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Single Common Market Organisation: Article-by-Article Commentary of the Legal Framework for Agricultural Markets in the European Union

Edited by Rudolf Mögele and Friedrich Erlbacher

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Edited by Rudolf Mögele and Friedrich Erlbacher, the Commentary under review represents, to this reviewer's knowledge, the first detailed and extensive legal analysis available in the English language of Regulation (EC) 1234/2007 establishing the Single Common Market Organisation (sCMO).¹ To fully appreciate the merits of this work, and before looking at its structure and content, one must consider that, by bringing in one single piece of legislation a myriad (about 50) of intricate and highly technical legislative acts, Regulation 1234/2007 has profoundly innovated the legal framework of what can be defined as one of the cornerstones in the European integration process as well as one of the most controversial and debated of its policies, the Common Agricultural Policy (CAP).²

¹ OJ [2007] L 299/1.

² For detailed information on the law of the CAP, see: McMahon J. (2007), *EU Agricultural Law* (Oxford: Oxford University Press); Jack B. (2009) *Agriculture and EU Environmental Law* (Adelshot: Ashgate Publishing); Blumann C., Blanquet M., Le Bihan D. C., Cudennec A., Mestre Ch., Petit Y., Valdeyron N. (2011) *Politique agricole commune et politique commune de la pêche* (Bruxelles: Éditions de l'Université de Bruxelles).

The CAP plays an important role within the European Union and this is somehow mirrored by its legal regime. Articles 38 to 44 of the Treaty on the Functioning of the European Union (TFEU) provide the main discipline concerning the CAP.³ Worth nothing is that the internal market rules apply to agricultural products “save as otherwise provided in Articles 39 to 44”,⁴ thus confirming that, unlike other economic sectors, agriculture occupies a special position within the EU policies and that its regime constitutes “a collective *lex specialis* in the law of the internal market”.⁵

According to Article 39 TFEU, the CAP pursues the following objectives: to increase agricultural productivity; to ensure a fair standard of living for those engaged in agriculture, by increasing their individual earnings; to stabilise the (agricultural) markets; to assure the availability of supplies; to ensure reasonable prices for the consumers. In order to achieve the CAP objectives, Article 40 TFEU foresees the establishment of a “common market organisation” (CMO) which can take one of the following forms: a) common rules on competition; b) a compulsory coordination of the various national market organisations; c) a European market organisation. Since the introduction of CAP, a CMO has been introduced for almost all agricultural products. Overall the Council has adopted 21 CMOs for each product or group of products,⁶ each governed by a separate Council basic regulation, often accompanied by further Council regulations and Decisions.⁷

Needless to say, this rather wide and highly technical legal framework was not exactly user-friendly. It therefore comes as no surprise that, on the basis of the fifth CAP reform of 2003 that established a horizontal legal framework for all direct payments and amalgamated an array of support systems into a single payment scheme⁸ and in line with the approach set out in a 2005 Communication that called for a more incisive intervention in this field of EU law,⁹ the Commission put forward, at the end of 2006, a proposal to streamline and simplify the CAP with reference to CMO regulations. The main objective of the proposal was to revise the existing 21

³ These Articles have never really been the object of any change in their substance. Instead, they have been renumbered twice. The original Articles 38 to 44 of the Treaty establishing the European Economic Community became, as a consequence of the changes introduced in 1997 by the Treaty of Amsterdam, Articles 32 to 38 of the Treaty establishing the European Community. Following the most recent entry into force of the Lisbon Treaty in 2009, those Articles have become the current Articles 38 to 44 TFEU.

⁴ Article 38(2) TFEU.

⁵ Schütze, R. (2009) 'Reforming the 'CAP': from 'vertical' to 'horizontal' harmonization' 28 *Yearbook of European Law* 338.

⁶ Namely: cereals, rice, sugar, dried fodder, seeds, hops, olive oil and table olives, flax and hemp, fruit and vegetables, processed fruit and vegetables, bananas, wine, live plants and products of floriculture, raw tobacco, beef and veal, milk and milk products, pig meat, sheep meat and goat meat, eggs, poultry meat, other products.

⁷ It must be said that the CAP makes up the biggest share of EU legislation; see European Commission, Press release IP/06/1296 of 2 October 2006.

⁸ 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, OJ [2003] L 270/1. This regulation was replaced by Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, OJ [2009] L 30/16.

⁹ European Commission, *Simplification and Better Regulation for the Common Agricultural Policy* (COM(2005) 509 final).

basic regulations on sector-specific CMOs and combine them into a comprehensive single regulation but without changing the underlying policies or principles. By having a single CMO, the Commission aimed at increasing transparency of its legislative instruments as well as improving the quality of the legal texts: all 21 CMO regulations have been merged, together with all those accompanying regulations and decisions, in one single legislative act; more than 920 legal articles have been replaced with “only” around 230. Regulation 1234/2007 establishes in particular common rules concerning marketing periods, public intervention, private storage, reference prices, intervention prices and disposal of products bought under public intervention.

With this in mind, writing an extended commentary on Regulation 1234/2007 can be considered a difficult but also courageous undertaking. Mögele and Erlbacher however managed to edit a highly valuable volume, whose aim, according to the editors’ preface, is explaining the purpose and objective of the provisions of Regulation 1234/2007 as well as its scope and exegesis. Because the vast majority of the authors (editors included) work (as members of the Directorate-General for Agriculture and Rural Development or as members of the Legal Service) at the European Commission and deal with this area of EU law, the comments offer well-informed and first-hand information. They expertly navigate previous legislative acts and case law and then pilot through the current text of Regulation. Although the comments maintain a practical approach, explaining how rules and procedures are interpreted and applied, they often make reference to the historical background of provisions, to the negotiations between Member States and between Member States and the Commission, and to international legislation, with a particular focus on the relations between the European Union and the World Trade Organization. Where necessary, the authors also provide the reader with an outlook on future changes and challenges. Although the comments can vary, often quite considerably, in terms of length, on average, analysis includes a usually short (with some lengthy exceptions¹⁰) historical background, a substantive description of the provision and the procedure. Also worth noting is that, just after the text of the provision and before the comment, authors provide, although not always to the same extent, an apparatus with the relevant recitals of Regulation 1234/2007, the applicable implementing provisions, EU case law and literature available on the subject dealt with.

As noted in the introductory comment, “[i]t is obvious that the sCMO Regulation, being the basis for all market related policies, will often be subject to amendments”.¹¹ The Editors have managed to include all the relevant changes occurring until the end of 2010. Since the publication of the book, however, further amendments have been adopted or are to be adopted in the very near future. Worth mentioning here is Regulation (EU) 121/2012¹² which, following the judgment of the General Court in Case T-576/08,¹³ has radically innovated the food distribution scheme as foreseen by Article 27

¹⁰ See, for example, Comment on Article 44, concerning “Animal diseases”.

¹¹ Thiele, G. ‘General Introduction’ 38.

¹² Regulation (EU) No 121/2012 of the European Parliament and of the Council of 15 February 2012 amending Council Regulations (EC) No 1290/2005 and (EC) No 1234/2007 as regards distribution of food products to the most deprived persons in the Union, OJ [2012] L 44/1.

¹³ Case T-576/08 Germany v Commission, judgment of 13 April 2011 (not yet published). The General Court, in deciding on an action brought by the Republic of Germany for annulment of Regulation (EC) 983/2008 adopting the annual plan for 2009 under the programme for the supply of food to the most deprived persons in the Union, has clarified that purchases of food on the Union market cannot replace the reduced intervention stocks on a regular basis. The aim of Article 27 is primarily to allow existing stocks to be disposed of and not, except in exceptional circumstances, to make purchases of food for subsequent disposal. In fact, according to the Court, it is inferred from

of Regulation 1234/2007 which relies on the distribution of products from Union intervention stocks, supplemented, in case of temporary unavailability of products, by purchases on the market. The new text of Article 27 ends the food distribution scheme. However, in order to give charity organisations in Member States that are using the current food distribution scheme sufficient time to adapt to the new situation, Article 27 in its new text provides for a phasing-out period (that should end on the completion of the 2013 annual plan), during which market purchases should become a regular source of supply for the food distribution scheme, in order to complement intervention stocks where suitable intervention stocks are not available.

The book also informs the reader about the Commission's proposal¹⁴ to replace Regulation 1234/2007 in order to align it with the differentiation between delegated and implementing powers of the Commission introduced by Articles 290 and 291 TFEU. Articles 290 and 291 TFEU establish a clear distinction between on the one hand the powers delegated to the Commission to adopt non-legislative acts and, on the other, the powers conferred on the Commission to adopt implementing acts. The proposed alignment of Regulation 1234/2007 with the new requirements resulting from Articles 290 and 291 TFEU is based on a careful qualification of the existing Commission powers as "delegated" and "implementing" which was operated against the background of the implementing measures adopted by the Commission on the basis of its current powers. Since the publication of the book, the mentioned proposal has been discussed and amended by the European Parliament.

One of the most critical points of the new regulation is the too extensive use of Article 43(3) TFEU which stipulates that "The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aids and quantitative limitations (...)". This provision forms an exception from Article 43(2) TFEU which requires the ordinary legislative procedure to be used "to establish the common organisation of agricultural markets ... and the other provisions necessary for the pursuit of the objectives of the common agricultural policy". According to the European Parliament, the Commission proposal on the new regulation on the sCMO has not respected the principle that Article 43(3) TFEU needs to be interpreted restrictively. In particular, "defining conditions and criteria for fixing aid amounts, export refunds and minimum export prices should remain with the Legislator, leaving to the Commission only the fixing of amounts through implementing acts. Hence the proposal runs against the Legislator's prerogatives under Article 43(2) TFEU".¹⁵ More negotiations are deemed to be necessary and more time needed to get the new regulation adopted.

To conclude, the book represents an unparalleled analysis of Regulation 1234/2007 and is a magnificent addition to the legal literature in the field of the CAP. It will not only add to the current debate on the new rules on the sCMO but it will prove to be essential reading for officers, practitioners and policy makers involved in the area of agricultural law.

Regulation 1234/2007 that the purchase of certain products is permitted only in the exceptional case of their temporary unavailability.

¹⁴ European Commission, "Proposal for a regulation of the European Parliament and of the Council establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)", COM(2010) 799 final.

¹⁵ European Parliament, Explanatory Statement to the Report on the "Proposal for a regulation of the European Parliament and of the Council establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)", (COM(2010)0799 – C7-0008/2011 – 2010/0385(COD).