within the EFSA's mandate, the common terms of reference for each category of animal are:

Describe, based on existing literature and reports, the current husbandry systems and practices of keeping them;

Describe the relevant welfare consequences. Relevance should not be based on a full risk assessment but on EFSA's expert opinion regarding the severity, duration and occurrence of each welfare consequence;

Define qualitative or quantitative measures to assess the welfare consequences (animal-based measures);

Identify the hazards leading to these welfare consequences;

Provide recommendations to prevent, mitigate or correct the welfare consequences (resource and management-based measures).¹³³

In addition, the EFSA will explore scientific information on the advantages and disadvantages of several production systems in particular for laying hens, pigs and calves, taking into account the possible diversity of the production systems and exploring how to improve them. For specific situations where the Commission has identified practical difficulties or insufficient information in ensuring the

¹³¹ (n 127) .

¹³² Chiara Fabris and Denise Candiani, 'Overview on the 2019- 2020 activities of EFSA on animal welfare', 4

https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20201103_pres-03.pdf.

¹³³ *ibid*; <https://www.efsa.europa.eu/en/topics/topic/animal-welfare>.

welfare of animals, the EFSA will propose detailed animal-based measures and detailed preventive and corrective measures with, where possible, qualitative (yes / no question) or quantitative (minimum / maximum) criteria (i.e. requirements to prevent and / or mitigate the welfare consequences). Specific situations for pigs, for example, include: the welfare of sows and piglets from farrowing to weaning in different housing systems offering different degrees of behavioural freedom; space allowance, including competition for space; types of flooring, including poor cleanliness and comfort; enrichment material; air quality; health status; diet, including competition for food; and practice of mutilations (tail-docking, tooth-clipping, castration). For chickens / broilers, examples of specific situations concern: the welfare of fast-growing chickens in barns and the risks associated with air and floor temperature, access to feed and water, space allowance and air quality; and the welfare of broiler breeders and the risks associated with housing in (individual) cages and feed restriction. In relation to calves, specific situations comprise, for example, the welfare of male dairy calves raised for producing 'white' veal meat and the risks associated with individual housing, insufficient space and feed restriction (such as deprivation of iron and fibres); and the welfare of dairy calves and risks associated with limited cow-calf bond.¹³⁴ It is possible that the species-specific welfare legislation will be reformed and replaced by animal-based outcome measurements based on science with which to assess welfare, tied in with the EU F2F strategy.¹³⁵

2.10 Concluding Comments

The inclusion of animal welfare within the contemporary EU F2F Strategy could be seen as a key response to the ECA's concerns and recommendations that the Commission evaluate and put in place concrete actions to see the animal welfare Strategy 2012-2015 reach fruition. In the process regard for animal welfare has become subsumed into the EU's wider agenda of a sustainable agriculture. While the scientific updating of existing animal welfare legislation is relevant and overdue, there is a need to improve the standards of animal welfare for animals in EU agriculture and compliance of the same as an obligation of result. This entails a strengthening and broadening of the resource-based inputs necessary to enable a species to live in an environment which fulfils its needs with additional animal-based monitoring of the outcomes. The EU has focused on Member States' diverse practices in monitoring the welfare of dairy cows using animal-based outcome assessment, with a projected role for private standards of assurance in monitoring the welfare of dairy cattle, i.e. private standards protection within EU Member States.¹³⁶ The direction of the EU apparently is one which increasingly pursues animal-based outcome assessment of welfare underpinned by science, which aligns more with the approach of the OIE. The Commission affirms an approach which foresees a role for private standards of assurance in animal welfare with some hybridity evident in the process.

¹³⁴ (n 132).

¹³⁵ Gavinelli (n 117); https://ec.europa.eu/food/sites/food/files/safety/docs/f2f_action-plan_2020_strategy-info_en.pdf.

¹³⁶ European Commission, (DG SANTE, 2017-6241) (n 56).

Formal EU adoption of a link to the consumer by way of a label signalling the animal welfare quality going above EU minimum requirements of the agri-produce sourced and supplied in the agri-food chain will augment the focal objectives of this thesis to communicate enhanced animal welfare standards to the credence consumer of agri-food. A label linking value-added animal welfare to the informed consumer is germane with relevance for key stakeholders in the agri-food chain. These stakeholders are the credence consumer, the producer of enhanced agri-produce with the potential to extend to producers along the global food chain, the State through economic growth and the retailer supplying the value chain.

Chapter 3 The Role of the EU Common Agricultural Policy in Delivering Animal Welfare

‘In effect, a new social contract is needed between farmers and society which sees the delivery of public goods as part of a modern approach to agriculture where food, fibre and fuel are supplied in ways that are resource efficient, help address climate change and *deliver high levels of biodiversity and farm animal welfare*, within the context of diverse and vibrant rural areas.’¹

3.1 Introduction

Building on the regard for animal welfare in the general provisions of the EU Treaties and the momentum of the EU Farm to Fork Strategy, this chapter considers the scope for improved protection and promotion of farm animal welfare within the EU Common Agricultural Policy (CAP). The focus will be on the CAP for the programming period 2014-20, which reform presented the first real opportunity to assess the impact of Article 13 TFEU and the extent to which animal welfare has become integrated into the support mechanisms of the CAP. The possibility to cultivate animal welfare within the stated Treaty objectives of the CAP will be explored and the CAP instruments' specified objectives assessed for their scope to raise animal welfare standards in agriculture within the current term.²

Four factors to be considered are: first, the increasing societal demand for raised animal welfare standards in agriculture; second, the economic potential for farmers practising higher standards of animal husbandry; third, the responsibility of the EU to incentivise the provision of value-added animal welfare in agriculture; and fourth, the extent to which the CAP has optimised animal welfare. The European Commission (Commission) stated at the onset of the reform of the CAP towards 2020, ‘[d]elivering more public benefits in future will require a strong public policy because the goods provided by the agricultural sector cannot be adequately remunerated and regulated through the normal functioning of the markets’.³ The Commission also asserted that ‘[i]mproving the functioning of the

¹ European Parliament Directorate General for Internal Policies - Agriculture and Rural Development, *What Tools for the European Agricultural Policy to Encourage the Provision of Public Goods?* Study IP/B/AGRI/IC/2010_094. PE 460.053 (June 2011) (emphasis added).

² Diane Ryland, ‘Animal Welfare in the reformed Common Agricultural Policy: Wherefore art thou?’ (2015) 17(1) *Env L Rev* 22.

³ European Commission Communication, *The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future*, COM (2010)672, 18 November 2010, 4.

food supply chain is necessary' facilitative of farmers 'revers[ing] the steadily decreasing trend in their share of the value added generated by the food supply chain'.⁴ Furthermore, 'the CAP should become ... more accountable to the needs and expectations of the EU citizens'.⁵ Arguably, there could therefore be more focus on animal welfare in the context and architecture of the CAP 2014-20. These three statements epitomise focal aims of this thesis: first, securing the delivery of value-added animal welfare in agri-produce as a public good in agriculture⁶ under the auspices of the CAP; second, compulsory requirements with a budget towards this end supporting farmers to engage with enhanced welfare practices above the minimum norm; and third, the delivery of a strong animal welfare CAP in response to EU citizens' attendant values with a communicative link promoting the same to the informed consumer.

Some historical background to the CAP will be provided with analysis to ascertain the scope to locate animal welfare within the objectives of the CAP in the Agriculture Treaty Title. The potential impact of Article 13 in integrating full regard for animal welfare in the CAP's support and promotion mechanisms will then receive appraisal. In this context, it is relevant to recollect the Treaty incorporation of the obligation to integrate full regard for the welfare of animals as sentient beings into the adoption and implementation of EU agriculture policy in the law making process and in implementation by Member States. There will be an evaluation of the CAP instruments for the period 2014-20 in which an animal welfare element is explicit, or arguably should have been given greater emphasis in the scheme of things. The CAP 2014-20 retains its two Pillar support structure with a direct payments scheme operating under Pillar I underpinned by statutory requirements with which compliance is mandatory and reinforced through a cross-compliance penalty system in the event of non-conformity. The Direct Payments Regulation will be appraised from the perspective of its contribution to animal welfare as a public good associated with agriculture. An analysis will follow of the cross-compliance regime situated within the new Horizontal Regulation, assessed also by the European Court of Auditors (ECA). Rural Development Regulation support located within Pillar II of the CAP is varied, with this chapter's focus firmly directed to a critical appraisal of the animal welfare payment, rural development objective 3 in the context of the agri-food chain and the Rural Development Regulation's support for, and promotion of, quality schemes. Two EU quality schemes receive scrutiny: first, the quality regime supporting and promoting protected products of designated origin and geographic indication; and second, the quality scheme for the production and labelling of organic produce; with both regimes assessed in terms of their inconsistencies with good animal welfare practices in EU agriculture. Significant to this thesis's aims is the leaning towards hybridity on the part of the EU with private farm assurance and

⁴ *ibid* 10.

⁵ *ibid*.

⁶ Tasmin Cooper, Kaley Hart, David Baldock, *Provision of Public Goods through Agriculture in the European Union*, Report for DG Agriculture and Rural Development 30-CE-0233091/00-28 (IEEP London, 2009); John McNerney, *'Animal Welfare, Economics and Policy'*, Report on a study undertaken for the Farm and Animal Health Economics Division of Defra (London, 2004); Organisation for Economic Co-operation and Development, *Multifunctionality: Towards an Analytical Framework* (Paris, 2001).

certification schemes. Consequently, there will be an exploration of the third avenue of support to farmers to engage in voluntary quality schemes, albeit not falling into the same category as the two aforementioned EU schemes, under rural development Pillar II. An assessment is offered as to whether the CAP 2014-20 is optimised in respect of animal welfare. Acknowledging the reform process underway, a brief appraisal traces the consideration of animal welfare in the proposed CAP for the period post-2020.

3.2 CAP Treaty Objectives: Scope to Locate Animal Welfare?

The stated objectives of the CAP remain the same as those in force in 1957 as does their numerical citing in the EU Treaties,⁷ yet the CAP has gradually evolved.⁸ In accordance with the Treaties the CAP aims explicitly:

to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.⁹

Member States continue to agree that in working out the CAP and the special methods for its application account must be taken of the particular nature of agricultural policy, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions, the need to effect the appropriate adjustments by degrees and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.¹⁰ McMahon maintains that it is symbolic of the transition from Economic Treaty to European Union that expectations of agriculture under the CAP would become more orientated towards its broader contribution to economic, social and cultural objectives.¹¹

⁷ TFEU, arts 39-43.

⁸ COM (2010)672 (n 3) 3. Joseph A McMahon 'Chasing a Moving Target through a Thick Fog: Questioning the Objectives of the Common Agricultural Policy' in Niamh Shuibhne and Laurence Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012) 267.

⁹ TFEU, art 39(1)(a)-(d).

¹⁰ TFEU, art 39(2)(a)-(c).

¹¹ McMahon (n 8) 273.

The CAP has evolved to address new challenges facing agriculture and the economy¹² such as EU enlargement, food safety, animal health and welfare, the environment and climate change, using the existing CAP legal basis¹³ and premised on its historic objectives.¹⁴ It is recalled that the EU minimum standards of welfare for specific species of farm animal are derived from the agriculture Title in the Treaties,¹⁵ whereupon harmonisation proved to be a key element. According to the *dicta* of the European Court of Justice (ECJ) in the early case of *United Kingdom v Council*:

Efforts to achieve objectives of the common agricultural policy, ... cannot disregard requirements relating to the public interest ..., requirements which the Community institutions must take into account in exercising their powers.¹⁶

Productivity in the evolution of the CAP should be understood not just in terms of quantity,¹⁷ but also in terms of quality production synonymous with ensuring the competitiveness of agriculture. It will be relevant to ascertain the extent to which animal welfare features in the EU's quality agenda since it is increasingly arguable that higher standards may promote competition.

Carsten Daugbjerg explains that the CAP has evolved substantially since the early 1990s through a series of limited reforms, each reform setting the direction for the future evolution of the CAP.¹⁸ Milestones in CAP reform include the introduction of direct payments under the MacSharry Reform of 1992, which reform Daugbjerg submits 'showed that farmers accepted direct payments. It opened the window for further use of such policy instruments in the future'.¹⁹ The Mid-Term Review 2003 affirmed the two Pillar CAP, the decoupling of payments from production and extended the conditionality criteria known as cross-compliance. The 2003 CAP reform resulted in a more market-oriented CAP in its responsiveness to consumer concerns through its animal welfare objectives in promoting good animal husbandry. This reform also introduced the 'meeting standards' payment to help farmers adapt to EU animal welfare standards based

¹² See, for example, Michael N Cardwell, 'European Union agricultural policy and practice: the new challenge of climate change' (2011) 13(4) *Env L Rev* 271.

¹³ TFEU, art 43(2).

¹⁴ Case 68/86 *United Kingdom v Council* [1988] ECR 855.

¹⁵ TFEU, art 43. To establish the common organisation of agricultural markets in accordance with art 40(1) and attain the objectives set out in art 39 TFEU.

¹⁶ Case 68/86 *United Kingdom v Council* (n 14) [12].

¹⁷ A degree of reversion to quantity for food security objectives is evident, see COM (2010)672 (n 3).

¹⁸ Carsten Daugbjerg, 'Sequencing in public policy: the evolution of the CAP over a decade' (2009) 16 *JEPP* 395.

¹⁹ *ibid* 402.

on EU minimum legislative requirements,²⁰ the enhanced animal welfare payment²¹ and more broadly an agri-product quality regime.²² The new Rural Development Regulation in 2005 embedded the meeting standards payment specifically helping farmers to adapt to demanding legislative standards.²³ It also entrenched the animal welfare payment an important innovation facilitative of higher animal welfare standards, albeit voluntary and dependent on Member States including an animal welfare commitment in their rural development programmes and committing to co-finance such an objective.²⁴ Specific support for the practice of enhanced animal welfare standards was authorised in the Direct Payment Regulation of 2009.²⁵ McMahon contends that the 2003 Mid-Term Review, the 2005 Rural Development Regulation and the 2008 Health Check confirmed a new orientation for EU agriculture by way of supporting agriculture's contribution to the realisation of public goods.²⁶

3.3 Treaty of Lisbon Reforms

Article 13 TFEU implies a capacity to be the impetus for the EU legislature to integrate a full regard for animal welfare into the legislative provisions establishing the CAP. The competence exists in EU law to pay full regard to the welfare needs of animals as sentient beings when formulating and implementing certain policies, one of which is agriculture. The significance of this provision for the improvement and promotion of good animal welfare practices in EU agriculture merits consideration in the context of the provisions of the CAP. The instruments of the CAP for the reference period 2014-20 will therefore be explored in order to assess the extent to which animal welfare in accordance with Article 13 TFEU has become integrated within the CAP.

As a result of the amendments introduced by the Treaty of Lisbon, the CAP is stated explicitly to be a competence shared between the EU institutions and the

²⁰ Council Regulation (EC) No 1257/1999, ch Va, arts 21a(a)(b), 21b(1)(2), 21c [1999] OJ L160/80 as amended by Council Regulation (EC) No 1783/2003 [2003] OJ L270/70.

²¹ *ibid* arts 22(f), 23, 24.

²² *ibid* art 24a-d. European Commission Communication, *Mid-Term Review of the Common Agricultural Policy* COM (2002)394 10 July 2002; Michael N Cardwell, 'Current Developments: Agriculture' (2006) 55 ICLQ 467, 471-472.

²³ Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), art 20(c)(i) [2005] OJ L277/1. Support contributing partly to costs incurred and income foregone on the part of farmers who have to apply standards, *inter alia*, in the field of animal welfare, art 31(1).

²⁴ *ibid* art 40.

²⁵ Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, art 68(1)(iv), [2009] OJ L30/16.

²⁶ (n 8) 283.

Member States.²⁷ This corroborates the CAP's two Pillar structure with central and decentralised input in meeting the CAP's objectives. McMahon informs of the European Parliament's (EP) increasing role in decisions taken on the CAP budget, the TFEU having ended the distinction between compulsory EU expenditure (under which CAP funding fell previously) and non-compulsory expenditure (in respect of which the EP played a decisive role).²⁸ The EP has been accorded an enhanced role as joint legislator in the ordinary legislative procedure applicable to the CAP.²⁹ Member States with diverse farming systems and animal welfare practices under earlier Treaty provisions³⁰ were required to reach agreement³¹ within the Council in a legislative procedure that accorded the EP a consultative role only. Constraints are perceived to offset the EP's co-legislative powers, in that the Agriculture and Rural Development Committee's membership with its 'strong agricultural ties fails to reflect the plurality of interests linked to agricultural and rural policy.'³² Yet it is apparent that the EP exercised a constructive animal welfare role indirectly in the CAP (2014-20).

3.4 The CAP Instruments (2014-20): Animal Welfare?

The Commission's stated intention to optimise the current mechanisms of the CAP with animal welfare preceded the adoption of the CAP instruments for 2014-20. The Commission expressed an agenda to achieve this end through cross-compliance, rural development, promotional measures, quality policy, organic farming, etc., as part of a socially oriented agricultural approach to animal welfare, stating '[e]very opportunity to express in economic terms the value added by animal welfare policy should be taken up in order to enhance the competitiveness of EU agriculture, including small farmers'.³³ It will be a valuable exercise to examine the extent to which good animal welfare practices in agriculture are reinforced for economic and societal gain utilising the CAP's mechanisms.

A public debate was held on the future of the CAP³⁴ prior to the reform of the CAP instruments for 2014-20. Key findings of that debate included a strongly held

²⁷ TFEU, art 4.

²⁸ McMahon (n 8) 267.

²⁹ TFEU, art 43(2).

³⁰ EEC, art 43.

³¹ By a qualified majority. See Case 68/86 *United Kingdom v Council* (n 14) [4] [14].

³² Louise Knops, 'CAP Reform: Will the European Parliament take the bull by the horns?' (2012) Centre for European Policy Studies <http://www.ceps.eu/book/cap-reform-will-european-parliament-take-bull-horns>.

³³ European Commission, *Strategy for the Protection and Welfare of Animals 2012-2015* (COM (2012)6/2, 15 February 2012) 3, 11; European Commission Staff Working Paper, *Second Animal Welfare Strategy for the period 2012-2015 'Impact Assessment'* (SEC (2012)55, 19 January 2012)

³⁴ European Commission Agriculture and Rural Development, *The Common Agricultural Policy after 2013 Public debate Summary Report*. (copy on file).

view particularly among the general public that ‘industrial’ agriculture should have little place in the CAP.³⁵ There was also wide recognition amongst the general public that farmers should be compensated for providing public goods and benefits because these are not covered via market prices.³⁶ Furthermore, there were numerous responses from the general public arguing that EU welfare standards should be improved.³⁷ Subsequently, the Commission presented policy options for the CAP to 2020 to address the food security, natural resources and territorial challenges facing the EU.³⁸ Therein, the Commission emphasised the primary role of agriculture in supplying food and that EU citizens demand high quality food products which reflect high welfare standards. The Commission noted that agriculture remains an essential driver of the rural economy in much of the EU, noting also the contribution the reformed CAP would make in terms of smart, sustainable and inclusive growth with a focus on high value-added quality products and the provision of environmental public goods. Unlocking economic potential in rural areas was considered by the Commission to be significant in terms of inclusive growth. Reform orientation under Pillar I would be necessary to improve the functioning of the food supply chain so as to reverse farmers steadily decreasing share of the value added generated by the food supply chain.³⁹ Acting under rural development Pillar II, the Commission identified the need further to strengthen and simplify the quality (including organic farming) and promotion policies in order to enhance the competitiveness of the agriculture sector.

Proposals for new CAP instruments were adopted and considered in accordance with the ordinary legislative procedure⁴⁰ and following formal approval by the EP the Council of Agricultural Ministers adopted Regulations for the reformed CAP for the period 2014-20. This chapter analyses the scope for raised animal welfare standards in the Direct Payments Regulation, the Horizontal Regulation and the Rural Development Regulation. It reasons that integrating improved animal welfare into the economic and societal aims of the CAP will not only facilitate the achievement of the CAP’s stated objectives, but also serve to legitimise the acceptability of the CAP to EU citizens.

³⁵ *ibid* 7.

³⁶ *ibid* 30.

³⁷ *ibid* 33.

³⁸ COM (2010) 672 (n 3).

³⁹ European Commission Communication, *A better functioning food supply chain in Europe* COM (2009)591, 28 October 2009.

⁴⁰ European Commission Press Releases IP/13/613 26.6.13 and IP/13/864 24.9.13.

3.4.1 Direct Payments

The Direct Payments Regulation⁴¹ replaces the area-based single payment scheme with a basic payment⁴² based also on the number of eligible hectares of farmers' land.⁴³ The basic direct payment is payable to farmers who exercise an agricultural activity in accordance with the Regulation namely: producing, rearing or growing agricultural products,⁴⁴ including harvesting, milking, breeding animals, and keeping animals for farming purposes; maintaining an agricultural area in a state which makes it suitable for grazing or cultivation; or carrying out a minimum activity defined by Member States⁴⁵ on agricultural areas naturally kept in a state suitable for grazing or cultivation.⁴⁶ One aspect of the Direct Payments Regulation with the potential to bear significance for animal welfare is in the provision of public goods associated with agriculture.

3.4.1.1 Public Goods associated with Agriculture

Pillar I of the CAP has specified as a public good the protection of the environment and climate change mitigation in association with which compulsory practices there is targeted financial support.⁴⁷ One of the objectives of the CAP 2014-20 is the enhancement of environmental performance through a mandatory 'greening' component of direct payments supportive of agricultural practices beneficial for the climate and the environment throughout the EU. The greening payment is a compulsory element of the direct payment scheme with a defined budget entitlement of thirty per cent of Member State's national ceilings under the European Agricultural Guarantee Fund (EAGF).⁴⁸ Eligible farmers are required to undertake certain agricultural practices beneficial for the climate and the environment consisting of crop diversification, maintaining existing permanent grassland, having ecological focus area on the agricultural area, or defined equivalent practices.⁴⁹ Given the recognised environmental benefits of the organic farming systems, organic farmers voluntarily fulfilling the conditions laid

⁴¹ Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 [2013] OJ L347/608.

⁴² and a transitional simplified scheme 'the single area payment scheme' *ibid* art 1(b)(i).

⁴³ *ibid* ch 1, Title III.

⁴⁴ 'Agricultural products' mean 'the products with the exception of fishery products ..., listed in Annex I to the Treaties.' *ibid*, art 4(1)(d).

⁴⁵ *ibid* art 4(1)(c)(2)(b) Circumscribed by a Commission framework *ibid*, art 4(3)(b).

⁴⁶ *ibid* art 4(1)(a)(c).

⁴⁷ *ibid*, recital (37), arts 44, 47.

⁴⁸ *ibid*, art 47. Member States are empowered to establish simplified schemes for small farmers, with exemption from compulsory participation in the greening initiative *ibid*, art 61.

⁴⁹ *ibid*, art 43(1)-(3).

down in the Regulation on organic production and labelling of organic products⁵⁰ are entitled *ipso facto* to receive, and to benefit from, the greening payment.⁵¹ This is explicitly linked to the environmental component of organic farming.

It is notable that there is no express reference to animal welfare constituting a public good, nor is there additional budgetary assistance for compulsorily raised animal welfare practices in the revised first Pillar of the CAP on a par with the new mandatory greening mechanism. This is so notwithstanding that, according to the Organization for Economic Co-operation and Development (OECD), animal welfare is a non-commodity output of agriculture and is, increasingly, a public good reflected in its 'jointness' with agricultural commodity output and the growing societal demand for quality agri-products that have resulted from farming practices which enhance animal welfare.⁵² This latter is a credence requisite of consumers of the agri-produce output in addition to the food consumed. Arguably animal welfare is already accepted as a public good according to the OECD report which would serve to justify a level of obligation to achieve welfare benefits with defined EU support.

The public goods concept in economic theory has two defining characteristics. First, public goods are 'non-rival' meaning that if the good is consumed by one person, it does not reduce the benefit available to others. Second, public goods are 'non-excludable' in that if the good is available to one person, others cannot be excluded from enjoying its benefits.⁵³ In many cases in agricultural policy, given the absence of functioning markets, public intervention is necessary to secure a desirable level of provision of agricultural public goods.⁵⁴ The study undertaken for the EP includes farm animal welfare as a principal public good associated with agriculture.⁵⁵ Animal welfare in agriculture is classified as a social public good, highly valued by society in a report prepared for the EU Directorate General Agriculture and Rural Development.⁵⁶ A clear role for government policy is implied by the existence of this public good according to McInerney in an earlier report to DEFRA.⁵⁷ He explains that farm animal welfare is:

⁵⁰ Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 [2007] OJ L189/1, as amended by Council Regulation (EC) No 967/2008 [2008] OJ L264/1; Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production, labelling and control [2008] OJ L250/1.

⁵¹ Regulation (EU) No 1307/2013 (n 41) art 43(11).

⁵² OECD (2001) (n 6) para 13.

⁵³ EP, *What Tools to Encourage the Provision of Public Goods?* (n 1)19, n1.

⁵⁴ *ibid*, 19.

⁵⁵ *ibid*, Table 1, 21.

⁵⁶ Cooper, Hart, Baldock (n 6) 15, 28.

⁵⁷ McInerney (n 6) Exec summary, para 17.

an externality – an economic value that is not adequately handled through the normal market processes surrounding livestock farming. This is because people not directly involved in the production or consumption of a livestock product can nevertheless feel unease (a loss of benefit) if animals are not treated well. 58

Non-consumers of agri-produce including low-income people also value the welfare of animals, as well as the credence consumer. McInerney further corroborates the fact that the ‘welfare standards that farm animals experience carry through into being a perceived characteristic of the food product they yield’.59

The acceptance of CAP payments for farmers’ provision of public goods in the form of environmental protection has sown the seeds for the recognition of animal welfare as a public good in respect of which raised mandatory animal welfare requirements and a defined payment mechanism essentially could be included in the first Pillar of the CAP. It is important at this juncture to make the distinction between: (i) animal welfare minimum statutory requirements which form part of the Pillar I cross-compliance regime, which will be discussed further under the CAP Horizontal Regulation below; and (ii) the animal welfare payments mechanism under Pillar II for exceeding the cross-compliance baseline. What is being advocated at this point is a mandatory requirement together with a designated budget situated within Pillar I in order that all Member States go that stage further over and above the minimum statutory baseline in order to provide enhanced animal welfare in agriculture as a public good. A ‘harmonized legislative baseline with respect to what farmers are required to do’,60 or in other words, ‘a strong regulatory baseline, applying to all farms’61 were strongly advocated as being necessary to ensure the provision of public goods in the EU CAP for the period 2014-20. Significantly, the EP Report on the Single Payments scheme asserted:

With the progressive shift of the budget towards support for the provision of public goods, it is increasingly important that the public goods provided by agriculture and those that are eligible for payments are defined at EU level, and that the boundary between what is part of the baseline (i.e. what

58 *ibid*, 39.

59 *ibid*, Exec summary, para 26.

60 European Parliament Directorate General for Internal Policies -Policy Department B: Structural and Cohesion Policies - Agriculture and Rural Development, *The Single Payment Scheme after 2013: New Approach-New Targets* IP/B/AGRI/IC/2009_038 PE 431.598 (March 2010) 13.

61 EP, *What Tools to Encourage the Provision of Public Goods?* (n 1) 11.

is statutory for farmers) and what goes beyond and is eligible for payments remain consistent across Member States.⁶²

Animal welfare is characterised as a public good in the organic farming Regulation in which organic production is accorded a 'dual role where it on the one hand provides for a specific market responding to a consumer demand for organic products and on the other delivers public goods contributing to the protection of the environment and animal welfare.'⁶³ The EU Regulations on the method of organic production and labelling of organic products⁶⁴ establish higher animal welfare species-specific (behavioural needs) standards, including husbandry criteria for livestock, pig and poultry production,⁶⁵ which go beyond good agricultural practice. The route chosen by the EU and its Member States in the CAP legislative process is to promote organic farming with its 'application of high animal welfare standards and a production method in line with the preferences of certain consumers',⁶⁶ in other words a Pillar II payment. It is not mandatory to practise the organic way of farming which is promoted under the quality regimes of the EU Rural Development Regulation, which this chapter will discuss below.⁶⁷

This thesis has identified a need alongside that advocated in chapter one for a more comprehensive public floor of minimum standards of animal welfare in EU agriculture beneath which Member States may not go. In the case of Pillar I direct payments, the CAP works on the basis that EU funded direct payments may be reduced or withdrawn in the event that beneficiaries of such payments do not comply with the underpinning minimum legislative requirements in animal welfare. This thesis is advocating additionally that the EU targets a defined budget under Pillar I towards the obligatory enhancement of animal welfare above that baseline floor. Cross-compliance still remains of considerable importance in creating the baseline to be observed for Pillar I payments, as well as the baseline to be exceeded for Pillar II payments, each of which will be discussed in turn.

⁶² EP, *The Single Payment Scheme after 2013: New Approach-New Targets* (n 60) 12,13.

⁶³ Council Regulation (EC) No 834/2007 (n 50) recital 1. This Regulation remains in force until 1 January 2021: Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L150/1.

⁶⁴ Council Regulation (EC) No 834/2007 *ibid*; Commission Regulation (EC) No 889/2008 (n 50).

⁶⁵ Council Regulation (EC) No 834/2007 *ibid*, Recital 1.

⁶⁶ *ibid*.

⁶⁷ Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 [2013] OJ L347/487, art 29.

3.4.2 Horizontal Regulation

The second instrument, a new Horizontal Regulation, confirms that the financing of expenditure under the CAP 2014-20 made by the EAGF and the EAFRD will fall under the general budget of the EU.⁶⁸ This Regulation on the financing, management and monitoring of the CAP lays down the general rules relating to the management and control systems to be put in place by Member States. In relation to animal welfare, the Horizontal Regulation contains the rules on cross-compliance which include the statutory measures Member States must comply with in order to receive their direct payment entitlement under Pillar I of the CAP.

3.4.2.1 Cross-Compliance

To be entitled to receive direct payments (also the animal welfare payment under the Rural Development Regulation) free of administrative penalty⁶⁹ beneficiaries⁷⁰ are obligated to comply with specified statutory management requirements inclusive of animal welfare norms.⁷¹ A requirement to comply with three EU animal welfare Directives only is stipulated, namely the species-specific Directives laying down minimum standards for the protection of calves⁷² and pigs,⁷³ and the general farm animals Directive.⁷⁴ In the calculation of the administrative penalty, i.e. a reduction or exclusion of payment should farmers fail to comply with these stipulated legislative requirements for animal welfare, account is to be taken of the severity, extent, permanence and reoccurrence of non-compliance.⁷⁵ For cases of non-compliance due to negligence any reduction in payment will not exceed five per cent, or fifteen per cent in cases of reoccurrence. A first finding of non-compliance may not lead to a reduction in payments received, instead leading to a warning under an early warning system should Member States so choose.⁷⁶ Cases of non-compliance which constitute a direct risk to public or animal health will always lead to a reduction or exclusion of payment.⁷⁷ Though it is provided that calculation of penalties for intentional

⁶⁸ Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 [2013] OJ L347/549, art 3.

⁶⁹ *ibid*, arts 91(1), 92.

⁷⁰ Beneficiaries in receipt of direct payments under Regulation (EU) No 1307/2013 (n 41) arts 46 and 47 payments and under Regulation (EU) No 1305/2013 (n 67) arts 28 (agri-environment), 29 (organic) and 33 (animal welfare) *ibid*, art 92.

⁷¹ Regulation (EU) No 1306/2013 (n 68) art 93(1)(c); Annex II (SMR 11-13).

⁷² Council Directive 2008/119/EC [2009] OJ L10/7, arts 3 and 4.

⁷³ Council Directive 2008/120/EC [2009] OJ L47/5, arts 3 and 4.

⁷⁴ Council Directive 98/58/EC [2009] OJ L221/23, art 4.

⁷⁵ Regulation (EU) No 1306/2013 (n 68) art 97.

⁷⁶ *ibid*, art 99(2) para 4.

⁷⁷ *ibid*, art 99(2) para 3.

non-compliance with the animal welfare statutory requirements may go as far as total exclusion from aid, this is not a requirement and the percentage reduction 'in principle' will not be less than twenty per cent.⁷⁸

An exception to the rules on cross-compliance is applicable to farmers participating in the small farmers scheme⁷⁹ under the Direct Payments Regulation.⁸⁰ This is a new scheme voluntarily entered into on the part of Member States, which may potentially operate adversely to animal welfare. It is worth reciting from Recital (57) to the Horizontal Regulation:

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

Reasons of simplification and reduction of the administrative burden posed by cross-compliance formalities led the ECA to conclude that 'the motives for doing so need to be balanced against the necessity to achieve the objectives of cross compliance'.⁸¹ Small farmers will still be expected to comply with the animal welfare Directives the subject of the statutory management requirements, but without the additional sanction of a cross-compliance financial penalty providing the deterrent and incentive to do so. Member States are under an obligation to take all necessary measures to ensure fulfilment of their obligations under EU law and failure to ensure such application in practice to small farmers should give rise to administrative consideration of infringement proceedings under EU law.⁸² To recollect, enforcement of the animal welfare minimum norms remains problematic generally. The fact that Member States may choose to exempt small farmers from cross-compliance stems the opportunities which would accrue to farmers who practice good standards of animal welfare going beyond the minimum statutory norms.

The administrative penalties as they exist may not be strong enough to act as a deterrent to the farmer who acts recklessly in the welfare of his farm animals.

⁷⁸ *ibid*, art 99(3). See Case C-396/12 *van der Ham and A.H. van der Ham-Reijersen van Buuren* EU:C:2014:98 for interpretative guidance on the concept of intentionality.

⁷⁹ Regulation (EU) No 1306/2013 (n 68) art 92 para 2.

⁸⁰ Regulation (EU) No 1307/2013 (n 41) art 61.

⁸¹ European Court of Auditors Special Report No 26, *Making cross-compliance more effective and achieving simplification remains challenging* (2016) paras 41-52, 76.

⁸² TFEU, art 258.

Non-compliance with animal welfare standards as a result of negligence is considered to be minor and the cross-compliance regime can be said to be permissive of default. At least, the administrative penalties should be 'proportionate, effective and dissuasive'.⁸³ The ECA has determined the sanction system to be weak with Member States not defining adequately the terms of the severity, extent and permanence of non-compliance. As a result the sanctions neither depended on the extent nor on the consequences of non-compliance, the reductions to farmers' direct payments were low, and flat rates typically of one per cent were applied.⁸⁴ Deeming cross-compliance to be a vital element of the CAP,⁸⁵ the ECA has recommended that the objectives of cross-compliance be made clearer from the perspective of the EU⁸⁶ and that Member States undertake their responsibilities to implement effective control and sanction systems.⁸⁷ The ECA has maintained its criticisms of the resulting diversity in the calculation of penalties for cross-compliance within Member States.⁸⁸ Recognising that cross-compliance links CAP direct payments to farmers' compliance with basic rules on animal welfare and that it applied to seven and a half million farmers who in 2015 received approximately forty seven billion euro in payments (with small farmers excepted and thus excluded from these figures), the ECA underscored the high expectations of society that farmers receiving CAP payments comply with the cross-compliance requirements.⁸⁹ The ECA recommended for the CAP post 2020 that the Commission encourage a more harmonised application of penalties at EU level by further clarifying the concepts of severity, extent, permanence, reoccurrence and intentionality.⁹⁰ Subsequently the ECA reiterated that some Member States did not ensure that the penalties applied under cross-compliance were proportionate to the seriousness of the non-compliance identified.⁹¹ Member States are required to carry out on-the-spot checks covering at least one per cent of CAP beneficiaries to verify if farmers are meeting cross-compliance requirements and the Commission, DG AGRI, performs audits to check the adequacy of Member States' control systems for cross-compliance.⁹² Member States can use the outcome of their official inspections to reach the minimum control rate for cross-compliance.⁹³ The

⁸³ Regulation (EU) No 1306/2013 (n 68) recital (57).

⁸⁴ European Court of Auditors Special Report No 8/2008, *Is Cross Compliance an Effective Policy?* (2009) paras 67, 71, 73, Box 4.

⁸⁵ *ibid*, para 90.

⁸⁶ *ibid*, para 85.

⁸⁷ *ibid*, para 88.

⁸⁸ European Court of Auditors (2016) (n 81) paras 65-71.

⁸⁹ *ibid*, Exec summary para I.

⁹⁰ *ibid*, Exec summary para IX, para 79, Recommendation 6.

⁹¹ European Court of Auditors Special Report No 31, *Animal welfare in the EU: closing the gap between ambitious goals and practical implementation* (2018) para 73.

⁹² *ibid*, para 10. Regulation (EU) No 1306/2013 (n 68) art 96(3)(4).

⁹³ Commission Implementing Regulation No 809/2014 [2014] OJ L 227/69, art 68 para 2. European Court of Auditors (2018) *ibid*, para 67.

Commission's audit of Member States' cross-compliance checks their respective procedures on the exchange of information but it does not check whether results of animal welfare inspections performed at CAP beneficiaries by the same competent authority as for cross-compliance are then reported to the authority responsible for imposing administrative penalties under cross-compliance.⁹⁴ Accordingly, a recommendation was addressed to the Commission to improve the coordination between the official inspections and cross-compliance by strengthening its conformity audits on cross-compliance.⁹⁵

The animal welfare statutory management requirements with which farmers are mandated to comply are not comprehensive. The cross-compliance criteria do not include the minimum welfare standards of the laying hens Directive 96 or those of the chickens Directive.⁹⁷ The basic direct payment should be conditional on compliance with all EU minimum legislative standards of animal welfare, especially since the direct payments scheme operates on the basis of area of eligible land, which may encompass poultry farmers.⁹⁸

3.4.3 Rural Development

The revised rules governing support for the CAP's rural development objectives remain within a separate Rural Development Regulation⁹⁹ maintaining the CAP's two Pillar structure. The Rural Development Regulation sets out the objectives to which rural development policy will contribute and the relevant EU priorities for rural development on the basis of responsibilities shared between the Member States and the Commission.¹⁰⁰ The competitiveness of agriculture, the sustainable management of natural resources and a balanced development of rural economies and communities are the stated objectives to be achieved through rural development support from the EAFRD.¹⁰¹ The improvement of animal welfare is not given expression as an objective to which rural development policy will contribute, although three points having relevance for animal welfare will be addressed. These are: first, the animal welfare payment; second, the third priority of the rural development policy - promoting food chain organisation; and third, quality schemes.

⁹⁴ European Court of Auditors (2018) (n 91) para 70.

⁹⁵ *ibid*, para 103, Recommendation 3.

⁹⁶ Council Directive 1999/74/EC [1999] OJ L203/53.

⁹⁷ Council Directive 2007/43/EC [2007] OJ L182/19.

⁹⁸ Eurogroup for Animals Briefing March 2012, Horizontal aspects of the future CAP (copy on file).

⁹⁹ Regulation (EU) No 1305/2013 (n 67).

¹⁰⁰ *ibid*, art 1(1).

¹⁰¹ *ibid*, art 4.

3.4.3.1 Animal Welfare Payment

Should Member States decide to include the improvement of animal welfare in their rural development programmes, an annual animal welfare payment may be granted for a renewable period of one to seven years. This would be paid to eligible farmers who undertake voluntarily to carry out operations consisting of one or more animal welfare commitments which go beyond the EU legislative minimum norms, known as statutory management requirements and listed in the Horizontal Regulation. Payments are granted on an annual basis compensating farmers for all or part of the additional costs and income foregone and where necessary may cover transaction costs although this figure is capped, with EAFRD support limited to the maximum amount of five hundred Euros per livestock unit.¹⁰² It is obligatory for these funds to be supplemented with national spending in one of four specified areas of upgraded standards of production: First, water, feed and animal care in accordance with the natural needs of animal husbandry; second, housing conditions, such as increased space allowances, flooring surfaces, enrichment materials, natural light; third, outdoor access; and fourth, practices which avoid mutilation and / or castration of animals, or in specific cases when mutilation or castration of animals is deemed necessary, provide for the use of anaesthetics, analgesia and anti-inflammatory medication or immunocastration.¹⁰³ The welfare credentials for 2014-20 are not as strong in comparison with its predecessor,¹⁰⁴ which urged the provision of upgraded animal welfare standards in 'at least' one of five areas, the fifth now deleted namely the prevention of pathologies mainly determined by farming practices and or keeping conditions.¹⁰⁵

Rural Development reform has treated animal welfare less favourably than the previous CAP Rural Development Regulation and also in comparison to the current Pillar II agri-environment-climate and organic payments, respectively. The former period of entitlement to the animal welfare payment was as a general rule between five and seven years and where necessary and justified, for a determined longer period.¹⁰⁶ Compare the continuing voluntary nature of the

¹⁰² *ibid*, art 33; Annex II. The livestock unit is a reference unit which facilitates the aggregation of livestock from various species and age as per convention, via the use of specific coefficients established initially on the basis of the nutritional or feed requirement of each type of animal [https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Livestock_unit_\(LSU\)](https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Livestock_unit_(LSU)).

¹⁰³ Commission Delegated Regulation (EU) No 807/2014 of 11 March 2014 supplementing Regulation (EU) No 1305/2013 of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and introducing transitional measures [2014] OJ L227/1, art 10.

¹⁰⁴ Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2006] OJ L368/15, art 27(7).

¹⁰⁵ *ibid*, art 27(7)(e). Commission Delegated Regulation (EU) No 807/2014 (n 103) recital (10).

¹⁰⁶ Former Regulation (EC) No 1698/2005 (n 23) art 40.

current animal welfare payment, renewable annually from one to seven years, with the compulsory agri-environment-climate measure, entitlement to which payment runs for a defined period of at least five to seven years.¹⁰⁷ It could be that this latter reflects the long-term commitment required of agri-environment-climate schemes when compared with the relatively short lives of livestock. This argument would ignore the level of commitment necessary to provide resource and management inputs in order to improve the welfare of each consecutive herd or flock of specific species of farm animal now and in the future. It should be added that the meeting standards support, degressive aid,¹⁰⁸ has now disappeared.¹⁰⁹ An animal welfare payment for a renewable period of one to seven years is not a guaranteed and effective incentive to encourage farmers voluntarily to engage with the changes necessary to improve farm animal welfare in the long term. Originally proposed as an annually renewable period the duration of the annual renewable period was extended to seven years at the initiative of the EP.¹¹⁰ This evidences a compromise agreement compared to the agri-environment-climate measure and the defined minimum period of five to seven years for organic farming support, i.e. for commitments going beyond the statutory norms undertaken on a voluntary basis to convert to or maintain organic farming practices and methods.¹¹¹ Moreover, there is a specific budget allocation targeted at agricultural practices positively contributing to the environment and climate change and going beyond EU minimum norms, amounting to thirty per cent of the total EAFRD contribution to Member States' rural development programmes.¹¹² There is no such compulsory, budgeted and targeted CAP EAFRD support for farmers practising enhanced standards of animal welfare. The voluntary character of animal welfare payment support towards Member States' rural development programmes in which animal welfare is enhanced and the lack of a dedicated budget allowance for it, prompted Eurogroup for Animals to question the political willingness to achieve animal welfare improvement through this measure. In the previous CAP reference period only twenty one out of a total of ninety rural development programmes included the animal welfare payment; one region only (Valle d'Aosta-Italy) allocated a significant part of its budget (7.02 per cent) to animal welfare payments.¹¹³ Only 1.1 per cent of EU farms with livestock had used the measure in the previous

¹⁰⁷ Regulation (EU) No 1305/2013 (n 67) art 28 (1) – (3).

¹⁰⁸ Flat-rate, temporary support granted on an annual basis for a maximum duration of five years from the date the standard became mandatory, former Regulation (EC) No 1698/2005 (n 23) art 31(2).

¹⁰⁹ Former Regulation (EC) No 1698/2005 (n 23) arts 20(c)(i) and 31. Commission Regulation (EU) No 807/2014 (n 103) Annex I Correlation Table.

¹¹⁰ European Parliament Committee on Agriculture and Rural Development, Draft Report on the proposal for a regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (COM(2011) 0627- C7-0340/2011-2011/0282(COD)) PR\881155EN.doc. PE474.053v01-00 (24.5.12) Amendment 48.

¹¹¹ Regulation (EU) No 1305/2013 (n 67) art 29(1)(2).

¹¹² *ibid*, art 59(6).

¹¹³ Eurogroup for Animals, 'Overview of the animal welfare payment measure in EU Member States' rural development programmes 2007-2013' (July 2010) (copy on file).

reference period.¹¹⁴ Rural development funding of €1 billion was allocated for the animal welfare payment between 2007-13, and for the 2014-20 period eighteen Member States allocated €1.5 billion to this measure (1.5 per cent of the total planned expenditure for all measures). The UK allocation is the lowest out of those Member States which utilised this payment in this current period and ten Member States did not use this measure.¹¹⁵ The ECA found that the animal welfare measure was not widely used and that its cost-effectiveness was reduced since it supported farms which were not beneficiaries of direct payments and which did not respect minimum legislative standards on pig welfare.¹¹⁶

3.4.3.2 Rural Development Priority 3

The Rural Development Regulation prioritises the promotion of food chain organisation including the processing and marketing of agricultural products, animal welfare and risk management in agriculture.¹¹⁷ It directs its focus to the private sector to improve the competitiveness of primary producers by better integrating them into the agri-food chain through quality schemes, adding value to agricultural products, promotion of the same in local markets and short supply circuits, producer groups and organisations and inter-branch organisations.¹¹⁸ The second priority of enhancing farm viability and competitiveness¹¹⁹ ignores the opportunity expressly to improve animal welfare on the farm; high standards of animal welfare may unlock premium prices and / or increase supplies of value-added agri-produce. According to the draft report of the Committee on Agriculture and Rural Development, fostering knowledge transfer in agriculture would have focused on improving animal welfare as a fourth indent of this first rural development priority. Such specificity was not to be.¹²⁰

The EP succeeded in augmenting food chain organisation, including animal welfare into the CAP for the reference period 2014-20.¹²¹ Adherence to the processing and marketing of agricultural products, also to animal welfare in the

¹¹⁴ European Court of Auditors (2018) (n 91) para 95, citing Ecorys and IfLS, 'Synthesis of Rural Development Programmes ex-post evaluations of period 2007-2014' (2018).

<https://op.europa.eu/en/publication-detail/-/publication/0cdeb97a-ca32-11ea-adf7-01aa75ed71a1/language-en>.

¹¹⁵ European Court of Auditors (2018) (n 91) paras 12, 80, 93.

¹¹⁶ *ibid*, para 104.

¹¹⁷ Regulation (EU) No 1305/2013 (n 67) art 5(3).

¹¹⁸ *ibid*, art 5(3)(a).

¹¹⁹ *ibid*, art 5(2).

¹²⁰ European Parliament Committee on Agriculture and Rural Development, Draft Report PR\881155EN.doc. PE474.053v01-00 (24.5.12) (n 110) Amendment 12.

¹²¹ Amendments 001-001 by the Committee on Agriculture and Rural Development to the Commission Proposal for a regulation on support for rural development by the European Agricultural Fund for Rural Development (COM(2011)0627- C7-0340/2011-COM(2012)0553 – C7-0313/2012-2011/0282(COD)) A7-0361/2013, PE519.385/1 (14.11.2013).

food chain, did not appear in the Commission's initial proposal.¹²² References to 'improving the competitiveness' of primary producers by better integrating them into the agri-food chain through quality schemes, and 'adding value to agricultural products', were inserted into the adopted Regulation as a direct result of the EP's endeavours to ensure the contribution of the CAP's Rural Development Regulation to the Europe 2020 Strategy.¹²³ The way forward for animal welfare in agriculture evidently would lie in the role of animal welfare in the agri-food chain to improve the competitiveness of farmers as producers of enhanced animal welfare agri-produce in accordance with quality schemes promoted to the consumer. This is corroborated by the EFSA assertion that '[t]here is clearly a strong demand for higher animal welfare standards: food quality is considered to be not only determined by the overall nature and safety of the end product but also by the perceived welfare status of the animals from which the food is produced'.¹²⁴

3.4.3.3 Rural Development Quality Regimes

The Rural Development Regulation continues to offer Pillar II support for the voluntary promotion of quality produce by farmers newly participating in quality schemes established in EU law. ¹²⁵ One EU quality regime consists of the regulation and promotion of protected products of designated origin (PDO) or products of geographical indication (PGI) in accordance with the EU Regulation on quality schemes for agricultural products and foodstuffs.¹²⁶ A second major EU quality regime is concerned with organic production, processing and labelling.¹²⁷ Support is also available under the quality architecture of the Rural Development Regulation for farmers' new participation in voluntarily undertaken private farm assurance and certification schemes.¹²⁸

Rural Development support may cover costs arising from information and promotion activities implemented by groups of producers concerning products covered by a quality scheme receiving support in accordance with the Rural

¹²² European Commission Proposal for a Regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) COM (2011)627 final/2, 19 October 11.

¹²³ European Commission, *Europe 2020 Strategy for smart, sustainable and inclusive growth* COM (2010)2020 3 March 2010.

¹²⁴ EFSA Technical Report, *The use of animal-based measures to assess animal welfare in the EU – state of the art of 10 years of activities and analysis of gaps* (6 November 2015) 1.1.1.

¹²⁵ Regulation (EU) No 1305/2013 (n 67) art 16(1)(a)(i)(ii).

¹²⁶ Regulation (EU) No 1151/2012 of 21 November 2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs [2012] OJ L343/1.

¹²⁷ Council Regulation (EC) No 834/2007 (n 50); Commission Regulation (EC) No 889/2008 (n 50).

¹²⁸ Regulation (EU) No 1305/2013 (n 67) art 16(1)(b)(i)-(iv)(c)(2)(3)(4).

Development Regulation.¹²⁹ Granted as an annual incentive payment, support is determined according to the level of the fixed costs arising from participation in supported schemes, for a maximum duration of five years. 'Fixed costs' means the costs incurred for entering a supported quality scheme and the annual contribution for participating in that scheme, including expenditure on checks required to verify compliance with the specifications of the scheme.¹³⁰

This section will look first at the EU quality schemes for agricultural produce and foodstuffs with a focus on PDOs and PGIs. It will proceed to provide examples of how the quality schemes for PDOs and PGIs do not bode well for higher standards of animal welfare. The EU quality regime concerned with the production, promotion and labelling of organic produce will feature in the second instance. Third, support facilitative of EU farmers newly participating in private farm assurance and certification schemes will receive appraisal, noting the leaning on the part of the EU to hybridity in standardisation in farm animal welfare.

3.4.3.3.1 EU Quality Schemes for Agricultural Produce and Foodstuffs

An EU framework regulates quality schemes for agricultural products and foodstuffs, providing the basis for identifying the 'value-adding characteristics or attributes' of high quality protected PDOs and / or products of defined geographic indication (PGI).¹³¹ Adopted on the basis Article 43(2) (Agriculture) and the first paragraph of Article 118 TFEU (Intellectual Property), this Regulation works on the premise that the quality and diversity of the Union's agricultural production is one of its important strengths, giving a competitive advantage to the Union's producers and making a major contribution to its living cultural and gastronomic heritage.¹³² The Regulation recognises that EU citizens and consumers seeking quality products are also concerned to maintain the diversity of EU agricultural production which generates a demand for agricultural products or foodstuffs with identifiable specific characteristics, in particular those linked to their geographical origin.¹³³ Its clear objective is the establishment of a scheme for protected designations of origin and protected geographical indications in order to help producers of products linked to a geographical area by: (a) securing fair returns for the qualities of their products; (b) ensuring uniform protection of the names as an intellectual property right in the territory of the Union; (c) providing clear information on the value-adding attributes of the product to consumers.¹³⁴

¹²⁹ *ibid*, art 16(2).

¹³⁰ *ibid*, art 16(3). Support is capped, art 16(4), Annex II.

¹³¹ Regulation (EU) No 1151/2012 (n 126); Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs [2014] OJ L179/36, art 1(1)(2)(a)(b).

¹³² Regulation (EU) No 1151/2012 *ibid*, recital (1).

¹³³ *ibid*, recital (2).

¹³⁴ *ibid*, Title II, art 4.

For the purposes of this Regulation:

‘designation of origin’ is a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and (c) the production steps of which all take place in the defined geographical area.

‘geographical indication’ is a name which identifies a product: (a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area.¹³⁵

A PDO or a PGI must comply with a specification which includes at least the detailed information in the Regulation, for example: the name to be protected as a PDO or PGI, as it is used; a description of the product, including its principal characteristics; the definition of the geographical area delimited; evidence that the product originates in the defined geographical area; and details establishing the link between the quality or characteristics of the product and the geographical environment or between a given quality, the reputation or other characteristic of the product and the geographical origin.¹³⁶ To qualify for protection, PDOs and PGIs should be registered in the publicly accessible EU register¹³⁷ and display the relevant EU quality logo.¹³⁸

Inconsistencies in terms of animal welfare quality

The quality schemes’ objective of informing the consumer of the value-adding attributes as a result of the farming or processing methods used in the production of protected products¹³⁹ does not require specified animal welfare criteria to have been met.¹⁴⁰ The breadth and depth of animal welfare conformity criteria are absent. This quality regime with support for the promotion of PDOs and PGIs is inconsistent with the notion of enhanced animal welfare and works against the delivery of high standards of animal welfare in EU agriculture and the agri-food chain. Two examples, one of a PDO and the second an example of a PGI, will

¹³⁵ *ibid*, art 5(1)(2) Requirements.

¹³⁶ *ibid*, art 7 (1) Product specification.

¹³⁷ *ibid*, arts 11, 24

¹³⁸ *ibid*, arts 28. 64. Commission Implementing Regulation (EU) No 668/2014 (n 131).

¹³⁹ Regulation (EU) No 1151/2012 (n 126) art 1(1)(2)(b).

¹⁴⁰ 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, *ibid* art 5(4). Specific rules on feed require the product specification of a product of animal origin the name of which is registered as a protected designation of origin to contain detailed rules on the origin and the quality of feed, Commission Implementing Regulation (EU) No 668/2014 (n 131) art 3.

serve to substantiate this statement. The discussion which follows will also demonstrate that there is no easy and immediate solution to reconcile the diverse views held by EU citizens from different geographical locations and their associated credence demands for animal welfare and / or regional strengths of PDO / PGI.

The surgical castration of pigs is scientifically proven to be painful,¹⁴¹ yet this EU quality scheme for agricultural produce accommodates such intervention undertaken in order to avoid the development of boar taint, which is deemed to be 'unavoidable to meet the current quality standards' required in respect of 'traditional productions requiring heavier pigs'.¹⁴² In Italy male pigs are castrated, some with analgesia: Anaesthesia is not used.¹⁴³ The majority of the Italian pig production is located in the Protected Designation Origin region for Parma ham (province of Parma - Emilia-Romagna region, Italy).¹⁴⁴ 'Prosciutto di Parma' is registered and protected as a product of designated origin to Italy¹⁴⁵ and heavy pigs are reared for late slaughter to provide this product, which has a delicate, sweet flavour, according to the specificities.¹⁴⁶ The expert group on the European Declaration has recognised that more knowledge and dissemination of good practice is required. More research is required to prepare a list of traditional products requiring heavier pigs and to establish which alternatives to surgical castration can guarantee meat quality, and on the availability of effective and practical analgesic and anaesthetic protocols for on-farm use.¹⁴⁷ There is a

¹⁴¹ EFSA, *Welfare aspects of the castration of piglets* (EFSA J (2004) 91) 1. Armelle Prunier and others, 'A review of the welfare consequences of surgical castration in piglets and the evaluation of non-surgical methods' (2006) 15 Anim Welf 277.

¹⁴² EU Declaration on alternatives to surgical castration of pigs (2010) http://ec.europa.eu/food/animals/docs/aw_prac_farm_pigs_cast-alt_declaration_en.pdf.

¹⁴³ Based on a Federation of Veterinarians survey in 2015, 97% of male pigs were castrated without analgesia or anaesthesia, cited in Gé Backus and others, Second Progress Report 2015–2017 on the European declaration on alternatives to surgical castration of pigs (Brussels 2018) 6. Nancy De Briyne and others (2016) 'Pig castration: will the EU manage to ban pig castration by 2018?' Porcine Health Management 2016 2:29.

¹⁴⁴ Gé Backus and others, First progress report (2012-2014) on the European declaration on alternatives to surgical castration of pigs (2010) (Brussels 2014) 10.

¹⁴⁵ eAmbrosia Database: PDO-IT-0067 Registered 21 June 1996. Extract from the Register, ec_food_67238.pdf.

<https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/#>.

¹⁴⁶ Commission Implementing Regulation (EU) No 1208/2013 of 25 November 2013 approving minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indication (Prosciutto di Parma (PDO)) [2013] OJ L317/8, art 2, Annex II [5.2, 5.3].

¹⁴⁷ Gé Backus and others, Second Progress Report (2018) (n 143). See European Commission Final Report Establishing Best Practices on the production, the processing and the marketing of meat from uncastrated pigs or pigs vaccinated against boar taint (immunocastrated) (14 March 2019)

discernible tension in which market stakeholders' dichotomy of interests pervade and the lack of availability and use of anaesthesia result in poor welfare. Gé Backus informs that 'the process of moving towards alternatives to surgical castration is irreversible, even if solutions applied in Europe differ. But there are no easy solutions, and not all markets are ready yet'.¹⁴⁸ There is a growing consensus at least in Western Europe that surgical castration of male piglets should be abandoned. Furthermore, surgical castration with anaesthesia and pain relief is deemed not to be sustainable in the long-term in main stream production, although it might be a solution for the products which demand pigs of higher age and weight at slaughter. Backus confirms that solutions to the issues raised by entire male pig production and the acceptability to consumers of boar taint and immunocastration are the subject of research and scientific discussion.¹⁴⁹ Successful adoption of the alternatives to castration will require concerted action at all levels of the supply chain in which the increased role of information to consumers is considered a factor.¹⁵⁰

Additionally, the process of producing *foie gras* through the forced-feeding of ducks and to a lesser degree geese to produce enlarged livers is an extreme animal welfare concern,¹⁵¹ in respect of which there are no species-specific EU minimum welfare requirements. To the contrary, EU law promotes and protects the gastronomical qualities of such produce to the detriment of the ducks' welfare. 'Canard à foie gras du Sud-Ouest (Chalosse, Gascogne, Gers, Landes, Périgord, Quercy)' is registered and protected as a product of geographical indication,¹⁵² 'reflecting the rural, gastronomic culture of South-West France'.¹⁵³ Elements of the amended registration include the introduction of a minimum weight for force-

https://ec.europa.eu/food/sites/food/files/animals/docs/aw_prac_farm_pigs_cast-alt_establishing-best-practices.pdf.

¹⁴⁸ Gé Backus, Director Connecting Agri & Food, 'Ending castration of piglets' Activities of the voluntary initiative on piglets: alternatives for surgical castration COST IPEMA (Innovative Approaches for Pork Production with Entire Males) (CA 15215) (EU supported) https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20201103_pres-07.pdf.

¹⁴⁹ <http://www.ca-ipema.eu/> COST action IPEMA aims to find general, region-specific or chain-specific solutions to facilitate the development of alternatives to surgical castration of piglets: Raising entire males; Immunocastration. IPEMA is looking for integrated solutions taking into account meat quality (boar taint and other meat quality issues), animal welfare, management and production costs, acceptance by stakeholders, consumers and citizens.

¹⁵⁰ Gé Backus, COST IPEMA (n 148) .

¹⁵¹ Irene Rochlitz and Donald M Broom, 'The welfare of ducks during foie gras production' (2017) 26(2) Anim Welf 135-149.

¹⁵² eAmbrosia Database: PGI-FR-0034 Registered 27 June 2000. Extract from the Register, ec_food_75083.pdf. <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/#>.

¹⁵³ Publication of an amendment application pursuant to Article 50(2)(a) Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs. [2015] OJ L 11/18 [3].

fed animals in addition to their average weight, continuous force-feeding i.e. of ducks of different ages simultaneously, together with the qualitative aim to achieve a liver weighing 550 grams (minimum size remains 350 grams).¹⁵⁴

These protected products are communicated and connected to the consumer via marketable EU logos.¹⁵⁵ In contrast, an EU animal welfare label / logo for animal welfare good agricultural practice produce does not exist with which to link the enhanced conditions in which an animal lives its life on the farm to the credence consumer of agri-food. The interests of farmers in reaping the returns of practising higher animal welfare standards are not reinforced by an associated and marketable EU trade mark or logo.

In detracting from the requirement to pay full regard to the welfare of animals as sentient beings, such illustrative practices could perhaps continue to be accommodated in the *proviso* to Article 13 TFEU facilitative of the customs of the Member States relating in particular to cultural traditions and regional heritage - in the interests of European consumers to preserve their national gastronomy. Yet such an interpretation runs contrary to EU citizens' expectations for CAP expenditure to improve animal welfare. This conflict fails to recognise:

the movement to end interventions pursuant to the European Declaration on alternatives to surgical castration of pigs;¹⁵⁶

the trilateral initiative of the Danish, German and Netherlands delegations;¹⁵⁷

the joint declaration of the Danish, German and Netherlands delegations calling for better regulation, better welfare and the promotion of awareness and knowledge at both European and global level and in different arenas for the well-being of animals;¹⁵⁸

the position paper of the German, Swedish Danish and Netherlands delegations on the establishment of an EU platform for animal welfare to generate momentum and focus on the animal welfare challenges faced by the EU;¹⁵⁹

¹⁵⁴ *ibid* [4].

¹⁵⁵ https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en.

¹⁵⁶ http://ec.europa.eu/food/animals/docs/aw_prac_farm_pigs_cast-alt_declaration_en.pdf.

¹⁵⁷ Council of the European Union, 16923/1/14 REV 1 (Brussels, 17 December 2014).

¹⁵⁸ Council of the European Union, 16654/14 (Brussels, 9 December 2014).

¹⁵⁹ Council of the European Union, 5708/16 (Brussels, 29 January 2016).

the momentum of Germany, the Netherlands, Sweden and Denmark in their jointly signed position paper requesting a revision of the pigs Directive;¹⁶⁰ or

the group of Member States led by Germany calling for an EU animal welfare label.¹⁶¹

A positive reading of the *proviso* to cater for the higher standards of welfare espoused societally, culturally and regionally would accord with mainstream moral perceptions. It would strengthen the ascending drive for change to uphold the sentience of animals through reinforced standards for their welfare on the farm and promotion of the same. There is a tension between EU quality regimes and the soaring regard for animal welfare imperatives. There are, nevertheless, signs that suppliers in the agri-food chain and policy makers are aware of the societal cultural movement for improved standards of animal welfare. EU-funded research into alternatives to castration is evidence of the steps being taken to find a market solution in which concern for the welfare of animals reared for food is a paramount factor.

3.4.3.3.2 EU Organic Quality Scheme

The EU Rural Development Regulation also offers support for farmers' newly participating in the EU organic quality regime.¹⁶² The Rural Development Regulation promotes such participation in EU compliant quality organic farming schemes within which, inter alia, high standards of animal welfare are practised going beyond the minimum EU welfare norms, for which voluntary undertaking a payment may be obtained.¹⁶³ Rural development commitments to organic farming are to be made for a period of five to seven years with Member States afforded some flexibility to determine alternative periods in specified instances.¹⁶⁴ Annual payments compensate beneficiaries for all or part of the additional costs and income foregone resulting from the commitments made to organic farming and where necessary may cover transaction costs to a percentage value which is capped. Overall support is capped.¹⁶⁵

Separate EU Regulations govern the method of organic production and the promotion of quality organic farming using the organic logo. The EU Regulations on organic production and labelling of organic products¹⁶⁶ are not specific to

¹⁶⁰ Council Directive 2008/120/EC. Council of the European Union 8596/15 (Brussels, 5 May 2015).

¹⁶¹ Council of the European Union, 5346/1/20 REV 1 (Brussels, 24 January 2020).

¹⁶² Regulation (EU) No 1305/2013, art 16(1) (a) (ii) (2)(3)(4).

¹⁶³ *ibid*, recital (23) art 29(1)(2).

¹⁶⁴ *ibid*, art 29(3).

¹⁶⁵ *ibid*, art 29(4)(5), Annex II.

¹⁶⁶ Council Regulation (EC) No 834/2007 (n 50); Commission Regulation (EC) No 889/2008 (n 50).

animal welfare, additionally being comprised of a wider array of environmental / green practices, for example. Organic production thus aims, amongst other objectives, to produce high quality agricultural products which respond to consumers' demand for goods produced by the use of processes that do not harm animal health and welfare.¹⁶⁷ Organic farming is premised on the observance of a high level of animal welfare respecting species-specific needs,¹⁶⁸ the feeding of livestock with organic feed and the application of animal husbandry practices that deter disease including regular exercise and access to open air areas and pastureland where appropriate.¹⁶⁹ Rules establish species-specific behavioural needs requirements to be met in organic livestock farming.¹⁷⁰ Poultry, for example, must be reared until they reach a minimum stipulated age per species or come from slow-growing strains.¹⁷¹ Cattle are required to have access to pasture for grazing.¹⁷² Compulsorily, tail-docking, cutting of teeth, trimming of beaks and dehorning cannot be carried out routinely.¹⁷³ Nutritional requirements focus on meeting species' welfare needs, for example calves' diets which encourage anaemia are prohibited and forced-feeding is forbidden.¹⁷⁴ A new Regulation on organic production and labelling of organic products¹⁷⁵ will establish additional production rules for deer, rabbits and poultry.¹⁷⁶ Quality organic produce is promoted to the consumer by way of the EU organic logo.¹⁷⁷ Standards of animal welfare in organic farming go beyond good agricultural practice with the dual aim of satisfying consumer confidence in the associated provision of an organic logo identifying the higher organic standards of organically produced agri-food. It is recalled that the *Hala!* case upheld the significance of the consumer-facing organic logo with which to signal to consumers the fact that their preferences for high standards of animal welfare had been met.¹⁷⁸

¹⁶⁷ Regulation (EC) No 834/2007 *ibid*, art 3(b)(c).

¹⁶⁸ *ibid*, art 3(a)(iv).

¹⁶⁹ *ibid*. See, for example, *ibid*, arts 5(h)(k)(l), 14(b)(d).

¹⁷⁰ *ibid*. Species mentioned in Annex III, *ibid*, art 7.

¹⁷¹ *ibid*, art 12(3)(2).

¹⁷² *ibid*, art 14(1).

¹⁷³ Commission Regulation (EC) No 889/2008 (n 50) art 18.

¹⁷⁴ *ibid*, art 20 (4).

¹⁷⁵ Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L150/1.

¹⁷⁶ https://ec.europa.eu/info/food-farming-fisheries/farming/organic-farming/future-organics_en.

¹⁷⁷ https://ec.europa.eu/info/food-farming-fisheries/farming/organic-farming/organics-glance/organic-logo_en.

¹⁷⁸ Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation* EU:C:2019:137.

Deficiencies as an animal welfare vehicle

Organic animal production accounted for less than one per cent of the total EU 27 animal herd in 2010.¹⁷⁹ Within that small proportion pigs held the smallest share (0.33%), with cattle enjoying the highest share (2.90%).¹⁸⁰ In 2015 there were 3.7 million heads of certified organic cattle in the EU-28, with 0.86 million organic dairy cows in the EU 15 accounting for ninety per cent of organic dairy cows in the EU. The organic pig herd amounted to 0.978 million heads in 2015 holding a very minor share in the EU pig market, but with ninety seven per cent of the organic pig production situated in the EU 15.¹⁸¹ The 2018 figures for organic livestock as a share of all livestock in the EU 28 showed a rise in cattle and sheep raised organically, but only in some Member States. There were more than 4.6 million organic cattle out of a total of 87.4 million bovine livestock including dairy cattle reported in 2018. For most EU Member States organically reared pigs accounted for only a small share in the total pig population with the highest share in Denmark at just under four per cent.¹⁸² Organic livestock farming and production labelling is evolving slowly, but there is not a level playing field in all EU Member States and particularly the percentage of pigs reared under organic methods is poor.

3.4.3.3.3 Support to farmers newly participating in other voluntary quality schemes

Rural development support is also available for farmers newly participating in quality schemes including farm certification schemes recognised by Member States as complying with EU criteria. The specificity of the final product under such schemes must be derived from clear obligations to guarantee specific product characteristics, or specific farming or production methods, or a quality of the final product which goes significantly beyond the commercial commodity standards as regards animal or plant health, animal welfare or environmental protection.¹⁸³ This public acknowledgement of private farm assurance schemes and concurrent push to farmers to align their produce with higher private welfare

¹⁷⁹ Rachele Rossi, European Commission Agriculture and Rural Development Report *Facts and figures on organic agriculture in the European Union* (October 2013) 35 https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/trade/documents/report-organic-agriculture-eu-2013_en.pdf.

¹⁸⁰ *ibid*, citing Table 9 Percentage of organic out of total animal herd in the EU-27 (2010) Eurostat.

¹⁸¹ Rachele Rossi, European Commission Agriculture and Rural Development Report *Facts and figures on organic agriculture in the European Union* (December 2016) 37. https://ec.europa.eu/agriculture/rca/pdf/Organic_2016_web_new.pdf.

¹⁸² European Commission – Eurostat, 'Organic farming statistics' (January 2020) https://ec.europa.eu/eurostat/statistics-explained/index.php/Organic_farming_statistics.

¹⁸³ The scheme must be open to all producers, involve binding product specifications, compliance with which is verified by public authorities or by an independent inspection body and be transparent, assuring complete traceability of products, Regulation (EU) No 1305/2013 (n 67) art 16(1)(b)(i)-(iv).

standards going beyond EU minimum norms is evidence of a degree of hybridity and of the blurring of the public / private standards dichotomy.¹⁸⁴ Eligibility for rural development support also accrues to farmers newly participating in voluntary agricultural product certification schemes recognised by the Member States as meeting the Union best practice guidelines for the operation of voluntary certification schemes relating to agricultural products and foodstuffs.¹⁸⁵ Support may be granted as an annual incentive payment determined in accordance with the fixed costs of scheme participation and verification for a maximum duration of five years,¹⁸⁶ with the possibility of information and promotion cost support.¹⁸⁷

The Commission Delegated Regulation strengthens the Rural Development Regulation's 'nudge' to farmers to engage with private sector standards in accommodating more fully the promotion of high animal welfare standards linked to the quality scheme concerned in the types of action eligible for support.¹⁸⁸ There is a degree of EU encouragement to engage with the private assurance schemes and to observe private best practice quality standards inclusive of animal welfare standards in the CAP Rural Development quality objectives, albeit the nature of participation in such schemes would be voluntary.

Lacking a specific animal welfare quality regime

Although some recognition could be given to the animal welfare provisions in the Commission Delegated Regulation, the EU CAP does not promote a bespoke EU animal welfare quality regime for agricultural products and foodstuffs. The CAP Treaty basis would accommodate such an animal welfare quality scheme in accordance with the ECJ's pronouncement in the case of *United Kingdom v Council*: 'Measures adopted on the basis of Article 43 of the Treaty may include rules governing conditions and methods of production, quality and marketing of agricultural products'.¹⁸⁹ The potential for one lies within the Rural Development Regulation's ambit in agricultural product quality to strengthen local / regional diversity in the promotion of value-added animal welfare quality agri-produce. But the dual tools of EU governance are absent, namely 'support' for, and 'promotion'

¹⁸⁴ Linda C Botterill and Carsten Daugbjerg, 'Engaging with private sector standards: a case study of GLOBALG.A.P.' (2011) 65(4) Australian J Int Aff 488.

¹⁸⁵ Commission Communication *EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs* [2010] OJ C341/5.

¹⁸⁶ Regulation (EU) No 1305/2013 (n 67) art 16(1)(c), art 16(2)(3) which will be capped, art 16(4), Annex II.

¹⁸⁷ *ibid*, art 16(2).

¹⁸⁸ Commission Delegated Regulation (EU) No 807/2014 (n 103) art 4(2)(a)(b). See Botterill and Daugbjerg (n 184) and 'Carsten Daugbjerg and Linda C Botterill, 'Ethical food standards schemes and global trade: Paralleling the WTO?' (2012) 31 Policy Soc 307.

¹⁸⁹ Case 68/86 *United Kingdom v Council* (n 14) [892].

of,190 improved animal welfare agri-produce in a singular EU animal welfare quality scheme.

3.5 Is the CAP 2014-20 Optimised in Animal Welfare?

Farmers face the challenge of recouping and increasing their share of the agri-food supply chain with a key element being the role of the EU CAP in both the provision and the promotion of improved animal welfare quality. The initiative of the EP integrated the potential for value-added animal welfare into the EU's competitiveness and growth agenda to 2020 via the agri-food production chain. But the market alone will not sustain the delivery of such a public good and the farmer meeting consumer societal demand for animal welfare credence attributes of agri-produce merits adequate public support.

The Treaty stated objectives of the CAP have not undergone reform, but this would not be necessary to enable the CAP to embrace new animal welfare initiatives. The CAP has evolved to serve new ends, for example the challenges posed in protecting the environment and mitigating climate change based on the same Treaty-based CAP objectives. To do so involves a question of interpretation in line with political, economic and societal expectations and demands. Yet it should be questioned whether such a strained interpretation is the best way forward. The objectives expressed in the Agriculture Title and in the CAP legislative instruments do not recognise animals as sentient beings. Animal welfare is not harnessed for its own sake nor in communicating to farmers the economic benefits of engaging with animal welfare improvements with dedicated support in which to do so. To the contrary there is a palpable contradiction within certain CAP quality regimes. Article 13 TFEU placed with the provisions having general application in the EU demonstrates acceptance of the progressive rise of animal welfare as a valid concern with its explicit recognition of animal sentience, yet it is devoid of mention in the 2014-20 CAP proposal documents.¹⁹¹

The EU and the Member States in the legislative process, could, and should, have done more since animals are sentient beings to pay full regard to animal welfare in the formulation of the CAP instruments, more particularly with Pillar I support and the promotion of quality under Pillar II. Article 13 TFEU authorises the EU legislature to integrate full regard for animal welfare into the legislative provisions establishing the CAP, i.e. to embed animal welfare as a direct concern of the CAP. Were the Regulations establishing the CAP to incorporate animal welfare as an expressed obligation, the effect would be to inject into the current regulatory context of the common organisation of the market in animal agricultural

¹⁹⁰ European Parliament Directorate General for Internal Policies - Policy Department B: Structural and Cohesion Policies – Agriculture and Rural Development, *The Future of the Quality Policy in the light of the CAP Post-2013* IP/B/AGRI/IC/2011_019. PE 460.033 (March 2011) 11.

¹⁹¹ Compare with the regard paid to the former Animal Welfare Protocol in the Mid-Term Review of the CAP, COM (2002)394 (n 22) 9.

produce - animals constituting products¹⁹² - the complementary key derivative of animal welfare for farm animals as sentient beings. The *Halal* case suggests that the CJEU will accommodate animal welfare principles where there is an explicit commitment by the EU legislator to the animal welfare objective to be attained by the norm adopted on the agriculture legal basis. The CJEU's interpretative *dicta* could be influenced towards the protection of animal welfare as an inherent value read in the light of Article 13 TFEU. Respecting cultural traditions and regional diversity need not then be viewed as a negative *proviso* in order to limit EU animal welfare in agriculture policy. The fact that a number of EU Member States increasingly are taking a stance in order to improve the welfare of pigs beyond the minimum norms, for example, demonstrates the ascending legitimate public value status of animal welfare in the EU. Concern for animal welfare has moved beyond the views of a minority of society.¹⁹³ There would be the scope to respect, and to take account of, EU Member States' progressive deviation from the minimum norm where animal welfare opinion has proliferated. The embryonic stance of Denmark, Germany, The Netherlands and Sweden calling for better welfare standards for pigs¹⁹⁴ and setting out the next steps for animal welfare,¹⁹⁵ would be a key example in point, as would the prior Joint Declaration of Denmark, Germany and the Netherlands on Animal Welfare of 14 December 2014.¹⁹⁶ These initiatives have received recognition.¹⁹⁷ Emphasis should be placed on Article 13 TFEU in order to inject an express and derivative regard for animal welfare in future EU legislative provision adopted on the basis of EU agricultural policy. There are positive signs in that Article 13 TFEU receives expression in the EU Agriculture Council's approval of the motivation for an EU animal welfare label, albeit in the preamble.¹⁹⁸

The broader reach of Pillar I of the CAP is the location in which to situate a good animal welfare agricultural practice mandatory requirement and one accorded the status of a public good akin to that of the greening / climate change obligation, also with specific budgetary support. A public responsibility manifests under the auspices of the CAP to mandate the compulsory attainment of standards of good agricultural practice in animal welfare going above the minimum norms, with a defined budget allocated for this purpose: one which would compensate farmers for their expenses incurred and income foregone in engaging with the necessary expenses of enhanced animal welfare production processes on-farm. This is to meet the growing societal expectation that the CAP delivers an enhanced animal

¹⁹² TFEU, art 38. Katy Sowery 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55 CML Rev 55-100.

¹⁹³ Ian A Robertson, *Animals, Welfare and the Law* (Earthscan from Routledge 2015) 276.

¹⁹⁴ 8596/15 (5 May 2015) (n 160).

¹⁹⁵ 5708/16 (29 January 2016) (n 159).

¹⁹⁶ 16923/1/14 REV 1 (17 December 2014) (n 157).

¹⁹⁷ Council of the European Union Conclusions on animal welfare - an integral part of sustainable animal production 14975/19 (Brussels, 16 December 2019) preamble (8).

¹⁹⁸ 13691/20 (Brussels, 7 December 2020) Preamble (1).

welfare policy. It is vital that it becomes economically viable for farmers to engage in improved welfare practices¹⁹⁹ and for the animal welfare value-added produce to reach consumers at reasonable prices in accordance with the historical objectives of the CAP.²⁰⁰ Budgetary constraints and the lack of universal acceptance of raised animal welfare standards may hinder such progress as Margaret Grossman explains, '[t]hough some non-commodity outputs may be public goods [to some countries], countries also disagree about the importance of government intervention to ensure that agricultural producers provide those public goods'.²⁰¹ Yet fundamentally, societal interest and cultural values increasingly are focused on enhanced animal welfare with farmers too identifying with the prospects presented by a CAP supportive of value-added animal welfare in agriculture and the agri-food chain. Essentially there should be some recasting of the administrative penalty scheme of cross-compliance to focus on the effectiveness of the penalties across Member States, the inclusion of small farmers²⁰² within its ambit and to comprise comprehensive criteria across all EU animal welfare Directives.

There is a *lacuna* in EU quality promoted within the CAP which fails to espouse enhanced animal welfare quality in an independent quality scheme with levelled support and a corroborative promotional animal welfare label, with positive steps underway in respect of the latter. A consumer-facing animal welfare label signalling enhanced agricultural practice more generally than that of organic production remains a pivotal goal of this thesis. The EP's assertion in 2011 rings true today in the light of current EU policy,²⁰³ 'An animal welfare label, which is under discussion in the EU could provide farmers producing under animal welfare conditions with higher prices for their products and thus incentivise the delivery of animal welfare'²⁰⁴ It is necessary for the EU to communicate in economic terms the overarching advantages which will accrue to farmers engaging with enhancements in animal welfare on the farm and being seen to use the CAP instruments to support this. In its evaluation of the CAP and animal welfare the ECA has recommended that the Commission going forward provide guidance to Member States on the use of rural development measures other than the animal welfare payment further to support improved animal welfare standards in order to

¹⁹⁹ EP, *What Tools to Encourage the Provision of Public Goods?* (n 1) 11.

²⁰⁰ TFEU, art 39(1)(e).

²⁰¹ Margaret R Grossman, 'Multifunctionality and Non-trade Concerns' in Michael N Cardwell, Margaret R Grossman and Chris P Rodgers (eds), *Agriculture and International Trade: Law, Policy and the WTO* (CABI 2003) 85, 86.

²⁰² Representing 40% of the total number of EU farmers, European Commission, 'Review of greening after one year' SWD (2016) 218 final, 22 June 2016, cited in European Court of Auditors (2018) (n 91) para 7.

²⁰³ COM(2020) 381 final, 20 May 2020; 13691/20 (Brussels, 7 December 2020. Chapter 2 (n 3) (n 4).

²⁰⁴ EP, *What Tools to Encourage the Provision of Public Goods?* (n 1) 12.

give farmers a wider range of incentives to improve animal welfare, with a target implementation date of 2021.²⁰⁵

To do so would be to target the CAP objectives in line with the Treaty empowerment post Lisbon to integrate animal welfare fully in EU agricultural policy. The continued existence of the CAP would receive legitimacy *vis à vis* the significant percentage of EU citizens calling for a reinforced EU role in ensuring good standards of animal welfare in EU agriculture.²⁰⁶

3.5.1 The CAP Beyond 2020?

The CAP reform process is continuing with proposals²⁰⁷ adopted for the period 2021-2027. The Commission undertook a public consultation²⁰⁸ prior to setting out the EU's ambitions for the future of food and farming under the CAP.²⁰⁹ In setting out its proposals for a new delivery model for the CAP, the Commission acknowledged that lessons were to be learned from the public consultation in which ninety six per cent 'of all respondents said that farmers' positions in value chains should be improved'.²¹⁰ Animal welfare was a recurring theme in responses to almost all open questions in that consultation.²¹¹ Animal welfare featured as the third option selected (after environment / climate and animal

²⁰⁵ European Court of Auditors (2018) (n 91) Recommendation 4.

²⁰⁶ European Commission, Special Eurobarometer 442 *Attitudes of Europeans towards Animal Welfare November –December 2015* (March 2016)

²⁰⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council, COM(2018)392 final, 1 June 2018 (Strategic Plan Regulation). European Commission, Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013, COM (2018)393 final, 1 June 2018 (Horizontal Regulation).

²⁰⁸ Ecorys, 'Modernising and Simplifying the Common Agricultural Policy Summary of the Results of the Public Consultation' (Brussels, 7 July 2017).

https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/key_policies/documents/summary-public-consul-modernising-simplifying-cap_2017_en.pdf. European Commission Highlights 'Modernising and Simplifying the Common Agricultural Policy'
https://ec.europa.eu/agriculture/sites/agriculture/files/consultations/cap-modernising/highlights-public-consul_en.pdf.

²⁰⁹ European Commission, *Communication on The Future of Food and Farming* COM (2017)713 final, 29 November 2017.

²¹⁰ *ibid*, 5.

²¹¹ Ecorys (2017) (n 208) 150.

health) out of nine options in citizens' responses to the question: 'considering consumer and wider societal demands, where can the linkage between CAP and standards be improved?'²¹² Commission highlights indicate that animal welfare and quality products emerged in the societal demands for the objectives of the CAP.²¹³ The future CAP intends to continue to address societal expectations for sustainable food production concerning food quality and animal welfare standards.²¹⁴ Furthering organic production and addressing the inappropriate use of antimicrobial medicine in agriculture feature strongly in EU policy for food and farming with a future role for the CAP:

one which can help farmers to improve the application of EU rules on animal welfare and to further increase standards through voluntary initiatives aimed at promoting the market value of animal welfare both within and outside the EU.²¹⁵

The proposed 'Strategic Plan Regulation' encapsulates the Direct Payments and Rural Development Regulations combining the CAP's support mechanisms, with animal welfare expressed to be a CAP objective for the forthcoming reference period. The new CAP aims to improve the response of EU agriculture to societal demands on food and health, including safe, nutritious and sustainable food, as well as animal welfare.²¹⁶ Member States will design appropriate interventions²¹⁷ in their circumstances and present their proposed interventions to achieve EU specific objectives in a CAP strategic plan, which will be forwarded to the Commission for approval.²¹⁸ In their strategic plans, Member States will set targets as to what they want to achieve in the programming period using defined result indicators, for example 'output indicators', i.e. the realised output of the interventions supported.²¹⁹ The new model of application is premised upon performance as opposed to compliance, the Member States reporting on implementation and the Commission monitoring progress and evaluating the effectiveness of the interventions.²²⁰ Direct payments will continue to be paid 'conditional' upon Member States implementing the minimum welfare requirements for calves, pigs and the general farm Directive²²¹ [should these remain in existence]. Cross-compliance will not exist in name: a more flexible

²¹² *ibid*, 109.

²¹³ European Commission Highlights (n 208) 3.

²¹⁴ COM (2017)713 (n 209) 12.

²¹⁵ *ibid*, 24.

²¹⁶ Strategic Plan Regulation, COM(2018)392 (n 207) art 6 (1) (i).

²¹⁷ *ibid*, art 8, based on the types of interventions in Annex I.

²¹⁸ *ibid*, art 106.

²¹⁹ *ibid*, art 7(1)(a).

²²⁰ COM(2018) 392 (n 207) 11-13.

²²¹ Strategic Plan Regulation COM(2018)392 (n 207) art 11(1)(c), Annex III.

system of conditionality is proposed with the new annual performance clearance reflecting the shift from compliance by the individual beneficiary to performance of the policy in the diverse Member State under the Horizontal Regulation.²²² There is no designated direct payments budget for animal welfare,²²³ rather provision for rural development interventions for management practices which go beyond minimum animal welfare requirements for co-finance by the EU and Member States.²²⁴

The new ‘conditionality’ detracts from the ECA recommendation for a more centrally-led cross-compliance regime with greater harmonisation to the level of the Member States to meet society’s expectation of farmers receiving CAP direct payments that they comply with basic legislative requirements.²²⁵ The EP Commission on the Environment at first reading advocated that a stronger focus should be placed upon Member States indicating animal welfare objectives in their strategic plans, and that respecting higher than minimum norms should be a condition of receiving CAP payments based upon more space allowance, with a defined maximum stocking density.²²⁶ This is an important initiative with the adopted EP Resolution stressing the nature of animal welfare as a European public good which can only be provided effectively at EU level.²²⁷ The ECA has expressed concern that in the absence of clear, specific and quantified EU objectives uncertainty is created as to how the Commission will assess Member State’s strategic plans, that achievement of EU objectives cannot be measured, weak incentives exist for performance, and targets could be missed with little impact on EU financing.²²⁸

The EU and the Member States have contributory responsibilities towards achieving a targeted animal welfare orientation. Greater flexibility will be accorded to farming practice and monitoring within diverse Member States under the new strategic plans in respect of which the Commission will have a less intrusive role.²²⁹ Market orientation is a key component of the future CAP. But a

²²² Horizontal Regulation COM (2018)393 (n 207), art 84 ff.

²²³ Strategic Plan Regulation COM(2018)392 (n 207) art 41.

²²⁴ *ibid*, art 64(a), art 65(5)(b).

²²⁵ European Court of Auditors (2016) (n 81) Exec summary paras I, IX, para 79, Recommendation 6.

²²⁶ European Parliament PE627.760v03-00. A8-0200/2019 (23 May 2019).

²²⁷ *ibid*.

²²⁸ European Court of Auditors, Opinion (pursuant to Article 322(1)(a) TFEU) concerning Commission proposals for regulations relating to the Common Agricultural Policy for the post-2020 period (COM(2018)392, 393 and 394 final) Opinion No 7/ 2018 [2019] OJ C41/1, Overall Conclusion 8. Luchino Ferraris, ‘The role of the principle of environmental integration (Article 11 TFEU) in maximising the “greening” of the common agricultural policy’ (2018) 43(3) ELRev, 410, 421-2.

²²⁹ European Commission
https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_3974;

basic and comprehensive responsibility justifiably remains with the EU to provide additional support to farmers compulsorily engaging in enhanced animal welfare practices on a level playing field within the EU and to promote enhanced animal welfare in EU agriculture.

Chapter 4 Private Animal Welfare Standards in Agriculture

Drivers and Implications?

'It is important ... to see private standards as part of broader trends in value chain coordination in the context of ongoing changes in regulatory controls, consumer demand, and so on.'¹

4.1 Introduction

It is evident that EU animal welfare legislation provides a valuable and necessary minimum public floor below which Member States' standards of animal welfare cannot go, albeit not applicable to all species of farm animal where welfare problems exist. OIE animal welfare standards offer an essential level of protection, which is acceptable to Member Countries. A 'plethora'² of private animal welfare assurance schemes have evolved alongside public animal welfare norms. Private, *prima facie* voluntary, standards of animal welfare co-exist³ with, or are substitutes in the absence of, public standards⁴ and play a determinate role in the food sourced and supplied in the agri-food chain. It is not certain whether animal welfare is the driving concern of private standard-setters in the light of expressed consumer preference, as opposed to market differentiation and commercial gain.

A discussion will follow of the reasons underpinning the emergence⁵ of private animal welfare quality assurance schemes and progressively the motivating forces for this movement. The respective interests of the stakeholders in the expansion of private standards of animal welfare will be considered in an

¹ Spencer Henson and John Humphrey 'Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries' (2010) 46(9) J Develop Stud 1628, 1630.

² Spencer Henson 'The role of public and private standards in regulating international food markets' (2008) 4(1) J Intl Agri Trade Develop 63, 64. Garry Smith, *Interaction of Public and Private Standards in the Food Chain* (OECD Food, Agriculture and Fisheries Working Paper No 15 2009) para 56.

³ Carsten Daugbjerg and Linda Botterill, 'Ethical food standards schemes and global trade: Paralleling the WTO?' (2012) 31 Policy Soc 307.

⁴ Smith (n 2) para 10.

⁵ For the growth of private food safety standards see, for example, Elena Fagotto 'Private roles in food safety provision. The law and economics of private food safety' (2014) 37(1) Eur J L Econ 83; Spencer Henson and Thomas Reardon, 'Private agri-food standards: Implications for food policy and the agri-food system' (2005) 30 Food Pol 241; Maki Hatanaka, Carmen Bain, Lawrence Busch, 'Third-party certification in the global agri-food system' (2005) 30 Food Pol 354; Linda Fulponi, 'Private voluntary standards in the food system: The perspective of major food retailers in OECD countries' (2006) 31(1) Food Pol 1.

endeavour to ascertain who or what has driven this momentum. Further, the implications of standardisation, a voluntary marketing tool, will be examined in the context of animal welfare in the agri-food chain.⁶ Private animal welfare standards and certification schemes potentially raise a number of regulatory concerns, their 'voluntary' status becoming *de facto* mandatory for producers particularly in developing countries to gain access to the global food market with added cost implications.⁷ Practices of market differentiation and stakeholder distinction on the part of standard-setters, with standards lacking clarity and transparency, further pose issues for public bodies and for consumers both key stakeholders in the agri-food chain. The EU to-date has only adopted voluntary guidelines for the operation of private certification schemes offering assurances for agri-food products and processes, which will receive analysis below.

This chapter will explore the relevant discussions on the role of private standards which have taken place in the Committee on Sanitary and Phytosanitary Measures (SPS Committee)⁸ under the auspices of the World Trade Organization (WTO). It will not be possible to address all the implications of private animal welfare assurance schemes in this chapter. Rather, it will highlight certain contemporary matters arising from the growth of private animal welfare standard schemes and some of the uncertainties expressed as to whether private standards schemes fall to be regulated within the WTO Agreements on Sanitary and Phytosanitary Measures (SPS Agreement)⁹ and on Technical Barriers to Trade (TBT Agreement).¹⁰ The discussion will then address the concerns expressed by the OIE in relation to private standards in animal welfare and the actions taken by the international standard-setter in animal welfare and animal health to ameliorate the impact of private animal welfare standards on international trade in agri-produce. Heeding the credibility of the concerns expressed over private standards by small producers, finally this chapter will evaluate the opportunities private standardisation may engender for suppliers in developing and developed countries to cater for a market in value-added animal welfare agri-produce.

4.2 Private Animal Welfare Standard Schemes: Drivers?

Research undertaken for the Organisation for Economic Co-operation and Development (OECD) identified three key developments which have taken place

⁶ Diane Ryland, 'Animal welfare standards in agriculture: drivers, implications, interface?' in Mariagrazia Alabrese and others (eds), *Agricultural Law - Current Issues from a Global Perspective* (LITES Series Springer 2017) 181.

⁷ G/SPS/GEN/746; Communication from Linda Fulponi (OECD) 'Private Voluntary Standards and Developing Country Market Access: Preliminary Results' G/SPS/GEN/763.

⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS (1994) 493, art 12.

⁹ *ibid.*

¹⁰ WTO, Technical Barriers to Trade Agreement, 1868 UNTS (1994) 120.

in the food sector: first, resort to voluntary management systems for monitoring product and process attributes in the private sector; second, coalitions of firms setting private standards; and third, the increased use of private global business-to-business (B2B) standards between retailers and suppliers.¹¹ Key drivers of private standard schemes have been '[m]ajor retailer firms' reputation in terms of safety and quality as well as developments in the legal and institutional frameworks for food safety'.¹² The respective food crises for example Bovine Spongiform Encephalopathy (BSE), Salmonella, Dioxins, Avian Influenza, and the ensuing legislative regimes pursuant to which retailers are required to exercise due diligence concerning the safety of food¹³ led to the development of private retailer food safety assurance schemes.¹⁴ This movement coincided with the larger supermarket retailers gaining greater market share and the development of supermarket own-named premium brands, which in turn fuelled fears of reputational loss and loss of revenue from failure to retain consumer loyalty in the event of a food recall.¹⁵ With the infrastructure in place retailers have expanded their private standard and certification schemes horizontally so as to encompass not only safety, but also food quality assurance schemes – animal welfare quality being one such assurance.¹⁶ Good agricultural practice¹⁷ (GAP) in a growing number of private standard schemes includes additional on-farm stipulations relating to animal welfare,¹⁸ the private sector being motivated to 'address consumer concerns and to harness these concerns as a means to compete in quality-defined markets'.¹⁹

Private standards are those standards developed and adopted by private bodies.²⁰ They are voluntary and in this sense are standards with which compliance is not mandatory in accordance with the rules of the TBT Agreement, which defines a standard as a:

¹¹ Linda Fulponi, OECD Final Report, *Private Standards and the Shaping of the Agro-Food System* (AGR/CA/APM(2006)9/FINAL) paras 13-15.

¹² G/SPS/GEN/763 (n 7) para 2.

¹³ Caoimhín [MacMaoláin](#), *Food Law: European, Domestic and International Frameworks* (Hart 2015)117-148.

¹⁴ Alison Burrell, 'Good agricultural practices' in the agri-food supply chain' (2011) 13(4) *Env L Rev* 251, 253; G/SPS/GEN/746 (n 7) para 4.

¹⁵ Fagotto (n 5) 90, 91; Daugbjerg and Botterill (n 3) 312.

¹⁶ Burrell (2011) (n 14) 252.

¹⁷ 'Practices that address environmental, economic and social sustainability for on-farm processes, and result in safe and quality food and non-food agricultural products' Food and Agricultural Organization
http://www.fao.org/waicent/search/2_dett_fao.asp?Lang=en&pub_id=247087.

¹⁸ Burrell (2011) (n 14) 252.

¹⁹ Henson (2008) (n 2) 68.

²⁰ Henson and Humphrey (2010) (n 1) 1630.

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. 21

Standards as such are distinguished from technical regulations with which compliance is mandatory under the TBT Agreement.²² Private standard schemes exist at the level of individual retailers for example Nature's Choice run by Tesco or Filière Qualité operated by Carrefour; collective national schemes for example British Retail Consortium Global Standard in the UK, Food QS Qualität Sicherheit in Germany or Label Rouge in France; or collective international schemes for example the Global Food Safety Initiative (GFSI) and GLOBALG.A.P. (formerly EurepGAP).²³ The European retailers' initiative, EurepGAP, became GLOBALG.A.P. 'to reflect both its global reach and its goal of becoming the leading international G.A.P. standard'.²⁴ Fulponi comments that '[m]any of the private voluntary standards schemes are becoming global standards as the food system becomes interlinked across the world'.²⁵

General characteristics of voluntary private animal welfare schemes are: the standards set; implementation through meeting certification criteria; and enforcement by way of audited compliance, with a scale of private sanctions for non-compliance.²⁶ Private corporate individual and collective standards of good agricultural practice are stipulated within B2B certification schemes, operative between retailers for example and producers,²⁷ from which consumers are distanced to differing degrees. Individual retailer animal welfare assurance schemes including those of retailers Marks and Spencer²⁸ and Waitrose,²⁹ emphasise the promotion of the higher animal welfare standards in their quality food produce which go beyond the minimum legislative norms. Private collective standards are developed by company / industry actors beyond a single company

²¹ TBT Agreement (n 10) Annex 1 2.

²² *ibid*, Annex 1 1.

²³ G/SPS/GEN/746 (n 7) para 4.

²⁴ https://www.globalgap.org/uk_en/who-we-are/about-us/history/.

²⁵ Fulponi (2006) Food Pol (n 5) 4.

²⁶ Fagotto (n 5) 87.

²⁷ Fulponi, OECD (2006) (n 11) Exec Summary para 3, Report paras 13-15.

²⁸ Marks and Spencer Policy for Farm Animal Health and Welfare (June 2017) <https://corporate.marksandspencer.com/documents/plan-a-our-approach/foods-2016/mns-farm-animal-health-and-welfare-policy.pdf>.

²⁹ Waitrose Animal Welfare Commitments (2020) https://www.waitrose.com/home/inspiration/about_waitrose/the_waitrose_way/waitrose_animal_welfarecommitments.html.

/ industry.³⁰ A leading international example of a collective standard would be the IFA Livestock Certificated Standard of GLOBALG.A.P.,³¹ a global partnership of retailers, food service providers and producers members to GLOBALG.A.P.. Some private animal welfare assurance schemes interface directly with the public as B2C standard schemes: the RSPCA Assured Non-Governmental Organisation's standards is an example in point.

Retailer consolidation aided by contemporary methods of doing business - by food, communications and transportation technologies - enables the sourcing of agricultural produce meeting animal welfare standards across State boundaries.³² The consequential emergence of private animal welfare assurance schemes could apparently signal the fact that retailers are acting to assuage consumer credence demands for agricultural produce emanating from farm animals which have experienced a high standard of welfare. Conversely, the interests of the ethical consumer and those of the retailers vying both for market differentiation and / or commercial gain may be in marked contradiction. There are also the interests of countries in the unhindered trade of agricultural produce across boundaries, a factor which may be at odds with the interest of the ethical consumer and also of the commercial interests of certain private suppliers of agri-food. Carsten Daugbjerg and Linda Botterill have evaluated the emergence of the private collective global scheme of GLOBALG.A.P. with its embodiment 'of broadly postmaterialistic values that suggest that food purchasing and consumption are also social, ethical and perhaps even political activities', as opposed to the 'instrumental value of food consumption in which food is seen as a commodity to be traded in accordance with international trade rules'.³³ Issues which would matter to the post-materialistic consumer they consider include the welfare of animals kept for food production, both those intended for slaughter and animals such as dairy cows and layer hens.³⁴ Daugbjerg and Botterill contend that '[t]his trend could be broadly described as the rise of the ethical consumer who not only is concerned about the physical content of the food he/she consumes but also about the conditions under which it is produced'.³⁵

This rationalisation should be qualified by further consideration of the potential for private standards of animal welfare to be adopted in order to engender market

³⁰ Anne M Tallontire, 'CSR And Regulation: Towards a Framework for Understanding Private Initiatives in the Agri-Food Chain' (2007) 28 Third World Q 775, 777.

³¹ https://www.globalgap.org/uk_en/for-producers/globalg.a.p./integrated-farm-assurance-ifa/livestock/.

³² Spencer Henson and John Humphrey, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' 10 Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, ALINORM 09/32/9D-Part II (2009).

³³ Daugbjerg and Botterill (n 3) 307.

³⁴ *ibid* 311.

³⁵ *ibid* 308.

differentiation and encapsulation of market share.³⁶ Private regulatory regimes may be 'driven by the changes in global value chains and in international trade,'³⁷ although Steven Bernstein and Benjamin Cashore maintain to the contrary that 'operationally, they *use* global supply chains' and 'aim to *reconfigure* markets'.³⁸ Further views consider that '[p]rivate standards are typically driven by strategic considerations at the firm level, product differentiation in the pursuit of market share, for example',³⁹ to 'increase product sourcing across the globe',⁴⁰ or to 'control the value / supply chain'.⁴¹ The potential endures for private international collective animal welfare standard schemes to become powerful regulatory regimes able to control the global agri-food chain with consequences for countries' economies.⁴² It could be questioned as to whether animal welfare and the interests of the ethical consumer are the motivating forces behind the emergence of all private farm assurance schemes, whether there could be the possibility of mixed motives and whether there could be a way to reconcile the contending interests of key stakeholders in the agri-food chain in which trade, market share and ethical interests pervade?

4.3 Private Animal Welfare Standards: Implications?

4.3.1 Regulatory Concerns

The outcome could be that what are *prima facie* voluntary animal welfare standards may *de facto* become mandatory and in reality the industry norm, compliance with which determines market access. Concern has been expressed in the WTO articulated by Fulponi:

The retailer scheme [individual or collective] may be *de facto* applied as the industry norm by all actors in the supply chain. Thus the choice of

³⁶ Henson and Reardon (2005) (n 5) 245.

³⁷ Fabrizio Cafaggi 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015)36(4) U Pennsylvania J Int L 101, 102.

³⁸ Steven Bernstein and Benjamin Cashore, 'Can Non-State Global Governance Be Legitimate? An Analytical Framework' (2007) 1 Regul Govern 347, 348, 350 (emphasis added).

³⁹ Jane Korinek, Mark Melatos, Marie-Luise Rau, 'A Review of Methods for Quantifying the Trade Effects of Standards in the Agri-Food Sector' (OECD Trade Policy Working Paper No 79/2008 TAD/TC/CAWP(2007)1/FINAL) 5 n 1.

⁴⁰ Fulponi, OECD (2006) (n 11) para 3.

⁴¹ Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation. Mapping the Labyrinth' (2012) The Dovenschmidt Q 16, 18.

⁴² Linda C Botterill and Carsten Daugbjerg, 'Engaging with private sector standards: a case study of GLOBALG.A.P.' (2011) 65(4) Australian J Int Aff 488, 489.

whether or not to comply with a voluntary standard becomes a choice between compliance or exit from the market. 43

Fulponi's research suggests that compliance with private voluntary standard schemes is becoming increasingly mandatory for accessing lead retailer supply chains. Small-holders are subject to an increased risk of exclusion from the food chains of lead retailers because of their inability to comply with private voluntary schemes.⁴⁴ Particularly in developing countries, producers of agri-food products have increasingly faced strong pressure to comply with the private standards of supermarkets and retailers who dominate the global agri-food market with large market share.⁴⁵ Private animal welfare standard and certification schemes may therefore present particular problems for the small producer. Exclusionary effects may result for those smaller producers who lack the capacity to engage with the schemes' substantive requirements because of the disproportionate costs of doing so,⁴⁶ factors which underscore developing countries' concern that private standards fall to be disputed within the framework of WTO rules.⁴⁷ These issues were raised as concerns by Saint Vincent and the Grenadines in relation to small vulnerable economies where private standards 'are perceived as being in conflict with the letter and spirit of the SPS Agreement'.⁴⁸ This would be the more likely prevalent for producers in developing countries where domestic laws have not protected animal welfare to the extent of the governing private standard.⁴⁹

Some private schemes prescribe the use of specified certification bodies,⁵⁰ which raises the question of the independence of the certification procedures.⁵¹ Generally, collective private standards are enforced through third-party certification.⁵² Maki Hatanaka and others inform that '[t]hird-party certifiers are private or public organizations responsible for assessing, evaluating, and certifying safety and quality claims, based on a particular set of standards and

⁴³ G/SPS/GEN/763 (n 7) para 9.

⁴⁴ *ibid*, para 21.

⁴⁵ Henson and Reardon (2005) (n 5) 250-251.

⁴⁶ Henson and Humphrey (2009) (n 32) 30.

⁴⁷ G/SPS/GEN/746 (n 7) paras 12-14, Table 2.

⁴⁸ G/SPS/GEN/766, para 3.

⁴⁹ Miet Maerten and Johan Swinnen 'Transformations in Agricultural Markets: Standards and Their Implications' Working Paper No 11/2006 (Leuven Interdisciplinary Research Group on International Agreements and Development) 10 https://ghum.kuleuven.be/ggs/publications/working_papers/archive/wp11.pdf.

⁵⁰ G/SPS/GEN/746 (n 7) para 14, Table 2.

⁵¹ Donal Casey, 'Structuring Private Food Safety Governance: GLOBALGAP and the Legitimizing Role of the State and Rule Intermediaries' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 31-53.

⁵² Henson (2008) (n 2)74.

compliance methods'.⁵³ Third-party certification fees may be insurmountable for smaller producers in developing countries seeking market access via membership⁵⁴ which 'may become less about gaining a competitive edge and more about simply remaining in the marketplace.'⁵⁵ 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.⁵⁶ In the context of the SPS Committee's work on private standards, most replies to a Questionnaire on SPS-related Private Standards⁵⁷ highlight concerns with the additional costs of compliance, some of which occur only initially and others on a regular basis. Noted responses conclude that '[c]osts are incurred for initial studies, investment in infrastructure, external consultant fees for implementation, training, record-keeping, conduct of internal and external audits, annual certification fees, as well as required adaptations to changing requirements over time'.⁵⁸

Practices of market differentiation⁵⁹ on the part of retailers raise concerns when privately marketed standards may potentially duplicate EU legislative standards with which compliance is required,⁶⁰ or act as substitutes without a clear evidence base and at additional cost to producers.⁶¹ 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 agricultural produce being sourced, may succeed in passing the cost of so doing to their suppliers.⁶² Could this ability of the private sector to reallocate costs of compliance be an influential factor in the acceptance of private animal welfare schemes by public

⁵³ *ibid*, 355.

⁵⁴ Hatanaka and others (n 5) 355, 361- 4.

⁵⁵ *Ibid*, 361.

⁵⁶ Smith (n 2) para 80.

⁵⁷ G/SPS/W/232.

⁵⁸ G/SPS/GEN/932, para 29. G/SPS/W/247 Rev 3, para 32: 'Members have raised a number of concerns regarding SPS-related private standards including the lack of a scientific basis for requirements, deviations from international standards, the multiplicity of standards and the lack of harmonization among them, the costs of compliance and certification especially with a multitude of standards, the lack of transparency, consultation and appeal mechanisms, the prescriptive, rather than outcome-based, operational procedures required by private standards, which disregards the concept of equivalence and the disproportionate effect on small- and medium-sized producers and exporters in developing countries'.

⁵⁹ Korinek and others (n 39).

⁶⁰ Burrell (2011) (n 14) 251.

⁶¹ Michael Scannell, 'Private Standards in the Sanitary and Phytosanitary Area', 76th General Session OIE (76 SG/10 Paris, May 2008) ss 2-4.

⁶² Hatanaka and others (n 5) 360.

bodies since they might reduce public expenditure on farm inspections?⁶³ To what extent should this practice continue unregulated?

4.3.2 Private Standards and the EU

The EU has issued best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs?⁶⁴ Reference is made therein⁶⁵ to an inventory compiled for the European Commission (Commission),⁶⁶ which 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. The guidelines highlight best operative practice, are directed primarily to scheme developers and operators and state that uptake of the guidelines is voluntary; adherence thereto does not mean that the Commission has endorsed the requirements set up by these schemes.⁶⁷ Recommended practices address scheme participation and development, transparency, evidence and science-based documentation, certificated compliance with the schemes' requirements and inspections.⁶⁸

The Commission reiterated the conclusion⁶⁹ reached in its Communication on agricultural product quality policy⁷⁰ which was based on an impact assessment.⁷¹ That assessment identified as main concerns:

the lack of inclusiveness in standard-setting and the dominance of industry in [schemes'] governance structure;

⁶³ Botterill and Daugbjerg (n 42) 488, 495. European Commission Staff Working Paper, *Second Animal Welfare Strategy for the period 2012-2015 'Impact Assessment'* (SEC (2012)55, 19 January 2012) Annex 5C, 108.

⁶⁴ 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.

⁶⁵ [2010] OJ C341/5 *ibid*, Introduction.

⁶⁶ Study conducted by Areté for DG AGRI (2010).

⁶⁷ [2010] OJ C341/5 (n 64) para 1.2.

⁶⁸ *ibid*, paras 4-6.

⁶⁹ *ibid*, 1.2.

⁷⁰ COM (2009)234, 28 May 2009.

⁷¹ European Commission *Agricultural Product Quality Policy: Impact Assessment* SEC (2009)670 28 May 2009, Annex D Communication on *Certification Schemes for Agricultural Products and Foodstuffs* (8 April 2009) 30.

the de facto mandatory status in some markets, combined with a significant degree of overlap with legal requirements, leading to duplication of official controls; and

the potential misleading of consumers as regards the 'higher' quality of products covered.⁷²

Two general options were considered, namely regulation or voluntary guidelines.⁷³ Consideration was given to the regulatory oversight of the way in which private and national certification schemes operate, i.e. with a focus on process. In this instance, criteria could be established which form the minimum requirements for all certification schemes to address cross-cutting problems of independence, inclusiveness, transparency, accreditation and control which are inherent in the way certification schemes operate. This would be equivalent to a meta-standard, a certification of certification schemes.⁷⁴ All schemes operating in the EU market would have to comply with these rules.

The '[s]ignificant resistance of many stakeholders to this option present[ed] a clear constraint,' which was 'based on the perception that certification schemes, inasmuch as they are private or Member State initiatives, should be left to the private sector or the administration in the Member States as much as possible.'⁷⁵ The majority of stakeholder responses to the consultation on the Green Paper on Agricultural Product Quality⁷⁶ held the opinion that there was no need for an EU regulatory framework for quality assurance schemes; that guidelines were sufficient. According to CEJA (European Council of Young Farmers) and COPA/COGECA (the united voices of farmers and agri-cooperatives in the EU) a diversity of schemes exist, a dynamic which would be lost by regulatory intervention. Certification bodies believed that the EU should work only as a facilitator of rationalisation of certification schemes in the form of reducing the number of schemes in each segment of the food chain and improving mutual recognition and benchmarking. Retailer stakeholders questioned how official interventions to standardise existing certification schemes would differ from the requirements in international norms on accreditation and certification. They feared a loss of diversity at the B2C level and questioned whether legal liability would be transferred from operators to regulators, expressing that certification schemes have to build confidence in their systems, are accountable directly to their stakeholders and must be free to set their own reasonable criteria.⁷⁷

⁷² Annex D (2009) *ibid*, 6, 7, para 1.1.2.

⁷³ *ibid*, 29,30.

⁷⁴ *ibid*, 34.

⁷⁵ *ibid*, 35.

⁷⁶ COM (2008) 641 final, 15 October 2008, (Annex 10).

⁷⁷ Annex D (2009) (n 71) 36, 37.

The Commission considered that the issue of consumer confusion arising from different schemes covering similar objectives was being taken up by initiatives such as the ISEAL Code of Good Practice.⁷⁸ Furthermore, proponents of existing schemes claimed to have embarked on a significant degree of harmonisation.⁷⁹ Accordingly, the Commission concluded:

In light of these developments and stakeholder comments in response to the Green Paper on Agricultural Product Quality, the Commission does not support legislation for private and national certification schemes at this stage. While recognising the private status of schemes, the Commission plans to develop good practice guidelines for the operation of schemes relating to agricultural product quality. The guidelines will be drawn up in consultation with stakeholders.⁸⁰

The EU views private standards as commercial enterprise and not to be fettered.⁸¹ The representative of the European Communities present in the SPS Committee when Saint Vincent and the Grenadines raised their concerns over the trade-distorting impact of the private standards of EurepGAP, now GLOBALG.A.P., clarified that:

Eurep/Gap was not an EC body nor one of its Member States. It was a private sector consortium representing the interests of major retailers. In no case could Eurep/Gap requirements be presented as EC requirements. Even if these standards, in certain cases, exceeded the requirements of EC SPS standards, the EC could not object to them as they did not conflict with EC legislation.⁸²

Yet there are constitutional issues raised by private standards, which are compounded by the effects they may have on consumers interested in and affected by available agri-food supplies. The legitimacy to determine standards of welfare for food-producing animals could be questioned where private farm assurance standard-setters are not subject to the mechanisms in place

⁷⁸ The ISEAL Alliance defines and codifies best practice at international level for the design and implementation of social and environmental standards.

⁷⁹ Annex D (2009) (n 71) 23.

⁸⁰ COM (2009)234 (n 70)13.

⁸¹ Michael Scannell European Commission: 'For the EC, it is important to allow markets to function according to commercial realities', Report, OIE meeting on private standards, including for animal welfare (17 March 2009) Annex XL Appendix IV.2, 1017, 1020 https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_TA_HSC_Sept_2009_Part_B_b.pdf.

⁸² G/SPS/R/37/Rev.1, para 18.

constitutionally with which to hold public regulators to account.⁸³ Indeed the potential arises for private suppliers of agri-produce to perpetuate their effects on stakeholders external to their organisational governance, those stakeholders having an interest, but playing no part, in the private standards of animal welfare which ensue. With regard to the retailer / consumer interface, doubts emerge as to the extent to which the consumer knows what standards of welfare have been practised on the farms which supply agricultural produce to the supermarkets.⁸⁴ Considerations of transparency arise concerning the information communicated to the consumer. Questions surface as to how far the standards are in fact private and as to the extent to which private quality agri-food standards are specific to animal welfare. These *lacunae* and reservations as they relate to private schemes of assurance and standards of welfare therein are focal to this thesis and will be addressed in chapter five.

4.3.3 Private Standards and the WTO

The issue of private standards was first raised in the WTO SPS Committee in 2005 when Saint Vincent and the Grenadines raised the concern regarding the trade effects on small farmers of EurepGAP's standards for pesticides on imports of bananas.⁸⁵ The scope to locate private standards and the concerns to which they give rise under the SPS and TBT Agreements within the WTO regulatory framework has been the subject of discussions ever since. These discussions have taken place for the most part in the Committee established under the SPS Agreement without the achievement of a resolution of the concerns raised, for reasons that private standards are perceived with differing views on the part of developing / developed countries Members to the WTO.⁸⁶ In the absence of dispute settlements there are many questions as to the application of both the SPS and TBT Agreements to (potential) disputes as a result of the operation of private standards, in respect of which there is uncertainty and scope for interpretive divergencies.⁸⁷ There is also the more specific question as to

⁸³ Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 JLS 20, 49.

⁸⁴ Scannell (2008) (n 61).

⁸⁵ G/SPS/R/37/Rev.1, paras 16-20. Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766 (n 48).

⁸⁶ G/SPS/R/86, paras 7.2, 7.3. Ming Du, 'WTO regulation of transnational private authority in global governance' (2018) 67(4) ICLQ p 867, 870. Report, OIE *ad hoc* Group on Private Standards and International Trade in Animals and Animal Products, 4-5 June 2009, Annex XL, 1005 https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_TA_HSC_Sept_2009_Part_B_b_.pdf.

⁸⁷ See, for example, Du (n 86) ; Petros C Mavroidis and Robert Wolfe, 'Private Standards and the WTO: reclusive no more' (2017) 16(1) World Trade Rev 1; Alessandra Arcuri, 'The TBT Agreement and Private Regulation' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 485; Michael N Cardwell and Fiona Smith, 'Contemporary problems of climate change and the TBT Agreement: Moving beyond eco-labelling' in Tracey Epps

whether animal welfare falls to be regulated by the provisions of each Agreement.⁸⁸ The discussion which follows will consider: first the question of attribution to WTO Members of the activities of private standard-setters; second, the scope to locate private standards in the SPS Agreement; and third, the compatibility of private standards with the TBT Agreement.

4.3.3.1 Question of Attribution?

WTO rules govern the potential attribution of the activities of private standard-setters to the Member Country in which they are located, which are ‘grounded... on the inter-state character of the WTO Agreement’.⁸⁹ Higher standards of animal welfare adopted and implemented by private corporate retailers and food service providers may, potentially, be attributed to Members for the purposes of regulation within the WTO framework. In *Japan – Measures Affecting Consumer Photographic Film and Paper*, the Panel ruled:

The WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations.

But while this ‘truth’ may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making some difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.⁹⁰

The fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.⁹¹

On the facts sufficient government involvement was evident in Japan’s collaboration in *formulating* the private practices *and* then *endorsing* them.⁹² Absent collaborative formulation and subsequent government endorsement, it

and Michael J Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 391; Diane Ryland and Joseph A McMahon, ‘Promoting Better Animal Welfare post-Brexit: Looking for a Different Path’ draft article on file.

⁸⁸ Ryland and McMahon *ibid*.

⁸⁹ Geraldo Vidigal, ‘Attribution in the WTO: The Limits of ‘Sufficient Government Involvement’’ (2017) 6 SI J Int Trade Arb L 133.

⁹⁰ Panel Report, WT/DS44/R, 31 March 1998 [10.52].

⁹¹ *ibid* [10.56].

⁹² Rex J Zedalis, ‘When do the Activities of Private Parties Trigger WTO Rules?’ (2007) 10(2) J Int Econ L 335, 345 (emphasis added).

would likely be deemed insufficient to establish 'sufficient involvement' so as to attribute the activities of private standard-setters to WTO Members.⁹³

4.3.3.2 Scope to Locate Private Standards in the SPS Agreement?

The SPS Agreement sets out the basic rules for food safety and animal and plant health standards and entered into force with the establishment of the WTO on 1 January 1995. The SPS Agreement is concerned to ensure that food supplies traded between countries are safe and that countries' health and safety standards are not used to protect domestic producers.⁹⁴ Countries' food safety and animal and plant health standards⁹⁵ must be based on science, applied only to the extent necessary to protect human, animal or plant life or health and not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.⁹⁶ Joanne Scott informs that, 'in its turn to science' this Agreement uses 'scientific evidence' as the 'primary basis for its rulings' and 'a committee system for norm elaboration and information exchange'.⁹⁷ It 'is an agreement about managing trade in the context of regulatory diversity'.⁹⁸ For the purposes of the Agreement, the OIE is the relevant organisation for the development of international standards, guidelines and recommendations for animal health and zoonoses.⁹⁹

It is questionable whether private standards are captured in principle by the SPS Agreement which provides in Article 13 that Members are 'fully responsible for the observation of all obligations' under the Agreement. McMahon posed the question whether a Member Country could be responsible for the activities of private standards bodies within its territory in accordance with the Article 13 of the SPS Agreement, if the Member State has not taken 'reasonable measures'¹⁰⁰ to ensure their standards are compliant with the Agreement. A further uncertainty relates to the concept of 'non-governmental entity' for the purposes of Members' responsibilities in respect of private standards under Article 13 of the SPS Agreement, a term which is not defined in the Agreement.¹⁰¹ Should the SPS Committee pursue a legal analysis of the relationship between the SPS Agreement and private standards? In order to

⁹³ It would also likely be insufficient to prove government organisation of the acting private parties, the provision of initial start-up funds, or government expressions of hope that privately created measures would be respected and observed generally, *Japan-Photo Film* (n 90) [10.190] and [10.194]. Zedalis *ibid*, 346.

⁹⁴ https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm

⁹⁵ SPS Agreement (n 8) Annex A 1. defines a sanitary or phytosanitary measure.

⁹⁶ *ibid*, arts 1, 2.

⁹⁷ Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2007) 2, 3.

⁹⁸ *ibid*, 6.

⁹⁹ SPS Agreement (n 8) art 3(4) Annex A(3)(b).

¹⁰⁰ Ryland and McMahon (n 87).

¹⁰¹ *ibid*. Du (n 86); Mavroidis and Wolfe (n 87).

identify practical actions for the SPS Committee in relation to private standards, Members were asked to respond to a number of circulated questions, in respect of which the Secretariat prepared a summary of responses.¹⁰² Many respondents considered that a legal analysis would be useful and some described it as essential. Others suggested that engaging in such analysis was unlikely to yield a result which could be endorsed on a consensus basis and at the same time provide clarity and direction for Members. They suggested that the Committee should look instead at practical actions which might assist Members who face specific problems.¹⁰³

Since 2011, the ongoing discussions in the SPS Committee on private standards have focused on five actions agreed by the Committee,¹⁰⁴ and in particular on Action 1 relating to the development of a working definition of SPS-related private standards, on which a decision has not been reached.¹⁰⁵ Furthermore, the Committee was unable to agree on a recommendation that the Committee 'will consider specific problems identified by a Member that arise from an SPS-related private standard that affects its exports'.¹⁰⁶ The OIE plays a formal role within the SPS Agreement as one of the 'three sister' organisations to the WTO,¹⁰⁷ in the exercise of which it plays an important role in SPS Committee discussions on private standards. Specifically in relation to Action 2 on the 'information exchange mechanism' between it and the SPS Committee, the OIE continues to inform of its continued activities and linkages with private standard-setting bodies in matters of animal health and welfare so as to promote compatibility and avoid conflict.¹⁰⁸ Also, acting in accordance with Action 5 of the Committee on private standards to promote the importance of international SPS standards, the OIE noted that all its publications were available in its three official languages and that it constantly emphasised the importance of adopting and adhering to international standards.¹⁰⁹ WTO Members referred to the OIE resolution guiding OIE's relations with private standard-setting bodies¹¹⁰ and encouraged the OIE to collaborate with private standard-setting bodies to foster the development and implementation of science-based standards, whether official or private. It was further suggested, in particular by Argentina, that the OIE liaise directly with the

¹⁰² G/SPS/W/230.

¹⁰³ *ibid*, para 10.

¹⁰⁴ G/SPS/55. See G/SPS/W/256; G/SPS/62, paras 14.1, 14.21. Consensus was unable to be achieved on a further seven actions, in respect of which future discussion may remain open.

¹⁰⁵ G/SPS/62 *ibid*, paras 14.2-14.7.

¹⁰⁶ *ibid*, para 14.20.

¹⁰⁷ G/SPS/62 (n 104) para 14.8.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid*, paras 14.12, 14.13.

¹¹⁰ Resolution No 26 Roles of public and private standards in animal health and animal welfare, discussed below (n 142). G/SPS/GEN/1024, Annex 4.

private schemes identified by Members,¹¹¹ a direction which this thesis progresses.

In relation to the more specific question whether animal welfare is captured by the SPS regime, the SPS Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.¹¹² Animal welfare measures would not appear to fall within the definition of an SPS measure as being protective of animal health and protecting against disease in accordance with Annex A 1. of the Agreement. For an animal welfare measure to be capable of being justified under the SPS Agreement, it must be established scientifically that the animal welfare concern which is the basis for that measure is likely to lead to an outbreak of animal disease.¹¹³

4.3.3.3 Compatibility of Private Standards with the TBT Agreement?

The TBT Agreement lays down a regulatory framework for non-discriminatory trade and aims to ensure that technical regulations and standards do not create unnecessary obstacles to trade. At the same time it recognises WTO Members' right to implement measures to achieve legitimate policy objectives as long as these are not discriminatory.¹¹⁴ Under Article 4(1) of the TBT Agreement, WTO Members are required to:

take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with' the Code of Good Practice for the Preparation, Adoption and Application of Standards (The Code of Good Practice) in Annex 3 to the TBT Agreement.¹¹⁵

The concept of 'non-governmental bodies' for the purposes of the TBT Agreement is defined in Annex I(8) as: 'Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.'¹¹⁶ This definition remains

¹¹¹ In G/SPS/GEN/932/Rev.1 GLOBALG.A.P. was pointed out as a major scheme, para 45.

¹¹² SPS Agreement (n 8) art 1(1).

¹¹³ McMahon in Ryland and McMahon (n 87) citing Derek Eaton, J Bourgeois, Thom Achterbosch, 'Product differentiation under the WTO. An analysis of labelling and tariff or tax measures concerning farm animal welfare (Report 6.05.11). Agricultural Economics Research Institute, The Hague, 2005, 42.

¹¹⁴ https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

¹¹⁵ (n 10).

¹¹⁶ (n 10).

inconclusive¹¹⁷ complicated further when instances of hybridity arise¹¹⁸ and the scope of application of the Code of Good Practice is uncertain; albeit 'standardizing bodies assume no direct obligation' thereunder.¹¹⁹ The substantive provisions of the Code of Good Practice advocate, *inter alia*, adherence in standard-setting to the principles of non-discrimination / no less favourable treatment, transparency, not creating unnecessary obstacles to international trade and basing standards upon international standards where these exist.¹²⁰ The TBT Committee has expressed the need to strengthen implementation of Article 4 of the TBT Agreement¹²¹ and 'linkages' between the requirements of both the TBT and SPS Agreements are considered relevant for discussion in the SPS Committee, expressly 'horizontal aspects such as transparency',¹²² in accordance with the endorsed Action 3 on private standards.

With regard to the more specific question whether animal welfare is captured by the TBT Agreement, the possibility to locate animal welfare concerns within the TBT Agreement as a legitimate objective would appear to be accommodated within the open ended wording in Article 2.2, in the absence of discriminatory treatment.¹²³ In *US - Tuna II*, the Panel found that the two US 'objectives to protect dolphins and not to deceive tuna consumers about dolphin by-catch, fell within those explicitly listed as "legitimate" in Article 2.2' of the TBT Agreement.¹²⁴ On appeal, the Appellate Body upheld the Panel's determination that the protection of dolphins constituted a legitimate objective within Article 2.2 'without further discussion'.¹²⁵ The Appellate Body determined that the US

¹¹⁷ Arcuri (n 87); Cardwell and Smith (n 87).

¹¹⁸ C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas-und Wasserfaches eV (DVGW) – Technisch- Wissenschaftlicher Verein* EU:C:2012:453 [27].

¹¹⁹ Enrico Partiti, 'What use is an unloaded gun? The substantive discipline of the WTO TBT Code of Good Practice and its application to private standards pursuing public objectives' (2017) 20 JIEL, 829, 836.

¹²⁰ (n 10) Annex 3:D, E, F, J, L.

¹²¹ G/TBT/26, para 26. Having previously stressed Members' obligation to ensure compliance with the Code by 'bodies which are not commonly considered as standardizing bodies and which have not accepted the TBT Code'. G/TBT/13, para 25, cited in Partiti (n 118) 835. Ryland and McMahon (n 87).

¹²² G/SPS/55, para 10.

¹²³ the relevant part of which reads '... technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, ... Such legitimate objectives are, *inter alia*: ...' (n 10).

¹²⁴ WTO *US- Tuna II* Panel Report, WT/DS381/R (Sept. 15, 2011) [7.437], [7.440]; Gabrielle Marceau, 'The New WTO TBT jurisprudence in US-Clove Cigarettes, WTO *US-Tuna II*, and *US-COOL* (2013) 8(1) Asian J WTO Int Heal 1,16.

¹²⁵ Marceau *ibid*, WTO *US - Tuna II* Appellate Body Report, WT/DS381/AB/R, 13 June 2012 [337].

labelling measure ‘not only sets out conditions for the use of the label’,¹²⁶ which could be permitted, but establishes ‘a single and legally mandated definition . . . [which] disallows the use of other labels’.¹²⁷ Given this latter the US measure was in breach of Article 2.1 of the TBT Agreement, which requires that technical regulations ‘accord treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country’.

4.3.4 Private Standards and the OIE

Concern has also been voiced about private standards in the OIE, which is accorded express recognition in the SPS Agreement as the relevant international organisation and standard-setter for animal health and zoonoses¹²⁸ for the purposes of WTO law. The discussions in the SPS Committee have been concerned primarily and unsuccessfully with reaching a definition of a private SPS-related measure, with Members remaining divided on the applicability of the SPS Agreement to private standards. In contrast, the OIE emphasises the need to ensure that private animal welfare standards do not undermine the international reference status of the animal welfare standards in the OIE TAHC. The OIE defines private standards as:

commercial requirements developed, owned and implemented by non-governmental entities, with which suppliers must comply to have access to specific markets for animals and animal products. They sometimes include sanitary safety and animal welfare issues.¹²⁹

Participating in the SPS Committee discussion on private and commercial standards, the OIE stated that ‘private standards could cause confusion and potentially undermine the key disciplines of the SPS Agreement of transparency and scientific justification of standards’, noting ‘that solutions were not easy to find, and that it would be unrealistic to expect that private standards would disappear’.¹³⁰ Explicitly, the OIE’s concern lay with developing countries where ‘private standards had disproportionate negative effects’.¹³¹ Joanne Scott’s affirms that the key SPS principle of transparency ‘serve[s] to facilitate international trade’ in ‘ensuring ... predictability’ of the standards, which would corroborate the issues which have concerned the OIE, since the SPS Agreement is ‘designed with trade goals in mind’.¹³² A scientific basis for the international

¹²⁶ WTO *US - Tuna II* Appellate Body Report *ibid* [195].

¹²⁷ *ibid.* Marceau (n 124) 5,6.

¹²⁸ SPS Agreement (n 8) art 3(4), Annex A 3 (b). Scott (n 97).

¹²⁹ Report, OIE *ad hoc* Group (June 2009) (n 86) Official OIE working definition of private standards, 1007.

¹³⁰ G/SPS/R/54, para 155.

¹³¹ *ibid.*

¹³² Scott (n 97) 192, 193.

reference standards, likewise, is the *sine qua non* to achieve consensus in OIE standard-setting.¹³³

4.3.4.1 OIE Submission to the WTO

The OIE submitted to the WTO in February 2008 its considerations relevant to private standards in the field of animal health, food safety and animal welfare, in which it stated that its standards are developed on the basis of a scientific risk assessment and adopted through the democratic procedures of the OIE and that it rejects private animal welfare standards which lack a proper scientific basis.¹³⁴ It has serious concerns about the potential for private standards to have trade-limiting and trade-distorting effects and considers that it is important to prevent the haphazard introduction of non-science-based measures in relation to both animal health and welfare. Given this, the OIE urges countries, regional organisations and international organisations to strongly support the OIE's standards including its recommendations on animal welfare as the appropriate references for the purpose of international trade.¹³⁵ The OIE voiced that growth in the implementation of private standards could undermine the hard won improvements in market access arrangements which followed the establishment of the SPS Agreement in 1995, in that the OIE considers that private standards seldom have a scientific basis, especially if they are introduced for purely commercial reasons (e.g. to differentiate in the marketplace products which are equivalent in sanitary terms). The OIE deems that commercial considerations underpin the validity and credibility of private certification schemes.¹³⁶ Private standards are perceived essentially to be private transactions, primarily between suppliers and retailers, which may not therefore be implemented or managed in a transparent manner, the object being to establish a preference for products from certain producers with a disproportionate effect on developing countries.¹³⁷

Private standards relating to animal welfare warranted specific mention on the part of the OIE together with the leadership role which the OIE has assumed in the elaboration of international animal welfare standards. The close link between animal welfare and animal health is stressed, as is the nexus of animal welfare with the SPS Agreement in that animal health, animal welfare, food production and food safety are all linked.¹³⁸ The OIE does not prescribe the systems to be used to deliver good animal welfare outcomes. Rather the OIE aims to establish guiding principles and practices, which can be applicable to Members having varied social, economic, religious and cultural contexts.¹³⁹ Members are

¹³³ OIE Animal Welfare Fact Sheet (2015)

http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Fact_sheets/AW_EN.pdf

¹³⁴ G/SPS/GEN/822, point 13.

¹³⁵ *ibid*, points 14, 16.

¹³⁶ *ibid*, points 3, 4, 8.

¹³⁷ *ibid*, points 5-8.

¹³⁸ *ibid*, point 9.

¹³⁹ *ibid*, point 11.

encouraged to give effect to the OIE democratically adopted animal welfare recommendations within their territories and to encourage trading partners to use the OIE recommendations as a reference point in negotiating market access and trade agreements.¹⁴⁰

4.3.4.2 OIE Resolutions

Documented OIE Resolutions adopted outside the SPS Committee seek to resolve these conceivable tensions. In May 2008, OIE Members adopted a Resolution on the implications of private standards in the international trade of animals and animal products,¹⁴¹ which reaffirms the standards published by the OIE in the field of animal welfare as the global reference standard for OIE Members. In a second Resolution adopted in May 2010 on the roles of private standards in animal health and animal welfare, OIE Member countries considered that, while private standards could be beneficial in promoting good practice and supporting producers to meet public standards, it was of major concern to OIE Members that some private standards for animal welfare relating to animal products have the potential to conflict with OIE standards.¹⁴² The primordial concern of the OIE remains that of the potential for private standards of animal welfare to create obstacles to trade and to interfere with the delicate balance achieved in accordance with the SPS Agreement's rules formally applicable to standards of animal health. These standards, while firmly based on science, are finely tuned to the interests of developing and developed countries' trade in animals and agri-produce.

In OIE Resolution No 26, the General Assembly of OIE Member Countries noted that formal linkages and channels of communication between private standard-setting organisations and the OIE have so far been limited and could be strengthened.¹⁴³ The Assembly accordingly recommended in May 2010: to promote the implementation of the OIE animal welfare standards as reference standards that apply globally; that the Director General continue to provide advice on the steps which may be available to advocate that private animal welfare standards, where used, are consistent with and do not conflict with those of the OIE; and that he maintain and strengthen appropriate links and dialogue with relevant global private standard-setting bodies and global private industry organisations with the aim to allow compatibility of private standards with OIE standards while ensuring communications with national governments and

¹⁴⁰ *ibid*, point 12.

¹⁴¹ OIE Resolution No XXXII (2008) https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/en_resolution_20N_C2_B0_20XXXII.pdf.

¹⁴² OIE Resolution No 26 (2010) para 6 https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_RESOLUTION_2010_PS.pdf.

¹⁴³ The OIE has signed official Agreements and works in close collaboration with the international industry organisations, such as International Federation of Agricultural Producers (IFAP), International Dairy Federation (IDF), International Meat Secretariat (IMS), International Egg Commission (IEC), International Poultry Council (IPC) and Safe Supply of Affordable Food Everywhere (SSAFE), OIE Resolution No 26 *ibid*, points 8, 9

consumers.¹⁴⁴ The Assembly of OIE Member Countries encouraged global private standard-setting bodies to promote the use of official standards as benchmarks against which private standards are referenced for international trade in animals and animal products, while also encouraging them to strengthen or develop transparent mechanisms and to work toward increased harmonisation with public standards and transparency of private standards.¹⁴⁵

Such disposition towards key players in the food supply chain in the interests of trade could be seen to impact to the detriment of consumers, also key stakeholders in agri-food, who are interested to raise the bar of animal welfare standards over and above that of the public consensus floor. On this occasion of its Annual General World Assembly in 2010, the OIE acknowledged that 'over the past two decades world consumers have become increasingly concerned about systems of production as well as aspects of food safety and animal welfare, leading food system stakeholders to develop private standards in order to try to meet these consumer requirements and spending patterns'.¹⁴⁶ The OIE Director-General declared:

The OIE and its partners will continue the dialogue with agri-food industry and private standard-setting bodies to avoid potential conflict between public and private standards and to explore the possibilities for collaboration and find complementarities of action - except on sanitary issues - to the benefit of all developing and developed countries and both world producers and consumers.¹⁴⁷

Thereafter in September 2010, the OIE hosted a meeting with selected private standard-setting organisations with a global scope. Dr Vallat, then OIE Director General, asked the participants to explore the possibilities of agreements between the OIE and GLOBALG.A.P. and between the OIE and the Global Food Safety Initiative (GFSI). The GFSI was launched in 2000 to promote 'continuous improvement in food safety management systems to ensure confidence in the delivery of safe food to consumers'.¹⁴⁸ He explained the formal procedures within the OIE to be followed before an agreement could be signed: First the board of the OIE would need to be consulted and second the General Assembly

¹⁴⁴ *ibid*, Recommendations 4, 7, 9.

¹⁴⁵ *ibid*, Recommendations 10 and 11.

¹⁴⁶ G/SPS/GEN/1024 (n 110) Annex 3: 78th Annual General Session of the OIE (23 – 28 May 2010) para 33.

¹⁴⁷ *ibid*, para 32.

¹⁴⁸ <http://www.mygfsi.com>.

would have to endorse the agreement.¹⁴⁹ OIE Resolution No 26150 was taken as the starting point for the participants' discussion of the next steps and future work. Beet Urlings, Board Member of GLOBALG.A.P., explained that GLOBALG.A.P. developed several additional standards. Sylvie Coulon asked what exactly an additional standard was, to which Urlings replied that an additional standard means a standard that is based on international standards and on science. He added that GLOBALG.A.P. focuses on safety issues (safe for human consumption, environment and animal welfare).¹⁵¹ Catherine François, Director GFSI, stated that in this context animal welfare is considered by the private sector as a competitive issue, unlike food safety.¹⁵² The OIE President explained that there are private standards which exceed international standards and one of the reasons for diverging official and private standards could be a lack of communication between the private sector and government. Coulon, representing the EU, agreed that there should be an ongoing communication between private sector and government. Urlings stated that GLOBALG.A.P.'s regional working groups developed regional interpretations for the GLOBALG.A.P. standards and that in his view OIE and GLOBALG.A.P. standards were complementary. He added, 'the OIE sets the international standards directed to governments and GLOBALG.A.P. focuses on translating international standards into standards that can be used at the farm level'.¹⁵³ The meeting participants¹⁵⁴ suggested the following initiatives: to identify mechanisms for collaboration; to define common terminology; to define recognised private standard schemes and animal welfare standards; giving OIE standards to a working group to translate into benchmarking requirements; and to explore complementarity of OIE and global private standard-setting organisations in standard-setting and implementation and compliance. The need for a communication strategy was noted, as were important international certification bodies including, for example, the International Organization for

¹⁴⁹ Report, OIE Meeting on Private Standards (Paris, Annex XXXV11, 10 September 2010)
http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/Final_private_standards_report.pdf.

¹⁵⁰ (2010) (n 142).

¹⁵¹ OIE Meeting on Private Standards (September 2010) (n 149) s 6.7.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.* Dr Carlos Correa Messuti, President of the OIE; Dr Bernard Vallat, Directeur General, OIE; Sylvie Coulon, International Issues DG Sanco, European Commission; Catherine François, Director, GFSI; Jean-François Legrand, Safe Supply of Affordable Food Everywhere (SSAFE); Beet Urlings, Board Member, GLOBALG.A.P.; Dr Sarah Kahn, Head OIE International Trade Department.

Standardization (ISO)¹⁵⁵ and the International Accreditation Forum (IAF).¹⁵⁶ OIE participating Members proposed to: assess the state of the problem with certification association costs; explore collaboration in capacity building, working level collaboration in the standard-setting process of agricultural practices and input at advisory board level; share information for better transparency; harmonise with public standards and possible collaboration at regional level; and continue to pursue the development of official agreements, starting with GLOBALG.A.P. and the GFSI.¹⁵⁷

It is pertinent to recall the capacity for private standards to conflict with the international standards of animal welfare achieved through democratic means based on science and thus the legitimate standards of welfare of the OIE in its TAHC. In the discussions of the OIE Working Group on Animal Welfare,¹⁵⁸ Sarah Kahn, former OIE Head of International Trade, alluded to the different opinions of developing and of developed countries concerning private standards. The OIE ad hoc Group on private standards in 2009¹⁵⁹ developed a questionnaire sent to all OIE Members and to relevant organisations having an official agreement with the OIE. In the reported responses, nearly all developed countries (eighty nine per cent) could see benefits of private animal welfare standards. If the responses of the then twenty seven EU Member States were excluded, seventy six per cent of total respondents agreed with the statement that private standards for animal welfare create or may create problems.¹⁶⁰ It would remain germane for the OIE to seek alignment with major private standard-setting bodies in order to bridge the public / private divide.

The World Assembly of Delegates of the OIE, meeting on 27 May 2015, adopted Resolution Number 28 on Animal Welfare which recommends that the Director

¹⁵⁵ 'ISO is an independent, non-governmental international organization with a membership of 164 national standards bodies. Through its members, it brings together experts to share knowledge and develop voluntary, consensus-based, market relevant international standards that support innovation and provide solutions to global challenges'. <http://www.iso.org/iso/home/about.htm>.

¹⁵⁶ 'The world association of Conformity Assessment Accreditation Bodies and other bodies interested in conformity assessment in the fields of management systems, products, services, personnel and other similar programmes of conformity assessment. Its primary function is to develop a single worldwide program of conformity assessment which reduces risk for business and its customers by assuring them that accredited certificates may be relied upon'. <http://www.iaf.nu/>.

¹⁵⁷ OIE (September 2010) (n 149).

¹⁵⁸ *Report, Ninth Meeting of the OIE Working Group on Animal Welfare* (June 2010) http://www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/AWWG_Reports/ANG_AWWG_June_2010.pdf.

¹⁵⁹ (n 86).

¹⁶⁰ OIE Final Report – OIE Questionnaire on Private Standards (2010) Exec Summary http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/en_executive_20summary.pdf.

General continue dialogue with the GFSI, GLOBALG.A.P. and the ISO to ensure awareness of OIE science-based animal welfare standards.¹⁶¹ It is important to the OIE to engage in collaborative undertakings with leading international private standard-setting bodies so as to reinforce the international reference status of its animal welfare standards. Prior to this Resolution the OIE had entered formally into cooperative agreements with the GFSI and with the ISO, but it would appear to have proven more difficult to achieve cooperation between the private global scheme of GLOBALG.A.P. and the OIE.

4.3.4.3 OIE Agreements

In the Cooperation Agreement between the OIE and the ISO both Parties considered that strengthening links would facilitate and strengthen cooperation and collaboration between them where their respective mandates and activities may be of mutual interest, including but not limited to the field of international standards and recommendations on animal health and welfare and sanitary safety of international trade in terrestrial animals and animal products.¹⁶² The Parties undertake to keep each other informed of their activities in the fields of mutual interest in particular where there is the potential for joint activities in the interest of Member Countries / institutes, to meet at least annually and to invite the other Party to participate as an observer / liaison in meetings where matters of mutual interest may arise. The listing of ISO committees / activities of potential interest to the OIE includes ISO Technical Committee (TC) 34, Food Products. The listing of OIE committees / activities of potential interest to the ISO includes the then permanent Animal Welfare Working Group and its work programme. The Agreement provides that the Parties may decide to adopt other forms of cooperation and collaboration and in particular promotion of the use of international standards under the mandates of the Parties.¹⁶³

A Cooperation Agreement has been adopted between the GFSI and the OIE in order to strengthen cooperation and collaboration between the Parties in relation to their respective mandates, programmes and activities, including but not limited to standards, guidelines and recommendations on safe production and trade in food products derived from terrestrial animals.¹⁶⁴ The Parties undertake to share information in the fields of mutual interest in particular where there is the potential to undertake joint activities, to meet on a regular basis and to invite the other Party to participate as an observer in meetings where matters of mutual interest may arise. The Parties may decide to undertake other forms of cooperation, in particular the promotion of the use of international standards under the mandates

¹⁶¹ OIE Resolution No 28, *Animal Welfare* 83 GS/FR-Paris (2015) 174 http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/Session/A_FR_2015_public.pdf.

¹⁶² Cooperation Agreement Between the International Organization for Standardization (ISO) and the World Organisation for Animal Health (OIE) (2011) http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/accords/ISO_ENG.pdf.

¹⁶³ *ibid*, art 5.

¹⁶⁴ Cooperation Agreement between the Global Food Safety Initiative (GFSI) and the World Organisation for Animal Health (OIE) (2011) https://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/accords/GFSI_ENG.pdf.

of the Parties and training and awareness-raising in Member Countries particularly in developing countries.¹⁶⁵

4.3.5 Opportunities

Private standards may present positive prospects for animal welfare in agriculture and for key stakeholders in the agri-food chain. It is pertinent to trace not only the concerns, but also the potential opportunities to which private standards of animal welfare give rise. One school of thought recognises the added value of private animal welfare standard schemes as being facilitative of farmers / producers collecting a premium price for raised animal welfare produce.¹⁶⁶ Private standards may feasibly raise standards of animal welfare in the agri-food chain and be endorsed by producers in developed and developing countries of enhanced animal welfare produce in a value market to which access is facilitated.¹⁶⁷ The SPS Committee records such opportunities as:

the facilitation of compliance with national and international standards, where private schemes take as a basis these standards and provide comprehensive guidance on achieving them;

the promotion of best practices and productivity;

improved brand reputation; and

facilitation of access to markets and credits.¹⁶⁸

This is even though private standards frequently exceed the international norms embedded in the SPS Agreement.

Fulponi maintains that private standards 'may also provide incentives for physical and human capital development in order to raise technical competencies, leading to future market access and earnings'.¹⁶⁹ It may be that harmonised standards in a collective private scheme would go some way towards alleviating the costs incurred in having to comply with a number of different operative schemes to gain access to each respective portion of the market.¹⁷⁰ It is recognised in SPS

¹⁶⁵ *ibid.*

¹⁶⁶ Per Olson chief veterinary advisor International Federation for Agricultural Producers, OIE Meeting on Private Standards (16 February 2010) (n) s 7; Yoshiko Naiki, 'The dynamics of private food safety standards: a case study on the regulatory diffusion of GlobalG.A.P.' (2014) 63(1) ICLQ 137, 143, citing Benjamin Cashore, Graeme Auld, Deanna Newsom (eds), *Governing through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale UP 2004) 23.

¹⁶⁷ Henson and Humphrey (2009) (n 32) 34.

¹⁶⁸ G/SPS/W/247 Rev. 3 (n 58) para 33.

¹⁶⁹ Fulponi (2006) (n 5) 11.

¹⁷⁰ Henson (2008) (n 2) 76. Fagotto (n 5) 88.

Committee discussions that 'private standards are already and will continue to play an increasingly important role in international trade' and that 'they pose opportunities',¹⁷¹ corroborating Spencer Henson and John Humphrey that 'private standards are here to stay'.¹⁷² It is noted that compliance with official standards does not necessarily guarantee market access and that 'private standards could create a bridge between the essential step of meeting official standards and finding customers' in order to meet the requirements of the market,¹⁷³ a prospect which this thesis develops.

Private standardisation in animal welfare may play a vital role towards meeting consumers' demands for a higher level of welfare than that required or expected in underlying public standards. Jane Korinek and others state, '[w]hile private standards in the agri-food sector are based on government standards, they may also exceed governmental requirements'.¹⁷⁴ Private standards of animal welfare could be providing a 'quality' threshold above EU minimum norms with relevance to this thesis' objectives of raising animal welfare standards in EU agriculture and the agri-food chain. In doing so private standards may prove to be part of the solution in meeting EU consumers' expressed preferences for value-added animal welfare agri-food. Echoing the words of Henson and Humphrey, '[i]t is important ... to see private standards as part of broader trends in value chain coordination in the context of ongoing changes in regulatory controls, consumer demand, and so on'.¹⁷⁵ It is viable that private farm assurance schemes should present an avenue to raise animal welfare standards above the science-based public floor to meet the preferences of consumers.

Regard for animal welfare is the weak link in the sustainability¹⁷⁶ of the agri-food value chain in which retailers and food service companies motivate, support and source improved animal welfare produce from farms where animals' individual needs are catered for in lower stocking densities with enhanced conditions; where indirectly farmers will receive a fairer income for their higher animal welfare produce supporting rural economies and rural growth in both developing and developed countries. The EU Farm to Fork initiative implies a recognition of the scope for animal welfare to strengthen the sustainability of the agri-food chain, with some hybridity evident towards this end.¹⁷⁷

¹⁷¹ G/SPS/55 (n 104) para 5.

¹⁷² Henson and Humphrey (2010) (n 1) 1630.

¹⁷³ G/SPS/W/230 (n 102) para 9.

¹⁷⁴ Korinek and others (n 39) para 7.

¹⁷⁵ Henson and Humphrey (2010) (n 1) 1630.

¹⁷⁶ Henry Buller and others, 'Towards Farm Animal Welfare and Sustainability' (2018)⁸ Animals, 81.

¹⁷⁷ COM(2020) 381 final, 20 May 2020.

Nevertheless, any potential for abuse on the part of private standard-setters essentially should be curtailed in the interests of all key stakeholders in the agri-food chain. One crucial question which arises from the OECD research is '[i]n which area is there a need for collaboration to meet the needs of the food industry / retailers and government responsibilities towards society?'¹⁷⁸ Botterill and Daugbjerg underline the contemporary relevance of research into global private governance arrangements,¹⁷⁹ citing David Vogel's work¹⁸⁰ in which he identifies one of the key questions in need of more research as being 'the responses of governments to private global standards schemes and how such schemes interact with domestic and intergovernmental regulatory policies'. Elena Fagotto acknowledges the potential for increased 'collaboration and interdependence among firms, government and civil society' to 'improve the governance and effectiveness of private regulation'.¹⁸¹ Scholars increasingly debate whether the two types of governance systems, public and private, and at global level can be considered to be complementary with one reinforcing the other; or whether they coexist in competition¹⁸² with the potential to impact negatively upon domestic economies.¹⁸³ Burrell maintains, '[a] key requirement for efficient longer-term coexistence between public and private standards is that there should be better coordination between them'.¹⁸⁴ Vogel asserts 'the future effectiveness of global business regulation depends on the extent to which private and public authority, civil and government regulation, and soft and hard law, reinforce one another'.¹⁸⁵ An avenue lies in examining the feasibility of the process of coordinating relations with and between coexisting public and private global standard schemes in the domain of animal welfare in agriculture, which this thesis will progress.

4.4 Concluding Comments

The EU, recognising the private status of schemes, has developed good practice guidelines for the operation of schemes relating to agricultural product quality. Consensus¹⁸⁶ has not been able to be obtained on a number of key points raised within the SPS Committee on the application of WTO rules to the emergent private standards. The potential for unfettered private standard schemes to

¹⁷⁸ Fulponi, OECD (2006) (n 11) para 95.

¹⁷⁹ Botterill and Daugbjerg (n 42) 489.

¹⁸⁰ David Vogel, 'Private Global Business Regulation' (2008) 11 *Annu Rev Polit Sci* 261.

¹⁸¹ Fagotto (n 5) 95.

¹⁸² Burrell (2011) (n 14) 264, 265; Fagotto (n 5) 83; Naiki (2014) (n 166) 137, 146.

¹⁸³ Botterill and Daugbjerg (n 42) 489.

¹⁸⁴ Burrell (2011) (n 14) 265.

¹⁸⁵ David Vogel, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) 49(1) *Bus Soc* 68, 83.

¹⁸⁶ In the WTO, 'endorsement through non-objection', 'where no-one's objections are ignored', Jaime Tijmes, 'Consensus and majority voting in the WTO' (2009) 8 *World Trade Rev*, 417, 418, 423.

undermine OIE animal welfare standards as the international reference standard based on scientific criteria in respect of which consensus has been achieved has led to a momentum towards change. The public intergovernmental standard-setting organisation is open to pursuing lines of communication and dialogue with private global standard and certification schemes. This is to reinforce the international common basis reference point of the public science-based standards and to encourage Member Countries to implement OIE animal welfare standards.¹⁸⁷ A *lacuna* in dialogue is evident in the absence of a cooperation agreement between the OIE and the collective private standard and certification scheme of GLOBALG.A.P., its animal welfare standards potentially becoming the industry norm for access to the agri-food chain.

It should be asked what motivates this ongoing movement, i.e. in whose interests is it pursued? It is important to weigh up the conceivable interests involved inclusive of the international trade objectives of the OIE, its public role of guarding the interests of developed and developing countries in the face of uncoordinated private standards which potentially may be market driven, also the assurance of an acceptable consensus level of animal welfare in the agri-food chain. Equally, questions as to whether the private standards are science-based or partly market driven especially where no legal requirements exist and the standards are in fact substitutes, lead to the overarching question as to whether a regulatory framework is due. Perhaps a pre-emptive strategy should start to be conceived which will curtail the potential to use standardisation solely as a marketing tool / food chain control mechanism by private animal welfare certification schemes. After all private standard schemes may be self-perpetuating. Doris Fuchs and others caution '[p]rivate standards are not only a manifestation of retailers' structural and discursive power, but a means to extend it'.¹⁸⁸

Still, it may be the case that the major certificated producers and suppliers of agri-produce are operating with a threshold of welfare which is higher and broader than the minimum level of protection provided by EU legislative standards of animal welfare. Private standards may be able to attain a higher level of welfare than those able to be agreed in public norms. This in turn may impact upon the extent to which the private standards lack legitimacy to determine the standards of welfare for animals in agriculture. What of the potential for private animal welfare standards to raise standards of animal welfare beyond, and in place of, EU norms to satisfy the societal values held by consumers? The interests of private stakeholders in a market for enhanced animal welfare agri-produce in the agri-food chain may be prospects to be pursued. Farmers may be able to re-gain a valuable share of the market returns which ensue from supplying animal-welfare enhanced agri-produce in a value market for which there is credence consumer demand. Private standards can and do 'move in' where there is a

¹⁸⁷ OIE Resolution No 26 (2010) (n 142).

¹⁸⁸ Doris Fuchs, Agni Kalfagianni, Maarten Arentsen, 'Retail Power, Private Standards and Sustainability in the Global Food System' in Jennifer Clapp and Doris Fuchs (eds), *Corporate Power in Global Agrifood Governance* (Boston, MIT Press 2009) 48, 64.

public vacuum - in accordance with the market.¹⁸⁹ The standard-setting organisations must be seeing an opportunity to be exploited. Reciprocal interests ensue. The opportunities presented by credible and verifiable private farm assurance schemes ought to be harnessed in such a way that the interests of all stakeholders and those of the animals in agriculture are not only assuaged but prosper in the process, which remains the objective of this thesis.

¹⁸⁹ Scannell (2008) (n 61) s 5. Robach M, 'A Private Sector Perspective on Private Standards – Some approaches that could help to reduce current and potential future conflicts between public and private standards' 78th General Session, OIE (Paris, May 2010) 78 SG/9, s 4. https://www.oie.int/fileadmin/Home/eng/Publications_%26_Documentation/docs/pdf/TT/2010_001-006_Robach_A.pdf.

Chapter 5 Private Standards of Animal Welfare in Agriculture

A Comparative Review

‘Transnational ... regulation triggers the emergence of new competitive patterns that respond more strongly to the design, mode of instrumentalisation, implementation and governance of ... standards than to their quantity and stringency.’¹

5.1 Introduction

This chapter will undertake a comparison of three carefully selected private standard schemes and their respective standards of animal welfare with a focus on species of farm animal for which welfare problems have been identified. It will also offer a comparison of the chosen private schemes with EU animal welfare legislative norms. Of the essence is what role can be established for credible and transparent private standards which project above and beyond the effectual baseline of EU legislative standards, with the objective of elevating standards of animal welfare in EU agriculture and the transnational setting of the agri-food chain?

Emphasis will be placed on three designated private farm assurance schemes and on the standards that are developed and adopted,² to ascertain the nature and depth attributed to farm animal welfare for certain food-producing animals. Regard will be paid first to the inaugural Select Farm Assurance standards and Farm Animal Health and Welfare Policy of the prominent quality food retailer Marks and Spencer. In the private sphere, Marks and Spencer was the first retailer to develop and introduce an animal welfare farm assurance scheme - for produce sourced for its supply chain.³ Second, consideration will be given to the established independent and not-for-profit farm welfare standards ‘RSPCA Assured’, which are communicated to consumers via the RSPCA Assured label on the agricultural produce of retailers who subscribe to apply this business-to-consumer (B2C) logo. Third, attention will turn to the global collective industry

¹ Veerle Heyvaert ‘Regulatory Competition—Accounting for the Transnational Dimension of Environmental Regulation’ (2013) 25 (1) JEL 1, 1.

² Spencer Henson and John Humphrey ‘Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries’ (2010) 46 J Develop Stud 1628, 1630.

³ Marks and Spencer Policy for Farm Animal Health and Welfare (June 2017) 4.0 <https://corporate.marksandspencer.com/documents/plan-a-our-approach/foods/mns-farm-animal-health-and-welfare-policy.pdf>.

standard - the Integrated Farm Assurance (IFA) Livestock Certificate and animal welfare Add-on Modules of the global partnership of good agricultural practice (GLOBALG.A.P.). This choice has been influenced by the diverse natures and differing missions of each of these foremost private institutions, the difference in the constituents of the identified organisations and, thus, the interests served. A relevant factor in the selection of private standards is that enhanced animal welfare is stipulated within both individual company schemes, such as that of Marks and Spencer and collective corporate schemes, of which GLOBAL.G.A.P. is a key example. Further, animal welfare standards may be one aspect of good agricultural practice alongside food safety, workers' health and safety and environmental protection within business-to-business (B2B) certification schemes, applicable as such to Marks and Spencer and GLOBALG.A.P..⁴ Consumers are distanced to differing degrees from B2B schemes, the foremost target stakeholders of which are retailers and producers of agricultural produce,⁵ which is the case with the Select Farm Assurance Scheme of Marks and Spencer and the IFA Assurance Certificate of GLOBALG.A.P. Changes are underway and the extent to which each established B2B scheme can legitimately be characterised additionally as a B2C standard scheme will receive critical appraisal. By contrast, the third scheme to be considered, RSPCA Assured, is an established ethical animal welfare B2C standard scheme, enjoying a trusted link to the consumer via the RSPCA Assured label. The RSPCA initiated the establishment of the non-profit organisation registered under Belgian law, Eurogroup for Animals, which became the invited Secretariat of the EP Intergroup on Animal Welfare.⁶ The RSPCA has also been an invited participant to the OIE group meetings on private standards.⁷ The World Trade Organization Committee established under the Agreement on Sanitary and Phytosanitary Measures⁸ (SPS Committee), discussing the responses to a questionnaire on SPS-related private standards,⁹ noted the references to Marks and Spencer's retailer standards and to GLOBALG.A.P. as the international scheme most mentioned.¹⁰ Two-thirds of the replies indicated that at least some of the requirements of

⁴ Linda Fulponi, OECD Final Report, *Private Standards and the Shaping of the Agro-Food System* AGR/CA/APM(2006)9/FINAL Exec Summary para 3, Report paras 13-15, 39.

⁵ Pascal Liu, FAO, Paper presented at the WTO Workshop on Environment-related Private Standards, Certification and Labelling Requirements, Geneva, 9 July 2009, para 2.3. http://www.fao.org/fileadmin/templates/est/AG_MARKET_ANALYSIS/Standards/Private_standards_Trade_Liu_WTO_wkshp.pdf.

⁶ Michael Radford, *Animal Welfare Law in Britain. Regulation and Responsibility* (OUP 2001) 184-5. <https://www.eurogroupforanimals.org/who-we-are/our-members>.

⁷ Report, OIE Meeting on private standards including for animal welfare, 17 March 2009, Annex XL App IV.2 1017 https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_TA_HSC_Sept_2009_Part_B_b.pdf.

⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS (1994) 493, art 12.

⁹ G/SPS/W/232.

¹⁰ WTO SPS Committee, 'Effects of SPS-related private standards' G/SPS/GEN/932, paras 10, 11.

private standards exceed those of the relevant international standards, inclusive of stricter animal welfare standards.¹¹

This exercise will be conducted in an endeavour to develop solutions to the current impasses identified in corporate farm animal welfare assurance, predominantly in B2B schemes. It will be relevant to see who sets the private standards and how the schemes are designed and governed. The methodology employed is doctrinal and empirical in conducting a search of the available information on the designated corporate and non-governmental organisation (NGO) websites, which details the standards of animal welfare for certain species of farmed animals and applicable compliance criteria. Such a comparison will be informed further through a reflection of, and comparison with, EU regulation of farm animal welfare within and across Member State borders and geographical boundaries. An analysis will be undertaken per selected species, per designated private standard scheme, with a relevant comparison undertaken inter se and with EU legislative standards highlighting examples of best practice and, conversely, of poor practice.

Each of the three private schemes require certified compliance with the scheme's animal welfare standards on the part of producers and deploy accredited¹² third-party conformity assessment of compliance.¹³ Drawing on the data which is available on each schemes' website, there will be an exploration, as indicated, of the scope of the species-specific animal welfare criteria and the levels at which the standards are pitched by these non-State organisations. Of the essence, is the degree of welfare the private schemes accord to species of animals farmed to the pertaining benchmark and on the clarity of the standards. Key welfare issues will be underscored and standards highlighted in the process of drawing out the strengths and weaknesses of the respective welfare and compliance criteria for each species. It will be relevant to see if it is possible to gauge whether the welfare promoted is broader or higher than EU legislative norms, which will be explored through a careful consideration of a number of variables, inclusive of resource-based and management-based input standards and animal-based outcome measures. Resource-based requirements comprise, for example, housing conditions such as ventilation and the provision of an environment conducive to practise natural behaviours. Management standards range from in-house oversight of the welfare practices, to independent conformity assessment and to the competence of the handlers responsible for the day to implementation of the standards pre-farm-gate. Animal-based outcome measures assess the individual animal's physical and mental / behavioural welfare.

¹¹ *ibid* paras 21, 32.

¹² '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', Maki Hatanaka, Carmen Bain, Lawrence Busch, 'Third-party certification in the global agri-food system' (2005) 30 *Food Pol* 354, 357.

¹³ To remind, '[t]hird-party certifiers are private or public organizations responsible for assessing, evaluating, and certifying safety and quality claims, based on a particular set of standards and compliance methods'. *ibid*, 355.

While an evaluation of the substantive welfare criteria is considered to be a vital indicator of the standards' stringency, additional factors should also be weighed in the balance. Constituent elements of the relative credibility and verifiability of welfare assurance include monitoring compliance, the process of reporting on performance, procedural review and continual improvement goals, partnerships with expert authorities, availability of transparent information, relations with stakeholders and, thus, the overall design and governance of private standard schemes.¹⁴

Such an assessment of the private standard schemes will be undertaken in an analysis of the legitimacy of each scheme and its acceptance to the ethical consumer. The clarity and transparency of the standards will also affect the extent to which the scheme meets conventional principles of good governance. This in turn is relevant to establishing credence with consumers, who would be influenced by which parties participate in standard-setting, their knowledge and credentials in animal welfare and whether there is a potential conflict of interest in the constituencies served.

A private interest is identified in the provision of value-added agri-produce in a value chain and this chapter will examine how far private animal welfare labels may serve as a mechanism with which the key private stakeholders in the agri-food chain (retailers, farmer producers and informed consumers) may capitalise on the provision of enhanced animal welfare produce. Concluding comments will extrapolate best practices and recommended processes and identify weaker standards where improvements should be made.

5.2 Private Animal Welfare Schemes and Standards

The focus will be upon welfare assurance for chickens, pigs and calves where minimum standards pertain in EU law. The *lacuna* in EU species-specific welfare provision for dairy cattle lean towards analysis of private standards for dairy cows. This chapter's interest lies in the extent to which the private standards raise the bar of welfare above and beyond the EU legislative floor for these species of animals in EU agriculture and in produce supplied in the transnational regulatory space of the agri-food chain.

5.2.1 Marks and Spencer Select Farm Assurance

The first retailer to adopt and implement an animal welfare farm assurance scheme for its own sourced and supplied agri-produce,¹⁵ Marks and Spencer was also a founding member of GLOBALG.A.P. (formerly EurepGAP)¹⁶ of which

¹⁴ Heyvaert (n 1) 1, 30-31.

¹⁵ Marks and Spencer Policy (2017) (n 3) 4.0.

¹⁶ Hatanaka and others (n 12) 359.

it remains a longstanding retail member today.¹⁷ Marks and Spencer maintains a prominent position in farm animal welfare having been placed consistently in the leading tier of the Business Benchmark for Farm Animal Welfare (BBFAW) since 2013.¹⁸ Marks and Spencer pioneered cage-free eggs in 1997 and, prior to legislative provision, requires CCTV monitoring in approved slaughter houses.¹⁹ Marks and Spencer farm animal welfare standards are based upon, and stated expressly to go beyond, the requirements of legislation and industry²⁰ farm assurance standards. Its policy on high welfare veal, sourcing rose veal as opposed to white veal,²¹ is highlighted as one of its top achievements in animal welfare.²² Marks and Spencer's accomplishments and undertakings in animal welfare continue to receive acclaim. Recognition from the RSPCA, for example, includes the Sustained Excellence Award in the RSPCA Good Business Awards 2011 for achievements in animal welfare.²³ The British Free Range Egg Producers Association named Marks and Spencer 'Retailer of the Year' in 2015 for its leading standards in free-range egg production²⁴ and Compassion in World Farming (CIWF) recognised Marks and Spencer's commitment to cage-and-confinement-free farming in its inaugural award in 2017.²⁵

5.2.1.1 Governance and Standard-Setting

The multinational public limited company of Marks & Spencer directs over one thousand stores in the UK and over four hundred stores in international markets. It operates food and other retail businesses using the Marks and Spencer own-brand model focused on delivering good value for money.²⁶ Its annual food revenue totals £ six billion.²⁷ It is committed to ensure Marks and Spencer fulfils

¹⁷ GLOBALG.A.P. Annual Report 2019 <https://globalgapsolutions.org/annual-report/>.

¹⁸ Nicky Amos and Rory Sullivan, 'The Business Benchmark on Farm Animal Welfare Report' (2019) 17. https://www.bbfaw.com/media/1793/bbfaw_report_2019-v2.pdf. An initiative of the prominent NGOs Compassion in World Farming and World Animal Protection.

¹⁹ Marks and Spencer Policy (2017) (n 3) 5.1.

²⁰ For example Red Tractor <https://www.redtractor.org.uk/>. Marks and Spencer Policy (2017) (n 3) 4.0, 5.1.

²¹ https://corporate.marksandspencer.com/media/press-releases/archive/2007/08102007_marksspencerbanswhitevealandcalvesliver.

²² <https://corporate.marksandspencer.com/plan-a/food-and-household/product-standards/raw-materials-commodities-and-ingredients/beef-lamb-venison>.

²³ <https://corporate.marksandspencer.com/plan-a/our-approach/food-and-household/product-standards/farm-animal-health-and-welfare>.

²⁴ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/eggs>.

²⁵ <https://www.ciwf.org.uk/our-impact/food-business-programme/good-farm-animal-welfare-awards/cage-free-award/>.

²⁶ <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework>.

²⁷ <https://corporate.marksandspencer.com/investors/key-facts>.

the potential of its brand to its investors, colleagues and the communities in which it operate. One of the special attributes of Marks and Spencer is the level of trust it has established on the high street.²⁸

The Board is the guardian of the Marks and Spencer brand, its reputation and stakeholder relationships.²⁹ Clearly Marks and Spencer operates in the interests of its constituencies through its integral commitment to secure and maintain its reputed high quality brand. A senior independent Director sits on the Board whose role is to: provide a communication channel between the Chairman and non-executive directors and, when required, principal shareholders; be available to shareholders and other stakeholders and to listen to their views; and to generate constructive relationships with investors to listen to their concerns and maintain their support.³⁰ The responsibilities of the Board's non-executive Directors' include to ensure the Company acts responsibly having due regard to its reputation and does the right thing for its shareholders and wider stakeholders,³¹ inclusive of, for example, its suppliers and customers.³² The Group Secretary, furthermore, is under a duty to promote the success of the Company for the benefit of shareholders, taking into account the interests of wider stakeholders; and is expected to make high quality decisions which look after Marks and Spencer's brand integrity.³³ The focus of the Board's Chief Executives involves: updating the Board on progress against its business strategies and key performance indicators including, for example, UK sales, profits and market share; customer data; store and online and international performance; to lead the business and promote the Marks and Spencer brand values; and to ensure Marks and Spencer's Plan A commitments are delivered.³⁴

Marks and Spencer's Farming for the Future Annual Report details its food business mission and feeds into its overarching corporate Plan A 2020. Plan A is Marks and Spencer's business plan and ethical and environmental programme, which includes responsible sourcing, reducing waste, social community action, food safety, environmental protection, carbon efficiency, sustainability and animal health and welfare. The target relationship of the Farming for the Future

²⁸ (n 26).

²⁹ <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework#f2c63da1a3504223ab8e5d17e3ea9062>.

³⁰ <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework#1de9fa96334a45b08180df09da4cf1e4>.

³¹ Likewise, a responsibility of Marks and Spencer Chief Executives, <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework#4990e6b102de4c4981ed68761a84fb2c>.

³² <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework#3139cadfea954445b2ae42332b0f3f24>.

³³ <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework#340cbd1a379b45c5ace3bf327009baae>.

³⁴ <https://corporate.marksandspencer.com/investors/corporate-governance/governance-framework#3c26fd4cc499499cb7f9c478a68d5479>.

Programme inclusive of its animal welfare practices is that of Marks and Spencer with its farmers and growers, to enable them to deliver products to consumers 'which do not compromise on quality, integrity or food safety'. Its 'standards are developed with farmers and growers in mind'.³⁵ Marks and Spencer's Policy for Farm Animal Health and Welfare and its B2B Select Farm Assurance Scheme comprised, inter alia, of its own independently certified species-specific animal welfare standards, are directed towards farmers and suppliers of livestock-derived products into Marks and Spencer's quality food supply chain.³⁶ The management of its policy is the responsibility of Marks and Spencer's team of agriculture specialists who are externally trained in animal welfare by Bristol University and re-certified every three years.³⁷ The policy requires persons who handle livestock to have received appropriate training and be competent to care for them.³⁸ Animal welfare provision is wide ranging in application to chickens, turkeys, ducks, geese, guinea fowl, pigs, dairy cattle, calves, beef cattle, lamb and venison, in respect of which Marks and Spencer closely associates with key animal welfare NGOs and with University researchers in animal welfare behavioural science.³⁹

Marks and Spencer's approach is to work collaboratively with its suppliers and farmers to establish the need and then align with the most relevant industry research partner.⁴⁰ Notable are Marks and Spencer's long-term partnerships with Bristol University and with the Food Animal Initiative (FAI Farms).⁴¹ FAI Farms, for example, is helping Marks and Spencer to benchmark and monitor performance working closely with Marks and Spencer suppliers. FAI Farms provides Marks and Spencer with animal welfare knowledge and direction and is responsible for managing its independent data collection and supply chain research and animal-based outcome measures.⁴² This programme covers all the major species including chickens, laying hens, pigs, turkeys and beef and dairy

³⁵ Marks and Spencer Farming for the Future Annual Report (2016) 3, 5 <https://corporate.marksandspencer.com/documents/plan-a-our-approach/mns-farming-for-the-future-report-april2016.pdf>.

³⁶ Marks and Spencer Policy (2017) (n 3) 1.0.

³⁷ *ibid*, 3.

³⁸ *ibid*, 5.1.

³⁹ Farming for the Future (2016) (n 35) 5.

⁴⁰ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/pork#1b0031030ee64e0980ab78491dac416f>.

⁴¹ Since 2001 FAI Farms has farmed and operated 1650 acres (668ha) of Oxford University farmland in Wytham, Oxfordshire. FAI Farms commits to help overcome the food sector's key challenges and implement better farming practices through applied research and innovation in collaboration with Oxford, Reading and Bristol Universities <https://www.faifarms.com/our-locations/england/>.

⁴² <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/poultry#dcbe8086edcc47058d1549be60a54279>.

cattle in respect of which Marks and Spencer increasingly uses and monitors outcome measured data.⁴³ For example, Marks and Spencer has removed the practice of more than one thinning (removal of birds from the house) for its fresh chicken, which is associated with bird stress. Pilot trials were undertaken of new objects of enrichment to support increased behavioural opportunities for chickens housed indoors. Marks and Spencer further has trialled indoor-free-farrowing systems, which allow the sow and piglets space to express their natural behaviours during farrowing and nursing (PigSAFE).⁴⁴

These are examples of better practice environment and management input resources. Marks and Spencer's programme of action in relation to sustainable animal welfare works on the premise of developing beyond a best practice baseline of good agricultural practice, through the incremental development and monitoring of outcome measures in association with identified research projects on targeted aspects of welfare per species, highlighting future focus areas. Dairy farming is notable in that all Marks and Spencer producers receive an annual health and welfare audit by a specialist vet from the Royal Veterinary College, who works closely with farmers and their vets throughout the year to focus on key issues such as mastitis, lameness, disease prevention and cow comfort.⁴⁵

5.2.1.2 Assessment and Audit

Marks and Spencer's suppliers are required to undertake a process of conformity assessment and certification by Marks and Spencer approved auditors to enter Marks and Spencer's supply chain.⁴⁶ Marks and Spencer Select Farm Audits are a strong part of its animal welfare process. Its direct supplier must undertake Marks and Spencer Select Farm Assurance audits to the full specification of Marks and Spencer standards to the minimum specified frequency (typically every twelve to eighteen months depending on the species). Supplying farmers must pass this audit in order to be part of Marks and Spencer's supply chain. Marks and Spencer's approved Select Farm auditors employed by, or contracted to, the supplier must be trained to Marks and Spencer requirements by an independent specialist audit company and be re-trained every three years.⁴⁷ Suppliers must provide to that third party updated details (in the prescribed format within a defined period) of farms which have passed and failed, with latest audit dates. Direct suppliers must monitor animal welfare compliance using welfare outcome measures by providing data, and commit to continuous improvement in

⁴³ Farming for the Future (2016) (n 35) 4-8.

⁴⁴ *ibid*, 6, 7. The PigSAFE Project (Piglet and Sow Alternative Farrowing Environment) started in April 2008 for three years with the objective of developing and testing a practical non-crate system for indoor farrowing accommodation. Funded by Defra and undertaken by the University of Newcastle and Scotland's Rural College (SRUC) in consultation with welfare (RSPCA) and industry groups (BPEX, QMS) https://www.freefarrowing.org/downloads/file/5/pigsafe_project_final_report.

⁴⁵ Farming for the Future (2016) (n 35) 8.

⁴⁶ Marks and Spencer Policy (2017) (n 3) 5.4.

⁴⁷ *ibid*.

the standards of animal welfare practised on the farm.⁴⁸ Direct suppliers are also required to accommodate a minimum of two third-party shadow audits and spot checks of their Marks and Spencer Select Farms per primary processing site each year to ensure consistency with Marks and Spencer standards.⁴⁹ Farms must pass these unannounced audits to remain part of Marks and Spencer's supply chain. The direct supplier's responsibility is overseen by the third-party conformity assessment in a stringent system of independent oversight, with Marks and Spencer following through with an effective corrective policy. If a supplier fails to meet the standards, Marks and Spencer will work with them to make changes to improve performance. If standards continue not to be met suppliers will be removed from Marks and Spencer's supply chain.⁵⁰

5.2.2 RSPCA Assured Welfare Standards

The Royal Society for the Protection of Cruelty to Animals' (RSPCA) B2B Freedom Food scheme was initiated in 1994. Milestones include prohibition of the live export of calves from RSPCA Freedom Food farms in 2010.⁵¹ It was the first scheme to introduce animal welfare officers at abattoirs as well as compulsory CCTV (preceding legislative initiative) in 2011 and also to introduce veterinary health plans.⁵² The McNair Report⁵³ found that the RSPCA is highly trusted by the public in animal welfare, but that Freedom Food was little known. Freedom Food was re-branded to the consumer in 2015 as 'RSPCA Assured' and the B2C scheme of RSPCA Assured replaced the phased out Freedom Food brand in October 2017.⁵⁴ The RSPCA Assured scheme achieves its objectives by creating a commercial incentive for producers and retailers to source and supply produce meeting its standards of welfare and to communicate this practice to their consumers using the RSPCA Assured logo.⁵⁵ RSPCA Assured is

⁴⁸ *ibid*, 6.0.

⁴⁹ During 2019/20 Lloyd's Register performed these shadow audits <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/farm-animal-health-welfare#da165c80e02e4ceb84c2b9e95211a451>. UKAS accreditation number 0071. Acoura Certification Limited trading as Lloyd's Register adheres to ISO/IEC 17065 (Conformity assessment requirements for bodies certifying products, processes and services) https://services.acoura.com/media/66293528/lr_certification_regulations_issue_1_revision_9.pdf?pbcc=1242422.

⁵⁰ Marks and Spencer Policy (2017) (n 3) 5.4.

⁵¹ The Food Ethics Council and Heather Pickett, *Farm Animal Welfare Past, Present and Future*, Summary Report (September 2014) 14 https://www.rspcaassured.org.uk/media/1041/summary_report_aug26_low-res.pdf.

⁵² <https://www.berpscaassured.org.uk/about-us/what-is-rspca-assured/>.

⁵³ Duncan McNair, Caroline Spelman and David Main, The McNair Report (May 2013), an independent enquiry and report commissioned by the RSPCA into the Freedom Food animal welfare assurance scheme.

⁵⁴ <https://www.berpscaassured.org.uk/about-us/frequently-asked-questions/>.

⁵⁵ The McNair Report (2013) (n 53).

characterised by an animal-focused logo and RSPCA Assured certification mark on products produced to RSPCA Assured welfare standards.⁵⁶

5.2.2.1 Governance and Standard-Setting

RSPCA Assured is a wholly owned subsidiary of the RSPCA, which operates independently as a charity in its own right⁵⁷ and which was set up to administer the RSPCA's farm animal welfare labelling scheme RSPCA Assured.⁵⁸ Strategic leadership in line with RSPCA Assured's purpose, vision and goals is provided by the RSPCA Freedom Food Board of Directors. RSPCA Board members are voted on to the Freedom Food Board by the RSPCA Board. The Chairman provides leadership to the Board and exercises responsibility for ensuring the Board has agreed priorities and has trustees who are able to govern well and thereby add value to the charity. Board members must not be involved with any groups of businesses which contravene RSPCA and RSPCA Assured policies,⁵⁹ negating potential for conflicting interests. The minimum number of Board members is five, with no maximum limit and Board members hold office for a maximum of three 3-year terms from the date of appointment. Any Board member who is a council member of the RSPCA or an RSPCA employee will cease to hold office on resignation or termination otherwise of their employment. In year two of each term, Board members must have a review with the Chief Executive Officer to assess their participation and contributions to RSPCA Assured. In the final year of the first and second term, Board members must have a further such review to agree whether or not they will extend their term. Non-executive Directors are recruited to fill gaps in the Board's expertise, which may include specialisms such as, for example, farming or certification. The role is either advertised or someone will be identified as a result of a recommendation. The Chief Executive Officer then meets the candidate for an initial meeting, which is followed by an interview with the Chairperson and another member of the Board.⁶⁰

This private, not-for-profit charity and farm assurance schemes' charitable purpose and vision is dedicated to improving farm animal welfare.⁶¹ It is independent from the food and farming industry.⁶² Its mission is to 'offer a higher welfare choice, raise consumer awareness and demand for RSPCA Assured

⁵⁶ RSPCA Farm Animal Science Review (2014) 11 <https://science.rspca.org.uk/documents/1494935/9042554/Farm+Animal+Science+Review+2014+%28PDF+1.88MB%29.pdf/1cbde6f4-3cc3-03f7-499f-e8ba1167db6a?t=1558017779993>.

⁵⁷ <https://www.berpcaassured.org.uk/about-us/what-is-rspca-assured/>.

⁵⁸ <https://business.rspcaassured.org.uk/about-us/governance/>.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ <https://business.rspcaassured.org.uk/about-us/what-is-rspca-assured/>.

⁶² <https://www.rspcaassured.org.uk/about-us/how-rspca-assured-works/>.

products and ensure confidence and trust in the RSPCA Assured brand.⁶³ Based in the UK, RSPCA Assured is recognised by the UK government and the EU as a higher level scheme,⁶⁴ evident in its policy engagement in animal welfare as a representative of the UK in Eurogroup for Animals. This can be seen to demonstrate a level of hybridity, i.e. a degree of public / private interface and a blurring of the public / private dichotomy in farm animal welfare standards, noticeable also in the RSPCA feed into the OIE debate on private standards. The broad applicability of the welfare standards of the RSPCA Assured scheme span the major species of farm animal inclusive of laying hens, chickens, dairy cattle, beef cattle, veal cattle, sheep, ducks, pigs and turkeys.⁶⁵ Updated sheep welfare standards apply in 2020, where is gap in the provision of EU welfare norms. This scheme is both broad and deep in that there are forty million terrestrial farm animals farmed under the RSPCA Assured scheme, including more than a quarter of all UK pig production and fifty per cent of egg laying hens.⁶⁶

RSPCA Assured welfare standards are based on leading scientific evidence and veterinary and practical industry expertise⁶⁷ and include, per species, the benefits of space, natural lighting, comfortable bedding, environmental enrichment, shade and shelter.⁶⁸ Standards Technical Advisory Group (STAG) meetings are held once a year for each species.⁶⁹ STAG members are selected for the specific expertise they bring in different areas of livestock care. Typically an advisory group would include an independent chairman, RSPCA farm animal specialists, representatives of large and small-scale farms (usually members of the RSPCA Assured scheme), animal welfare and production scientists and / or agricultural consultants, veterinarians with species-specific expertise, and technical / field operations representatives of RSPCA Assured.⁷⁰ In developing the standards account is also taken of feedback received from RSPCA field staff

⁶³ Clive Brazier RSPCA Assured chief executive, *Chain of Custody Audit standard* (2019) 2 <https://business.rspcaassured.org.uk/media/2593/april-19-online-chain-of-custody-standards-online-1.pdf>.

⁶⁴ <https://www.berspcaassured.org.uk/about-us/what-is-rspca-assured/>.

⁶⁵ <https://science.rspca.org.uk/sciencegroup/farmanimals/standards>.

⁶⁶ <https://www.berspcaassured.org.uk/about-us/what-is-rspca-assured/>.

⁶⁷ <https://www.berspcaassured.org.uk/about-us/frequently-asked-questions/>. 'The evidence base for farm animal welfare: RSPCA Farm Animals' Department Approach pdf' (2015) <https://science.rspca.org.uk/sciencegroup/farmanimals/standards>.

⁶⁸ <https://www.rspcaassured.org.uk/farm-animal-welfare/rspca-welfare-standards>.

⁶⁹ <https://www.berspcaassured.org.uk/rspca-welfare-standards/>.

⁷⁰ <https://science.rspca.org.uk/sciencegroup/farmanimals/standards/workinggroups>. RSPCA Standards Technical Advisory Groups Terms of Reference (2018) <https://science.rspca.org.uk/documents/1494935/9042554/Standards+Technical+Advisory+Group+Terms+or+Reference+%28PDF+214KB%29.pdf/90d7d0c3-4852-4af8-f1a2-bf80b8c20359?t=1553182788520>.

(Farm Livestock Officers) who carry out monitoring of the RSPCA Assured Scheme, and RSPCA Assured assessors who audit the scheme members.⁷¹

As a result of a collaborative project led by the RSPCA, the Soil Association and the University of Bristol known as AssureWel, practical and scientifically informed welfare outcome assessments for a growing number of species of farm animals including laying hens, dairy cattle, finishing pigs and dry sows⁷² have been implemented in the RSPCA Assured scheme. In April 2016 the welfare outcome assessment became a compulsory part of an RSPCA Assured annual on-farm audit.⁷³ Measures include, for example, tail-docking, body marks and enrichment use, which give an indication of pig welfare.⁷⁴ During 2017, AssureWel protocols were finalised for chickens, beef cattle and sheep.⁷⁵ AssureWel assesses the effects of resource-input standards on an animal's welfare using the system developed for welfare outcome assessment for all major farmed animal species for incorporation into farm assurance. Welfare outcome assessment is used by RSPCA Assured assessors and RSPCA Farm Livestock Officers as objective evidence when checking compliance with RSPCA welfare standards. Significantly, RSPCA Assured welfare standards remain primarily based on 'inputs' describing what must be provided to the animals in terms of certain resources such as housing, space, feed, veterinary care and management practices. The RSPCA acknowledges the importance of knowing what effect these inputs are having on the welfare of the animals and in conjunction looks at the 'outcomes' of these inputs, i.e. the impact of inputs on the health, physical condition and behaviour of the animals.⁷⁶ This is the recommended method of the EFSA to ensure good welfare and to prevent poor welfare.⁷⁷

5.2.2.2 Assessment and Audit

Each RSPCA Assured member is subject to an assessment carried out annually by an independent RSPCA Assured assessor.⁷⁸ An assessor's compliance

⁷¹ <https://www.berspcaassured.org.uk/about-us/what-is-rspca-assured/>.

⁷² 'The term dry sow' encompasses all gestating sows, sows awaiting service and barren sows within the herd. Jeremy N Marchant-Forde, 'Welfare of Dry Sows' in Jeremy N Marchant-Forde (ed), *The Welfare of Pigs* (Springer 2009) 95.

⁷³ RSPCA, *The Welfare of Pigs* (April 2016) 7. <https://www.rspca.org.uk/adviceandwelfare/farm/pigs>.

⁷⁴ *ibid.*

⁷⁵ RSPCA Science Group Review of 2017 (2018) 15 <https://science.rspca.org.uk/sciencegroup/home>.

⁷⁶ <https://science.rspca.org.uk/sciencegroup/farmanimals/outcomeassessment>.

⁷⁷ EFSA, *Statement on the use of animal-based measures to assess the welfare of animals* (EFSA J (2012)10(6) 2767) Conclusions and Recommendations, 23.

⁷⁸ RSPCA Assured Standards are audited by NSF CMI International and are United Kingdom Accreditation Service (UKAS) accredited to ISO 17065 (Conformity Assessment Standard) <https://berspcaassured.org.uk/benefits-to-your-business/good-animal-welfare/>.

report will detail any un-met standards, known as non-compliances. Members are then required to submit evidence within four weeks clearly showing that the required changes have been made.⁷⁹ RSPCA farm livestock officers additionally undertake compulsory monitoring visits of a significant proportion of the member farms, at least thirty per cent which amounts to a significant risk analysis⁸⁰ including during the first year of membership, which can be unannounced.⁸¹ This system of double monitoring is noteworthy. Failure to meet the RSPCA Assured welfare standards may lead to suspension or permanent removal from the scheme depending on the severity of the non-compliance. If there is a minor infringement, such as record keeping, which does not impact directly on an animal's health and welfare, that member will be given a short period within which to prove they have rectified the problem. In the event that they fail to do they may be suspended or removed from the scheme.⁸² It is necessary immediately on ceasing to be an RSPCA Assured member to remove the RSPCA certification mark and any references to it from all products and marketing communications.⁸³

5.2.3 GLOBALG.A.P. Integrated Farm Assurance (IFA) Livestock

Standard

GLOBALG.A.P. is a global organisation with the 'crucial objective of safe, sustainable agriculture worldwide'. Acknowledging that 'every generation has a right to safe food', its stated purpose is to 'support farmers to connect them to markets where they can sell their safely and sustainably produced agricultural products by developing and implementing farm assurance systems that are based on facts and recognised across the supply chain'.⁸⁴ GLOBALG.A.P. claims to be the world's leading farm assurance program.⁸⁵ It is a trademark and a set of standards for good agricultural practices (G.A.P.) and it is a private collective B2B standard and certification scheme.⁸⁶ GLOBALG.A.P. Certification endorses standards of good agricultural practice in animal welfare, food safety, sustainability, environmental protection and workers' health and safety in more than one hundred and thirty five countries.⁸⁷ The GLOBALG.A.P. IFA Livestock Standard consists of control points and compliance criteria (CPCC)

⁷⁹ RSPCA Information Booklet 2017, 2
https://business.rspcaassured.org.uk/media/2688/rspcaass_a4information_email.pdf;

⁸⁰ <https://www.rspcaassured.org.uk/about-us/frequently-asked-questions/>.

⁸¹ <https://www.berespcaassured.org.uk/about-us/how-rspca-assured-works>.

⁸² <https://www.rspcaassured.org.uk/about-us/frequently-asked-questions/>.

⁸³ <https://www.berespcaassured.org.uk/selling-rspca-assured/levvy/>.

⁸⁴ https://www.globalgap.org/uk_en/who-we-are/about-us/.

⁸⁵ https://www.globalgap.org/uk_en/who-we-are/about-us/history/.

⁸⁶ Liu (n 5). Fulponi, OECD (2006) (n 4).

⁸⁷ https://www.globalgap.org/uk_en/for-producers/globalg.a.p./
https://www.globalgap.org/uk_en/who-we-are/about-us/history/.

⁸⁸ https://www.globalgap.org/uk_en/who-we-are/members/.

which define the requirements for the All Farm Base Module, the Livestock Scope Module and the respective Sub-scope Module[s] necessary to attain the Standard. There are six Sub-scopes, namely, cattle and sheep, dairy, calf and young beef, pigs, poultry and turkeys.⁸⁹

Europe is GLOBALG.A.P.'s key market for IFA certification generally and its producer members are predominantly European, which stems from its origins. GLOBALG.A.P. was established in 1997 as EurepGAP a private initiative of retailers belonging to the Euro-Retailer Produce Working Group (EUREP). It was an initiative of a group of twenty leading European retailers and became a partnership of agricultural producers and retailers / food providers to establish certification standards for good agricultural practices.⁹⁰ Originally focusing its standards on fresh fruit and vegetable produce, EurepGAP began the process of developing species-specific livestock standards⁹¹ prior to renaming itself GLOBALG.A.P. Producers under certification to the IFA Livestock Standard number 3,314 in nineteen countries, the IFA Livestock Certificate accounting for nineteen per cent of total IFA certification.⁹²

5.2.3.1 Governance and Standard-Setting

GLOBALG.A.P. is not dependent on sourcing agri-food directly; it is a global partnership of an increasing number of retailers / food service providers⁹³ and producers who respectively source and / or supply agricultural produce meeting GLOBALG.A.P. standards worldwide. GLOBALG.A.P. membership status offered to producers and retailers is the definitive condition to accrue voting rights and to have a representative voice, whether by consensus,⁹⁴ in the IFA Livestock Standard. Retail and food service membership of GLOBALG.A.P. with voting rights accrues from the payment of a yearly fee determined by retailer / food service turnover. Group and individual producers pay a membership fee of 2,550

⁸⁹ http://www.globalgap.org/uk_en/for-producers/globalg.a.p./integrated-farm-assurance-ifa/livestock/.

⁹⁰ European Commission DG JRC Joint Research Centre / IPTS Sustainability in Agriculture, Food and Health Case Studies 5. *EurepGAP* (11 December 2006) 4-5. Henson and Humphrey (2010) (n 2) 1642.

⁹¹ JRC / IPTS Study (2006) *ibid*, 25.

⁹² GLOBALG.A.P. Annual Report (2019) (n 17). There are three IFA Certification Scopes: Crops; Livestock and Aquaculture.

⁹³ Which include, for example, Asda, Coop, McDonalds, Marks and Spencer, Morrisons, Sainsbury's, Tesco, GLOBALGAP Annual Report 2018, 112 https://www.qcsinfo.org/download/globalg-a-p-annual-report-2016/?wpdmdl=1859&ind=2Sq8j2WIZetxBqTWk4Don9RqP-qIP4em0a-P0h7LfXumv_4yew5cm_ihD_DDYuSldjxdtcs_1qIXIMaoC3WuwA.

⁹⁴ GLOBALG.A.P. Board Terms of Reference (v2_28 October 2019) The Board seeks to make decisions by consensus (defined as the absence of sustained opposition) between retailer and producer/supplier members. Where consensus cannot be reached, decisions shall be made through voting. (6. Decision-making 2, 3) <https://www.globalgap.org/.content/galleries/documents/170530-GLOBALG.A.P.-Board-Terms-of-Reference.pdf>.

Euros or 1,550 Euros, respectively and producer groups are accommodated also in the certificate and assessment licence fees. Each type of membership includes one Sub-scope and Technical Committee voting right, with an additional fee of 525 Euros for each extra Sub-scope. For the IFA Livestock Standard, an annual producer registration fee is charged based on quantity produced determined for livestock, dairy (milk) and poultry, with a fee for each of two animal welfare Add-on Modules.⁹⁵ Certified producer members are entitled to represent their producer interest in GLOBALG.A.P.'s governance structure and to use the GLOBALG.A.P. logo on their promotional materials at business level.⁹⁶ Retailers / food service providers may use the GLOBALG.A.P. Brand in their corporate strategy and partake in standard-setting. Membership enables retail / food service providers to source certified produce and to identify GLOBALG.A.P. certified producers through preferential access to a producer's unique thirteen digit certification ID number registered on GLOBALG.A.P.'s data base.⁹⁷

GLOBALG.A.P.'s governing Board is elected by GLOBALG.A.P. voting members, which is an important governance distinction from the aforementioned two schemes. It is comprised of seven elected member producer representatives⁹⁸ and seven elected member retailer / food service representatives for a four year (renewable) term, headed by an independent chairman or by a member of the Board. Two new producer, and two new retailer, seats were reserved for candidates from Africa, Asia/Pacific and the Americas in elections in 2018 to reflect the expansion and internationalisation of GLOBALG.A.P..⁹⁹ At least three of four regions (Europe, Africa, Asia/Pacific, or the Americas) must be represented on the Board. The Board provides direction to the GLOBALG.A.P. Secretariat its acting management operated by FoodPLUS GmbH a private limited company based in Germany, which owns the GLOBALG.A.P. Brand.¹⁰⁰

The Board also provides direction to GLOBALG.A.P.'s Livestock Technical Committee, comprised of six retailer / food service members and six producer members with livestock knowledge and experience in animal health, safety and welfare, which develops species-specific modules.¹⁰¹ The Board takes the final

⁹⁵ GLOBALG.A.P. 'General Fee Table' (v 5 March 2020) (separate fee table applies for North America).

⁹⁶ https://www.globalgap.org/.content/.galleries/documents/200221_General-GG-Fee-Table_2020_V5_en.pdf.

⁹⁷ http://www.globalgap.org/uk_en/who-we-are/members/supplier/.

⁹⁸ http://www.globalgap.org/uk_en/buyers/.

⁹⁹ At least one producer seat must go to a Livestock representative.

¹⁰⁰ GLOBALG.A.P. Annual Report (2018) (n 93) 8.

¹⁰¹ GLOBALG.A.P. Board Terms of Reference (2019) (n 94).

¹⁰¹ *ibid*; GLOBALG.A.P. Livestock Technical Committee https://www.globalgap.org/uk_en/who-we-are/governance/technical-committees/tc-livestock/.

resolution on adopting standards, revisions and new modules. 102 GLOBALG.A.P. members have organised National Technical Working Groups (NTWGs) to assist in applying GLOBALG.A.P.'s IFA Livestock Standard on a local scale and in identifying local adaptation challenges. The NTWGs develop national interpretation guidelines¹⁰³ which are required to be submitted for approval to the Livestock Technical Committee and ultimately for approval to the Board.¹⁰⁴ GLOBALG.A.P. can withdraw or revise the national interpretation guidelines at any time on an individual point basis if the global integrity of the IFA Standard is challenged.¹⁰⁵

5.2.3.2 Assessment and Audit

In the process of applying for IFA Livestock Certification, individual producers or companies undertake self-assessment and complete the required checklist of 'Major Musts,' 'Minor Musts' and 'Recommendations' for the Livestock Standard Scope and relevant Sub-scopes. General Regulations stipulate general compliance requirements.¹⁰⁶ To attain Certification, one hundred per cent compliance with all applicable Major Must control points is compulsory, together with ninety five per cent compliance with all applicable Minor Must control points.¹⁰⁷ No minimum percentage of compliance is required for Recommendations.¹⁰⁸ All applicants are subject to an announced annual inspection. Unannounced inspections are conducted on a minimum of ten per cent of certificate holders, with two days advanced notification possible.¹⁰⁹ Compared with Marks and Spencer Select Farm Assured and RSPCA Assured, these figures do not constitute a satisfactory assurance that an adequate risk assessment process is in place with which to monitor and detect the occurrences of potential malpractices that may be undertaken by particular parties or more generally.

¹⁰² GLOBALG.A.P. Board Terms of Reference (2019) (n 94).

¹⁰³ http://www.globalgap.org/uk_en/who-we-are/ntwgs/.

¹⁰⁴ GLOBALG.A.P. Terms of Reference for Technical Committees 2020-2030 (April 2020) https://www.globalgap.org/content/galleries/documents/200401_GG_ToR_TC_2020-2023_en.pdf.

¹⁰⁵ http://www.globalgap.org/uk_en/who-we-are/ntwgs/nig/nig-approval/index.html.

¹⁰⁶ GLOBALG.A.P. General Regulations Part I - General Requirements (v 5.2_1 August 2019) https://www.globalgap.org/content/galleries/documents/190201_GG_GR_Part-I_V5_2_en.pdf. General Regulations Livestock Rules (v 5.2_1 August 2019) https://www.globalgap.org/content/galleries/documents/190201_GG_GR_Livestock_Rules_V5_2_en.pdf.

¹⁰⁷ From the All Farm Base, Livestock Base and Sub-scope Modules, GLOBALG.A.P. General Regulations Part I *ibid*, s 6.2.1-2.

¹⁰⁸ *ibid* s 6.2.

¹⁰⁹ *ibid* ss, 5.2.2.1, 5.2.2.2 (i)(iii).

Producer members are required to undergo a process of third-party audit and compliance certification undertaken by a GLOBALG.A.P. approved certification body.¹¹⁰ A producer applying to be certified as compliant with the Livestock Standard must choose a GLOBALG.A.P. approved certification body, details of which are available on GLOBALG.A.P.'s website. The producer pays a fee for such approved third-party certification and the certificate is valid for one year.¹¹¹ This raises, potentially, questions of 'fairness' in the distribution of costs amongst developed / developing country producers.¹¹² Pro rata lacking the economies of scale¹¹³ small producers in developing countries may effectively bear the burden of the costs of GLOBALG.A.P. approved third-party certification¹¹⁴ or the consequential inevitability of exclusion from the agri-food chain.

Non-conformance with the Certification rules, for example non-compliance with one or more Major Musts, or more than five per cent of applicable Minor Musts,¹¹⁵ triggers the rigorous sanction regime inclusive of a warning and / or product suspension or cancellation of membership.¹¹⁶ In addition to their associate membership fee, certification bodies pay an annual certification licence fee and a certificate fee to GLOBALG.A.P..¹¹⁷ GLOBALG.A.P. approved certification bodies must be accredited to ISO/IEC 17065¹¹⁸ and, supplementary to having requisite competence, act independently, impartially, confidentially and with integrity. As associate members certification bodies do not play a role in the internal governance of GLOBALG.A.P.. Not being full members and thus bereft of a vote they do not have representative rights in the setting of the Livestock

¹¹⁰ *ibid* ss 3, 4.1.

¹¹¹ *ibid* ss 4-5.

¹¹² Spencer Henson and John Humphrey, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, ALINORM 09/32/9D-Part II (2009) 36.

¹¹³ *ibid* 30.

¹¹⁴ Hatanaka and others (n 12) 361. GLOBALG.A.P. has engaged with small producers in its concessionary fee structure for group membership although additional rules require a Quality Management System. GLOBALG.A.P. General Regulations Part II Quality Management System Rules (v 5.2_1 August 2019) https://www.globalgap.org/.content/.galleries/documents/190201_GG_GR_Part-II_V5_2_en.pdf. Henson and Humphrey (2009) (n 112) 28.

¹¹⁵ GLOBALG.A.P. General Regulations Part I (n 106) ss 6.1(b), 6.2.

¹¹⁶ *ibid* s 6.4-5.

¹¹⁷ GLOBALG.A.P. General Regulations Part III Certification Body and Accreditation Rules (v 5.2_1 August 2019) https://www.globalgap.org/.content/.galleries/documents/190201_GG_GR_Part-III_V5_2_en.pdf.

¹¹⁸ ISO/IEC 17065 Requirements for bodies certifying products, processes and services (2012) <https://www.iso.org/obp/ui/#iso:std:iso-iec:17065:ed-1:v1:en>.

Standard.119 GLOBALG.A.P. established the Certification Bodies Committee to coordinate and supervise the activities of its certifiers and in 2012 created a South American Certification Bodies Committee Subgroup. GLOBALG.A.P. has further secured a Certification Integrity Programme (CIPRO),¹²⁰ which in a notable system of double monitoring monitors and assesses the performance of GLOBALG.A.P. approved certification bodies. The Board-appointed Integrity Surveillance Committee¹²¹ takes the final decision on imposing sanctions¹²² on certifying bodies, which are implemented and enforced by GLOBALG.A.P.'s Secretariat.¹²³ The extent to which third-party certification of the Standard is centrally led could be perceived to detract from the certifiers independence from the regulatory regime,¹²⁴ even though the certifiers are certifying the rules established by the internal governance system and play no part in their adoption. This stringent system of central oversight could be said to underscore the independence of the certifiers from their producer clients and the credibility of the IFA Certificate in this regard.¹²⁵ Nonetheless, GLOBALG.A.P. entered into a Memorandum of Understanding (MoU) with the International Accreditation Forum (IAF)¹²⁶ for reasons of legitimisation sought by GLOBALG.A.P.,¹²⁷ as a consequence of which GLOBALG.A.P. approved certification bodies must be

¹¹⁹ http://www.globalgap.org/uk_en/who-we-are/members/associates/index.html.

¹²⁰ http://www.globalgap.org/uk_en/what-we-do/the-gg-system/integrity-program/CIPRO/index.html.

¹²¹ http://www.globalgap.org/uk_en/who-we-are/governance/Other-committees/integrity-surveillance-comm./index.html.

¹²² Defined by GLOBALG.A.P., General Regulations Part III (n 117) s 9.3.

¹²³ *ibid*

¹²⁴ Hatanaka and others (n 12) 356; Donal Casey, 'Structuring Private Food Safety Governance: GLOBALGAP and the Legitimizing Role of the State and Rule Intermediaries' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 31.

¹²⁵ Paul Verbruggen and Rebecca Schmidt, 'The Role of Certification in the Enforcement of Transnational Private Regulation' (SSRN 2012) 24 <http://dx.doi.org/10.2139/ssrn.2255918>.

¹²⁶ Memorandum of Understanding between FoodPLUS and IAF Issue 2 – 29 May 2009 (updated), originally signed on 2 June 2006 https://www.iaf.nu/upFiles/451410.IAF-GLOBALGAP-MoU_Signed_090529_clean.pdf cited in Casey (n 124) 50, 51. See IFA and GLOBALGAP MLA Agreement, Endorsement of the GLOBALG.A.P. Integrated Farm Assurance (IFA) Certification Scheme, 25 October 2013 <https://www.iaf.nu/upFiles/GLOBALG.A.P.pdf>.

¹²⁷ 'One of GLOBALGAP's key responses to criticisms relating to inconsistencies in certification bodies' practices', Casey (n) 49. '... as GLOBALGAP expanded both geographically and in size, accredited third-party verification proved insufficient to ensure acceptance of the monitoring and enforcement of the GLOBALGAP standard by key stakeholders, in particular retailers'. Interview, *Informant 1*, cited in Casey (n 124) 49.

accredited by a body that has signed the MoU with FoodPLUS GmbH within either European co-operation for Accreditation (EA) or IAF.¹²⁸

5.3 Animal Welfare Standards

5.3.1 Chickens

5.3.1.1 Marks and Spencer Select Farm Assurance

Marks and Spencer fresh chicken is reared to Marks and Spencer Oakham™ specification, whereby chickens are reared in controlled environment barns and are not caged. Oakham™ chickens are housed on straw or wood shavings and have constant access to a cereal based diet and water, with controlled temperature and lighting levels in-house. Their environment is enriched with natural daylight and straw bales which the birds use for pecking and perching behaviours to encourage movement and activity. Birds may not be stocked at a density greater than thirty kilograms per square metre, where one thinning is permitted.¹²⁹ Within Marks and Spencer speciality range, corn-fed free-range birds must not be stocked at a density greater than twenty seven and a half kilograms per square metre with only one thinning permitted. The lower stocking densities with one permitted thinning better EU law's thirty three kilograms per square metre with no stated thinning limit. Relatively high standards prevail in stocking densities and enrichment for cage-free fresh chicken supplied by Marks and Spencer. Welfare outcome measures are monitored on Oakham™ and free-range chicken including information on the health status of the flock, particularly leg health. Key target areas identified for improvement across Marks and Spencer's supply are hock burn, footpad dermatitis and focusing suppliers on improving existing levels.¹³⁰ Prophylactic and routine use of antibiotics are prohibited and where veterinary medicines are administered for health reasons strict withdrawal periods are required to ensure that no trace remains in the produce.¹³¹

All chicken for ingredient use must come directly from a farm that meets an industry standard (minimum legislative compliance) assurance scheme or is a Marks and Spencer Select Farm. Farms assured to industry standard schemes

¹²⁸ https://www.globalgap.org/uk_en/what-we-do/the-gg-system/certification/list-of-accreditation-bodies/.

¹²⁹ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/poultry#84a806c1b3394caf8758ceac9012b592>.

¹³⁰ Farming for the Future (2016) (n 35) 6 .

¹³¹ Marks and Spencer Policy (2017) (n 3) 5.3.

<https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/poultry#84a806c1b3394caf8758ceac9012b592>.

allow stocking densities of thirty eight kilograms per square metre,¹³² which is not a characteristic strong benchmark for ingredient use in Marks and Spencer processed produce. It is lower than the EU highest standard of thirty three kilograms per square metre and Marks and Spencer's stocking density of thirty kilograms for chickens reared for fresh supplies. Marks and Spencer has committed to reporting on its use of animal welfare outcome indicators and to improving standards in its EU / continental ingredient supply through the provision of straw bales and natural light.¹³³ Key performance measures reported in 2019 show a high compliance rate of ninety six per cent for ingredient and frozen produce from 298,053,632 chickens stocked at the industry standard of thirty eight kilograms per square metre, with one thin. In contrast, the proportion of chickens provided with behavioural enrichment, natural light, bales and pecking objects was one hundred per cent across all sourced chickens.¹³⁴ Especially commendable, however, is the fact that Marks and Spencer was the first British retailer¹³⁵ to sign up to the European Chicken Commitment,¹³⁶ which has been drawn up by a partnership of animal protection groups inclusive of the RSPCA, CIWF and Eurogroup for Animals. Marks and Spencer has pledged to require its suppliers of one hundred per cent of the fresh, frozen, and processed chicken in its supply chain, to adopt a maximum stocking density of thirty kilograms per square metre (limited to one thin per flock) by 2026. Its pledge extends to farming a new approved slower-growing breed of bird with better welfare outcomes and to demonstrate compliance via third-party auditing and annual public reporting on its progress. The birds will also be provided with natural daylight, perches and pecking substrates.¹³⁷ These committed welfare measures improve upon EU standards. Marks and Spencer also sources turkey, duck, goose and guinea fowl for sale as fresh products as well as for ingredient use in Marks and Spencer food, in accordance with Select Farm Assurance Standards or Codes of Practice.¹³⁸ EU animal welfare species-specific criteria do not exist for these poultry birds and thus Marks and Spencer's Animal Health and Welfare Policy is notably broader and higher, inclusive of choosing not to source *foie gras*.¹³⁹

¹³² <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/poultry#2f2899e3764>.

¹³³ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/poultry#cbffe98f69104a719bd5d527895f011f>.

¹³⁴ *ibid.*

¹³⁵ <https://www.ciwf.org.uk/philip-lymbery/blog/2018/01/ms-signs-up-to-advance-chicken-welfare>.

¹³⁶ <https://welfarecommitments.com/europeletter/>.

¹³⁷ *ibid.*

¹³⁸ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/poultry#4ebf6a98e9ed420983a83b2b4601e864>.

¹³⁹ Marks and Spencer Policy (2017) (n 3) 5.2.

5.3.1.2 RSPCA Assured

RSPCA Assured standards for chickens produced for meat¹⁴⁰ require the floor of the house to be completely covered in litter of good quality material and particle size, which is hygienically stored and kept dry. It must be maintained in a dry, friable (loose and free flowing) condition and replaced where necessary. The average minimum depth of five centimetres is necessary to allow for dilution of faeces and for the birds to dust bathe and must be topped up daily if necessary, with fresh litter and be managed hygienically.¹⁴¹ Chickens must not have to travel more than four metres in the house to reach food or more than three metres in-house to reach water which is clean and fresh at all times.¹⁴² Water meters are required to be connected to all birds' drinking systems for each house with an approximation of numbers known so that water consumption can be monitored on a flock basis, since changes in water consumption can help to provide an early indication of health issues.¹⁴³ Ventilation in buildings must maintain good air and litter quality with accommodation provided for all chickens.¹⁴⁴ Requirements for the maintenance of ventilation systems are higher than the EU norm,¹⁴⁵ essentially ensuring that chickens have access to a thermally comfortable environment at all times.¹⁴⁶ In each twenty four hour period, the standards specify the provision of a minimum of eight hours continuous light and a minimum period of six hours and maximum period of twelve hours continuous darkness for chickens. No area of the house must be lit at less than twenty lux, the EU norm, which must be achieved by natural daylight alone except on dark days when artificial lighting is permissible.¹⁴⁷ Brighter lighting is important to stimulate activity, which can help to reduce the incidence of leg disorders and contact dermatitis.¹⁴⁸ For chickens reared in indoor systems the stocking rate and density must never exceed nineteen birds per square metre and thirty kilograms per square metre of floor space.¹⁴⁹ When total bird weight within a square metre of floor space is higher than thirty kilograms there is an increase in the risk of

¹⁴⁰ (July 2017)
<https://science.rspca.org.uk/documents/1494935/9042554/RSPCA+welfare+standards+for+meat+chickens+%288.48+MB%29.pdf/e7f9830d-aa9e-0908-aebd-2b8fbc6262ea?t=1557668435000>.

¹⁴¹ E 3.3.

¹⁴² *ibid*, FW 1.11, FW 2.9, FW 2.1.

¹⁴³ *ibid*, FW 2.10.

¹⁴⁴ *ibid*, E 2.20.

¹⁴⁵ *ibid*, E 6.3.

¹⁴⁶ *ibid*, E 6.4.

¹⁴⁷ E 4.1-2, 4.3-4.

¹⁴⁸ EU Scientific Committee for Animal Health and Animal Welfare Report, *The Welfare of Chickens kept for Meat Production* (2000) 62.

¹⁴⁹ E 5.1.

serious welfare problems developing.¹⁵⁰ These standards exceed EU legislative criteria.

A stimulating environment containing straw bales, perches and objects to peck at encourages birds to be active. Environmental enrichment must be furnished to chickens at no later than seven days of age and be maintained / replaced throughout the rearing period as necessary; guidance is given on minimum provision.¹⁵¹ Chickens and the facilities on which the birds depend must be inspected a minimum of three times daily which is high, with recording procedures. Stringent provisions concern training¹⁵² and record keeping, including records on the breeds of chicken being reared, daily water consumption, relative humidity and ventilation.¹⁵³ Any welfare problems seen during inspection must be dealt with without delay, otherwise constituting evidence of stock-keeper neglect.¹⁵⁴ Twice yearly unannounced independent welfare audits additionally focus on those standards that can change frequently during the lifetime of a flock with a direct impact on bird welfare including an assessment of stock-keeper ability, performance and competence, which amounts to good risk assessment.¹⁵⁵ There must also be a written Veterinary Health and Welfare Plan in which any mutilation of chickens is prohibited.¹⁵⁶

One challenge remains with the welfare of chickens where RSPCA Assured high standards of production account for only a small proportion of the total birds produced.¹⁵⁷ Chickens produced for meat generally have been genetically selected to grow very quickly. This rapid weight gain can cause severe health problems such as lameness and heart defects. The RSPCA believes that only genetically slower-growing breeds should be used; those approved and accepted for use by the RSPCA.¹⁵⁸ It is a requirement of the standards that all such breeds must have their welfare assessed¹⁵⁹ in accordance with its Broiler Welfare Assessment Protocol,¹⁶⁰ which assesses key welfare parameters including

¹⁵⁰ <https://www.rspca.org.uk/adviceandwelfare/farm/meatchickens/keyissues>.

¹⁵¹ E 7.1-3.

¹⁵² M 2.0 - 4.

¹⁵³ M 1.3.

¹⁵⁴ M 3.4.

¹⁵⁵ M 4.1, 5, 7, 8.

¹⁵⁶ H 1.3, 2.0.

¹⁵⁷ Summary Report (September 2014) Foreword (n 51).

¹⁵⁸ H 3.0. <https://www.rspcaassured.org.uk/farm-animal-welfare/chickens/>.

¹⁵⁹ May 2017 <https://www.berspcaassured.org.uk/rspca-welfare-standards/meat-chicken-breeds-accepted-for-use-within-the-rspca-assured-scheme/>.

¹⁶⁰ (May 2017) <file:///C:/Users/diane/Downloads/RSPCA%20Broiler%20Welfare%20Assessment%20P>

growth rate, mortality and leg health. The RSPCA is concerned about the associated practice of deliberately slowing the growth rate of fast-growing breeds by adjusting the quality or quantity of their feed. Broilers / chickens must be fed a diet which allows them to achieve their genetic growth rate potential, which is a factor in the choice of approved breed selected. The RSPCA proposes to extend its reach to an international market to raise awareness and to drive up practices and chicken welfare.¹⁶¹

5.3.1.3 GLOBALG.A.P. IFA Livestock Standard

Feed must be continuously available or be meal fed and only withdrawn from chickens for a maximum of twelve hours before the expected slaughter time,¹⁶² reflecting verbatim EU law¹⁶³ and compulsory for producers in non-EU countries. Major Must provisions also govern water equipment supplies and access to water,¹⁶⁴ the details of which go beyond the EU species-specific norm. Moreover, birds must not have to travel more than four metres for feeders and three metres for water anywhere in the house to reach food or water, as a Major Must.¹⁶⁵ Conversely, ensuring only minimal evidence of water spillage onto litter is a Minor Must specification;¹⁶⁶ EU legislative requirement is stronger here with the requirement for permanent access to dry litter.¹⁶⁷ There is a Major Must procedural obligation to make checks daily to minimise water wastage and to prevent litter problems.¹⁶⁸ It is stated to be mandatory, as a Major Must, that all poultry have continuous access to an adequate supply of clean fresh drinking water assessed visually and with records of cleaning supply pipes kept. Yet the extent to which water meters record daily consumption and / or corrective action is taken with evidence kept when drinking patterns are disrupted, depends upon a producer opting-in (or out) of a Minor Must level of compliance within a flexible margin of five per cent. The compulsory condition that poultry are kept on dry and friable litter does not apply where litter is not used.¹⁶⁹ Only where litter is used must it satisfy conditions of hygiene, suitability of material and particle size, dryness and depth,¹⁷⁰ which is not good. EU law mandates permanent access

[rotocol%20May17.pdf](#);

<https://science.rspca.org.uk/sciencegroup/farmanimals/standards/chickens>.

¹⁶¹ Summary Report (September 2014) (n 51) 18.

¹⁶² IFA Poultry Control Points and Compliance Criteria (v 5.2_1 August 2019) IFA PY 4.8

https://www.globalgap.org/.content/.galleries/documents/190201_GG_IFA_CPCC_PY_V5_2_en.pdf.

¹⁶³ Council Directive 2007/43/EC [2007] OJ L183/19 Annex 1 (2).

¹⁶⁴ IFA PY 4.10.

¹⁶⁵ IFA PY 4.13.

¹⁶⁶ IFA PY 4.11.

¹⁶⁷ Directive 2007/43/EC (n 163) Annex I (1) (3).

¹⁶⁸ IFA PY 4.14.

¹⁶⁹ IFA PY 5.5.1.

¹⁷⁰ IFA PY 5.5.2.

to litter which is dry and friable on the surface.¹⁷¹ There is thus some mirroring of EU standards which, conversely, will not apply in third countries and yet IFA Livestock Certification may ensue.

Visual assessment acts as a measure of compliance with the stated obligation that all birds have sufficient space to enable them without difficulty to move freely, stand normally, turn around, stretch their wings, perch and sit without contact with other birds.¹⁷² But the specification for regular checks of live weights and associated record keeping to be undertaken exists at a Minor Must level of compliance.¹⁷³ A written calculation of the stocking rates must be available and a maximum stocking density of thirty eight kilograms per square metre must not be exceeded,¹⁷⁴ comparable it would seem to the middle EU maximum allowable density of thirty nine kilograms although notably without the additional welfare criteria which are EU legal requirements.¹⁷⁵ Stocking density stipulations are written in strong words, but are solely dependent on there being applicable legislation in place. Stocking density requirements for outdoor poultry are also dependent on legislative provision for free-range systems.¹⁷⁶ These stipulations are not private standards and do not apply in the absence of prevailing norms. Keeping written records of stocking densities and monitoring that stocking densities are not exceeded at the end of the growing period are subject to the level of compliance of Minor Must, with thinning allowed to adjust the stocking density.¹⁷⁷ The number of permitted thinnings is not specified. EU legislation would appear also to condone such practice in the Directive's provision to record the numbers of chicken remaining after removal for sale or slaughter.¹⁷⁸ Conversely, the EU norm specifies a lower stocking density of thirty three kilograms per square metre and is in this regard a higher standard. The RSPCA allows one thinning only as does Marks and Spencer; this practice is stressful for the birds.

Having written plans for back-up systems in the event of mechanical ventilation failure is also a Minor Must compliance specification.¹⁷⁹ In contrast, EU documentary requirements are mandatory for alarm systems and backup

¹⁷¹ Directive 2007/43/EC (n 163) Annex I (1) (3).

¹⁷² IFA PY 5.2.2.

¹⁷³ IFA PY 5.2.3.

¹⁷⁴ IFA PY 5.2.4.

¹⁷⁵ Directive 2007/43/EC (n 163).

¹⁷⁶ IFA PY 6.1.

¹⁷⁷ IFA PY 5.2.6.

¹⁷⁸ Directive 2007/43/EC (n 163) Annex 1 (11(e)).

¹⁷⁹ IFA PY 5.3.1.

systems in the event of failure of any automated or mechanical equipment.¹⁸⁰ The Sub-scope requires a documented ventilation plan to be in place to ensure good air quality generally. Appropriate temperature and humidity are assured through visual assessment and workers' awareness and¹⁸¹ if there are concerns for the effectiveness of the ventilation system the house must be stocked at lower densities. This is written as a Major Must obligation ¹⁸² but does not retain its perceived one hundred per cent compulsion according to the compliance criteria. Comparable in wording to the EU thresholds for maximum concentrations of ammonia and carbon dioxide with indicated parameters, the procedures of recording and making available test results and action plans to meet targets are only Minor Must clauses.¹⁸³ EU legislation, in contrast, establishes an obligation to ensure that specified thresholds are not exceeded.¹⁸⁴ A further provision for the control of inside temperature in the event of heightened temperatures outdoor (a requirement in EU law),¹⁸⁵ corroborated by records, is conditioned as a Minor Must.¹⁸⁶ Likewise a Minor Must, daily temperature records are to be kept to show that poultry are protected from heat stress.¹⁸⁷ As a Minor Must, stock persons need to be aware of heat stress, be able to recognise it and to apply the policy in place, with the need to have such a policy a Minor Must stipulation.¹⁸⁸ The maximum and minimum temperatures within all automatically ventilated houses measured and recorded on a daily basis must be available to be reviewed by the attending veterinary surgeon within a veterinary health policy, as a Major Must procedural requirement.¹⁸⁹ A comparable stipulation in respect of the air quality parameters of ammonia and carbon gases is the subject of a Recommendation only.¹⁹⁰

Light duration and intensity stipulated at twenty lux as a Major Must¹⁹¹ appears to accord *verbatim* with EU law, but only to the extent that a Minor Must level of compliance is adhered to.¹⁹² It is a Minor Must clause that workers have a

¹⁸⁰ Directive 2007/43/EC (n 163) Annex 2 (2(b)(d)) 2nd indent by virtue of reference in art 3(3).

¹⁸¹ IFA PY 5.3.2.

¹⁸² IFA PY 5.3.3.

¹⁸³ IFA PY 5.3.4.

¹⁸⁴ Directive 2007/43/EC (n 163) Annex 2 (3(a)).

¹⁸⁵ A requirement even in respect of the lower stocking density of 33 kilograms per square metre.

¹⁸⁶ IFA PY 5.3.6.

¹⁸⁷ IFA PY 5.3.7.

¹⁸⁸ IFA PY 5.3.8.

¹⁸⁹ IFA PY 5.3.10.

¹⁹⁰ IFA PY 5.3.11.

¹⁹¹ IFA PY 5.4.1. Directive 2007/43/EC (n 163) Annex I (7).

¹⁹² IFA PY 5.4.4, PY 5.4.5. Directive 2007/43/EC (n 163) Annex I (6).

recognised training certificate or record of internal training or that visual / factual evidence is available.¹⁹³ Conversely, EU provisions in respect of training and attestation of equivalent experience are stringent legal requirements¹⁹⁴ detailed in their objectives and scope covering, for example, physiological needs, the concept of stress, careful catching, emergency care etc,¹⁹⁵ as are the standards of Marks and Spencer and of RSPCA Assured. Nevertheless, records of inspections undertaken at least twice daily (akin to EU law) and fallen stock must be provided and worker's knowledge demonstrated as a Major Must requirement.¹⁹⁶ Conversely, and in contrast to the relative legal requirement in EU law,¹⁹⁷ the prompt removal from flock and humane culling of birds which have difficulty in reaching food and water is only measured for compliance as a Minor Must where suffering is evident and welfare poor.¹⁹⁸ Records of internal or external training and experience of workers are required when there are health implications which necessitate the culling of birds.¹⁹⁹ Stock-persons must merely be aware of the welfare problems associated with poor litter management, i.e. hock burn, foot pad lesions and breast blisters.²⁰⁰

Within an allowable non-compliance margin of five percent in the Minor Must criteria IFA Certification may ensue when less than optimal practices are accommodated, each of which results in poor chicken welfare compounded by the possibility of some accumulation. Examples include inadequate ventilation with high ammonia levels, insufficient training and competence requirements for chicken handlers, higher stocking densities without additional safeguards where chickens suffer the stress of multiple stock reductions at the time of harvest.

5.3.1.3.1 Animal Welfare Add-on Module for Poultry / Broiler Chickens

The Add-on Module for poultry / broiler chickens²⁰¹ is one of two voluntary animal welfare Add-on Modules which GLOBALG.A.P. offers to enhance IFA Livestock Certification.²⁰² An ad hoc Stakeholder Committee on Animal Welfare worked on the Add-on Modules from 2011-13 comprised of producers, processors, retailers, and representatives from certification bodies, academia and NGOs. Significantly, an OIE representative joined that committee to facilitate

¹⁹³ IFA PY 13.1.

¹⁹⁴ Directive 2007/43/EC (n 163) art 4 (1) (2)–(6).

¹⁹⁵ *ibid*, Annex IV.

¹⁹⁶ IFA PY 13.2.

¹⁹⁷ Directive 2007/43/EC (n 163) Annex I (9).

¹⁹⁸ IFA PY 13. 3.

¹⁹⁹ IFA PY 14.1.

²⁰⁰ IFA PY 14.4.

²⁰¹ V 1_15 February 2013
https://www.globalgap.org/.content/.galleries/documents/130215_gg_add-on_aw_py_cpcc_v1_0_en.pdf.

²⁰² The second being an Add-on Module for pigs, discussed below.

information exchange between the OIE and GLOBALG.A.P.²⁰³ This Module consists of two documents, (i) a checklist and (ii) control points and compliance criteria, which criteria are a mixture of Major Must requirements and non-binding Recommendations. All control points must be inspected unless there is a written agreement from individual producer members only to inspect the conditions subjected to Major Must compliance. Given this, inspections would not be conducted for criteria the subject of a Recommendation in respect of which the producer's justification of current practice is acceptable.²⁰⁴

Producers may benchmark to higher standards than the requirement not to exceed a stocking density of thirty three kilograms per square metre as a general rule, which mirrors EU best practice.²⁰⁵ A stocking density up to thirty nine kilograms per square metre based on veterinary authority approval is accommodated, as in EU law.²⁰⁶ A Major Must, air quality / aerial contaminant levels of ammonia are required to be below twenty ppm (parts per million) and carbon dioxide below three thousand ppm (the maximum permissible EU concentrations) with written records of measurement tests performed three times per cycle available for each poultry house. Compliance is measured through the requisite availability of records of test results and action plans to meet targets,²⁰⁷ injecting an element of flexibility into the measure of compliance and not an obligation of result. The responsibility to maintain litter is dependent on the operation being one where poultry are kept on litter, in which case litter must be permanently available, well-maintained, well-drained, dry and friable,²⁰⁸ as in the IFA Standard and in EU law. Workers' competence in litter management and enhanced welfare practices is compulsory only where litter is used.²⁰⁹ The provision of a minimum light intensity of twenty lux disseminated homogenously in the entire house for all seasons is a Recommendation only, as is the use of slow-growing breeds. Conversely, chicken welfare will be enhanced through the provision of environmental enrichment in barns such as straw or pecking objects at the compliance level of Major Must verifiable through visual checks and materials invoices, where the latter pecking objects are not prescribed in EU law.²¹⁰

While the Module has the potential to encourage EU Member and non-EU country producers to aim higher, overall it is not obligating practices which raise the bar

²⁰³ http://www.globalgap.org/uk_en/who-we-are/governance-old/stakeholder-comm./SHC-Animal-Welfare/.

²⁰⁴ GLOBALG.A.P. Animal Welfare Add-On Module for Poultry / Broiler Chicken Check List (v 1_Feb 13).

²⁰⁵ *ibid*, AW PY 1.1.

²⁰⁶ Directive 2007/43/EC (n 163) Annex II (n).

²⁰⁷ AW PY 2.1.

²⁰⁸ AW PY 7.1.

²⁰⁹ AW PY 8.1.

²¹⁰ AW PY 9.1.

of EU legislative requirements. Clearly identifiable transparent indicators of welfare associated with the animals raised by those producers who subscribe to the voluntary Add-on Module would be absent.

5.3.2 Pigs

5.3.2.1 Marks and Spencer Select Farm Assurance

All Marks and Spencer Select Farm Assurance fresh pork in the UK is British and is clearly labelled with the country of origin. Fresh pork is required to be from outdoor-bred, free-range or indoor free-farrow systems, with Marks and Spencer committing to remove all confinement-farrowing from its ingredient and continental pork supply by April 2025.²¹¹ This is justifiably targeted since in 2019 eighty five per cent of its EU / continental ingredient sourced herds were confinement-farrowed, i.e. confined in farrow crates.²¹² All Marks and Spencer ingredient pork will be sourced from outdoor-bred, straw-finished production systems ensuring there is no confinement-farrowing or slat-finishing in its supply chains.²¹³ The RSPCA has compiled a Protocol, to which Marks and Spencer is a signatory, which defines the different rearing systems, which will be discussed below. Marks and Spencer fresh pork is produced on Marks and Spencer Select Farm Assurance certified farms to a maximum outdoor-bred stocking density of thirty sows per hectare.²¹⁴ Marks and Spencer has moved to a single standard where all pork used in Marks and Spencer for fresh, ingredient and continental meats will be sourced from Marks and Spencer Select Farms. Increased enrichment is one of the areas of focus particularly in respect to manipulative material. If sourcing indoor-reared pork the provision of manipulative materials will be facilitative of pigs' ability to express their natural rooting behaviours. Castration is a practice which Marks and Spencer does not condone, borne out in its nil percentage performance ratings in 2019 with the exception of fourteen per cent of its continental ingredient stock.²¹⁵ Marks and Spencer sourced piglets are weaned at twenty eight days and then housed in deep straw bedded barns., a practice which Marks and Spencer does not condone. Marks and Spencer's Routine behavioural mutilation through tail-docking and teeth-clipping is not permitted unless veterinary advice deems it strictly necessary to protect

²¹¹ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/pork#5374e056281b4b94ab6a642dcf0f2c6c>.

²¹² *ibid.*

²¹³ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/pork#b3ce6bc2cfa74b3b91fe5084dab996d3>.

²¹⁴ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/pork#1b0031030ee64e0980ab78491dac416f>.

²¹⁵ (n 211).

from injury.²¹⁶ Welfare outcome measures are monitored on Marks and Spencer Select Farm fresh-supply pigs with Marks and Spencer committed to publish its year-on-year performance against these outcome measure standards.²¹⁷ Percentage tail-bites are measured to assess injury to pigs, for example, and behaviour assessed in accordance with maximum stocking density and the presence or absence of manipulable enrichment materials.²¹⁸ This data is collected and independently collated by FAI Farms. Marks and Spencer is working with FAI Farms to develop automated methods of data capture to ensure independent outcome measure recording over time and aims to use this data to shape future production standards and drive a continual improvement culture across its farm supply base.²¹⁹ Due recognition should be accorded to this initiative.

5.3.2.2 RSPCA Assured

RSPCA Assured standards require pigs to be fed a wholesome diet, accessible each day, with foraging substrate provided to all pigs and topped up regularly or spread over the entire pen so that pigs are fed in ways that minimise bullying.²²⁰ No piglet can be weaned from the sow before twenty eight days of age and all pigs over two weeks of age must have permanent access to a sufficient quantity of fresh drinking water, with one drinking place provided per ten pigs.²²¹ Pigs must be kept on, or have access at all times to, a lying area of solid construction (not perforated) either sloped to provide drainage or bedded to a sufficient extent to provide a dry lying area.²²² Bedding material must be comfortable, absorbent and provide thermal comfort.²²³ RSPCA minimum space allowances for growing pigs are relatively high²²⁴ and under review. The minimum floor space for sows, for example, is three and a half square metres for mature adults, higher than EU law.²²⁵

²¹⁶ Marks and Spencer Policy (2017) (n 3) 5.3.

²¹⁷ Farming for the Future (2016) (n 35) 4.

²¹⁸ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/pork#1ebb7495532b40809a6297ef7571dcac>.

²¹⁹ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/pork#1b0031030ee64e0980ab78491dac416f>.

²²⁰ (November 2016) FW 1.1, 1.8-9
<https://science.rspca.org.uk/documents/1494935/9042554/RSPCA+welfare+standards+for+pigs+%28PDF+5.72MB%29.pdf/8b2d5794-9a10-cd1f-f27d-e3642c0c1945?t=1557668440116>.

²²¹ FW 1.15, 2.1-2.

²²² E 4.1.

²²³ E 4.2.

²²⁴ E 5.1.

²²⁵ Council Directive 2008/120/EC [2009] OJ L47/5, art 3(1)(b).

Pigs must not be closely confined except in listed narrow exceptions and for the shortest necessary time²²⁶ with particular care taken to prevent bullying amongst sows and gilts kept in groups.²²⁷ RSPCA Assured standards do not permit the use of farrowing crates in which sows are confined. Sows must be settled into clean, comfortable farrowing quarters a minimum of five days prior to their expected farrow dates. Clean, suitable bedding and enrichment material such as dry straw which is well shaken up must at all times be provided in sufficient quantity, be evenly distributed for the sow's comfort and topped up as required to maintain hygiene and allow expression of natural behaviours such as rooting. ²²⁸ At least two kilograms of straw of sufficient length to be picked up must be provided per sow forty eight hours prior to the expected farrowing date to satisfy nest building behaviour.²²⁹ Appropriate quantities are under review. Sows must be able to turn around easily at all times without hindrance in the farrowing pen and it is compulsory for farrowing quarters to offer protection for piglets from crushing.²³⁰ For indoor-farrowing on hard standing floors, a bedded lying / nest area measuring at least 2.8 square metres must be provided.²³¹ Enhanced stipulations require pigs at all times to have access to effective environmental enrichment materials in sufficient quantities to allow and encourage proper expression of rooting, pawing and chewing behaviours.²³² The RSPCA cautions that EU legislative provision 'is open to interpretation, resulting in variable requirements across the EU and often inadequate provision.'²³³

High stipulations require adequate light for inspection at any time with records kept of lighting regimes. In each period of twenty four hours housed pigs must have access to an area providing a period of at least eight hours continuous light with a maximum intensity of fifty lux (exceeding EU stipulations) and a period of continuous darkness of at least six hours.²³⁴ Minimum lying areas are stipulated for mature sows and gilts kept in outdoor systems of production, where breeding animals must be stocked at no more than thirty adult animals per hectare.²³⁵ Well-managed mud-wallows or cool, spacious, well-ventilated shaded areas with

²²⁶ *ibid*, E 5.5.

²²⁷ *ibid*, E 5.7-8.

²²⁸ Shredded paper must not be used as bedding or enrichment material E 6.2, 3-4.

²²⁹ E 6.5.

²³⁰ E 6.6-7.

²³¹ E 6.8-9.

²³² E 7.1.

²³³ RSPCA, 'The Welfare of Pigs' (April 2016) (n 73) 4.

²³⁴ E 8.1-3.

²³⁵ E 9.3. Minimum total spaces and lying areas are expressed for free range systems, E 9.3.2-3.

sufficient space to allow pigs to lie down simultaneously and apart must be provided during summer conditions.²³⁶ These provisions are of a high standard.

Eighty per cent of piglets have their tails docked shortly after birth to try to reduce tail-biting when pigs are older and it is often the practice that piglets have their needle teeth clipped or ground which can cause pain and distress.²³⁷ The removal of the points of piglets' needle teeth must not be carried out routinely; teeth-grinding only is being considered.²³⁸ Tail-docking is not permitted except in exceptional circumstances, when only the minimum amount of tail necessary may be removed. The producer and veterinary surgeon must submit a fully reasoned written request for permission to tail-dock to the RSPCA indicating the severity, i.e. the numbers involved and frequency of the outbreaks of tail-biting, and the proposed method of docking (including the equipment to be used). If tail, flank or ear-biting occurs, immediate action must be taken to alleviate the problem through means other than docking, with the veterinary health and welfare plan modified to identify that action and regularly reviewed.²³⁹ Where permission to tail-dock is granted and docking is undertaken, a minimum of six centimetres of tail must be left. If a tail prior to docking is six centimetres or less the tip only may be removed. Variation in tail lengths must be avoided.²⁴⁰ Compulsory welfare outcome measures include tail-docking, body marks and enrichment use.²⁴¹ The surgical castration of pigs is not permitted.²⁴² Any medicines used must be licensed in the UK and applied in accordance with UK and EU legislation,²⁴³ with a record kept of on-farm vaccine use.²⁴⁴ Managers and stock-keepers are required to be thoroughly trained, skilled and competent in animal husbandry and welfare and have a good working knowledge of their system and the livestock under their care, inspecting livestock at least twice daily. It is obligatory for records to be kept of personnel, training programmes, data required by the standards, and a veterinary health and welfare plan.²⁴⁵ These are high standards of husbandry. They are credible, exacting and verifiable.

5.3.2.3 GLOBALG.A.P. IFA Livestock Standard

GLOBALG.A.P.'s animal welfare standards in respect of pigs are available in three different forms: first the Sub-scope requirements necessary for the attainment of Certification to the IFA Livestock Standard; second a voluntary Add-

²³⁶ E 9.7.

²³⁷ RSPCA, 'The Welfare of Pigs' (n 73) .

²³⁸ H.7.2, 7.10-13.

²³⁹ H 7.4.

²⁴⁰ H 7.5, 7.7.

²⁴¹ WA 1.1-2-4.

²⁴² H 7.14.

²⁴³ H 4.6.

²⁴⁴ H 4.7.

²⁴⁵ M 1-3, 2.1-3.

on Module to that Standard; and third, a bespoke initiative in separate and additional customised standards applicable solely to the Dutch market and a mandatory element of the Certified IFA Standard for all pig produce supplied in that market. Each of these will be discussed in turn.

GLOBALG.A.P. IFA Livestock Standard Sub-scope compliance criteria for pigs require young stock to be inspected to ensure that castration is performed within seven days of birth or after that only with anaesthetic and then carried out by a vet.²⁴⁶ This is a Major Must criterion applicable also to producers located outside the EU. The Sub-scope motivates the administration of pain relief parallel to the procedure taking place within seven days of birth, at the compliance level of Minor Must.²⁴⁷ EU legislation allows piglets up to seven days old to be castrated without anaesthetic and with no analgesic pain relief following surgery. The Sub-scope, nevertheless, is bereft of the EU law requirement for post-operative pain relief / analgesia after the age of seven days.²⁴⁸ Compulsory stipulations equivalent to EU legislation apply to tooth-clipping or grinding, tail-docking and weaning ages,²⁴⁹ with positive perspectives for non-EU countries. It could be contemplated that the conformity assessment undertaken by third-party audit offers assurances of compliance that are lacking in the divergent EU practices across Member States, where tail-docking, for example, is commonplace. Arguably, there would need to be a more robust risk assessment over and above the self-assessment check-lists and one announced annual inspection (with a one in ten 'unannounced' inspection, which may be pre-notified.). A supply of sufficient, clean, fresh potable water must be freely available daily to all pigs over two weeks of age.²⁵⁰ For monitoring purposes whether there is evidence of water quality inspection or an annual inspection is conditioned as a Minor Must.²⁵¹

Slatted flooring for pigs is allowed, with a Major Must compliance stipulation applicable to maximum width openings and minimum slat widths dependent on the size and definition of pigs, comparable with EU law.²⁵² Enrichment provision is compulsory with suitable objects required to be made of manipulable material which can be moved and investigated, for example straw, wood, rope made from natural materials, etc,²⁵³ where there is scope for interpretive ambiguity and exception in enrichment provision in EU law. It is compulsory that all pigs have

²⁴⁶ IFA Pigs Control Points and Compliance Criteria (V 5.2_1 August 2019) IFA PG 3.1 https://www.globalgap.org/content/galleries/documents/190201_GG_IFA_CPCC_PG_V5_2_en.pdf.

²⁴⁷ IFA PG 3.2.

²⁴⁸ Directive 2008/120/EC (n 225) Annex I ch I (8).

²⁴⁹ IFA PG 3.4, 6, 8.

²⁵⁰ IFA PG 4.6.

²⁵¹ IFA PG 4.7.

²⁵² IFA PG 5.1.1.

²⁵³ IFA PG 5.1.2.

access to a clean dry lying area²⁵⁴ without obligation to provide or to refresh bedding, akin to the EU norm. It is a Recommendation only that when bedding is used it should be topped up or changed regularly.²⁵⁵ The welfare of farrowing sows will be poor here, as there is also the scope for in EU law.²⁵⁶ Minimum space allowances²⁵⁷ are commensurate with EU legislative provisions²⁵⁸ for weaning, growing and finishing pigs. Maximum stocking density must be calculated (pen measured and maximum weight pigs) and defined in accordance with national legislation and GLOBALG.A.P. Guidelines without derogation, being a Major Must specification.²⁵⁹ Again this raises the question as to what the standard adds beside the respective national legislation and EU legal requirements. If there are no norms in respect of stocking densities within countries, the potential exists for different standards to be accommodated under the IFA Livestock Certificate.

The achievement of detailed target temperatures is stated to be obligatory with symptoms of heat / cold stress deemed indicative of non-conformance. Conditioned as a Minor Must, ²⁶⁰ this falls short of a Major Must obligation. GLOBALG.A.P. Guidelines provide: 'Insulation, heating and ventilation of the building shall ensure that air circulation, dust level, temperature, relative humidity and gas concentrations are kept within limits which are not harmful to the pigs;'²⁶¹ the standard is not unequivocal in its requirements. Whether air ventilation systems are designed, maintained and operated so as to prevent aerial contaminants is subject to evaluation based on sensory perception and the compliance criterion as to whether air is noticeably unpleasant to breathe is a Minor Must.²⁶² Compliance assessed at the level of Minor Must accommodates potentially within a five per cent margin divergences in individual Certification in areas in which non-compliance impacts poorly on pigs' welfare.

GLOBALG.A.P. standards applicable to EU Member States require pigs to be kept in light with intensity of at least eighty lux for at least eight hours per day,²⁶³ higher than forty lux specified in EU legislation. Conversely, GLOBALG.A.P. Certification would allow derogation for non-EU countries in the absence of

²⁵⁴ IFA PG 5.1.3.

²⁵⁵ IFA PG 5.1.4.

²⁵⁶ Directive 2008/120/EC (n 225) Annex I ch II B (3).

²⁵⁷ IFA PG 5.4.

²⁵⁸ Directive 2008/120/EC (n 225) art 3(1)(a); and word for word restatement of art 3(2)(a) for gilts after service and sows kept in groups.

²⁵⁹ IFA PG 5.4.1, Pig Guideline Annex PG 1.1.

²⁶⁰ IFA PG 5.2.1.

²⁶¹ IFA PG Annex: Chapter General Considerations, 3.

²⁶² IFA PG 5.2.3.

²⁶³ IFA PG 5.3.1.

national comparable standards. Minimum space allowances²⁶⁴ are also premised upon EU legislative provision applicable to EU Member States.²⁶⁵ Maximum stocking density is to be calculated and defined in accordance with national legislation and GLOBALG.A.P. Guidelines.²⁶⁶ The guidelines specify measurements to be taken of pens housing pigs according to class, growing pig or sow for example, and the establishment of maximum pig weights with the ensuing calculations required to fall within the space limits defined in EU legislation. If there is no stocking density provision within countries the potential exists for lower standards to be accommodated under the IFA Livestock Certificate.

No stalls / tethers or other restrictive pens except farrowing crates and stalls up to four weeks of service can be used,²⁶⁷ the latter also permitted in EU law.²⁶⁸ If stalls (presumably up to four weeks post-service) are used the service dates are required to be verified.²⁶⁹ In contrast, confinement-farrowing which is accepted as farming practice by GLOBALG.A.P. Certification is prohibited in EU Member States.²⁷⁰ A Minor Must specifies that sows cannot be moved into farrowing crates within seven days prior to farrowing until a maximum period of forty two days after farrowing, subject to verification by checking the dates.²⁷¹ Having a potential five per cent non-compliance margin this is another example of IFA Livestock Certification accommodating poor welfare practices for sows. In resorting to the use of farrowing crates beyond the farrowing period non-EU countries may conform to the compliance criteria to be IFA Livestock Certified. Confinement and social isolation are compounded in that sows in farrowing crates and for this extended period of confinement are excepted from the requirement for sows individually housed to have nose-to-nose contact with other pigs, the latter subject to local legislative requirements.²⁷²

²⁶⁴ IFA PG 5.4.

²⁶⁵ Directive 2008/120/EC (n 225) arts 3(1)(a), 3(2)(a).

²⁶⁶ IFA PG 5.4.1, Pig Guideline Annex PG 1.1.

²⁶⁷ IFA PG 5.4.2 (i).

²⁶⁸ art 3 (4) para 1.

²⁶⁹ IFA PG 5.6.1-2.

²⁷⁰ Directive 2008/120/EC (n 225) with the exception of sows and gilts raised on holdings with fewer than 10 sows may be kept individually during the period mentioned in that subparagraph, provided that they can turn around easily in their boxes, art 3(4) para 2.

²⁷¹ IFA PG 5.6.3.

²⁷² IFA PG 5.6.1. In EU legislation, in the week before the expected farrowing time and during farrowing, sows and gilts can be kept out of the sight of conspecifics; this period of confinement is circumscribed. Directive 2008/120/EC (n 225) Annex I ch I (3), para 3.

A (repeated)²⁷³ obligation requires pigs in all cases to have a dry lying area;²⁷⁴ EU legislation specifies adequate drainage and cleanliness.²⁷⁵ Whether pigs in all cases are able to lie down at the same time and fulfil GLOBALG.A.P. criteria²⁷⁶ depends solely upon the existence of national / EU maximum stocking density requirements.²⁷⁷ Absent legislative norms, GLOBALG.A.P. Certification may be attained where the stocking density is such that all pigs cannot lie down simultaneously. Comfort, confinement and stocking density standards cater for inferior and diverse standards of pig welfare yet IFA Livestock Certification may ensue.

Criteria for outdoor pigs are subject to Minor Must compliance levels, for example the provision of straw bedding to maintain thermal comfort in winter,²⁷⁸ the provision of shade or wallows to allow pigs to keep cool during warm conditions,²⁷⁹ not exceeding a stocking rate of thirty sows per hectare²⁸⁰ and the presence of an alarm system to warn stock persons of a ventilation system failure.²⁸¹ Use of antibiotics is dependent on compliance with the applicable legislation in the country of production and the country of destination as a Major Must, with some apparent leeway accommodated where applicable for the use of certain growth promoters.²⁸² Major Must handling stipulations are strong where health is at issue with farmers / workers required to describe the inspection routine and assess the adequacy of at least daily inspections for signs of injury, ill health or distress and remove sick / injured pigs from mainstream pens.²⁸³ It is obligatory that the farm demonstrates it has personnel with competence in the safe use of medicines (authorised to do so by the attending veterinary surgeon), in pig handling and care and in pig health and welfare – including the recognition of diseases, abnormal behaviours, heat and cold stress and when and from whom to seek help.²⁸⁴ Growing pigs other than for example farrowing pigs must be kept in stable social groups with pig flow going from large groups to smaller

²⁷³ See IFA PG 5.1.3.

²⁷⁴ IFA PG 5.4.2.

²⁷⁵ Directive 2008/120/EC (n 225) Annex 1 (3).

²⁷⁶ IFA PG 5.4.3 (iii).

²⁷⁷ and GLOBALG.A.P. Guidelines Annex PG. 1(II).

²⁷⁸ IFA PG 6.3.

²⁷⁹ IFA PG 6.7.

²⁸⁰ IFA PG 6.4.

²⁸¹ IFA PG 7.3, Annex PG. 1.

²⁸² IFA PG 8.1.1.

²⁸³ IFA PG 10.1.

²⁸⁴ IFA PG 10.2.

groups as a general principle, with management demonstrating knowledge of this.²⁸⁵

5.3.2.3.1 Animal Welfare Add-on Module for Pigs / Finishers

The second voluntary animal welfare Add-on Module offered by GLOBALG.A.P., this time for pigs, again includes the option for individual member producers to agree to audit by inspection solely in respect of Major Must criteria.²⁸⁶ Major Must compliance criteria for space allowance are higher than both EU law and the Sub-scope in stipulating compulsory space allowances for each individual pig, for example 0.49 square metres per 30-50 kilograms in weight and 1.23 square metres per pig over 110 kilograms. Producer space requirements which are higher per square metres per pig may apply. Visual assessment and calculation of randomised batches form the basis for monitoring conformity.²⁸⁷ The Add-on Module does not require improved standards in outdoor stocking density.²⁸⁸

This voluntary Module stipulates ‘the ventilation system shall maintain aerial contaminants below levels that do not cause eye or nose irritation for housed pigs and or humans during inspection’. The level of compliance is only a Recommendation.²⁸⁹ Likewise, it is stated ‘bedding must be provided; it must be fresh, clean and dry; materials can be straw, saw dust, rubber mats or similar’.²⁹⁰ Examination is by visual inspection and the level of compliance is a non-binding Recommendation. These are examples of strong wording bereft of the requirement to comply and ability to enforce. It is further stated that the flooring of the pens must be constructed so that forty per cent of the available space is solid and not slatted as in EU law, assessed by visual inspection²⁹¹ yet conditioned as a Recommendation where there is no obligation to comply and the scope exists for an individual producer to opt out of audit inspections.

It is a Major Must for pigs to have permanent access to items that are not harmful to pigs’ health which provide collectively rootable, chewable, destructible and refreshable characteristics in order to provide an enriched environment, that the quantity provided must be appropriate regarding the amount and adopted to the individual location, and that straw may be a good example. Compliance is

²⁸⁵ IFA PG 10.5.

²⁸⁶ GLOBALG.A.P. Animal Welfare Add-On Module for Pigs / Finishers Check List (v1-Feb 13) https://www.globalgap.org/content/galleries/documents/130215_gg_add-on_aw_pg_cpcc_v1_0_en.pdf.

²⁸⁷ AW PG 1.1.

²⁸⁸ IFA PG. 6.4.

²⁸⁹ AW PG 2.1.

²⁹⁰ AW PG 3.1.

²⁹¹ AW PG 4.1.

assessed by visual inspection.²⁹² There would be scope for interpretative divergence, as in EU law,²⁹³ so as not to provide straw and for diverse and divergent standards depending on geographical location.

At slaughter weight a minimum of fifteen centimetres tail length must be present in the pigs, verified by visual inspection.²⁹⁴ This appears to be a developed standard²⁹⁵ but is not compelling since compliance is the subject of a Recommendation with a possible transition period of one year from the first audit. It is good practice to have continual improvement goals but these need to be performance-checked for compliance; an individual producer may agree not to have inspection audits undertaken in respect of Recommendations and practices may not correspond. If cannibalism is evident, there is a Major Must requirement for a written action plan for the detection and elimination of the causes to be in place. Signs of cannibalism are defined as lesions due to active biting by other pigs causing wounds to the ears, tails, genital organs and limbs. Skin lesions to the flanks are not deemed signs of cannibalism.²⁹⁶ The value added by this stipulation in the Add-on Module beyond the IFA Sub-scope is questionable. Robustly worded criteria state that male pigs must be entire; immunocastrated pigs are regarded as non-entire. Yet compliance is the subject of a Recommendation.²⁹⁷ The Sub-scope²⁹⁸ is reinforced with the Add-on Major Must requirement for a hospital pen providing visual contact with other pigs to be in place and permanently available so that the sick pig is not isolated, unless contrary to veterinary advice which must be documented.²⁹⁹ Moreover, it is a Major Must stipulation of procedural good practice that a written policy on the responsible use of antibiotics is available, implemented and reviewed at least twice per year jointly with the contracted veterinarian taking into account antibiotics usage in the previous six months.³⁰⁰ Acknowledging that the mixing of pigs 'must' be avoided during the finishing period to avoid stress and fighting, conformity is only Recommended.³⁰¹ It is also a Recommendation and not compulsory to have available documented provision of nest building materials supplied for farrowing sows producing the piglets.³⁰² This animal welfare Add-

²⁹² AW PG 5.1.

²⁹³ Directive 2008/20/EC (n 225) Annex I ch I (5).

²⁹⁴ AW PG 7.1.

²⁹⁵ To that of IFA PG 3.6, which is comparable to EU law in that there must not be routine tail-docking, but permissive of invasive procedure prior to seven days of a piglet's life with veterinary approval.

²⁹⁶ AW PG 9.1.

²⁹⁷ AW PG 8.1.

²⁹⁸ IFA PG 8.2.2.

²⁹⁹ AW PG 10.1.

³⁰⁰ AW PG 12.1.

³⁰¹ AW PG 15.1.

³⁰² AW PG 16.1.

on Module does not proscribe the farrowing crate when confinement equates with sows' poor welfare in and beyond the farrowing period.

5.3.2.3.2 Add-on Sustainable Meat Initiative: Module 2 Animal Welfare

The Sustainable Meat Initiative (SMI)³⁰³ with its compulsory Add-on Module on Animal Welfare for Finishing Pigs solely for the Dutch market³⁰⁴ is an interesting initiative. Suppliers of pork produce to the Dutch retail market are required to subscribe to the Animal Welfare Module of the Add-on SMI for sustainable pig production in the Netherlands. Assessment against the Module is a prerequisite to Certification to the GLOBALG.A.P. IFA Livestock Standard. The compliance criteria are Major Must, with few Minor Must, specifications and no Recommendations which strengthens the effectiveness of this Module as compared with the voluntary Add-on Module. The SMI Animal Welfare Module requires enhanced standards of welfare for finishing pigs. Major Must conditions underpin the audit of the farm's capacity for pig husbandry,³⁰⁵ enhanced stocking density for sows with piglets with further provision for social groupings at least by 2025, ³⁰⁶ compulsory forty per cent solid flooring (as opposed to a Recommendation in the voluntary Add-on Module) and specifically for weaned piglets by 2025,³⁰⁷ with the provision of nest building materials for sows one day prior to the expected farrowing date.³⁰⁸ The procedural requirement to draw up ventilation improvement plans related to aerial contaminants is at the lower level of Minor Must. ³⁰⁹ Note-worthy is the compulsion to maintain an improvement plan in conjunction with a veterinarian to have a minimum tail length intact.³¹⁰ Strengthened provisions apply to the avoidance of mixing pigs³¹¹ and the return of sows into the group after service,³¹² stronger also than EU law where there is exception.³¹³ Male pigs are required to be fully entire.³¹⁴

³⁰³ https://www.globalgap.org/uk_en/for-producers/globalg.a.p.-add-on/sustainable-meat-initiative/.

³⁰⁴ V 1_1 January 2014
https://www.globalgap.org/content/galleries/documents/140130_gg_cbl_add-on_aw_cpcc_v1_0_en.pdf.

³⁰⁵ PRE PG 4.

³⁰⁶ 3.8 square metres AW PG 1.1.

³⁰⁷ AW PG 1.2. and PG 1.3.

³⁰⁸ AW PG 1.10.

³⁰⁹ AW PG 1.5.

³¹⁰ AW PG 2.1.

³¹¹ AW PG 2.6.

³¹² AW PG 2.8.

³¹³ Directive 2008/120/EC (n 225) art 3(4) para 2.

³¹⁴ AW PG 2.2.

5.3.3 Dairy / Calves

5.3.3.1 Marks and Spencer Select Farm Assured

Marks and Spencer fresh milk comes from a stated pool of farms which are RSPCA Assured, produced in accordance with Marks and Spencer Select Farm Assurance standards and labelled with the RSPCA Assured logo.³¹⁵ Marks and Spencer Milk Pledge Plus was introduced in 1999 guaranteeing Marks and Spencer farmers a sustainable price for milk and delivering high welfare on the farm, ³¹⁶ notably in the absence of EU species-specific standards for dairy cows. As a minimum, Marks and Spencer standards require milking cows to be provided with access to grazing for at least one hundred days for at least four hours per day, weather conditions permitting. Cattle must have access to fresh water, natural light, air and housing sufficient to allow appropriate group sizes, with stocking densities determined by the type of stock, age, size and social groupings. All milking cows are required to be fed diets (such as grass, maize, rapeseed and linseed) which aim to deliver low saturated fat milk. Farms may be removed from the pool if there is the potential for Marks and Spencer's brand integrity to be compromised or a significant risk to animal health or welfare.³¹⁷

Welfare is measured relative to the percentage of cows showing comfort indicators (swellings or abrasions), percentage herd lameness, herd stocking density when housed and the presence or absence of enrichment provision. ³¹⁸ All milk used in Marks and Spencer ingredients is sourced from cows which are free from tethering and tail-docking;³¹⁹ where there would be scope for improved welfare criteria. In 2020 Marks and Spencer introduced the requirement for all calves to have sight and contact of another calf from birth and then be paired or group-housed post-twenty one days of age.³²⁰ It is reminded that Marks and

³¹⁵ <https://corporate.marksandspencer.com/plan-a/our-approach/food-and-household/product-standards/raw-materials-commodities-and-ingredients/dairy>.

³¹⁶ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/dairy#94ec3dbdd7db4247a6609d792f52be1d>.

³¹⁷ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/dairy#0f5fcc3b1ea2463b82cf1efe99151f5d>.

³¹⁸ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/dairy#a1f4c9bb663445d19fd90e3d92ab3>.

³¹⁹ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/dairy#27ba9c64aa564c01aca4ca47fd8c4e7f>.

³²⁰ <https://corporate.marksandspencer.com/sustainability/food-and-household/product-standards/raw-materials-commodities-and-ingredients/dairy#0f5fcc3b1ea2463b82cf1efe99151f5d>.

Spencer only sells rose veal; the welfare of calves producing white veal is poor through inadequate diet.

5.3.3.2 RSPCA Assured

Updated RSPCA Assured welfare standards for Dairy Cattle³²¹ require pasture to be provided for at least four hours a day and ideally six hours, for a minimum number of days expected to be at least one hundred and ten days a year depending on local weather conditions.³²² Freshly calved cows must each be given a total feeding space allowance of one hundred centimetres, have a specific section in the nutrition plan, be introduced to changes in nutrition gradually, have steps taken to increase their lying comfort and undergo minimal social stress caused by group mixing.³²³ Cattle must not be closely confined except, for example, when feeding or awaiting entry to the milking parlour. Tethering is prohibited.³²⁴ Cubicle housing must meet space and comfort standards. Adequate bedding must be provided on the cubicle base and be managed to maximise cow comfort, with fouled bedding removed at least twice daily,³²⁵ all of which evidence better practice in resource-inputs. Additionally, where any cows which are calving are kept in a building, they must be kept in a pen or a yard which is fully bedded with enough space to accommodate the number of cows calving.³²⁶ If individual calving pens are used, the pen must be at least twelve square metres, cows must not remain in pen for more than forty eight hours and when in the pen a cow must be able to see and hear other cows.³²⁷

It is a requirement for calves under twenty eight days old to be fed six litres (or fifteen per cent of their birth bodyweight, whichever is the most) of milk across at least two feeds per day.³²⁸ Un-weaned calves (before eight weeks of age) must, from eight days of age, have unlimited access to palatable, dried feed and fibrous roughage, with starter roughage of good quality hay or straw.³²⁹ Calves' diet must prevent anaemia and mineral / vitamin deficiency, with the iron content

321 January 2018
<https://science.rspca.org.uk/documents/1494935/9042554/RSPCA+welfare+standards+for+dairy+cattle+%28PDF+7.76MB%29.pdf/41638530-20de-c6cc-5e9c-7b73f9c8f4b7?t=1557731468543>; <https://www.rspcaassured.org.uk/farm-animal-welfare/dairy-cows/>.

322 *ibid*, E 8.1.

323 TC 1.1.

324 *ibid* E 4.7, 8.

325 *ibid*, E 5.5-7.

326 *ibid*, E 7.1,4.

327 *ibid*, E 7.5.

328 FW(C) 1.7.

329 FW(C) 1.10-11, 15.

sufficient to maintain a blood haemoglobin level of 9g/dl,³³⁰ which is higher than the EU norm.

5.3.3.3 GLOBALG.A.P. IFA Livestock Standard

With compliance a Minor Must, colostrum feeding for calves within six hours of birth is not compulsory; ³³¹ it is in EU law.³³² Workers must demonstrate competence to handle and care for the health and welfare of young calves reared for veal / beef,³³³ but it is a Minor Must specification that calves have sufficient access to feed to cover their nutritional needs and be fed twice daily.³³⁴ EU legislative provision requires all calves to be fed at least twice a day and where calves are housed / fed in groups each calf must have access to the food at the same time as the others in the group.³³⁵ The IFA Sub-scope's obligation for the feed ration to include fifty grams of fibre dry feed per day starting at eight weeks of age extended to at least two hundred and fifty grams until twenty weeks of age,³³⁶ falls below EU conditionality where a specified minimum daily ration of fibrous food must be provided over the age of two weeks.³³⁷ In addition, EU law stipulates that sufficient iron content be present in food to ensure a minimum average blood haemoglobin level. The Sub-scope requirement that all calves over two weeks of age have access to a sufficient quantity of clean water or are able to satisfy their fluid intake needs by drinking other liquids, does not stipulate unrestricted access. Under warm weather conditions and for sick calves unrestricted access to clean water is mandatory.³³⁸ The requirement that individual pens for calves (except those for sick animals) have perforated walls which allow calves to have direct visual contact, lacks the EU requirement that these pens allow *tactile* contact also.³³⁹ Floors must be designed to *minimise* injury or suffering of calves standing or lying on them,³⁴⁰ whereas EU law prescribes that floors must be smooth but not slippery so as to *prevent* injury and so designed as *not to cause* injury or suffering.³⁴¹ Comparable standards to

³³⁰ FW(C) 1.17.

³³¹ IFA Ruminant Base / Cattle and Sheep (v 5.2_1 August 2019) CS 2.3 https://www.globalgap.org/.content/galleries/documents/190201_GG_IFA_CPCC_CS_V5_2_en.pdf.

³³² Council Directive 2008/119/EC [2009] OJ L10/7, Annex I (15).

³³³ IFA Calf and Young Beef (v 5.2_1 August 2019) CYB 1.1 https://www.globalgap.org/.content/galleries/documents/190201_GG_IFA_CPCC_CYB_V5_2_en.pdf.

³³⁴ *ibid*, CYB 3.1.1.

³³⁵ Directive 2008/119/EC (n 332) Annex I (12).

³³⁶ CYB 3.1.2.

³³⁷ Directive 2008/119/EC (n 332) Annex 1 (11).

³³⁸ CYB 3.2.1.

³³⁹ CYB 4.2.3. Directive 2008/119/EC (n 332) art 3(1)(a) 2nd indent (emphasis added).

³⁴⁰ CYB 4.3.1. First sentence (emphasis added).

³⁴¹ Directive 2008/119/EC (n 332) Annex I (10) (emphasis added).

those of EU law apply where EU law is applicable in respect of space allowances for calves in groups³⁴² and for calves' accommodation, flooring and prohibition of tethering;³⁴³ word for word EU law, calves must have sufficient room to stand up, lie down and turn around.³⁴⁴ Not all IFA Certification will be within the EU; the potential persists for IFA Livestock Certification to accrue to producers in non-EU counties practising poor welfare standards for calves.

5.4 Legitimacy / Consumer Acceptance

The legitimacy of the schemes in terms of their credibility and acceptance to the credence consumer will receive appraisal in light of the different constituencies each private standard scheme is trying to satisfy. In this regard the governance regime merits consideration as to the extent to which the schemes meet principles of good governance. The nexus of the standards with the ethical consumer bears relevance in terms of the parties who participate in standard-setting, their knowledge and credentials in animal welfare, the potential for conflicting interests and the clarity and transparency of the standards.

5.4.1 Legitimacy

The concept of legitimacy has two dimensions, namely, empirical and normative.³⁴⁵ Empirical legitimacy is concerned with 'whether actors accept a rule of an institution as authoritative (social legitimacy)',³⁴⁶ which is appropriate for this thesis' aims. Legitimacy, defined as 'the justification of actions to those whom they affect, according to reasons they can accept',³⁴⁷ is apt to measure the social / empirical legitimacy of the private standard schemes to consumers who are external stakeholders to the business regulatory regime. For the purposes of this thesis the term 'regulatory regime' defines 'a transnational non-state regulator,' the activities of which 'are not based on or mandated by national, supranational, or international law'.³⁴⁸

³⁴² CYB 4.2.4.

³⁴³ CYB 4.3.1-5.

³⁴⁴ CYB 4.2.2.

³⁴⁵ Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée, Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (OUP 2008) 705, 709. 'Normative theory asks whether the authority possesses legitimacy' Steven Bernstein, 'Legitimacy in Intergovernmental and Non-State Global Governance' (2011) 18 Rev Intl Pol Econ 17, 20.

³⁴⁶ Bernstein, *ibid*.

³⁴⁷ Melissa S Williams 'Citizenship as Agency within Communities of Shared Fate' in Steven Bernstein and William D Coleman (eds), *Unsettled Legitimacy: Political Community, Power, and Authority in a Global Era* (U British Columbia Press 2009) 33, 33, 43.

³⁴⁸ Julia Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' (2008) 2 Regul Govern 137, 138.

Fritz Scharpf's theory of output-oriented legitimacy and effective decision making, i.e. of 'substantive' legitimacy, is a viable conception of legitimacy, which will be used in the assessment of the three case studies. The fact that 'output-oriented legitimacy belief' places emphasis on the need to engage in deliberative dialogue in the development of an effective solution,³⁴⁹ reinforces this thesis' rationale. Additionally, Jenny Steele's idea of deliberation is deemed instrumental as a basis for ascertaining consumer acceptance of the private standard schemes in focusing 'on citizens as a valuable source of knowledge and values', and 'associat[ing] reasoned participation with problem-solving ... in order to achieve the best available decisions'.³⁵⁰ Values are deemed to be 'central' to Steele's hypothesis in that "[d]eliberation' is meant to foster a reasoned form of communication about values, distinct from mere compromises between clashing interests and competing preferences, and in this way to allow resolution of the most intractable problems'.³⁵¹ To reach a solution, in which consumers' values will feed into private standards of animal welfare it is important also to employ Chiara Armeni's characterisation of participation based on deliberative democracy, 'dialogue and communication of rational arguments and transformation of participants' views in deliberative models, ... in which citizens have a *real opportunity to influence*'.³⁵²

5.4.2 Marks and Spencer

Marks and Spencer Select Farm Assurance standards, animal health and welfare policy and farming for the future programme are subsumed within a B2B farm assurance scheme, and consumer recognition / acceptance of Marks and Spencer animal welfare quality agri-food ensues from the Marks and Spencer brand.³⁵³ The complementary element of external association with the species-specific standards of RSPCA Assured, for example, sustains an entrenched consumer acceptance of Marks and Spencer's (food) brand. Marks and Spencer surrounds itself with external validation and accreditation from a plethora of authoritative organisations which keeps both its corporate shareholders and its customers satisfied. Marks and Spencer Select Farm Assurance animal welfare standards are developed in partnership with authoritative research institutions,

³⁴⁹ Fritz Scharpf, *Governing in Europe Effective and Democratic* (OUP 1999) 20, 21. "Government for the people' derives legitimacy from its capacity to solve problems requiring collective solutions'. 11.

³⁵⁰ Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21(3) OJLS 415, 417, 430, 433.

³⁵¹ *ibid*, 423.

³⁵² Chiara Armeni, 'Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 JEL 415 (n) 418, 422. (emphasis added).

³⁵³ Mara Miele, 'Report concerning consumer perceptions and attitudes towards farm animal welfare', European Animal Welfare Platform 'Progressing animal welfare through the food chain' (2010) 9; Donald M Broom, 'Animal Welfare in the European Union' European Parliament Policy Group C, PE 583.114. (2017) 39.

industries and universities and are aligned with a range of relevant benchmarks. Research and innovation partnerships include Bristol University and FAI Farms, as a result of which liaisons it is listening and continually improving upon the standards of its welfare assurance. Its pledge of incremental development of animal outcome-based measures and the reporting of key performance indicators, in conjunction with automatic data collection throughout the animal's life on the farm, will over time ensure a commensurate higher level of welfare protection which otherwise would not be there in private or public standards of welfare.³⁵⁴ Consumers choose to purchase and consume Marks and Spencer sourced and supplied agri-produce and there is no obvious need for Marks and Spencer to attempt to steer consumer behaviour towards acceptance of, and demand for, its agri-food. Regarding its ingredient produce - concerning the castration of pigs, for example, Marks and Spencer performance review in working towards one Select Farm Standard for fresh and ingredient produce in time is transparent and will be consumer led, albeit there is scope further to direct information to its consumers since its stated key stakeholders are its farmers and producers.

5.4.3 RSPCA Assured

RSPCA Assured, a subsidiary of the RSPCA, is an independent charity in its own right with a watchful constituent membership. The organisation as a charity both holds and serves consumer credence. Its standards in animal welfare and in agri-food operate in consumers' interests, its standard-setters are authoritative partners and its science-based standards can be trusted to benefit the species-specific behavioural needs of farm animals. RSPCA Assured strong evidence-based standards assess the welfare of individual animals per species utilising animal-based outcome measures which are underpinned by resource-based and management-based input requirements. The transparency of the information in respect of the welfare needs of specific species and the steps taken by the RSPCA to address lacunae and inherent welfare issues is a valuable source of information to the credence consumer of agri-food.

5.4.4 GLOBALG.A.P.

It is evident that GLOBALG.A.P. is starting to build partnerships with eminent research institutions to improve the health and welfare of pigs and poultry in its IFA Livestock Standard. FoodPlus GmbH is one of eight partners in a multidisciplinary consortium led by Wageningen Research Centre, as part of a four year project funded by the European Commission and the Chinese Ministry of Science and Technology on healthy livestock to ameliorate antimicrobial resistance.³⁵⁵ Were GLOBALG.A.P. to detail the extent to which that research

³⁵⁴ Marks and Spencer, Farming for the Future Annual Report (2017) https://corporate.marksandspencer.com/documents/plan-a-our-approach/mns-farming-for-the-future-report-nov2017_1.pdf.

³⁵⁵ <http://healthylivestock.net/the-project/>. https://www.globalgap.org/uk_en/media-events/news/articles/Tackling-Antimicrobial-Resistance-through-Improved-Livestock-Health-and-Welfare/.

effects the Sub-scopes of its IFA Livestock Standard, this may serve to improve the credibility of the current provisions. There are *lacunae* in the transparency of information as to GLOBALG.A.P.'s animal welfare external scientific advisers for each of its Sub-scopes and thus the validation of the animal welfare component of its IFA Livestock Standard.

The SMI initiative with its compulsory customised animal welfare Module 2 could be the impetus to additional competitive siting of animal welfare enhanced produce in the agri-food supply chain. GLOBALG.A.P. is offering customised solutions to standard-setting which could go above both the IFA Livestock Standard, the voluntary Add-on Modules in individual countries and, where applicable, the determining EU legislative norms. In comparison, the inconsistencies in animal welfare practices which endowment of IFA Livestock Certification accommodates derogates from the legitimacy and integrity of GLOBALG.A.P.'s IFA Livestock Standard to the credence consumer of IFA Livestock Certified agri-food.

Compliance and enforcement are key to the application and implementation of good agricultural practice in animal welfare and therefore to the credibility and acceptance of the Standard. Five factors illustrate how this scheme falls behind the other two selected schemes in this regard. First, the general compliance requirements of the IFA Livestock Standard require ninety five per cent of Minor Musts to be complied with to be Certificated, with some flexibility in the remaining five per cent offered to producers to engage in practices which perpetuate poor welfare, for example the continued confinement of sows in and beyond numerous farrowing periods. Second, the wording of control points to apply in a determined situation, invariably where EU and national law pertains, results in variable determinants of the scope of the compliance criteria and associated compliance. This is evident where Major Must compliance stipulations are dependent upon local, national, EU legislative norms, where in the absence of legislative provision there is scope to tolerate third country practices within consequential IFA Livestock Certification. Overall, the margin of appreciation applicable to Minor Must compliance criteria and the accommodation of diverse control point criteria on which certification is based renders IFA Certification possible for agri-produce meeting diverse and sub-optimal welfare standards. Third, GLOBALG.A.P. is astute in mirroring EU law and positioning its standards. It may take identical wording, which it does in many instances, one example relating to the provision of enrichment for pigs and another regarding ammonia and CO₂ levels. In other situations, GLOBALG.A.P. may appear to better the EU figure by one digit, for example, the mid maximum stocking density in EU law is thirty nine kilograms per square metre. GLOBALG.A.P. premises its standard on legislative provision without the additional EU safeguards and expresses the maximum density to be thirty eight kilograms per square metre. Fourth, the criteria differ as to how compliance requirements are stated and the extent to which the level of compliance ensures enhanced welfare. For example, the level of compliance may be a Major Must but there may be a lack of direct stringency in wording and therefore obligation, using 'should' as opposed to 'shall', for example. By contrast, Minor Must compliance levels may leave room for five per cent compliance opt-out but be written in much more mandatory terms, for example 'shall ensure' or 'shall not'. Fifth, compliance monitoring in the instances that procedures of

documenting / record keeping are maintained for example, does not require threshold attainment or corrective action in the interests of improving animal welfare. Components of the voluntary Add-on Modules do not add to the respective IFA Sub-scopes in enhancing animal welfare where the level of compliance is a Recommendation. This could be strengthened were convergence stipulated to be a goal to reach over time through expressed continuous improvement targets and performance monitoring and were criteria and compliance consistent and / or transparent in respect of each voluntarily subscribed producer. Were GLOBALG.A.P. to point clearly to its animal welfare objectives, underlining what standards exist, for what reasons of welfare need[s] they exist and in what ways and in respect of which species they go beyond the EU legislative norms, this would alleviate Black's concern that 'regulators may attempt to create and manipulate others' perceptions of their legitimacy'.³⁵⁶

A conflict of interest situation stems from the extent of GLOBALG.A.P.'s internal governance rules. These determine the controlling role of its producer and retailer / food service members in the adoption of the animal welfare components of GLOBALG.A.P.'s Standard and its accountability to such constituencies including the shareholders of its founding company FoodPLUS GmbH. GLOBALG.A.P.'s governing Board is elected by GLOBALG.A.P. voting and subscribing members,³⁵⁷ which is the fundamental governance distinction from the schemes of Marks and Spencer and RSPCA Assured and which is significant, therefore, in singling this scheme out as relevant for scrutiny in the light of principles of good governance. The standards of animal welfare adopted as a direct consequence of GLOBALG.A.P.'s internal constitutional regime are then subsumed within its B2B IFA Livestock Certificated Standard and marketed with the GLOBALG.A.P. brand. GLOBALG.A.P. does not sell certified agri-food directly to the consumer who remains distanced from its brand.

There are no formal representative rights for those affected as consumers of GLOBALG.A.P. certified produce to influence through representation the animal welfare criteria of GLOBALG.A.P.'s IFA Livestock Standard and Add-on Modules. GLOBALG.A.P. is still very much a business focused organisation and regulatory regime, in which its key stakeholders and standard-setters are producers and retailers / food service providers at the business level. Yet it has the potential to impact upon stakeholders who are external by definition to its organisational governance but who are affected by its regulatory regime.³⁵⁸ In contrast, this situation does not arise in respect of Marks and Spencer and RSPCA Assured. The governing members of Marks and Spencer and the RSPCA's respective Boards act in the interests of their wider constituents inclusive of consumers external to the business regime. Crucially, Marks and Spencer Select Farm Assurance standards and RSPCA Assured Standards are externally and independently validated with a strong scientific evidence-base. GLOBALG.A.P.'s

³⁵⁶ Black (2008) (n 318) 139.

³⁵⁷ GLOBALG.A.P. Board Terms of Reference (n 94) point 2.

³⁵⁸ Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38(1) J L Soc 20, 46.

standard-setting process does realise good practice in limiting decision making to its members when measured against the 'meta-rules'³⁵⁹ of the ISEAL Code of Good Practice for Setting Social and Environmental Standards.³⁶⁰ ISEAL is a procedural meta-regulator, its standards concerned with process. ³⁶¹ GLOBALG.A.P. is not evaluated against ISEAL's criteria directly; it is not a voluntary Member or Associate Member of ISEAL,³⁶² but is a subscriber to ISEAL.³⁶³ Consumers are not members of GLOBALG.A.P. and it may not be possible because of the constitutional rules of its owning company FoodPLUS GmbH,³⁶⁴ for consumers to be accorded internal representative rights as committee members to vote ex ante on the IFA Livestock Standard.³⁶⁵ Though it could be said that GLOBALG.A.P. should, consistent with Gráinne De Búrca, 'strive continuously' for 'the fullest possible participation and representation of those affected'.³⁶⁶

GLOBALG.A.P. is missing an opportunity constructively to engender behavioural change in consumers³⁶⁷ of agricultural produce in an extended value chain. GLOBALG.A.P. needs the legitimacy of the credence consumer to incentivise

³⁵⁹ 'Meta-rules are framing principles that individual regulators implement in their own regulatory instruments' Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36(4) U Pennsylvania J Int L 101, 125 n 99.

³⁶⁰ The ISEAL Code of Good Practice for Setting Social and Environmental Standards (2014) Clause 5.6.

[https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL Standard Setting Code v6 Dec 2014.pdf](https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL%20Standard%20Setting%20Code%20v6%20Dec%202014.pdf).

³⁶¹ Fabrizio Cafaggi, 'Transnational Private Regulation. Regulating Private Regulators' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 212.

³⁶² Associate members must meet the baseline criteria of the Standard-Setting Code. Full members are required to undergo an independent evaluation to assess compliance with the improvement criteria of ISEAL, ISEAL (2014) (n 360).

³⁶³ https://www.isealalliance.org/community-members?f%5B0%5D=community_status%3A181. ISEAL subscribers must commit to ISEAL's mission but there are no formal compliance or membership requirements <https://www.isealalliance.org/get-involved/become-subscriber>.

³⁶⁴ 'Regulators' scope for action may be bounded, and in any event structured by their institutional environment' Black (2008) (n 318) 157.

³⁶⁵ Nicolas Hachez and Jan Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.' (2011) 14(3) JIEL 677, 701.

³⁶⁶ Gráinne De Búrca, 'Developing Democracy beyond the State' (2008) 46 Columbia J Transnational L 102, 131.

³⁶⁷ Black (2008) (n 318) 138-9.

demand for IFA Livestock Certificated agri-produce.³⁶⁸ Adopting scholars' notions of legitimacy, it would be expedient for GLOBALG.A.P. pragmatically to pursue 'the practical need for diverse perspectives'³⁶⁹ focusing upon output-oriented legitimacy³⁷⁰ founded upon deliberative and participatory democracy,³⁷¹ in which consumers would be able to have a real say³⁷² in GLOBALG.A.P.'s IFA Certified animal welfare standards. Henson and Humphrey comment on the strides of opening up its consultation procedures to grant two opportunities for external stakeholders to feed into GLOBALG.A.P.'s four yearly standard revision process.³⁷³ All comments received in a consultation need not be made public in order to be ISEAL compliant:³⁷⁴ It is ISEAL stated good practice to prepare a written synopsis of how each material issue has been addressed and to make that synopsis publicly available.³⁷⁵ GLOBALG.A.P. did not go as far as ISEAL promoted good practice, in only providing a brief list of the revisions made in the Livestock Standard Version V.³⁷⁶ GLOBALG.A.P. is engaging in an extensive round of three consultations in relation to draft Version 6 of its IFA Standard. Public consultations are informed through GLOBALG.A.P. placing its draft version 6 documents on its website, with the extended opportunity to register to participate in scheduled webinars and to feed-in to the version revision using a standard form and to receive a reply.³⁷⁷

Yet consultation needs to be much deeper than a process.³⁷⁸ The decisions taken by GLOBALG.A.P. manifest in its IFA Standard should be 'defensible on grounds other than (just) the fairness of the [revision] process'.³⁷⁹ The relevant concern does not lie with whether GLOBALG.A.P.'s 'method is "legitimate"', but with whether the 'decisions' taken as a result 'allow for successful development and pursuit of collective goals'.³⁸⁰ The public consultation process itself

³⁶⁸ Black *ibid*, 154. Diane Ryland, 'Animal Welfare Governance: GLOBALG.A.P. and the Search for External Legitimacy' (2018) 30(3) JEL 453.

³⁶⁹ Margaret Young, *Trading Fish, Saving Fish* (CUP 2011) xii, 16.

³⁷⁰ Scharpf (n 349) 20, 21.

³⁷¹ Steele (n 350) 431-33.

³⁷² Armeni (n 352) 418, 422.

³⁷³ Henson and Humphrey (2009) (n 112) Exec Summary points 17, 18.

³⁷⁴ It is ISEAL stated *aspirational* good practice to make any original comments per group of stakeholders received during a consultation exercise publicly available (n 360).

³⁷⁵ ISEAL *ibid*, Clause 5.4.

³⁷⁶ GLOBALG.A.P. Annual Report 2015, 22, 23 (copy on file).

³⁷⁷ https://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/public-consultation/. Version 6 will be published in 2022 and come into effect in 2023.

³⁷⁸ Steele (n 350); Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) OJLS 33.

³⁷⁹ Steele (n 350) 430. GLOBALG.A.P. Annual Report 2015 (n 376) 22.

³⁸⁰ Steele *ibid*, 430.

enhancing public participation, may be perceived to be a way of eliciting acceptance from stakeholders external to GLOBALG.A.P. of the draft standards, focusing minds on the underpinning animal welfare issues, towards achieving a public consensus of the same. This falls short of the 'deliberative participation problem-solving approach' advocated, which in the words of Steele 'seek[s] in broadly-based 'deliberation' a superior means of reaching practical decisions, as opposed to seeking the most legitimate or defensible form of democracy.'³⁸¹

The virtues of participation and deliberation are related primarily to the beneficial effects on decision-making. It is essential to achieve a deliberative solution drawing on as broad a base of experience and values as possible.³⁸²

Such deliberative participation will 'likely enhance'³⁸³ the animal welfare value-added component of GLOBALG.A.P.'s IFA Standard and in so doing elicit credence consumer acceptance GLOBALG.A.P. certified agri-produce. GLOBALG.A.P. should 'respond'³⁸⁴ to its interested and affected consumer stakeholders, since GLOBALG.A.P. requires their 'active support' effectively to govern animal welfare standards in an extended global agri-produce market and to 'prosper'.³⁸⁵

There is the potential for invited external expertise in GLOBALG.A.P.'s Livestock Technical Committee.³⁸⁶ There is, however, no apparent guarantee, through sporadic invitation, of a two-way reasoned deliberative discourse undertaken 'on an equal basis'³⁸⁷ in which evidence-based science (as opposed to business policy) is discussed along with ethical or value-oriented justification for raising standards of animal welfare. The Board takes the final decision and while taking 'proper account of committee decisions and consumer and scientific views in its decision-making by ensuring wide consultation with interested parties', it 'preserv[es] the principle of priority given to the views of the paid membership'.³⁸⁸ Deliberative participation is of the essence between consumers, representative organisations and animal welfare scientific experts on the one hand, and GLOBALG.A.P.'s Livestock Technical Committee on the other. These participants must meet in an equal capacity as an ongoing practice to set

³⁸¹ *ibid*, 432.

³⁸² *ibid*, 432-3

³⁸³ *ibid*, 433.

³⁸⁴ Black (2008) (n 318) 137.

³⁸⁵ *ibid* 154, 149.

³⁸⁶ GLOBALG.A.P. Terms of Reference for Technical Committees (2020) (n 104) Guests and observers are non-voting and are invited on a meeting-by-meeting basis, 2.3.(6).

³⁸⁷ Black (2001) (n 378) 34.

³⁸⁸ GLOBALG.A.P. Board Terms of Reference (n 94) 1, para 2.

the animal welfare component of GLOBALG.A.P.'s IFA Livestock Standard, i.e. 'preceding' the Standard and ex-post consultations and likewise in application to update the animal welfare Add-on Modules.³⁸⁹ There is no requirement for there to be a formal structure³⁹⁰ for such reasoned deliberation, so long as the voice of values has the opportunity to influence the decision taken on the standard in a 'relatively stable' and 'semi-permanent pattern[] of mutual support.'³⁹¹ As David Levi-Faur maintains, '[r]egulation involves a continuous action of monitoring, assessment and refinement of rules rather than ad hoc operation'.³⁹² Armeni's rationale applies in so far as an in situ [as opposed to the transient nature of an ad hoc] animal welfare committee would have 'the significant potential to catalyse participation as collaborative problem-solving and constitute an alternative forum for deliberative public dialogue' it 'might turn ...to being the beginning of the solution'.³⁹³ Of paramount importance is the scope for deliberative democracy as defined to introduce a values element of animal welfare into the IFA Standard and its Add-ons, i.e. a 'richer rationality',³⁹⁴ which may go above and beyond evidence-based science and by so doing elicit the legitimacy of the consumer. It is not evident that GLOBALG.A.P. consults other than from a business perspective and position, nor in a manner of reasoning which necessarily corresponds to Julia Black's hypothesis of 'thick' deliberative discourse where 'each participant speaks and each listens' and, in consequence, 'reflect on their views'.³⁹⁵ The interests of GLOBALG.A.P. accommodating producers member to GLOBALG.A.P. ought 'not overshadow the voices of those most affected by'³⁹⁶ disparate and lower-standard GLOBALG.A.P. IFA Livestock Certification. After all, whether GLOBALG.A.P.'s Standard 'actually generates influence or impact will depend on the extent to which [it] 'crystallise[s]'³⁹⁷ in daily reality'. The demand for IFA Livestock Certified produce depends upon the consumer's acceptance of it.

³⁸⁹ Scharpf (n 349) 20.

³⁹⁰ *ibid* 19, 20.

³⁹¹ *ibid*.

³⁹² David Levi-Faur, 'Regulation and Regulatory Governance' (Jerusalem Working Paper in Regulation and Governance No 1/2010) 8 <http://levifaur.wiki.huji.ac.il/images/Reg.pdf>.

³⁹³ Armeni (n 352) 441.

³⁹⁴ Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' (2009) 62 CLP 242, 245, quoting Cass Sunstein, *Risk and Reason: Safety, Law and the Environment* (CUP 2002).

³⁹⁵ Black (2001) (n 378) 36.

³⁹⁶ Diedre Curtin and Linda Senden, 'Public Accountability of Tansnational Private Regulation: Chimera or Reality?' (2011) 38(1) J L Soc 163, 187.

³⁹⁷ *ibid*, 269, citing Donal Casey and Colin Scott, 'The Crystallization of Regulatory Norms' (2011) 38(1) J L Soc, 76, 88, 89.

5.5 Private Animal Welfare Labels

The animal welfare credence attribute of agricultural produce is not just a public concern, but also a private interest with a market value capable of augmentation via a private animal welfare label. There is a market interest to be exploited by private standard-setters, their standards having gained the acceptance and trust of consumers external to the business governance regime.³⁹⁸ Acting thereupon, private B2B standard schemes may still not be capitalising to the extent possible in order to reap the prospects presented by differentiating their value-added animal welfare produce in the market. Animal welfare is subsumed within a number of other product credentials, such as, for example, food safety and environmental protection, and is 'not communicated as the key selling point' in order to reach the animal welfare credence consumer.³⁹⁹ It becomes necessary to link the credible provision of enhanced animal welfare produce to the credence consumer via a private animal welfare label.⁴⁰⁰

5.5.1 Marks and Spencer Select Farm Assured

Marks and Spencer chicken and pork is clearly labelled with the country of origin of the produce⁴⁰¹ and the method of production (Oakham™, outdoor-bred, corn-fed, free-range). Where Marks and Spencer has adopted higher animal welfare systems these are promoted to customers with product description and name identifiers placed on pack messages. Marks and Spencer conforms with the RSPCA initiated Protocol on labelling discussed below with its definitions of best practice rearing methods, where such definitions and associated labelling still do not exist in EU law.

³⁹⁸ Christine Parker and others, 'Can the Hidden Hand of the Market be an Effective and Legitimate Regulator? The Case of Animal Welfare Under a Labeling for Consumer Choice Policy Approach' (2017) 11 Regul Govern 368, 382.

³⁹⁹ Filiep Vanhonacker and Wim Verbeke, 'Public and Consumer Policies for Higher Welfare Food Products: Challenges and Opportunities' (2014) 27 J Agr Environ Ethics 153, 162.

⁴⁰⁰ Meike Janssen and Ulrich Hamm, 'Product labelling in the market for organic food: Consumer preferences and willingness-to-pay for different organic certification logos' (2012) 25 Food Qual Prefer 9, 21; Lennaert R [Heerwagen and others, 'The Role of Quality Labels in Market-Driven Animal Welfare' \(2015\) 28 J Agr Environ Ethics 67;](#) Alessandro Bonanno and others, 'Credence attributes and the quest for a higher price – a hedonic stochastic frontier approach' (2019) 46(2) Eur Rev Agric Econ 163; Marta E Alonso and others, 'Consumer Concerns and Perceptions of Farm Animal Welfare' (2020) 10 Animals 385, 391.

⁴⁰¹ In accordance with Commission Implementing Regulation (EU) No 1337/2013 of 13 December 2013 laying down rules for the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry [2013] OJ L335/19.

Marks and Spencer was the first major retailer to source its fresh milk from RSPCA Assured dairy farms.⁴⁰² Alignment with the RSPCA Assured standards for milk-producing dairy cows is communicated in store through the application of the RSPCA Assured logo on its milk produce and associated invitation to consumers to visit Marks and Spencer's website for more details. This is not accompanied with a 'url' indicator which would take the consumer to a focused consumer-orientated and informative animal welfare page or portal. The question arises as to why Marks and Spencer published animal welfare standards remain solely within a B2B standard scheme with a firm focus on Marks and Spencer's relations with its farmers and producers. Marks and Spencer publishes information about its approach to animal welfare on its website (although this is not meant for consumers but for its suppliers).⁴⁰³ Progress is reported through Marks and Spencer's independently assured Plan A Report on an annual basis, which is not specific to animal welfare.⁴⁰⁴ Through its Farming for the Future programme, Marks and Spencer works with its farmers to improve ethical practice in the way that they look after any animal in their care, ensuring high standards of welfare at all times and to develop supply chain relationships that secure the high quality materials to continue delivering its consumers the quality food they expect.⁴⁰⁵ Yet this information is not deployed directly to the credence consumer.

Marks and Spencer is communicating in-store to its consumers with the methods of production as defined in the RSPCA Protocol and through resort to the RSPCA logo on its milk and there is a relationship of trust with its consumers in its brand, which in itself is sufficient. A label is not deemed necessary for the marketing of the animal welfare credentials of Marks and Spencer's agri-produce which occurs indirectly through its brand. Nevertheless, Marks and Spencer could be losing a valuable opportunity to extend the marketing of its brand to the informed consumer via a more publicly forged link to its own consumer-focused website / portal as a complement to its in-store labels and communication strategy. In so doing, Marks and Spencer would be reaping the opportunity to earn a new, as well as to maintain an existing, loyal and trusting consumer base.

5.5.2 RSPCA Assured

RSPCA Assured standards are applied through its higher welfare food labelling and farm assurance scheme. RSPCA Assured is its registered certification mark. RSPCA is a registered trademark which belongs to the RSPCA. The RSPCA Assured certification mark (name or logo) can only be used to indicate products (and dishes) which contain animal-derived ingredients from farms meeting RSPCA Assured welfare standards. The logo may be used on the front of the

⁴⁰² <https://www.rspcaassured.org.uk/get-involved/lobby-your-supermarket/> 2.

⁴⁰³ Marks and Spencer Farming for the Future 2016 (n 35).

⁴⁰⁴ *ibid*, 4; <https://corporate.marksandspencer.com/documents/reports-results-and-publications/plan-a-reports/2020/plan-a-report-2020.pdf>.

⁴⁰⁵ <https://corporate.marksandspencer.com/sustainability/food-and-household/capacity-building-initiatives/farming-for-the-future>.

pack if, for example, all the animal-derived ingredients are RSPCA Assured. If more than fifty per cent of the animal-derived ingredients and the overall primary animal-derived ingredient are RSPCA Assured and make up more than fifty per cent of all ingredients, the label may also appear on the front of the pack. However, it must be separated from any other brand name or unrelated wording by a line break or full stop and must be followed by the principal RSPCA Assured ingredient.⁴⁰⁶ The labelling application requirements give rise to the question as to whether the consumer will understand fully the front and back of package locations and the reasons for these differing situations of the RSPCA Assured logo. The name RSPCA Assured cannot be used without the logo on produce. The RSPCA Assured logo cannot be used on websites and other marketing communications to promote products that do not carry the RSPCA logo and name RSPCA Assured.⁴⁰⁷ All uses of the RSPCA Assured certification mark (name and logo) are strictly subject to scheme membership, traceability,⁴⁰⁸ levy⁴⁰⁹ and prior written approval, operative on a non-profit basis in sustaining the audit process.⁴¹⁰ A retailer who wishes to apply / use the mark must therefore be an RSPCA Assured member, for which competitively low fees apply,⁴¹¹ as must the suppliers to that business. RSPCA Assured membership is required in order to sell a product as being RSPCA Assured to another business, regardless of whether or not the product is labelled.⁴¹²

Additionally, pork and poultry products must clearly state the rearing system on the front of the pack.⁴¹³ Pork and pork products labelled as outdoor-bred or outdoor-reared also have to contain a statement about how the pigs are farmed, a practice which goes beyond EU norms. The RSPCA has with the pig industry

⁴⁰⁶ Using the RSPCA Assured certification mark. Brand Guidelines (April 2020) <https://business.rspcaassured.org.uk/media/2666/rspca-assured-artwork-guidelines-0420-digital-v2.pdf>.

If fifty per cent or less of the animal-derived ingredients, and the overall primary animal-derived ingredient, are RSPCA Assured, the name and logo may be used on the back of the pack.

⁴⁰⁷ <https://www.berस्पcaassured.org.uk/selling-rspca-assured/artwork-approval/>.

⁴⁰⁸ <https://www.rspcaassured.org.uk/about-us/traceability/>. RSPCA, *Chain of Custody Audit standard* (2019) (n 63).

⁴⁰⁹ The levy is based on the price at which a product is sold, excluding VAT. For meat, poultry and liquid egg it is 0.375 per cent of the value of the product sold; for eggs it is 5 pence per 30 dozen eggs sold; and for milk 2.5 pence per 20 litres sold. <https://www.berस्पcaassured.org.uk/selling-rspca-assured/levy/>.

⁴¹⁰ <https://www.berस्पcaassured.org.uk/selling-rspca-assured/using-the-mark/>.

⁴¹¹ Based on the size and type of business <https://www.berस्पcaassured.org.uk/about-us/how-rspca-assured-works/>; https://business.rspcaassured.org.uk/media/2669/membership-fees_press-1.pdf.

⁴¹² <https://www.berस्पcaassured.org.uk/about-us/what-is-rspca-assured/>.

⁴¹³ *ibid*.

developed definitions in a voluntary code of practice for labelling pig produce,⁴¹⁴ which major retailers including Marks and Spencer have signed.⁴¹⁵ This voluntary initiative goes some way towards informing consumers as to the production method of pork for the purpose of credence purchasing, a practice which Marks and Spencer engages with in its method of production labelling on its produce in-store. Indoor-reared, for example, applies to pigs and meat-poultry reared without access to a range or with limited access to a range that is insufficient to fulfil the legal requirements to label a product as free-range. Free-range pigs are those born outside in fields, remaining outside until sent for processing. Outdoor-reared pigs are born outside in fields where they are reared for approximately half their life. Minimum space allowances apply (defined as at least thirty kilograms). Outdoor-bred pigs are born outside in fields where they are kept until weaning. It is forbidden to attribute any other statements (such as quality or flavour) to the RSPCA Assured certification mark or to combine such statements with the required RSPCA supporting text, which reads, 'The [system – e.g. free range] [ingredient] in this [product/dish] comes from producers inspected to RSPCA welfare standards by the RSPCA's independently certified farm assurance scheme'.⁴¹⁶

In order to display its animal welfare standards more clearly the RSPCA Assured scheme has created a series of simple icons, which have been designed to help convey the essence of the RSPCA Assured standards.⁴¹⁷ These logos⁴¹⁸ really are consumer friendly and do serve to complement the somewhat complex requirements which underpin permissible application of the RSPCA Assured trademark label. In close association with this thesis' orientation, RSPCA Assured aspires towards market segmentation on the basis of animal welfare standards and competition between retailers, which in turn has significant potential to generate welfare gains and to drive up the welfare standards of farm animals in retailers' supply chains and along an extended global agri-food chain.⁴¹⁹ The B2C animal welfare trademark label and complementary logos of the RSPCA Assured standards augment this effect.

5.5.3 GLOBALG.A.P. IFA Livestock Standard and Animal Welfare

Add-On Modules

The level of recognition of GLOBALG.A.P. IFA Livestock Certificate animal welfare criteria among consumers is in doubt. The GLOBALG.A.P. trademark - the word 'GLOBALG.A.P.' and its 'G'- shape logo - may only be used directly as

⁴¹⁴ <http://www.porkprovenance.co.uk/productionmethods.asp>.

⁴¹⁵ <http://www.porkprovenance.co.uk/a-z.asp>.

⁴¹⁶ Using the RSPCA Assured certification mark. Brand Guidelines (2020) (n 406).

⁴¹⁷ <https://www.berस्पcaassured.org.uk/rspca-welfare-standards/why-choose-rspca-assured/>.

⁴¹⁸ https://business.rspcaassured.org.uk/media/2642/rspcaassured-icons_0620b.pdf

⁴¹⁹ Summary Report (September 2014) (n 51) 13.

specified in a business context⁴²⁰ and is prohibited from appearing as a product label directly linked to certified products.⁴²¹ A thirteen digit GGN (GLOBALG.A.P. Number) serial number is printed on the packaging of IFA Livestock certified produce which identifies the certified producer of origin.⁴²² A newly introduced IFA Livestock Certificated GGN logo with a link to GLOBALGAP.'s prospective portal is still in its pilot phase.⁴²³ The GGN Livestock label is intended to show that produce certified to the IFA Livestock Standard complies with good agricultural practices in relation to worker health and safety, animal welfare, traceability, the responsible use of antibiotics and respect for the environment. GLOBALG.A.P. claims that 'transparency is the core value of the label'.⁴²⁴ Certified producers are not authorised to use the GGN consumer label automatically; it may only be used by IFA certified companies based on a special licensing agreement, in respect of which an application must be made to GLOBALG.A.P.⁴²⁵ Concurrently, the B2B relevance of the GGN number continues to be promoted to GLOBALG.A.P. members for sourcing and supply purposes.⁴²⁶

This is not a designated animal welfare label directed to the consumer and reservations surface on three counts. First, doubts arise as to the extent to which the IFA Livestock portal is capable of providing the informative level of detail and at the same time conveying the standards of animal welfare accurately and simply to the credence consumer. Second, the fact that IFA Livestock Certification can be obtained by producers in different countries practising diverse and low standards of animal welfare will not be conveyed. Third, the Livestock GGN is not specific to animal welfare, when a designated animal welfare logo which is visible and transparent could serve to augment credence consumer confidence in agri-produce which is animal welfare labelled and certified as such. IFA Livestock Certification with its GGN logo is not an animal welfare scheme in the same sense as RSPCA Assured. The GGN label does not communicate good agricultural practice in animal welfare to the credence consumer of IFA Livestock Certificated agri-food. GLOBALG.A.P. is missing a valuable opportunity to market value-added animal welfare agri-produce in the absence of a clearly expressed label which signals, specifically and transparently, the animal welfare credentials of its Standard to consumers, a gap which is becoming larger in light of current EU law

⁴²⁰ General Regulations Part I (n 106) Annex I.

⁴²¹ *ibid* 1 (iii) (vii).

⁴²² *ibid* 3 (i)(ii).

⁴²³ GLOBALG.A.P. Annual Report 2019 <https://globalgapsolutions.org/annual-report/products-report/ggn/>.

⁴²⁴ GLOBALG.A.P. Newsletter, 30 July 2019 https://www.globalgap.org/uk_en/media-events/news/articles/Central-de-Carnes-Premium-joins-forces-with-El-Corte-Ingls-to-be-the-first-in-the-world-to-implement-the-GGN-label-GLOBALG.A.P.-for-livestock/#pk_campaign=NL1907&pk_kwd=CentraldeCarnes. GLOBALG.A.P. Spotlights 30 October 2020. [First GGN Livestock Label](https://aquaculture.ggn.org/de/informationen-fuer-b2b.html).

⁴²⁵ General Regulations Part I (n 106) Annex I, 4 (i) (ii).

⁴²⁶ <https://aquaculture.ggn.org/de/informationen-fuer-b2b.html>.

initiatives. Assuming such communicative responsibility would engender a measure of comprehension and credibility of the animal welfare constituent of the GLOBALG.A.P. IFA Livestock Standard and animal welfare Add-on Modules which currently is absent. For higher animal welfare value-added agri-produce and to promote the same, animal welfare Add-on Modules could serve as credence labels in the event that the Modules' animal welfare criteria are also fortified with evolving science and values in which the consumer will have a voice.

5.6 Concluding Comments

Necessary inroads have been made into a comparative analysis of selected prominent private farm assurance standard schemes and vis à vis EU animal welfare norms. Private standards play a role in the determination of enhanced welfare experienced by animals reared for food dependent on the informed choices made within the supply chain. In the first instance it is consumer acceptance of the produce of a private standard-setter which will determine the demand for that agri-produce. Donal Casey and Colin Scott claim '[w]here transnational private regulation is perceived as legitimate, a sense of obligation and active support may naturally follow'.⁴²⁷ To the extent that private standards are clearly and verifiably broader in scope and higher than EU standards, lacunae in animal welfare protection may be alleviated. It is evident from this study that private animal welfare assurance schemes are driving up standards of farm animal welfare in differing but significant ways. Farm assurance schemes diverge in design, procedures and content, in which there are instances of good and better practice. There are disparities and shortfalls too.

Marks and Spencer markets the quality and animal welfare credentials of its sourced and supplied animal welfare added-value indirectly through the Marks and Spencer brand, fortified through fusion with RSPCA Assured standards and communication of the same with RSPCA enhanced rearing methods to the consumer. Consumer acceptance of its food brand determines Marks and Spencer food enhanced status and market supplies and its commitment to have one Select Farm Assurance Standard per species for fresh, continental ingredient and frozen supplies can be monitored for progress over time.

RSPCA Assured Standards cater for and to the credence consumer, its charitable status and independence from industry control sustaining consumer credence. The science-basis for its standards affords resources capable of meeting species-specific needs which enable animals to practise inherent behavioural traits and improve welfare. Further these standards of good animal welfare agricultural practice are communicated to the informed consumer who becomes the discerning purchaser of agri-food meeting RSPCA Assured high welfare standards.

⁴²⁷ Casey and Scott (n 397) 95.

GLOBALG.A.P.'s IFA Livestock Standard crucially needs to be unambiguous, more exacting and transparent in its standards and compliance criteria in animal welfare good agricultural practice to attain IFA Livestock Certification and in order to cater for the credence consumer of its agri-produce. The dominance of its internal corporate constituencies in terms of accountability and control over the animal welfare standards adopted and implemented is a factor for change.

The empirical research and analysis undertaken in the three case studies demonstrates that a private animal welfare label and / or communicative link to a consumer-accessible website for the dissemination of transparent and validated animal welfare information, would be the tools with which to reach, independently and directly, the informed and circumspect credence consumer of agri-food and to raise the bar of animal welfare standards on the farm. The process by which animals are raised on the farm cannot be readily assessed currently by the credence consumer of agri-food who needs this information to make a discerning purchase choice. This thesis' case studies substantiate the clear beneficial effects which B2C enhanced farm assurance schemes will engender for key stakeholders in the agri-food chain through the communicative link to the consumer of credible value-added standards of animal welfare.

Acting upon a public floor, B2B private standard-setters should forge greater communicative links with the consumer who is secure in the knowledge of the animal welfare credentials of the agri-produce sourced and supplied, further identified by its individual label. Following the Appellate Ruling in *US-Tuna II*,⁴²⁸ the labelling of non-product related production processes in a Regulation may be compatible with the TBT Agreement.⁴²⁹ Arguably, private voluntary standard-setters assume no direct obligations under the TBT Agreement or, should a Member State be deemed responsible for the voluntary standard labels of private bodies, then it may still be compliant following *US - Tuna II*.⁴³⁰

A stronger B2C approach on the part of each individual private standard-setter, crucially one which can be validated, is the way forward. In so engaging with the consumer, private standard schemes will be competing on value-added animal welfare agri-produce as a market differentiator in a value chain. Such competition will manifest in a continual process of conformity assessment of result, associated procedural best practice and performance reporting in standard schemes, raising standards of welfare over time. Fulponi maintains, '[t]he credibility of a standard to ensure specific product or process characteristics relies on the procedures to

⁴²⁸ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381/AB/R, 13 June 2012.

⁴²⁹ Technical Barriers to Trade Agreement, 1868 UNTS (1994) 120; Michael N Cardwell and Fiona Smith (2013) 'Contemporary problems of climate change and the TBT Agreement: Moving beyond eco-labelling' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 391.

⁴³⁰ See the discussion in chapter 4 (n 115) (n 119) (n 123) to (127).

enforce and verify them.’⁴³¹ Credibility thus depends on the overall design of the standard scheme.⁴³²

A recommendation is made for a competitive and individual model of private animal welfare label in that each farm assurance scheme may rather deploy its own logo in direct communication with its consumers with the separate provision of information on its website. RSPCA Assured consumer-orientated illustrative logos and more generally and specifically its RSPCA Assured logo would provide a model from which to craft a separately owned design, each assurance scheme reinforcing its respective animal welfare mission and communicating this to the consumer via an individual corporate label and / or set of logos. To recall, the RSPCA Protocol to which retailers may sign up classifies the various methods of production,⁴³³ for example, indoor-reared / outdoor-bred for the purpose of produce labelling. Thereupon the opportunity would exist for private farm assurance schemes each to compete in a value market in the myriad ways in which animal welfare may be enhanced and monitored in a continuous process in a well-designed, credible and verifiable farm assurance scheme.⁴³⁴

⁴³¹ Linda Fulponi ‘Private voluntary standards in the food system: The perspective of major food retailers in OECD countries’ (2006)31(1) Food Pol 1, 8.

⁴³² Heyvaert (n 1).

⁴³³ See also Compassion in World Farming’s proposals for animal welfare labelling with six potential component labels along a scale. Ranging from 0 to 5, the categories apply to and define intensive-outdoors, improved- indoors, partially-outdoors, free-range, organic (legally defined) and pasture-fed, respectively.

<https://www.ciwf.org.uk/our-campaigns/honest-labelling/confusion-and-clarity/>.

⁴³⁴ Hayvaert (n 1).

Chapter 6 Hybrid Animal Welfare Governance A Soft Law Regulatory Model in a Market for Agri-Food

‘[T]he strategy of governance designs and control, is to determine not which pure model of governance is more effective or more legitimate, but which hybrids are. We need to conceptualise a world where governance is increasingly a hybrid of different systems of regulatory control; where ... private regulation co-evolves and expands with public regulation; ...; voluntary regulations expand with co-ercive ones; and the market itself is used or mobilized as a regulatory mechanism.’¹

6.1 Introduction

The focus of this thesis is to suggest a governance framework which will raise the animal welfare threshold in EU agriculture and the agri-food chain, with private standards also operating in a transnational regulatory space. Private standards have the potential to raise standards of animal welfare in EU agriculture with positive prospects for key stakeholders in the agri-food chain. Elements of hybridity are evident in the direction pursued by the EU in its animal welfare regulatory strategy in which private assurance schemes are contemplated, even targeted, as functional players. Yet this blurring of the public / private dichotomy of standards raises questions as to the extent to which there could, and should, be EU ‘orchestration’ and / or EU ‘regulatory oversight’ of private standard schemes for animal welfare in EU agriculture and the agri-food chain.

The determination of the legal relationship between public and private standard-setters and their relative standards of animal welfare for food producing animals is fundamental to this thesis’ aims and consideration will be given to the capacity of standardisation to act as a bridge between the public / private dichotomy of animal welfare standards. Recourse to a hybrid model of meta-regulation contemplated by the EU receives consideration as a purported model of governance to bridge the public / private divide. But the EU meta-regulatory model is not the hybrid solution proposed in this thesis to strengthen reciprocal relations between the public and the private sphere in the complex area of animal welfare in agriculture, where societal, political, economic and trade interests pervade.

¹ David Levi-Faur, ‘From “Big Government to Big Governance”?’ in David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP 2012) 3, 14.

EU animal welfare regulatory strategy encompasses active cooperation with the OIE and this public law linkage in animal welfare in agriculture bears significance for the direction which this thesis pursues. The EU holds an interest in raising animal welfare awareness globally so as to discourage lower standard imports. Yet, governance of the blurred public / private divide in standards of animal welfare in agriculture is deemed necessary in the interests of those stakeholders in the agri-food chain affected by private standards' impact on trade and their determinative status of the quality of agri-food. There is also a need to address the movement towards hybridity in public / private standards which arguably is operating in a governance 'vacuum.'

The emergent phenomenon of private animal welfare assurance schemes also raises concerns because of the potential to undermine public standards adopted in accordance with democratic procedures in the pursuit of international trade. The OIE plausibly perceives private standards to conflict with its leading international standards in animal welfare, the private standards lacking in transparency and an evidential science-base. In particular, GLOBALG.A.P.'s collective Standard increasingly occupies a strategic position in the global agri-food chain as the industry norm.² It has the potential incrementally to undermine the 'integrity' of the OIE³ as the international reference standard and to destabilise the science-based public consensus standards achieved by democratic means. On the other hand, GLOBALG.A.P. could potentially optimise its goal of becoming the global industry Standard by playing a constructive role in the implementation of the animal welfare standards of the OIE, and having done so elevate beyond to capitalise on the provision of a quality threshold above EU standards of welfare in a value market for agri-food.

This chapter proposes a soft law hybrid mechanism, its terms to be agreed through deliberative interaction and mutually reinforcing dialogue within and between GLOBALG.A.P. and the OIE. The hybrid nature of food governance in which public and private bodies increasingly coordinate their activities is substantiated by Paul Verbruggen and Tetty Havinga.⁴ Consideration will be given to operative OIE oversight of private animal welfare standard schemes in which public sphere the EU will continue to play an active cooperative role. Within such a hybrid model of governance through soft law regulation State 'facilitation' will legitimise and increase the effectiveness of the private collective regulatory

² See Yoshiko Naiki, 'The dynamics of private food safety standards: a case study on the regulatory diffusion of GlobalG.A.P.' (2014) 63(1) ICLQ 137, 139 citing Jan Wouter and Dylan Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations' (2012) 11 World Trade Rev 479, 488. Linda C Botterill and Carsten Daugbjerg, 'Engaging with private sector standards: a case study of GLOBALG.A.P.' (2011) 65(4) Australian J Int Aff 488.

³ Alison Burrell, 'Good agricultural practices' in the agri-food supply chain' (2011) 13(4) Env L Rev 251, 267.

⁴ Paul Verbruggen and Tetty Havinga, 'Hybridization of Food Governance: An Analytical Framework' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 1, 3.

regime.⁵ Further regard will be paid to the nexus of the advocated hybrid model with World Trade Organization (WTO) rules and principles. The approach taken will highlight the benefits of such a soft law hybrid model of animal welfare governance in agriculture for key stakeholders in the agri-food chain. It will promote the prospects of a memorandum of understanding (MoU) for improving standards of animal welfare in EU agriculture and the agri-food chain. This discussion will be underpinned by a theoretical understanding of the regulatory context of the proposed hybrid model of public and private interface in transnational animal welfare governance in the agri-food chain. It will consider the extent to which such a model of animal welfare governance may raise public and private standards of animal welfare through regulatory competition.

6.2 A Hybrid Model of Animal Welfare Governance in EU Agriculture?

An increasing portion of business regulation emanates from the dynamic interaction of hybrid public-private institutions operating transnationally,⁶ yet there is an absence of such an effective governance interaction in the policy domain of animal welfare in agriculture. The definition of hybrid governance is adopted in which the actors or stakeholders are public (State / intergovernmental) bodies and private (non-State) organisations.⁷

6.2.1 Meta- Regulation?

A developing phenomenon in transnational private regulation is the growth of private meta-regulators, and of sector-specific meta-standardisation, the rationale being to 'bolster[] ... the integrity, legitimacy and accountability of private regulatory regimes'.⁸ Meta-regulation implies a process in which '[t]he primary control responsibilities are ... carried out within the ... management systems of corporations and the regulator's role becomes the auditing, monitoring, and incentivizing of these systems'.⁹ One example of a sectoral meta-regulator is the Global Food Safety Initiative (GFSI). Existing food safety standard schemes are

⁵ Kenneth W Abbot and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 Vanderbilt J Transnational L 501, 502, 576-7.

⁶ Burkard Eberlein and others, 'Transnational business governance interactions: Conceptualization and framework for analysis' (2014) 8(1) Regul Govern 1; Olaf Dilling and Till Markus, 'The Transnationalisation of Environmental Law' (2018) 30(2) JEL 179.

⁷ Verbruggen and Havinga, 'Hybridization of Food Governance: An Analytical Framework' (n 4) 5.

⁸ Paul Verbruggen and Tetty Havinga, 'The Rise of Transnational Private Meta-Regulators,' Osgoode Hall Law School Legal Studies Research Paper No 71/2014 <http://ssrn.com/abstract=2512843>.

⁹ Robert Baldwin, Martin Cave, Martin Lodge, *Understanding Regulation* (2nd edn, OUP 2012) 147.

evaluated for equivalence against the GFSI's regulatory criteria on governance, procedure and content.¹⁰ GLOBALG.A.P. is such a recognised scheme.¹¹ There is no formal meta-regulator of private animal welfare standards. Within the WTO regulatory framework the focus of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) is on animal health as governed by State actors. Arguably, it could be necessary to form an operative system of coordination of private practices in animal welfare in agriculture which affect a range of stakeholders along an extended food chain, by introducing a system of meta-regulation of private transnational farm assurance standards and certification schemes operating with the potential to control the global agri-food chain.

The EU seems to be continuing to engage 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'.¹² This is evident to-date as demonstrated in the dialogue and expert exchanges taking place in the animal welfare labelling sub-group of the EU Platform on Animal Welfare, discussed in chapter two of this thesis. To what extent are the boundaries of the public / private interface circumscribed in EU law? Rob Van Gestel and Hans-Wolfgang Micklitz comment¹³ 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.¹⁴ In the case of *Fra.bo* the CJEU was faced with the question of whether a private certification body which monitored compliance with technical standards was or could be in breach of Article 34 TFEU prohibiting quantitative restrictions or measures having equivalent effect on imported products. By virtue of the private standardisation body's authority to certify the products in question, the CJEU ruled that in reality

¹⁰ Verbruggen and Havinga, 'Hybridization of Food Governance: An Analytical Framework' (n 4) 7; Fabrizio Cafaggi, 'Transnational Private Regulation. Regulating Private Regulators' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 212. SSRN: <https://ssrn.com/abstract=2615694>, 1, 18, 19.

¹¹ Tetty Havinga and Paul Verbruggen, 'The Global Food Safety Initiative and State Actors: Paving the Way for Hybrid Food Safety Governance' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 183, 190. In February 2020, the new GFSI v2020 benchmarking requirements were published. GLOBALG.A.P. IFA v5.2 will continue to be valid (but no longer GFSI-recognised) until IFA v6 is published.

https://www.globalgap.org/uk_en/for-producers/globalg.a.p./integrated-farm-assurance-ifa/IFA-V5.3-GFS/.

¹² Garry Smith, 'Interaction of Public and Private Standards in the Food Chain' OECD Food, Agriculture and Fisheries Working Paper No 15 (2009) para 40.

¹³ Rob Van Gestel and Hans-Wolfgang Micklitz, 'European Integration through Standardization: How Judicial Review is Breaking Down the Clubhouse of Private Standardization Bodies' (2013) 50 CML Rev 145.

¹⁴ Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas-und Wasserfaches eV* EU:C:2012:453.

it held the power to regulate the entry into the market of an EU Member State.¹⁵ The 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. Issues of hybridity arise in that German legislation had established that products certified by the private body were compliant with national law.¹⁶

That there are perceived advantages for the EU in recognising, or cooperating with, private setters of animal welfare standards becomes evident since some 'complementarity',¹⁷ i.e. an element of hybridity,¹⁸ would appear to exist. It is appropriate to recall the EU Rural Development Regulation's general quality regime, with initial capped support available for farmers who subscribe to voluntary agricultural product certification schemes meeting EU best practice guidance.¹⁹ To remind, the EU has issued best practice guidelines for the operation of private certification schemes, when EU regulation of private schemes was deemed not to be warranted at the time.²⁰ Moreover, some private standard regimes are reliant on public systems of oversight to ensure credibility,²¹ which demonstrates the existence of a level of hybridity in conformity assessment and accreditation. To recollect also, the EU has contemplated a legislative framework which would authorise the benchmarking of private certification schemes with animal welfare claims.²² A related route is being pursued within the mandate extended to the animal welfare labelling sub-group of the EU Animal Welfare Platform²³ and subsumed within the EU Farm to Fork Strategy for a sustainable agriculture.²⁴ Benchmarking, potentially, could operate as a mode of animal welfare governance, whereby EU meta-standards

¹⁵ *ibid* [31].

¹⁶ *ibid* [27].

¹⁷ Smith (n 12) para 10.

¹⁸ Botterill and Daugbjerg (n 2).

¹⁹ Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 [2013] OJ L347/487, arts 16(1)(c) 16(2)(3).

²⁰ Commission Communication – EU Best Practice Guidelines for Voluntary Certification Schemes for Agricultural Products and Foodstuffs [2010] OJ C341/5.

²¹ Spencer Henson, 'The role of public and private standards in regulating international food markets' (2008) 4(1) *J Intl Agri Trade Develop* 63, 74.

²² European Commission *Staff Working Paper Impact Assessment* (SEC) (2012)55, 19 January 2012, Annex 5C, 107-8.

²³

https://ec.europa.eu/food/sites/food/files/animals/docs/aw_platform_20201103_pres-04.pdf.

²⁴ COM(2020) 381 final, 20 May 2020.

would act as ‘catalysts for bringing about changes in practice in order that conformity with those target standards would be achieved.’²⁵

An interesting example of EU meta-regulation would be the existing EU normative requirement for producers of biofuels marketed in the EU to benchmark to EU sustainability criteria, certification to which must meet formal accreditation conditions.²⁶ This meta-standard ‘sets basic requirements and then allows the regulated community to use existing standards that have been benchmarked to the meta-standard to certify compliance’.²⁷ The EU formally recognises a number of such voluntary private certification schemes.²⁸ Jolene Lin contends that ‘the need for certification schemes to maintain credibility in order to remain in the ‘marketplace’ leads to behaviour that enhances legitimacy’.²⁹ Using ‘the principal-agent framework developed in delegation theory’, she submits that, ‘the agent’s quest for legitimacy acts as a countervailing incentive against slack and, in fact, serves to align the preferences of the agent [auditor] and the principal [EU]’.³⁰

Would potential EU meta-regulation of private animal welfare standards and certification schemes provide a viable meta-regulatory model of private farm assurance schemes, or a model for adaptation at the global level applicable to agri-produce supplied in the agri-food chain? While offering a meta-regulatory model with the propensity to justify the legitimacy of private regulatory regimes, it is questionable whether such a meta-regulator of transnational private animal welfare standards schemes would be opportune. Jody Endres maintains that ‘criteria and indicators of benchmarked standards need continual reassessment as scientific knowledge grows’.³¹ More particularly, she cautions that, ‘important questions arise as to whether such standards can truly incorporate countries’ differing notions of social and economic welfare’.³² Viewed in this light meta-

²⁵ Lisa Jack, ‘Standards, Indices and Targets for Environmental Performance’ in Lisa Jack, *Benchmarking in Food and Farming* (Gower 2009) 75, 83.

²⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16 as amended.

²⁷ Jody Endres, ‘Clearing the Air: The Meta-Standard Approach to Ensuring Biofuels Environmental and Social Sustainability’ (2010) 28(1) *Virginia Env L J* 73, 76.

²⁸ https://ec.europa.eu/energy/topics/renewable-energy/biofuels/voluntary-schemes_en?redir=1. Jolene Lin, ‘The Environmental Regulation of Biofuels: Limits of the Meta-Standard Approach’ (2011) 5 *Carbon Climate L Rev* 34.

²⁹ Jolene Lin, ‘Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuels Certification Regime and the Clean Development Mechanism’ (2012) 24 *JEL* 43, 69.

³⁰ *ibid.*

³¹ Endres (n 27) 119.

³² *ibid* 119, 120.

standards may not be effective. The nature of animal welfare in agriculture is complex in that societal, political, economic, and trade interests infiltrate, and the modus operandi involves working to achieve minimum standards within the EU common organisation of the market in agricultural products and consensus between developed and developing countries in the animal welfare standards of the OIE TAHC.

Furthermore, hybridity in meta-regulation where WTO Members and third parties participate in international standard-setting would, arguably, be problematic with respect to the WTO Technical Barriers to Trade Agreement (TBT Agreement).³³ It is unclear as to whether formal recognition by the European Commission of private standards and associated conformity assessment requirements, or animal welfare in sustainable agriculture criteria, would give rise to barrier to trade issues.³⁴ The EU would thus be 'blurring the boundaries' between EU legislative Acts and private standard schemes,³⁵ giving rise to questions of potential attribution of the private standards to the EU legislator. In accordance with WTO law, whether a Member's associated role would amount to 'sufficient involvement' in the activities of private standard-setters 'because of some governmental connection to or endorsement of those actions' would necessarily be decided on a case-by-case basis.³⁶ Even though the application of WTO rules may not prove fatal to such a combination and the measures may remain in compliance if, for example, they are non-discriminatory, EU meta regulation is not substantiated as the route to be taken formally to bridge the public / private divide. For the dual reasons of respecting the complex nature of animal welfare in agriculture and the uncertain nature of WTO rules, EU meta-regulation or an adapted model at the global level should be considered only as a last resort.

6.2.2 Soft-Law Governance

This thesis advocates a hybrid solution located within a soft law mechanism in which mutually reinforcing liaison results in agreed terms endorsed by both Parties. A collaborative document undertaken on a horizontal³⁷ understanding and formally orchestrated will be more flexible than meta-regulation. Governance,

³³ World Trade Organization Technical Barriers to Trade Agreement, 1868 UNTS (1994) 120, arts 2 and 3, Annex 1. Michael N Cardwell and Fiona Smith, 'Contemporary problems of climate change and the TBT Agreement: Moving beyond eco-labelling' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 391.

³⁴ Cardwell and Smith *ibid*, 400, 417, 419-20; Stephanie Switzer and Joseph A McMahon, 'EU biofuels policy-raising the question of WTO compatibility' (2011) 60(3) ICLQ 713, 735-6.

³⁵ Botterill and Daugbjerg (n 2) 495.

³⁶ Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* WT/DS44/R, 31 March 1998 [10.56] and [10.52].

³⁷ Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36(4) U Pennsylvania J Int L 101, 105.

moreover, encapsulates a 'wider definition of regulation that captures regulation as soft law ... and non-State processes'.³⁸ It is relevant and timely to secure a scientifically determined baseline of animal welfare protection underpinning the privately assured global Standard of GLOBALG.A.P. and for GLOBALG.A.P. to identify, clearly, its higher animal welfare standards going beyond the minimum norms with which compliance is a legal requirement. This stems from the effects of the regime on its external stakeholders, the capacity to control the global agri-food chain, and the overall complexity in, and lack of transparency of, GLOBALG.A.P.'s animal welfare standards. GLOBALG.A.P. needs to attain external legitimacy from the State (defined to include intergovernmental organisations),³⁹ such that it does not usurp the leading international status in animal welfare of the OIE, and in a way that its private standards do not undermine the consensus achieved by developed and developing countries in the intergovernmental standards of welfare for animals in agriculture adopted under the auspices of the OIE. A soft law hybrid model of transnational animal welfare governance, i.e. 'governance via regulation,' as opposed to 'regulating regulation',⁴⁰ undertaken in horizontal accord and deliberative mode will provide the requisite regulatory solution to the public / private dichotomy of standards in animal welfare.

The direction pursued is one which will operate outside the multilateral framework of the WTO albeit running alongside, in parallel to, and greatly aligned with, the principles underpinning both the SPS and TBT Agreements, albeit indirectly. Given this proximity, core considerations are the necessity to reinforce the scientific basis of the private standards, to augment transparent and credible standards, as well as to strengthen interrelations between the major public and private standard-setters in animal welfare. A focal objective remains the role of private standardisation in meeting continued consumer preferences for value-added animal welfare agri-produce.

6.2.2.1 A Memorandum of Understanding between GLOBALG.A.P. and the OIE

It is the potential emerging relationship between the major public international animal welfare standard-setter the OIE and the major private global animal welfare standard regime which is considered relevant to this thesis' aims. It is recalled that the OIE adopted a Resolution on the role of public and private standards in animal welfare,⁴¹ which recommends that the OIE Director General encourage global private standard-setting bodies to work toward transparency of

³⁸ David Levi-Faur, 'Regulation and Regulatory Governance' (Jerusalem Working Paper in Regulation and Governance No 1/2010) 8 <http://levifaur.wiki.huji.ac.il/images/Reg.pdf>.

³⁹ Paul Verbruggen and Tetty Havinga, 'Hybridization of Food Governance: An Analytical Framework' (n 4).

⁴⁰ Levi-Faur (2010) (n 38) 10.

⁴¹ OIE Resolution No 26 [2010] *Roles of public and private standards in animal health and animal welfare* http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_RES_O_2010_PS.pdf.

private standards. In discussing the steps to be taken to implement its recommendations the OIE identified GLOBALG.A.P. as a relevant global private standard-setting body with which to strengthen collaborative links.⁴² GLOBALG.A.P.'s IFA Standard is the major collective industry standard with which the prominent retailers and food service providers align. It has the propensity to become the industry norm with the potential to steer the agri-food chain⁴³ and to impact unfavourably on stakeholders external to its organisation who are affected by, and interested in, animal welfare standards for agricultural produce. Moreover, the EU would be predisposed towards a solution to the concerns to which private standards give rise, in particular to developing countries, at the global level guided by the OIE in the light of the OIE's 'dual role, not only for setting international standards but also for promoting trade and improving food security.'⁴⁴ The EU's objective in raising animal welfare awareness through its multilateral activities with the OIE will be reinforced through strengthened collaborative interrelations between the OIE and GLOBALG.A.P. Such public / private collaboration with GLOBALG.A.P. may be a way to unblock the impasses found in intergovernmental negotiations on welfare standards for animals in agriculture.

This thesis recommends that GLOBALG.A.P. and the OIE engage in coordinated dialogue, as the major animal welfare standard-setting bodies in the private sphere and in the public sphere, respectively. It will be in the interests of each Party to strengthen their relations in animal welfare in agriculture and in the interests of other key stakeholders in value-added agri-food in the global supply chain. These major public and private standard-setting bodies in animal welfare are urged to draw up a joint MoU, a soft law hybrid⁴⁵ governance tool, in which undertakings by both Parties are agreed and endorsed under their signatures. Such a collaborative mechanism will offer a preferred alternative solution to, and is distinguished from, that of meta-regulation. The scope will exist simultaneously for 'reasoned discourse' through which 'public reason' will 'invoke mutuality'⁴⁶ through the legitimating mechanism of a MoU, the terms of which are agreed upon and sanctioned with the signatures of both Parties. The EU in the exercise of its external relations in animal welfare will continue actively to buttress the public dimension of this interrelation through its cooperation with the OIE.

⁴² OIE Meeting on Private Standards (2010) Annex XXXVII (Paris, 10 September) http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/Final_private_standards_report.pdf.

⁴³ Botterill and Daugbjerg (n 2) 499.

⁴⁴ 'For this reason', OIE standard-setting in animal health and animal welfare 'should be strongly supported', Michael Scannell European Commission, OIE Meeting on private standards including for animal welfare (Paris, 17 March 2009) Annex XL, Appendix IV.2, 1017, 1020
https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_TA_HSC_Sept_2009_Part_B_b.pdf.

⁴⁵ Cafaggi (2015) (n 37) 101.

⁴⁶ Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) OJLS 33, 36.

In becoming Party to a MoU with the internationally recognised intergovernmental animal welfare standard-setter, the OIE, GLOBALG.A.P. will be adding to its associations with leading international organisations.⁴⁷ Kaarlo Tuori is a proponent of such 'dialogue,' 'discourse' and 'mutual communication' in a transnational setting.⁴⁸ The deliberative interrelations model of liaison and mutually reinforcing⁴⁹ discourse between the two major animal welfare standards bodies is necessary for the complex topic of animal welfare, which has multi-dimensional elements, including those of economics, society and trade.⁵⁰ Micklitz considers 'the outward interaction between the public and the private' to be 'essential to an understanding of hybrids'.⁵¹ A proposed MoU between the major public and private animal welfare standard-setting bodies will 'open[...] up the perspective'⁵² Precedents exist⁵³ in the cooperation agreement entered into between the GFSI and the OIE,⁵⁴ and between the International Organization for Standardization (ISO) and the OIE.⁵⁵ In this context, it is relevant to recall one significant outcome of the OIE and ISO Cooperation Agreement, namely: ISO Technical Specification (T/S) 34700, on 'Animal welfare management - General requirements and guidance for organizations in the food supply chain'.⁵⁶ Its objectives are: to provide a management tool for the implementation of the animal

⁴⁷ GLOBALG.A.P. collaborates in capacity building with the International Finance Corporation (IFC), a member of the World Bank Group, for example, and in raising transparency working with the International Trade Centre, the joint agency of the WTO and the United Nations (UN). GLOBALG.A.P. Annual Report 2015 12-13 (copy on file). [Amfori and GLOBALG.A.P. collaborate in partnership to integrate GLOBALG.A.P.'s Standard in the sustainability practices of global retailers using amfori business services in order to drive human rights due diligence in the agri-food supply chain, www.amfori.org.](http://www.amfori.org)

⁴⁸ Kaarlo Tuori, 'Transnational law. On legal hybrids and perspectivism' in Miguel Maduro, Kaarlo Tuori, Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (CUP 2014) 11, 42.

⁴⁹ Lars Gulbrandsen, 'Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs' (2014) 8(1) *Regul Govern* 74, 86-88; Eberlein and others (n 6) 11.

⁵⁰ Endres (n 27) 119-20.

⁵¹ Hans-Wolfgang Micklitz, 'Rethinking the public/private divide' in Miguel Maduro, Kaarlo Tuori, Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (CUP 2014) 271, 277.

⁵² *ibid.*

⁵³ See Margaret Young, *Trading Fish, Saving Fish* (CUP 2011) for the entrenchment of regime interaction through a memorandum of understanding in marine species conservation.

⁵⁴ 12 July 2011
http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/accords/GFSI_ENG.pdf.

⁵⁵ 27 May 2011
<http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/accords/ISO_ENG.pdf.

⁵⁶ ISO/TS 34700:2016(en) <https://www.iso.org/obp/ui/#iso:std:iso:ts:34700:ed-1:v1:en>. Sandrine Tranchard, 'New ISO Specification for Better Management of Animal Welfare Worldwide' <https://www.iso.org/news/2016/12/Ref2147.html>.

welfare principles of the OIE Terrestrial Animal Health Code (TAHC) (Section 7); to provide guidance for the implementation of public or private animal welfare standards and relevant legislation which meet at least the OIE TAHC (Section 7); and to facilitate the integration of animal welfare principles in business-to-business relations.⁵⁷ ISO T/S 34700 was anticipated to act as a bridge between the public and private spheres in the setting of standards and assessment of animal welfare,⁵⁸ though lacking in terms of assurance in the absence of any associated system of conformity assessment.⁵⁹ In so doing, ISO T/S 34700 will foreseeably interact in parallel with the proposed GLOBALG.A.P. / OIE MoU and could also motivate GLOBALG.A.P. to differentiate its IFA Livestock Standard in aiming higher and exceeding the animal welfare standards of the OIE TAHC, as promoted in the ISO Technical Specification. On the part of GLOBALG.A.P. a precedent exists in the MoU entered into between GLOBALG.A.P. and the International Accreditation Forum (IAF)⁶⁰ for the reason of GLOBALG.A.P. seeking closer cooperation with the organisations exercising oversight of accreditation.⁶¹ Further, GLOBALG.A.P. has signed a MoU with Amfori⁶² outlining a commitment on behalf of both organisations to align the operation of their independent social compliance tools, with the aim to drive social sustainability through respect for human rights in food and agricultural supply chains.⁶³

The terms of such a hybrid soft law mechanism will incorporate undertakings by both Parties in which each pledges its own interest in entering into such an understanding in animal welfare. The practice of deliberative dialogue should be incorporated in a clause of the MoU in which the Parties agree to hold regular meetings to discuss matters of relevance to each. Also applicable to both Parties will be accompanying mutual pledges, in particular to promote the international standards under the respective mandate of each Party, together with

⁵⁷ <https://www.iso.org/obp/ui/#iso:std:iso:ts:34700:ed-1:v1:en>

⁵⁸ Sandrine Espeillac Secretary, ISO ISO/TC 34 'Food Products' and ISO working group on animal welfare, 'ISO and OIE Collaboration on Animal welfare' (4th OIE Global Conference on Animal Welfare, Guadalajara, Mexico 2016) <https://www.oie.int/eng/animal-welfare-conf2016/PTT/1.3.%20ISO.pdf>.

⁵⁹ *ibid*, 15.

⁶⁰ An updated Memorandum of Understanding between FoodPLUS and IAF was signed on 29 May 2009 (Issue 2) https://www.iaf.nu/upFiles/451410.IAF-GLOBALGAP-MoU_Signed_090529_clean.pdf. See IFA and GLOBALG.A.P. Multilateral Recognition Arrangement (MLA) Agreement, Endorsement of the GLOBALG.A.P. Integrated Farm Assurance (IFA) Certification Scheme, 25 October 2013 <https://www.iaf.nu/upFiles/GLOBALG.A.P.pdf>.

⁶¹ Originally signed on 2 June 2006, cited in Donal Casey, 'Structuring Private Food Safety Governance: GLOBALGAP and the Legitimizing Role of the State and Rule Intermediaries' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 31, 50, 51.

⁶² www.amfori.org, the leading global business association for open and sustainable trade.

⁶³ GLOBALG.A.P. Spotlights, February 2021, [GLOBALG.A.P. Amfori MoU](#).

commitments to awareness raising of animal welfare in agriculture in their respective Member Countries. It is in the interests of the EU and the OIE that producer stakeholders develop capacity to meet at least the science-based standards of the OIE, the EU concerned not to accommodate lower animal welfare standards in imported agri-produce. The OIE standards process is concerned with developing, not monitoring compliance with, international standards.⁶⁴ It will be recalled that the OIE foresees a role for private standardisation in the implementation of the animal welfare standards of the OIE in its TAHC while at the same time upholding the OIE's leadership role in standard-setting.⁶⁵ EU and OIE animal welfare standards where they do exist tend to be minimum or consensus standards based on science 'leaving market actors to define private standards that extend beyond this minimum'.⁶⁶ For this reason, Spencer Henson and Thomas Reardon underscore the role of public policy-makers in 'facilitating compliance with private standards ... where these predominate and have become the basis of competitiveness, especially in the case of vulnerable groups that face potential marginalisation'.⁶⁷ A clause in the proposed MoU could, therefore, include pledges to train to raise awareness and to build competence⁶⁸ which record the respective responsibilities of each Party toward those producers who would struggle to meet the higher private standards.

It is important that the interests of stakeholders are catered for. Accordingly, GLOBALG.A.P. ought to provide assurance to engage with producer members fairly to distribute costs (membership / certification fees) geographically per category of stakeholder along the supply chain⁶⁹ to lower the transaction costs pro rata of compliance with the Standard for market access. GLOBALG.A.P.'s Standard is 'diffusing', i.e. entering other countries 'through market mechanisms'⁷⁰ raising standards within countries. GLOBALG.A.P.'s local development schemes evidence support for this process.⁷¹ Additionally,

⁶⁴ G/SPS/W/230, para 7(e).

⁶⁵ OIE Resolution No 26 (2010) (n 41).

⁶⁶ Spencer Henson and Thomas Reardon, 'Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System' (2005) 30 Food Pol 241, 252.

⁶⁷ *ibid.*

⁶⁸ See Clause 2 of the FAO-CITES Memorandum of Understanding. Reproduced at CITES SC 53 Doc 10.1 and FAO *Fisheries Report No 807* (2006), Appendix F, cited in Young (n 53) 316.

⁶⁹ Henson S and Humphrey J, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission ALINORM 09/32/9D-Part II (2009) 36.

⁷⁰ Naiki (2014) (n 2) 143.

⁷¹ An intermediate level localg.a.p. brand falls short of formal certification. A 'resembling' benchmarking scheme and status for emerging producers enables schemes which partially conform to the GLOBALG.A.P. Standard to develop 'supplementary' requirements to earn GLOBALG.A.P. recognition of equivalence http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/localg.a.p./. Naiki (2014) (n 2) 153-4.

equivalent status is accorded to G.A.P. certification systems worldwide which fully conform to GLOBALG.A.P.'s Standard.⁷²

GLOBALG.A.P., conversely, cannot be expected to reflect stakeholder interests to the extent of destroying the market opportunities an elevated collective animal welfare standard would present.⁷³ The direction taken, therefore, is that of linking the major private and public animal welfare bodies, namely GLOBALG.A.P. and the OIE, using soft law tools of governance based upon reciprocity of interests through deliberative dialogue. Deliberative dialogue carries with it notions of wider participation, which will be secured through a reflection in the MofU of the the interest in animal welfare standards by consumers of agri-food, with a corresponding commitment to be made to GLOBALG.A.P.'s participatory processes in this regard. There will, as a result, be the essential scope for values and scientific expertise despite documented tensions as epitomised and challenged in the literature.⁷⁴ Identifying with Daniel Bodansky's words, '[t]he fact that both conceptions of legitimacy remain important reflects the fact that we want ... institutions to be both effective in solving problems and subject to public control.'⁷⁵ This thesis advocates that to substantiate both the MofU and the IFA Livestock Standard with the legitimating mechanisms of science and values will authenticate 'effective problem-solving' and 'hinder' any potential to act solely for purposes of market differentiation.⁷⁶

Essentially, the MoU between GLOBALG.A.P. and the OIE will contain a clause in which the internationally recognised science-based animal welfare standards for those species of farm animal in respect of which a chapter exists in the OIE TAHC are upheld as constituting the core minimum level of animal welfare protection. By visibly demonstrating exactly where its animal welfare standards are placed *vis á vis* international norms, i.e. by benchmarking to, and building upon, the public science base GLOBALG.A.P. will evade any allegations of serving the interests of its members 'that shape it'.⁷⁷ Science on its own is not enough to legitimise the animal welfare component of the private collective Livestock Standard, but science is needed as a basis. McEldowney and others are right in their conclusions that market devices alone⁷⁸ cannot deal with the

⁷² GLOBALG.A.P. Benchmarking Regulations v 5.1_April 2020 https://www.globalgap.org/content/galleries/documents/200401_GG_Benchmarking_Regulations_V5_1_en.pdf.

⁷³ Henson and Humphrey (2009) (n 69) Exec Summary, point 26.

⁷⁴ Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée, Elen Hey (eds), *Oxford Handbook of International Environmental Law* (OUP 2008) 705, 719; Maria Lee, 'Beyond Safety? The Broadening Scope of Risk Regulation' (2009) 62 CLP 242.

⁷⁵ Bodansky, *ibid*.

⁷⁶ Fritz Scharpf, *Governing in Europe Effective and Democratic* (OUP 1999) 13.

⁷⁷ Elena Fagotto, 'Private roles in food safety provision: The law and economics of private food safety' (2014) 37(1) Eur J L Econ 83, 94.

⁷⁸ John McEldowney, Wyn Grant, Graham Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy* (Routledge 2013)167, citing Burrell (2011) (n 3).

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.⁷⁹ A firmly embedded minimum science-based floor in the mechanism of a MoU will serve to remove any inclination solely for market differentiation goals and ameliorate the potential for conflict with the OIE. GLOBALG.A.P.'s animal welfare standards will be required to be assessed scientifically to the same minimum level, beyond which it would then be able to market agri-produce certificated to the GLOBALG.A.P. IFA Livestock Standard.

Where there are no current OIE animal welfare standards there is debatably no apparent conflict and the incentive exists for private animal welfare standards to move in.⁸⁰ Nonetheless, the case can also be made for the major private collective standard-setting body to justify a science base for standards of animal welfare, even in the absence of public standards for specific species.⁸¹ Key to this thesis' purpose is that OIE / GLOBALG.A.P. interrelations may serve to instigate the adoption of OIE animal welfare standards for those species where currently a chapter does not exist in the OIE TAHC. This would sustain the need for private species-specific standards to be justified in accordance with each developed public science base, further removing the scope for private standards merely to be marketing tools.

OIE oversight of animal welfare standards will function outside the SPS Committee but the nexus of the OIE animal welfare and OIE animal health standards is such that the OIE Standards Commission now sets both animal health and animal welfare standards. The permanent animal welfare working group's mandate has now ceased and animal welfare standard-setting is firmly integrated into the work of the OIE TAHC Standards Commission.⁸² The

⁷⁹ McEldowney and others *ibid*, 168.

⁸⁰ *Report, Thirteenth Meeting of the OIE Animal Welfare Working Group* (June 2014) http://www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/AWWG_Reports/A_A_WWG_June_2014.pdf

Michael Scannell, 'Private Standards in the Sanitary and Phytosanitary Area' 76 SG/10, 8 s 5 (Paris, May 2008) https://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_private_20standards.pdf.

⁸¹ Just as under the SPS Agreement, '[i]n the event that there are no such international standards, measures need to be scientifically justified'. Derek Eaton, J Bourgeois, Thom Achterbosch, 'Product differentiation under the WTO. An analysis of labelling and tariff or tax measures concerning farm animal welfare' (Report 6.05.11). Agricultural Economics Research Institute (The Hague, 2005) 42 <http://ageconsearch.umn.edu/bitstream/29123/1/re050611.pdf>.

⁸² The inclusive terms of reference of which comprise 'to promote the adoption by the International Committee of animal health (including zoonoses), animal welfare and animal production food safety standards, guidelines and recommendations concerning trade or international movement of mammals, birds and bees, and their products. Such standards, guidelines and recommendations are designed to minimise the risks of

mandate of the OIE in animal welfare includes the improvement of terrestrial animal health and welfare worldwide, health being a key component of animal welfare.⁸³ Thus the reach of the OIE in directing itself to both animal health and animal welfare is greater than that of the SPS Committee. Yet, for the purposes of liberalised trade between both developed and developing countries the rules and principles upon which the SPS Agreement is constituted hold particular relevance, indirectly, for the direction pursued in the strengthening of interrelations between the major public and private animal welfare standard-setters, namely the OIE and GLOBALG.A.P.

6.2.2.2 Alignment with World Trade Organization Principles

A pledge to align with the SPS and TBT Agreements' cross-cutting principle of transparency of information⁸⁴ will serve to engender not only clarity in,⁸⁵ but also the integrity of, the animal welfare component of the IFA Livestock Standard in order to meet the demand of consumers for standards going beyond the public science-baseline. It would be in GLOBALG.A.P.'s interest to do so, since GLOBALG.A.P. needs consumer acceptance of its IFA Livestock Standard; transparency is also necessary at the global level. Such a commitment to transparency reflected in GLOBALG.A.P.'s internal governance rules as well as in a 'transparency' clause in the MoU to this effect would cater to the credence consumer of GLOBALG.A.P. agri-produce which would otherwise be certificated in accordance with disparate criteria. At the same time, such commitment to transparency will serve the OIE's interest in upholding this 'key discipline' of the SPS Agreement for the purposes of 'monitoring' the operation of private standards and their 'effects'.⁸⁶ Mutual interests and reciprocal obligations render the entrenchment of core principles in a MoU pertinent and opportune.

GLOBALG.A.P.'s Standard will accrue credence and legitimacy as a result of its correlation through soft law with the OIE and, indirectly, with the WTO strengthened by the Exchange of Letters between the WTO and the OIE.⁸⁷ The OIE is recognised by the WTO in the SPS Agreement as the relevant international organisation for animal health, which standards are thereby accorded a formal status. As Scott explains, '[t]he SPS Agreement does not confer binding force on international standards. It does, however, constitute these as benchmarks against which Members must justify their SPS measures'.⁸⁸ GLOBALG.A.P.'s IFA Livestock Standard will be reinforced by the link with the 'standards,

transmitting diseases (including zoonoses) while avoiding unjustified sanitary barriers'. [The Terrestrial Animal Health Standards Commission Terms of Reference](#) (OIE 2020) 1.

⁸³ OIE Resolution No 33, *Animal Welfare Working Group*, 85 GS/FR-PARIS (May 2017).

⁸⁴ G/SPS/55, para 10.

⁸⁵ Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2007) 192.

⁸⁶ G/SPS/R/54, para 155. Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS (1994) 493, art 7.

⁸⁷ WT/L/272 (8 July 1998). G/SPS/GEN/775, para 10.

⁸⁸ Scott (n 85) 243.

guidelines and recommendations developed under the auspices of the OIE⁸⁹ and the 'science-based obligations'⁹⁰ laid down in the SPS Agreement,⁹¹ indirectly.

It is, thus, in the OIE within a hybrid model of governance premised on soft law principles and mechanisms that this thesis situates the public oversight of private standards of animal welfare. The reciprocal endorsement of the Parties' compatible standards will be augmented by their respective signatures. A MoU between GLOBALG.A.P. and the OIE in this regard will alleviate any need for tighter legal controls. Thereby, the internationally recognised public animal welfare standard-setter and stakeholder, the OIE, fortified through its linkage to the WTO, may accord external legitimacy to the private collective standards of animal welfare of the major private standard-setter GLOBALG.A.P.

The OIE will, in accordance with the terms of the MoU, be confirming the conformity of the private collective IFA Livestock Standard indirectly with the formal SPS Agreement requirements of a legitimate science base and associated principle of transparency and thereby deference to the international reference standards in animal welfare of the OIE, also mirroring the TBT Agreement's Code of Good Practice.⁹² The OIE and Member Countries will play no part in the formulation of the private collective IFA Livestock Standard, which will be adopted in accordance with the revised internal governance rules of the GLOBALG.A.P.'s private regulatory regime; there will be no collaboration in this regard. OIE endorsement of the terms of the MoU will unlikely constitute promotion or orchestration of GLOBALG.A.P.'s private collective Standard. To the contrary, the OIE will be commending the compatibility of the IFA Livestock Standard with crucial WTO rules and principles indirectly. OIE recognition of the private IFA Livestock Standard of GLOBALG.A.P. will not amount to 'sufficient involvement' to be attributable to the WTO Members in whose territories that Standard and scheme associates.⁹³ The major private collective IFA Livestock Standard so legitimised will operate outside the legal framework of the WTO, albeit closely aligned with the rules of the WTO Agreements - finely tuned in application to developing and developed countries.

Such alignment will serve to benefit the public interests of the EU and the OIE and the private interests of GLOBALG.A.P. The interests of the EU and the OIE will be met through: adherence to the core principles of transparency in standard-setting and adoption; a science-base; implementation of the OIE standards -

⁸⁹ SPS Agreement (n 86) Annex A 3(b), art 3(4).

⁹⁰ Scott (n 85) 3, 249.

⁹¹ (n 86) art 2(2).

⁹² (n 33) Annex 3.

⁹³ *Japan-Photo Film* (n 36) paras 10.52 and 10.56. Rex J Zedalis, 'When do the Activities of Private Parties Trigger WTO Rules?' (2007) 10(2) J Int Econ L 335, 345-6; Geraldo Vidigal, 'Attribution in the WTO: The Limits of 'Sufficient Government Involvement'' (2017) 6 SI J Int Trade Arb L 133.

raising awareness of animal welfare; and upholding the integrity of the OIE as the international reference standard. The scope will exist for GLOBAL.G.A.P., so committed in soft law governance, and legitimated through the OIE's link to the WTO, to project beyond competitively in a value market for enhanced animal welfare agricultural produce.

6.2.2.3 A Theoretical Understanding of the Public / Private Interface

A solid theoretical substantiation and understanding exists for this thesis' recommendation for strengthened coordinated interrelations between the major public and private standard-setters in animal welfare. Daugbjerg and Botterill suggest that:

competing values can 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.⁹⁴

The authors define a 'commensalistic relationship' as 'the relationship between [...] institutions which co-exist, while representing non-compatible values'.⁹⁵ In application to GLOBAL.G.A.P. on the one hand, and on the other hand to the OIE supported by the potential ISO Technical Specification, there will exist 'an element of competition but also of mutual benefit from the coexistence of the respective institutions'.⁹⁶ Daugbjerg and Botterill rely on the concept of 'the *firewall strategy*',⁹⁷ which:

is more of an avoidance strategy than a balancing act. Under this model, policy makers quarantine incompatible or conflicting values by addressing them separately, often in different institutions.⁹⁸

They maintain that:

firewalling can help [to] understand the existence of parallel institutions founded upon conflicting values within a policy field, how they can be sustained over time and how they avoid being entangled in institutional battles'.⁹⁹

⁹⁴ Carsten Daugbjerg and Linda C Botterill, 'Ethical food standards schemes and global trade: Paralleling the WTO?' (2012) 31 Policy Soc 307 (emphasis added).

⁹⁵ *ibid.*

⁹⁶ *ibid.*, 315.

⁹⁷ Citing David Thacher and Martin Rein, 'Managing value conflict in public policy' (2004) 17(4) Governance 457 (emphasis added).

⁹⁸ Daugbjerg and Botterill (n 94) 314-15.

⁹⁹ *ibid.*

The key to the circumvention of conflict will lie in the segregation of values and their respective upholders, through the mutually reinforcing practice of liaison and dialogue between the leading public and private standard bodies of the OIE (supported by the EU) and GLOBALG.A.P., manifest in a MoU. Daugbjerg and Botterill draw upon the hypothesis of David Thacher and Martin Rein:

By focusing attention of each institution on a *subset of the values that ultimately matter to public policy*, it is possible to simplify the task of practice and keep the pathologies of value conflict at bay. That arrangement helps to ensure that each value has a committed defender.¹⁰⁰

Daugbjerg and Botterill's theory of 'institutional commensalism' underscored with Thacher and Rein's 'firewall strategy' corroborate this thesis' comprehension that public / private interrelations in animal welfare, the terms of which are endorsed in a soft law MoU, will preserve the individual spheres in which each party operates. The OIE will be seeking to uphold its integrity as the international standard-setter of animal welfare in agriculture, its intergovernmental standards adopted in accordance with its democratic procedures. Such standards are based on science sustaining the consensus reached which is facilitative of trade for both developed and developing countries.

It will be necessary for there to be the flexibility for the private collective IFA Livestock Standard and Certification scheme to adopt higher animal welfare standards than the baseline norm, so long as these do not conflict with, i.e. meet at least, the science-based standards of the OIE. This will be subject to a mutual (i.e. in the interests of both public and private standard-setters) reinforcement of soft law principles of transparency, non-discrimination and compatibility with science-based standards, in effect the principles underpinning the WTO SPS and TBT Agreements, i.e. based upon a public floor.

GLOBALG.A.P.'s IFA Livestock Standard necessarily will commit to the 'subset' of core values¹⁰¹ and key principles crucial to stakeholders' interests, beyond which it will be able to pursue its market-orientated goals and aim higher in a value market for agri-food.

Each Party will remain located and operative within its own public / private sphere each with its own interests protected. Conflict will be avoided by 'deflecting' issues of concern and 'protecting' the 'values' of each respective public / private standard-setter and those in the public / private interest too.¹⁰²

¹⁰⁰ (n 97) (emphasis added).

¹⁰¹ Daugbjerg and Botterill (n 94) 314-15, citing Thacher and Rein (n 97).

¹⁰² Thacher and Rein *ibid*; Daugbjerg and Botterill (94) 314-15.

6.2.2.4 Relative Standards of Assurance

Building upon OIE validation in the MoU, GLOBALG.A.P. will be motivated further to justify its corporate mission statement and objectives¹⁰³ as the global industry Standard inclusive of animal welfare and to transcend the 'bottom-line' in contemplation of Vogel's 'race to the top'.¹⁰⁴ Naiki reveals that 'if a private scheme competes against a government-drive scheme, the competition may actually encourage the proliferation of the private effort'.¹⁰⁵ GLOBALG.A.P. will be validated to offer standards of animal welfare in its IFA Livestock Standard which reflect consumer preferences, which exceed the consensus science-based floor. Injecting a higher 'values' element into the Standard will thereby satisfy the credence consumer of agri-food. GLOBALG.A.P. should not be perceived as excluding competitor third-party certificated farm assurance schemes. To the contrary, justifiable and undistorted competition will be unleashed. The GLOBALG.A.P. IFA Livestock Standard will be one of a plethora of private standards which may then compete in credible and verifiable value-added animal welfare standards in a market for agri-food. Market demand will be empowering also of those exporting from developing countries to practise higher animal welfare, inclusive of the OIE baseline standards.

This will be in positive manifestation of the 'California effect' epitomised by David Vogel reasoning that, 'stricter standards represent a source of competitive advantage for domestic producers' who 'often compete with firms from other political jurisdictions by raising rather than lowering their standards'.¹⁰⁶ The 'California effect' depicts 'the ratcheting upward of regulatory standards in competing political jurisdictions'¹⁰⁷ and has three components. First, to the extent that stricter regulations prove a source of competitive advantage for domestic producers, the latter may be more likely to raise their standards. Second, 'rich' nations which have enacted stricter standards 'lure' foreign producers to export to and enjoy access in the 'value' market and to adjust upwards to do so. Third, the terms of agreements to reduce trade barriers can provide the stricter standard-setter with the opportunity to 'force' other nations to raise their standards.¹⁰⁸ 'Thus the disparity in national regulations is not only an ongoing source of trade tensions; it also represents a mechanism by which

¹⁰³ Cf the account of the GFSI in Havinga and Verbruggen, 'The Global Food Safety Initiative and State Actors

(n 11) 193,194.

¹⁰⁴ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard UP 1997).

¹⁰⁵ Naiki (2014) (n 2) 146.

¹⁰⁶ Vogel (n 104) 6. Cf Veerle Hayvert, *Transnational Environmental Regulation and Governance* (CUP 2019): 'The 'trading up' dynamic offers an appealing perspective on globalization as an engine for progressive [standards], yet empirical evidence of trading up is sparse', 67.

¹⁰⁷ Vogel (n 104), 259.

¹⁰⁸ *ibid*, 259, 260, 263.

national standards can be driven upward' according to Vogel.¹⁰⁹ This is because '[h]aving made these initial investments, [foreign producers] now have a stake in encouraging their home market[] to strengthen its standards as well, since their exports are already meeting those standards'.¹¹⁰

It is relevant, therefore, to deploy Vogel's hypothesis of regulatory competition in the particular context of the terms of the MoU agreed between the OIE and GLOBALG.A.P.. The commitments therein will be facilitative of private standards elevating higher in competition in value-added animal welfare standards. Not only will the MoU provide a baseline upon which competition will be unleashed between private standard-setters, it will be an instrument which triggers public standards to ratchet upwards also. The smaller producer in both developed and developing countries has a 'self-interest' in gaining access to the agri-food chain at the end of which exists credence consumer demand. The producers in their respective Member Countries having taken the first step, may lead to a greater consensus in the EU and the OIE each to deepen / broaden its animal welfare standards' base on a relative upward trend.¹¹¹ This impetus more than likely would lead to a broader comprehensive floor of public standards, whether these be additional OIE animal welfare standards, higher / broader EU legislative norms or national baseline standards of animal welfare, as a principled springboard upon which competitive private farm assurance schemes may then further project in a rising spiral of animal welfare standards. Vogel informs that '[p]aradoxically, the more authority nations concede over the making of [...] regulatory standards, the more likely these standards will be strengthened'.¹¹² Market forces and political agreement are further dependent on the degree of economic integration, which will be substantiated by the global transnational setting of the agri-food chain ('the increased integration of regional and global markets in a "borderless world"'¹¹³). The process is 'not automatic' and is 'dependent on the preferences of domestic constituencies'.¹¹⁴ The key stakeholder driving the higher animal welfare standards in that market in a 'borderless world' will be the credence consumer's demand for animal welfare value-added agri-produce.

6.3 Concluding Comments

The hybrid model of governance proposed will capture the external State legitimisation of higher private standards via the soft law deliberative mechanism of a MoU 'tuned' to the interests of the key stakeholder external to the private regulatory regime, the OIE. GLOBALG.A.P.'s IFA Livestock Standard duly

¹⁰⁹ *ibid*, 7.

¹¹⁰ *ibid* 6, 259.

¹¹¹ 'In short, Baptist-bootlegger coalitions can serve to advance the legitimate interest of both Baptists *and* bootleggers'. *ibid*, 260, 261.

¹¹² *ibid*, 264.

¹¹³ *ibid*, 270.

¹¹⁴ *ibid*, 269.

substantiated will 'provide a bridge between producers in developing countries and consumer preferences in high-income markets'¹¹⁵ presenting opportunities for such stakeholders by opening up an animal welfare value-added agri-food chain.¹¹⁶ GLOBALG.A.P.'s private collective IFA Livestock Standard possesses the potential to raise animal welfare in instances where countries intergovernmentally have not been able to agree because of different national animal welfare standards per country – per species,¹¹⁷ dependent on consumer acceptance and demand.

Private standards will play a valid role in the implementation of OIE animal welfare standards which are not monitored, while upholding the OIE as the international reference standard. In the projected model of public / private interface with OIE oversight, private standards can go higher as long as they are based upon / benchmarked to the OIE consensus science-based floor in a transparent process. The credence consumer will determine the demand for raised animal welfare agri-food, the costs of which will be subsumed across more trade for Member Countries to the EU and to the OIE. Producers can capitalise on this. Private standards (governed) will be the way to raise standards of animal welfare in the market for agri-produce, which is what EU consumers want. Such elevation will be in the interests of the EU seeking to ensure that higher level welfare produce is available for its citizens and for EU credence consumers' market demand. The OIE / GLOBALG.A.P. MoU, together with the EU continuing to be an active player in the public dimension of this hybrid public / private interface, will be the soft law governance vehicle with which to elevate higher standards of animal welfare in EU agriculture and the agri-food chain.

¹¹⁵ Miet Maertens and Johan Swinnen, 'Transformations in agricultural markets: Standards and their implications (Leuven Interdisciplinary Research Group on International Agreements and Development Working Paper No 11/2006) 12 https://ghum.kuleuven.be/ggs/publications/working_papers/archive/wp11.pdf.

¹¹⁶ Smith (n 12) para 7.5.

¹¹⁷ Linda Fulponi, 'Private voluntary standards in the food system: The perspective of major food retailers in OECD countries' (2006) 31(1) Food Pol 1, 11.

Recommendations in Conclusion

EU agricultural policy originally provided a legal basis reconciling the welfare of animals with the common organisation of the EU market in agricultural produce. Strengths lie in the EU animal welfare standards adopted, which provide a necessary and valuable floor of protection for those farm animals below which Member States may not go. However, emphasis should be placed on the integrative provision in Article 13 TFEU to inject a derivative full regard for animal welfare in future legislative provision for animals in EU agriculture, taking forward the progress made in the *Halal* case. The *proviso* of 'respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage' is perceived to weaken the effect of Article 13. Conversely, the *proviso* should be used constructively to substantiate the societal and ascending cultural momentum to enhance the welfare of animals in agriculture as sentient beings.

The EU in the exercise of its external relations continues to drive and endorse the intergovernmental science-based animal welfare standards of the OIE. OIE standards of welfare are consensus standards, the nature of which consensus is based upon science and premised on the pursuit of international trade in agricultural produce. There is a crucial role also for values in setting the standards of welfare for animals in the EU's regulatory strategy in agriculture and the agri-food chain.

It is necessary for the EU to do more internally to support farmers financially in the compulsory enhancement of animal welfare in the provision of agricultural produce under Pillar I of the EU Common Agricultural Policy (CAP). The cross-compliance statutory management system, deemed to be vital by the European Court of Auditors, requires a more centrally controlled and harmonised policy of conformity with statutory animal welfare requirements in the EU, inclusive of smaller farmers. An EU designated animal welfare quality scheme and associated logo under the Pillar II support mechanisms of the CAP are core to provide and to promote further improved animal welfare generally in good agricultural practices on-farm. Certain quality food promoted conflicts with high standards of animal welfare and derogates from such a target objective, when a positive reading of the *proviso* in Article 13 TFEU would justify the movement for change. The EU CAP should do more, recognising also that it cannot be expected

to do everything in a market in which private animal welfare standard-setters are also key stakeholders.

Animal welfare standards increasingly are specified in private standard schemes and, as a fundamental element of this thesis, a comparative analysis was undertaken between three private schemes *inter se* and *vis à vis* EU norms. The three diverse private schemes selected were: first, the leading Farm Animal Health and Welfare Policy and Select Farm Assurance Standards of the individual retailer Marks and Spencer renowned for its food quality brand; second, the foremost and historically high standards of animal welfare linked to the consumer of agri-produce by the label RSPCA Assured of the charity of the same name; and third, the global collective partnership of good agricultural practices of GLOBALG.A.P.'s IFA Livestock Certificate and Standard having the potential to become the industry norm. Research findings evidenced best practice and instances where standards fall short of delivering acceptable standards of welfare for food-producing animals.

Marks and Spencer has forged a credible leading position in the market for agri-produce sourced to high animal welfare standards. It is to be commended for its practices of benchmarking to, or aligning with, a target set of standards, procedures and principles, voluntarily, in order that an intended aim or goal is achieved or avidly worked towards with actual performance monitored over a fixed period of time. This process undertaken in association with authoritative partners with expertise in animal welfare is identified as a strength in elevating practices, procedures and standards of animal welfare in agriculture overtime for animals reared on the farm. There remains room for improvement in its standards for continental-sourced ingredient produce, which is acknowledged in a transparent process. Marks and Spencer is renowned for the pledges and commitments it has made continually to improve, to report on its performance and further to roll out outcome-based indicators of welfare for individual species.

The RSPCA Assured animal welfare standards, communicated to the consumer by way of the RSPCA Assured label in a business to consumer (B2C) scheme, are commendable for their breadth of application and for the depth of their specifications. Especially, the extent of the explanatory information they provide of the individual species' inherent behavioural needs is refreshing and essential in educating and informing the credence consumer of the extent of the animal welfare-enhanced agricultural produce. Fundamentally, this is identified by the

RSPCA Assured logo(s). Such information and a conveying logo should be more readily available across the spectrum of private standards.

GLOBALG.A.P.'s IFA Livestock Standard has a global reach and offers the scope to accommodate divergences in animal welfare within its IFA Livestock Certified produce sourced and supplied in the agri-food chain. Some of the serious welfare problems experienced by sows in confinement and calves' diets, for example, may continue unabated under IFA Livestock Certification. In order to accrue legitimacy from the credence consumer for the animal welfare credentials of its IFA Livestock Standard GLOBALG.A.P. should revise its internal constitutional procedures and raise the standards of welfare upon which accredited certification ensues. GLOBALG.A.P.'s Standard has the potential to facilitate a 'race-to-the-top' on the part of its producers, retailers / food providers who work together with GLOBALG.A.P. to enhance the animal welfare component of its IFA Livestock Standard. Positive prospects will accrue to GLOBALG.A.P.'s Certified agri-produce in the adoption of a higher threshold of animal welfare in its IFA Livestock Standard and Add-on Modules.

It is crucial to empower consumers through the availability and transparent communication of enhanced standards of welfare practised on the farm. Labelling on the basis of a private standard is essential to this end. The informed credence consumer will become the discerning consumer of value-added agri-food with the potential to drive the standards of animal welfare on the farm. Positive prospects will be presented to those private standard-setters capitalising on the credence factor of value-added animal welfare agri-food. Towards this end it is crucial that primarily business-to-business (B2B) schemes move along a scale to bridge the divide in the communication of animal welfare to consumers in a continuous process. Marks and Spencer's Select Farm Standard and in-store practices for its quality food brand provide a best practice example in point. This is fortified through its synthesis with the high species-specific welfare standards of the charitable organisation RSPCA Assured perpetuating the elevated standards of welfare for food-producing animals on-farm. Marks and Spencer exploits the RSPCA Assured logo on its quality milk in-store and the RSPCA Assured rearing methods protocol for pork and chicken produce, both of which link the produce of animals having lived a life conducive to their needs to the credence consumer.

Competition in the interests of key stakeholders in a value chain could be facilitated through the deployment of separate individual corporate B2C animal

welfare labels linking each bespoke B2B standard and certification scheme to the ethical consumer. This should be complemented with the provision of transparent and verifiable information on the standards of welfare practised on the farm and how these go above minimum EU legislative standards.

This thesis also advocates a hybrid soft law model of governance to bridge the public / private divide, which will unleash the prospects presented by credible and verifiable private animal welfare standardisation in the interests of key stakeholders in the agri-food chain and curtail the potential for commercial capture. Private standards increasingly are 'relied upon' or recognised in *lieu* of raising the public floor. Indications of hybridity exist and are emerging in the EU. This thesis has taken a different direction to that of seeking to place the governance of private standards of animal welfare within an EU hybrid meta-regulatory governance model. A new soft law hybrid model of governance is proposed in which private standardisation is harnessed for its positive propensities to serve the collective interest of stakeholders in the agri-food chain. A coordinated hybrid relationship between the major public and private standard-setters of animal welfare is recommended, one which is based on reciprocity of interests and embedded in a soft law governance tool of a memorandum of understanding (MoU) between GLOBALG.A.P. and the OIE.

This hybrid model of animal welfare governance in agriculture is characterised by the relative interface between the major private and public standard-setters, namely GLOBALG.A.P. and the OIE respectively, in the legitimate provision of higher animal welfare standards on-farm based on science and functional in a value market. Animal welfare has become integrated into the OIE's international role as the standard-setter in animal health which is firmly based on science, health being a key component of welfare. It is this evolution which has proven significant to the focal direction of this thesis. The OIE enjoys recognition under WTO rules in relation to the setting of sanitary and phytosanitary standards for animal health in accordance with its direct role in the SPS Agreement, the implications of which *vis à vis* private standards of animal welfare have been developed in order to underscore a new hybrid governance regime in the domain of animal welfare in agriculture. It is the OIE in which the public 'oversight' of private standards of animal welfare is situated, noting the EU's driving role and participatory influence in the animal welfare standard-setting of the OIE.

Such a soft law model of interface between the major animal welfare standard-setters draws upon crucial elements of both the SPS and TBT Agreements indirectly in utilising analogous principles with which to abridge the public and private dichotomies of animal welfare standardisation in the agri-food chain. These become embedded in the soft law mechanism of a MoU undertaken between the OIE and GLOBALG.A.P. in which both Parties endorse mutual interests, reciprocal pledges and crucial public interest principles. A working model of reinforced public / private interrelations operative outside the international trade order will preserve the individual spheres in which each Party operates.

Since the SPS Agreement in its 'turn to science' is less committed to values than society's credence consumer, it is essential that both values and science legitimise this hybrid model of governance in the domain of animal welfare in agriculture and the agri-food chain. It is the credence consumer who will drive the demand for value-added animal welfare in the agri-food chain. The consensus standards of the OIE provide a floor below which standards of animal welfare are not acceptable. There would be reason for higher private animal welfare standards to prosper for the benefit of the consumer, the producer, the retailer, the State and for animal welfare. The MoU advocated between GLOBALG.A.P. and the OIE with its endorsed baseline will serve to spark a principled 'race to the top' in relative public and private standards of animal welfare in EU agriculture and the agri-food chain.

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