

**CEDR – European Congress for Rural Law – Poznań  
21–23.09.2019 – Colloquium «The reform of the CAP»**

A photograph of a modern building facade with large, dark-framed windows and white architectural elements, viewed from a low angle looking up.

**Flexibility contra distortion of competition**

Prof. em. Dr. iur. Paul Richli

1. Comparison with Topic of Commission I at the Lille-Congress:  
«Competition rules in agriculture»
2. Basic provisions in the TFEU
3. Legal provisions in force with regard to PAC aids
4. Proposal for a Regulation for strategy plans
  - a. Explanatory Memorandum
  - b. Considerations
  - c. Important provisions
5. How to identify/define a distortion of competition?
  - a. CAP aid figures
  - b. Proposal for the discussion

# 1. Comparison with Topic of Commission I at the Lille-Congress: «Competition rules in agriculture»

- **Main focus at Lille-Congress:** How to provide a «**countervailing power**» to producers (farmers) of foodstuffs with regard to the oligopol of the demand side (processing and marketing of food).
- **Recommendation 5:** EU legislators should amend EU provisions so as to clarify that the **prohibition of price fixing does not apply to the fixing of a joint purchasing or selling price in the context of the marketing of products by recognized agricultural organisations or by cooperatives.** It should be irrelevant in that context whether the property of the products concerned is transferred by producer before their sale to recognized agricultural organisations or cooperatives.
- **Recommendation 7:** The decision on whether to make use of the **extension of rules set by agricultural organisations** should continue to **lie in the discretion of the country concerned** in order to take into account the different traditions. (...)
- **Main focus at Poznań-Congress:** Is there a **risk of distortion of competition between farmers** (in different or in the same Member States) to be avoided in case of **more flexibility within the CAP?**

### Article 38 TFEU

2. **Save as otherwise provided** in Articles 39 to 44, the **rules** laid down for the establishment and functioning of the **internal market shall apply to agricultural products**.

### Article 42 TFEU

The Council, on a proposal from the Commission, may **authorise the granting of aid**:

- (a) for the protection of enterprises handicapped by structural or natural conditions;
- (b) within the framework of economic development programmes.

## 2. Basic provisions in the TFEU (2)

### Article 39 TFEU (1)

1. The **objectives** of the common agricultural policy shall be:
  - (a) **to increase agricultural productivity** by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
  - (b) thus **to ensure a fair standard of living for the agricultural community**, in particular by increasing the individual earnings of persons engaged in agriculture;
  - (c) to **stabilise markets**;
  - (d) to **assure the availability of supplies**;
  - (e) to **ensure** that supplies reach **consumers** at **reasonable prices**.

## 2. Basic provisions in the TFEU (2)

### Article 39 TFEU (2)

2. In working out the common agricultural policy and the special methods for its application, **account shall be taken of:**

- (a) the **particular nature of agricultural activity**, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
- (b) the need to effect the **appropriate adjustments by degrees**;
- (c) the fact that in the Member States **agriculture** constitutes a sector closely **linked with the economy as a whole**.

### Article 107 TFEU

1. **Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition** by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be **incompatible with the internal market**.

## REGULATION (EU) No 1307/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 december 2013

establishing rules for **direct payments to farmers under support schemes** within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009

### Article 13 State aid

By way of derogation from Article 211(1) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council (1), **Articles 107, 108 and 109 TFEU shall not apply to payments made by Member States in conformity with this Regulation.**

### 3. Provisions in force with regard to PAC aids (2)

#### REGULATION (EU) **No 1305/2013** OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 december 2013

on **support for rural development** by the European Agricultural Fund  
for Rural Development (EAFRD) and repealing Council Regulation  
(EC) No 1698/2005

#### Article 81 State aid

1. Save as otherwise provided for in this Title, Articles 107, 108 and 109 TFEU shall apply to support for rural development by Member States.
2. **Articles 107,108 and 109 TFEU shall not apply to payments made by Member States** pursuant to, and in conformity with, this Regulation, or to additional national financing referred to in Article 82, within the scope of Article 42 TFEU.

#### Article 82 Additional national financing

Payments made by **Member States** in relation to **operations** falling within the **scope of Article 42 TFEU** and intended to **provide additional financing for rural development for which Union support is granted** at any time during the programming period, shall be **included** by Member States in the **rural development programme** ... and, where they comply with the criteria under this Regulation, shall be **approved by the Commission**.

# 4. Proposal for a Regulation for strategy plans (1)

## a. Explanatory Memorandum

### Proposal for a

### **REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (**CAP Strategic Plans**) and financed b by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council {SEC(2018) 305 final}

### **Explanatory Memorandum**

**Title III** introduces a number of common requirements for the CAP strategic Plans, as well as elements which apply to several interventions. **The common requirements concern compliance with general principles and fundamental rights such as the avoidance of distortion of competition**, respect for the internal market and non-discrimination as well as the respect of the rules of WTO domestic support.

## 4. Proposal for a Regulation for strategy plans (2)

### a. Explanatory Memorandum

Finally, **Titles VIII and IX** concern the **competition rules**, which explain how in particular **State aid** rules have to be applied, and the final provisions that explain what regulations are repealed and when the regulation becomes applicable.

**A certain level of flexibility** for transfers between allocations will be offered to the **Member States**. **Up to 15% of respective direct payments can be transferred to EAFRD allocation and vice versa**. A **higher percentage** can be transferred from direct payments to EAFRD allocation for interventions addressing **environmental and climate** objectives and installation grants for **young farmers**.

## 4. Proposal for a Regulation for strategy plans (3)

### b. Considerations

(35) **Sectoral** types of **interventions** are needed to **contribute** to the **CAP objectives** and reinforce **synergies** with other CAP instruments. In line with the delivery model, **minimum requirements** concerning the contents and objectives for such sectoral types of interventions should be elaborated at Union level **in order to ensure a level playing field in the internal market and avoid conditions of unequal and unfair competition**. Member States should justify their inclusion in their CAP Strategic Plans and ensure consistency with other interventions at sectoral level.

(87) In order to ensure uniform conditions for the implementation of this Regulation and to **avoid unfair competition or discrimination between farmers**, implementing **powers** should be conferred on the **Commission** as regards the fixing of reference areas... (...)

## 4. Proposal for a Regulation for strategy plans (4)

### c. Important provisions

#### Article 9 General principles

Member States shall design the interventions of their CAP Strategic Plans in accordance with the Charter of Fundamental Rights of the European Union and the general principles of Union law.

**Member States shall ensure** that interventions are set out on the basis of objective and **non-discriminatory criteria**, are compatible with the internal market and do **not distort competition**.

## 4. Proposal for a Regulation for strategy plans (5)

### c. Important provisions

#### Article 90 Flexibility between direct payments allocations and EAFRD allocations

1. As part of their CAP Strategic Plan proposal referred to in Article 106(1), **Member States** may decide to **transfer**:

(a) **up to 15% of the Member State's allocation for direct payments** set out in Annex IV after deduction of the allocations for cotton set in Annex VI for calendar years 2021 to 2026 to the Member State's **allocation for EAFRD** in financial years 2022–2027; **or**

(b) **up to 15% of the Member State's allocation for EAFRD in financial years 2022–2027** to the Member State's allocation for direct payments set out in Annex IV **for calendar years 2021 to 2026**.

## 4. Proposal for a Regulation for strategy plans (6)

### c. Important provisions

#### Article 106 Approval of the CAP Strategic Plan

2. The **Commission shall assess the proposed CAP Strategic Plans** on the basis of the completeness of the plans, the consistency and coherence with the general principles of Union law, with this Regulation and the provisions adopted pursuant to it and with the Horizontal Regulation, their effective contribution to the specific objectives set out in Article 6(1), **the impact on the proper functioning of the internal market and distortion of competition**, the level of administrative burden on beneficiaries and administration. The assessment shall address, in particular, the adequacy of the strategy of the CAP Strategic Plan, the corresponding specific objectives, targets, interventions and the allocation of budgetary resources to meet the specific CAP Strategic Plan objectives through the proposed set of interventions on the basis of the SWOT analysis and the ex-ante evaluation.

## 4. Proposal for a Regulation for strategy plans (7)

### c. Important provisions

#### TITLE VIII COMPETITION PROVISIONS

##### Article 130 Rules applying to undertakings

Where **support** under Title III of this Regulation is **granted to forms of cooperation** between undertakings, it may be granted **only to such forms of cooperation which comply with the competition rules** as they apply by virtue of Articles 206 to 209 of the **Regulation (EU) No 1308/2013**.

##### Article 131 State aid

Save as otherwise provided for in this Title, **Articles 107, 108 and 109 TFEU** shall **apply** to support under this Regulation.

Articles **107, 108 and 109 TFEU** shall **not apply to payments** made by **Member States** pursuant to and in accordance with this Regulation, or to **additional national financing referred to in Article 132** of this Regulation falling within the scope of Article 42 TFEU.

= identical with Article 81 Regulation (EU) No 1305/2013

## 4. Proposal for a Regulation for strategy plans (8)

### c. Important provisions

#### Article 132 Additional national financing

**Payments by Member States** in relation to operations falling within the scope of Article 42 TFEU that are **intended to provide additional financing for interventions** for which Union support is granted at any time during the CAP Strategic Plan period may only be made if they **comply with this Regulation**, are included in Annex V to the CAP Strategic Plans as provided for in Article 103(5) and have been **approved by the Commission**.

= comparable with Article 82 Regulation (EU) No 1305/2013

#### Council of the EU – Presidency progress report of June 7, 2019, p. 9

The **Romanian Presidency** also focused its work on the **Competition provisions**, mainly on **redrafting Article 131 (State aid)**.

## 5. How to identify/define a distortion of competition (1)

### a. CAP aid figures

- **CAP aids** financed through the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) for 2014–2020 (7 years): **408.3 billion EUR**
- The total number of Member States that transferred funds from pillar I to pillar II amounts to 12. The total amount transferred over the 7 years is: **7.12 billion EUR**.
- Five Member States have operated transfers from pillar II to pillar I. The total amount transferred over the 7 years is: **3.4 billion EUR**.
- The **net result of all these transfers** is thus a total transfer from pillar I to pillar II of **EUR 3.76 billion over 7 years**.
- **Balanced out, the net transfer reaches 0.92 % of the total aid of 408.3 billion EUR.**

## 5. How to identify/define a distortion of competition (2)

### a. CAP aid figures

- The **flexibility** for Member States **goes clearly further** in general than these figures show: **they may transfer up to 15 % of their part of PAC aids from pillar I to pillar II.**
- Member States have **more than 40 design options** for their part of PAC aids.
- Member States may choose **a national or a regional design** for their part of PAC aids.
- Member States have a **great variety of options for «greening».**
- **etc.**
- The Commission identified **more than 250 grant options** for the PAC aids.

## 5. How to identify/define a distortion of competition (3)

### b. Proposal for the discussion

- (1) Do you see/feel/think that agricultural undertakings in your country do suffer from a distortion of competition under the regulations in force which could have its reason in the current flexibility of the Member States with regard to the design of their distribution of the PAC aids in other Member States?
- (2) Do you see a higher risk for distortion of competition in the proposal for a Regulation for strategy plans compared with the current regulation? If yes, could it be compensated by the planning procedure for the strategy plans?
- (3) Can/does the 15 % flexibility for the transfer of payments between pillar I and II in art. 90 lead to a distortion of competition?
- (4) Does the regionalisation of the design for the distribution of the CAP aids in a number of Member states complicate the assessment of a distortion of competition?
- (5) Are you finally in favor (a) for an even greater range for flexibility for Member States, (2) for the status quo or (3) for a/what reduction of the range for flexibility?