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**THE COMMON AGRICULTURAL
POLICY:
AN ADEQUATE MEANS OF
SUPPORTING BIODIVERSITY AND
ECOSYSTEM SERVICES WITHIN THE
EUROPEAN UNION?**

Annie Martyn¹

Abstract

This research presents a critical analysis of the 2013 Common Agricultural Policy (CAP) reforms and their ability to support the European Union in reaching its target of halting biodiversity loss by 2020 and to preserve and restore ecosystem services. In light of the link between agriculture and its negative effects on the environment, the role of the CAP will be examined. In particular, this paper will focus on the tension between the ambition set out in the Policy to provide sufficient economic support to farmers and the EU-wide focus to prevent further environmental damage caused by agriculture, and whether, in fact, the reformed CAP can practically address such issues.

Keywords: Common Agricultural Policy, biodiversity, ecosystem services

Introduction

The Common Agricultural Policy has been a major influence upon European agriculture for over 50 years and can be located back to the creation of the European Economic Community (EEC) in 1957. It originates from the economic and political objectives of building a European community after the devastating consequences of World War Two. A common policy for agriculture was seen to be beneficial within the EEC: the six original Member States had large agricultural industries which faced financial problems; a common market would be very difficult to achieve without a specific EEC policy; and, other policies would be somewhat undermined without a

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common policy of agriculture. Therefore, common measures were introduced to ensure equal protection of producers between Member States. Article 39(1) Treaty on the Functioning of the European Union (TFEU, ex Article 33 Treaty of Rome) sets out the objectives of the policy:

- a) To increase agricultural productivity by promoting technical progress and ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour
- b) 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

These objectives are a fair representation of the factors which had motivated Member States' own national policies before the CAP's formation. They promote economic growth within both Member States and the European Union (EU) as a whole, whilst still protecting farm incomes and ensuring reasonably priced food of adequate supply.²

Regardless, the true significance of the objectives is their role in legitimising actions. In order for policy to be enacted the EU Commission must have a legal basis for its proposals: Article 39(1) provides that. Although the CAP has undergone many reforms and now incorporates a wider range of policy goals, such as environmental protection, the re-endorsement of these goals into more recent official documents highlights how the original objectives still form the basis of the new policy.³ However, this is problematic. Whilst the CAP indeed provides an importance source of income for farmers across the EU and thus fulfils its economic and social aims, it has been made clear that agriculture can negatively impact upon the environment, particularly in terms of biodiversity loss.

Environmental protection mechanisms have been increasingly woven into both the international and European legal systems. The 10th Conference of the Parties to the Convention on Biological Diversity in October 2010 (the Convention) agreed to take 'effective and urgent action to halt the loss of biodiversity in order to ensure that by

² McMahon, J.A. *Law of the Common Agricultural Policy* (1999, Harlow: Longman).

³ See European Commission, *Agenda 2000 Volume 1: For a Stronger and Wider Union*, COM (97) 2000 Final, 26

2020 ecosystems are resilient and continue to provide essential services.’⁴ In doing so, the Conference recognised that biological diversity is vital for providing ecosystem services which are essential for supporting fundamental human needs such as ‘food security, human health, ... clean air and water’, as well as important social and economic factors.⁵ More importantly, the Conference highlighted the parties’ failure to significantly reduce biodiversity loss by 2010: of itself a concern, considering that humans have impacted biodiversity so severely that it has been warned that we are in danger of precipitating the planet’s sixth mass extinction.⁶

As a party to the Convention on Biological Diversity, the EU is committed to halting biodiversity loss and preventing degradation of ecosystem services by 2020; and to restoring ecosystem services wherever possible.⁷ Since the EU has failed to reduce biodiversity loss by 2010, the problem is no less serious in Europe than it is internationally. Consequently, the 2013 CAP reforms, outlined by the Commission,⁸ demonstrate methods designed to place environmental obligations upon farmers in exchange for their annual payments. However, these reforms are not without criticism, particularly in terms of how well they will contribute towards the EU’s goal of halting biodiversity loss by 2020 (EU Biodiversity Goal).⁹

This paper will explore the extent to which the 2013 CAP reforms will be likely to provide an adequate means of supporting biodiversity and ecosystem services within the EU. By exploring the impact agriculture has had upon biodiversity and ecosystem services, a suitable backdrop is provided for examining whether most recent reforms are likely to achieve the EU Biodiversity Goal.

⁴ Decision X/2, *The Strategic Plan for Biodiversity 2011-2020*, Article 12, Available at <http://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf> [Accessed 8 April 2014]

⁵ *Ibid*, Article 3.

⁶ For further information see Barnosky, A., et al ‘Has the Earth’s Sixth Mass Extinction Already Arrived?’ [2011] *Nature*, p.11.

⁷ European Union Commission Communication, ‘*Our Life Insurance, Our Natural Capital: An EU Biodiversity Strategy to 2020*’ COM(2011) 244 final, p.2.

⁸ European Commission Communication, *The CAP towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future*, (2010) COM(2010) 672 final.

⁹ Biodiversity Plan.

1 A Link Between Agriculture and the Environment?

Agricultural Impact on Biodiversity

The importance of species and habitats is seen in many ways. Not only can protected areas be valued as ‘living laboratories’,¹⁰ and thereby have special scientific interest, nature can have important economic and social benefits: it can provide food, protection against flooding, or pharmaceutical products.¹¹ Biodiversity is defined in Article 2 of the Biodiversity Convention:¹²

‘biological diversity’ means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

Since agriculture accounts for around 47% of land use in the EU, and even exceeds 70% in some Member States¹³ it has a significant impact upon the rural environment.¹⁴ Studies have shown that agricultural landscapes have the potential to offer a range of ecological conditions suitable for biodiversity; open habitats such as heath, scrub and grassland are all beneficial to plant species and animal species.¹⁵ However, the CAP has been historically driven by achieving economic gain and, along with technological advancements, farm intensification has resulted in much environmental damage. This has been clearly acknowledged by the European Environment Agency (EEA):¹⁶

agriculture uses and depends on natural resources... This exerts pressures on the natural environment in the form of soil degradation, water depletion and pollution, air emissions, and damage to ecosystems... Minimising the environmental pressures from agriculture while maximising its positive external outputs is a key challenge for societies throughout Europe.

¹⁰ Wildlife Conservation Special Committee (the ‘Huxley Committee’), *Conservation of Nature in England and Wales*, (1947), Cmd.7122.

¹¹ For more information, see Bell, S., et al ‘*Environmental Law*’ (2013, OUP, 8th edn.), pp. 718-719.

¹² United Nations, *Convention on Biological Diversity*, (1992), Article 2 Use of Terms.

¹³ European Union Commission, *Rural Development in the European Union: Statistical and Economic Information Report* (2011), at p.138. Agriculture exceeds 70% in Member States such as in the UK and Ireland.

¹⁴ House of Lords Select Committee on the European Communities, *20th Report: Agriculture and the Environment* (1984), Session 1983-1984, (London: HMSO) para.127.

¹⁵ See Bignal E.M., and McCracken D.I., ‘Low-intensity farming systems in the conservation of the countryside’ (1996) 33 *Journal of Applied Ecology* 413–424; Robinson R.A., Wilson J.D., and Crick H.Q.P., ‘The importance of arable habitat for farmland birds in grassland landscapes’ (2001) 38 *Journal of Applied Ecology* 1386-1386,

¹⁶ European Environment Agency, ‘*Europe’s Environment: The Fourth Assessment*’ (2007) at pp.295-296.

Even before the UK joined the, then, EEC it was noted that agricultural development and the expansion of urban areas had a significant impact upon the rural environment.¹⁷ It must still be said that the CAP in fact escalated this problem. For example, in 1998, the World Wildlife Fund (WWF) predicted that further species of wildlife would become extinct within the next 20 years as a direct result of agricultural practices, influenced by the CAP.¹⁸

It is not just the diversity of wildlife which has been affected. The number of farm animal breeds has been in decline for over a century,¹⁹ and throughout Europe, local breeds have either been replaced with more productive breeds or improved with the process of cross-breeding. Crops have also been affected by biodiversity loss, as it is estimated that the agricultural industry relies upon just nine species for 75% of all crops.²⁰ Crop failure is therefore at a high risk should these species succumb to disease. Furthermore, sheep farming in particular has caused a wide range of environmental problems. Grazing of the trees and shrubs uphill prevents rainwater from being absorbed causing floods downstream.²¹ Careless farming has been blamed for causing flooding, which has most recently been an issue with the 2014 UK floods.²² This indicates the negative impact agriculture has had on biodiversity, ecosystem services and the environment as a whole.

Biodiversity within the EU

The CAP has the ability to play a vital role in helping the EU meet its biodiversity goals. The EU has adopted a twin-track strategy. On one hand, it provides special legislative protection for sites of particular nature significance. On the other, the EU provides broader measures, in the form of agri-environment schemes, to protect the rural environment as a whole.²³ As such, the CAP is central to both aspects of this strategy.

¹⁷ Nature Conservancy Council, *Nature Conservation in Great Britain* (1984) pp. 49-59.

¹⁸ WWF, *Doomsday for Nature*, WWF Press Release, 14 December 1998.

¹⁹ World Conservation Monitoring Centre, *Global Diversity: the Status of the Earth's Living Resources* (1992) at 401. Since 1892, 26 breeds of farmland animal have become extinct in the UK.

²⁰ Emerson, C., and Jenkins, R., *Thought for Food* (1995) at p.2.

²¹ See Monboit, G., *Sheepwrecked*, (2013)

<http://www.monbiot.com/2013/05/30/sheepwrecked/> [Last Accessed 8 April 2014]

²² See Palmer, R.C., and Smith, R.P., 'Soil structural degradation in SW England and its impact on surface-water runoff generation' (2013) 29(4) *Soil Use and Management* 567-575, and 'Careless Farming Adding to Floods', BBC News, 7 March 2014

<http://www.bbc.co.uk/news/science-environment-26466653>

²³ *Biodiversity Strategy to 2020*, p.5.

The two key Directives targeted towards reducing biodiversity loss and enhancing nature conservation are:

Directive 2009/147/EC on the Conservation of Wild Birds (the Birds Directive, which dates back to 1979)²⁴

Directive 92/42/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the Habitats Directive).²⁵

The Wild Birds Directive

The Birds Directive 1979 is significant in that it was the first piece of nature conservation legislation adopted by the European Community. It deals primarily with the protection of wild birds, and establishes rules concerning their unlawful killing or capture. Of greater interest in this context is that it regulates their habitats. It places an obligation upon Member States to maintain the population of wild birds

at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.²⁶

Furthermore, the Birds Directive requires Member States to protect the habitats of particularly vulnerable and migrating birds by implementing special conservation measures.²⁷ Member States must specify the most suitable areas for such species as 'special protection areas', (SPAs) and must 'take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds'.²⁸

The Court of Justice of the European Union (CJEU) has adopted a very strict approach towards Member States and their duty to designate SPAs. For example, in the *Santoña Marshes* case, the Court held that if an area fulfils the objective ornithological criteria set by the Directive, the Member State is under a duty to designate such area as an SPA.²⁹ In the *Lappel Bank* case, the Court held that the duty to designate sites was unaffected by economic considerations.³⁰ In addition, the Court has held that Member States are in breach of the Directive by not designating a sufficient number of sites as SPAs. In *Commission v Netherlands*, the Netherlands failed to designate 47 sites out of 70, which had been suggested by the 1989

²⁴ [2009] OJ L20/7

²⁵ [1992] OJ L206/7.

²⁶ Wild Birds Directive [2009] OJ L20/7, Article 2.

²⁷ *Ibid*, Article 4 – as to the extent of this obligation see *Royal Society for the Protection of Birds v Secretary of State for Environment Food and Rural Affairs* [2014] EWHC (Admin) 1645.

²⁸ *Ibid*, Article 4(1) and 4(4), respectively.

²⁹ Case C-355/90 *Commission v Spain* [1993] ECR I-4221.

³⁰ Case C-44/95 *R v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1997] QB 206.

Important Bird Areas study by Birdlife Europe, and was therefore in breach of its duty.³¹ The strict approach taken by the CJEU has helped make the Birds Directive more effective.

The Habitats Directive

The Habitats Directive was implemented by the European Community to widen the scope of nature conservation law. This Directive is more prescriptive in its approach compared with the Birds Directive. Under the Habitats Directive, Member States must inform the Commission of candidate sites of Special Areas of Conservation (SAC), according to criteria in Annex III. Next, the Commission is to draw up a draft list of 'Sites of Community Importance' (SCIs), again taking into account the criteria laid down in Annex III. Once the final list is produced, following independent scientific advice, Member States are under an obligation to designate any site on the list as a SAC.

Like the Birds Directive, the Habitats Directive prohibits the capture or killing of specific animals identified within the Directive.³² It also places a duty upon Member States to protect wild animals and plants and their habitats. It achieves this in a different way to the Wild Birds Directive creating the general provision that 'measures taken pursuant to [the] Directive shall take account of economic, social and cultural requirements and regional and local characteristics'.³³ Thus, it appeared that, in designating candidate SACs, Member States could take economic factors into consideration. However, this idea was the subject of a referral from the English High Court to the CJEU in *First Corporate Shipping*, where it was held that Member States could *not* take economic considerations into account when submitting candidate SACs and that the selection criteria set out in the Directive were exclusively ecological.³⁴ Furthermore, the Court held that a Member State could be in breach of its obligations if it submits a list of candidate SACs which is manifestly inadequate,³⁵ thereby mirroring its strict approach to SAPs under the Wild Birds Directive.

Natura 2000

A main feature of the Habitats Directive is the requirement for the creation of the ecological network known as *Natura 2000*, as a contribution towards preserving biodiversity. This network is made up of the SACs, and incorporates SPAs classified

³¹ Case C-3/96 *Commission v Netherlands* [1999] *Environmental Law Review* 147

³² Council Directive 92/42/EEC (Habitats Directive) [1992] OJ L206/7 Article 12.

³³ *Ibid.*, Article 2(3).

³⁴ Case C-371/98 *R v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd* [2001] ECR I-9235.

³⁵ Case C-71/99 *Commission v Germany* [2001] ECR I-5811.

under the Birds Directive. Therefore, *Natura 2000* is made up of sites designated under two different Directives, each with different criteria and methods of selection.

In theory, the Birds and Habitats Directives provide a comprehensive system for safeguarding vulnerable wildlife within Europe. However, most Member States have failed to implement these Directives fully, so progress towards the EU Biodiversity Goal has been minimal. For example, only 17% of the EU's habitats and species and 11% of EU protected ecosystems were in a favourable state by 2010.³⁶ Given the 2020 target,³⁷ it is recognised that the achievement of this objective will not be possible through the implementation of these Directives alone. The target requires significant integration of ecosystem conservation measures and biodiversity into key policy areas, such as agriculture.

2 Biodiversity, *Natura 2000* and Ecosystem Services: The Role of the CAP

Progress towards Natura 2000

Undoubtedly the CAP has an important role to play in reversing, where possible, the damage caused by farming. The proposals for the reform of the 2008 *CAP Health Check* acknowledged that the CAP must do more to protect biodiversity,³⁸ also noted by the Commission in its Biodiversity Action Plan for Agriculture.³⁹ Biodiversity priorities for agriculture are outlined as:⁴⁰

...the promotion and support of environmentally friendly farming practices and systems which benefit biodiversity [and] sustainable farming activities in biodiversity-rich areas.

This Action Plan focuses primarily on environmental objectives and is indicative of the EU's developing integration of environmental protection into agricultural policy. Additionally, agriculture can support the operation of the Birds and Habitats Directives. This is highlighted by the fact that agricultural habitats make up around

³⁶ European Environment Agency, *EU 2010 Biodiversity Baseline*, No 12/2010, p.12, <http://www.eea.europa.eu/publications/eu-2010-biodiversity-baseline/> as referred to above in *Biodiversity Strategy to 2020* p.2.4.

³⁷ *Biodiversity Strategy to 2020*.

³⁸ European Commission, *Preparing for the 'Health Check' of the CAP Reform*, COM (2007) 722, at 9.

³⁹ European Commission, *Biodiversity Action Plan for Agriculture*, COM(2001) 162 final.

⁴⁰ European Commission, *Biodiversity Plan for Agriculture: Implementation Report*, (2004), Brussels, at 4.

35% of the area proposed as potential SCIs by the EU-15.⁴¹ It has been predicted that out of the 198 habitat types that are protected under the Habitats Directive, 65 are threatened by agricultural intensification, and another 32 are jeopardised by the abandonment of extensive grazing.⁴²

Cross-Compliance measures

As outlined above, Member States have an obligation to take appropriate action to avoid the deterioration of natural habitats and habitats of protected species. Cross-compliance measures, included within the CAP since 2003, are one method in which the EU has been able to assist Member States in meeting this obligation. For example, in order for farmers to receive their direct payments, Member States had been required to⁴³

take environmental measures they consider to be appropriate in view of the situation of the agricultural land used or the production concerned and which reflect the potential environmental effects.

In response to this, eight Member States from the EU-15 introduced the cross-compliance scheme, requiring compliance with environmental imperatives before receiving direct payments.⁴⁴ The Commission has observed that only two Member States, Finland and Ireland, have implemented cross-compliance methods specifically to protect biodiversity.⁴⁵ On the other hand, (under Rural Development schemes) the old 'less favoured areas scheme' allowed farmers to apply 'usual good farming practices compatible with the need to safeguard the environment and maintain the countryside',⁴⁶ while the 'environmentally sensitive areas scheme' required farmers to go beyond 'usual good farming practice'.⁴⁷ In the absence of any EU law framework, Member States have adopted a variety of approaches in defining 'good farming practice'. A criticism might be that Member States paid little attention to practices that have a direct positive impact upon nature conservation and biodiversity.⁴⁸ Because these approaches contain limited measurable standards, it is clear to see why their enforcement has proved difficult.

⁴¹ European Environment Agency, *Progress Towards Halting the Loss of Biodiversity by 2010*, (2006) Copenhagen, at 42. The term EU-15 refers to the 15 Member States of the EU as of 31 December 2003

⁴² *Ibid.*

⁴³ Council Regulation 1259/99, [1999] OJ 160/113, Article 3.

⁴⁴ *Biodiversity Plan for Agriculture*, at 20.

⁴⁵ *Ibid.*

⁴⁶ Council Regulation 1257/99 [1999] OJ L160/80, Article 14(2).

⁴⁷ Regulation 1257/99, Article 23(2).

⁴⁸ *Biodiversity Plan for Agriculture*, at 20.

Today farmers must comply with both the Birds and Habitats Directives in order to receive their Single Farm Payments. Thus, an incentive is created for farmers to protect *Natura 2000* sites; failure to comply results in reduced payments, and, sometimes removal of payments altogether. This cross-compliance method was further developed by Regulation 1698/2005, whereby farmers receiving payments under the EU's Environmentally Sensitive Areas scheme or the Less Favoured Areas scheme were specifically required to comply with the Birds and Habitats Directives.⁴⁹ These measures are only effective upon implementation by Member States, and as Member States are traditionally reluctant to support cross-compliance methods, the European Commission must ensure they remain positive and take effective action. Cross-compliance has evolved in the 2013 reforms and its potential effectiveness will be examined later.

Funding Natura 2000

The CAP has the responsibility of helping Member States meet their obligations of maintaining protected habitats and species at favourable conservation levels.⁵⁰ More specifically, the CAP can assist Member States to achieve the requirement of implementing 'the necessary conservation measures [that] correspond to the ecological requirements' of protected habitats and species.⁵¹ The main issue regarding this obligation is cost. It has been estimated by the Commission that the cost of managing the entire *Natura 2000* network will be about €5.8 billion per year.⁵² Therefore, it is not surprising that these management costs have dissuaded Member States in notifying potential *Natura 2000* sites.⁵³

In response, the Habitats Directive permits the EU to provide funding for conservation measures for *Natura 2000* sites which contain priority habitat types or species.⁵⁴ The Commission has therefore recommended that funding for *Natura 2000* should be provided for through existing policies, and in particular through the CAP.⁵⁵ In providing financial incentives for farmers the CAP can, in theory, promote environmental protection whilst still preserving the income of farmers.

⁴⁹ Council Regulation 1698/2005 [2005] OJ L277/1.

⁵⁰ Habitats Directive, Article 3(1).

⁵¹ Habitats Directive, Article 6(1).

⁵² Institute for European Environmental Policy, *Costs and socio-economic benefits associated with the Natura 2000 network*, (2010), at p.1, http://ec.europa.eu/environment/nature/natura2000/financing/docs/natura2000_costs_benefits.pdf

⁵³ Beaufoy, G., *Natura 2000: Opportunities and Obstacles*, (1999) World Wildlife Fund, at 15.

⁵⁴ Habitats Directive, Article 8.

⁵⁵ *Biodiversity Action Plan for Agriculture* at 8.

The EU's less favoured areas scheme was extended by Regulation 1257/99 to provide funding for land management in areas where farmers were restricted on the agricultural use of their land by EU environmental protection legislation.⁵⁶ Under this Regulation, Member States had discretion whether to award compensation to farmers who suffered a loss as a result of managing *Natura 2000* sites. This provision has now become a stand-alone *Natura 2000* payment scheme under Regulation 1698/2005 and the CAP will have a fundamental role in this regard.⁵⁷ In practice, only three Member States – Germany, Italy and Spain – had introduced *Natura 2000* payments in 2001, likely due to delays regarding the identification and designation of the sites themselves.⁵⁸ This perhaps is suggestive of Member States' unwillingness to support the *Natura 2000* network within the CAP, therefore undermining its effectiveness.

A solution might be to make *Natura 2000* payments a compulsory provision for Member States.⁵⁹ It was also put forward that the EU should reconsider the way in which payments are made. Under Regulation 1698/2005, payments are made to compensate 'for costs incurred and income forgone' as a result of designating *Natura 2000* sites on agricultural land. It has been submitted that farmers should be paid for their contribution towards environmental services by managing such sites, thus providing a more positive incentive.⁶⁰ In light of these arguments, and the 2013 reform Regulations, it must be determined whether, in fact, the CAP can in future make a more positive contribution towards nature conservation and halting biodiversity loss. But first, the role of the CAP must be considered in terms of its contribution towards ecosystem services.

Ecosystem services: Adapting to an ecosystem based approach

Ecosystem services are the benefits which humankind acquire through the use of ecosystems. The Millennium Ecosystem Assessment (the MEA report) was launched in 2000 under the support of the United Nations to

assess the consequences of ecosystem change for human well-being and to establish the scientific basis for actions

⁵⁶ Regulation 1257/99.

⁵⁷ Regulation 1698/2005, Articles 36(a)(iii) and 38.

⁵⁸ *Biodiversity Action Plan for Agriculture* at 20.

⁵⁹ Jack, B., 'The European Community and biodiversity loss: Missing the target' (2006) 15 *Review of European Community and International Environmental Law* 304, at 314.

⁶⁰ Regulation 1698/2005, Articles 38(1), as referred to in Nature Conservancy Council, 'Nature Conservation in Great Britain' (1984).

needed to enhance the conservation and sustainable use of ecosystems and their contributions to human well-being.⁶¹

The report emphasises the importance of the ecosystem services concept.⁶² Four categories of ecosystem services were identified in the report: provisioning services, regulating services, cultural services, and supporting services.⁶³ Of these, the provisioning services are essentially the products humans obtain from ecosystems, such as food, water, and raw materials such as timber and fibre. Regulating services are those ecosystems that affect the maintenance of the environment, such as climate regulation, protection of water and air quality, pollination of crops, and the prevention of soil erosion or flooding. Cultural services provide recreational and aesthetic benefits, whilst supporting services emphasise the important role ecosystems play in providing the fundamental tools, such as soil formation and photosynthesis, which are necessary for other services to operate.⁶⁴

The MEA report highlighted that, in the last 50 years humans had altered ecosystem services more drastically than in any other comparable time period in history.⁶⁵ It established that, unless addressed, the benefit of ecosystem for future generations would be diminished.⁶⁶ The degradation of ecosystem services is clear in the EU: the majority of services across all categories have either declined or stayed the same between the periods 1950 – present.⁶⁷

The CAP's role in Ecosystem Services

Supporting ecosystem services is vital to protect the benefits humans receive from them. Agriculture, as the principal producer of food, has an important role to play and the CAP must continue to support this industry to achieve and retain sustainability and biological diversity in order to effectively support ecosystem services. Adapting to an ecosystem-based approach, whereby its environmental principles are based upon supporting the ecosystem as a whole, will be the key way to achieve this goal.

Originally, the CAP promoted just two ecosystem services, which were the production of food and raw materials. Therefore, within the EU, the manufacture of

⁶¹ Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis*, (2005), preface.

⁶² Ibid.

⁶³ Ibid, p.7.

⁶⁴ Ibid.

⁶⁵ Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis*, (2005), p.2.

⁶⁶ Ibid, p.5.

⁶⁷ European Environment Agency, *Ecosystem services in the EU*, (2010), <http://www.eea.europa.eu/themes/biodiversity/where-we-stand/ecosystem-services-in-the-eu> [

these two products has been the exception to the general trend of ecosystem service decline.⁶⁸ However, as noted by the MEA report, too much concentration on one ecosystem service usually results in the degradation of others.⁶⁹

Whilst the European Environment Agency (EEA) has reported that, over the past 20 years, the CAP reforms have done little towards benefitting biodiversity,⁷⁰ the Convention, along with the EU, has become the driver for the prioritising of tackling the relationship between agriculture and biodiversity under the CAP.⁷¹ The Convention set the goal that agricultural land should be managed in a sustainable way in order to conserve biodiversity.⁷² Following this principle, the EU has, under its biodiversity strategy, created its own target:⁷³

by 2020, maximise areas under agriculture across grasslands, arable land and permanent crops that are covered by biodiversity-related measures under the CAP so as to ensure the conservation of biodiversity and to bring about a measureable improvement in the conservation status of species and habitats that depend on or are affected by agriculture and in the provision of ecosystem services as compared to the EU2010 baseline, thus contributing to enhanced sustainable management.

Consequently, the 2013 CAP reforms, which are to be in place from January 2015, present further opportunities by which measures can be implemented to clarify the biodiversity benefits, thereby making a significant contribution towards aiding the EU Biodiversity Goal and sustaining ecosystem services.

3 The CAP Reforms – Pillar One: Cross-Compliance and Direct Payments

Whilst previous CAP reforms have introduced incremental improvements in regards to environmental protection, the effective integration of such measures remains intangible. As emphasised by the EEA, important challenges remain in terms of the protection of biodiversity and nature conservation.⁷⁴ This reflects the reality that environmental concerns have had to compete with other pressing demands during

⁶⁸ MEA p.7.

⁶⁹ *Ibid.* p.6.

⁷⁰ EEA, *10 Messages for 2010: Agricultural Ecosystems* (2010), p.3.

⁷¹ *10 Messages for 2010* p.10.

⁷² Biodiversity Plan, Article 13, target 7.

⁷³ *Biodiversity Strategy to 2020*, p.6.

⁷⁴ See European Environment Agency, *Agriculture and Environment in the EU-15: the IRENA indicator report*, (2006).

each CAP reform, such as the EU budget and preparations for EU enlargement.⁷⁵ As noted above, environmental protection has greater importance in EU policy and legislation, and the EU has definite environmental targets including the 2020 biodiversity suite. Against this background, the paper will now examine the role that the most recent CAP reforms will have in successfully and effectively implementing environmental goals. In particular, this section of the paper will focus on the 'greening' of direct payments, the cross-compliance regime and the effectiveness of rural development policy.

Direct Payments

As a result of previous reforms, the CAP production policy has altered its attention from financially supporting the production of food to providing financial support to farmers. This has been shown most visibly through the introduction of EU-funded direct payments. Currently, and up until 2015, farmers in the EU-15, plus Slovenia and Malta, receive Single Farm Payments, whilst other Member States receive Single Area Payments.⁷⁶ Whilst direct payments are still a feature of the new CAP, they have now been amalgamated into one 'basic payment', of which payments are based solely on the amount of eligible land farmed, rather than the more economically focussed payments for production.⁷⁷ In place of the Single Payment Entitlements, the basic payment per hectare will account for 70% of the total payment, with the remaining 30% being comprised of a 'greening payment'.

The EU's biodiversity strategy has highlighted that the EU's ability to achieve its objectives will depend upon the availability and efficient use of its financial resources.⁷⁸ The CAP is an expensive policy. In 2012, the SFPs and SAPs cost €37billion, accounting for over 60% of the EU's agricultural expenditure, and over a quarter of its total budget.⁷⁹ Taking this into consideration, it is surprising that the objectives are left unclear. Direct payments were introduced to compensate farmers suffering from price reductions, linking more closely the commodity prices in the EU

⁷⁵ Jack, B., 'The Reform of the Common Agricultural Policy: Meeting the Environmental Challenge', (2013), *UCD Working Papers in Law, Criminology & Socio-Legal Studies*, Research Paper No.04/2013, p.1.

⁷⁶ Council Regulation 1310/2013 [2013] OJ L347/865.

⁷⁷ See, European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy*, COM(2011) 625 final/2, Arts 18 to 22, and Council Regulation 1307/2013 [2013] OJ L347/608.

⁷⁸ *Biodiversity Strategy to 2020*, p.9.

⁷⁹ European Commission, *Agriculture and the European Union: Statistical and Economic Information*, (2012), table 3.4.1.

to the lower prices in the world markets.⁸⁰ However, as global commodity prices have increased, the Commission now describes the payments as being income supports.⁸¹ Indeed, it has been proven that direct payments do provide necessary income for farmers, particularly in Denmark, Slovenia, Sweden and the UK.⁸² For example, in the UK, around 15% of farms receive a negative income which would inevitably decrease to at least 60% if direct payments were abolished; it is evident that these payments are crucial in supporting the economic viability of farmers throughout the EU.⁸³

It has been identified that direct payments are blunt instruments and do not accurately reflect individual circumstances. The highest payments are usually made to large, intensive farms, whilst smaller and poorer farm households receive the least amount of support.⁸⁴ In an attempt to resolve this issue, the CAP reforms have introduced capping of the basic payment. The payment is likely to be capped to a maximum of €300,000, with progressive reductions of 20%, 40% and 70% being applied to farmers who receive more than €150,000, €200,000, and €250,000 respectively.⁸⁵ Furthermore, payments will only be made to 'Active Farmers' ensuring that only those deserving the payment shall receive it by excluding businesses such as waterworks, airports, real estate services and permanent sport and recreational grounds.⁸⁶ Whilst this capping mechanism may benefit the EU budget, it is possible that these provisions may never occur. Member States failed to support similar proposals made in 2003,⁸⁷ and it has been recommended by a parliamentary committee that the UK should reject such a proposal.⁸⁸

An alternative method would be to acknowledge other ecosystem services associated with agriculture and to use direct payments as a means to support these

⁸⁰ See, European Commission, *The Development and Future of the Common Agricultural Policy (Reflections Paper)*, COM(91) 100 final, pp.13-14.

⁸¹ See, Tangermann, S., *Direct Payments in the CAP Post 2013*, (European Parliament, 2011), and *The CAP towards 2020*, p.8.

⁸² Vrolijk, H., et al, *Farm Viability in the European Union: Assessment of the Impact of Changes in Farm Payments*, (2010), p.43.

⁸³ Ibid.

⁸⁴ See, Ferrer, J., and Kaditi, E., *The EU Added Value of Agricultural Expenditure: from market to multifunctionality - gathering criticism and success stories of the CAP*, (undated), p.14.

⁸⁵ Commission Proposal, Article 11, and Regulation 1307/2013.

⁸⁶ Regulation 1307/2013, Article 9. Also see House of Commons Environment, Food and Rural Affairs Committee, *Seventh Report – Implementation of the Common Agricultural Policy in England 2014-2020*, (2013) at 2.28.

⁸⁷ European Commission, *Mid Term Review of the Common Agricultural Policy*, COM(2002) 394, 23.

⁸⁸ House of Commons Environment, Food and Rural Affairs Committee, 5th Report: *The Common Agricultural Policy After 2013*, HC 671-1, para.181.

services.⁸⁹ Although this suggestion would benefit smaller farms and be more financially viable, any attempt to reform the direct payments in such a way would likely receive strong political resistance.⁹⁰ Thus, a 'greening component' has been introduced into the payment structure as an agreeable middle ground.

Cross Compliance

Since 2003, cross-compliance has been a compulsory environmental obligation for eligibility of the Single Farm Payment.⁹¹ Within the CAP, it is the primary environmental tool used to integrate environmental protection into pillar one. Farmers in receipt of Single Farm Payments must comply with the obligations set by 14 EU Directives and 4 EU Regulations which deal with environmental, public, animal and plant health and animal welfare.⁹² Additionally, farmers must observe standards of good agricultural and environmental condition (GAEC standards), set by Member States under a collective EU framework.⁹³ The effectiveness of cross-compliance has been criticised by a range of reports.⁹⁴ Although the GAEC standards are strongly centred upon environmental issues, the pre-2013 legislative requirements strayed from environmental protection and incorporated obligations such as livestock identification, public, animal and plant health, disease and the welfare of animals. The Court of Auditors in particular have been critical of the environmental issues, submitting that there is no clear reason why some provisions are included whilst others are excluded.⁹⁵ Initially, 38 Statutory Management Requirements were proposed for the 2013 reforms but were reduced to the present 18 following discussions between Member States and the European Commission.⁹⁶ Five of these are Directives relating to environmental protection:

- Council Directive 2009/47 (the Wild Birds Directive)⁹⁷

⁸⁹ Buckwell, A., et al, 'Towards a common agricultural and rural policy for Europe', [1997] *European Economy Reports and Studies* no.5.

⁹⁰ *Ibid.*

⁹¹ Council Regulation 1782/2003 [2003] OJ L270/1.

⁹² See Council Regulation 73/2009 [2009] OJ L30/16, Article 5 and Annex II.

⁹³ *Ibid.* Article 6 and Annex III. 'GAEC' is defined by the EU as such: 'This concept includes the following: the protection of soil against erosion, the maintenance of soil organic matter and soil structure, and the safe-guarding of wildlife habitats. It is the Member States – not the European Union – which decide the exact specification of these parameters', http://ec.europa.eu/agriculture/glossary/good-agricultural-and-environmental-condition_en.htm]

⁹⁴ See Court of Auditors, *Special Report 8/2008: Is Cross Compliance an Effective Policy?*, (2008), Birdlife International, *Through the Green Smokescreen: How is CAP Cross Compliance Delivering for Biodiversity?* (2010); Alliance Environnement, *Evaluation of the Application of Cross Compliance as Foreseen under Regulation 1782/2003*, (2007)

⁹⁵ See *Ibid.* (Report 8/2008).

⁹⁶ Bianchi, D., 'Cross-Compliance: The new frontier in granting subsidies to the agricultural sector in the European Union', (2006) 19 *Georgetown International Environmental Law Review* 817 at p.822.

⁹⁷ [2009] OJ L20/7.

- Council Directive 2006/118 (the Groundwater Directive)⁹⁸
- Council Directive 86/278 (the Sewage Sludge Directive)⁹⁹
- Council Directive 91/676 (the Nitrates Directive)¹⁰⁰
- Council Directive 92/43 (the Habitats Directive)¹⁰¹

Under the new legislative requirements, the number of environmental directives included within cross-compliance has fallen to three, excluding the Groundwater Directive and the Sewage Sludge Directive.¹⁰² As the Groundwater Directive has recently been repealed, the protection of groundwater will now fall under the Water Framework Directive.¹⁰³ However, the complete removal of the Sewage Sludge Directive from the list could be seen as a backwards step, particularly since the importance of soil biodiversity to supporting ecosystem services has been recognised by the EU.¹⁰⁴ In addition, the potential inclusion of the Water Framework Directive and the Pesticides Directive¹⁰⁵ in cross-compliance obligations has been addressed both within the proposals and the reform itself. Regulation 1306/2013 has included the provision for the Commission to come forward with a legislative proposal to include these Directives into cross-compliance obligations once the Directives have been fully implemented in all Member States.¹⁰⁶

It can also be said that Regulation 1306/2013 leaves legislative gaps in terms of Statutory Management Requirements. Whilst farmers are required to comply with other environmentally focussed directives, not all of them are included within the cross-compliance obligations. For example, farmers are already legally required to comply with other Directives such as:

- The Waste Framework Directive;¹⁰⁷
- The Animal By-Products Regulation¹⁰⁸
- Environment Impact Assessment Directive¹⁰⁹
- Renewable Energy Directive¹¹⁰

⁹⁸ [2006] OJ L372/19.

⁹⁹ [1986] OJ L181/6.

¹⁰⁰ [1991] OJ L375/1.

¹⁰¹ [1992] OJ L206/7

¹⁰² Regulation 1306/2013)Annex II.

¹⁰³ Directive 2000/60 [2000] OJ L327/71.

¹⁰⁴ See, for example, *10 Messages for 2010* p.7.

¹⁰⁵ Directive 2009/128 [2009] OJ L309/71.

¹⁰⁶ Council Regulation on the financing, management and monitoring of the common agricultural policy, No 1306/2013, [2013] OJ L347/549.

¹⁰⁷ Directive 2008/98, [2008] OJ L312/3.

¹⁰⁸ Council Regulation 1774/2002, [2002] OJ L273/1.

¹⁰⁹ Council Directive 2011/92, [2011], OJ L26/1.

¹¹⁰ Council Directive, 2009/28, [2009] OJ L140/16, Article 17(3).

If the Statutory Management Requirements under Regulation 1306/2013 were to be extended to include these measures, there would be no additional obligations upon farmers. However, there would be an additional means to ensure compliance and the link between agriculture and environmental protection would be stronger, as well as providing an extra incentive for farmers to wholly comply. Therefore, it can be said that the recent reforms have failed in this sense.

Good Agricultural and Environmental Condition standards

Regulation 1306/2013 also includes the requirement for farmers to comply with GAEC standards as part of cross-compliance obligations.¹¹¹ There are seven GAEC standards to comply with, designed to encourage environmentally friendly practices within agriculture and are in addition to the legislative obligations imposed by the Directives referred to above.¹¹² The GAEC standards are compatible with the EU's Biodiversity Goal. Whilst the Council rejected the Commission's proposals to include a ban on cutting hedges and trees during the bird-breeding season (within the GAEC condition of retention and maintenance of landscape features), it has in fact been included within Regulation 1306/2013.¹¹³ The biodiversity benefit of this ban has been highlighted by the EEA. The population of farmland birds are a key indicator when measuring the state of biodiversity and as such it has been noted that farmland bird populations have been steadily declining over the past 40 years.¹¹⁴ Thus, the ban on cutting hedges during bird breeding season can be said to be a positive step.

Of the eight GAEC standards proposed by the Commission, only seven were put into effect by the Regulation.¹¹⁵ The omitted measure was a ban on ploughing, which would have been part of an obligation to protect wetlands and carbon rich soils. This measure can be directly linked with the wider EU policy objective to reduce greenhouse gas emissions by 2020 and so it is therefore disappointing that it was not supported as a GAEC standard.¹¹⁶

¹¹¹ Council Regulation 1306/2013 [2013] OJ L347/549 Annex II.

¹¹² Ibid. These GAEC standards deal with water quality and quantity, the protection of soil and carbon stock, and the retention and maintenance of landscape features.

¹¹³ Ibid.

¹¹⁴ European Environment Agency, *Integration of Environment into EU Agriculture Policy – the IRENA indicator-based assessment report*, (2006), at p.26.

¹¹⁵ See European Commission, *Proposal for a Regulation on the financing, management and monitoring of the common agricultural policy*, COM(2011) 628 final/2, Article 93 and Annex II, and Regulation 1306/2013, Annex II

¹¹⁶ See, European Commission, *20 20 by 2020: Europe's Climate Change Challenge*, COM(2008)30 final. In relation to agriculture in particular see European Commission, 'EU Agriculture- Taking on the Climate Change Challenge', (2008).

Whilst there are apparent theoretical benefits to imposing GAEC standards upon farmers, there are clear issues with the practicality of such obligations. The proposals, put into effect by the Regulation, will prevent Member States from introducing additional GAEC standards.¹¹⁷ Whilst this creates uniformity throughout the EU, it prevents Member States from introducing measures to address issues of national importance. As a compromise, Member States are required to take into account specific characteristics of an area, 'including its soil and climatic condition, existing farming systems, land use, crop rotation, and farming practices', when implementing the GAEC standards.¹¹⁸ An obvious weakness is that the Commission is not required to approve Member States' GAEC standards before they are implemented.¹¹⁹

It must also be noted that cross-compliance is not wholly uniform, as eligibility depends on farming types.¹²⁰ The effectiveness of cross-compliance when it does apply has been criticised by the Court of Auditors and environmental NGOs.¹²¹ It appears that the Commission proposals and subsequently the Regulation do little to address such issues. In 2007, the Court of Auditors found that out of seven Member States audited none had fully implemented cross-compliance into operational requirements.¹²² Furthermore, the implementation of GAEC standards was criticised, whereby Birdlife International described them to be 'undemanding' and 'allowing common bad practice'.¹²³ Farm inspections in respect of cross-compliance observance are limited. Whilst Member States are required to inspect 5% of farms to ensure they are eligible to receive their direct payments, Member States are only required to inspect 1% of farms to check observance of cross-compliance.¹²⁴ Thus, this disparity highlights the EU's preference to attach greater importance to the protection of its budget rather than to the protection of the environment.

¹¹⁷ See European Commission, *Proposal for a Regulation on the financing, management and monitoring of the common agricultural policy*, COM (2011) 628 final/2, Article 94, and Regulation 1306/2013, Article 94.

¹¹⁸ *Ibid.* (Regulation 1306/2013).

¹¹⁹ *Report 8/2008*, para.43.

¹²⁰ Horticulture, pig and poultry farmers are not eligible for direct payments and subsequently are not subject to cross-compliance, but they are however subject to cross-compliance measures if they receive natural handicap or agri-environment payments.

¹²¹ *Report 8/2008*, para.85, *Through the Green Smokescreen* and Alliance Environnement

¹²² *Ibid.* (*Report 8/2008*) The Member States were Finland, France, Greece, the Netherlands, Poland, Portugal and Slovenia.

¹²³ *Through the Green Smokescreen*, p.41. Also see Alliance Environnement, p.xvii.

¹²⁴ Council Regulation 1122/2009, [2009] OJ L316/65, Articles 30 and 50.

Additionally, it has been argued by Birdlife International that the environmental GAEC and Directive requirements, which are complex and difficult to inspect, may not be thoroughly checked during farm inspections.¹²⁵ This could also be linked to the lack of incentive that Member States may only retain 25% of the penalty imposed on farmers for non-compliance, a figure which remains unchanged under the new Regulation.¹²⁶ Furthermore, even when a penalty is imposed, the amount may be small.¹²⁷ In practice, the cost of compliance is much higher than the risk of facing penalties from non-compliance,¹²⁸ and when combined with the low inspection rate, the risk of non-compliance is no greater than the benefit attained for compliance. The Commission proposals, and the Regulation, appear to accept rather than rectify this issue by replacing the guideline 3% reduction for non-compliance with the mere stipulation that the reduction should not exceed 5%.¹²⁹ Additionally, Member States have the discretion to not impose a penalty if it does not exceed €100, and can instead simply notify farmers of their breach and remedial obligations.¹³⁰ Whilst there is the positive incentive to receive direct payments for cross-compliance, the cost and practicalities involved with compliance are high and thus remains the risk and likelihood that farmers will not comply and, because of the lack of rigidity of inspections, will not face penalties. Theoretically the cross-compliance scheme is beneficial to the environment and biodiversity, but the practical implementation of it is weak and the reforms have done little to rectify this issue.

Greening Direct Payments

The 'greening component' has been added into the existing payment structure as an alternative to introducing payments specifically for ecosystem services.¹³¹ Although this greening component has been one of the most contested aspects of the Commission's proposals, there is overall agreement between the Council,¹³² European Parliament¹³³ and Commission as to the basic outline of the scheme. Not only is there the agreement that the Single Farm Payment will evolve into the Basic Payment, there is the agreement that one third of Member States' national envelopes

¹²⁵ *Through the Green Smokescreen*, p.14.

¹²⁶ Regulation 1307/2013, Article 100.

¹²⁷ See *Ibid*, Chapter II.

¹²⁸ *Report 8/2008*, para.69.

¹²⁹ Regulation 1306/2013, Article 99(2). This figure will increase to 15% in the case of reoccurrence of non-compliance.

¹³⁰ *Ibid*, Article 97(3).

¹³¹ Regulation 1307/2013, recital 37.

¹³² The negotiating position of the Council can be accessed at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/agricult/136582.pdf

¹³³ The negotiating position of the European Parliament can be accessed at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0087&language=EN&ring=B7-2013-0082>

are to be used to provide payments for farmers who provide agricultural services beneficial to the environment.¹³⁴ The Commission is of the view that that the greening component will provide payments to farmers in return for 'simple, generalised, non-contractual and annual actions that go beyond cross compliance'.¹³⁵ Farmers will be required to adhere to at least one of three environmental practices relevant to their farms as outlined by the Commission.¹³⁶ These are outlined as follows:

- (a) Crop diversification: Arable farmers with over three hectares of land are required to undertake crop diversification, which would involve cultivating at least three different crops, with none covering less than 5% and the largest crop no larger than 70% of their arable land¹³⁷
- (b) Maintain permanent grassland: Farmers are required to maintain permanent grassland on their farms¹³⁸
- (c) Ecological focus areas: Farmers are required to set aside up to 7% of their farmland, excluding permanent grassland, as ecological focus areas.¹³⁹

Organic farmers are exempt from these requirements as they are already deemed to sufficiently secure eligibility.¹⁴⁰ Farmers with *Natura 2000* sites upon their land are only required to comply in so far as it is compatible with the protection of such sites as under the Birds Directive and the Habitats Directive.¹⁴¹

Thresholds for the greening component

With regards to crop diversification, it was proposed by the Commission that farmers with over three hectares of arable crops should be required to grow at least three different types of crop.¹⁴² More specifically, it was proposed that the main crop should not exceed 70% of the arable land and no crop should cover less than 5%. The Council and Parliament however proposed that this provision should only apply to farmers with over 10 hectares of arable land, and both favoured a stepped approach, whereby farmers with between 10 and 30 hectares should grow at least two arable crops, and farmers over 30 hectares should grow at least three. Unfortunately the Commission's proposals were not legitimised and instead Regulation 1307/2013 better reflects the proposals submitted by the Council and Parliament.¹⁴³ The

¹³⁴ Commission Proposal, Art. 33(1).

¹³⁵ Ibid, recital 26.

¹³⁶ See, Ibid, Article 29, and Regulation 1307/2013, Articles 44-46.

¹³⁷ Regulation 1307/2013 Art 44.

¹³⁸ Ibid, Art 45.

¹³⁹ Ibid, Art 46.

¹⁴⁰ Ibid, Art 43(11).

¹⁴¹ Regulation 1307/2013, recital 37.

¹⁴² Commission Proposal, Article 30.

¹⁴³ Regulation 1307/2013, Article 44.

proposals submitted by the Commission have failed, thus resulting in less environmental and biodiversity protection than was envisaged.

Under the greening component, it is now compulsory to retain areas of permanent grassland from 2015.¹⁴⁴ However, it may have been possible that farmers converted their land to arable use before this time, thus escaping the obligation. From 2015 Regulation 1307/2013 will allow farmers to convert up to 5% of their permanent grassland and still remain eligible for the greening component payment.¹⁴⁵ In the proposals submitted by the European Commission and Council, there was no requirement for the protection of environmentally important areas, such as semi-natural grasslands, even though this motion was put forward by the European Parliament's proposals.¹⁴⁶ Now Regulation 1307/2013 gives consideration to environmentally sensitive areas covered by the Habitats and Birds Directives, and Member States may designate additional areas not covered by the Directives, in order to further protect environmentally valuable grasslands. Thus, the importance of the protection of such areas has been acknowledged by the EU, despite the lack of recognition in its initial proposals.

Finally, there was disagreement in the proposals relating to ecological focus areas. Initially, the Commission proposed that all farmers should ensure at least 7% of their farmland, excluding permanent grassland, was an ecological focus area.¹⁴⁷ In comparison, the Parliament suggested there should be a threshold of 10 hectares, of which 3% should be treated as an ecological focus area. Ultimately, it was the Council's proposal that was adopted in the Regulation, whereby the threshold is 15 hectares of land with 5% being an ecological focus area.¹⁴⁸ The suggestion that this figure rises to 7% by 2018 was adopted.¹⁴⁹ It appears that almost a middle ground was reached; whilst the environmental protection proposed by the Commission was compromised, flexibility is retained to increase this in the future.

The greening component and existing measures

The greening component must be taken into consideration with the other existing environmental concepts. Whilst the Commission states the greening component will

¹⁴⁴ Regulation 1307/2013, Article 45.

¹⁴⁵ Ibid, Article 45(2).

¹⁴⁶ The negotiating position of the European Parliament can be accessed at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0087&language=EN&ring=B7-2013-0082>

¹⁴⁷ Commission Proposal, Article 32.

¹⁴⁸ Regulation 1307/2013, Article 46(1).

¹⁴⁹ Ibid, Article 46(2). This is subject to a legislative act of the Parliament and Council.

'go beyond cross compliance', it must be determined whether this is accurate. The previous GAEC standards in Regulation 73/2009 provided protection for permanent pastures so the greening component would effectively duplicate this obligation.¹⁵⁰ The GAEC standards in Regulation 1306/2013 do not impose such an obligation and so it can be said that the greening component goes beyond cross-compliance in this sense. This is also true for ecological focus areas and crop diversification. Both of these were GAEC standards in Regulation 73/2009, but are not in Regulation 1306/2013.¹⁵¹ Therefore, theoretically it is true that the greening component introduces additional obligations to the 2013 cross-compliance requirements. However, it imposes no additional obligations to the 2009 GAEC standards and so it appears that such standards have simply been renamed as greening obligations and do not in fact impose any further environmental obligations upon farmers. Despite this, the compulsory greening component provides an opportunity for Member States to remodel their agri-environment schemes to ensure they go beyond cross-compliance and the three obligations set under the greening component. This would further emphasise the Commission's objective of improving the integration of environmental protection within pillar one of the CAP.

Penalising non-compliance of the greening component

Prior to Regulation 1306/2013, the European Parliament proposed to separate the greening component from the basic payment, making the greening component a voluntary measure.¹⁵² Fortunately, the penalties for non-compliance of the greening component are included within Regulation 1306/2013, thus combining the penalties and reinforcing the compulsory aspect of the greening component.¹⁵³ On the face of it, the penalty appears fair as it takes account of the 'severity, extent, duration and re-occurrence of the non-compliance', and allows for Member States to make a reduction, suspension, or complete exclusion of payment.¹⁵⁴ As the penalties for cross-compliance and the greening component are combined, it reinforces their compulsory nature and how farmers must comply with both in order to receive their direct payment.

Practical Implementation

The Commission maintains that the obligations set out by Regulation 1306/2013 will

¹⁵⁰ See Regulation 73/2009, Annex III.

¹⁵¹ Compare *Ibid* with Regulation 1306/2013, Annex II.

¹⁵² Institute for European Environmental Policy, *Plenary Vote on CAP reform package: a bitter sweet victory for the environment*, press release 19 March 2013. <http://www.cap2020.ieep.eu>

¹⁵³ See Regulation 1307/2013, recital 39, and Regulation 1306/2013 Title V, Chapter I.

¹⁵⁴ Regulation 1307/2013, Article 64.

‘ensure that all farms deliver environmental... benefits through the retention of... grassland habitats associated with permanent pasture, ... habitat protection by the establishment of ecological focus areas and the improvement of... ecosystems through crop diversification’.¹⁵⁵

Taken together, these measures appear to be linked to the EU Biodiversity Goal.¹⁵⁶ However, there is a risk that the positive environmental impact of these measures will be limited.¹⁵⁷ The Commission has aimed to set ‘simple, generalised, non-contractual and annual actions’,¹⁵⁸ even though it has been proven that environmental goals are better achieved by tailoring measures to the specificities of the environmental situation in each individual area rather than merely applying a general measure.¹⁵⁹ In addition, farmers are given broad discretion when choosing which land should be set aside. It is therefore possible that farmers would select to set aside land which is least agriculturally productive, rather than choosing the most ecologically valuable areas. In practice, the positions adopted by both the European Parliament and Council provide much less environmental protection than those initially proposed by the Commission and this has been reflected within the 2013 Regulations.

4 The CAP Reforms: Pillar Two - Rural Development Policy

Whilst agricultural intensification has proved problematic in terms of biodiversity, the effects are not uniform. Some areas, because of their poor land quality, climatic conditions and social factors, have inhibited agricultural intensification. Although these areas have typically lower production rates, they are an important source of protection for farmland biodiversity, and help to manage high nature value farmland.¹⁶⁰ Approximately one third of farmland in the EU-27¹⁶¹ is of high nature value, a figure which rises much higher in some Member States.¹⁶² But as this farmland is associated with low production rates and consequently lower farm

¹⁵⁵ Commission Proposal at p.3.

¹⁵⁶ *Biodiversity Strategy to 2020*, p.6.

¹⁵⁷ See, House of Commons, Environment, Food and Rural Affairs Committee, *5th Report: The Common Agricultural Policy After 2013*, HC 671-1, para.149.

¹⁵⁸ Commission Proposal at recital 26.

¹⁵⁹ Hart, K., and Baldock, D., ‘*Greening the CAP: Delivering Environmental Outcomes Through Pillar One*’, (2011, IEEP), p.6.

¹⁶⁰ From an environmental perspective, high nature value land is the most valuable land in the EU. See EEA, *EEA Report 1/2004: High Nature Value Farmland: Characteristics, trends and policy challenges*, (2004)

¹⁶¹ The term EU-27 refers to the 27 Member States of the EU as of 30 June 2013

¹⁶² Paracchini, M., et al., *High Nature Value Farmland in Europe: An estimate of distribution patterns on the basis of land cover and biodiversity data*, (European Commission Joint Research Centre, 2008), p.29. For example, 78% of farmland in Slovenia is of high nature value.

incomes, it puts the ecosystems it supports at risk of abandonment or intensification.¹⁶³

The EU has attempted to address these issues through the second pillar of the CAP: rural development policy. It is important to note that pillar two receives significantly less funding than pillar one.¹⁶⁴ Prior to the 2013 reforms, the rural development policy was regulated by Regulation 1698/2005 whereby Member States could choose from a selection of 22 schemes divided into four axes.¹⁶⁵ The current legislation, Regulation 1305/2013, replaces these axes with six priority areas which Member States can use to formulate their own Rural Development Programmes.

Agri-Environment-Climate Scheme Payments

The agri-environment-climate change scheme (or the agri-environment scheme) has been a compulsory part of rural development policy since 1992.¹⁶⁶ Its scope depends upon Member States' willingness to provide funding, and farmers' willingness to participate.¹⁶⁷ Farmers only receive payment under this scheme if they exceed their cross-compliance and meet greening component obligations.¹⁶⁸ The scheme plays an important role in supporting the EU Biodiversity Goal and also provides assistance in the management of the *Natura 2000* network. As previously noted, there was confusion as to the relationship between the greening component and the agri-environment scheme, and the effectiveness of the scheme under the new reform provisions is also unclear. Whilst there was confusion following the Commission proposals as to whether farmers would receive double payment for compliance with both the greening component and the agri-environment scheme, this has been prevented in Regulation 1305/2013.¹⁶⁹

In terms of environmental benefits the agri-environment scheme has received mixed reviews. The Commission has praised the positive biodiversity impact of the Countryside Stewardship scheme in England and, in particular, noted that cirl bunting

¹⁶³ Ibid, p.7.

¹⁶⁴ European Commission, *Proposal for a Regulation on the financing, management and monitoring of the common agricultural policy*, COM(2011) 628 final/2, p.7. It is estimated that pillar two is accounts for just 25% of the EU's spending on agriculture, with the remainder being allocated to pillar one.

¹⁶⁵ Regulation 1698/2005.

¹⁶⁶ Under Council Regulation 2078/92 [1992] OJ L215/1.

¹⁶⁷ The scheme is voluntary at farm-level.

¹⁶⁸ Council Regulation 1305/2013 [2013] OJ L347/487, Article 28(3).

¹⁶⁹ Regulation 1305/2013, Article 28(6).

populations had increased by 82% of land under the influence of this scheme.¹⁷⁰ Essentially, in order for agri-environment schemes to be effective, they must be well designed. Unfortunately, this has not been successfully accomplished. For example, in 2011 the Court of Auditors audited agri-environment schemes in eight Member States and found that some States had recognised specific environmental problems but had not implemented any measures to address such issues.¹⁷¹ This therefore highlights the practical issues associated with the implementation of agri-environment schemes.

Additionally, the funding of this scheme raises issues. For example, under the 2005 Regulation, Member States were required to spend at least 25% of the funds allocated to their rural development programmes on Axis II (programmes to improve the environment and countryside, including the agri-environment scheme).¹⁷² Whilst this figure has been increased to 30%, this funding must be split between eight measures and therefore it may be possible that the agri-environment scheme will receive less.¹⁷³ This issue is further compounded by the flexibility of the Regulation which allows Member States to transfer funds from pillar two to pillar one.¹⁷⁴ This would clearly reduce the amount of money available for agri-environment schemes if Member States acted upon this.

Finally, there has been no significant improvement regarding the protection of *Natura 2000* and high nature value sites. Both the 2005 and 2013 Regulations allow payments to be made only in regards to 'additional costs and income forgone' related to the implementation of Birds Directive and the Habitats Directive.¹⁷⁵ There is no additional positive financial incentive. Now, in order for farmers to receive these payments, they must have gone beyond the GAEC standards and comply with the greening component.¹⁷⁶ This could encourage *Natura 2000* site managers to comply with the conditions and go beyond them as they now have an incentive to do so. This is a slight improvement to the previous Regulation but arguably this provision was

¹⁷⁰ European Commission, *Agri-Environment Measures: Overview on general principles, types of measures and application*, (Brussels, 2005) at 16. The Countryside Stewardship scheme was the predecessor of England's current Environmental Stewardship scheme.

¹⁷¹ Court of Auditors, *Special Report 2011: Is Agri-Environmental Support Well Designed and Managed?* (Luxembourg, 2011). The countries audited were Spain (in relation to Andalusia), Italy (in relation to Piedmont), Germany (in relation to Berlin and Brandenburg), Sweden, Austria, Hungary, Poland and France.

¹⁷² Regulation 1698/2005, Article 17(1).

¹⁷³ Regulation 1305/2013, Article 59(6).

¹⁷⁴ *Ibid*, Article 9(b)(iii), and see Regulation 1307/2013 recitals 15 and 17.

¹⁷⁵ Regulation 1698/2005, Article 46, and Regulation 1305/2013 Article 30(1).

¹⁷⁶ Regulation 1305/2013, Article 30(3).

simply a means to help protect the EU budget rather than to promote environmental protection.

Natural Handicap Payments

Natural handicap payments, previously known as less-favoured area payments, were introduced into the CAP in 1975.¹⁷⁷ The objectives of the original scheme were essentially socio-economic as the payments were intended to support farm incomes in less productive areas and to prevent rural depopulation. These socio-economic origins are still visible in the current CAP criteria as the scheme supports farming in areas which are affected by significant handicaps. In these areas, the populations are mostly dependent upon farming but as the land is at risk of abandonment due to its low agricultural productivity, the conservation of the countryside is necessary to sustain the livelihoods of such populations.¹⁷⁸

Today, the natural handicap scheme is primarily a socio-economic measure. Although it is part of the Rural Development Regulation which aims to improve the environment and the countryside, and payments are only made if cross-compliance is met, the environmental benefits of the scheme are only incidental. These benefits are only acquired through the management of land which would otherwise be abandoned, and that the physical conditions present in such land made agricultural intensification impossible resulting in extensive and more environmentally beneficial practices. It must be noted that there is disparity between Member States regarding payments, with little correlation to the environmental importance of the land.¹⁷⁹ For example, Slovenia and Finland provide payments which are relative to the environmental importance of the land, whilst Spain maintains low payment rates.¹⁸⁰ Finally, both the old and new Regulations require Member States to set a minimum size threshold for eligible farms. This, in some cases, has resulted in large areas being excluded. For example, in Spain and Italy, almost half of all farms identified in eligible areas were excluded because they did not meet the minimum size thresholds of two and three hectares respectively.¹⁸¹ This problem, which will continue for the foreseeable future, is a further limitation of the contribution agriculture can make towards supporting ecosystem services and halting biodiversity loss by 2020.

¹⁷⁷ Under Council Directive 75/268 [1975] OJ L128/1.

¹⁷⁸ Regulation 1305/2013, Article 32.

¹⁷⁹ EEA, Technical Report 12/2009, *Distribution and Targeting of the CAP Budget from a Biodiversity Perspective*, (2009), p.42

¹⁸⁰ *Ibid*, pp.42 and 55.

¹⁸¹ See Cooper, T., et al., *An evaluation of the less favoured areas measure in the 25 Member States of the European Union*, (IEEP, 2006), 8

Conclusion

The concept of ecosystem services has become embedded within international and EU environmental policy within recent years and the need for urgent action is unmistakable. In particular, agriculture's negative impact upon the environment must be addressed. It is clear to see the 2013 CAP reforms are the most environmentally focussed reforms since its creation, however it seems that the reforms stop short of providing effective support for the EU Biodiversity Goal and the degradation of ecosystem services by 2020.

The reforms continue to include the direct payment scheme as a central part of the CAP. Although the inclusion of a greening component demonstrates the ability for the EU to further enhance the environmental outcomes achieved through pillar one, it is not without criticism. Particularly, the 'simple, generalised, non-contractual and annual' approach adopted in the 2013 Regulations overlooks the crucial lessons learnt from previous environmental measures. While the Regulations provide uniformity throughout the EU, Member States are prevented from introducing nationally tailored measures and instead must conform to EU-wide obligations. Environmental benefits are best achieved through the use of local and regional measures and the reforms do little to recognise this. Concerns about duplicate payments for agri-environment schemes and the greening component have been recognised and addressed but little has been done in terms of targeting environmental priorities such as *Natura 2000* or High Nature Value land. Although there are higher thresholds for farmers on agri-environment schemes to meet, it can be argued that such thresholds are merely a way to protect the EU budget.

Historically, Member States have been reluctant to implement European environmental law. However, it can be said that Member States are more willing to support the environmental provisions of the CAP due to its more recognised importance of sustaining employment within agriculture. Indeed, the UK Government has recently responded to the 2013 reforms.¹⁸² It has decided to transfer 12% of funding from pillar one to pillar two which will hopefully result in an improvement in the environment, the growth of the rural economy and create additional employment; this figure they hope to rise to 15% in 2016 following an assessment. Specifically, they have stated that £3 billion of the £3.5 billion allocated to rural development

¹⁸² Government Response to House of Commons Environment, Food and Rural Affairs Committee, *Seventh Report – Implementation of the Common Agricultural Policy in England 2014-2020* (2014).

schemes will be spent on improving the environment. With regards to direct payments, the UK Government will cap the payments and apply the 'Active Farmer' test. The consideration given to the environmental provisions of the CAP by the UK Government is definitely positive, however the CAP of course applies to all Member States within the EU and so will only be effective if it is consistently implemented throughout.

Ultimately, the CAP is a socio-economic policy, designed to support the income of farmers who would otherwise struggle to survive. This therefore is the reason that environmental protection has taken a backseat and how agricultural intensification has caused devastating effects upon the biodiversity of the rural environment. The 2013 reforms demonstrate a step in the right direction, and do uphold elements of the Commission's intention to support biodiversity and ecosystem services, but unless Member States implement the reforms in an adequate and structured way, truly effective protection of the environment cannot be achieved. Conclusively, will this remain a goal for the next reform package?