

## As Germany Comes to Grip with its Own Mad-Cow Crisis, Where was the E.U.?

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[1] The first real casualty of Germany's burgeoning Mad-Cow crisis must be the great pride Germany takes in its reputedly efficient, high quality and "green" agriculture industry. The second and third casualties were the Federal Ministers of Agriculture and Public Health, both of whom recently handed over their resignations to Chancellor Schroeder under sharp criticism that they ignored the potential for a German Mad-Cow crisis, which broke when the first German cases were registered in late November, 2000. Hundreds of beef cattle will meet a similar, premature end. We must wait to learn whether German consumers will become casualties of the crisis.

[2] How is it possible that Germany only recently "discovered" its own cases of Mad-Cow infections after a Mad-Cow crisis has simmered and then raged through its E.U. partners Great Britain and France for the last half decade? How is it that Germany now seems to be scrambling to invent and implement policies long-ago enacted in Britain? Why didn't then the E.U. marshal an immediate, centralized, E.U.-wide response to BSE when it first surfaced as a serious and sizeable problem in Great Britain in 1996? An analysis of E.U. law and policy on this issue reflect back on the broader, philosophical struggles confronting the E.U. experiment: (1) stubborn nationalism and the on-going reluctance to surrender national competence; and (2) democratic deficiencies.

[3] This article will address the role the E.U. could have (or should have) played in averting Germany's Mad-Cow crisis. First, the article briefly details the disease and its recent history in Europe. Second, the article outlines the E.U. competence over the matter. Third, the article describes the actions taken (or not taken) by the E.U. and comments on the shortcomings in the E.U. system.

### A. Mad-Cow's Disease: An Exposition and Chronology (1)

[4] First identified in British cattle in 1985, the British government conceded in 1996 that humans were falling victim to diseases linked to Bovine Spongiform Encephalopathy (BSE), otherwise known as Mad-Cow disease (for the odd behavior it triggers in afflicted cattle). The complications manifested themselves in humans as Creutzfeldt-Jakob Disease (CJD), which has now killed more than 80 people in Britain and infected at least 5 more, one of them in France. In both the animal and human manifestations, the diseases strike the neurological system producing problems like unsteadiness and involuntary movements. Shortly before death, the victim becomes completely immobile and mute.

[5] There are considerable gaps in the scientific and medical understanding of the two diseases; the link between the two remains an open question as well, though it is now widely accepted that humans are being infected by eating contaminated beef. There have been BSE cases in dairy cattle as well, raising the unsubstantiated possibility of human infection resulting from the consumption of milk. The American Red Cross has also pressed for a federal policy banning blood donated by some Europeans (focusing on France) out of fear that the disease could be transferred human-to-human.

[6] At the center of the storm is the beef industry's wide-spread use of cattle feed (in its natural form, plant material) that contains animal waste- and by-products. The animal waste serves as protein supplements for feed that is less rich (and much less expensive). The use of animal waste in feed also helps address the massive waste within the meat industry, utilizing the unused portion of the cattle slaughtered for beef. In essence, the meat industry is able to maximize profits by cutting the costs for feed and cutting the losses from waste. In theory, the consumer enjoys the benefit of these savings through lower meat prices. The animal content in feed, handled in less than sanitary conditions, is believed to have sustained a form of Scrapie, which when ingested by the cattle, transformed itself into BSE. Calves born of infected cows can carry the disease.

[7] The United Kingdom, in the summer of 1988, passed laws that banned the use of certain types of animal feed and implemented a slaughter policy for animals showing BSE symptoms. The following summer, the European Union imposed a ban on the export of British beef (from cattle that had been born before July, 1988, and the off-spring thereof). Between 1992 and 1993, reports of BSE in Britain peaked at 100,000 confirmed cases. The first known victim of CJD, 19-year-old Stephen Churchill, died in 1995, followed by three more CJD deaths in the U.K. in the same year. In March, 1996, the European Commission imposed a world-wide ban on all British beef exports. A British challenge to this ban in the European Court of Justice failed. The U.K. began slaughtering all cattle over the age of 30 months in 1996, after the imposition of the E.U. ban.

[8] France continued to enforce an embargo on British beef even after the European Commission lifted its ban in August, 1999. The French boycott of British beef did not, however, shield the French market from contamination. In October, 2000, French President Jacques Chirac demanded stronger measures to fight BSE after potentially-tainted meat was found on supermarket shelves in France. The French imposed, in November, 2000, their own ban on beef

on the bone and suspended the use of all livestock feed containing meat. Two days later Italy banned the import of adult cows and beef on the bone from France. In December, a new report found that the incidence of Mad-Cow disease in France is more prevalent than had previously been thought. The French Food Safety Board says it had detected at least one case of the disease for every 500 cattle tested in the northwest of the country. Early this month, France began testing all cattle older than 30 months, six months ahead of the European Union's deadline for implementing a testing program.

[9] Germany confirmed the first two cases of Mad-Cow disease in cattle born in Germany on November 24, 2000, after long characterizing the issue as a problem resulting from sloppy and inferior farming practices in Britain and France. Germany confronted the news with a mandatory beef testing policy in an attempt to calm public fears and the German Parliament approved an immediate blanket ban on meat and bone meal feed. These measures were not enough to stave off the political fallout of the German government's long inaction. On January 9, 2001, the Federal Ministers of Health and Agriculture resigned from Chancellor Schroeder's government under heavy criticism over their (mis)handling of the Mad-Cow disease issue. France's Farm Minister said the resignation of the German ministers was the price Germany had paid for its "head-in-the-sand policy." As of the 25th of January, 2001, Germany had registered 19 cases of BSE. German sales of beef were off by nearly 60% in the month of December, prompting executives in the German meat industry to label the response of German consumers as "slightly hysterical." In the last week the Federal Government, under the new Minister of Agriculture, proposed the formation of a Federal Health/Consumer Safety agency at the same time that Bavarian state officials were setting in motion similar plans on the state level. The new Minister of Agriculture predicted that as many as 500 cases of BSE will be discovered in Germany this year. The E.U. also recently announced that it is prepared to slaughter 400,000 head of German cattle for which the Federal Government promised to provide fixed compensation.

[10] Spain registered its first case of BSE on November 23, 2000. Italy registered its first case of Mad-Cow disease on January 13, 2001, the same day that the Danes confirmed their third case. Austria, too, has finally registered a case of BSE, leaving only the Scandinavian members of the E.U. unaffected to this point.

## B. E.U. Competence Over Agriculture, Consumer Protection and Public Health

[11] The European Union is first and foremost a common economic market, with the objectives of: (1) promoting harmonious, balanced and sustainable economic activities; (2) a high level of social protection for the citizens of the member states; and (3) raising the standard of living and improving the quality of life in the member states. (Art. 2, Consolidated E.C. Treaty). The Union is to pursue these objectives by implementing the common policies or undertaking the common activities identified in Articles 3 and 4 of the E.C. Treaty. The following areas of authority over the common market are relevant to the Mad-Cow crisis now sweeping Europe: (1) a common policy in the sphere of agriculture (Art. 3(e), Consolidated E.C. Treaty); (2) a contribution to the attainment of a high level of health protection (Art. 3(p), Consolidated E.C. Treaty); and (3) a contribution to the strengthening of consumer protection (Art. 3(t), Consolidated E.C. Treaty).

### 1) *Agriculture*

[12] The "common market", as defined by Art. 14(2) of the Consolidated E.C. Treaty, applies to agriculture. (Art. 32(1), Consolidated E.C. Treaty). The common market is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured . . ." (Art. 14(2), Consolidated E.C. Treaty). The fundamental parameters of the common market include: (1) common citizenship (Arts. 17-22, Consolidated E.C. Treaty); (2) free movement of goods (Arts. 23-24, Consolidated E.C. Treaty); (3) a customs union (Arts. 25-27, Consolidated E.C. Treaty); and (4) a ban on "quantitative restrictions" (Arts. 28-31, Consolidated E.C. Treaty). The framers of the Union's treaties clearly anticipated, however, circumstances in which public health concerns would take priority over the needs and interests of the common market, including the common agricultural market. Thus, the supremacy of the common market is limited, especially with regard to the ban on quantitative restrictions, when necessary to promote the "protection of health [and] life of humans." (Art. 30, Consolidated E.C. Treaty).

[13] The common agricultural market includes "stock farming", the agricultural sector at issue in the BSE crisis. (Art. 32(1), Consolidated E.C. Treaty).

[14] The Union is charged with the creation of a "common agricultural policy" (Art. 32(4), Consolidated E.C. Treaty), which has as its objective "increased production", that is to say, "optimum utilization of the factors of production" and "ensuring rational development of agricultural production." (Art. 33(1)(a), Consolidated E.C. Treaty). These goals are not completely divorced from the interests of the consumer as they also promote availability of goods and reasonable prices. (Art. 33(1)(d) and (e), Consolidated E.C. Treaty). In the context of the BSE crisis, however, the treaties' objectives for the common agricultural policy significantly lack any reference to the quality or safety of the common market's agricultural products. In fact, the objectives of the common agricultural policy clearly emphasize support for the farming industry. The objectives of the common agricultural policy include, for example, the assurance of a "fair standard of living for the agricultural community, particular[ly] by increasing the individual earnings of persons

engaged in agriculture." (Art. 33(1)(b), Consolidated E.C. Treaty). The common agricultural policy must also take account of the social and regional sensitivity of the industry. (Art. 33(2)(a), Consolidated E.C. Treaty). Professor Thomas Opperman, a German specialist on European Community Law, concluded, on this point, that the Community's agricultural policy (reflecting the domestic policy of the member states) places a "priority on the interests of the farming industry over those of the consumer." (Thomas Opperman, *Europarecht* (2d. Ed.), § 20, Margin No. 1364 (1999) (original in German)).

## 2) Public Health

[15] Public health matters are not integrated into the common market, as is the case with agriculture. Instead, the treaties provide that "a high level of human health protection shall be ensured in the definition and implementation of all community policies and activities [including agricultural activities]." (Art. 152(1), Consolidated E.C. Treaty). The ability of the European Union to impact public health matters has two major limitations. First, there is no direct competence over the matter. Instead, public health matters are to play a role, indirectly, in those fields over which the Union does have direct competence. Second, community action with respect to public health must "complement national policies" and not direct or lead the member states in the field. (Art. 152(1), Consolidated E.C. Treaty). The Union is explicitly limited to promoting coordination between the member states in the field of public health (Art. 152(2), Consolidated E.C. Treaty), and is prohibited from pursuing harmonization of public health regimes among the member states when implementing measures designed to protect and improve human health. (Art. 152(4)(c), Consolidated E.C. Treaty).

[16] Most importantly, in the context of discussions of the BSE crisis, the treaties provide a specific link between the Union's public health objectives and its agricultural policy. Veterinary measures, which contradict the common agricultural market but have as their direct objective "the protection of public health," are permitted. (Art. 152(4), Consolidated E.C. Treaty).

## 3) Consumer Protection

[17] Of the three fields of greatest relevance to the BSE crisis, the Union's authority over consumer protection matters is the weakest. As with the public health field, consumer protection is not an element of the common market. Instead, the treaties empower the Union to "contribute" to protecting the health and safety of consumers by taking those concerns into account in defining and implementing community policy. (Arts. 153(1) and (2), Consolidated E.C. Treaty). As with public health actions, the Community may not directly implement consumer protection measures but is limited to making consumer protection issues a factor in its competence and activities in other fields (like agriculture).

[18] The Council can seek to promote the approximation of domestic consumer protection law as outlined in Art. 95 of the Consolidated E.C. Treaty. (Art. 153(3)(a), Consolidated E.C. Treaty). The Council, again employing the system outlined by Art. 251 of the Consolidated E.C. Treaty, may take actions to "support, supplement and monitor" domestic policy. (Art. 153(3)(b), Consolidated E.C. Treaty).

## 4) Conclusions

[19] Where the E.U. has direct authority to act in the BSE crisis (in the field of agriculture) its consumer oriented objectives are limited to the most elemental market mechanisms (prices and supply) and are slanted toward the concerns of industry, at least to the degree that they emphasize the economic and social viability of the industry while remaining silent on the issues of the quality and safety of the industry's products. In the other fields that speak directly to the BSE crisis, public health and consumer protection, the E.U. has limited authority. It lacks the competence to directly legislate in these fields and is mostly assigned the role of promoting cooperation and policy approximation within the member states.

### C. What the Mad-Cows Are Telling Us About the E.U.

[20] The limitations on the E.U.'s authority over the fields most relevant to the BSE crisis (agriculture, public health and consumer protection) were not the reason the Union failed to act in a way and at a time that might have allowed it to avert Germany's emerging Mad-Cow crisis. The present state of Union activity on the issue demonstrates that the treaties provide the muscle the Union needed to respond vigorously (or at least more vigorously than it did) to the BSE crisis on a European-wide scale. In November, 2000, the Commission finally adopted regulatory proposals that establish fundamental principles of food safety and that establish the European Food Authority to promote and monitor food quality and safety from "farm to fork." These responses come more than 14 years after concerns about BSE first emerged in the U.K. and more than 11 years after the Union's first legislation related to BSE. The Union pressed against the BSE crisis on several fronts in 2000, ordering monitoring and testing in all states (Commission

Decision 00/374, 5 June 2000) and at long last implementing an outright ban on all animal tissues likely to present a BSE risk from the food chain (Commission Decision 00/418, 29 June 2000).

[21] These (and more extensive) measures had been demanded by the Parliament for nearly a decade. The Parliament highlighted the Commission's inaction by pointing to a sweeping regulatory regime enacted by the United States Food and Drug Administration in 1997, which sought to control for the possibility of a BSE crisis even though the U.S. had not yet registered a case of BSE. The FDA's regime included several of the provisions the Parliament had been demanding from the Commission and Council: generally prohibiting the use of most (allegedly the most risky) animal material in animal feed, implementing strict labeling and records keeping rules, and monitoring for compliance. With its actions in 2000, after the crisis had swept across the Channel and onto the Continent, the E.U. finally began to implement some of the policies the U.S. had implemented three years earlier.

[22] Some of the Union's previous activity in the common agricultural community, as well as the response of the European Court of Justice to some emergency measures taken in response to the BSE crisis, suggest that the power to act had always been available to the Union. (2)

[23] Why didn't the E.U. seize on these powers earlier? In fairness, the Commission's influence prior to the creation of the single market in 1993, was limited. The Commission also defended its "controlled" response to BSE as an expression of its insistence on employing the flexibility necessary to adapt its policies to the constant new flow of scientific developments on the issue. This flexibility was imposed by a Commission Directive in 1990 (Commission Directive 90/667). Based on this flexibility the Commission imposed only a qualified ban on animal material in feed in 1994, with adjustments made over the course of several years to the processing requirements that had to be met in order to include animal matter in feed. (Commission Decisions 94/381 and 94/382, 27 June 1994; 96/449, 18 July 1996).

[24] A review of the Union's reaction to the issue presents the significance of the problems that many consider to be plaguing the E.U.

[25] Subsidiarity leaves the Union too weak to lead the member states, requiring instead that it follow their lead (and only when they achieve consensus). In answering criticisms about the Council's failure to enact a more comprehensive ban on animal material in feed, an advisor to the Commission explained that the Council didn't react because the member states did not see the problem as a shared problem, or if they did see it as a shared problem, they did not see it as a uniform problem best handled by the Union's common market mechanisms. Instead, the member states resisted Union activity preferring to keep their own competence over the issue.

[26] The democratic deficiencies of the Union are laid bare by the events unfolding in Germany. At the national level, political fortunes can be broken by neglect of such an important the issue, thus requiring immediate and aggressive political as well as policy responses. The truth of this conclusion is affirmed by the fact that the only E.U. institution with direct electoral links to the consumers at risk in the Mad-Cow crisis, the Parliament, had long pressed the other, less democratically representative institutions, for a dramatic response to the growing crisis. No E.U. Commissioner has stepped down as a result of the BSE crisis, as did Germany's Agricultural and Health ministers. The implication being that this democratic insulation allowed the Commission to remain beholden to the agricultural industry's lobby in spite of the growing crisis.

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(1) <u>See</u>, Gaven Morris, "Fear and Mystery of Cross Species Killer" [www.cnn.com/2000/WORLD/europe](http://www.cnn.com/2000/WORLD/europe), 26 Oct. 2000; and "Timeline: How the Crisis Unfolded", [www.cnn.com/2000/WORLD7europe](http://www.cnn.com/2000/WORLD7europe), 15 Jan. 2001. <u>See also</u>, the following articles from the Frankfurter Allgemeine Zeitung (English Edition): "Health Minister Rejects Criticism in BSE Affair From Government-Funded Scientific Council", 3 Jan. 2001, No.2/1; "BSE Found in Live Animal", 5 Jan. 2001, No. 4/1; Manfred Schaefer, "Ministers Offer New Proposals", 5 Jan. 2001, No. 4/1; "Commissioner Rebukes Ministers for BSE Response", 8 Jan. 2001, 6/2; Axel Schnorbus, "Unilever Not Beefing About Mad-Cow Crisis", 8 Jan. 2001, No. 6/2; Heinz Stuewe and Roswin Finkenzeller, "Head of BSE Commission Weighs Need for Consumer Protection Ministry", 9 Jan. 2001, No. 7/2; Roswin Finkenzeller, "Being Bavarian Does Not Help Against BSE", 9 Jan. 2001, No. 7/2; "Two German Ministers Resign Over BSE Crisis", 10 Jan. 2001, No. 8/2; "Greens Leader to Head Agriculture Ministry, Social Democrat in Charge of Health", 11 Jan. 2001, No. 9/2; "Despite Sharp Attack by Schroeder, Farmers Say They Will Cooperate on Policy", 12 Jan. 2001, No. 10/2; Helmut Buender, "Germany's Green Oasis Needs Refreshing", 12 Jan. 2001, No. 10/2; Barbara Weiland, "Happy Cows Make Farmers and Consumers Happy", 12 Jan. 2001, No. 10/2; "States Urge National Standards for Handling BSE", 13 Jan. 2001, No. 11/2; Frank Pergande, "In Farming, Size Can Matter", 13 Jan. 2001, No. 11/2; Lukas Weber, "German Farms Produce Big Yields on Small Patches of Land", 13 Jan. 2001, No. 11/2; "Bavaria Announces Its Own

Ministry For Health, Nutrition and Consumer Affairs", 16 Jan. 2001, No. 13/3; "State Government Provides Millions to Fight BSE", 17 Jan. 2001, 14/3; "Consumers Lose Confidence in Beef Over BSE Crisis", 18 Jan. 2001, No. 15/3; "Ministry Promises New Measures to Fight BSE, Says At Least 500 Cases Likely This Year", 19 Jan. 2001, No. 16/3; "Cabinet to Debate Anti-BSE Measures Next Week", 20 Jan. 2001, No. 17/3.

(2) A regulatory scheme for the common market in beef was implemented in 1986 (Commission Regulation 805/68, 27 June 1968). The Union also implemented regulatory controls on the quality of wine (Commission Regulation 822 and 829/87, 16 March 1987) and specifications for bananas (Commission Regulation 404/93, 13 February 1993). The most dramatic action taken by the Union was its embargo of British beef (Commission Decision 96/239, 27 March 1996), an act that was upheld by the European Court of Justice. The Court embraced the Commission's actions citing the gravity of BSE and the danger of its transmissibility to man as a real risk "which vindicates the decision." (European Court Decisions 1998, I-2211).