Reforming the 'CAP': From Vertical to Horizontal Harmonization

*Robert Schütze**

I. Introduction: The Common Agricultural Policy—A Policy Unlike any Other?

When the EC was founded, agricultural production in Europe was characterized by economic insufficiency. In most European States, agricultural production was subject to national policies that actively intervened in the market to ensure a degree of national autonomy. Two options therefore existed when the European Community was created. The EC Treaty could exclude agricultural products from the liberal principles of the common market. Alternatively, the Treaty could include agriculture, but replace *national* agricultural policies with a *common* agricultural policy.[1] The first option proved unacceptable to the 'agricultural' countries in Europe. Freedom of movement for industrial but not for agricultural goods would have tilted the balance in favour of German industrial export trade.[2] The Treaty thus did include agricultural products within the scope of the common market, but—in the light of their special status—established a special regime for them. A separate title would be dedicated to agricultural goods—following the title on industrial goods. Its opening article confirmed that '[t]he common market shall extend to agriculture and trade in agricultural products'.[3]

* Durham Law School. Thanks go to A Antoniadis.

[1] Less integrated economic unions—such as free trade areas or customs unions—typically leave agriculture outside their scope. For an excellent introduction into the 'historical' birth conditions of the common agricultural policy, see M Melchior, 'The Common Agricultural Policy' in Commission of the EC (ed), *Thirty Years of Community Law* (Office for Official Publications of the EC, 1981) 437–438.

[2] For an analysis of the geo-political situation, see A Moravcik, *The Choice for Europe: social purpose and state power from Messina to Maastricht* (Cornell University Press, 1998) ch 2.

[3] Article 32(1) EC. The Treaty defined agricultural products as follows: '"Agricultural products" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.' Article 32(3) specifically defined the products to which the agricultural title was to apply: 'The products subject to the provisions of Articles 33 to 38 are listed in Annex I to this Treaty.' The Annex expressly included 'fish, crustaceans and molluscs' in the definition of agricultural products. The Common Fisheries Policy would thus be part of the

Yet, while agricultural products were thus part of the common market, the normal constitutional principles of that market would only apply 'save as otherwise provided in 33–38 EC'.[4] The agricultural regime constituted a collective *lex specialis* in the law of the internal market.

The reason behind the special status of agricultural policy was the strong nexus between the common *market* and a common *policy*. This constitutional link was clarified in the very first provision: 'The operation and development of the common *market* for agricultural products *must be accompanied* by the establishment of a common agricultural *policy*.'[5] The objectives of this Common Agricultural Policy (CAP) would include the increase of agricultural productivity, the guarantee of a fair standard of living for farmers, and the stabilization of markets.[6] In order to attain these objectives, the Treaty had anticipated the establishment of 'a common organization of agricultural markets'. Common market organizations should have been established by the end of the transitional period. This was in fact achieved for most products.[7] Each common market organization (CMO) would thereby follow one of three regulatory mechanisms: (a) common rules on competition, (b) coordination of national market organizations, or (c) European market organization.[8] The distinction was to be of 'little importance' as the European legislator would 'invariably' favour the third option.[9] These European market organizations would—ideally—'replace the

Common Agricultural Policy. The common market organization for fishery and aquaculture products can today be found in Regulation 104/2000, [2000] OJ L17/22, Article 1 of which states: 'A common organization of markets is hereby established, comprising a price and trading system and common rules on competition.'

[4] Article 32(2) EC. [5] Article 32(4) EC (emphasis added).

[6] Article 33(1)(a)–(c).

[7] Common organizations for product markets should have been brought into force by the end of the transitional period 'at the latest' (Article 40(1) EEC (repealed)). The notable exceptions were, inter alia, potatoes and sheepmeat. Originally, it was thought that by virtue of Articles 37 and 38 EC and ex-Article 45 EEC (repealed) national organizations of the market could be maintained until they had been replaced by common market organizations. This view was even taken by the Commission. However, in Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* [1974] ECR 1383 the Court disagreed in relation to the free movement of goods provisions. The protected position of national market organizations would only last until the end of the transitional period. This doctrine was reaffirmed in *Commission of the European Communities v Ireland*, Case 288/83, [1985] ECR 1761 in which the Court stated that 'agricultural products in respect of which a common organization of the market has not been established are subject to the general rules of the common market with regard to importation, exportation and movement within the Community'. However, while the free movement rules will so apply automatically to agricultural products, not all normal Treaty rules will so apply. The EC Treaty's State aid rules, in particular, would only operate where the national market organizations have been replaced by a common market organization for the given product; hence the continued use of countervailing duties under Article 38 EC (cf J A Usher, *EC Agricultural Law* (Oxford University Press, 2001) 19).

[8] Article 34(1).

[9] F G Snyder, *Law of the Common Agricultural Policy* (Sweet & Maxwell, 1985) 71. The distinction between these three intervention methods has not been consistently maintained by the Community legislator in the past. Constitutional practice has instead preferred the expression *common market organization* for a regulatory regime that combined elements from each method (M Melchior, above n 1, 443).

national market organisations'.[10] And a 'common price policy' would be the heart of the original CAP.

The close connection between negative and positive integration—that is: the extent to which market unity required a uniform policy—predestined agricultural law to become the 'most developed and coherent field of Community law'.[11] The CAP would hold a unique position in European constitutional law: it was the 'prima donna' of the Community's common policies.[12] While it had not been declared an exclusive Community competence, it was de facto the most centralized Community policy. This gave rise to the common belief that once the Community had intervened through the setting up of a CMO, the Community's competence would become 'exclusive' through an 'occupation of the field'.[13] Was the CAP therefore a fiefdom of dual federalism,[14] albeit in the moderate form of legislative exclusivity? It will be seen that European constitutionalism has not been purist, but the 'old' CAP indeed came close to a dual federal solution under which the Community would—almost completely—replace the Member States.

This picture has dramatically changed. The MacSharry reforms started a process of 'decoupling' the CAP from product support. The desire to shift agricultural law from vertical to horizontal legislation was confirmed in the 'Agenda 2000' proposals. It would, eventually, be translated into an enormous legislative package, the latest instalment of which emerged in January 2009.[15] How have these radical reforms affected the division of responsibilities between the European Community and the Member States? Have they injected elements of cooperative federalism into the 'sacred cow' of European law?[16] And if so, how can we analyse the changing structure of European agricultural law?

[10] Article 37(3) EC. Article 37 EC provided the legal basis for Community measures in the title.

[11] R Barents, *The Agricultural Law of the EC* (Kluwer, 1994) 366.

[12] D Bianchi, *La Politique Agricole Commune (PAC): Toute La PAC, Rien d'Autre Que La PAC* (Bruylant, 2006) 3.

[13] Various academic commentators referred to the 'exclusive powers' of the EC under its agriculture title. See G Olmi, 'Politique agricole commune' in J-V Louis et al (eds), *Commentaire J. Megret : Le droit de la CE et de l'Union européenne* (Vol 2) (Editions de l'Université de Bruxelles, 1991) 291 and 298 as well as M Blumental, 'Implementing the Common Agricultural Policy: Aspects of the Limitations on the Powers of the Member States' (1984) 35 Northern Ireland Legal Quarterly 28 at 32: 'In relation to agriculture, however, Community rules seek not only to control but actively to manage the markets. It is an area where the exclusive competence of the Community as against that of individual Member States stretches furthest.' The Court itself has—occasionally—referred to the 'exclusive powers' under the agricultural title, cf Case 216/86 *Antonini & Prefetto di Milano* [1987] ECR 2919, para 10: '[A]s regards wholesale prices for pigmeat and beef and veal, the Community has the exclusive legislative power which precludes any action on the matter by a member state, it is not necessary to examine the question whether such national rules do or do not jeopardize the objectives or the functioning of the common organizations in the sectors under consideration[.]'

[14] On the concepts of dual and cooperate federalism, see R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009) Introduction.

[15] On the various reform instalments, see Section III.A below.

[16] We must not forget how 'sacred' the CAP was: it was the CAP that led the French government to adopt its cripplingly successful 'empty chair policy' culminating in the Luxembourg Accords.

The key to answering this question lies in the doctrine of pre-emption.[17] Since competences are potentialities—entitlements for future legislation—the enumeration of shared competences within a federal legal order will only provide abstract guidelines about the respective legislative responsibilities of either government. What matters is how these shared competences are *exercised*. The use of a particular pre-emption type thereby reveals the federal philosophy underlying the work of the Community legislator. Field pre-emption is based on the idea of two mutually exclusive legal spheres: *any* national legislation within the occupied field is prohibited. The most concrete form of pre-emption will occur, where national legislation literally contradicts a *specific Community rule*. Compliance with both sets of rules is (physically) impossible. In between these two extremes lies obstacle pre-emption. This third pre-emption type requires some *material* conflict between Community and national law. The Court will not go into the details of the Community scheme, but will be content in finding that the national law somehow interferes with the proper functioning or impedes the objectives behind the Community legislation.

This chapter will try to analyse the changing structure of Europe's agricultural law. Has the CAP moved from a—predominantly—dual to a—predominantly—cooperative federal philosophy as regards the structure of European law? The demise of field pre-emption and the emergence of softer forms of conflict pre-emption will be our constitutional compass. Since softer pre-emption formats will outlaw only parts of national legislation, they ratify the peaceful coexistence of Community and national legislation within a policy field and, as such, represent a cooperative federal arrangement.

We shall proceed in two steps. We shall first investigate the constitutional principles governing the 'old' CAP. It will be seen that the legislative choice in favour of a price intervention system and vertical harmonization has structured agricultural law in fundamental ways. It has been responsible for the aggressive pre-emption standard in this area of European law. The 'new' CAP, by contrast, has tried to move away from this intervention mechanism by 'decoupling' the CAP from product support. This change will open up previously pre-empted legislative spaces to the Member States. A second section will provide a—brief—analysis of the novel legislative regime. A conclusion will summarize the results and ask whether there are constitutional limits to legislative decentralization.

[17] On the Community doctrine of 'pre-emption', see E D Cross, 'Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis' (1992) 29 CML Rev 447; as well as R Schütze, 'Supremacy without Pre-emption? The very slowly emergent Doctrine of Community Pre-emption' (2006) 43 CML Rev 1023.

II. The 'Old' CAP: Common Market Organizations as Vertical Harmonization

From the outset, the Community legal order preferred a 'vertical' approach to the regulation of agricultural products. The original Community agricultural policy would be characterized by *product* support as opposed to *producer* support. Each product was to be regulated by a common market organization.[18] Each common market organization would, thereby, form a comprehensive regulatory code for the product(s) to which it applied. The Treaty had provided the Community legislator with a wide spectrum of regulatory methods. To establish European CMOs, the Community would be entitled to adopt 'all measures "required to attain the objectives of the CAP", in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports'.[19] In order to encourage production, the Community had chosen to influence supply and demand of the market of a product by regulating the latter's price. The Community's price policy was principally designed to ensure an adequate level of agricultural income and a coherent and stable production policy.[20]

The 'typical' CMO would contain three essential components.[21] It would first define the scope of the CMO by specifying the products falling under it. The heart of the CMO would be formed by provisions establishing the 'common price' system for production within the internal market. The internal regime would—thirdly—be protected by a special section that would filter external trade through a system of import quotas and levies. In the event of a

[18] However, instances of 'horizontal' legislation existed since the 1970s: cf Commission Regulation 645/75 (export levies), [1975] OJ L67/16; and Council Directive 79/112/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, [1979] OJ L33/1. Some of these horizontal measures even follow a minimum harmonization approach. In Case 4/75 *Rewe-Zentralfinanz GmbH v Landwirtschaftskammer* [1975] ECR 843, the Court identified Directive 69/466, [1969] OJ English Special Edition: I-565, based on Article 39 and 94 EC, as allowing for additional national measures. For an exemplary list of minimum harmonization in the field of agriculture, see M Wagner, *Das Konzept der Mindestharmonisierung* (Duncker & Humblot, 2001) 179–183.

[19] Article 34(2) EC.

[20] Case 26/69 *Commission v France* [1970] ECR 565.

[21] The prototype common market organization has been that in cereals. After a transitional regime established by Regulation 19/62 ([1962] OJ L30/933) it was put in place by Regulation 120/67 ([1967] OJ English Special Edition: I-33). The CMO was much amended and subsequently consolidated by Regulation 2727/75 ([1975] OJ L281/1). The latter Regulation was repealed in 1992 by Regulation 1766/92 ([1992] OJ L181/21), and again reformed in 2003 by Regulation 1784/2003 ([2003] OJ L270/78). Today, the CMO has been brought into Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [2007] OJ L299/1.

Community surplus, the CMO would provide for the eventuality of export subsidies.[22]

The regulation of common prices thereby evolved into *the* policy instrument of the CAP. Common prices were so essential that 'the common agricultural policy and the common price policy were almost identical concepts'. 'It is thus not surprising that the common price instrument has exercised a profound effect on the structure and nature of Community agricultural law.'[23] The central idea behind the price regulation was the 'market principle'.[24] According to that principle agricultural producers had to obtain their income from the market and not—at least not directly—from Community funds.[25] To secure the survival of the European agricultural sector and to stabilize the product markets, a sophisticated intervention system would be established to keep Community prices at a constant level. The socialist complexity of the organizational structure had important consequences for the division of legislative powers between the Community and the Member States. To what extent could national legislators tinker with a common market organization? This was the burning legal issue in the 1970s. The question was 'whether the compatibility of national legislation with the rules of the common organization should be tested in relation to the

[22] F Snyder distinguished three groups of common market organizations: those that provide for complete, partial, or no price guarantee (F G Snyder, above n 9, 73). A complete price guarantee was provided for products that constitute an important component of farm income (eg cereal, sugar, and milk products). For products that are of less economic importance for farm income, the price mechanism would either be conditional (pigmeat, wine), or the Community policy was limited to a frontier mechanism (poultry, eggs). G Olmi, above n 13 at 158–229, distinguished between CMOs that provide price guarantees (cereals, rice, sugar, diary products, etc), CMOs that provide for production aids (olive oil, tobacco, etc), and those CMOs that provide no guarantee (trees, flowers).

[23] R Barents, *The Agricultural Law of the EC* (Kluwer, 1994) 89. In Case 2/77 *Hoffmann's Starkefabriken AG v Hauptzollamt Bielefeld* [1977] ECR 1375, para 16 the European Court stated that 'the annual fixing of agricultural prices indeed constitutes a basic economic feature of the common agricultural policy as it is at present implemented'. The classical price model comprised three common price concepts: the target price, the intervention price, and the threshold price. The intervention price was the price at which the producer would be able to sell his produce to a public agency if no higher price could be obtained on the market. The target price represented the price at which imports from third countries may be purchased. The threshold price was a reflection of the target price for imports. The Treaty did not lay down the criteria for determining prices. The prices could therefore be set freely on a 'contractual' basis, thus leaving them to intergovernmental bargaining. This 'free price formation' was a feature of most market organizations. The annual setting of these prices pursuant to the procedure set out in Article 37(2) EC has been a melodramatic ritual ever since the establishment of the CAP.

[24] M Melchior, above n 1 at 439. The principle has been defined as guaranteeing a 'market to which every producer has free access and whose operation is regulated only by the measures provided for by the common organization', cf Case 218/85 *Association comite economique agricole regional fruits et legumes de Bretagne v A Le Campion (CERAFEL)* [1986] ECR 3513, para 20.

[25] In the words of F Snyder, the reference to the market principle is 'at best confusing' as it—misleadingly—'implies that CAP prices are determined by supply and demand, whereas in fact they are determined by negotiation and then administered' (Snyder, above n 9, fnn 6 and 105). Public authorities would be authorized to intervene in the common market to adjust the balance between supply and demand so as to keep prices at the desired level.

scope of the regulations forming the common organization as a whole, or simply in relation to the *specific provisions in those regulations*'.[26]

In order to identify the constitutional principles underlying the division of legislative responsibilities in the agricultural field, we need to dive into some agricultural case law. Two specific issues will be addressed in particular. First, which type of legislative pre-emption would the Community legal order adopt within a CMO? Second, in what circumstances were the Member States allowed to adopt national measures for a product governed by a CMO?

A. The Exclusionary Effect of CMOs: Between 'Field' and 'Obstacle' Pre-emption

Two approaches resurface in the early jurisprudence of the European Court. They have been referred to as the 'conceptualist-federalist' and the 'pragmatic' approach. The former involved automatic field pre-emption: the very existence of a CMO for a given product seemed to *a priori* preclude all national action within its scope.[27] By contrast, under the latter approach the Court would search for a substantial conflict between the CMO and the national legislation. By the end of the 1970s, the ECJ definitely preferred the pragmatic approach.[28] Since then, it was settled 'that the mere existence of a common organization does not *per se* exclude national legislation relating to its subject-matter, but care must

[26] J A Usher, 'The Effects of Common Organizations and Policies on the Powers of a Member State' (1977) 2 European Law Review 428, at 430.

[27] The—perhaps—most emblematic expression of the conceptualist-federalist rhetoric is made in Case 407/85 *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* [1988] ECR 4233, para 26: '[O]nce the Community has established a common market organization in a particular sector, the Member States must refrain from taking any unilateral measure even if that measure is likely to support the common policy of the Community. It is for the Community and not for a Member State to seek a solution to the problem described above in the context of the common agricultural policy.' See also Case 177/78 *Pigs and Bacon Commission v McCarren & Co Ltd* [1979] ECR 2161; Case 222/82 *Apple and Pear Development Council v KJ Lewis Ltd* [1983] ECR 4083. The Court occasionally makes these conceptualist-federalist statements in the context of free movement cases, where the existence of a CMO has merely an accidental character. According to M Waelbroeck, 'The Emergent Doctrine of Community Pre-emption—Consent and Re-delegation' in T Sandalow and E Stein, *Courts and Free Markets: Perspectives from the United States and Europe* (Vol 2) (Oxford University Press, 1982) 548 at 559, '[t]he *Galli* judgement is the clearest and the most extreme expression of the conceptualist-federalist theory . . . The only question to be examined, according to the Court, concerned the scope of the subject-matter covered by the Community regime.' However, a close reading of the case shows that only those national measures that impede the Community system will be pre-empted through the 'very existence' of a CMO.

[28] M Waelbroeck's fine analysis of the case law in the agricultural field revealed that (ibid, 555) 'during an initial period, the Court did not base its decisions on the *pre-emption doctrine as such*, but on the exclusionary effect of the type of legal acts employed, i.e. regulations . . . Thereupon followed a period of hesitation between the pragmatic and the conceptualist-federal approach. Since 1976, the pragmatic approach appears to have prevailed.'

be taken to ensure that the national legislation does not conflict with the specific provisions of that common organization, with the aims and objectives which may be deduced from those provisions or with general provisions of Community law which may apply within their scope'.[29]

But if the Court had not insisted on automatic field pre-emption, what type of pre-emption would generally apply for the common agricultural policy? Labelling the lion's share of the case law 'pragmatic' at best evades the question of *which* conflict criterion is employed.

The constitutional principles governing the doctrine of pre-emption inside common market organizations came to the fore in *Galli*.[30] An Italian decree controlled the prices of goods produced or distributed by large firms. The national measure was reviewed in the light of two common market organizations. In relation to cereals, the Community legislator had established a common price system which intended to create a 'single market' in cereals subject to a common administration. The Community legislator had thereby intended to establish a system that comprised a set of rules 'to meet all foreseeable situations'. A 'central place' within that system was held by a price mechanism.[31] The importance and objective of the price system was explained as follows:

> The purpose of this price system is to make possible *complete freedom* of trade within the Community and to regulate external trade accordingly, all in accordance with the objectives pursued by the common agricultural policy. *So as to ensure the freedom of internal trade the Regulation comprises a set of rules intended to eliminate both the obstacles to free movement of goods and all distortions in intra-Community trade due to market intervention by Member States other than that authorized by the Regulation itself.* . . . Such a system excludes any national system of regulation impeding directly or indirectly, actually or potentially, trade within the Community. Consequently, as concerns more particularly the price system, any national provisions, the effect of which is to distort the formation of prices as brought about within the framework of the Community provisions applicable, are incompatible with the Regulation. Apart from the substantive provisions relating to the functioning of the common organization of the market in the sector under consideration, Regulation No 120/67 comprises a framework of organization designed in such a way as to enable the Community and Member States to meet all manner of disturbances.[32]

The Court thus concluded that '*in sectors covered by a common organization of the market*—even more so when this organization is based on a common price system—Member States can no longer interfere through national provisions taken unilaterally in the machinery of price formation established under the

[29] J A Usher, *The Effects of Common Organizations and Policies on the Powers of a Member State*, above n 26 at 443. For the opposite view, see J A McMahon, *EU Agricultural Law* (Oxford University Press, 2007) 61: 'So, the existence of a common organization of the market precluded national legislation on matters covered by the common organization.'

[30] Case 31/74 *Filippo Galli* [1975] ECR 47.

[31] Ibid, paras 8–10.

[32] Ibid, paras 11–16 (emphasis added).

common organization'. National legislation falling within this field would conflict with the Community legislation as well as with the 'general provision of the second paragraph of [Article 10] of the Treaty according to which Member States must abstain from "any measure which could jeopardize" the attainment of the objectives of the Treaty'.[33] The reason given by the Court for this wide pre-emptive effect was that the Community legislator had intended to create a single market characterized by 'complete freedom of trade' in which 'all distortions' of competition due to national legislation were eliminated.

This nexus between the intention to create a true 'single market' in a product and the strength of the pre-emptive effect of the Community legislation re-emerged in *Pigs Marketing Board v Redmond*.[34] Here, the Court had to deal with the common market organization in pigmeat and found that the market in that product was 'regulated solely by the instruments provided for by that organization'.

> Hence any provision or national practices which might alter the patterns of imports or exports or influence the formation of market prices by preventing producers from buying and selling freely within the State in which they are established, or in any other Member State, in conditions laid down by Community rules and from taking advantage directly of intervention measures or any other measures for regulating the market laid down by the common organization are incompatible with the principles of such organization of the market.[35]

The Court concluded that 'any intervention by a Member State or its regional or subordinate authorities in the market machinery apart from such intervention as may be specifically laid down by the Community Regulation *runs the risk of obstructing the functioning of the common organization of the market*'.[36] This was not field pre-emption, but a very aggressive format of obstacle pre-emption. The latter would lead to the near-total exclusion of any national legislation within the scope of a common market organization. Thus, within a CMO, the silence of the Community legislator would not as such signify a gap that supplementary national legislation could close.

This constitutional consequence was spelt out in *van den Hazel*.[37] The Court had been asked to rule on the legality of a national measure that restricted the slaughtering of poultry in the light of the common organization of the market in poultrymeat. Noting that there was no concrete conflict between the national measure and any specific provision in the CMO, the Court still found the silence of the Community legislator to be significant: '[T]he absence does not stem from an omission or from an intention to leave measures of this nature to the appraisal of the Member States but is rather the consequence of a considered

[33] Ibid, paras 29–30.
[34] Case 83/78 *Pigs Marketing Board v Raymond Redmond* [1978] ECR 2347.
[35] Ibid, paras 57–58. [36] Ibid, para 60.
[37] Case 111/76 *Officier van Justitie v Beert van den Hazel* [1977] ECR 901.

choice of economic policy of relying essentially on market forces to attain the desired balance.'[38] The CMO was based on 'freedom of commercial transactions under conditions of genuine competition'[39] and would exclude all national laws since 'uncoordinated action is of such a nature as to cause discrimination between producers' and 'distort trade between Member States'.[40] There was thus a presumption in favour of the secondary exclusivity of the Community regime.

The jurisprudence equally showed that the Court did *not* employ the strongest version of pre-emption. National legislation was not found to violate European law *because* the Community had established a CMO. CMOs did not induce automatic field pre-emption within their scope as not every CMO constituted a complete system that would exhaustively regulate all aspects falling within its scope.[41] Instead, the Court employed an aggressive version of obstacle pre-emption to oust supplementary national legislation. Perhaps the clearest expression of the pre-emption standard emerges in *Compassion*.[42] 'Rules which interfere with the proper functioning of a common organization of the market are also incompatible with such common organization, even if the matter in question has not been exhaustively regulated by it[.]'[43] Emphasizing the unity of the common market, the Court traditionally insisted that a CMO would try to recreate the 'conditions for trade within the Community similar to those existing in a national market'.[44] National measures that impeded the proper functioning of the CMO or jeopardized its aims would be pre-empted by the Community legislation. While not as potent as field pre-emption, the virility of this functional conflict criterion was nevertheless remarkable. This aggressive pre-emption format came close to a dual federalist philosophy.[45]

[38] Ibid, para 16. [39] Ibid, para 18. [40] Ibid, para 22.

[41] For the standard formulation, see Case 16/83 *Criminal proceedings against Karl Prantl*, [1984] ECR 1299, para 13: '[O]nce rules on the common organization of the market *may* be regarded as forming a complete system, the Member States no longer have competence in that field unless the Community provides otherwise.'

[42] Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd* [1998] ECR I-1251.

[43] Ibid, para 41. A similar pronouncement had already been made in *Association comité économique agricole regional fruits et legumes de Bretagne v A Le Campion (CERAFEL)*, above n 24 at para 13: 'In order to reply to the question raised by the national court it is therefore necessary to ascertain whether and to what extent Regulation No 1035/72 precluded the extension of rules established by producers' organizations to producers who are not members, either because the extension of those rules affects a matter with which the common organization of the market has dealt exhaustively or because the rules so extended are contrary to the provisions of Community law or interfere with the proper functioning of the common organization of the market.'

[44] Case 4/79 *Société coopérative 'Providence agricole de la Champagne' v Office national interprofessionnel des céréales (ONIC)* [1980] ECR 2823, para 25.

[45] In Case 177/78 *Pigs and Bacon Commission v McCarren and Company Limited* [1979] ECR 2161 the Court had to decide on the compatibility of a national levy intended to subsidize export marketing with, inter alia, Regulation 2759/75 on the common organization of the market in pigmeat. Having repeated that 'once the Community has, pursuant to [Article 34] of the Treaty, legislated for the establishment of the common organization of the market in a given sector,

This strong pre-emption standard would hold sway over the CAP for over three decades.[46] The golden rule behind European agricultural cases seemed to be as follows: the closer the national measure was to the production or price formation of agricultural products, the more likely it would be pre-empted by the Community regime. National legislation dealing with prices at the production level would be presumed to be incompatible with Community law. By contrast, consumer price regulations would only violate European law where they jeopardize the objectives or functioning of a CMO.[47] The Court would thus adopt a distinction between 'product' related measures and 'marketing' measures, which we now also find in other areas of European law. This

Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it' (ibid, para 14), the Court considered the marketing system the Community had set up as '*intended* to ensure the freedom of trade within the Community by the abolition both of barriers to trade *and of all distortions in intra-Community trade* and hence precludes *any intervention by Member States in the market otherwise than as expressly laid down by the Regulation itself*' (ibid, emphasis added). The Court consequently found the national levy 'incompatible with the rules' on the free movement of goods '*and more particularly* under the provisions of Regulation 2759/75' (ibid, para 17, emphasis added). Similarly strong formulations are used in Case 222/82 *Apple and Pear Development Council v KJ Lewis Ltd and others* [1983] ECR 4083 where the Court inspected the common organization of the market in fruit and vegetables (Regulation 1035/72), finding that 'an *exhaustive* system of quality standards applicable to the products in question' existed, therefore preventing national authorities from imposing unilateral quality requirements unless the Community legislation itself provided for such a power. Even though the Court left it to the national court to investigate whether the national measure was 'incompatible with Community law' (para 25), the reference to the 'exhaustive' nature of the Community system makes it appear an empty phrase.

[46] For a relatively recent case, see for example Case 22/99 *Cristoforo Bertinetto and Biraghi SpA* [2000] ECR I-7629.

[47] This reading is supported by Case 65/75 *Ricardo Tasca* [1976] ECR 291. The case concerned an Italian law that fixed maximum *consumer* prices for sugar against the common market organization for that product. Cautioning that 'a strict distinction between maximum consumer prices and maximum prices applicable at previous marketing stages is difficult' 'due to the fact that on the one hand price rules at the stage of the sale to the ultimate consumer may well have repercussions on the price formation at the previous stages', the Court affirmed that national legislation dealing with the same marketing stages as the Community system will 'run a greater risk of conflicting with the said system' (ibid, para 6). Having looked at the sugar market, the Court held that a Member State would jeopardize the objectives of the organization, where it regulated prices in such a way as to directly or indirectly make it more difficult for sugar manufacturers to obtain the intervention price. The Court added that an indirect obstruction would exist where a national measure—without regulating the price at the production stage—fixed maximum selling prices for the wholesale or retail stages at such a low level that the producer found it actually impossible to sell at the intervention price (ibid, para 11).

The clearest manifestation of this distinction can be found in Case 216/86 *Antonini & Prefetto di Milano* [1987] ECR 2919, where the Court dealt with the CMO in pigmeat, beef, and veal. Here, the Court held that

> as regards wholesale prices for pigmeat and beef and veal, the Community has the exclusive legislative power which precludes any action on the matter by a Member State, it is not necessary to examine the question whether such national rules do or do not jeopardize the objectives or the functioning of the common organizations in the sectors under consideration; such an examination is necessary, however, when national measures are adopted in respect of retail or consumer prices and are thus in a field which does not fall within the exclusive powers of the Community. (ibid, para 10).

distinction between 'price' measures and all other national laws would influence the way in which the Court constructed the legal status of national measures adopted within a CMO.

B. National Caveats: Delegated Community Powers or Autonomous National Powers?

How would the Court conceive Community rules that referred to national action under a CMO? Theoretically, two answers are possible: the Court could either conceive of these 'authorizations' as Community delegations, or it could conceive of them as simple acknowledgments of autonomous national powers. The Court has often preferred the first solution when 'essential' elements of the CMO are concerned. Here, the powers 'left' to the Member States are constructed as federal authorizations. Where, on the other hand, non-essential aspects were at issue, the Court has had few problems in acknowledging the autonomous powers of the Member States.

Let us investigate the first scenario. In *Cucchi*,[48] the Court had to deal with an Italian surcharge on sugar imports. Italy contended that the measure was allowed under the CMO. The Court rejected this, clarifying that derogations from the general provisions of Community legislation 'must arise from an express provision or, at least, a form of words which make clear the Council's intentions in this respect'.[49] The Court, referring to its *Rey Soda* ruling,[50] extrapolated from it the following conclusion: '[T]he functioning of a common organization of the markets and in particular the formation of producer prices must in principle be governed by the general Community provisions as laid down in general rules amended annually with the result that any specific interference with this functioning is strictly limited to the cases expressly provided for.' The Community was 'in the absence of express derogation, alone competent to adopt specific measures involving intervention in the machinery of price formation'.[51] For matters affecting the price mechanism, the Member States would only be allowed to act, where the CMO so expressly provided.

But where the CMO did so expressly provide, how would these 'residual powers' be construed? In *Plimveeslachterij Midden-Nederland BV*,[52] the Court

[48] Case 77/76 *Entreprise F.lli Cucchi v Avez SpA* [1977] ECR 987. [49] Ibid, para 9.

[50] Case 23/75 *Rey Soda v Cassa Conguaglio Zucchero* [1975] ECR 1279. The case clarified that essential policy choices had to be made by the Community legislator and could not be delegated to the national authorities via express legislative caveats or a discretionary margin left under an implementation scheme. Here, the normative or de facto delegation of legislative powers from the Commission to the Member States would have violated the inter-institutional balance between the Commission and the Council. [51] Ibid, paras 31, 35.

[52] Joined Cases 47/83 and 48/83 *Pluimveeslachterij Midden-Nederland BV* [1984] ECR 1721.

gave an answer to that question.[53] The CMO in poultrymeat had been established by Regulation 2777/75. In Article 2, the Community legislator had left the issue of marketing standards to subsequent legislative measures.[54] This power had not been used. Would Dutch legislation on quality standards for the slaughtering of poultry nevertheless be pre-empted? The Commission argued this, claiming that 'the Community legislature expressed its intention to "occupy the ground" regarding matters governed by the organization of the market and the Member States may therefore no longer legislate on those matters'.[55] The Court agreed about the occupation of the field, but allowed the national action. How? Pointing to 'the Council's almost total failure to act', this CMO was still not able to function normally.[56] The Court, referring to its 'trustee of the common interest' doctrine, added that the exercise of national powers '*must not be regarded as involving the exercise of the Member State's own powers, but as the fulfilment of the duty to cooperate in achieving the aims of the common organization of the market which, in a situation characterized by the inaction of the Community legislature, [Article 10] of the Treaty imposes on them*'. 'Consequently, the measures adopted by the Member States may only be temporary and provisional in nature and they must cease to be applied as soon as Community measures are introduced.'[57] The Court thus projected the idea of the Member States acting as trustees of the common interest—an idea from its jurisprudence on the conservation of biological resources of the sea[58]—to the agricultural field. The Court thereby extended a dogmatic construction developed in the context of exclusive competences to the phenomenon of *legislative exclusivity*.

Let us now look at the second scenario. Where an issue would not affect the price mechanism—and thus be of only secondary importance for the CMO—the Court adopted a more generous approach. Member States would not have to point to an express authorization in the Community scheme. This was confirmed in *Jongeneel Kaas*.[59] The case concerned the common organization of the market in milk and milk products. Dutch legislation had laid down rules on the quality and types of cheeses which could be produced in The Netherlands.

[53] This CMO was weaker than a normal CMO (cf ibid, para 17): 'In order to answer the question raised by the College van Beroep it should first be recalled that the common organization of the market in poultrymeat, as at present laid down in Regulation No 2777/75, is based on a set of measures designed to stabilize the market and ensure fair process without resort to intervention measures of the kind provided for in other agricultural markets. According to Article 2, supply is to be adjusted to market requirements by means of a set of measures designed to promote better organization of production, processing and marketing, to improve quality and to facilitate the establishment of market forecasts and the recording of price trends.'

[54] Article 2 of Regulation 2777/75 ([1975] OJ L282/77).

[55] *Pluimveeslachterij Midden-Nederland BV*, above n 52 at para 12.

[56] Ibid, para 21.

[57] Ibid, paras 22–23 (emphasis added).

[58] For an analysis of this doctrine, see R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009 forthcoming) ch 3, Section II.

[59] Case 237/82 *Jongeneel Kaas BV and others v State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole* [1984] ECR 483.

The national regime was contested by Dutch cheese dealers. They claimed it was a violation of the Community organization of the market. The Court disagreed. Unlike other common market organizations, having as their purpose the support of the market by maintaining either a given price level or minimum quality standards, the present market organization did not (yet) contain any provisions on the quality of cheese. Thus, even though the Member States were obliged to refrain from taking any measures to undermine the common market organization,

> the fact that the legislation in question makes no mention of the designation and quality of cheese does not mean that the Community consciously and of necessity decided to impose on the Member States in that sector an obligation to adhere to a system of absolute freedom of protection. In the absence of any rule of Community law on the quality of cheese products the Court considers that the Member States retain the power to apply rules of that kind to cheese producers established within their territory.[60]

The Court confirmed the existence of autonomous national powers within the scope of a CMO in *Prantl*.[61] German legislation had limited the use of the *Bocksbeutel* bottle to quality wine produced in certain German regions, thus prohibiting the marketing of Italian wine in similarly shaped bottles. The Court started by repeating that 'once rules on the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise' and even agreed that the common organization in wine 'could be regarded as forming a complete system, especially as regards prices and intervention, trade with non-member countries, rules on production and oenological practices and as regards requirements relating to the designation of wines and labelling'. However, as regards rules on the presentation of products, the CMO had left the adoption of common rules in the discretion of a future Community legislator.[62] And while the Community legislator had indeed acted to protect the use of a bottle known as 'Flute d'Alsace', the Court rejected the contention that the Community had thereby exhaustively harmonized the issue of bottle shapes.[63] In light of the 'secondary importance' of the question of bottle shapes for the fundamental principles of the CMO, the possibility of adopting national legislation on the issue had not been totally pre-empted by the Community legislation.

In conclusion, the 'old' agricultural case law thus follows two lines of jurisprudence. For measures that concerned the price system, the Court requires specific authorization in the Community measure before a Member State can act within a CMO. The national action is—in the most extreme centralist version—conceived as originating from a delegated Community power that is exercised by

[60] Ibid, para 13.
[61] Case 16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 1299.
[62] Ibid, paras 13–15. [63] Ibid, para 16.

the national legislator acting as 'trustee' of the Community interest. This view brought the essential aspects of a CMO close to exclusive Community competences. However, for non-essential matters of a CMO, the Member States continue to act autonomously.[64] Here, legislative caveats only 'recognize' or 'declare' the residual and autonomous powers of the Member States, which a CMO has left untouched. (However, national action will be subject to Community review.[65]) The Court thus seems to acknowledge a more lax pre-emption standard in relation to agricultural 'flanking' measures. (The three principal flanking policies in agriculture typically follow three objectives: the health of persons and animals, consumer protection, and the quality of the products.[66] These 'horizontal' measures were often adopted under the dual legal basis of Articles 37 and 94 EC.[67]) Stricter national standards were generally allowed in these 'flanking' areas.[68]

[64] Subsequent case law has confirmed *Prantl*; cf Case C-312/98 *Schutzverband gegen Unwesen in der Wirtschaft eV v Warsteiner Brauerei Haus Cramer GmbH & Co KG* [2000] ECR I-9187, para 49; Case C-121/00 *Criminal proceedings against v Walter Hahn* [2002] ECR I-9193, para 34; and Case C-409/03 *Société d'exportation de produits agricoles SA (SEPA) v Hauptzollamt Hamburg-Jonas* [2005] ECR I-4321, paras 24–25.

[65] Case C-313/99 *Gerard Mulligan and Others v Minister for Agriculture and Food, Ireland and Attorney General* [2002] ECR I-5719. In that case, a legislative caveat allowed Member States a national choice under the common organization of the market in milk and milk products. While admitting that the Member States were in principle free to introduce certain national measures, the Court qualified this freedom by stating that 'this finding cannot lead to the conclusion that the Member States are authorised to introduce any type of … measure in any circumstances whatsoever. It must be observed, first, that, having regard to the fact that the adoption of a national measure such as that at issue in the main proceedings falls within the scope of the common agricultural policy, such a measure cannot be established or applied in such a way as to compromise the objectives of that policy and, more particularly, those of the common organization of the markets in the milk sector' (ibid, para 33).

[66] C Blumann, *Politique Agricole Commune* (Litec, 1996), 213–238.

[67] From the mid 1980s, Article 37 could also be chosen as the sole legal basis for these measures. See, in particular: Case 131/86 *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities* [1988] ECR 905, in which the Court clarified that consumer protection, protection of health and life of humans and animals were also objectives of Article 37. This was confirmed in Case C-269/97 *Commission of the European Communities v Council of the European Union* [2000] ECR I-2257.

[68] In relation to animal welfare, the approach of the Community legislator has been to lay down minimum standards, see for example: Directive 91/629 relating to the protection of calves ([1991] OJ L340/28), Directive 91/630 relating to the protection of pigs ([1991] OJ L340/33), Directive 98/58 relating to the protection of animals kept for farming purposes ([1998] OJ L221/23), and Directive 1999/74 relating to the protection of laying hens ([1999] OJ L203/53). More generally on minimum flanking measures, see also Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd* [2003] ECR I-5121, esp para 50. We should expect similar constitutional principles in this area as those that apply to industrial products. A cautioning note has, however, been voiced by C Blumann. According to this author, the transition from dual to cooperative federalism provoked by the new approach to harmonization in relation to industrial products could not necessarily be extended to agricultural products. Speaking about the 1985 White Book, the author notes: 'Le volet agricole et agro-alimentaire du Livre blanc s'avère des plus consistants. En effet, sur les 300 mesures annoncées, une centaine concerne ces produits. Leur importance n'est pas seulement quantitative, mais qualitative, car les produits agro-alimentaires cadrent mal avec la nouvelle approche de la Commission. D'abord, les

This Court's more lax pre-emption standard towards horizontal measures is likely to be generalized, and thereby become dominant, once the Community abandons the vertical approach to agricultural law and the price mechanism it entails.

III. The 'New' CAP: The Rise of Horizontal Harmonization

Why was there such a need for legislative uniformity under the old CAP? The insistence on uniformity in agricultural law was a direct result of its intervention method. The powerful pre-emption standard in this area of European law must be understood against this background. The fragility of the price mechanism required that any national legislation that would potentially affect it had to be banned as an unlawful interference with the Community regulatory regime. Uniformity followed the price mechanism. In the Court's own words: 'in a sector covered by a common organisation, *a fortiori where that organisation is based on a common pricing system*, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation at the production and marketing stages established under the common organisation'.[69] It followed that

> the functioning of a common organisation of the markets and *in particular the formation of producer prices* must in principle be governed by the general Community provisions as laid down in general rules amended annually, with the result that any specific interference with this functioning is strictly limited to the cases for which express provision has been made.[70]

This connection between the structure of the old CAP and the insistence on legislative uniformity has been emphasized in academic analysis:

> [I]n principle, every element of the intervention mechanism has to be regulated by the Community. As a result, common market organizations are characterized by a multitude of explicit and implicit prohibitions for the Member States. The Court's doctrine on the division of powers between the Community and Member States in the field of price intervention and the near-absolute prohibition of any unilateral action can largely be explained in terms of the uniformity requirement. It is standing case law that any unilateral intervention in the common mechanism of price formation is excluded . . . This explains why under a common system of price intervention the role of the Member States is limited to a strict application to individual cases of the Community rules concerned . . . By its very nature price intervention cannot take the form of framework

normes techniques relatives à ces produits sont quasiment inexactes, d'autre part, le secteur agro-alimentaire entrant de plain-pied parmi ceux relevant des exigences essentielles, en matières de santé, de sécurité des produits et de protection des consommateurs, le principe de reconnaissance mutuelle s'y avère quasi inapplicable et il importe d'opter en faveur d'une harmonisation législative de type classique' (C Blumann, above n 66 at 208).

[69] Case C-283/03 *A H Kuipers v Productschap Zuivel* [2005] ECR I-4255, para 42.

[70] Ibid, para 49.

legislation which has to be worked out by Member States according to their own situations and administrative structures.[71]

European federalism was in a stranglehold of the imperatives of the price mechanism. The ever greater 'centrifugal influence of the price intervention system on the agricultural legislation' had already emerged in the 1970s.[72] Shaken by monetary fluctuations in exchange rates, an ever more sophisticated intervention system had been put in place to stabilize the common market and bridge price differences between national agricultural markets. Beginning with monetary compensatory amounts and moving to export refunds, new subsidy mechanisms, and non-marketing premiums as well as conversion premiums, the Community system became increasingly complex and averse to national 'interferences'. The influence of such a legislative structure on the division of legislative power between the Community and the Member States was decisive.[73] The vertical approach, combined with the price support system, aligned the CAP to a dual federalist philosophy.

Has this changed? The reform effort of the last decade will indeed substantially alter the structure of European agricultural law. The shift from product to producer support is 'likely to have a substantial effect on the structure and features of Community agricultural law' with 'consequences for the tasks of the Community legislator, the division of powers between the Community and the Member States'.[74] The gradual abandonment of the price mechanism will potentially lead to a breaking up of (largely) occupied fields and, thereby, free legislative space for the national legislator. 'As a consequence, Community agricultural law will lose to an increasing extent its rather uniform character resulting from the formal equality brought about by price intervention.'[75] What are these fundamental reforms? Would they cause a shift from a—predominantly—dual to a—predominantly—cooperative federalism in the structure of agricultural law?

A. Restructuring the CAP: From Product to Producer Support

The 'old' CAP had originally emerged to cater for a situation of agricultural insufficiency of Europe. This situation had dramatically changed after two decades. Modern agricultural production methods had led to an impressive agricultural surplus in the Community. Yet, thanks to the price mechanism

[71] R Barents, *The Agricultural Law of the EC* (Kluwer, 1994), 227–228, 235–237.

[72] Ibid, 377.

[73] Ibid, 367: 'The uniformity principle has decisively influenced the structure of Community agricultural law. It explains, *inter alia*, why the position of the operator under the market and price policy is almost exclusively a matter of Community law and why, in general, the role of the Member States is limited to the strict application of the Community legislation. Moreover, this feature has significantly contributed to the legalistic structure of this field of law, as any divergent practice on the level may undermine its effectiveness and thus has to be prevented by the laying down of Community rules. The result is a strong centralization of agricultural legislation[.]'

[74] Ibid, 365. [75] Ibid, 371.

within the Community, this surplus could not be sold off on the world market as Community prices were above the world market level. By the end of the 1980s, internal and external pressure on the system had increased to such an extent that reform seemed inevitable.[76] The radical changes in European agricultural policy started in 1992. The MacSharry reforms reduced the price support for cereals (and beef) and began the process of 'decoupling' the CAP from product support. This was not yet a comprehensive reform. The latter would be suggested in the 'Agenda 2000'.[77] The Commission felt it was 'now time to formulate concrete proposals to reshape the common agricultural policy and prepare it for the next century'. There was 'an urgent need' for 'a greater decentralisation of policy implementation, with more margin being left to Member States and regions'. The Commission thus proposed 'deepening and extending the 1992 reform through further shifts from price support to direct payments, and developing a coherent rural policy to accompany this process'.[78] The Agenda 2000 proposals would structure the CAP into two 'pillars': income support and rural development.[79]

Reforms in both pillars would be continued and reviewed in 2002, when the Commission undertook a 'mid-term review'.[80] The review acknowledged the need to enhance the competitiveness of European agriculture by 'completing the shift from product to producer support with the introduction of a decoupled system of payments per farm'. It equally recognized the idea to '[s]trengthen rural development by transferring funds from the first to the second pillar of the CAP via the introduction of an EU-wide system of compulsory dynamic modulation and expanding the scope of currently available instruments for rural development to promote food quality, meet higher standards and foster animal welfare'.[81] To ensure a fair standard of living for farmers, the loss of farm income through cuts in agricultural prices would be 'cushioned' by compensating farmers through direct payments.[82] This did not necessarily mean total 'decoupling'. However, '[i]n order to achieve the proper balance in maximising the benefits of decoupling, the Commission propose[d] to accomplish the final step in the shift of support from product to producer by introducing a system of a single income payment per farm'. 'Such a system would integrate all existing direct payments a producer receives from various schemes into this single

[76] L A Patterson, 'Agricultural Policy Reform in the European Community: a three-level Game Analysis' (1997) 51 International Organization 135.

[77] Agenda 2000 for a stronger and wider Union (COM (1997) 2000 final (Volume I)), Bulletin of the European Union, Supplement 5/97.

[78] Ibid, 26–29.

[79] The major legislative fruit of the second pillar was Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) ([1999] OJ L160/80), whose Article 1 states: '(1) This Regulation establishes the framework for Community support for sustainable rural development. (2) Rural development measures shall accompany and complement other instruments of the common agricultural policy and thus contribute to the achievement of the objectives laid down in Article 33 of the Treaty.'

[80] Commission Communication: Mid-Term Review of the Common Agricultural Policy (COM (2002) 394 final).

[81] Ibid, 3.

[82] Ibid, 7.

payment, determined on the basis of historical references.'[83] As regards rural development, the Commission proposed 'to consolidate and strengthen the second pillar by increasing the scope of the accompanying measures and widening and clarifying the scope and level of certain measures'. This reinforcement of the second pillar was believed to lead to greater decentralization.[84]

In 2005, the Community adopted a new central legislative act for rural development.[85] More importantly still, the Community introduced the single farm payment. The central legislative act was Regulation 1782/2003 establishing common rules for direct support for farmers. (The Regulation would eventually be amended in 2009 and—in the interest of clarity—be repealed by Regulation 73/2009.[86]) The Regulation introduced a Single Payment Scheme that was horizontal to and independent of production.[87] Full receipt of the direct payment would henceforth be conditional on complying with statutory management requirements as defined in—horizontal—Community legislation in the areas of public, animal, and plant health; the environment; and animal welfare.[88] This 'cross-compliance' mechanism was a second facet of the new system of horizontal harmonization.

From 2003 onwards, the Community had also started to reform each European common market organization by inserting the single payment scheme. Substantive reform would—at this stage—be confined to some sectors in the first pillar.[89] However, the move towards horizontal legislation would finally lead to proposals to bring all existing sectoral market organizations under the umbrella of a single common market organization. This feat of technical simplification was achieved by Regulation 1234/2007—the 'Single CMO Regulation'.[90] The new horizontal Regulation establishes a common structure for most CMOs.[91] Admittedly, the Single CMO Regulation did not represent much substantive reform as it still paid partial homage to price control through public intervention in the internal and external market.[92] However, by the end of

[83] Ibid, 19. [84] Ibid, 24 and 10.

[85] Regulation 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) ([2005] OJ L277/1). [86] Below n 97.

[87] However, the Community legislator did not favour total decoupling; see Chapter 5 of the Regulation.

[88] Article 4 of Regulation 1782/2003 ([2003] OJ L270/1) and—now—Article 5 of Regulation 73/2009 ([2009] OJ L30/16).

[89] See Regulation 318/2006 (Sugar), [2006] OJ L58/1; Regulation 1182/2007 (Fruit and Vegetables), [2007] OJ L273/1; and Regulation 479/2008 (Wine), [2008] OJ L148/1.

[90] Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L299/1.

[91] The Regulation would not cover all CMOs as recital 8 clarified: 'Against this background, this Regulation should not include those parts of CMOs which are subject to policy reforms. This is the case with regard to most parts of the fruit and vegetables, processed fruit and vegetables and the wine sectors. The provisions contained in the respective Regulations (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1493/1999 should, therefore, be incorporated into this Regulation only to the extent that they are not themselves subject to any policy reforms. The substantive provisions of these CMOs should only be incorporated once the respective reforms have been enacted.'

[92] Cf Parts II and III of Regulation 1782/2003.

2007, the Commission conducted yet another review of the reform process in the form of a 'health check'.[93] These reform impulses led, in May 2008, to a new package for agricultural legislation.[94] In an explanatory memorandum the Commission now insisted that 'any remaining supply controls of the CAP (namely dairy quotas and set aside) should be removed'.[95] This commitment was translated into three agricultural Regulations in January 2009.[96] The first Regulation thereby expressly continued the past reform effort:

> As was the case with the CAP reform of 2003, with a view to enhancing the competitiveness of Community agriculture and promoting market-oriented and sustainable agriculture, it is necessary to continue the shift from production support to producer support by abolishing the existing aids in the Single CMO Regulation for dried fodder, flax, hemp and potato starch and integrating support for these products into the system of decoupled income support for each farm.[97]

B. The Rise of Cooperative Federalism: 'Breaking up' Pre-empted Fields?

Today's CAP is based on two pillars. In relation to the first pillar, the 2003 reforms had introduced a gradual shift from product to producer support. This was the heart of the changing structure of the CAP: 'La pierre angulaire de cette nouvelle étape du processus de réforme agricole lancé en 1992 est le principe de découpage : couper le lien entre soutien au revenue agricole et la production.'[98] Decoupling will eventually restructure all common market organizations. Under

[93] Commission Communication: Preparing for the 'Health Check' of the CAP Reform, COM (2007) 722 final.

[94] COM (2008) 306 final: Proposal for a Council Regulation establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers; Proposal for a Council Regulation on modifications to the common agricultural policy by amending Regulations (EC) No 320/2006, (EC) No 1234/2007, (EC) No 3/2008 and (EC) No [. . .]/2008, Proposal for a Council Regulation amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Proposal for a Council Regulation amending Decision 2006/144/EC on the Community strategic guidelines for rural development (programming period 2007 to 2013).

[95] Ibid, 3. However, according to the Commission, these proposals, while making a contribution to the overall reform effort, would not constitute a new fundamental reform (ibid, 4).

[96] Regulation 72/2009 on modifications to the Common Agricultural Policy by amending Regulations No 247/2006, No 320/2006, No 1405/2006, No 1234/2007, No 3/2008 and No 479/2008 and repealing Regulations No 1883/78, No 1254/89, No 2247/89, No 2055/93, No 1868/94, No 2596/97, No 1182/2005 and No 315/2007, [2009] OJ L30/1; Council Regulation No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations No 1290/2005, No 247/2006, No 378/2007 and repealing Regulation No 1782/2003, [2009] OJ L30/16; and Regulation No 74/2009 amending Regulation No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), [2009] OJ L30/100.

[97] Regulation 72/2009, Preamble 12.

[98] V Adam, 'Les Droits à paiement, une création juridique innovante de la réforme de la politique agricole commune' (2004) 475 Revue du Marché commun et de l'Union européenne 96.

the new regulatory system, farmers will be eligible to receive direct income support. Payment would not only come from Community sources, but so-called 'national envelopes' may exist as 'a Community-wide scheme with uniform payments to all producers would be too rigid to respond adequately to the structural and natural disparities and the diverse needs resulting therefrom'.[99] In the light of this new regulatory structure, can we identify a move towards greater decentralization and cooperative federalism? Would the 'new approach' under the CAP lead to a breaking up of previously pre-empted 'fields' through a revival of shared national regulatory responsibilities?

There is an element of speculation involved in attempting to answer this question. However, even if we will have to wait until the European Courts give us authoritative guidance, the very structure of the new agricultural legislation already proves insightful. Let us concentrate on the recently reformed CMO in wine.[100] Are there structural elements of cooperative federalism? The Community law envisages the existence of *national* support programmes to finance support measures in the wine sector.[101] Each Member State is free to choose the geographical level at which it wishes to implement these measures and may accommodate regional particularities, but must submit a draft five-year support programme to the Commission.[102] And in the context of the Community's grubbing-up scheme, 'complementary national aid' is expressly provided for in Article 106 of the Regulation.

Apart from these administrative structures, can we find instances where Member States are granted legislative freedom under the Regulation? One instance is offered by Article 28 allowing the Member States to 'provide for more stringent restrictions for wines authorised under Community law produced in their territory with a view to reinforcing the preservation of the essential characteristics of wines with a protected designation of origin or protected geographical indication and of sparkling wines and liqueur wines'. Another cooperative federal sign can be seen in the title on production potential and dealing with planting rights. Article 96 states: 'Member States may adopt stricter national rules in respect of the award of new planting rights or replanting rights.' While these instances may already be regarded as signals of a more cooperative agricultural arrangement in a specific—vertical—market organization, the real break with the CAP's dual federalist past will only be ratified when the Court eventually

[99] Regulation 1254/1999 ([1999] OJ L179/1), Recital 15 (and Articles 14–20). The discretion left to the Member States in the context of environmental protection has been regarded as 'considerable' under the 1999 'horizontal regulation' (M Cardwell, *The European Model of Agriculture* (Oxford University Press, 2004) 259): 'What is clear is that Agenda 2000 reforms have offered sufficient latitude for Member States to implement very different programs on grounds which may be objectively justified, but which may have a very different financial impact on participants. . . . [I]n the context of environmental measures, it is also clear that Member States enjoy the ability both to retain and introduce higher national standards[.]' (Ibid, 261–262).

[100] Regulation 479/2008, [2008] OJ L148/1.

[101] Ibid, Article 2.

[102] Ibid, Article 5.

rules on the pre-emptive effect of the new CMO. For the reasons referred to above, the decline of the price mechanism and the rise of direct income support are likely to introduce a less aggressive pre-emption standard into this field.

Can we already see concrete evidence for a move towards cooperative federalism in the CAP's second pillar? The new Regulation on rural development expressly states that '[a]ction by the Community should be complementary to that carried out by the member States or seek to contribute to it.' Complementary European action was deemed necessary as the objectives of rural development 'cannot be achieved sufficiently by the Member States given the links between it and other instruments of the common agricultural policy, the context of the disparities between the various rural areas and the limits in the financial resources of the Member States in an enlarged Union'.[103] Article 4 of the Regulation defines the three objectives of the Community's rural development policy as improving the competitiveness of the agricultural sector, improving the environment and the countryside, improving the quality of life in rural areas as well as diversification of the rural economy. And Article 5 obliges the Community to 'complement national, regional and local actions contributing to the Community's priorities'. Article 7—entitled 'Subsidiarity'—charges the Member States with the responsibility for implementing the rural development programmes at the appropriate territorial level, according to their own institutional arrangements. The commitment to the principle of subsidiarity is translated into the mechanism of national strategy plans.[104] Under the Regulation, the European Agricultural Fund for Rural Development (EAFRD) will refund costs incurred in the pursuit of rural development. In accordance with the principle of subsidiarity,[105] '[t]he rules on eligibility of expenditure shall be set at national level, subject to the special conditions laid down by this Regulation for certain rural development measures'.[106]

Europe's agricultural law is thus opening up to the principle of subsidiarity.[107]

IV. Conclusion: The Changing Structure of European Agricultural Law

The great majority of the European Community's powers are shared competences. Here, two public authorities—the European and the national level—may colegislate in the same area at the same time. The presence of shared competences within a federal order does not in itself signify a choice in favour of cooperative federalism. The constitutional experience of the American federation shows that a dual federalist rationale can equally structure the constitutional regime for

[103] Recitals 4 and 5 of Regulation 1698/2005, [2005] OJ L277/1.
[104] Ibid, Articles 10–14. [105] Ibid, Recital 61. [106] Ibid, Article 71(3).
[107] See generally E Rabinowicz, K J Thomson, and E Nalin, *Subsidiarity, the CAP and EU Enlargement* (Swedish Institute for Food and Agricultural Economics, 2001).

non-exclusive competences.[108] Various types of legislative conflict have been recognized in the jurisprudence of the European Court of Justice and—borrowing the terminology of American federalism—may be called 'field', 'obstacle', and 'rule' pre-emption. The use of field pre-emption reflects a dual federalist rationale: the total exclusion of the national legislators supports the understanding of two mutually exclusive legislative spheres. Softer pre-emption standards, by way of contrast, will represent a cooperative federalist paradigm. Here, the national legislators can legislate within the same field as the European legislator.

The Community legal order has traditionally employed an aggressive pre-emption criterion for its agricultural law, which almost approached the pre-emptive power of field pre-emption. The CAP tended towards a dual federalist philosophy. This article has tried to assess the likely changes in the legislative structure of the Common Agricultural Policy resulting from the reform efforts of the last decade. It was argued that there are signs that the Community legal order is in a process of creating cooperative European law. The gradual abandonment of the price mechanism and the shift from product to producer support constitutes the most radical reform of the CAP ever since the inception of the Community. This reform has caused a fundamental change in European agricultural policy with important 'consequences for the tasks of the Community legislator, the division of powers between the Community and the Member States'.[109] We speculated that the reform of the legislative regime presently governing the CAP will necessarily involve the repeal of old Community legislation. Vertical—that is: product-specific—Community legislation will increasingly be replaced by horizontal legislation. This evolution will parallel the shift caused by the 1985 White Paper and the 'new approach' to harmonization.[110] If this is the case, national governments will regain legislative space to adopt stricter national measures within hitherto (largely) occupied agricultural fields. This re-opening of national legislative spaces would bring the CAP closer to the philosophy of cooperative federalism.

But are there *constitutional* limits to this *legislative* decentralization? A negative answer would condemn the re-nationalization reforms in the areas of competition and agriculture to the constitutional gallows. Indeed, the argument has been made that in the light of the protected status of the *acquis communautaire*,[111] the Community cannot break up occupied fields to create new legislative space for national legislators.

The reasoning goes as follows: where the Community had established complete harmonization by means of a legislative act, the repealing Community

[108] R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009, forthcoming) ch 2.

[109] R Barents, *The Agricultural Law of the EC* (Kluwer, 1994) 365.

[110] For an analysis of this shift through the federal lens, see R Schütze, above n 108, ch 4, Section I.

[111] On the concept of the *acquis communautaire*, see C Delcourt, 'The Acquis Communautaire: Has the Concept had its Day?' (2001) 38 CML Rev 829.

legislator would have to demonstrate that the deregulatory measure would equally well achieve the integration of national markets.[112] The integrationist bias of the Community legal order would have a blocking effect that permanently solidifies legislative exclusivity. Where the Community legislator thus deregulates a subject, this *deregulation* would *not* mean *decentralization*. The field remains totally occupied by the Community legislator; only now does it reflect its intention to leave the field totally unregulated.[113] Such a view brings legislative exclusivity close to constitutional exclusivity.[114]

Supporters of this 'centralist' view have referred to *Ramel* to justify their claim.[115] There the Court had found that the legislative powers must 'be exercised from the perspective of the unity of the market'. 'Any prejudice to what the Community has achieved in relation to the unity of the market moreover risks opening the way to mechanisms which would lead to disintegration contrary to the objectives of progressive approximation of the economic policies of the Member States set out in Article 2 of the Treaty.'[116] However, these passages only superficially lend themselves to generally prohibiting the Community legislator from re-nationalization.[117] And, we can easily find a case illustrating the constitutionality of revoking the exhaustive nature of EC legislation in *Cidrerie Ruwet*.[118]

[112] D Dittert, *Die ausschließlichen Kompetenzen der Europäischen Gemeinschaft im System des EG-Vertrags* (Peter Lang, 2001) 131.

[113] Ibid, 132–133.

[114] K Lenaerts and P van Ypersele, 'Le Principe de Subsidiarité et son Contexte: Etude de l'article 3B du Traité CE' (1994) 30 Cahiers de Droit Européen 3 at 22–23: 'Par conséquent, les exercices de pouvoir ne sont réversibles que si la restitution de leur compétence aux Etats membres permet de réaliser aussi bien ou mieux les objectifs du traité . . . Ces considérations montrent que, quant à leurs effets concrets, les compétences exclusives par exercice ont tendance à se rapprocher des compétences exclusives par nature.'

[115] Joined Cases 80 and 81/77 *Société Les Commissionnaires Réunis SARL v Receveur des douanes; SARL Les fils de Henri Ramel v Receveur des douanes* [1978] ECR 927.

[116] Ibid, paras 35–36.

[117] These statements must be seen in the context of the special constitutional regime set up for the free movement of agricultural goods. According to Article 32(2) EC, the general principles for the free movement of goods would apply save as otherwise provided in Articles 33 to 38 EC. A Community regulation had allowed Member States to limit intra-Community trade in wine by introducing charges (cf Regulation 816/70 laying down additional provisions for the common organization of the market in wine (OJ, English Special Edition 1970 (I), 234)), and it therefore became 'necessary to find in [Articles 33 to 38] a provision which either expressly or by necessary implication provides for or authorizes the introduction of such charges' (para 26). The Court found no provision in the Treaty that could justify derogating from the fundamental principle of free movement of goods. The Community measure's authorization to re-introduce import charges created an obstacle to trade that was contrary to the Treaty. The judgment in no way implies that the Community legislator would be bound by the entire *acquis communautaire*. It was the fundamental free movement provisions—and not past legislative acts—that posed a limit to the discretion of the Community legislator. The absolute protection of the acquis communautaire cannot be derived from this ruling.

[118] Case C-3/99 *Cidrerie Ruwet SA v Cidre Stassen SA and HP Bulmer Ltd* [2000] ECR I-8749. Directive 75/106 EC on the harmonization of pre-packaged liquids ([1975] OJ L42/1) had originally undertaken 'full harmonization' to overcome all obstacles to the free movement of certain liquid foodstuffs resulting from national disparities in consumer protection standards. To that

In conclusion, revocability is not only constitutionally possible; it has been applied in the past to mean decentralization.[119] This 'empirical' result will be confirmed by the Lisbon Treaty, which will expressly allow for decentralization. According to Declaration 18, the Union may decide to 'cease exercising its competence'. This re-opening of legislative space would arise 'when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality'.[120] Shared competences are thus no one-way road—they allow for centralization as well as for decentralization. They grant the European legislator the freedom to periodically change the federal structure of European law.

effect, Article 4(2) excluded the marketing of pre-packages of volumes that differed from those exhaustively listed in Annex III of the Directive—this was the so-called exclusivity clause—while Article 5 guaranteed the free movement of products complying with the Community standard. The exclusivity of the uniform Community standard had been repealed by amending Community legislation. Henceforth, the Community regime represented only 'partial harmonization'. Member States were again entitled to permit the marketing of pre-packages that differed from those indicated in Annex III (ibid, para 43). While many Member States had reintroduced diverse national standards, in the present case, Belgium had not repealed the previously exclusive uniform Community standard within its territory. The question thus arose as to how the (by now) partial harmonization would interact with the free movement principles, in particular, the principle of moderated mutual recognition under *Cassis de Dijon*.

[119] Cf K Lenarts and D Geradin, 'Decentralisation of EC competition law enforcement: judges in the frontline' (2004) 27 World Competition 313–349.

[120] See Declaration 18 in relation to the delimitation of competences.