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Preface

Dear Reader

Although 2018 is not a congressional year, CEDR is by no means idle. I draw attention to the Regional Forum to be held in Miskolc on 13th October and my thanks go to our Hungarian colleagues who have organised it. I also give my thanks to all the authors who contributed to this edition of the CEDR-JRL. The range of topics, from novel food and climate protection to water law, is, as always, diverse and invites you to a hopefully inspiring read.

Roland Norer

Editorial Director

Chère lectrice, cher lecteur

En 2018 qui passera sans congrès, le CEDR n'est en aucun cas en reste. En particulier, je voudrais attirer l'attention sur le premier forum régional en octobre à Miskolc. Mes remerciements vont à nos collègues hongrois qui l'ont organisé ainsi qu'à tous les auteurs qui ont contribué à cette édition du CEDR-JRL. La gamme de sujets, allant du Novel Food à la protection du climat en passant par le droit de l'eau, est toujours aussi variée et vous invite à une lecture inspirante.

Roland Norer

Editorial Director

Sehr geehrte Leserinnen und Leser

Im kongressfreien Jahr 2018 präsentiert sich der CEDR keinesfalls untätig. Insbesondere sei hier auf das erste Regional Forum im Oktober in Miskolc hingewiesen. Mein Dank gebührt der ungarischen Kollegenschaft für die Ausrichtung sowie all den Autorinnen und Autoren, die einen Beitrag für diese Ausgabe des CEDR-JRL verfasst haben. Die Themenpalette, die von Novel Food und Klimaschutz bis hin zum Wasserrecht reicht, ist wie immer vielfältig und lädt Sie, werte Leserinnen und Leser, zu einer hoffentlich anregenden Lektüre ein.

Roland Norer

Editorial Director

President's Corner

Views of the President Geoff Whittaker

Welcome to the latest edition of the CEDR Journal.

I start this President's Corner by congratulating the Austrian Association for Agricultural and Environmental Law, which this year celebrates its 50th Anniversary. Although not by any means the largest association member of CEDR, its contribution to our work is substantial. We wish our Austrian friends and colleagues well for the next 50 – and more – years.

I report some appointments which were made by the Management Board at its meeting in February. Prof. Dr. Esther Muñiz Espada, the Spanish Vice-President, was elected unanimously to the position of First Vice-President, taking the place of Prof. Dr. Rudy Gotzen. Prof. Gotzen remains on the Board as Belgian Vice-President, but I take this opportunity to give thanks to him on behalf of CEDR for his work on our behalf over many years.

Also, given my election as President last year, it became inappropriate for me to continue in the position of Treasurer General, and that position has been given by the Board until the Congress of 2021 to Mag. Hannes Kronaus from the Austrian Association. My thanks go to Mag. Kronaus for stepping forward and giving his services. His position on the Board as Austrian Vice-President has been taken by Dr. Anton Reinl, whom we welcome to the role.

Finally, a new position was created with the specific intent of improving the relationships of CEDR with other relevant bodies within Europe, particularly with the Institutions of the European Union. Prof. Dr. Dieter Schweizer, the immediate Past President of CEDR, was appointed as President of Honour and Consultant with that particular responsibility.

I made the point in my last President's Corner that it is necessary to improve the co-ordination of our communications, including those between the members of national associations at their own level. To that end, we are proposing to institute a series of Regional Forums, developing on the idea which was begun with a Mediterranean Forum by Secretary General Dr. Leticia Bourges and Prof. Muñiz in 2013.

I am pleased to be able to give you a date to reserve in your calendars: 13th October 2018. On this date will be held the next in the series, kindly hosted by our colleagues of the Hungarian Association in Miskolc. The details are being finalised at present, and will be announced to you as soon as they are known.

We propose that Forums be held from time to time around Europe – another is under discussion to take place in Spain early in 2019 – to discuss questions of rural law which are relevant to that part of the continent. That is, after all, in keeping with the European principle of subsidiarity! But anyone interested in them, no matter where is their base of operation, will be welcome to attend.

We are aware that there have been – and are – several initiatives for cross-border discussions between CEDR members and we will be glad to help facilitate those where you think we may be useful. Equally, we will welcome hearing from anyone who may be interested in hosting such a Forum.

Other aspects of the initiative to improve communications are receiving attention. Work in is progress to redevelop our website in order not only to facilitate our being able to inform you of relevant matters from "Headquarters", but also to enable you to circulate relevant information from your location to your fellow members in other jurisdictions and to the larger world of rural law.

Also, you may recall that we have established a discussion group on LinkedIn. Go to www.linkedin.com/ and search "European Council for Rural Law" to find it. This is a private group – in order to avoid the possibility of receiving postings which are not relevant to our discussions – so if you are not presently a member but would like to join, you simply need to request it. We will be glad to enrol any person interested in rural law.

It is important to us also to hear your feedback and suggestions on the activities of CEDR. What do we do that you think is good? What do we not do that you think we should? How can we improve the services we provide for you? How might you contribute to those services?

In English, there is a saying: "Many hands make light work". In other words, the more people who contribute to a project, the less effort is required from each of them. If you are able and willing to make a contribution, please contact us. We shall welcome hearing from you.

The primary object of CEDR, according to Article II of our Statutes, is "to undertake research into and to study all questions of rural law and other related studies within the European context … and to promote the dissemination of information and the exchange of views between its members". That, of course, must work in two directions: from CEDR to its members, but also from its members to CEDR.

If you have any comments about what we do, or about what you think we should do, I shall be very glad to hear them. Please email me: geoff@geoffwhittaker.com

Meanwhile, I hope you have enjoyed the summer months and are returned after rest and relaxation in some fine weather.

News

CEDR Regional Forum Central Eastern Europe, 13th October 2018, Miskolc (Hungary)

University of Miskolc

9.30 a.m. – 3.00 p.m. Conference
3.30 p.m. – 5.30 p.m. Board of Management

CEDR Regional Forum Mediterranean Europe, 25th - 26th January 2019, Sevilla (Spain)

Publications

XXVII European Congress and Colloquium of Rural Law, Lucerne, 11-14 september 2013

CEDR (ed.), Aspects du droit de la famille et du droit de l'environnement dans l'agriculture, Paris 2018

Angelo Mary Jane/Du Plessis Anél (ed.), Research Handbook on Climate Change and Agricultural Law, Cheltenham UK/Northampton MA USA 2017

Cardwell Michael, Brexit and agriculture: implementing a new legal framework for agricultural support, The Cambridge Yearbook of European Legal Studies 2017, pp. 311 ff.

Eckhardt Gernot, Die Reform der GAP 2013, Wien/Graz 2017

Fancourt Timothy/Shea Caroline/Taskis Catherine/Windsor Emily/Peters Edward/Sutherland Jamie (ed.), Muir Watt & Moss: Agricultural Holdings, 15th ed., London 2018

Hollo Erkki J. (ed.), Water Resource Management and the Law, Cheltenham UK/Northampton MA USA 2017

Martínez José (Hrsg.), Reichweite und Grenzen des Agrarrechts. Gedächtnisschrift für Dr. Wolfgang Winkler, Baden-Baden 2018

Norer Roland (Hrsg.), Handbuch zum Agrarrecht, Bern 2017

Richli Paul, Agrarrecht, in: ders. (Hrsg.), Wirtschaftsstrukturrecht unter besonderer Berücksichtigung des Agrar- und Filmwirtschaftsrechts, 2. Aufl., Basel 2018

WEKA, Rechtshandbuch Land- und Forstwirtschaft, Wien 2017

Some comments on the new regulation of novel foods

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Abstract

The paper discusses the legislation on novel foods, particularly Regulation of the European Parliament and of the Council (EU) No 2015/2283 of 25 November 2015 which came into force on 1 January 2018. The aim of the recently adopted solutions, apart from maintaining a high level of protection of the health and life of consumers, is to open the EU market to safe innovations in the agri-food sector. This objective is to be achieved by, among others, updating basic concepts and definitions, shortening and reducing the cost of authorisation procedures, introducing a centralised risk and food safety assessment, simplifying procedures for the placing on the EU market of traditional foods from third countries, and protecting the scientific data of innovators. The discussion aims to answer the question whether, and if so to what extent, the newly adopted solutions facilitate the placing of novel foods on the EU market and ensure a high level of protection of the health and life of consumers and their economic interests.

Cet article discute de la législation sur les nouveaux aliments, en particulier le règlement du Parlement européen et du Conseil (UE) n° 2015/2283 du 25 novembre 2015 qui est entré en vigueur le 1er janvier 2018. L'objectif des solutions adoptées récemment , outre le maintien d'un niveau élevé de protection de la santé et de la vie des consommateurs, consiste à ouvrir le marché de l'UE à des innovations sûres dans le secteur agroalimentaire. Cet objectif doit être atteint, notamment en actualisant les concepts de base et les définitions, en raccourcissant et réduisant le coût des procédures d'autorisation, en introduisant une évaluation centralisée des risques et de la sécurité alimentaire, en simplifiant les procédures de mise sur le marché communautaire des aliments traditionnels. pays tiers et protégeant les données scientifiques des innovateurs. La discussion vise à répondre à la question de savoir si, et dans quelle mesure, les solutions nouvellement adoptées facilitent la mise sur le marché européen de nouveaux aliments et garantissent un niveau élevé de protection de la santé et de la vie des consommateurs et de leurs intérêts économiques.

Key words: *novel foods; food safety; food security; new technologies.*

1. Introduction

The subject of this discussion is the legislation on novel foods. Foodstuffs of this kind include both products obtained through new methods of production or food processing, and third-country foods which have not been consumed within the European Union (EU). Certainly, unknown and hitherto not consumed foods may be of help in ensuring food security, which is one of the biggest challenges of the Common Agricultural Policy (CAP)[1]. Furthermore, using these innovations in the agri-food sector can have a positive economic impact on business operators by, among others, lowering the cost of land

[1] cf. R. Budzinowski, «Współczesne wyzwania związane z żywnością i ich rola w kształtowaniu polityki rolnej i prawa rolnego», Przegląd Prawa Rolnego, 2015, No 2, p.17.

cultivation, stock farming, and food production and processing, or by making production less dependent on climatic and weather conditions. Additionally, it could minimise the negative human impact on the environment, e.g. through the use of clean technology or reducing waste production. Finally, alternatives to conventional foods are sought after by consumers who are more and more interested in foods with certain qualities and special characteristics, such as increased or reduced calorie content or nutrient and mineral values, as well as hypoallergenic products.

Although placing novel foods on the market creates many opportunities, using these foodstuffs also involves a number of risks. Special consumer protection should be ensured in the case of foods hitherto unknown in the EU, since the consequences of their consumption are difficult to predict. Novel foods may pose a risk not only for the life and health of consumers, but also for the environment. Moreover, the negative effects of producing, using and consuming novel foods may become apparent over a longer period of time, since the safety of these products has not been confirmed by a history of safe consumption in the EU.

Placing novel foods on the EU market, and ensuring their safety, was dealt with primarily in Regulation No 258/97[2] which entered into force on 15 May 1997 and applied for over 20 years. The solutions contained therein were criticised mainly because of the long and costly authorisation procedures, failure to protect the achievements of innovators and numerous concerns pertaining to the scope of the Regulation. One could even say that these rules prevented the full technological potential of the agri-food sector from being explored. The twenty years that Regulation No 258/9 was in force saw less than 200 applications for an authorisation to place a novel food on the market. On 1 January 2018 the previous solutions were replaced by Regulation No 2015/2283[3]. The aim of the new rules was to update basic concepts and definitions, shorten and reduce the cost of authorisation procedures, introduce centralised risk and food safety assessments, simplify procedures for the placing on the EU market of traditional foods from third countries, and protect the scientific data of innovators.

The following discussion aims to answer the question whether, and if so to what extent, the newly adopted solutions facilitate the placing of novel foods on the EU market and ensure a high level of protection of the health and life of consumers as well as their economic interests.

2. Updating the definition of novel foods

The definition of novel foods under Regulation 258/97 comprised two criteria: a history of safe use and the application of specific production processes[4]. According to the first criterion, novel foods are those foods and food ingredients which until 15 May 1997 were not used for human consumption to

[2] Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, OJ L 43, 14.2.1997, p. 1, as amended, referred to in this paper as Regulation No 258/97.

[3] Regulation of the European Parliament and of the Council (EU) No 2015/2283 of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001, OJ L 327, 11.12.2015, p.1, referred to in this paper as Regulation No 2015/2283.

[4] V. Amanor-Boadu, "Post-market surveillance model for potential human health effects of novel foods", *Food Policy,* 2004, No 6, p. 611.

a significant degree within the EU. The criterion consisted of two elements: time and quantity[5]. The second criterion required novel foods to fit into legally established categories. In literature[6], these have been divided into biological, chemical and physical innovations[7].

The previous definition was repeatedly criticised for the presence of many vague and imprecise expressions[8]. They are in particular: "not used for human consumption to a significant degree within the EU"; "a new or intentionally modified primary molecular structure"; "undesirable substances"; "traditional propagating or breeding practices" and "foods and food ingredients [...] having a history of safe food use". Such vague wording raised both theoretical and practical doubts over the scope of the Regulation. They resulted from the fact that the ambiguously worded provisions were used in the first place by business operators intending to place novel foods on the EU market[9].

Regulation No 2015/2283 introduces changes to the previous definition of novel foods. Due to the advances in science and technology, it was necessary to review, clarify and update the categories of these types of foodstuffs[10]. The intention was to make the new definition more precise and reflective of technological developments[11]. As a result, the new definition is very broad and describes novel foods as any food which was not used for human consumption to a significant degree within the Union before 15 May 1997, irrespective of the dates of accession of Member States to the Union, and which falls under at least one of as much as ten legally established categories[12].

Although initially the legislator wanted to create an open catalogue of novel foods[13], ultimately it was decided that the scope of the new legislation should remain unchanged compared to the current rules. In order to ensure continuity with the provisions of Regulation No 258/97, one of the criteria for recognising a food as novel should still be the absence of use for human consumption to a significant degree in the EU before 15 May 1997[14].

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[5] *cf.* B. van der Meulen, M. van der Velde, *European Food Law Handbook,* Wageningen, 2009, p. 294; and A.H. Meyer, *Gen Food Novel Food. Recht neuartiger Lebensmittel,* Monachium, 2002, p. 64.

[6] A.C. Huggett, C. Conzelmann, "EU regulation on novel foods: Consequences for the food industry", *Trends in Food Science & Technology,* 1997, No 8, p. 134.

[7] Biological innovations include foods and food ingredients consisting of or isolated from micro-organisms, fungi or algae, those consisting of or isolated from plants, as well as foods and food ingredients of animal origin, unless obtained by traditional propagating or breeding practices and having a history of safe food use. Chemical innovation is understood as the intentional modifying of the primary molecular structure, while physical innovation involves the application of a production process not currently used, where that process gives rise to significant changes in the composition or structure of a food or food ingredient which, in turn, affect its nutritional value, metabolism or level of undesirable substances. *cf.* Article 1 (2) of Regulation No 258/97.

[8] See K.A. Schroeter, "Anwendungsprobleme der Novel Food-Verordnung", *ZLR – Zeitschrift für das gesamte Lebensmittelrecht,* 1997, No 4, p. 377; D. Groβ, *Die Produktzulassung von Novel Food,* Berlin, 2001, p. 208 ff.; I. Gerstberger, "Innovationen durch Lebensmittel aus anderen Kulturkreisen", *ZLR – Zeitschrift für das gesamte Lebensmittelrecht,* 2011, No 4, p. 430 ff.

[9] *cf.* R. Streinz, "Anwendbarkeit der Novel Food-Verordnung und Definition von Novel Food", *ZLR – Zeitschrift für das gesamte Lebensmittelrecht,* 1998, No 1, p. 2.

[10] See recital 8 of the Preamble and Article 3 (2)(a) of Regulation No 2015/2283.

[11] D. Stankiewicz, "Nowa żywność", *Analizy BAS,* 2014, No 13, p. 7.

[12] See Article 3 (2)(a) of Regulation No 2015/2283.

[13] See the original wording of the proposal for a Regulation of the European Parliament and of the Council on novel foods COM(2013)894 final.

[14] See recital 7 of the Preamble to Regulation No 2015/2283.

Out of the categories of novel foods which are present in Regulation 2015/2283 but were not explicitly specified in Regulation No 258/97, particular attention should be paid to foods consisting of, isolated from or produced from materials of mineral origin. In the previous legal environment, it was unclear whether foods of this kind should be considered 'novel'. While these doubts were clarified by the CJEU[15], which ruled that the phrase "new primary molecular structure" does refer to foods of mineral origin which were present in nature in with the same molecular structure before 15 May 1997, the judgement which settled the matter was delivered towards the end of 2016, i.e. after Regulation No 2015/2283 was published.

Another new category covers foodstuffs consisting of, isolated from or produced from cell culture or tissue culture derived from animals, plants, micro-organisms, fungi or algae. Unfortunately, the provisions concerning novel foods do not specify the meaning of "cell culture or tissue culture". Consequently, the phrase must be assumed to refer to all isolated plant and animal cells and tissue as well as substances derived therefrom[16].

The legislator also singled out foods consisting of engineered nanomaterials[17] which, pursuant to Regulation No 2015/2283, should be considered novel foods[18]. It must be stressed, however, that nano-foods could already be considered novel foods under the previous legislation. To the extent that a food or its ingredients had a new or intentionally modified primary molecular structure[19], nano-novel foods could fall within the scope of Regulation 258/97[20]. At the same time, they could be categorised as foods or food ingredients derived from a production process not currently used, where that process gives rise to significant changes in the composition or structure of the foods or food ingredients[21]. Thus, creating a separate category is supposed to prevent doubts over the classification of foods consisting of engineered nanomaterials.

In order to clarify its conceptual scope, Regulation No 2015/2283 includes an additional category of "functional novel foods"[22]. This category covers vitamins, minerals and other substances used in food supplements, i.e. so-called "enriched foods"[23] or foods for particular nutritional uses. These will be considered novel foods in the following two cases[24]. Firstly, where the production process applied was not used for food production in the EU before 15 May 1997 and leads to significant changes in the composition or structure of the foods which have an impact on their nutritional value, metabolism or

[15] See judgement of the Court of 9 November 2016 in Case C-448/14 – Davitas GmbH v Stadt Achaffenburg, intervener: Landesanwaltschaft Bayern, ECLI:EU:C:2016:839.
[16] *cf.* M. Delewski, M. Grube, J. Karsten, *Novel-Food-Verordnung. Fragen & Antworten,* Hamburg, 2016, p. 43.
[17] For the definition of an engineered nanomaterial, see in Article 3 (2)(f) of Regulation No 2015/2283.
[18] See Article 3 (2)(a)(viii) and recitals 8 and 10 of the Preamble to Regulation No 2015/2283.
[19] See Article 1 (2)(c) of Regulation No 258/97.
[20] *cf.* K. Leśkiewicz "Prawne aspekty nanotechnologii w produkcji żywności i materiałów przeznaczonych do kontaktu z żywnością", *Przegląd Prawa Rolnego,* 2013, No 2, p. 94.
[21] *cf.* D. Marrani, "Nanotechnologies...", p. 182 and D. Marrani, "Nanofoods e Novel foods nella legislazione alimentare dell'Unione europea", *Diritto Comunitario e Degli Scambi Internazionali,* 2012, No 3, p. 557 ff.
[22] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 47.
[23] In accordance with Regulation of the European Parliament and of the Council No 1925/2006 of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods, OJ L 404, 30.12.2006, p. 26.
[24] See Article 3 (2)(a)(ix) of Regulation No 2015/2283.

the level of undesirable substances. Secondly, where these vitamins, minerals or other substances consist of or contain engineered nanomaterials.

The last new category established in Regulation No 2015/2283 covers foods used within the EU before 15 May 1997 exclusively in food supplements, if they are intended to be used in foods other than food supplements[25]. Bearing in mind dosage directions of food supplements, it must be assumed that foods used in the EU before 15 May 1997 solely for that purpose cannot be considered as having been used for human consumption to a significant degree[26]. The legislator provides that foods which before 15 May 1997 were used only as a food supplement or an ingredient of such a supplement should be allowed to be placed on the EU market after that date for the same use[27].

Expanding and clarifying the definition of novel foods will also help to once and for all determine whether it covers whole insects and their parts[28]. Although the Commissioner for Health and Food Safety in the European Commission stated that both insects and foods isolated from insects (e.g. protein) are novel foods as long as they were not consumed to a significant degree by humans in the EU before 15 May 1997[29], there was much controversy over the question whether the previous rules covered whole insects and products derived from insects[30]. Member States assumed that parts of insects and isolated insect cells do fall under the legislation on novel foods. However, the placing on the market of whole insects was seen differently which lead to inconsistent legislation across the EU. Some Member States tolerated placing whole insects on the domestic market (e.g. Great Britain), while others created lists of approved insects[31] (e.g. Belgium). Many Member States carried out risk assessments (e.g., France, the Netherlands), and others did not allow insects as food to be placed on their domestic markets at all[32]. Adequate legal classification of insects may be significant from a practical perspective, while the harmonisation of safety requirements for these foodstuffs could mark an important milestone in solving many social, economic and ecological problems, particularly in helping to ensure food security.

[25] See Asticle 3 (2)(a)(x) and recital 8 of the Preamble to Regulation No 2015/2283.
[26] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 48.
[27] See recital 13 of the Preamble to Regulation No 2015/2283.
[28] See Article 3 (2)(a)(v) and recital 8 of the Preamble to Regulation No 2015/2283.
[29] *cf.* Answer by the Commissioner for Health and Food Safety in the European Commission Vytenis Andriukaitis given on 23 December 2014 to written question E-008560-14, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-008560&language=ET, accessed on: 1 February 2018.
[30] T. Laaninen, *Insects – soon to be a regulated food?,* EPRS | European Parliamentary Research Service, Members' Research Service PE 583.830, p 1, http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/583830/EPRS_ATA(2016)583830_EN.pdf, accessed on: 1 February 2018; P. Cuba-Sichler, J-P. Montenot, *Règlement UE no 2015/2283 « novel food » : les avancées en matière d'autorisation des aliments traditionnels en provenance des pays tiers,* p. 4, http://www.ds-avocats.com/dsfr/IMG/pdf/Cuba-Sichler_-_Option_Qualite_17_juin_2016.pdf, accessed on: 1 February 2018.
[31] Belgium will temporarily tolerate the placing on the domestic market, on the condition that food safety requirements are met, of the following species of insects: *Acheta domesticus*, *Locusta migratoria migratorioides*, *Zophobas atratusobraz morio*, *Tenebrio molitor*, *Alphitobius diaperinus*, *Galleria mellonella*, *Schistocerca americana gregaria*, *Gryllodes sigillatus*, *Achroia grisella*, *Bombyx mori*. *cf.* http://www.favv.be/foodstuffs/insects/, accessed on: 1 February 2018, http://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/insects_fr.pdf, accessed on: 1 February 2018.
[32] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 41.

As was the case with Regulation No 258/97, the scope of Regulation 2015/2283 does not include genetically modified foods and foods intended for technological purposes, which are already covered by separate EU rules[33]. Consequently, the new Regulation excludes food enzymes, foods used only as food additives, flavourings and extraction solvents, even though they may in certain cases fall into the category of novel foods.

All in all, the definition of novel foods set out in Regulation No 2015/2283 does not resolve many of the existing doubts, which are related mainly to the interpretation of vague expressions and make it difficult to accurately determine the scope of this Regulation. Furthermore, the European Economic and Social Committee, in an opinion on the draft regulation on novel foods, expressed its concerns over the ambiguity of the phrase "used for human consumption to a significant degree"[34], particularly over whether the phrase refers to a given region, country, geographical area, or perhaps a specific population. Consequently, the questions concerning the definition set out in Regulation No 258/97 remain unanswered which may cause delays in placing novel foodstuffs on the EU market[35].

3. Simplifying the administrative procedures

The classification of a foodstuff as a novel food has considerable implications. EU rules contain several requirements which must be complied with before a novel food can be placed on the market. The requirements specified in Regulation No 258/97 were not significantly changed in Regulation No 2015/2283: firstly, the food in question, based on scientific evidence, cannot pose a safety risk to human health; secondly, its use cannot mislead the consumer, particularly when it is intended to replace other food and there is a significant change in its nutritional value; and finally, when the food is intended to replace other food, it cannot differ from that food in a way that would be nutritionally less advantageous for the consumer[36].

However, the new rules help applicants determine whether the food they intend to place on the market fits into the novel food category. Regulation No 2015/2283 provides for the establishment of a list of novel foods. The new solutions require that in order to be introduced onto the EU market, novel foods must not only obtain an appropriate authorisation, but must also be included in the Union list[37]. The inclusion in the list is constitutive in nature. The list has been updated to cover foods which were authorised under the previous rules or have been successfully notified[38], meaning they are already present on the market. The creation of a legally established list of novel foods, where the inclusion in that list is a constitutive requirement, should be welcomed. It will help ensure economic certainty and will streamline the product classification process for the person intending to place a food on the EU market, while minimising the possible economic risk of the applicant.

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[33] See recital 5 of the Preamble to Regulation No 2015/2283.
[34] Opinion of the European Economic and Social Committee on the proposal for a Regulation of the European Parliament and of the Council on novel foods, OJ C 311, 19.09.2014, p.73.
[35] *cf.* D. Stankiewicz, *op. cit.*, pp. 7-8.
[36] See Article 7 of Regulation No 2015/2283.
[37] See Article 6 (1) of Regulation No 2015/2283.
[38] See Article 8 of Regulation No 2015/2283 and Commission Implementing Regulation (EU) 2017/2470 of 20 December 2017 establishing the Union list of novel foods in accordance with Regulation of the European Parliament and of the Council (EU) 2015/2283 on novel foods, OJ L 351, 30.12.2017, p. 72.

Regulation No 2015/2283 also enables food business operators to check whether the food they intend to place on the market falls within the scope of its provisions. In case of doubt, potential applicants may consult the competent authority[39] of their Member State[40]. Additionally, the Member State may conduct relevant consultations with other Member States and the Commission[41]. The stages of the consultation procedure, including the dates and manner of public disclosure of the outcome, will be determined by the Commission by means of implementing acts[42]. Unfortunately, the Commission has not been asked to create a dedicated body that potential applicants could contact in order to determine the official classification of an innovative foodstuff[43]. According to the new rules, if in doubt, business operators may seek the assistance of their Member State which, if the matter proves too complex or difficult, may consult other Member States and the Commission[44]. Nevertheless, only practice will show if the newly adopted solutions prove helpful.

As of 1 January 2018, individual authorisations are replaced by a general authorisation system and the notification procedure has been scrapped. The application process is centralised and takes place at the Union level, as opposed to being carried out at the national level and under certain conditions also at the EU level[45]. These measures streamline the procedure by making it more efficient and limiting the administrative burden, and avoid duplication of work when a risk assessment is performed twice – at the national and EU level.

The procedure can be launched at the initiative of the Commission, although the literature does not expect this to be a common occurrence[46], or at the initiative of the operator interested in placing the foodstuff concerned on the market based on an application for authorisation submitted directly to the Commission. If the novel food in question is liable to have an impact on human health, the Commission may request the European Food Safety Authority (EFSA) to give its opinion[47]. This may affect the length of the proceedings, since EFSA has to adopt its opinion within nine months of receiving a valid application[48]. In addition, if EFSA requests further information from the applicant, the nine-month period may be extended[49]. The length of such an extension is left to EFSA's discretion, but the Commission has the option to object within eight working days of being informed of it by EFSA[50].

[39] In Poland, this will be the Chief Sanitary Inspectorate.
[40] See Article 4 (2), first sentence, of Regulation No 2015/2283.
[41] See Article 4 (3) of Regulation No 2015/2283.
[42] Implementing acts are adopted in accordance with the examination comitology procedure.
[43] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 26.
[44] *cf.* P. Loosen, "Die neue Novel Food-Verordnung – Übersicht und erste Bewertung", *ZLR – Zeitschrift für das gesamte Lebensmittelrecht,* 2016, No 1, p. 17.
[45] K.A. Schroeter, Verfahrensrechtliche Regelungen der Novel Food-Verordnung, (in:) R. Streinz (ed.), Neuartige Lebensmittel. Problemaufriß und Lösungsansätze, Bayreuth 1999, p. 113.
[46] Ch. Ballke, "Die neue Novel Food-Verordnung – Reform 2.0", *ZLR – Zeitschrift für das gesamte Lebensmittelrecht,* 2014, No. 4, p. 420.
[47] See Article 10 (3) of Regulation No 2015/2283.
[48] See Article 11 (1) of Regulation No 2015/2283.
[49] See Article 11 (4), first sentence, of Regulation No 2015/2283.
[50] See Article 11 (4), third sentence, of Regulation No 2015/2283.

The Commission prepares a draft decision based on EFSA's opinion and submits it to the committee within seven months of the opinion being published[51]. If the Commission did not request EFSA's opinion, the seven-month period starts from the date of receipt of a valid application[52]. The draft decision concerns not only the authorisation to place a novel food on the EU market, but also the update of the Union list. It takes into account the requirements for novel foods, relevant provisions of food law, including in particular the precautionary principle, EFSA's opinion, and any other legitimate factors relevant to the application under consideration[53]. However, there are doubts about what should be considered legitimate factors, or even whether there exist any other factors that may justify the refusal of an authorisation[54].

The Commission was also granted permission to ask applicants for additional information concerning risk management. This may involve extending the time limit for preparing and submitting the draft decision. Should that be the case, Member States must be informed of this extension[55]. Additionally, the Commission may extend the time limits of its own accord[56]. This applies both to the time limit provided for EFSA's opinion and for the draft decision but can be done only in exceptional circumstances, either on the Commission's initiative or at the request of EFSA, where the nature of the matter justifies such an extension. Solutions such as these may cause various practical problems. One concern is the question of when an extension should be justified. Frequent and arbitrary use of these powers can significantly delay food business operators in introducing innovations. Moreover, applicants have practically no influence on these *ad hoc* extensions.

The authorisation procedure for placing novel foods on the market and updating the Union list concludes with the adoption of an appropriate implementing act in the form of a Commission decision[57]. An ideal procedure authorising the placing of novel foods on the EU market should last no longer than 18 months. This is around half the time of the previous procedure, which took an average of 3.5 years to complete[58]. In practice, however, the process of introducing novel foods on the EU market may last longer. The new solutions provide for many possibilities of extending the time limits, both in order to obtain further information from the applicant and on the Commission's own initiative. In the latter case, the only requirement are the vaguely described "exceptional circumstances". The actual length of the procedure varies from one case to another.

Introducing an EU-level authorisation system will reduce the cost of authorisation procedures. Under the previous national procedure, the burden of paying for the process fell on the applicants. By contrast, the European Commission and EFSA do not charge any fees for conducting the procedures[59]. The possibility of doing so was considered in recent years, but the matter was abandoned[60]. However,

[51] See Article 12 (1) of Regulation No 2015/2283.
[52] See Article 12 (2) of Regulation No 2015/2283.
[53] See Article 12 (1) of Regulation No 2015/2283.
[54] Ch. Ballke, *op. cit.*, p. 421 ff.
[55] See Article 21 (1) of Regulation No 2015/2283.
[56] See Article 22 of Regulation No 2015/2283.
[57] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 66.
[58] G. Osęka, J. Prokop, "Nowa żywność. Procedura rejestracyjna w okresie przejściowym", *Przemysł Spożywczy,* 2016, Vol 70, p. 17.
[59] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 70.
[60] For more on this topic, see: http://ec.europa.eu/dgs/health_consumer/dyna/enews/enews.cfm?al_id=1346, accessed on: 1 February 2018.

Member States might still introduce fees for determining the status of novel foods, which is a process conducted by Member States' authorities[61].

A considerable challenge for the legislator is increasing the involvement of SMEs in introducing innovation to the food market. The previous rules were criticised for the fact that obtaining an authorisation for placing a novel food on the market was so burdensome, lengthy and costly, that most EU food business operators, particularly SMEs, lost interest[62]. The new solutions do not facilitate or simplify the authorisation procedure for SMEs either. However, the shift from an individual authorisation system to a general one may itself prove helpful for SMEs in that it will prevent the re-submission of applications for the same novel foods by other business operators[63].

Correcting, expanding and updating the definition led to the creation of new categories of novel foods. Consequently, as a result of adopting the new solutions, foods which were not considered novel under the previous Regulation could now be recognised as such[64]. The problem would affect foodstuffs which were introduced between 15 May 1997 and the date of the entry into force of the new Regulation and were not classified as novel foods under Regulation No 258/97 but do fall within that category under Regulation No 2015/2283. Products that were legally placed on the market would be required to undergo an additional safety assessment procedure[65]. This could have a negative economic impact, such as a possible ban on the sale or an increase of the cost of and time needed to obtain the authorisation. That said, the legislator did provide for transitional measures. Affected foods may continue to be placed on the EU market until a decision on the request is made, after an authorisation request has been submitted, but not later than 2 January 2020.

4. A new model of conduct for traditional foods from third countries

The previous authorisation system for placing novel foods on the EU market was criticised by third countries which considered it a trade barrier preventing foods safely consumed in their countries of origin from accessing the EU market[66]. In response to these concerns, the EU legislator adopted new solutions which introduce simplified procedures for foods that have for years been safely consumed in non-EU countries.

In the case of traditional third-country foods, opting for a faster, streamlined procedure for updating the Union list is possible only in the absence of duly reasoned safety objections[67]. The placing of such a product on the EU market should be facilitated if the history of safe food use in a third country has

[61] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 71.
[62] See point 1.5.1. of the legislative financial statement for the proposal for a Regulation of the European Parliament and of the Council on novel foods COM(2013)894 final.
[63] See point 6 of the explanatory memorandum of the proposal for a Regulation of the European Parliament and of the Council on novel foods, COM(2013)894 final.
[64] *cf.* Ch. Ballke, *op. cit.*, p. 416.
[65] See Article 35 (2) of Regulation No 2015/2283.
[66] See point 1.5.1. of the legislative financial statement for the proposal for a Regulation of the European Parliament and of the Council on novel foods COM(2013)894 final.
[67] See recital 3 of the Preamble to Regulation No 2015/2283.

been demonstrated[68]. The legislator provided a legal definition of the phrase "history of safe food use in a third country". It means that the safety of a food has been confirmed with compositional data and from experience of continued use for at least 25 years in the customary diet of a significant number of people in at least one third country prior to the Union procedure being initiated[69]. The history of safe food use should not include non-food uses or uses not related to normal diets[70].

The simplified procedure has been established for traditional foods from third countries, i.e. novel foods derived from primary production[71]. The procedure is initiated by a notification to the Commission which forwards it to Member States and EFSA without delay and no later than one month after verifying its validity[72]. Within four months, Member States and EFSA may submit relevant safety objections[73]. The objections are valid if they satisfy two criteria: they concern food safety and are duly reasoned. If no objections are made, the Commission must authorise the food concerned and immediately update the Union list[74]. Ideally, the procedure should conclude within approximately six months, but its actual length will depend largely on the completeness of the application and evidence submitted[75].

If reasoned objections are made, the Commission cannot authorise the traditional third-country food to be placed on the Union market[76]. In that case, the applicant may initiate an additional procedure to obtain an authorisation for placing a novel food on the market. This procedure is similar to the standard one but provides for shorter time limits.

The introduction of a simplified procedure for placing traditional third-country foods on the EU market should be viewed as positive mainly because the risk assessment will be based on past experience of safe consumption in other parts of the world. That said, the new solutions do raise some concerns. Firstly, it is likely that they will never be widely used due to the demanding quantitative and qualitative requirements, particularly if the concerns that no evidence of "safe use" has been gathered so far prove to be founded[77]. Secondly, there is some discussion about whether the requirements for traditional foods from European third countries, such as Switzerland, Norway or Liechtenstein, should be the same as those for countries from other continents. Given the similar dietary habits in European non-EU countries, in the future it may be appropriate to relax the requirement of twenty five years of documented safe consumption in these countries.

The effectiveness of the simplified procedure for traditional third-country foods depends largely on the role of Member States[78]. The length and final result of the process will be strongly affected by

[68] See recital 15 of the Preamble to Regulation No 2015/2283.
[69] See Article 3 (2)(b) of Regulation No 2015/2283.
[70] See recital 15 of the Preamble to Regulation No 2015/2283.
[71] See Article 3 (2)(c) of Regulation No 2015/2283.
[72] See Article 15 (1) of Regulation No 2015/2283.
[73] See Article 15 (2) of Regulation No 2015/2283.
[74] See Article 15 (4) of Regulation No 2015/2283.
[75] *cf.* M. Delewski, M. Grube, J. Karsten, *op. cit.*, p. 74.
[76] See Article 15 (5) of Regulation No 2015/2283.
[77] Ch. Ballke, *op. cit.*, p. 418.
[78] P. Loosen, *op. cit.*, p. 25.

whether or not they choose to pursue their own political interests. Member States, which can submit objections and have representatives in the committee, may still actively participate in the procedures.

5. Scientific data protection

Placing novel foods on the EU market entails a considerable economic risk for business operators. For this reason the legislator envisaged several legal instruments designed to protect the pioneers. The previous solutions provided for the confidential treatment of certain information if its disclosure could significantly harm the applicants' competitive position[79].

Regulation No 2015/2283 introduced new solutions concerning the protection of scientific data provided in support of an application. According to the legislator, newly obtained scientific evidence and scientific data should be used for the sole benefit of the applicant[80]. If the applicant requests so, and supports this request with appropriate and verifiable information, the newly developed scientific evidence and scientific data on which their application was based can only be used with their consent. Data protection is granted for the period of five years if the following conditions are met: the newly developed scientific evidence or scientific data was designated as proprietary when the initial application was made; the initial applicant had exclusive right of reference to that evidence or data; and, the novel food could not have been authorised without the scientific evidence or scientific data[81]. The protection of scientific data provided by an applicant should not prevent other applicants from seeking the inclusion of the novel food in the Union list on the basis of their own scientific data or by referring to the protected data with the consent of the initial applicant[82].

It must be noted that these rules do not apply to notifications and applications concerning the placing on the EU market of traditional third-country foods[83]. Furthermore, there will be no renewal of protection for scientific evidence and scientific data already protected or where the period of protection has expired[84]. Also, the overall five-year period of data protection granted to the initial applicant should not be extended due to the granting of data protection to subsequent applicants[85].

The rules on data protection are aimed at stimulating research, development, and innovation in agriculture and within the agri-food industry, especially through protecting the costly investments made by innovators in gathering information and data in support of an application for a novel food. It is intended to serve as an incentive for food business operators. However, the provisions do not specify which kind of evidence and data should be considered new[86].

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[79] See Commission Regulation (EC) No 1852/2001 of 20 September 2001 laying down detailed rules for making certain information available to the public and for the protection of information submitted pursuant to European Parliament and Council Regulation (EC) No 258/97, OJ L 253, 21.09.2001., p. 17, as amended. For the new rules, see Article 23 (1) of Regulation No 2015/2283.
[80] See recital 30 of the Preamble to Regulation No 2015/2283.
[81] See Article 26 (2) of Regulation No 2015/2283.
[82] See recital 30 of the Preamble to Regulation No 2015/2283.
[83] See Article 26 (3) of Regulation No 2015/2283.
[84] See Article 27 (2) of Regulation No 2015/2283.
[85] See recital 30 of the Preamble to Regulation No 2015/2283.
[86] *cf.* I. Gerstberger, "«Was lange währt, wird endlich gut?» – Zum Vorschlag der Kommission zur Revision der Novel Food Verordnung", *ZLR – Zeitschrift für das gesamte Lebensmittelrecht,* 2008, No 2, p. 217.

It must be noted that granting data protection changes the legal nature of the authorisation. The decision will be individual, i.e. applicant-linked, rather than a general one. This is why the Commission itself decided that these individual authorisations will be granted only in the case of "really innovative foods"[87]. In practice, this could significantly limit the applicability of the new solutions.

6. Conclusions

Overall, the new solutions concerning the placing of novel foods on the EU market provided for in Regulation No 2015/2283 deserve a positive assessment. They certainly accomplish one of the fundamental objectives of food law, which is to ensure the safety of novel foods. The legislator has updated basic concepts and definitions, modified authorisation procedures to reduce their cost and length, introduced centralised risk and safety assessments, simplified the procedure for placing traditional third-country foods on the EU market and ensured that the scientific data of innovators is protected. Still, the new solutions continue to raise a number of theoretical and practical concerns.

Regulation No 2015/2283 not only fails to address some of the existing doubts which could not be resolved through practice, but also uses numerous vague expressions. Difficulties in understanding the notion of novel foods, as well as other instances of vague wording used by the legislator, can contribute to food business operators deciding against placing such products on the EU market.

The definition of novel foods included in Regulation 2015/2283 is very broad. It seems that being excessively detailed in legal provisions is not desirable if one wants to take account of the rapid and ongoing development of science and technology as well as the long legislative process and difficulties in reaching a consensus among Member States. The closed nature of the definition of novel foods makes it impossible to assume that in the future the legislator is not be required to intervene further and update the classification of novel foods again. Therefore, future verification of the new rules and their effectiveness should consider a more general wording of the definition.

It must be noted that in practice Regulation 2015/2283 could become a major trade barrier for food business operators, and in particular for SMEs. Despite plans to shorten the procedures, the new rules fail to precisely define their duration, leaving considerable freedom to the authorities that conduct them. Furthermore, it seems unlikely that the costs will be significantly reduced, given that it remains the applicant's responsibility to correctly classify a foodstuff, carry out initial tests and prove the novel food is safe.

Restrictions on placing innovations on the market by some food business operators could also result from the politics of Member States which participate in the procedures. In order to protect certain sectors of national agriculture and industry, Member States may use the legal instruments available to them to delay or prevent the placing on the EU market of safe novel foods that would compete with their strategic national products.

The legislator does not provide for any support system for business operators intending to place novel foods on the EU market. Consequently, the only reason for implementing new food production

[87] *cf.* Commission Staff Working document: 'A Fitness check of the Food chain' – state-of-play and next steps, SWD (2013) 516 of 5 December 2013, p. 44. The phrase "really innovative foods" is used by the Commission.

methods and importing hitherto unknown foodstuffs are the possible economic benefits for the pioneers. In order to encourage food business operators to place novel foods on the EU market, which is an expensive and time-consuming investment, innovations requiring a considerable economic effort to implement should be protected. Both the high cost and long duration of the procedures are partly justified by the need to ensure food safety, but copying innovations are exploiting research results by third parties may deter food business operators from trying to market these products.

For this reason, the introduction of a protection period for new scientific data, during which only the applicant is allowed to place the novel food concerned on the EU market, should be viewed as positive. However, the five-year period of protection may prove too short to cover even a part of the expenses incurred. The new solutions largely fail to account for the initial phase of product distribution where profits are relatively low because consumers need time to develop a taste for a given foodstuff.

A welcome change is the introduction of simplified solutions for foods that are traditionally consumed in non-EU countries and have a history of safe consumption. However, for most food business operators, this provision may prove a difficult barrier to overcome. The problem is how to prove the safety of a product over 25 years of continued use and with what kind of evidence to support this. Most documentation, if there is any at all, is kept for a few years only and relates to the internal procedures of business operators. Thus it might turn out that relevant evidence will only begin to be collected, and demonstrating the history of safe food use will only be possible several years from now.

In conclusion, even though Regulation No 2015/2283 introduces many changes to facilitate the placing of novel foods on the EU market and ensure a high level of protection of the health and life of consumers and their economic interests, only the practical application of these solutions will determine whether the EU market has indeed been opened to safe innovations.

La politique agricole commune face à la question climatique : L'Accord de Paris change-t-il la donne ?*

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Abstract

L'Accord de Paris du 22 avril 2016 vise à « renforcer la riposte mondiale à la menace des changements climatiques en contenant l'élévation de la température moyenne de la planète et renforcer les capacités d'adaptation aux effets néfastes des changements climatiques. » Vu son poids non négligeable dans les émissions mondiales de gaz à effet de serre, l'agriculture devrait participer à l'effort collectif. À cette fin, la politique agricole commune doit être mobilisée. Se posent alors les questions suivantes : la politique agricole commune de 2013 est-elle suffisante à cet égard ? Faut-il la réformer, voire la transformer ? Nous tenterons de répondre à ces interrogations.

The Paris Agreement of the 22th of April 2016 aims to strengthen the global response to the threat of climate change, holding the increase in the global average temperature and increasing the ability to adapt to the adverse impacts of climate change. Given its significant weight in global greenhouse gas emissions, agriculture should be part of the collective effort. To this end, the Common Agricultural Policy must be mobilized. This raises the following questions: Is the 2013 the Common Agricultural Policy sufficient in this respect? Should it be reformed or even transformed? We will try to answer these questions.

***Mots clef**: Activité agricole, agriculture, changement climatique, conditionnalité, développement rural, intégration, modèle d'exploitation, politique agricole commune, verdissement.*

1. Preface

Avec la réforme de la Politique agricole commune (PAC) de 2013-2014[1], l'Union européenne (UE) affiche la lutte contre le changement climatique et l'adaptation à ce changement au rang des objectifs principaux. Elle semble avoir finalement pris la mesure de la responsabilité de l'agriculture dans l'augmentation des gaz à effet de serre (GES).

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[1] Pour ce qui concerne cet article: Règlement « horizontal » (RH) : Règl. UE n° 1306/2013 du Parlement européen et du Conseil, 17 déc. 2013, relatif au financement, à la gestion et au suivi de la politique agricole commune et abrogeant les règlements (CEE) n° 352/78, (CE) n° 65/94, (CE) n° 2799/98, (CE) n° 814/2000, (CE) n° 1200/2005 et (UE) n° 485/2008 du Conseil, *JO*, n° L. 347/549, 20 déc. ; Règlement « paiements directs » (RPD) : Règl. UE n° 1307/2013 du Parlement européen et du Conseil, 17 déc. 2013, établissant les règles relatives aux paiements directs en faveur des agriculteurs au titre des régimes de soutien relevant de la politique agricole commune et abrogeant le règlement (CE) n° 637/2008 du Conseil et le règlement (CE) n° 73/2009 du Conseil, *JO*, n° L. 347/608, 20 déc.; Règlement «développement rural» (RDR) : Règl. UE n° 1305/2013 du Parlement européen et du Conseil, 17 déc. 2013, relatif au soutien au développement rural par le Fonds européen agricole pour le développement rural (Feader) et abrogeant le règlement (CE) n° 1698/2005 du Conseil, *JO*, n° L. 347/487, 20 déc.

Vu la situation, il était sans doute temps: s'appuyant sur le quatrième rapport du Groupe d'experts intergouvernemental sur l'évolution du climat (GIECC), le réseau action climat rappelle que 13,5% des émissions mondiales de GES serait d'origine agricole et que si « on combine les émissions directes de l'agriculture à celles du changement d'affectation des sols et de la déforestation qui lui sont souvent liées (17,4% des émissions mondiales), on arrive à la première source mondiale d'émission de GES.»[2]

Au sein de l'Union européenne (UE), malgré une chute de 24% depuis 1990, l'agriculture reste responsable d'environ 10% des émissions européennes de GES. Elle génère plus particulièrement 40% des émissions de méthane ou CH_4 (digestion animale et fumier) et 95% de la pollution par ammoniac (oxyde nitreux ou protoxyde d'azote, issu des engrais azotés minéraux ou biologiques)[3].

La consommation de viande constitue donc la cause principale des émissions de GES agricole. Même si des efforts peuvent être réalisés au stade de la production pour baisser les taux de chargement et les intrants utilisés sur les surfaces agricoles destinées à l'alimentation du bétail[4], l'augmentation de la consommation mondiale de viande – que certains fixent à 76% d'ici 2050[5] – risque d'aggraver le problème; d'autant plus que la destruction de puits de carbone (arrachage des forêts[6]; destruction de zones humides), notamment au bénéfice de la production agricole (alimentaire ou non), empêche de compenser ces émissions.

Dans ce contexte, pour être efficace, la PAC doit influer sur l'ensemble des facteurs d'émission de GES: modalités d'élevage, conduite des cultures pour l'alimentation du bétail, protection et développement des puits de carbone (cultures et forêts).

La réforme de 2013 est-elle suffisante à cet égard? Permet-elle de l'objectif ambitieux du récent Accord de Paris du 22 avril 2016[7] qui souhaite «renforcer la riposte mondiale à la menace des changements climatiques en contenant l'élévation de la température moyenne de la planète et renforcer les

[2] RAC, Agriculture et GES: état des lieux et perspectives, sept. 2010 (http://www.rac-f.org/ Agriculture-et-gaz-a-effet-de,1836).

[3] V. Factsheet, EU Agriculture and Climate Change, sept. 2015 (https://ec.europa.eu/agriculture/climate-change_fr). Notons qu'il existe de grandes variations d'un pays à l'autre.

[4] Selon et Euractiv, Agriculture and climate change: the role of the new CAP, 25-29 janv. 2016 (http://www.euractiv.com/section/all/special_report/agriculture-and-climate-change-the-roleof-the-new-cap/), «L'agriculture pourrait contribuer de manière importante à la lutte contre le changement climatique en jouant un rôle de siphon et en stockant du carbone dans la matière organique du sol et la biomasse… Les technologies de l'information pourraient aider les agriculteurs à réduire les émissions de GES de l'UE. Les drones sont l'une des technologies les plus prometteuses, car ils permettent par exemple de pulvériser des pesticides de manière plus efficace et ciblée.» V. aussi Factsheet, EU, 2015, op. cit.

[5] Euractiv, 2016, op. cit.: «Près d'un tiers des terres cultivées dans le monde est utilisé pour l'alimentation animale. Rien que dans l'UE, 45 % de la production de blé est utilisée pour nourrir les animaux.»

[6] «EU forests, for example, absorb the equivalent of nearly 10 % of total EU greenhouse gas emissions each year. Land use and forestry – which include our use of soils, trees, plants, biomass and timber – can thus contribute to a robust climate policy» (https://ec.europa.eu/clima/policies/forests_fr).

[7] L'Accord de Paris a été ratifié en juin 2017 par 148 pays sur 197 Parties à la Convention (V. http://unfccc.int/portal_francophone/accord_de_paris/items/10081.php). L'UE l'a ratifié le 5 octobre 2016 (Décision (UE) 2016/1841 du Conseil du 5 octobre 2016 relative à la conclusion, au nom de l'UE, de l'Accord de Paris adopté au titre de la CCNUCC) et l'Accord est entré en vigueur le 4 novembre 2016. V. : http://eur-lex.europa.eu/content/paris-agreement/paris-agreement.html?locale=fr.

capacités d'adaptation aux effets néfastes des changements climatiques.»? Comment la PAC pourrait être modifiée pour mieux répondre à ces objectifs climatiques?

Pour répondre à ces questions, nous chercherons à comprendre en quoi l'agriculture est impliquée dans les discussions de la Conférence des Parties de la Convention-Cadre des Nations Unies sur les Changements Climatiques (CCNUCC) (I) et si l'actuel dispositif climatique de la PAC est à la hauteur de l'engagement international (II). Sur ces bases, nous envisagerons les voies de mutation de la PAC (III).

2. L'agriculture dans l'accord de Paris

À première vue, l'Accord de Paris semble laisser de côté l'agriculture. Les considérants et dispositions donnent plutôt à penser que l'agriculture constitue une sorte de secteur protégé: «Reconnaissant la priorité fondamentale consistant à protéger la sécurité alimentaire et à venir à bout de la faim, et la vulnérabilité particulière des systèmes de production alimentaire aux effets néfastes des changements climatiques.» La même idée est portée par l'article-coeur de l'Accord selon lequel l'action internationale ne doit pas menacer la production alimentaire[8]. Cette protection serait motivée, d'une part, par la fonction de l'agriculture – produire des aliments pour tous – et par la fragilité des systèmes de production même lorsqu'ils génèrent des émissions de GES. Dans ce contexte, on peut se demander si l'agriculture ne bénéficie pas d'un régime d'exception qui permettrait de l'exclure du champ des secteurs économiques concernés par l'Accord et de l'obligation de prévoir des mesures d'atténuation et d'adaptation du et au changement climatique.

Une lecture plus approfondie de l'Accord de Paris et de la CCNUCC[9] ne milite pas en faveur de cette interprétation:

D'une part, la CCNUCC range l'agriculture parmi les secteurs impliqués tant dans la politique d'atténuation que dans celle d'adaptation. L'article 4 dispose que toutes les Parties encouragent et soutiennent par leur coopération la mise au point, l'application et la diffusion de technologies, pratiques et procédés qui permettent de maîtriser, de réduire ou de prévenir les émissions anthropiques des GES non réglementés par le Protocole de Montréal dans tous les secteurs pertinents, y compris l'agriculture et les forêts. Les Parties s'engagent aussi à mettre au point des plans appropriés et intégrés pour les ressources en eau et l'agriculture.

D'autre part, l'Accord de Paris promeut le maintien et le développement des puits de carbone dans le secteur forestier et agricole. L'agriculture peut y contribuer à double titre: en ne détruisant pas les zones constitutives de puits de carbone (forêt et zones humides en premier lieu) – mais aussi en développant des pratiques agricoles qui transforment le sol et les cultures en puits de carbone[10]. L'Accord de Paris se place ainsi directement sous le toit et dans le prolongement de la CCNUCC qui, dès 1992, avait mis les puits et réservoirs de GES à l'honneur[11].

[8] Accord de Paris, art. 2.1.
[9] V. http://unfccc.int/portal_francophone/essential_background/convention/items/3270.php.
[10] V. art. 4.1.
[11] V. art. 4. L'Accord de Paris fait écho à ces dispositions: V. art. 5.1.

En outre, dans le prolongement de l'article 4.2 de la CCUNCC[12] et de l'Accord de Paris[13], les contributions nationales prévoient nombre de mesures concernant l'agriculture et la forêt. 142 pays ont enregistré une contribution à ce jour[14]. Les pays membres de l'UE ont déposé une contribution commune (en date du 5 octobre 2016 généralement) et certains pays, comme la France, ont ajouté un « complément»[15]. Après avoir rappelé que l'UE et ses États membres se sont engagés à réduire leur GES d'au moins 40 % en 2030 par rapport à 1990, la contribution européenne circonscrit les gaz concernés[16] – dont les deux principaux émis par la production agricole (CH_4 et N_2O) – et précise les secteurs économiques qui doivent contribuer à l'effort collectif. L'agriculture, la forêt et les autres usages fonciers en font partie. Des précisions sont apportées quant aux domaines, pratiques et usages particulièrement visés. Fort logiquement, on y trouve la fermentation entérique et la gestion des épandages, les fertilisants et la gestion des sols agricoles, la gestion des cultures et des prairies, ainsi que la gestion forestière, la reforestation et le boisement. La généralité du propos frappe dans cette contribution: la liste n'est qu'indicative et il n'existe pas d'autres précisions que les gaz, secteurs et pratiques. En découle une interprétation téléologique du texte : ce qui compte, c'est l'objectif de réduction et toute mesure, toute innovation, qui peut y contribuer dans le champ concerné est opportune. En ressort aussi une grande autonomie des États membres dans le choix des mesures et du niveau d'action, sous réserve de respecter les engagements de coopération et les domaines de compétence de l'UE. Autrement dit, dans le domaine agricole et forestier, la compétence et l'action climatique seront partagées entre les États et l'UE.

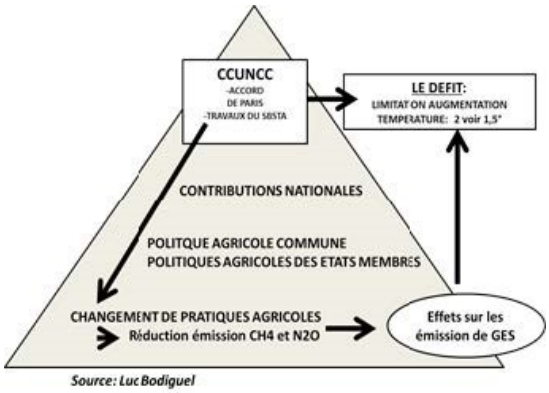
Enfin, il faut savoir que la Conférence des Parties réunie à Durban en 2011[17] a décidé que la question agricole devait être mise à l'ordre du jour du *Subsidiary Body for Scientific and Technological Advice* (SBSTA)[18]. Cette décision a notamment abouti à un rapport[19] lors de la COP 40[20] qui traite essentiellement des modalités d'adaptation de l'agriculture au changement climatique et requiert un approfondissement sur les systèmes d'alerte en cas de situation climatique extrême (sécheresse, inondations, glissements de terrain, tempêtes, érosion des sols et intrusion d'eau salée), sur la vulnérabilité des systèmes agricoles en lien avec le changement climatique, sur les mesures d'adaptation et sur l'évaluation des pratiques agricoles propres à améliorer la productivité de manière durable, la sécurité alimentaire et la résilience. Ce travail sera prolongé notamment lors du SBSTA 44 (mai 2016) et est à l'agenda de la COP23 à Bonn (6-17 novembre 2017)[21].

Au regard de ces derniers développements, il est clair que l'agriculture n'est pas une exception ou ne bénéficie d'aucun cadre dérogatoire à l'engagement climatique des Parties à l'Accord de Paris. Les dispositions qui pouvaient y faire penser doivent donc plutôt s'analyser comme un principe de pru-

[12] V. art. 4- Engagements 2.
[13] Sur la communication et l'actualisation des contributions, V. art. 4.1 et 7.9.
[14] V. registre : http://www4.unfccc.int/ndcregistry/Pages/Home.aspx.
[15] En France par exemple pour les Pays et Territoires français d'Outre-Mer.
[16] «All greenhouse gases not controlled by the Montreal.»
[17] COP 17, 28 nov.-11 déc. 2011.
[18] SBSTA, Decision 2/CP.17.
[19] FCCC/SBSTA/2014/2.
[20] Bonn, 4-15 juin 2014.
[21] Sur les différents travaux «agricoles» du SBSTA: http://unfccc.int/land_use_and_climate_change/agriculture/items/8793.php. Sur la COP 23 : https://cop23.com.fj/about-cop-23/about-cop23/. Notons le point 5 Issues relating to agriculture à l'Agenda for the SBSTA 46 session Bonn, Germany, 8-18 mai 2017.

dence: ne pas détruire la faculté de produire des aliments pour tous par le développement de nouveaux procédés ou de cultures concurrentes au nom de la diminution des émissions de GES, car la sécurité alimentaire ne pourrait plus être assurée. Ce principe relève d'ailleurs d'un considérant plus général de l'Accord de Paris selon lequel «les Parties peuvent être touchées non seulement par les changements climatiques, mais aussi par les effets des mesures de riposte à ces changements.»

L'Accord de Paris propose donc un défi au secteur agricole et aux politiques agricoles, qui peut être illustré de la manière suivante:



Face à ce défi, la PAC est-elle déjà armée?

3. La politique agricole commune actuelle: du «climat»… inter alia

Pour l'essentiel, la PAC est un distributeur d'euros. Son budget annuel est d'environ 59 milliards d'euros, soit environ 38 % du EU Budget. L'enjeu des orientations de la PAC n'est donc pas négligeable. Or, en 2013, poursuivant le processus engagé en 2009[22], le législateur européen a innové en insérant la question climatique à tous les étages du système d'aides publiques agricoles (aides aux revenus et au développement rural)[23].

Comment cette PAC fonctionne-t-elle et agit-elle en faveur du climat?

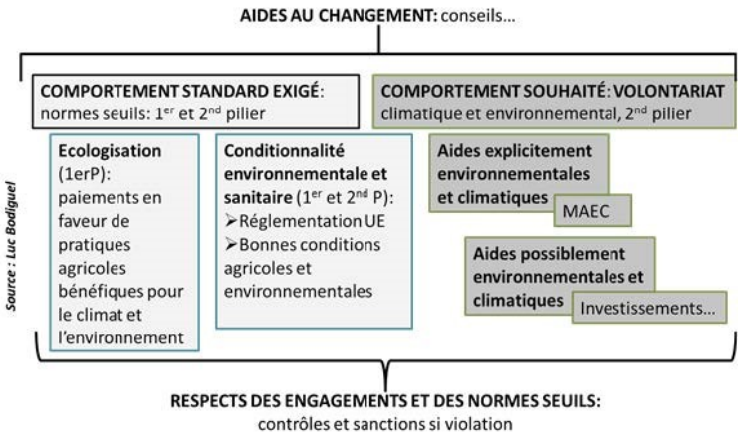
3.1 La «PAC 2013»: Un système au service de l'enjeu climatique

La PAC 2013 constitue un véritable système politique et juridique fondé sur deux types de comportements que les autorités européennes incitent à adopter: un «comportement standard» motivé par

[22] Considérants (1) et (3), Règlement (CE) n° 74/2009 du Conseil du 19 janvier 2009 portant modification du règlement (CE) n° 1698/2005 concernant le soutien au développement rural par le Fonds européen agricole pour le développement rural (Feader), JO L 30, 31 janv. 2009. Règlement 1698/2005, art. 16 bis et ANNEXE II proposant une « liste indicative des types d'opérations et des effets potentiels liés aux priorités notamment pour l'adaptation aux changements climatiques et leur atténuation. Pour la France, V. Programme de développement rural hexagonal, TOME 2, point 5.1.4, p. 335.

[23] Dans le droit dérivé européen concernant la PAC, la question climatique était jusqu'alors marginale ou anecdotique. V. l'article utilisé dans cette partie : L. Bodiguel, «Lutter contre le changement climatique : le nouveau leitmotiv de la politique agricole commune», Revue de l'UE, juil.-août 2014, n° 580, p. 414-426.

des aides de base et un «comportement volontaire» promu par des aides complémentaires. Á des fins d'efficacité, l'ensemble est encadré par des dispositifs de conseil et de contrôle.



Si les exploitants agricoles restent libres de demander ou non les aides de la PAC, dès lors qu'ils en demandent, ils sont contraints au respect de règles et de pratiques que l'on peut qualifier de socle minimum commun ou de «comportement standard». Ce socle est composé de deux éléments: la «conditionnalité» et le «verdissement».

La conditionnalité des aides de la PAC relie le bénéfice des aides de la PAC au respect de «normes-seuil» imposées par l'autorité publique[24]. On y trouve des «exigences réglementaires en matière de gestion (ERMG) prévues par la législation de l'Union et des normes relatives aux bonnes conditions agricoles et environnementales des terres (BCAE)»[25]. Parmi celles-ci, la question climatique est omniprésente[26]. Sont par exemple visés le stockage du carbone (couverture minimale des sols), la lutte contre les émissions de GES agricole au travers des règles de protection de l'eau (bandes tampons le long des cours d'eau) et d'entretien des éléments de paysage (maintien des haies et des arbres)[27].

Le «verdissement» ou *greening* ou «écologisation» du premier pilier de la PAC constitue l'innovation principale de la réforme proposée par la Commission en 2010. Ces «nouveaux» paiements directs aux «pratiques agricoles bénéfiques pour le climat et l'environnement»[28] (dits «paiements verts») représentent au minimum 30 % du plafond national annuel de chaque État membre[29]. Pour y avoir droit, les agriculteurs pétitionnaires[30] doivent «effectuer trois cultures différentes sur leurs terres arables»[31]; «maintenir les prairies permanentes existantes de leurs exploitations»[32], et «disposer d'une surface d'intérêt écologique sur leur surface agricole.»[33] L'enjeu climatique est ainsi bien pris en considération

[24] I. Doussan, C. Hermon, Production agricole et droit de l'environnement, Lexis Nexis, 2012, p. 813-273 ; L. Bodiguel, «Une conditionnalité en bonne santé!», Revue de Droit Rural, 2009, déc. 2009, n° 378, p. 17-23 ; Fiches conditionnalité : https://www1.telepac.agriculture.gouv.fr/telepac/html/public/aide/conditionnalite2016.html.
[25] RH, art. 93 et 94. Comme dans le Règlement 73/2009, art. 4 et 6.
[26] RH, art. 93.
[27] Annexe II du RH.
[28] RPD, Considérant (26).
[29] RPD, art. 33.
[30] Des conditions spéciales pour les agriculteurs situés sur une zone Natura 2000 et les agriculteurs biologiques.
[31] RPD, art. 30.
[32] RPD, art. 31.
[33] RPD, art. 32.

par l'exigence de pratiques spécifiques, favorables au stockage du carbone et indirectement à la diminution de l'usage d'intrants de synthèse.

Parallèlement au comportement standard, l'UE promeut un comportement volontaire, incite à «aller au-delà des normes»[34], c'est-à-dire au-delà des règles de conditionnalité et de «verdissement»[35].

Le volontariat climatique se décompose notamment en une série de mesures «présentant un intérêt particulier aux fins (…) de la transition vers une économie à faibles émissions de CO_2 et résiliente face au changement climatique dans les secteurs agricole et alimentaire et dans le secteur de la foresterie»[36]. On y trouve par exemple, des «investissements améliorant la résilience et la valeur environnementale des écosystèmes forestiers» qui «renforcent le caractère d'utilité publique des forêts ou des surfaces boisées de la zone concernée ou le potentiel d'atténuation du changement climatique des écosystèmes»[37].

Toutefois, le volontariat climatique prend principalement appui sur deux mesures jumelles: les paiements «agroenvironnementaux et climatiques» (PAEC) et ceux pour les «services forestiers, environnementaux et climatiques» (SFEC)[38]. Diverses conditions préludent à l'octroi de ces aides[39], le point essentiel résidant dans le respect d'engagements «agroenvironnementaux et climatiques»[40] pour les PAEC et d'engagement « forestiers et environnementaux » pour les SFEC[41], tous soumis aux règles de la conditionnalité.

Le système «PAC 2013» combine ainsi récompense (l'aide) et respect des normes (conditionnalité; verdissement). Théoriquement, il semble constituer un levier solide de sensibilisation et de mobilisation dans la lutte contre les GES d'origine agricole. Toutefois, il n'est pas sans faille et sans contradiction…

[34] V. «Contexte de la proposition», RPD, p. 3 et 8. V. aussi RDR, art. 29-3.
[35] V. RDR, art. 31 et art. 34.
[36] Annexe V du RDR. Certains dispositifs de soutien agricole mentionnés à l'annexe V ne font pas explicitement référence au changement climatique et pour autant peuvent jouer un rôle: art. 23, 24, 29-8, 30, 31 et 35-3. Certains dispositifs d'aide ne font pas partie de la liste de l'annexe V du RDR, mais la diminution des GES ne peut pas être totalement exclue de leur champ d'action : RDR, art. 2q, 2r, 18-1d), 19, 20, 21, 36-2f).
[37] RDR, art. 22, 26, 27.
[38] Sur durée, v. RDR, art. 29-5 et 35-2.
[39] RDR, art. 29-2 et 35-1.
[40] Les auteurs s'accordent pour dire que l'UE promeut ainsi un instrument juridique particulier: le contrat. Toutefois, le RDR ne se réfère pas à la notion de contrat, mais d'engagement. D'autres formes juridiques d'acte sont donc compatibles avec la formulation européenne. En droit français, v. le débat général sur les mesures agri-environnementales: notamment J.-Fr. Struillou, «Nature juridique des mesures agri-environnementales: adhésion volontaire à un statut ou situation contractuelle ?», RD rur., nov. 1999, n° 277, p. 510-518.
[41] Ces engagements sont détaillés dans les plans de développement ruraux des État membres. Autres conditions: v. RDR, art. 29-3, 35-2 et 35-1. Sur les différents PDR, v. http://enrd.ec.europa.eu/home-page_en; nombre PDR et contenu : http://agriculture.gouv.fr/feader-la-politique-de-developpement-rural-de-lunion-europeenne-sur-la-programmation-2014-2020.

3.2 Les limites de la PAC 2013: le climat parmi tant d'autres

Quatre limites peuvent être successivement énoncées:

Premièrement, l'enjeu climatique est particulièrement mis en avant dans les discours et les objectifs mais le modèle économique dans lequel il doit trouver une expression s'appuie toujours sur le triptyque croissance/productivité/compétitivité[42]. Or, même si elle est souhaitée «plus intelligente et durable»[43], cette logique de compétitivité internationale risque de ne pas toujours être compatible avec l'enjeu climatique. Il faut aussi souligner que la force juridique et pratique de l'objectif climatique de la PAC est limitée par le droit communautaire de la concurrence[44] et le droit de l'organisation mondiale du commerce (OMC)[45], qui, s'ils autorisent des aides environnementales, ne les permettent qu'à titre exceptionnel, dans le cadre de programmes institués, et pour des montants limités aux «coûts supplémentaires et pertes de revenus résultant des engagements contractés»[46]; en d'autres termes, la rémunération du service climatique ou environnemental est en principe interdite par la loi[47]. Par conséquent, le renouveau climatique de la PAC est concurrencé non seulement par le paradigme économique sous-tendant la pensée de l'UE mais aussi par ses corollaires: les règles générales du commerce et de la concurrence.

Deuxièmement, si le climat fait désormais partie du discours et des orientations de la PAC, il n'est que l'un des «bénéfices que les Européens sont en droit d'attendre d'une politique publique»[48], au même rang que la sécurité alimentaire, l'environnement, l'équilibre social et territorial, le renforcement de la compétitivité et de l'innovation[49]. L'enjeu climatique vient donc en concurrence avec d'autres enjeux tout aussi importants; d'autant plus qu'ils participent souvent de la même enveloppe budgétaire. La force de cette éventuelle compétition entre les différents objectifs affichés doit être observée du point de vue pratique, mesure par mesure, en fonction des choix effectués pour la mise en oeuvre de la réforme. Le climat est également en compétition avec d'autres problématiques environnementales, tout aussi importantes, qui bénéficient d'une antériorité (eau, zones humides, biodiversité…). Il en résulte une sorte de confusion politique et juridique. Pour éviter cette concurrence, la PAC suggère des mesures à effets environnementaux et climatiques multiples et simultanés, ce qui est loin d'être évident en pratique.

Troisièmement, les intitulés des dispositifs de la PAC 2013 dissimulent parfois des mesures déjà utilisées par le passé pour d'autres objectifs environnementaux ; certaines pratiques promues au titre de

[42] COM (2010) 672, p. 3; art. 110 RH et 4 RDR; V. aussi le premier des objectifs de la PAC: «accroître la productivité de l'agriculture» (art. 39, TFUE, version consol. 26 oct. 2012, JO 2012/C 326/01).
[43] V. note précédente.
[44] Application à l'agriculture du droit communautaire de la concurrence : RDR, art. 88.
[45] Ladite «Boite verte» de l'OMC, v. Accord agricole, notamment Annexe II, http://www.wto.org/french/docs_f/legal_f/legal_f.htm. Sur ce sujet, v. M. Cardwell, «European Union Agricultural Policy and Practice: The New Challenge of Climate Change», Environmental Law Review 13 (2011), 271-295; M. Cardwell, F. Smith, «Renegotiation Of The Wto Agreement On Agriculture: Accommodating The New Big Issues», International and Comparative Law Quarterly, Volume 62, Issue 04, October 2013, 865-898.
[46] RDR, Considérant (28) et art. 29-8 et 35-3.
[47] Sur les PSE, v. Actes du colloque «L'agriculture et les paiements pour services environnementaux: quels questionnements juridiques ?», IODE, Rennes, 25-26 oct. 2012, PUR, à paraitre déc. 2017.
[48] COM (2010) 672, p. 3.
[49] COM (2010) 672, p. 3; RDR, art. 4.

la lutte contre les émissions de GES d'origine agricole ont déjà été proposées et utilisées (BCAE, rotation, prairies permanentes; MAE…)[50]. De ce fait l'apport de la réforme 2013 n'est pas évident.[51]

Enfin, le volontariat climatique est à la fois la force, parce qu'il induit une cer¬taine motivation, même opportuniste, et la faiblesse du système, puisqu'il exige le consentement [52]. Or, les aides ne rémunérant pas le service environnemental[53] mais essentiellement les surcoûts, l'importance de l'enjeu climatique peut ne pas être suffisamment perçue par les attributaires des aides au développement rural enserrés dans des logiques pragmatiques à court terme, ce qui pourrait les conduire à ne pas s'engager. En outre, dans le domaine des aides du second pilier, la peur des sanctions pourrait jouer contre l'envie de consentir. La clef réside donc dans le caractère suffisamment attractif des aides, autant que dans la détermination ou la motivation des exploitants.

Vu les failles du système, il apparait nécessaire d'envisager une nouvelle mutation de la PAC pour renforcer l'impact de cette politique dans le domaine climatique.

4. Les voies du changement pour la politique agricole commune

Pour répondre aux objectifs de l'Accord de Paris, comme d'ailleurs pour atteindre d'autres objectifs environnementaux, différentes voies de réforme de la PAC peuvent être empruntées. Elles peuvent être rassemblées autour de deux idées: continuer à intégrer; opter pour la radicalité.

4.1 La continuité: l'intégration

La première voie revient à systématiser le processus d'intégration en verdissant progressivement les deux piliers de la PAC, mais sans toucher à la structure du système 2013.

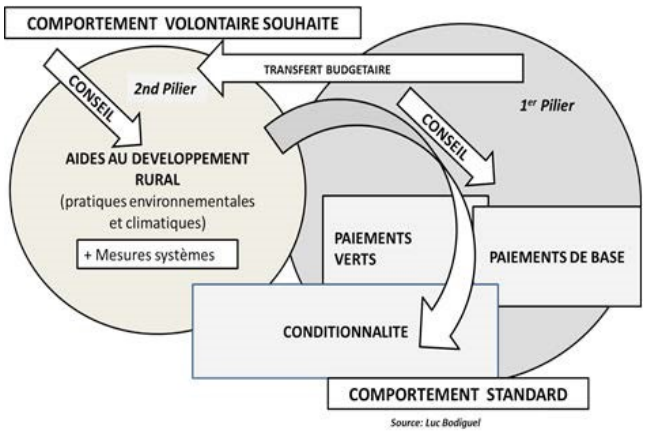
La PAC 2013 a fait passer des éléments qui faisaient partie pour l'essentiel du second pilier dans le premier avec les pratiques agricoles bénéfiques pour le climat et l'environnement. En d'autres termes, il s'agissait d'un transfert du «comportement volontaire» souhaité par l'UE vers le «comportement standard», sans toutefois sanctionner les exploitants agricoles puisque ces pratiques n'ont pas été intégrées dans la conditionnalité mais ont fait l'objet d'un paiement spécifique complémentaire au paiement de base. Dans cette logique, l'idée pourrait être de faire passer tout ou partie des pratiques agricoles bénéfiques pour le climat et l'environnement dans le champ des BCAE et parallèlement d'intégrer de nouvelles pratiques écologiques dans les paiements verts, par exemple liées à la baisse des intrants ou à la réduction des émissions de GES. Le comportement standard des exploitants agricoles en sortirait renforcé: la conditionnalité deviendrait plus exigeante et les nouveaux paiements verts

[50] V. PDRH version 7, p. 190 sur les BCAE. V. aussi I. Doussan, C. Hermon (2012), op. cit., 267-270.
[51] Voir évaluation 2015 de la PAC sur https://ec.europa.eu/agriculture/evaluation_fr.).
[52] L. Bodiguel, «Demander, adhérer ou se soumettre ou Du caractère polymorphe du "vouloir" en agriculture», Revue de droit rural, janv. 2016, p. 11-15.
[53] Sur cette notion, v. A. Langlais, «Les paiements pour services environnementaux, une nouvelle forme d'équité environnementale pour les agriculteurs? Réflexions juridiques», Environnement et développement durable, 1er janv. 2013, p. 32-41; I. Doussan, «Les services écologiques: un nouveau concept pour le droit de l'environnement», in La responsabilité environnementale, C. Cans (dir.), Dalloz, 2009, p. 125 ; I. Doussan, C. Hermon (2012), op. cit., p. 277-282.

annonceraient les futures normes-seuils de l'UE. L'ensemble devra bien sûr être accompagné par des mesures de conseil adaptées.

Les anciennes mesures structurelles, devenues aides au développement rural, ont toujours souffert d'un budget relativement faible qui a conduit, selon les époques, à un éparpillement des dépenses publiques ou à un rétrécissement des actions, l'inefficacité du dispositif étant souvent dénoncée. Par conséquent, le législateur européen pourrait poursuivre le mouvement de transfert budgétaire progressif du premier vers le second pilier de manière à rendre les mesures volontaires, climatiques notamment, plus incitatives. Ce premier mouvement pourrait être accompagné par un reformatage des dispositifs de manière à plus prendre en compte l'exploitation dans son ensemble, autrement dit à adopter une approche plus systémique. On pourrait ainsi avoir des dispositifs par type d'exploitation en fonction des choix agro¬nomiques - «agriculture biologique» ; «agro-écologie», etc. - ce qui supposerait des définitions claires des systèmes et laisserait aux autorités locales des marges de manœuvre sur la mise en œuvre, ouvrant ainsi la voie à l'innovation. Cette évolution peut être pensée en complément de la première ou de façon alternative en fonction des effets sur le développement des exploitations agricoles.

Ces mutations peuvent être représentées de la manière suivante:



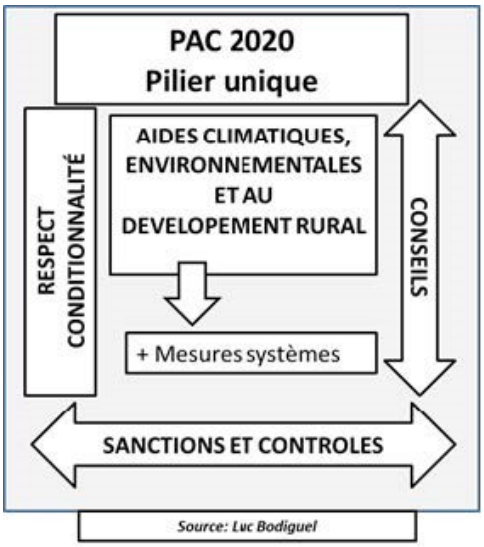
Ces évolutions «douces» seront-elles suffisantes? On peut en douter vu l'urgence climatique. Il faudrait peut-être suivre un chemin plus radical.

4.2 La rupture

Pour rompre avec le système de la PAC 2013, deux chemins peuvent être expérimentés.

À l'évidence, la rupture pourrait venir de la disparition du premier pilier au profit du second, conformément à l'esprit «système» que nous avons précédemment exposé. Il ne subsisterait alors qu'un seul pilier. Un tel changement ne se fera pas au seul bénéfice du climat mais de l'ensemble des enjeux environnementaux.

La PAC pourrait alors être schématisée de la manière suivante:



Il existe cependant une autre façon d'envisager un changement radical de la PAC. Complément ou substitut de l'intégration environnementale, l'idée pourrait être de toucher au coeur de la PAC, à ce qui en provoque l'application[54] : tel qu'il résulte de la notion juridique d'activité agricole. Il s'agit donc d'agir sur la définition d'activité agricole afin d'y intégrer une dimension climatique et environnementale incontournable et de réserver le régime juridique spécial agricole et ses bénéfices à ceux qui pratiquent l'agriculture conformément à ce nouveau modèle juridique.

Cette dimension peut être formalisée et imposée suivant au moins deux techniques. La première consisterait à rendre indissociable l'exercice d'une activité agricole de comportements favorables à la lutte contre le changement climatique ou à l'adaptation de l'agriculture au changement climatique. La seconde associerait l'agriculture à un modèle agronomique spécifique, adapté aux enjeux climatiques, par exemple l'agro-écologie[55].

Concrètement, quelles pourraient être les formules employées ?

Pour le savoir, nous suggérons de s'appuyer sur les deux façons de définir l'activité agricole que nous connaissons à ce jour: soit une formule générale faisant appel à l'idée de cycle biologique (Code rural français ou italien par exemple); soit une liste positive fermée (UE par exemple). Ainsi, en France, l'activité agricole correspond à la «maîtrise et l'exploitation d'un cycle biologique de caractère végétal ou animal et constituant une ou plusieurs étapes nécessaires au déroulement de ce cycle»[56] et au sein de l'UE, elle renvoie à «la production, l'élevage ou la culture de produits agricoles, y compris la récolte, la traite, l'élevage et la détention d'animaux à des fins agricoles»[57].

[54] V. L. Bodiguel, «Les alternatives aux pesticides au prisme du droit de l'exploitation agricole», in Ph. Billet (dir.), Les alternatives aux pesticides, L'Harmattan 2018.
[55] D'autres modèles agronomiques pourraient être envisagés: agriculture biologique, durable...
[56] Art. L. 311-1 C. rur. pêch. mar.
[57] Art. 4, Règl. 1307/2013.

Quatre options se présenteraient alors:

- Première option: l'activité agricole correspond à la maîtrise et l'exploitation totales ou partielles d'un cycle biologique de caractère végétal ou animal, et concourt obligatoirement à la diminution et au remplacement des traitements phytosanitaires conventionnels, au maintien des infrastructures vertes des exploitations, à la diminution des émissions de GES et à l'amélioration de la qualité des eaux.

- Seconde option: l'activité agricole correspond à la maîtrise et l'exploitation totales ou partielles d'un cycle biologique de caractère végétal ou animal, suivant des méthodes agro-écologiques.

- Troisième option: l'activité agricole est composée de la production, l'élevage ou la culture de produits agricoles, y compris la récolte, la traite, l'élevage et la détention d'animaux à des fins agricoles, dès lors qu'elle concourt à la diminution et au remplacement des traitements phytosanitaires conventionnels, au maintien des infrastructures vertes des exploitations, à la diminution des émissions de GES et à l'amélioration de la qualité des eaux.

- Quatrième option: l'activité agricole est composée de la production, l'élevage ou la culture de produits agricoles, y compris la récolte, la traite, l'élevage et la détention d'animaux à des fins agricoles, réalisés suivant les méthodes agro-écologiques.

La référence à la pratique agro-écologique pose la question de son contenu car entre les mouvements militants[58], son expert le plus renommé[59], ou les institutions[60], les conceptions sont nettement différentes, voire opposées. Ainsi, si M. Altieri propose une série de principes relativement stricts[61], les «institutionnels» proposent une agro-écologie plus consensuelle, alliant les «dimensions économiques, écologiques, et sociales visant à mieux tirer parti des interactions entre végétaux, animaux, humains et environnement» et s'exprimant dans un contexte d'intensification de la production[62].

À notre avis, tous ces choix ont leurs mérites et leurs limites qu'il faudrait étudier collectivement. Ils offrent tous l'avantage de changer effectivement le modèle d'exploitation et d'en organiser la transition. Ce discours n'est pas en soi révolutionnaire car, de notre point de vue, la radicalité n'est pas la révolution si le changement est organisé et soutenu. En ce domaine, le droit doit donner des signes

[58] L'agro-écologie est portée par des mouvements sociaux : Via Campesina (http://viacampesina.org/fr/) ; fondation Pierre Rabhi (http://www.fondationpierrerabhi.org/l-agroecologie.php). Pour une brève approche historique, N. Schaller, L'agroécologie : des définitions variées, des principes communs, Centre d'Études et de Prospective, Ministère de l'agriculture, 2013, Analyse n° 59, p. 1.

[59] V. aussi l'ouvrage de référence de M. Altieri, L'Agroecologie : bases scientifiques d'une agriculture alternative, Éditions Debard, Paris, 1986, 237 p.

[60] Rapport présenté à la 16ème session du Conseil des droits de l'homme de l'ONU [A/HRC/16/49], 8 mars 2011; V. http://www.srfood.org/images/stories/pdf/officialreports/20110308_a-hrc-16-49_agroecology_fr.pdf.

[61] Pour lui, l'agro-écologie repose sur cinq grands principes : la diversification (cultures et élevages) ; le recyclage; la protection du sol (apport de matière organique) ; la limitation des pertes d'eau, de sol, d'énergie lumineuse et de diversité génétique ; la recherche de synergies entre les êtres vivants afin d'améliorer la fertilité et de lutter contre les nuisibles. V. Entretien avec M. Altieri : https://www.letemps.ch/sciences/2015/06/15/lagroecologie-seul-chemin-viable.

[62] http://agriculture.gouv.fr/agriculture-et-foret/projet-agro-ecologique ; M. Guillou (dir.), «Le projet agro-écologique: Vers des agricultures doublement performantes pour concilier compétitivité et respect de l'environnement», proposition au Ministre de l'Agriculture, mai 2013. p. 4, 6 et 87. V. aussi Rapport INRA pour le CGSP, H. Guyomard (dir.), Vers des agricultures à hautes performances (4 vol.), 2013.

non pas de simplification – car il s'agit souvent d'un leurre évitant la réalité complexe – mais de clarté: le projet agro-écologique doit être clair, tout comme la définition nouvelle d'activité agricole; il doit comporter un véritable accompagnement au changement avec une période transitoire. Sans doute peut-il être conçu autour de projets collec¬tifs intégrés de territoire, sur la base d'expérimentations.

5. Conclusions

Nous avons pu voir que, même si le caractère contraignant des engagements nationaux n'est pas évident, l'Accord de Paris incite les parties à agir pour contrer la menace climatique et que l'agriculture fait partie des secteurs devant être mis à contribution pour y arriver. Nous avons aussi mis en évidence que si la PAC 2013 a été dotée d'objectifs et de mesures climatiques, elle n'est pas sans faille. Par conséquent, si l'UE décide de jouer le jeu de l'Accord de Paris, elle devra remodeler sa politique agricole, au minimum en renforçant le processus de verdissement, au maximum en la transformant en une politique agricole commune agro-écologique ou durable.

Toutefois, nous nous demandons s'il ne serait pas plus efficace d'agir sur la politique et le droit de l'alimentation, autrement dit de jouer sur la consommation de produits alimentaires pour modifier la production agricole. À ce jour, l'Accord de Paris est muet sur ce point.

Judicial Threads in a Maize Labyrinth – A Short Report of a German Court Case[♦]

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Abstract

Labyrinthe in Maisfelder sind eine weitverbreitete Attraktion und geben zugleich Gelegenheit, für die Landwirtschaft zu werben. Im Zusammenhang mit den Agrardirektzahlungen bestehen für sie allerdings weder auf EU-Ebene noch im deutschen GAP-Durchführungsrecht spezifischen Regelungen. Daher ist es zu unterschiedlichen Auffassungen gekommen, in welchem Umfang solche Maisfelder förderfähige Flächen darstellen. In einem Verwaltungsrechtsstreit über ein Maislabyrinth in Norddeutschland hat die Direktzahlungsbehörde eine Förderfähigkeit abgelehnt und ist anschließend durch das erstinstanzliche Verwaltungsgericht bestätigt worden. In der zweiten Instanz hat das Oberverwaltungsgericht Lüneburg zwischen den Wegen des Maislabyrinths und der Maisfläche differenziert. Zur Zeit ist das Verfahren vor dem Bundesverwaltungsgericht anhängig. Der Beitrag untersucht die verschiedenen Argumentationslinien und kommt zu dem Ergebnis, dass es sich um einen Grenzfall handelt, der mehrere förderrechtliche Fragen aufwirft.

Les labyrinthes de maïs sont une attraction populaire et permettent de promouvoir l'agriculture. Dans le contexte des paiements agricoles directs, toutefois, il n'y a pas de réglementation spécifique au niveau de l'UE ou dans la loi de mise en œuvre de la PAC allemande. Par conséquent, les points de vue divergent sur la mesure dans laquelle ces champs de maïs constituent des zones éligibles. Dans un litige administratif concernant un labyrinthe de maïs dans le nord de l'Allemagne, l'autorité de paiement direct a rejeté l'éligibilité et a ensuite été confirmée par le tribunal administratif de première instance. En deuxième instance, le tribunal administratif supérieur de Lunebourg a différencié les voies du labyrinthe de maïs et la zone de maïs. Actuellement, la procédure est en instance devant le tribunal administratif fédéral. L'article examine les différentes lignes d'argumentation et conclut que c'est un cas limite qui soulève plusieurs questions de droit des subventions.

1. The facts and the proceedings

In 2015 a farmer in Niedersachsen (Lower Saxony, which is the largest of the northern German Länder) created a maize labyrinth by cutting a number of small paths through one of his maize fields. This operation took place at the end of May 2015 when the maize had grown to about a third of the height

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* The original idea for this Article arose at the most recent CEDR Congress of Agricultural Law, held at Lille in September 2017, where the author acted as Co-rapporteur of Commission I on agricultural competition law. He is grateful to Prof. Michael Cardwell for the linguistic review of the Article. Any opinions expressed in this article are personal to the author only.

of a fully-grown man. The maize field in question stretched over 1.96 ha in total, whilst the paths accounted for 0.18 ha, less than 10% of the whole field. Surrounded by the paths were `islands' of maize. Some of these islands accounted for less than 0.1 ha each, and these small islands amounted in total to 0.36 hectare of the entire maize field.

The farmer established a parking area on another field nearby, erected a sign pointing to the labyrinth and created a number of presentation boards explaining the cultivation of maize. He took no entrance fee, but provided a donation box. Hence, he was not looking to make a profit, but rather wished to raise public awareness of the cultivation of maize and of his farming. In September 2015 the farmer harvested the maize in all his fields, including that where the maize labyrinth was located. There was no difference between the quality of the maize from the field with the labyrinth and that from the other fields.

The farmer applied in spring 2015 for the EU decoupled direct payment and, in his claim, included the whole of the maize field with the labyrinth among his eligible hectares. The local agricultural administration refused to accept the eligibility of this maize field, arguing that the whole field was primarily used for leisure purposes. The administration based its argument on Article 32(3) of Regulation (EU) No 1307/2013 and the German implementing law as contained in the Direktzahlungen-Durchführungsverordnung (Direct Payments Implementing Regulation) of 3rd November 2014.

Paragraph 12(3) No 3 of the Direktzahlungen-Durchführungsverordnung states that areas used for leisure and recreational purposes are generally not eligible. In addition, para.12(2) contains an indicative list of situations, which are regarded as not fulfilling the degree of agricultural activity required in art.32(3)(a) of Regulation 1307/2013. This list follows a restrictive approach. One of the situations named in the list is the destruction of the crops.

The farmer brought an action against the administrative decision before the Verwaltungsgericht (Administrative Court) in Braunschweig which was the starting point of the court case which has recently seen two important decisions. In its judgement of 6th July 2016 the Verwaltungsgericht decided in favour of the local agricultural administration. It was also so certain of its decision that it refused referral to the Court of Justice of the EU for a preliminary ruling. And it did not even permit appeal to the higher German administrative court.

The farmer did not accept this last part of the decision and petitioned the Oberverwaltungsgericht (Higher Administrative Court) in Lüneburg for leave to appeal. The Oberverwaltungsgericht granted this petition on 3rd November 2016 in light of the important nature of the legal questions raised. The farmer consequently forwarded a formal appeal to the Oberverwaltungsgericht, which decided in its judgement of 21st March 2017[1] that the maize field in question was eligible in principle, but the areas of the paths were not. It also allowed an appeal to the Bundesverwaltungsgericht (Federal Administrative Court) based on the fundamental character of the judicial issues.

[1] Oberverwaltungsgericht Lüneburg, Judgement of 21.3.2017, Case-No 10 LB 81/16, printed in Agrar- und Umweltrecht 2017, pp. 308-311, and available on the website of the judiciary of Niedersachen (www.rechtsprechung.niedersachsen.de).

The farmer did not further appeal, thus accepting the non-eligibility of the areas of the paths (the direct payments for those areas being small in amount). The local agricultural administration, however, appealed to the Bundesverwaltungsgericht where the case is still pending.

2. Legal analysis

Four legal aspects would seem worthy of detailed attention. The first aspect is the question of the eligibility of the maize field less the areas of the paths. It seems beyond dispute that the agricultural use of the land cropped for maize was not affected by the maize labyrinth. The maize was sown and harvested in the same way and was of the same quality as that to be found in the surrounding fields. Although the maize crop served the dual purpose of producing maize and being part of the maize labyrinth, it could not be said that thereby the production of maize was to any material extent reduced. Hence, the conditions of art.32(2)(a) and (3)(a) of Regulation 1307/2013 were fulfilled.

The only counter-argument seems to be that, because of the paths, the amount of maize harvested from the field was less in total than would have been the case without the existence of the maize labyrinth. But:

- first, the precise amount of the agricultural commodity produced is of no importance in the decoupled system;
- secondly, the reduced production can be estimated as equivalent to the areas of the paths and therefore as less than ten per cent of the total maize field, which is again no material reduction in production;
- thirdly, this counter-argument would lead to the result that a minor impact in respect of the use of an agricultural field might result in the ineligibility of the whole field; and,
- finally, art.32(2) and (3) of Regulation 1307/2013 does not refer to a `field' as such, but rather to the specific area which is used for dual purpose, with the consequence that the areas sown with maize and the paths should be looked at separately, an aspect which touches upon the very core of the judgement and which will be considered later.

With regard to the second legal aspect, the areas of the paths seem on first sight not to meet the eligibility requirements. There were no crops and the land was used for a non-agricultural purpose. Yet, on further consideration, art.32(3)(a) of Regulation 1307/2013 refers, *inter alia*, to the duration and timing of the non-agricultural activities. The cutting of the paths took place at the end of May and harvesting took place in September. Hence, the maize labyrinth was only in place for less than half of 2015.

If the farmer ploughed the maize field in October – which is not clear from the judgement – the areas of the paths would have been restored to good agricultural and environmental condition[2]. This leads

[2] The Oberverwaltungsgericht in Lüneburg seems to have overlooked that important point. In the judgement it defines agricultural activity only in the sense of Article 4(1)(c)(i) of Regulation (EU) No 1307/2013. On that interpretation, the path areas were clearly non-agricultural in character. But the farmer is generally allowed to destroy crops without giving a reason so long as the area is kept in a condition which meets the criteria laid down by Article 4(1)(c)(ii) of Regulation (EU) No 1307/2013 and so long as the farmer does not breach any duty to inform the administrative authorities of any change of use.

to the question whether every path, every bridleway and every non-use of parts of a field for agricultural activity which may occur for a certain time in the year must be taken into account. Such would not only mean a heavy administrative burden, but also could undermine the integrity of the system. Further, not every temporary change in use can be foreseen in spring, at the relevant time for applications under the direct payment scheme.

Remarkably, the Oberverwaltungsgericht took a very different approach to the case. It did not initially separate the areas of maize and of paths, but looked as a first step to the maize field as a whole. In Germany, according to the rules which govern the identification and registration of agricultural areas in Member States, farmers in their applications have to list their agricultural areas by reference to a unit termed a `Schlag'; and the maize field in question was entered by the farmer as a Schlag. However, art.32 of Regulation 1307/2013 uses the term `eligible hectare' as opposed to adopting the wording of the identification and registration system. Therefore, the approach of the Oberverwaltungsgericht seems not to be in line with art.32.

Adoption of this Schlag terminology also leads to the problem that either the whole Schlag is then eligible or not. The Oberverwaltungsgericht was aware of the difficulty and tried to avoid a Yes-No decision by removing, as a second step, non-eligible areas. The main problem with such a two-step approach seems to be that the result of the first step is dependent on the configuration and, in particular, the size of the Schlag in question, which may differ significantly. In a small Schlag a non-agricultural use may dominate the Schlag more easily than in a larger Schlag. As a consequence farmers could be treated unequally.

The third point of legal interest is how to deal with the `islands' of a small character created by the paths. Article 72(2) of Regulation 1306/2013, art.72(2), grants Member States the authority to define the minimum size of agricultural parcels. In Germany, the minimum size is 0.1 ha and, since some of the islands were below this size, the local agricultural administration argued that these islands should be separated out.

The Oberverwaltungsgericht dismissed the argument on the basis that there had to be a break in cultivation. The temporary paths did not result in such a break. Again, it would also create a huge administrative burden in terms of monitoring if at any given time in the year there were to be temporary islands in the fields which do not reach the minimum size of 0.1 ha.

A fourth legal aspect worthy of mention is that the German implementing rule states that no area used for leisure and recreational purposes is eligible. The maize field was used for such purposes and to a degree which encompassed more than the paths because without the maize no maize labyrinth would exist. The Oberverwaltungsgericht expressed doubts whether this wide-reaching consequence of the German implementing law enjoyed a firm basis in art.32(2) and (3) of Regulation 1307/2013. Surprisingly it did not discuss the question: rather, it failed to apply the rule without clearly setting it aside.

If it had looked more deeply into the issue, it might have noted that the implementing rule requires that the areas are `established' for such purposes, which indicates that the use is of a permanent nature, as is supported by the argument that the other examples listed in para.12(3) of the Direktzahlungen-Durchführungsverordnung are in general of a permanent nature (for example, park areas, military exercise areas and landing strips).

Another question is whether Member States – as in Germany – may interpret art.32(3)(b) of Regulation 1307/2013 in such a way that the dual use of an area is of no importance at all. There exists good reason for such an interpretation. The main function of art.32(3)(b) seems to be to create legal certainty and to prevent an often complicated administrative investigation of the situation. For example, if landing strips are listed under art.32(3)(b) they are never eligible, regardless of the extent of any agricultural dual use of the same landing strip.

If that interpretation is followed, it supports the argument that the non-agricultural purposes selected by the Member States under art.32(3)(b) have to be of a permanent nature. Otherwise there would be a contradiction between, on the one hand, the guidelines contained in art.32(3)(a) which refer, *inter alia,* to the duration and the timing of the dual use and, on the other hand, the option granted to Member States under art.32(3)(b). Taking into account also activities of a non-permanent nature under art.32(3)(b) leading to a non-eligibility of the area in question would then result in a full denial of the criteria of duration and timing stated in art.32(3)(a).

As a final comment, the case seems to be a classic borderline one[3]. On the one hand, the crops were destroyed to create a temporary leisure area. On the other hand, the maize labyrinth was intended to be part of the agricultural activities of the farmer, with the link to those activities still being very close. He wanted to create a better understanding of his farming and was not concerned to gain a profit out of the maize labyrinth. It will be interesting if the Bundesverwaltungsgericht refers the matter for a preliminary ruling to the Court of Justice of the EU which could lead to guidance as to how to deal with such cases.

[3] That was also the conclusion drawn by the Committee on Agricultural Subsidies and Market Law of the German Association of Agricultural Law which discussed the case at its session in Goslar in October 2017; see for a report on the session Busse, Agrar- und Umweltrecht, No 12 of December 2017, pp. 460-463.

Legal mechanisms of limiting the turnover of agricultural land in Poland

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Abstract

The Polish legislator introduced a series of mechanisms limiting the possibility of turnover of agricultural real estate. The amendment to the Act on the Formation of Agricultural System, binding since 30 April 2016, has introduced several limitations in the acquisition of agricultural real estate. The rule has been adopted that that only an individual farmer may be the acquirer of farming land, which excludes e.g. a commercial law company. The Agricultural Property Agency has been equipped with several competences enabling it considerable interference with the agricultural real estate turnover. The Agricultural Property Agency, has, among others, the pre-emption right to acquire farming land in the case of other legal actions than the sale(e.g. donation). It also has the pre-emption right in the purchase of shares and stocks, in case of their sale, if these companies own agricultural real estate.
These regulations relate to a clearly visible tendency – especially in new member states - to limit agricultural property turnover. Such solutions raise questions as to their compliance with EU law, and especially with the principle of freedom of turnover. The European Parliament resolution of 27 April 2017 on the current state of concentration of agricultural land in the EU: how to facilitate access to land for farmers? has become an expression of a serious concern about the direction of ownership structure transformation. It should be noted that the regulation contained in the Act on the Formation of Agricultural System is in line with EU law and is part of a clear tendency in the European Union to oppose uncontrolled concentration of agricultural and forest land.

Der polnische Gesetzgeber hat eine Reihe von Mechanismen eingeführt, die die Umsatzmöglichkeiten landwirtschaftlicher Immobilien beschränken. Die seit dem 30. April 2016 geltende Novelle des Gesetzes über die Gestaltung des Agrarsystems hat beim Erwerb landwirtschaftlicher Immobilien mehrere Beschränkungen eingeführt. So wurde zur Regel, dass nur ein einzelner Landwirt Ackerland erwerben kann, was z.B. eine Handelsgesellschaft ausschliesst. Das Amt für landwirtschaftliches Eigentum wurde mit mehreren Kompetenzen ausgestattet, die erhebliche Eingriffe in den landwirtschaftlichen Immobilienhandel ermöglichen. So hat es unter anderem das Vorkaufsrecht, wenn Ackerland über andere Rechtsgeschäfte als Verkauf (z.B. Schenkung) veräussert wird. Das Vorkaufsrecht gilt auch für Aktien von Gesellschaften, die landwirtschaftliche Grundstücke besitzen.
Diese Regelungen beziehen sich auf eine deutlich erkennbare Tendenz – insbesondere in den neuen Mitgliedstaaten –, den landwirtschaftlichen Immobilienhandel zu begrenzen. Solche Lösungen werfen Fragen auf, ob sie mit dem EU-Recht und insbesondere mit dem Grundsatz der Wirtschaftsfreiheit vereinbar sind. Der «Beschluss des Europäischen Parlaments vom 27. April 2017 zum derzeitigen Stand der Konzentration landwirtschaftlicher Flächen in der EU: Wie kann Landwirten der Zugang zu Land erleichtert werden?» ist zum Ausdruck einer ernsthaften Besorgnis über die Richtung der Transformation der Eigentumsverhältnisse geworden. Es sei darauf hingewiesen, dass die Regulierung im Gesetz über die Gestaltung des Agrarsystems mit dem EU-Recht in Einklang steht und Teil einer klaren Tendenz in der Europäischen Union ist, der unkontrollierten Konzentration von Agrar- und Waldflächen entgegenzuwirken.

Key words: shaping of agricultural system, agricultural real estate, Agricultural Property Agency, agricultural land turnover, free movement of capital

1. Preliminary issues

By the Act of 14 April 2016 on mechanisms of limiting the turnover of agricultural land in Poland and on change of some acts[1], the Act on Formation of Agricultural System of 11 April 2003 (ustawa o kształtowaniu ustroju rolnego[2]), hereinafter referred to as UKUR, was amended by introducing new mechanisms controlling the turnover of agricultural land. The new rule that governs the turnover of agricultural real estate is the principle of acquisition of agricultural land exclusively by an individual farmer. The existing pre-emption rights and the right of redemption of agricultural land by the National Center for Support of Agriculture acting as a trustee of the State Treasury (Krajowy Ośrodek Wsparcia Rolnictwa), hereinafter referred to as KOWR, have been modified. Entirely new regulations refer to restrictions on the shares and stocks of companies that own agricultural property.

The purpose of this article is to present the introduced restrictions on the turnover of agricultural land, to evaluate them and to analyze them from the point of view of compliance with EU law. There is no doubt that the currently imposed restrictions affect the scope of the property right. These changes should be assessed from the point of view of Polish solutions, including the Constitution of the Republic of Poland[3], but also taking into account the functioning of the EU market, including, above all, the principle of free movement of capital.

It should be emphasized that the direct impulse to introduce a new regulation was the expiry of the twelve-year period from the date of Poland's accession to the European Union, where it was permissible to maintain restrictions on the acquisition of agricultural real estate by applying the rules contained in the Act of 24 March 1920 on the acquisition of real estate by foreigners[4].

2. Acquisition of agricultural property exclusively by an individual farmer

Since 1 May 2016 significant changes have been introduced in the agricultural land acquisition system in Poland. Under the Act on Formation of Agricultural System, after amendments, only an individual farmer may acquire land, on condition that the area of his farm does not exceed 300 ha, after the acquisition. The above restrictions do not apply to close relatives of the farmer, local government units, Churches and religious communities[5]. Neither do they apply in the situation when the land is acquired as an inheritance or in the restructuration proceedings constituting a part of remedial proceedings.

Acquisition of agricultural land in other circumstances and by other subjects requires a consent of the President of Agricultural Property Agency - a public legal person managing the agricultural property owned by the State Treasury. Without the President's consent agricultural estate cannot be acquired

[1] Dz. U. poz. 585 z późn. zm. (Journal of Laws, item 585, as amended).
[2] Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego, Dz. U. z 2016 r. poz. 2052, z póź. zm. (The Act on Formation of Agricultural System of 11 April 2003, Journal of Laws of 2016, item 2052, as amended).
[3] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws no. 78, item 483, as amended).
[4] Journal of Laws of 2016, as amended.
[5] More on the definition of the close relative and other exclusions in the acquisition of agricultural land by individual farmers, see: K. Maj, Zmiany, s. 75 i nast.

by, among others, legal persons – including companies, even those founded by farmers. The President's consent is conditioned by several factors.

The President of the Agricultural Property Agency may give his consent for the acquisition of the agricultural land when requested to do so by the vendor, if the vendor proves that there was no possibility for the privileged entities to acquire the agricultural estate; the prospective acquirer undertakes to farm the land and if the too excessive accumulation of agricultural land does not result from it. A natural person intending to establish a family farm may also request the consent for the acquisition, if they have proper qualifications, or if they have been granted assistance from the European fund within the frames of the Rural Areas Development Program, on condition that they complete vocational qualifications and the time for completion of qualifications has not passed. Such a person is to guarantee farming of the land and undertakes to live for 5 years in the territory of the municipality, in the area, where one of the acquired estates being a part of the prospective family farm is situated[6]. The consent for acquisition of the agricultural estate is granted in the form of an administrative decision, which is controlled in the appeal proceedings before an organ of a higher instance – Agriculture Minister, and in the proceedings before an administrative court[7]. Premises validating issuing by the President of the Agricultural Property Agency the consent to acquire an agricultural estate are highly judgmental, difficult to prove both by the vendor and the acquirer. Lack of clear criteria in this respect results in granting of the consent by the President of the Agricultural Property Agency in an arbitrary way. The decision whether all the requirements are fulfilled or not, depends on the organ's interpretation.

If, by the decision of the President of the Agricultural Property Agency, the consent is not granted, the vendor, within the period of one month form the day when this decision became final, may file a binding written request for the filing by the President of the Agricultural Property Agency of declaration of acquisition of the agricultural estate[8] in return for the payment of cash equivalent reflecting its market value calculated by the Agency, by using appropriate methods of estate evaluation contained in estate management regulations[9]. If the vendor does not accept the price offered by the Agricultural Property Agency, he may apply to the court for the evaluation of the estate or he may withdraw the request that the Agency should acquire the estate, in which circumstances, the costs of the evaluation of the estate by the Agency will be charged to him.

The acquisition of the land is connected with some obligations to be fulfilled. The first one is the duty of running the farm that the acquired agricultural estate is a part of for at least 10 years from the day when it was acquired, and in the case of a natural person, the farm is to be run personally by the

[6] Act on Formation of Agricultural System, Art. 2a (4).
[7] For further information see: K. Maj, Zmiany, p. 83.
[8] Op.cit. p. 86.
[9] The regulations may be found in The Act on Estate Management of 21 August 1997, i.e: Journal of Laws of 2015, item 1774, after amendments. (t.j. Dz. U. z 2015 r. poz. 1774 z późn. zm.), for further information, see:. E. Klat-Górska, L. Klat-Wertelecka, Ustawa o gospodarce nieruchomościami. Komentarz, Warszawa 2015, pp. 762-813; A. Hopfer, (in:) (ed.) P. Czechowski, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2015, pp.738-779.

acquirer, who is supposed to work on the farm and who decides about all agricultural activities conducted on this farm[10]. The other limitation is the ban on disposal or transfer of possession to other subjects also within the period of 10 years. It may happen only with the court's consent, if the necessity of conducting of such an action results from unpredictable circumstances and is acquirer-independent. The Agricultural Property Agency is entitled to the supervision of the obligations imposed on the acquirer[11].

3. The pre-emption right in the agricultural real estate

The pre-emption right in the agricultural real estate, i.e. the priority of the purchase of an asset before it is offered to a third party, constitutes another limitation in land turnover. The execution of this right is guaranteed by the obligation of notification by the subject entitled to the pre-emption about the contents of the concluded sales contract. In the case of the sale of the agricultural estate the tenant has the statutory right of pre-emption, if the tenancy contract is concluded in writing, has the definitive date, has been fulfilled for at least 3 years starting from that date, and the purchased agricultural estate constitutes a part of the tenant's family farm[12]. The tenant is not entitled to the pre-emption right when the acquirer is a unit of the territorial government, the State Treasury or a close relative of the vendor, i.e. his descendant, ascendant, sibling, sibling's child, spouse, adaptor or adoptee. If the acquisition occurs with the consent of the President of the Agricultural Property Agency, if the agricultural estate has been acquired from the Agricultural Property Stock of the State Treasury in the course of the so-called restricted tender[13], the right of pre-emption shall not apply. Another exception to granting the tenant the pre-emption right is the sale of the agricultural estate between legal persons belonging to the same Church or religious organization.

If there is no tenant entitled to the pre-emption right, or he does not execute this right, the pre-emption right is statutorily ceded to the Agricultural Property Agency, acting in support of the State Treasury. Due to the fact that, apart from not very numerous cases when tenants are actual beneficiaries of the pre-emption right, it is the Agricultural Property Agency that is entitled to this right in the majority of agricultural real estate in Poland. The only exception is the situation when the acquisition of the agricultural estate results in the increase of the family farm in size in such a way that the area of the family farm does not exceed 300 ha. The acquired estate is to be in the municipality where the acquirer lives or the bordering municipality.

The entitled to pre-emption may request the court to evaluate of the estate being sold, if the price considerably differs from the market price. The court evaluates the estate according to the regulations contained in the Act on Estate Management. The execution of the pre-emption right by the Agricultural Property Agency consists in filing a notarized statement on the execution of the pre-emption right, which is then sent as a registered item with acknowledgement of receipt, and then published at the website of the Bulletin of Public Information of the Agricultural Property Agency, i.e. the portal used

[10] For more information on running a farm in person, see: P. Blajer, Pojęcia gospodarstwa rolnego i rolnika indywidualnego w ustawie o kształtowaniu ustroju rolnego z dnia 5 sierpnia 2015 r., „Krakowski Przegląd Notarialny" 2016, no. 1, pp. 18–2; on the duties of the acquirer see,: K. Maj, Zmiany, p. 87 onwards.
[11] Act on Formation of Agricultural System, Art. 8a.
[12] Act on Formation of Agricultural System, Art. 3 paragraph 1.
[13] Art. 29 paragraph 3b of the Act on Management of the Treasury Agricultural Property of 19 October 1991, Journal of Laws of 2015, item 1014, as amended (t.j. Dz. U. z 2015 r. poz. 1014 z późn. zm.)

for releasing public information by public authorities. It is worth emphasizing that the party that withdrew from the execution of the pre-emption right is presumed to have reviewed the contents of the statement of the Agricultural Property Agency about its execution of the pre-emption right as soon as it was published at the website of the Bulletin of Public Information of the Agricultural Property Agency, and not at the moment of the reception of this statement by post.

4. The pre-emption right in acquisition of shares and stocks in companies

A new restriction which was introduced on 1 May 2016 imposes the pre-emption right on the acquisition of shares and stocks in companies having agricultural estate in their possession[14]. The only exception to this regulation is the sale of shares admitted to public trading or disposal of shares to a close relative. It is to be stressed that the size of the agricultural estate being in possession of the company is irrelevant (as long as this estate is bigger than 0.3 ha, as, under the Act on the Formation of Agricultural System, art. 1a (2), the land areas of this size are exempted from the application of this act. The proceedings concerning the pre-emption right in the acquisition of the agricultural estate should be applied in such a case[15].

It is difficult to find any rational justification for the existence of such an institution. Apparently, the intention of its creators was to limit the turnover of agricultural land, but the actual effect consists in joining the company by an external subject - the Agricultural Property Agency, acting in support of the State Treasury. Such a solution considerably limits the company's autonomy. Even the legislator's goal, i.e. limitations in turnover of agricultural land by subjects that do not conduct agricultural activities, is achieved only indirectly.

In this way the Agricultural Property Agency receives shares or stocks in companies. Yet, the execution of corporate rights is not synonymous with real influence on the management of the agricultural estate which is in the company's possession. Thus, the Agricultural Property Agency interferes with the internal affairs of the company to prevent the disposal of the agricultural estate or making use of it in the way contrary to the goals of the Act on the Formation of Agricultural System, though there is no guarantee that it might in fact avert such situations. Moreover, there is no regulation which would guarantee that when the company disposes of its agricultural estate, the Agricultural Property Agency, which executed the right of pre-emption in the acquisition of shares and stocks, would sell these shares and stocks.

If the acquisition of shares and stocks in companies takes place by other legal events than a sales contract, the right to purchase the agricultural real estate is to be applied.

5. The right to acquire the agricultural real estate constituting the property of partnerships

Land turnover is also limited by the right of the Agricultural Property Agency, acting in support of the State Treasury, to acquire real estate in return for payment equivalent to the market value of the land.

[14] Act on Formation of Agricultural System, Art. 3a.
[15] For more information see: K. Maj, Zmiany, pp. 93-97.

This right applies in two situations: first, when the partner has changed; second, when another partner joins the already existing partnership. The execution of this right imposes on the partnership the obligation of the notification of the Agricultural Property Agency about the change of the partner or joining the partnership by another partner within a month of the date the legal transactions were performed[16].

Here, the procedure pertaining to the pre-emption right of agricultural real estate, i.e. the procedure of an entirely different institution, is to be applied. The notification on the statement by the Agricultural Property Agency on the acquisition of the real estate comes into effect as soon as it is published at the website of the Bulletin of Public Information of the Agricultural Property Agency. Just like in the case of the pre-emption right, the partnership is entitled to the courts' evaluation of the acquired agricultural estate.

The acquisition right does not apply if a partner has been replaced by his/her close relative in the partnership. However, in such a case, just like in the case of the institution of the pre-emption right pertaining to the acquisition of shares and stocks, there are no restrictions regarding the size of the agricultural real estate constituting the property of the partnership (apart from the 0,3 ha restriction).

6. The right to acquire the agricultural real estate

Due to the fact that the above discussed pre-emption right does not apply in the situation when the acquisition of agricultural real estate takes place by other legal events than a sales contract, the Act on Formation of Agricultural System provides an analogical solution: the right to acquire the agricultural estate. The Agricultural Property Agency is entitled to it, if the acquisition of the real estate is the result of a donation, exchange or is the consequence of the verdict of the court, public administration organ, executive organ (if issued under executive procedure regulations) or other legal action or legal event, especially resulting from the prescription of the agricultural real estate, inheritance or a vindicatory bequest pertaining to the agricultural real estate or farm. It also applies in the case of the company's division, transformation or merging. The payment for the acquisition constitutes the equivalent of its market value calculated in accordance with the regulations of the Property Management Act, if this value does not result from the contents of the legal action, the court's verdict, the verdict of the public administration organ, etc.[17]

The Agricultural Property Agency is not entitled to the right to acquire the agricultural real estate, if due to the transfer of ownership rights to the agricultural estate, the area of the farm increases, with the limitation that it does not exceed 300 ha of the farmland; if the acquisition takes place with the consent of the President of the Agricultural Property Agency or by a close relative of the vendor; as a result of statutory inheritance or the inheritance by an individual farmer under a vindicatory bequest.

The acquisition right is executed under the regulations pertaining to the right of pre-emption. Depending on the character of legal circumstances under which the acquisition of the agricultural real estate takes place, the competent authorities are obliged to notify the Agricultural Property Agency

[16] See: K. Maj, Zmiany, pp. 95-97.
[17] More on acquisition right: M. Stańko, Zakres przedmioty art. 4 ustawy o kształtowaniu ustroju rolnego, Studia Iuridica Agraria 2005, vol. IV, from p. 112 onwards.

about this fact, e.g.: the acquirer of the agricultural real estate is to notify the Agricultural Property Agency about the prescription of the agricultural real estate.

7. The sanction for the breach of the Act on Formation of Agricultural System regulations

The acquisition of agricultural real estate, of a share or part of a share in the joint ownership of agricultural real estate, acquisition of shares and stocks in a company owning agricultural real estate conducted contrary to the regulations of the Act on Formation of Agricultural System is deemed invalid. Effecting of a legal transaction without the notification required by the act, disposal of agricultural real estate or transfer of the title to its possession without the court's consent as well as the acquisition of agricultural real estate on the basis of false declarations or fraudulent or certifying untruth documents is especially invalid.

Moreover, if the acquirer of agricultural real estate did not start or ceased the management of a farm within 10 years of the date of its acquisition (in the case of a natural person, his personal management is required) and he does not fulfil the obligation of living - for at least 5 years from the moment of the acquisition of the agricultural real estate – in the municipality, where one of the acquired estates, being a part of the prospective family farm, is situated - the court acting at the request of the Agricultural Property Agency, declares the acquisition of this estate by the Agricultural Property Agency, acting in support of the State Treasury in exchange for monetary reimbursement constituting the equivalent of the market value of the agricultural real estate calculated in accordance with the regulations of the Property Management Act, unless important economic, social events or force majeure prevent it[18].

8. EU law

When analyzing the restrictions on the sale of agricultural real estate, there is a problem of compliance of solutions contained in UKUR with EU law. The question whether agricultural land restrictions may be introduced into the law of the Member States is to be answered. The doctrinal discussion which was created on the basis of the amended UKUR[19] leads to the conclusion that the implemented solutions may constitute an infringement of European Union law, including the free movement of capital.

9. Treaty of Accession

The sources of limitations introduced today can be derived from the circumstances relating to the negotiations on conditions for Poland's accession to the European Union. During the negotiations it was repeatedly stressed that there was a threat of redeeming agricultural real estate[20] by economically more powerful entities, primarily from the "old" EU countries, where land prices were considerably

[18] More on sanctions, see:. K. Maj, Zmiany, from p. 98 onwards.
[19] Ibid.
[20] B. Jeżyńska, R. Pastuszko, Ramy prawne obrotu nieruchomościami rolnymi po 2016 roku, Opinie i Ekspertyzy Biura Analiz i Dokumentacji Kancelarii Senatu, OE-197, December 2012, p. 21.

higher than in Poland. These concerns were taken into account in the Accession Treaty and, in accordance with point 4 of the Annex to the Treaty, transitional periods were introduced, temporarily suspending certain principles of EU law, primarily the principle of free movement of capital in the case of acquisition of certain types of real estate by entities from other European Union countries[21]. The twelve-year period of preferential regulations on the turnover of agricultural land expired on 30 April, 2016, so additional restrictions were added to Polish law - UKUR was amended to the form described above. At this stage it should be considered whether the new regulations are in line with EU law.

10. The principle of free movement of capital

Regulations restricting acquisition of agricultural land are subject to allegations of non-compliance with EU law, in particular the principle of free movement of capital[22]. Article 63 TFEU[23] prohibits any restrictions on the movement of capital between Member States and between Member States and third countries. This rule prohibits the establishment of legal restrictions that prevent or impede investment of capital in another Member State. This principle includes the freedom to invest in agricultural land[24]. This is certainly one of the fundamental principles of the European Union. Yet, there are also exceptions to it. Under Article 65 TFEU it is possible to limit this principle in a number of situations, including in particular tax law (due to different places of residence or capital investment), supervision of financial institutions and taking into account restrictions on freedom of establishment.

These restrictions are not of a closed nature. The Court of Justice has supported in its rulings the interpretation extending the conditions set out in Article 65 TFUE, because of "general interest" or "other overriding requirements of the public interest" or "necessary requirements"[25].

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[21] Chapter 4, point 2 of the Annex to the Accession Treaty no. XII – Without prejudice to the obligations arising from the Treaties on which the European Union is founded, Poland may maintain in force twelve years after the date of accession the principles provided for in the Law of 24 March 1920 on the acquisition of immovable property by foreigners (...) in respect of the acquisition of agricultural and forestry property. Under no circumstances may nationals of Member States or legal entities established under the laws of another Member State be treated less favorably as regards the acquisition of agricultural and forestry property than on the date of signature of the Accession Treaty.
For reasons of agricultural turnover restrictions see: P. Ciaian, J. Falkowski, D. Drabik d'A. Kancs, Market Impacts of New Land Market Regulations in Eastern EU Member States (Czynniki wpływające na nowe regulacje rynku ziemi we wschodnioeuropejskich państwa członkowskich UE) , EERI Research Paper Series 2016, no. 2, pp. 1-2; J. Swinnen, K. Van Herck, L. Vranken, Land Market Regulations in Europe (Regulacje rynku ziemi w Europie), "LICOS Discussion Paper Series" 2014, no.354, p. 10.

[22] See the proceedings initiated by the European Commission against Bulgaria, Romania, Latvia, Lithuania and Slovakia on a call for amendments to the legislation on restrictions on the sale of agricultural property due to infringements of Union law, European Union Press Release - IP/16/1827 http://europa.eu/rapid/press-release_IP-16-1827_en.htm.

[23] Consolidated version of the Treaty on the Functioning of the European Union, i.e. the Treaty establishing the European Economic Community (Journal of Laws of 2004, No. 90, item 864/2 as amended). Article 63 1: Under the provisions of this Chapter, any restriction on the movement of capital between Member States and between Member States and third countries shall be prohibited.

[24] See: M. Bidziński, M. Chmaj, B. Uljasz, Ustawa o wstrzymaniu, pp. 178-179.

[25] See: B, Jeżyńska, R. Pastuszko, Ramy prawne; also there - an interesting analysis of the case law of the Court of Justice in agricultural matters, clearly demonstrating the possibility of restricting the principle of free movement of capital in the case of agricultural land.

As pointed out by B. Jeżyńska and R. Pastuszko: *The objectives of shaping population and spatial structure in agriculture are in line with the common agricultural policy and can be considered as "overriding requirements of the public interest", which may justify restrictions on the free movement of capital. To prevent the acquisition of agricultural land for purely speculative purposes, national legislation facilitates the acquisition of land for those who wish to actually cultivate it, and thus meets the objective of general interest in a Member State, where agricultural land is a restricted natural resource. The measures taken cannot, however, go beyond what is necessary to achieve the objective pursued. First, they cannot be particularly burdensome. Second, the national legislature should apply the least restrictive structures. As regards the second requirement, it is of particular importance, to define rational and transparent conditions for the application of restrictive measures to participants of legal transactions. It is unacceptable to provide the supervisory authorities with too much freedom of assessment. This also implies the need to provide the appropriate system for verifying the activities of real estate control agents*[26].

Some of the new Member States of the European Union acceding in 2004 and 2007, after the expiry of the period when the restrictions on the acquisition of agricultural land by foreigners were maintained, introduced new regulations that interfere with the free turnover of agricultural land. Bulgaria, Lithuania, Latvia, Slovakia and Hungary, which introduced restrictions on the acquisition of agricultural land, both in domestic and foreign countries, were called by the European Commission for the abolition of infringement of the principle of free movement of capital and freedom of establishment by amending the rules governing the land market[27]. Poland was only asked by the European Commission to clarify the doubts pertaining to UKUR's compliance with EU law. The European Commission did not initiate formal proceedings in connection with the breach of EU law[28].

11. Change of position of the institutions of the European Union

In the European Union, more and more frequent voices about the unfavorable phenomena of capital concentration could be heard. The concept of *landgrabbing* has been widely used to denote a situation in which socially and economically disadvantaged concentrations of agricultural and forest land are in the hands of large entities, often uninterested in running agricultural or forestry activities. The widespread awareness of the rise of such adverse phenomena has affected the restrictions on the acquisition of real estate that is of particular importance to society - and especially - agricultural real estate. The European Parliament resolution of 27 April 2017 on the current state of concentration of agricultural land in the EU: how to make it easier for farmers to access agricultural land?[29] has become a source of serious concern relating to the direction of transformation of ownership structure.

[26] See: B. Jeżyńska, R. Pastuszko, Ramy prawne, p. 20.
[27] http://europa.eu/rapid/press-release_IP-16-1827_en.htm.
[28] http://tvn24bis.pl/z-kraju,74/ustawa-o-ziemi-komisja-europejska-nie-wszczela-procedury,728127.html
[29] See survey „Extent of Farmland Grabbing in the EU" („Skala masowego wykupu gruntów rolnych w UE") developed by the Committee on Agriculture and Rural Development of the European Parliament, p. 24 (PE540.369), Saturnino Borras Jr., Jennifer Franco and Jan Douwe van der Ploeg i in., Raport Transnational Institute (TNI) for European Coordination Via Campesina and Hands off the Land network: *Land concentration,land grabbing and people's struggles in Europe* (Koncentracja gruntów rolnych, masowy wykup gruntów rolnych i zmagania ludzi w Europie), 2013, https://www.tni.org/en/publication/land-concentration-land-grabbing-and-peoples-struggles-in-europe-0 , *R. Pastuszko, Land grabbing. Podstawowe zagadnienia prawne*, Studia Iuridica Lublinensia 2017, vol. XXVI, no. 1, pp. 147-155.

Agricultural land is a specific property. The wording of Resolution (S) is entirely correct in its statement that *farmland areas used for smallholder farming are particularly important for water management and the climate, the carbon budget and the production of healthy food, as well as for biodiversity, soil fertility and landscape conservation; whereas around 20 % of European farmland is already suffering as a result of climate change, water and wind soil erosion and poor cultivation; and whereas, owing to global warming, some regions of the EU, particularly in southern Europe, are already exposed to drought and other extreme weather events, which will cause soil deterioration and limit access to good-quality land and/or land fit for agricultural use.* The resolution of the European Parliament is a consequence of recognizing the problem of concentration of agricultural land, massive land acquisition, increasing inequalities in land use, limiting access to land[30]. It represents a significant change in the perception of the principle of free movement of capital, which may be subject to restrictions, on the grounds that, as the resolution states, *land is on the one hand property, on the other a public asset, and is subject to social obligations*[31]*.* The EU institutions recognize the very important problem of undesirable allocation of agricultural land to those whose main objective is not to carry out efficient but sustainable agricultural activities. The value of agricultural land is so important that it justifies the restriction of other principles of EU law, including the free movement of capital.

The resolution directly refers to the ruling of the German Constitutional Court of 12 January 1967 (1 BvR 169/63, BVerfG 21, 73-87), which stated that the turnover of agricultural land need not be as free as any other form of capital. and since the land area can not be increased and is needed, fair legal and social justice requires taking account of the interests of the general public in the case of land to a much greater extent than for other types of property[32].

Paragraph 11 of the *acknowledges that while land policy is essentially a matter for the Member States, it may be affected by the CAP or relevant policy areas, with serious impact on the competitiveness of farms on the internal market; considers that land policy must help to ensure a broad, fair and equitable distribution of land tenure and access to land, as well as the status of tenant farmers within an appropriate framework, as this has direct implications for rural living, working conditions and quality of life; draws attention to the important social function of land tenure and management over generations, given that a loss of farms and jobs will lead to the collapse of European smallholder agriculture and the demise of rural areas, and thus lead to structural changes that are undesirable for society as a whole.* It was therefore acknowledged that instruments used by the European Union, such as direct payments, usually paid per hectare, could increase and consolidate the concentration of land. The European Union does not have direct competence to regulate the trading of agricultural land and forest land, but encourages the Member States themselves to take action in this area. According to paragraph 22 of the resolution, the European Parliament *encourages all Member States to use such instruments to regulate the market in land as are already being used successfully in some Member States, in line*

[30] See: Opinion of the European Economic and Social Committee of 21 January 2015, „Masowy wykup gruntów rolnych – dzwonek alarmowy dla Europy i zagrożenie dla rolnictwa rodzinnego", 2015/C 242/03, http://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52014IE0926&from=PL. See also: Survey: „Extent of Farmland Grabbing in the EU" („Skala masowego wykupu gruntów rolnych w UE") developed by the Committee on Agriculture and Rural Development of the European Parliament, p. 24 (PE540.369).

[31] Point G of the resolution.

[32] Land Market Policy: General Situation and Opportunities - Working Group Report (Federal and Land Levels) on Land Market Policy, as decided by the Heads of the Ministry of Agriculture of 16 January 2014 (March 2015), p. 37.

with EU Treaty provisions, such as state licensing of land sales and leases, rights of pre-emption, obligations for tenants to engage in farming, restrictions on the right of purchase by legal persons, ceilings on the number of hectares that may be bought, preference for farmers, land banking, indexation of prices with reference to farm incomes, etc.

12. Final remarks

The Act on the Formation of Agricultural System of 1 May 2016 introduced several restrictions in the acquisition of the agricultural real estate. These restrictions target individual farmers, who are under an obligation of managing the farm for at least 10 years. Yet, the biggest limitations pertain to the possibility of land acquisition by legal persons, who may acquire agricultural land only with the consent of the President of the Agricultural Property Agency. Moreover, the Agricultural Property Agency was granted the pre-emption right and the right to purchase shares and stocks in companies owning agricultural estate. Obviously, such limitations make the turnover of the agricultural real estate more difficult, they also hinder acquisition of the agricultural real estate by foreigners, which was the aim of the Act. However, these regulations are a source of serious concerns about slowing down of positive tendencies in the alternations in the structure of farming land. A medium Polish farm is over 8 ha big, and the current restrictions might impede accumulation of farming land and thus, have a negative effect on Polish agriculture. Despite the declared support for family farms in Poland, the restrictive solutions may hinder the development of the Polish agriculture. It may be observed that the mechanisms of family farms protection focus on the control of the transfer of the farming land, instead of supporting these farms.

Serious legal uncertainties may arise in UKUR solutions concerning restriction of transformations of commercial law companies or the possibility of interfering with prescriptions. Moreover, the construction of the attachment of land owner to the land, including the obligation to conduct agricultural activities for 10 years, may be considered incompatible with both EU law and the Constitution of the Republic of Poland[33]. In view of the efforts of EU institutions to protect agricultural land from excessive concentration and misuse, the regulations introduced in Poland may either be compatible with the current EU policy or require some addition and/or elimination of errors not based on the assumptions of the act itself.

However, the principal design of UKUR – the acquisition of land exclusively by an individual farmer and the right of pre-emption and the right of redemption – as the underlying mechanisms of market control should be considered to be in line with EU law, including the principle of free movement of capital. In view of the current trends recognizing the importance of the problem of concentration of agricultural land, the threat to food security of the European Union, the restrictions imposed on trading should be regarded as the allowed limiting of the principle of EU free movement of capital, provided that this restriction results from the prevention of the negative phenomena described above and not discriminating against entities from other member states.

It cannot be ruled out that, in specific cases of exercising of rights by the KOWR, where the decision is based on the nationality of the purchaser, such actions may be considered incompatible with EU law,

[33] See. M. Bidziński, M. Chmaj, B. Uljasz, Ustawa o wstrzymaniu ... The conformity of the discussed regulations with the Constitution of the Republic of Poland will be decided by the Constitutional Tribunal - proceedings conducted under ref. Act K 36/16, http://trybunal.gov.pl/s/k-3616/.

and thus with the legal order of the Republic of Poland. Yet, the constructs contained in the UKUR are, in principle, a part of a clearly visible tendency to restrict the free disposal of land, which, being a particularly important resource of the country - should be regarded as a public good. However, as justified in the Explanatory Memorandum to the Resolution: *Many Member States have acknowledged the problem and are trying to use legislation to counteract this trend. This often leads to a conflict with one of the four basic European freedoms: the free movement of capital. This fundamental freedom, which rightly applies throughout the EU and includes a ban on discrimination against the nationals of other EU countries, encounters resistance when it comes to the sale of agricultural land*[34].

[34] Report on the current state of concentration of agricultural land in the EU: how to facilitate access to land for farmers ?, A8-0119 / 2017, proceedings under No. 2016/2141 (INI), http://www.europarl.europa.eu/sides/ getDoc.do?type=REPORT&reference=A8-2017-0119&language=EN.

Trinkwasserversorgung und Landwirtschaft – ein (un)lösbarer Konflikt?*

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Abstract

Due to the open provisions of the Water Protection Act of Switzerland, which open up a broad scope for enforcement, it must be determined on a case-by-case basis, by means of weighing interests, how the various concerned public interests can best be reconciled with one another.
Outstanding importance is attached to a careful fact-finding and a comprehensible professional assessment by experts of the respective field of expertise.
The findings are to be implemented in a case-by-case protection zone regulation, whereby their compliance and their effectiveness must be monitored on an ongoing basis. In this way, effective groundwater protection can be combined with meaningful, locally-compatible agricultural management and possible conflicts of use remedied in accordance with the law. A schematic application of certain provisions of the Water Protection Ordinance, however, can not guarantee this.

En raison des dispositions ouvertes de la loi sur la protection des eaux suisse, qui prévoient un large champ d'application, il convient de déterminer, au cas par cas, en évaluant les intérêts, la meilleure façon de concilier les intérêts publics concernés.
Une importance particulière est attachée à une enquête minutieuse et à une évaluation professionnelle compréhensible par des experts du domaine de compétence respectif.
Les résultats doivent être mis en œuvre dans le cadre d'une réglementation de la zone de protection au cas par cas, dans laquelle la conformité et l'efficacité doivent être surveillées en permanence. De cette manière, une protection efficace des eaux souterraines peut être combinée à une gestion agricole significative et compatible au niveau local et à d'éventuels conflits d'utilisation résolus conformément à la loi. Une application schématique de certaines dispositions de l'ordonnance sur la protection des eaux ne peut toutefois pas garantir cela.

1. Einleitung

Ziel des vorliegenden Beitrages ist es, ein paar Besonderheiten im Umgang mit Trinkwasserfassungen im öffentlichen Interesse darzustellen, welche sich durch das Zusammenspiel mit der landwirtschaftlichen Nutzung in ihrer Umgebung ergeben.

Konflikte zwischen Landwirtschaft und Gewässerschutz im Sinne von Rechtsstreitigkeiten sind aktuell vor allem beim planerischen Grundwasserschutz zu beobachten, und zwar im Zuge der Anpassung der Schutzzonen an die Gewässerschutzverordnung 1998, sowie beim baulichen Gewässerschutz. Dort

* Erstveröffentlichung in Blätter für Agrarrecht 1/2018, S. 43-59.

gibt vorab die Ausgestaltung von Ausläufen zu Differenzen Anlass[1], während dem z.B. die Anpassung der Lagereinrichtungen für Hofdünger an die Anforderungen von Art. 14 Abs. 3 GSchG[2] – trotz der teilweise sehr hohen Kosten – auf grosse Akzeptanz gestossen ist.

Zu Fragen des planerischen Grundwasserschutzes besteht im Übrigen kaum öffentlich zugängliche Rechtsprechung, ja häufig dürften die Sachverhalte gar nicht erst der juristischen Überprüfung zugeführt werden, da diese für alle Beteiligten ein erhebliches Risiko bedeutet. Nebst der verlorenen Zeit und den erforderlichen finanziellen Mitteln wirkt auch abschreckend, dass kaum eine Urteilsprognose abgegeben werden kann, weil eben viele der sich stellenden Fragen noch nie gerichtlich beurteilt worden sind und auch in der juristischen Fachliteratur selten eingehend betrachtet werden.

Eine umfassende Aufarbeitung der juristischen Fragestellungen würde auch den Umfang dieses Beitrages sprengen. Stattdessen soll versucht werden, aus Praktikersicht mit dem Fokus auf die Trinkwassergewinnung aus Grundwasser an die juristische Problematik heranzuführen. Dazu ist es in einem ersten Schritt unerlässlich, die Funktionsweise der juristischen Interessenabwägung etwas genauer zu beleuchten. Anschliessend sollen beispielhaft einige Streitpunkte bei der Schutzzonenausscheidung aufgegriffen werden, die unabhängig von den konkreten Gegebenheiten kritisch hinterfragt werden können.

2. Die konkurrienrenden öffentlichen Interessen

2.1 Vorbemerkungen

Sowohl die Trinkwasserversorgung als auch eine einheimische Landwirtschaft liegen zweifelsohne im öffentlichen Interesse. Ob und in welchem Umfang dies aber auch für ein konkret zu beurteilendes, sie betreffendes Vorhaben gilt, ist im Einzelfall zu ermitteln.

Jedes staatliche Handeln – und folglich auch sämtliche Tätigkeiten von Bund, Kantonen, Gemeinden und der Trägerschaft der öffentlichen Trinkwasserversorgung – muss im öffentlichen Interesse liegen und verhältnismässig sein (Art. 5 BV)[3]. Ob ein solches, ausreichendes öffentliches Interesse gegeben ist, muss nach Massgabe aller Umstände beurteilt werden[4]. Dazu sind sämtliche relevanten Interessen zu ermitteln, zu bewerten und gegeneinander abzuwägen, um gestützt darauf zu entscheiden, wie die Massnahme auszugestalten ist bzw. welchen Interessen allenfalls der Vorzug zu geben ist[5].

2.2 Ermittlung der öffentlichen Interessen

Entsprechend dem Thema dieses Beitrags wird nachfolgend die Lage der öffentlichen Interessen in Bezug auf das Trinkwasser und die Landwirtschaft dargestellt. Nicht selten kommen im konkreten Fall

[1] Mit seinen beiden jüngeren Entscheiden BGE 1C_390/2008 vom 15. Juni 2009 (Rinder-Laufhof; kritisch besprochen von Hans W. Stutz, Gelockerter Grundwasserschutz?, URP 2009, S. 673 ff.) und BGE 1C_62/2014 vom 15. Juni 2015 (Kälberiglu; kritisch besprochen von Hans W. Stutz, URP 2015, S. 394 ff.) hat das Bundesgericht zu diesen Fragen Stellung nehmen können. Kontrovers aufgenommen wurde vor allem, dass das Bundesgericht für Massnahmen zum Gewässerschutz in ständiger Rechtsprechung – nach hiesiger Meinung zu Recht – den Nachweis einer konkreten Gefahr für ein Gewässer verlangt.
[2] Bundesgesetz über den Schutz der Gewässer vom 24. Januar 1991 (Gewässerschutzgesetz, GSchG), SR 814.20.
[3] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (BV), SR 101.
[4] Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 7. Aufl., Zürich 2016, § 9, Rz. 536.
[5] Verwaltungspraxis der Bundesbehörden (VPB) 2002, Nr. 47, S. 529 ff., E. 7 mit weiteren Nachweisen.

jedoch weitere Interessen – z.B. des Hochwasserschutzes, der Fischerei oder des Auenschutzes – hinzu. Diese sind in gleicher Weise zu ermitteln und zu gewichten.

2.2.1 Trinkwasser

Sehr früh – nämlich bereits 1875 – erkannte der Bundesgesetzgeber die Notwendigkeit, das Wasser vor menschengemachter Verunreinigung zu schützen. Zwar stand damals der Erhalt eines gesunden Fisch- und Krebsbestandes im Vordergrund, doch zeigen die Bestrebungen zum Erlass des Fischereigesetzes von 1888 die enge Verbundenheit zwischen dem technischen Fortschritt und der Notwendigkeit, die Natur vor den damit einhergehenden negativen Auswirkungen zu schützen. Bis eine umfassende Bundeskompetenz zur Reinhaltung der Gewässer geschaffen wurde, mussten allerdings weitere 75 Jahre vergehen und das Mitte der 1950er-Jahre gestützt darauf erlassene erste Gewässerschutzgesetz erwies sich als wenig griffig. 1971 kam es deshalb zu einer Totalrevision, welche den Grundstein für den qualitativen Gewässerschutz legte, wie er bis heute Bestand hat. Während die formell-gesetzliche Grundlage seit über 40 Jahren praktisch unangetastet blieb –1991 wurde einzig der Aspekt des mengenmässigen Grundwasserschutzes neu aufgenommen –, ist die Allgemeine Gewässerschutzverordnung von 1972 1998 durch die bis heute geltende Gewässerschutzverordnung ersetzt worden[6]. Hinzu kamen die kantonale Ausführungsgesetzgebung, verschiedene Vollzugshilfen und vor allem in den letzten Jahren vermehrt planerische Erlasse.

Als Lebensmittel fällt Trinkwasser unter die Lebensmittelgesetzgebung[7]. Da der ganz überwiegende Teil des Trink- und Brauchwassers aus dem Grundwasser stammt[8], hat dieses in weiten Teilen die numerischen Vorgaben von Anh. 2 Ziff. 22 GSchV[9] einzuhalten. Damit soll unter anderem sichergestellt werden, dass das Grundwasser nach einfacher Aufbereitung die Anforderungen der Lebensmittelgesetzgebung erfüllt.

2.2.2 Landwirtschaft

Die Landwirtschaft ist im Selbstverständnis der Schweiz traditionell ein wichtiger Wirtschaftszweig und trägt viel zu ihrem äusseren Erscheinungsbild bei. Entsprechend wird sie mit namhaften Subventionen gefördert, damit sie ihre Hauptaufgaben – die sichere Versorgung der Bevölkerung, die Erhaltung der natürlichen Lebensgrundlagen und die Pflege der Kulturlandschaft sowie die dezentrale Besiedelung des Landes – trotz beträchtlichem wirtschaftlichem Druck erfüllen kann[10].

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[6] Zur Historie der Gewässerschutzgesetzgebung in der Schweiz vgl. Alain Griffel/ Arnold Marti/Heribert Rausch, in: Walter Haller (Hrsg.), Umweltrecht, ein Lehrbuch, Zürich 2004, § 9, Rz. 368 ff.

[7] Für Trinkwasser relevant sind nebst dem Bundesgesetz über Lebensmittel und Gebrauchsgegenstände vom 20. Juni 2014 (Lebensmittelgesetz LMG, SR 817.0), die Lebensmittel- und Gebrauchsgegenständeverordnung vom 16. Dezember 2016 (LGV, SR 817.02), die Verordnung des EDI über Trinkwasser sowie Wasser in öffentlich zugänglichen Bädern und Duschanlagen vom 16. Dezember 2016 (TBDV, SR 817.022.11), die Verordnung des EDI über die Hygiene beim Umgang mit Lebensmitteln vom 16. Dezember 2016 (Hygieneverordnung EDI, HyV, SR 817.024.1), und die Verordnung des EDI über Materialien und Gegenstände, die dazu bestimmt sind, mit Lebensmitteln in Berührung zu kommen vom 16. Dezember 2016 (Bedarfsgegenständeverordnung, SR 817.023.21).

[8] 83 % des Trink- und Brauchwasserbedarfs der Schweiz werden aus dem Grundwasser gedeckt; 44 % stammen aus Quellen, 39 % aus Filterbrunnen. Die restlichen 17 % werden aus Seewasser gewonnen (BUWAL, Wegleitung Grundwasserschutz 2004, S. 21).

[9] Gewässerschutzverordnung vom 28. Oktober 1998 (GSchV), SR 814.201.

[10] Vgl. Art. 104 BV.

Kulturland

Mitunter die wichtigste Ressource der Landwirtschaft zur Erfüllung ihrer multifunktionalen Aufgaben ist das Kulturland. Gleichzeitig gehört gutes Agrarland in der Schweiz zu den knappsten, nicht erneuerbaren Ressourcen. Es erfüllt zahlreiche ökologische und ökonomische Funktionen und ist für Mensch und Umwelt letztendlich von ähnlich existentieller Bedeutung wie das Wasser. Anders als das Wasser blieb das Kulturland in der Praxis jedoch lange Zeit kaum geschützt. Der jahrzehntelang rasch fortschreitende Verlust mit der Annäherung an eine kritische Grenze[11] haben schliesslich einen politischen und gesellschaftlichen Willen entstehen lassen, die verbliebenen Flächen streng zu schützen. Dies soll vorab mit raumplanerischen Mitteln geschehen, wie zuletzt die Novelle von Art. 3 Abs. 2 Bst. a RPG[12] (in Kraft seit 1. Mai 2014) gezeigt hat.

Als schützenswertes Kulturland gelten das Wies- und Ackerland, Weiden, Obstplantagen, Rebberge, Gartenbau sowie die alpwirtschaftlichen Nutzflächen. Wertvollster Bestandteil der Landwirtschaftsfläche sind die sogenannten Fruchtfolgeflächen, also das beste ackerfähige Kulturland. Sie umfassen vorab das Ackerland und die Kunstwiesen in Rotation sowie die ackerfähigen Naturwiesen und liegen grossmehrheitlich im Schweizer Mittelland. Rund zwei Drittel des Kulturlands können dagegen aus topographischen und klimatischen Gründen nur als Grünland genutzt werden[13].

Familienbetriebe als Grundlage eines gesunden Bauernstandes

Eine deutlich längere Schutztradition kennt das Produktionsmodell der bäuerlichen Familienbetriebe[14]. Dennoch stehen sie heute aus wirtschaftlichen und sozialen Gründen – bis zu einem gewissen Punkt politisch gewollt – stark unter Druck. Bauernfamilien sind mit dem von ihnen bewirtschafteten Land häufig in besonderer Weise verbunden und weisen deshalb in der Regel eine hohe Motivation auf, ein gesundes ökologisches Gleichgewicht auf Generationen hinaus zu bewahren. Es ist anzunehmen, dass der Umstand, dass die landwirtschaftliche Produktion in der Schweiz bisher vorwiegend durch Familienbetriebe und nicht durch Grossbetriebe erfolgt ist, die ähnlich wie Industrieunternehmen geführt werden, zur Schonung der natürlichen Ressourcen beigetragen hat bzw. verhindern konnte, dass in diese (noch) stärker eingegriffen wurde[15]. Mit einer gewissen Sorge ist deshalb die Entwicklung zu beobachten, dass in den letzten Jahren die Zahl der Betriebe mit einer landwirtschaftlichen Nutzfläche von mehr als 30 ha bzw. mehr als 50 ha stark zugenommen hat, während die Gesamtbetriebszahlen rückläufig sind[16].

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[11] Der Bundesratsbeschluss vom 8. April 1992 legt für die gesamte Schweiz einen Mindestumfang der Fruchtfolgeflächen von 438'560 ha fest (BBl 1992 II 1649). Der effektive Bestand liegt bloss 1 % höher.

[12] Bundesgesetz über die Raumplanung vom 22. Juni 1979 (Raumplanungsgesetz, RPG), SR 700.

[13] Vgl. https://www.are.admin.ch/are/de/home/raumentwicklung-und-raumplanung/ raumplanungsrecht/revision-des-raumplanungsgesetzes--rpg-/revision-des-raumplanungsgesetzes--rpg----2--etappe/kulturland-schutz.html.

[14] Vgl. Art. 1 Bundesgesetz über das bäuerliche Bodenrecht vom 4. Oktober 1991 (BGBB), SR 211.412.11 und dessen Entstehungsgeschichte.

[15] Ähnlich das Bundesgericht in Zusammenhang mit dem raumplanerischen Interesse an der Landwirtschaft in BGE 1C_647/2012 vom 3. September 2014, E. 6 f. und BGE 121 II 307 ff., 316 E. 5.f.

[16] Gesamtbetriebszahlen 2007: CH 61'764 / BE 12'625,
davon >30 <50 ha: CH 6'751 / BE 752; >50 ha: CH 1'717 / BE 132.
Gesamtbetriebszahlen 2016: CH 52'263 / BE 10'684,

Tierschutz

Damit die Landwirtschaft ihre Aufgaben erfüllen kann, muss sie sodann das Tierwohl gewährleisten (Art. 1 Bst. e LwG)[17]. Dazu gehört eine artgerechte Haltung der Nutztiere, welche im vorliegend interessierenden Zusammenhang vor allem die Gewährung eines in zeitlicher, räumlicher und baulicher Hinsicht tiergerechten Auslaufs bedingt.

2.3 Gewichtung und Abwägung der Interessen

2.3.1 Allgemeines

Sind die involvierten Interessen ermittelt, sind sie zu bewerten und gegeneinander abzuwägen bzw. in dem Sinne zu optimieren, dass sie mit Rücksicht auf die Beurteilung, die ihnen zuteilwurde, im Entscheid möglichst umfassend zur Geltung gebracht werden können[18]. Häufig bedingt dies, verschiedene Handlungsoptionen zu prüfen[19]. Hierbei kommt dem Verhältnismässigkeitsprinzip entscheidende Bedeutung zu: Seine drei Elemente, die Eignung und Erforderlichkeit einer Massnahme sowie die Verhältnismässigkeit von Eingriffszweck und Eingriffswirkung, müssen gleichermassen – möglichst optimal – erfüllt werden[20]. Ist dies nicht der Fall, liegt ein Fehler in der Interessenabwägung und damit ein Rechtsfehler vor[21].

Die Verpflichtung zur Vornahme der Interessenabwägung und der Grundsatz der Verhältnismässigkeit haben Verfassungsrang (Art. 5 BV)[22]. Entsprechend stehen sie bei der Beurteilung des konkreten umweltrechtlichen Einzelfalls häufig über den generell-abstrakten Lösungsansätzen in rechtssetzenden Verordnungen[23] oder Vollzugshilfen[24]. Diese stellen zwar eine wertvolle Orientierungshilfe dar, im

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davon >30<50 ha: CH 7'807 / BE 1'137; >50 ha: CH 2'680 / BE 206
Quelle: https://www.pxweb.bfs.admin.ch/Selection.aspx?px_language=de&px_db= px-x-0702000000_101&px_tableid=px-x-0702000000_101\px-x-0702000000_101. px&px_type=PX).

[17] Bundesgesetz über die Landwirtschaft vom 29. April 1998 (Landwirtschaftsgesetz LwG), SR 910.1.

[18] Zur juristischen Technik der Interessenabwägung vgl. z.B. Pierre Tschannen/Ulrich Zimmerli/Markus Müller, Allgemeines Verwaltungsrecht, 4. Aufl., Bern 2014, § 26, Rz. 34 ff. mit weiteren Verweisen.

[19] VPB (Fn. 5) 2002, Nr. 47, S. 529 ff. E. 9.

[20] Häfelin/Müller/Uhlmann (Fn. 4), § 9, Rz. 565.

[21] VPB (Fn. 5) 2002, Nr. 47, S. 529 ff., E. 7.

[22] Häfelin/Müller/Uhlmann (Fn. 4), § 9, Rz. 56, § 10, Rz. 583.

[23] Grundlegende respektive wichtige rechtssetzende Regelungen sind nach Art. 164 Abs. 1 BV auf Gesetzesstufe zu treffen. Weniger wichtige Regelungen können nach Art. 182 Abs 1 BV auch in Form der Verordnung erfolgen. Soweit allerdings Eingriffe in Eigentumsrechte einschliesslich Besitz drohen, muss das formelle Gesetz selber wenigstens die Grundzüge (Inhalt, Zweck und Ausmass) der Regelung umschreiben. Beruhen rechtssetzende Verordnungsbestimmungen im Einzelfall nicht auf einer diese Voraussetzungen erfüllenden Delegationsnorm, können sie die Interessenabwägung nicht ersetzen.

[24] Vollzugshilfen – wie Wegleitungen, Richtlinien und Merkblätter o.ä. – dienen als Richtschnur für die rechtsgleiche Anwendung der rechtlichen Vorgaben und verbessern die Vorhersehbarkeit staatlichen Handelns, in dem sie festlegen, wie das Verwaltungsermessen im Einzelfall ausgeübt wird. Allerdings sind sie als auf den Durchschnittsfall zugeschnittene Meinungsäusserung nicht bindend, falls ihre Anwendung im Einzelfall zu keiner überzeugenden Konkretisierung der rechtlichen Vorgaben führt, weil die allgemeine Auslegung dem Einzelfall nicht angepasst ist bzw. ihm nicht gerecht wird (Tschannen/Zimmerli/Müller (Fn. 18), § 4,1 Rz. 15 f. mit weiteren Verweisen).

Streitfall können sie die einzelfallbezogene Sachverhaltsermittlung aber nicht ersetzen und schon gar nicht deren Resultat derogieren.

Obschon die Interessenabwägung immer nur für den Einzelfall erfolgen kann, gibt es Hilfsmittel und Erkenntnisse, welche in einer Vielzahl von Fällen hinzugezogen werden können und deshalb nachfolgend kurz thematisiert werden sollen.

2.3.2 Landwirtschaftsspezifische Gefahrenherde

Die landwirtschaftliche Bewirtschaftung bringt den Umgang mit Stoffen mit sich, die bei unsachgemässem Umgang ein erhebliches Risiko für Grundwasservorkommen und Oberflächengewässer in der Umgebung in sich bergen. Deshalb ist es wichtig, im Einzelfall sorgfältig abzuklären, auf welchen Wegen diese Stoffe in die Gewässer gelangen können, und entsprechende Schutzvorkehrungen zu treffen. Der unantastbare Kerngehalt der Gewässerschutzgesetzgebung dürfte dabei sein, dass keine Stoffe in Gewässer gelangen sollen, welche nicht kurzfristig wieder abgebaut werden können[25]. Ob dies der Fall ist, hängt nicht zuletzt von der Fähigkeit des konkreten Grundwasserleiters zum Abbau dieser Stoffe ab.

Dünger, Pflanzenschutzmittel und Medikamente

Die grösste Gefährdung für die Gewässer geht vom Einsatz von Düngern und Pflanzenschutzmitteln aus, vor allem, wenn sie auf ungeeigneten Flächen (z.B. Karrenfelder) oder zur Unzeit ausgebracht werden, d.h. in einem Moment, in dem weder die Pflanzen noch der Boden die Inhaltsstoffe aufnehmen bzw. zurückhalten können. Allerdings können auch im Boden gespeicherte Stoffe z.B. durch Starkwetterereignisse ausgewaschen oder abgeschwemmt werden, weshalb es wichtig ist, bei der Bewirtschaftung insgesamt nicht mehr Stoffe zuzuführen, als im natürlichen Kreislauf umgesetzt werden können. Daran haben sowohl die Landwirtschaft als auch die Trinkwasserversorgung ein Interesse, da Nährstoffe, die in ein Gewässer oder ins Grundwasser gelangen, in diesem nicht nur eine Belastung darstellen, sondern auch für die Landwirtschaft verloren sind. Damit insgesamt nicht zu viel Nährstoffe in den Kreislauf eingespeist werden, müssen Betriebe mit Nutztierhaltung eine ausgeglichene Düngerbilanz aufweisen, und vor dem Einsatz von Handelsdüngern ist der Hofdünger zu verwerten (Art. 14 Abs. 1 GSchG)[26]. Bei künstlichen Präparaten ist sodann im Allgemeinen dem Einsatz von schnell abbaubaren Wirkstoffen der Vorzug zu geben.

Beim Umgang mit Düngern und Pflanzenschutzmitteln ist nicht nur darauf zu achten, dass sie nicht ausgewaschen oder abgeschwemmt werden, sondern es ist auch zu verhindern, dass sie (jedenfalls in grösseren) Mengen verdunsten, da sie über die Luft wiederum in Gewässer gelangen können[27].

Bei der Verwendung von Pflanzenschutzmitteln und Düngern sind es vor allem Stickstoffverbindungen (Nitrat, Nitrit und Ammonium) und andere anorganische Verbindungen, welche ins Grundwasser gelangen können. Nitrat, aber auch andere anorganische Salze werden im Grundwasser in der Regel nicht abgebaut und können über grosse Distanzen verfrachtet werden. In den meisten Pflanzenschutzmitteln sind organische Verbindungen und/oder Schwermetalle enthalten. Dabei handelt es sich oft

[25] Vgl. auch Roland Norer/Simone Tschopp, in: Peter Hettich/Luc Jansen/Roland Norer (Hrsg.), Kommentar GSchG, Zürich 2016, Art. 14, N 33.
[26] Norer/Tschopp (Fn. 25), Art. 14, N 10.
[27] Norer/Tschopp (Fn. 25), Art. 14, N 23 f.

um mobile und/oder persistente Stoffe, d.h. Stoffe, die schlecht sorbiert und/oder langsam bzw. nicht abgebaut werden. Im Fall von Hofdüngern besteht die Gefahr vor allem in einer bakteriologischen Verunreinigung des Grundwassers. Vereinzelt wurden auch Medikamentenrückstände nachgewiesen[28].

Bezüglich Bewirtschaftungsweise gilt, dass bei einer dauerhaft geschlossenen Grasnarbe die Auswaschung von Schadstoffen ins Grundwasser wesentlich geringer ist als bei der Bewirtschaftung offener Ackerflächen[29]. Dies hängt einerseits mit der Filterfunktion der Vegetation und des Bodens zusammen und ist andererseits darauf zurückzuführen, dass im Ackerbau mehr chemische Hilfsstoffe eingesetzt werden müssen.

Bemerkenswert erscheint, dass die Gewässerschutzgesetzgebung das Gefährdungspotential von flüssigem Hofdünger, d.h. von Gülle, allgemein höher einstuft als dasjenige von Mist. Nach hiesiger Erfahrung hängt das Gefährdungspotential indes weniger davon ab, ob die Stoffe bereits gelöst sind, wie in der Gülle, oder ob sie (z.B. durch Niederschläge) noch gelöst werden müssen, wie im Mist, sondern es ist vielmehr die Menge bzw. Konzentration der Stoffe, welche darüber entscheidet, ob sie eine ernstzunehmende Gefahr für die Trinkwasserversorgung darstellen. So sind z.B. Fälle bekannt, in denen eine jahrzehntelang problemlos funktionierende Fassung durch die Umstellung auf das Ausbringen der Gülle mittels Schleppschlauch – an sich als besonders umweltfreundliche Methode anerkannt und gefördert – wegen der erhöhten Konzentration am Boden zu Problemen geführt hat, ebenso wie es Fälle gibt, in denen erst die Umstellung auf Mistdüngung zu Trinkwasserverschmutzungen geführt hat.

Drainagen und Sickerverluste

Drainagen werden häufig nur unter dem Gesichtspunkt des quantitativen Grundwasserschutzes berücksichtigt[30]. In der Praxis führen sie bisweilen aber auch zu qualitativen Beeinträchtigungen, nämlich dann, wenn sie als Leiter für Problemstoffe aus Düngern und Pflanzenschutzmitteln fungieren.

Nach Schätzungen des Bundesamtes für Landwirtschaft ist knapp ein Fünftel der landwirtschaftlichen Nutzfläche drainiert. 70 % davon sind Fruchtfolgeflächen. Vielerorts ermöglicht erst die Drainage eine produktive landwirtschaftliche Nutzung. Sie trägt deshalb zur Versorgungssicherheit mit Lebensmitteln bei. Auf der anderen Seite geraten durch sie Feuchtbiotope und Moorböden unter Druck[31].

Bis Ende der 1980er-Jahre wurden im Rahmen von Gesamtmeliorationen regelmässig Drainagenetze erstellt. Private Drainagen, wie auch Vorrichtungen zur Ableitung von sog. «Bergwasser» wurden indes schon viel früher und häufig ohne Pläne – schlicht resultatorientiert – errichtet. Manchmal kennen die Bewirtschafter noch den ungefähren Verlauf oder wissen zumindest, dass «etwas» gemacht worden ist. Solchen Verdachtsmomenten ist vor der Prüfung von Bewirtschaftungseinschränkungen nachzugehen.

Ähnlich wie Drainagen können Defekte in Abwasserleitungen oder an Hofdüngerlagervorrichtungen zu nicht direkt auf die Bewirtschaftung einer konkreten Fläche zurückführbaren Verunreinigungen führen. Solche Defekte müssen ausgeschlossen werden, bevor Bewirtschaftungseinschränkungen zu prüfen sind.

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[28] Bundesamt für Umwelt, Wald und Landschaft (BUWAL), Wegleitung Grundwasserschutz 2004, S. 77.
[29] BUWAL, Wegleitung (Fn. 28), S. 75.
[30] So auch BUWAL, Wegleitung (Fn. 28), S. 75.
[31] Bundesamt für Landwirtschaft (BLW), Agrarbericht 2016, S. 146.

Bodenstruktur

Die Bodenstruktur ist einerseits wegen der unverzichtbaren Filterfunktion des Bodens von Bedeutung. Andererseits besteht auf zu wenig durchlässigen Böden ein erhöhtes Risiko von Abschwemmungen. Und schliesslich muss zur Grundwasserneubildung Niederschlagswasser versickern können. Die Bodenstruktur beeinflusst damit sowohl den qualitativen wie auch den quantitativen Grundwasserschutz.

Bewässerung

In der Schweiz werden heute nur wenige Prozent der landwirtschaftlichen Nutzfläche bewässert. Mit dem Klimawandel wird der Bewässerungsbedarf zunehmen[32]. Dadurch gerät die Landwirtschaft unter Umständen in Konkurrenz zum quantitativen Gewässerschutz. Die Bewässerung eines Gebiets kann sodann zur verstärkten Mobilisierung von Schadstoffen aus dem Boden und ihrer Auswaschung ins Grundwasser führen[33]. Damit ist sie auch für die Belange des qualitativen Grundwasserschutzes von Bedeutung.

2.3.3 Technische Möglichkeiten der Wasseraufbereitung

Da das Grundwasser grundsätzlich – zumindest langfristig – von anthropogen bedingten Belastungen freizuhalten ist, kommt die Rohwasseraufbereitung nur ausnahmsweise in Frage, wenn sie aufgrund der geologischen Gegebenheiten unabdingbar ist (Karstwasser) oder wenn es darum geht, bei einer unter normalen Umständen nicht belasteten Fassung z.B. die Folgen von Starkwetterereignissen auszugleichen. Hier wäre es unverhältnismässig, die Bewirtschaftung insgesamt derart einzuschränken, dass die Rohwasserqualität selbst in Ausnahmesituationen noch gewährleistet ist.

2.3.4 Sach- und Richtpläne

Sach- und Richtpläne dienen dazu, das Verwaltungshandeln zweckgerichtet und behördenverbindlich zu koordinieren[34]. Da sie gegenüber den Grundeigentümern keine direkte Rechtswirkung entfalten[35], führen sie im Streitfall mit diesen nicht per se zur Lösung. Sie helfen aber, wenn verschiedene raumwirksame Vorhaben priorisiert werden müssen[36].

Der bernische Richtplan 2030 weist aufgrund der umfassenden Vorarbeiten, vor allem im Zusammenhang mit der Erarbeitung der Wasserversorgungsstrategie 2010, sodann den Vorteil auf, dass er zwischen unbestrittenen Fassungen, Fassungsstandorten mit bestehenden, noch zu bereinigenden Nutzungskonflikten, sowie zwischen künftigen Fassungen unterscheidet[37]. Damit zeigt er den Handlungsbedarf behördenverbindlich auf, was in diesem Zusammenhang auch für die Wasserversorgungen, welche eine öffentliche Aufgabe wahrnehmen, gilt.

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[32] BLW, Agrarbericht (Fn. 31), S. 146.
[33] BUWAL, Wegleitung (Fn. 28), S. 75.
[34] Tschannen/Zimmerli/Müller (Fn. 18), § 37, Rz. 5 ff. und 31 f.
[35] Tschannen/Zimmerli/Müller (Fn. 18), § 37, Rz. 14 und 32.
[36] Vgl. dazu auch Urs Känzig-Schoch/Stefan Hasler/Adrian Fahrni, Naturschutz in der Interessenabwägung, ein Praxisbeispiel aus dem Kanton Bern, URP 2016, S. 176 ff., S. 179 f.
[37] Richtplan Kanton Bern, Richtplan 2030, RRB 1032/2015, Stand 19.12.2016, C_19.

2.4 Ergebnis der Interessenabwägung

So vielfältig wie die aus der landwirtschaftlichen Bewirtschaftung potentiell resultierenden Gefahren für die Trinkwasserversorgung sind, so vielfältig ist das Massnahmenspektrum, welches – richtig angewendet – die Gefahren im Einzelfall auf ein absolutes – vertretbares – Minimum reduzieren kann. Aus diesem Grund ist es wichtig, dass die hinzugezogenen nichtjuristischen Experten die Gefahren aus ihrem Fachgebiet heraus einzelfallbezogen exakt analysieren und beurteilen und die möglichen Massnahmen zu deren Eindämmung vorschlagen. Gestützt auf diese unverzichtbare Grundlage kann die juristische Beurteilung erfolgen, welche Massnahmen verhältnismässig — und somit umzusetzen — sind, um allen involvierten Interessen eine möglichst umfassende bzw. mindestens die ihnen zukommende Geltung zu verschaffen.

3. Planerischer Schutz von Trinkwasserfassungen

3.1 Allgemeines

Beim Schutz von Trinkwasserfassungen kommt dem Ausscheiden von Grundwasserschutzzonen traditionell grosses Gewicht zu. Grossflächig bestimmt wurden sie erstmals in den 1980er-Jahren gestützt auf die Wegleitung zur Ausscheidung von Gewässerschutzbereichen, Grundwasserschutzzonen und Grundwasserschutzarealen von 1977/82. Vielerorts wurden die Grundwasserschutzzonen im Zuge der Gewässerschutzverordnungsrevision von 1998 revidiert; mancherorts steht dieser Prozess noch aus, obschon die Wegleitung Grundwasserschutz von 2004 an sich eine Übergangsfrist bis 2015 vorsieht[38]. Da die formell-gesetzlichen Grundlagen – mit Ausnahme des quantitativen Grundwasserschutzes – nicht geändert wurden, muss es im Rahmen der Revision vor allem darum gehen, erkannte Mängel der bestehenden Ordnung zu beseitigen bzw. die zwischenzeitlich gewonnenen wissenschaftlichen und empirischen Erkenntnisse umzusetzen.

Beim Ausscheiden von Grundwasserschutzzonen handelt es sich um ein Instrument des nutzungsorientierten planerischen Grundwasserschutzes. Dieser ist raumwirksam, weil für die im Schutzzonenplan erfassten Gebiete eine besondere Nutzungsordnung gilt. Ähnlich dem baurechtlichen Zonenplan legt er zusammen mit dem Schutzzonenreglement die zulässige Nutzung parzellenscharf und grundeigentümerverbindlich fest.

In Konkretisierung dessen, was hievor zum Umgang mit konkurrierenden öffentlichen Interessen ausgeführt wurde, und in Wiederholung der raumplanungsrechtlichen Grundsätze bestimmt Art. 46 GSchV, dass die Anliegen des Grundwasserschutzes und der Grundwasserbewirtschaftung vorausschauend mit den anderweitigen raumplanerischen Interessen abgestimmt werden müssen. Zu letzteren gehört seit der Gesetzesnovelle vom 15. Juni 2012, in Kraft seit 1. Mai 2014, nun explizit auch, dass der Landwirtschaft genügend Flächen geeigneten Kulturlandes, insbesondere Fruchtfolgeflächen, erhalten bleiben sollen (Art. 3 Abs. 2 Bst. a RPG). Flächenkonflikte können deshalb nicht einseitig durch eine buchstabengetreue Umsetzung der revidierten Gewässerschutzverordnung gelöst werden, sondern es ist im Einzelfall zu prüfen, ob überhaupt Handlungsbedarf besteht (Erforderlichkeit), mit welcher Massnahme zusätzlicher Schutz erlangt werden kann (Eignung) und ob sich diese Massnahme mit dem Erhalt von produktivem Kulturland vereinbaren lässt oder die Aufgabe desselben rechtfertigt

[38] BUWAL, Wegleitung (Fn. 28), S. 42

(Verhältnismässigkeit im engeren Sinne). Nicht zu vergessen ist, dass unter Umständen auch die Aufgabe der Trinkwasserfassung geboten sein kann[39], wobei aber auch diese bloss als Ultima Ratio in Frage kommt, wenn alle milderen Mittel nicht zu einem vertretbaren Resultat führen.

Nie mit dem übergeordneten Recht vereinbar sein dürfte dagegen, auf die Ausscheidung von Schutzzonen schlechterdings zu verzichten[40], wenn diese mit den Bestimmungen der Gewässerschutzverordnung nicht in Einklang zu bringen sind, wie dies in der Praxis offenbar teilweise geschieht oder zumindest vorgeschlagen wird.

3.2 Die Schutzzonen

Zum Schutz von im öffentlichen Interesse liegenden Grundwasserfassungen sind Grundwasserschutzzonen auszuscheiden und die notwendigen Eigentumsbeschränkungen festzulegen. Damit sollen die Trinkwassergewinnungsanlagen und das Grundwasser unmittelbar vor seiner Nutzung als Trinkwasser vor Beeinträchtigungen geschützt werden[41]. Die Bemessungskriterien variieren im Allgemeinen je nach vorherrschendem Grundwasserleiter, da sie sich in der Gefährdungssituation erheblich unterscheiden[42].

Der nachfolgende kurze Abriss über die einzelnen Schutzzonen erhebt keinen Anspruch auf Vollständigkeit. Ziel ist es vielmehr, aufzuzeigen, wo bei der Schutzzonenfestlegung auf landwirtschaftlich genutzten Flächen aufgrund der rechtlichen Ausgangslage häufig Konflikte auftreten.

3.2.1 Zone S1

Die Zone S1 soll verhindern, dass Grundwasserfassungen und Schluckstellen sowie deren unmittelbare Umgebung beschädigt oder verunreinigt werden[43]. Nach der Wegleitung Grundwasserschutz 2004 sollen der S1 deshalb die Fassungsanlage mit sämtlichen Fassungssträngen, der durch den Bohr- und Bauvorgang aufgelockerte Bereich sowie ein Sicherheitsabstand zu diesen von in der Regel min. 10 m zugeteilt werden. Ausnahmen sollen zulässig sein bei Quellfassungen, wo der Abstand talseitig unterschritten, dafür hangwärts vergrössert werden muss, und bei Horizontalfilterbrunnen mit tiefliegenden Fassungssträngen oder bei Fassungen, bei denen genügend mächtige Deck- bzw. Zwischenschichten mit geringer Durchlässigkeit vorhanden sind. Je nach Situation soll hier der Schutz auf die unmittelbare Umgebung der oberirdischen Anlageteile beschränkt werden dürfen[44].

Obschon die Beschränkung des Schutzes auf die unmittelbare Umgebung der oberirdischen Anlageteile in der Wegleitung als Ausnahme dargestellt wird, dürfte sie bei den hier bekannten Verhältnissen in den bernischen Verwaltungsregionen Bern-Mittelland, Emmental und Oberland regelmässig ausreichen. Bei privaten Fassungen wird nämlich fast immer gänzlich auf einen Schutzbereich verzichtet und

[39] BUWAL, Wegleitung (Fn. 28), S. 97 f.
[40] Die Verpflichtung der Kantone zur Ausscheidung von Schutzzonen in Art. 20 GSchG ist zwingend und steht in der Normenhierarchie über den Ausführungsbestimmungen in der Gewässerschutzverordnung.
[41] Art. 20 GSchG i.V.m. Art. 29 Abs. 2 GSchV und Anh. 4 Ziff. 12 GSchV.
[42] Nebst der Art des Grundwasserleiters spielt auch die praktizierte landwirtschaftliche Bewirtschaftungsform eine erhebliche Rolle. Entsprechend ist der Handlungsbedarf regional sehr unterschiedlich (vgl. z.B. https://www.bafu.admin.ch/bafu/de/home/ themen/wasser/fachinformationen/zustand-der-gewaesser/zustand-des-grundwassers/grundwasser-qualitaet/nitrat-im-grundwasser.html).
[43] Anh. 4 Ziff. 122 Abs. 1 und 2 GSchV.
[44] BUWAL, Wegleitung (Fn. 28), S. 43.

dennoch werden die Vorschriften der Lebensmittelgesetzgebung[45] grossmehrheitlich ständig – selbst nach dem Ausbringen von Düngern! – eingehalten. Sollen für eine öffentliche Fassung also grössere Abstände vorgesehen werden, empfiehlt es sich, deren Notwendigkeit hydrogeologisch nachzuweisen, es sei denn, die Anpassung erfolge, weil es in der Vergangenheit nachweislich zu Verunreinigungen gekommen ist.

Zu Differenzen Anlass gibt sodann regelmässig die in der Wegleitung Grundwasserschutz 2004 vorgesehene Pflicht, die S1 fest einzuzäunen[46]. Wird die Umgebung beweidet, besteht tatsächlich die Gefahr, dass entlang des Zauns unerwünschte Trittpfade entstehen, auf denen einerseits die Grasnarbe fehlt und andererseits vermehrt Exkremente anfallen. Aus diesem Grund empfiehlt es sich, im Einzelfall zu prüfen, ob auf die Einzäunung zugunsten des Grundwasserschutzes verzichtet werden kann.

3.2.2 Zone S2

Die Zone S2 soll den ungestörten Grundwasserfluss sicherstellen und verhindern, dass Krankheitserreger sowie Stoffe, die Wasser verunreinigen können, in solchen Mengen in die Grundwasserfassung gelangen, dass sie die Trinkwassernutzung gefährden[47].

Aus den Vorschriften zur Dimensionierung der S2 erhellt, dass sie einerseits verhindern soll, dass kurz vor der Fassung neue Schadstoffe eingetragen werden. Andererseits dient die Verweildauer von mindestens zehn Tagen vor allem auch der Elimination von anderswoher stammenden pathogenen Keimen[48]. Überwiegt letzteres, ist die Massnahme nicht gegen den Störer[49] gerichtet und deshalb von Betroffenen auch nicht ohne weiteres hinzunehmen. Damit der Eingriff nicht unverhältnismässig wird, wäre zu prüfen, ob allenfalls auf gewisse, der Zone an sich inhärente – im Einzelfall zur Vermeidung neuer Einträge aber nicht erforderliche – Bewirtschaftungseinschränkungen verzichtet werden kann. Weil das Verhältnismässigkeitsprinzip in der Normenhierarchie höher steht als die zu derogierenden Verordnungsbestimmungen, wäre dies rechtstheoretisch ohne weiteres möglich. Alternativ kann die Schutzzonenausscheidung so angepasst werden, dass die Bewirtschaftungseinschränkungen den Störer treffen[50].

3.2.3 Zone S3

Die Zone S3 soll gewährleisten, dass bei unmittelbar drohenden Gefahren (z.B. Unfällen mit Stoffen, die Wasser verunreinigen können) ausreichend Zeit und Raum für die erforderlichen Massnahmen zur Verfügung stehen[51]. Da sie kaum mit Bewirtschaftungseinschränkungen verbunden ist, bietet sie in der landwirtschaftlichen Praxis wenig Probleme.

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[45] Vgl. zu den einzuhaltenden Bestimmungen Fn. 6.
[46] BUWAL, Wegleitung (Fn. 28), S. 39.
[47] Anh. 4 Ziff. 123 Abs 1 und 2 GSchV.
[48] BUWAL, Wegleitung (Fn. 28), S. 77.
[49] Zum Störerprinzip vgl. z.B. Tschannen/Zimmerli/Müller (Fn. 18), § 56, Rz. 28 ff.
[50] In diese Richtung geht die in der Gewässerschutzverordnung von 1998 geschaffene Möglichkeit, Zuströmbereiche Z_u auszuscheiden.
[51] Anh. 4 Ziff. 124 Abs. 1 GSchV.

3.3 Das Schutzzonenreglement

Die Schutzzonenreglemente bieten die Möglichkeit, eine auf die konkrete Fassung und ihre Bedürfnisse zugeschnittene Regelung aufzustellen und damit – gestützt auf ausreichende fachliche Grundlagen – gar von einer als unbillig empfundenen Regelung in der Gewässerschutzverordnung abzuweichen. Diese Chance wird leider häufig kaum wahrgenommen[52]. Zu bedenken ist jedoch, dass die Reglemente wegen der fehlenden Einzelfallgerechtigkeit juristisch angreifbar werden, wenn darin stattdessen schlicht Verordnungstext oder Vollzugshilfen wiederholt werden.

3.4 Die Grundlagenbeschaffung

Die Durchführung der notwendigen Erhebungen für die Abgrenzung der Schutzzonen obliegt den Inhabern von Grundwasserfassungen[53]. Entsprechend obliegt es ihnen, den von einer ausgewiesenen Fachperson auszuarbeitenden hydrogeologischen Bericht einzuholen. Dieser enthält eine Auflistung der Gefahrenpotentiale, die möglichen Schutzmassnahmen sowie eine Erläuterung der Schutzzonenbemessung. Mit Blick auf die hievor beschriebene Interessenabwägung ist es wichtig, dass der Bericht allfällige Handlungsalternativen beschreibt und bei jeder Massnahme angibt, ob sie aus fachlicher Sicht unabdingbar oder bloss wünschenswert ist[54].

Soll eine bestehende Schutzzonenordnung revidiert werden, empfiehlt es sich sodann, vorab die Daten der aktuellen Nutzung zu erheben und zu dokumentieren[55]. Zeigen diese keinen Handlungsbedarf, wird es schwer sein, die Notwendigkeit zusätzlicher Nutzungseinschränkungen zu belegen.

4. Überwachung der Schutzzonenordnung

Seit den frühen 1980er-Jahren bestehen an sich gute Rechtsgrundlagen für den Schutz von Trinkwasserfassungen vor wassergefährdenden Flüssigkeiten und mikrobiellen Verunreinigungen. Gestützt auf das Gewässerschutzgesetz von 1971 wurde 1977/1982 die Wegleitung zur Ausscheidung von Gewässerschutzbereichen, Grundwasserschutzzonen und Grundwasserschutzarealen ausgearbeitet. In der Folge sind die ersten Grundwasserschutzzonen flächendeckend ausgeschieden worden. Mit der Möglichkeit, Zuströmbereiche in den Gebieten zu bezeichnen, in denen die Grundwasserschutzzonen nicht ausreichen, um die gewünschte Wasserqualität in der Fassung zu erreichen, ist 1998 ein weiteres wichtiges Instrument hinzugekommen.

Es ist deshalb kritisch zu hinterfragen, wieso vor allem Fassungen im Mittelland die qualitativen Vorgaben noch immer nicht erfüllen können und welche Massnahmen allenfalls ergriffen werden müssen, um dies zu ändern. Hierbei kommt nicht zuletzt aussagekräftigen Messdaten, allenfalls gekoppelt mit Bewirtschaftungsprotokollen, eine Schlüsselrolle zu. Es ist zu begrüssen, dass solche Messdaten vermehrt erhoben und auch öffentlich zugänglich gemacht werden.

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[52] Vgl. auch Arnold Brunner, in: Peter Hettich/Luc Jansen/Roland Norer (Hrsg.), Kommentar GSchG, Zürich 2016, Art. 20, N 9.
[53] Art. 20 Abs. 2 Bst. a GSchG.
[54] Zur Begründungspflicht der entscheidenden Behörden vgl. z.B. Tschannen/Zimmerli/Müller (Fn. 18), § 26, Rz. 38 und 45 f.
[55] Vgl. zu den analog heranziehbaren Anforderungen an Messreihen BUWAL, Wegleitung (Fn. 28), S. 60.

Damit letztendlich die richtigen Massnahmen getroffen werden können, ist aber auch unerlässlich, dass die Einhaltung der bestehenden Schutzvorschriften überprüft wird und dass Bewirtschafter zeitnah über festgestellte Verunreinigungen informiert werden, selbst wenn damit kein Vorwurf an sie verbunden ist. Damit wird erreicht, dass sie die Bewirtschaftung ihrerseits überdenken und allenfalls von sich aus einen Beitrag zur Optimierung des Trinkwasserschutzes leisten können.

5. Fazit

Ob es zu Konflikten tatsächlicher Art kommt, hängt sehr stark vom Verhalten der jeweiligen Akteure ab[56]. Das Recht stellt mit der Interessenabwägung und mit dem verfassungsmässig verankerten Verhältnismässigkeitsgrundsatz Instrumente zur Verfügung, die juristischen Konflikte einzelfallgerecht zu lösen. Wie seine neuere Rechtsprechung zeigt, wendet zumindest das Bundesgericht die Instrumente konsequent an[57]. Diese begrüssenswerte Praxis ist auch in Zukunft unbedingt weiter zu führen und von den anderen Instanzen zu übernehmen, um den vermehrt wahrgenommenen, wegen des allseitigen Ressourcendruckes aber auch zunehmenden Nutzungskonflikten im Sinne der gesamten Rechtsordnung und im Interesse aller gerecht zu werden.

[56] Vgl. auch Känzig-Schoch/Hasler/Fahrni (Fn. 36), S. 176 ff.
[57] Vgl. Fn. 1.


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