PRZEGLĄD PRAWA ROLNEGO
NR 1 (30) – 2022, 235–254
DOI: 10.14746/ppr.2022.30.1.14

Paul Richli*
ORCID: 0000-0003-3940-3301

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

Introduction

It is an honour for me to contribute to the special edition of "Przegląd Prawa Rolnego" published on the 50th anniversary of Professor Roman Budzinowski's research work. His work is highly appreciated by the international community of scholars and practitioners of agricultural law. I know and appreciate Professor Budzinowski mainly through his valuable work in and for the European Committee for Rural Law (CEDR). My contribution deals with the question of if and how far Switzerland and the European Union legally support the income of the agriculture community.

In Switzerland like in the EU, there is no other sector of the economy that is subject to comparably extensive state legislation as agriculture is. This intensity of legislation is due to the unique position of the agricultural sector. Firstly, this economic branch is more vital to the population than any other. A lack of food directly threatens human survival. This historical experience largely explains the intensity of legislation and the concern for securing the livelihood of the farming population and farms as a prerequisite of the security of supply of vital foodstuffs for the population as a whole. Secondly, agriculture is exposed to production and income risks like no other sector of the economy. Exogenous factors impact agriculture more than most other economic sectors. Soil, water and solar radiation are three of the most

* University of Lucerne, Switzerland.

important input factors of production. These factors can only be imperfectly controlled even with modern technology. Climatic conditions and weather problems should also be mentioned, as well as damage caused by extreme natural events. Last but not least, agricultural production can only be adapted or stopped within a considerable time period. This is true for vegetable and cereal production as well as for fruit and wine growing (only one harvest per year), for meat production (animals have a life cycle) and for milk production (number of dairy cows cannot be increased or reduced at short notice).[1]

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

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

1. Securing the income from agriculture in Switzerland

1.1. First legislation in the first Agriculture Act of 1951

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

"The final wording of Article 22 will have a decisive influence on whether the intention of Articles 27–29 of the draft can be achieved. But one thing

[1] See mainly P. Richli, Ch. Busse, *General Report of Commission I: Competition rules in agriculture*, in: CEDR (ed.), *Agriculture and Competition, XXIX European Congress and Colloquium of Rural Law, Lille, 20–23 September 2017*, Baden-Baden 2019, p. 130 ff. with indication of relevant authors.

must be clear: If it is not possible to secure prices for agriculture which, applied to rural conditions, will enable those employed in it to earn approximately the same income as the other groups of the population who live together with them in many cases and who work mainly with their hands, then the further decline of the peasantry cannot be stopped."[2]

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

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

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

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

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

2. If, despite these measures, the existence of important branches of agriculture is threatened by the import of competing products, the Federal Council may, after consulting the Committee for Agriculture, impose further conditions on imports and in addition levy price surcharges or compensatory levies. The proceeds of such surcharges and levies shall be used to reduce the price of corresponding domestic products and to promote sales and improve domestic production. Such decisions shall be submitted to the Federal Assembly for subsequent approval."[3]

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

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

"Article 27

1. The measures provided for under this Act shall be applied in such a way that prices can be obtained for domestic agricultural products of good quality

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

[3] Ibidem, p. 264.

[4] Amtliche Sammlung (AS) 1951, Vol. III, p. 136.

[5] BBl 1951 I, p. 266.

[6] Ibidem.

[7] AS 1951 III, p. 139.

[8] Ibidem.

which cover the average production costs of rationally managed agricultural holdings taken over under normal conditions over a period of several years.

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

"Article 29

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

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

Article 29 para. 1 was amended in the 1992 revision and consequently read as follows,[10] when the separation of price and income policy[11] and direct payments were included in it:

"The measures provided for by this Act shall be applied in such a way that prices can be obtained for domestic agricultural products of good quality which, together with other income components, cover the average production costs of rationally managed agricultural holdings which are environmentally sound and which have been taken over under normal conditions, on average over several years."[12]

1.2. Modernisation in the new Agriculture Act of 1998

In its message on the new (second) Agriculture Act of 1998, the Federal Council submitted to the Federal Parliament a formal and systematic reformulation and, at the same time, modernisation of the provisions of the first Agriculture Act of 1951. According to the Federal Council's Message on the Agricultural Policy 2002 of 26 June 1996, the new policy focussed on a greater separation of price and income policy, combined with the realisation

[9] See on the parity wage in general and on the concretisation at ordinance level: T. Gubler, *Der kostendeckende Preis für landwirtschaftliche Erzeugnisse gemäss Art. 29 LwG – Seine Charakteristik und die Mittel zu seiner Erzielung*, Basel – Zurich 1986, p. 68 ff.

[10] AS 1993, p. 1571. Botschaft des Bundesrates zur Änderung des Landwirtschaftsgesetzes, Teil I: Agrarpolitik mit ergänzenden Direktzahlungen (BBl 1992 II, p. 46 ff. and 10 f.). It was only inserted in the course of the parliamentary deliberations (Amtliches Bulletin Nationalrat 1992, p. 1038 ff.).

[11] See for example P. Richli, *Entwicklungen im schweizerischen und europäischen Agrarrecht – Ein KMU-Rechts-Thema par excellence*, "Blätter für Agrarrecht" 2002, No 2, p. 90 f. with references.

[12] On direct payments in general, see for example P. Richli, G. Müller, T. Jaag, *Wirtschaftsverwaltungsrecht des Bundes*, Basel 2001, p. 187 ff.

of ecological concerns through economic incentives, as well as in a relaxation of state market policy to improve the competitiveness of the entire food sector. In this concept, income security in agriculture was to be realised increasingly with direct payments and no longer with price measures.[13] The fundamental objective of income policy was and is that sustainably managed and economically efficient farms should be able to earn an income comparable to that of the rest of the working population,[14] The agricultural sector should continue to generate as much of its income as possible through market transactions, i.e. the sale of its products. The function of direct payments is to compensate farmers for their public services instead by product prices.[15]

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

"Article 5. Income

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

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

3. Consideration shall be given to other sectors of the economy, the economic situation of the rest of the population and the situation of the federal finances."[16]

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

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

Today, the results of the central evaluation of accounting data by the Swiss centre of excellence for agricultural research (Agroscope) serve as the data basis for measuring agricultural income. Only sustainably managed farms

[13] BBl 1996 IV, p. 5 f.
[14] Ibidem, p. 11.
[15] Ibidem, p. 28.
[16] Ibidem, p. 313.
[17] Ibidem, p. 89 ff.
[18] BBl 1998 III, p. 2468.

that meet the accounting requirements are considered for income measurement. The data basis for the comparative income is the wage structure survey of the Federal Statistical Office.[19]

1.3. Legal nature of Article 5 para. 1 LwG

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

1.4. Realisation of the comparative wage in practice compared to the legal target

In legal reality, based on Articles 23, 29 and 31 of the first Agriculture Act of 1951 and on Article 5(1) of the second (new) Agriculture Act of 1998, the following results were achieved, although the figures have been confirmed only as of 1997 (Table 1).

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

In the dispatch of 12 February 2020 entitled "Agricultural Policy 2022+" (AP22+) on the further development of agriculture, the Federal Council assumed that farm income would continue to improve until 2025. In addition, the government announced that the increased support for mountain farming will be continued.[21] The alignment is attempted primarily through the

[19] See in detail R. Norer, in: R. Norer (ed.), *Kommentar zum Landwirtschaftsgesetz*, Berne 2020, Art. 5, No 16 ff.

[20] See in particular P. Richli, *Zur Funktion und Bedeutung von Artikel 5 des Landwirtschaftsgesetzes für das bäuerliche Einkommen*, "Blätter für Agrarrecht" 2003, No 1, Artikel 5, p. 16 f. and 19 ff.; R. Norer (ed.), *Kommentar...*, Art. 5, No 11 f.

[21] BBl 2000, 4166. The Federal Council already expressed similar arguments in its Botschaft vom 1. Februar 2012 zur Weiterentwicklung der Agrarpolitik in den Jahren 2014–2017 (Agrarpolitik 2014–2017), BBl 2012, p. 2317.

graduation of direct payments according to zones. The contribution rates for individual direct payments are graduated according to hill zone, mountain zone I, mountain zone II, mountain zone III and mountain zone IV, as well as according to the slope of hillsides. The lowest rates are for the hill zone, the highest for the mountain zone IV.[22] The Federal Council is in favour of further increasing the income of farms in relation to the comparative wage with AP22+.[23] However, it does not mention that this improvement also corresponds to a legal obligation. At least it does not relativise the objective as far as one author who believes that Article 5 para. 1 LwG is already fulfilled even if only a few farms reach the comparative income.[24] In the context of AP22+, farming and economic organisations suggest that the Federal Council must set and pursue a binding income target.[25] The Federal Council's reference in the AP22+ dispatch is correct insofar that other sectors of the economy, the economic situation of the non-agricultural population and the situation of federal finances in connection with agricultural income policy under Article 5 para. 3 LwG have to be considered.[26] It should also be ensured that the "economies of scale" are taken into account and that direct payments of more than CHF 150,000 for farms are gradually recompensed.[27]

According to the view expressed here, the objective must remain such that a significant proportion, if not the average, of farms achieve the income target. Otherwise, the legal mandate is not achieved. The Confederation is obliged to pursue a credible agricultural policy with regard to Article 5 para. 1 LwG or otherwise to alter this provision by amending the law.[28]

In order to improve their income situation, however, farmers will have to look for ways to increase their share in the food chain or through farming-related activities. In the first case, it is a question of direct sales in farm shops or at (weekly) food markets, whereby permanent access to the market is important.[29] In the second case, one might think of renting out guest rooms, running a farm pub or producing biogas.

---

[22] See Direktzahlungsverordnung (DZV), Appendix 7 (Systematische Rechtssammlung [SR] 910.13).

[23] BBl 2020, p. 4166.

[24] E. Hofer, *Reform der Agrarpolitik (AP 2002) – Das neue Landwirtschaftsgesetz und dessen Entstehung*, "Blätter für Agrarrecht" 1996, No 2–3, p. 65.

[25] BBl 2020, p. 4001.

[26] Ibidem, p. 4149.

[27] Ibidem, p. 4167.

[28] See in detail P. Richli, *Zur Funktion...*, Artikel 5, p. 3 ff., esp. 20 ff.

[29] M. Winistörfer, *Rechtsfragen der Zuteilung von Marktstandplätzen an Landwirtschaftsbetriebe*, "Blätter für Agrarrecht" 2016, No 1, p. 79 ff.

Traditionally, the income in mountain farming lays behind the income in valley areas. However, the gap has narrowed since the beginning of the century. Comparing the figures for the three-year periods 1997–1999 and 2017–2019, the income of valley farms in relation to the comparable wage developed from 62% to 81% and that of mountain farms from 42% to 54%. The ratio of income in the mountain area to the valley area thus remained at around 67%. This means that the need for the mountain area to catch up with the valley area has not diminished. Under these circumstances, the question still arises today as to whether this distribution of income can fulfill the constitutional requirements, in particular those of the article on the agricultural policy (Article 104 para. 3 let. a BV) and the principle of equal treatment (Article 8 para. 1 BV).[30]

The efforts to implement the income target of Article 5 para. 1 LwG are primarily made through direct payments which form a basic income for the farmers. It should be emphasised that the income does not constantly have to be at the level of the comparative income on annual basis, but that this should be the case on average over several years.[31] Direct payments are also justified insofar as they are primarily intended to compensate for expenses producing positive external effects of agriculture, such as landscape maintenance and preservation of the cultivated landscape.[32] In other words, they serve to safeguard the multifunctionality of agriculture.[33]

2. Income security for agriculture in the EU

2.1. Regulations in the EEC Treaty, the TEC and the TFEU

In the (present-day) EU, the provisions on income security for the farming population, which are laid down in Article 39 of the Treaty on the Functioning of the European Union (TFEU), still read the same as in Article 39 of the

[30] On the requirement of equal treatment under the law in general and in the context of agriculture see above all M. Huser, *Die Gleichbehandlung der Landwirte durch die Sonderberücksichtigung der e schwerten Produktions- und Lebensbedingungen*, Freiburg i.Ü. 1983, p. 35 ff.

[31] Botschaft zur Reform der Agrarpolitik: Zweite Etappe (Agrarpolitik 2002), Teil I: Neues Landwirtschaftsgesetz vom 26. Juni 1996, BBl 1996 IV, p. 90.

[32] B. Lehmann, S. Briner, *Weiterentwicklung von Landwirtschaft und Agrarrecht aus der Sicht des Bundesamtes für Landwirtschaft*, "Blätter für Agrarrecht" 2016, No 2–3, p. 11 ff.

[33] Ibidem, p. 10 ff.; B. Altermatt, *Förderung einer multifunktionalen Landwirtschaft unter veränderten Bedingungen*, "Blätter für Agrarrecht" 1992, No 1, p. 14 ff., esp. p. 24 ff.

EEC Treaty of 25 March 1957 and Article 33 of the Treaty establishing the European Union (TEC). They read as follows:

"Article 39(1) (ex Article 33(1) TEC).

The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.

2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:

(a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;

(b) the need to effect the appropriate adjustments by degrees;

(c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole."

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

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

Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers.[34] According to recital 21, the support schemes under the common agricultural policy provide for direct income support in particular with a view to ensuring a fair standard of living for the agricultural community. This objective is closely related to

[34] OJ 2003 L 270/1.

the maintenance of rural areas in order to avoid misallocations of community funds. Recital 22 states that common support schemes have to be adapted to developments, if necessary, within short time limits. Beneficiaries cannot, therefore, rely on support conditions remaining unchanged and should be prepared for a possible review of schemes in the light of market developments. In recital 24, it is mentioned that it is necessary to make the shift from production support to producer support by introducing a system of decoupled income support for each farm. It is, therefore, appropriate to make the single farm payment conditional upon cross-compliance with environmental, food safety, animal health and welfare, as well as the maintenance of the farm in good agricultural and environmental condition.

Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy.[35]

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

Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005.[36]

Agri-environment-climate payments should, according to recital 22, continue to play a prominent role in supporting the sustainable development of rural areas and in responding to society's increasing demands for environmental services. They should further encourage farmers to serve society as a whole by introducing or continuing to apply agricultural practices that contribute to climate change mitigation. Payments should contribute to cov-

[35] OJ 2013 L 347/608.

[36] OJ 2013 L 347/487.

ering additional costs and income foregone resulting from the commitments undertaken and should only cover commitments going beyond relevant mandatory standards and requirements, in accordance with the "polluter pays principle." Furthermore, recital 25 states that payments to farmers in mountain areas or in other areas facing natural or other specific constraints should compensate for income foregone and additional costs linked to the disadvantage of the area concerned.

On the basis of the Proposal of 1 June 2018[37] the European Parliament and the Council adopted recently Regulation (EU) 2021/2115 of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013.[38]

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

[37] COM(2018) 392 final.

[38] OJ 2021 L 435/1.

prescribes that the achievement of the general objectives shall be pursued through the following specific objectives: "to support viable farm income and resilience of the agricultural sector across the Union in order to enhance long-term food security and agricultural diversity as well as to ensure the economic sustainability of agricultural production in the Union."

2.3. Legal nature of Article 39(1)(b) of the TFEU

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

The EU legislator has a wide margin of discretion, especially in the choice of instruments to achieve the objective (price supports and direct payments). The measures may not be designed unilaterally as social aid. A criterion for the adequacy of the standard of living must also be productivity. Moreover, not only instruments of income increase lie in the target area of Article 39(1)(b) of the TFEU. Other instruments can also be used, such as agricultural social security. In this respect, Article 39 also has a social component. Until 1992, market support measures (intervention measures within the framework of individual market organisations) had been in the foreground for income security.

[39] See in particular J. Martinez, in: Ch. Calliess, M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta, Kommentar*, Munich 2016, Art. 39, No 2 ff.; R. Norer, in: M. Pechstein, C. Nowak, U. Häde (eds.), *Frankfurter Kommentar, zu EUV, GRC und AEUV*, Vol. II, Munich 2017, Art. 39, No 4 f. and 14 ff.; Ch. Busse, in: C.O. Lenz, K.-D. Borchardt (eds.), *EU-Verträge, Kommentar*, Köln – Wien 2012, Art. 39, No 2 ff.

With the Mac-Sherry reform, a reorientation began which led to the current promotion of agriculture working primarily with direct payments independent of production (1st pillar) and with measures to improve the quality of life in rural areas (2nd pillar).[40] It cannot be ruled out that adjustments to the CAP will trigger certain income losses for farmers, as long as the objective of a fair standard of living is not called into question.[41] This means that a consistently stable income is not guaranteed.[42]

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

"In Case 5/73 Balkan-Import-Export GmbH, the infringement of the objective in Article 39(1)(e) was invoked in favour of the objective in Article 39(1)(a) TFEU. The dispute concerned cyclical countervailing measures on imports of dairy products from Bulgaria to make imports more expensive. The ECJ stated in this regard.[43]

Article 39 of the Treaty sets out various objectives of the common agricultural policy. In pursuing these objectives, the Community Institutions must secure the permanent harmonisation made necessary by any conflicts between these aims taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made. If, owing to developments in the monetary situation at the time the disputed measures, preference happens to be given to the interests of the agricultural community, the Council does not in so doing contravene Article 39. Moreover, it has not been established that the measures questioned gave rise to prices which would appear obviously unreasonable on selling to consumers."

In Case 59/83 Biovilac, the question was whether the applicant which produced and sold skimmed-milk powder could claim damages from the EEC on the basis of Article 215(2) of the EEC Treaty for the loss it allegedly suffered as a result of the introduction of contributions to farmers for

[40] Ch. Busse, in: C.O. Lenz, K.-D. Borchardt (eds.), *EU-Verträge...*, Art. 39, No 11 f.; J. Martinez, in: Ch. Calliess, M. Ruffert (eds.), *EUV/AEUV...*, Art. 39, No 7 ff.; C. Bittner, in: U. Becker, A. Hatje, J. Schoo, J. Schwarze (eds.), *EU-Kommentar*, Baden-Baden 2019, Art. 39, No 10 ff.; I. Härtel, in: R. Streinz, W. Michel, *EUV/AEUV*, Munich 2018, Art. 39, No 7.

[41] J. Martinez, in: Ch. Calliess, M. Ruffert (eds.), *EUV/AEUV...*, Art. 39, No 10.

[42] C. Bittner, in: U. Becker, A. Hatje, J. Schoo, J. Schwarze (eds.), *EU-Kommentar*, Art. 39, No 11.

[43] Case C-5/73, ECR 1973, 1091, No 24 – Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof.

skimmed-milk powder. Biovilac argued that those aids reduce the market price of skimmed-milk powder to a level which substantially reduces sales of its products or makes them impossible.

The ECJ dismissed the action. The Court mentioned[44] that it has stated on numerous occasions that the institutions must reconcile the various aims laid down in Article 39 which does not allow any one of those aims to be pursued in isolation in such a way as to make the attainment of other aims impossible. Regulation No 1753/82 was adopted pursuant to the general policy applied to milk products. One of the main aims of that policy is to ensure that in accordance with Article 39 (1)(b) of the EEC Treaty Community milk producers receive a reasonable income through the fixing of a target price for milk, which is guaranteed by intervention buying of the principal dairy products, namely butter and skimmed-milk powder; in this regard the Regulation constitutes a supplementary measure for attaining that aim.

In Case C-122/94, the legal question at issue was whether France and Italy were allowed to introduce aid for the distillation of table wine. The ECJ came to a positive answer on the grounds that the Council committed no manifest error of assessment when deciding, in giving particular attention to the aim of guaranteeing wine producers a fair income, that the aid in question was to be considered to be compatible with the common market since they had not thereby caused a real and lasting disturbance in the functioning of the common organisation of the wine market. Moreover, in the final recital of the preamble to the two decisions, the Council considered that the aid was, by derogation, compatible with the common market to the extent and for the period strictly necessary for restoring the situation of imbalance found to exist.[45]

Finally, in the dispute C-34/08, the question was whether milk producers and their organisations could rightly be charged a levy for over-deliveries of milk quota. The ECJ affirmed compatibility with the objectives of Article 33 EC (now Article 39 of the TFEU), stating[46] that it should be borne in mind that the Community legislature enjoys a wide discretion in matters concerning the common agricultural policy, commensurate with the political responsibilities given to it by Articles 34 EC to 37 EC. As regards, more specifically, the objectives of the common agricultural policy as laid down

[44] Case C-59/83, ERC 1984, 4057, No 16 – SA Biovilac NV v European Economic Community.

[45] Case C-122/94, ERC 1996, I-881, No 25 – Commission of the European Communities v Council of the European Union.

[46] Case C-34/08, ERC 2009, I-4023, No 43 ff. – Azienda Agricola Disarò Antonio and Others v Cooperativa Milka 2000 Soc. coop. arl.

in Article 33 EC, the Community institutions must make sure that a way is found to pursue those objectives in harmony and on an ongoing basis, where this becomes necessary as a result of conflicts which may arise between those objectives when they are pursued in isolation, and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in the light of which their decisions are made. That purpose therefore falls within the ambit of the objectives of rational development of milk production and, by contributing to a stabilisation of the income of the agricultural community affected, that of ensuring a fair standard of living for the agricultural community.

2.4. Implementation of Article 39(1)(b) of the TFEU

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

According to a brief, the EU Commission focuses on nine specific objectives, including a fair (viable) farm income.[47] The Commission states in this context that comparisons between farm and non-farm income are difficult to make and are not straightforward. Yet in general, farm income across the EU, as measured by entrepreneurial income per family work unit, is below the average income in the rest of the economy, as measured by the average wage. Different definitions do not change this fact, which together with productivity increases explains why the agricultural sector is considered less attractive than other sectors and the EU faces a continuing loss of its agricultural workforce. However, the gap between farm income and income in the rest of the economy is narrowing over time. In 2017, farmers earned on average almost half of what could be earned in other jobs, compared to a third a decade ago.[48] But the income situation is different in EU countries. In some, farm income could even surpass the income in the rest of the economy (as has been continuously the case in Czechoslovakia and Estonia since 2008), but in all others, farmers get a lower income than those working in the rest of the economy (and in some cases at a very low level).[49]

[47] See European Commission, CAP specific objectives ... explained – Brief No 1 from 9 October 2018 – This brief is based on contributions from Koen Mondelaers, Barthélemy Lanos, Piotr Bajek, Chiara Dellapasqua and Léon Van De Pol. Disclaimer: The contents of the publication do not necessarily reflect the position or opinion of the European Commission, https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/key_policies/documents/cap_specific_objectives_-_brief_1_-_ensuring_viable_farm_income.pdf [accessed on 24.11.2021].

[48] Ibidem, p. 2.

[49] Ibidem, p. 3.

Article 39 of the TFEU that states that an objective of the CAP should be to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, which is – according the EU Commission – the basis for policy measures aiming at farm supporting income. Not all but the majority of EU citizens seem to be in agreement with Article 39 of the Treaty, in particular with the need to increase the individual earnings for farmers, since farm income is generally lower compared to the rest of the economy.[50] The main explanation for this large support seems to be the fact that farmers are providing not only agricultural goods but also public goods related to the environment, biodiversity, climate and landscape features. Although they benefit all EU citizens, these goods are not remunerated by the market. The successive reforms of the CAP after 1992 provided income support initially through direct payments coupled to production factors (area, livestock heads), and later mainly with decoupled and non-product specific support. Only a small part of coupled support remained to help to address difficulties that are specific to a particular sector, production type or farming method.[51]

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

The fact that 20% of the farmers receive 80% of payments is the source of a continuing debate. The unequal distribution of support raises concerns about economic efficiency and social equity in the public debate. The EU Commission seems to acknowledge the need to address this fact in the context of the new CAP 2022–2025. A second concern lies in the fact that the level of support varies greatly among Member States, sectors, and farm sizes, and also within Member States, with income support and land more concentrated in Eastern European countries, which stems from a history of large state farms on the one hand, and/or the fragmentation of the agricultural sector with many small farms on the other hand.[52] The most effective way to achieve a reduction in the concentration of support seems to be to reduce payments with farm size (degressive subsidies) and introduce a redistributive payment (a higher rate of support per hectare for the first hectares of farms).[53]

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

[50] Ibidem, p. 6.
[51] Ibidem, p. 7.
[52] Ibidem, p. 7 f.
[53] Ibidem, p. 10.

"The agricultural income per worker is on average about 41% of the average wage in the whole economy between 1995 and 2018. This share ranges from 32% in 2009 to 49% in 2017. At EU level, the gap between the agricultural income per worker and the average wage in the economy seems to be slowly converging over time. The income per worker is e.g. above average for field crops and around the average for milk and horticulture but below average in livestock. Furthermore, the income per worker is lower for smaller farms. Income per worker increases with farm size up to 500 hectares. The share of direct payments in the income per worker also increases with farm size up to farms with more than 75 hectares and then stays constant around 40%. Finally, the agricultural factor income per worker is on average lower in areas with natural constraints. It reaches in mountain areas 87% and in other areas with natural restraints 75% of income of workers that are not in areas with natural constraints."[54]

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

In Switzerland and in the EU there are legal provisions which provide for state and EU financial support for agriculture with regard to income. In Switzerland this is Article 5(1) LwG and in the EU Article 39(1)(b) of the TFEU. In addition, with regard to the differences in income between farms in valley and mountain regions in Switzerland and between farms in areas without natural restraints and areas with natural restraints in the EU, one has to consider the principle of equal treatment or equality of persons enshrined in Article 8 para. 1 of the Federal Constitution (BV) in Switzerland and in Article 20 of the Charter of Fundamental Rights of the European Union in the EU, respectively.

The Swiss legislation is more specific than the EU one. Incomes in agriculture are to be comparable with those of the rest of the working population in the region. However, this objective, which has existed since 1951, has only been partially realised to date. The originally very high income difference has, however, weakened considerably since 1997. While the average farm income in the period 1997–1999 was still 52% of the comparative income, this percentage had risen to 66% by the period 2017–2019. Moreover, there is still a large difference between the income of farmers in the valley and in

[54] EU-Commission (2020), EU agriculture in numbers, May 2020, p. 7 f., analytical-factsheet-eu-level_fair-income_en [accessed on 24.11.2021].

the mountain areas, which appears to be a problem from the point of view of the requirement of legal equality. Differences also exist in income in various branches of production.

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

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

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

BIBLIOGRAPHY

Altermatt B. (1992), *Förderung einer multifunktionalen Landwirtschaft unter veränderten Bedingungen*, "Blätter für Agrarrecht" No 1.

Bittner C. (2019), in: U. Becker, A. Hatje, J. Schoo, J. Schwarze (eds.), *EU-Kommentar*, Baden-Baden.

Busse Ch. (2012), in: C.O. Lenz, K.-D. Borchardt (eds.), *EU-Verträge, Kommentar*, Köln – Wien.

Gubler T. (1986), *Der kostendeckende Preis für landwirtschaftliche Erzeugnisse gemäss Art. 29 LwG – Seine Charakteristik und die Mittel zu seiner Erzielung*, Basel – Zurich.

Härtel I. (2018), in: R. Streinz, W. Michel, *EUV/AEUV*, Munich.

Hofer E. (1996), *Reform der Agrarpolitik (AP 2002) – Das neue Landwirtschaftsgesetz und dessen Entstehung*, "Blätter für Agrarrecht" No 2–3.

Huser M. (1983), *Die Gleichbehandlung der Landwirte durch die Sonderberücksichtigung der e schwerten Produktions- und Lebensbedingungen*, Freiburg i.Ü.

Lehmann B., Briner S. (2016), *Weiterentwicklung von Landwirtschaft und Agrarrecht aus der Sicht des Bundesamtes für Landwirtschaft*, "Blätter für Agrarrecht" No 2–3.
Martinez J. (2016), in: Ch. Calliess, M. Ruffert (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta, Kommentar*, Munich.
Norer R. (2017), in: M. Pechstein, C. Nowak, U. Häde (eds.), *Frankfurter Kommentar, zu EUV, GRC und AEUV*, Vol. II, Munich.
Norer R. (2020), in: R. Norer (ed.), *Kommentar zum Landwirtschaftsgesetz*, Berne.
Richli P. (2002), *Entwicklungen im schweizerischen und europäischen Agrarrecht – Ein KMU-Rechts-Thema par excellence*, "Blätter für Agrarrecht" No 2.
Richli P. (2003), *Zur Funktion und Bedeutung von Artikel 5 des Landwirtschaftsgesetzes für das bäuerliche Einkommen*, "Blätter für Agrarrecht" No 1.
Richli P., Busse Ch. (2019), *General Report of Commission I: Competition rules in agriculture*, in: CEDR (ed.), *Agriculture and Competition, XXIX European Congress and Colloquium of Rural Law, Lille, 20–23 September 2017*, Baden-Baden.
Richli P., Müller G., Jaag T. (2001), *Wirtschaftsverwaltungsrecht des Bundes*, Basel.
Winistörfer M. (2016), *Rechtsfragen der Zuteilung von Marktstandplätzen an Landwirtschaftsbetriebe*, "Blätter für Agrarrecht" No 1.

ON LEGAL INCOME TARGETS FOR AGRICULTURE IN SWITZERLAND AND IN THE EUROPEAN UNION

Summary

This article deals with the legislation regulating income from agriculture in Switzerland and in the EU. The provision of Article 5(1) of the Swiss Agriculture Act treats agricultural income similarly to incomes from other branches of economy This regulation, however, does not ensure farmers any income guarantee and is not enforceable in courts. The Common Agricultural Policy provisions are more general and also unenforceable. Article 39(1)(b) of the TFEU refers to a "fair standard of living for the agricultural community." While the average agricultural income in Switzerland in the period 1997–1999 was only 52% of the comparative income, this percentage was already 66% by the period 2017–2019. The agricultural policy 22+ seeks to reduce this income gap even more. In the EU, the average income from agricultural activity increased from 32% in 2009 to 49% in 2017 of the comparative income from other branches and the new CAP policy 2022–2025 also seeks to reduce this income gap further. As can be seen, when compared to income in the economy as a whole, farmers' income in Switzerland is substantially higher than in the EU. However, both Switzerland and the EU must undertake further efforts to comply with the current legal requirements to support legal income targets in agriculture.

Keywords: agriculture, common agricultural policy, farmer income, comparable farmer income

LA REGOLAZIONE GIURIDICA RIGUARDANTE IL SOSTEGNO DERIVATO DALL'ATTIVITÀ AGRICOLA IN SVIZZERA E NELL'UNIONE EUROPEA

Riassunto

L'articolo discute la legislazione che regola la questione del reddito degli agricoltori in Svizzera e nei Paesi dell'Unione Europea. L'articolo 5 par. 1 della legge svizzera sull'agricoltura contiene una disposizione relativa al reddito agricolo, il quale è trattato in maniera simile al reddito ottenuto in altri settori dell'economia. Le disposizioni concernenti la politica agricola comune sono più generali. L'articolo 39 par. 1 lett. b) TFUE include la formulazione di "un tenore di vita equo alla popolazione agricola". Le disposizioni in questione non danno la garanzia del reddito all'agricoltore e possono non essere applicate nei tribunali. Il reddito agricolo medio in Svizzera negli anni 1997–1999 continuava a costituire il 52% del reddito rispetto ai redditi in altri settori dell'economia, negli anni 2017–2019 è salito al 66%. La politica agricola 22+ mira a ridurre ulteriormente il divario nel reddito. Nell'Unione Europea i redditi delle aziende agricole variavano dal 32% nel 2009 al 49% del reddito maturato dall'intera economia nel 2017. Con la nuova politica agricola commune per gli anni 2022–2025, anche l'Unione Europea mira a ridurre l'esistente divario. Il confronto mostra che il reddito degli agricoltori in Svizzera è molto più alto che nei Paesi dell'UE rispetto al reddito maturato dall'intera economia. Ciò nonostante, sia la Svizzera sia l'UE devono fare sforzi per soddisfare i requisiti stabiliti dalla legge per rendere i redditi equivalenti.

Parole chiave: agricoltura, politica agricola comune, reddito dell'agricoltore, reddito comparabile dell'agricoltore