

CAP Reform vs WTO: Crop Diversification or Crop Rotation

1. Introduction and Summary

At first sight, the question “crop diversification or crop rotation” looks like a minor point in the long march to the reform of the Common Agricultural Policy (CAP). Considered under an environmental sustainability angle a Community-wide introduction of crop rotation would nonetheless constitute an excellent opportunity to improve agricultural practices in Europe through the first pillar of the CAP. From an economic viewpoint the question seems less clear, and the answer probably depends not only on farm size and location but also on the various available national and CAP-incentives.

This paper examines this issue exclusively from a World Trade Organization (WTO) viewpoint. It outlines the relevant rules and limitations applying to different types of farm support. It concludes that *crop rotation*, inasmuch as it extensifies production, is rather less likely to face a successful legal challenge under a Green Box notification than the *crop diversification* proposed by the European Commission. Second, even if either of these new compliance requirements turned out to be “non-green”, the EU’s Amber Box entitlement could easily accommodate such expenditures within the present ceiling scheduled in the WTO, and thus avoid litigation.

2. European Commission proposal: Crop diversification

Introducing what is claimed to be a “strong greening component”, the direct payments in pillar I of the CAP are to be linked to environmental performance:

“Direct payments should promote sustainable production by assigning 30 % of their budgetary envelope to mandatory measures that are beneficial to climate and the environment. [...] for the first time thus ensuring that all EU farmers in receipt of support go beyond the requirements of cross compliance and deliver environmental and climate benefits as part of their everyday activities. Thirty per cent of direct payments will thus be tied to greening, and these payments will ensure that all farms deliver environmental and climate benefits through the retention of soil carbon and grassland habitats associated with permanent pasture, the delivery of water and habitat protection by the establishment of ecological focus areas and improvement of the resilience of soil and ecosystems through crop diversification.”¹

¹ European Commission (2011). Proposals for a Regulation of the European Parliament and the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy: http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/com625/625_en.pdf (p.3, emphasis added).

Concretely, Art.30 of the Proposed Regulation foresees that “cultivation on the arable land shall consist of at least three different crops.”²

3. Proposed alternative: Crop rotation

The proponents of an alternative approach share the above objectives but they argue that the environmental and climate goals will not be attained by crop diversification. In their view, only mandatory *crop rotation* – which is already practiced by a number of EC Member States, will significantly contribute to “the protection of water, the improvement of soil quality, contributing to climate change mitigation and reducing input dependency.”³

Meaningfully also in a WTO context, the proponents further point out that existing IACS (Integrated Administration and Control System) and its Geographical Information System (GIS), established in order to effectively observe and process the distribution of CAP payments, would allow to also check crop rotation without additional cost.

4. WTO legal framework

It should be pointed out that the WTO does not define standards such as good agricultural practices, such as the EU’s ‘good agricultural and environmental condition’ (GAEC). The Agreement on Agriculture (AoA) instead classifies domestic farm support instruments mainly from a trade-distortion viewpoint and into three categories, i.e. the so-called Green, Blue and Amber Boxes. For direct payments linked to environmental performances, the question here is simply whether the envisaged requirements fall under the *Green Box* (subject to no limitations or reductions). If this is not the case, they would be considered as measures with a price support effect, or as subsidies directly related to production quantities, in other words distorting production and trade (with some exceptions). In that case they would fall under the *Amber Box* defined in Article 6 of the AoA.⁴

The Green Box is Annex 2 of the AoA, entitled “Domestic Support: The Basis for Exemption from the Reduction Commitments”. It stipulates in Paragraph 1 that

Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have *no, or at most minimal, trade-distorting effects or effects on production*. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

- (a) [...]
- (b) the support in question shall *not have the effect of providing price support to producers*; plus policy-specific criteria and conditions

² The proposed crop diversification measure requires that a farmer must have three different crops on his or her land, with no crop covering more than 70%, or less than 5%, of the total arable area.

³ *Crop Rotation. Benefiting farmers, the environment and the economy*. Study co-financed by the European Community, Directorate-General for the Environment and the MAVA Foundation, published by APRODEV (Association of World Council of Churches related Development Organisations in Europe), Friends of the Earth Europe, IFOAM EU Group and Pesticide Action Network Europe (July 2012).

⁴ The *Blue Box* is the “amber box with conditions” designed to reduce distortion, if the support also requires farmers to limit production (AoA-Article 6 Paragraph 5).

The criteria and conditions applicable here are listed in Paragraphs 5 and 12:

5. Direct payments to producers

Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 through 13 below. *Where exemption from reduction is claimed for any existing or new type of direct payment other than those specified in paragraphs 6 through 13, it shall conform to criteria (b) through (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.*

12. Payments under environmental programmes

(a) Eligibility for such payments shall be determined as part of a *clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs.*

(b) *The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.*

Paragraph 6 referred to in Paragraph 5 reads in relevant parts:

6. Decoupled income support

(a) [...]

(b) The amount of such payments in any given year shall *not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer* in any year after the base period.

This last requirement has been interpreted as prohibiting a government from linking disbursements to the production of specific commodities. The rationale for this view is that specific crop subsidies are a form of “product targeting” and thus have a bigger potential to distort trade than direct payments without such requirements. For example, in the lead case *US – Upland Cotton* (DS 267) certain domestic support programmes of the United States’ in respect of cotton were found to result in “serious prejudice to Brazil’s interests in the form of price suppression in the world market.”⁵ Another example from the United States of America which attracted criticism in the WTO concerned a direct payment scheme which excludes fruit and vegetable production. Does this mean a direct payment scheme subject to crop rotation is incompatible with the EU’s WTO obligations or, at the very least, that such a scheme would constitute an Amber Box subsidy?

It is important to underline the differences between the US cases and the proposed linking of direct payments to a number of different products (particularly legumes). In my opinion, the relevant differences are teleological. Indeed, where crop rotation conditions are formulated so as to offer a sufficiently large variety of options to the farmer, “product targeting” does not arise. Moreover, payments tied to such conditions also fulfil the chapeau conditions in Paragraph 1 of not having more than a minimal production or trade-distorting effect.

⁵ The measures incriminated in this case which the United States had notified under the Green Box were the product-related *direct payments* and the *production flexibility contracts*. Since these payments were directly related to the type of production undertaken and thus not green box measures conforming fully to paragraph 6(b) of Annex 2 to the AoA, they could be challenged under Article XVI of GATT 1994 and Part III of the WTO Agreement on Subsidies and Countervailing Measures (SCM). Brazil, the complainant in this case, was able to demonstrate that these payments, together with the export-contingent subsidies and a number of other price-contingent domestic subsidies (marketing loan program payments, user marketing (“Step 2”) payments, market loss assistance payments, and counter-cyclical payments) constituted a “serious prejudice” within the meaning of Article 6.3(c) of the SCM Agreement, by causing significant price suppression. For a summary of this dispute see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm last visited on 14 February 2013.

Another question is whether the environmental benefits of crop rotation make it potentially eligible under Paragraph 12. The condition under this provision is however that the payments are limited to the extra cost incurred in applying crop rotation practices. If this is not the case, direct payments subject to crop rotation should be notified under Paragraph 5. Nonetheless, the case for Green Box compatibility of crop rotation is stronger than for crop diversification, because crop diversification arguably entails little if any additional costs. What for taxpayers might look as “paying farmers for being farmers” might in the WTO be shown as having “the effect of providing price support to producers” (Paragraph 1). Consequently, crop diversification being only subject to the adoption of certain cropping systems is based on the type of production and therefore more likely to fall into the Amber Box than crop rotation. Furthermore, the environmental, climate and health benefits of crop rotation (reducing water clean-up costs, higher soil-carbon content, and reduced health care costs) can be seen as additional indicators of Green Box eligibility, because they demonstrate the “greening” effect of the new direct payments, and have no impact on production and trade.

The fact that the EU’s domestic support policy has not so far come under judicial review in the WTO is probably due to the fact that, even if a Green Box notified measure was found to rather constitute Amber Box price support, the amounts involved would still remain within the EU’s scheduled commitments concerning the level of its Aggregate Measure of Support (AMS).⁶

This is not to say that crop diversification necessarily falls into the Amber Box category of farm support. Nevertheless, a narrow legalistic view could reach that conclusion more easily than for crop rotation. Such a view might thus question the Green Box-character of crop diversification, even though it does not explicitly require agricultural production.⁷

5. Conclusions

WTO is not about academic moot points, but about market access commitment infringements in concrete cases. WTO jurisprudence (in particular, *US – Cotton*) deals with different measures and does not, at any rate, constitute “case law” as under national courts. A legal analysis of the proposed Article 30 on crop diversification can not predict with absolute certainty the outcome of a dispute under the WTO Dispute Settlement Understanding on the “box” into which such a measure would belong.

⁶ See WTO-Document G/AG/AGST/EEC, p.293ss. The EU’s total Aggregate Measure of Support (AMS) Commitment since 2001 is €67.16m, with a Current Total AMS of €46.68m (= 65%) in 1999 – i.e. before the introduction of the Single Farm Payment, and not including expenditures notified for 1998 under the Green Box (€19.7m), Blue Box (€19.6m) *de minimis* (€0.3m) and Export Subsidies (€5.8m). The EU Trade Policy Review Report by the Secretariat noted: “Since marketing year 2000/01, Green Box support has increased nearly three-fold, to €62.6 billion, while Blue and Amber Box support have both declined by three-quarters, to about €5.2 billion and €12.4 billion respectively.”

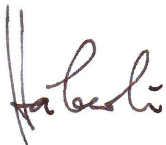
Sources: WTO-Document TN/AG/S/4 dated 20 March 2002 “Domestic Support. Background Paper by the Secretariat”; Trade Policy Review Report on the EU by the Secretariat (Document WT/TPR/S/248 dated 1 June 2011, para 41); and compilations available online at http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd19_data_e.htm#howmuch, last visited on 14 February 2013.

⁷ Such a narrow view might even put into doubt the Green Box nature of the Single Area Payment Scheme in force since 2007.

Nevertheless, two conclusions can be drawn.

1. Crop rotation is at least as likely to be found Green Box-compatible as crop diversification. Moreover, it will be more difficult to argue that crop diversification is “not more than minimally production-distorting” because it entails for most farmers less cost and work.
2. Even if (either of the two cropping schemes) were to be found “amber”, the EU would not have to relinquish this conditionality. This is because the direct payments involved would in all likelihood not, together with the other price support instruments, exceed the amount available under the presently scheduled maximum. This certainly acts as a deterrent from “litigating for nothing”.

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