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Colloquium “The reform of the CAP

The CAP-reform from a Swiss point of view

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I. Introduction

Switzerland is the only country in the center of Europe which is a non-member state of the EU. It is therefore able to run a quite independent agricultural policy. There are nevertheless important restrictions laid down in international treaties such as the WTO and with the EU.

My intention is to give you first a very summary insight into the development of the Swiss agricultural law and to compare it briefly with the development of the agricultural law in the EU. The focus lies on the Swiss law as you already know very well the EU legislation and as the new steps are presented by Christian Busse und Rudolf Mögele (p. II). This short insight with regard to the question from where Switzerland and the EU come with their agricultural policies will be followed by a look into some Swiss regulations which could be of interest to you as suggested by my colleagues Christian Busse and Rudolf Mögele. The chosen regulations deal with instruments and provisions on self-help by farmers and their organisations and on crisis situations in Swiss agriculture (p. III). A last question will be if the upcoming revision of Swiss agricultural law will have an effect on the bilateral agreements between the EU and Switzerland (p. IV).

II. Development of agricultural law

1. Switzerland

Since 1947 the Confederation (central state of Switzerland) has a full competency to regulate agriculture. The new **Swiss Constitution of 1999** (BV) deals with agriculture in art. 104 and 104a. Following art. 104 al. 1 BV the Confederation shall ensure that agriculture contributes substantially by way of a sustainable and market-oriented production to the reliable provision of the population with foodstuffs (lit. a), to the conservation of national resources and the upkeep of the countryside (lit. b) and to a decentralized population settlement of the country (lit. c). Art. 104 al. 2 BV states that in addition to the self-help measures that can reasonably be expected in the agriculture sector, the Confederation shall support farms that cultivate the land. And following art. 104 al. 3 BV the Confederation shall organise measures in such a manner that the agricultural sector fulfils its multi-functional duties. It has in particular the following powers and duties: (a) supplementing revenues from agriculture by means of direct subsidies in order to achieve of fair and adequate remuneration for the services provided, subject to proof of compliance with ecological requirements; (b) encouraging by means of economically advantageous incentives methods of production that are specifically near-natural and respectful of both the environment and livestock; (c) legislating on

declarations of origin, quality, production methods and processing procedures for foodstuffs; (d) protecting the environment against the detrimental effects of the excessive use of fertilisers, chemicals and other auxiliary agents; (e) at its discretion, encouraging agricultural research, counselling and education and subsidise investments; (e) at its discretion, legislating on the consolidation of agricultural property holdings.

Art. 104a BV protects the cultural land.

In **1951** the Confederation enacted the **first Agricultural Law** which introduced a great number of instruments, e.g. price and quantity guarantees for foodstuffs, and thus to provide the agricultural sector with an income which may be compared with the income in the industrial sector. The agricultural policy from the 50es to the 80es contained among other means import quotas, subsidies for export and quotas for milk production. In the early 90es the price policy was replaced substantially by subsidies (called direct payments) which allowed to dispense with price and quantity guarantees by the Confederation.

The new **Agricultural Law of 1998 (LwG)**¹ did strengthen this new orientation. Instead of saving agriculture as a whole the focus lies now on the multi-functionality and sustainability of agriculture. The present instruments of the agricultural policy which have been adapted and modified constantly **since 1998 by so-called agricultural policies (AP 2002, AP 2007, AP 2011 and AP 2014–2017)** aim to ensure a reasonable farmers income mainly by direct payments. These payments are detached from the production quantity and are depending on constantly increasing conditions with regard to ecological criteria which include an adequate treatment of animals, sound balance of fertilizers, sufficient part on farmland in a good ecological condition, an adequate soil and water protection and last but not least an adequate selection and application of pesticides. In addition, the LwG contains e.g. provisions for self-help by organisations of farmers, for subsidies for farm buildings, for agricultural research and counselling of farmers. In order to protect the national production Switzerland still keeps customs duties and customs quotas. As regards restrictions of the national production, the milk quotas which had been introduced in 1977 were abolished in 2009. The new approach of the agricultural law is not only due to national policy considerations but partly also due to obligations of Switzerland in the context of international treaties such as the WTO and with the EU.

Since 2014 (AP 2014–2017) the direct payments are categorized as follows:

- payments for security of cultural landscape which aim to keep the cultural landscape open (art. 71 LwG);
- payments for security of supply which aim to guarantee a reliable provision of the population with foodstuffs (art. 72 LwG);
- payments for biodiversity which aim to ensure and promote the biodiversity (art. 73 LwG);
- payments for promotion of the quality of landscape in order to protect, promote and further a cultural landscape with a big variety (art. 74 LwG);
- payments for system of production which aim to promote forms of production which are especially close to nature, to environment and to animal welfare (art. 75 LwG);
- payments for efficiency of resources which aim to promote a sustainable use of resources such as soil, water and air and to ensure the sustainable use of means of production (art. 76 LwG);

¹ Systematische Rechtssammlung (SR) 910.0.

- transitional payments which aim to guarantee the social acceptable development of agriculture (art. 77 LwG).

2. European Union

The **Common Agricultural Policy (CAP)** started with the conference of the 6 founding members in **Stresa in 1958**. After this conference the first Common Market Organisations (CMO) have been created and principles of the community financing have been established. Its main elements were related to prices and to measures at the community border (first Mansholt plan, named according to the commissioner for agriculture of that time).

In the seventies the European community extended the CMOs to most agricultural products. The result was that the EC generated in the eighties an overproduction for a couple of products. As a consequence the cost of the EC agriculture policy increased rapidly.

In **1992** the first big reform was started (**McSharry-reform**, named according to the commissioner for agriculture of that time). It modified the former price- and income-policy in the direction of a separation of these two policies. The price-support was reduced and compensated by subsidies (direct payments). Additional instruments were set a side-programs and the promotion of the structural policy.

The concept of the McSharry-reform was pursued further in the context of the **agenda 2000**. The environmental requirements grew stronger. The conditions of cross-compliance and multi-functionality of agriculture were established. Besides the production the maintenance of the farmland in good condition and the decentralized inhabitation got more importance.

The CAP reform of **2003 (Fischler reform)**, named according to the commissioner of agriculture at the time) established an important modification of the system of subsidies. A single payment was born with a series of characteristics, namely:

Cross-Compliance: The producer received payments for determined activities which were not related to the quantity of production but were in connection with the compliance with standards, namely standards in relation to the environment and animal welfare.

Decoupling: it aimed to ensure a minimum income to farmers. On the other side the market should determine the strategy of the farmers. Farmers were therefore expected to choose the most rewarding production.

Modulation: It aimed to generate financial resources for the second pillar, the policy for agricultural structure. And it should limit the expenses for agriculture in general.

The more than 20 earlier CMOs for each agricultural product were replaced by one single Common Market Organisation (single CMO regulation: Council Regulation (EC) 1234/2007). Furthermore, a new CMO for fruit and vegetables was established.

A further step of the CAP was the **“Health Check”** in **2009**: Among a range of measures, it increased modulation and milk quotas. These quotas were introduced in 1984 and abolished in 2015.

The result of the **last CAP-reform** are mainly four regulations which are in force for the time being, namely:

(1) Regulation (EU) 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;

(2) Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008;

(3) Regulation (EU) 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;

(4) Regulation (EU) 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

For the **new CAP-Reform** I refer to the presentations by Christian Busse und Rudolf Mögele.

3. Short comparison

The Swiss agricultural law was highly protective during its first period from 1951 to 1998. It included namely a great number of quota systems and price and market guarantees. The new agricultural law of 1998² which has a sound foundation in art. 104 and 104a BV repealed most of those restrictions except until 2009 quotas on the milk market³. The core instrument of the Swiss agricultural policy and the Swiss Agricultural Law (LwG) is now a system of direct payments to farmers which represents a turn from price- and quantity-guarantees to the separation of price and income policy. These subsidies remain on a very high level compared to other countries and the European Union. In 2015 the average direct payments to producers reached the amount of about 60'000 Euro compared with about 18'000 Euro in Austria. What is about the regulation of the milk production Switzerland started earlier with its quota system than the EU and abolished it earlier than the EU.

The Swiss agricultural law will in any case be resistant against a total liberalisation and a demonetisation. Otherwise Swiss agriculture would lose its competitiveness for several reasons such as natural conditions and the topography, high prices for farmland, high income level in general, higher prices for pre-products, expensive handling and marketing which are rather big burdens for Swiss agriculture.

With regard to the consumers the prices remain relatively high despite of the high direct payments. They exceed the prices in the European Union by 35-40%.

In the European Union, a great number of current market organisations (CMO) did exist since the seventies. They aimed to sustain the agriculture as such in the member states. Since the McSharry reform of 1992 the European Union turned to direct payments. The Fischler reform of 2003 continued and strengthened the separation of

² SR 910.1.

³ Since 2009 the milk production is free and must be organised on a contractual basis by the farmer and milk buyer. The milk prices for the producer is no longer fixed by the state but free. Producer organisations contract the prices with the milk processors (A milk = more than 80 % for the time being). One segment of the milk production has a lower price because there is no protection towards milk coming from abroad (B milk). And the last segment (C milk) gets only the world market price (see for further information on the segmentation of milk hereafter point III.2.2).

price- and income-policy. It included at the same time an important innovation: the decoupling which means the support of the producer instead of the product. From a legal viewpoint the introduction of a single farm payment represents a remarkable unification and codification effort.

If one compares the European and the Swiss agricultural policy on a system level, the Swiss policy seems to be more liberal domestically today. There are less state provisions with regard to market organisations. The weakness of the Swiss system lies in the high level of direct payments and in the still high import duties on foreign foodstuffs. The separation of the price and income policy and the milk quota system were introduced a couple of years earlier and the milk quotas were abolished a couple of years earlier in Switzerland than in the EU.

III. New reform process

1. Switzerland

Switzerland refrained from a new revision process after AP 2014–2017, enacted in 2013. The idea was to give more time to farmers to comply with the new conditions for production and for getting direct payments.

Now the agricultural policy after 2022 (AP 22+) is under discussion. The proposals of the Swiss government are highly controversial. The discussion and proposals include mainly the following elements⁴:

- (1) Better use of synergies between sustainability and market in order to strengthen the market position of farmers, e.g. by furthering (milk) production and products with a higher value added.
- (2) Repeal of state restrictions and fostering efficiency of production of foodstuffs by using optimally the technological progress and the digitisation. Modernization of the supply security payments. Integration of new products such as insects as food and feed.
- (3) Reduction of ecological damages and of use of non-renewable resources.
- (4) Reduction of maximum yard fertilizer application in order to protect water resources and of use of pesticides.

2. Europäische Union

See reports by Christian Busse and Rudolf Mögele.

III. Provisions and measures for self-help and crisis management in agriculture in Switzerland

1. Introduction

As already mentioned briefly (see ch. II.1 par. 1), self-help measures of agriculture are requested by the BV itself (art. 104 al. 2). This obligation is to be seen in connection

⁴ Erläuternder Bericht vom 14. November 2018 des Bundesamtes für Landwirtschaft zur Vernehmlassung zur Agrarpolitik ab 2022 (AP22+); Bericht vom 21. August 2019 des Bundesamtes für Landwirtschaft über die Ergebnisse der Vernehmlassung zur Agrarpolitik ab 2022 (AP22+).

with the principle of subsidiarity for Swiss economy laid down – since 2008 – even on a general level in art. 5a BV for all state activities. The LwG transforms this obligation in its art. 8, 8a and 9. And the Swiss Government introduced a very important ordinance for the protection and broadening of measures of self-help taken by organisations of branches and producers, namely the ordinance of 30 October 2002 on organisations of branches and producers (hereafter ordinance for self-help)⁵.

2. Measures of self-help by organisations of branches and producers

2.1. In general

Art. 8 LwG prescribes that the promotion of quality, marketing and adaptation of the production to the requirements of the market must be ensured by organisations of producers or the related branches (al. 1). They may enact standard contracts (al. 1^{bis}). The organisation of a branch is defined as a cooperation of producers of specific products or groups of products with the transformers and the distributors (a. 2).

Organisations of producers of specific products or groups of products may define price indications on a national or regional level following an agreement by distributors and buyers (art. 8a al. 1 LwG). The price indications must be differentiated following quality levels (al. 2). The individual enterprise cannot be forced to respect the price indication (al. 3). Price indications for consumer prices are forbidden (al. 4).

An important provision is art. 9 LwG which gives the Swiss Government the competency to underpin self-help measures taken by said organisations if the functioning of such measures is in danger due to outsiders that are not ready to follow the measures. There are nevertheless a series of conditions for a so-called declaration of general application (*Allgemeinverbindlichkeit*) by the Swiss Government such as representativeness, no presence in transforming and marketing of foodstuffs and finally support by a large majority of members of the organisation (al. 1). The Swiss Government may oblige non-members to pay contributions to finance measures of self-help in the sense of art. 8 al. 1 if the organisation requests such contributions of its members (al. 2). In order to adapt the production and the offer to the requirements of the market the Swiss Government may enact provisions exclusively in case of extraordinary developments which are not due to problems of market structure (al. 3). Al. 1 cannot include the direct marketing of products and al. 2 cannot include the obligation to pay contributions by outsiders (al. 4).

The Swiss Government enacted provisions in the self-help ordinance for the support of a series of self-help measures by organisations which are relevant for measures with regard to contributions of non-members to organisations of producers and branches (art. 11, annexe 1). The most important measures are the following ones:

(1) Organisation of producers (Schweizer Bauernverband): Non-members have to pay contributions of 1 to 9 cents per animal depending of the animal species (beef, pig, sheep, goat) to the organisation of producers. These contributions must be used for marketing communication for Swiss agriculture.

(2) Branch organisation cheese (Emmentaler Switzerland): Non-members must pay contributions of 70 cents/kg of produced “Emmentaler Switzerland”. These contributions must be used for sales promotion, public relations, fairs and exhibitions.

(3) Branch organisation wine (Schweizer Reben und Weine): non-members must, with some exceptions, pay contributions for each m² of vines-land. These contributions

⁵ SR 919.117.72.

must be used for the yearly sales promotion campaign of 2018 and 2019 (may be renewed).

2.2. In milk market

In the milk market we find two organisations which are of great importance within the the self-help ordinance (cf. point 2.1.): the organisation of milk producers (Swissmilk) and the branch organisation milk. For the time being, this branch organisation is the most important one. Its members are organisations of producers, undertakings of milk industry, professional cheesemaker and retail-sellers.

(1) Swissmilk: Non-members have to pay a contribution of 0.725 cents/kg milk which must be used for the following measurers: furthering the marketing of milk in Switzerland and abroad: market research; basic advertising; promotion of marketing; information on milk and its nutritional benefits; marketing for Swiss cheese.

(2) branch organisation milk:

- From 2003–2017 the provisions of the LwG with regard to milkbuy-contracts were binding for milk producers, milk-distributors and milk-transformers that were non-members. And provisions with regard to segmentation of the milk market (segments A, B and C) were binding for milk-sellers and milk-transformers who were non-members of the branch organisation milk (BO Milch). This regulation had been established in order to facilitate the transition from milk quotas to the free milk production by the end of 2009.
- Since 2018 there are no more binding provisions for outsiders. It is now a matter of the members of the branch organisation milk to look for a reasonable solution within the milk-buy-contracts which must be closed following art. 37 LwG. In the center of the private law regulation is the segmentation of the milk in three segments, namely A, B and C milk: The highest price is paid for A milk. This segment contains milk products with the highest value added like drinking milk, cream and butter. The “middle” price is paid for B milk. This segment contains milk products with a limited value added which are exposed to an increased competition, especially milk products for exportation. The lowest price is paid for C milk representing the lowest value added, especially regulating products like milk powder for exportation. Producers may not be obliged to deliver C milk. The fixed target prices for the three segments may not be applied as minimum or even fixed prices. They have nevertheless an important impact on the market as the private law regulation of the branch organization says that the target prices represent a guideline for the price fixing by the contract parties.

3. Measures in case of market unbalances (crisis situations)

The LwG contains in art. 13 a provision which allows the Confederation to make interventions in markets of foodstuffs. Following this article, the Confederation may participate in costs for timely limited measures for market relief (Marktentlastung) in times of extraordinary developments, with the aim of preventing a price-crisis situation (Preiszusammenbruch) (al. 1). But it can't contribute to the reduction of overproduction due to structural reasons.

The contributions of the Confederation are in principle only paid if the interested organisations and the Cantons participate in the cost.

As regards the producers themselves, this provision is an expression of the principle of subsidiarity and hence of the principle of self-help. Until today, such contributions

didn't have a major significance but were at least applied in the sectors of meat, eggs⁶ and grains⁷. But there is no detailed information on those contributions in the official communications of the Government and the Federal Office for Agriculture. One single case for which the Government established an ordinance was a financial compensation of the Confederation for Swiss producers of cucumbers and tomatoes who were victims of a sharp temporary decrease of sales and prices due to a false information with regard to a disease of cucumbers and tomatoes coming from Spain⁸.

The legislator himself had mainly in mind cases of animal diseases and drought periods.

The LwG contains in addition some similar provisions for specific products, e.g. for meat (art. 50).

Swiss regulations and practice can therefore hardly provide any inspiration to the EU legislator with regard to an intelligent conception to fight crisis situations within food production.

In this context one may add that the Government, after having taken notice of the results of the consultations with political parties and organisations, intends to include into the package of the AP22+ a proposal for an earnings fail-insurance. Its reason is that the Confederation shall give a financial support to farmers for insurance premiums if the private insurance market does not provide reasonable conditions for crop failures due to extreme climate and weather conditions.

IV. Effects of AP 22+ on the bilateral agreements between the EU and Switzerland

The Federal Office for Agriculture (BLW) writes in its explanatory report on AP22+ that the further development of the agricultural policy in the EU and in Switzerland go in the same direction: more flexibility, better targeted support and higher ambitions with regard to the protection of environment and climate, innovation and digitisation. The proposed revision of Swiss agricultural law will not substantially modify the bilateral relationship EU-Switzerland⁹.

The new instruments in Switzerland will be implemented in accordance with the obligations of Switzerland laid down in the bilateral agreements, namely in the convention on agriculture of 1999 which brought since 2007 a total liberalisation of the cheese market between the EU and Switzerland (art. 3)¹⁰.

Though the bilateral convention on agriculture contains an evolutionary provision (art. 13) the Swiss Government does not intend further steps of liberalisation in the context of the AP22+¹¹. After all, the Government will improve the legal protection so that decisions taken in application of the bilateral convention can be challenged before a court following art. 166 LwG¹².

⁶ Botschaft zur Weiterentwicklung der Agrarpolitik (AP 2011) vom 17. Mai 2006, Bundesblatt (BBl) 2006 6337 ff., p. 6544.

⁷ Botschaft zur Weiterentwicklung der Agrarpolitik in den Jahren 2014–2017 (AP 2014–2017) vom 1. Februar 2012, BBl 2012 2075 ff., p. 2185.

⁸ Verordnung über die Sonderentschädigung der Produzentinnen und Produzenten von Gurken und Tomaten im Jahr 2011 (EHEC-Entschädigungsverordnung) vom 23. September 2011, Amtliche Sammlung des Bundesrechts (AS) 2011 4467.

⁹ Erläuternder Bericht, S. 161.

¹⁰ SR 0.916.026.81.

¹¹ Erläuternder Bericht, S. 161.

¹² Erläuternder Bericht, S. 96.