REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 13, NR. 3, 135-157, PARIS LEGAL PUBLISHERS © 2020

# Mutual Recognition, Pre-emption and De-centralisation in the Common Agricultural Policy

Annalisa Volpato*

*Assistant professor of European Administrative Law, Maastricht University*

## Abstract

*The CAP is a fundamental policy area which has experienced profound changes since its establishment in the early years of EU integration – changes in nature, organization and power balance between the EU and national level. Within this policy area, the principle of mutual recognition is traditionally considered inapplicable. However, the increasing decentralisation of the CAP and subsequent regaining of regulatory powers by the Member States may pave the way for a more significant application of this principle. Mutual recognition also finds application in some sectoral legislation in the field. Thus, the objective of this contribution is to reflect on the role of the principle of mutual recognition in light of this evolution and, in doing so, highlighting the correlations between this principle, pre-emption and decentralisation in EU agri-food law.*

## 1. Introduction

The Common Agricultural Policy (CAP) has long been the 'cradle of EU law', the area in which the most remarkable innovations of this legal system have occurred.[1] Despite being extremely relevant for the history of the EU – as well as for its budget and for the economy of its Member States – this policy area represents a particularly under-researched topic of EU law, whose legal framework and institutional principles are not widely known. Thus, many EU lawyers of today may ignore that, from comitology to the *Plaumann* formula, crucial institutional arrangements, judicial doctrines, and principles

* DOI 10.7590/187479820X16007576818870 1874-7981 2020 Review of European Administrative Law
The author would like to thank the editors of this special issue and the anonymous reviewer for their helpful comments on an earlier draft.

1 JA McMahon, 'The Common Agricultural Policy' in HCH Hofmann, GC Rowe and AH Turk (eds), *Specialised Administrative Law of the European Union* (Oxford University Press 2018) 511-531, 511. See also JA McMahon and MN Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar 2015); D Bianchi, *La Politique Agricole Commune: toute la PAC, rien d'autre que la PAC!* (Bruillant 2006) and M Cadwell, *The European Model of Agriculture* (Oxford University Press 2004).

have been developed in relation to 'agricultural products', hence within the scope of application of the CAP.[2]

In a certain sense, also the principle of mutual recognition finds its roots in the agri-food field. By considering the most famous and relevant judgments which have contributed to creating the notion and application of this principle, one can quickly realise that they mostly relate to goods derived from agricultural products. The famous judgment *Cassis de Dijon*[3] – considered to be the starting point of the mutual recognition system in the EU – concerned a fruit liqueur,[4] while other cases concerning the shape of margarine,[5] bread,[6] *fois gras*[7], poultry meat[8] – not to mention the 'beer purity'[9] and the 'durum wheat pasta'[10] sagas – are very often recalled as remarkable examples of the functioning of this fundamental principle for the internal market.[11]

Still, mutual recognition and agriculture are quite an unusual juxtaposition: the agricultural policy and products are, in fact, generally considered an 'infertile ground' for the principle of mutual recognition. The Treaty of Rome established the market for agricultural products as a special constitutional regime, ruled by principles distinguishable from those applied to industrial products.[12] Under the current Treaties, in Article 38(2) TFEU, the rules laid down for the establishment and functioning of the internal market apply to agricultural products only

---

2 According to art 32(3) of the Consolidated version of the Treaty establishing the European Community [2002] OJ C325/33 [EC Treaty], now art 38(3) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/49 [TFEU], the provisions of the CAP are applicable to agricultural products, defined as 'the products of the soil, of stock-farming and of fisheries and products of first-stage processing directly related to these products' in art 32(1) TFEU and specifically listed in Annex I 'List Referred to in Article 38 of the Treaty on the Functioning of the European Union' of the TFEU [2016] OJ C202/331 [Annex I].

3 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* EU:C:1979:42.

4 Although obtained from agricultural products, differently from wines, liqueurs are not directly covered by the definition of agricultural product by express exclusion: See Annex I, Chapter 22, ex 22.08 [1] ex 22.09 [1]. This provision was inserted by art 1 of Regulation No 7a adding certain products to the list in Annex II to the Treaty establishing the European Economic Community [1961] OJ 7/71.

5 Case C-261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* EU:C:1982:382.

6 Case C-358/95 *Morellato* EU:C:1997:149.

7 Case C-184/96 *Fois gras* EU:C:1998:495. See A Mattera, 'L'arrêt Fois gras du 22 octobre 1998: porteur d'une nouvelle impulsion pour le perfectionnement du marché unique européen' [1998] Revue du marché unique européen 113.

8 Case C-40/82 *Commission v UK (poultry meat)* EU:C:1984:33.

9 Case C-178/84 *Commission v Germany (beer purity)* EU:C:1987:126.

10 Case 407/85 *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* EU:C:1988:401 and Case C-90/86 *Zoni* EU:C:1988:403.

11 See, *inter alia*, C Barnard, *The Substantive Law of the EU* (Oxford University Press 2010) 158-163 and L Daniele, *Diritto del mercato unico europeo* (Giuffrè 2006) 71-72.

12 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 360 and C Blumann, *Politique Agricole Commune* (Litec 1996) 208.

'save as otherwise provided in Articles 39 to 44 TFEU'. Moreover, the principle of mutual recognition is of no help when the national measures can be justified by mandatory requirements of public interest, or when there is full harmonisation of the rules at the EU level.[13] While EU agricultural law is one of the most centralised policies at the EU level,[14] the marketing of products derived from agricultural production is also highly permeated by health and safety considerations.[15] Like all products destined to human ingestion, the free movement of agri-food products is easily derogated by invoking the ground of 'protection of health and life of humans, animals, or plants' in Article 36 TFEU, as well as by invoking the mandatory requirements of consumer protection, food safety, and protection of public health elaborated in the case law. It is not by accident that in the White Book on the completion of the internal market of 1985 – which launched the New Approach and which has the principle of mutual recognition as a fundamental axis – around one third of the envisaged measures of traditional legislative harmonisation concerned agri-food products.[16] According to Blaumann, the framework of the New Approach is ill-suited to these products and, in the field of agriculture, '*le principe de reconnaissance mutuelle s'y avère quasi inapplicable*'.[17]

Over the last decades, however, the CAP has undergone a significant evolution, moving from a 'vertical' to a 'horizontal' form of harmonisation[18] and

---

13 Case 120/78 *Cassis de Dijon* EU:C:1979:42. See, on the principle of mutual recognition, W-H Roth, 'Mutual Recognition' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017); J Agudo, 'Mutual Recognition, Transnational Legal Relationships and Regulatory Models' (2020) 13 Review of European Administrative Law 7; M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405; S Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work Because It Doesn't Exist' (2018) 43 European Law Review 224; C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013); W van Bellegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015) and L de Lucia, 'From Mutual Recognition To EU Authorization: a Decline of Transnational Administrative Acts?' (2016) Italian Journal of Public Law 90.

14 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 339.

15 While it is acknowledged that, in the EU, food policy is separate from agricultural policy (which deals with production and transformation of agricultural products more than with their circulation), it is important to recall (i) that the CAP legal framework contains also provisions on the marketing of agricultural products, and that (ii) recently, EU institutions are promoting a more holistic approach in the field of agriculture and food production, bringing the two policies closer together. See Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' (Communication) COM (2020) 381 final. See also M Cardwell, 'Towards an Integrated Agricultural and Food Policy: A Role for Diet?' (2019) 24 Drake Journal of Agricultural Law 207.

16 C Blumann, *Politique Agricole Commune* (Litec 1996) 208.

17 ibid (emphasis added).

18 The terminology 'vertical' and 'horizontal' is taken from Robert Schütze (n 12), and refers to the concepts of harmonisation which either cover extensively each single agricultural product separately (vertical) or apply to the agricultural sector in general, i.e. to multiple products (horizontal).

progressively expanding the role of the Member States in the regulation of this important sector. At the same time, the interpretation of the scope of pre-emptive effect of EU agricultural rules has arguably changed in the case law of the Court.[19] While previous research has already underlined the interplay between pre-emption and decentralisation,[20] little attention has been paid to the role of mutual recognition as a regulatory technique in this field. Yet, within the context of a broader analysis of this principle in this issue, the peculiar field of agriculture can bring an interesting contribution to the understanding of the application of mutual recognition in EU law. Thus, the objective of this contribution is to reflect on the role of the principle of mutual recognition in light of the CAP's evolution and, in doing so, highlighting the correlations between this principle and pre-emption and decentralisation in EU agricultural law.

The contribution will be structured as follows. Firstly, in Section 2, the main characteristics of the CAP and the pre-emptive effect of its measures will be recalled, underlining the extent of the scope of application – if any – of national regulatory autonomy and of mutual recognition. Section 3 will go through the evolution of this policy and of the case law, pointing out how this affected the application and operation of the free movement principles and potentially the role of mutual recognition. Considering that mutual recognition is a concept with many facets and applications,[21] the analysis of the *judicial* mutual recognition will be complemented, in Section 4, by an overview of instances of *regulatory* mutual recognition in EU agricultural law.[22] Lastly, the conclusion will reflect on the role of mutual recognition in the future of the CAP and of the decentralisation of shared competences.

## 2. The common agricultural policy: an overview

### 2.1. The establishment of the CAP and of the CMOs

Since the signing of the Treaty of Rome, the internal market has included agriculture, fisheries, and trade in agricultural products within

19 See infra 3.2.

20 See, in particular, R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337.

21 See W-H Roth, 'Mutual Recognition' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 427; M Poiares Maduro, 'So Close and yet So Far: the Paradoxes of Mutual Recognition' (2007) 14 Journal of European Public Policy 814.

22 The analysis will thus adopt the distinction put forward by J Pelkmans, 'Mutual Recognition in Goods. On Promises and Disillusions' (2007) 14 Journal of European Public Policy 702.

its scope.[23] However, in a post-war Europe still struggling to ensure food supplies and to increase agricultural production to a level capable of adequately feeding the European population,[24] this economic sector could not be left to the free market dynamics. Therefore, a special regime was established for it:[25] Title II of the EC Treaty, recast today in Title III of the TFEU (with remarkably little variations in its content),[26] was specifically devoted to agriculture, constituting *lex specialis* in relation to the law of the internal market.

Article 32 of the EC Treaty was clear in requiring that 'the operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy.'[27] The objectives of this CAP, established by the Treaty, were (i) to increase agricultural productivity; (ii) to ensure a fair standard of living for the agricultural community; (iii) to stabilize markets; (iv) to assure the availability of supplies; and (v) to ensure that supplies reach consumers at reasonable prices.[28] In the pursuit of these objectives, one should take into account the particular nature of agricultural activity, the need to effect the appropriate adjustments by degrees, and the fact that, in the Member States, agriculture constitutes a sector closely linked to the economy as a whole.[29] Thus, economic and social concerns were at the heart of this policy. For historical reasons, environmental concerns were not included among the original political aims of the CAP. Nevertheless, since the Treaty of Maastricht, primary law establishes the need to integrate environmental protection requirements into the definition and implementation of all EU policies.[30] Today there is no doubt that sustainability, including environmental sustainability, features among the CAP's priorities – a position destined to further in-

23 art 32(1) EC Treaty (now art 38(1) TFEU).

24 R Budzinowski, 'Food-related Challenges of the Common Agricultural Policy in the Context of the Development of Agricultural Law' in I Härtel and R Budzinowski (eds), *Food Security, Food Safety, Food Quality* (Nomos 2016) 40. See also European Commission, 'La politique Agricole commune expliquée' (2008) 6.

25 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337.

26 JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019) 1.

27 Now art 38 (4) TFEU.

28 art 33(1) EC Treaty and art 38(1) TFEU.

29 art 33(2) EC Treaty and art 38(2) TFEU.

30 art 11 TFEU. See, *inter alia*, on the integration of environmental concerns in the CAP, L Ferraris, 'The Role of the Principle of Environmental Integration (Art. 11 TFEU) in Maximising the "Greening" of the Common Agricultural Policy' (2018) 43 European Law Review 413; R Mögele, 'The Integration of Environmental and Climate Protection into the Common Agricultural Policy – Legal Concepts and Developments' (2018) 16 Zeitschrift für Europäisches Umwelt- und Planungsrecht 405 and JF Stoepker, 'Greening the New Goal of the Common Agricultural Policy of the European Union for 2020' in I Härtel and R Budzinowski (eds), *Food Security, Food Safety, Food Quality* (Nomos 2016) 167-174.

crease in the future of the CAP.[31] Moreover, consumer protection, animal welfare, and a high level of protection of human life and health are also objectives that need to be integrated in the pursuit of all EU policies.[32] Therefore, nowadays the range of objectives of the CAP actually extends beyond those listed in Article 38 TFEU, touching upon various economic, social and cultural aspects which concern this peculiar policy area.[33]

To pursue the objectives established in the Treaties, the Treaty of Rome gave the EU institutions the power to establish a comprehensive political and legal framework for European agriculture, which included the setting up of one or more agricultural guidance and guarantee funds.[34] Most importantly, Article 34 EC Treaty demanded the establishment of a common organisation of agricultural markets, which could take the form of (a) common rules on competition; (b) compulsory coordination of the various national market organisations; and/or (c) a European market organisation.[35] Unsurprisingly, the EU institutions favoured the third option, entailing the replacement of existing national market organisations of agricultural products with a fully integrated common market policy.[36] Thus, following the Conference of Stresa in 1958,[37] an agreement was reached that common market organizations (CMOs) for various agricultural products were to be established during a transitional period.[38]

Gradually, the EU legislator established 21 CMOs, each regulating one or more agricultural products:[39] there were, *inter alia*, a CMO for cereals,[40] a CMO

---

31 See Commission, 'The Future of Food and Farming' (Communication) COM(2017) 713 final and Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system (Communication) COM(2020) 381 final.

32 See, for consumer protection, art 12 TFEU and, for animal protection, art 13 TFEU.

33 See further Commission, 'The Future of Food and Farming' (Communication) COM(2017) 713 final, which enumerates also: '(i) to foster a smart and resilient agricultural sector; (ii) to bolster environmental care and climate action and to contribute to the environmental and climate objectives of the EU; (iii) to strengthening the socio-economic fabric of rural areas.'

34 art 34(3) EC Treaty.

35 art 34 EC Treaty (now art 40 TFEU).

36 FG Snyder, *Law of the Common Agricultural Policy* (Sweet & Maxwell 1985) 71.

37 Pursuant to art 43 EEC, during the transitional period the Member States had to convene an intergovernmental conference, which represented the first step in the establishment of general principles for the CAP. It is interesting to note that the Commission also invited to this Conference professional organisations established in the Member States – such as farmers associations, trade unions and industrial organisations, as observers: see D Bianchi, *De Comitatibus. L'origine et le rôle de la comitologie dans la politique agricole commune* (L'Harmattan 2012) 51.

38 The transitional period came to an end at midnight on 31 December 1969. The objective of the creation of the CMOs was mostly achieved during the transitional period, with the exception of, *inter alia*, potatoes and sheepmeat. See Commission, First General Report on the Activities of the European Economic Community 1958 (Office for Official Publication 1959) 76-83.

39 JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019) 14.

40 Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organisation of the market in cereals, repealed by Regulation 2727/75, then by Regulation 1766/92, and again reformed by Regulation 1784/2003 (Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals [2003] OJ L270/78).

for wine,[41] and a CMO for fruits and vegetables.[42] The approach followed was 'vertical' in the sense that it established a comprehensive regulatory code for the product(s) to which it applied.[43] The Regulations on these CMOs were very similar in content and structure, regulating matters such as: intervention; private storage; import tariff quotas; export refunds; safeguard measures; the promotion of agricultural products; state aid rules; marketing requirements; and the communication and reporting of data.[44] In general, a CMO would comprise three essential components: (i) the definition of the scope of the market, i.e. the products falling under it; (ii) the establishment of a 'common price' and provisions to stabilize it; and (iii) the regulation of external trade through a system of import quotas and levies.[45]

The establishment of common prices was considered the core policy instrument of the CAP, providing support to the European agriculture by ensuring that prices remained at a constant level. Thus, originally, European agricultural producers did not receive *directly* a subsidy from the Community. Their income was secured through a sophisticated system of *product* support, according to which the price was formally determined by supply and demand (the so called 'market principle'). However, the Community authorities could intervene to adjust its balance so as to ensure prices were kept at the desired level.[46]

### 2.2. The Powers of the Member States in the Original Model of the CAP

The CAP is a complex program composed by a mix of different policy instruments which have, as their aim, the pursuit of a set of policy goals.[47] In spite of being a *shared* competence between the Community and the Member

41 Actually, two: Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine [1970] OJ L99/1(on table wines) and Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions [1970] OJ L99/20 (on quality wines).

42 EEC Council: Regulation No 23 on the progressive establishment of a common organisation of the market in fruit and vegetables [1962] OJ 30/965 , repealed by Règlement n° 159/66/CEE du Conseil, du 25 octobre 1966, portant dispositions complémentaires pour l'organisation commune des marchés dans le secteur des fruits et légumes [1966] OJ L192/3286 (French official version).

43 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 341.

44 JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019) 14.

45 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 341.

46 ibid, 342.

47 R Mögele, 'The Integration of Environmental and Climate Protection into the Common Agricultural Policy – Legal Concepts and Developments' (2018) 16 Zeitschrift für Europäisches Umwelt- und Planungsrecht 419.

States, the CAP became *de facto* the most centralised Community policy. As we have seen, the establishment of a common market organisation for agricultural products was the cornerstone in the architecture and operation of this policy. Setting forth a comprehensive regulatory code for agricultural products at the EU level, the establishment of the CMOs entailed the progressive replacement of the Member States' pre-existing national market organisations to ensure the support of the national production and a degree of national autonomy.[48] This significantly affected the division of competences between the Community and the Member States, which gradually saw their regulatory autonomy eroded through the 'occupation of the field' by the Community.

Consequently, to what extent could the Member States have or retain the power to act in law in relation to agricultural products? This is a crucial question to understand to what extent (if any) the rules and principles of the internal market – including the principle of mutual recognition – are applicable in this field, since mutual recognition presupposes the existence of different rules enacted by national authorities.[49] The answer to this question depends not only to the enactment of EU legislation in a certain field, but also on the interpretation of the Court of the doctrine of pre-emption. In particular, whether the pre-emptive effect of EU agricultural law covers 'the scope of the regulations forming the common organisation as a whole, or simply in relation to the specific provisions in those regulations'.[50] On these aspects, the agricultural case law of the Court of Justice presents a quite complicated picture.

In the beginning, the Court of Justice faced the question of the compatibility of the existing national market organisations with the common market organisation in the transition period. The national market organisation remained in force before the end of the transitional period, whereas the first common organisations repeated literally the text of the Treaty provisions ensuring that the free movement of goods could be relied upon in the agricultural field in that time.[51] After the transitional period, these organisations were still considered to be applicable until they were replaced by a common market organisation, but they had to abide by the requirements of the internal market to the fullest extent

48 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 337.

49 M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 412.

50 JA Usher, 'The Effects of Common Organisations and Policies on the Powers of a Member State'(1997) 2 European Law Review 428, 430.

51 See L Gormley, 'Free Movement of Goods and Pre-Emption of State Power' in A Arnull and A Dashwood (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 367, citing Case C-5/79 *Procureur Général v Buys et al* EU:C:1979:238, Opinion of AG Warner, followed by the Court of Justice in Case C-251/78 *Denkavit Futtermittel GmbH v Minister für Ernährung, Landwirtschaft und Forschung des Landes Nordrhein-Westfalen* EU:C:1979:252.

possible.[52] As clearly stated in *Commission v Ireland*, 'agricultural products in respect of which a common organisation of the market has not been established are subject to the general rules of the [internal] market with regard to importation, exportation and movement within the [EU].'[53] Thus, the early cases, where the Court considered the limitation to the free movement imposed on agricultural products in light of the internal market rules and the principle of mutual recognition,[54] mostly took place in this initial situation where the centralisation of agricultural law had yet to happen.

The approach of the Court on the validity of national provisions and the role of the internal market rules *after* the adoption of a common organisation of the market, however, is much less clear.[55] In its early case law, the Court moved from an initial 'automatic field pre-emption' – according to which the existence of EU rules impeded *a priori* any form of State action – to an 'obstacle pre-emption' or 'pragmatic approach' – according to which the national rules were allowed in so far as, in so doing, they did not create a *conflict* with the EU rules.[56] Thus, in *Glocken,* the Court peremptorily held that 'once the Community has established a common market organisation 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'.[57] Similarly, in *Galli*, it stated that 'the *very existence* of a common organization of the market in the sense of Article [40(1)(c) TFEU] has the effect of precluding Member States from adopting in the sector unilateral measures capable of impeding intra-Community trade'.[58] This approach, defined as 'the clearest and most extreme expression of the conceptualist federalist theory' underpinning the automatic understanding of the doctrine of pre-emption,[59] appeared hence to preclude national action in any form within the field of agricultural law.

---

52 JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019) 14.

53 Case C-288/83 *Commission v Ireland* EU:C:1985:251 (potato imports), para 23. See also Case C-68/76 *Commission v France* EU:C:1977:48 (potatoes); Case C-231/78 *Commission v UK* EU:C:1979:101 (potatoes) and Case C-48/74 *Charmasson v Ministre de l'économie and des finances* EU:C:1974:137, 1396.

54 See the second paragraph of Section 1.

55 L Gormley, 'Free Movement of Goods and Pre-Emption of State Power' in A Arnull and A Dashwood (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 367.

56 R Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 46 Common Market Law Review 1023, 1037. See also M Waelbroeck, 'The Emergent Doctrine of Community Pre-emption—Consent and Redelegation' in T Sandalow and E Stein (eds), *Courts and Free Markets* (Clarendon Press 1982) 548-580.

57 Case C-407/85 *Glocken* EU:C:1988:401, para 26.

58 Case C-31/74 *Galli* EU:C:1975:8, para 27.

59 M Waelbroeck, 'The Emergent Doctrine of Community Pre-emption—Consent and Redelegation' in T Sandalow and E Stein (eds), *Courts and Free Markets* (Clarendon Press 1982) 559.

Nevertheless, this latter judgement can be read as already planting the seeds of the doctrine which later prevailed in the case law of the Court: the pragmatic approach.[60] The Court there 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 as established under the common organization.'[61] The focus of the Court was, therefore, on the obligation not to undermine or create exceptions to the common organisation which could jeopardise the attainment of the objectives set out in the Treaties. In the subsequent case law, national rules on the production or marketing of agricultural products were not completely precluded, as long as they respected the objectives of what is now Article 39 TFEU and did not conflict with the proper functioning of the CMO.[62] Clearly, these powers of the Member States were in fact residual, being allowed only if such action was not excluded explicitly or implicitly by the CMO.[63]

It has been noted that, although not applying the extreme version of the doctrine of pre-emption (the automatic field pre-emption), the Court appeared to oscillate between a strong and a weak application of the obstacle pre-emption doctrine.[64] On the one hand, it nearly totally excluded any measure, since 'any intervention by a Member State or by 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'.[65] On the other hand, it opened unexpected spaces for States' intervention, claiming for instance that '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'.[66] While the prohibition of jeopardising the objective and the functioning of the CMO was clear,

60 According to Waelbroeck, the pragmatic approach prevailed in the case law since 1976: See M Waelbroeck, 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation' in T Sandalow and E Stein (eds), *Courts and Free Markets* (Clarendon Press 1982) 555.

61 Case C-31/74 *Galli* EU:C:1975:8, para 29-30.

62 See inter alia Case 273/82 *Jongeneel Kaas* EU:C:1984:44.

63 JA McMahon, 'The Common Agricultural Policy' in HCH Hofmann, GC Rowe and AH Turk (eds), *Specialised Administrative Law of the European Union* (Oxford University Press 2018) 521.

64 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 345-347.

65 Case C-83/78 *Pigs Marketing Board v Redmond* EU:C:1978:214, para 60 (emphasis added).

66 Case C-237/82 *Jongeneel Kaas* EU:C:1984:44, para 13 (emphasis added). The case concerned Dutch legislation laying down rules on the quality and types of cheeses which could be produced in the Netherlands, adopted by the Dutch government when the CMO in milk and milk products was already in place.

the reason or the criterion for these differences in the approach remained unstated.[67]

In literature, the difference in the approach has been explained with reference to the different character of the CMOs concerned,[68] or – more convincingly – with whether the rule at stake concerned the 'core' of the CMO provisions, i.e. the price system. In the words of Schütze, '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'.[69] He thus recognised the criterion in the distinction between 'price' measures and all other measures, often 'flanking' measures concerning the health of persons and animals, consumer protection, and the quality of products.[70] This is particularly relevant as regards the possibility to apply the principle of mutual recognition. If the Court acknowledged a more permissive pre-emption standard in relation to the flanking measures, it is in relation to these measures that the rules of the internal market and its principles could find application in the case law.[71] At the same time, though, this area corresponds to measures which could easily be justified on the grounds of public health or consumer protection, *de facto* reducing the possibilities to invoke the application of the principle of mutual recognition in the actual cases.

Interestingly, in the cases where the Court makes a weak application of the obstacle pre-emption doctrine by allowing the existence of national rules next to the CMO regime, there is evident inconsistency in the choice of legal framework against which the national provisions are tested.[72] Sometimes they are tested against both the CMO and the Treaty, sometimes against one or the other.[73] A relevant case, in this sense, is *Celestini*.[74] In the case, concerning the sale of a consignment of wine which the German authorities impounded and returned to Italy for the alleged reason that it had been diluted with water, Ce-

67 L Gormley, 'Free Movement of Goods and Pre-Emption of State Power' in A Arnull and A Dashwood (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 368.

68 ibid, 368, referring to the cases notes on Van der Hulst's Zonen case by VerLoren van Themaat (in [1975] Sociaal-Economische Wetgeving 251) and Waelbroeck (in (1977) 14 Common Market Law Review 94).

69 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 347.

70 ibid, 351.

71 See, for instance, Case C-16/83 *Prantl* EU:C:1984:101, para 16.

72 L Gormley, 'Free Movement of Goods and Pre-Emption of State Power' in A Arnull and A Dashwood (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 369.

73 See e.g. Case C-154/77 *Dechmann* EU:C:1978:145; Case C-223/78 *Grosoli* EU:C:1979:196; Case C-5/79 *Buys* EU:C:1979:238; Joined Cases C-16/79 to C-20/79 *Danis* EU:C:1979:248; Joined Cases C-95/79 and C-96/79 *Keffer and Delmelle* EU:C:1980:17; Case C-216/86 *Antonini v Prefetto di Milano* EU:C:1987:322 and Case C-188/86 *Ministère public v Lefèvre* EU:C:1987:327.

74 Case C-105/94 *Celestini v Saar-Sektkellerei Faber* EU:C:1997:277.

lestini expressly invoked the principle of mutual recognition. More generally, Celestini tried to frame the case under the internal market rules of the Treaty. The Court rejected the argument, highlighting that the wine sector was extensively regulated at the EU level (including the prohibition of adding water to wine). The application of mutual recognition considerations therefore appeared to be excluded. However, since the CMO Regulation demanded imposed upon the Member State the duty to carry out systematic controls, those provisions had to be interpreted in consistency with the Treaty provisions. Therefore, in the spirit of cooperation and mutual assistance, the German authorities had to recognise the certificates obtained from the Member State of production and could carry out additional checks only in exceptional cases.[75]

This case, and more broadly the case law of the Court, shows that even in the CAP, the principle of mutual recognition can find a marginal – yet possible – application. The doctrine of pre-emption, in the evolving and oscillating interpretation of the Court, still leaves some space for the regulatory autonomy of the Member States. Thus, in the cracks between the CMO rules, or better yet at its margins, the rules of the internal market become relevant – and with them its principles. Even when the rule is centralised in its substance, thus voiding of purpose the mutual recognition of equivalence of the applicable *rules*, the necessity of implementation at the national level may still allow the application of the principle in the recognition of *certificates* issued by national administrations. As we will see, and considering the evolution of the CAP in the last years, a further increase in the relevance of the principle of mutual recognition in EU agricultural law is still possible. Thus, mutual recognition may yet become less marginal in the architecture of the market for agricultural products.

## 3. The Evolution of CAP: carving out a Space for Mutual Recognition?

### 3.1. The Reforms of the CAP

The CAP has evolved significantly from the described original model of 'control of the market in various agricultural products through a system of price support, backed up with an intervention system and control of trade'.[76] From the 1980s onwards – and especially during the 1990s – the original model started to face increasing problems. This was due to the first EU enlargement (with its consequences on the intervention stocks and on the EU

75 ibid, para 37.

76 As effectively summarised by JA McMahon, 'The Common Agricultural Policy' in HCH Hofmann, GC Rowe and AH Turk (eds), *Specialised Administrative Law of the European Union* (Oxford University Press 2018) 512.

budget),[77] as well as to the international pressure in the preparation for the Uruguay round of negotiations for the signing of the GATT in 1994.[78]

These issues fostered a rethinking of the nature of the policy, eventually resulting in the first structural reform of EU agricultural law – the MacSharry reform of 1992. The reform aimed to stabilise the agricultural markets and the EU budget expenditure, improve the competitiveness of EU agriculture, diversify the production, and protect the environment.[79] With this reform, the model began to shift from *product* support (through prices) to *producer* support (through income support). Direct payments to the producers on an area or headage basis were introduced to compensate for the decrease of the price support, and they were allocated regardless of the actual production. Compulsory set-aside and other accompanying measures (agri-environment programs, afforestation, early retirement and diversification) were also introduced. This process of 'decoupling' the funds allocation from the production continued with the 1999 reform, also known as Agenda 2000, which developed the idea of a new rural development policy. The policy was meant to encourage many 'bottom-up' rural initiatives while helping farmers to diversify, improve their product marketing, adopt more sustainable agricultural practices, and restructure their businesses.[80] As a result, the structure of the CAP was divided into two 'pillars': income support and rural development.[81] Whereas the first pillar included a support for the farmers' income through direct payments and market instruments, the second pillar reinforced these measures with strategies and funding to strengthen the EU's agri-food and forestry sectors, as well as environmental sustainability and the wellbeing of rural areas in general.[82]

77 ibid. See also Commission, 'La politique Agricole commune expliquée' (2008) 7.

78 G Medina and C Potter, 'The Nature and Developments of the Common Agricultural Policy: Lessons for European Integration from the UK Perspective' (2017) 39 Journal of European Integration 373, 377.

79 See, for an overview of the CAP reforms: A Cunha and A Swinbank, *An Inside View of the CAP Reform Process: Explaining the MacSharry, Agenda 2000, and Fischler Reforms* (Oxford University Press 2011); I Garzon, *Reforming the Common Agricultural Policy. History of a Paradigm Change* (Palgrave 2006); E Fouilleux, *La Politique Agricole Commune et Ses Réformes: Une politique à l'épreuve de la globalisation* (L'Harmattan 2003) and J Loyat and Y Petit, *La politique agricole commune (PAC). Une politique en mutation* (La Documentation Française 2009).

80 Commission, 'Agenda 2000: For a stronger and wider Union' (Communication) COM(97) 2000 final.

81 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 354.

82 See Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations [1999] OJ L160/80.

Reforms in both pillars took place in 2003,[83] 2005[84] and 2007.[85] In particular, the Single Payment Scheme (SPS) was introduced by Regulation 1782/2003.[86] Under the scheme, a producer is entitled to receive the full amount of direct payment on the condition that he/she complies with statutory management requirements as established in sectoral EU legislation on public, animal, and plant health; the environment; and animal welfare.[87] This mechanism of 'cross-compliance' thus introduced a horizontal element in the CAP, since it induced the producers of different agricultural products to abide by the same EU legislative acts across different CMOs.

A second and even more relevant element of horizontal harmonisation introduced in the new CAP was the establishment of the 'Single CMO'.[88] As noted in a Commission Communication of 2005, the integration of the various support schemes into the SPS could be mirrored in the common organisation of the markets.[89] Therefore, it was possible to move from a system of market organisations established vertically for each product towards 'a single set of harmonised rules in the classic areas of market policy such as intervention, private storage, import tariff quotas, export refunds, safeguard measures, promotion of agricultural products, state aid rules, communications and reporting of data'.[90] Accordingly, Regulation 1234/2007 established a common structure which simplified the previous framework and replaced the various market or-

83 See 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 and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 [2003] OJ L270/1 [Regulation 1782/2003].

84 See Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2005] OJ L277/1.

85 See Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [2007] OJ L299/1 [Regulation 1234/2007].

86 Amended in 2009 by Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 [2009] OJ L30/16 [Regulation 73/2009].

87 art 4 of Regulation 1782/2003. See R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 355.

88 ibid. See J Vandenberghe, 'The Single Common Market Organisation Regulation' in JA McMahon and MN Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar 2015) 62-85.

89 Commission, 'Communication from the Commission on Simplification and Better Regulation for the Common Agricultural Policy' (Communication) COM (2005) 509.

90 ibid, 8.

ganisations with a single one for most products.[91] Although initially it still contained traces of price control through public intervention,[92] the remaining supply control mechanisms were later removed by the three agricultural Regulations of 2009.[93]

Today, the legal framework of the CAP essentially comprises four basic acts. These regulate the direct income support for producers,[94] the rural development policy,[95] the single CMO,[96] and provide horizontal rules on the financing, management and monitoring of the CAP.[97] The content of these four Regulations carries the features of the described reforms since it is still fundamentally shaped around the axes of income support, rural development, SPS, and single CMO. These legislative acts were meant to regulate the European agricultural policy from 2013 to 2020. In the absence of an agreement on the multi-annual financial framework, however, a transitional measure is going to extend their application until 2022.[98] In the meantime, the legislative proposals for the future

91 See Regulation 1234/2007. Not all the CMOS are replaced by the Single CMO: See recital 8 of the Regulation, which implies the continued existence of the fruit and vegetables, processed fruit and vegetables, and the wine CMOs.

92 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 355. See also COM (2008) 306 final.

93 Council Regulation (EC) No 72/2009 of 19 January 2009 on modifications to the Common Agricultural Policy by amending Regulations (EC) No 247/2006, (EC) No 320/2006, (EC) No 1405/2006, (EC) No 1234/2007, (EC) No 3/2008 and (EC) No 479/2008 and repealing Regulations (EEC) No 1883/78, (EEC) No 1254/89, (EEC) No 2247/89, (EEC) No 2055/93, (EC) No 1868/94, (EC) No 2596/97, (EC) No 1182/2005 and (EC) No 315/2007 [2009] OJ L30/1; Regulation 73/2009 and Council Regulation (EC) No 74/2009 of 19 January 2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2009] OJ L 30/100.

94 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 and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 [2009] OJ L347/608 [Regulation 1307/2013].

95 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 [2013] OJ L347/487.

96 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L347/371 [Regulation 1308/2013].

97 Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 [2013] OJ L347/549. The legal framework is complemented by a wide array of delegated and implementing acts of the Commission: See, for an overview, JA McMahon, *EU Agricultural Law and Policy* (Edward Elgar 2019) 30-32.

98 The Commission proposed an extension already in October 2019: See Commission, 'Proposal for a regulation laying down certain transitional provisions for the support by the European Agricultural Fund for Rural Development (EAFRD) and by the European Agricultural Guarantee Fund (EAGF) in the year 2021 and amending Regulations (EU) No 228/2013, (EU) No 229/2013 and (EU) No 1308/2013 as regards resources and their distribution in respect of the year 2021 and amending Regulations (EU) No 1305/2013, (EU) No 1306/2013 and (EU) No 1307/2013 as regards their resources and application in the year 2021' (Proposal/Communication) COM(2019)

of the CAP are currently under negotiations through the ordinary legislative procedure as established in the Treaty of Lisbon.[99]

### 3.2. The Decentralisation of the CAP Reforms and its Implications

The gradual shift from product to producer support – and from a vertical to a horizontal structure of markets organisation – constituted not only a much needed simplification of the existing legal framework, but also arguably a rearrangement of the relationship between the EU and the national regulatory spheres. It is widely acknowledged that the described reforms represented a fundamental change in the structure of the CAP which had important 'consequences for the tasks of the Community legislator, the division of powers between the Community and the Member States'.[100]

In this regard, already the Agenda 2000 recognised the 'urgent need' for 'a greater decentralisation of policy implementation, with more margin being left to Member States and regions.'[101] Without necessarily signifying a 'renationalisation' of the policy, this has given an enhanced role to the Member States in European agricultural law, something which is clearly present in the legislative package presently in force. Not only do the Member States enjoy, *inter alia*, a certain freedom in the definition of criteria or of the threshold for the activities

581 final. An informal agreement between the lawmakers has been reached in July 2020: See G Fortuna, 'Lawmakers agreed to delay post-2020 CAP by two years' (*Euractiv*, 1 July 2020) <www.euractiv.com/section/agriculture-food/news/lawmakers-agreed-to-delay-post-2020-cap-by-two-years/> accessed 15 September 2020.

99 Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council' (Proposal) COM(2018) 392 final (CAP Strategic Plans Regulation); Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013' (Proposal) COM(2018) 393 (CAP Horizontal Regulation) and Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands' (Proposal) COM(2018) 394 (CMO Amending Regulation).

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

101 Commission, 'Agenda 2000: For a stronger and wider Union' (Communication) COM(97) 2000 final, 26.

which entitle the farmers to direct payments,[102] but they are also able to transfer funds between the two pillars to prioritise certain policy goals.[103]

This tendency towards the *decentralisation* of the CAP appears destined to increase significantly in the future legal framework. In line with the emphasis on 'active subsidiarity' which has emerged in the last years,[104] the proposals for the CAP beyond 2020 have been inspired by the concept that 'Member States should bear greater responsibilities', by establishing national strategic plans to meet the objectives and achieve targets agreed at the EU level. [105]In light of this further shift in responsibilities towards the Member States, the question of what this decentralisation means for the free movement principles becomes even more urgent, in particular as regards the principle of mutual recognition. In other words: does this re-gaining of regulatory space for the Member States affect the scope and application of the doctrine of pre-emption in the CAP?[106] Does it do so in a way which will allow the Court to apply the provisions of the Treaty on the internal market, and which will require the national authorities to recognise the agricultural products produced and marketed in another Member States according to domestic rules?

The answer to the question on the effects of the decentralisation or deregulation at the EU level of a certain field is far from being obvious; it has been argued that certain EU constitutional limits inherently hamper the breaking up of occupied fields to create new legislative autonomy for national legislators.[107] From this view, once a shared competence has been fully harmonised by the EU, the repealing of the EU measure does not necessarily entail the revival of national regulatory powers, which are possible only in so far as they are allowed, or in so far as they concur to achieve the integration of the national markets.[108] Thus, the occupation of the field is irreversible in the sense of EU exclusivity. However, there are examples in the case law of revocation of the exhaustive

---

102 Regulation 1307/2013, arts 4 and 10.

103 Regulation 1307/2013, art 14.

104 The term 'active subsidiarity' was used by the Task Force on Subsidiarity, Proportionality – and 'Doing Less More Efficiently' in its Report (Brussels, 10 July 2018) – to indicate an improved engagement with all stakeholders and local and regional authorities throughout the entire policy cycle: See Commission, 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking' (Communication) COM(2018) 703 final, 6.

105 Commission, 'The Future of Food and Farming – for a flexible, fair and sustainable Common Agricultural Policy' (Communication) COM(2017) 713 final, 9.

106 R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 360.

107 ibid, 359.

108 D Dittert, *Die Ausshließlichen Kompetenzen der Europaischen Gemeinschaft im System des EG-Vertrags* (Peter Lang 2001) 131. contra K Lenaerts and D Gerardin, 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline' (2004) 27 World Competition 313. The possibility to cease to exercise a shared competence is now expressly recognized in Declaration 18 (18.Declaration in relation to the delimitation of competences [2016] OJ C202/344) annexed to the Treaty of Lisbon.

nature of EU legislation (and, consequently, of pre-emption). In *Ramel*, the Court found that a provision allowing Member States to introduce charges in the intra-Community trade in wine was invalid since it violated the free movement of goods. It further said that the national legislative power must 'be exercised from the perspective of the unity of the market' without posing the risk of a 'disintegration contrary to the objectives of progressive approximation of the economic policies of the Member States'.[109] However, in *Cidrerie Ruwet*, a case concerning the directive on harmonisation of pre-packaged liquids which had initially entailed a full harmonisation and which was then amended in the sense of a partial harmonisation, the Court recognised that the repeal of that legislative act allowed the Member State to introduce diverse national standards on the matter.[110]

### 3.3. The Limited Decentralisation in the CMO and the Role of Mutual Recognition

In the specific context of the CMO, since Article 38 (2) TFEU establishes that the general principles of the internal market apply save as otherwise provided by EU agricultural measures, the regaining of regulatory powers by the Member States arguably has the effect of re-expanding the internal market provisions.[111] Thus, the decentralisation of the CAP should bring a wider application of the rules and principles of the internal market in the trade for agricultural products.

The Court indeed confirmed that Regulation No 1308/2013 leaves to the Member States larger leeway, and recognises the residual competence of Member States to adopt measures intended to attain an objective relating to the general interest other than those covered by the CMO – even if those rules are likely to have an effect on the functioning of the common market in the sector concerned.[112] Following the decoupling and abandonment of price support, this is true not only in relation to the 'flanking' aspects of the CAP, where we have seen that the principle of mutual recognition could already find a timid application, but also in relation to *price* measures. In this regard, the case *Scotch Whisky Association*, concerning a national measure imposing a minimum price of alcohol drinks, is emblematic. Despite the fact that the product fell under the scope of the single CMO, the Court did not hesitate to analyse the measure

[109] Joined Cases C-80 and C-81/77 *Commissionnaires réunis* EU:C:1978:87, para 36.
[110] Case C-3/99 *Ruwet SA* EU:C:2000:560, para 43.
[111] As noted in relation to *Ramel* by Robert Schütze: See R Schütze, 'Reforming the "CAP": From Vertical to Horizontal Harmonisation' (2009) 28 Yearbook of European Law 337, 360.
[112] Case C-2/18 *Lietuvos Respublikos Seimo narių grupė* EU:C:2019:962.

under the lens of Article 34 TFEU,[113] even if just to find that the national measure was justified for the protection of human life and health. Therefore, it can be concluded that, in the aftermath of the CAP reforms, no area of the CAP appears to be completely immune to the potential application of the free movement principles, marking a recalibration of the pre-emptive effects of this policy.

Moreover, Article 83 of Regulation 1308/2013 expressly allows the enactment of national rules for certain products and sectors. For instance, Member States may adopt or maintain national rules laying down different quality levels for spreadable fats,[114] or they may limit or prohibit the use of certain oenological practices and provide for more stringent rules for wines authorised under Union law produced in their territory.[115] Member States may, however, only adopt or maintain additional national provisions on products covered by a Union marketing standard if those provisions comply with Union law, in particular the principle of free movement of goods; they are further subject to the notification obligation for technical specifications.[116]

In relation to the marketing of agricultural products, however, the shift appears less drastic than what it could have been, since the Commission's proposal for a general marketing standard for all agricultural products was rejected in the legislative negotiations.[117] The unification of the framework for the different products has entailed a reduction of the 'density' of the EU rules on marketing and producer organisations. Nevertheless, Article 75 empowers the Commission to adopt delegated acts on marketing standards by sectors or products, regulating aspects such as the technical definitions, designation and sales descriptions, or the presentation, labelling and packaging. By directly regulating these matters at the EU level –[118]or by referring to international standards –[119]the EU still leaves limited room for manoeuvre to the Member States and, consequently, for the mutual recognition of national rules.

---

113 Case C-333/14 *Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland* EU:C:2015:845, para 26.

114 Regulation 1308/2013, art 83 (1).

115 Regulation 1308/2013, art 83 (2).

116 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services [1998] OJ L204/37.

117 J Vandenberghe, 'The Single Common Market Organisation Regulation' in JA McMahon and MN Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar 2015) 77.

118 See, for instance, Commission Implementing Regulation (EU) No 1333/2011 of 19 December 2011 laying down marketing standards for bananas, rules on the verification of compliance with those marketing standards and requirements for notifications in the banana sector [2011] OJ L336/23.

119 See art 3 (referring to UNECE standards) in Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [2011] OJ L157/1.

## 4. Mutual Recognition in Other Legislative Provisions under the CAP

The analysis of the case law has highlighted the expansion of conceptual premises for the application of the principle of mutual recognition, even though the actual application of this principle is still severely limited. However, clearer evidence of the increased role of mutual recognition in the common agricultural policy emerges from reading other sectoral legislative acts based on Article 43 TFEU. These present some examples of mutual recognition clauses and procedures.

In this regard, particularly interesting is the Regulation on the placing of plant protection products on the market, which establishes a mechanism of mutual recognition of authorisations issued by Member States divided into zones.[120] To facilitate mutual recognition – and to take into account environmental or agricultural circumstances specific to the territory of one or more Member States – automatic recognition is granted to the authorisations issued by a Member States in the same zone,[121] while the recognition of authorisations issued in other zones can be refused.[122] Moreover, it is worth noting that certificates on organic production issued by a national competent authority are recognised throughout the Union,[123] thus qualifying as an administrative act with automatic transnational effects.[124] The enforcement of the rules on organic production - and, more generally - the system of official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products rests not only on the principle of mutual recognition of controls, but also on the ad-

---

120 art 40-42 of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1 [Regulation 1107/2009].

121 The Member State to which an application for mutual recognition is submitted must grant it, but it can impose appropriate conditions and other risk mitigation measures deriving from specific conditions of use (arts 36.3 and 37.4). See also Commission, 'Guidance document on zonal evaluation and mutual recognition under Regulation (EC) No 1107/2009' SANCO/13169/2010 rev. 9.

122 Mutual recognition of an authorisation for a different zone may be granted 'provided that the authorisation for which the application was made is not used for the purpose of mutual recognition in another Member State within the same zone'. Mutual recognition is only voluntary in this case: See art 41 (2) (a) of Regulation 1107/2009. For the interpretation of the application of this procedure, see Joined cases C-260/06 and C-261/06 *Escalier and Bonnarel* EU:C:2007:659; Case C-384/16 P *European Union Copper Task Force v European Commission* EU:C:2018:176 and Case T-545/11 RENV *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission* EU:T:2018:817.

123 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L150/1.

124 L De Lucia, 'From Mutual Recognition to EU Authorization: A Decline Of Transnational Administrative Acts?' (2016) 8 Italian Journal of Public Law 90.

ministrative assistance and cooperation between authorities in the Member States.[125] In this context, mutual recognition does not find application directly under the Treaties as a form of negative integration of the internal market. Rather, it finds application as an instrument of positive integration enacted by the EU legislator for the functioning of the internal market and which concurs to the development of a European administrative space.

Finally, and very significantly, agricultural products are included in the scope of Regulation 2019/515 on the mutual recognition of goods lawfully marketed in another Member State.[126] Although arguably improperly named,[127] this regulation aims to strengthen the functioning of the internal market by establishing rules and procedures concerning the application by Member States of the principle of mutual recognition in individual cases.[128] While the detailed analysis of this regulation and its limits is beyond the scope of this contribution,[129] the inclusion of agricultural products within the scope of Regulation 2019/515 leaves no doubt that, today, the principle of mutual recognition plays a fundamental role also in the common agricultural policy and in the marketing of agricultural products.

## 5. Conclusions

The CAP is a fundamental policy area which has experienced profound changes since its establishment in the early years of EU integration

---

125 Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [2017] OJ L95/1, especially arts 102-106. Forms of mutual assistance between authorities of different Member States is foreseen also in the controls on the CAP spending: See Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy [2013] OJ L347/549, especially art 83.

126 art 2(1) of Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L91/1 [Regulation 2019/515]. Agricultural products were included also in Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1. The Commission is, however, invited to assess the feasibility and benefits of further developing an indicative product list for mutual recognition in order to help to identify which types of goods are subject to the Regulation: see Recital 12 of Regulation 2019/515.

127 S Weatherill, 'The Principle of Mutual Recognition: It Doesn't Work because It Doesn't Exist' (2018) 43 European Law Review 228.

128 art 1 of Regulation 2019/515. It is interesting to note that, although this is a form of *regulatory* mutual recognition (in the sense given by Pelkmans (n 22)), this Regulation strengthens the application of mutual recognition as a Treaty-based tool of negative integration.

129 Especially considering that the detailed analysis is carried out in L De Lucia, 'One and Trine. Mutual Recognition and the Circulation of Goods in the EU' in this issue.

– changes in nature, organization and power balance between the EU and national level. From the building of a highly centralized and specialized system of common market organizations, it has moved towards a form of decentralisation after subsequent reforms opened unprecedented space for Member States in the regulation of this policy area. The trend is destined to further increase in the legislative instruments which are currently under negotiation among EU institutions.

The analysis of case law of the Court of Justice has shown the complex interaction between the system of the CAP – in particular that of the CMO – and the Treaty principles of the internal market. The evolving and oscillating approach of the Court on the doctrine of pre-emption has especially shaped this interaction, indirectly affecting the applicability of the internal market provisions and potentially of the principle of mutual recognition. This principle – initially limited to the aspects or products for which a common EU regime was not yet established, or to a marginal application in the context of the 'flanking' measures to the CMO – can now find more fertile ground for its application in the new CAP. However, while the mutual recognition of certificates or of official controls is an integral part of the CAP and of related sectoral regimes, the principle has not yet unleashed its full potential in relation to the functioning of the CAP and the marketing of agricultural products in the EU. In this sense, the role of mutual recognition is relatively marginal but not completely absent (as was traditionally assumed).

The findings are revealing not only for the study of the under-researched CAP and its functioning, but also for the understanding of the principle of mutual recognition and its relation to decentralisation. In the scholarly debate, much attention has been devoted to the issues of equivalence of national measures[130] and of the degree of substantive approximation and mutual trust as preconditions for the application of mutual recognition.[131] At the same time, being 'relational' in its essence, this principle needs a certain degree of divergence in the rules or systems to carry out the comparison exercise at the basis of recognition.[132] Strongly centralised governance models, such as full harmonisation or common market organisations, are deemed incompatible with this principle. Yet, this analysis on the CAP seems to demonstrate that no policy area can be so centralised that mutual recognition does not – or could not –

---

130 J Agudo, 'Mutual Recognition, Transnational Legal Relationships and Regulatory Model' (2020) 14 Review of European Administrative Law 7, 8 and literature cited therein.

131 See, *inter alia*, M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, especially 416 and M Poiares Maduro, 'So Close and yet so Far: the Paradoxes of Mutual Recognition' (2007) 14 Journal of European Public Policy 814, 823.

132 J Agudo, 'Mutual Recognition, Transnational Legal Relationships and Regulatory Model' (2020) 14 Review of European Administrative Law 7, 16.

play a role, especially taking into account the different forms which this principle assumes in the EU.[133]

The aforementioned is particularly true in processes of decentralisation of a policy. In relation to the division of powers between the EU and the Member States, mutual recognition is often described as a restriction of the Member States' regulatory autonomy,[134] a horizontal transfer of sovereignty of the Member States[135] or, conversely, as a tool to preserve the national identities and peculiarities.[136] In a decentralised governance model, the principle of mutual recognition may be not only an instrument to overcome the existence of diverse national rules as in the past, but also as an instrument to effectuate and manage such a decentralised system in a way that preserves the attainment of Treaty objectives and the integrity of the internal market.[137] Thus, the regaining of regulatory powers of the Member States may be counterbalanced by the relational and collaborative nature of mutual recognition. In this perspective, and in light of the recent emphasis on the principle of subsidiarity and decentralisation in shared competences, the evolution of the CAP and its implications may serve as an important laboratory for the future of the system of division of competences between the Union and the Member States.

133 M Poiares Maduro, 'So Close and yet so Far: the Paradoxes of Mutual Recognition' (2007) 14 Journal of European Public Policy 814, 822.

134 Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 411.

135 SK Schmidt, 'Mutual Recognition as a New Mode of Governance' (2007) 14 Journal of European Public Policy 5, 672.

136 A Mattera, 'Le principe de reconnaissance mutuelle : instrument de préservation des traditions et des diversités nationales, régionales et locales' [1998] Revue du marché unique européen 5.

137 This role of managed mutual recognition has been observed in the financial sector by W-H Roth, 'Mutual Recognition' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 448.