

C.E.D.R.



**European Council for Agricultural Law
Comité Européen de Droit Rural (C.E.D.R.)
Europäisches Agrarrechtskomitee**

**XXIII European Congress and Colloquium of Agricultural
Law – Røros (Norway) – 6-10 March 2005**

**XXIII Congrès et Colloque Européens de Droit Rural
– Røros (Norvège) – 6-10 mars 2005**

**XXIII Europäischer Agrarrechtskongress mit Kolloquium
– Røros (Norwegen) – 6.-10. März 2005**

Commission II – Kommission II

**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**

General Report – Rapport général – Generalbericht

Dra. Ana Carretero GARCÍA

**Profesora de Derecho civil
Universidad de Castilla-La Mancha (España)**

The Consequences of the Recent Reform of the Common Agricultural Policy on Agricultural Business and Property

Dra. Ana Carretero GARCÍA – Professor of Civil Law, University of Castilla-La Mancha (Spain)

1. INTRODUCTION

It is clear that the Common Agricultural Policy (CAP) is the result of a difficult balancing of a number of factors, external as well as internal, which requires constant adjustment and reform.

Among external factors, the agreements and compromises made by the EU in the context of multilateral negotiations stand out, particularly since the founding of the World Trade Organisation (WTO), whose object is to deepen and advance the liberalisation of trade in agricultural products begun by the Uruguay Round of GATT.

From among the internal factors, one must point out, on the one hand, the pre-existing budgetary pressures borne of the preoccupation of net contributors to the EU with reducing their public deficit (a situation aggravated by the process of enlargement). On the other hand, there are problems of social acceptability of the CAP, since it must be able to adapt to the various social demands – for the protection of the environment and of the countryside, food safety and quality, regional and sectoral imbalances, and so on – which justify public intervention in agriculture.

Thus, as was the case for the Agenda 2000 reforms in 1999, the recent CAP reform was influenced essentially by the forthcoming negotiations in the WTO and by internal financial issues. According to the Community authorities, it was intended to guarantee stability of agricultural incomes, to facilitate the process of enlargement and to enable a better defence of the CAP in the WTO.

2. THE RECENT CAP REFORM

It must be pointed out, before all else, that the Berlin Council of 1999 had already foreseen the possibility of a review of the CAP in 2003, in the event that it were considered necessary to adapt measures to market evolution.

The Communication *Mid-Term Review of the Common Agricultural Policy* of July 2002 was the starting point.¹ However, the key element which marked the process of reform is the budgetary accord adopted by the Brussels Council in October 2002.

Let us not forget that during the course of the Brussels Council the direct payments under the CAP had been fixed for the new Member States² and the financing of the First Pillar of the CAP (market policies and direct payments) had been established for the period to 2013, without settling what resources to allocate to the Second Pillar (rural development) beyond 2007.

¹ COM(2002) 394 final, 10th July 2002

² It was this that allowed the negotiations with the ten candidate countries to be concluded in Copenhagen in December 2002

In an initial phase, the new Member States were to be integrated into direct payments at a percentage rate relative to the EU-15: 25% in 2004; 30% in 2005; 35% in 2006; and 40% in 2007. In a second phase, there would be increases of 10%, so that by 2013, and from then on, the new Member States would reach parity with the EU-15.

This progressive introduction will be realised in a framework of financial stability conforming to the principle of budgetary neutrality, as the Brussels Council froze the budget for market policies, at 2006 levels and at constant prices, at €45.306bn³, which would have to be shared by all 25 Member States.

The budget for prices and market policies was fixed for the EU-25 until 2013 in order to facilitate (more precisely to affirm) the process of enlargement, while avoiding at the same time disagreement by the new Member States after their accession in 2004.

Subsequently, following debates on the July Communication and, above all, taking account of the conclusions of the Brussels Council, the Commission presented in January 2003 a collection of legislative proposals (seven in all) entitled *A long-term policy perspective for sustainable agriculture*.⁴

In spite of some reluctance, the final agreement was adopted by the Agriculture Council of Ministers on 26th June 2003 (the Luxembourg Council), in exchange for certain concessions in matters of price and the allowing of aids for specific products which enabled the different nations to give way and accept the reform as a whole.

While the reforms of 1992 and 1999 were founded on reductions in intervention prices, partially compensated by direct payments, the new reform of the CAP adopted by the EU brings in an important change to the system of agricultural support based essentially upon: (1) decoupling aid from production (with a view to easing negotiations in the WTO); (2) compulsory modulation of aid payments (to provide resources for the Second Pillar); and (3) cross-compliance (to give it greater social legitimacy). Additionally, it is intended to reinforce rural development policy, as well as revising some facets of market organisation from the point of view of development and of stability of agricultural markets.

Decoupling aid from production – the single payment regime

The new system is based on “decoupling”, or dissociation, that is to say on the breaking of the link between support payments and income from agricultural production.⁵ One single payment to each business, calculated according to a historical reference period (2000-2002), unites all the direct payments which the farmer formerly derived from different common market organisations. Its objective is to guarantee a minimum income level while allowing the market to determine farmers’ business strategies.

In that way, the single payment is not subordinated to the production of any particular product (in fact, farmers can use their land for whatever agricultural activity they choose, even if it is different from that which gave rise to the payments in 2000-2002). Furthermore, production may be abandoned altogether, provided the land is maintained in good agricultural and environmental condition.

However, in the interests of avoiding distortions, production on supported land of permanent crops⁶, fruit and vegetables (fresh or processed) and potatoes (except those

³ An amount which rises slightly at the rate of 1% annually

⁴ COM(2003) 23 final, 21st January 2003

⁵ As Valérie ADAM indicates, “the single payment is called decoupled because its receipt is not dependent on an act of production or on the outcome of a production operation and it does not depend on market prices” (“The right to payment, an innovative legal creation of the reform of the Common Agricultural Policy”, *Revue du Marché commun et de l'Union européenne*, No.475, February 2004, p.96)

⁶ Except for olives and hops under Council Regulation (EC) 864/2004 of 29th April 2004 modifying Regulation (EC) 1782/2003 establishing common rules for direct support schemes under the common agricultural

intended for starch) is excluded, save that there is an exception to this principle in cases where the single payment is applied on a regional basis (which we will look at further below)⁷, and in the case of the new Member States⁸.

We are, therefore, in a normative environment which creates new rights and introduces a new definition of agricultural activity (it is no longer necessary for there to be a productive activity; it is enough to maintain the land in good agricultural and environmental condition). Nevertheless, this full definition of agriculture conflicts with certain national laws (French and Italian, for example) and, as Monsieur Bodiguel indicates, not only so far as the definition itself is concerned, but also in relation to the law of agricultural tenancies.

Initially, the regime would apply to products covered by the arable regime, grain legumes, seeds, cattle, sheep, rice, durum wheat, dairy (once the reform is fully operative), starch potatoes and dried fodder.

But, rapidly, questions arise as to whether the system will extend to other equally assisted sectors and, above all, whether it will extend to sectors unsupported at internal level: pigs, poultry, fruit and vegetables, etc. As Madame Massauer emphasises, products not included suffer a competitive disadvantage.

For the time being, the Community has extended the single payment scheme to the cotton, olive oil, tobacco and hops sector (albeit that the decoupling of aid is not complete).⁹

The governing texts themselves warn of the risk of relocation of production and cessation of activity in the less profitable regions and products in which costs of production are higher or which lack support, all of which will pose greater problems in the less favoured areas.

For example, it may be that in Finland the decline in the number of businesses will increase further, particularly in the north of the country. Also, in Norway, the small businesses of the north and the west will find it more difficult to survive when one considers that their costs of production are higher than in the rest of Europe, taking into account the climate, the small-scale production levels and the fact that almost 70% of its imports of agricultural produce come from the EU. It may equally be that France will have to face up to the disappearance of less profitable, less remunerative sectors (for instance, small dairy producers).

That is why the decoupled single payment scheme does not exclude maintaining elements of coupling, to avoid the abandonment of certain types of production. In practice, Member States have a number of options apart from complete decoupling. For example, they may apply partial decoupling for certain products (arable, sheep- and goatmeat and beef) or completely exclude others from the new regime (regional payments, seeds and dried fodder). Furthermore, they may delay implementation of the new system until 1st January

policy and establishing certain support schemes for farmers, and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (OJ L161, 30.4.04, as amended by corrigendum published OJ L206, 9.6.04)

⁷ Council Regulation 1782/2003, Art.60

⁸ Council Regulation (EC) 583/2004, 22nd March 2004, amending Regulations (EC) 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, (EC) 1786/2003 on the common organisation of the market in dried fodder and (EC) 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union added a new Chapter 6 (Implementation in the new Member States) to Title III (Single Payment Scheme), of which Art.71g provides that farmers in these countries may use land for production of fruit and vegetables (fresh or processed) and potatoes other than those intended for starch (but not for permanent crops)

⁹ Council Regulation (EC) 864/2004 of 29th April 2004 modifying Regulation (EC) 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (OJ L161, 30.4.04, as amended by corrigendum published OJ L206, 9.6.04)

2007; they may apply the scheme at a regional level; and other support regimes are provided for (the sector-specific aids covered by Title IV of Regulation 1782/2003).¹⁰

First, in order to avoid any abandonment of production, a link is maintained between public aids and some agricultural production. In arable matters, Member States may retain up to 25% of payments under a coupled system, or up to 40% in the case of durum wheat premium. For sheep- and goatmeat, up to 50% of the headage premia may be retained. With beef, there is a choice between (a) retaining up to 100% of the slaughter premium and up to 40% of the suckler cow premium or (b) retaining up to 100% of the suckler cow premium or, alternatively, up to 75% of the beef special premium.

According to Monsieur Bodiguel, the French government was motivated to 'recouple' by the need to avoid abandonment of the traditional breeding regions (mountains ...) where profitability is poor and dependence on aid payments heavy.

Furthermore, under Art.69, Member States may retain up to 10% of the national ceiling to bolster payments to particular types of agriculture which are important for the protection or improvement of the quality and marketing of agricultural products. As shown by Monsieur Amat and Madame Llombart, this option will be used by Spain to protect certain less favoured areas.

Next, the Member States may decide to exclude from the single payment regime, and therefore from decoupling, direct payments attributable in the Aegean Islands and in the peripheral regions to seeds and dried fodder.

The system is intended to come into force on 1st January 2005. However, where agricultural conditions justify it, a Member State may decide to apply the single payment scheme after a transitional period (lasting either until 31st December 2005 or 31st December 2006), subject to adherence to the prescribed budgetary limits (Art.70 of Regulation 1782/2003).

Ten Member States decided to implement the scheme with effect from 1st January 2005: Austria, Belgium, Denmark, Germany, Ireland, Italy, Luxembourg, Portugal, Sweden and the United Kingdom. Finland, France, Greece, the Netherlands and Spain will apply it in 2006. So far as the new Member States are concerned, Malta and Slovenia will begin implementation in 2007 and the eight other States will apply it superficially, in that farmers in specified regions will be offered flat-rate entitlements per hectare, financed from the same regional envelope. These new Member States will adopt the full scheme later, from 2009.

One must not forget also that a regionalised application of the single payment scheme is permitted. Member States may decide to implement it at a regional level, provided the regions are clearly defined and the national ceiling is divided amongst the regions on an objective basis.¹¹ There are two possibilities: the regional ceiling may be divided amongst all farmers with a business in the region concerned (including those who are not included in the single payment scheme); or the regional ceiling may be divided by the number of eligible hectares.

It is important to point out that the redistribution of support on a regional basis over eligible hectares may be total or partial; decoupled aid may be paid on permanent pasture; and it may be permitted to grow fruits, vegetables and non-starch potatoes on eligible land.

¹⁰ Council Regulation (EC) No 1782/2003 of 29th September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ L270, 21st October 2003)

¹¹ Member States with less than three million eligible hectares may be considered a single region

Similarly, the dairy premium and supplementary payments will be included, in whole or in part, in the single payment scheme from 2005; and the determination of set-aside payments may also be made on a regional basis under Art.63(2) of Regulation 1782/2003.

Belgium, Denmark, Finland, Germany, Sweden and the UK have adopted the regional basis for implementing the single payment scheme (some by means of a hybrid model pursuant to Arts.59(3) and 63(3) of Regulation 1782/2003).

For example, in England the single payment will be calculated in part on the basis of the farmer's historical reference and in part on a regional basis (a payment per hectare), with different rates for the less favoured areas and others. But, as Mr. Mackay has emphasised, the UK has adopted two systems of single payment: one for England and another for Scotland and Wales, creating problems for businesses with land on either side of the border.

Finally, there is a further exception to the system of decoupling, since Title IV of Regulation 1782/2003 deals with other aid regimes for specified sectors. Regulation 1782/2003 and its implementing regulation 2237/2003¹² propose special premia for certain products within a limit of area determined for each category of aid.

As a result, there is an initial increase in the aid for durum wheat, proteins, rice, nuts, energy crops and starch potatoes¹³, and other products like milk, arable crops, seeds, sheep and goats, beef and grain legumes. It is clear that these aids correspond to the concessions made in the course of negotiations to allow different countries to accept the reforms. Later, as we now know, Regulation 864/2004 established similar support schemes for producers of cotton, olive oil and hops.

But these choices given to the Member States and the Regions can be looked at in two ways: as elements allowing adaptation to the *droit communautaire* of particular national issues, or as an inability to create a common policy, with the danger of renationalising the Common Agricultural Policy.

On the other hand, there are considerable uncertainties as to what will be encountered in practice by each farmer in view of the list of possible reductions contemplated by Regulation 1782/2003.

It must be noted that the total of the reference amounts in each Member State may not exceed the national ceiling set out in Annex VIII¹⁴, so that, if necessary, Member States must apply linear percentage reductions to the reference amounts to bring them in line with the ceilings (Art.41).

Also, once those reductions have been made, Member States must apply a further linear percentage reduction (not exceeding 3%) in the first year of their implementation of the single payment scheme to create a national reserve. That reserve may be topped up from time to time by a proportion of entitlements transferred without land.

Member States may use the national reserve to grant, in priority, payment entitlements to farmers who commenced an agricultural activity after 31st December 2002, or during 2002

¹² Commission Regulation (EC) No.2237/2003 of 23rd December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No.1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ L339, 24th December 2003)

¹³ Granted with different objectives, for example, improving the quality of durum wheat; encouraging production of crops rich in proteins; preserving rice-growing in certain areas; preventing the disappearance of nut production in traditional regions and its negative effects from the environmental, rural, social and economic viewpoints; or promoting energy crops (with the possibility of using land withdrawn from production of industrial crops)

¹⁴ The reference amount will be the average of three years' total payments made to a farmer under the support schemes set out in the corresponding annexes in each calendar year of the reference period (2000, 2001 and 2002)

but without making a claim for aid in that year, according to objective criteria and so as to ensure equal treatment between farmers and to avoid market and competition distortions. They must similarly use the national reserve to establish payment entitlements for farmers who find themselves in a special situation. Member States may also use the national reserve to establish payment entitlements for farmers in areas subject to restructuring and/or development programmes relating to one or other form of public intervention in order to avoid abandonment of land and/or to compensate specific disadvantages for farmers in those areas.

Except in case of actual or anticipated inheritance, entitlements allocated from the national reserve may not be transferred for a period of five years from their allocation.¹⁵

Further, in the case of a sale or a lease for six or more years of a holding or part of a holding or of premium rights during the reference period or not later than 29th September 2003, part of the entitlements to be allocated to the seller or lessor may be siphoned off to the national reserve.

When a farmer, who has no entitlements, applies for entitlements from the national reserve, he may be allocated a number of entitlements not greater than the number of hectares he has at his disposal (whether owned or leased) at that time.

As our Italian colleague points out, the functioning of this whole system hinges on the national reserve, the administration of which will therefore be a critical component of national agricultural policy (management in Italy and Spain, for example, will be on a regional basis).

So far as the single payment scheme is concerned, under Art.33 of Regulation 1782/2003, farmers will have access to it if they received a payment during the reference period under at least one of the support schemes listed in Annex VI; or if they received their holding or part of it by inheritance or anticipated inheritance from a farmer who received such payment; or if they have received a payment entitlement from the national reserve or by transfer. If a farmer who was granted such a payment in the reference period changes his legal status or denomination during that period or not later than 31st December of the year preceding the year of application of the single payment scheme, or if merger or scission has taken place, the farmer or farmers who manage the holding will have access to the single payment scheme on the same terms as the farmer originally managing the holding.

But, as Professor Albinini has remarked, in this context legal concepts are used which are unknown in certain jurisdictions (the concept of anticipated inheritance in Italy or Spain, for example) or definitions which differ in meaning according to the country (as is the case with the change of legal status or denomination), which might give rise to interpretations in Member States which differ from that expected at Community level.

Each farmer will be allocated an entitlement per hectare, calculated by dividing the reference amount by the average number of hectares giving rise in the reference period to direct payments under the schemes listed in Annex VI.¹⁶ Then, as a general rule, any payment entitlement not used for three years reverts to the national reserve.

¹⁵ The general rule is that entitlements not used for three years will be forfeit to the national reserve. In the case of entitlements granted from the national reserve, any not used in any one of the first five years following their allocation will revert to the national reserve.

¹⁶ A farmer whose production was seriously affected in the reference period by a case of *force majeure* or exceptional circumstances may request that the reference amount be calculated on the basis of the calendar years of the reference period not affected in that way. If the whole reference period was affected by *force majeure* or exceptional circumstances, the Member State may calculate the reference amount by using the period 1997-99. By way of examples of *force majeure* or exceptional circumstances, Art.40 of Regulation 1782/2003 cites: the death of the farmer; long-term professional incapacity of the farmer; a severe natural disaster gravely affecting the holding's agricultural land; the accidental destruction of livestock buildings on the holding; or an epizootic affecting part or all of the farmer's livestock.

Thus, the payment entitlements belong to the farmer and not the landowner. For this reason, the possibility of payment entitlements, without available land, gives greater relevance to the transfer of entitlements, due to the problems which arise between non-farming landowners and farming tenants. This question was raised especially by our British colleague, Mr. Mackay, who shows us that in his country parties are attempting to renegotiate the terms of lettings and there is a particular problem with long-term leases.

Equally, our colleagues, Mr. Vilander and Ms Massauer underline as well the problem of negotiation of new clauses in leases and the reduction in value of land without payment entitlements, a problem to which Professor Albisini adds the difficulties encountered where there is guaranteed succession.

For our Belgian colleague, Mr. Van Malleghen, payment entitlements per hectare are personal rights belonging to farmers and not tied to the idea of ownership of land and buildings, not even those of the farmer. According to him, the farmer has, therefore, a perfectly individualised and recorded right, which might be legally classified as a debt due.

However, payment entitlements may be transferred only to a farmer in the same Member State, except in case of inheritance or anticipated inheritance (although, even in the case of inheritance or anticipated inheritance, payment entitlements may be used only in the Member State where they were established).

In order to avoid speculative transfers giving rise to an accumulation of entitlements without a corresponding agricultural base, a link is established between payment entitlements and the specified number of eligible hectares, as well as the possibility of confining transfer of entitlements within the same region.

For example, in France, except the overseas Departments, the single payment scheme will be implemented on a national basis; the management of envelopes will take place at departmental level, which implies that transfers will be permissible only within departments.

In accordance with Regulation 1782/2003, transfers of payment entitlements, with or without land, may be by sale or any other definitive transfer. In contrast, leases and similar types of transaction are permitted only if the payment entitlements transferred are accompanied by the transfer of an equivalent number of eligible hectares.¹⁷ A farmer may not transfer his payment entitlements until he has used at least 80% of his payment entitlements during at least one calendar year, or has given up voluntarily to the national reserve all the payment entitlements he has not used in the first year of application of the single payment scheme.

In the case of sales of payments entitlements, with or without land, Member States may decide that a proportion of the entitlements in question revert to the national reserve or that their unit value be reduced in favour of the national reserve, in accordance with Commission Regulation (EC) 795/2004, of 21st April 2004, laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers.¹⁸

However, there will be no retention in the case of sales of payment entitlements, with or without land, to a farmer who commences an agricultural activity nor in the case of transfer by inheritance or anticipated inheritance.

¹⁷ According to Valerie ADAM, *op. cit.*, p.101, "farmers with payment entitlements are free to transfer their entitlements on the terms set out in the Community regulations. Thus, the agricultural legislator has affirmed clearly the principle of mobility of payment entitlements, their individual character and their inheritability. ... The way the 1992 reforms were applied left Member States with much room for manoeuvre in the way they implemented 'premium rights'. The mode of application remains to be written for payment entitlements..."

¹⁸ OJ L 141, 30th April 2004

Lastly, the following amounts, which derive from payments made during the period 2000-2002 (designated by Art.47 of Regulation 1782/2003 as payments subject to special conditions) will be integrated into the reference amount: they are the deseasonalisation premium, slaughter premium, beef special premium and suckler cow premium under certain circumstances, the additional payments provided for in Art.14 of Council Regulation (EC) 1254/1999 for beef and the payments provided for under the sheep and goats aid scheme. Not forgetting that from 2007 amounts deriving from the dairy premium and additional payments will be included in the single payment scheme.¹⁹

Modulation

The total amount of direct payments made for a calendar year to a farmer in a Member State will be reduced each year from 2005 until 2012 by the following percentages: 3% in 2005; 4% in 2006; and 5% from 2007 to 2012.

In the final analysis, modulation consists of a system of compulsory progressive reductions in direct payments at the Community level in the period 2005-2012, the object of which is to reinforce the second pillar of the CAP (rural development). That is a difficult object to attain given that modulation may not exceed 5% (nothing compared with the 20% originally proposed) for all businesses receiving more than €5,000 in payments annually.

Payments less than €5,000 are not subject to reduction, so that, even though it is not achieved directly, a type of exemption exists by way of an additional amount of aid, since this amount will be the same as the amount which results from applying the percentage reductions per calendar year considered for the first €5,000 of direct payments or less. For example, two thirds of businesses in Austria will not be affected by modulation.

However, no maximum level has been fixed on the amount of aid each claimant may receive (originally proposed at €300,000) and there is no mention of the possibility of using the amounts deriving from modulation to diminish national contributions to co-financed accompanying measures such as was proposed in the Communication of 2002.

On the other hand, the amounts resulting from the application of the proposed reductions will be used, in the name of additional Community support, to underpin measures relevant to rural development programmes financed by the EAGGF Guarantee Section, in accordance with Regulation 1257/1999.

An amount corresponding to one percentage point will be allocated to the Member State where the corresponding amounts were generated. The remainder will be allocated to the Member States according to their agricultural areas, agricultural employment and GDP per capita in parity with their purchasing power.

For all this, the system of modulation has a single, linear percentage, that is, without differentiating between levels of aid per claimant and without distinction between areas. Also, the objective criteria for distribution of resources will apply only to a maximum of 20% of the resources granted by each Member State, since each Member State will receive at least 80% of the amounts generated by that State from modulation (90% for rye in certain circumstances). And that without forgetting that the small budgetary resources devoted to the second pillar have also to fund the new rural development measures.

Lastly, we must underline that modulation will not apply to the peripheral regions, nor to the new Member States in the transitional period (in this last case, because they will not be entitled to the full range of aids).

¹⁹ In principle, decoupling will apply for milk products when the reform of the common market organisation in that sector is complete (expected in January 2007), but it is possible to bring the date forward to 2005.

Financial discipline

An instrument of financial discipline is also introduced with the aim of reducing the amount of aid received by farmers in the event that the planned budget is exceeded. If, in the course, of a budgetary review, forecasts indicate that the planned budget will be exceeded (taking into account a margin of €300m), direct payments are adjusted accordingly.

Art.11 of Regulation 1782/2003 provides that, beginning with the budget for 2007, and with a view to ensuring that the amounts for the financing of the common agricultural policy respect the annual ceilings fixed by the financial perspectives, an adjustment of the direct payments shall be made when the forecasts indicate that the amounts foreseen under subheading 1a (market measures and direct aids) will be exceeded in a given budget year. This is, in effect, a freezing of the guideline for market policy and direct aids at the 2006 level for the period 2007-2013 (with an increase of only 1% per annum to reduce the impact of inflation).

It is well known that budgetary conditions are decisive in the evolution of the CAP. Nevertheless, one wonders how the extra cost of other sectoral reforms (especially sugar) will be tackled. It is important also to avoid, by an overly restrictive financial approach, taking the risk that there will be insufficient resources to meet unexpected crises, price fluctuations, or market instabilities.

For example, France intends to use part of the modulation funds to establish a crisis management system for sectors which do not benefit from common market organisations (pigs, poultry, fruit and vegetables).

Also, the calculation of fixed, decoupled aid, being based on a historic reference, does not permit a better distribution of the community agriculture budget; on the contrary, it tends to reinforce existing imbalances between the regions, sectors and producers, contrary to the principles of territorial, economic and social cohesion envisaged by the Treaty Establishing the European Community (Art.16 and Arts.158 and 159). For example, the arable sector absorbs more than 60% of the EAGGF Guarantee section. Further, there are enormous differences between aids received by the large holdings and the level of support given to small farmers.²⁰

From another point of view, it must not be forgotten that we are faced with a sort of national envelope funded by past receipts, which puts in doubt a possible agreement between Member States on any future redistribution at community level on other criteria such as territory, employment, new social demands, etc.

The community authorities insist that this reform will reinforce the EU's position in negotiations in the WTO, since the system of decoupling of support by reference to production (similarly to the 'Freedom to Farm' Act in the United States in 1996) will transfer a good part of internal aid payments to the 'Green Box'. However, this reform may also inspire important changes of focus of production (in favour of products less costly to produce) or abandonment of land, putting in danger the viability of the more vulnerable holdings, those more dependant on public aid and those less able to adapt to falling prices.

Moreover, the stated advantages are not as obvious as the Commission would have us believe. In the first place, it ignores the failure of the decoupled model applied by the Freedom to Farm Act in the United States in 1996 by means of market transition payments. This frustrated attempt demonstrates that a system of fixed aid is not viable if one does not attend to internal market stability. This situation is aggravated by the financial corset imposed by the Commission from 2007, which, in practice, prevents any increase in aid in response to price developments. The fundamental problem is that, once the direct

²⁰ What is more, the system remains open to all – as opposed to a system of compensatory public assistance and income support – which takes into account neither the recipient's total resources nor whether he is in reality a farmer.

production-related payments are converted to fixed – decoupled – payments, the EU gives away the means of combating market instability, of compensating for an additional reduction in the safety margin which might influence the course of multilateral negotiations and, in the final analysis, of preserving the multifunctional model of agriculture. Secondly, the Commission does not take account of the increase in manpower which in the chapter relating to internal aid the EU already has, according to its latest submissions to the WTO, and the proposals of the Harbinson Report.²¹

Equally, it must not be forgotten that the Farm Bill in the United States in 2002 (“Farm Security and Rural Investment Act”) committed itself to an openly protectionist route. As our colleague Mrs. Grossman pointed out, in analysing that law in her report, the US allocates considerable resources to agriculture by means such as “decoupled direct payments”, “counter-cyclical payments”, “marketing assistance loans” and “loan deficiency payments”. But the expenditure includes also measures of conservation, commerce, energy, food programmes, rural development, cross compliance, land withdrawal, woodlands, insurance, disaster relief, investment, export stimulus, etc.

On the contrary, in the EU, in spite of enlargement, the CAP is going to lose financial importance, falling from 45% of the community budget in 2006 to 35% in 2013 (with an EU of probably 27 members). Further, according to a Communication on the new financial perspectives for an enlarged EU,²² the CAP will become integrated with the new Section 2 (sustainable management and protection of natural resources) along with fisheries and environmental policies.

Cross compliance

In accordance with Art.3 of Regulation 1782/2003, all farmers receiving payments will be obliged to observe statutory management requirements, as well as maintaining land in good agricultural and environmental condition.

In effect, cross compliance becomes another condition of receipt of aid by making the grant of aid subject to compliance with the statutory management requirements set out in Annex III in matters of public, animal and plant health, environment and animal welfare.²³ Cross compliance translates, therefore, through those requirements into a series of non-production-related criteria for receipt of the CAP payments, the criteria being those set out in 18 legislative schemes already in force.

Further, the Member States will have to make sure that all agricultural land, particularly that left out of production, is maintained in good agricultural and environmental condition. For this, Member States must define, at the national or regional level, the minimum standards of good agricultural and environmental condition on the basis of Annex IV, taking into account the characteristics of the areas concerned: including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices and farm structures (Art.5), without prejudice to the standards governing good agricultural practices as applied in the context of Council Regulation (EC) 1257/1999 and to agri-environmental measures applied above the reference level of good agricultural practices.

²¹ Albert MASSO MARTÍ, “La PAC y el Parlamento Europeo”, *Agricultura Familiar en España 2003*, Anuario de la Fundación de Estudios Rurales, 2003, p.44-46

²² Communication from the Commission to the Council and the European Parliament, “Building our common Future – Policy challenges and Budgetary means of the Enlarged Union 2007-2013”. COM(2004) 101 final of 10th February 2004

²³ According to Daniele BIANCHI, “the goal of cross compliance is therefore to increase the farmer’s responsibility in environmental, food, veterinary and phytosanitary matters, without imposing on him new obligations but by making the grant of aid subject to compliance with existing obligations”, in “Cross compliance of direct payments or the responsibility of the farmer receiving those payments in the context of the common agricultural policy (CAP)”, *Revue du Marché commun et de l’Union européenne*, No.475, February 2004, p.94

Similarly, Member States must make sure that land in permanent pasture as at 31st December 2002 is maintained under permanent pasture.²⁴

If these standards are not respected, reductions in the amounts of direct payments granted to businesses are envisaged (between 10% and 100% according to the circumstances or as a function of the risk or damage caused). Reductions or exclusions will be applied only where the non-compliance relates to an agricultural activity or agricultural land (including the areas set aside). Also, the severity, extent, persistence and repetition of the non-compliance will be taken into account. In accordance with Art.7, in a case of negligence, the percentage reduction will not exceed 5% or, for repeated non-compliance, 15%. If the non-compliance is intentional, the percentage reduction will not, in principle, be less than 20% and may go as far as total exclusion from one or several aid schemes and may apply for one or more calendar years.²⁵

The amounts forfeit as a result of cross compliance penalties will be credited to the EAGGF Guarantee section, although Member States may retain 25% of those amounts (which may encourage checks). However, the application of cross compliance will imply not only cost for businesses, but also greater management effort on the part of the administrators, as our Finnish and Austrian colleagues mention.

New rural development measures

Apart from attempting to reinforce the second pillar through modulation, the new reforms have enlarged the sphere of operation of rural development policy by means of Council Regulation (EC) 1783/2003, amending Regulation (EC) 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF).²⁶ The objective is to strengthen rural development policy by expanding the range of measures set up by Regulation 1257/1999. In this way, as well as making certain modifications by means of specific articles,²⁷ Chapter VI is reincarnated under the heading "Agri-environment and animal welfare" and two new chapters are added: Chapter Va "Meeting standards" and Chapter VIa "Food Quality".

As far as Chapter V is concerned, the support given to production methods which protect the environment, maintain the countryside (agri-environment) or improve animal welfare must promote ways of using agricultural land which are compatible with the protection and improvement of the environment, the landscape and its features, natural resources, the soil and genetic diversity; must also promote an environmentally-friendly extensification of farming and management of low-intensity pasture systems; the conservation of high nature-value farmed environments which are under threat; the upkeep of the landscape and historical features on agricultural land; the use of environmental planning in farming practice; and the improvement of animal welfare. The support is to be granted to farmers who give agri-environmental or animal welfare commitments for at least five years and these commitments must involve more than simply the application of usual good farming

²⁴ Except for permanent pasture intended to be afforested, if such afforestation is compatible with the environment and with the exclusion of plantations of Christmas trees and fast growing species cultivated in the short term

²⁵ On the other hand, by 31st December 2007 at the latest, the Commission must submit a report on the application of the system of cross compliance accompanied, if necessary, by appropriate proposals notably with a view to amending the list of statutory management requirements set out in Annex III

²⁶ OJ L270 of 21st October 2003

²⁷ For example, Art.16 of Regulation 1257/1999 is modified by permitting compensation to farmers for costs incurred and income foregone in areas subject to environmental restrictions on agricultural use as a result of the application of Council Directive 79/409/EEC of 2nd April 1979, concerning the protection of wild birds (OJ L103 of 25th April 1979) and of Council Directive 92/43/EEC of 21st May 1992, concerning the protection of natural habitats of wild fauna and flora, if and insofar as such payments are necessary to solve specific problems arising from the application of those Directives

practice, including good animal husbandry practice. Aid is calculated annually on the basis of income foregone, additional costs resulting from the commitment given, and the need to provide an incentive.

In respect of all these new chapters, the support granted to support farmers who adapt to demanding standards based on Community legislation in the fields of the environment, public, animal and plant health, animal welfare and occupational safety must contribute to a more rapid implementation of demanding Community standards by Member States; the respect of those standards by farmers; the use of farm advisory services by farmers, as provided for in Regulation 1782/2003 (of which the object is to assess the performance of farm businesses and identify improvements required with regard to the statutory management requirements as set out in that Regulation). It is intended, in order to grant temporary support, to contribute partly to costs incurred and income foregone to farmers who have to apply demanding standards based on Community legislation and newly introduced in national legislation. Support may not be granted for a period exceeding five years from the date the standard becomes mandatory in accordance with Community legislation. Further, to be eligible for support, the standard should impose new obligations or restrictions on farming practice which have a significant impact on typical farm operating costs and which concern a significant number of farmers.

Support for agricultural production methods designed to improve the quality of agricultural products and for promotion of those products shall contribute to providing assurances to consumers on the quality of the product or of the production process used; achieving added value for agricultural primary products and to enhance market opportunities; and improving consumer information on the availability and specifications of such products. Support is to be granted to farmers who participate voluntarily in Community or national food quality schemes, which impose specific production requirements on agricultural products listed in Annex I to the Treaty of Rome (except fishery products). Support will be paid as an annual incentive payment up to the maximum eligible amount per holding and the duration of the payment is limited to a maximum period of five years. Similar support is available to producer groups for activities intended to inform consumers about and promote agricultural products or foodstuffs designated under Community or national food quality schemes. Payments will cover information, promotion and advertising activities and is limited in total to a maximum of 70% of the eligible costs of the activity.

The new rural development programmes are to be accompanied by greater internal co-financing. And the problems will doubtless be greater still for those regions which, following enlargement, find themselves having to make a larger contribution to community financing in the zones not designated as Objective 1 (particularly those regions which, by 'statistical effect', will no longer be considered as Objective 1 zones from 2007).

With regard to the future, the Communication (cited above) on the financial perspectives of the enlarged Union, pulling together the conclusions of the Salzburg Conference of November 2003, proposes: 1. the integration of rural development in one discrete funding programme based around three main objectives: increasing the competitiveness of agriculture and forestry; improvement of the environment, the rural community and agriculture by means of support for land management; and improvement of the quality of life in rural areas and stimulation for diversification in rural business. 2. creation of a single Rural Fund; and 3. establishment of a single financial regime for rural development through a single dedicated regulation, in conformity with the Proposal for a Council Regulation relating to the support for rural development from European agricultural and rural development funds (FEADER)²⁸, derogating from Regulation 1257/1999 with effect from 1st January 2007.

²⁸ COM(2004) 490 final of 14th July 2004

However, while more than half of the population of the EU-25 lives in rural areas which comprise 90% of the total area, only 9.8% of the community budget will be devoted to rural development.

Other measures

Between now and 1st January 2007, Member States will establish a Farm Advisory service for farmers, covering matters of business and land management, under the control of one or more designated authorities or private organisations. The compass of the advisory service will comprise, at least, the statutory management requirements of land management and good agricultural and environmental condition, as established. All farmers will be entitled to the benefit of the service if they choose, although Member States must give priority to those farmers receiving more than €15,000 per annum. Later, in 2010 and subject to a Commission report on its operation, the Council will decide whether to make the scheme compulsory for farmers.

Also, in order to retain the function of set-aside as a production control mechanism, set-aside is maintained at 10%. This may be rotational, and set aside land may be used for non-food crops. By way of exception, organic farmers are excused the obligation to set aside.

Finally, and in view of the complexity of the new regimes, each Member State must create an integrated administration and control system applicable to the support schemes and comprising the following elements: a computerised database, a system of identification for land parcels, a system for identification and registration of payment entitlements and payment applications, an integrated control system and a system for identifying uniquely every farmer who submits an aid application.

The integrated administration and control system imposes obligations on Member States to establish measures to control fraud, and to ensure observance of the cross compliance conditions.

3. OBJECTIVE

It is well known that the latest reform of the CAP adopted by the EU brings in an important change in the system of agricultural support. Starting with those elements that have been announced, the objective of Commission II of the XXIII Colloquium of the European Council for Rural Law is to reflect on the possible shortcomings, doubts in interpretation and application, contradictions between national standards and those of the Community, or other problems posed by the principal instruments of the new Common Agricultural Policy, as well as to collect as much information as possible about the judicial consequences and the impact of the reforms on the ground.

On the other hand, there is no doubt that the evolution of the CAP has an effect not only on the standards adopted in each Member State (or on the governmental structures which divide competences between State and Regions, as our Italian and Spanish colleagues point out in relation to modulation and cross compliance), but also on the relations between private citizens and therefore on private law. These repercussions oblige us to take account of the problems derived from the connection between Community law and National law and to analyse particularly the effect of the new agricultural support system on agricultural business, on the contractual practices within Member States and on established contractual relationships.