

C.E.D.R.



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Europäisches Agrarrechtskomitee**

**XXV European Congress and Colloquium of Agricultural Law
Cambridge – 23 to 26 September 2009**

**XXVe Congrès et colloque européens de droit rural
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Commission III

**National Report – Rapport national – Landesbericht
Poland**

Scientific and practical development of agricultural law in the EU,
in countries and in the WTO – Développement scientifique et
pratique du droit rural dans l'UE, dans les pays et dans l'OMC –
Wissenschaftliche und praktische Entwicklung des Rechts des
ländlichen Raums in der EU, in den Ländern und in der WTO

Prof. Dr. Roman Budzinowski – University of Poznań
Prof. Dr. Małgorzata Korzycka-Iwanow – University of Warsaw
Sebastian Balcerak (MA) – University of Poznań,
Chief Specialist at OCEI

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National report

POLAND

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OCEI

- I. Main legal developments in the framework of WTO with regard to rules, dispute settlement and context of multilateral negotiations - an overall assessment (here answers to points: 1, 2, 3 of the questionnaire).**

In the course of the recent months (i.e. in 2008 calendar year and in the first quarter of 2009) the legal foundations of the World Trade Organisation shaped by the agreements resulting from the Uruguay Round multilateral negotiations have not been changed or made subject to any binding review. As regards the sphere of agricultural activity and agricultural trade, the commitments of WTO Members (including the European Communities) persist to be driven by *Agreement on agriculture* (URAA). However, this shall not mean that the WTO activity in the latest months has decreased and that the legal development of WTO has been weakened.

The proof for that lies in the intense multilateral negotiations led in the framework of the Doha Development Agenda (DDA) which aim at drafting the legal path for the next stage of world trade liberalization, including – in particular – trade in agricultural goods. Due to the complex set of factors influencing the talks, any deliberations on the final text of the new agreement (especially with regard to the date of adoption and its entering into force) carry the burden of uncertainty. Nevertheless, already available drafts of the new elements of the *Agreement on agriculture* allow for at least a preliminary assessment of possible directions the heralded changes might follow.

For the purpose of such assessment it would be helpful to make a working assumption according to which within the changes currently being prepared one might differentiate modifications of WTO rules of both quantitative and qualitative nature. The first group refers to those conclusions already taken which present the mathematical side of the next step of liberalization process (particularly in the field of market access, reductions of domestic support, pace of abolishing export subsidization, etc.). The second category of changes to the WTO legal framework happens to be of a greater interest for the school of agricultural law, as it opens the room for both theoretical and practical discussion. This is the case especially when it comes to the submitted changes to the current definitions and rules on domestic support not subject to reduction commitments (i.e. the so-called *green box* measures).

The source for these considerations rest in the *dossier* prepared by the Chairman of DDA agricultural negotiations, Ambassador C. Falconer of 30 April 2007¹. As negotiations followed the document evolved to become *modalities* of the new agreement². A thorough analysis of its consecutive versions renders it possible to read the negotiating background of the amendments. Later on, this allows for a more precise studying of the legal objectives of future WTO rules.

It needs to be underlined in this place that any assessment of both the consequences and impact of particular negotiating stages at DDA level upon the structure of Community agricultural law should take into account that while shaping its agricultural policy and legal mechanisms the Community is used to anticipating the introduction of changes to the WTO regime, so that the new provisions would not require the EC to launch fundamental sectoral reforms and bring major changes to the legal system of EC's agricultural *acquis*. In principle, the legal solutions the Commission usually negotiates at WTO level have either already been introduced to the Common Agricultural Policy or they have already been addressed by pending legal initiatives in the EU. By doing this, the Commission strengthens its position at the international scene and create itself as a progress initiator in liberalization process of agricultural trade.

To give a concrete example for possible WTO legal development in the field of agriculture which the *modalities* paper signals to WTO Members one must point out to a modernized legal structure for decoupled income support, currently subject to regulation under Annex 2 to the *Agreement on agriculture*³. The new *modalities* language on green box (par. 6a of Annex 2 URAA) – in its wording of December 2008 – distinguishes between two essential scenarios when dealing with *decoupled income support*. One is the establishment of an appropriate base period (i.e. historical, fixed, defined and unchanging) with detailed criteria in case of the Members' willingness to carry out an exceptional update of the already notified base period. The other one is the establishment of a base period which is not historical (i.e. only fixed, unchanging and not based on any future factor use of production). It appears from the text that the core distinction between the two subparagraphs within point a) refers to the possibility of Members not to apply a *historical* base period.

Putting it very simple, the meaning of the new rules for *green box* support for WTO Members lies in the establishment of a new legal framework drawing the guidelines for carrying

¹ Dok. 2989: Communication from the Chairman of the Committee on Agriculture, Special Session: 'Challenges Paper', Geneva, 2007. The second version of this document was published on 25 May 2007.

² See docs.: of 17 July 2007 *Draft modalities for agriculture*; doc. TN/AG/W/4/Rev.1 of 8 February 2008 (08-0611) *Revised draft modalities for agriculture*, doc. TN/AG/W/4/Rev.2 of 19 May 2008; *Revised draft modalities for agriculture*, doc. TN/AG/W/4/Rev.3 z 10 July 2008; *Revised draft modalities for agriculture*, doc. TN/AG/W/4/Rev.4 of 6 December 2008; *Revised draft modalities for agriculture* (08-6017).

³ New wording of certain provisions of Annex 2 of the URAA is contained in Annex B to the document TN/AG/W/4/rev.4 p. 39.

out internal reforms of direct support schemes (incl. the first introduction of decoupled income support schemes) the text implies that there exists the possibility of Members to *establish* appropriate base periods (i.e. historical, defined, fixed and unchanging being the mandatory elements thereof) – understood as other base periods than the base periods already notified or understood as new base periods in case of no previous notifications being submitted by the Member concerned. In both cases, the text provides that the prerequisite for this possibility is the existence of a *substantially different decoupled income support*. If properly interpreted, the very essence of the two subparagraphs is the following:

- Members are not allowed to depart from the obligation to establish a *historical* base period by claiming that they have not made use of this type of payment and thus have not notified it regardless of Members' capacity to collect necessary historical record. Members are not allowed to derogate from the obligation to set up a *historical* base period when introducing payments consisting *de facto* of two substantially different types of programmes with only one being deprived of the possibility to collect necessary historical record.
- Members willing to introduce new programmes with new appropriate base periods will have to prove that the new programme in question is a *substantially different decoupled income support* from the one already notified in accordance with par. 6 in order not to be subject to the criteria of an *exceptional update* referred to in the first subparagraph⁴.

Although it might seem to be a purely technical character of legislative changes it will certainly be fundamentally important for the continuation of decoupled income support models in WTO Members with greatest share in *green box* subsidies (i.e. EC, U.S. and Japan).

Additionally to the possibility to update the base period, which – for the EC – happens to be the core element of the single payment⁵, what should also be noted with acknowledgement to the European Commission's negotiating tactics is the introduction to the draft URAA amendments of the possibility to transfer payment entitlements to decoupled income support⁶.

While observing the situation in the DDA negotiations across the latest months a few remarks might be drawn on the linkage between legislative activities of the EU institutions and the legal developments at international level. Suspending the talks on *modalities* twice could seriously distort the planned schedule and scope of works in the EU Agriculture Ministers

⁴ Detailed conditions and criteria for base period updating have been set in the following way: "*producer expectations and production decisions are unaffected, in particular due to (a) ensuring that any updated base period is not only a significant number of years in the past⁴ but is also determined and promulgated by the administering authority in such a way that the updated base concerned could not have been reasonably anticipated by producers such that their production decisions could be materially altered, (b) that such updating is not made in conjunction with, or otherwise amounts de facto to, a decision to increase the uniform unitary rate per crop⁴ and (c) that this updating shall not, in itself or otherwise by reason of its introduction, have the effect, directly or indirectly, of circumventing the obligations regarding domestic support measures and price support to producers pursuant to paragraph 1*".

⁵ On grounds of Regulation (EC) No 1782/2003 and Regulation (EC) No 73/2009 base period and historical reference amounts are the starting point for the allocation of payment entitlements and for the calculation of their unit value. On top of that, the principle of historical reference serves for the determination of budgetary ceilings for direct payments in particular EU Member States.

⁶ According to the new wording of point 6a of Annex 2 to the URAA: "*Transfer of entitlements to existing decoupled income support between producers or landowners shall not be precluded.*"

Council with regard to *health check* of the CAP and preparatory discussions on the future model of European agriculture (in particular when it comes to direct payments). Had the negotiations been successfully completed in July 2008 it would have given both to the Council and the Commission the possibility to make adaptations to the EC's agricultural legal system in the course of *health check* and would have been the best justification for certain solutions (both for changes accepted and rejected by the Commission). In other words, the pace of ongoing DDA negotiations created to a certain extent political pressure on the Agriculture Ministers Council. Having known the most probable final wording of the draft *modalities* the EU would have been able to make relatively firm assumptions and assessment of the WTO regulatory environment on the eve of the introduction of significant changes to the EU's agricultural policy – also with regard to aspects of budgetary nature. However, this was not the case.

Lack of the agreement on *modalities* was the reason for the separation of the EU legislative path from the WTO DDA negotiating process. Because of the continuous suspension of the multilateral talks the *health check* exercise became detached from WTO environment. Should the *modalities* paper be adopted in 2010 it will be already too late to act at the EU level. That seems to be a serious problem, because what is left now for the Commission is either to claim the current agricultural legal framework as already conformed and in line with the final text of the *modalities* (regardless of the eventual outcome of negotiations) or to submit some legislative modifications to the Council and by this start the discussion on decoupled income support all over again.

In general, the enter into force of the *health check* provisions related to direct support regime was not in harmony or in anticipation to the *modalities* text of 6 December 2008. Thus, so far at the international level the *health check* legal framework will be reviewed and assessed only with respect to its conformity with the current language of URAA. This is at the same time the basic conclusion drawn from the aforementioned considerations on the legal developments of WTO rules in the area of agriculture.

From the other WTO developments which might be of importance for the discussion on international legal conditions of European agriculture what should be recalled is the long awaited notification of direct support schemes excluded from reduction obligations under Art. 18(3) of the URAA committed by the EC in February 2009.⁷ For the school of agricultural law it is of great interest how the European Commission classifies income support schemes against the terminology and criteria of WTO. Explanation attached to the notification dossier together with the discussion which will surely emerge in the WTO Agriculture Committee will be particularly useful for considerations on inter alia legal nature and character of the decoupled single payment.

One of the emanations of WTO functioning in practice is the frequency of legal disputes launched by Members on grounds of trade issues. According to the situation in the end of March 2009, the EC was actively involved in 34 dispute cases having as their subject the application of WTO agreements⁸. The EC mostly complains about or defends itself against Argentina, Brazil, Canada, China, Colombia, Ecuador, Honduras, India, Japan, Mexico, Nicaragua, Panama, Chinese Taipei, Thailand and the US. Therefore, the experience shows that the EC either challenges or defends itself against countries from both Americas and to a lesser extent against South-East Asia countries. Moreover, the primary law relations between the EC and the ACP countries find their reflection in the lack of any disputes with representatives of that region. A

⁷ See doc. G/AG/N/EEC/58 of 24 February 2009 (09-0957).

⁸ In 14 of these cases the EC is the complaining party while in the remaining 20 cases the EC is on the defending side

similar phenomenon might be seen when it comes to European countries not having the status of the EU Member States. It is thus not surprising that this rule is followed in trade preferences and political support of the EC towards these countries on grounds of Common Agricultural Policy, particularly within the common organisation of agricultural markets⁹.

Agriculture related disputes in which the EC has been involved in the course of the recent months refer to four subject areas: poultry¹⁰, bananas¹¹, hormones¹² and GMO¹³. All four disputes are important from the Polish point of view. It is interesting to note, that at the time of the introduction of the *tariff-only* import regime of bananas to the Community, Poland raised the issue of a hindered access of the consumers from the new Member States to this product at reasonable prices while basing the arguments inter alia on WTO rules. In case of imports of bananas to the EC and disputes emerged in this field at WTO level one can notice a strong linkage between the banana 'wars' and the current negotiations, particularly with regard to the so called list of tropical products¹⁴. This is the example for a very interesting relations between dispute settlement on grounds of currently applicable WTO rules and the newly prepared multilateral agreement. Such an approach seems to be typical for World Trade Organization.

Finally, summing up the considerations on the developments in WTO legal structure and case law it would be appropriate to recall the accession progress of new WTO Members. From the Polish point of view particularly worth noting is the membership gained by Ukraine¹⁵. It is expected that this development significantly accelerates the creation of a free trade area with the EU and improves the cooperation in the field of agricultural trade safety.

II. Main legal developments in the EU – legislation and case law (here answers to points: 1, 2, 3 and 7 of the questionnaire).

⁹ See e.g. the case of the EU sugar regime.

¹⁰ See case DS. 389 where the US challenges: Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin, including Articles 3 and 6; 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), including Annex XIV(B)(II)(2) dealing with marketing standards for poultry meats; SCoFCAH's rejection of the Commission's proposal regarding the removal of surface contamination from poultry carcasses on June 2, 2008; the EU Agricultural and Fisheries Council's rejection of the Commission's proposal regarding the removal of surface contamination from poultry carcasses on December 18, 2008; and any amendments, related measures, or implementing measures.

¹¹ See case DS. 27 in which the EC lost the proceedings on grounds of the Community new import regime *tariff-only* and committed itself to modify schedule of concessions and signaled its readiness to negotiate multilaterally.

¹² See case DS. 26, in which the EC's ban on beef imports treated with growth hormones led towards sanctions imposed by the U.S. and Canada. On 15 January 2009 USTR heralded the application – on a random basis – of retaliation measures against certain products from a given group of EU Member States unless there is an agreement on the EC's ban on beef imports.

¹³ See case DS. 291.

¹⁴ See annex G to *modalities* text of December 2008 – inserting a product into the list of tropical products would most probably mean that where the scheduled tariff is less than or equal to 25 per cent ad valorem, it would be – as a consequence of DDA liberalization – reduced to zero and where it is greater than 25 per cent ad valorem the applicable tariff cut would be 85 per cent

¹⁵ Formally, Ukraine became a 152nd WTO Member on 16 May 2008.

Taking into account the dynamics of the development of the *acquis* and the frequency of changes to the EU agricultural law, a period of four Presidencies seems to be too wide to undergo a brief analysis in the framework of this report. Therefore, the most appropriate way for a presentation and assessment of tendencies and changes of the agricultural *acquis* would be to commit it in a systematic way limited to recalling a concrete legal initiative or a legal act, highlighting the effects thereof, referring it to the view of Poland and afterwards writing the concrete example into the already known or new trends of development.

Health check legislative package

The most important achievement of Community agricultural law in the period discussed is the *health check* legislative package¹⁶. From the point of view of the Polish agriculture policy assumptions and the school of agricultural law, the key elements of the agreement on *health check* are the following:

- extension of the legal possibility to apply in the new Member States of the single area payment scheme (SAPS) until 2013 (Art. 122(3) of Council Regulation (EC) No 73/2009);
- introduction of facultative measures of regionalization and approximation of the value of single payment entitlements as an anticipation of a gradual but obligatory future break with the current historical reference in the initial calculation of the entitlements' value and national ceilings and with matching them with the intensity and scale of production in a reference period (an irrelevant one when it comes to contemporary challenges and the specifics of the European agriculture) (Art. 45, 48, 62 of Council Regulation (EC) No 73/2009);
- matching the deadlines for the application of controls and reductions under the various points of cross-compliance system with the *phasing-in* mechanism of direct payments in the new Member States (Art. 124(5)). The policy objective of cross-compliance is to impose extensive rules on farmers so that the society's expectations are legitimately satisfied. Having complied with those rules the farmer is granted the full amount of Community aid. That is why it was important to guarantee, that farmers from the new Member States shall be treated no less favourably when meeting the expectations of the Community's general public interest;

¹⁶ The *health check* package consists of the following acts: 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; 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; 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) and Council Decision of 19 January 2009 amending Decision 2006/144/EC on the Community strategic guidelines for rural development (programming period 2007 to 2013) (2009/61/EC).

- further development of specific support instrument (Art. 68 – 72 of Council Regulation (EC) No 73/2009) and the inclusion into this of new areas of relations connected with agricultural activity, i.e. mutual funds for producers against crisis situations, crop insurance and plant insurance;

However, there were also shortcomings in the legal system brought with *health check*:

- lack of generality and widespread application of new, cross-border, supranational and Community-wide challenges resulting from the model of financing in the first and the second pillar of the CAP. Both solutions agreed in *health check* petrify the disadvantageous access to Community funds for the new Member States.

Other legislative initiatives and normative acts

As far as the other legislative initiatives and acts are concerned which have been of a greater interest for the Polish school, one should name the following:

- the modified spirit drinks regime¹⁷. In the course of negotiations of the agreement on the new regulation the group of Member States producing vodka in a traditional way and according to traditional practices raised numerous arguments of a legal character aiming to extend a greater legal protection of a sales denomination. These activities found their emanation in the form of a specific provisions on product labelling but the sales denomination as such remained outside the scope of the protection of Community legislation which the other spirit drinks enjoy. With the end but settling down of the dispute on the definition of vodka what comes next for the producers is the opportunity given by Community legislation in the field of promotion (Regulation (EC) No 3/2008) and the challenge of communicating – within a seven-year period – to the Commission the specifics of spirit drinks with geographical indications.
- the reform of the common market organization in wine¹⁸. The regulation reaffirmed the status of Poland as a wine producing Member States in zone A and freed the local vine planting from the necessity to obey the planting right regime and new planting ban. However, the Polish wine producers have been given no access to use Community funds in the future within the framework of multiannual support programmes covering promotion or modernisation measures.
- the introduction into the agricultural *acquis* of the 'school fruit scheme'¹⁹. This initiative pictures the willingness of the Community legislator to gain a broader recognition and social approval of the CAP activities. The proposal as such has

¹⁷ Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89.

¹⁸ Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999.

¹⁹ Council Regulation (EC) No 13/2009 of 18 December 2008 amending Regulations (EC) No 1290/2005 on the financing of the common agricultural policy and (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) in order to set up a School Fruit Scheme.

not been addressed to farmers but to the consumers and tax payers whose expectations towards the costly agricultural policy grow with every year of CAP's existence. This new legal instrument introduced into the common market organization proves the interest of the Community's legislator in the field of healthy consumption practices or the promotion of appropriate consumer behaviours. Therefore, it deserves being taken into account in the discussion over future objectives of the agricultural policy.

- European Commission's proposal to amend the system of food aid towards the most deprived persons in the Community²⁰. The proposal raised numerous legal concerns with relation to the goals of the Common Agricultural Policy. So far, this scheme has served as an accompanying tool in the intervention safety net while bringing food to the needy people at the same time. The amendment proposed by the Commission which aimed at breaking the link with intervention stocks raised some serious reservations of a few Member States. Should this scheme be finally adopted, the CAP would become – to a certain extent – a direct source of financing the social policy.

Developments in case-law

From Poland's point of view, the best way to address the role of Community courts' rulings on grounds of Poland's participation in the instruments of Common Agricultural Policy would be to rely on the examples of cases with a direct Polish involvement or cases of a greater importance to the Polish agricultural sector.

One of widely commented cases before the Court was the one which ended with the ECJ's ruling on 23 October 2007 (C-273/04 *Republic of Poland vs Council of the European Union*). The Court – in a case based on matters related to accession of a new Member State – delivered a ruling after 40 months from the date of lodging the claim by the complaining party. It is justified to say that the value of this judgement for the conditions of agricultural producers operating along the first years on the internal market is marginal, if any. Moreover, when taking into account the constant changes to the Community income support schemes carried out in the course of reforms of particular sectors between 2004 and 2007 calendar years one might even suggest that the lengthy operation of judicial procedures before the Court significantly restricted the scope of discussion in the Council of Agriculture Ministers on the application of new direct payment schemes in the new Member States.

Another good example of Court proceedings particularly important for the Polish agricultural sector was ECJ's ruling of 8 May 2008 in joined cases C-5/06 and C-23/06 to C-36/06, *Zuckerfabrik Jülich AG vs Hauptzollamt Aachen*²¹. This judgement is indirectly related with

²⁰ Proposal for a Council Regulation amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy and Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) as regards food distribution to the most deprived persons in the Community (doc. COM(2008) 563 final).

²¹ Parties in joined cases: *Saint Louis Sucre SNC* (C-23/06), *Sucreries du Marquenterre SA* (C-24/06), *SA des Sucreries de Fontaine Le Dun, Bolbec, Auffray (SAFBA)* (C-25/06), *SA Lesaffre Frères* (C-26/06), *Tereos*, as successor in title to *Sucreries, Distilleries des Hauts de France* (C-27/06), *SA Sucreries & Distilleries de Souppes – Ouvré fils* (C-28/06), *SA Sucreries de Toury et Usines Annexes* (C-29/06), *Tereos* (C-30/06), *Tereos*, as successor in title to *SAS Sucrerie du Littoral Groupe SDHF* (C-31/06), *Cristal Union* (C-32/06), *Sucrerie Bourdon* (C-33/06), *SA Sucrerie de Bourgogne* (C-34/06), *SAS*

another pending action before the Court of First Instance brought by Republic of Poland vs European Commission seeking to declare Article 2 of Commission Regulation (EC) No 1686/2005²² of 14 October 2005 setting the production levies and the coefficient for the additional levy in the sugar sector for the 2004/05 marketing year to be invalid. However, the invalidity of the entire aforementioned act the Court has already declared in its order of 6 October 2008, but the Court did that in the result of a preliminary ruling case C-5/06. On the other hand, the arguments and claims brought by Poland referred to a completely different aspect of the said regulation, i.e. the Commission adopting two separate coefficients of additional sugar levy with one lower for the EU-15 Member States due to surplus levies incurred by those states before the accession of the EU-10 Member States, which – according to the complaining party – breached the non-discrimination principle under the common market organization and the basic legislative regime as such either²³.

While reading both cases one might draw the conclusion that a natural character of Community agricultural law and the European Union's agricultural policy is a constant, if not endless, evolution of the legal instruments applied in the internal market. In spite of the mere adjustments of these instruments to the changing market environment or international requirements, all the spheres of Community agricultural law are – quite frequently – subject to a complex review. As a result of such reforms, the set of instruments applied in the period preceding the amendments are very often much different from those entering into force with the new regime. Nevertheless, what is also typical for the CAP, the structure and objectives of the newly introduced schemes – in line with the *path dependency* principle – stem from the previous system. This particular feature combined with the specifics of the European court proceedings (particularly with regard to the lengthy practice of working schedule) leads to situations where challenging the legality of a normative act adopted by Community institutions may create very complex and intricate factual and legal relations. A model example of such phenomena is the abovementioned judgment of the Court in case *Zuckerfabrik Jülich and other*. The sugar regime has already undergone two substantial reforms whereas the ruling dealt with basic regulations relevant for the previous six-year period of functioning of the common market organization.

The recalled proceedings constitute a good basis for drawing some preliminary but fundamental conclusions as for the role of Community courts for the new Member States' participation in the structures of Common Agricultural Policy:

- the lack of case-law and the interpretation of European courts in the area of direct payments weakens the discussion on the future of the income support scheme and deprives it of arguments of legal nature (particularly with regard to the justification of the support, legal conditions for modifications thereof, legal character of the payments as personal rights with a character of an asset). The shortage of a visionary and directional case-law in this field has an impact on interinstitutional relations, particularly between the new Member States and the Council, but also with the Commission;

Vermendoise Industries (C-35/06), SA Sucrieries et Raffineries d'Erstein (C-36/06) vs Directeur général des douanes et droits indirects, Receveur principal des douanes et droits indirects de Gennevilliers.

²² OJ EU, L 271 of 15 October 2005, p. 12-13.

²³ Quite astonishingly, in May 2009 the Court of First Instance asked the parties to the proceedings on their respective opinion on the suspension of the case T-4/06 until one of the parties, i.e. the Commission, responds appropriately to the order of the Court of 6 October 2009. By this approach, the judicial protection of one party was made dependant on the activities of the other one.

- from the perspective of the interest of agricultural producers the most attractive way of claiming his/her rights before the Community courts seems to be the preliminary ruling procedure. Direct actions brought by Member States – inspired very often by agricultural unions or associations – do not necessarily lead to desired results;
- a significant hindrance for the new Member States in taking legal steps before the Community courts is the lengthiness of proceedings, what in cases dealing still with accession matters seem to be an obstacle leading in extreme situations to even depriving the privileged parties of judicial protection.

III. Competition between food and biofuel production. Legal developments (here answer to point: 5 of the questionnaire).

As far as the steps of Community legislator are concerned in the field of food prices crisis, competition between various sources of demand for agricultural produce, in the period of the recent months there have been numerous examples of the Council's legislative activeness.

In the area of Community customs law it should be recalled that with the Council Regulation (EC) No 1/2008 of 20 December 2007²⁴ the import duties on imports of certain cereals into the Community have been suspended. This autonomic step of Community legislator aimed at guaranteeing favourable conditions for supplying the internal market with agricultural products in the situation of an increased demand on cereals for the production of biofuels and against the background of higher food prices crisis.

In the field of direct income support schemes, the almost 20-year-old set-aside obligation for agricultural holdings receiving direct payments was preliminary suspended²⁵ to be completely abolished later on in the *health check*²⁶. By such a move, the Community legislator allowed for a bigger arable area to be sown with cereals, which then was a deficit, expensive and unavailable product.

Another legislative step meeting the challenge of an increased demand for agricultural produce intended for renewable energy purposes was the repeal of the energy crops scheme with the effect from 2010 calendar year (also in the result of *health check*). This was a heavily discussed topic in the new Member States where the scheme has been operating since 2007 only. Besides, the scheme was abolished completely, although the increased demand for biofuel production had nothing in common with biomass land (short rotation coppice etc.), also subject to the premium.

Finally, when it comes to the national instruments guaranteeing that certain areas of agricultural land be devoted to food outlets, it must be underlined that – in principle – such

²⁴ OJ EU, L 1 of 4 January 2008, p.1.

²⁵ Council Regulation (EC) No 1107/2007 of 26 September 2007 derogating from Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, as regards set-aside for the year 2008.

²⁶ By 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.

schemes might not be in line with Community direct support regime, the philosophy of decoupling which leaves the production decisions to the discretion of a particular farmer. What the national legislator might do is to regulate appropriately the matter of agricultural structure, continue the state-owned land lease policy, or coordinate the land planning policy and strengthen the legal protection of agricultural and forestry land. In conformity with common market organization rules each state may maintain strategic product reserves for anti-crisis measures. In such a case Community guidelines on surplus renewals must be followed so that they do not undermine the intervention legal framework.

IV. The overall role of international and European legislation for the development of law in rural areas. (here answer to point: 6 of the questionnaire).

The international factor played particularly significant role in the development of rural law. Already the negotiations carried out in the course of Uruguay Round constituted a strong incentive for a deep reform of the CAP. The Marrakech Agreement signed in 1994, which served as a legal emanation of the agricultural trade globalization, changed the attitude of the Community towards the agricultural policy, because it made clear that such policy should be shaped in conformity with the international commitments. The pressure of trading partners of the European Union on the decrease of the scope of internal support actually excluded the possibility of a continuous subsidizing of agricultural incomes through market and price support measures.

The consequence of globalization processes was the reference to the local elements of development, namely the territory²⁷. It brought the exposure of the role of rural policy within the agricultural policy. The Community, while protecting the European model of agriculture, resorted to these elements which are linked with territory, locality. That is the protection of acknowledged values in European society, matched with environment, production quality, animal welfare, territory, cultural heritage etc. At the same time, the goals realized in the framework of rural development policy gained a better societal acceptance than it is the case with sector specific objectives targeted solely to the producers. Reorientation of the CAP, being the result of the aforementioned legal globalization, was incorporated into the MacSharry's reform and the consequence of that was the introduction of various rural development measures.

Although, the territorial references in the Community agricultural law were present already earlier and the rural development issues – as understood nowadays – have been constantly included in certain Community *dossier*. Since 1988, the complex approach to the development of rural legislation appeared no earlier than in the late nineties of the last century. It is the Community legislator, which should be considered as a leading one in the development of rural development legislation, drawing the objectives thereof and placing it in the CAP structure together with building the catalogue of RDP instruments. Council Regulation (EC) No 1257/1999 and the implementing Regulation (EC) No 445/2002 were the first to regulate comprehensively the matter and to draw the scope of legislation. Owing to these acts, the Community agricultural law has been given a new, clearly shaped sphere.

²⁷ F. Adornato is right to say that globalization – what may sound as a paradox – strengthens the local elements of development. See F. Adornato, *Evoluzione dell'intervento pubblico e contrattazione programmata*, Milano 1999, p. 8. Also the same Author: *Od kontraktu rolnego do kontraktualizacji programowanej* (From the agricultural contract towards programmed contractualization.), *Przegląd Prawa Rolnego* 2007, No. 1, p. 212.

The new Council Regulation (EC) No 1698/2005 reaffirms the recent trends and builds up the picture of rural development law until 2013. Rural area, as the subject of regulation integrates a lot of objectives, extended group of beneficiaries, catalogue of instruments and numerous “models” of agriculture. The rural development law mirrors the rural development policy in line with Regulation No 1698/2005 and the CAP objectives under the EC Treaty.

V. The overall role of national legislature and jurisprudence in the development of law in rural areas. (here answers to points: 8, 9 of the questionnaire).

When describing the role of national law and jurisprudence for the development of law in rural areas it would be appropriate to underline at the very beginning that the Community leaves a much greater discretion for the Member States to take a decision and choice on best suitable measures fulfilling their national policy priorities.

The concept – as such – of rural development in Poland has been changed by the influence of Community agricultural law. For a very long time it has been associated with urbanization of these areas. It turned out however, that in principle such an approach, based on the assumptions of elimination of rural character through introduction of urban living style and approximation of rural areas towards urban infrastructure, has not guaranteed appropriate level of socio-economic development, yet it showed many negative phenomena. Because of this, the notion of development in rural areas has been substantially extended to include the improvement of living standard of agricultural families, creation of non-farm employment, local initiative enhancement, etc.

The necessity of aligning the national law to the European criteria was the eventual reason for the extension of the said concept. During the accession period, rural development in Poland concentrated on those aspects which aimed at catching-up of the Polish countryside to the European level. The basic EU legislation and the set of national provisions build up the rural development law in Poland, sometimes called rural law. The basis for its separation, with no willingness to assign any autonomy to it, is the precise subject of regulation, constituting already an extensive part of agricultural law²⁸. This is a very essential part of law as rural areas in Poland cover slightly more than 93% of country’s area with 38% population living there.

As for the sources of law, the national rural development law comprises the basic orientation act dealing with the functioning and management of support, numerous implementing acts with concrete eligibility criteria and the operational documents in the form of RDP programme and strategies. But the question of rural development is also addressed by various legal acts – to put it – of a traditional nature, i.e. planning law, construction law, water management law, law on protection of agricultural and forestry land. Not all of them are treated as parts of agricultural law but they do have impact on the way the RDP programmes are implemented.

The rural development law in Poland does have some specific characteristics. It results not only from the previously mentioned discretionary manoeuvre allowed for the Member States but also from the experience gained in the course of pre-accession period.

²⁸ See for a further reference: R. Budzinowski, Problemy ogólne prawa rolnego. Przemiany podstaw legislacyjnych i koncepcji doktrynalnych (General problems of agricultural law. Changes of legislative foundations and doctrinal conceptions), Poznań 2008, p. 222 and further pages.

The development of law for rural areas seen from the perspective of the recent years is strictly linked with Poland's membership in the European Union. Thanks to the influence of the Community law the agricultural regime has been extended to new areas and the rather poor agricultural law gained a new part. The growth of agricultural legislation towards the inclusion of food, territorial, environmental and social aspects took place against the background of a visible desagrarization of the countryside. One cannot omit to notice however, that these provisions are extremely detailed, nearly casuistic and too frequently novelised.

This last feature shows how important a role plays the jurisprudence, particularly of administrative courts in applying and indirectly for the creation of rural law. This role results from the legislative weakness of the normative acts in question and from failure in applying the law. The national law establishes many new concepts, not always in line with domestic terminology. On top of that, the procedures introduced by the new provisions are not coherent with general rules on administrative procedure²⁹.

Summary

In the course of the recent months (i.e. in 2008 calendar year and in the first quarter of 2009) the legal foundations of the World Trade Organisation shaped by the agreements resulting from the Uruguay Round multilateral negotiations have not been changed or made subject to any binding review. As regards the sphere of agricultural activity and agricultural trade, the commitments of WTO Members (including the European Communities) persist to be driven by *Agreement on agriculture* (URAA). However, this shall not mean that the WTO activity in the latest months has decreased and that the legal development of WTO has been weakened. The proof for that lies in the intense multilateral negotiations led in the framework of the Doha Development Agenda (DDA) which aim at drafting the legal path for the next stage of world trade liberalization, including – in particular – trade in agricultural goods.

Any assessment of both the consequences and impact of particular negotiating stages at DDA level upon the structure of Community agricultural law should take into account that while shaping its agricultural policy and legal mechanisms the Community is used to anticipating the introduction of changes to the WTO regime, so that the new provisions would not require the EC to launch fundamental sectoral reforms and bring major changes to the legal system of EC's agricultural *acquis*. In principle, the legal solutions the Commission usually negotiates at WTO level have either already been introduced to the Common Agricultural Policy or they have already been addressed by pending legal initiatives in the EU. By doing this, the Commission strengthens its position at the international scene and create itself as a progress initiator in liberalization process of agricultural trade. Finally, one of the emanations of WTO functioning in practice is the frequency of legal disputes launched by Members on grounds of trade issues.

The most important achievement of Community agricultural law in the period discussed is the *health check* legislative package. As shortcomings, however, one should point to lack of

²⁹ See closer on this S. Prutis, Instrumenty prawne wsparcia rozwoju rolnictwa ze środków UE (w świetle orzecznictwa Wojewódzkiego Sądu Administracyjnego w Białymstoku (Legal instruments of EU rural development support (against the case law of Voivodship Administrative Court in Białystok), *Studia Iuridica Agraria* 2007, Volume VI, p. 39 and further pages; A. Zieliński, Ekonomiczne wsparcie rozwoju rolnictwa ze środków unijnych w orzecznictwie Wojewódzkiego Sądu Administracyjnego w Poznaniu w 2007 r. (Economic support for agriculture from EU sources in the jurisprudence of Voivodship Administrative Court in Poznań in 2007), *Przegląd Prawa Rolnego* 2008, No 1, p. 258 and further pages.

generality and widespread application of new, cross-border, supranational and Community-wide challenges resulting from the model of financing in the first and the second pillar of the CAP. Both solutions agreed in *health check* petrify the disadvantageous access to Community funds for the new Member States.

As far as the steps of Community legislator are concerned in the field of food prices crisis, competition between various sources of demand for agricultural produce, in the period of the recent months there have been numerous examples of the Council's legislative activeness. One of such steps in meeting the challenge of an increased demand for agricultural produce intended for renewable energy purposes was the repeal of the energy crops scheme with the effect from 2010 calendar year. This was a heavily discussed topic in the new Member States where the scheme has been operating since 2007 only. National instruments guaranteeing that certain areas of agricultural land be devoted to food production purposes might not be in line with Community direct support regime, the philosophy of decoupling which leaves the production decisions to the discretion of a particular farmer.

The international factor played particularly significant role in the development of rural law. Already the negotiations carried out in the course of Uruguay Round constituted a strong incentive for a deep reform of the CAP. The Marrakech Agreement signed in 1994, which served as a legal emanation of the agricultural trade globalization, changed the attitude of the Community towards the agricultural policy, because it made clear that such policy should be shaped in conformity with the international commitments. The consequence of globalization processes was the reference to the local elements of development, namely the territory.

It brought the exposure of the role of rural policy within the agricultural policy. The Community, while protecting the European model of agriculture, resorted to these elements which are linked with territory, locality. The new Community legislation reaffirms until 2013 the picture of rural law with – undoubtedly – development character.

The development of law for rural areas seen from the perspective of the recent years is strictly linked with Poland's membership in the European Union. Thanks to the influence of the Community law the agricultural regime has been extended to new areas and the rather poor agricultural law gained a new part. The growth of agricultural legislation towards the inclusion of food, territorial, environmental and social aspects took place against the background of a visible desagrization of the countryside. One cannot omit to notice however, that these provisions are extremely detailed, nearly casuistic and too frequently novelised.

This last feature shows how important a role the jurisprudence of administrative courts plays in applying and creating the law, while pointing out to evident failures of legislation.