

## Farmers, Milk Prices and Rural Indignation

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### Abstract

For over a decade there have been protests by United Kingdom farmers against the low prices which they receive for their milk. This Chapter will first set these protests against the legal background, with specific reference to the deregulation of the dairy sector in the 1990s, actions taken by the competition authorities and recent statutory intervention in the groceries supply chain. It will then examine the protests themselves, concentrating on the militant expression of indignation which has coalesced around Farmers for Action and the ways in which the farmers have hoped to influence either industry practice or even the political process. Finally, there will be discussion of reforms at European Union level designed to rebalance the respective bargaining power of farmers and dairy processors. In conclusion, it will be suggested that the protests have overall been relatively effective, and may even be characterised as a form of 'negotiation' in a market which is not functioning well.

### Key words

Farmers; protest; milk prices; Farmers for Action; Groceries Code Adjudicator; Regulation (EU) No. 261/2012; social movements

### Resumen

Durante más de una década, los ganaderos del Reino Unido han protestado por los bajos precios que reciben por su leche. En primer lugar, este artículo analizará el marco legal de las protestas, haciendo una referencia específica a la desregulación del sector lácteo en la década de 1990, las medidas adoptadas por las autoridades de competencia y la reciente intervención legal en la cadena de suministro de

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alimentos. A continuación, se analizarán las protestas en sí mismas, concentrándose en la expresión activista de indignación, reunida alrededor de Farmers for Action (Ganaderos en Acción), y la forma en la que los ganaderos han pretendido influir tanto en la práctica industrial o incluso en el proceso político. Por último, se debatirán las reformas a nivel de la Unión Europea, destinadas a reequilibrar el poder de negociación de agricultores y elaboradores de productos lácteos. En conclusión, se sugiere que, en general, las protestas han sido relativamente eficaces, e incluso se pueden caracterizar como una forma de "negociación" en un mercado que no está funcionando bien.

**Palabras clave**

Ganaderos; protestas; precio de la leche; Ganaderos en Acción; Adjudicador del Código de Alimentos; Regulación (EU), 261/2012; movimientos sociales

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## 1. Introduction

The British countryside is often represented as a rural idyll, free from politics; yet there may also be detected numerous instances where it has proved the *locus* for protest against socio-economic inequality (Woods 2005, Murdoch *et al.* 2012, pp. 95-110). The Peasants' Revolt of 1381 immediately springs to mind, while the outcry which followed the sentencing of the Tolpuddle Martyrs in 1834 played a major role in the development of trade unionism.<sup>1</sup> Recent years have seen a re-awakening of such indignation. For example, farmers were to the fore in the fuel protests of 2000, with their blockades of Stanlow and other oil refineries having far greater impact than had been expected (through a combination of such factors as 'just-in-time' delivery by tankers to petrol stations and panic-buying by motorists) (Doherty *et al.* 2003, Robinson 2003). Two years later, in 2002, 400,000 people were reported to have participated in the March for Liberty and Livelihood, organised by the Countryside Alliance (BBC News 2002), with the size of the demonstration arguably reflecting success on the part of the movement in extending its ambit beyond the defence of hunting so as to capture also broader rural issues (Woods 2003, pp. 101-30, Anderson 2006). And, central to this Chapter, for over a decade there have been a series of protests by farmers against the low prices which they receive for their milk, a phenomenon not confined to the United Kingdom (as may be seen in the spraying by farmers of thousands of litres of milk at the European Parliament in November 2012) (Reuters 2012).

The scale of these manifestations of indignation has been sufficiently great to prompt suggestions that a new social movement is in the course of development, based around notions of 'rural identity' (Woods 2003, 2008).<sup>2</sup> In particular, the campaigners are considered to conform with the classic definition of a new social movement as set out by Diani (1992, p. 13), namely 'a network of informal interactions between a plurality of individuals, groups and/or organizations, engaged in political and cultural conflict on the basis of a shared collective identity'. On the other hand, the diversity of protest has also received emphasis, with it being cogently argued that, although the countryside may be the place where direct action is initiated, different voices with different agendas are to be heard (Reed 2008, Bell *et al.* 2010). This may again be illustrated by the fuel protests of 2000 and the marches of the Countryside Alliance. In the case of the fuel protests, farmers without doubt played a leading role, but the absence of a coherent and specifically 'rural' agenda may be suggested by the equally prominent role played by the hauliers (Doherty *et al.* 2003, Woods 2005, pp. 149-152). Similarly, differing priorities may be detected within the Countryside Alliance (which, significantly, did not support the fuel protests). Born of an amalgamation of the British Field Sports Society, the Countryside Business Group and the Countryside Movement, there continues to be within the organisation the potential for conflict between those for whom the highest priority remains the defence of field sports and those for whom greater importance should be attached to a broader defence of rural life. Definitely, there would seem to have been a conscious effort to include the latter constituency with the purpose of widening public appeal (Anderson 2006), but a price to be paid may be the watering down of a 'shared collective identity'.

In consequence, to whatever degree a new social movement may be identified, it would seem relatively uncontroversial that there remain divergent (albeit frequently

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<sup>1</sup> The Peasants' Revolt of 1381, which had its focus in the counties of South-East England, was sparked by the levy of poll tax but later embraced wider political demands, including the abolition of serfdom. Despite some initial successes, and the promise by a young King Richard II to abolish serfdom, the authorities soon regained control and such leaders of the revolt as survived were executed. The Tolpuddle Martyrs were leaders of a farmworkers' union formed in Dorset to protest against ever lower wages. In 1834 they were sentenced to seven years' transportation to Australia for having taken an oath of secrecy. However, in the face of mass demonstrations, the Government subsequently gave way and they returned home with free pardons after three years.

<sup>2</sup> On indignation and social movements more generally, see, for example, Collins (2001).

connected) strands of rural indignation. And this Chapter will be directed to the strand comprising the numerous protests by farmers over low milk prices, which may offer at least two notable advantages as a subject for study. First, most of the direct action taken by the farmers remains reasonably differentiated, in that it may fairly be characterised as a sectoral industry dispute. The immediate actors are the farmers themselves, dairy processors and major retailers, notwithstanding that a clear objective of the protests may have been to generate wider publicity – and, in turn, public sympathy and government intervention. Secondly, there are good grounds for believing that the law has played a major part – and that it retains the capacity to do so. In particular, the low prices received by dairy farmers have been attributed to a regulatory framework which leaves them at a structural disadvantage, while a constant source of controversy is the extent to which the law should intervene (whether on a voluntary or compulsory basis) so as to rebalance the market.

Accordingly, this Chapter will proceed in three sections. The first will address certain legal aspects of the current operation of the United Kingdom supply chain for milk and milk products, having regard to their effects on the financial returns which are received by farmers. This should go some way to explaining the source of their indignation. Secondly, the protests themselves will be examined, with focus on the leadership provided by Farmers for Action (FFA) and the ways in which the farmers hoped to achieve their objectives. Finally, there will be discussion of a specific legislative response, instigated at European Union level and designed to rebalance the respective bargaining power of farmers and dairy processors. Such discussion will concentrate on two provisions, namely a measure to enhance negotiating rights for producer organisations and a measure permitting Member States to impose compulsory written contracts between farmers and dairy processors. Without doubt, this legislative response again throws into sharp relief the question whether there should be intervention on a voluntary or compulsory basis.

## **2. The United Kingdom supply chain for milk and milk products**

In any analysis of the factors which have generated indignation among dairy farmers, it would be impossible to ignore the formal (and sometimes less formal) governance of the United Kingdom supply chain for milk and milk products. Indeed, this is an area where both ‘hard law’ and ‘soft law’ approaches have been adopted; and it is also an area where policy initiatives have swung from treating the dairy sector as ‘exceptional’ to treating it, in large part, as ‘just another industry’. As shall be seen, such tensions would seem to persist and underpin much of the current turbulence, with (broadly speaking) farmers looking for state intervention in what they consider to be a dysfunctional market and Government showing some reluctance to do so.

In this context, reference will be made to three developments over the past twenty years: first, the deregulation of the milk and milk products markets in the early 1990s, in consequence of the abolition of the statutory Milk Marketing Boards; secondly, action taken by the relevant competition authorities in relation to price-fixing as between retailers and dairy processors during 2002-2003; and, thirdly, more recent statutory intervention in the groceries supply chain, with a view to redressing the respective bargaining power of primary producers, suppliers and retailers.

As indicated, until the early 1990s the milk and milk products markets were subject to close regulation, with a central role being played by the five United Kingdom Milk Marketing Boards, namely the Milk Marketing Board for England and Wales, the Scottish Milk Marketing Board, the North of Scotland Milk Marketing Board, the Aberdeen and District Milk Marketing Board and the Milk Marketing Board for Northern Ireland. Their creation may be ascribed to difficulties within the dairy

supply chain following the First World War, at a time when, not dissimilar to today, individual farmers were struggling to secure higher prices for their milk (Federation of United Kingdom Milk Marketing Boards 1993, p. 11). In effect, the Boards were farmer co-operatives enjoying statutory status;<sup>3</sup> and each Board would sell the milk for every farmer within its region. All receipts would then be pooled and distributed in proportion to the amount of milk which the farmer had delivered, with the Court of Justice of the European Union holding that such price equalisation applied also to pasteurised milk (*Milk Marketing Board of England and Wales v. Cricket St. Thomas Estate*) and to skimmed and semi-skimmed milk (*Commission v. United Kingdom*). A consequence was that those producing on a small scale could still hope to survive in the market, even if far from urban outlets; and, by virtue of willingness on the part of Government to legislate comprehensively, the full effect of competition was blunted.

When the United Kingdom joined the European Economic Community in 1973, the continuation of the Milk Marketing Boards received formal sanction (Council Regulation (EEC) No. 1422/78 of 20 June 1978 concerning the grant of certain special rights to milk producer organisations in the United Kingdom, Commission Regulation (EEC) 1565/79 of 25 July 1979 laying down rules for implementing Regulation (EEC) No. 1422/1978).<sup>4</sup> However, twenty years later the decision was taken to revoke all the statutory schemes, with a view to market liberalisation (Williams 1993, Smith 1995a, 1995b).<sup>5</sup> Although the immediate consequence would seem to have been a period of high returns for farmers (in 1996-1997 the average farmgate price for milk rising to 25.02 pence per litre), there was thereafter a consistent downward trend, to the extent that by 2002-2003 the price had fallen to 16.91 pence per litre (Ian Potter Associates 2013a). Moreover, in its major report into the operation of the grocery supply chain, the Competition Commission (2008, p.160) observed that the milk sector was one where 'the proportion of the UK retail price captured by the primary producer [had] fallen over the ten years from 1997 to 2006'. And this inability to secure a 'fair share' of the retail price would seem to have persisted, reaching a particular crisis in the summer of 2012 when it was calculated that, from a £1.18 retail price for 4 pints (2.3 litres) of semi-skimmed milk, only 57 pence (or 25 pence per litre) reached the farmer, to be set against 68 pence production costs, while by contrast the retailer mark-up was some 34 pence (BBC News 2012a). Further, there was evidence that the supermarkets were selling milk as a 'loss leader', with 4 pints of milk costing less than one bottle of mineral water (Gray 2012).

In the same context, it may also be noted that, following the revocation of the statutory schemes, efforts were made to institute 'successor' co-operatives and, in particular, Milk Marque became 'successor' co-operative to the Milk Marketing Board for England and Wales and Scottish Milk became 'successor' co-operative to the Scottish Milk Marketing Board (Monopolies and Mergers Commission 1999, pp. 127-151). The size of their operations was considerable. Milk Marque alone enjoyed a 49.6 per cent share of the milk supply in Great Britain in 1996-1997; and this led to a finding by the Monopolies and Mergers Commission in its 1999 report that it was a 'scale monopolist' and that it had 'been able to exploit its monopoly position by

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<sup>3</sup> The Milk Marketing Board for England and Wales, the Scottish Milk Marketing Board, the North of Scotland Milk Marketing Board and the Aberdeen and District Milk Marketing Board all came into being during the 1930s under the Agricultural Marketing Act 1931 and the Agricultural Marketing Act 1933, while the Milk Marketing Board for Northern Ireland was not formally constituted until 1955 under the Agricultural Marketing Act (Northern Ireland) 1933.

<sup>4</sup> Such sanction was conditional upon, *inter alia*, a poll of producers in the region of each Board to establish whether or not they supported its maintenance (all such polls, in the event, revealing clear majorities in favour).

<sup>5</sup> The statutory schemes governing the Milk Marketing Board for England and Wales, the Scottish Milk Marketing Board, the North of Scotland Milk Marketing Board and the Aberdeen and District Milk Marketing Board were all revoked as from 1 November 1994 under the Agriculture Act 1993; and the statutory scheme governing the Milk Marketing Board for Northern Ireland was revoked as from 1 March 1995 under the Agriculture (Northern Ireland) Order 1993 SI 1993/665 (NI 10).

using its selling system to price discriminate and to control the supply of milk made available to the market' (Monopolies and Mergers Commission 1999, p. 4). For that reason, the Monopolies and Mergers Commission recommended, *inter alia*, the division of Milk Marque into independent bodies and, despite the Secretary of State for Trade and Industry not accepting this recommendation, Milk Marque subsequently issued a voluntary proposal that it be divided into three regional co-operatives, a proposal carried into effect by the creation of Axis, Milk Link and Zenith. A matter of some importance is that the validity of the Monopolies and Mergers Commission 1999 report (and other decisions of the Secretary of State) was confirmed by the Court of Justice of the European Union in *R. v. Competition Commission, ex parte Milk Marque*. The judgment made clear that, notwithstanding extensive European Community legislation in this field, national authorities in principle retained jurisdiction to apply national competition law to a milk producer co-operative with a powerful position on the national market; and that the interests of consumers were also to be taken into account, these being interests which could in the correct circumstances be granted priority over the objective of ensuring a fair standard of living for the agricultural community (*R. v. Competition Commission, ex parte Milk Marque*, paras 80-94).

The ensuing fragmentation would seem to have had a negative impact on the financial viability of producer co-operatives generally. To provide just one illustration, in 2002 Zenith Milk merged with The Milk Group to form Dairy Farmers of Britain, a larger co-operative with ambitions, only for the larger co-operative to go into receivership in 2009. Although the House of Commons Environment, Food and Rural Affairs Committee found that its demise was not attributable to co-operative status, it was also accepted that there was scope to strengthen this form of trading vehicle, with specific reference to enhancing access to capital markets (House of Commons Environment, Food and Rural Affairs Committee 2010). Furthermore, and perhaps most significantly in terms of generating a sense of helplessness and indignation, Dairy Farmers of Britain had been formed with the clear objective of finding a producer-based solution to low prices and, in terms of realising this objective, it had failed.<sup>6</sup>

Secondly, as indicated, the intervention of the competition authorities has extended also to price-fixing as between retailers and dairy processors. It might be expected that such action would have the capacity to benefit producers, on the basis that the highly consolidated retail sector in the United Kingdom enjoys a powerful bargaining position as against processors, who in turn are under pressure to reduce the prices paid to producers (Competition Commission 2008). Any curb on collusive activity might therefore seem a welcome development for farmers - and definitely the Office of Fair Trading has been able to impose substantial penalties in the dairy context. Thus, following extensive investigations, by a decision issued in August 2011 penalties totalling almost £50 million were imposed on four supermarkets (Asda, Safeway, Sainsbury's and Tesco) and five dairy processors (Arla, Dairy Crest, Lactalis McClelland, The Cheese Company and Wiseman) for co-ordinating price increases of certain dairy products to consumers in 2002 and/or 2003 (Office of Fair Trading 2011).<sup>7</sup>

Nonetheless, evidence advanced in the subsequent appeal by Tesco against this decision of the Office of Fair Trading would suggest that the co-ordinated price increases were motivated not so much by a desire on the part of the supermarkets and dairy processors to realise greater profits for themselves; rather, in the words

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<sup>6</sup> See, for example, the evidence of Mr Philip Moody, a former Board Member of Dairy Farmers of Britain to the House of Commons Environment, Food and Rural Affairs Committee (stating that, when the co-operative first came into being, 'there was a very strong sense that farmers needed to do something to take destiny into their own hands to try and create a longer-term sustainable future' (House of Commons Environment, Food and Rural Affairs Committee 2010, HC 227-I, para 8).

<sup>7</sup> It may be noted that these penalties marked a significant reduction as compared with those earlier imposed (Office of Fair Trading 2007, Office of Fair Trading 2008, Office of Fair Trading 2010).

of the Competition Appeal Tribunal, the purpose of the exercise was 'to appease the farmers', who had commenced blockades of creameries and other processing plants (*Tesco Stores Ltd v. Office of Fair Trading*, para 1). As already noted, by 2002-2003 farmgate prices for milk had fallen considerably, with the resulting sense of injustice being further fuelled by an understanding that, in contrast, the sale of milk and milk products were generating significant profits for supermarkets. Indeed, the Competition Appeal Tribunal observed that the margin of retailers increased from 3.1 per cent in 1995 to almost 28 per cent in 2003, with processors squeezed in the middle, their margins showing only a 'modest rise' (*Tesco Stores Ltd v. Office of Fair Trading*, para 25). Such acknowledged difficulties faced by farmers would seem to have provided the impetus for Tesco to make a public declaration in their support on 3 September 2002, subsequently calling upon all dairy processors to increase the price paid for raw milk by at least 2 pence per litre. However, since dairy processors would inevitably wish to pass on any increased price to retailers, Tesco would in turn have to increase the price charged to consumers if it were to maintain its margins. At the same time, it became evident that, if an increase in price of 2 pence per litre were to be delivered effectively to farmers, then action would be required not only by Tesco, but also by all the major retailers - and in respect of raw milk used to manufacture other dairy products (such as cheese) as well as fresh liquid milk (*Tesco Stores Ltd v. Office of Fair Trading*, paras 163-169). It was the communications for this purpose between dairy processors and retailers that attracted the attention of the Office of Fair Trading and, although on appeal several findings against Tesco were set aside, there is something of a paradox in the competition authorities initiating investigations into activities which could be considered to have had as their aim a better balance (or, at least, a better distribution of profit margin) within the supply chain. In addition, the investigations would seem to have proceeded on the underlying basis that the interests of consumers should be accorded greater priority than the interests of farmers; yet it may be questioned whether the driving down of farmgate prices to the extent that the dairy industry may lurch into genuine crisis does in fact operate in the long-term interests of the consumer, while for the supermarkets themselves there is always the issue of security of supply.

Thirdly, by contrast, farmers may now derive some comfort by reason of tighter regulation of the grocery supply chain, not least because, following criticism of the draft legislation as first introduced in Parliament, the statute as enacted has acquired sharper teeth. The origin of this initiative was the 2008 report of the Competition Commission. The report found that primary producers were capturing a smaller proportion of the retail price, but it also considered that the exertion of 'buyer power' by United Kingdom grocery retailers and intermediary purchasers was just one factor determining returns for farmers, to be set alongside, *inter alia*, Common Agricultural Policy reform and food safety and animal health and welfare issues (Competition Commission 2008, pp. 160 and 162).<sup>8</sup> Nonetheless, it did recommend that the existing voluntary Supermarkets Code of Practice be strengthened and extended to a wider range of grocery retailers; and that an Ombudsman be established to oversee the revised Code (Competition Commission 2008, p. 6). Further, while for the purposes of establishing the Ombudsman a voluntary approach was initially to be preferred (with legally binding commitments to be sought from grocery retailers), there was also a recommendation that Government should take the necessary action if such commitments could not be secured (Competition Commission 2008, p. 6).

In the event, the revised Groceries Code came into force on 4 February 2009, but the requisite commitments from grocery retailers in relation to the establishment of an Ombudsman were not forthcoming, with the result that the Competition Commission was obliged formally to request Government intervention (House of

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<sup>8</sup> For the position in other Member States of the European Union, see Bukeviciute *et al.* (2009).

Commons Business, Innovation and Skills Committee 2011, paras 1-9, Seeley 2013). As a consequence, following the election of the Coalition Government in 2010, a Draft Groceries Code Adjudicator Bill was introduced in the House of Lords in May 2011 (Draft Groceries Code Adjudicator Bill 2011). However, the proposed powers of the Groceries Code Adjudicator received considerable criticism, in that financial penalties could only be levied if authority to do so was granted under an order by the Secretary of State for Business, Innovation and Skills (House of Commons Business, Innovation and Skills Committee 2011, para 113). This potential weakness was nevertheless carried through into the Bill itself when introduced in the House of Lords in May 2012, only for the Government to announce in December 2012 that the Adjudicator would indeed be given the power to fine from inception, the relevant press notice expressly stating that this change was 'likely to be widely welcomed by suppliers and farmers' (Department for Business, Innovation and Skills 2012). The power to fine may now to be found in Section 9 of the Groceries Code Adjudicator Act 2013, which completed its passage through Parliament in April 2013.<sup>9</sup>

That said, farmers would be wise to show some caution, in that again the purpose of the legislation has been articulated very much in terms of its benefits for the consumer: as stated in January 2012 by the then Secretary of State for Environment, Food and Rural Affairs, Caroline Spelman, '[f]ree and fair competition is the key to a healthy market, and it is right that the adjudicator should make sure the market is working in the best long-term interests of consumers' (HC Deb (2010-12) Vol 539 Part 253 Col 48). In addition, as highlighted by the House of Commons Environment, Food and Rural Affairs Committee, the focus of the legislation is on the relationship between major retailers and their direct suppliers – and few dairy farmers directly supply supermarkets (House of Commons Environment, Food and Rural Affairs Committee 2015, paras 36-40).

### 3. The protests

As has been seen, protests by farmers over low prices for milk have been ongoing for over a decade and it may be recalled that the co-ordinated price increases by retailers during 2002 and 2003 were a direct reaction to blockades of creameries and other processing plants. Such cause and effect was explicitly acknowledged by the Competition Appeal Tribunal in *Tesco Stores Ltd v. Office of Fair Trading*, which emphasised that '[t]hese protests had the potential to be most disruptive to the retailers and could have caused substantial damage to their operations, profits and reputations' (*Tesco Stores Ltd v. Office of Fair Trading*, para 165). It has also been persuasively argued that this form of action was founded upon earlier experience and, in particular, the demonstrations against beef imports from Ireland during the Bovine Spongiform Encephalopathy (BSE) Crisis, when a consignment of Irish beefburgers was notoriously tipped into Holyhead Harbour (Woods 2005, pp. 146-9). Furthermore, protest over farm prices more generally can be traced back over the centuries.<sup>10</sup> That said, two distinctive aspects of the current protests may be highlighted: first, the more militant expression of indignation which has coalesced around FFA; and, secondly, the way(s) in which farmers have sought through blockades and otherwise to influence either industry practice or even the political process.

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<sup>9</sup> However, it may be observed that, under the same Section, the exercise of the power to fine is dependent upon the Secretary of State having specified the amount of the permitted maximum for financial penalties or having specified how that amount is to be determined; and the draft order to do so was only issued in early 2015 following criticism of the delay by, among others, the House of Commons Environment, Food and Rural Affairs Committee when investigating dairy prices (House of Commons Environment, Food and Rural Affairs Committee 2015, paras 41-42).

<sup>10</sup> For a magisterial treatment of indignation against high prices for agricultural commodities in the Eighteenth Century (but in circumstances where the indignation was directed rather against the farmers, on the grounds that they were with-holding grain from market), see Thompson 1971.

FFA was formed in 2000 at a motorway service station from a loose array of protest groups (Woods 2003, 2005, pp. 149-161, Reed 2008).<sup>11</sup> Since that date, the organisation has proved a beacon for more militant farmers, also providing them with sufficiently close identity to engage with Government, retailers and other actors. Under the leadership of its charismatic Chair, David Handley, it has acquired a high media profile; and comparisons may legitimately be drawn with the *Confédération Paysanne* in France and its likewise charismatic founder, José Bové.

From inception, there would seem to have been a conscious attempt to generate distance from the National Farmers' Union (NFU), founded in 1906 and understood by members of FFA to have been captured by 'the establishment'. Thus, its website unequivocally states that FFA is comprised of 'a group of farmers who were disillusioned by the ineffectiveness of the organisations representing their industry' (FFA *About Us*). By contrast, even as FFA was coming into being, Grant (2000, p. 24) could categorise the NFU as 'a core insider group' (together with, for example, the Confederation of British Industry and the British Medical Association), distinguished by extensive exchange with policy-makers across numerous issues relevant to its sector. It was not, therefore, perceived to be sufficient as a vehicle to convey the full force of farmer indignation (Grant 2004), which may account for the fact that its leadership has over recent years been contested by more radical candidates, with this trend being perhaps most evident in the 2010 election for President (when the incumbent, Peter Kendall, succeeded in fighting off a challenge from Derek Mead, who claimed that the Government saw the NFU as being 'little more than a rubber-stamping institution') (Farmers Weekly 2010).

Such 'outsider' status would seem to have been exploited to good advantage by FFA. Thus, it can undertake activities which might not be easy for the NFU, these often being calculated to attract media attention and thereby raise the issue of milk prices higher up the political agenda (Grant 2000, pp. 125-148). Definitely, blockades continue to secure column inches across a broad range of the press (Driver 2012a, Crick 2012), while a deliberate intent to court publicity may be divined from the use of 'stunts': for example, in the summer of 2012 there were several instances of protestors sitting in a bath of milk outside supermarkets (BBC News 2012b). Accordingly, comparisons may be drawn with the activities of the *Confédération Paysanne* and, not least, the notorious dismantling of a McDonalds in Millau in 1999. In like vein, at least initially, FFA would seem to have derived benefit from its informal structure, again a common feature of 'outsider' groups: to provide just one illustration, the authorities would struggle to identify individuals or assets as targets of enforcement proceedings (Doherty *et al.* 2003).

For these reasons, the direct actions undertaken by FFA share at least some elements with those undertaken by radical environmental movements (such as, in the United Kingdom, the protests against the Newbury bypass or the second runway at Manchester Airport), but any analogy with those movements would seem, at best, imprecise. In particular, FFA may be regarded rather as engaging in an industry dispute, with its tendencies being conservative in the sense that there is a desire to preserve a dairy supply chain that is not subject to the full vagaries of the market (Reed 2008). Similarly, the response of the police during the early stages of the fuel protest was less robust than had been the case a year earlier when dealing with environmentalists at Manchester Airport, which arguably reflects a perception on the part of the police that the farmers and hauliers were less of a threat to public order (Doherty *et al.* 2003, Robinson 2003). Indeed, there was the perception in certain parts of the media that this was 'a very British blockade' (Cooper 2000) and the leader of the Conservative Party even described the protestors as 'fine, upstanding citizens' (BBC News 2000b).<sup>12</sup> Consistent with this

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<sup>11</sup> The website of FFA is available from: <http://www.farmersforaction.org/>.

<sup>12</sup> The Conservative Party did, however, urge the protestors to cease their direct action as the scale of its effect became apparent (Robinson 2003).

portrayal, FFA in its *Code of Conduct* expressly eschews civil disobedience (FFA *Code of Conduct*, Principles 4 and 5), distinguishing it from anti-GM organisations such as genetiX snowball, whose avowed purpose is to uproot GM crops (albeit in a non-violent manner) (genetiX snowball *Handbook*). As a result, although FFA may play much on its radical credentials, its activities at the time of the fuel protest have even been characterised as those of a petit bourgeois countermovement, enjoying strong establishment connections within rural society (Bagguley 2000).

In addition, over recent years there has been evidence of an increased willingness of FFA to work with the NFU, a development which may in part be attributed to moves by the NFU to shed some of its 'insider' status: for example, it has moved its headquarters out of London to Stoneleigh in Warwickshire (Grant 2004, pp. 413-414, 2005, Woods 2005, p.161). Further, such cooperation for a while enjoyed some formality. Both organisations became members of the 'Dairy Coalition', constituted during further milk price protests in 2012, with a view to securing a 'fair and functioning marketplace' (Midgley 2012). This incorporation of FFA within a broader alliance was also explicitly recognised on the FFA website, which declared that '[a]s FFA we are continually in dialogue with our coalition partners on issues such as how we progress with producer organisations, how we can achieve a formula that takes cost of production into farmgate milk prices, and many other things associated with dairy farming' (FFA *Milk Campaign 2012*). As a consequence, FFA could engage in formal dialogue with both industry and Government, while reserving its position on 'taking to the barricades'. Likewise, the NFU on occasion would seem to adopt a slightly more nuanced stance over protest, with the approach of both organisations being well encapsulated in a recorded statement by David Handley of FFA in February 2013 (Walsh 2013):

The NFU has said it will not condemn any protests if we deem them necessary, but they will not utilise their network to notify members of protests and when they are being held.

I won't argue with that because that's their right, but if we think protests are necessary that shouldn't stop us.

Nevertheless, the fragility of the relationship between FFA and the NFU was subsequently illustrated by their parting of ways in April 2013, FFA choosing to leave the Dairy Coalition (Driver 2013, Gregory-Kumar 2013).

Secondly, as indicated, the direct action taken by FFA has been calculated to influence industry practice and even the political process, but (again perhaps as a result of 'outsider' status) the influence exerted has itself not always been so direct. Thus, in the case of the fuel protest the blockades were abandoned without clear commitment by the Government to a reduction in fuel duty, many of the protestors having become uneasy as to their scale and effect. Instead, a sixty-day ultimatum was given to the Government and, when that ultimatum expired, subsequent efforts to resurrect the protests met with little success (Woods 2005, pp. 151-152). On the other hand, it has been cogently argued that the blockades did in fact have some affect on longer-term policy in that the next budget (in November 2000) contained measures which lessened the tax burden on transport (Robinson 2003, p. 436). And, in any event, the prospect of an explicit link between the blockades and legislative reform would be rendered the less likely by an understandable determination on the part of Government to avoid any charge that it was being railroaded into such reform by protestors whose activities it considered to be of questionable legality.

Turning again more specifically to milk prices, it has been seen that the blockades of 2002 prompted Tesco to seek a rise of 2 pence per litre for farmers. In this case, therefore, the effect of the blockades was more robust, influencing industry practice, and it may be regarded as significant that, when Tesco publicly called for the rise, a factor behind the decision to do so would appear to have been the favourable impression that it would make upon consumers: as stated in evidence

before the Competition Appeal Tribunal, the public call 'delivered the desired PR coup for Tesco' (*Tesco Stores Ltd v. Office of Fair Trading*, para 166).

The attachment of so much importance to reputation by Tesco would tend to confirm that the garnering of popular support is accorded high priority by all those involved in the ongoing controversy over milk prices, and not least FFA. Its *Code of Conduct* places great weight on the avoidance of any activity which might alienate the general public and express reference is even made to its 'image'. Thus, Principle 3 states that '[n]o threats or intimidation to be aimed at any lorry driver or member of staff or general public who may cross your path. Remember you are representing the whole farming industry and our image is key to our success' (FFA *Code of Conduct*). This is consistent with earlier experience during the fuel protests. Elements of the media threw their weight behind those protests (Milne 2005, pp. 27-35), media support then apparently being translated into more general approval, as evidenced by surveys finding that over 90 per cent of the public were sympathetic to the farmers and hauliers (Robinson 2003, p. 434). On the other hand, when the extent of the economic consequences became apparent, media support soon dissipated (Doherty *et al.* 2003, p.5).

#### 4. The European Union legislative response

It may be recalled that the food supply chain in the United Kingdom is now statutorily regulated by the provisions of the Groceries Code Adjudicator Act 2013; and recent years have also seen a process of legislative reform at European Union level which was originally targeted at the dairy sector, but which has now been extended more widely. Significantly, the indignation of farmers would seem to have played a major role in this process: thus, the 2010 Report of the High Level Expert Group on Milk (which laid down the contours of the legislation subsequently to be introduced in respect of milk and milk products) could expressly speak of 'unrest among milk producers' as a driver of change (High Level Expert Group on Milk 2010, pp. 7-8).

As indicated, the reforms to the food supply chain were originally directed to the dairy sector, being carried into effect by Regulation (EU) No. 261/2012 of the European Parliament and of the Council, amending Council Regulation (EC) No. 1234/2007. Two changes effected by this Regulation had particular resonance in the context of milk prices. First, in order to achieve 'a fairer distribution of value added along the supply chain', the bargaining power of farmers as against dairy processors was strengthened by allowing producer organisations composed entirely of dairy farmers and their associations jointly to negotiate contract terms with a dairy in respect of some of all of their members' production, with it being possible for such negotiations to extend also to price (Regulation (EU) No. 261/2012, Preamble (14)). That said, the dispensation was hedged around with numerous conditions. Perhaps most significantly, the volume of raw milk covered by the negotiations was subject to limits expressed in terms of total European Union production (3.5 per cent) and total national production (33 per cent).<sup>13</sup> In consequence, there has been no scope in the United Kingdom to return to a monopoly of the same order as the Milk Marketing Boards, or even Milk Marque. It may also be observed that, if a producer organisation were able to reach the 33 per cent limit laid down by the legislation, this would only equate with the proportion of the market already achieved at processor (as opposed to producer) level by Müller Wiseman Dairies: following the 2012 takeover by Müller of Robert Wiseman, the combined company delivered over 30 per cent of the fresh milk consumed in Britain each day (Müller Wiseman Dairies 2013).

Secondly, Member States could decide to require that all deliveries of raw milk by farmers to processors be covered by compulsory written contracts; and, if this

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<sup>13</sup> Council Regulation (EC) No. 1234/2007, Article 126c, as amended by Regulation (EU) No. 261/2012.

option were exercised, among the terms to be included would be the price payable for the delivery.<sup>14</sup> That said, the voluntary nature of the provision was made clear in the legislation itself, which recited that: '[i]n view of the diversity of the situations that exist across the Union in relation to contract law, in the interests of subsidiarity, such a decision should remain with Member States' (Regulation (EU) No. 261/2012, Preamble (9)). Furthermore, as highlighted early in the reform process by Jim Paice, the Minister of State for Agriculture and Food, there is no ability for a Member State to fix a minimum price so as to protect primary producers (HC Deb (2010-12) Vol 529 Part 164 Cols 11-12WH). On the other hand, it should also be emphasised that the price could be calculated by reference to a formula, with factors which might be taken into account extending to 'market indicators reflecting changes in market conditions'.<sup>15</sup> Reference to such market indicators may protect farmers from being locked in to low prices at a time when, for example, there is a surge in the cost of inputs; and, as shall be seen, there is now some evidence of contracts in this form being negotiated in the United Kingdom.

In the context of the reforms of the Common Agricultural Policy agreed for the period 2014-2020, these provisions in Regulation (EU) No. 261/2012 were carried forward into the new Single Common Market Organisation Regulation, Regulation (EU) No. 1308/2013 of the European Parliament and of the Council.<sup>16</sup> At the same time, they also provided the template for similar provisions introduced across a broad range of sectors.<sup>17</sup> Indeed, the overall reform package was understood to mark a considerable rebalancing of commercial relations along the food supply chain (Blockx and Vandenberghe 2014).

Nevertheless, there has been little appetite on the part of Government in England to take up the option of imposing compulsory written contracts.<sup>18</sup> This may in large part be explained by the fact that, as again noted by Jim Paice, 'virtually all' British farmers already have contracts, a state of affairs which is not replicated widely across the European Union (HC Deb (2010-12) Vol 529 Part 164 Col 12WH). And such reluctance to resort to statute would seem to chime well with the broader ethos of Government when regulating for agriculture: as stated early in the days of the Coalition Government by the Secretary of State for Environment, Food and Rural Affairs, Caroline Spelman, there would be an end to 'the old way of doing business', namely '[t]he paternal approach of Government telling industry what to do and industry complying' (Spelman 2011).

In addition, any decision whether or not to impose compulsory written contracts was arguably somewhat overtaken by events. As indicated, a new wave of protests over milk prices erupted during the summer of 2012, with extensive use of 'stunts' (*FFA Milk Campaign 2012*), these being followed by agreement between the NFU (on behalf of farmers) and Dairy UK (on behalf of processors) that a voluntary code of practice should cover milk contracts (BBC News 2012a, Driver 2012b). Where the code of practice applies, almost certainly the greatest benefit for farmers is that they are now entitled to give as little as three months' notice of termination if

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<sup>14</sup> Council Regulation (EC) No. 1234/2007, Article 185f, as amended by Regulation (EU) No. 261/2012.

<sup>15</sup> Council Regulation (EC) No. 1234/2007, Article 185f(2)(c), as amended by Regulation (EU) No. 261/2012.

<sup>16</sup> Regulation (EU) No. 1308/2013, Articles 148-149 (and see also Preamble (207)).

<sup>17</sup> Regulation (EU) No. 1308/2013, Articles 168-171 (with separate provisions also for sugar in Article 125).

<sup>18</sup> In accordance with the constitutional settlement effected by the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Acts 1998 and 2006, it falls to the devolved administrations in Scotland, Wales and Northern Ireland to make their own decisions as to whether compulsory written contracts should be imposed. In addition, the 2001 Devolution Memorandum of Understanding addresses the relationship between the devolved administrations and the United Kingdom Government in respect of obligations to implement European Union law.

prices are unilaterally reduced by their processor.<sup>19</sup> And this development has done little to incline Government towards the imposition of compulsory written contracts: in the words of the document launching the consultation exercise on implementation of Regulation (EU) No. 261/2012, '[o]ur preference is to allow sufficient time for [the code] to take effect, rather than immediately implementing compulsory contracts that cover less detail and are more restrictive' (Department for Environment, Food and Rural Affairs 2012, para 1.17). Yet, as at April 2014, the voluntary code of practice still only covered about 85 per cent of the United Kingdom milk supply (Farmers Weekly 2014), while, even where it does apply so as to allow a farmer to escape an onerous contract, it does not necessarily guarantee that there will be a more favourable price readily available with another processor.

## 5. Some conclusions

What would seem reasonably clear is that the indignation expressed by farmers and, in particular, members of FFA has not been ineffective. To the extent that the purpose of their protests was to attract media attention, they have enjoyed much success, the milk price debate now being firmly conducted within the public arena. In addition, dairy farmers would seem to have developed means of re-igniting that debate if and when required (for example, through the use of 'stunts' in the summer of 2012). Even the hint of direct action can secure column inches, as when in July 2012 a threat was issued to disrupt the Olympics (Shipman 2012).

Moving beyond publicity, the protests would also seem to have enjoyed at least a degree of success in terms of raising milk prices paid to farmers. While direct cause and effect may be difficult to measure, there is no doubt that the protests in 2002 and 2003 did have some influence on the behaviour of the supermarkets. As has been seen, the 2 pence per litre increase implemented by Tesco was 'to appease the farmers' (even if Tesco might at the same time have also been operating in its own interests, with a view to generating a public-relations coup – and perhaps also to securing the future financial viability of its suppliers). Likewise, there must be a respectable argument that the wave of protests which swept over Britain during the summer of 2012 was a factor behind the agreement to bring in a new code of practice covering milk contracts, while it may also be reiterated that wider unrest among farmers would appear to have prompted action at European Union level, leading to the enactment of Regulation (EU) No. 261/2012. In any event, by May 2014 the United Kingdom average farmgate price for milk was 32.6 pence per litre (Department for Environment, Food and Rural Affairs 2014a), a considerable advance on the 16.91 pence per litre recorded during 2002-2003. On the other hand, it should be noted that prices subsequently fell back over the summer and autumn of 2014, in line with those pertaining globally for dairy commodities (Department for Environment, Food and Rural Affairs 2014b)). Moreover, this state of affairs has persisted, with the United Kingdom average farmgate price for milk in January 2015 being only 26.3 pence per litre (Department for Environment, Food and Rural Affairs 2015), which would suggest that militant action by farmers is likely to be less effective when the downward pressure on price is dictated by international markets as opposed to the functioning of national food supply chains.

One reason which may explain earlier successes of the protests is that farmers have looked to exploit to advantage a 'twin track' approach involving the more radical FFA and the more established NFU (while recognising also that there is increasing evidence that the NFU is shedding some of its 'insider' status). In the words of one expert industry commentator, the respective leaders of the NFU and FFA may be regarded as working 'a good cop, bad cop routine' (Ian Potter Associates 2012). And it is perhaps no coincidence that it was FFA which led the

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<sup>19</sup> Previously, there had been considerable evidence that farmers were unable to terminate their contracts on less than twelve months' notice, notwithstanding that the processor might implement one or more price cuts (House of Commons Environment, Food and Rural Affairs Committee 2012, Q 67).

protests in the summer of 2012, but the NFU which negotiated the ensuing code of practice. Besides, notwithstanding that both organisations were for some time within the Dairy Coalition, they would seem to be reserving for themselves substantially differentiated roles, which operates to the overall benefit of the farmers' cause. At official level, the NFU continues to stop short of active involvement in the protests, while not condemning them and, on occasion, publicly supporting them (Driver 2012c). By contrast, even after the entry into force of the code of practice covering milk contracts, FFA continues to take direct action if it sees fit. For example, in December 2012 there were blockades of the Droitwich plant of Müller Wiseman Dairies (Ford 2012) and in October 2014 direct action was again extensively employed in response to the general fall in milk prices (BBC News 2014).

It is less easy to determine the extent to which such indignation may be regarded as part of a more extensive rural social movement. Without doubt, as has been seen, rural indignation finds expression across a diverse range of issues, which may at times even be contradictory (Reed 2008, Bell *et al* 2010). Again by way of illustration, the aims and objectives of both FFA and the NFU would seem at odds with those of The Land is Ours, an avowedly radical, land rights organisation with rural emphasis, whose purpose is to campaign 'peacefully for access to the land, its resources, and the decision-making processes affecting them, for everyone, irrespective of race, gender or age' (The Land is Ours 2013). Indeed, the approach taken by The Land is Ours towards Common Agricultural Policy reform would seem substantially inimical to more entrenched farming interests (Hamer 2012-13). Similarly, it is not immediately obvious that the activities of FFA (and other farmers) could be categorised as an instance of the '99 per cent' taking on the 'one per cent'. A defining feature of the protests over both fuel and milk prices has been the extent to which influence has been exerted by relatively small groups of individuals. The blockade of Stanlow oil refinery in September 2000 was undertaken by approximately 100 farmers and hauliers (BBC News 2000a), while the more recent blockade of the Droitwich plant of Müller Wiseman Dairies apparently involved just 30 members of FFA (Ford 2012). Further, it would not seem correct to depict supermarkets as the 'one per cent'. As has again been seen, Tesco and the other supermarkets may not have had purely altruistic motives for seeking to secure a higher price for dairy farmers in 2002-2003, but they did nonetheless take concrete steps which alleviated the financial position of their primary producers. Indeed, there must be some truth in the statement by Paul Kelly of Asda to the House of Commons Environment, Food and Rural Affairs Committee (2012, Q 21) that: 'while every drama needs a villain, to simply point at the supermarkets and say that we are the solution to all the problems in the sector is perhaps a little bit misleading'.

Rather, what would appear to be happening is that various interested parties are seeking to capture the support of the '99 per cent' in what in essence remains a sectoral dispute (albeit one that has broader resonance). The 90 per cent support originally enjoyed by the fuel protestors was critical to their early success and it may be reiterated that the *Code of Conduct* of FFA is directed to preventing any form of action which might alienate public support. To the same end, posters of FFA exhort that the Government should 'Listen to the People', not just the farmers (Shipman 2012); and the organisation, through representations of itself as David taking on Goliath, might even be considered to have enjoyed some success in 'manufacturing' vulnerability, following in the footsteps of radical environmentalists (Doherty 1999). Meanwhile, on the other side of the 'barricades', the 2002 public call by Tesco for a price rise for farmers was considered to deliver the desired public-relations coup.

More generally, the indignation of farmers, and the consequent protests giving expression to that indignation, may be viewed as a response to a dysfunctional market. What now determines price is very hard to judge. However, it would not

seem controversial to suggest that it is not purely a question of bargaining on an open market, free from any artificial constraints (despite the faith at times placed by Government in competition law) (HC Deb (2010-12) Vol 525 Part 136 Col 813W (Jim Paice)). And this 'false' market would seem to propagate a general sense of unease across the dairy industry: supermarkets continue to be conscious of adverse publicity;<sup>20</sup> processors continue to feel squeezed in the middle; and farmers continue to find profits elusive (House of Commons Environment, Food and Rural Affairs Committee 2012). Significantly, a way forward increasingly evident in practice has been determination of milk prices not by 'the market' but by reference to the cost of production as stipulated in specific contracts between supermarkets and dedicated suppliers, with some supermarkets also guaranteeing to pay over the cost of production (House of Commons Environment, Food and Rural Affairs Committee 2012, QQ 22 and 23, Glotz 2012). Thus, it would now appear to be the case that the 'proper share' attributable to farmers is often to be determined by reference to such cost of production (House of Commons Environment, Food and Rural Affairs Committee 2012, Q 27). This approach has readily apparent advantages in terms of financial stability: for example, in March 2013 the cost of production formula operated by Tesco saw dairy farmers receiving an additional 1.19 pence per litre (Tesco 2013). On the other hand, a concomitant disadvantage is the potential to generate a 'two-tier' system, with farmers who do not succeed in securing status as a dedicated supplier potentially suffering material disadvantage. In addition, even where such contracts do apply, questions arise as to the mechanism which should be employed to calculate the cost of production and as to the extent that account should be taken of the individual circumstances of individual farmers. And setting prices by reference to the cost of production may have adverse consequences for dairy farmers where world market prices strengthen and 'leap-frog' those payable under the contract (Ian Potter Associates 2013b).

These developments arguably resurrect issues akin to those which gave rise to the formation of the Milk Marketing Boards in the 1930s: not least, the use of 'pooling' under the statutory schemes sought to obviate any form of 'two-tier' system. However, it is interesting that, when the water, gas, electricity and other privatisations took place during the 1990s, the legislative template employed would as a rule include the appointment of an industry regulator to address substantially similar questions to those now faced by the dairy industry, yet this template was not followed on abolition of the Milk Marketing Boards. It is also interesting that the decision to dispense with an industry regulator was challenged by the Dairy Trade Federation, concerned at potential abuse of a dominant position by Milk Marque and, although the challenge was dismissed on procedural grounds, the judge did express some sympathy for the view that the new scheme would not implement a properly functioning market (*R. v. Minister of Agriculture, Fisheries and Food, ex parte Dairy Trade Federation Ltd*, Smith 1995a). The establishment of the Groceries Code Adjudicator may now go some way to remedying this lacuna. That said, the remit of the Adjudicator extends broadly across the grocery supply chain as opposed to being sector-specific and, in any event, focus is less on price than is the case with, for example, Ofgem (regulating gas and electricity markets), where market monitoring remains a key statutory obligation. Accordingly, there would still seem to be scope for introducing a more structured mechanism for determining milk prices. The alternative is to persist with a state of affairs where it can credibly be suggested that a key factor prompting their movement is rather the extent to which financial pressures and a real sense of injustice drive indignant farmers to 'negotiate' through direct action.

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<sup>20</sup> In this context, a comparison might be drawn with the position recently adopted by Starbucks following criticism of its low levels of payment of United Kingdom Corporation Tax, the company formally stating that '[w]e've listened to our customers and we're taking the actions necessary to pay more corporation tax in the UK, above what we are required to' (Starbucks 2012).

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