strategy is well-intentioned.[38] But managing the internal market is a long-term exercise and the Commission is constrained both materially and constitutionally in forcing the pace.

STEPHEN WEATHERILL*

II. AGRICULTURE

A. Introduction

A defining feature of the agricultural sector is now the imperative of achieving global food security, in terms of both access to food and access at reasonable cost. This imperative is well illustrated by the pressures on demand and price which affected world markets in 2008. Indeed, according to a report prepared in April 2008 by the Food and Agriculture Organization (FAO), it was expected that cereal stocks at the close of the 2008 growing seasons would be the lowest for 25 years;[1] and the price for wheat exports from the United States were found to have increased from US $209 per tonne in March 2007 to US $481 per tonne in March 2008.[2] Although (as also expected in the same report) the situation has eased, there is acute awareness that chances cannot be taken with the food supply: Robert Zoellick, the World Bank President, was clear that '[t]his is not just a question of short-term needs, as important as those are; this is ensuring that future generations don't pay a price too'.[3]

The issue of food security has inevitably had an influence on the regulation of the Common Agricultural Policy (CAP). Not least, production controls were initially relaxed by removing the compulsory set-aside obligation for 2008;[4] and then compulsory set aside was abolished altogether as part of the 'Health Check' of the CAP Reform.[5] Similarly, for a while it was not even necessary to apply import duties on most cereals, as Europe moved from being a net exporter to a net importer.[6] That said, the legislative framework of the CAP was not completely ill-equipped to deal with the advent of food shortages. Thus, considerable vindication was provided for two of its long-criticised objectives, namely increasing agricultural productivity and assuring the availability of

[38] For a report that is generally supportive see House of Lords EU Committee, 5th Report of Session 2007/08, *The Single Market: Wallflower or Dancing Partner? Inquiry into the European Commission's Review of the Single Market* (HL Paper 36-I 2008). See also R Kovar, 'Le législateur communautaire encadre le régime de la mises des produits dans le marché intérieur' 44(2) RTDE 2008, 289.

* Somerville College and Law Faculty, University of Oxford.

[1] FAO, *Crop Prospects and Food Situation: No 2, April 2008* (FAO, Rome, 2008) 6–7.

[2] ibid Table 3.

[3] 'Food price crisis imperils 100 million in poor countries, Zoellick says' World Bank News & Broadcast 14 April 2008 <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/>. See also the background note, World Bank *Rising Food Prices: Policy Options and World Bank Response* (World Bank,Washington DC, 2008).

[4] Council Regulation 1107/2007 [2007] OJ L 253/1.

[5] For the 'Health Check' of the CAP Reform see *post*.

[6] *Agriculture: European Union Suspends Import Duties on Most Cereals* Press Release IP/07/1977 Brussels (20 December 2007).

[*ICLQ* vol 58, October 2009 pp 993–1002] doi:10.1017/S0020589309001444

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

supplies; and additional weight could be attached to the further objective of ensuring that supplies reach consumers at reasonable prices.[7]

While such volatility in world agricultural markets may have grabbed many of the headlines, there has nonetheless been considerable legislative activity impacting upon the CAP. However, the emphasis would seem to have been upon simplification of the existing regulatory framework, as opposed to further radical reform on the scale of the Mid-term Review.[8] Such emphasis had already been clearly articulated in the 2005 *Communication from the Commission on Simplification and Better Regulation for the Common Agricultural Policy*;[9] and early initiatives included new regulations to govern both the financing of the CAP and the rural development regime.[10] Importantly, under Commissioner Fischer Boel simplification has been elevated to a major priority;[11] and in May 2009 she confirmed that 'CAP simplification forms an integral part of the Commission's overall strategy on better regulation'.[12] The agenda has been taken forward not just in terms of technical simplification, but also in terms of the delivery of policy.[13] Accordingly, there may be considered, first, the most substantial consolidation of existing legislation yet undertaken, the enactment of Council Regulation 1234/2007 (Single Common Market Organisation Regulation), which brought under one 'umbrella' the rules for 21 common organisations of the market;[14] and, secondly, the 'Health Check', which, while arguably the most significant recent development in policy, was regarded by the European Commission as making adjustments rather than implying fundamental reform.[15]

B. The Single Common Market Organization Regulation

As indicated, the Single Common Market Organization Regulation has been the flagship project in terms of technical simplification, bringing together the legislative frameworks for 21 common organization of the market.[16] This replacement of a

[7] EC Treaty Art 33(1)(a),(d) and (e). It may also be noted that food security is stated to be a legitimate non-trade concern in the Preamble to the Uruguay Round Agreement on Agriculture.

[8] For the initial policy document see European Commission, *Mid-term Review of the Common Agricultural Policy* COM(2002)394.

[9] European Commission COM(2005)509.

[10] See respectively Council Regulation 1290/2005 [2005] OJ L 209/1 and Council Regulation 1698/2005 [2005] OJ L 277/1; and see also 'Current Developments—European law: Agriculture' (2006) 55 ICLQ 467–475.

[11] See eg *CAP Reform: Commission Steps Up Efforts to Simplify the Common Agricultural Policy* Press Release IP/06/1296 Brussels (2 October 2006).

[12] *Speaking Points on Simplification* Speech /09/125 Brussels (18 May 2009).

[13] This distinction may be seen at, eg European Commission, *Communication from the Commission on Simplification and Better Regulation for the Common Agricultural Policy* COM(2005)509, 2: 'technical simplification (ie within a constant policy framework) implies revision of the legal framework, administrative procedures and management mechanisms to achieve streamlining and greater cost-effectiveness and attain existing policy objectives more effectively, without changing the underlying policies; "policy simplification" reduces complexity through improvements to the agricultural support and rural development policy instruments'. See also generally European Commission, Communication from the Commission to the European Parliament and the Council: A Simplified CAP for Europe—A Success for All COM(2009)128.

[14] Council Regulation 1234/2007 [2007] OJ L 299/1.

[15] See eg European Commission, *Communication from the Commission to the Council and the European Parliament: Preparing for the "Health Check" of the CAP Reform* COM(2007)722, 3.

[16] For the extensive list of measures consequently repealed see the Single Common Market Organisation Regulation [2007] OJ L 277/1 art 201.

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

sectoral approach by a horizontal approach followed the pattern already adopted for direct payments to farmers under Council Regulation 1782/2003;[17] and harmonized rules were laid down for, inter alia, intervention, private storage, import tariff quotas, export refunds and State aid rules. Nonetheless, the process was *ab initio* confessed to be less than complete. In particular, two sectors (fruit and vegetables, and wine) were subject to ongoing reform and could not be fully included within the new legislation as enacted.[18] In consequence, it was accepted that a 'step-by-step' approach was inevitable. Further, even regimes which were fully included have retained distinctive features (for example, different products require different marketing years, adapted to their own biological production cycle).[19]

A matter of some importance was that the Single Common Market Organisation Regulation was expressly stated to be essentially 'an act of technical simplification'.[20] As a result, it was not to repeal or change existing instruments unless they had become obsolete, redundant or, by their very nature, were not to be dealt with at Council level; and it did not provide for new instruments or measures.[21] This may, however, lead to some underestimation of the extent of the simplification achieved. With the enactment of the Single Common Market Organisation Regulation, the overall framework of the CAP came to be governed by just four Council regulations: Council Regulation 1782/2003 in respect of direct payments to farmers;[22] Council Regulation 1290/2005 in respect of financing;[23] Council Regulation 1698/2005 in respect of rural development;[24] and the Single Common Market Organisation Regulation itself. This represents a considerable change since the Millennium.

On the other hand, the European Commission has throughout recognized the limits of any attempts to reduce the complexity of legislation;[25] and in this context two factors may be highlighted. First, the sheer scale and geographical diversity of the European Union now renders it effectively impossible to provide for a single template to accommodate all circumstances; and the EC Treaty expressly accepts that, when implementing the CAP, account should be taken of 'the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions'.[26] It has been seen that, even within the Single Common Market Organisation Regulation itself, product-specific measures remained necessary, but, perhaps unsurprisingly, the degree of accommodation would seem most marked in the case of rural development policy, where regional disparities have been addressed by permitting Member States a high degree of subsidiarity.[27] In consequence, even if there may be simpler legislation at European Community level, the trade-off can be a wide variety of measures at national,

[17] [2003] OJ L 270/1. For clear statement of this change in approach see the Single Common Market Organisation Regulation [2007] OJ L 277/1 Preamble (5).

[18] For subsequent completion of reform of the fruit and vegetables sector see Council Regulation 1182/2007 [2007] OJ L 273/1; and for subsequent completion of reform of the wine sector see Council Regulation 479/2008 [2008] OJ L 148/1.

[19] Single Common Market Organisation Regulation [2007] OJ L 299/1 Preamble (9).

[20] ibid Preamble (7).

[21] ibid.

[22] [2003] OJ L 270/1 (now replaced, following the 'Health Check' of the CAP Reform, by Council Regulation 73/2009 [2009] OJ L 30/16, for which see *post*).

[23] [2005] OJ L 209/1.

[24] [2005] OJ L 277/1.

[25] European Commission, *Communication from the Commission on Simplification and Better Regulation for the Common Agricultural Policy* COM(2005)509, 3.

[26] art 33(2)(a).

[27] Council Regulation 1698/2005 [2005] OJ L 277/1 Preamble (5).

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

or even regional, level.[28] Secondly, a familiar feature of CAP reform has been the need for compromise to secure agreement between the Member States, as well illustrated by the Mid-term Review of the CAP, where the achievement of political consensus was at the price of numerous derogations.[29] The eventual ironing out of at least some of these derogations would seem to have been a policy objective of the European Commission from the moment that agreement was concluded: definitely Commissioner Fischer Boel saw a key element of the 'Health Check' to be making the Single Payment Scheme as instituted under the Mid-term Review 'more effective, efficient and simple'.[30]

C. The 'Health Check' of the CAP Reform

The 'Health Check' could perhaps be best characterized as policy (as opposed to technical) simplification. However, as indicated, it was viewed by the European Commission as making adjustments rather than implying fundamental reform; and many of the measures were detailed revisions to the regimes for market management, direct payments to farmers and rural development.[31] Nevertheless, while not a new reform as such, the 'Health Check' was considered to go beyond 'fine-tuning';[32] and five initiatives may be considered: first, simplifying the Single Payment Scheme; secondly, revision to the cross-compliance rules; thirdly, strengthening modulation; fourthly, abolition of set aside; and, fifthly, the incorporation of new challenges into rural development policy.

1. The Single Payment Scheme

The Single Payment Scheme introduced under the Mid-Term Review had brought most direct payments to farmers within one regime, but, as noted, agreement was secured at the price of extensive derogations. The option of delayed implementation may have unwound by 2007,[33] but there remained wide variations in terms of national implementation. Not least, several Member States had opted not to follow the standard, historic method of implementation, under which payment entitlements were

[28] See eg Case C-428/07 *R (on the application of Horvath) v Secetary of State for Environment, Food and Rural Affairs* (16 July 2009) (relating to regional implementation of the Single Farm Payment in the United Kingdom and, in particular, the extent to which such implementation may amount to discrimination as between farmers in the different regions of the United Kingdom).

[29] See, eg D Bianchi, *La Politique Agricole Commune (PAC): Toute la Pac, Rien d'Autre que la PAC* (Bruylant, Brussels 2006) 287–374; and, for the negotiating process, see, eg M Cardwell, *The European Model of Agriculture* (Oxford University Press, Oxford, 2004) 159–174.

[30] *The Health Check of the Common Agricultural Policy: fit for new opportunities—Presentation of the Health Check at the Agricultural Committee of the European Parliament* Speech/07/727 Brussels (20 November 2007).

[31] See eg the incremental increases of milk quotas in preparation for their scheduled expiry on 31 March 2015: Single Common Market Organisation Regulation [2007] OJ L 299/1 Annex IX.1, as amended by Council Regulation 72/2009 L30/1.

[32] Commissioner Fischer Boel, *A Few Things That You Need to Know About the CAP Health Check: DG AGRI Seminar on Health Check Review of the CAP* Speech/07/791 Brussels (6 December 2007).

[33] Council Regulation 1782/2003 [2003] OJ L 270/1 Art 71.

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

determined on the basis of individual historic reference amounts per farmer. Instead, at the time of the 'Health Check' several Member States had opted for regional implementation, which included the ability to allocate payment entitlements in whole or in part between all farmers within the region on a flat-rate basis.[34] In reliance on this derogation, Malta, for example, had allocated all payment entitlements on a flat-rate basis, while other Member States had preferred a combination of both historic and flat-rate payment entitlements, the 'hybrid' model. And to make matters more complicated, the 'hybrid' model had been implemented both in 'static' form, where the proportion of historic and flat-rate payment entitlements is fixed, and in 'dynamic' form, where the proportion is varied. An example of the 'static hybrid' model is the Northern Ireland region of the United Kingdom; and examples of the 'dynamic hybrid' model are the regions of Germany and the English region of the United Kingdom.[35] Such diversity in implementation clearly offered scope for simplification and, in addition, it was apprehended that entitlement on the basis of historic production led to the perpetuation of uneven levels of support as between farmers.[36] More precisely, a high level of support based on a 2000–2002 reference period could effectively become entrenched, so preventing flexibility in farming practices and the redistribution of resources. To address these issues, Member States which allocated payment entitlements on the historic basis have been granted the option of revising these entitlements, so as to move in or after 2010 towards approximating their value;[37] and, they also enjoy the option to switch to the regional basis in or after 2010.[38] That said, two limitations may be noted: first, Member States are under no compulsion to exercise these options; and, secondly, if they do so, restrictions are imposed on the speed and scale of modifications.

Further simplification was achieved by extending the ambit of the Single Payment Scheme. Originally it had included, most notably, area aid payments in the arable sector and headage premiums in the beef and veal sector;[39] and this list of direct payments had grown significantly as and when common organizations of the market were reformed. Thus, at least a proportion of direct payments in the cotton, olive oil, raw tobacco and hops sectors were added as from 1 January 2005;[40] and subsequent amendment brought in direct payments from the sugar sector as from 1 January 2006,[41] the bananas sector as from 1 January 2007[42] and the fruit and vegetable sector as from 1 January 2008[43] with eligibility being conferred in respect of the wine sector as from 1 January 2009.[44] This process of progressive integration was continued by the 'Health Check'. In particular, it ended specific payment in respect of protein crops by 2012.[45]

[34] ibid Arts 58–59.

[35] For a survey of implementation in the various Member States, see eg D Bianchi (n 29) 355–358.

[36] Council Regulation 73/2009 [2009] OJ L 30/16 Preamble (32).

[37] ibid art 45.

[38] ibid Arts 46–47, in this case there may again be the option of revising payment a entitlements: art 48.

[39] Council Regulation 1782/2003 [2003] OJ L 270/1 Annex VI.

[40] ibid, Annex VI, as amended by Council Regulation 864/2004 [2004] OJ L 206/20.

[41] ibid, Annex VI, as amended by Council Regulation 319/2006 [2006] OJ L 58/32.

[42] ibid Annex VI, as amended by Council Regulation 2013/2006 [2006] OJ L 384/13.

[43] ibid Annex VI, as amended by Council Regulation 1182/2007 [2007] OJ L 273/1.

[44] ibid Annex VII, as amended by Council Regulation 479/2008 [2008] OJ L 148/1.

[45] As had been available under Council Regulation 1782/2003 [2003] OJ L 270/1 Arts 76–78. See now Council Regulation 73/2009 [2009] OJ L 30/16 (and, in particular, Arts 63 and 64 and Annexes XI and XII).

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

Further, and importantly, it also reduced the extent to which Member States could opt for partial implementation of the Single Payment Scheme.[46] By way of example, Member States had been able to retain up to 25 per cent of area aid payments in the arable sector. The retention of product-specific support in this way was felt to blunt the responsiveness of farmers to market signals and, accordingly, the extent of this derogation was materially circumscribed, with all payments in the arable sector to be integrated into the Single Farm Payment as from 2010 and most payments in the beef and veal sector to be so integrated by 2012 at the latest.[47]

2. *Cross-Compliance*

The Mid-Term Review had increased the cross-compliance obligations to be observed as a condition for receipt of direct payments, these being extended beyond environmental protection to public, animal and plant health and animal welfare, together with an overarching obligation to maintain all agricultural land in good agricultural and environmental condition.[48] A key function of such measures were to justify support, on the basis that farmers were providing the 'public goods' demanded by civil society.[49] The 'Health Check' had no hesitation in maintaining the cross-compliance system,[50] but concern at the relevance and beneficial effects of some provisions led to their deletion. Among those deleted were some of the statutory management requirements under the Wild Birds Directive,[51] while many of the standards required for good agricultural and environmental condition became optional.[52] On the other hand, with the new emphasis on water resources, the European Community framework for good agricultural and environmental condition was reinforced by measures for the protection and management of water.[53]

3. *Modulation*

The 'Health Check' saw substantial strengthening of modulation (the transfer of a proportion of direct payments made to farmers in order to increase funding for rural

[46] As had been available under Council Regulation 1782/2003 [2003] OJ L 270/1 Arts 64–68. For a survey of partial implementation in the various Member States see eg European Commission COM(2008)306, Explanatory Memorandum.

[47] Council Regulation 73/2009 [2009] OJ L 30/16 (and, in particular, Arts 63 and 65 and Annex XI).

[48] Council Regulation 1782/2003 [2003] OJ L 270/1 Arts 3–5 and Annexes III and IV. See also D Bianchi, 'Cross compliance: The New Frontier in Granting Subsidies to the Agricultural Sector in the European Union' (2007) 19 Georgetown International Environmental Law Review 817–828.

[49] See eg European Commission, *Mid-term Review of the Common Agricultural Policy* COM(2002)394, 2.

[50] Council Regulation 73/2009 [2009] OJ L 30/16 Preamble (3) and (4).

[51] Council Directive 79/409 [1979] OJ L 103/1.

[52] For the full range of amendments contrast Council Regulation 1783/2003 [2003] OJ L 270/1 Arts 3–5 and Annexes III and IV and Council Regulation 73/2009 [2009] OJ L 30/16 Arts 4–6 and Annexes II and III. It may be noted that, even if in principle a standard required for good agricultural and environmental condition became optional, exceptions were provided where a Member State had defined a minimum requirement before 1 January 2009 and/or where national rules addressing the standard were applied in the Member State.

[53] Council Regulation 73/2009 [2009] OJ L 30/16 Preamble (6) and Annex III.

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

development). Under the Mid-Term Review compulsory modulation had been introduced as from 2005, rising to a rate of 5 per cent as from 2007.[54] However, this realised only some 1.2 billion Euros per annum even when the 5 per cent rate was reached;[55] and, apart from the United Kingdom, there had been little appetite for voluntary modulation (as authorized over and above the compulsory rate):[56] thus, in England it was provided that voluntary modulation would reach 14 per cent in 2009, which, when combined with the compulsory rate, would result in a total deduction of 19 per cent.[57] Accordingly, owing to low rates of compulsory modulation and low uptake of voluntary modulation, the additional resources generated by modulation for rural development were not considered sufficient to meet the new challenges for rural development policy.[58] The result was an initial proposal that compulsory modulation be increased by 2 per cent annually over the period 2010–2013;[59] but in the event it was provided that the rate should increase to 7 per cent in 2009, 8 per cent in 2010, 9 per cent in 2011 and 10 per cent in 2012.[60] Larger beneficiaries were, nonetheless, targeted. Amounts which they received in excess of 300,000 Euros were placed subject to an additional 4 per cent deduction,[61] with this being justified on the basis that they did not require the same level of income support and enjoyed greater potential to adapt their farming practices.[62] A contrast can be drawn with earlier, failed attempts to introduce such redistribution under both the 1992 MacSharry Reforms and the Mid-term Review of the CAP.[63]

4. Set Aside

As indicated, the temporary suspension of compulsory set aside during 2008 was rendered permanent; and, with milk quotas due to expire on 31 March 2015, supply controls will cease to be a major feature of the CAP. While there might be economic

[54] Council Regulation 1782/2003 [2003] OJ L 270/1 Art 10(1).

[55] Commission Decision 2006/588 of 29 August 2006 [2006] OJ L 240/6.

[56] See, in particular, Council Regulation 378/2007 [2007] OJ L 95/1.

[57] The Common Agricultural Policy Single Payment and Support Schemes Regulations 2005 SI 2005/219 Reg 11, as amended by the Common Agricultural Policy Single Payment and Support Schemes (Amendment) Regulations 2007 SI 2007/3182. Lower additional percentages were stipulated for in other regions of the United Kingdom: see eg the Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005 SI 2005/143 Reg 10, as amended by the Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2007 SI 2007/414, where the additional rate was not to rise above 9 per cent.

[58] For these new challenges, considered below, see Council Regulation 1698/2005 [2005] OJ L 277/1, as amended by Council Regulation 74/2009 [2009] OJ L 30/100; and Council Decision 2006/144 of 20 February 2006 [2006] OJ L 55/20, as amended by Council Decision 2009/61 of 19 January 2009 OJ [2009] L 30/112.

[59] European Commission, *Communication from the Commission to the Council and the European Parliament: Preparing for the "Health Check" of the CAP Reform* COM (2007)722, 10.

[60] Council Regulation 73/2009 [2009] OJ L 30/16 art 7(1). National ceilings were imposed to prevent farmers in Member States which had implemented voluntary modulation from being subject to very high levels of reduction in their direct payments: ibid Art 8.

[61] ibid art 7(2).

[62] ibid Preamble (11).

[63] For proposals in favour of redistributive modulation see European Commission, *The Development and Future of the CAP* COM(91)100, 12; and European Commission, *Mid-term Review of the Common Agricultural Policy* COM(2002)394, 23 (proposing a cap of €300,000).

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

and structural advantages as production increases to meet rising demand, the European Commission has shown concern over potential negative impact on both farmers and the environment.[64] Thus, to prevent the abolition of compulsory set aside resulting in the loss of earlier environmental gains, the cross-compliance requirement that all agricultural land should be maintained in good agricultural and environmental condition has been bolstered by, for example, provision for the establishment and/or retention of habitats.[65] Likewise, in the case of milk quotas, under the direct payments regime Member States may grant specific support 'to buffer the consequences' of their being phased out.[66]

5. *Rural Development Policy*

The legislative framework for rural development policy was recast to address new challenges, these for the most part reflecting environmental imperatives which extend well beyond agriculture. As from 1 January 2010 the rural development programmes of Member States must include measures having as their priority, inter alia, climate change, renewable energies, water management and biodiversity;[67] and an indicative list was provided of the types of operations to be linked to these priorities, together with their potential effects.[68] By way of illustration, in the case of climate change the types of operations include improvement in the efficiency of nitrogen fertiliser use; in the case of water management they include wetland restoration and the conversion of agricultural land into swamps; and in the case of biodiversity they include conservation of genetic diversity. A matter of some interest is that a wide range of measures address renewable energies, while at the same time the Health Check, under the direct payments regime, removed specific support for energy crops.[69] Amendment in like vein was made to the Community Strategic Guidelines for Rural Development.[70] As noted, increased compulsory modulation was expressly regarded as necessary to fund the new challenges of rural development policy; and, in the context of climate change, renewable energy, water management and biodiversity, the Community Strategic

[64] See eg European Commission, *Communication from the Commission to the Council and the European Parliament: Preparing for the "Health Check" of the CAP Reform* COM(2007)722, 6–7.

[65] Council Regulation 73/2009 [2009] OJ L 30/16 Preamble (5) and Annex III. For a useful overview of these issues see eg Rural Payments Agency and Natural England, *Recapturing the Environmental Benefits of Set-aside: Executive Summary of XC1 Final Implementation Report* (Rural Payments Agency and Natural England London 2008) <http://www.defra.gov.uk/corporate/consult/gaec/rpa-ne-report08.pdf> (accessed on 24 April 2009).

[66] Council Regulation 73/2009 [2009] OJ L 30/16 Preamble (35). In addition, under the rural development regime provision has been made for measures accompanying restructuring of the dairy sector: Council Regulation 1698/2005 [2005] OJ L 277/1 Art 16a(1)(e), as amended by Council Regulation 74/2009 [2009] OJ L 30/100.

[67] Council Regulation 1698/2005 [2005] OJ L 277/1 Art 16a(1)(a)–(d), as amended by Council Regulation 74/2009 [2009] OJ L 30/100.

[68] ibid Annex II, as amended by Council Regulation 74/2009 [2009] OJ L 30/100.

[69] Council Regulation 73/2009 [2009] OJ L 30/16 Preamble (42): '[d]ue to recent developments in the bio-energy sector and, in particular, to the strong demand for such products on international markets and the introduction of binding targets for the share of bio-energy in total fuel by 2020, there is no longer sufficient reason to grant specific support for energy crops'.

[70] Council Decision 2006/144 of 20 February 2006 [2006] OJ L 55/20, as amended by Council Decision 2009/61 of 19 January 2009 [2009] OJ L 30/112.

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

Guidelines, as revised, focus on the extent to which agriculture and forestry are both a significant part of the problem and a significant part of the solution.[71] Thus, to give just one example, they state that '[a] large part of Europe's biological diversity is dependent on agriculture and forestry and the efforts to protect biodiversity will have to be increased, particularly in the light of the expected adverse effects of climate change and increasing water demand'.[72]

D. Conclusion

While recently the pace of change may be less swift than under the Mid-Term Review, there definitely remains an ongoing agenda of reform for the CAP. Indeed, there was express recognition that '[c]onsensus on all the elements of the 2003 reform could not be reached in one go';[73] and continuation of the process under the 'Health Check' may be regarded as an inevitable consequence of the derogations, and complexity, necessary to secure political agreement. Moreover, what can be said with some certainty is that most direct payments to farmers are now bundled into the Single Payment Scheme and decoupled from production in the sense that they are not tied to growing a specific crops or rearing specific livestock; and the increased emphasis on the environment, food quality and animal welfare chimes well with the views of civil society as revealed, for example, in numerous Eurobarometer surveys.[74]

By contrast, there has been far less progress in the arena of world trade. The 'July Package', issued on 10 July 2008, failed to provide a basis for agreement;[75] and, although further *Revised Draft Modalities for Agriculture* were issued by Chairperson Ambassador Crawford Falconer on 6 December 2006, he accepted that consultations since the collapse of the July meeting had not seen much closer approximation of negotiating positions.[76] Indeed, he declared that '[w]hile Members have at last been prepared to step (albeit tentatively) outside their comfort zones, they have not been prepared to get as far as a real convergence'.[77] That said, there is evidence that the European Union still sees a renegotiated Uruguay Round Agreement of Agriculture as the best way forward in terms of a legislative framework for world trade in agricultural products. Faith is still placed in an expanded Single Payment Scheme for the delivery of direct payments to farmers in a manner that is exempt from domestic support reduction commitments;[78] and, interestingly, the 'Health Check' introduced for the

[71] The extent to which agriculture may be part of the problem had been highlighted in the FAO report, Steinfeld et al, *Livestock's Long Shadow—Environmental Issues and Problems* (FAO, Rome, 2006), which found that 18 per cent of greenhouse gas emissions were attributable to the livestock sector (more than the percentage attributable to transport): at xxi.

[72] Council Decision 2006/144 of 20 February 2006 [2006] OJ L 55/20 Annex para 2.5(iii), as amended by Council Decision 2009/61 of 19 January 2009 [2009] OJ L 30/112. See also eg European Commission, *Communication from the Commission: Halting the Loss of Biodiversity by 2010—and Beyond: Sustaining Ecosystem Services for Human Well-being* COM(2006)216, 7–8.

[73] European Commission, *Communication from the Commission to the Council and the European Parliament: Preparing for the 'Health Check' of the CAP Reform* COM(2007) 722, 3.

[74] See eg Special Eurobarometer 294, *Europeans, Agriculture and the Common Agricultural Policy* (European Commission, Brussels, 2008) 294.

[75] In respect of the agriculture negotiations see the *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.3, 10 July 2008.

[76] TN/AG/W/4/Rev.4, 6 December 2008.

[77] ibid 2.

[78] On the basis that it is 'de-coupled income support' within para 6 of Annex 2 to the Uruguay Round Agreement on Agriculture.

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press

first time community financial contributions for crop, animal and plant insurance, together with mutual funds for animal and plant diseases and environmental incidents,[79] and such measures were expressly linked with WTO compatibility.[80]

MICHAEL CARDWELL*

III. CITIZENSHIP AND FUNDAMENTAL RIGHTS

A. Citizenship

1. Introduction

Free movement for EU citizens has been consistently recognized by the Court as a fundamental right.[1] Standing alone, article 18 EC remains a weak legal basis for Citizenship to become the 'fundamental status' of nationals of one of the Member States of the EU. To ensure that the full benefit of article 18 EC can be enjoyed by EU citizens the Court has consistently intervened to remove barriers imposed by Member States which restrict the rights provided for in article 18 EC. Most frequently this has required the Court to consider article 18 EC in conjunction with Article 12 EC to prevent discrimination on grounds of nationality. Increasingly with a more mobile population the exercise of Citizenship rights is raising questions concerning the payment of pensions and other social security benefits. One issue which the Court has addressed in two recent judgments, *Nerkowska*[2] and *Zabłocka-Weyhermüller*,[3] concerns the lawfulness of national legislation which imposed a residence requirement upon the recipients of a non-contributory social benefit. In these cases the Court was asked to consider whether national legislation regulating pension payments, and which were outside the scope of Regulation 1408/71, could be set aside even where the objective of that legislation was, inter alia, to promote societal solidarity with victims of war and oppression.

2. Case Law

In *Nerkowska* the case concerned a Polish national born in 1946 on the territory of what today is known as Belarus. In the aftermath of World War II many ethnic Poles who

[79] Council Regulation 73/2009 [2009] OJ L 30/16 Arts 70 and 71.

[80] See eg European Commission COM(2008)306, Explanatory Memorandum (proposing that such measures should be subject to financial ceilings, unless with certainty they met the conditions of the 'Green Box' (ie within Annex 2 to the Uruguay Round Agreement on Agriculture)).

* Faculty of Law, University of Leeds.

[1] See for example Case C-184/99 *Gryzelczyk* [2001] ECR I-6193; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Joined Cases C413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-; Case C-224/02 *Pusa* [2004] ECR I-5763. Case C-1/05 *Jia* [2007] ECR I-1.

[2] Case C-499/06 *Halina Nerkowska* v *Zakład Ubezpieczeń Społecznych* (Judgment of 22 May 2008).

[3] Case Krystyna *Zabłocka Weyhermüller* v *Land Baden-Württemberg* (Judgment of 4 December 2008).

[*ICLQ* vol 58, October 2009 pp 1002–1012] doi:10.1017/S0020589309001456

https://doi.org/10.1017/S0020589309001444 Published online by Cambridge University Press