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CEDR (Comité Européen de Droit Rural) | Zenodo

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Preface

Dear Readers

The first Journal 2022 is dedicated to various current topics of European and national agricultural law and also includes Ukrainian law. Thanks to the tireless efforts of our Polish colleagues from Poznań, we have been able to establish many contacts in the war-ravaged country. As was recently observed at an online conference on which the article printed here was based, this commitment has met with a grateful response. Of the upcoming events, special mention should be made of the CEDR Colloquium on 25 October 2022 in Brussels, where the year without a congress due to the pandemic will be more than bridged by a high-calibre round of representatives from European institutions. See you in Brussels!

Roland Norer

Editorial director

Chères lectrices, chers lecteurs

Le premier Journal 2022 est consacré à différents thèmes d'actualité du droit agricole européen et national et intègre également le droit ukrainien. Grâce à l'engagement infatigable des collègues polonais de Poznań, de nombreux contacts ont pu être noués dans ce pays ravagé par la guerre. Comme on a pu le constater récemment lors d'une conférence en ligne, dont l'article reproduit ici est à l'origine, cet engagement rencontre un écho reconnaissant. Parmi les manifestations à venir, il convient de mentionner le colloque de la CEDR du 25 octobre 2022 à Bruxelles, où l'année sans congrès en raison de la pandémie sera plus que comblée par une table ronde de haut niveau réunissant des représentants d'institutions européennes. Au plaisir de vous revoir à Bruxelles !

Roland Norer

Directeur éditorial

Sehr geehrte Leserinnen und Leser

Das erste Journal 2022 ist verschiedenen aktuellen Themen des europäischen und nationalen Agrarrechts gewidmet und bezieht auch das ukrainische Recht ein. Dank des unermüdlichen Einsatzes der polnischen Kollegenschaft aus Poznań konnten vielfältige Kontakte in das kriegsversehrte Land geknüpft werden. Wie zuletzt bei einer Online-Konferenz, welcher der hier abgedruckte Artikel zugrundelag, beobachtet werden konnte, fällt dieses Engagement auf dankbares Echo. Von den kommenden Veranstaltungen darf besonders auf das CEDR-Koloquium am 25. Oktober 2022 in Brüssel verwiesen werden, wo das pandemiebedingt kongressfreie Jahr mit einer hochkarätigen Runde von Vertretern europäischer institutionen mehr als überbrückt werden soll. Auf ein Wiedersehen in Brüssel!

Roland Norer

Redaktionsleiter

President's Corner

Views of the President Geoff Whittaker

Welcome once again to this, the first edition of the CEDR Journal for 2022. In this edition you will find a miscellany of articles dealing with topics of current relevance to our lives in agricultural and rural law. We are grateful as always to all contributors and to our Delegate-General, Prof. Dr. Roland Norer, for his work in editing the Journal.

Since the last Journal was published, we have continued to engage via our Regional Forums. The III Central European Forum, hosted in March by the Faculty of Law at the University of Miskolc and supported by the Hungarian Ministry of Agriculture, the Hungarian Association of Agricultural Law, the Hungarian Academy of Sciences, the Ferenc Mádl Institute of Comparative Law and the Hungarian Lawyers' Association, considered the topic of succession to ownership of agricultural land and the holding of it by corporate legal persons. The Forum was in hybrid format, allowing personal participation but also permitting those who were unable to travel to participate online.

A further online Forum will be hosted in early October by the University of Valladolid in Spain, with contributions also from France, Portugal, Italy, Germany and Poland on the subject of the organisation of agricultural activities through registers, which showes once again the commonality of experiences and problems experienced in that regard.

Outside the scope of our own technical discussions, it is a significant year for the Common Agricultural Policy of the EU, which celebrates its 60th Anniversary. It is interesting to see how the policy has continued to develop over time; a pocket-sized history of the subject is published by DG AGRI on its website at *https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-glance_en*. The reviews continue, of course, with the latest reform due to come into effect from January 2023.

Most significantly for CEDR, we celebrate in 2022 our own 65th Anniversary. We were formed in 1957 following the establishment, by the Treaty of Rome, of the European Common Market, the forerunner of the modern European Union. Rural representatives of the six founding member countries – Belgium, France, Italy, Luxembourg, the Netherlands and West Germany – came together to establish a forum to exchange views on similarities and differences in the application of agricultural and rural law at a national level, a philosophy which continues to the present day.

Since then, as the European Union has expanded, so has CEDR and we now have members from across the continent of Europe and associate members from other parts of the world. Anyone with an interest in the law relating to agriculture and rural affairs more broadly is welcome to join us.

We shall be holding a Colloquium in Brussels in October to consider, with extensive contributions from officers of the European Parliament and Commission, the progress towards the latest reform of the CAP.

And of added significance for CEDR is that the Colloquium will present the first occasion on which we have been able physically to reassemble since the Covid-19 pandemic took over our lives in early 2020. We are very much looking forward to being able to get together in a positive atmosphere and we anticipate with great pleasure meeting again with those who are able to attend the Colloquium and look to a brighter future for us all.

Universidad de Valladolid

Facultad de Derecho

INTERNATIONAL CONGRESS

THE ORGANISATION OF AGRICUTURAL ACTIVITIES THROUGH ITS REGISTERS

7th October 2022 (On line)
https://cutt.ly/OC3Nmre

Dir. **Esther Muñiz Espada**
University of Valladolid
Coord. **Begoña González Acebes**

1. Objectives

This congress aims to provide a forum for analysis and reflexion on the current organisation of agricultural administrative registers. In Spain, their main characteristic is their dispersion and fragmentation, which presents difficulties to unify all the big data related to agricultural activity. Other countries in our context share some of our problems, but others offer a rational organisation that could be a reference or point of comparison. This congress aims to be an exposition of the main models and their regulations in this respect in order to provide us ideas that can improve our organisation towards a more efficient reorganisation of our system that promotes the competitiveness of our agricultural and agri-food sector.

In the search for solutions to avoid the multiplicity of agricultural administrative registers, several reforms should be considered in our legislation, from some articles of the Commercial Code to the various regulations of agricultural importance. It would also be necessary to consider the possibility of the Commercial Register coordinating all this information or the integration of a large part of this information in this Commercial Register in the personal file of the agricultural entrepreneur. The importance of the value of the effects provided by the business register should be emphasised.

A project for the reunification and interconnection of agricultural information is certainly underway in our legal system, but although it partly improves the situation, especially for the purposes of CAP aid,

it is not the definitive and complete solution, as it does not cover the aspects of private law that would be resolved by means of the security offered by the Commercial Register.

Comité científico:

R. Businowski, Poznan University, Poland
J. Martinez, Göttingen University, Germany
I. Canfora, Bari University, Italy
L. Bodiguel, Nantes Research Center, France
M.J. Moral, Valladolid University. Spain.

9.30hs: Presentation

Rector University of Valladolid.
G. Dueñas, Consejero de Agricultura, Ganaderia y Desarollo rural, Junta Castilla y León.
G. Whittaker, President, European Council of Rural Law, CEDR.
A. Candau, Presidente-Decano Colegio de Registradores de Castilla y León.
G. Thiele, Head of Unit, European Commission, DG Competition, Brussels.

10.30hs: Sessions

Moderator: Prof. M. Alabrese, Saint'Anna School of Advanced Studies, Pisa, Italy.

SPAIN

R. Perteguer, Vocal de Medio ambiente Colegio nacional de Registradores y Mercantiles de España.
Situation in Spain of the registers relating to agricultural activity.

FRANCIA

Christine Lebel, Responsible de l'Axe activités économiques et professionnelles du Centre de recherches juridiques de Franche-Comté.
Du registre des actifs agricole au registre de l'entreprise.

PORUGAL

T. Picao de Abreu. Lawyer.
The registration formalities in activity in Portugal: introduction to the problem.

ITALY

L. Constantino, Prof. Bari University.
The agricultural registration system in Italy.

GERMANY

J. Martinez, Director, Institut für Landwirtschadtsrecht, Göttingen University. *The agricultural registration system in Germany.*

POLAND

A. Suchón, Prof. Faculty of Law and Administration of Adam Mickiewicz University. *Legal rules for starting agricultural activity in Poland by natural and legal persons, and then entry into the voluntary national system of producers' records, farm records and records of application for payment.*

K. Leśkiewicz, Prof. Faculty of Law and Administration of Adam Mickiewicz University. *Requirements of registers for food business operators.*

K. Rózanski, Prof. Faculty of Law and Administration of Adam Mickiewicz University. *Legal aspects of the process of registration and registration for agricultural entrepreneurs in Poland.*

I. Lipinska, Prof. Faculty of Law and Administration of Adam Mickiewicz University – **J.** Dobkowski, Prof. Faculty at Warnia and Mazury University in Obstyn.
Progress in informatization of public registers of the agri-food sector in Poland; Functions of Polish registers, records and other data sets on agriculture (farmers)

Closing

Dr. L. Bourges, S.G., CEDR

60th Anniversary CAP
65th Anniversary CEDR

The new CAP post 2020
CEDR Colloquium

25. October 2022, 14h00 – 18h00

European Committee of the Regions

Bâtiment Jacques Delors
Rue Belliard/Belliardstraat 99-101
B-1040 Brüssel

(conference languages: English, French)

14.00-14.15	
Opening	*Geoff Whittaker* (President CEDR) *Ulrike Müller* (European Parliament)
Introduction	
14.15-14.45	
Background and genesis	*Herbert Dorfmann* (European Parliament)
14.45-15.15	
New legislation and implementation	*Michael Niejahr* (European Commission)
15.15-15.45	
Local and regional aspects	*Isilda Gomes* (European Committee of the Regions)
15.45-16.15	Coffee break

Strategic plans

16.15-16.45

Instrument and national implementation	*Mihail Dumitru* (European Commission)

16.45-17.15

National examples: Poland	*Aneta Suchon* (Adam Mickiewicz University Poznań)
Spain	*Esther Muñiz Espada* (University of Valladolid)

Environmental and climate

17.15-17.45

CAP in the light of the European environmental and climate strategies	*Wolfgang Burtscher* (European Commission)

Close

17.45-18.00

Overall evaluation and outlook	*Rudolf Mögele* (DGAR)

Publications

Borghi Paolo/Canfora Irene/Di Lauro Alessandra/Russo Lugi (eds.), Trattato di diritto alimentare italiano e dell'Unione europea, Milano 2021

Bürgler Mario, Die GUB/GGA, Schutzumfang, Eintragungsverfahren, Vollzug und Kontrolle, Bern 2021

Hamann Evan/Huggins Anna, Natural Capital, Agriculture and the Law, Cheltenham/Northampton 2020

Kuncio Paul/Schmid Sebastian (Hrsg.), Das Protokoll "Berglandwirtschaft" der Alpenkonvention, Wien 2021

Pitschel Anthea Luisa, Die gute fachliche Praxis. Ein staatliches Steuerungsinstrument im Spannungsfeld zwischen ökonomischen und ökologischen Interessen in der Landwirtschaft, Baden-Baden 2021

Uniwersytet im. Adama Mickiewicza w Poznaniu (Hrsg.), Przegląd Prawa Rolnego Nr 2 (29) 2021, Profesorowi Romanowi Budzinowskiemu, Poznań 2021

Ein Governance-Rahmen für landwirtschaftliche Daten[1]

José Martinez
Prof. Dr., University of Göttingen (Germany)

Abstract

The governance framework for agricultural data is currently rightly based on the principle of market self-regulation. The flexibility this entails will continue to be necessary as long as the process of digitisation has not stabilised, in which efficient processes and standards have become established in the market. As the stabilisation process continues, however, corrections will be necessary, which may require state action. It remains to be seen to what extent specific agricultural digital legal regulations will have to be created or whether the solutions developing in parallel for the industrial sector or for the digital society will suffice.

Le cadre de gouvernance des données agricoles repose actuellement, à juste titre, sur le principe de l'autorégulation du marché. La flexibilité qui en découle reste nécessaire tant que le processus de numérisation ne s'est pas stabilisé, au cours duquel des processus et des normes performants se sont imposés sur le marché. Mais au fur et à mesure que le processus de stabilisation se poursuit, des corrections seront nécessaires, qui nécessiteront éventuellement une intervention de l'État. L'avenir nous dira dans quelle mesure il faudra créer des réglementations juridiques spécifiques à l'agriculture numérique ou si les solutions qui se développent en parallèle pour le secteur industriel ou pour la société numérique seront suffisantes.

I. Governance-Rahmen vs. Innovation?

Sollen Richtlinien oder ein rechtliches Rahmenwerk gleichsam einem Korsett das junge Pflänzchen der Digitalisierung der Landwirtschaft in ihrer Entwicklung und Entfaltung begrenzen? Recht ist zunächst ein starres Instrument, das eine von Methodik, Prinzipien, Rechtsbegriffen und -instituten modellierte Welt regelt. Recht ermöglicht in einem freiheitlichen Rechtsstaat durch den Schutz von Freiräumen die Kreativität und Innovation; durch eine zu frühzeitige Modellierung der Rechtswirklichkeit kann es aber auch die Kreativität erheblich hemmen. Hoffmann-Riem beschreibt dieses Verhältnis von Recht zu Innovation als ein Paradoxon, da es etwas regeln will, was noch gar nicht da ist[2]. Dieses Paradoxon verstärkt sich in dem Moment, in dem das Recht in einem Rechtstaat sich an den Folgen technischer Entwicklungen orientieren muss, um eine Rechtfertigung für Eingriffe in grundrechtsrelevante Bereiche zu erzielen. Denn in der Regel werden diese Folgen noch nicht vollständig absehbar sein[3]. Schon diese ersten Überlegungen machen deutlich, dass sich die Entwicklung eines Governance-Rahmens für landwirtschaftliche Daten nicht auf einen rein juristischen Ansatz beschränken darf. Auch dürfen wir unsere Perspektive nicht auf bloße rechtliche Instrumente zur Regelung der sozialen und wirtschaftlichen Beziehungen zwischen den Akteuren in der digitalen Landwirtschaft beschränken. Wir

[1] Erstveröffentlicht in: AUR 2021, S. 122 ff.
[2] Hoffmann-Riem, Risiko und Innovationsrecht im Verbund, in: Die Verwaltung 2005 (Bd. 38), S. 145 (146).
[3] Luhmann, Juristische Argumentation: Eine Analyse ihrer Form, in Teubner (Hrsg.), Entscheidungsgründe als Rechtsgründe, Baden-Baden 1995, S. 19.

brauchen auch die ökonomische und soziale Dimensionen des Governance-Rahmens, da sie die Beziehungen zwischen Datenerzeugern und -nutzern begründen, erheblich prägen und zum Teil den rechtlichen Rahmen in den Hintergrund treten lassen.

Im Folgenden gehe ich von drei Prämissen aus, die sicherlich konsensfähig sind:

- Digitalisierung findet bereits statt.
- Digitalisierung basiert auf funktionierenden Governance-Strukturen.
- Digitalisierung ist ein dynamischer Prozess.

II. Digitalisierung findet bereits statt

Beginnen wir mit der ersten Prämisse: Die Digitalisierung der Landwirtschaft ist eine Technologie im Entstehen.

Die Landwirtschaft ist seit jeher geprägt von Kontinuität und Dynamik. Wie kaum ein anderer Wirtschaftssektor erfordert die Landwirtschaft durch die Abhängigkeit vom nicht vervielfältigbaren Wert "Boden" eine nachhaltige und dauerhafte Bewirtschaftung. Zugleich ist die Landwirtschaft als Teil eines marktwirtschaftlich orientierten Systems angehalten, sich dynamisch den Erfordernissen des Marktes anzupassen. Das ist vor dem Hintergrund ihrer Funktionen, die Ernährung der Gesellschaft zu sichern, die Landschaft zu pflegen und die Lebensfähigkeit der ländlichen Räume zu erhalten, im besonderen öffentlichen Interesse.

Aus einer historischen Perspektive betrachtet, kann die Anpassung der Landwirtschaft in verschiedene Epochen unterteilt werden. Derzeit erleben wir den Beginn einer neuen Epoche, die parallel zur Industrie mit dem Schlagwort der Digitalisierung oder des "Internet der Dinge" gekennzeichnet wird. Schlagworte wie "Industrie 4.0", "M2M Communication" (Machine to Machine) und das "Internet der Dinge" beziehungsweise "Internet of Things" (IoT)[4] beschreiben den epochalen Wandel, der sich derzeit in Industrie und Fertigungsprozessen vollzieht. Das parallel genutzte Schlagwort "Landwirtschaft 4.0" verdeutlicht sprachlich, dass wir uns in einer vierten Entwicklungsphase, der die Mechanisierung, Industrialisierung und Automatisierung vorgegangen sind und die im Folgenden kurz in Erinnerung gerufen werden sollen.

Die Mechanisierung der Landwirtschaft beschreibt die Unterstützung der menschlichen Arbeitskraft durch den Einsatz von Maschinen und technischen Hilfsmitteln. Sie beginnt in der frühen Menschheitsgeschichte und erreicht den Höhepunkt im Getreideanbau und in der Viehhaltung Ende des 19. und der zweiten Hälfte des 20. Jahrhunderts[5].

Industrielle Landwirtschaft bezeichnet die nächste Epoche der Landwirtschaft, die sich der industriespezifischen Produktionsweisen bedient. Sie ist durch Betriebe mit einem hohen Spezialisierungsgrad

[4] Grünwald, Andreas / Nüßing, Christoph, Machine To Machine (M2M)-Kommunikation : Regulatorische Fragen bei der Kommunikation im Internet der Dinge, in: MMR 2015, S. 378; Peter Bräutigam/Thomas Klindt, Industrie 4.0, das Internet der Dinge und das Recht, NJW 2015, 1137.
[5] Grundlegend hierzu Brakensiek/ Kießling/ Troßbach/ Zimmermann (Hrsg.), Grundzüge der Agrargeschichte Köln 2016.

gekennzeichnet, durch die Verwendung technischer Verfahren, einem hohen Kapital- und Energieeinsatz, einer hohe Produktivität und dem Übergang zu standardisierter Massenproduktion. Die Entwicklung zur industrialisierten Landwirtschaft betrifft nicht nur einige wenige dabei entstandene Agrarindustrie-Unternehmen, sondern auch Betriebe, die sich z.B. in Familienbesitz befinden.

Die Industrialisierung geht auf das Ende des 19. Jahrhunderts zurück und findet ihren Ursprung in den USA[6]. Dort löste ein Ende der Ertragssteigerungen die Sorge aus, dass ohne reichliche, preiswerte Nahrungsmittel ein Ende der Industrialisierung im nicht-landwirtschaftlichen Bereich zu erwarten sei. Aber noch im Jahr 1920 unterschied sich die Landwirtschaft nicht grundsätzlich von der seit Tausenden von Jahren praktizierten Landwirtschaft. Erst danach erfasste die industrielle Revolution die Landwirtschaft auch direkt: Kunstdünger und chemische Schädlingsbekämpfungsmittel, Maschinen und wissenschaftliche Züchtungsmethoden führten zu einer Agrarrevolution.

In Europa konnte die Landwirtschaft bis zum Ende des Zweiten Weltkrieges nicht über eine punktuelle Einbindung in die Industrialisierung hinauskommen. Von Beginn des 20. Jahrhunderts bis zum 1. Weltkrieg wurden in Europa vereinzelt die ländlichen Räume an die elektrische Versorgung angeschlossen. So kamen nun auch vereinzelt Elektromotoren in der Landwirtschaft zum Einsatz[7]. Durch den Einsatz bergmännisch abgebauten oder industriell hergestellten Dünger konnte die Produktivität der Landwirtschaft weiter gesteigert werden. All diese Neuerungen modernisierten aber im Wesentlichen den Einsatz tierischer Arbeitskraft, sie verdrängten ihn nicht. Diese Symbiose zwischen der bäuerlich-handwerklichen Wirtschaft und der modernen, industriell-kapitalistischen Wirtschaft endete in den Jahren nach dem 2. Weltkrieg in Form eines "Strukturbruchs". In kürzester Zeit wurden Arbeitsprozesse modernisiert und Tierbestände vergrößert, viele Arbeitskräfte wanderten ab und Bauernhöfe wurden aufgelöst ("Höfesterben").

Automatisierung bezeichnet die Übertragung von Funktionen des Produktionsprozesses, insbesondere Prozesssteuerungs- und -regelungsaufgaben vom Menschen auf künstliche Systeme[8]. Davon abzugrenzen ist die Maschinisierung, die die Übernahme von Funktionen des Produktionsprozesses durch künstliche Systeme (Maschinen) beinhaltet. Bei der Mechanisierung übernehmen die Maschinen lediglich die Zufuhr der für den Produktionsprozess erforderlichen Energie. Der Begriff der Automatisierung beinhaltet dagegen auch die Übernahme von Prozesssteuerungs- und ggf. Prozessregelungsaufgaben durch künstliche Systeme.

Automaten sind damit künstliche Systeme, die selbsttätig ein Programm befolgen und dabei aufgrund des Programms Entscheidungen zur Steuerung und ggf. Regelung von Prozessen treffen. Die Entscheidungen des Systems beruhen auf der Verknüpfung von Eingaben mit den jeweiligen Zuständen eines Systems und haben Aufgaben zur Folge. Im Bereich Tierproduktion sind Melkroboter das

[6] Hierzu grundlegend Hillstrom / Collier Hillstrom, Industrial revolution in America, Vol. 8: Agriculture and meatpacking, Santa Barbara, 2007.
[7] Spoerer/ Streb, Neue deutsche Wirtschaftsgeschichte des 20. Jahrhunderts, München 2013, S. 49 ff.
[8] Springer Gabler Verlag (Herausgeber), Gabler Wirtschaftslexikon, Stichwort: Automatisierung, online im Internet: http://wirtschaftslexikon.gabler.de/Archiv/72569/automatisierung-v7.html.

bekannteste Beispiel für die Automatisierung in der Landwirtschaft[9]. Fast 40 Prozent aller Neuinvestitionen im Bereich Melken sind automatische Melksysteme[10]. Auch in anderen Bereichen der Innenwirtschaft zeichnen sich Trends zur Automatisierung ab. Bei fast allen Tierarten wird heute das Füttern und Entmisten der Ställe automatisch durchgeführt.

Eng verwandt, aber gleichwohl bereits ein weiterer Entwicklungsschritt ist die Digitalisierung der Landwirtschaft. Kennzeichnend ist das selbständige Kommunizieren der Systeme ohne das Dazwischentreten des Menschen[11] Dieses Verhältnis wird auch als M2M (machine to machine) bezeichnet. Das Ergebnis der Vernetzung ist eine Datenbank, die von allen digitalisierten Maschinen gespeist wird. Ziel ist eine möglichst genaue Erfassung und Bewirtschaftung des Hofes, und der Ersatz der bislang auf Erfahrungen beruhenden Entscheidungen des Landwirts durch ein vernetztes System, das sich auf der Grundlage objektiver, mathematischer Modellen selbständig die Parameter der Entscheidungen zusammenstellt und verarbeitet.

Digitale Landwirtschaft ist im Folgenden als intelligentes Netzwerk aus Mensch, Maschinen und Bewirtschaftung zu verstehen, das alle Stationen der landwirtschaftlichen Tätigkeit – vom Einkauf der Saat bis zur Auslieferung der Ernte – umfasst. Voraussetzung ist die Errichtung eines eingebetteten Systems, das Überwachungs-, Steuerungs- oder Regelfunktionen übernimmt. Dabei werden sowohl die Maschinen als auch die Lagerhaltung sowie die Betriebsmittel miteinander vernetzt. In diesem vernetzten System kommt es zum autonomen Austausch von Informationen zwischen den Maschinen, zwischen Maschine und Landwirt sowie zwischen Maschine/Landwirt und Dritten[12]. Rechtlich von Bedeutung ist dabei auch die autonome gegenseitige Steuerung der Maschinen untereinander. Sie wirft die noch zu erörtende Frage auf, ob und wie "Willenserklärungen" von Maschinen untereinander, mit dem Ziel, Bestellungen vorzunehmen oder zu korrigieren, rechtlich gewertet werden[13]. Ziel der Vernetzung ist die Schaffung intelligenter Ablaufketten, die ineinandergreifen. Hierdurch sollen Ressourcen und Arbeitsabläufe in zeitlicher als auch räumlicher Dimension kombiniert werden und Synergieeffekte genutzt werden[14].

Eng zusammenhängend mit dem Begriff der Digitalen Landwirtschaft steht der Begriff des Big Data, auch "Massendaten" genannt: Die Definition der wissenschaftlichen Dienste des deutschen Bundestags lautet[15]: "Big Data bezeichnet große Datenmengen aus vielfältigen Quellen, die mit Hilfe neu entwickelter Methoden und Technologien erfasst, verteilt, gespeichert, durchsucht, analysiert und visualisiert werden können"[16]. Darunter versteht man das Prinzip des Einsatzes großer und vielfältiger Da-

[9] Siehe Bericht unter: http://www.heise.de/newsticker/meldung/Automatisierung-in-der-Landwirtschaft-Bauern-im-Melkroboter-Dilemma-3291294.html.
[10] Quelle: http://www.agrarheute.com/landundforst/news/vormarsch.
[11] Sendler, Industrie 4.0 grenzenlos, Berlin 2016, S. 17ff.
[12] Grünwald/Nüßing, Machine To Machine (M2M)-Kommunikation : Regulatorische Fragen bei der Kommunikation im Internet der Dinge, in: MMR 2015, S. 378.
[13] Siehe hierzu unter Kapitel VII, 1.
[14] Zech, "Industrie 4.0" – Rechtsrahmen für eine Datenwirtschaft im digitalen Binnenmarkt, GRUR 2015, 1151 (1152).
[15] Dorner, Big Data und Dateneigentum, CR 2014, 617.
[16] Wissenschaftlicher Dienst des Deutschen Bundestages, Nr. 37/13, abrufbar unter https://www.bundestag.de/blob/194790/c44371b1c740987a7f6fa74c06f518c8/big_data-data.pdf.

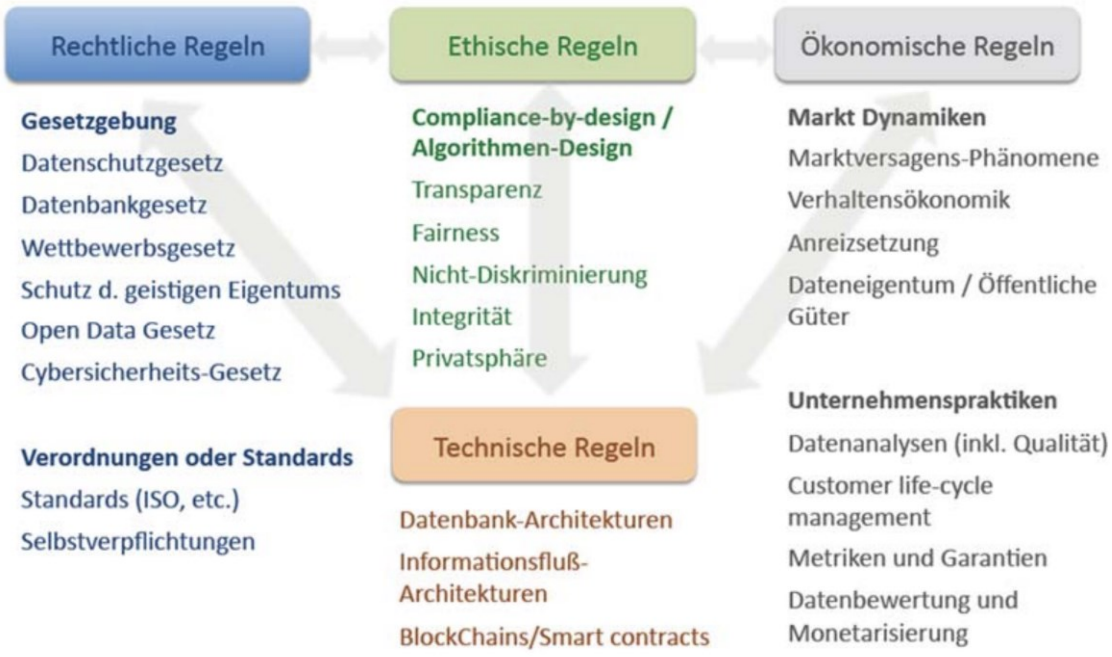
tenmengen, die typischerweise von miteinander vernetzten Maschinen generiert werden und – regelmäßig ohne konkret vorformulierte Erwartungshaltung an das Ergebnis – in Echtzeit analysiert werden.[17] Dabei werden Daten und Informationen gewonnen, die mit herkömmlichen Mitteln überhaupt nicht oder allenfalls wesentlich zeitaufwendiger erlangt werden. Die Erstellung von großen Datenbanken im Sinne eines Big Data ist somit die Grundvoraussetzung, um mit Datenanalyse und Modellierung die nächste Optimierungsgrenze aus der Sicht der Digitalen Anbieter zu erreichen.

Das verdeutlicht ein weiteres Merkmal der Digitalisierung. Die Daten aus der Landwirtschaft sind handelbare Wirtschaftsgüter geworden, die einen erheblichen kommerziellen Wert haben. "Data has become a new factor of production, an asset and in some transactions a new currency."[18]

Die Entwicklung der digitalen Landwirtschaft ist ein gesellschaftliches, staatlich gefördertes aber nicht staatlich gesteuertes Phänomen, das bereits die typischen drei Entwicklungsstufen durchlaufen hat, die für innovative Technologien charakteristisch sind: 1. Stufe: Diese Technologien sind in und von der Gesellschaft entwickelt worden (man spricht üblicherweise von Erfindungen); 2. Stufe: Sie werden gerade zur Anwendungsreife gebracht (man spricht üblicherweise von Innovationen) und 3. Stufe: Sie erweisen sich prinzipiell als marktfähig (man spricht üblicherweise von Diffusion).

III. Digitalisierung basiert auf funktionierenden Governance-Strukturen

Kommen wir daher zu zweiten Prämisse: Grundlage für die Digitalisierung ist eine entwickelte Data Governance. Data Governance umfasst alle Bedingungen und Regelungen, die die Erzeugung, Speicherung, Analyse und Nutzung von Daten bestimmen. Data Governance umfasst damit rechtliche und administrative Vorgaben, wirtschaftliche Verpflichtungen, ethische Kodizes und technische Standards.



[17] Dorner, Big Data und Dateneigentum, CR 2014, 617.
[18] Commission Staff Working Document SWD (2015) 100 final, 59.

In diesem Diagramm ist das bereits bestehende System der Data Governance erkennbar. Auf dieser Basis kann folgende Beobachtungen gemacht werden: Das System ist bisher im Wesentlichen durch Selbstregulierung geprägt. Die Märkte haben ökonomische Regeln aufgestellt, insbesondere zur Nutzung von Daten und zur Standardisierung. Darüber hinaus haben sich ethische Regeln durch den Markt entwickelt (s.u. Kapitel VIII). Für den speziellen Bereich der Agrardaten haben die Mitgliedsstaaten und die Europäische Union bisher aber keine rechtlichen Regeln erlassen. Die bestehenden gesetzlichen Regelungen beziehen sich nicht speziell auf die Landwirtschaft, sondern sind allgemeine Regeln, an die die Marktteilnehmer wie alle anderen Bürger gebunden sind. Die EU und die Mitgliedsstaaten haben bisher die bestehende, durch Selbstregulierung geprägte Grundstruktur der Governance nicht verändert und nur durch externe Anreize Einfluss auf das bestehende Governance-System genommen.

IV. Digitalisierung ist ein dynamischer Prozess

Reicht das bestehende System aus, um die entstehenden Herausforderungen zu bewältigen, oder muss es weiter entwickelt werden? Dazu sind folgende Überlegungen zu berücksichtigen:

Die Digitalisierung ist ein fortlaufender Prozess. Es gibt keine fertige Entwicklung, die es uns erlauben würde, abschließend und umfassend zu beurteilen, ob die digitale Landwirtschaft bereits ausreichend geregelt ist. Die weitere technische und wirtschaftliche Entwicklung ist nicht exakt vorhersehbar. Daher können wir auch nicht genau bestimmen, ob und wie sich die Regeln, mit denen wir die aktuelle Governance verändern, auf die digitale Landwirtschaft von morgen auswirken werden. Wir denken also über ein Governance-System nach, das auf Unsicherheit basiert. Dabei gilt es besonders sich bewußt zu machen: Jede Änderung der bestehenden Struktur darf die Entwicklung in den drei Bereichen Invention, Innovation und Diffusion nicht behindern.

Wir befinden uns in der dritten Stufe der technologischen Innovation. Dies ist die Phase der Diffusion, also der Durchdringung des freien Marktes mit Technologie. Das heißt aber nicht, dass die ersten beiden Stufen (also Invention und Innovation) bereits abgeschlossen sind. Wir haben zwar bereits marktreife Grundtechnologien zur digitalen Landwirtschaft; es entstehen aber jährliche neue Technologien, zum Teil mit grundsätzlich verschiedenen Ansätzen und Stsndards. Grundsätzlich wird der Staat in einer freien Marktwirtschaft erst dann aktiv, wenn eine Technologie wie die digitale Landwirtschaft die dritte Stufe erreicht hat. Der Staat wird also erst aktiv, wenn Produkte auf den Markt gebracht werden. Wenn der Staat regulierend eingreift, will er Rechtssicherheit für alle schaffen, das heißt, er will Verhaltens- und Erwartungssicherheit gewährleisten und damit auch die Angst vor ungewissen zukünftigen Entwicklungen reduzieren. Der Staat will Gefahren abwehren und Vorsorge treffen, d.h. er will nicht nur Garant für den Ausfall bei Fehlentwicklungen sein. Ein solches Vorsorgedenken kann jedoch die laufende Erfindung und Innovation hemmen und sogar stoppen. Die Herausforderung für das Vorsorgerecht besteht also darin, die Regelung des Neuen vorauszusetzen, bevor es überhaupt bekannt ist oder gar Realität geworden ist. Um zu entscheiden, ob der Staat eigenständig ein bestehendes Governance-System verändern oder Anreize zur Veränderung setzen soll, muss daher zunächst die Frage beantwortet werden, ob ein Handeln zwingend erforderlich ist und wie es erfolgen muss. Die folgenden drei Fragen helfen dabei, die Frage zu beantworten, ob der Staat überhaupt handeln soll:

- Welche gesellschaftlich wünschenswerten Ergebnisse sind mit der Technologie verbunden bzw. welche negativen Ergebnisse sollen verhindert werden?

- Wie groß ist die Notwendigkeit sicherzustellen, dass die gewünschten Wirkungen erreicht werden?

- Wer ist für die Veränderung der Governance-Struktur verantwortlich?

V. Erwartungen an die Digitalisierung

Die erste Frage fragt danach, was die Gesellschaft von der digitalen Landwirtschaft erwartet und ob die Erwartungen erfüllt werden.

Hier ist zu unterscheiden zwischen den Erwartungen der Gesellschaft, die bereits gesetzlich definiert sind, und den Erwartungen der Gesellschaft, die empirisch ermittelt werden müssen.

1. Normative Erwartungen

Das heutige Recht dokumentiert eindeutig die Erwartungen der Gesellschaft an eine neue Technologie. Die erste Priorität der Gesellschaft ist die Einhaltung des Grundgesetzes. Die digitale Landwirtschaft muss die Grundrechte respektieren. Dazu gehört das Grundrecht auf Datenschutz, wie es in den Verfassungen der Mitgliedsstaaten und in der Charta der Grundrechte der Europäischen Union niedergelegt ist. In Bezug auf landwirtschaftliche Daten müssen wir feststellen, dass die üblichen Erwartungen der Gesellschaft an den Datenschutz bisher ausschließlich auf personenbezogene Daten beschränkt sind. Landwirtschaftliche Daten sind vom Grundrecht auf Datenschutz nicht erfasst.

Ein weiterer Bereich der verfassungsrechtlich normierten Erwartungen der Gesellschaft sind die Rechte am geistigen Eigentum. Geistiges Eigentum ist eine Kategorie von Eigentum, die immaterielle Schöpfungen des menschlichen Geistes umfasst. Dazu gehören auch Daten, die auf der Grundlage einer analytischen Auswertung von Grunddaten gewonnen werden. So ist z.B. die Menge des benötigten Pflanzenschutzmittels das Ergebnis einer Analyse verschiedener Grunddaten wie Pflanzenart, Bodenqualität, Niederschlag, Wind und Temperatur. Das Ergebnis der Analyse muss also rechtlich geschützt werden. Die Grunddaten selbst sind jedoch nicht als geistiges Eigentum geschützt. Auch sind die Grunddaten nicht durch Eigentumsrechte geschützt. Der Schutz der Nutzung von Betriebsgrunddaten ist also noch nicht normativ festgelegt und der Staat ist nicht verpflichtet, sie zu schützen. Dennoch müssen andere Verfassungswerte, die wiederum gesellschaftliche Erwartungen widerspiegeln, rechtlich berücksichtigt werden. Dazu gehört die öffentliche Sicherheit. Governance-Strukturen müssen daher Regelungen zur Cybersicherheit enthalten. Zu den verfassungsrechtlichen Werten gehört auch die Wahrung des Marktgleichgewichts, da dies eine unabdingbare Voraussetzung für eine freie Marktwirtschaft ist. Das Governance-System muss daher auch Regelungen zur Bekämpfung von Marktungleichgewichten enthalten. Solche Marktungleichgewichte können im Bereich der digitalen Landwirtschaft entstehen, weil die Positionen der Akteure auf dem Markt der digitalen Landwirtschaft hinsichtlich der Machtkonstellationen asymmetrisch sind. Dieses Marktungleichgewicht ist strukturell in der Beziehung zwischen Landwirten und Landmaschinenunternehmen bzw. IT-Betreibern angelegt.

2. Gesellschaftliche Erwartungen

Wo es keine verfassungsrechtliche Grundlage für gesellschaftliche Erwartungen an die digitale Landwirtschaft gibt, muss die empirische Wissenschaft oder die Politik diese Erwartungen definieren. Dazu

gehören insbesondere die folgenden Fragen: Soll der Zugang zur digitalen Landwirtschaft z.B. durch finanzielle Anreize gefördert werden, soll die Wissenschaft durch freien Zugang zu den Daten gefördert werden, soll die Landwirtschaft ökologischer werden, indem die Daten an Umweltbehörden weitergegeben werden, sollen kleine und mittlere Betriebe durch besondere Regelungen geschützt werden, soll der Zugang zu den Technologien und Daten für Menschen im Globalen Süden geöffnet werden? Die Antworten auf diese Fragen sind nicht rechtlich festgelegt, sondern werden allein durch gesellschaftliche oder politische Erwägungen bestimmt.

VI. Verantwortliche der Agrar-Data-Governance

Hat man die Frage beantwortet, welche gesellschaftlichen oder politischen Erwartungen eine Modifikation des Governance-Systems erfordern, stellt sich die Frage, ob die neuen Governance-Regelungen in eine gesetzliche Regelung aufgenommen oder vertraglichen Vereinbarungen überlassen werden sollten oder durch rechtlich unverbindliche Formen der Selbstregulierung abgedeckt werden könnten. Eine Pflicht zur gesetzlichen Regelung ergibt sich nur aus dem Verfassungsrecht. Gleiches gilt für jede Regelung, die dem Schutz von Grundrechten dient, oder für jede Regelung, die einen Verfassungswert verkörpert, sei es die Cybersicherheit, der Schutz des Marktgleichgewichts, die Erhaltung der Agrarstrukturen oder die Ernährungssicherheit. Ob die Regelungen zur Nutzung von Betriebsdaten in ein Gesetz aufgenommen werden oder der Selbstregulierung überlassen werden, liegt jedoch im Ermessen der Verantwortlichen. Dies gilt auch für Fragen der Haftung bei der Nutzung von Daten.

In einzelnen Bereichen ist also eine verbindliche Regelung zwingend erforderlich. Verbindlichkeit kann auch durch nicht-legislative Instrumente erreicht werden. Man wird sogar sagen müssen: In einer freien Marktwirtschaft sollten Effektivität, Effizienz, Akzeptanz oder Umsetzbarkeit vorrangig durch nicht-legislative Instrumente erreicht werden. Insbesondere die Selbstregulierung durch den Markt in Form von vertraglichen Vereinbarungen muss daher die Regel sein. Dies können Nutzungsrechte, Standardisierung oder Interessenausgleiche bei der Haftung sein. Die Rolle der Mitgliedstaaten bzw. der EU reduziert sich in einem solchen Szenario auf den Schutz des Rahmens für die Selbstregulierung. Die Governance-Forschung spricht vom "Schatten der Hierarchie"[19] als einem staatlichen Handeln, das ohne hierarchische Formen der sozialen Handlungskoordination auskommt und auf der Kooperation öffentlicher und privater Akteure in formalisierten Verhandlungssystemen oder informellen Netzwerken beruht. Die wichtigste Rahmenbedingung ist das Vorhandensein eines ausreichenden Marktgleichgewichts. Nur in den Ausnahmefällen, in denen Grundrechte berührt werden oder Verfassungswerte wie die öffentliche Sicherheit betroffen sind, sind die EU oder die Mitgliedstaaten verpflichtet, verbindliche gesetzliche Regelungen zu erlassen.

Zusammenfassend lässt sich sagen, dass das Governance-System der digitalen Landwirtschaft weitgehend tatsächlich durch Selbstregulierung geprägt ist und dieser hohe Grad der Selbstregulierung als ausreichend angesehen wird. Der Staat muss die Governance-Strukturen nur dann ändern, wenn Grundrechte oder Verfassungswerte bedroht sind. Der Staat kann diese Strukturen aber auch verändern, wenn das System der Selbstregulierung versagt, indem es die gesellschaftlichen Erwartungen nicht ausreichend adressiert. So ist es beispielsweise denkbar, dass der Staat die Erwartungen der

[19] Börzel, Der "Schatten der Hierarchie" — Ein Governance-Paradox?, in: Schuppert / Zürn M. (Hrsg) Governance in einer sich wandelnden Welt, 2008, S. 118.

Landwirte an die Nutzung ihrer Daten als Eigentum realisiert und ein neues Recht auf Eigentum an landwirtschaftlichen Daten schafft.

Allerdings muss jede Veränderung der Governance-Struktur daraufhin geprüft werden, ob sie innovationsfreundlich ist. Ein staatliches Handeln ist dann innovationsfreundlich, wenn es die bestehenden Spielräume für die Marktteilnehmer weitestgehend bewahrt. Daher sollten vernetzte Regelungen Vorrang vor hierarchischen Ansätzen haben. Insbesondere sollte sich der Staat bewusst sein, wie effizient alternative Formen der Regulierung sind. Dazu gehören die Vorgabe von Modellen zur Selbstregulierung (z.B. vertragsbasierte Modelle), aber auch Verhaltensanreize. Auch hier ist wieder zu bedenken, dass der Staat in ein dynamisches System eingebunden ist, dessen Entwicklung er nicht vorhersehen kann. Der Staat kann daher auch die Rechtsfolgen seiner Regelungen nicht genau festlegen. Daher müssen die erzielten Veränderungen des Systems regelmäßig evaluiert werden. Um Unsicherheiten zu reduzieren, ist der Staat verpflichtet, alle betroffenen wissenschaftlichen Disziplinen in die Entwicklung von Governance-Regelungen einzubeziehen. Schließlich sollten vorhandene Erfahrungen aus anderen Governance-Systemen genutzt werden, um die bestehenden Unsicherheiten weiter zu reduzieren. Auf diese Weise ist es möglich, einen dynamischen Governance-Rahmen weiterzuentwickeln, der die kreative Kraft der Gesellschaft nicht hemmt, sondern die Erfindung, Innovation und Verbreitung der digitalen Landwirtschaft fördert.

VII. Überwindung des fehlenden Vertrauens

Eine zentrale Hürde der Digitalisierung der Landwirtschaft ist derzeit das Fehlen von Vertrauen der Landwirte. Nur wenn die Landwirte bereit sind, ihre Daten mit anderen Interessengruppen zu teilen, beispielsweise mit den Agrarunternehmen, die die digitalen Landwirtschaftstechnologien entwickeln, kann die Marktfähigkeit jenseits von finanziellen Anreizen wie das Investitionsprogramm Landwirtschaft (die sog. Bauernmilliarde)[20] erreicht werden. Empirische Untersuchen in den Vereinigten Staaten, Australien und Europa haben jedoch ergeben, Landwirte nur beschränkt bereit sind, dies zu tun[21].

1. Ursachen des fehlenden Vertrauens

Landwirte misstrauen den Agrarunternehmen häufig, da die Unternehmen ihre Daten für den Aufbau anderer Unternehmen und Dienstleistungen wiederverwenden und den Landwirt dabei ausschliessen könnten, so dass dieser nicht in der Lage ist, an den Vorteilen teilzuhaben.[22] Alternativ können Agrarunternehmen die erworbenen Betriebsdaten verwenden, um Entscheidungen an der Börse zu beeinflussen, um Profile der Landwirte zu erstellen und diese Profile an Dritte zu verkaufen, beispielsweise an Unternehmen, die an den Präferenzen der Landwirte interessiert sind oder an andere

[20] https://www.lwk-niedersachsen.de/index.cfm/portal/58/nav/2144/article/36725.html
[21] Nachweise bei van der Burg/Wiseman/Krkeljas, Trust in farm data sharing: reflections on the EU code of conduct for agricultural data sharing, in Ethics and Information Technology 2020, https://doi.org/10.1007/s10676-020-09543-1
[22] Hierzu und im Folgenden van der Burg/Wiseman/Krkeljas, Trust in farm data sharing: reflections on the EU code of conduct for agricultural data sharing, in Ethics and Information Technology 2020, https://doi.org/10.1007/s10676-020-09543-1

Interessengruppen wie Forscher, Regierungen, NGOs, Banken, Versicherungsunternehmen usw. Empirische Untersuchungen zu den Ursachen sind relativ jung[23]. Dabei tritt ein vielschichtiges Mosaik von Ursachen zu Tage.

1. Der Datenschutz, da landwirtschaftliche Betriebe private Unternehmen sind und daher die Landwirte die Kontrolle über die Daten erhalten wollen, die Informationen über ihre landwirtschaftlichen Betriebe enthalten[24]

2. Das Dateneigentum und damit die Frage, wer der Eigentümer der Daten ist und wer daher das Recht hat, den Wert der Daten zu nutzen und davon zu profitieren[25]

3. Ein Unbehagen der Landwirte über den Datenaustausch als Reaktion auf die Verschiebung der Machtverhältnisse, die die digitalen Technologien im sozialen Netzwerk der landwirtschaftlichen Betriebe verursachen und damit die Frage nach einer fairen und gerechten Verteilung der Leistungen auf und Verantwortlichkeiten innerhalb dieses Netzwerks[26].

2. Private/verbandliche Initiativen

Da das gesetzte Recht bislang weder klare und sorgfältig ausgearbeitete Regelungen für den angemessenen Umgang mit den ethischen, rechtlichen und sozialen Auswirkungen digitaler Agrartechnologien auf landwirtschaftliche Unternehmen und Beziehungen entwickelt hat noch konnte (s.o.). haben Interessengruppen (Landwirte, ihre Interessenverbände und Agrarunternehmen aus dem Bereich der digitalen Landwirtschaftstechnologien) ihre eigenen Richtlinien entwickelt, um die Praktiken des agrarischen Datenmanagements zu verbessern und eine Vertrauensbasis zu schaffen. Diese Richtlinien sind weltweit in verschiedenen Verhaltenskodizes über die Grundsätze zum Schutz der Privatsphäre und der Sicherheit in der Landwirtschaft sowie Verhaltenskodizes für Daten zusammengestellt worden. So wurden bereits im Jahr 2014 in den USA die Datenschutz- und Sicherheitsgrundsätze des American Farm Bureau für Farmdaten[27] niedergeschrieben Im Anschluss an diese Initiative wurde 2014 der neuseeländische Verhaltenskodex für landwirtschaftliche Daten entwickelt[28]. 2019 wurde der EU-Verhaltenskodex für den Austausch landwirtschaftlicher Daten im Rahmen einer vertraglichen Vereinbarung

[23] Wiseman/Sanderson/Lachlan Robb, Rethinking ag data ownership. Farm Policy Journal 2018, 15(1), S. 71–77; Janzen, Data ownership questions—And why they're important. Future Farming, 3 October. Retrieved October 20, 2019, https://www.futurefarming.com/Tools-data/Articles/2018/10/Data-ownership-questions--and-why-theyre-important-340743E/; Schuster, Big data ethics and the digital age of agriculture. Resource, 24 (2017), S. 20f.

[24] Sykuta, Big data in agriculture: Privacy, property rights and competition in ag Data Services. International Food and Agribusiness Management Review, 19 (2016), S. 57–74.

[25] De Beer, Ownership of open data: Governance options for agriculture and nutrition, 2016; Poppe/ Bogaardt/Wal, The economics and governance of digitalisation and precision agriculture. Briefing paper 4. Precision agriculture and the future of farming in Europe. Technical horizon scan. Brussels 2016.

[26] Van der Burg/Bogaardt/Wolfert, Ethics of smart farming: current questions and directions for responsible innovation towards the future. NJAS Wageningen Journal of Life Sciences (2019). https://doi.org/10.1016/j.njas.2019.01.001; Rodriguez/de Voil, / Rufno, / Odendo/ van Wijk, M. T., To mulch or to munch? Big modelling of big data. Agricultural Systems, 153 (2017), S. 32–42.

[27] Privacy and Security Principles for Farm Data 2021, abrufbar unter https://www.fb.org/issues/innovation/data-privacy/privacy-and-security-principles-for-farm-data

[28] New Zealand Farm Data Code of Practice, abrufbar unter https://www.farmdatacode.org.nz/#:~:text=The%20Farm%20Data%20Code%20of,and%20data%20storage%20and%20security.

(im Folgenden als EU-Kodex bezeichnet) entwickelt und eingeführt[29]. Als vorläufig letztes Dokument findet sich im Jahr 2020 Australian Farm Data Code der National Farmers Federation[30].

Wir wollen uns im Folgenden mit dem EU-Kodex auseinandersetzen:

VIII. EU - Code of conduct on agricultural data sharing by contractual agreement

1. Rechtsnatur

Dieser Verhaltenskodex wurde 2018 gemeinsam von CEETTAR, CEJA, CEMA, COPA-COGECA, ECPA, EFFAB, ESA, FEFAC und Fertilizers Europa entwickelt und 2019 von Animalhealth Europe und CLIMMAR unterstützt.

Damit wird bereits die Rechtsnatur dieses Codex deutlich. Es handelt sich um ein Dokument eines Sektors der Landwirtschaft. Er entfaltet weder eine verbindliche Wirkung für Dritte noch soll er für die Beteiligten eine Selbstverpflichtung begründen. Vielmehr als ein Kodex handelt es sich dabei um unverbindliche Leitlinien, die den nationalen Vertragsmodellen zugrundegelegt werden sollen[31].

2. Vertragsrecht als Gegenstand

Der Kodex hat die vertraglichen Beziehungen zum Gegenstand und gibt, wie dargelegt, Leitlinien für die vertragliche Verwendung landwirtschaftlicher Daten, insbesondere das Recht auf Zugang und Nutzung der Daten. Darin wird anerkannt, dass es notwendig ist, dem Datengenerierer (demjenigen, der die Daten entweder mit technischen Mitteln oder selbst erstellt bzw. gesammelt hat oder der Datenanbieter zu diesem Zweck beauftragt hat) eine führende Rolle bei der Kontrolle des Zugangs zu und der Nutzung von Daten aus seinem Unternehmen einzuräumen und von der Weitergabe der Daten an alle Partner zu profitieren, die ihre Daten verwenden möchten.

Die Unterzeichner des Kodex sind der Ansicht, dass für Landwirte/innen der Zugang zu genauen landwirtschaftlichen Daten für die Entwicklung der digitalen Landwirtschaft unerlässlich ist, damit Landwirte/innen und Genossenschaften mit weniger Ressourcen mehr produzieren können. Um die Vorteile der digitalen Landwirtschaft voll ausschöpfen zu können, muss der Datenaustausch zwischen verschiedenen Partnern der Agrar- und Lebensmittelkette fair und transparent gestaltet werden. Dabei wird die Vielfalt der zu unterscheidenden Akteure im Bereich der digitalen Landwirtschaft deutlich:

Das Dokument orientiert sich weitgehend am Datenschutzstandard, den die DSGVO vorgegeben hat, zum Teil weicht es aber erheblich hierfür zugunsten des Landwirts/in ab. Ausgangspunkt ist ganz im Sinne des Datenschutzrechts, dass eine ausdrückliche und bestimmte Vereinbarungen zwischen den Beteiligten erforderlich sein soll, die eine Datennutzung ermöglicht.

Personen- und betriebsbezogener Daten dürfen ohne Zustimmung nicht erhoben werden. Hier ist der Umstand bemerkenswert, dass beide Dateitypen trotz unterschiedlicher rechtlicher Schutzregime

[29] EU - Code of conduct on agricultural data sharing by contractual agreemen, abrufbar unter http://www.fao.org/family-farming/detail/en/c/1370911/
[30] Australian Farm Data Code, abrufbar unter https://nff.org.au/programs/australian-farm-data-code/
[31] Härtel spricht auch zutreffend von einer Branchenempfehlung, Härtel, Agrarrecht 4.0, in: Frenz (Hrsg.), Handbuch Industrie 4.0, Berlin 2020, S. 144.

gleichgesetzt werden. Hinsichtlich des Schutzmaßstabs ist zunächst festzustellen, dass im Rahmen der digitalisierten Landwirtschaft ein Potpourri an Daten verarbeitet wird: Von den persönlichen Daten des Betriebsinhaber über Angaben über den Betrieb, die Bewirtschaftung, Ernteerträge bis hin zu klimatischen Angaben oder Angaben zur Bodenqualität.

Der deutsche Gesetzgeber hat sich im Gegensatz zu anderen Vorbildern[32] entschieden, juristische Personen und Personenmehrheiten aus dem Anwendungsbereich des BDSG auszunehmen. Im Grunde verwirklichen damit die bundesdeutschen Regelungen im BDSG den Grundrechtsbezug der Datenschutzregelungen, da sie als Ausprägung der Menschenwürde das Persönlichkeitsrecht eines natürlichen Menschen voraussetzen[33].

Die Datenschutzregelungen des Bundes und der DSGVO gelten daher zunächst nur für personenbezogenen Daten. Bei den unternehmensbezogenen Daten kann man zwischen Sach- und Geodaten unterscheiden. Unter Sachdaten sind Angaben zu verstehen, die sich auf einen Sachverhalt oder ein Ereignis der Außenwelt, jedoch nicht unmittelbar auf eine natürliche Person beziehen[34]. Geodaten sind digitale Informationen, deren räumliche Lage auf der Erdoberfläche ausgewiesen ist (Lokalisierungsdaten, etwa GPS-Koordinaten) sowie raumbezogene beschreibende oder abbildende Daten[35]. Dazu gehören etwa Angaben zu Bebauung, Nutzung, Klima, Topographie, Versorgung mit öffentlichen Einrichtungen, statistische Angaben zum Bevölkerungsaufbau, sozio-ökonomische Kennziffern, Luftaufnahmen, Straßenfrontbilder (Geofachinformationen). Raumbezogene Informationen können zwar auch in vielfältigen Beziehungen zu zahlreichen Personen gesehen werden.

Werden Sachdaten oder Geodaten ohne Verknüpfung mit Daten verarbeitet, die der Identifikation von Personen dienen, so sind sie grundsätzlich nicht als personenbezogene Daten anzusehen. Der Grund liegt darin, dass eine exklusive Zuordnung zu einer Einzelperson, wie das informationelle Selbstbestimmungsrecht voraussetzt, bei Sachdaten typischerweise nicht besteht. Sachen stehen vielmehr in Beziehung zu vielen Personen und verändern sich im Zeitablauf. Bei ihrem vollen Einbezug in den Anwendungsbereich des BDSG wäre dieses Schutzsystem nicht mehr praktikabel, weil meist die Rechte mehrerer oder vieler Berechtigter zu beachten wären. Isoliert verarbeitete Sachdaten sind somit keine personenbezogenen Daten[36].

Geodaten, d.h. die Erdoberfläche, ihr öffentlich zugängliches Aussehen und die einzelnen Bereichen zugewiesenen physikalischen oder sozio-ökonomischen Kennwerte sind typische soziale Gegebenheiten und daher nicht als personenbezogen einzustufen. Auch Geodaten können jedoch Personenbezug erhalten, wenn sie im Kontext mit Angelegenheiten bestimmter einzelner Personen verarbeitet werden.

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[32] Stancke, Grundlagen des Unternehmensdatenschutzrechts – gesetzlicher und vertraglicher Schutz unternehmensbezogener Daten im privaten Wirtschaftsverkehr, „BB“ 2013, 1418, (1419).

[33] Vgl. BVerfG, Urteil v. 15.12.1983 – BvR 209/83, 1 BvR 484/83, 1 BvR 440/83, 1 BvR 420/83, 1 BvR 362/83, 1 BvR 269/83 = BVerfGE 65, 1 – Volkszählung.

[34] Die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit, Datenschutz-Wiki, Kommentare und Erläuterungen zu § 3 Abs. 1; https://www.bfdi.bund.de/bfdi_wiki/

[35] Ebd.

[36] H. Schild in: H. Wolff/S. Brink (Hrsg.), Datenschutzrecht in Bund und Ländern, München 2013, BDSG, § 3 Rn. 23.

Die Abgrenzung ist damit schwierig, wenn die von einer Person erhaltenen Daten nur indirekt Rückschlüsse auf ihre Identität ermöglichen. Das BDSG und die frühere Richtlinie 95/46/EG (EU-Datenschutzrichtlinie) thematisieren dieses Abgrenzungsproblem nicht. Im Schrifttum und in der Praxis werden unterschiedliche Positionen eingenommen.

Folgt man der Theorie vom "absoluten" Datenbegriff reicht es aus, wenn es objektiv möglich ist, mithilfe eines Datums eine konkrete Person zu bestimmen, auch wenn dazu die nutzende Person bzw. das nutzende Unternehmen Informationen von Dritten benötigt[37]. Das gilt unabhängig davon, ob es wahrscheinlich ist, dass eine solche Mitwirkung jemals erfolgt.

Die Theorie vom "relativen" Datenbegriff knüpft die Kategorisierung der Daten als personen- oder unternehmensbezogen an die Frage, inwieweit die konkrete datenverarbeitende Stelle selbst die Möglichkeit hat, eine bestimmte Person zu ermitteln. Informationen von außerhalb sind hiernach nicht relevant[38].

Bei der digitalisierten Landwirtschaft ist zu berücksichtigen, dass bei den Dienstleistungserbringern nicht einzelne Daten, sondern große Datenmengen in Datenbanken gesammelt werden. Kraftfahrzeuge, Fuhrpark und Lager produzieren Daten, die man ohne weiteres mit den Landwirten in Verbindung bringen. Sie geben Aufschluss über die Bewirtschaftungsform des Landwirts, die zurückgelegten Entfernungen und das Bedienverhalten des Anlagennutzers[39]. Wenn der Dienstleistungserbringer durch die Verknüpfung personen- und sachbezogener Daten die Identität einer konkreten Person bestimmen kann, liegt nach beiden Theorien ein Personenbezug vor, mit der Folge, dass die datenschutzrechtlichen Anforderungen einzuhalten sind. Grundsätzlich ist damit davon auszugehen, dass es sich im Zweifel bei den Daten des Datenbankbetreibers um personenbezogene Daten handelt. Nur soweit die Daten nachweislich bereits vor deren Weiterverarbeitung anonymisiert wurden, handelt es sich weiterhin um "nur" unternehmensbezogene Daten.

Ohne Zustimmung sollen Daten konsequenterweise nur als anonyme Daten verwendbar sein. Bereits dieses ermöglicht jedoch eine zumindest für wissenschaftliche Zwecke verwertbare Veröffentlichung der Daten. Die Datennutzung muss des Weiteren vom Grundsatz der Zweckbindung der Daten geprägt sein. Im Datenschutzrecht gilt der Grundsatz der Zweckbindung, d.h. Daten dürfen nur für den Zweck verarbeitet werden, für den sie erhoben wurden. Der Betroffene ist bei der Erhebung seiner Daten über die Zweckbestimmungen der Erhebung, Verarbeitung und Nutzung der Daten zu informieren. Werden die Daten für die Erfüllung eigener Geschäftszwecke, d.h. im Zusammenhang mit der Abwicklung von Verträgen oder der Pflege von Kundenkontakten, verwendet, ist eine nachträgliche Änderung des Zwecks zulässig. Die Zweckänderung ist dabei beim Vorliegen berechtigter Interessen des Verarbeitenden, eines Dritten oder der Öffentlichkeit zulässig. Für die Datensammlung im Rahmen der digitalisierten Landwirtschaft ist von besonderer Bedeutung, dass ein generelles zweckfreies Vorhalten von Daten unzulässig ist. Die datenverarbeitende Stelle ist trotzdem verpflichtet, einen bestimmten Zweck für das Vorhalten von Daten festzulegen.

[37] H. Schild in: H. Wolff/S. Brink (Fn. 46), BDSG, § 3 Rn. 17 ff.; U. Dammann in: S. Simitis (Hrsg.), BDSG, 7. Auflage, Baden-Baden 2011, § 3 Rn. 20 ff.
[38] Ebd.
[39] http://www.cr-online.de/blog/2016/02/17/acht-thesen-zum-dateneigentum/.

Ein besonderes Augenmerk gilt dabei der Frage der Weiterleitung von Daten an Dritte, insbesondere an Behörden. Wenn im Rahmen der digitalisierten Landwirtschaft Betriebsdaten erhoben und gesammelt werden, so löst dieses nicht nur Begehrlichkeiten bei Unternehmen aus, sondern auch bei Behörden und Verbänden. So besteht an der Analyse der Daten über die Verwendung von Düngemittel ein unmittelbares öffentliches Interesse. Die Behörde kann mit dem Datenbankbetreiber einen Zugang zu diesen Informationen vereinbaren, wenn der Landwirt die Zweckbindung und die Nutzungsrechte nicht ausreichend präzisiert. Ist dieses unterbunden, ist ein abstraktes Abrufrecht der Umweltbehörden – vergleichbar zu denen im Finanzbereich – nur aufgrund einer gesetzlichen Ermächtigung zulässig. Hier soll der Grundsatz greifen, dass die Weiterleitung von Daten an Dritte von einem Zustimmungserfordernis des Betroffenen abhängig ist.

Digitalisierte Landwirtschaft beruht auf einer weitgehend automatischen Analyse von Daten. Grundsätzlich sieht § 54 BDSG vor, dass Entscheidungen, die für den Betroffenen eine rechtliche Folge nach sich ziehen oder ihn erheblich beeinträchtigen, nicht ausschließlich auf eine automatisierte Verarbeitung personenbezogener Daten gestützt werden dürfen, die der Bewertung einzelner Persönlichkeitsmerkmale dienen. Ausnahmsweise dürfen automatisierte Entscheidungen jedoch dann herangezogen werden, wenn die Entscheidung im Rahmen eines Vertrags- oder anderen Rechtsverhältnisses zu treffen ist und zugunsten des Betroffenen ergeht; oder die Wahrung der Interessen des Betroffenen anderweitig gewährleistet ist.

Der Datenerheber soll des Weiteren ein jederzeitiges und unbeschränktes Zugriffsrecht haben. Damit wird ein bislang vertraglich in den AGBs der Landtechnikunternehmen zu findendes Exklusivrecht des Serviceanbieters abgelehnt. Der Landwirt/in soll schließlich ein einseitiges Kündigungs- und Löschungsrecht haben.

Der Kodex lässt indes zahlreiche Fragen offen. Sicherlich bedingt durch den weiten Anwendungsbereich, der sämtliche EU-Mitgliedstaaten mit unterschiedlichen zivilrechtlichen Regelungssystemen umfasst, wird der Vertragstyp einer derartigen Nutzungsvereinbarung nicht näher festgelegt. Hier sind verschiedene Typen denkbar, vom Kauf- über den Dienst- und Werkvertrag bis hin zum Auftrag. Der Kodex orientiert sich darüber hinaus strikt juristisch am bipolaren Verhältnis zwischen Datenerheber und dem Landtechnikunternehmen als Datenverarbeiter. Der Datennutzer als Dritter wird indes nicht einbezogen. Auch wird nicht geklärt wie die Datenzuordnung bei gemeinsamer Nutzung von Landtechnik erfolgen soll. Damit zusammenhängend bleibt die Nutzungsberechtigung bei Datenbanken oder bei neu generierten Daten auf der Grundlage der landwirtschaftlich erhobenen Daten offen. Schließlich bleibt der Umgang mit öffentlichen Daten offen.

IX. Ausblick

Der Governance-Rahmen beruht derzeit zu Recht auf dem Prinzip der Selbstregulierung des Marktes. Die damit einhergehende Flexibilität ist weiterhin solange erforderlich, wie sich der Prozess der Digitalisierung nicht stabilisiert hat, in dem sich auf dem Markt leistungsfähige Prozesse und Standards durchgesetzt haben. Mit dem Fortgang des Stabilisierungsprozesses werden Korrekturen erforderlich sein, die wiederum zunächst im "Schatten der Hierarchie" umgesetzt, ggf. aber ein staatliches Handeln erfordern werden. Inwiefern hier spezifisch agrardigitale Rechtsregelungen geschaffen werden müssen oder ob sich die parallel entwickelnden Lösungen für den Industriesektor bzw. für die digitale Gesellschaft ausreichen werden, wird sich zeigen müssen. Es mag aber gleichwohl die Prognose erlaubt

sein, dass jenseites der technischen Standardisierungsnormen insbesondere im Kartellrecht aufgrund des strukturellen Ungleichgewichts der Akteure im Agrarsektor möglicherweise derart agrardigital-spezifische Regelungen erforderlich werden könnten.

Saving the world under agricultural law or overtaxing it? – On the methodology of integrating non-agricultural claims into European agricultural law[1]

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Abstract

Au fil de son évolution, la politique agricole commune a été confrontée, à partir de l'organisation des marchés agricoles, à de nombreuses matières différentes et non agricoles. Il a fallu faire face aux exigences de la protection de l'environnement, de la politique structurelle et sociale, du bien-être animal, de la politique énergétique ou de la protection du climat. Aujourd'hui, on observe trois méthodes différentes, à savoir la séparation, la combinaison et l'intégration, qui permettent d'organiser juridiquement la relation entre le droit agricole et les matières juridiques non agricoles. Une analyse finale montre les limites de ce qui est réalisable.

Die Gemeinsame Agrarpolitik wurde im Lauf der Entwicklung von der Ordnung der Agrarmärkte aus mit vielen unterschiedlichen und außerlandwirtschaftlichen Materien konfrontiert. So galt es sich den Anforderungen von Umweltschutz, Struktur- und Sozialpolitik, Tierwohl, Energiepolitik oder Klimaschutz zu stellen. Heute lassen sich mit Trennung, Verknüpfung und Integration drei unterschiedliche Methoden beobachten, mit denen die Beziehung zwischen Agrarrecht und agrarfremder Rechtsmaterie juristisch gestaltet wird. Eine abschließende Analyse zeigt die Grenzen des Machbaren auf.

1. Introdction

As is well known, European agricultural law is based on Articles 38 to 44 TFEU and thus has an open and relatively lean mandate for action. The five classical objectives mentioned in Article 39 TFEU – increasing productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, assuring supplies, supplying consumers at reasonable prices – are to be pursued by means of one of the three instruments provided by Article 40 (1) TFEU. These are common competition rules, compulsory coordination of the various national market organisations and a European market organisation. Option 3 was chosen early on, as only a European market organisation at the beginning of the Common Agricultural Policy (CAP) was considered to be sufficiently suitable to achieve the objectives, and in particular to remedy the shortages after the Second World War.

On this basis, European agricultural law was subsequently developed, a body of law which is probably unparalleled within European law in terms of scope and level of detail[2]. In the process, the thematic basis was continuously expanded, whereby on the one hand the agricultural policy agenda itself was continually developed, and on the other hand other policies were integrated to a greater or lesser extent. This article first attempts to outline the most important of these expansions (Chapter 2) and

[1] Revised and translated version of R. Norer, *Agrarrechtliche Weltenrettung oder Überforderung? Von der Methodik der Integration außerlandwirtschaftlicher Ansprüche ins europäische Agrarrecht*, Festschrift for Roman Budzinowski, Przegląd Prawa Rolnego 2/2021, pp. 349 ff.
[2] J. Schwarze, *Europäisches Verwaltungsrecht,* 2nd edition, Baden-Baden 2005, p. 380.

then to systematise (Chapter 3) and analyse (Chapter 4) the instruments used to address these new issues.

2. Extensions

Compared to the initial situation at the time of the Stresa Conference of July 1958, which was in accordance with the mandate of ex-Art. 43 (1) of the EEC Treaty[3], the current thematic breadth may be surprising. Nevertheless, it was not without reason that the primary legislation was conceived as a framework regulation, in order to allow sufficient leeway for the concrete political design depending on the branches and forms of business, geographical regions and countries, topics and times.[4] This primary law control deficit has hardly had a negative effect and has only made possible the transformations described here.

2.1 Market regulation

The actual legal start of the CAP dates back to 1962 with the first regulations for the gradual establishment of the common market organisations (CMOs)[5] , which could be concluded for most products by 1970.[6] These regulations presented themselves exclusively as being of a genuine agrarian legal character, comprising in particular price and trade regulations, intervention measures, import licences and refunds, plus the basic rules for financing the CAP. No more and no less.

The further development of this core component of European agricultural law was then marked by the undesirable developments of the 1980s and early 1990s, which manifested themselves in surplus production (the proverbial milk lakes and butter mountains) and the associated extreme financial burdens. It was not until the 1992 CAP reform (MacSharry reform), which is still groundbreaking today[7], with its move away from price guarantees towards direct area and yield-oriented income subsidies, that the economic instruments were sustainably transformed.

After the continuation within the framework of "Agenda 2000"[8], the 2003 reform (Fischler reform)[9] was able to take a further radical step with the introduction of the production-independent single farm

[3] Cf. R. Norer, *Die Zukunft der Gemeinsamen Agrarpolitik: Europarechtlicher Trendsetter oder Expertenhochburg?* , in: R. Norer, G. Holzer (eds.), Agrarrecht Jahrbuch 2020, Vienna 2020, p. 217; O. Gottsmann, Art. 43 EWGV para. 2, in: H. von der Groeben, H. von Boeckh, J. Thiesing, C.D. Ehlermann (eds.), Kommentar zum EWG-Vertrag, 3rd edition, Baden-Baden 1983.

[4] See R. Norer, Art. 38 TFEU para. 4, in: M. Pechstein, C. Nowak, U. Häde (eds.), Frankfurter Kommentar EUV, GRC und AEUV, Vol. II, Tübingen 2017, with further references.

[5] In addition, Regulation (EEC) No. 25/1962 on the financing of the common agricultural policy, OJ 1962, No. 30/991; Regulation (EEC) No. 26/1962 applying certain rules of competition to production of and trade in agricultural products, OJ 1962, No. 30/993.

[6] E.g. Regulation No 120/67/EEC on the common organisation of the market in cereals, OJ 1967, L 117/2269; Regulation No 121/67/EEC on the common organisation of the market in pigmeat, OJ 1967, L 117/2283; Regulation (EEC) No 805/68 on the common organisation of the market in beef and veal, OJ 1968, L 121/67. Also Regulation (EEC) No 729/70 on the financing of the common agricultural policy, OJ 1970, L 94/13.

[7] Regulations (EEC) No. 1765/92 and 1766/92, OJ 1992, L 181/12 ff; Regulation (EEC) No. 2066/92-2080/92, OJ 1992, L 215/49 ff.

[8] Regulation (EC) No 1251/1999-1259/1999, OJ 1999 L 160/1 et seq.; Regulation (EC) No 1493/1999, OJ 1999 L 179/1.

[9] Regulation (EC) No 1782/2003-1788/2003, OJ 2003 L 270/1 et seq.; Implementing Regulation (EC) No 795/2004 and 796/2004, OJ 2004 L 141/1 et seq.

payment, whereby in retrospect this reform stage presents itself as Janus-faced: on the one hand as a further development of the reform steps introduced in 1992, on the other hand as a system break due to the fundamental decoupling of direct payments[10].

The 2013 reform[11] finally abandoned the allocation of payment entitlements based on historical reference values and replaced it with the basic payment scheme. Subsequently, the expiry of milk quotas in 2015 and sugar quotas in 2017 led to the abandonment of decades of central agricultural regulatory systems, followed by the appearance of new safeguard clauses and the extension of the recognition of producer organisations and interbranch organisations to all sectors on the agricultural legal stage.

2.2 Environmental protection

Despite various earlier developments[12], aspects of a separate agri-environmental policy emerged clearly for the first time in the context of the 1992 CAP reform. The agri-environmental programmes to be offered by the Member States under Regulation (EEC) No. 2078/92[13] served to ensure agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside. With the 1999 reform ("Agenda 2000") this legal framework was then incorporated as a flanking measure into the newly created 2nd pillar of the CAP[14] , where it still exists today[15] – alongside numerous other measures, some of which are also ecologically oriented. As a rule, five- to seven-year commitments are made which aim to maintain and promote necessary changes in agricultural practices that have a positive impact on the environment.

With Agenda 2000, however, environmental objectives were integrated into the first pillar for the first time[16]. Under the heading "environmental protection requirements", the member states were required to take appropriate environmental measures, which included support in return for agri-environmental commitments, general mandatory environmental requirements and specific environmental requirements constituting a condition for direct payments.

The 2003 reform then enshrined the cross-compliance system, which is still in force today and ties the (full) payment of direct aid to compliance with certain rules relating to agricultural land, production and activity. Statutory management requirements (SMRs) concerning environment, public, animal and

[10] G. Eckhardt, *Die Reform der CAP 2003 - Zwischenbilanz und Ausblick,* in: R. Norer, G. Holzer (eds.), Agrarrecht Jahrbuch 2010, Vienna/Graz 2010, p. 217.
[11] Regulation (EU) No 1305/2013-1308/2013, OJ 2013, L 347/487 et seq.
[12] See in detail G. Queisner, *Rahmenbedingungen für eine umweltverträgliche Landwirtschaft im Europarecht. Zugleich ein Beitrag zur Reform der CAP, Cross Compliance und Klimaschutz*, Baden-Baden 2013, p. 113 ff; G. Holzer, *Die neue "Ökoarchitektur" der CAP,* in: R. Norer, G. Holzer (eds.), Agrarrecht Jahrbuch 2015, Vienna/Graz 2015, pp. 122 ff. = abridged version in CEDR-JRL 1/2015, pp. 50 ff.
[13] Regulation (EEC) No. 2078/92 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, OJ 1992, L 215/85.
[14] Art. 22 ff. Regulation (EC) No 1257/99 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF), OJ 1999, L 160/80.
[15] Art. 28 Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ 2013, L 347/487.
[16] Cf. Art. 3 Regulation (EC) No 1259/1999 establishing common rules for direct support schemes under the common agricultural policy, OJ 1999, L 160/113.

plant health, animal welfare and the maintenance of land in good agricultural and environmental condition (GAEC) were incorporated into market organisation law[17].

In addition to modifications to cross compliance[18], the 2013 reform saw the additional introduction of so-called greening, whereby 30 % of the available national financial envelope is linked to the application of certain sustainable agricultural practices. In this context, part of the direct payments is made conditional on compliance with agricultural practices beneficial for the climate and the environment[19]. This obligatory greening component of the basic payment thus represents a payment for ecological services rendered[20]. The greening measures go beyond the cross-compliance requirements and include, on arable land, crop diversification and the establishment of ecological priority areas or ecologically equivalent measures as well as the maintenance of permanent grassland.

Thematically, the environmental protection issues addressed now cover an impressive range of topics based on cross-compliance requirements, greening and rural development measures: *Environmental protection in a narrow sense*, *nature and biodiversity conservation*, *water protection*, *animal welfare* and *climate protection*[21].

Currently, the system based on agricultural competence presents itself as a complex *eco-pyramid*[22], which spirals upwards in steps from mandatory to voluntary standards and from environmentally relevant sectoral legislation to cross compliance, greening and rural development. This pyramid – albeit in a modified form – will also characterise the regime of the new CAP post 2020[23].

Even if "greening the CAP" – i.e. designing the support system in accordance with the green box measures of the WTO Agreement on Agriculture (AoA)[24], which by definition are exempt from the dismantling obligations under international trade law – may have been at the beginning of this development, the current differentiation of the measures goes far beyond what is required under international law.

2.3 Structural and social policy

Within the framework of the common agricultural structural policy, which, in addition to market policy, was only launched later, socio-structural directives were adopted in 1972 and supplemented in 1975 by measures in favour of mountain areas and other disadvantaged areas[25].

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[17] Art. 3 ff. in connection with Annex III and IV Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ 2003 L 270/1.

[18] Art. 91 ff. in connection with Annex II Regulation (EU) 1306/2013 on the financing, management and monitoring of the common agricultural policy, OJ 2013, L 347/549.

[19] Art. 43 Regulation (EU) 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, OJ 2013, L 347/608.

[20] J. Martínez, *Das Greening der Gemeinsamen Agrarpolitik,* NuR 2013, p. 692.

[21] Detailed evidence with R. Norer, *Agrarrechtliche Weltenrettung oder Überforderung? Von der Methodik der Integration außerlandwirtschaftlicher Ansprüche ins europäische Agrarrecht*, Festschrift for Roman Budzinowski, Przegląd Prawa Rolnego 2/2021, pp. 353 ff.

[22] G. Holzer (fn. 11), p. 133; G. Holzer, *Die neue Ökoarchitektur der GAP und ihr Beitrag zum Klimaschutz*, in: R. Norer, G. Holzer (eds.), Agrarrecht Jahrbuch 2019, Vienna/Graz 2019, p. 196.

[23] For the upcoming changes through CAP post 2020 see fn. 62.

[24] https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm.

[25] Directive 72/159/EEC on the modernization of farms, OJ 1972, L 96/1; Directive 72/160/EEC concerning measures to encourage the cessation of farming and the reallocation of utilized agricultural area for the purposes

While the accompanying measures of the MacSharry reform provided for early retirement schemes[26], finally in 1999 with "Agenda 2000" rural development support was created as an equal 2nd pillar of the CAP[27]. This established the framework for Community support for sustainable development and flanked and complemented the other instruments of the Common Agricultural Policy.

Today, the 2nd CAP pillar pursues, among other things, the achievement of balanced territorial development of the rural economy and rural communities, including the creation and maintenance of jobs. One of the priorities is to promote social inclusion, poverty reduction and economic development in rural areas, with a focus on diversification and creation of small enterprises and jobs, fostering local development in rural areas and enhancing the accessibility of information and communication technologies in rural areas[28]. Relevant measures are in particular the payments to areas facing natural or other specific constraints[29].

2.4 Food safety

First of all, organic farming should be mentioned here, starting with the EC Organic Regulation in 1991. The common rules for production, labelling and control of organic (ecological) farming have been promoted in the agri-environmental programmes since 1992[30].

Today, food safety is part of cross compliance in Annex II of Regulation 1306/2013, consisting of two references to relevant legal standards[31], as well as from the areas of animal identification and registration[32] and animal diseases[33].

2.5 Energy policy

With the 2009 Health Check, the EAFRD Regulation was amended to allow Member States to include climate change and renewable energy projects in their development programmes[34].

3. Instruments

After this brief outline, the instruments used to implement this thematic expansion up to the current CAP with all its non-agricultural content will now be examined.

First of all, it should be noted that integrated policies are not only a familiar concept of European law, but are often even expressly desired. A prime example is the integration clause of Article 11 TFEU,

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of structural improvement, OJ 1972, L 96/9; Directive 72/161/EEC concerning the provision of socio-economic guidance for and the acquisition of occupational skills by persons engaged in agriculture, OJ 1972, L 96/15; Directive 75/268/EEC on mountain and hill farming and farming in certain less-favoured areas, OJ 1975, L 206/15.

[26] Regulation (EEC) No 2079/92 instituting a Community aid scheme for early retirement from farming, OJ 1992, L 215/91.

[27] Regulation (EC) 1257/1999.

[28] Art. 4 lit. c and Art. 5 line 6 Regulation (EU) 1305/2013.

[29] Art. 31 Regulation (EU) 1305/2013.

[30] Cf. Art. 2 para. 1 lit. a Regulation (EEC) 2078/92 and currently Art. 29 Regulation (EU) 1305/2013.

[31] SMR 4-5.

[32] SMR 6-8.

[33] SMR 9.

[34] Art. 16a para. 1 lit. a and b Regulation (EC) 1698/2005, amended by Regulation (EC) No. 473/2009, OJ 2009, L 144/3.

according to which environmental protection requirements must be integrated into the definition and implementation of other Union policies and activities, in particular with a view to promoting sustainable development. According to Article 4 (2) (d) TFEU, agriculture is one of these other policies. Even if this requirement was expressed more pointedly in the predecessor provision of Art. 6 ECT – according to which environmental protection requirements must be "materially integrated" into the other policy areas – the pursuit of environmental policy goals by agricultural policy in particular is required today more than ever. As early as 1992, the first basis for agri-environmental measures in Art. 1 Regulation (EEC) No. 2078/92 stated that one of the intended purposes was to contribute to "the achievement of the Community's policy objectives regarding agriculture and the environment". The obligation to take environmental concerns into account is not limited to specific Union policies, but covers all areas of EU activity, in particular transport and energy policy in addition to agriculture[35].

Methodologically, three different approaches can essentially be distilled: a separation of the various legal matters (3.1.), their linkage (3.2.) and their – usually one-sided – integration (3.3.).

3.1 Separation

In terms of the law of competence and dogmatically unproblematic is the normal case of separation of the various areas of law and thus also of administrative competences. This means that European environmental law, consumer protection law, social law, energy law etc. is enacted on the basis of the relevant primary law competence (Art. 192, 169, 153, 194 TFEU), where necessary transposed into the respective specific national law and enforced by way of the common means of indirect enforcement by the national environmental, consumer protection, social and energy authorities.

3.1.1 General standards

If these are general standards, this right applies in general terms to everyone and not only to agriculture. Farmers are therefore bound by it in the same way as all other EU citizens.

As an example, the lowest level of the eco-architecture pyramid[36], the environmentally relevant sectoral law, can be cited here. These generally binding standards of EU and national law claim general validity and can be uniformly enforced by means of technical sanctions. However, in the case of directives, national legislators sometimes have a great deal of leeway, resulting in different environmental standards in the individual member states, which is why the tendency here is towards directly applicable regulations[37].

Examples include the Groundwater Directive[38], Water Framework Directive[39], Environmental Liability Directive[40] or the Natura 2000 Directives[41].

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[35] S. Heselhaus, Art. 11 TFEU, para. 21, in: M. Pechstein, C. Nowak, U. Häde (fn. 3).
[36] See fn. 21.
[37] Thus G. Holzer (fn. 11), p. 134 with examples.
[38] Directive 2006/118/EC on the protection of groundwater against pollution and deterioration, OJ 2006, L 372/19.
[39] Directive 2000/60/EC establishing a framework for Community action in the field of water policy, OJ 2000, L 327/1.
[40] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L 143/56.
[41] Directive 2009/147/EC on the conservation of wild birds, OJ 2009, L 20/7; Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206/7.

3.1.2 Specific standards

A second, somewhat different case is that in which the "other" legal matter contains agricultural-specific norms, which then – explicitly or implicitly – apply only to agriculture[42]. This means that (almost) only farmers are bound by them.

Examples of such *individual* specific standards in general regulations are the Groundwater Directive, which sets limits for nitrates and active substances in plant protection products[43], or the Environmental Liability Directive, which addresses agriculture as an activity[44].

Exemplary for *entire* sets of regulations of such specific standards is the Sewage Sludge Directive[45] and the Nitrates Directive[46], both of which already bear the (exclusive) reference to agriculture in their names[47].

But again, these standards have not been enacted under agricultural competence and are not (in principle) enforced by the agricultural authorities.

3.2 Linkage

A second way, which is clearly more specific to agriculture, is to link the non-agricultural areas of law with agricultural law. This gives certain norms of general specialised law a special meaning that goes beyond their general binding force. Such a link is conceivable in both directions, i.e. the "non-agricultural" norm contains a special reference to agricultural law or the link is made in the agricultural norm itself.

While no example is apparent for the first case, the second case in the environmental sector is exemplified by the already-described cross compliance[48]. In this case, the statutory management requirements (SMRs) are linked to individual environmentally relevant standards of sectoral law that are in force. These must be complied with by farmers not only because of their general validity, but also because they have special effects on them under agricultural law. In the event of a violation, the sanction under sectoral law is accompanied by reductions in direct payments under the first and second pillar[49].

Here, the "non-agricultural" norm is enacted under the relevant competence norm and enforced by the respective specialised authority, but at the same time it receives a second side in that it is also enforced by the agricultural authority due to the link enacted in the agricultural competence[50].

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[42] These special norms can be exception norms (*ius singulare*) or special norms (*ius proprium*); on this see Ch. Grimm, R. Norer, *Agrarrecht,* 4th edition, Munich 2015, p. 15.
[43] Annex I Regulation 2006/118/EC.
[44] Art. 3 para. 1 lit. a in connection with Annex III lines 7c and 11 Directive 2004/35/EC.
[45] Directive 86/278/EEC on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture, OJ 1986, L 181/6.
[46] Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991, L 375/1.
[47] Furthermore, Art. 4 and 5 Directive 91/676/EEC are the subject of the Cross Compliance Standard SMR 1; Annex II of Regulation (EU) 1306/2013.
[48] Art. 91 ff. in connection with Annex II Regulation (EU) 1306/2013.
[49] Art. 97 ff. VO (EU) 1306/2013.
[50] F.-J. Peine, *Verknüpfung der Beihilfen mit der Einhaltung von Umweltstandards – Konsequenzen,* AUR 2005 Supplement I, p. 12, speaks of a strengthening of validity.

3.3 Integration

The third possibility can be seen in the fact that agricultural law regulates the extraneous matter itself. In this case, it is a matter of genuine agricultural law norms, which are enacted under agricultural competence and enforced exclusively by the agricultural administration.

Greening is an example of this. Here, agricultural law formulates land management methods that promote climate and environmental protection, compliance with which must already be demonstrated in the multiple claim. In the event of violations, a complicated graduated system of reductions in the eco-premium is applied[51]. Another example is the wide range of rural development measures based on European and national agricultural law, which are entered into voluntarily and whose standard must exceed that of cross compliance and greening.

4. Analysis

4.1 Assessment

The *separation* proves to be the legal normal case. Like all other general norms, the relevant legal material is enforced by the respective competent (non-agricultural) authority and any infringements either affect farmers like all other citizens (general norm) or (almost) exclusively farmers (specific norm).

In terms of *linkage,* cross compliance has been able to maintain a fixed position that has outlasted all reform stages since then, despite numerous critical legal questions associated with it[52].[53] On the contrary, the literature even calls for a readjustment with regard to a stronger unification of the standards[54].[55]

From the series of legal questions, only the problem of competence should be addressed here. Accordingly, cross compliance leads to the fact that essential parts of environmental law are ultimately enforced by agricultural law and, due to the efficient funding controls, generally gain significantly in steering effect[56]. In this process, the norms of environmental law mutate, as it were, into agricultural law norms by virtue of linking for the purposes of the Horizontal CAP Regulation, which according to jurisprudential dogma[57] can be described as so-called subsidiary agricultural law. The relevant norms remain in the non-agricultural matter, but by virtue of reference in agricultural-specific contexts they acquire a second legal nature, as it were. If they have thus become a norm of agricultural law in this

[51] Art. 24-29 Delegated Regulation (EU) 640/2014 supplementing Regulation (EU) 1306/2013, OJ 2014, L 181/48.
[52] R. Norer, *Rechtsfragen der EU-Agrarreform*, Vienna/Graz 2007, pp. 107 ff.; for a synopsis of the fundamental legal questions raised in the literature see G. Holzer (fn. 11), pp. 140 ff.
[53] G. Eckhardt (fn. 9), p. 103, even speaks of a quantum leap.
[54] This uniformity currently depends mainly on the implementation practice of the individual Member States, as the SMR linkage is mostly based on EU directives, which inevitably leads to inconsistent standards due to the different implementation in the individual Member States. However, this is also and even more evident in the integration of the requirements for GAEC, where various minimum requirements are specified for certain topics to be filled in by the Member States at national or regional level. For details on the regulatory technique and content, see G. Holzer (fn. 11), pp. 136 ff.
[55] G. Holzer (fn. 11), p. 143.
[56] R. Norer (fn. 51), p. 125 f.; G. Holzer, (fn. 11), p. 141.
[57] For example, in the relationship between administrative law and civil law, P. Tschannen, U. Zimmerli, M. Müller, *Allgemeines Verwaltungsrecht,* 4th edition, Bern 2014, p. 130.

context, it is also justified that they are enforced and sanctioned by the agricultural authorities. This is at the expense of the agricultural budget[58].

Finally, in the case of *integration,* "non-agricultural" content from the specialised law is not brought into agricultural law, as it were, as in the case of linking, but is formulated in agricultural law itself.

In this context, the question may arise as to whether such norms may be legally enacted by the agricultural legislator at all. However, the ECJ has repeatedly confirmed in numerous rulings that the agricultural competence of (currently) Art. 43 TFEU is to be interpreted broadly. In the case of BSE measures and agri-environmental measures, for example, the Court of Justice has found that, in contrast to the article on consumer protection and environmental competence, agricultural competence is sufficient, since a legal act that has two objectives must be based on the essential or predominant component.[59]

Whether the implementation of environmental measures in Pillar 1 enables the efficient achievement of environmental goals at all is judged differently with reference to the blanket application[60].

4.2 Comparison

In an overall view of all three methods described here, both separation and integration prove to be largely unproblematic from a legal point of view. In the case of separation, the non-agricultural authorities enforce their own matters for all those affected by them (farmers or not); in the case of integration, the agricultural authorities enforce their own agricultural law. In this respect, non-agricultural inclusions are also agricultural law, which is enacted by the agricultural legislators after a political compromise. This means that it is hardly ever "unadulterated" environmental, social or food law, but rather a version tailored to agriculture, which in this respect should be highly suitable for achieving the goals pursued with it.

Only in the case of linkage do legal problems become apparent, although this method has shown itself to be surprisingly resistant since its introduction and still does. Conceptually, it is not surprising that legal friction arises when a norm designed for another area of law is applied *tel quel* in agricultural law. The underlying idea sees the granting of agricultural subsidies as going beyond agricultural law from an overall societal perspective. For example, a livestock farmer who uses banned antibiotics would have to face criminal proceedings including a fine "outside of agricultural law", but could keep the direct payments granted by the Union without a link. This could not be made comprehensible to the public and could not be reconciled with the state's function as a role model[61]. In this respect, compliance with the standards would also be in the interest of the CAP itself, as this would increase the social acceptance of agricultural subsidies[62].

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[58] R. Norer (fn. 51), p. 126, according to which a distinction must be made between the legal and the legal-political side.

[59] ECJ, Case C-269/97, [2000] ECR I-2257; Case C-336/00, [2002] ECR I-7699. On conflict of laws, see R. Norer, Art. 43 TFEU, para. 5, in: M. Pechstein, C. Nowak, U. Häde (fn. 3).

[60] Thus B. Mittermüller, *Die Ökoprämie und ihre „eigentümliche" Rechtsnatur*, in: R. Norer, G. Holzer (eds.), Agrarrecht Jahrbuch 2014, Vienna/Graz 2014, p. 161; B. Heinrich, C. Holst, S. Lakner, *Die Reform der gemeinsamen Agrarpolitik: Wird alles grüner und gerechter?* , GAIA 22/1, 2013, pp. 22 f.; contrary G. Holzer (fn. 11), p. 151.

[61] R. Norer (fn. 51), pp. 104 f. with further references.

[62] Ch. Busse, Art. 40 TFEU para. 79, in: C. O. Lenz, K.-D. Borchardt (eds.), EU- Verträge Kommentar, 6th edition, Cologne/Vienna 2012.

4.3 Result

From a regulatory perspective, then, three instruments are available. In the eco-pyramid described above, all three regulatory techniques are currently condensed. At the bottom is the separation in the case of environmentally relevant sectoral law (= general environmental law), then the linking in the case of cross-compliance and at the top the integration in the case of greening and agri-environmental measures[63]. These instruments can only be successful if certain conditions are met in each case.

The separation presupposes not only that non-agricultural law can be effectively enforced by non-agricultural authorities, but also an agricultural law cleansed of non-agricultural claims. This would ultimately mean that (once again) each policy would legislate and enforce for itself: environmental policy would be environmental policy, structural policy would be structural policy, climate policy would be climate policy, etc. with clearly delineated competences and budgets[64]. This would, however, significantly reduce the scope and (also financial) importance of agricultural law, and set it back to its historical core tasks within the meaning of Art. 39 TFEU, in particular the fulfilment of the food function.

Integration presupposes not only the incorporation of non-agricultural claims into agricultural law, but ultimately also the exemption of agriculture from the application of general law. This would mean a multifaceted agricultural policy that wants to meet all non-agricultural demands and that would set out to save the world as a superhero: the environment the day before yesterday, food safety yesterday, animal welfare today, the climate tomorrow and whatever the day after tomorrow. This would inevitably overtax agricultural law, which would run the risk of becoming without contours and arbitrary.

Seen in this light, the least convincing instrument from a purely legal point of view, namely linkage, is perhaps the most feasible between segregation under agricultural law and excessive demands. A world rescue in miniature with methodological flaws, so to speak.

[63] The most recent CAP reform stage will bring about changes in the subject area dealt with here insofar as the current three-tier eco-architecture (cross compliance, greening, agri-environmental and climate measures) will be reduced to two tiers. To this end, greening will be merged into the cross-compliance system under the new title of eco-conditionality. This will again significantly increase the "baseline" and change the normative ground of validity. In addition, the climate and environment-related payments envisaged in both pillars will go beyond; R. Mögele, I.E. Rusu, *The Commission's proposals for the Common Agricultural Policy after 2020,* CEDR-JRL 2/2018, p. 12; in detail G. Holzer (fn. 21), pp. 196 ff. and most recently G. Holzer, *Ökoarchitektur der Gemeinsamen Agrarpolitik im Umbruch,* in: J. Martínez (ed.), Jahrbuch des Agrarrechts Vol. XV, Baden-Baden 2021, pp. 71 ff.

[64] In this direction already R. Norer, *Synthesis Report,* in: C.E.D.R. (ed.), CAP Reform: Market Organisation and Rural Areas. Legal Framework and Implementation. XXVIII European Congress and Colloquium of Agricultural Law, Potsdam. 9-13 September 2015, Baden-Baden 2017, p. 423.

On legal income targets for agriculture in Switzerland and in the European Union[1]

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Abstract

Cette contribution traite de la législation relative au revenu des agriculteurs en Suisse et dans l'UE. La loi suisse sur l'agriculture contient à l'article 5, paragraphe 1, une disposition qui vise un revenu comparable à celui des autres branches économiques de la région. La PAC est plus générale à l'article 39(1) b TFUE et vise un "niveau de vie équitable pour la population agricole". Ces dispositions ne donnent pas de garantie de revenu aux agriculteurs, elles ne peuvent donc pas être appliquées par les tribunaux.

Alors que le revenu agricole moyen en Suisse pour la période 1997-1999 représentait encore 52 % du revenu comparatif, ce pourcentage est passé à 66 % pour la période 2017-2019. La politique agricole 22+ vise à réduire encore l'écart de revenu. Dans l'UE, la comparaison entre le revenu agricole et le revenu dans l'ensemble de l'économie varie de 32 % en 2009 à 49 % en 2017. Avec la nouvelle politique agricole 2022-2025, l'UE cherche également à réduire l'écart de revenu.

La comparaison montre que le revenu des agriculteurs en Suisse est nettement plus élevé que dans l'UE par rapport au revenu de l'économie dans son ensemble. Mais tant la Suisse que l'UE doivent faire des efforts supplémentaires afin de satisfaire aux exigences légales.

Dieser Beitrag befasst sich mit der Gesetzgebung in Bezug auf das Einkommen der Landwirte in der Schweiz und in der EU. Das Schweizer Landwirtschaftsgesetz enthält mit Artikel 5 Absatz 1 eine Bestimmung, die ein Einkommen zum Ziel hat, das mit dem Einkommen in anderen Wirtschaftszweigen in der Region vergleichbar ist. Die GAP ist in Artikel 39 Absatz 1 Buchstabe b AEUV allgemeiner gehalten und zielt auf eine "angemessene Lebenshaltung der landwirtschaftlichen Bevölkerung" ab. Diese Bestimmungen geben den Landwirten keine Einkommensgarantie und können daher von den Gerichten nicht durchgesetzt werden.

Während das durchschnittliche landwirtschaftliche Einkommen in der Schweiz im Zeitraum 1997-1999 noch 52 % des Vergleichseinkommens betrug, ist dieser Anteil bis zum Zeitraum 2017-2019 auf 66 % gestiegen. Mit der Agrarpolitik 22+ soll die Einkommenslücke weiter verringert werden. In der EU reicht der Vergleich zwischen dem landwirtschaftlichen Einkommen und dem Einkommen in der Gesamtwirtschaft von 32 % im Jahr 2009 bis 49 % im Jahr 2017. Mit der neuen GAP-Politik 2022-2025 will die EU die Einkommenslücke ebenfalls verringern.

Der Vergleich zeigt, dass die Einkommen der Landwirte in der Schweiz im Vergleich zu den Einkommen in der Gesamtwirtschaft deutlich höher sind als in der EU. Aber sowohl die Schweiz als auch die EU müssen weitere Anstrengungen unternehmen, um die gesetzlichen Vorgaben zu erfüllen.

[1] First published in Przegląd Prawa Rolnego 1/2022, pp. 235 ff.

1. Introduction

This contribution deals with the question of if and how far Switzerland and the European Union legally support the income of the agriculture community.

In Switzerland and in the EU, there is no sector of the economy that is subject to comparably extensive state legislation as agriculture. This intensity of legislation is due to the unique position of the agricultural sector. Firstly, this economic branch is more vital to the population than any other. A lack of food directly threatens human survival. This historical experience largely explains the intensity of legislation and the concern for securing the livelihood of the farming population and farms as a prerequisite of the security of supply of vital foodstuffs for the population as a whole. Secondly, agriculture is exposed to production and income risks like no other sector of the economy. Exogenous factors impact agriculture more than most other economic sectors, namely soil, water and solar radiation as three of the most important input factors of production. These factors can only be imperfectly controlled even with modern technology. Climatic conditions and weather problems should also be mentioned, as well as damage caused by extreme natural events. Last but not least, agricultural production can only be adapted or stopped within a considerable time period. This is true for vegetable and cereal production as well as for fruit and wine growing (only one harvest per year), for meat production (animals have a life cycle) and for milk production (number of dairy cows cannot be increased or reduced at short notice).

If the necessity is recognised that state measures are indispensable to secure the supply of food to the population and to safeguard the livelihood of the farming population and farms, the question arises as to what extent the support for agriculture should go. If one considers the principle of equal treatment or equality before the law, which is enshrined in Article 8 paragraph 1 of the Swiss Federal Constitution (BV) and in Article 20 of the Charter of Fundamental Rights of the European Union, it would seem obvious to postulate income for the farming population which are comparable to income in other sectors of the economy.

In the following, the origin, justification and development as well as the current status of legal income security for the farming population in Switzerland and in the EU will be discussed and assessed.

2. Securing the income of agriculture in Switzerland

2.1 First legislation in the first Agriculture Act of 1951

The systemic legislation of agriculture as a branch of the economy, which is still characteristic of Switzerland today, goes back to the legislation in the first Agriculture Act of 1951. In the message (i.e. the explanations) of the Federal Council (i.e. the national government) to the Federal Assembly (i.e. the parliament of Switzerland) on the draft of a federal law on the promotion of agriculture and the preservation of the farming community of 19 January 1951, the need for measures to secure the income of farmers was outlined as follows[2]:

> The final wording of Article 22 will have a decisive influence on whether the intention of Articles 27–29 of the draft can be achieved. But one thing must be clear: If it is not possible to secure prices for agriculture

[2] Bundesblatt (BBl) 1951 Volume I, p. 193.

which, applied to rural conditions, will enable those employed in it to earn approximately the same income as the other groups of the population who live together with them in many cases and who work mainly with their hands, then the further decline of the peasantry cannot be stopped.

Article 22 reads, as far as relevant here, in the draft of the Federal Council as follows[3]:

[1] If the importation jeopardises the sale of agricultural products at prices that can be described as reasonable in accordance with the principles of this Act, the Federal Council shall be authorised, with due regard for other sectors of the economy:

a. to restrict the importation of similar products in terms of quantity;

b. to impose customs surcharges on imports of similar products that exceed a certain quantity;

c. to oblige importers to accept similar products of domestic origin in reasonable proportion to the import and to take the necessary measures and issue regulations to this end.

[2] If, despite these measures, the existence of important branches of agriculture is threatened by the import of competing products, the Federal Council may, after consulting the Committee for Agriculture, impose further conditions on imports and in addition levy price surcharges or compensatory levies. The proceeds of such surcharges and levies shall be used to reduce the price of corresponding domestic products and to promote sales and improve domestic production. Such decisions shall be submitted to the Federal Assembly for subsequent approval.

Article 22 of the Federal Council's draft was adopted by the Federal Assembly unchanged and enacted as Article 23 of the Agriculture Act of 1951[4].

In addition to Article 22, Articles 27[5] and 29[6] were of outstanding importance in the Federal Council's draft, which read as follows and were declared law unchanged by the Federal Assembly as Articles 29[7] and 31[8]:

Article 27

[1] The measures provided for under this Act shall be applied in such a way that prices can be obtained for domestic agricultural products of good quality which cover the average production costs of rationally managed agricultural holdings taken over under normal conditions over a period of several years.

[3] BBl 1951 I, p. 264.
[4] Amtliche Sammlung (AS) 1951 Volume III, p. 136.
[5] BBl 1951 I, p. 266.
[6] BBl 1951 I, p. 266.
[7] AS 1951 III, p. 139.
[8] AS 1951 III, p. 139.

[2] In doing so, consideration shall be given to the other branches of the economy and to the economic situation of other groups of the population.

Article 29

The Federal Council may fix target prices for domestic agricultural products in accordance with the principles laid down in Articles 29 and 30.

The income target sought by Articles 23, 29 and 31 was not yet given a specific term in the Federal Council's draft. This was only introduced as «parity wage» in the implementing ordinance of the Federal Council[9].

Article 29 paragraph 1 was amended as follows[10] in the 1992 revision, which introduced the separation of price and income policy[11] and direct payments[12]:

The measures provided for by this Act shall be applied in such a way that prices can be obtained for domestic agricultural products of good quality which, together with other income components, cover the average production costs of rationally managed agricultural holdings which are environmentally sound and which have been taken over under normal conditions, on average over several years.

2.2 Modernisation in the new Agriculture

In its message on the new (second) Agriculture Act of 1998, the Federal Council submitted to the Federal Parliament a formal and systematic reformulation and, at the same time, modernisation of the provisions of the first Agriculture Act of 1951. According to the Federal Council's Message on the Agricultural Policy 2002 of 26 June 1996, the new policy focussed on a greater separation of price and income policy, combined with the realisation of ecological concerns through economic incentives, as well as in a relaxation of state market policy to improve the competitiveness of the entire food sector. In this concept, income security in agriculture was to be realised increasingly with direct payments and no longer with price measures[13]. The fundamental objective of income policy was and is that sustainably managed and economically efficient farms should be able to earn an income comparable to that of the rest of the working population[14]. The agricultural sector should continue to generate as much of its income as possible through market transactions, i.e. the sale of its products. The function of direct payments is to compensate farmers for their public services instead by product prices[15].

[9] See on the parity wage in general and on the concretisation at ordinance level Gubler, p. 68 ff.
[10] AS 1993, p. 1571. Botschaft des Bundesrates zur Änderung des Landwirtschaftsgesetzes, Teil I: Agrarpolitik mit ergänzenden Direktzahlungen (BBl 1992 II, p. 46 ff. and 10 f.). It was only inserted in the course of the parliamentary deliberations (Amtliches Bulletin Nationalrat 1992, p. 1038 ff.).
[11] See for example P. Richli, *Entwicklungen*, p. 90 f. with references.
[12] On direct payments in general, see for example P. Richli, G. Müller, T. Jaag, p. 187 ff.
[13] BBl 1996 IV, p. 5 f.
[14] BBl 1996 IV, p. 11.
[15] BBl 1996 IV, p. 28.

Based on this conception, the Federal Council requested the following reformulation of income maintenance in Article 5 of the new Agriculture Act[16]:

Article 5 Income

[1] The measures of this Act shall aim to ensure that sustainably managed and economically efficient farms are able to achieve income on average over several years that are comparable with the income of the rest of the economically active population in the region.

[2] If income falls significantly below the comparable level, the Federal Council shall take temporary measures to improve the income situation.

[3] Consideration shall be given to other sectors of the economy, the economic situation of the rest of the population and the situation of the federal finances.

The Federal Council put forward a number of arguments in its dispatch (message) to justify this provision[17]. At this point, it should only be underlined from the argumentation that the comparison of income should primarily serve to control the need for direct payments. This should be based on a longer-term view. The direct payments are intended to represent a basic income on which the farms can build their market-economy activities.

This provision was adopted by Parliament without significant amendment[18].

Today, the results of the central evaluation of accounting data by the Swiss centre of excellence for agricultural research (Agroscope) serve as the data basis for measuring agricultural income. Only sustainably managed farms that meet the accounting requirements are considered for income measurement. The data basis for the comparative income is the wage structure survey of the Federal Statistical Office[19].

2.3 Legal nature of Article 5 paragraph I LwG

Article 5 paragraph 1 LwG – like Article 29 of the first Agriculture Act of 1951 before – contains no statement on its legal nature. The Federal Council did not comment on this topic in its messages either. However, it is undisputed in legal doctrine that the settlement wage is not enforceable. Article 5 paragraph 1 LwG is a target norm that is directed at Federal Parliament and the Federal Council who are obliged to orientate their agricultural policy in such a way that farms can achieve the comparative wage as far as possible[20]. As far as one can see, there is also no case law on this provision from the Swiss Federal Courts.

[16] BBl 1996 IV, p. 313.
[17] BBl 1996 IV, p. 89 ff.
[18] BBl 1998 III, p. 2468.
[19] See in detail R. Norer, *Kommentar*, Art. 5, No 16 ff.
[20] See in particular P. Richli, *Artikel 5*, p. 16 f. and 19 ff.; R. Norer, *Kommentar*, Art. 5, No 11 f.

2.4 Realisation of the comparative wage in practice compared to the legal target

In legal reality, based on Articles 23, 29 and 31 of the first Agriculture Act of 1951 and on Article 5(1) of the second (new) Agriculture Act of 1998, the following results were achieved, although the figures are only proved since 1997:

Average three years	Comparison wage CHF	Agricultural earnings CHF	%
1997–1999[21]			
Valley region	62’182	38’286	62
Hill region	58’788	29’781	52
Mountain region	52’656	22’180	42
Average	57’875	30’082	52
2002–2004[22]			
Valley region	67’623	42’204	62
Hill region	62’459	30’322	49
Mountain region	56’823	22’849	40
Average	62’301	31’791	51
2007–2009[23]			
Valley region	72’311	48’213	67
Hill region	65’789	34’776	53
Mountain region	61’347	25’012	41
Average	66’482	36’000	54
2012–2014[24]			
Valley region	74’266	53’503	72
Hill region	68’753	42’076	61
Mountain region	63’757	30’949	49
Average	68’925	42’176	62
2017–2019[25]			
Valley region	74’853	60’295	81
Hill region	70’054	43’184	62
Montain region	66’268	36’028	54
Average	70’392	46’702	66

This overview shows that there are considerable differences in the income situation in the valley area, the hill area and the mountain area. In addition, income varies greatly depending on the type of farm (arable farming, special crops, dairy cows, combined production, etc.).

In the dispatch of 12 February 2020 entitled "Agricultural Policy 2022+" (AP22+) on the further development of agriculture, the Federal Council assumes that farm income will continue to improve until 2025. In addition, the government announced that the increased support for mountain farming will be

[21] See Bundesamt für Landwirtschaft (2020), *Agrarbericht*, Berne, p. 58 f.
[22] See Bundesamt für Landwirtschaft (2005), *Agrarbericht*, Berne, p. 53 f.
[23] See Bundesamt für Landwirtschaft (2010), *Agrarbericht*, Berne, p. 43.
[24] See Bundesamt für Landwirtschaft (2015), *Agrarbericht*, Berne, p. 72.
[25] See Bundesamt für Landwirtschaft (2020), *Agrarbericht*, Berne, p. 60 f.

continued[26]. The alignment is attempted primarily through the graduation of direct payments according to zones. The contribution rates for individual direct payments are graduated according to hill zone, mountain zone I, mountain zone II, mountain zone III and mountain zone IV, as well as according to the slope of hillsides. The lowest rates are for the hill zone, the highest for the mountain zone IV[27]. The Federal Council is in favour of further increasing the income of farms in relation to the comparative wage with AP22+[28]. However, he does not mention that this improvement also corresponds to a legal obligation. At least he does not relativise the objective as far as one author who believes that Article 5 paragraph 1 LwG is already fulfilled even if only a few farms reach the comparative income[29]. In the context of AP22+, farming and economic organisations suggest that the Federal Council must set and pursue a binding income target[30]. The Federal Council's reference in the AP22+ dispatch is correct that other sectors of the economy, the economic situation of the non-agricultural population and the situation of federal finances in connection with agricultural income policy under Article 5 paragraph 3 LwG have to be considered[31]. It should also be ensured that the "economies of scale" are taken into account and that direct payments of more than CHF 150,000 for farms are gradually recompensed[32].

According to the view expressed here, the objective must remain such that a significant proportion, if not the average, of farms achieve the income target. Otherwise, the legal mandate is not achieved. The Confederation is obliged to pursue a credible agricultural policy with regard to Article 5 paragraph 1 LwG or then to alter this provision by amending the law[33].

In order to improve their income situation, however, farmers will have to look for ways to increase their share in the food chain or through farming-related activities. In the first case, it is a question of direct sales in farm shops or at (weekly) food markets, whereby permanent access to the market is important[34]. In the second case, one might think of renting out guest rooms, running a farm pub or producing biogas.

Traditionally, the income in mountain farming lays behind the income in valley areas. However, the gap has narrowed since the beginning of the century. Comparing the figures for the three-year periods 1997–1999 and 2017–2019, the income of valley farms in relation to the comparable wage developed from 62 to 81 % and that of mountain farms from 42 to 54 %. The ratio of income in the mountain area to the valley area thus remained at around 67 %. This means that the need for the mountain area to catch up with the valley area has not diminished. Under these circumstances, the question still arises today as to whether this distribution of income can fulfill the constitutional requirements, in particular

[26] BBl 2000 4166. – The Federal Council already expressed similar arguments in its Botschaft vom 1. Februar 2012 zur Weiterentwicklung der Agrarpolitik in den Jahren 2014–2017 (Agrarpolitik 2014–2017), BBl 2012, p. 2317.
[27] See Direktzahlungsverordnung (DZV), Appendix 7 (Systematische Rechtssammlung [SR] 910.13).
[28] BBl 2020,, p. 4166.
[29] E. Hofer, p. 65.
[30] BBl 2020, p. 4001.
[31] BBl 2020, p. 4149.
[32] BBl 2020, p. 4167.
[33] See in detail P. Richli, *Artikel 5*, p. 3 ff., esp. 20 ff.
[34] See M. Winiständorfer, p. 79 ff.

of the Article on the agricultural policy (Art. 104 para. 3 let. a BV) and the principle of equal treatment (Art. 8 para. 1 BV)[35].

The efforts to implement the income target of Article 5 paragraph 1 LwG are primarily made through direct payments, which form a basic income for the farmers. It should be emphasised that the income does not constantly have to be at the level of the comparative income on annual basis, but that this should be the case on average over several years[36]. Direct payments are also justified insofar as they are primarily intended to compensate for positive external effects of agriculture, such as landscape maintenance and preservation of the cultivated landscape[37]. In other words, they serve to safeguard the multifunctionality of agriculture[38].

3. Income security for agriculture in the EU

3.1 Regulations in the EEC Treaty, the TEC and the TFEU

In the (present-day) EU, the provisions on income security for the farming population, which are laid down in Article 39 of the Treaty on the Functioning of the European Union (TFEU), still read the same as in Article 39 of the EEC Treaty of 25 March 1957 and Article 33 of the Treaty establishing the European Union (TEC). They read as follows:

> Article 39(1)
>
> (ex Article 33(1) TEC). 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. In working out the common agricultural policy and the special methods for its application, account shall be taken of:

[35] On the requirement of equal treatment under the law in general and in the context of agriculture see above all M. Huser, p. 35 ff.
[36] Botschaft zur Reform der Agrarpolitik: Zweite Etappe (Agrarpolitik 2002), Teil I: Neues Landwirtschaftsgesetz vom 26. Juni 1996, BBl 1996 IV, p. 90.
[37] See B. Lehmann, S. Briner, p. 11 f.
[38] See B. Lehmann, S. Briner, p. 10 ff.; B. Altermatt, p. 14 ff., esp. p. 24 ff.

(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.

3.2 Article 39(1)(b) TFEU as guiding principle in Regulations and in the new CAP policy process 2022–2025

As far as one can see, Article 39(1)(b) did not get any major concretisation in Regulations of the EU Commission and of the EU parliament. But there are numerous references to this provision in recitals of Regulations. A series of particularly representative references are mentioned hereafter. The most concrete references are made in documents with regard to the new CAP policy process 2022–2025.

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[39]: According to recital 21, the support schemes under the common agricultural policy provide for direct income support in particular with a view to ensuring a fair standard of living for the agricultural community. This objective is closely related to the maintenance of rural areas. In order to avoid misallocations of community funds. And recital 22 says that common support schemes have to be adapted to developments, if necessary within short time limits. Beneficiaries cannot, therefore, rely on support conditions remaining unchanged and should be prepared for a possible review of schemes in the light of market developments. In recital 24, it is mentioned that it is necessary to make the shift from production support to producer support by introducing a system of decoupled income support for each farm. It is, therefore, appropriate to make the single farm payment conditional upon cross-compliance with environmental, food safety, animal health and welfare, as well as the maintenance of the farm in good agricultural and environmental condition.

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[40].

According to recital 13 the distribution of direct income support among farmers is characterised by the allocation of disproportionate amounts of payments to a rather small number of large beneficiaries. Larger beneficiaries, due to their ability to exploit economies of size, do not require the same level of unitary support in order for the objective of income support to be efficiently achieved. Member States should therefore reduce by at least 5 % the part of the basic payment to be granted to farmers which exceeds EUR 150 000. Recital 47 mentions a specific income support for young farmers. And according to recital 49 Member States should be allowed to use part of their national ceilings for direct payments for coupled support in certain sectors or regions in clearly defined cases.

[39] OJ 2003 L 270/1.
[40] OJ 2013 L 347/608.

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[41]

Agri-environment-climate payments should, according to recital 22, continue to play a prominent role in supporting the sustainable development of rural areas and in responding to society's increasing demands for environmental services. They should further encourage farmers to serve society as a whole by introducing or continuing to apply agricultural practices that contribute to climate change mitigation. Payments should contribute to covering additional costs and income foregone resulting from the commitments undertaken and should only cover commitments going beyond relevant mandatory standards and requirements, in accordance with the "polluter pays principle". Furthermore, recital 25 states that payments to farmers in mountain areas or in other areas facing natural or other specific constraints should compensate for income foregone and additional costs linked to the disadvantage of the area concerned.

On the basis of the Proposal of 1 June 2018[42] the European Parliament and the Council adopted recently REGULATION (EU) 2021/2115 of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013[43].

This Regulation contains a series of recitals to income support for farmers which incorporate and develop recitals on income support in the previous Regulations towards the new challenges with regard to the urgent climate and environmental issues. These recitals are too numerous to list them all here. The first recital that must be mentioned seems to be recital 56 which says: "In order to guarantee a minimum level of agricultural income support for all active farmers, as well as to comply with the objective of ensuring a fair standard of living for the agricultural community laid down in Article 39(1), point (b), TFEU, an annual area-based decoupled payment should be established as the type of intervention 'basic income support for sustainability'". In recital 19 it is mentioned that with a view to further improving the performance of the CAP, income support should be targeted towards active farmers. In recital 28 it is mentioned that in order to foster a smart and resilient agricultural sector, direct payments keep on constituting an essential part to guarantee a fair income support to farmer. Last but not least recital 53 should be mentioned which states that in order to ensure a fairer distribution of income support, Member States should be allowed to cap or reduce the amounts of direct payments above a certain ceiling and the product should either be used for decoupled direct payments and in priority for the complementary redistributive income support for sustainability. What is about the provisions of the Regulation EU) 2021/2115 of 2 December 2021, Article 6(1)(a) refers implicitly to Article 39(1)(b) TFEU and prescribes that the achievement of the general objectives shall be pursued through the following specific objectives: "to support viable farm income and resilience of the agricultural sector across the Union in order to enhance long-term food security and agricultural diversity as well as to ensure the economic sustainability of agricultural production in the Union;"

[41] OJ 2013 L 347/487.
[42] COM(2018) 392 final.
[43] OJ 2021 L 435/1.

3.3 Legal nature of Article 39(1)(b) TFEU

It is clear from the case law and legal literature on Article 39(1)(b) TFEU that this provision does not entitle the farming population with any rights, but that it contains an important and priority objective for the design of the PAC. Ensuring an adequate standard of living is not the only objective of Article 39(1) TFEU. Other objectives in Article 39(1) are: (a) to increase agricultural productivity; (c) to stabilise markets; (d) to assure the availability of supplies and (e) to ensure that supplies reach consumers at reasonable prices. This can lead to conflicting objectives. Not all objectives can be optimally achieved at a given time. Depending on the individual case, the EU legislator can emphasise one or the other objective. No objective has absolute priority over the others. Furthermore, adjustments to agricultural policy can be made – while respecting the requirements of legitimate expectations – as it was the case with the fundamental change from price support to direct payments. The EU institutions are obliged to achieve a balance between the objectives in cases of conflict. Last but not least, the criteria listed in Article 39(2) of the TFEU must be considered[44].

The EU legislator has a wide margin of discretion, especially in the choice of instruments to achieve the objective (price supports and direct payments). The measures may not be designed unilaterally as social aid. A criterion for the adequacy of the standard of living must also be productivity. Moreover, not only instruments of income increase lie in the target area of Article 39(1)(b) TFEU. Other instruments can also be used, such as agricultural social security. In this respect, Article 39 also has a social component. Until 1992, market support measures (intervention measures within the framework of individual market organisations) had been in the foreground for income security. With the Mac-Sherry reform, a reorientation began which led to the current promotion of agriculture working primarily with direct payments independent of production (1st pillar) and with measures to improve the quality of life in rural areas (2nd pillar)[45]. It cannot be ruled out that adjustments to the CAP will trigger certain income losses for farmers, as long as the objective of a fair standard of living is not called into question[46]. This means that a consistently stable income is not guaranteed[47].

To illustrate the possible conflicts of objectives among the objectives of Article 39(2) TFEU and the lack of enforceability of Article 39(1)(b) TFEU, some ECJ judgments from different decades are briefly outlined:

In Case 5/73 Balkan-Import-Export GmbH, the infringement of the objective in Article 39(1)(e) was invoked in favour of the objective in Article 39(1)(a) TFEU. The dispute concerned cyclical countervailing measures on imports of dairy products from Bulgaria to make imports more expensive. The ECJ stated in this regard[48]:

Article 39 of the Treaty sets out various objectives of the common agricultural policy. In pursuing these objectives, the Community Institutions must secure the permanent harmonization made necessary by any conflicts between these aims taken individually and, where necessary, allow any one of

[44] See in particular J. Martinez, Art. 39, No 2 ff.; R. Norer, *Frankfurter Kommentar*, Art. 39, No 4 f. and 14 ff.; Ch. Busse, Art. 39, No 2 ff.
[45] See Ch. Busse, Art. 39, No 11, p. f.; J. Martinez, Art. 39, No 7 ff.; C. Bittner, Art. 39, No 10 ff.; I. Härtel, Art. 39, No 7.
[46] See J. Martinez, Art. 39, No 10.
[47] See C. Bittner, Art. 39, No 11.
[48] Case C-5/73, ECR 1973, 1091, No 24 – Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof.

them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made. If, owing to developments in the monetary situation at the time the disputed measures, preference happens to be given to the interests of the agricultural community, the Council does not in so doing contravene Article 39. Moreover, it has not been established that the measures questioned gave rise to prices which would appear obviously unreasonable on selling to consumers.

In Case 59/83 Biovilac, the question was whether the applicant, which produced and sold skimmed-milk powder, could claim damages from the EEC on the basis of Article 215(2) of the EEC Treaty for the loss it allegedly suffered as a result of the introduction of contributions to farmers for skimmed-milk powder. Biovilac argued, that those aids reduce the market price of skimmed-milk powder to a level which substantially reduces sales of its products or makes them impossible.

The ECJ dismissed the action. The Court mentioned[49] that it has stated on numerous occasions, that the institutions must reconcile the various aims laid down in Article 39, which does not allow any one of those aims to be pursued isolatedly in such a way as to make the attainment of other aims impossible. Regulation No 1753/82 was adopted pursuant to the general policy applied to milk products. One of the main aims of that policy is to ensure that Community milk producers in accordance with Article 39 (1) (b) of the EEC Treaty receive a reasonable income through the fixing of a target price for milk which is guaranteed by intervention buying of the principal dairy products, namely butter and skimmed-milk powder; in this regard the Regulation constitutes a supplementary measure for attaining that aim.

In Case C-122/94, the legal question at issue was whether France and Italy were allowed to introduce aid for the distillation of table wine. The ECJ came to a positive answer on the grounds that the Council committed no manifest error of assessment when deciding, in giving particular attention to the aim of guaranteeing wine producers a fair income, that the aid in question was to be considered to be compatible with the common market since they had not thereby caused a real and lasting disturbance in the functioning of the common organization of the wine market. Moreover, in the final recital of the preamble to the two decisions, the Council considered that the aid was, by derogation, compatible with the common market to the extent and for the period strictly necessary for restoring the situation of imbalance found to exist[50].

Finally, in the dispute C-34/08, the question was whether milk producers and their organisations could rightly be charged a levy for over-deliveries of milk quota. The ECJ affirmed compatibility with the objectives of Article 33 EC (now Article 39 TFEU), stating[51] that it should be borne in mind that the Community legislature enjoys a wide discretion in matters concerning the common agricultural policy, commensurate with the political responsibilities given to it by Articles 34 EC to 37 EC. As regards, more specifically, the objectives of the common agricultural policy as laid down in Article 33 EC, the Community institutions must make sure that a way is found to pursue those objectives in harmony and on an ongoing basis, where this becomes necessary as a result of conflicts which may arise between those

[49] Case C-59/83, ERC 1984, 4057, No 16 – SA Biovilac NV v European Economic Community.
[50] Case C-122/94, ERC 1996, I-881, No 25 – Commission of the European Communities v Council of the European Union.
[51] Case C-34/08, ERC 2009, I-4023, No 43 ff. – Azienda Agricola Disarò Antonio and Others v Cooperativa Milka 2000 Soc. coop. arl.

objectives when they are pursued in isolation, and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in the light of which their decisions are made. That purpose therefore falls within the ambit of the objectives of rational development of milk production and, by contributing to a stabilisation of the income of the agricultural community affected, that of ensuring a fair standard of living for the agricultural community.

3.4 Implementation of Article 39(1)(b) TFEU

A good insight into the implementation of Article 39(1)(b) TFEU is given in documents with regard to the new agricultural policy 2023–2025.

According to a brief, the EU Commission focusses on nine specific objectives, including a fair (viable) farm income[52]. The Commission states in this context that comparisons between farm and non-farm income are difficult to make and are not straightforward. Yet in general, farm income across the EU, as measured by entrepreneurial income per family work unit, is below the average income in the rest of the economy, as measured by the average wage. Different definitions do not change this fact, which together with productivity increases explain why the agricultural sector is considered less attractive than other sectors and the EU faces a continuing loss of its agricultural workforce. However, the gap between farm income and income in the rest of the economy is narrowing over time. In 2017, farmers earned on average almost half of what could be earned in other jobs, compared to a third a decade ago[53]. But the income situation is different in EU countries. In some, farm income could even surpass the income in the rest of the economy (as has been continuously the case in Czechoslovakia and Estonia since 2008), but in all others, farmers get a lower income than those working in the rest of the economy (and in some cases at a very low level)[54].

Article 39 of the TFEU that states that an objective of the CAP should be to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, is – according the EU Commission – the basis for policy measures aiming at farm supporting income. Not all but the majority of EU citizens seem to be in agreement with Article 39 of the Treaty, in particular with the need to increase the individual earnings for farmers, since farm income is generally lower compared to the rest of the economy[55]. The main explanation for this large support seems to be the fact that farmers are providing not only agricultural goods but also public goods related to the environment, biodiversity, climate and landscape features. Although they benefit all EU citizens, these goods are not remunerated by the market. The successive reforms of the CAP after 1992 provided income support initially through direct payments coupled to production factors (area, livestock heads), and later mainly with decoupled and non-product specific support. Only a small

[52] See European Commission, CAP specific objectives ... explained – Brief No 1 from 9 October 2018 – This brief is based on contributions from Koen Mondelaers, Barthélemy Lanos, Piotr Bajek, Chiara Dellapasqua and Léon Van De Pol. Disclaimer: The contents of the publication do not necessarily reflect the position or opinion of the European Commission See : https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/key_policies/documents/cap_ specific_objectives_- _brief_1_-_ensuring_viable_farm_income.pdf (accessed 24 November 2021).
[53] Ibidem, p. 2.
[54] Ibidem, p. 3.
[55] Ibidem, p. 6.

part of coupled support remained to help to address difficulties that are specific to a particular sector, production type or farming method[56].

The large support seems to end if one focusses on the distribution of the direct payments.

The fact that 20 % of the farmers receive 80 % of payments is the source of a continuing debate. The unequal distribution of support raises concerns about economic efficiency and social equity in the public debate. The EU Commission seems to acknowledge the need to address this fact in the context of the new CAP 2022–25. A second concern lies in the fact that the level of support varies greatly among Member States, sectors, and farm sizes, and also within Member States, with income support and land more concentrated in Eastern European countries, which stems from a history of large state farms on the one hand, and/or the fragmentation of the agricultural sector with many small farms on the other hand[57]. The most effective way to achieve a reduction in the concentration of support seems to be to reduce payments with farm size (degressive subsidies) and introduce a redistributive payment (a higher rate of support per hectare for the first hectares of farms)[58].

The latest figures for the EU as a whole can be found in the EU Commission's document «EU agriculture in numbers» from May 2020. They are as follows[59]:

The agricultural income per worker is on average about 41 % of the average wage in the whole economy between 1995 and 2018. This share ranges from 32 % in 2009 to 49 % in 2017. At EU level, the gap between the agricultural income per worker and the average wage in the economy seems to be slowly converging over time. The income per worker is e.g. above average for field crops and around the average for milk and horticulture but below average in livestock. Furthermore, the income per worker is lower for smaller farms. Income per worker increases with farm size up to 500 hectares. The share of direct payments in the income per worker also increases with farm size up to farms with more than 75 hectares and then stays constant around 40 %. Finally, the agricultural factor income per worker is on average lower in areas with natural constraints. It reaches in mountain areas 87 % and in other areas with natural restraints 75 % of income of workers that are not in areas with natural constraints.

4. Comparison of Swiss and EU income-support for farmers

In Switzerland and in the EU there are legal provisions which provide for state and EU financial support for agriculture with regard to income. In Switzerland this is Article 5(1) LwG and in the EU Article 39(1)(b) TFEU. In addition, with regard to the differences in income between farms in valley and mountain regions in Switzerland and between farms in areas without natural restraints and areas with natural restraints in the EU, one has to consider the principle of equal treatment or equality of persons

[56] Ibidem, p. 7.
[57] Ibidem, 7 f.
[58] Ibidem, p. 10.
[59] EU-Commission (2020), EU agriculture in numbers, May 2020, p. 7 f. See: analytical-factsheet-eu-level_fair-income_en (accessed 24 November 2021)

enshrined in Article 8 paragraph 1 of the Federal Constitution (BV) in Switzerland and in Article 20 of the Charter of Fundamental Rights of the European Union in the EU, respectively.

The Swiss legislation is more specific than the EU one. Income in agriculture are to be comparable with those of the rest of the working population in the region. However, this objective, which has existed since 1951, has only been partially realised to date. The originally very high income difference has, however, weakened considerably since 1997. While the average farm income in the period 1997–99 was still 52 % of the comparative income, this percentage had risen to 66 % by the period 2017–2019. Moreover, there is still a large difference between the income of farmers in the valley and in the mountain areas, which appears to be a problem from the point of view of the requirement of legal equality. Differences also exist in income in various branches of production.

The EU Regulation aims – without any explicit mention of comparative income – at a "fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture". In the EU-27, the agricultural income per worker is on average about 41 % of the average wage in the whole economy between 1995 and 2018. This share ranges from 32 % in 2009 to 49 % in 2017.

The new CAP policy 2022–2025 explicitly aims to reduce the gap of income between the farms and farmers compared to the other branches of the economy. In addition, the CAP policy seeks a fairer distribution of the income amongst farms and farmers in the different regions, production sectors and member states of the EU.

The comparison shows that farm income have risen over the decades in Switzerland and in the EU compared to income in the rest of the economy and that the goal is to further reduce the differences. Parallelly, the goal of achieving an adequate income for the farming population compared to the population as a whole remains a recognised agricultural and socio-political concern. In an absolute comparison with the income of the rest of the population, Switzerland's farming population is clearly better off than that of the EU as a whole. Finally, it should be mentioned that the differences between the EU Member States are considerable and that there are even countries in which farm income are on average higher than the income of the rest of the population.

5. Summary

This contribution deals with the legislation with regard to the income of farmers in Switzerland and in the EU. The Swiss Agriculture Act contains with Article 5 paragraph 1 a provision which has in view an income which is comparable with the income in other economic branches in the region. The CAP is more general in Article 39(1) b TFEU and has in view a "fair standard of living for the agricultural community". These provisions do not give an income guarantee to farmers, therefore, they may not be enforced by courts.

While the average farm income in Switzerland in the period 1997–1999 was still 52 % of the comparative income, this percentage had risen to 66 % by the period 2017–2019. The agricultural policy 22+ seeks to further reduce the income gap. In the EU, the comparison between farm income and income in the economy as a whole ranges from 32 % in 2009 to 49 % in 2017. With the new CAP policy 2022–2025, the EU also seeks to reduce the income gap.

The comparison shows that farmer income in Switzerland are substantially higher than in the EU compared to income in the economy as a whole. But both Switzerland and the EU must undertake further efforts in order to meet legal requirements.

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Agrarian structure in Poland and Ukraine (history, present state and future)[1]

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Abstract

La structure agraire actuelle de la Pologne et de l'Ukraine est très différente. La première est dominée par des exploitations agricoles gérées par des particuliers, ayant généralement le statut d'exploitation familiale. Il existe peu de sociétés holding agricoles et environ 600 coopératives agricoles. Les exploitations familiales constituent la base du système agricole et le législateur a soutenu et continuera de soutenir ces entités à l'avenir. L'exploitation moyenne en Pologne est d'environ 12 ha. En Ukraine, par contre, plus de 60 % des terres agricoles d'une superficie comprise entre 200 et 2 000 ha sont louées. Les exploitations agricoles revêtent une grande importance. Compte tenu de son statut de candidat à l'adhésion à l'Union européenne, l'Ukraine devrait procéder à une réforme pour renforcer la position des agriculteurs ukrainiens.

Die derzeitige Agrarstruktur Polens und der Ukraine ist recht unterschiedlich. In Polen dominieren landwirtschaftliche Betriebe, die von Einzelpersonen geführt werden und im Allgemeinen den Status eines Familienbetriebs haben. Es gibt nur wenige landwirtschaftliche Holdinggesellschaften und etwa 600 landwirtschaftliche Genossenschaften. Die landwirtschaftlichen Familienbetriebe sind die Grundlage des landwirtschaftlichen Systems, und der Gesetzgeber hat solche Einheiten unterstützt und wird sie auch in Zukunft unterstützen. Der durchschnittliche landwirtschaftliche Betrieb in Polen ist etwa 12 ha groß. In der Ukraine hingegen sind mehr als 60 % der landwirtschaftlichen Flächen mit einer Größe zwischen 200 und 2.000 ha gepachtet. Der landwirtschaftliche Besitz ist von großer Bedeutung. Im Hinblick auf ihren Status als Beitrittskandidat zur Europäischen Union sollte die Ukraine eine Reform durchführen, um die Position der ukrainischen Landwirte zu stärken.

1. Introduction

Poland and Ukraine are neighbouring countries, and agriculture plays a critical role in both. Ukraine has been a sovereign state since 1991. However, since 2014 it is a country that has been associated with the European Union. The beginnings of the history of Poland as a separate country date back to the mid-ten century. In 1922 the main part of the modern Ukraine became one of the Republics of the

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Soviet Union. Poland, on the other hand, became after Second Word War a socialist country in the Eastern Bloc. The systemic transformation in 1989 that brought Poland into the market economy was of key importance, and in 2004 membership in the European Union. Due to the neighbourhood as well as historical conditions, the relations between the indicated countries and citizens are very good. Poland supports Ukraine's efforts to join the European Union.

The aim of this article is to indicate the development of legal regulations concerning the agrarian structure in Poland and Ukraine. Due to the limited scope of the article, only selected issues related to the history and the current state will be presented. The likely directions of future changes will also be indicated.

2. Legal regulations concerning the agrarian structure in Poland

In the interwar period (1918-1939), agricultural land in Poland was under special protection, which resulted from Art. 99 of the March Constitution (Act of March 17, 1921)[2]. According to this provision, "land, as one of the most important factors in the existence of the Nation and the State, cannot be traded unlimitedly. (…) The agricultural system of the Republic of Poland is to be based on farms capable of proper production and being personal property[3]." In the interwar period, leasing of agricultural land was also popular.

It is worth adding that over the centuries, from the 11th century onwards, part of today's Ukraine area was part of Poland, and then the Polish–Lithuanian Commonwealth, as well as the 1st and than 2nd Republics of Poland (1918-1939). Therefore, the regulations presented below were in force in Poland and in some areas of today's Ukraine.

In the interwar period, agricultural reform laws were introduced that had an impact on the expansion and creation of farms. In accordance with the Act of July 15, 1920 on the implementation of the land reform[4], the principles of its implementation concerned, inter alia, the compulsory purchase of large-owned land, with an area below a certain statutory maximum, e.g. land surplus: over 60 hectares of total area in estates located in industrial and suburban districts and over 400 hectares of total area in estates located in some parts of the lands of the former Prussian partition and the eastern territories of the Republic of Poland[5], a surplus of over 180 hectares of total area in properties located in the remaining parts of the Republic of Poland. Obviously, the owner of the property or properties subject to compulsory purchase was entitled to remuneration. The next Act of December 28, 1925 on the implementation of the agricultural reform[6] indicated in Article 1 that the agricultural system of the Republic of Poland would be based on farms of various types and sizes, which would be strong, healthy and capable of high levels of production, and which would be the private property of their owners. The

[2] Constitution of the Republic of Poland, March 17, 1921; http://libr.sejm.gov.pl/tek01/txt/kpol/e1921.html[As on: 09.09.2022].
[3] P. Kociubiński, Powojenne przekształcenia własnościowe w świetle konstytucji, Warszawa 2013.
[4] Journal of Laws of 1920 r. no 70, item 462 as amended.
[5] See more M. Stanulewicz, Reforma rolna jako próba regulacji stosunków agrarnych w Polsce. Koncepcje i próby ich realizacji latach 1918 – 1944, [in:] Reformy rolne w Polsce międzywojennej i powojennej, ed. E. Borkowska-Bagieńska, W. Szafrański, Poznań 2008, pp 11 and next.
[6] Journal of Laws of 1926, no 1, item. 1 as amended.

introduction of the new system included, inter alia, creating independent farms, expanding existing dwarf farms to the size of independent economic units, creating small farms for horticultural and vegetable production, creating gardens for workers and officials, etc. near cities and industrial centers.

Before World War II, the Polish countryside was diverse in terms of social and economic development. In 1931, the land covered an area of 37.9 million hectares. Farms with an area of less than 50 ha totaled 21.8 million ha (57.6 %), while those with an area of at least 50 ha, i.e. landed property, totaled 9.8 million ha (25.8 %). Small and medium-sized units (up to 10 ha) prevailed in number, together constituting 89 %. Landowners accounted for only 0.5 % of all farms, covering 25.8 % of the total land[7]. In the period from 1921 to 1939, certain changes took place in the agrarian structure, consisting in a decrease in the amount of land owned by landowners and public ownership in favor of small farms[8]. These modifications were primarily the result of the parceling of economically decaying landed estates[9] and should be assessed positively.

Diametric changes in the Polish political system and relations in agriculture were introduced on the basis of the decree of the Polish Committee of National Liberation on the land reform of September 6, 1944[10]. Article 2 of this legal act stipulated that land owned or jointly owned by natural or legal persons would be designated for the purposes of the land reform, if the total size exceeded 100 ha of the total area, or 50 ha of agricultural land, and in the Poznań, Pomorskie and Śląskie voivodeships, if their total size exceeded 100 ha of the total area, regardless of the size of the agricultural land surface. In the light of the provisions, this agricultural real estate was immediately, without any remuneration, wholly expropriated by the State Treasury, for the purposes specified in the Act[11]. As a rule, the transfer of land ownership under Art. 2 of the Polish Committee of National Liberation decree of September 6, 1944 took place without any remuneration. Only expropriated owners or co-owners of agricultural real estate could obtain independent farms outside the poviat (county) where the expropriated property was located. Or, if they did not exercise this right, they could be paid a monthly allowance equal to the salary of a government official of the VI group.

In the following years, state-owned agricultural enterprises (PPGR or PGR) and agricultural production cooperatives were of great importance in the country. In Poland, as probably the only socialist country, there were also private farms of farmers. It was possible thanks to patriotism and the struggle of Polish peasants. The area of land purchased by a natural person (private person), including the area of land that was already the exclusive property of the buyer or his share in joint ownership, could not exceed 15 ha, and if, due to the type of agricultural land, the agricultural property had the nature of a livestock farm, it could not exceed 20 ha. The changes were introduced after the political transformation.

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[7] E. Gorzelak, *Polityka agrarna PRL*, Warszawa 1987, pp. 45-46.
[8] W. Grabski, Społeczne gospodarstwo agrarne w Polsce. Warszawa 1923.
[9] Ibidem.
[10] Journal of Laws of 1945 No 3, item. 13 as amended, See. W. Góra, *Reforma rolna PKWN*, Warszawa 1969, p. 15 and next.
[11] See A. Suchoń, M. Kowalczyk, Analiza przepisów dekretu PKWN z 6 września 1944 r. o przeprowadzeniu reformy rolnej wraz z późniejszymi zmianami oraz innych aktów prawnych na podstawie których nastąpiło przejęcie nieruchomości ziemskich i lasów, [in:] Reformy rolne w Polsce międzywojennej i powojennej, ed. E. Borkowska-Bagieńska, W. Szafrański, Poznań 2008, pp. 63-138.

On 1 January 1992, the Agricultural Property Agency of the State Treasury started its activity[12]. Its main task was to take over all state agricultural property and to manage the property in compliance with the regulations. The Agricultural Property Reserve took over the state property which used to belong to the National Land Fund or used to be a part of organized production units in the form of state agricultural companies or state agricultural farms. It is worth mentioning at this point that the National Land Fund[13] was established on the basis of a decree of the Polish Committee of National Liberation of 6 September 1944 and it operated continuously for 48 years. Some land included in the Fund were land properties taken over by the state from former owners.

Pursuant to Article 24 of Act on 19 October 1991 on Managing Real Estate from the State Treasury and its implementing provisions[14], the Agency manages the Reserve by: selling the property in full or in part; leasing or renting the property for a fixed period of time to be used, for consideration, to legal persons or natural persons; contributing the property or its part to a company; entrusting the property in full or in part to an administrator for management purposes for a fixed period of time; creating a trust; and exchanging the property. Property included in the Agricultural Property Reserve can be given, free of charge, to a local government unit under an agreement for purposes connected with the carrying out of the investment[15].

By the end of December 2010, the Agricultural Property Agency had taken over properties of a surface area amounting to over 4,740,424,00 ha. For many years, lease[16] was the main form of managing property. In 1995, more than 2 million 745 thousand ha were leased in Poland, in 1996 – 2 million 928 thousand ha, 1998 – 2 million 810.5 thousand ha, 2002 – 2 million 407.5 thousand ha. The sale of property, however, has recently become more popular before Poland became a member of the European Union[17]. Once Poland joined the European Union and fell under the Common Agricultural Policy, the need for structural changes undoubtedly increased. This results from the fact that only stable agricultural activity on bigger agricultural farms will make Polish agricultural producers competitive on the EU market and help them to use the financial aid in an effective way. This refers to such aid as that coming from the programme designed to improve agricultural farms. At the same time, it should be mentioned that some EU programs, such as structural pensions[18] or bonuses for young farmers, encourage the older generation farmers to stop their agricultural activity and lead to the promotion of bigger, more modern units set up by young farmers.

[12] Under the Act of 11 April 2003 on Formation of Agricultural System the name of the Agricultural Property Agency of the State Treasury was changed to the Agricultural Property Agency. The Agricultural Property Agency is a legal successor of the Agricultural Property Agency of the State Treasury.

[13] M. Błażejczyk M., *Prawne aspekty racjonalnego wykorzystania gruntów Państwowego Funduszu Ziemi*. Studia Prawnicze 1968, z. 18.

[14] Journal of Laws of 2022 r. item 514, 1270, 1370, 1846 as amended.

[15] See more P. Popardowski, Komentarz do art. 24 ustawy o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa, in: Komentarz do ustawy o gospodarowaniu nieruchomościami rolnymi Skarbu Państwa, ed. K. Osajda 2021, Legalis/el.

[16] A. Suchoń, Prawna ochrona trwałości gospodarowania na dzierżawionych gruntach rolnych, Warszawa-Poznań 2006, p. 5 and next.

[17] Agricultural Property Agency, *Activity report of 2010*, https://www.kowr.gov.pl/zasob/raporty-roczne-anr [As on: 02.08.2022].

[18] E.g. Regulation of the Council of Ministers of 30 April 2004 on the detailed conditions and procedure for granting financial aid for obtaining structural pensions covered by the rural development plan Journal of Laws of 2004,

Certain restrictions in the field of agricultural real estate trading were introduced by the Act of April 11, 2003 on the shaping of the agricultural system[19]. The legislator then decided to use instruments of civil law: pre-emption and buyout[20]. In the period from July 16, 2003 to April 30, 2016, this legal act did not significantly affect the structure of agricultural holdings. Major changes in the field of agricultural real estate trading were introduced by the amendment of April 14, 2016 on the shaping of the agricultural system under the Act of April 14, 2016 on suspending the sale of real estate owned by the Agricultural Property Stock of the Treasury and amending certain acts, providing for new subjective restrictions and obligations related to the acquisition of agricultural real estate. Pursuant to the Act of 11 April 2003 on Formation of Agricultural System, only an individual farmer may be the purchaser of agricultural property, unless the law provides otherwise. This legal act stipulates that the above principle does not apply to the acquisition of agricultural real estate by, for example, a relative, or a local government unit, as a result of inheritance or debt recovery[21]. Such a regulation is to limit the acquisition of agricultural land for purposes of speculation. Poland's membership in the European Union has encouraged the Polish legislator's increased interest in legal guarantees of the protection of agricultural real estate.

The subjective limitations result mainly from the fact that according to Art. 23 of the Constitution, the state's agricultural system is based on the family farm, i.e. a unit run by an individual farmer, which is a natural person who is the owner, perpetual usufructuary, sole owner, or tenant of agricultural real estate with a total area of agricultural land not exceeding 300 ha, with agricultural qualifications and at least 5 years of residence in a municipality where one of the agricultural real estates is located, and who runs the farm personally for this period. At the same time, the regulations provide for obtaining approval for the purchase of agricultural real estate issued by the National Agricultural Support Centre: at the request of the seller or the buyer, after meeting the statutory requirements. According to the novelty of Act on the Formation of the Agricultural System, since April 30, 2016 (date of the coming into force of the amendment of 14 April 2016 to the Act of 11 April 2003 on the Formation of the Agricultural System), are the obligations of the purchaser of agricultural real estate. Namely, this person is obliged to run a farm, which includes the purchased agricultural real estate, for a period of at least 10 years (and currently 5 years) from the date of purchase of this real estate, and in the case of a natural person, to run the farm in person[22]. During this period, the land may not be sold or given to other entities.

The Act on the Structuring the Agricultural System was amended in 2019[23], introducing the possibility of purchasing agricultural real estate up to 1 ha by persons who do not have the status of an individual farmer. This change was welcomed by those interested in small properties. Currently, the legislation

no 114, item 1191; Council Regulation No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultual Fund for Rural Development (EAFRD).

[19] Journal of Laws of 2003 No 64, item. 592 as amended. Consolidated text, Journal of Laws of 2022, item. 461, 1846.

[20] A. Lichorowicz, *Instrumenty oddziaływania na strukturę gruntową Polski w ustawie z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego*, „Kwartalnik Prawa Prywatnego" 2004, no 1.

[21] K. Marciniuk, Prawne instrumenty ingerencji władzy publicznej w obrót nieruchomościami rolnymi jako środki kształtowania ustroju rolnego, Warszawa 2019.

[22] See more P. Wojciechowski, Komentarz do art. 2b ustawy o kształtowaniu ustroju rolnego, in : Komentarz do ustawy o kształtowaniu ustroju rolnego, ed. K. Osajda 2021, Legalis/el., Nb 44.

[23] Journal of Laws of 2019 item 1080.

in Poland is conducive to the creation and expansion of family farms. The expansion of a non-family farm may occur, inter alia, through the lease of mainly private land and the so-called communal land. In Poland, where the vast majority of farms are run by natural persons, most have the status of family farms. There are also agricultural production cooperatives in Poland – currently over 600[24].

According to Article 138 of the Act of 16 September 1982 on co-operative law[25], the object of the agricultural activity of an agricultural production co-operative (APC) is to run a joint agricultural holding and to operate for the benefit of the individual agricultural holdings of its members. A co-operative may also engage in other business activities. The legislator used the connecting word 'and' to refer to the two basic types of activity of this type of co-operative. It seems that it is right to interpret it in a purposeful way - the APC runs a joint agricultural holding, but it may also operate for the benefit of its members' individual agricultural holdings. When defining the objectives of the APC, the legislator referred to the concept of an agricultural holding. However, the Act does not define it. Since co-operative law is classified as civil law, it is justified to refer to the definition contained in the civil code. According to the aforementioned Article 55^3 of the Polish Civil Code[26], an agricultural holding is considered to be an agricultural land together with forest land, buildings or parts of buildings, equipment and livestock, constituting or capable of constituting an organised economic unit and rights related to running an agricultural holding. Within the set of components constituting an agricultural holding, agricultural land is given primary importance. In the case of the APC land may constitute property of that entity or be only in its possession. Special provisions of co-operative law specify the requirements to be met by members of agricultural production co-operatives. These may be farmers who are: owners or natural holders of agricultural land; tenants, users or other dependent holders of agricultural land; and may also include other persons with qualifications useful for working in a co-operative. In agricultural production co-operatives, a member has the right and obligation to work on an agricultural holding. This is provided for in Article 155 of the Act of 16 September 1982.

There are relatively few farms run by commercial companies in Poland. These are mainly entities leasing agricultural land from the National Centre for Agricultural Support, and the contracts were often concluded in the 1990s. It is worth mentioning here the legal instruments that facilitate the acquisition of agricultural real estate, the owners of which are commercial companies, by the National Agricultural Support Centre. Namely, in the event of a change of a partner or a new partner joining the partnership (general partnership, limited partnership, Kommanditgesellschaft, limited joint-stock partnership), which is the owner or perpetual usufructuary of an agricultural property with an area of at least 5 ha or agricultural property with a total area of at least 5 ha, the National Agricultural Support Center, acting for the benefit of the State Treasury, may submit a declaration on the purchase of this real estate for the payment of a price corresponding to their market value (Article 3b of the Act on Structuring the Agricultural System). In turn, according to Art. 3a of the Act on Structuring the Agricultural System, the National Agricultural Support Center, acting for the benefit of the State Treasury, has, within the meaning of the Commercial Company Code Act of 15 September 2000, the right of pre-

[24] See more about cooperatives A. Suchoń, *Legal aspects of the organisation and operation of agricultural co-operatives in Poland*, Poznań 2019, p. 80 and next. https://press.amu.edu.pl/pub/media/productattach/s/u/suchon_the_legal_aspects_2019__2022_oa_amup.pdf

[25] Uniform text: Consolidated text, Journal of Laws of 2021, item 648 as amended.

[26] Ustawa from 23 April 1964 - Kodeks cywilny, Polish Civil Code, Consolidated text, Journal of Laws of 2022, item. 1360 and next.

emption of shares and stocks in a capital company, which is the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 ha or agricultural real estate with a total area of at least 5 ha[27].

It is also worth mentioning that, on the basis of the Act of 10 February 2017 on the National Agricultural Support Centre[28], this institution continues the activities of the Agricultural Property Agency, the successor of the Agricultural Property Agency of the State Treasury (which began its activities in 1992). The current tasks of National Agricultural Support Centre are varied. On the one hand, it continues to manage the Treasury Property Stock, which currently amounts to over 1,346,898 ha. As of 30 June, 2022, 1,082.3 thousand ha remained under lease on the basis of 68.7 thousand lease agreements concluded[29]. Currently, lease from the Treasury Property Stock is mainly for individual farmers and young farmers setting up farms.

On the other hand, the National Agricultural Support Centre has been obliged to implement the provisions of the Act on Structuring the Agricultural System. Therefore, the National Agricultural Support Centre influences the trade in private and communal agricultural real estate within the scope of, inter alia: examining applications and issuing administrative decisions concerning the purchase of agricultural real estate, exercising the pre-emption right and the right to acquire agricultural real estate, and supervising the fulfilment of statutory obligations by buyers of agricultural real estate. The National Support Centre for Agriculture also has broader competences, for example, in supporting measures associated with renewable energy sources, in particular in agriculture; and with monitoring the following: agricultural biogas production, the market for biocomponents and liquid biofuels, and the production of bioliquids.

According to statistical data, there were 1.3 million agricultural holdings in Poland in 2020, and when compared to 2010 their number decreased by 192,000 (by 12.7 %)[30]. The area of agricultural holdings covered 16.4 million hectares and, compared to 2010, decreased by 587 thousand hectares (by 3.5 %). In 2020. 91.4 % of farm acreage belonged to individual farms, and this was 3.1 % more than a decade earlier. In terms of the structure of farms in 2020, every second farm belonged to the range of 1-5 ha of agricultural land (52.4 % in 2010). Farms of 5-10 ha (21.9 %, 1.0 p.p. less than in 2010) and of 15 ha and more (15.9 %, 2.9 p.p. more than in 2010) also had a large share. As in 2010, every tenth farm had an area of 10-15 ha, and the lowest share was of the smallest farms, i.e. with an area of up to 1 ha - 2.0 % (1.7 % in 2010) [31]. The average size of agricultural land in an agricultural holding in Poland in 2022 was 11.32 ha[32].

[27] See more P. Blajer, W. Gonet, *Ustawa o kształtowaniu ustroju rolnego*. Komentarz, Warszawa 2020.
[28] Journal of Laws of 2017 item 623.
[29] https://www.kowr.gov.pl/zasob [As on: 02.08.2022].
[30] GUS, Obszary wiejskie w Polsce w 2020 r.
[31] GUS, Obszary wiejskie w Polsce w 2020 r., p .101 and next.
[32] Announcement of the President of the Agency for Restructuration and Modernization of Agriculture of September 15, 2022 on the size of the average area of agricultural land in a farm in individual provinces and the average area of agricultural land in a farm in the country in 2021, https://www.gov.pl/web/arimr/srednia-powierzchnia-gruntow-rolnych-w-gospodarstwie-w-2022-roku [As on: 02.08.2022].

3. Legal regulation and agrarian structure in Ukraine

Practically since Ukraine became part of the Soviet Union (1922), its land has belonged exclusively to the state. The forced collectivisation of the 1930s led to the creation of *kolkhozes* (collective farms) and *sovkhozes* (state enterprises) reaped the benefits of using the land free of charge. Only in 1991, after Ukraine gained independence, land reform began with the former collective farms, which were transformed into collective agricultural enterprises (*KSP*), in accordance with the Resolution of the Verkhovna Rada of Ukraine "On Land Reform" of December 18, 1990 (this resolution is not currently in force), Laws of Ukraine "On Forms of Ownership on Land" of January 30, 1992[33], (no longer in force) and the Law "About the collective agricultural farm" of November 14, 1992[34].

These laws recognised the right granted to each of the employees the right to a proportionate share of the *kolkhoz* land (a so-called "pai").The process of determining the size of the pai (1–8 ha, depending on the district) lasted about ten years and, according to various data, 6–8 million people received certificates confirming their right to them. During the initial stage of the agrarian reform, 10,800 former collective farms (*kolkhozes*) were reorganised into collective agricultural farms (*KSP*). More than 2,300 state farms (practically the same as PGR in Poland) and other state-owned enterprises were also privatized.

Although during this time the entire *kolkhoz* land was "allocated", only the area of land which fell to a given person was determined, without marking out plots on maps, let alone in the field (this was to be done only if the owner of the *pai* wanted to leave the kolkhoz and farm independently). The vast majority of land ownership certificates were leased to the heads of agri-companies, and only about 6 % of them were converted into the right to use a specific, physically separate plot of land.

In the same period, namely in 1992, the first Land Code of independent Ukraine was adopted. According to this legislation, the land fund of the country ceased to be the exclusive property of the state, and land plots could be in state, collective, and private ownership. Article 4 of the Code listed land that could not be transferred to collective or private ownership, and all other land could be privatised. The 1992 Land Code did not allow private ownership of land plots by legal entities. Legal entities could receive land plots for permanent or short-term use, as well as for lease for a period not exceeding 50 years.

The next stage of land reform was the definition of land shares (agricultural land). As of June 1 2001 6,480,000 peasants became owners of certificates confirming their right to a land parcel (share or *pai*). During these years, there were an active privatization process when there was no prohibition on the sale of land shares (*paji*). The issued decrees determined the procedure for the circulation of arable land. All agreements had to be notarized and registered, which the state was not ready for. So 65.5 % (or 27.4 million ha) of arable land had been privatized by the end of 1997. The most successful measures have been the privatization of small plots of land, mainly with houses on them, which can be bought and sold.

The main phases of this period are: 1995 – the Presidential Decree "On the Procedure for the Sharing of Land Transferred Into Collective Ownership of Agricultural Enterprises and Organizations"; 2001 –

[33] The Law of Ukraine No. 2073-XII "On Forms of Ownership on Land" of January 30, 1992, no longer in force.
[34] The Law of Ukraine No.2114-XII "About the collective agricultural farm" of November 14, 1992.

the Adoption of the Law "On Agreements on the Alienation of a Land Portion". In 2001, the new Land Code of Ukraine was enacted, establishing ownership of agricultural land. But it was believed that the country was not prepared for the introduction of free trade in land (in part due to the lack of a land cadastre) and therefore the implementation of the legislation was suspended until the necessary conditions were met[35].

The first interim act prohibiting the purchase of land and establishing the first moratorium was passed in 2001. This regulation was established for three years to regulate the market during this time. However, the "temporary moratorium" was prolonged eight times. The sale of land was mothballed, and only 2 areas were developed: gratuitous privatization of land (the possibility of each individual receiving 2 ha of land from the community and land lease).

It must be mentioned that during this time, there has been a concentration of land and the creation of large agricultural enterprises (called agri-holdings in Ukraine), farming on tens or – in some cases – hundreds of thousands of hectares leased from the owners of *pais*. At the same time, the former *kolkhoz* workers, some of whom had no heirs, were dying out. The area of such no-man's-land is steadily increasing, and is currently estimated at 1.6 million ha. The possibility of the free use of this land motivated both entrepreneurs and officials, who corruptly profited from this procedure, the reform of the ownership situation in agriculture.

This period began in 2011, when the Law "On State Land Cadastre" was adopted. It took the Ukrainian parliament 30 years to pass the Law on the Land Market. It was only during Zelensky's presidency that the long-awaited Law of Ukraine from the 31 March 2020 No. 552-IX "On Amendments to Certain Legislative Acts of Ukraine Regarding the Circulation of Agricultural Land", the basis for the entire land reform, was adopted[36].

However, the implementation of the this law will be gradual:

- From July 1, 2021 only individuals – citizens of Ukraine may purchase agricultural land. And they may not buy more than 100 hectares per person.
- From January 1, 2024, legal entities registered in Ukraine and founded by a citizen of Ukraine will be able to purchase more than 10 thousand hectares.

The land market has opened, but the purchase and sale of land are proceeding rather slowly because of the unprepared infrastructure: the complexity of the legal processing of agreements, the incompleteness and absence of land in electronic registers. But now foreigners and foreign companies are not allowed to acquire ownership of agricultural lands in Ukraine until the applause (sub-question) of this question at the all-Ukrainian referendum. At this time, the mechanism of the all-Ukrainian referendum has not been clearly defined: it is not known when it will take place and under what conditions.

As a result of the aforementioned reform, the ownership structure of agricultural land in Ukraine (41,4 million ha) is now as follows[37]: 1) private ownership – 31 million ha (74.9 %); 2) state ownership

[35] P.F. Kulynych, *Zemelna reforma v Ukraini: pravovi problem*. Monografia. Kyiv: Norma prava, 2021. 308.
[36] The Law of Ukraine No. 552-IX "On Amendments to Certain Legislative Acts of Ukraine Regarding the Circulation of Agricultural Land" of March 13, 2020.
[37] Zemelny dovidnyk Ukrainy 2020. – https://kurkul.com/spetsproekty/1094-zemlya-dlya-fermera-dovidniki-zakoni-i-poradi-yuristiv-ta-ekspertiv [As on: 02.08.2022].

– 8.7 million ha (21 %); 3) communal ownership – 1.7 million ha (4.1 %). In 2020 the structure of agricultural land use was as follows: 1) land that is cultivated by its owners – 29 %; 2) land leased from owners – 56 %; 3) land leased from the state – 8 %; 4) land that is not cultivated – 7 %. Overall, Ukraine has formed a large group of landowners and land users – 25.3 million people and 6,9 million owners of land shares. In the year 2000, a total of 14,700 new companies were established on the basis of 11,400 *KSP*s. Among them: 1,254 peasant farms, 6,761 business partnerships (mostly of them were in form of LLC), 2,901 private and rented enterprises, 3,325 agricultural cooperatives and over 500 other business entities.

The number and role of different enterprises has changed over the years, but their overall structure has remained the same[38]. Therefore, four main groups of agricultural producers can now be distinguished in Ukrainian agriculture: 1) households – also including persons–entrepreneurs, who are not legal entities and who grow agricultural products both for their own needs and for sale; 2) private enterprises – in agriculture they are represented by farms and private agriculture enterprises. Farms may be established exclusively by citizens of Ukraine and their activities must be based on the labour of the members of the farmer's family, although the hiring of workers is permitted. The land may be owned by the farmer as the right of ownership. The size of farms can also vary from a few hectares to 5000-10,000 hectares, which is effectively a medium-sized enterprise. More than 60 % of the farms have an area of 100 to 2,000 hectares. Private agricultural enterprises are legal entities that operate on the basis of private property and may be founded by citizens of Ukraine, as well as foreigners, stateless persons and legal entities. The general rules of the Civil Code and the Commercial Code on the conduct of business activities apply to them;

3) collectively owned enterprises, different forms of cooperatives. Cooperatives in Ukraine can be of different types. The most common are production cooperatives and service cooperatives. *A producer cooperative is established exclusively by individuals for joint production or other economic activities on the basis of their obligatory participation in labour for the purpose of making a profit.* A service cooperative is established by natural and/or legal persons to provide services primarily to the members of the cooperative, but also to other persons for the purpose of carrying out their business activities. Among other things, the development of cooperatives was to be encouraged by the new Law "On agricultural cooperatives" of July 21, 2020[39], which made significant changes to the rules of cooperatives and changed their classification. In addition to this, all types of agricultural cooperatives operating by 15.11.2020 must be re-registered within 3 years, i.e. by 15.11.2023.

4) business partnerships – can be either domestic, foreign or with foreign investment. In the agricultural sector, business partnerships are the most common form of business after farms. They are predominantly in the form of limited liability and joint-stock partnerships.

Ukraine stands out for the high percentage of land cultivated by agricultural companies (agri-companies). In 2019, individual farmers utilised only 27 % of the land. The share of companies in production varies depending on the crop type – it is the highest in the case of oilseeds (rapeseed, sunflower and soybean), cereals (maize, wheat and barley) and sugar beets.

[38] UKAB. Vydy silskohospodarskyh pidpryjemstv v Ukraini. – https://kurkul.com/spetsproekty/1094-zemlya-dlya-fermera-dovidniki-zakoni-i-poradi-yuristiv-ta-ekspertiv [As on: 05.08.2022].
[39] The Law of Ukraine No. 819-IX "On agricultural cooperatives" of July 21, 2020.

Agri-companies are very fragmented, with the vast majority leasing land of less than 100 ha. The largest players (above 3,000 ha) constitute about 1 % of all companies operating in the agri-food sector and produce more than 20 % of cereals and oilseeds. The most important position, however, is held by medium-sized companies with an acreage of 200–2000 ha. There are about 6,000 of them and, depending on the species cultivated, they are responsible for cultivating 50–75 % of the land tilled by the companies.

The subsequent development of the agricultural sector, based on a system of land renting, has led to the emergence of a new type of companies, called agri-holding. This process was greatly accelerated with the adoption of the Land Code in 2001. Ukrainian agri-holdings are distinguished by their having a large share of foreign capital (the largest portion comes from the USA and Saudi Arabia); entities from outside the country own around 10 % of agricultural land. This is a significant difference in comparison to other sectors of the economy, where, apart from electricity distribution and a metallurgy, the whole industry remains under the control of a few local oligarchs. The largest agricultural producers have a holding structure and list their shares on world stock exchanges. In Warsaw, a separate index was even created targeting mainly local agri-companies (WIG Ukraine).

In 2019, there were twenty-two entities in Ukraine leasing an area of more than 50,000 ha, ten of which were in charge of more than 100,000 ha. In total, they cultivated about 3.4 million ha of land (12 % of all agricultural land). A very interesting fact is that the term “agri-holding” does not exist in Ukrainian law. It is commonly used to describe the largest companies operating in the agri-food market, which adopt a holding structure to optimise their management. Ukrainian agri-holdings can be divided into those owned by agri-oligarchs and foreign investors. Compared to other sectors of the economy, agriculture is distinguished by having a fairly large share of foreign capital. This applies to both large agri-holdings (the American-owned *Agroprosperis* or *Continental Farmers Group*, owned by the Saudi fund SALIC) and small and medium-sized enterprises.

4. Conclusion

Although Poland and Ukraine are two neighboring and friendly countries, today there is a substantial difference in their agrarian structure. Before the Second World War, both in Poland and in parts of Ukraine there were farms of medium size, the so-called gentry farms, and small peasant farms. The agrarian reforms of 1920, 1925 in Poland (on the basis of which the state bought part of the agricultural land from the owners of large estates and sold it to small farms to enlarge their area) were aimed at modernizing the agrarian structure.

In 1930th collective farms were established in the Ukrainian territories that were then part of the Soviet Union. After the Second World War, land reform was carried out in Poland and Ukraine. In Poland, from 1945 to 1989, in addition to state farms and agricultural production cooperatives, small individual farms, generally up to 15 ha, persisted. They could be established and operated throughout the socialist period. However, in Ukraine agricultural land belonged to the state. After the transformation of the political system in Poland in 1989-1991 and Ukraine’s declaration of independence in 1991, further changes took place. In Poland, long-established individual farms developed and many entities increased their acreage by purchasing or leasing land from the Agricultural Property Stock of the State Treasury. At the same time, new farms were established, including commercial companies run by people such as those managing state-owned farms.

In Ukraine by carrying out the reform and transferring agricultural real estate with an area of 8 ha to the employees of collective farms (which was often quite formal), it seems that legislator appreciated the long-term work of the employees of these units in those country. In practice, however, it turned out that these persons were not prepared to carry out agricultural activities themselves in Ukraine. Consequently, a great number of lease agreements were concluded with agri-holdings, whose shareholders are often foreign companies. Some of the companies acquired real estate on their own.

The current agrarian structure of Poland and Ukraine is therefore different. The former is dominated by farms run by individuals, generally having the status of a family farm. There are few agricultural holding companies and about 600 agricultural cooperatives. Family farms are the basis of the agricultural system and the legislator has supported and will continue to support such entities in the future. The average farm in Poland is about 12 ha. In Ukraine, on the other hand, more than 60 % of agricultural land with an area of between 200 and 2,000 ha is leased. Agri-holdings are of great importance. In view of its status as a candidate for membership of the European Union, Ukraine should carry out a reform to strengthen the position of Ukrainian farmers. In the European Union, family farms are the most popular in the majority of countries. It must of course be acknowledged, however, that Ukraine currently has other problems to contend with. Russia's invasion of Ukraine on 24 February 2022 has already caused enormous damage to the Ukrainian agrarian economy. Of course, it is still difficult to assess the extent of the damage accurately at this stage. Just the indirect losses in agriculture due to production decrease, logistics disruption and lower prices for export-oriented commodities were estimated at USD 23.3 billion (at the middle of June). This is stated in the analysis “Agricultural War Losses Review Ukraine. Rapid Loss Assessment”, prepared by the team of the Center for Food Research and Land Use at KSE (*Kyiv School of Economics*) Institute (KSE Agrocenter) in cooperation with the Ministry of Agrarian Policy and Food of Ukraine[40].

[40] Kyiv School of Economics (KSE). Ohliad zbytkiv ta vtrat v APK. – https://kse.ua/ua/oglyad-zbitkiv-ta-vtrat-v-apk/[As on: 05.08.2022].


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