## II. AGRICULTURE, FISHERIES AND ENVIRONMENT

### A. The Continuing Reform of European Agriculture

Taking stock in its *Agenda 2000—For a Stronger and Wider Union*,[1] the Commission offered a frank view of the shortcomings in this field. "Rural policy of the Union", it said, "still appears as a juxtaposition of agricultural market policy, structural, and environmental policy with rather complex instruments and lacking overall coherence."[2] Consequently, the Commission sees an "urgent need for a radical simplification of rules and a greater decentralisation of policy implementation".[3]

The reformed Common Organisation of the Market (COM) in Fruit and Vegetables[4] is meant to be a step in this direction. The Council stresses producer organisations as the basic element in this COM, the decentralised operation of which they ensure at their level. Moreover, there organisations combine the interests of producers in the face of an ever increasing concentration of demand.[5] Hence they combine administrative decentralisation with economic utility.

For the sake of administrative decentralisation, member States may, under certain conditions, make rules of a producer organisation binding on non-member producers.[6] In order to safeguard the common economic interests of the members of the organisation, such non-members are not allowed to sell more than 25 per cent (in some cases no more than 20 per cent) of their produce independently of the organisation.[7] Moreover, the Community grants financial assistance if producer organisations withdraw produce from the market. These withdrawal operations, however, have to be reduced in scope in several phases.[8]

However, both the passing of binding, uniform rules for traders and the combining of their commercial actions are typical of cartels. Cartels are, in principle, outlawed in Community law under Article 85(1) of the EC Treaty.[9] Therefore, the Regulation goes to some lengths to make sure producers do not abolish competition among themselves altogether.[10] This conflict of policies will inevitably occur whenever common organisations of the agricultural markets, for the sake of other policy aims, invite or even compel would-be competitors to co-operate.

1. Bulletin EU, Supp.5/97, Brussels 1997.
2. *Idem*, p.27, right col., 2nd para.
3. *Idem*, p.28, right col., 5th para.
4. Council Reg. (EC) No.2200/96 of 26 Oct. 1996 (1996) O.J. L297/1 (21 Nov.).
5. Recital 7.
6. Art.18(1) and (3).
7. Art.11(1)(c)(3), 1st indent.
8. Art.15(1) and (3).
9. Reg. 26 of 4 Apr. 1962 [1959–1962] O.J. Eng. Sp. Ed. p.132 mitigates this somewhat regarding agricultural products. On the interface between agricultural and competition policy, see recently Joined Cases C–319/93, C–40/94 and C–224/94 *Hendrik Evert Dijkstra* v. *Friesland (Frico Domo) Coöperative BA* [1995] E.C.R. I–4497 and Case C–399/93 *H.G. Oude Luttikhuis et al.* v. *Verenigende Coöperative Melkindustrie Coberco BA* [1995] E.C.R. I–4520.
10. Cf. Art.18(5) and Art.20(1).

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### *B. (Not so) Splendid Isolation: Britain Scares Europe over Beef*

The BSE crisis which, at the time of the last survey on these matters, was just unfolding, has in the meantime generated much Community legislation. In March 1996 the Commission adopted emergency measures against the spread of BSE.[11] According to these, the United Kingdom must not export (not even to third countries) any bovine animals or products derived from them, even if the animals come from third countries and were not slaughtered in the United Kingdom. Certain exceptions apply to gelatine and tallow products, but these must in no case be derived from animals showing symptoms of BSE or older than 30 months; they also apply to third-country animals slaughtered in third countries.[12] The United Kingdom must report fortnightly to the Commission on the measures it has taken against BSE.[13]

A range of other measures complement this ban. In July 1996 the Commission adopted a decision on suitable heat treatment of animal waste.[14] As only one system had proved capable of fully neutralising the scrapie agent in meat-and-bone meal, member States must not authorise processing of animal waste other than by using the system described in the annex to the decision; more stringent requirements in some member States need not, however, be repealed.[15]

In 1997, against the backdrop of faltering consumer confidence and reported cases of BSE in other member States, the Community stepped up its activities. Pending full implementation of the last-mentioned decision, the Commission tightened the control over trade in animal waste.[16] As there are not enough facilities in all member States to incinerate carcasses of animals killed in the course of disease-control measures, some carcasses may have to be sent to other member States. There must not, however, be any possibility of them entering the food or feed chain. This authorisation does not apply to the United Kingdom. The export of untreated animal waste is permitted only for use as fuel or for incineration or further processing in accordance with the decision mentioned in the preceding paragraph.[17]

Meanwhile, the Council had established a system that allows the individual identification of each animal, its origin and all its movements. Labelling requirements for beef products ensure that detailed information is passed on to the con-

11. Commission Decision on emergency measures to protect against bovine spongiform encephalopathy (96/239/EC) (1996) O.J. L78/47 (28 Mar.), as amended by Commission Dec.96/362/EC of 11 June 1996 (1996) O.J. L139/17 (12 June). Articles in the main text as amended. By two judgments of 5 May 1998 the ECJ declined to annul the decision (Case C-157/96, *National Farmers Union* and Case C-189/96, *U.K.* v. *E.C. Commission*). Independently of this, the Council repealed and replaced Dec. 96/239/EC on 16 March 1998 by Dec. 98/256/EC, (1998) O.J. L113/32 (15 April).

12. Arts.1(1), 1a, and Annex.

13. Art.3.

14. Commission Decision on the approval of alternative heat treatment systems for processing animal waste with a view to the inactivation of spongiform encephalopathy agents (96/449/EC) of 18 July 1996 (1996) O.J. L184/43 (24 July).

15. Recital 5 and Art.2(1), (2), (4).

16. Commission Decision concerning protection measures in trade in mammalian animal waste (97/735/EC) of 21 Oct. 1997 (1997) O.J. L294/7 (28 Oct.).

17. Art.4 of Dec.97/735/EC.

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sumer.[18] This Regulation, in turn, is complemented by several measures. One of these is the ban on the use of so-called specified risk material of animal origin.[19] Another measure concerns labelling requirements for fodder which may, if fed to ruminants, pose a risk of spreading BSE.[20] Yet another measure bans the use of protein derived from mammalian tissue in animal fodder altogether.[21]

The latest developments occurred in May 1998. In January the Commission proposed to the Council to lift the export ban on beef and beef products from herds in Northern Ireland which could be certified as being free of BSE. There, unlike in the rest of the United Kingdom, an effective computer system was in operation. The Commission also suggested that the United Kingdom could now be allowed to export meat from third-country animals not slaughtered in the United Kingdom.[22] In February the Commission had made two proposals to widen the ban on the use of specified risk material. These proposals would, as from 1 July 1998, extend the list of specified risk materials which must be removed from slaughtered animals and introduce harmonised EU rules for epidemic surveillance.[23] The Council of Agricultural Ministers, at its session of 16/17 March 1998, endorsed the first but not the second proposal.[24] On 27 May, with effect from 1 June, the Commission lifted the ban on beef coming from two establishments in Northern Ireland.

### *C. Going Bananas: No Common Outlook, Byzantine Organisation, Little Market*

The Common Organisation of the Market (COM) in Bananas[25] has lately started to disintegrate under attacks from three sides. Attacks started from Community traders in bananas. Moreover, some member States' governments, most promi-

18. Council Reg. (EC) No.820/97 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products of 21 Apr. 1997 (1997) O.J. L117/1 (7 May); cf., in particular, Arts.3–7 and 14(1) and (2). The system draws on central computerised databases in accordance with Dir.97/12/EC (1997) O.J. L109/1 (25 Apr.). As to the relevance of these databases, cf. the last para. of this section. It should also be noticed that on 18 Dec. 1997 the Council adopted Dir.97/98/EC on the organisation of veterinary checks on products entering the EC from third countries (1998) O.J. L24/9 (30 Jan.).

19. Commission Decision on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies (TSE) (97/534/EC) of 30 July 1997 (1997) O.J. L216/95 (8 Aug.); cf., in particular, Recital 23 and Arts.1, 2, 4 and 6. Com. Dec.97/866/EC of 16 Dec. 1997 has deferred the date from which the first-mentioned decision is to be applied from 1 Jan. to 1 Apr. 1998. The reasons for the deferral are unclear; the Commission cites, among others, the need to "review new scientific evidence".

20. Com. Dir. 97/47/EC of 28 July 1997 amending the Annexes to Council Dirs. 77/101/EEC, 79/373/EC and 91/357/EEC (1997) O.J. L211/45 (5 Aug.). On the science of the BSE crisis, cf. *The Economist*, 14 Mar. 1998.

21. Commission Decision establishing a list of ingredients whose use is prohibited in compound feeding stuffs (97/582/EC) of 28 July 1997 (1997) O.J. L237/39 (28 Aug.).

22. Press release IP/98/29 of 14 Jan. 1998.

23. Press release IP/98/178 of 25 Feb. 1998.

24. This resulted in the adoption of Council Dec. 98/256/EC, which deals with the situation in Northern Ireland and permissible exports from the U.K. of products derived from animals slaughtered elsewhere, and further tightens the requirements for exports of products from animals slaughtered in the U.K.

25. As established by Reg.404/93 (1993) O.J. L47/1. See, on this, the succinct discussion by Snyder (1996) 45 I.C.L.Q. 744–747.

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nently the German government,[26] never gave up their fundamental opposition to the whole scheme. Both have recently had some success. Lastly, the new banana regime has been challenged in the light of the GATT 1994, where it received a serious blow in autumn 1997.

The German fruit importer T. Port launched two challenges against the COM in bananas. In its judgment on the first, the European Court of Justice had to deal with the rather technical matter of interim relief.[27] In its judgment on the second challenge brought, the Court declared discriminatory and therefore invalid[28] a provision that granted privileged treatment to importers of bananas from Colombia, Costa Rica and Nicaragua.[29] The Court gave a similar judgment in the action brought by the German government.[30]

A similar conclusion had already been reached by the WTO Appellate Body that heard the appeals the Community—as well as four Central American States and the United States—had brought against WTO panel reports of May 1997 on the Community's banana regime.[31] The Appellate Body held that the Community's quota allocation infringed the principle of non-discrimination;[32] the Community could not invoke the GATT waiver of the obligation to accord most-favoured-nation treatment to all GATT members, which waiver was granted solely for preferential treatment of the ACP States;[33] and that the differentiation between the various categories of operators was contrary to the prohibition on discrimination as contained in the General Agreement on Trade in Services.[34]

In compliance with these findings, the Commission proposes to modify the banana regime by granting an additional tariff quota and streamlining quota allo-

26. It will be remembered that Germany was (and still is) the largest importer of so-called dollar bananas from Central America and therefore stood to lose most from the quota and tariffs imposed on these by the new COM in bananas.

27. The question there was whether national courts could grant interim relief in cases where EC institutions have failed to act and an individual stands to suffer hardship as a result. The ECJ held that they could not, but that judicial protection by the ECJ could be sought, Case C-68/95 *T. Port GmbH & Co. KG* v. *Bundesanstalt für Landwirtschaft und Ernährung*, judgment of 26 Nov. 1996, [1996] E.C.R. I-6065, paras.53, 57–61.

28. Joined Cases C-364/95 and C-365/95 *T. Port GmbH & Co. KG* v. *Hauptzollamt Hamburg-Jonas*, judgment of 10 Mar. 1998 (not yet rep.), paras.61–63 and 87–89. The reader should also consider paras.44–51 of the judgment to get an idea of the tangled background to the proceedings and the potential turmoil looming for the EC legal order from the controversy about the banana regime; on the latter point see Everling, "Will Europe Slip on Bananas?" (1996) 33 C.M.L.Rev. 401. For a general survey of the recent case law on agriculture (until the end of 1996), the reader is referred to Barents (1997) 34 C.M.L.Rev. 811.

29. Art.3(2) of Reg.478/95 exempted "Category B operators" (i.e. importers of EC-produced and/or "traditional" ACP bananas) from the obligation to obtain export licences. The countries mentioned were thus granted a guaranteed outlet of their produce to the EC as part of the 1994 "Banana Framework Agreement" under the auspices of the Uruguay Round of trade negotiations; this was the first (and not the last) major dilution of the banana regime as originally devised in 1993. For details, see Snyder, *op. cit. supra* n.25.

30. Case C-122/95 *Germany* v. *Council* (not yet rep.), paras.68–72 (in so far as identical with the aforementioned judgment).

31. WTO Appellate Body: EC-Regime for the Importation, Sale and Distribution of Bananas, AB-1997-3, 9 Sept. 1997; summary of the findings at No.255, pp.107 *et seq.*

32. Art.XIII:1 of the GATT 1994; Nos.160–163 of the Appellate Body's findings.

33. Art.I:1 of the GATT 1994; Nos.175 and 176 of the Appellate Body's findings.

34. Art.II of the GATS; No.244 of the Appellate Body's findings.

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cations. At the same time, however, it proposes to increase further some privileges for certain ACP suppliers and to grant the ACP States technical and financial assistance with a view to enhancing their competitiveness.[35] In all, therefore, the regime seems safe for the time being, but at a high cost to the Community's credibility both at home and on the world stage. However, with three layers of amendments, and with continuing controversy surrounding the entire scheme, the banana regime's title as a "common organisation of the market" is now rather a misnomer.

### *D. Common Fisheries Policy*

The main challenge of the Common Fisheries Policy (CFP) in the time under review (and, in all likelihood, for the foreseeable future) is striking a balance between the need to preserve rapidly dwindling fish stocks while maintaining employment in the fishing industry. The latter has numerous social and cultural implications for the fishing community and society in general. So, a Council decision stipulates a gradual reduction in fishing effort of up to 30 per cent depending on how close to depletion a given stock has come. Member States have a choice between reduction in capacity or in fishing effort.[36] Excess catches in one year are now, in principle, set off against the next year's allowable catch. Moreover, excess catches of endangered stocks attract disproportionally high deductions on a sliding scale and additional penalties for repeated overfishing.[37] By another Regulation the Commission had to take urgent conservation measures to protect the stock of North Sea herring, reducing allowable catches by half within ten days.[38] Somewhat downbeat, the Commission admitted that serious problems continue to affect CFP enforcement and suggested a pilot scheme on better co-ordination as a remedy.[39]

### *E. Environmental Policy*

Here also, consolidation rather than revolution characterised the period under review. A long established measure, the directive on environmental impact assessment,[40] was amended.[41] It no longer permits exemptions from the application of

35. Press release IP/98/28 of 14 Jan. 1998. The German government has already announced its dissatisfaction with these proposals and again advocated the transformation of all quantitative restrictions on third-country bananas into tariffs, a hurdle more easily overcome thanks to the latter bananas' superior competitiveness, see *Frankfurter Allgemeine Zeitung*, 17 Mar. 1998, p.21: "Enttäuschung über das Rechtsgutachten im Bananenstreit".

36. Council Decision concerning the restructuring of the Community fisheries sector with a view to achieving a balance on a sustainable basis between resources and their exploitation (97/413/EC) of 26 June 1997 (1997) O.J. L175/27 (3 July), Arts.2(2)–(4) and 5.

37. Council Reg. (EC) No.847/96 of 6 May 1996 introducing additional conditions for year-to-year management of total allowable catches and quotas (1996) O.J. L115/3 (9 May), Art.5.

38. Com. Reg. (EC) No.1265/96 of 1 July 1996 (1996) O.J. L163/24 (2 July), Arts.1 and 3.

39. Commission Communication "Fisheries Monitoring and the CFP" 26 Feb. 1998, as downloaded from the EC's Internet server at http://europa.eu.int.

40. Council Directive on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) of 27 June 1985 (1985) O.J. L175/40 (5 July).

41. Council Dir.97/11 (1997) O.J. L73/5 (14 Mar.).

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the directive (or, rather, the national implementing measures) where a given project has damaging effects in another member State, and the latter, therefore, initiates the consultation procedure.[42] Moreover, the right of member States to adopt more stringent requirements[43] is deleted. This constitutes a rare move contrary to the recent emphasis in Community politics (and to a lesser extent in Community law) on subsidiarity. A new annex lists the projects subject to assessment.

There are now provisions for integrated pollution prevention and control,[44] adding soil protection to the existing, separate regimes on the protection of air and water, and uniting all three in a single directive. This approach is meant to prevent circumvention of the single regimes that was previously possible by shifting pollution from one medium to another.[45] New installations (as set out in the annex to the directive) and substantial changes to existing ones will require a permit;[46] old installations have to comply with the directive within eight years.[47] The permit may be granted only if the installation uses the "best available technique" for pollution control.[48] Permits have to be reconsidered where substantial changes in the best available technique make it possible to reduce emissions significantly, without excessive costs.[49] However, in any case the choice of the specific technology employed is with the operator.[50] The directive strikes a reasonable balance between environmental and economic concerns. As usual, its actual impact for good or ill will depend largely upon public awareness and member State implementation, and ultimately its administration.[51]

Lastly, the Commission has addressed to the Council a proposal for a directive on the assessment of the effects of certain plans and programmes on the environment[52] which, if adopted, could have a major impact on some member States' planning legislation. In keeping with the principle of subsidiarity, the directive merely lays down broad principles, while leaving it to the member States to decide on procedural details (which account for much in such highly formalised procedures as the adoption of plans!).[53] The directive would cover town and country planning plans and programmes which have, under national law, to be adopted by legislative act.[54] It would make assessment prior to such legislation compulsory,[55] and the central element of the procedure would be an explanatory statement which would

42. Arts.2(3) and 7, as amended.
43. Formerly Art.13.
44. Council Dir.96/61/EC of 24 Sept. 1996 (1996) O.J. L257/26 (10 Oct.).
45. Recitals 4 and 5.
46. Art.12(2); definition in Art.2 No.10(b).
47. Arts.4 and 5(1).
48. Arts.9(1), 3 and 10; definition in Art.2 No.11.
49. Art.13(2), 2nd indent.
50. Art.9(4).
51. In this context it should be noted that Council Dec.97/872/EC on a Community action programme promoting non-governmental organizations primarily active in the field of environmental protection (1997) O.J. L354/25 (30 Dec.) grants financial assistance to the activities of such NGOs.
52. 97/C 129/08 (1997) O.J. C129/14 (25 Apr.).
53. Recital 8.
54. Art.2(a)(i).
55. Art.4(1).

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enable the effects of implementing the plan on a host of environmental parameters to be assessed.[56] This assessment would be without prejudice to that under the above-mentioned directive on environmental impact assessment.[57]

Two judgments of the European Court in the field of environmental protection should briefly be mentioned here. The Court's judgment in *Kraaijeveld* established that member States, under Article 4(1) of the directive on environmental impact assessment (cf. above) have some discretion to establish criteria and thresholds as to which projects are subject to an environmental impact assessment according to Article 2; if such an assessment had to be carried out in any case, the Court held, Article 4(1) would be pointless. The discretion is, however, limited in that member States cannot in advance exempt from assessment whole classes of projects which are likely to have a substantial impact on the environment. For, according to the Court, the criteria and thresholds to be established are meant to serve and facilitate the environmental impact assessment, not to do away with it altogether.[58]

As a more general principle, the judgment establishes that where, under national law, courts *may*, on a discretionary basis, raise points of law of their own motion, they *must* apply Community law even where the parties to the proceedings have not invoked it. This follows from the duties that Article 5(2) of the EC Treaty imposes on all the organs of member States, including their courts.[59] The latter must assess whether the national legislature has exceeded its discretion under the terms of a Community measure and, if so, set the national legislation aside and apply the Community provisions directly.[60]

Another point of general importance was made in *Inter-Environment Wallonie*. There, the Court held that a member State cannot be faulted for not having transposed a directive before the end of the period for implementation. During that time, however, the member State must create the conditions for implementation after the deadline. Although member States are not obliged to adopt those measures before the end of the period prescribed for transposition, they must refrain from taking any measures "liable seriously to compromise" the result prescribed, as the Court put it.[61] Both cases are important contributions to the Court's jurisprudence on the direct effect of directives.

STEFAN ENCHELMAIER*

56. Art.5(1) and (2).

57. Art.10.

58. Case C-72/95 *Aanemersbedrijf P.K. Kraaijeveld BV et al.* v. *Gedeputeerde Staten van Zuid-Holland*, judgment of 24 Oct. 1996, [1996] E.C.R. I-5403, paras.48–51.

59. This continues the scrutiny, lately heightened, by the ECJ of national procedural rules; for an overview of the recent case law, see Hoskins, "Tilting the Balance: Supremacy and National Procedural Rules" (1996) 21 E.L.R. 365 and Kakouris, "Do the Member States Possess Judicial Procedural Autonomy?" (1997) 34 C.M.L.Rev. 1389.

60. *Kraaijeveld*, *supra* n.58, at paras.58–61.

61. Case C-126/96 *Inter-Environment Wallonie ASBL* v. *Région Wallonne*, judgment of 18 Dec. 1997 (not yet rep.), paras.43–45. In the case in hand, the Walloon region of Belgium had (faultily) exempted products from the definition of "waste" in Art.1(a) of Dir.75/442/EEC that were an "integral part of an industrial production process".

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