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

LES CONSÉQUENCES DE LA NOUVELLE RÉVISION DE LA PAC SUR L'EXPLOITATION ET LA PROPRIÉTÉ AGRICOLE

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

National Report – Rapport national – Landesbericht

Italy – l'Italie – Italien

Italian report* – Rapport italien* – Italienischer Bericht*

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The Consequences of the New Revision of the CAP on the Exploitation and Rural Property

SUMMARY: 1. Introduction – 2. The constitutional framework – 3. The Ministerial Decree of 5 August 2004 – 4. New definitions – 5. New rights.

1. Introduction

The new approach and the new rules of the CAP have been originally proposed as expression of a *Review*, i.e. an adjustment of the important reforms introduced during the last decade of the XX century[1].

In fact, the result of the new regulations adopted after a long negotiation, and specifically of Regulation No 1782/2003[2], considered from the point of view of the Italian legal system, is more in the direction of a radical revolution of fundamental legal concepts, for a long time non subject to discussion, than of a simple review.

During years 2002 and 2003, in the course of negotiations within Member States and the Commission, the content of the proposed reform received in Italy limited attention from legal scholars, and was investigated mainly by economists. The adoption of a *decoupled* system of European aids to agriculture was considered mainly with reference to the possible effects on the national production of some products (especially durum wheat and beef), and a strong political pressure induced the Italian government to insist during the negotiations for the introduction of rules giving the member States the faculty to proceed with a partial, and non total decoupling, with reference to those productions.

The legal aspects of the new proposed rules did not receive a similar attention, partly due to the continuous changes in the drafts prepared by the offices of the Commission (so that any comment risked to become irrelevant in few days), and partly due to the traditional attitude, under which European rules of the CAP have been largely considered as expression of economic governance decisions, more than of a consistent and coherent legal system.

By comparison, in the same period, agricultural law in Italy showed a renewed strong tension in favour of general and important reforms; tension which had been abandoned for almost two decades after the last national reform of the agricultural contracts in 1982[3].

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* This paper is drafted on 30 November 2004, and updated to the national legislation published until this date.

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1 From Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops, to Council Regulation (EC) No 1251/1999 of 17 May 1999 establishing a support system for producers of certain arable crops; and from Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures, to Council Regulation (EC) No 1257/1999 of 17 May 1999, on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.

2 Council Regulation (EC) No 1782/2003 of 29 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.

3 Law 3 May 1982, No 203.

After many years of small cabotage, during which have been adopted single rules of favour with no general systematic perspective[4], the Italian legislation at the end of the XX century and the beginning of the XXI century has seen the introduction of a multiplicity of new legal rules, with systematic ambitions (but not always with systematic results), adopted along a continuous line, which survived even the change of government of year 2000.

It may be here remembered the legislative decree of 1998[5], aimed to sustain agricultural structures with new rules on competition and on organization of agri-food business, the law of 2001[6] on the general regulation of markets giving specific attention to the process of orientation[7] and reform in agriculture, the legislative decrees of 2001[8] of orientation in agriculture, forestry, and fishery, the law of 2003[9] reopening the terms for the adoption by the government of legislative decrees in agriculture and for the compilation and publication of a *Agricultural Code*, containing in a single text all the rules applicable to agricultural activity[10], and the legislative decrees of 2004 on agriculture[11] and on fishery[12].

This *open yard* of Italian agricultural law is still far from being completed, and the multiple questions posed by the reform of CAP concur to extend the request for new national regulations, as a consequence of:

a) the introduction of new rights, first of all the payment entitlement[13], whose legal qualification is far from being clear;

b) the transplant in all the member States of legal concepts until today known only in some legal systems, like that of anticipated inheritance[14], and of definitions having a meaning different from that customary in the national language, like that of change of legal status or denomination[15];

c) the modification of basical rules of European agricultural law, with the introduction of a new definition of agricultural activity[16];

d) the possible contradiction between national and European rules.

2. The constitutional framework

The reform of CAP at the beginning of the century is of peculiar interest for Italian scholars, producers, and politicians, not only for the specific content of the new regulations, but also

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4 See, e.g., the numerous laws in favour of the "*coltivatori diretti*" (small direct farmers) in the fields of taxation, pension funds, social security, and credit, or the laws enlarging the qualification of agricultural business, and the related benefits, to mushrooms growers even without land (Law 5 April 1985, No 126), to fish-breeders (Law 5 February 1992, No 102), and even to dog-breeders (Law 23 August 1993, No 349).

5 Leg. Decree 30 April 1998, No 173.

6 Law 5 March 2001, No 57.

7 The inspiration of the reform and the same expression adopted are openly derived from the French *Loi d'orientation agricole*.

8 Leg. Decrees 18 May 2001, No 226, 227, 228.

9 Law 7 March 2003, No 38.

10 Art. 1, 3, Law 7 March 2003, No 38.

11 Leg. Decrees 29 March 2004, No 99, and No 102.

12 Leg. Decrees 26 May 2004, No 153, and No 154.

13 Art.43, of Regulation (CE) 1782/2003.

14 Art.33, 1, b), of Regulation (CE) 1782/2003.

15 Art.33, 2, of Regulation (CE) 1782/2003.

16 Art. 2, 1, c), of Regulation (CE) 1782/2003.

due to the circumstance that such reform is crossing (and this does not appear to be a mere accident) in Europe with the preparation and signature of the Treaty establishing a Constitution for Europe, and in Italy with the approval of the reform of Title V of Italian Constitution[17] as part of the movement toward a significant devolution of powers to Regions.

The regulation (CE) 1782/2003 contains rules both of public and private law, and in some way synthesizes more than ten years of reforms related to the multifunctional missions of agriculture. The institutional tool adopted is that of a predefinition of national ceilings for the entire period until 2012[18], and of the recognition to any member State of a significant amount of discretionary powers as to the initial application, the choice between total or partial decoupling, the regionalization, the optional implementation for specific types of farming and quality production[19].

Under this perspective it seems not subject to doubt that Member States have reacquired a flexibility in government unknown to previous regulations pertaining to the first pillar of CAP, and that we are witnessing to a process of reconciliation between basic principles underlying the policy of production and the policy of rural development.

Even the adoption of national ceilings, established until 2012 and including many aid regimes until to-day separately regulated, plays a significant role in giving larger space to national choices regarding the whole agriculture considered as a system, with comparison to previous politics related to single productions.

These characteristics have been confirmed and emphasized by the approval in April 2004 of the regulation extending the Single Payment Scheme to other products (i.e. cotton, olive oil, raw tobacco and hops), and in the same context adapting the system in reason of the accession of the new member States[20].

Even from a formal point of view, the rules regarding the different common organizations of agricultural markets and therefore regarding different products, are no more inserted in different regulations (each one with its own principles and procedures), but are part of a uniform discipline.

Regulation No 1782/2003, with these recent amendments and with the enlargement of its objects, is becoming a sort of *code of the first pillar*, of general application, whose content and whose procedures in some ways innovate deeply to the original model of the Treaty of Rome.

In this sense it is possible to conclude (with some Italian scholars) that Regulation No 1782/2003, the Single Payment Scheme, and its progressive expansion to other classes of products, is innovating to the basic principles of the Treaty regarding European agricultural policy.

The Treaty establishing a Constitution for Europe, coeval to MTR, does not seem to consider the relevant novelties of CAP in goals, tools and procedures. But, notwithstanding this silence, the principle of *subsidiarity* is finding effective place in the CAP.

In a parallel evolution, Italian Constitution has been reformed in 2001 giving much larger legislative and administrative powers to the Regions. The same word "*agriculture*" has been

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17 Constitutional Law 18 October 2001, No 3.

18 Annex VIII, of Regulation (CE) 1782/2003.

19 Art.69, of Regulation (CE) 1782/2003.

20 Council Regulation (EC) No 864/2004 of 29 April 2004, amending Regulation (EC) No 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.

repealed from the text of art.117 of the Italian Constitution. The original text of Constitution of 1942, at art.117 included "*agriculture*" among the fields of law of concurrent regulation (i.e.: recognizing to the State the adoption of fundamental principles, and to the Regions the adoption of all other rules in that field of law).

The new text of art.117 does not mention the word *agriculture.* Under art.117, 4, all fields of law not expressly mentioned pertain to the exclusive legislative competence of the Regions. This rather extreme interpretation has been supported by some Regions and has found some acceptation in one holding of the Constitutional Court of January 2004 relating to the vineyard's discipline[21].

Significantly, just in the last few months, the experience of the approval of the decrees regarding the Italian application of the Single Payment Scheme demonstrated the need of some uniform and national regulation.

The Regions participated to the process of preparation and approval of the national decrees to implement the reform of CAP, without assuming any position in favour of the regionalization option, and they did not contested in any legal way the adoption of the national decree as such[22].

Even the Constitutional Court, in a more recent holding[23], recognised that in fields of law pertaining to the area of agriculture, like that of milk quotas, the assumption of legislative and administrative powers by the State is justified by the *European origin of the applicable rules*, that as such require by necessity "*a central level of government*".

We assist therefore to a rather complex process, under which European Community is transferring important economic decision to the Member States, and in the meantime the central government of Italy is reacquiring powers in the political competition with Regions on the basis of the same European reform.

3. The Ministerial Decree of 5 August 2004

The duty imposed by Regulation 1782/2003 to use the national reserve "according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions"[24] played an important role in the national decision-process in Italy, stressing the need for uniform treatment, and was expressly invoked by the Italian government at the time of adopting national regulations.

The first Italian choices on the implementation of the Single Payment Scheme have been taken with a decree of the Ministry of Agriculture dated 5 August 2004, adopted with the previous approval expressed by the Regions in the meeting of 29 July 2004, and on the basis of the power conferred to the Ministry by a law of 3 August 2004[25], which established that the Ministry of Agriculture may adopt decrees implementing European regulations "according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions".

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21 Constitutional Court, 13 January 2004, No 12.

22 The position of the Regions, which did not objected to the adoption of relevant decision by the Ministry of Agriculture (i.e. to the central assumption and exercise of powers) notwithstanding the mentioned reform of art.117 of the Italian Constitution, appears even more relevant when compared to the recourse of some regions before the Constitutional Court against some articles of the legislative decree No 99 of 2004 on the modernisation of agriculture; recourse based on the assumed violation of art.117 of the Italian Constitution.

23 Constitutional Court, 19 July 2004, No 240.

24 Art.43, Regulation (CE) 1782/2003.

25 Law 3 August 2004, No 204, which converted with amendments the decree law 24 June 2004, No 157.

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In those decrees and laws, Italian Government and Parliament adopted exactly the same formulas introduced by Regulation (CE) 1782/2003, to justify the centralised exercise (through an administrative and not legislative tool) of power of choice among the different options offered by the new European regime.

It seems therefore reasonable to come to the conclusion that the MTR had some relevant institutional effects, not limited to the relation among the Community and the Member States, but extended to operate inside the national structures of government.

The Decree of 5 August 2004 decided:

a) to implement in Italy the Single Payment Scheme from 1 January 2005, with no transitional period, with the only exception of dairy premium ex art.62 reg.1782/2003 deferred to 1 January 2006[26];

b) to apply a full decoupling with reference to all productions involved, with the only exception of seeds[27];

c) to exercise all the powers of use of the national reserve admitted by art.42 of reg. 1782/2003[28];

d) to retain 8 % of the component of national ceilings referred to arable crops, 7% of the component of national ceiling referred to beef and veal, 5% of the component of national ceiling referred to sheep and goats, and to use these sums under art.69 reg. 1782/2003 for quality production[29];

e) to assign these supplementary quality aids for arable crops to farmers which use specified seeds, for beef and veal to farmers growing animals of specific quality, for sheep and goats to farmers having more than 50 animals[30];

f) to apply art.46, 3, reg. 1782/2003, in case of sale of payment entitlements, operating a retention in favour of the national reserve with the maximum percentages provided by art.9 of Commission Regulation No 795/2004[31];

g) to introduce two joint Committee State-regions, one having the task to make proposals on the distribution of sums deriving from modulation, the other to make proposals on the destination of supplementary quality payments.

The choices above mentioned have been taken after a fierce debate among political and professional organisation.

The main reasons in favour of an immediate implementation and of a general decoupling was that any other decision was deemed to expose to the serious risk not to use the entire amount of national ceiling assigned to Italy under Annex VIII of Regulation 1782/2003.

There have been many studies of economists, estimating the possible effects on the level of production in Italy of a choice of total decoupling vs. partial decoupling. The generally accepted conclusion has been that, under the difficult conditions of many small farms in Italy, a partial decoupling would not be sufficient to maintain the present level of production.

With specific reference to durum wheat, the production per hectare in some parts of Italy is so small (in many cases 10-15 quintals per hectare) that to subject the payment of 40% of the aids to the effective production of durum wheat will not be sufficient to encourage such

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26 Art.1, 1, D.M. 5 August 2004.

27 Art.1, 2, D.M. 5 August 2004.

28 Art.2, 1, D.M. 5 August 2004.

29 Art.8, D.M. 5 August 2004.

30 Art.9, D.M. 5 August 2004.

31 Art.10, D.M. 5 August 2004.

production. The costs of seeds, of ploughing, sowing, thrashing, in most case will not be covered by the sale price of durum wheat. Therefore the conclusion of such economic studies has been that those farmers will presumably decide in any case not to produce and will prefer to get only 60% of the aids, free of production cost. The possible result shall be that of an use only partial of the 40% of aids reserved to producers; with the overall result of an use only partial of the national ceiling assigned to Italy.

Similar considerations have been made for beef and veal production.

The Ministerial Decree pursued an alternative way to try to avoid a massive reduction of durum wheat production, using for this goal the supplementary quality payment ex art.69 Reg.1782/2003.

The adoption of a full decoupled system (giving in any case to the farmer the right to the full amount of aids, less the modulation and less 8% retained for quality programs) together with the provision of a supplementary payment based on a quality program, that subjects the payment of the supplement to the use of specific seeds and therefore subjects the supplementary payment to the prosecution of productions, is aimed (in the opinion of the Italian Ministry of Agriculture) to obtain two relevant effects:

a) to guarantee the full use of the entire amount of national ceiling, avoiding any condition that could interfere with such result;

b) to encourage farmers to produce durum wheat in cases in which there is a balance between production costs and sales prices plus supplementary quality payment.

Other significant discussions occurred with reference to the choice of regionalisation under art.58 ff. of Regulation 1782/2003. There have been many economic estimations, trying to consider the effects on production and market of a regionalisation, total or limited to some productions (e.g.: beef and veal) in which the difference among farmers is bigger.

The conclusion has been that any formula different from recognising historical rights will create serious risks of judicial conflicts among beneficiaries and between beneficiaries and public administration. Reference made by art.59, 2, of Regulation 1782/2003, to "*eligible hectares within the meaning of Article 44*" was reference not only to arable crops, already verified by the national authorities on the basis of previous regulations, but also to *permanent pasture*, non considered by previous regulations and therefore unknown in their exact extension. Moreover, dividing "*the total amount of the regional ceiling established under Article 58 or part of it between all the farmers whose holdings are located in the region concerned, including those who do not meet the eligibility criterion referred to in Article 33*"[32], will subordinate the definition of the exact amount of any single entitlement to the previous definition of the total amount of *eligible hectares*[33], with other reasons of time consuming judicial conflicts[34].

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[32] As per art.59, 1, Regulation No. 1782/2003.

[33] Under art.59, 2, Regulation (CE) No 1782/2003: *"2. In this case of division of the total amount of the regional ceiling, farmers shall receive entitlements, whose unit value is calculated by dividing the regional ceiling established under Article 58 by the number of eligible hectares, within the meaning of Article 44(2), established at regional level*".

[34] At the time of preparation of this paper, the only judicial case pending against D.M. 4 August 2004 is that began by seed producers, which contest the decision of total decoupling with no transitional period, and assume that this decision will cause unfair damages to them by reason of the circumstances that in August the seed have been already produced, while the decoupled system will reduce in a considerable size the amount of sale; in particular the seed producers assumed that such a decision, involving their private economic rights, was not legitimately adopted through a simple administrative decree and should require an act of Parliament.

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The Ministerial Decree of 5 August 2004 postponed to subsequent measures[35] the adoption of decisions regarding the use of resources coming from modulation and the effective implementation of cross compliance rules.

Both these themes involve legislative and administrative competence of the Regions.

With reference to modulation, it is open the competition among Regions to benefit of the additional resources coming from it. The institution of a joint Commission State-Regions (see *above*) will not, by itself alone, solve this competition. The new constitutional provisions (see art.117 cost. as modified in 2001) have a general content and do not provide an operational process to define this sort of problems. It may be forecasted that a general tendency will be that of assigning the amounts resulting from modulation to the same Regions where they have been originated.

In any case it must be considered that a very high percentage of Italian farms is of such small dimension that they fit in the limit of 5.000,00 euro per year fixed by art.12 of Regulation No 1782/2003, and therefore they will not suffer substantive reduction. The most significant consequence in those cases will be that of increasing administrative costs, due to the different dates of payment and consequent double procedures established by art.28, 2, of Regulation No 1782/2003.

With reference to cross-compliance of the list of directives and regulations to be respected by farmers beginning from 1 January 2005, the Italian situation is fundamentally different as to the first five directives on environment and as to the other directive and regulations (No 6, 7, 8) on the registration of animals.

The second group of rules has been already implemented in Italy; therefore their inclusion in the cross-compliance list will not change in any significant way the present situation of farmers.

For the first five directives on environment, on the contrary, the trouble is that they received only a general implementation in Italy with national laws, giving large space to regional rules for an effective implementation on a local basis, due to the necessity to consider specific situations (see, e.g., protection of natural habitats and similar questions, strictly related to a zoning problem, largely assigned to the competence of Regions). Only few Regions have already adopted zoning decisions and locally implemented the rules, and it is not clear what could be the application at a national level.

From the point of view of the farmer, it should be noted that the first five directives mentioned in Annex III of Regulation No 1782/2003 for a large part of their content do not imply a specific individual behaviour of a single farmer, but involve rather effective public behaviour assigned primarily to the State and to the Regions.

Under this perspective, it seems that the first five directives (when scrutinised in their effective content) have been inserted in the cross compliance list by Bruxelles to reach indirectly the goal to force the member States to implement effectively environmental directives until to day largely neglected, more than to declare rules of immediate and direct interest for farmers, like those regarding the registration of animals.

4. New definitions

The language of agricultural law is in course of modification as a consequence of MTR, and it does not seem an accident that the title of Regulation No 1251/1999 was dedicated to a

[35] Not adopted until the date of this paper.

support system for *"producers"*[36], while the title of Regulation No 1782/2003 is dedicated to support schemes for "*farmers"*[37].

The shift from producing (i.e.: obtaining a product) to farming, in that term including the simple "*maintaining the land in good agricultural and environmental condition*"[38], is clear.

The result is a relevant difference between the new definition of agricultural activity introduced by European law and the definition of agricultural activity known by the Italian legal system.

The Italian civil code introduced in 1942 the definition of agricultural entrepreneur[39], with the distinction among activities qualified *agricultural per se* (i.e. growing, forestry and breeding) and other activities, which are to be considered agricultural only when connected (under both subjective and objective aspects) to the first ones. The attention was on the production of physical goods, and not on supplying immaterial services.

The category of *connected activities* was largely capable of expansion and has been interpreted in the following decades in a way to comprehend an always increasing number of activities, including the supply of immaterial services.

In the '80s a new law on agritourism[40] (inspired by the French experiences on the s.c. *tourisme rural* and by some regional laws of the '70s) introduced tourist services in farm in the category of agricultural connected activity.

Italian scholars, on the basis of innovations introduced during the same years by the reforms of PAC (i.e. set aside policies, and environmental policies), began to discuss the role of services in the agricultural business.

In 2001, the legislative decree of modernisation[41] reformed the old text of art. 2135 of the civil code, enlarging breeding to any sort of animals living on earth or in water, qualifying taking care of living being as element who identifies agricultural business (therefore traducing in a text of law the innovating teaching of prof. Antonio Carrozza), and considering sufficient to this purpose even the care of only one step of the biologic cycle.

The new text of art.2135 Italian civil code widened also the number of the agricultural connected activities, expressly mentioning the supply of immaterial services, to other farmers, public bodies, or private clients[42].

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36 Council Regulation (EC) No 1251/1999 of 17 May 1999, establishing a support system for *producers* of certain arable crops.

37 Council Regulation (EC) No 1782/2003 of 29 September 2003, establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for *farmers* …".

38 Art. 2, 1, c) Regulation (EC) No 1278/2003.

39 Art. 2135 Italian civil code.

40 Law 5 December 1985, No 730.

41 Leg. Decree 18 May 2001, No 228.

42 Art.2135 present text: "Art. 2135 *Imprenditore agricolo.* - [*I*]. *È imprenditore agricolo chi esercita una delle seguenti attività: coltivazione del fondo, selvicoltura, allevamento di animali e attività connesse. - [II]. Per coltivazione del fondo, per selvicoltura e per allevamento di animali si intendono le attività dirette alla cura ed allo sviluppo di un ciclo biologico o di una fase necessaria del ciclo stesso, di carattere vegetale o animale, che utilizzano o possono utilizzare il fondo, il bosco o le acque dolci, salmastre o marine. - [III]. Si intendono comunque connesse le attività, esercitate dal medesimo imprenditore agricolo, dirette alla manipolazione, conservazione, trasformazione, commercializzazione e valorizzazione che abbiano ad oggetto prodotti ottenuti prevalentemente dalla coltivazione del fondo o del bosco o dall'allevamento di animali, nonché le attività dirette alla fornitura di beni o servizi mediante l'utilizzazione prevalente di attrezzature o risorse dell'azienda normalmente impiegate nell'attività agricola esercitata, ivi comprese le attività di valorizzazione del territorio e del patrimonio rurale e forestale, ovvero di ricezione ed ospitalità come definite dalla legge*".

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But, notwithstanding this relevant reform, the core of the qualification of a business as agricultural business remain the three fundamental activities qualified as agricultural *per se*: growing, forestry and breeding, all having as qualifying goal that of obtaining *products*.

The production of services is considered valuable, but is qualified agricultural, even in present Italian legislation, only when connected to an activity of producing material goods, which remains principal.

This construction is openly far from the definition of *agricultural activity* introduced by art. 2 of Regulation No 1782/2003, including the simple "*maintaining the land in good agricultural and environmental condition*".

European rules and definitions, as such, do not modify directly internal Italian rules having domestic application.

But it easy to predict that – as happened in the past with new definitions introduced by Directive No 159/72 – the novelties introduced in the CAP will influence both the legislature and the judiciary in applying domestic rules.

It is sufficient to consider the relation between landlord and tenant and the duty of the second to maintain the economic destination and structure of the farm holding, to imagine the possible consequences.

From a different point of view, it must be stressed that Italian legal system gives important privileges to agricultural business: e.g. exempting this business from bankruptcy or from the payment of taxes to obtain the authorization to erect buildings in the countryside, and in some Regions restricting only to agricultural business the building permits in the countryside.

It will be difficult to maintain that an activity, qualified as agricultural according to European law, must be qualified as not agricultural according to domestic law. It is therefore possible to forecast that we will assist to non infrequent cases of judicial conflicts on the prevalence of the two definitions.

5. New rights

The MTR introduced in the legal language a new expression "*payment entitlements*", translated in the official Italian text of Regulation No 1782/2003 as "*diritto all'aiuto*".

It is open the debate among Italian legal scholars on the juridical nature of this entitlement or right, and it is relevant to consider that the Ministerial Decree of 5 August 2004 (see *above*), accepting the proposals of the IDAIC[43], adopted the expression "*titoli all'aiuto"* instead of that of "*diritti all'aiuto*" used in the Italian text of Regulation No 1782/2003. The intention was that to clarify, even in terms of language, that we are not in front of a full right, but rather in a position protected by the law, giving to the title holder the right to be recognised as such, but not the right to get effectively a specific amount of money.

Other commentators contested such reconstruction, stressing that in presence of all the conditions requested by art.33 of regulation No 1782/2003, the public administration is obliged to recognize the entitlement with no discretion, so that to attribute to the entitlement the nature of a full right.

When one considers that these entitlements may be "*transferred by sale or any other definitive transfer with or without land*"[44], and therefore have a patrimonial content and may be used as a guarantee, the arguments in favour of a construction as a new right, and not only as a mere title, appear consistent.

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[43] Institute of International and Comparative Agricultural Law, based in Florence.

[44] Art.46, Regulation No 1782/2003.

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A possible difference may be found between entitlement to be recognised to historical farmers[45] (here there is no discretion of the public authorities about *an debeatur*, and there is discretion only about *quantum debeatur*), and entitlements that each member State *may* recognise to new farmers from the national reserve[46], where there are significant aspects of discretionary powers of the public administration.

In the relation between land owners and tenant farmers, MTR clearly insists on the attribution of the entitlement to the farmer, i.e. the worker against the *rentier*. This apparently clear orientation unfortunately is not capable by it alone to solve a number of possible conflicts, beginning with the case (not infrequent in Italy, due to the fact that many old contracts came to an effective termination only recently, after a long transition period and long-lasting judicial cases) of a tenant, who gave back the land to the owner after the reference period. In this case we have an ex-farmer, who has the entitlements but who does not have the land, and an owner, who presently has the land and exercises agricultural activity but does not have entitlements.

In fact the administration of the reserve will be a crucial element of the national government of agricultural policies in the next few years.

The decision of Italian government, to apply the maximum percentages admitted by the European Regulations in case of sale of payment entitlements, moves in the direction to increase the reserve to be used in favour of new farmers.

Similarly important is to specify the *hardship cases*. The case of fault of the tenant, is not expressly considered by Regulation No 1782/2003, but it should be regulated by national authority. It happens frequently that a judicial case against a tenant in fault lasts more than the three years period, after which the unused payment entitlements are reassigned to the national reserve[47]. There is consequently a serious risk for the land owner, who has given in lease the land together with the payment entitlements, that in case of negligence of the tenant (with violation of the cross-compliance rules) or simply in case of non use, the payment entitlements (originally owned by the land owner) will be transferred to the national reserve.

The same problems apply to the case of the State financial institution which loans money to small farmers to buy the land. This State institution is trying to introduce new clauses in the traditional financial contracts, so to acquire the faculty to intervene in the cultivation before the end of the three years, avoiding the risk of the cancellation of the payment entitlements. Apart from those new clauses, the need to distinguish between responsibilities of land owner and of tenant, with reference to the fair use of the entitlements and the respect of the rule of cross-compliance, is another of the themes that national regulation should expressly face in the next few months.

Together with the payment entitlements, Regulation No 1782/2003 introduced other new legal concepts in the Italian legal language: first of all, the *anticipated inheritance*[48] and the *changes of legal status or denomination* also for physical persons and not only for companies[49].

Anticipated inheritance is a German legal tool[50], unknown to the Italian legal system, which traditionally prohibits any inheritance contract.

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45 Art.33, 1, a), of Regulation No 1782/2003.

46 Art.42 of Regulation No 1782/2003.

47 Art.45, regulation No 1782/2003.

48 Art.33, 1, b), of Regulation No 1782/2003.

49 Art.33, 2, of Regulation No 1782/2003.

50 See §593 of BGB.

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A possible solution was simply not to apply this provision of the Single Payment System in the Italian implementation of it. But this solution would create greater problems for the effective and fair management of the system, due to the provisions contained in art.37, 2, of the regulation No 1782/2003.

Under this provision[51], the person who exercised the agricultural activities during the reference period (2000-2001-2002) will be entitled to an amount calculated on the average of the years of effective activity; e.g. the person who exercised the agricultural activities only for one year during the reference period, will be entitled to one third of the aids.

But paragraph 2 of the same disposition introduces a derogation to this principle, so that the person who began the agricultural activity in the third year, will be entitled not only to one third of the aid, but to the full hundred per cent of the aids. In case of one person exercising the activity during the first two years of the reference period, and another person exercising the activity on the same land only in the third year, the result will be that for the same land, the first person will be entitled to two thirds of the aids, and the second person to three thirds of the aids. Therefore for the same land two persons will be entitled to have two distinct assignments from the national ceiling for a total amount largely bigger (166%) than the amount yearly perceived in previous years.

The only way to reduce this paradoxically result, seemed that to expand the cases in which the person (physical or legal) cultivating the land only in the third year is to be considered not a new farmer but simply the continuation, in a different form, of the previous farmer.

From here the idea (accepted in the Ministerial decree of 5 August 2004) not to introduce for the future in the Italian legal system an institute (the *anticipated inheritance*), that could be considered contrary to Italian public order, but simply to regulate the hypothesis in which a fact, known under a different aspect by the Italian law, could be considered relevant for the identification of the new or old farmer under Regulation No 1782/2003.

Art.3, 1, of the Ministerial Decree consequently establishes that it is to be considered as anticipated inheritance under art. 33 of Regulation No 1782/2003:

a) the case of consolidation of usufruct with bare ownership,

b) the case of transfer, by any title and in any form, of the agricultural holding to a person who may be called to inherit at law from the previous farmer.

Along the same line, art.3, 2, of the Decree qualifies as a mere change of status of denomination, therefore assuming the substantial identity of the farmer notwithstanding the changes:

a) the case of a farmer who previously was a member of the family business engaged in the agricultural holding[52], or even simply worked as a member of the family in charge of the agricultural holding;

b) the case of a physical or legal person, who exercised agricultural activity through a company which he controlled, or reciprocally acted as tenant of he company which he controlled;

c) the case of a company exercising agricultural activity through one or more shareholders.

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[51] "Article 37- Calculation of the reference amount -1. The reference amount shall be the three-year average of the total amounts of payments, which a farmer was granted under the support schemes referred to in Annex VI, calculated and adjusted according to Annex VII, in each calendar year of the reference period referred to in Article 38. - 2. By way of derogation from paragraph 1, when a farmer commences an agricultural activity in the reference period, the average shall be based on the payments he was granted in the calendar year or years during which he exercised the agricultural activity".

[52] Under art. 230/bis civil code.

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Art.3, 3, of the Decree clarifies that the same rules apply in case of a person who exercised as physical person the activity during the reference period and who later created a company exercising the activity at the time of approval of the Decree.

In some way it is possible to say that the process of adoption in agriculture of some operating models well known in commercial law, but until now unusual in the agricultural world, determines as natural consequence the adoption of the same principles of transparency and fair use of incorporation rules that have been used from a long time to regulate business affairs.

It is difficult to forecast whether these first rules will be sufficient to avoid frauds and abuses of the new system, but it may be admitted that the reform of CAP is issuing a decisive challenge, not only to national economic government, but even, and much more than in the past, to some fundamental principles of the Italian legal system, both in the public fields of government, and in the private fields of contractual regulations, transfers and guarantees.

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