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THE CONSEQUENCES OF THE NEW REVISION OF THE CAP ON EXPLOITATION AND RURAL PROPERTY

LES CONSEQUENCES DE LA NOUVELLE REVISION DE LA PAC SUR L'EXPLOITATION ET LA PROPRIETE AGRICOLE

DIE AUSWIRKUNGEN DER NEUEN REVISION DER GAP AUF DIE LANDWIRTSCHAFTLICHEN BETRIEBE UND DAS BÄUERLICHE EIGENTUM

Independent Report – Rapport indépendant – unabhängiger Bericht

Prof. Christopher RODGERS

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CAP Reform, Property Rights and Land Use – a common lawyer's perspective

Introduction

The Agenda 2000 reform and subsequent Mid-Term Review ("MTR") has placed sustainability principles at the heart of the reformed Common Agricultural Policy of the EU ("CAP"). Implementing the reforms will have major implications for property rights models for promoting nature conservation and environmental policy initiatives within the CAP. A proper understanding of the interaction of property rights with environmental regulation requires the study of both economic and legal models of property rights, as well as an analysis of the changing legal and social framework of property rights in land. The changes to the common agricultural policy made by the Agenda 2000 reform have particular relevance to the social and economic framework of property rights.

A key feature of the legal regime for sustainable agriculture is the adoption of "good agricultural practice" as a normative standard within the legal order of the reformed CAP. A related aspect is the requirement that farmers must keep land in "good agricultural and environmental condition" as a condition for the receipt of Single Income Payments ("SIPs") under the Mid-Term Review. These are both variable standards which attempts to apply targeted agricultural standards appropriate to different geographical localities, depending upon the nature of the locality, it's landscape and the husbandry practices which have historically been practised there. While this may imply responsiveness on the part of the law to the diverse geographical conditions in different parts of the EU, the formulation and enforcement of flexible normative standards of this type presents unique problems for Community law.

Agri Environment Policy and Property Rights

The introduction of environmental regulation within the framework of the common agricultural policy has major implications for property rights. The earliest agri environmental measures were closely linked with market management within the CAP, and their environmental focus was, as a consequence, often blunted. They were introduced under the CAP farm structures legislation, most notably Council Regulation 797/85 on improving the efficiency of agricultural structures. This permitted member states to establish zonal programmes to encourage the adoption of traditional farming methods in environmentally vulnerable areas.[1]

The impetus towards adopting an environmental agenda within the CAP was substantially strengthened in 1992, chiefly as a consequence of reforms primarily aimed at reducing overproduction of many agricultural commodities within the CAP.[2] Under the 1992

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[1] Title 7 Council Regulation (EEC) 797/85. Three earlier Farm Structures Directives – Directives 71/159/EEC, 72/160/EEC and 72/161/EEC on socio-economic adjustment to farmers – were little used. In any event, their chief concern was to promote farm development plans and early retirement, and had little environmental relevance.

[2] There are a number of texts dealing with the economics of CAP reform and 1992. See for example R.Fennell, *The Common Agricultural Policy : Continuity and Change* (1997 Oxford) esp. Ch.6 pp. 169ff. and Ch. 11 ; M.Cardwell, *Milk Quotas : EC and United Kingdom Law* (1996 Oxford) Ch.3.

"McSharry Proposals" supply control measures were introduced for some agriculture sectors – through quotas on livestock subsidy payments,[3] and the introduction of a set aside requirement for arable land before arable payments could be paid.[4] This was accompanied by reductions in guaranteed prices, aimed at bringing the price of EU products down to world market levels (e.g. for beans, beef and cereals). The "accompanying provisions" agreed as part of the 1992 reform package also introduced a greater environmental element into the reformed CAP.[5] In particular, Council Regulation 2078 of 1992 required member states to draw up agri-environment programmes and submit them to the European Commission to a set timescale (this was previously optional under the farm structures measures). The financing of agri-environmental policy was transferred to the Guarantee section of the European Agricultural Guarantee and Guidance Fund (EAGGF). This associated agri-environmental policy with the mainstream of CAP expenditure and meant that no financial limit was placed on initial expenditure commitments.

The focus of the 1992 Agri Environment Regulation was, therefore, at least in part socio-economic as well as environmental. The 1992 reform stressed the environmental contribution of agriculture as the largest land use activity within the Community, and made a significant contribution towards increased transparency by shifting the burden of subsidy from consumers to taxation, with a greater emphasis on direct support payments. The very diversity of programmes which were permitted, however, meant that there was uncertainty as to the primary objectives of the agri environment measures. While some member states used Council Regulation 2078/92 to introduce new environmental schemes with EC co-financing, others (especially the Mediterranean states) viewed its primary focus in terms of providing an appropriate income for farmers.[6] The very diversity of the stated objectives for agri-environment policy therefore blunted the wider impact of Regulation 2078/92 as a vehicle for introducing new environmental measures.

The 1992 reforms also saw a move to integrate environmental requirements into the operation of some of the common market organisations for produce within the CAP, e.g. the arable regime was reformed to require the management of land set aside from production for environmentally beneficial purposes. This was achieved by introducing "cross-compliance" into the operation of direct subsidy regimes, making the receipt of many subsidies for farming conditional upon the observance of basic environmental safeguards. The continuing link with commodity management meant, however, that agri-environment measures were viewed as subsidiary to the market support functions of the CAP and, moreover, led to tensions between market and agri-environment policies. The cereals sector illustrates these problems. Under the arable area payments scheme, compensatory payments were introduced for cereals producers and paid on the acreage sowed to crops annually, in order to compensate them for reductions in guaranteed prices aimed at bringing the market into alignment with world market prices. This was subject to a requirement to set aside a fixed percentage of the holding (initially 15% of the area down to arable crops) annually. In practice, however, the environmental benefits achieved by the use of set aside and the more rational use of fertilisers was largely offset by the

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[3] In the case of suckler cow premiums by Council Regulation (EC) 2066/92, amending Council Regulation (EC) 805/68 art. 4f. Quotas on sheep annual premiums were introduced by Council Regulation (EC) 2069/92, amending Council Regulation (EC) 3013/89 art 5b. Detailed rules for the imposition of quotas by member states were laid down in Commission Regulation (EC) 3886/92 and 3567/92.

[4] Under Council Regulation (EC) 1765/92, establishing the arable area payments scheme for EU cereals producers – see ibid. arts. 2.5 and 7.

[5] The three accompanying measures were Council Regulation (EC) 2078/92 on farming methods compatible with the environment, Council Regulation (EC) 2079/92 on early retirement for farmers and Council Regulation (EC) 2080/92 on on-farm forestry aid.

[6] See for example H.Buller "The Agri-Environment Measures", Chapter 12 in (Lowe, P. and Brouwer, F. eds.) *CAP Regimes and the European Countryside* (CABI 1999) esp. at 200ff.

encouragement of intensive crop production by the regionalisation of direct payments for cereals, and by intensification of livestock production encouraged e.g. by subsidising silage crops.[7] Similarly, the introduction of the arable area payments scheme effectively "fossilised" the arable area on most holdings, as payments were based on arable cropping in a historical reference period,[8] and this offered a powerful disincentive to a return to more environmentally friendly mixed farming systems[9].

Sustainable Agriculture and the Agenda 2000 Process

Agenda 2000 saw the adoption of more overtly environmental agenda within the CAP. The reorientation of agricultural policy towards the promotion of "Sustainable Agriculture" was the key development underpinning the move to integrate environmental policy into the CAP, and encapsulated the desired relationship between agriculture and the environment that Agenda 2000 sought to achieve.[10] This is a new policy element with the greatest implications for property rights. The European Commission's original proposals for the introduction of sustainable agriculture called for the management of natural resources in a way that ensures that their benefits are also available in the future.[11] In as much as over supply within the existing common market organisations implies a waste of resources, it can be claimed that the reformed market management measures under Agenda 2000, whose principal aim is to bring demand and supply into closer equilibrium, are themselves a move towards sustainable development in the agriculture sector. The Commission quickly recognised, however, that a broader understanding of sustainability was required, extending to a larger set of features linked to land use such as the protection of habitats, landscapes and biodiversity, as well as the prevention of pollution to drinking water and air.[12]

The continuing link with commodity management and market support was a problem, however, with which the Agenda 2000 reforms did not satisfactorily deal. Agenda 2000 was in large measure based upon the 1992 measures, and on the need to continue the progress made in reducing institutional surpluses and introducing agri-environment measures under the "accompanying measures" adopted in 1992. As a consequence, agri-environment measures remained linked to commodity management, and therefore secondary to the principal market support function of the CAP. However, the reform of the financial structures and organisation of the CAP introduced under Agenda 2000 moved agri-environment policy into the broader framework of the new policy on rural development. This will, in the longer term, strengthen the role of agri-environment policy within the framework of the CAP. A major reorientation in the administration and policy goals of agricultural policy was also instituted by Agenda 2000, with Rural Development becoming from January 2000 (alongside market management) the second pillar of the CAP.

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7 This was a key environmental effect identified by the European Commission in the Agenda 2000 reform proposals themselves: see *Agenda 2000 For a Wider and Stronger Union* (COM (97) 2000 final,), esp. at p23.

8 Compensatory and set aside payments can only be claimed under the arable area payment scheme on land which was farmed with the intention of producing eligible cereal crops in the "base year" for the scheme viz. the 1991/2 marketing year. See Council Regulation (EC) 1765/92 art.1 and Annex 1 (defining eligible crops for these purposes).

9 M. Winter, "The Arable Crops Regime and the Countryside", Ch. 8 in (Lowe, P. and Brouwer, F. eds.) *CAP Regimes and the European Countryside* (CABI 1999) esp. at 132ff.

10 *Indicators for the Integration of Environmental Concerns into the Common Agricultural Policy* (COM (2000) 20 final) at 1.3.1.2.

11 *Directions Towards Sustainable Agriculture* COM (1999) 22 Final, at p 30.

12 *Indicators for the Integration of Environmental Concerns into the Common Agricultural Policy* (COM 20 (final)) at 1.3.1.2.

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The regulations implementing the Agenda 2000 reforms laid the foundation for what the European Commission has claimed will be "a comprehensive and consistent rural development policy whose task will be to supplement market management by ensuring that agricultural expenditure is devoted more than in the past to spatial development and nature conservancy", as well as other socio economic rural development measures.[13] Furthermore, the introduction of "modulation" created increased scope for enhanced funding by member states of agri-environment measures at a local geographic level. Modulation enables member states to reduce the amount of payments granted to farmers under market management support schemes financed from the Guarantee section of EAGGF by up to 20% in any given calendar year.[14] Any expenditure so released can be redirected to support measures under the rural development programme for promoting early retirement, less favoured areas policy, agri-environment schemes and forestation measures. Modulation of direct support payments cannot be used to boost expenditure on other aspects of the rural development "suite" of policies.

The Agenda 2000 proposals for rural development were implemented in Council Regulation (EC) 1257/1999.[15] This brought together all previous rural development measures, including the 1992 "accompanying measures" on agri-environment, forestry and early retirement, into one composite framework regulation. The key principles underlying the new measures were the recognition of the *multi-functional role of agriculture*, and the need to develop an *integrated approach* to development in rural areas, based upon the use of rural development plans.[16] The Agenda 2000 reforms recognised the need to change the perception of farmers as simply "producers" of agricultural crops and food. They must be viewed, instead, as "stewards" of the rural environment and, where appropriate, incentive payments should be made available to further this stewardship role. In formulating rural development policies member states could choose from the menu of rural development measures provided for in Chapter II of the 1999 regulation – early retirement of farmers, investment in agricultural holdings, training, agri-environment measures etc. Importantly, however, whatever the mix of measures chosen, the rural development regulation makes it obligatory for member states' rural development plans to include agri-environment measures throughout their territories. It also required them to keep the necessary balance between the different support measures.[17]

The CAP Mid-Term Review

The Mid-Term Review, although ostensibly based upon the same policy foundations as the original Agenda 2000 process, in fact takes agriculture policy on a much more radical path towards the use of sustainability as a key element of European Law and Policy. The key reform, of course, is the decoupling of all support measures from production with the introduction of the Single Income Payment ('SIP'), and the use of cross compliance techniques to impose environmental conditionality conditions to its receipt by farmers across the EU. The decoupled payments, in the form of a single income payment per farm, are based upon receipt of direct payments under the relevant support schemes over a 2000-2002 reference period. The SIP is to be established at farm level, but then split into payment entitlements on a hectare basis to facilitate transfer when part of a farm is leased

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13 *Agenda 2000 :Reform of the Common Agricultural Policy (CAP)* at p2: http://www.europa.eu.int/scadplus/eg/en/lvb/160002.htm

14 see arts. 4 and 5 of Council Regulation (EC) 1259/1999 establishing common rules for direct support schemes under the common agricultural policy (O.J. L 160/113 (26.6.99)). Hereafter referred to as "the horizontal regulation".

15 O.J. L 160/80 (26.6.99) hereafter referred to as "the rural development regulation".

16 See generally *Agenda 2000 : Reform of the Common Agricultural Policy (CAP)* pp 1-2 at http://www.europa.eu.int/scadplus/leg/en/lvb/160002.htm

17 Council Regulation (EC) 1257/99, art.43.2.

or sold. There will be some flexibility, however, in that Member States are permitted to balance individual SIP entitlements with regional or national averages.

The most radical change in the legal order for the CAP is the extension of cross compliance to apply to all direct payments to producers. The grant of the SIP will be conditional on observance of statutory environmental, food safety and animal health and welfare standards, as well as occupational safety standards for farmers.[18] Although there will be regional variations in the standards adopted by the Member States, the focus of cross-compliance conditions should be to support the enforcement of 'good farming practice' and encompass mandatory statutory requirements. All land, and especially that which is no longer used for production, must be maintained in "good agricultural and environmental condition". The framework for defining this requirement is specified in Council Regulation 1782/2003, and includes the retention of minimum soil cover, setting standards for crop rotations and stubble management (in the case of arable land) and setting minimum livestock grazing rates (in the case of livestock producers) to maintain landscape features and prevent unwanted vegetation encroachment.[19] Cross-compliance is to be applied using a whole-farm approach. This follows directly from the logic of decoupling and will emphasise the main purposes of the cross-compliance regime *viz.* to support the implementation of environmental, food safety and animal health and welfare legislation.

The cross-compliance conditions to be observed by producers receiving SIPs are closely linked to the non-trade concerns underpinning the Community's negotiating position in the WTO Millennium Round *viz.* environmental protection requirements, animal welfare, and food safety. These are underpinned by relatively stringent enforcement rules. Council regulation 1782/2003 provides for a reduction of not less than 20% in payment for intentional non-compliance, with the total exclusion of a producer from one or more aid schemes for one or more years the maximum permitted penalty applicable. For negligent non compliance the maximum penalty is fixed at 5% , and in the case of repeated non compliance 15%.[20] The normal penalty for negligent non compliance will be a 3% reduction in payments for the calendar year concerned, but once the 15% ceiling has been reached for repeated infractions then any further non compliance will be deemed to be intentional and treated as such.[21] The normal penalty for intentional non compliance has been fixed at 20% of the overall payment amount in any one calendar year.[22] In the case of "extreme event, severity or permanence or where repeated non compliances have been determined" the producer concerned can be excluded from the SIP scheme for the following calendar year.[23]

The inter-relationship between the decoupling proposals and their potential effect on the farmed environment is likely to be more complex than envisaged by the Commission in the Mid-term Review policy document. Because there will be no requirement to produce anything to receive the SIP, this might encourage landowners to take the payments and cease farming altogether where this advantageous economically. This will depend on conditions in the market, but, given the depressed state of the market for sheep meat and beef, it may be a particular concern in upland areas that are dependent on livestock production. The application of environmental cross-compliance conditions will be particularly important in addressing these issues if they emerge as a real problem.

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18 Council Regulation (EC) 1782/2003, arts. 3 and 4.

19 Council reg.(EC) 1782/2003 art 5 and Annnex IV.

20 Council reg.(EC) 1782/2003 art 7.2,7.3.

21 Commission Reg. (EC) 796/2004 OJ L 141/18 (30.4.2004), art 66.1, 66.4.

22 art 67.1 ibid.

23 art. 67.2 ibid.

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CAP Reform: the implications for Property Rights

The choice of legal and economic instruments to implement the new CAP policy objectives has major implications for property rights. The precise choice of legal and economic instruments is left to the national legal order of the member states. However, Community law requires that the environmental elements of farm policy be implemented using two regulatory techniques. Council Regulation 1782/2003 makes it mandatory for member states to apply cross compliance requirements to direct support payments in all spheres (previously this was only mandatory for beef and sheep livestock payments and set aside). Secondly, agri-environment schemes with incentive payments for environmental stewardship can be used where measures targeted at particular environmental problems are required.

The primary implications for property rights theory raised by CAP reform arise from the underlying principles by reference to which the new policy instruments must operate, and the adjustment in property rights that this implies. A fundamental feature of the new law of the CAP is the requirement that, in order to qualify for environmental stewardship payments under the Rural Development Regulation, farmers must be required to meet conditions going beyond what is required by "good agricultural practice". Basic conditions of environmental conditionality are, by contrast, to be applied through cross compliance under the SIP scheme.

"The philosophy underpinning the environmental aspects of the CAP reforms is that farmers should be expected to observe basic environmental standards without compensation. However, where society demands that farmers deliver an environmental service beyond the base line level, this service should be specifically purchased through the agri-environment measures".[24]

The law of the CAP now, therefore, establishes "good agricultural practice" as a normative standard. This has property rights implications, in that compensation payments for changes in land use will only be made if the land management concerned goes beyond what is considered to be good practice. Landowners will be required to respect general requirements concerning environmental stewardship without specific payment for doing so. In other words, landowners will be expected to bear environmental compliance costs up to a reference level of good agricultural practice reflected in property rights.[25]

This philosophy underwrites the detailed measures contained in the regulations implementing Agenda 2000 and the Mid-Term Review in the Community legal order. It is applied to the rural development measures, for example, to ensure they are only applied subject to the condition that minimum environmental standards should be observed or result from the action funded.[26] For activities going beyond the base line standard of good agricultural practice, agri-environment measures with incentive payments will normally be applicable. But article 23.2 of the 1999 rural development Regulation expressly requires that agri-environment commitments shall involve more than the application of usual good farming practice. Support under agri-environment schemes must be for commitments for at least 5 years, and support is to be granted annually on the basis of income foregone by participating farmers, additional costs and "the need to provide an incentive".[27] The reference point for calculating income foregone and the additional costs to the farmer of implementing the agri environment undertaking given must be the usual farming practice in

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[24] *Directions Towards Sustainable Agriculture*, COM (1999) 22 Final at para 3.2.1.

[25] *Indicators for the Integration of Environmental Concerns into the Common Agricultural Policy*, COM (2000) 20 Final.

[26] See e.g. Council Regulation (EC) 1257/1999, arts. 5 (investment), 26 (improving processing and marketing) and 31 (forestation).

[27] article 24 ibid.

the given area where the measure applies.[28] The level of incentive payment to be applied is left to the member states to determine, but it must be determined on the basis of objective criteria, and a ceiling is applied limiting the incentive element to a maximum of 20% of income foregone and the additional cost of carrying out the undertaking given.[29]

The reforms are an attempt to apply the Polluter Pays principle of EC environmental law to the agriculture sector. A key problem concerns the elasticity of the concept of "good practice". Clearly, good agricultural practice is a concept whose content will vary from one location to another, and it is entirely dependant on the nature of the husbandry practised in a locality and its historic interaction with wildlife, landscape and the wider environment. It is not a homogenous concept capable of any precise definition with universal validity. The implementing regulations for the Agenda 2000 reforms recognise this, and define "usual good farming practice" as the standard of farming which a reasonable farmer would follow in the region concerned.[30] They require member states to formulate verifiable standards in their rural development plans, with environmental indicators against which the impact of agricultural practice on the environment can be measured.

In terms of establishing a normative, and legally enforceable, standard of environmental stewardship, the provisions on good practice have several weaknesses, of both a theoretical and practical nature. Most importantly, there are no objective legal criteria by which "good" practice is to be measured. If objective criteria are to be established, and differential impacts on property rights in different regions to be avoided, this must be done by reference to fixed environmental criteria established in the Community legal order. Instead, the new law of the common agricultural policy clothes established agricultural usage, in the guise of "good practice" with normative effect. In accordance with the subsidiarity principle this is to be dependant on an evaluation of what constitutes good practice in the region concerned. What is to be regarded as "good agricultural practice" in a particular region will to a large extent depend upon the historic husbandry practices of the majority of farmers in that region, and this may not accord with the requirements of environmental protection as currently understood. In practical terms, fixing the legal basis of the new standard in established usage will also minimise the impact on property rights of the environmental reforms of CAP.

Rethinking Property Rights Theory

The reform of agri-environment law initiated by Agenda 2000 has placed greater emphasis on the use of contractual mechanisms for promoting environmental stewardship using land management agreements, coupled with the use of cross compliance to impose environmental conditions on land use. If this strategy is to be effective, it must be underpinned by a fundamental revision of the theory and ideology of property rights.

Following the well known categorisation of property rights by Calabresi and Melamed,[31] the environmental regulation of land use is concerned primarily with property rules and liability rules. The property owner may appear to hold an inalienable entitlement, in that at common law freehold ownership confers unrestricted rights to exploitation, management and control. These are rights, however, which can be removed in a voluntary transaction in which the seller agrees the value of the entitlement. The rules governing environmental management agreements provides a classic example, as here the owner is bargaining away his entitlement to unfettered exploitation of land in return for a payment reflecting both the value of the right foregone and the value of the stewardship obligations contracted for. The

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[28] art. 17 Commission Regulation (EC) 1750/1999.

[29] art. 18 Commission Regulation (EC) 1750/99 ibid..

[30] art. 28 Commission Regulation (EC) 1750/1999, emphasis added.

[31] G.Calabresi and A.D.Melamed, "Property Rules, Liability Rules and Inalienability : One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089.

principal legal rules underpinning the environmental regulation of land use are therefore properly property rules and liability rules in Calabresi's categorisation, not inalienable entitlements.

Management agreements and compensation payments are the primary legal vehicles in English law for reassigning private property rights, and the legal framework for management agreements accordingly requires the payment of compensation for reassigning legally vested rights. The Community legal order now places limits on this, as we have seen, in that only those vested rights whose exercise goes beyond "good" agricultural practice can be adjusted in an agreement and compensated.

The changes in the law of the Common Agricultural Policy initiated by Agenda 2000 and the MTR have been introduced using public law mechanisms. This has resulted in a modulation of property rights in environmental management contracts between state agencies and individual producers, and under the administrative arrangements for the common organisation of the various markets for agricultural produce. The reforms do nothing, however, to reassign *private* property rights to incorporate the stewardship ethic, or to reform the fundamental paradigm of the property domain in English law.

This is a significant issue for the implementation of agri environmental policy, with both practical and theoretical consequences of some importance. Private property rights have precedence over public law notions of property in legal systems, like the common law, founded in notions of capitalist liberal economics. Any reassignment of property rights under a management agreement is, by definition, temporary and endures for the lifetime of the contract. Similarly, the adjustment of property rights by the use of cross compliance mechanisms attached to SIPs payments merely imposes a transient measure of environmental regulation. The management rights traded in return for subsidy would automatically be reassigned at common law to the property owner on termination of the subsidy arrangement. Moreover, if the producer is willing to farm without direct subsidy the cross compliance technique has no relevance. It can only be used to reassign private property rights if economic conditions are such that producers are dependant on subsidy for production, and are willing to trade their entitlements in an interdependence arising from their participation in direct support arrangements within the CAP. If a *permanent* reassignment of property rights is to be achieved, this will require the reform of property rights to incorporate adherence to the stewardship ethic within the private property domain in English Law. Reliance solely on public law techniques of environmental regulation will not suffice.

Another prominent characteristic of modern environmental regulation is the imposition of *positive* duties to manage land in a particular way. The new law of the CAP is a good example of this trend in modern environmental regulation. As we have seen, Agenda 2000 and the MTR require member states to implement environmental reform by attaching environmental conditions to direct support payments under SIPs (cross compliance) and, where necessary, to implement targeted agri environment schemes appropriate to the geographical locality, where they are needed to address specific environmental problems. Both are premised on positive management, in as much as the law now requires landowners to farm their land in accordance with the requirements of good agricultural practice as a basic incident of the owner's property domain. The use of environmental contracts is also increasingly focussed on the imposition of positive land management to improve the environment and to recreate natural habitats and landscape features, rather than on land use restrictions aimed simply at preserving the *status quo ante*. In England and Wales, the most recent agri environment schemes are based upon a new generation of "positive" management agreement which typically impose obligations to manage land for environmental improvement and habitat recreation, with incentive payments and additional payments for capital works of conservation benefit. In England this development is typified

by the Countryside Stewardship scheme administered by DEFRA[32] and (in the case of designated wildlife sites) the Wildlife Enhancement scheme administered by English Nature. These schemes are the primary vehicles in England for implementing the targeted agri-environment measures envisaged in the Agenda 2000 reform.

Legal rules requiring positive land management, whether imposed within a contractual framework or through the administrative arrangements for producer support, cannot be satisfactorily classified simply as property-limitation rules. Their primary focus is the requirement of positive land management in accordance with an established normative standard. They are therefore a species of property-duty rule. Harris' classification of property rights recognises the distinction between property-liability rules and property-duty rules, but locates property-duty rules in the imposition of obligations on the owner of assets which have nothing to do with the exercise of any ownership privileges over the asset in question (in our case land).[33] Environmental rules of the kind we are concerned with do not fit within this paradigm: they are a new species of property rule that imposes positive obligations specifically as an attribute of the exercise of ownership privileges. They do not abrogate property rights as such, rather they impose positive obligations that impact on the *way in which* ownership privileges and powers are exercised. A farmer is perfectly entitled to adopt the system of farming he wishes on his land, whether intensive arable, dairy or livestock farming. This is a privilege of ownership and remains so. Having made his choice, however, the law requires him to manage his land in accordance with the dictates of good agricultural practice, insofar they apply to the land use he has chosen. And he may be offered a management agreement with incentive payments if the requirements of environmental protection indicate that something beyond this base line of sound management is required to deliver the policy goal sought

The environmental regulation introduced in the new legal order for the CAP is not, therefore, based upon property-duty rules in the classical sense. Neither do these rules fit easily within Calebresi's hierarchy of property rights, which assumes complete freedom of action on the part of the property owner when reassigning rights protected by a property rule.[34] They would be better characterised as an entirely new species of property rule – *property-management* rules. That this is an entirely new category of property rule is apparent from a consideration of the interaction of property-management rules with the rules protecting the owners existing interest within an interdependence. Protection of one's interest within an interdependence by a property rule normally infers that one's desires in the relationship are ascendant to the desires of other involved parties, unless the protected individual chooses to reassign his control.[35] In this regard, property-management rules differ from other types of property rule. They are distinctive in that the imposition of a property-management rule is intended to protect a public interest goal (ensuring a basic standard of environmental husbandry) rather than the protection of the property owner's rights *per se*. In the negotiation of an interdependence by which those rights are subsequently reassigned (for example in a management agreement), the scope of those rights that the property owner can bargain and reassign is correspondingly reduced. He still has unfettered property rights – it is just that his freedom to bargain them away in an interdependence is restricted.

If we adopt an economic "bargaining" model of property rights this becomes clear. Property rules are fundamental to the operation of markets that assign value to an interdependence. However, the market is not free of coercion and the terms of the exchange that the parties voluntarily agree will depend on the alternatives available to each party if a market transaction cannot be negotiated. Environmental regulation that constrains farm

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[32] See now the Countryside Stewardship Regulations 2000, SI 2000/3048.

[33] JW Harris, *Property and Justice* (Oxford 1996) at 37.

[34] Calabresi and Melamed, n.4 above, 1092-1093,1106-1110.

[35] R. Griffin., "Welfare and Institutional Choice" (1991) 73 *American Journal of Agricultural Economics* 601

management choices and diminishes net returns does not force a farmer to sell out – it simply reduces his bargaining power, and his ability to negotiate terms within an interdependence which allocate a higher value to the rights he is willing to reassign.[36]

Conclusion

The reforms to the law of the CAP initiated by the Mid-Term Review represent a move towards the greater use of property-management rules in the environmental regulation of land use. So far, this has been implemented primarily through administrative techniques of land use regulation (for instance by attaching environmental cross compliance requirements to producer subsidy schemes) and through the promotion of voluntary environmental management schemes. The reformed law of the CAP demonstrates responsiveness to the geographical diversity of the EU and to the diverse pattern of agricultural practices that have, historically, shaped the rural environment in its constituent member states. If a new theory of "environmental" property rights is to be developed, however, this will require a radical extension of the stewardship ethic and its integration into the framework of the private property domain in English law. The common law understanding of property rights must be fundamentally reappraised to include *duties* and *responsibilities* to manage land sustainably, and to adhere to the principles of environmental stewardship.

The CAP reforms testify to a growing awareness of the need to introduce effective environmental regulation of intensive agriculture. If this is to be satisfactorily achieved, however, we must ensure that property rights are conditioned by environmental considerations, and that social responsibility becomes integral to the bundle of legal rights and duties recognised by common law property rules. This will require a radical extension in the use of property – management rules, and their incorporation into the private property domain itself. English property law is heavily influence by natural law theories of property ownership, which view property rights as a species of natural right arising independently of the law. This ignores the social context of property ownership, and the owner's duty to farm in accordance with requirements of sustainable agriculture. A theory of "environmental" property rights can only be premised on a more modern view – that property rights owe their existence to civil society. They are a product of the law itself, with boundaries dictated by the priorities and concerns of modern society. The implementation of sustainability principles in the legal order for agricultural property rights must not only be achieved, therefore, in a manner that is sympathetic to the geographical diversity of the EU. It will also involve a fundamental shift towards an explicit recognition of the duties of property ownership, as well as its benefits.

[36] See B.Colby. "Bargaining over Agricultural Property Rights" (1995) 77 *American Journal of Agricultural Economics* 1186.