



THE COMMON AGRICULTURAL POLICY (CAP) AND THE TREATY

Following the entry into force of the Treaty of Rome, Member States' agricultural policies were replaced by intervention mechanisms at Community level. The foundations of the common agricultural policy (CAP) have remained unchanged since the Treaty of Rome, with the exception of rules relating to the decision-making procedure. The Lisbon Treaty recognised codecision as the 'ordinary legislative procedure' for the CAP, in place of the consultation procedure.

LEGAL BASIS

Articles 38 to 44 TFEU.

RATIONALE BEHIND THE CAP

When the Treaty of Rome established the common market in 1958, State intervention was a major feature of agriculture in the six founding Member States. If the principle of the free movement of goods was to apply to agricultural produce, ongoing State intervention notwithstanding, national intervention mechanisms which were incompatible with the common market had to be transferred to Community level: this is the basic rationale behind the establishment of the CAP.

What is more, at the time, intervention in agriculture reflected the broad consensus regarding the specific characteristics of the sector — that is to say that it is highly dependent on climate and geography and prone to systemic imbalances between supply and demand, and hence substantial fluctuations in prices and incomes.

Demand for food is inelastic, in other words price fluctuations have little bearing on it. Moreover, the length of production cycles and the unchanging nature of certain inputs mean that farmers themselves have scant control over the global supply of farm produce. Accordingly, an increase in supply automatically forces prices down, whereas a decrease forces them up. All these factors create permanent market instability. Faced with this situation, governments have always been keen to regulate agricultural markets and to support farmers' incomes, a tendency inherited by the CAP.

Although today farming accounts for only a small part of the economies of developed countries, even in the EU ([5.2.10](#), Table II), State intervention has increased of late, in the form of agricultural and rural policies which have added new dimensions, such as sustainable development, combating climate change, land and countryside management, diversification and renewal of the rural economy and the production of energy and biomaterials, to support for the industry's traditional primary activity, namely food production. Support for public assets or non-commercial aspects of agriculture — in other words, those not rewarded by the market — has thus become a key strand of today's agricultural and rural policies, including the CAP.

OBJECTIVES

Article 39 TFEU sets out the specific objectives of the CAP:

- a. to increase agricultural productivity by promoting technical progress and ensuring the optimum use of the factors of production, in particular labour;
- b. to ensure a fair standard of living for farmers;
- c. to stabilise markets;
- d. to ensure the availability of supplies;
- e. to ensure reasonable prices for consumers.

These objectives are both economic [Article 39(a), (c) and (d)] and social [Article 39(b) and (e)] and are intended to safeguard the interests of producers and consumers. In practice, the objectives of the CAP have remained unchanged since the Treaty of Rome came into force, given that their wording has proved extremely flexible and capable of accommodating the countless reforms seen since the 1980s (5.2.2). It should be pointed out that, as evidenced by settled case law, the objectives of the CAP cannot all be fully achieved at the same time. The Union legislator therefore has considerable room for manoeuvre when it comes to choosing instruments and determining scope of reforms and must take account of market trends and the priorities set by the Union institutions at any given time.

Alongside the specific objectives of the CAP set out in Article 39 TFEU, a number of Treaty provisions lay down other objectives which are applicable to all EU policies and measures. On that basis, promoting a high level of employment (Article 9), environmental protection to promote sustainable development (Article 11), consumer protection (Article 12), animal welfare requirements (Article 13), public health (Article 168(1)) and economic, social and territorial cohesion (Articles 174 to 178) are becoming objectives of the CAP in their own right. Furthermore, at a time of market liberalisation and globalisation, Article 207 sets out the principles of the common commercial policy, which also apply to trade in agricultural products. Lastly, a derogation has been granted from competition policy principles for agricultural products and trade in such products, in view of the unique structure of the farming industry (Article 42). However, this exception was introduced only as part of the most recent reform of the common market organisation (CMO) in 2013 (5.2.4).

THE DECISION-MAKING PROCESS IN THE AREA OF AGRICULTURAL POLICY

The Treaty of Rome laid down the procedure for drawing up and implementing the CAP: a Commission proposal, an opinion delivered by the European Parliament and, if necessary, the European Economic and Social Committee, and a Council decision taken by a qualified majority. This procedure, involving the consultation of the European Parliament, remained unchanged until 2010. The Treaty on the Functioning of the European Union (Article 42, first paragraph, and Article 43(2)) then recognised codecision as the ‘ordinary legislative procedure’ for the CAP (1.4.1), in place of the consultation procedure, thus consolidating the European Parliament’s role as true co-legislator in the agricultural sphere.

Nevertheless, the new Treaty raises major problems of interpretation, in that it introduces exceptions to the ordinary procedure which work to the benefit of the Council: Indeed, with regard to competition rules, the second paragraph of Article 42 provides that ‘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'. What is more, Article 43(3) stipulates that 'the Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations'. In the absence of a clear demarcation of the legislative powers of the European Parliament and the Council in the agricultural sphere, legal and political problems arose during the negotiations on the new post-2013 CAP. The European Parliament has always rejected general implementing reservations in favour of the Council, which could qualify, or even invalidate, the co-decision powers acquired under the new Treaty, particularly in the context of fundamental reforms of the CAP which include, as key elements, the fixing of aid levels and prices. The Council, however, has rejected any restrictions on the powers conferred by Article 43(3) under the new CMO (Regulations (EU) No 1308/2013 — OJ L 347, 20.12.2013, — and (EU) No 1370/2013 — OJ L 346, 20.12.2013) ([5.2.4](#)) and the fixing of the percentage reductions in direct aid in the context of financial discipline (Article 26 of Regulation (EU) No 1306/2013 — OJ L 347, 20.12.2013). Parliament was thus forced to agree to the exception in order to prevent the adoption of the new CAP from being blocked (resolution [P7_TA\(2013\)0492](#) of 20 November 2013). Furthermore, a final declaration by Parliament, the Council and the Commission acknowledges that the agreement reached is without prejudice to subsequent CAP reforms and does not preclude possible legal action.

It was entirely foreseeable, therefore, that the interinstitutional debate on the scope of Article 43(3) would continue before the Court of Justice of the European Union. This is precisely what happened when Parliament and the Commission sought the annulment of two common fisheries policy acts based on Article 43(3) TFEU: a Council decision on the allocation of fishing opportunities (cases C-103/12 and C-165/12); and a regulation on a long-term plan for cod stocks (cases C-124/13 and C-125/13). Under the Court's judgments of 26 November 2014 and 1 December 2015, measures which — because they are necessary for the pursuit of the objectives of the common agriculture and fisheries policies — entail a policy decision that is reserved for the Union legislator, must be based on Article 43(2) TFEU. However, the Court's judgment in Case C-113/14 of 7 September 2016 has established a broad interpretation of the concept of 'fixing prices' in Article 43, paragraph 3, TFEU, which includes reference thresholds for intervention prices. As a result, Article 7 of Regulation (EU) No 1308/2013 (CMO Regulation), based on Article 43, paragraph 2, has been cancelled, and reference thresholds have been adopted again by the Council exclusively. In the wake of those judgments, future reforms designed to bring CAP mechanisms into line with policy objectives will have to clarify the scope of existing legal bases in order to better respect the balance between co-legislators.

In addition, there have always been other bodies which have been involved in the implementation of the CAP under the 'comitology' procedure. Since 1961, when the first CMOs were established, a number of committees have been set up. The Commission had proposed that it should have wide-ranging powers to take decisions on the running of CMOs, but a number of Member States were keen for that power to remain with the Council. The committees were a compromise between the two positions: management was entrusted to the Commission, but it had to consult a committee consisting of representatives of the Member States which took decisions by a qualified majority.

The Lisbon Treaty introduced a distinction between 'delegated acts' and 'implementing acts' ([1.3.8](#)). The adoption of delegated acts is now governed by the relevant basic legislative act, whereas the adoption of implementing acts is subject to the new examination or advisory procedures provided for by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 (OJ L 55, 28.2.2011). Most of the Commission's draft

implementing acts in the agricultural sphere are subject to examination procedures as part of which the European Parliament and the Council have a ‘right of scrutiny’.

What is more, professional organisations in the EU, represented by the Committee of Professional Agricultural Organisations (COPA) and the General Confederation of Agricultural Cooperatives in the European Union (COGECA), have always been indirectly involved in the European decision-making process through the work of the advisory committees. Very recently the scope of the consultation process has been widened by setting up civil dialogue groups to assist the Commission in applying the CAP.

THE CAP, COMPETENCE SHARED BETWEEN THE UNION AND THE MEMBER STATES

The TFEU divides competences into three categories (Title I) (1.1.5): exclusive competences, shared competences and competences to carry out actions to coordinate, support or supplement the actions of the Member States. In this context, Article 4(2)(d) recognises that competence is shared between the Union and the Member States in the field of agriculture, contrary to established legal opinion and the stance adopted by the Commission’s legal services (SEC(92) 1990, 27.10.1992), which have hitherto regarded policy on markets (first pillar of the CAP) as an exclusive Union competence. New Article 4(2)(d) TFEU has a bearing on legislative work in the sphere of agriculture in that the European institutions apply the subsidiarity principle (1.2.2) in areas not covered by the Union’s exclusive competence (Article 5(3) and Article 12 of the EU Treaty). The national parliaments can thus forward to the Presidents of the European Parliament, the Council and the Commission reasoned opinions stating whether, in their view, a draft legislative act in the agricultural sphere is consistent with the subsidiarity principle. In addition, the ‘enhanced cooperation system’ established by Article 20 of the EU Treaty (1.1.5) is from now on applicable to the CAP. On that basis, some Member States (here, a minimum of nine) may choose to work more closely together in the agricultural sphere, in keeping with the increasing flexibility in the application of common mechanisms under the CAP (5.2.3).

ROLE OF THE EUROPEAN PARLIAMENT

Because it has no decision-making powers, Parliament has had to use non-binding methods, such as own-initiative reports and resolutions, in an effort to exert a significant influence on the framing of the CAP. Since the European Council declaration in 1997 advocating a European agricultural model, the European Parliament has on several occasions demonstrated its commitment to a multifunctional European agriculture (and food) model, valid throughout the territory of the enlarged Union and compatible with the liberalisation and globalisation of the markets. This was evident in the context of the 2003 CAP reform (resolutions of 30 May and 7 November 2002) and the multilateral negotiations on agriculture within the World Trade Organisation (the Doha Round) (5.2.8). In that connection, the European Parliament has also stated that it is in favour of incorporating new objectives into the CAP with a view to responding to the new challenges facing the farming industry, such as product quality, public health, sustainable development, economic, social and territorial cohesion, environmental protection and tackling climate change. These principles have recently been confirmed by the resolutions of 8 July 2010 and 23 June 2011 on the future of the CAP after 2013 (OJ C 351 E, 2.12.2011, p. 103, and OJ C 390 E, 18.12.2012, p. 49). This new reform of the CAP, the parliamentary procedure for which began in March 2010, with the adoption of negotiating mandates, and was completed on 20 November 2013 with the adoption of the basic regulations, has given the European Parliament the opportunity to play its role as a fully-fledged co-legislator in the

area of agriculture, on the basis of the institutional framework established by the Lisbon Treaty (resolutions [T7-490/2013](#) to [T7-494/2013](#)).

Albert Massot

06/2017