

LEGAL PERSPECTIVE OF SUSTAINABLE AGRICULTURE

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ABSTRACT

The present article is a legal reflection about sustainable agriculture in Europe. We will take into consideration the European Union Common Agriculture Policy (PAC 2014-2020), some commercial agreements between European Union and third countries and the use of legal mechanisms in the field of Intellectual Property Law and Consumers Law. Two main questions will be treated: how to define sustainable agriculture and how to promote it by using some legal mechanisms.

RESUMO

O presente artigo é uma reflexão jurídica sobre a agricultura sustentável na Europa. Teremos em consideração a Política Agrícola Comum da União Europeia (PAC 2014-2020), alguns acordos comerciais entre a União Europeia e países terceiros e o desenvolvimento e utilização de mecanismos jurídicos no âmbito do Direito da Propriedade Intelectual e Direito dos Consumidores. Serão abordadas duas questões principais: como definir agricultura sustentável e como a promover através de mecanismos jurídicos.

KEYWORDS: legal, sustainable, agriculture.

DEFINING SUSTAINABLE AGRICULTURE

The term sustainable agriculture is used worldwide to describe a practice of farming that harmonises plant and animal production to satisfy crescent human food needs with landscape protection, including their natural ecosystems.

Sustainable agriculture is commonly related to organic farming. According to European Commission, organic farming is «an agricultural system that seeks to provide the consumer, with fresh, tasty and authentic food while respecting natural life-cycle systems¹¹». This respect of the natural life-cycle systems is achieved by the adoption of some practises as: multi-annual, wide and varied crop rotation, the use of organic fertilisers instead of chemical synthetic pesticides, avoiding «long-term changes to the chemical consistency and dependency of the soil»¹², the plantation of hedges and meadows or other «appropriate plant varieties that can compete with weeds and resist pests and diseases»¹³. Consequently, the structure of this natural element, upon which agriculture depends, is improved and is protected from nutrient loss and erosion. Such a quality of soil is an important tool to sustainable water management. Regarding the rational water consumption, the improvement of soil structure and the capacity of water retention from natural streams or wetlands, achieved by those practices, reduce the need for crop irrigation¹⁴. Regarding also the quality of water and the consequently protection and increase of natural diversity, by avoiding the use of chemical synthetic pesticides and other synthetic products, farmers protect nature form water pollution caused by an intentional or unintentional introduction of these chemicals into aquatic ecosystems.

The protection and the increase of natural diversity is the result of the application of a basic principle of sustainable agriculture: «every living organism should be held in high regard: from the tiniest micro-organism living in the soil to the mightiest tree towering above it»¹⁵. This principle is evidenced not only through the prevention of soil erosion, water pollution or by given preference to the use of natural enemies of weeds and pests instead

¹¹European Commission, «What is organic farming», Agriculture and Rural Development, http://ec.europa.eu/agriculture/organic/organic-farming/what-organic_en

¹²European Commission, «Soil», Agriculture and Rural Development, http://ec.europa.eu/agriculture/organic/environment/water_en

¹³European Commission, «Water, Retention», Agriculture and Rural Development, http://ec.europa.eu/agriculture/organic/environment/water_en

¹⁴ Idem.

¹⁵ European Commission, «Biodiversity», Agriculture and Rural Development, http://ec.europa.eu/agriculture/organic/environment/water_en

chemicals, but also through the use of traditional or indigenous breeds of plants and livestock raised, preferentially, in free-range open air, the protection of native species instead of the production of genetically modified organisms, contributing to the protection of rural landscape and traditions, and the development of local products.

Finally, sustainable agriculture is a type of farming that has an important role on minimizing negative effects of climate change. As evidenced by some scientific reports agricultural land use is responsible for 12% of global greenhouse gas emissions. These percentage will continue to rise very fast if farmers continue to deforest and degrade the soil in order to respond to food demand increase¹⁶. However, sustainable practices used by organic farming, identified above, can contribute to reduce emissions of greenhouse gases (GHGs) and sequester more carbon dioxide from the atmosphere in the soil than conventional agriculture. For example, the preference for organic fertilizers rather than pesticides produced through energy – intensive processes, waste recycling, efficient recycling of manures from livestock and crop residues by composting, use of farmyard manure as a fertilizer in the crops, reforestation, afforestation, reduced livestock units per hectare, diversified crop rotations with green manure or longevity of animals on organic farms, are all relevant practices to minimize climate change¹⁷.

LEGAL MECHANISMS TO PROMOTE SUSTAINABLE AGRICULTURE

According to some market studies the demand for organic food is increasing in Europe¹⁸. This demand is generating economic and social development of rural areas, avoiding the abandonment of rural landscape and the loss of traditional farming practices related to processes and local products. How can legal mechanisms promote this sustainable agriculture?

It is known that agriculture does not survive without financing and conventional farmers need financial support to change their old practices to face the «green challenges». It is

¹⁶ Research Institute of Organic Agriculture FiBL and International Trade Centre, *Organic Farming and climate change*, Switzerland, 2007, p.5
http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Sectors/Fair_trade_and_environmental_exports/Climate_change/Organic_Farming_Climate_Change.pdf

According to this report « Predictions concerning the future global trends for greenhouse gas emissions from agriculture largely depend on physical and economic parameters that have a strong influence on total emissions. These parameters include: cost of fuel, economic development, evolution of livestock numbers, increase in productivity, new technology, availability of water, deforestation and consumer attitudes and diet», p. 12.

¹⁷ For further scientific information about this subject consult, for example, Research Institute of Organic Agriculture FiBL and International Trade Centre, *Organic Farming and climate change*, Switzerland, 2007 and the study of the Institute for Environment and Sustainability (IES) and the Institute for Prospective Technological Studies (IPTS) within the European Commission's Joint Research Centre, *Assessing Agriculture Vulnerabilities for the design of Effective Measures for Adaption to Climate Change (Avemac Project)*, 2012, http://ec.europa.eu/agriculture/analysis/external/avemac/full_text_en.pdf

¹⁸ Between 10-15% of the annual market growth for organic products. Cfr. http://ec.europa.eu/agriculture/organic/consumer-confidence/consumer-demand_en

fundamental thus to create legal dispositions about agricultural financing associated to an environmental protection strategy. In this sense, common agricultural policy reform (CAP 2014-2020) reflects a better integration of environmental concerns into financing policies of economic activities, by stating that European Union agriculture need to accomplish the following objectives: sustainable management of natural resources, food security, balanced territorial development and climate change adaption¹⁹. In order to fulfil these objectives 30%²⁰ of the direct payments²¹ are dependent on environmental and climate benefits generated by farmers such as: retention of soil carbon and grassland habitats associated with permanent pasture, water and natural habitats protection and restoration «by the establishment of ecological focus areas and improvement of the resilience of soil and ecosystems through crop diversification»²², contributing to implement Natura 2000, Water Framework Directives and European Union 2020 biodiversity strategy. Thus, organic farming is entitled to direct payments.

In spite of introducing a greening component into the first pillar of CAP (direct payments and market measures) this reform has not only positive aspects but also negative ones. The explicit recognition of organic agriculture both in the direct payments (first pillar) and the rural development (second pillar)²³, environmental conditions on part of the direct payments or the payments to young farmers who want to implement projects that promote agricultural and rural development are, without question, among the positive aspects of CAP. However, as affirmed by the IFOAM EU Group – International Federation of organic agriculture movements EU Regional group «the greening of the first pillar should raise the level of environmental performance for all farmers, but must in no way be used as an excuse to reduce the payments targeting the environment in the second pillar»²⁴. The IFOAM EU Group proposes that direct payment funds which will remain unused when farms do not fulfil the environmental criteria, «should be channelled as additional financing to the second pillar, in the same manner as unused funds stemming from capping, but in this case earmarked for

¹⁹ Proposal for a regulation of the European parliament and the council establishing rules for direct payments to farmers under support schemes within the framework of common agricultural policy. Brussels, 19.10.2011 COM (2011) 625 final/2, available at http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/com625/625_en.pdf

²⁰ 30% of the annual national ceiling set out in Annex II of the proposal for a regulation of the European parliament and the council establishing rules for direct payments to farmers under support schemes within the framework of common agricultural policy. Cfr. Article 33^o of the proposal.

²¹ Direct payments are covered by the first pillar of CAP. They are single payments, granted directly to farmers to support their income, decoupled from production and that take into account the environmental, climate and food security benefits generated by sustainable farming practices. Market measures are also covered by the first pillar CAP. They support traders and processors (export refunds or processing and transformation subsidies) of some products such as protein crops, cotton, milk, olive groves, among others, under certain conditions. For further developments about this subject consult http://ec.europa.eu/agriculture/grants/index_en.htm and http://ec.europa.eu/agriculture/grants/index_en.htm

²² Proposal for a regulation of the European parliament and the council establishing rules for direct payments to farmers under support schemes within the framework of common agricultural policy, p. 3.

²³ The second pillar of CAP covers rural development. Is related to the financing of projects that «improve the quality of life and diversification of the rural economy». Cfr. http://ec.europa.eu/agriculture/grants/index_en.htm

²⁴ International Federation of Organic Agriculture Movements EU Regional Group, Position Paper. Reaction to the CAP legislative proposals 2014-2020. Brussels, 2012, p. 5.

the agri- environment-climate and organic farming measures»²⁵. Also according to the IFOAM EU Group the quality and the location of the ecological focus areas (EFAs) are more important than the size. In this context, each arable field should have in close proximity an EFAs «to provide biodiversity refuges, green infrastructure and improve ecosystem services». Consequently, «mixed farms which have many areas with EFA characteristics should be rewarded for this by including these in the calculation of the EFA on the farm»²⁶.

We must not also forget that the growing problems of desertification and climate change can both contribute to largely reduce the productivity of the farm. In this sense it is necessary to strongly take account of these risk situations when designing CAP dispositions.

Trade liberalization, for example, between the European Union and the Mercosur, can also conduct some agriculture sectors to a crisis situation. It is estimated that 80% of the European beef imported from the Mercosur countries may undermine domestic beef production from Azores, since the cost of meat production in those countries are lower than in Azores. CAP 2014-2020 provides an emergency reserve to respond to crisis situations and also a regime of volunteer support to agricultural activities in case of economic and social difficulties, up to 5% of annual national ceiling set out in Annex II, which can exceed this limit whenever the severity of these difficulties is justified. In this context it is also recognized the importance of the extension of the European Globalization Adjustment Fund to the agricultural sector so it can face economic problems that come with trade liberalization²⁷. 2.5 million euros of this European globalization adjustment will support farmers. In spite of the value to support farmers a European Commission study about the impact of free trade agreement between European Union and the Mercosur to agriculture says that this agreement can have a negative impact of 7 billion on the income of the farmers. Thus the value of 2.5 million Euros would be insufficient²⁸.

If some trade agreements can have a negative impact on European agriculture, trade agreements can also be a good instrument to promote sustainable agriculture. The agreement between European Union and United States in the context of organic products (Nuremberg, 15 February 2012) is a good example of how a trade agreement can facilitate the import/export of organic products by removing bureaucratic barriers. According to this agreement organic products certified in Europe or in the United States may be sold as

²⁵ Ibid, p. 12

²⁶ Ibid, p. 13

²⁷ Proposal for a regulation of the European Parliament and of the Council on the European Globalization Adjustment Fund (2014-2020), COM/2011/0608 final - 2011/0269 (COD),

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0608:EN:NOT>

²⁸ Debate European Parliament, Excepción de crisis del fondo europeo de adaptación a la globalización, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120313+ITEM-007+DOC+XML+V0//ES&language=ES&query=INTERV&detail=2-119-000>

organic in either region²⁹. This is possible because European Union and United States have agreed that each other organic product certification system (programs regulations, quality control measures, certification requirements and labeling practices) are compatible and there is no need for companies that wanted to trade products «on both sides of the Atlantic (...) to obtain separate certifications to two standards which meant a double set of fees, inspections and paperwork»³⁰. In spite of the banning of the use of antibiotics, except to control invasive bacterial infections (fire blight) in organic apple and pear orchards, imposed by the United States regulations, and the fact that European Union organic production regulations allow antibiotics only to treat infected animals, both members of the agreement agreed that products traded under this agreement shall not use antibiotics as a condition of the organic product certification. They have also agreed that all products must be shipped with an organic export certification that «will identify the organization that certified the organic product, verify that prohibited substances and methods weren't used, certify that terms of the partnership were met, and allow traded products to be tracked»³¹. It was also previewed that member parties of the agreement «will also begin to work on a series of cooperation initiatives to promote organic production and tackle important topics such as animal welfare (...) share technical information and best practices on an ongoing basis to further enhance the integrity of organic crops and livestock production systems»³².

In this context certification and labeling are good instruments to promote sustainable agriculture by protecting true organic products against fraud. In other words to protect against products that pretend to be the result of biological agriculture but they are not, they do not fulfill the requirements imposed by European Union regulations. Among these regulations we mentioned Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products, Commission regulation (EC) n° 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) n° 834/2007 as regards the arrangements for imports of organic products from third countries. According to this regulation, the European Union is committed to ensure fair competition. The labeling and advertising shall not use terms to mislead consumers by suggesting that a product or its ingredients are the result of organic farming when they are not. Organic products should be produced according to some strict rules:

- They cannot contain genetically modified organisms³³;

²⁹ European Union and United States agree to Historic New Partnership on Organic Trade, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/138>.

³⁰ *Idem*.

³¹ *Idem*.

³² *Idem*.

³³ Article 9 of the Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products.

- Livestock shall be fed with organic feed that meets the animal's nutritional requirements at the various stages of its development. A part of the ration may contain feed from holdings which are in conversion to organic farming³⁴;
- Organic livestock shall be born and raised on organic holdings³⁵;
- Mineral nitrogen fertilizers shall not be used to plant production³⁶;
- It is forbidden to use ionizing radiation for the treatment of organic food or feed, or raw materials in organic food or feed³⁷ or
- Animal welfare respect³⁸.

The promotion of local/regional products are an important part of sustainable agriculture and it can be achieved by some legal mechanisms such as some industrial property rights: geographical indications, appellations of origin or trademarks.

A geographical indication is a sign identifying a product with a specific geographical origin by its qualities, reputation or characteristics that are «essentially attributable to that place of origin»³⁹. It normally includes the name of the place of origin of the product. For example, the *Alheira de Mirandela* (PT), the *Borrego (lamb) de Montemor – o – Novo* (PT), the *Maça (Apple) de Portalegre* (PT), *Vinhos (Wines) Península de Setúbal* or *Duriense* (PT), *Dealurile Munteniei* or *Dealurile Transilvaniei* (R) are all geographical indications that represents products that derive from a particular place in Portugal and Romania and «are influenced by specific local factors, such climate and soil»⁴⁰. The geographical indication encompasses an appellation of origin⁴¹. It consists on «a geographical name or a traditional designation used on products which have specific quality or characteristics that are essentially due to the geographical environment in which they are produced»⁴², for example, in Portugal, *Queijo (Cheese) de S. Jorge* and *Vinho do Porto (Porto Wine)*, *Bairrada (Wine) or in Romania wines Cotnari* or *Alba Iulia*.

A trademark is also a sign but its main function is to identify a certain product (or service) with the person or enterprise that produces it.

³⁴ Article 14 n° 1 d) (ii) of the Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products.

³⁵ Article 14 n° 1 a) (i) of the Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products.

³⁶ Article 12 of the Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products.

³⁷ Article 10 of the Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products.

³⁸ Article 5 h) the Council Regulation (EC) n° 834/2007 of 28 June 2007 on organic production and labeling of organic products.

³⁹ Geographical Indication Gateway, WIPO, http://www.wipo.int/geo_indications/en/about.html

⁴⁰ *Idem*.

⁴¹ *Idem*.

⁴² But there are differences. According to the Portuguese Institute of industrial property «the major difference between an appellation of origin and a geographical indication rests with the type of link that exists between the qualities or characteristics of the product and the natural environment from which they originate. (...). In the case of an appellation of origin, the unique quality of the product is a direct consequence of the area in which it is produced, or rather, its specific characteristics are due not only to human factors, but also to the physical conditions present in that particular environment. All stages of production must take place in this environment. In contrast, a geographical indication does not demand such a strict link between the qualities of the product and the environment from which it comes. It is enough that its unique quality or reputation can be attributed to that origin» <http://www.marcaspatentes.pt/index.php?section=127>.

These industrial property rights helps the consumers identify and purchase a product because of its unique characteristics related with a specific origin (geographical indication/ appellation of origin) or the quality of the product related to the skills and knowledge of the producer (quality of the trademark).

Once registered this industrial property rights confer to its holder the possibility to react against infringements and unfair concurrence: the use of similar distinctive signs to market inferior or different products or counterfeiting.

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