

CONSOLE

CONtract Solutions for Effective and lasting delivery of agri-environmental-climate public goods by EU agriculture and forestry

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Report on Legal Aspects on contractual solutions for the delivery of public goods

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Preamble

This report aims to cover the most important legal aspects identified in the CONSOLE project. In particular, it addresses contracts targeting the delivery of public environmental goods and services as well as climate action. Furthermore, it examines in greater depth land tenure contracts, result-based contracts and collective contractual solutions. Value chain contracts, which are essentially product-based as opposed to land-based, has been tackled in workshop. Insights gained from that event have been the main source of information.

The new legal framework for the next CAP programming period, which will be implemented from 2023, has been taken into account in this report. This has greater relevance for result-based and collective contract solutions, as for both of these EU co-financing is possible.

- **The evolution of legislation:** much European agricultural legislation falls within the ambit of the CONSOLE project, with there being major ongoing developments. More specifically, besides the regulations to carry into effect the new CAP reform, there is ongoing development of the Green Deal, yet to be fully implemented, as well as a need to ensure articulation between the CAP reform and the Green Deal. Notably, the Green Deal engages both legal texts and policy documents, some of these being integral to the Green Deal itself, such as the Farm to Fork Strategy¹ and the Biodiversity 2030 Strategy². There will also be consideration of legislation concerning sustainable finance, in which area several texts are again still at the preparatory stage.

- **The imperative of a comparative law approach:** in this context, contractual analysis involves a study of the individual legislation of each Member State. The richness of the CONSOLE project is that it has participants from 13 different countries, so embracing 13 different national legal systems. This diversity is reflected in the case studies across the range of CONSOLE partners. Together with legal analysis of these case studies, the report conducts a closer investigation of the legal position in France for land tenure based contracts and in England for result-based approaches.

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system* (COM(2020) 381 final).

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Biodiversity Strategy for 2030: Bringing nature back into our lives* (COM(2020) 380 final).

It is divided into four parts, which can be read independently from one another. The first part aims to **explore the legal framework** applicable to contractual solutions for the delivery of environmental goods and services. The second part focuses on **land tenure contracts**, considering their use for the delivery of environmental goods and services. A third part is directed to **result-based contracts**. They constitute a fast-evolving and distinctive approach, at the same time forming part of the new emphasis on environmental performance which has received impetus at European level in the context of the CAP reform. A fourth part focuses on the **implementation of collective contractual solutions**. This is important because the collective dimension operates as an extension of many other forms of contract to realise more effective delivery of environmental goods and services. **Value chain contracts** are not included in this Report. Because they are essentially product-based as opposed to land-based, and therefore generate different considerations, they will instead be addressed through a separate Workshop.

Key points:

This first part is intended to lay the legal foundations for the analysis which is undertaken in the rest of this report. It aims to clarify and define the main legal concepts, such as: the nature of the contract; the subject matter of the contract; and the nature of environmental goods and services. It also aims to clarify the main existing legal principles underlying the legal framework, such as the principle of subsidiarity and the relevant contractual principles. Further, it addresses pervasive legal issues of general application that run through any analysis of contractual solutions linked to the provision of environmental goods and services. These include, in particular, questions relating to financing, such as: national and European state aid rules; WTO implications; and sources of private financing.

This exercise will be undertaken in such a way as to focus on three of the four categories of contract which are covered by CONSOLE (land tenure contracts; result-based contracts; and the implementation of collective contractual solutions) and to highlight their main interactions from a legal perspective.

1 Overview of the legal framework for the analysis of contracts targeting the provision of environmental goods and services

The objective of this section is to present the general framework within which the legal analysis takes place. First, it aims to provide an understanding of the main definitions and legal issues surrounding the use of a contractual solution (1.1). Then, a diagram is presented which portrays in context the legal framework and associated legal issues (1.2).

1.1 General definitions and legal issues relating to the choice of a contractual solution

The choice of terms and their definition make it possible to clarify the expectations of the various actors concerned (states, farmers, public and private financiers, etc.) (1.1.1). Furthermore, the decision to use contractual solutions to promote environmental protection and climate action engages a range of legal questions which have general application (1.1.2).

1.1.1 General definitions

Targeting

Among the key general definitions, we will focus on the contract and the subject matter of the contract (the provision of environmental goods and services) and its consideration, including financial consideration.

Definition of the contract

Contracts enjoy broad diversity since all the Member States have their national contractual law (1.1.1.1). However, these national contractual laws have common contractual characteristics that allows the framing of specific contractual solutions for the purposes of the CONSOLE project (1.1.1.2).

1.1.2 The legal definition of contracts in light of legal diversity

Therefore, defining what is a contract is not as straightforward as one might think, since the form of contract varies from state to state. In particular, there is a divergence in the rules of law governing contracts as between the civil law and the common law. These divergences, which reflect cultural diversity, can affect the ways in which the contract is drawn up and implemented. However, over and above the often specific and technical rules, there are nevertheless major principles such as "pacta sunt servanda" (Latin for "agreements must be kept", or the principle of good faith), which guide most legal systems. And the implications at EU level must also be considered, with the possibility of an approximation of national contract laws.

1.1.2.1 Variation in the nature of contract from state to state

A major difference as between states is that some interpret contract through the lens of civil law, whereas elsewhere the emphasis is on the common law³, with focus on the element of bargain⁴ that is not necessary found in civil law.

For example, in French civil law, Article 1101 of the civil code defines a contract as “an agreement of intentions between two or more parties that will create, modify, transfer or terminate/complete obligations”⁵ (for example, a lease or sale). The freedom to contract or not, the right to choose the other contracting party and the right to determine the content and form of the contract are all possible within the limits of the law. A contract is formed by the meeting of an offer and an acceptance. The contract cannot violate public order either through its terms or objectives, whether known or unknown to the parties. Legally formed contracts are binding on those who contracted⁶.

And, to provide an illustration of a difference between this French civil law and English common law, in the former case it is possible to have a gratuitous contract, but in the latter case some form of consideration is required.

1.1.2.2 Major and common principles of contract

Although there exists a diversity between different national contract laws, certain characteristics remain common. In particular, common features are the idea of an agreement and thus of a willingness to commit oneself, as well as the binding nature of the commitment between the contracting parties (*pacta sunt servanda*).

This is reflected in a number of general definitions of “contract”. For example, in the Draft of a Common Frame of Reference (DCFR)⁷ the following was proposed under Article II.1:101: “a contract is an agreement which creates or purports to create a binding legal relationship, or which purports to produce some other legal effect. It is a bilateral or multilateral act”. Furthermore, the agreement within the contract can, as a general rule, be formulated both in writing and orally.

Similarly, the literature indicates that, if there are long-term relations or a long duration between purchase and delivery, the use of a written contract is

³ Civil law is primarily based on the adoption of legislation, whereas the common law looks to judicial decisions: J. Dainow, ‘The Civil Law and the Common Law: some points of comparison’, (1967) 15(3) American Journal of Comparative Law 419.

⁴ H. Kötz, B. Fauvarque-Cosson, C. Signat and D. Galbois-Lehalle, *Droit européen des contrats*, Sirey, Paris, 2020, p. 7. (Translated title: European contract law)

⁵ Translated by us.

⁶ *Définition du contrat*, *Lexique des termes juridiques 2019-2020*, editions Dalloz, p.277 (translated title: *Definition of the contract*, *Lexicon of legal terms 2019-2020*).

⁷ V.C Von Bar, E. Clive and H. Schulte-Nölke (Ed.) *Principles, Definitions and Model Rules of European Private Law, Draft of a Common Frame of Reference (DCFR)*, Interim outline Edition 2008. See also, R. Zimmermann, “Common Frame of Reference” in *Max Planck Encyclopaedia*, 2012, p. 261.

particularly likely⁸. Generally, a contract specifies the actions each party will take (for example the delivery of a good or service by one party and the payment to be made by the other party) ⁹.

Despite the existence of these common features, there is a greater expectation of uniformity of contract law at the European level. This is due to the close relationship between the economic order and contract law.

1.1.2.3 Fragmented contract law at the European level

In connection with the creation of a single market, the European Union would better achieve its goal if a more or less uniform European contract law were in place. Indeed, *"if one wants to deal in a coherent way with fundamental issues which are of an economic nature, sooner or later a contract law in line with this economic order will inevitably develop"*¹⁰. Such a development would facilitate exchanges across the European Union and could be seen as a means of removing an obstacle to the functioning of the internal market and, importantly, ensuring maximum legal certainty.

However, while attempts have been made at European Union level, European contract law remains largely fragmented.

- **Fragmented sector-specific contracts**

European contract law is *fragmented* in the sense that it does not contain any set of general rules that are applicable, in principle, to all types of contracts (such as those for sale, provision of services, lease or agency) or all types of contracting parties (whether consumers or businesses). Nor does it address the main issues that may arise in the life cycle of a contract, including formation, invalidity, interpretation, performance, non-performance and remedies.

Instead, EU contract law is 'sector-specific', addressing specific problems in specific sectors of the internal market, such as commercial agency, timeshare, package travel, late payment in commercial transactions and consumer credit.

- **No European civil code or common frame of reference**

As indicated, there have been attempts at formulating and adopting a set of more general contract law rules, but these remain soft law¹¹.

⁸ O. Hart and B. Holmström, 'The theory of contracts', in T. Bewley (Ed.), *Advances in Economic Theory: Fifth World Congress - Econometric Society Monographs*, Cambridge, Cambridge University Press, 1987, pp. 71-156 doi:10.1017/CCOL0521340446.003

⁹ N.B.P. Polman and L.H.G. Slangen, 'Institutional design of agri-environmental contracts in the European Union: the role of trust and social capital', (2008) 55 NJAS -Wageningen Journal of Life Sciences 413.

¹⁰ Translated by us. H. Kötz, B. Fauvarque-Cosson, C. Signat and D. Galbois-Lehalle, *Droit européen des contrats*, Sirey, Paris, 2020, p. 7. (Translated title: European contract law).

¹¹ The PECL example: Resolutions of the European Parliament of 1989 and 1994 expressed the desire to establish a common European civil law, and as an initial foundation, a common contract law was to be first created. Published in 1995 and completed in 2002, the EU adopted general rules of

- **Fragmented silos**

Frequently contract law rules represent merely one element of more comprehensive regulation of a specific sector, which may embrace also public law rules and self-regulation, and which may be applicable at national, European Union and sometimes even global level. Indeed, sector-specific regulation in this way, of which the 'regulatory private law' rules are but one element, have been referred to as a 'siloed' approach, with each silo having its own set of rules and standards (which are a mix of private law, public law and private governance), its own expertise and its own dispute resolution mechanisms. Each of these silos, however, has a higher degree of normative coherence, at least in the eyes of the relevant professional community, and looks less fragmented than 'European contract law' which forms only a small part of each silo¹².

Interestingly, at the same time as discussions on the establishment of 'European contract law' were taking place, the European Court of Justice issued a ruling limiting the intervention of the European Union in the field in land tenure: according to the judgment of the European Court of Justice in Case C-2/92, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* (24 March of 1994): '[s]uffice it to say, on that point, that legal relations between lessees and lessors, in particular on the expiry of a lease, are, as Community law now stands, still governed by the law of the Member State in question' (para. 26)¹³.

Nonetheless, if there are to be effective contractual solutions for the delivery of environmental public goods, then a degree of contractual harmonisation at European Union would assist.

contract law identified as "The Principles of European Contract Law" (PECL), these being rules of soft law and therefore not legally enforceable. The PECL Parts I and II cover the core rules of contract: formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies. Communication from the Commission to the Council and the European Parliament on European contract law (COM(2001) 398 final).

¹² M.W. Hesselink, 'Contract theory and EU contract law', in C. Twigg-Flesner (ed.) *Research Handbook on EU Consumer and Contract Law*, Edward Elgar Publishing, Cheltenham, 2016, pp. 508-534.

¹³ CJEU, 24 March 1994, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, Case C-2/92., European Court Reports 1994 I-955.

1.1.2.4 The definition of the contract as a deciding factor of the contractual solutions identified in CONSOLE

The concept of contractual solutions larger than the concept of contracts

As mentioned above, contracts are defined by common characteristics although each Member State has its own legal rules. And they are central to the notion of 'contractual solutions' for the purposes of CONSOLE. A matter of importance, however, is that "contractual solutions" extend beyond contracts, which are concerned with the legal relationship between the parties. **In particular, the concept of "contract" does not include certain preparatory phases**, such as building farmers' confidence through numerous preliminary meetings (e.g. focus groups), nor the training required to enter into contracts with a strong technical dimension (as evident from the case studies). The term "contractual solution", in contrast, is able to integrate these elements.

AT 2-Biodiversity monitoring with farmer

This case-study from Austria focuses on the education of the farmers. The scheme is called "Farmers keep an eye on plants and animals" and has been part of Austria's rural development programme since 2007. Notably, "[t]he program stands for the annual monitoring and documentation of plants and animals, as well as for the willingness to care for and maintain extensive grassland. The program is part of the education measures of the rural development programme, with the aim to demonstrate to farmers the biodiversity on their meadows and to inspire them to conserve it. This helps to better understand the relationship between management and the occurrence of certain indicator species and results in the independent design and conservation of habitats important for biodiversity". Its effectiveness lies in building farmers' knowledge of the species and habitats actually present on their land. They take no risk and are paid to receive education.

Training of farmers may be a prerequisite for entering into a contract for the provision of environmental goods and services. And, further, this training can in itself also constitute a contract, especially if it is accompanied by monitoring. For example, there may be a contract for the delivery of useful data by farmers in exchange for financial compensation and there can also be a contract where farmers commit to training in exchange for financial compensation.

Common features of the contract: an indicator to distinguish between what is contractual and what is not

Only what is based on an agreement and therefore on the will of the parties constitutes a contract, whether the parties be private or public. The common point is **the agreement**. Significantly for present purposes, under the second pillar of the CAP, agri-environment payments are designed to be allocated on an explicitly contractual basis. Thus, in the current CAP¹⁴, according to Article 28(2) of Regulation (EU) 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 Development¹⁵, “[a]gri-environment-climate payments shall be granted to farmers, groups of farmers and other land-managers who undertake, **on a voluntary basis**, to carry out operations consisting of one or more Agri-environment-climate commitments on agricultural land to be defined by Member States, including but not limited to the agricultural area defined under Article 2 of this Regulation”. This will again be the case in the new CAP from 2023 onwards where it is stated in Article 70(2) “(...) grant payments to farmers or other beneficiaries who undertake, on a voluntary basis, management commitments (...)”¹⁶.

Conversely, the greening measures of the CAP developed within the first pillar of the current CAP are clearly not contractual, although the associated practices are likewise understood to be “beneficial for the climate and the environment”. It is mentioned in the Recital 37 of Regulation (EU) 1307/2013 of 17 December 2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy¹⁷ that: “[o]ne of the objectives (...) is the enhancement of environmental performance through a mandatory “greening” component of direct payments which will support agricultural practices beneficial for the climate and the environment applicable throughout the Union. For that purpose, Member States should use part of their national ceilings for direct payments in order to grant, on top of the basic payment, an annual payment which may take account of internal convergence in the Member State

¹⁴ A transitional regulation has been adopted for 2021 and 2022.

¹⁵ OJ L 347/487, 20.12.2013 (emphasis added).

¹⁶ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 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 Regulations (EU) No 1305/2013 and (EU) No 1307/2013, OJ L 435/1, 6.12.2021.

¹⁷ Regulation (EU) 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, OJ L 347/608, 20.12.2013 (emphasis added).

or region, for compulsory practices to be followed by farmers addressing, as a priority, both climate and environment policy goals. **Those practices should take the form of simple, generalized, non-contractual and annual actions that go beyond cross-compliance and that are linked to agriculture**, such as crop diversification, the maintenance of permanent grassland, including traditional orchards where fruit trees are grown in low density on grassland, and the establishment of ecological focus areas".

In the framework of the CAP reform to be implemented as from the beginning of 2023, the main novelty of the "green" architecture of the CAP lies in the introduction of eco-schemes within the first pillar of the CAP. In contrast to the mandatory greening, they will be voluntary for farmers, as stated in **Article 31(1)** of the new CAP Strategic Plans Regulation: "Member States shall establish and provide support for **voluntary schemes** for the climate, environment and animal welfare ('eco-schemes') under the conditions set out in this Article and as further specified in their CAP Strategic Plans."¹⁸. It is further specified in 31(2) that "Member States shall support under this Article active farmers or groups of active farmers who make **commitments to observe agricultural practices beneficial for the climate, the environment**, animal welfare and combatting antimicrobial resistance ". Yet details regarding the conditions for the implementation of these climate and environmental programmes remain unclear. However, several elements suggest that it will be through an agreement of contractual nature that farmers will be able to benefit, similar to the current AECMs.

With regard to the relationship between the farmer and the Member State in the case of eco-schemes, the term "**commitment**" has been used, a term initially associated with AECM. Thus, Article 31(5)(d) specifies as a condition of eligibility for eco-schemes that they have to be "different from commitments in respect of which payments are granted under Article 70" (which are the AECM under the second pillar of the CAP).

The difference between these two forms of commitment would lie not only in their length (5 to 7 years for Article 70 commitments (Article 70 (6)) and one year for Article 31 commitments (Article 31(7)), but also in the nature of the commitment itself. In particular, under Article 31(3), eco-schemes are based on a list of agricultural practices to be selected by the Member States:

"Member States shall establish a list of agricultural practices beneficial for the climate, the environment and animal welfare and combatting antimicrobial resistance".

¹⁸ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

When targeting their provision of environmental goods and services, Member States will need to ensure that each eco-scheme in principle covers at least two of the areas of action which are expressly included in the list which is set out in Article 31(4).

1.1.3 The delivery of environmental goods and services by contract

The delivery of environmental goods and service by contract will be discussed by reference to the core purpose for the contract and the requisite remuneration.

1.1.3.1 The concept of delivering environmental goods and services

Concept of environmental goods and services

Public goods are defined in The Economics of Ecosystems and Biodiversity (TEEB) report¹⁹ as "goods or services received by one party (that) do not diminish the availability of benefits to other parties, and for which access cannot be restricted". And the concept of public goods has featured prominently in the current reform process. Thus, in "The CAP for 2020: Food, Natural Resources and Territory - Meeting the Challenges of the Future"²⁰, it was stated that: "[d]elivering more public benefits in future will require a strong public policy because the goods provided by the agricultural sector cannot be adequately remunerated and regulated through the normal functioning of markets".

As indicated, the concept of public goods extends to both goods and services. And, for the purposes of CONSOLE, environmental goods and services have particular resonance. In its 2005 working paper entitled "Environmental Goods and Services: A Synthesis of Country Studies", the OECD saw such environmental goods and services as including:

"goods derived from biological resources such as water, wood, biological material, medicinal plants, artisanal products, edible fruits, non-timber forest products as well as agricultural products. It also includes services provided by ecosystems such as carbon sequestration, as well as human activities, such as

¹⁹ "The Economics of Ecosystems and Biodiversity (TEEB) is a global initiative focused on "making nature's values visible". Its principal objective is to mainstream the values of biodiversity and ecosystem services into decision-making at all levels. It aims to achieve this goal by following a structured approach to valuation that helps decision-makers recognize the wide range of benefits provided by ecosystems and biodiversity, demonstrate their values in economic terms and, where appropriate, capture those values in decision-making" (available at, <http://www.teebweb.org>).

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future* (COM(2010) 672 final) p. 4.

wastewater activities, solid-waste management, hazardous-waste management, and noise and vibration abatement.”²¹

Notably, this definition is very close to the one adopted for ecosystem services by the Millennium Ecosystem Assessment: “[e]cosystem services are the benefits people obtain from ecosystems”.²²

Such emphasis on environmental public goods can also be found in the CAP Strategic Plans Regulation, where it is affirmed at Recital (30) that “[t]he CAP should play a role both in reducing negative impacts on the environment and climate, including biodiversity, and also **in increasing the provision of environmental public goods**”.²³ In addition, Member States have to consider the provision of public goods when defining “agricultural activity” as it “shall be determined in such a way that **it allows to contribute to the provision of private and public goods** (...)” (Article 4(2)).

There has also been longstanding mention of the “production of environmental goods” alongside agricultural production, particularly in relation to the CAP²⁴, which is consistent with a multifunctional vision of agriculture as espoused at the time of the Agenda 2000 reforms. And such use of the word “production” would seem to imply a voluntarist approach²⁵.

Concept of delivery (of environmental goods and services)

The notion of delivery would suggest that we are dealing with “an obligation of result” in French law and “performance” in English law. How this interpretation might be applied also to environmental goods and services will be explored later in relation to land tenure contracts and result-based contracts.

²¹ Reference was made to OECD/ Eurostat Environmental Goods and Services Industry: Manual for Data Collection and Analysis (OECD/Eurostat, 1999)

²² MEA (2001), Synthesis, (available at <https://www.millenniumassessment.org/documents/document.356.aspx.pdf>).

²³ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

²⁴ “Agriculture and forestry play a key role in producing public goods, notably environmental such as landscapes, farmland biodiversity, climate stability and greater resilience to natural disasters such as flooding, drought and fire”: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and The Committee of the Regions, *The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future* (COM(2010) 672 final) p. 5.

²⁵ A. Langlais, ‘ Les paiements pour services environnementaux comme réponse pertinente en faveur d’une agriculture durable ?’, in M.-L. Demeester et V. Mercier (Ed.), *Agriculture durable: contributions juridiques, scientifiques et économiques pour l’élaboration d’un cadre normatif*, Presses universitaires d’Aix-Marseille, 2016, pp. 395-411 and, in particular, p. 410. (Translated title: ‘Payments for environmental services as an appropriate answer in favour of a sustainable agriculture?’, in *Sustainable agriculture: legal, scientific and economical contributions for the elaboration of a legal framework*.)

1.1.3.2 Consideration for the provision of environmental goods and services

Although consideration for the provision of environmental goods and services is generally thought of in terms of financial compensation, which is generally the case, it is nevertheless important to highlight other forms of consideration based on the logic of 'mutual aid' in French law.

An exchange of services: 'mutual aid' in French law

In French law, there also exists the concept of 'mutual aid', defined as a contract for the exchange of services between farmers (Articles L. 325-1 et seq. of the French Rural and Maritime Fishing Code), including *"when the beneficiary reimburses the service provider for all or part of the costs incurred by the latter"* (Article 325-1 of the French Rural and Maritime Fishing Code) ²⁶.

The services exchanged generally consist of work (provision of labour) and/or equipment. Mutual aid implies reciprocity of services. It may be occasional, temporary or occur on a regular basis each year. The service may be provided by the farm manager, his employee or a member of his family and may concern routine farm work as well as ancillary tasks carried out for the smooth running of the farm (for example, maintenance of buildings).

The exchange must be reciprocal. If this is not the case, the service may be considered as undeclared work (in other words, the provision of labour). An employment contract would then be necessary. Furthermore, mutual aid applies only to farmers and is generally dedicated to agricultural production. As indicated, it may constitute labour or the loan of equipment (such as for the harvest). Nevertheless, it is not impossible to consider the use of mutual aid for environmental preservation and, more specifically, the provision of environmental goods and services. For example, a farmer could very well ask a neighbour or local farmer to help him to maintain a number of hedgerows which are useful for the preservation of biodiversity and carbon sequestration.

More generally, however, it is financial incentives that invite contracting and thus constitute remuneration for the provision of environmental goods and services.

Financial payment for contractual provision of environmental public goods

Although the principle of financial payment is common in contracts, in the case of providing environmental goods and services, there are still many variables, such as the nature, source and amount of the payment.

- Nature and source of the payment: financial aid or remuneration? Private or public?

Payment granted by the CAP in the framework of AEEM seeks to compensate for additional costs and loss of income, as specified in Regulation (EU) 1305/2013

²⁶ Translated by us.

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)²⁷: "[p]ayments shall be granted annually and shall compensate beneficiaries for all or part of the additional costs and income foregone resulting from the commitments made" (Article 28(6)).

Notably, this payment is expressly considered "compensation" (as opposed to remuneration in proportion to the environmental effort made).

Somewhat different wording has, however, been adopted in the case of the CAP Strategic Plans Regulation²⁸, Article 70(4)) stating: "Member States shall determine the payments to be made on the basis of the additional costs incurred and income foregone resulting from the commitments made, taking into account the targets set. Those payments shall be granted annually and may also cover transaction costs." Importantly, "compensation" is not explicitly mentioned and "targets" make an appearance.

- WTO rules and AECM under the CAP

The FAO in its 2007 report "Paying farmers for environmental services"²⁹ sees scope to clarify or even change the Green Box eligibility rules: "[i]n the current trade round, Green Box criteria may be reviewed and clarified with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects"³⁰.

And, in order to promote the Green Box compatibility of CAP support, studies tend to focus on the financial potential of AECM, within the limits offered by the rules of competition³¹. In particular, there is exploration of the extent to which the basis for calculating environmental payments can be amended so as to render them more financially attractive to farmers, while still being compatible with world trade rules.

What is clear is that, over the years, support for AECM has been notified to the WTO by the EU as exempt from domestic support reduction commitments on the basis that it falls within the Green Box. More specifically, it is considered to meet

²⁷ 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, OJ L 347/487, 20.12.2013.

²⁸ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

²⁹ FAO, *Paying Farmers for Environmental Services*, FAO, Rome, 2007.

³⁰ *Ibid.*, p. 89.

³¹ For example, in France, Ministère de l'agriculture, de l'agroalimentaire et de la forêt, Oréade-Brèche,

Rémunération des services environnementaux en agriculture et règles de l'Organisation Mondiale du

Commerce, Étude n° SSP- 2014-017, 2015. (Translated title: *Payments for environmental services in agriculture and World Trade Organization*).

the criteria for “payments under environmental programmes” under Paragraph 12 of Annex 2 to the Agreement on Agriculture³².

Paragraph 12 of Annex 2 to the Agreement on Agriculture provides as follows:

- (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 programme³³.

And, in respect of these provisions, three aspects may be highlighted.

- First, the limitation to extra costs or loss of income may present challenges in terms of securing participation in AECM schemes by farmers who may struggle to see how they will receive a positive contribution to the finances of their enterprise³⁴. In the past, the EU has provided an incentive element to payment under agri-environmental programmes which would tend to address such concerns. Thus, Article 24(1) of Council Regulation (EC) 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) expressly referred to payment on the basis of, *inter alia*, “the need to provide an incentive”³⁵. More recently, however, this policy has been discontinued in both Council Regulation (EC) 1698/2005 of 20 September 2005 and Regulation (EU) 1305/2013 of the European Parliament and of the Council of 17 December 2013,³⁶ with no reinstatement evident in the CAP Strategic Plans Regulation³⁷; and it is a reasonable inference that such discontinuation

³² See, for example, WTO, G/AG/N/EU/61 (30 April 2020) where Paragraph 12 measures include ‘protection of environment and preservation of the countryside, aid for environmentally sensitive areas’.

³³ It may be observed that the text makes reference to extra costs or loss of income in the alternative.

³⁴ See, for example, D. Blandford and T. Josling, *Should the Green Box be Modified?* (IPC Discussion Paper, International Food & Agricultural Trade Policy Council), March 2007, p. 31.

³⁵ [1999] OJ L160/80 26.6.1999.

³⁶ Respectively [2005] OJ L277/1, 21.10.2005, Article 39(4); and [2013] OJ L 347/487, 20.12.2013, Article 28(6).

³⁷ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021. The European Parliament had proposed that Member States should “also provide a financial incentive”: Report on the 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 (COM(2018) 392 – C8-0248/2018 – 2018/0216(COD), Amendment 442.

flows from a desire to secure WTO exemption³⁸. Further, and significantly, Annex II to the CAP Strategic Plans Regulation expressly envisages that “[e]nvironmental, climate and other management commitments’ are to be exempt within the Green Box under Paragraph 12 of Annex 2 to the Agreement on Agriculture; and Article 10 on “WTO domestic support” makes clear that, in the case of “the schemes for the climate, the environment and animal welfare”, Paragraph 12 is the sole option, in that they “**shall** qualify” in accordance with its criteria³⁹.

- Secondly, payment by reference to “loss of income” may nonetheless offer some prospect to farmers of securing the financial viability of their enterprises, particularly if account is taken of “an opportunity cost”, as suggested by Matthews:

If the AECM payment includes an opportunity cost (that is, a sum to compensate farmers for the income opportunity lost by enrolling in an AECM), then by definition it will provide at least the same income as the alternative production activity on that land. There would still be a ceiling on the level of payment possible under an AECM, but it would provide farmers with at least the same level of income as they might earn from ‘conventional’ production⁴⁰.

That said, there would remain the potential difficulty that any loss of income is likely to be greatest in areas where there is a high level of agricultural productivity as opposed to areas where there is a high level of nature value⁴¹. And, more generally, a hurdle to be cleared in AECM scheme design is the fact that neither the relevant provisions of Paragraph 12 nor WTO case law provide detail as to the how the amount of the loss should be calculated⁴².

- Thirdly, under Annex 2 to the Agreement on Agriculture, Green Box exemption would only seem to be available in respect of direct payments to

³⁸ See, for example, A. Swinbank, ‘The Reform of the EU’s Common Agricultural Policy’, in R. Meléndez-Ortiz, C. Bellmann and J. Hepburn (Ed.), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals*, Cambridge University Press, Cambridge, 2009, p. 70, at pp. 79-80.

³⁹ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021 (emphasis added).

⁴⁰ A. Matthews, *Introducing a Development Policy Perspective into CAP Strategic Plans* (TEP Working Paper No. 0319, March 2019) p. 14. See also J-C Bureau, ‘Does the WTO Discipline Really Constrain the Design of CAP Payments’ (23 October 2017) (available at <http://capreform.eu/does-the-wto-discipline-really-constrain-the-design-of-cap-payments/>).

⁴¹ A. Brunner and H. Huyton, ‘The Environmental Impact of EU Green Box Subsidies’, in R. Meléndez-Ortiz, C. Bellmann and J. Hepburn (Ed.), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals*, Cambridge University Press, Cambridge, 2009, p. 468, at p. 487.

⁴² See, for example, L. Petetin, ‘Post-Brexit Agricultural Support and the WTO: Using Both the Amber and Green Boxes?’ (21 June 2018) (available at <https://www.brexitenvironment.co.uk/2018/06/21/post-brexit-agricultural-support-wto-using-amber-green-boxes/>).

“producers”⁴³, which may restrict the ability to operate schemes through entities which are not actively engaged in farming, such as non-governmental organisations.

At the same time, it may be observed that, although focus by legislators and policymakers has generally been directed to Paragraph 12 of Annex 2 in order to secure Green Box exemption for AECMs, other opportunities may be available.

- First, under Paragraph 2 of the same Annex, exemption is conferred on “general services” which are defined so as to embrace, *inter alia*: (i) research (including “research in connection with environmental programmes”); (ii) training services; and (iii) extension and advisory services. All of these would seem pertinent in the case of AECM schemes, with this pertinence likely to be increased under both the CAP Strategic Plans Regulation⁴⁴ and the Farm to Fork Strategy⁴⁵.
- Secondly, Paragraph 5 of Annex 2 permits Green Box exemption for direct payments even if not specifically listed in Paragraphs 6 to 13⁴⁶, which may offer opportunities to design schemes where payment is not limited to extra costs or loss of income. In this regard, it may be noted that Annex II to the CAP Strategic Plans Regulation looks to Paragraphs 5 and 6 of Annex 2 to the Agreement on Agriculture as avenues for securing Green Box exemption for payments under eco-schemes when these are granted as “payments additional to the basic income support”: the payments are to qualify under Paragraph 5 if implementation of the related basic income support for sustainability is not based on payment entitlements, while they are to qualify under Paragraph 6 if implementation of the related basic income support for sustainability is based on payment entitlements⁴⁷. As also highlighted by Matthews, an innovative feature of eco-schemes is that such additional payments may present an opportunity to provide a larger income stream for farmers and “open the way for value-based payments”⁴⁸; and it is possible that more traditional AECM schemes, likewise relying on Paragraph 5, could be so designed as to achieve similar objectives. On the other hand, an obstacle which would need to be addressed is that under Paragraph 5 no production is to be required in order to receive payment; and this may not be

⁴³ See, in particular, the heading to Paragraph 5.

⁴⁴ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

⁴⁵ European Commission (COM(2020) 381 final) pp.15-16.

⁴⁶ See J.A. McMahon, *The WTO Agreement on Agriculture: a Commentary*, Oxford University Press, Oxford, 2006, p. 71.

⁴⁷ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

⁴⁸ A. Matthews, *Introducing a Development Policy Perspective into CAP Strategic Plans* (TEP Working Paper No. 0319, March 2019) p. 15.

easy to reconcile with a range of AEEM commitments (such as planting a particular crop for environmental purposes)⁴⁹.

- Thirdly, it may also be possible to ensure WTO compliance through use of the *de minimis* exemption. In the case of developed countries, under Article 6:4(a) of the Agreement on Agriculture, this exemption extends to product-specific support not exceeding 5 per cent of a member's total value of production of a basic agricultural product during the relevant year; and to non-product-specific domestic support not exceeding 5 per cent of the value of a member's total agricultural production (the latter category being more likely relevant for AEEM schemes).
- Fourthly, even if the AEEM payments do not qualify for any form of exemption, instead falling within the Amber Box, the EU currently enjoys considerable "headroom" within its Amber Box limits. Thus, for the marketing year 2017/2018, the EU Total Aggregate Measurement of Support commitment level was 72,378 million Euros, while the total of Amber Box domestic support was only 6,932.8 million Euros⁵⁰.

- Rules governing private sources of financing outside CAP

Beyond the regulatory framework of the CAP and state aid rules in EU law, private sources of financing can develop so as to provide an alternative source of remuneration for farmers. Impetus for this may be provided by the 2020 EU regulation on the establishment of a framework to promote sustainable investments⁵¹. This flowed from publication by the Commission in 2018 of three legislative projects⁵², which aimed to put in place the following:

- a measure establishing a European taxonomy for sustainable finance
- a measure to clarify information on sustainable investments and ad hoc risks;
- a measure establishing benchmarks for a low-carbon economy.

⁴⁹ But see also N. Röder, 'Payments for the Environment – New Turmoil Around an Old Issue' (2 March 2021) (available at <http://capreform.eu/payments-for-the-environment-new-turmoil-around-an-old-issue/>).

⁵⁰ WTO, G/AG/N/EU/61 (30 April 2020). A downward adjustment in the EU Total Aggregate Measurement of Support may be required following Brexit.

⁵¹ Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, OJ L 198/13 22.06.2020.

⁵² Opinion of the European Economic and Social Committee on 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions — Action Plan: Financing Sustainable Growth' (COM(2018) 97 final) EESC 2018/01695; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks (COM(2018) 355 final); and Proposal for a Regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 (COM(2018) 354 final).

In the European Commission's view, the overall objective is to boost the growth of sustainable finance, namely investments that integrate non-financial criteria relating to the environment, social responsibility and corporate governance.

More specifically, Regulation (EU) 2020/852 on the establishment of a framework to promote sustainable investment aims to establish a taxonomy of green activities. For that purpose, it *"establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable"* (Article 1).

The Regulation creates a common language for all Member States, setting out a series of environmental objectives and permitting an economic activity to be declared sustainable if it contributes to at least one of the following objectives without significantly undermining any of the others (Articles 3 and 9):

- climate change mitigation and adaptation;
- sustainable use and protection of water and marine resources;
- transition to a circular economy, including waste prevention and increased use of secondary raw materials;
- prevention and control of pollution;
- and, finally, protection and restoration of biodiversity and ecosystems (Recital (23))⁵³.

Thus, it is recited that *"[a]n economic activity that pursues the environmental objective of climate change mitigation should contribute substantially to the stabilisation of greenhouse gas emissions by avoiding or reducing them or by enhancing greenhouse gas removals. The economic activity should be consistent with the long-term temperature goal of the Paris Agreement. That environmental objective should be interpreted in accordance with relevant Union law, including Directive 2009/31/EC of the European Parliament and of the Council (Recital (24))."*

And it is also recited that *"[a]n economic activity can contribute substantially to the environmental objective of the protection and restoration of biodiversity and ecosystems, in several ways, including by protecting, conserving or restoring biodiversity and ecosystems, and thereby enhancing ecosystem services"*(Recital (31)).

The Article 9 list of environmental objectives that permit an economic activity to qualify as sustainable inevitably has resonance for farmers, being as follows:
a) climate change mitigation;

⁵³ Recital (23) states that: *"[f]or the purpose of determining the environmental sustainability of a given economic activity, an exhaustive list of environmental objectives should be laid down"*.

- (b) climate change adaptation;
- (c) the sustainable use and protection of water and marine resources;
- (d) the transition to a circular economy;
- (e) pollution prevention and control;
- (f) the protection and restoration of biodiversity and ecosystems.

Investment in natural capital⁵⁴ and the assimilation of green investment as part of corporate social responsibility (CSR)⁵⁵ is encouraged, but there is work yet to be done in quantifying the amount of financial compensation to be granted in exchange for the provision of environmental goods and services.

1.1.4 General legal issues relating to contractual solutions for the provision of environmental goods and services

Contractual solutions for the provision of environmental goods and services are evolving within a more general contractual framework which engages several broader legal issues, two of which may be considered: whether intervention should be at the level of the EU or the Member State and flexibility.

1.1.4.1 The level of intervention

The level of intervention for any contractual policy for the provision of environmental goods and services requires thinking about the interaction between the EU and the Member States⁵⁶, so as to clarify the role of each of the actors and the associated sources of funding.

While the EU does not contract directly with farmers in the context of agri-environmental payments, it does encourage the use of contracts for AECP under the CAP, including the provision of funding. Thus, Article 28(2) of Regulation (EU) 1305/2013 provides that: “[a]gri-environment-climate payments shall be granted to farmers, groups of farmers or groups of farmers and other land-managers who undertake, on a voluntary basis, to carry out operations consisting of one or more agri-environment-climate commitments on agricultural land to be defined by Member States, including but not limited to the agricultural area defined under Article 2 of this Regulation. Where duly justified to achieve environmental objectives, Agri-environment-climate payments may be granted to other land-managers or groups of other land-managers”. **Notably, while farmers are the preferred contractual partners, other actors (land-managers and groups of land-managers) may be eligible.**

⁵⁴ A.M. Jansson, M. Hammer, S. Koskoff, C. Folke and R. Costanza, *Investing in Natural Capital: The Ecological Economics Approach to Sustainability*, Island Press, 1994.

⁵⁵ G. Málovics, N.Nagypál Csigéné and S. Kraus, 'The role of corporate social responsibility in strong sustainability', (2008) 37(3) *The Journal of Socio-Economics* 907.

⁵⁶ Especially for CAP payments.

The Member State as a key player in the development and implementation of the contract

Rather it is the Member State which enters into the AECM contracts, this being an expression of the principle of subsidiarity⁵⁷.

The principle of subsidiarity is defined in Article 5 of the Treaty on European Union:

"3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

In other words, **the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level.**

And **both the CAP and environmental policy are instances of shared competence (TFEU Article 4 (2) (d) and (e))⁵⁸**, with the result that the Member States have considerable room for manoeuvre, both in the implementation of contracts under the CAP and under national law. By virtue of such shared competence, they can adapt contracts under the CAP to local requirements both in relation to AECM under Pillar II and, in the future, eco-schemes under Pillar I. And the role of the Member State is likely to be increased under the new CAP through the preparation of National Strategic Plans.

1.1.4.2 Contract flexibility: strength or weakness

Flexibility is a significant factor in determining the attractiveness of a contract. On the other hand, the same factor may also be a handicap in finding the right instrument to preserve the environment and more specifically to ensure the provision of environmental goods and services. Therefore, the flexibility of a contract is a strength (1.1.2.2.1), but in the context of AECM there are some constraints on such flexibility (1.1.2.2.2). And the flexibility of contracts may also act as a weakness (1.1.2.2.3), while contracts may also lead to both fragmentary protection (1.1.2.2.4) and time-limited protection (1.1.2.2.5).

⁵⁷ F. Fabbrini, Federico, *The Principle of Subsidiarity* (May 19, 2016). Takis Tridimas & Robert Schütze (Ed.), *Oxford Principles of EU Law* (OUP 2016) iCourts Working Paper Series No. 66 (available at SSRN: <https://ssrn.com/abstract=2781845> or <http://dx.doi.org/10.2139/ssrn.2781845>); S. Gosepath, 'The Principle of Subsidiarity', in A. Follesdal and T. Pogge (Ed.), *Real World Justice. Studies in Global Justice*, Vol 1. Springer, Dordrecht, 2005 https://doi.org/10.1007/1-4020-3142-4_9; and K. Lenaerts, 'The Principle of Subsidiarity and the environment in the European Union: Keeping the balance of federalism', (1993) 17 *Fordham Int'l L.J.* 846.

⁵⁸ Now for both pillars of the CAP since the Lisbon Treaty.

The freedom to contract

Unlike a unilateral compulsory measure that leaves no room for negotiation, contracts offer, in principle, freedom whether or not to be bound and also as to the extent of the obligations. In the case of contracts involving a public entity, such as AECM, the extent of the obligation is in general already defined, but farmers remain free as to whether or not to enter into the commitment and may have some leeway to adapt standard contractual provisions. In the case of contracts involving only private persons, the contracting parties have a great deal of freedom within the rules imposed by contract law, which aim to ensure the validity of the contract and the legal certainty of the commitment made. And such contractual freedom allows farmers to adopt new perspectives on the environment.

Contract and regulatory constraints

However, this does not mean that it is possible to ignore **unilaterally imposed regulatory constraints**. Indeed, as a matter of principle, farmers should not expect to be paid for compliance with pre-existing regulatory standards, which must be respected, monitored and sanctioned in accordance with their own terms. In other words, AECM contracts will need to go beyond what is already mandatory, such as cross-compliance – and, in the future, conditionality – requirements which act as a floor to unlocking Pillar II support.

Weakness of contracts

By contrast, their flexibility is often regarded as a weakness which diminishes the attractiveness of contracts. They have been considered to be of limited value in the preservation of the environment since they only bind the signatories by virtue of the doctrine of privity of contract – and they can also only bind where there is consent. This problem appears to be exacerbated when it comes to achieving an environmental objective at a territorial scale and raises issues relating to fragmentation⁵⁹.

Contract and risk of fragmented protection of the ecosystem

Contracts carry risks of fragmentation of environmental or ecosystem protection, since they may address specific environmental issues according to the interests of the parties, but not the needs of a specific region or ecosystem⁶⁰.

⁵⁹ These aspects will be developed in Part 4 on collective implementation.

⁶⁰ T. Tasan-Kok, R. Atkinson and M.L.R. Martins, 'Hybrid contractual landscapes of governance: Generation of fragmented regimes of public accountability through urban regeneration', (2021) 39(2) Environment and Planning C: Politics and Space 371.

Environmental effects of the contract: are the changes lasting?

A risk often highlighted is that the end of the contract also marks the end of a particular action to preserve the environment. Mechanisms for securing long-term benefits are, therefore, particularly important, with relevant factors including the duration of the contract, whether there are complementary contractual solutions and the possibility of alternative sources of financing⁶¹.

Two CONSOLE case study which have taken into account the need to provide lasting changes are LV2 (in Latvia) and DE3 (in Germany).

Case Study LV2 - Latvia - Dviete Life

In the Latvian case study of Dviete Life (LV2), the organization in charge of the initial LIFE + project (DVPA) committed to maintain the results obtained from that project and to implement measures to restore and protect the floodplains for 20 years following its end.

Case Study DE 3 - Germany - Collaboration for sustainability between institutional landowners and tenant farmers

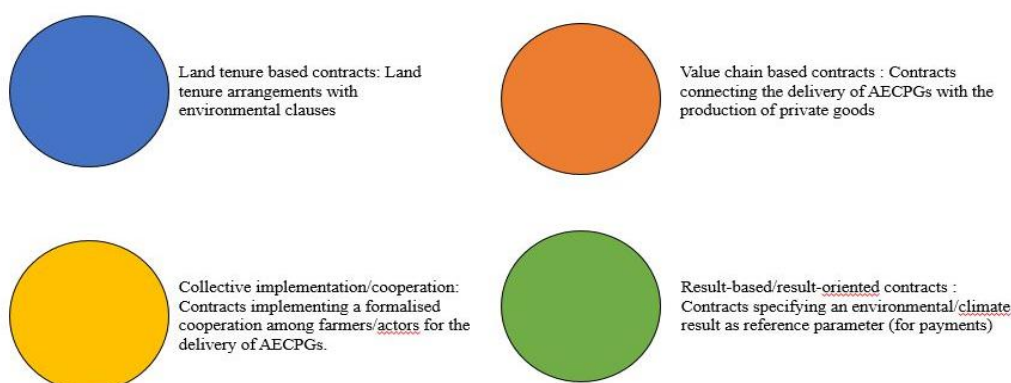
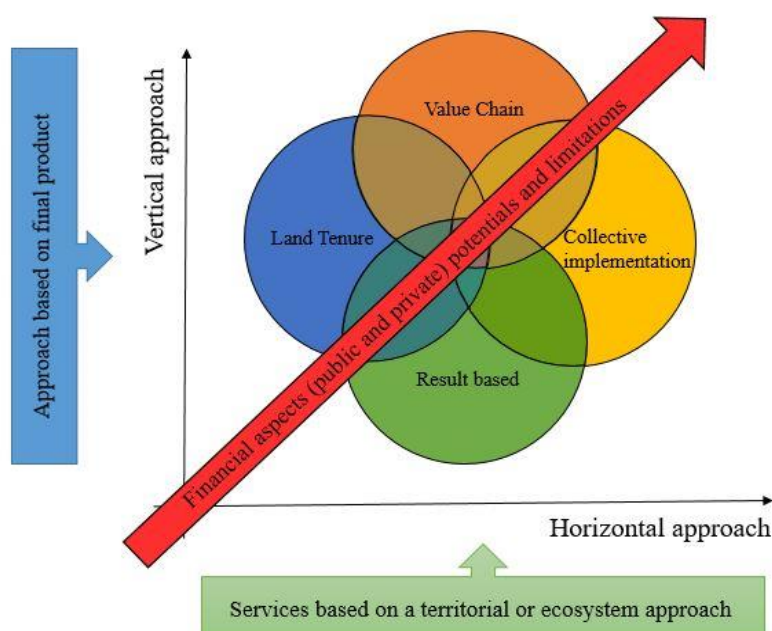
In the German case study on collaboration for sustainability between institutional land owners and tenant farmers in the region of the city of Greifswald (DE3), a contractual approach employing environmental clauses was first developed and implemented, which was then continued following the original period of the initiative. In particular, longevity was achieved through the subsequent establishment of an association to provide an institutional structure.

1.2 General legal framework and challenges of agri-environmental contracts: Explanatory Diagram

In order to put the legal issues of the four contractual solutions discussed in Console into perspective, these solutions are represented in a diagram (1.2.1) which is then explained to better highlight their legal dimension (1.2.2).

6 ⁶¹ See Part 2 on land tenure contracts.

1.2.1 Schematic representation of the contractual solutions identified



*A particular attention was paid to land tenure arrangements with environmental clauses but more broadly, blue circle takes into account Land tenure based contracts, including land tenure arrangements with environmental clauses.

1.2.2 Objectives of the diagram

This diagram aims to highlight the legal interrelationships between the different forms of provision of environmental goods and services and the distinct approaches which underpin them. In particular, the legal interrelationships reveal the key role of land contracts, which inevitably enjoy a privileged position through the clear link between the provision of environmental goods and services and agricultural land.

These different contractual approaches are articulated **horizontally** by reference to the valorization of agricultural ecosystems, while also being attached to the production system, and **vertically** by reference to the valorization of the final product. In this context, the collective approach is an extension of the link to agricultural land, the source of the provision of environmental goods and services.

The incentive generated by financial payment can be analysed as **a cross-cutting issue** for all the contracts identified, with both public and private sources of finance being relevant.

1.2.2.1 A more detailed presentation of the different components of the scheme

The different components of the diagram constitute the main foundations upon which the legal analysis is based.

Within each of these components, the report will address legal drivers which may be expected to develop, improve or even create from scratch contractual solutions favourable to the sustainable provision of environmental goods and services.

The blue circle: land tenure contracts

Identified as the basic element of the contractual matrix, this circle comprises land tenure contracts as broadly interpreted so as to include not just landlord and tenant relationships, but also, for example, contractual relationships entered into by landowners (such as conservation covenants and environmental trusts). The Report will consider such contracts with the following aims:

- 1: to characterize the purpose of the differing contractual obligations and thus their capacity to contribute to the provision of environmental goods and services.
- 2: to draw up a typology of relevant existing environmental land tenure contracts, with particular reference to:
 - a. "Real" environmental obligations (such as "conservation easements"/"conservation covenants");
 - b. environmental trusts;
 - c. rural tenancies with environmental clauses;
 - e. ecological compensation contracts (as currently found, for example, under the Habitats Directive and Wild Birds Directive)
 - f. Offsets
- 3: To question the capacity of these contracts to deliver sustainable provision of environmental goods and services, this capacity being evaluated according to the following criteria:
 - a. legal criteria, such as the potential duration of the contract.

- b. an economic criterion: the financial attractiveness of the contract.
- 4: To think about achieving greater sustainability in the provision of environmental goods and services through the combination of such contracts.
- 5: To compare the contracts according to the different criteria chosen.

The yellow circle: collective implementation

The collective dimension enriches the individual dimension which is generally applicable in the case of contracts targeting a particular landscape.

The ability to deliver provision of environmental goods and services collectively forms part of the horizontal approach and is based more broadly on the ecosystem at territorial level. It is also based on participation by a range of actors (generally farmers) whose similar purpose and presence across a relevant ecological zone generates scope for high environmental impact. Importantly, ecological zones do not tend to map simply onto individual farms.

The orange circle: value chain contracts

In the case of value chain contracts, the approach is vertical, whether the buyer is private (within supply chains) or public (where, even though the initial contract may be with a private supplier, the rules of public procurement may be relevant). There may also be a collective dimension orchestrated by the distributor or by the farmers themselves who may form associations. Importantly, value chain contracts relate to the product as opposed to the land.

The green circle: result-based contracts

With regard to result-based contracts, their aim is to achieve a high level of environmental performance by requiring specific environmental results as opposed to just the carrying out pre-defined agri-environmental management practices.

The red line framing the contractual matrix: the financial incentive

The red line framing the contractual matrix has a triple objective:

- To explain the threefold sources of legal rules on financing, which closely interact: international law (in particular, WTO law); EU law; and national law.
- To explain the different legal regimes which govern private and public financing for the sustainable supply of environmental goods and service.
- To consider blended finance as a means of support for the sustainable supply of environmental goods and services.

2 Land tenure based contracts

2.1 Introduction

For the FAO, “Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. (For convenience, “land” is used here to include other natural resources such as water and trees.) Land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions”⁶². The terms “land tenure” and “land rights” are often used interchangeably.

There are several types of land tenure: (i) private; (ii) communal; (iii) state; and (iv) open access. All of these are relevant for agriculture and forest land.

Categories of land tenure (FAO)⁶³

Private: the assignment of rights to a private party who may be an individual, a married couple, a group of people, or a corporate body such as a commercial entity or non-profit organization.

Communal⁶⁴: a right of commons may exist within a community where each member has a right to use independently the land of the community. For example, members of a community may have the right to graze cattle on a common pasture⁶⁵.

State: property rights are assigned to an authority in the public sector. For example, in some countries, forest lands may fall under the mandate of the state, whether at a central or decentralised level of government.

Open access: specific rights are not assigned to anyone and no-one can be excluded. This typically includes marine tenure where access to the high seas is generally open to anyone.

Environmental expectations are leading to a change in the relationship with land, as it is now a question of considering not only the private goods which it

⁶² “3. WHAT IS LAND TENURE” (available at <http://www.fao.org/3/y4307e/y4307e05.htm#TopOfPage>).

⁶³ Ibid.

⁶⁴ This kind of land tenure will be mentioned further when considering collective implementation: see below.

⁶⁵ Communal rights should not be confused with collective implementation as interpreted for the purposes of the CONSOLE project: see below.

offers, but also the public environmental goods. Indeed, agricultural land is at the heart of a re-focusing on environmental preservation. Thus, in its communication *The Future of Food and Farming*, the European Commission states that "[t]he EU's farmers are also the first stewards of the **natural environment**, as they care for the natural resources of soil, water, air and biodiversity on **48% of the EU's land** (foresters a further 36%)"⁶⁶. The various legislative changes to the CAP are representative of this new relationship with land. Announcing the current reform of the CAP, the European Commission therefore stressed in the same Communication that "farmers and foresters are not only users of natural resources, but also, indispensable managers of ecosystems, habitats and landscapes"⁶⁷. By referring to a quantitative criterion (the percentage of land use) and a qualitative criterion (the way land is managed), the European Commission requires the CAP to take central responsibility for land use.

The relationship to land is embedded in legal relationships, which are likewise affected by these developments, the new environmental expectations materially shaking up the legal regulation of agricultural land use. In this section, we will focus on private land tenure⁶⁸, in particular on the relationship between the agricultural landlord and tenant, since the tenanted sector still covers a material proportion of all agricultural land across the Member States (see Box below).

Rented agricultural land: some data

- In France, a study by INSEE indicates an upward trend in the rate of rented agricultural land since the 1980s. It also indicates that in 2010 two thirds of the agricultural area in France was cultivated by farmers who were not owners⁶⁹.
- Before the First World War, 90 per cent of agricultural land in Great Britain was rented. In England, the proportion is now only about 35 per cent⁷⁰.
- In Germany, for 2020, 60.1 % of agricultural land is rented, while 38.2 % is owner-occupied, with a further 1.7 % made available as part of the holding free of charge⁷¹.

⁶⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Future of Food and Farming* (COM(2017) 713 final) p. 3 (emphasis in original).

⁶⁷ *Ibid.*, p. 18.

⁶⁸ For the "group approach", see the section on collective implementation.

⁶⁹ F. Courleux, *Increasing the share of rented agricultural land: failure or success of the land policy?*, INSEE, *ECONOMIE ET STATISTIQUE* N°444-445 (2011).

⁷⁰ Central Association of Agricultural Valuers, *The Annual Agricultural Land Occupation Surveys*, 2020 (2021) 3 and 4.

⁷¹ Wen gehört die Landwirtschaft? Landwirtschaftszählung 2020 (available at <https://www.giscloud.nrw.de/arcgis/apps/storymaps/stories/43e6eb55a955499eb8e624e78b38eca>).

- The percentage of land that is owner-occupied and available for rent differs from country to country.
- In Europe, access to agricultural land is restricted by concentration of ownership and/or the impossibility for younger farmers to become owners of agricultural land⁷².

In addition to agricultural tenancies, there will also be consideration of circumstances where owners of land enter into contractual obligations relating to the environment, for example the “fiducie environnementale” (called in English the “environmental trust”) or the “obligation réelles environnementales” (ORE)⁷³ (called in English “conservation easements”/“conservation covenants”)⁷⁴.

And the overall inquiry will be conducted by reference to the examples of “land rights” as set out in the box below.

EXAMPLES OF LAND RIGHTS ⁷⁵

The rights underlined in bold are those that appear at the heart of the research conducted by CONSOLE.

A right to use the land.

A right to exclude unauthorized people from using the land.

A right to control how land will be used.

A right to derive income from the land.

A right to protect from illegal expropriation of the land.

A right to transmit the rights to the land to one's successors, (i.e., a right held by descendants to inherit the land).

A right to alienate all rights to the entire holding (e.g., through sale), or to a portion of the holding (e.g., by subdividing it).

A right to alienate only a portion of the rights, e.g., through a lease.

A residuary right to the land, i.e., when partially alienated rights lapse (such as when a lease expires) those rights revert to the person who alienated them.

A right to enjoy the property rights for an indeterminate length of time, i.e., rights might not terminate at a specific date but can last in perpetuity.

⁷² For example, W. Anseeuw and G-M. Baldinelli, The Land Inequality Initiative, Synthesis Report ‘Unequal Ground: Land inequality at the heart of unequal societies’ (2020).

⁷³ See the typology of land tenure contracts.

⁷⁴ C. Rodgers and D. Grinlinton, ‘Covenanting for nature: a comparative study of the utility and potential of conservation covenants’, (2020) 83 Modern Law Review 373; and see also, J. Owley and A. R. Rissman, ‘Trends in private land conservation: increasing complexity, shifting conservation purposes and allowable private land uses’, (2016) 51 Land Use Policy 76.

⁷⁵ “3. WHAT IS LAND TENURE” (available at <http://www.fao.org/3/y4307e/y4307e05.htm#TopOfPage>).

A duty not to use the land in a way that is harmful to other members of society, (i.e., the right is held by those who do not hold the right to use the land).

A duty to surrender the rights to the land when they are taken away through a lawful action, (e.g., in a case of insolvency where the right is held by the creditors, or in the case of default on tax payments where the right is held by the state).

However, it should be remembered that land policy falls within the competence of the Member States. They retain powers in the areas of land regulation, land taxation, inheritance law and planning law. Accordingly, as seen in the *Bostock* case, each Member State has competence to provide a legal framework for the relationship between an owner and a tenant. Although the European Union is, by definition, not competent in land policy per se, it undoubtedly influences how rights are exercised over agricultural land and how leases operate, not least through the prism of the CAP. Thus, agricultural practice is steered through the mandatory environmental conditionality which must be respected in order to receive CAP direct payments. And such a steer is even more direct in the case of contractual aid, whether as payments for AECM or, in the future, for eco-schemes as currently being developed.

Because of their increasingly tight link with environmental objectives, land tenure contracts have been reconfigured - and are still being reconfigured. And, as environmental demands become more precise and ambitious, it is important to underline the additional challenges which such contracts face: it is no longer just a matter of integrating an environmental dimension into a land lease that has traditionally been geared towards production, but of working towards the sustainable provision of environmental goods and services. In other words, it is a question of assessing the **capacity of these contracts to accommodate or even to adapt** to this environmental challenge, and thus to identify their current environmental efficacy, together with how it could be improved.

The first stage in our analysis is therefore to develop a typology of land tenure contracts that are likely to meet the demand for the provision of environmental goods and services, including in the long term (2.1). This typology focuses mainly on the purpose of the contract itself or the content of the commitment. A second stage provides more specifically a critical analysis of sustainability criteria which should be included for the provision of environmental goods and services under land tenure contracts (2.2).

2.2 Legal analysis of the capacity of land contracts to promote the delivery of environmental goods and services

Not all land tenure contracts concluded on agricultural land are exclusively production-oriented. This is particularly the case for contracts with environmental clauses. Contracts of different types and duration are set out below to highlight the diversity of contractual formulae and, therefore, the different ways in which the law can deliver environmental goods and services.

Methodology: French contracts

The law applicable to land tenure contracts is that of the state concerned. It is therefore particularly difficult to provide an exhaustive survey of the design of contracts in all EU Member States, together with the issues which they raise. For present purposes, focus will be on French contracts, but they have many similarities with those which exist in the other EU countries.

2.2.1 Contracts not directly focused on the provision of environmental goods and services but on agricultural practices

In land tenure contracts which regulate the use of agricultural land, it is standard farming practices which tend to be the core of the contractual commitment, not the provision of environmental goods and services (although there can also be some blurring as between the two).

2.2.1.1 The environmental dimension

The insertion of environmental clauses specifically to address the environmental dimension has been a defining feature of recent policy. And this environmental dimension has been accentuated through the logic of the CAP, which has the capacity to shape national agricultural policies as implemented by the individual Member States.

The rural lease and the inclusion of practices deemed to have a positive environmental impact

Rural leases are inevitably concerned with the cultivation practices to be undertaken. Indeed, clauses to this effect form part of all standard leases of agricultural land. And some rural leases also contain environmental clauses, which specify practices considered to have beneficial effects on the environment as well as prohibitions of practices at risk of being harmful for the environment.

If we take the French example of the rural lease with environmental clauses, the nature of the environmental clause is specified in Article R.411-9-11-1 of the Rural

and Maritime Fishing Code. The article lists the sixteen environmental practices, extending to practices to be maintained or new practices to be put in place by the tenant:

- "1° The non-ploughing up of grasslands;*
- 2° The creation, maintenance and management of grassland areas;*
- 3° Harvesting methods;*
- 4° The clearing of an overgrown area and the keeping open of an area liable to be overgrown;*
- 5° The setting aside of parcels or parts of parcels;*
- 6° The limitation or prohibition of fertiliser inputs;*
- 7° The limitation or prohibition of plant protection products;*
- 8° Periodic or permanent plant cover for annual or perennial crops;*
- 9° The establishment, maintenance and care of specific cover crops for environmental purposes;*
- 10° The prohibition of irrigation, drainage and all forms of water management;*
- 11° Arrangement for submerging plots of land and managing water levels;*
- 12° Diversification of crop rotation;*
- 13° The creation, maintenance and care of hedges, slopes, copses, individual trees, rows of trees, buffer strips along watercourses or forests, ponds, ditches, terraces, low walls;*
- 14° Soil working techniques;*
- 15° The management of crops or livestock in accordance with the requirements for organic farming;*
- 16° Practices combining agriculture and forestry, particularly agroforestry."* ⁷⁶

These practices aim at:

- Improving the stability of a landscape or natural elements (grassland, hedges, banks, copses, individual trees, ponds, ditches, terraces, low walls and tillage techniques)
- Preventing water pollution and soil degradation (limitation of phytosanitary products, fertilisers, plant cover, prohibition of irrigation, drainage, diversification of crop rotation and crop management)
- Restoring an ecosystem (rotation or set-aside and water level management),
- Protecting certain species (harvesting methods)⁷⁷.

The measures to be complied with have to be stipulated in the rural lease with environmental clauses when the contract is signed. Failure to comply with these measures will result in the termination of the lease.

⁷⁶ Translated by us.

⁷⁷ According to the categorization done by L. Bodiguel, 'Les clauses environnementales dans le statut du fermage', (2011) 8-9 Environnement, étude 10 (Translated title: Environmental clauses in the statute of tenancy)

It is possible to enter into a rural lease with environmental clauses in the following situations:

- Establishment of a new rural lease with environmental clauses
- Renewal of a standard rural lease
- Contractual amendment during the term of the lease

Environmental integration accentuated by the CAP: the introduction of environmentally friendly agricultural practices

In all EU Member States, EU agricultural policy undoubtedly shapes national agricultural policy through contractualised financial instruments, whether long-established (such as AECM under the second pillar of the CAP) or the new eco-schemes under the first pillar of the CAP, to start in 2023.

- The CAP's involvement through agricultural practices

With conditionality under the CAP defining the boundaries for agricultural practices eligible for EU payments, it is clear that the EU legislative framework is likely to have some influence on agricultural practices which may be reflected in national land tenure contracts. It is also the case that long-standing experience with AECM has fostered the adoption or maintenance by farmers of ways of working which target environmental issues, often at territorial level, such as the preservation of water quality, biodiversity and soil or the mitigation of/adaptation to climate change⁷⁸.

The Court of Auditors has deplored the "*negative, (...) limited or unknown*" impact of the current CAP on the maintenance of biodiversity⁷⁹. The reform of the CAP, combined with the effect of the Green Deal⁸⁰, therefore provides the opportunity to reinforce the environmental requirements of the CAP and to connect practices more strongly to their effects, including through the introduction of eco-schemes. Article 31 (2) of the CAP Strategic Plans Regulation⁸¹ specifies that: "*Member States shall support under this Article active farmers or groups of active farmers who make commitments to observe agricultural practices beneficial for*

⁷⁸ See Article 28(1) and (2) of 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, OJ L 347/487, 20.12.2013.

⁷⁹ European Court of Auditors, Special Report No. 13/2020, *Biodiversity on farmland: CAP contribution has not halted the decline*, p. 47 (available at https://www.eca.europa.eu/Lists/ECADocuments/SR20_13/SR_Biodiversity_on_farmland_EN.pdf).

⁸⁰ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *The European Green Deal* (COM (2019) 640 final).

⁸¹ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

the climate, the environment and animal welfare and combatting antimicrobial resistance." Furthermore, Article 31(3) specifies that: "Member States shall establish a list of agricultural practices beneficial for the climate, the environment (...)." In mid-January 2021, the Commission published a list of potential eco-schemes in which a broad spectrum of agricultural practices are suggested as constituting the requisite form of agroecology (such as crop rotation and low-intensity grass-based livestock farming), agroforestry, precision farming (such as reducing the use of fertilisers) and carbon sequestration (such as extensive use of permanent grasslands)⁸².

- A focus on the national level: strategic plans and link with land tenure

The increasing importance attached to the shaping of CAP instruments at national level finds concrete expression in the responsibility given to Member States to design and implement national strategic plans, this in turn tending to reinforce the impact of the CAP on national land tenure contracts⁸³. Within the CAP framework, it is up to the Member States to specify their intervention strategy, explaining how they will deploy the relevant instruments, while also taking into account local conditions and rural needs, in order to achieve climate and environmental objectives. In other words, each Member State will have a clear interest in articulating these European instruments with its own national instruments, including land tenure contracts.

Accordingly, there is potential impact on contractual negotiation of land tenure contracts, such negotiations sometimes being conducted in circumstances where the legal framework remains as yet somewhat opaque.

2.2.1.2 The impact on land tenure contracts of increased attention to the environmental effects of agricultural practices

Traditionally, AEEM operated through action-based commitments, with the farmer obliged to undertake a range of specified practices, but there being no obligation to achieve a specific outcome. Accordingly, if the expected environmental results of a specific practice were not achieved, the farmer would not be held contractually liable. More recently, there has been greater enthusiasm for generating environmental goods and services through result-based contracts⁸⁴, and this is not without consequences for land tenure contracts, which are likewise evolving.

⁸² https://ec.europa.eu/info/news/commission-publishes-list-potential-eco-schemes-2021-jan-14_en.

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Recommendations to the Member States as regards their strategic plan for the Common Agricultural Policy* (COM(2020) 846 final).

⁸⁴ See below Part 3 on result-based contracts.

Greater visibility of the ecological value of agri-environmental practices

The development of result-based contracts has challenged the current dominant paradigm of action-based contracts, revealing more fully the true environmental value of agricultural practices and better connecting such practices with their ecological effects. In turn, this has provided additional factors to be taken into account by a tenant when negotiating a land tenure contract. And such greater visibility of the ecological value of agri-environmental practices is also evident in the emergence of concepts such as payments for environmental services⁸⁵ or ecosystem services⁸⁶.

A typology of the different forms of lease may therefore be attempted.

Types of leases	Environmental expectations
"Classic" lease (traditional approach)	<ul style="list-style-type: none"> - No environmental expectations - Focus on production
Lease specifying environmental actions	<ul style="list-style-type: none"> - Environmental expectations are met through agricultural practices identified as being favourable to environmental protection, as well as prohibition of harmful practices - Action-based scheme
Lease specifying environmental results	<ul style="list-style-type: none"> - Environmental expectations are met through environmental outcomes specified in the contract - Result-based schemes
A hybrid lease	<ul style="list-style-type: none"> - A hybrid lease based on both environmental actions and environmental outcomes

FR 1 - Case study: Eco-grazing - Grazing for ecological grasslands maintenance in the green areas of Brest Metropole

The Head of Green Spaces of Brest Metropole (France) has chosen to entrust the maintenance of his green spaces to an eco-grazing service proposed by a shepherd, who makes available part of his flock of Scottish Black Face sheep whose production (lamb) is subsequently sold. Eco-grazing is more expensive than conventional machine mowing, but it has been chosen for the many

⁸⁵ See for example, A. Langlais (Ed.), *L'agriculture et les paiements pour services environnementaux : quels questionnements juridiques ?*, Editions PUR, 2019 (Translated title: *Agriculture and payments for environmental services: what are the legal issues?*)

⁸⁶ See for example, A. Langlais A, 'Framing Ecosystem services for sustainability?' in V. Mauerhofer, D. Rupo and L. Tarquinio (Ed.), *Sustainability and law : general and specific aspects*, Springer, Dordrecht, 2020, pp. 609-629.

environmental services that result (reducing GHG emissions, reducing noise, social links, local agriculture, invasive plant management and encouraging flowering plants). Because of this choice, it was stated that "even though environmental services are not explicitly paid through the current contract (public contract with specified technical clauses), the higher price of eco-grazing could be considered as the city's willingness to pay for induced environmental services"⁸⁷. Without doubt, the city made this choice to highlight the environmental services indirectly rendered by the sheep.

A move towards a contractual overlay on agricultural land which better considers the effects of agri-environmental practices?

The development of result-based schemes may create new pressures for land tenure contracts, with there being in the same arena conventional leases, leases stipulating certain environmental actions and leases targeting environmental outcomes.

The emergence of a result-based approach is likely to affect the clarity of obligations in land tenure contracts, with this being particularly the case where there are existing contractual relations between landlords and tenants⁸⁸.

2.2.2 A typology of land tenure contracts for agricultural land in French Law

A general typology of leases has been set out above and here a more detailed typology will be provided by reference to French Law, considering: their legal basis; their duration; how they function; and how they deliver environmental goods and services (see Table below).

Admittedly, as indicated, the exact design of a contract varies from Member State to Member State⁸⁹, but the characteristics here are sufficiently common to have widespread relevance and to provide analogies – and indeed inspiration – for other Member States.

In this typology of land tenure contracts, there appear first rural leases, both those without and those with environmental clauses. A range of other contractual forms are, however, also included, among them where outright owners of land enter into contractual obligations relating to the environment, for example the "fiducie environnementale" (called in English the "environmental trust") or the

⁸⁷ See Deliverable 2.1.

⁸⁸ See Part 3 on result-based schemes.

⁸⁹ "The vocabulary and discourse of property does not transcend place and culture; it is not universal. Law has origins in time and in place": Abstract to 'Epilogue: placing property', in N. Graham (Ed.), *Landscape: Property, Environment, Law* (1st ed.), Routledge-Cavendish, 2020 <https://doi.org/10.4324/9780203847169>.

"obligation réelles environnementales" (ORE) (called in English "conservation easements"/"conservation covenants").

TABLE 1: LAND TENURE CONTRACTS TYPOLOGY BASED ON FRENCH LAW

Contract Type	Legal Basis	Length	How does it work?	Inclusion of environmental goods and services (EGS)
Rural lease	Articles L.411-1 et seq. and L.311-1 et seq. of the French Rural Code	At least 9 years and can go to 18 or even 25 years	Rural lease between the landowner and the farmer that follows the tenant farming statute (the tenant farming statute being the specific rules that apply to contracts leasing agricultural buildings for an agricultural purpose)	EGS are not the central components of the rural lease. They are indirectly taken into account in clauses regarding the requisite farming practices. A recent judgement from the French Court of Cassation of February 6th 2020 mentions that environmental clauses can be added to the standard rural lease if they do not impinge upon the rights of the tenant. Ignorance of those clauses can cause the termination/cancellation of the contract depending on the context of each contract.
Rural lease with an environmental clause	Articles L.411-27 and R.411-11-1 of the French Rural Code	At least 9 years and can go to 18 or even 25 years	The environmental clause can be added to any rural lease. These clauses implement practices that have as an objective the preservation of water resources, the biodiversity, landscapes, the quality of products, soils and air, the prevention of natural risks and soil erosion control (fixed list)	EGS are not the central components of this lease either, although an explicit environmental dimension exists through the environmental clauses and allows them to be taken into account.

Multiannual grazing agreement	Articles L.481-1 to -4 of the French Rural Code	Between 5 and 9 years	This agreement does not follow the tenant farming statute, but will allow the implementation in extensive pastoral zones of environmental clauses to ensure the protection of such zones in exchange for a rent.	EGS are not the central components of this agreement (the grazing being the central component), but the agreement allows their indirect inclusion through the practical effects of the environmental management of the relevant goods.
Loan for use	Articles 1875 and 1891 of the French Civil Code	No minimum or maximum length	These loans allow a party (the lender) to deliver goods to another party for their use. The other party has to return the goods back to the lender after using the goods. It is possible for there to be inclusion of environmental clauses in specifications or management plans.	EGS are not the central components of this agreement, but it allows their indirect inclusion of them through the practical effects of the environmental management of the relevant goods.
Rural Land Organisation Agreements	Articles L.142-6 and 7 of the French Rural Code	6 years, renewable once (max 12 years)	These agreements are implemented to designate the use of plots of land or to showcase agricultural land. They are restricted to farmers.	The central component of these agreements is the designation of the use of plots of lands and the showcasing of agricultural land with the possibility to conclude environmental clauses. The inclusion of environmental goods and services is done indirectly through the effects of the used practices.
Coastal Conservatory Agreements	Article L.322-1-9 of the French Environmental Code	From 1 to 25 years	These agreements between the Coastal Conservatory, the manager and the farmers allow them to implement environmental clauses through prescribed practices and management plans.	EGS are not the central components of these agreements either (the positive management of the public domain by the Coastal Conservatory being at their core), but can be included indirectly through the environmental management of the relevant goods.

Environmental compensation agreement (equivalent of offset)	Articles L.163-1 et seq. of the French Environmental Code	Will depend on which form of contract is used to enforce the compensation	Environmental compensation is an obligatory measure for the project owner of a development site. They have to implement such measures to compensate for the loss of and damage to biodiversity because of the construction undertaken; and the compensation itself is provided through agreements/contracts on suitable land.	The agreement is based on the restoration of natural habitats that have been damaged through the undertaking of the construction. EGS are thereby indirectly taken into account through the practices laid down by the agreement.
Obligations réelles environnementale (ORE) equivalent of conservation covenant	Article L.132-3 of the French Environmental Code	Between 1 and 99 years	This contract can only be made at the demand of a landowner who wants to implement environmental management of his property. The contract is between the owner and another contracting party (mostly public institutions) and as a result will create obligations for the original parties and for the future landowners.	EGS are explicitly taken into account here because of the owner's intention to dedicate the land to the protection of the environment; the obligations can be positive or restrictive and are the contractual purpose.
Trust agreement	Articles 2011 et seq. of the French Civil Code	Between 1 and 99 years	Trust agreements operate through the transfer by one or more settlors to one or more trustees. The trustee(s) will take this property and manage it for the benefit of one or more beneficiaries. The trust fund will be separate from the trustee's own property and, at the end of the agreement, the trust fund then goes to the beneficiaries.	EGS can be part of the trust agreement through the implementation of an environmental management plan

<p>AECM (Potential impacts on land tenure contracts)</p>	<p>Article 28 of the Regulation (EU) n° 1305/2013 of the European Parliament and of the Council of 17 December 2013</p>	<p>5 years</p>	<p>AECM are mandatory measures for the EU Member States, but not for farmers, who voluntarily conclude contracts. The measures have to follow EU goals in terms of environmental protection and improvement as indicated in Article 11 of the TFEU: to ensure the sustainable management of natural resources and the implementation of measures which aim to combat climate change. They also have to follow the priorities of the EU for rural development listed at Article 5 of the Regulation. The EU provisions do not explicitly list all the applicable measures, it being for the Member States and their regions to decide which measures are to apply according to the needs of the environment in their regions. The Member States have to implement rural development programmes and national scoping documents to provide a framework.</p>	<p>The AECMs are mostly based on the implementation of specified agricultural practices (for example: a ban on the ploughing up of grassland).</p>
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Eco-schemes (potential impacts on land tenure contracts)	CAP Strategic Plans Regulation for the period 2023 - 2028	1 year	Eco-schemes are an innovative element of the first pillar of the CAP, aimed to increase national environmental and climate action based on national needs and circumstances. It is mandatory for Member States to design and offer eco-schemes to meet one or more of the specified objectives. They are voluntary for farmers to join. Eco-schemes involve an annual 'one-year-at-a-time' commitment, making them flexible and attractive for farmers to continue in the schemes which worked best for them and leave those that did not.	Eco-schemes present a unique opportunity for Member States to provide significant incentives and rewards for their farmers where they go beyond the mandatory baseline requirements of conditionality and enhance environmental and climate performance based on local needs and conditions.
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2.3 Legal analysis of the criteria for the lasting provision of environmental goods and services in land tenure contracts

For the lasting provision of environmental goods and services in land tenure contracts it is not sufficient to consider only how environmental practices that generate environmental goods and services can be integrated into the contracts themselves. It is also a question of being able to maintain such environmental practices over a long period of time. This legal analysis will therefore address both contractual issues (2.2.1) and conduct a SWOT analysis of the different forms of contracts previously identified (2.2.2).

2.3.1 Legal analysis of the sustainability of the provision of environmental goods and services under land tenure contracts

In the case of land tenure contracts, their duration is a key criterion for the sustainability of the provision of environmental goods and services, ensuring that one or more environmental practices are maintained over a predefined period of time (2.2.1.1). However, this criterion is far from being the only one to be taken into account. Indeed, while it ensures that the agreements between the parties

are binding over a more or less long period, the legal certainty offered by the contract must also be linked to the effectiveness and efficiency of the contract itself (2.2.1.2).

2.3.1.1 The duration of the contract/length of binding engagement between the contracting parties

It is quite legitimate to believe that the longer the duration of a land tenure contract, the greater the guarantee that practices favourable to the preservation of the environment can be maintained⁹⁰. French rural lease contracts have a duration of at least 9 years and may last up to 25 years, thus ensuring per se a certain continuity. Their renewable nature is also a factor to consider as it allows for an extension of the agreed practices. And this element is reinforced by the – at least theoretical – possibility of inserting environmental clauses when renewing the contracts (as well as by their maintenance)⁹¹. In any case, the longevity of the lease contract arguably allows farmers to invest in the improvement of soil quality and more broadly in the implementation of environmental practices⁹². Studies frequently show that it is more likely to be farmers who own their land who engage in environmental improvements (as opposed to farmers who hold rural leases)⁹³. However, long duration may also be a source of concern for the contracting parties, who fear that commitments may become too restrictive. The duration of the contract should therefore not be a brake on the commitment to pursue environmental practices, particularly where there is scope for the contract to be renewed or amended. Indeed, the landowner may feel dispossessed of his property if the duration of the contract is too long, while the tenant may feel concerned about having to implement environmental practices, including perhaps new ones, over a long period of time⁹⁴.

CASE STUDY: TUOHI Green jointly owned forests (FI5)

This Finnish case study concerning TUOHI Green jointly owned forests (FI5) is of interest with specific regard to the length of contract implemented.

Forest owners contract together and become shareholders for the purposes of environmentally friendly management of forests of different maturity. **This**

⁹⁰ For example, see R.J.F Burton and G. Scharz, 'Result-oriented agri-environment schemes in Europe and their potential for promoting behavioural change', (2013) 30 Land Use Policy 628.

⁹¹ See above para. 2.1.2.

⁹² S. Myyrä, K. Pietola and M. Yli-Halla, 'Exploring long-term land improvements under land tenure insecurity', (2007) 92 Agricultural Systems 63.

⁹³ Nida Akram *et al.*, 'Does Land Tenure Systems Affect Sustainable Agricultural Development?', (2009) 11 (4) Sustainability 3925.

⁹⁴ S. Myyrä, K. Pietola and M. Yli-Halla, 'Exploring long-term land improvements under land tenure insecurity', (2007) 92 Agricultural Systems 63.

contract is permanent, but to avoid concerns over being locked in an option for withdrawal is available for the shareholders. The case study states that: "**Withdrawal of a shareholder is possible with invested money and if agreed with forest property, but not necessarily with the originally invested/merged forest property.**"

The establishment of forests of different maturity does not only improve biodiversity, but also increases carbon storage in the long term. The case study also indicates that managing continuous forest cover in this way in Finland has so far produced exceptional outcomes and the initiative is to be expanded.

The permanent nature of the contract in the TUOHI case study allows for expansion and provides the opportunity for new shareholders to join, so as to increase the amount of forests under management indefinitely into the future.

The duration of land tenure contracts is not sufficient in itself, in that there must also be an environmental dimension. In this regard, the main issues in French law, shared by many Member States, illustrate the evolving focus on the environment that is being played out between owners of agricultural land and tenant farmers. In particular, resort may be had to leases with environmental clauses, although these largely remain exceptional as compared to so-called "classic" rural leases, which are designed and interpreted on the basis of production agriculture.

Two French legal issues, at least partly relevant to other Member States of the European Union⁹⁵, deserve particular attention: first, the protection of lessees who have developed environmental practices; and, second, the scope which the lessor enjoys to insert environmental clauses in the contract.

The protection of the lessee who has developed environmental practices

In this regard, it is important to highlight that the legislator has made a significant change to Article L.411-27 of the French Rural and Maritime Fishing Code by adding the following wording: "*The fact that the lessee applies practices on the leased land that are aimed at preserving water resources, biodiversity, landscapes, the quality of the products, the soil and the air, the prevention of natural hazards and the fight against erosion cannot be invoked in support of a request for termination made by the lessor in application of this article*"⁹⁶.

As a result, the lessee cannot have his lease terminated for practices that are favourable to the environment. Such termination had earlier been effected against tenant farmers who had opted for set-aside under the Common

⁹⁵ Other forms of renting agricultural land can be considered in the EU Member States.

⁹⁶ Translated by us.

Agricultural Policy⁹⁷. In the eyes of the lessor, set-aside was not considered to be a form of cultivation practice that corresponded with the productivist underpinnings of rural leases. And such concerns could have been reiterated with GAEC 8 under the reformed CAP, which provides that a minimum share of at least 4% of arable land at farm level should be devoted to non-productive areas and features, including land lying fallow.

However, today, there is not absolute protection of the lessee in the case of the lessee implementing environmental practices, since the lessor could "*request compensation for degradation of the land if he can prove it*"⁹⁸ (French Rural and Maritime Fishing Code., art. L. 411-72). This intervention by the legislator invites us nonetheless to "*no longer consider an environmental practice in itself as an action that may compromise the purpose of the land or as a source of degradation*"⁹⁹. Such degradation of agricultural land is rather to be assessed on a case-by-case basis.

In English law, under the rules of good husbandry as set out in Section 11 of the Agriculture Act 1947, a tenant is obliged, *inter alia*, to maintain "a reasonable standard of efficient production" and there is a danger of breach of this rule in the case of many measures under AECS schemes (such as leaving land fallow). Further, breach may entitle the landlord to serve a Case C notice to quit under the Agricultural Holdings Act 1986.¹⁰⁰ And, in this context, a recent case where the decision went against the tenant was *Cruse v Snook*, where the First-Tier Tribunal specifically found that a tenant which had entered the land into an environmental stewardship scheme failed to comply with the rules of good husbandry, the absence of a crop being a determining factor. It is also telling that, in the course of the judgment, the First-Tier Tribunal affirmed that "efficient production" did not extend to growing a mixture of grasses and flowers to attract pollinators.

The insertion of these environmental clauses in rural leases, combined with the protection of tenants working to preserve the environment, makes it possible to ensure, to an extent, longevity of an environmental investment. And this is so despite the view of several authors, that leases give rise to the "tenancy hypothesis", whereby tenants have little incentive to make long-term commitments to their property since they have no stake in the land beyond the term of the lease¹⁰¹.

⁹⁷ For example, CA Angers, 20 March 199; *Revue de droit rural*, 1998, commentaire 259.

⁹⁸ Translated by us.

⁹⁹ L. Bodiguel, 'Les clauses environnementales dans le statut du fermage', (2011) 8-9 *Environnement*, étude 10, p.3 (Translated title: Environmental clauses in the statute of tenancy)

¹⁰⁰ The tenant may, however, be protected if the tenancy agreement contains an express conservation clause: Agricultural Holdings Act 1986, Sch. 3, Part II, para. 9(2).

¹⁰¹ E. Lichtenberg, 'Tenants, landlords and soil conservation', (2007) 89 *American Journal of Agricultural Economics* 294, 294. More broadly, a link has been established between poor sustainable agricultural practices and land tenure, including in respect of leases and conservation

The scope for the lessor to include environmental clauses

In the French legislation, Article L. 411-27 of the Rural and Maritime Fishing Code was also amended by the French Agricultural Orientation Law of 5 January 2006¹⁰² to make it possible to include environmental clauses in rural leases. This possibility has been extended under subsequent legislation. That said, the use of rural leases with environmental clauses has been limited in scope: the environmental clauses must have been one of those permitted and could only be included by a lessor that is a legal entity under public law or a nationally approved environmental protection association. By contrast, for a private lessor, only certain designated areas were eligible¹⁰³. In practice, therefore, the inclusion of environmental clauses was widely used by nature-management organisations¹⁰⁴, but, at least initially, agricultural land was only eligible in the case of private lessors when it specifically received the benefit of environmental protection through legislation.

However, a recent development in case law¹⁰⁵ seems to open up to private lessors the possibility of inserting environmental clauses outside the conditions provided for in Article L. 411-27 paragraph 3 of the Rural and Maritime Fishing Code, a French decision of the Court of Cassation on 6 February 2020 which appears to favour contractual freedom. The court considered that, as a general rule, *"the tenant is exposed to the termination of his lease if he uses the property for another use than that for which it was contractually intended"*¹⁰⁶. This implies that, in a standard lease, a clause providing for environmentally friendly farming methods is not contrary to legal public policy. In the case in question, a clause in the contract provided that: *"the land would be cultivated in accordance with environmental constraints and using organic methods"*¹⁰⁷; and yet, according to the lessor, the lessees had, from the outset, *"deliberately farmed the land in a conventional manner"*¹⁰⁸. According to the logic of the court, if a lessor includes in this way a clause that a lessee should farm in an environmentally friendly manner, then the lessor can terminate the lease if the lessee undertakes

covenants: E. Cox, 'A lease-based approach to sustainable farming, Part II: farm tenancy trends and the outlook for sustainability on rented land', (2010) *Drake Journal of Agricultural Law* 369, 370-371; and F. Clearfield and B.T. Osgood, *Sociological Aspects of the Adoption of Soil Conservation Practices*, Soil Conservation Service, Washington, DC, 1986 (available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/stelprdb1045620.pdf); and J.J. Richardson, 'Land tenure and sustainable agriculture', (2015) 3 *Texas A&M Law Review* 799.

¹⁰² Article 76, Law No. 2006-11 of 5 January 2006.

¹⁰³ These are areas protected under the French Environmental Code and cover three main categories: areas designated for the protection of water; areas designated for the protection of nature; and areas designated for the protection of biodiversity.

¹⁰⁴ Cerema (Direction territoriale méditerranéenne), 'Le bail rural à clauses environnementales et le paysage agro-environnemental', June 2015, p. 11 (Translated title: The rural lease with environmental clauses and the "agri-environmental" landscape')

¹⁰⁵ Cass. 3e civ., 6 February 2020, No. 18-25.460.

¹⁰⁶ Translated by us.

¹⁰⁷ Translated by us.

¹⁰⁸ Translated by us.

conventional farming. In other words, the court will uphold environmental clauses inserted by the parties to a contract.

This unprecedented decision overturns the previous relationship between the landowner and the farmer in a so-called “classic” rural lease. Traditionally, the farmer has been deemed to enjoy economic freedom, but this can now, according to the new case, be limited by certain clauses in the lease imposing a method of production and, therefore, respect of certain practices. Indeed, the application of conventional methods of farming on land devoted to organic farming can be characterised as an act likely to compromise the proper operation of the land and therefore justify a termination of the lease held by the farmer. As one commentator has pointed out, the French Court of Cassation “has even taken a further step in this new opening of the status of tenancy to environmental imperatives by assimilating conventional agriculture to polluting agriculture”¹⁰⁹. Moreover, with regard to the conditions for termination, the Court noted that the land in question “was used for organic production”; that “its proper operation was compromised by the application of polluting methods, contrary to the classification of the land”; and that the lessor suffered damage “as a result of the administrative sanctions generated by the non-compliance of these plots with the conversion to organic farming”¹¹⁰. The lease was terminated on this basis.

The step taken here is important in that it moves away from a productivist model. As indicated, practices previously found capable of compromising the proper exploitation of farmland were instead largely those restricting agricultural production: for example, grounds for the termination of rural leases might be an insufficient use of fertiliser or even the fact of setting the land aside.

In addition, such case law also raises **the question of the latitude enjoyed by tenants of agricultural land**. Freedom of cropping has generally been ensured by agricultural holdings legislation and the decision of the Court of Cassation would therefore seem to mark a major upheaval of the *status quo* through the lifting of constraints imposed on the inclusion of environmental clauses, in particular their limitation to eligible areas in the case of private lessors.

2.3.1.2 Other criteria regarding the effectiveness and efficiency of land tenure contracts for the lasting provision of environmental goods and services

Ensuring the effectiveness of land tenure contracts with environmental clauses is dependent upon monitoring of environmental practices and the imposition of sanctions in the event of non-compliance (2.2.1.2.1). As for their efficacy in delivering an agro-ecological balance, this requires thinking about the

¹⁰⁹ Translated by us, V. Bouchard, ‘La reconnaissance de l’efficacité des clauses environnementales dans les baux à ferme “classiques”’, *Droit Rural* No. 483, May 2020, comm. 89 (Translated title : Recognition of the effectiveness of environmental clauses in “classic” farm leases)

¹¹⁰ *Ibid.*

conditions for implementing the requisite environmental practices and their environmental purpose on the farm (2.2.1.2.2).

Effectiveness of land tenure contracts: controls and sanctions in respect of environmental practices

To ensure that environmental practices included in rural leases are carried out, contracts must include the necessary provisions to allow monitoring of the proper implementation of these practices as well as appropriate sanctions in case of non-compliance or insufficient or incorrect compliance.

In the case of monitoring environmental practices under the legislative framework for rural leases with environmental clauses, it is provided that a: *"lease including the clauses mentioned in the third paragraph of Article L. 411-27 (i.e. permitted forms of environmental clause)¹¹¹ shall set out the conditions under which **the lessor may ensure annually that the lessee complies with the agreed cultivation practices** "¹¹². As no details are given in the legislation, these elements will therefore have to be specified in the contract itself. This implies a lack of harmonisation in procedures for annual monitoring of compliance with environmental practices as between different lease contracts. And such latitude may explain the great diversity of existing environmental practices.*

In any lease contract, the lessor may rely **on the initial inventory carried out on entering into the contract and drawn up jointly and at the expense of both parties** (Article L.411-4 paragraphs 3 and 4 of the Rural and Maritime Fishing Code). The inventory serves as a common point of reference since its *"purpose is to make it possible to determine, when the time comes, the improvements made by the lessee or the damage suffered by the buildings, the land and the crops. It shall state precisely the condition of the buildings and land as well as the degree of maintenance of the land and its average output over the last five years"*. (Same article).

To facilitate this monitoring of compliance with environmental practices in the contract, several lessors have relied on monitoring indicators. Yet, according to a French study conducted in 2015, most owners feel unable formally to carry out this task themselves¹¹³. And the same study underlines that, because of this difficulty¹¹⁴, owners opt for the implementation of obligations to carry out actions under environmental clauses, which are more affordable and simple to control

¹¹¹ See Section 2.1.2 listing all eligible environmental clauses for the purposes of rural leases with environmental clauses in France.

¹¹² Translated by us.

¹¹³ Cerema (Direction territoriale méditerranéenne), 'Le bail rural à clauses environnementales et le paysage "agro-environnemental"', June 2015 (Translated title: The rural lease with environmental clauses and the "agri-environmental" landscape)

¹¹⁴ This is a difficulty shared with the development of result-based approaches (on which, see below). One can see here a potential theoretical shift towards a result-based approach.

and monitor¹¹⁵. It is also easier to control practices that can be quantitatively evaluated, such as the number of trees planted or visible to the naked eye, or whether the holding is used as cropland or grassland.

In general, actions to be undertaken are easier to monitor than results. Furthermore, some results are easier to monitor than others (for example, it is not easy to monitor the number of a particular species of bird). And, as rural leases with environmental clauses granted by private actors are in France only eligible in protected zones,¹¹⁶ the lessor often resorts to relying on the control and monitoring mechanisms for the management plans of these zones.

Methods of monitoring environmental practices and quality of this monitoring

In the case of leases with environmental clauses, the monitoring of environmental practices is not laid down in law, but is a matter for agreement between the parties; this gives the lessor some leeway to adapt his annual monitoring to the different environmental practices under the contract. On the other hand, the same freedom can lead to disparities in practice; and such disparities may be detrimental to the lessee, who can be subject to greater or lesser constraints depending on the level of monitoring required. Besides, the lessor may be left ill-equipped to implement the mechanism which has been stipulated, so creating a risk of poor quality monitoring.

The quality of monitoring may depend to a considerable extent on the following criteria which reflect a more detailed ecological knowledge of the land in question:

- appreciation of environmental improvements to the land as opposed to focus crop yield; and
- identification of relevant and better targeted monitoring indicators, which may even extend to results indicators¹¹⁷.

The presence and quality of this monitoring is also important in that it plays a major role in determining the level of sanctions, the most radical form of which is the termination of the lease¹¹⁸. The grounds for termination of the lease are

¹¹⁵ Cerema (Direction territoriale méditerranéenne), 'Le bail rural à clauses environnementales et le paysage "agro-environnemental"', June 2015 (Translated title: The rural lease with environmental clauses and the "agri-environmental" landscape) p. 52.

¹¹⁶ This is the specific legal mechanism set up in France and entitled "rural lease with environmental clauses".

¹¹⁷ See Part 3 on the result-based approach.

¹¹⁸ This may also be non-renewal of the lease.

specifically provided for by law, being governed by Article L. 411-31 of the Rural and Maritime Fishing Code. The lessor must justify one of a number of reasons for requesting the termination of the lease, not all of which are immediately relevant to the CONSOLE project.

- *"Two defaults in the payment of rent or the lessor's share of the products which have continued after the expiry of a period of three months following formal notice after the due date."*
- *"Actions of the lessee likely to jeopardise the proper operation of the land, in particular the fact that he does not have the labour required for the needs of such operation"*
- *"Non-compliance by the lessee with the clauses mentioned in the third paragraph of Article L. 411-27 ", i.e. environmental clauses¹¹⁹.*

The monitoring of environmental practices, together with possible sanction in the event of non-compliance, provide powerful levers for the proper implementation of environmental practices and thus bolster the capacity of land tenure contracts to provide environmental goods and services.

The efficacy of land tenure contracts in delivering an agro-ecological balance

Agro-ecological balance is understood to mean reconciling the maintenance of agricultural production capacity with the deployment of practices likely to have a real environmental impact - and therefore generate the provision of environmental goods and services. Such a reconciliation is central to the purpose of rural leases with environmental clauses¹²⁰.

- The financial incentive to enter into rural leases with environmental clauses and the choice of the agricultural land concerned

In this search for balance, determination of the parcel(s) eligible for a rural lease with environmental clauses will be decisive. A concern is that preference be given to less productive land so as to avoid the possible loss of output resulting from the environmental practices adopted. The risk of this happening is high since the legal framework itself provides that, insofar as a rural lease with environmental clauses entails additional costs for the lessee, these can be compensated by a reduction in the rent (Art. L. 411-11 of the Rural and Maritime Fishing Code). **Consequently, the weak economic incentive for lessors to use this**

¹¹⁹ Translated by us.

¹²⁰ M.A. Altieri, *Agroecology: Principles and Strategies for Designing Sustainable Farming Systems*, 2000; M.A. Altieri, *Agroecology: the Science of Sustainable Agriculture*, CRC Press, 2018; and C. Léger-Bosch M. Houdart, S. Loudiyi and P-M Le Bel, 'Changes in property-use relationships on French farmland: A social innovation perspective', (2020) 94 Land Use Policy 104545.

option may undermine the efficacy of such land tenure contracts in the provision of environmental goods and services, so indicating a role for the CAP as a source of support.

- The agricultural land concerned and the response to local environmental issues

The purpose of the contract may also be **to respond to local environmental issues**, such as the presence of a source of drinking water, the presence of animal or plant species sensitive to certain agricultural operations, soil erosion, etc. And such local environmental issues may require specific practices, such as reducing inputs. From the lessor's point of view, this requires a degree of clarity as to the environmental objective targeted and, above all, a level of ecological knowledge of both the land and the environmental issue at stake, so as to be able to include the most suitable practices in the lease contract. In other words, in order to respond to an environmental issue, even a specific and local one, **there is the need for a strategic choice of the agricultural land to be comprised in the lease**. There is a balance to be found, for example, between the most productive fields and those richest in biodiversity; and between fields with high potential for environmental improvement and those whose level of protection must be maintained.

- The agricultural land concerned and the response to global environmental issues

Rural leases with environmental clauses can also be used to respond to **global environmental issues**, such as climate change or biodiversity loss¹²¹. Tillage techniques, agroforestry or the creation, maintenance and management of hedges, slopes and copses can all be practices that contribute to meeting global challenges. Such an ambition invites us to look to achieve agro-ecological transformation at the scale of the whole farm; and, in this context, the rural lease and, *a fortiori* the rural lease with environmental clauses can be regarded as playing a decisive role. However, while such contracts have many strengths, they also has weaknesses, although these weaknesses might be addressed or at least mitigated by other forms of land tenure contracts. And this possibility to resort to a suite of contracts will now be the subject of a SWOT analysis, including the scope for CAP funding.

¹²¹ COWI, Ecologic Institute and IEEP, *Technical Guidance Handbook - setting up and implementing result-based carbon farming mechanisms in the EU* - Report to the European Commission, DG Climate Action, under Contract No. CLIMA/C.3/ETU/2018/007 (COWI, Kongens Lyngby, 2021).

2.3.2 Strengths and weaknesses of the main land tenure contracts: A SWOT analysis

The purpose of this analysis is to reveal the strengths and weaknesses of different types of land tenure contracts. In addition to those specifically dedicated to agriculture, and in particular the rural lease, there have been contracts that do not involve a landlord and tenant relationship, but still seek to achieve environmental goals, such as OREs. A SWOT analysis of all these contracts has been carried out in the French context and the results are presented in tabular form (2.2.2.1). Importantly, it is revealed that rural leases with environmental clauses are but one option, which allows consideration of others which may work in synergy, so allowing us to think of a **range of contractual arrangements**. Finally, and most importantly, this synergy is to be sought through focus on two key requirements for the sustainable provision of environmental goods and services, namely long duration and financial incentive (2.2.2.2).

2.3.2.1 SWOT analysis of land tenure contracts in tabular form

TABLE 2: SWOT ANALYSIS OF LAND TENURE CONTRACTS

Contract Type	Srengths	Weaknesses	Opportunities	Threats
Rural lease	<ul style="list-style-type: none"> - Rural lease is the most common form of land tenure contract for farmers in France. - It can take any form (written or oral). - The tenant has the right to improve the farm. - In general, the tenant farming statute gives better protection to the tenant. For example, if the owner decides to sell the land, the tenant will have a preemptive right to purchase the land. - The duration of the contract is at least 9 years and the contract is automatically renewed if there are no new formalities at the end of the lease. 	<ul style="list-style-type: none"> - When an oral lease is made, it is harder to show evidence of its existence. This can cause problems in the event of litigation where the tenant has to prove the grant of the land through presenting the lease. - Problems can also arise for the tenant when submitting applications for financial aid (CAP or national); and it may be difficult to renew the contract because of uncertainty surrounding the start date of the initial contract which may not be clearly remembered. - Also, when land consolidation takes place, this may not be notified to the authorities which would then make it difficult to distribute financial aid owing to the grants of land having been combined. - The delivery of environmental goods and services is not the central subject matter of the contract. 	<ul style="list-style-type: none"> - A recent Judgement of the French Court of Cassation of the 6th February 2020 allowed a standard rural lease to be terminated because the tenant did not comply with a clause requiring him to farm using organic farming methods. It confirmed the legality of such clauses in standard rural leases. - Before any rural lease can be concluded, there has to be an initial inventory and a further inventory at the end of the lease. This process helps to identify the improvements made by the tenant on the lands, especially environmental improvements. - With regard to the increase of urban agriculture, there could be an opportunity to change the tenant farming statute so as to better meet these new demands (in particular, 	<ul style="list-style-type: none"> - The tenant can be limited in his rights by environmental clauses, especially in his right to exercise freedom of cropping. - Modifications of the lease have to be approved by the tenant and the owner, so that if one of them does not agree to modification, it will not be applied. - It is difficult to implement result-based contracts because of the difficulty in evaluating the results.

			new forms of relationship between the tenant and the owner)	
Rural lease with an environmental clause	<ul style="list-style-type: none"> - These environmental leases can be implemented in any of the zones protected under the French Environmental Code and by public legal entities with a public interest role. If the tenant does not respect the obligations in the clauses, the lease can be terminated. This termination does not depend proof of harm to the owner. - The practices specified in the environmental clauses cover several aspects: the improvement of the stability of a landscape or its natural elements, the prevention of water pollution and soil depletion, the restoration of the ecosystem and the protection of certain species. Accordingly, there is a large range of measures, building in flexibility. - A financial advantage exists for the tenants: a lower rent because the legislator considers that the tenant's compliance with the environmental clauses 	<ul style="list-style-type: none"> - The scope of application for environmental clauses is limited to only 2 situations: (i) specific persons (mainly legal public entities) can have environmental clauses on any type of land; (ii) all persons can have environmental clauses on specific protected zones (mainly those mentioned in the French Environmental Code); The evidence is that it has mainly been legal public entities which have used these types of clauses, they being rare in the case of private persons. 	<ul style="list-style-type: none"> - The owner can arrange a mechanism for monitoring compliance by the tenant with the required practices. The legislation does not lay down any procedures in this regard, rather allowing the owner to make an annual review so as to ensure compliance. - When the landowner decides to sell his property, the tenant has a preemptive right, to ensure the continuity of environmental practices already being undertaken. - Also, the delivery of environmental goods and services can be indirectly or directly supported through the environmental clause. 	<ul style="list-style-type: none"> - Modifications of the lease have to be approved by all the parties: if one does not agree them, then there is no change. - The implementation of such a clause can create layers of administration for the tenants and the owners, which can be seen as an obstacle.

	gives rise to additional costs (which do not fall on the landowner).			
Obligation réelle environnementale (ORE) (equivalent of an easement)	<ul style="list-style-type: none"> - The owner creates a contract binding also on future owners. This form of contract form is open to all types of landowners wanting to implement environmental management on their land. It allows the owner to benefit from a property tax exemption. - These contracts are very flexible as to their duration, their obligations, their revision and their termination. - This form of contract creates mutual commitments between the owner and the other contracting party in relation to implementation of the chosen practices. - It can be used in agriculture and forestry where there is a rural lease, so long as there is prior agreement of the lessee. 	<ul style="list-style-type: none"> - The tax incentive is not considered sufficient for the economic realities of the agricultural sector. - This type of contract cannot be made on the initiative of tenants of a rural lease. If their landlord wants to make such a contract, it is a requirement that the tenant agrees. - In practice, such contracts have caused many difficulties, with public entities having shown most enthusiasm for them. 	<ul style="list-style-type: none"> - This type of contract is not well known to landowners. Better communication and explanation would therefore assist. - It can be used as an offsetting measure. - It can also improve the delivery of environmental goods and services from an agricultural holding or indeed, any environment it concerns. 	<ul style="list-style-type: none"> - Some owners do not want to engage themselves in such obligations owing to the administrative burden. - The lessee not agreeing to an ORE over the tenanted land would block the process of implementation. - The ORE has adverse economic effect for future owners and partner organisations. (ORE can be implemented through a public as well as a private person).
Trust agreement	<ul style="list-style-type: none"> - Trust agreements have flexibility in their objects and 	<ul style="list-style-type: none"> - The cost of the trust may be an issue for potential trustees. 	<ul style="list-style-type: none"> - Its use is growing, especially in the environmental context; and there is 	<ul style="list-style-type: none"> - The early achievement of the purposes of the

	can be employed in strategies for the management of property so as to secure its environmental preservation. The objects need not be for a lucrative purpose, so can extend to agreements which include environmental management and environmentally friendly measures.	- Also, if the purposes of the trust are satisfied before the time fixed for the expiration of the trust, this terminates the trust agreement (and ends environmental protection). In order to have effective environmental protection and sound management of the fund, the purpose and conduct of the trust must be adapted to the timeframe desired by the settlor.	potentially broad application and long duration so as to better address environmental questions.	trust has the effect of ending the trust and therefore ending the environmental protection: in other words, environmental protection is linked to the time of the trust.
Multiannual grazing agreement	<ul style="list-style-type: none"> - This agreement can be implemented by any type of person - Object of the agreement: grazing and its management, a practice that has many environmental advantages. 	<ul style="list-style-type: none"> - The agreements are limited in time between 5 to 9 years, with renewal required if the practices are to be continued. This is not optimal if the environment requires lasting protection and management. 	<ul style="list-style-type: none"> - They fill a lacuna where the owners cannot implement environmental clauses. 	<ul style="list-style-type: none"> - Risk of less effective management because of the length of the agreement.
Loan for use	<ul style="list-style-type: none"> - Can be a free loan - Loan can be for an indefinite period, so there is the potential for long continuity. - Allows considerable latitude in terms of formalities (can be oral or written) and can cover numerous situations, including in particular if an owner wants to 	<ul style="list-style-type: none"> - There is no necessity for payment to the owner from the person who takes the loan. - There is a risk for the owner in loaning out his belongings/property, not least that it may not be used as requested. 	<ul style="list-style-type: none"> - Easy to implement; no mandatory form required. 	<ul style="list-style-type: none"> - The person who takes the loan is responsible for all damage to the belongings/property during the time of the loan, including its loss. And this principle applies also to a loan from a landowner to a farmer.

	implement environmental management on their property.			
Rural Land Organisations Agreements	<ul style="list-style-type: none"> - The objectives of the Rural Land Organisations include the protection of agricultural, natural and forest areas by contributing to the sustainable management of rural land. This inevitably helps environmental protection by contributing to landscape diversity and the protection of natural resources, as well as to the maintenance of biological biodiversity. - Any type of owner can implement such an agreement with the Rural Land Organisation. 	<ul style="list-style-type: none"> - Limited length of agreements, so precluding environmental management in the long-term (6 years, renewable once (max 12 years)). - Only renewable once in the case of real property within the perimeter of natural and agricultural areas as defined by departments or public institutions. And this is also the case for agreements to provide land for seasonal grazing, and for real property situated in mountain zones and some municipalities. 	<ul style="list-style-type: none"> - When the agreement is concluded, it governs which improvements the tenant will have to make on the land (for which they will be compensated). 	<ul style="list-style-type: none"> - The short length of the agreements may hinder the adequacy of the environmental management of the land. - It is not subject to the tenant farming statute, so the farmer cannot take advantage of protection which it offers.
Coastal Conservatory agreements	<ul style="list-style-type: none"> - These agreements are made to fulfil the mission of the Coastal Conservatory: a land policy to safeguard the coastline, to protect ecological balance and to preserve natural sites and their cultural assets. - When public ownership already extends to a farm, 	<ul style="list-style-type: none"> - These agreements are only temporary and specific to a plot of land. This hinders a long-term management of land in public ownership, unless the agreement is renewed on its expiration. 	<ul style="list-style-type: none"> - Engaging with local farmers who know the particular features of the land allows them to undertake efficient management. 	<ul style="list-style-type: none"> - These agreements likewise are not subject to the tenant farming statute.

	<p>those farmers are prioritised when agreements are concluded.</p> <ul style="list-style-type: none"> - The length of the agreements can be adapted according to current agricultural practices. 			
Environmental compensation agreement (equivalent of offset)	<ul style="list-style-type: none"> - The agreements can be implemented in addition to a great range of contracts and agreements (such as rural leases and trusts). - They are made to compensate for damage done to the environment elsewhere. 	<ul style="list-style-type: none"> - The agreements are implemented after the damage has been done to the environment or where damage is inevitably anticipated. - They rarely recreate exactly the lost habitat (working on the basis of environmental equivalence). - They are as yet not often used by those undertaking projects. - There is also a risk of 'freezing' the land used for offsetting, farmers no longer being able to produce crops once it has been designated for environmental purposes. 	<ul style="list-style-type: none"> - It creates an opportunity to diversify the use of agricultural land in order to repair damage done to the environment. 	<ul style="list-style-type: none"> - If the compensatory activity does not suit the actual activity of the farmer, they may be reluctant to use the land for that purpose.
AECM	<ul style="list-style-type: none"> - This CAP measure is mandatory for Member States and agreements are voluntarily concluded by farmers. They can benefit from the EU funding. - They can be implemented in a large range of circumstances, 	<ul style="list-style-type: none"> - AECM payments are calculated to compensate for the additional costs and income forgone due to their implementation. Potential can be limited by the level of ambition of the Member State. - Also, in practice, there is a risk that farmers do not fully understand the 	<ul style="list-style-type: none"> - These measures allow flexibility and adaptation to environmental and climatic requirements at regional level. - They can sit alongside other contractual solutions in Member States. This creates opportunities for 	<ul style="list-style-type: none"> - The interaction between AECMs, on the one hand, and current greening and future eco-schemes, on the other, gives rise to legal complexities, also creating administrative hurdles which can

	<p>subject to regional/national programming and Commission approval.</p> <ul style="list-style-type: none"> - These measures are made in contractual form, which can sit alongside other contracts depending on the law of the Member State. - They aim to: restore, preserve and enhance ecosystems; promote resource efficiency; and move towards a low-carbon and climate-resilient economy 	<p>scope of their commitments and, failing to meet these, are subject to sanctions.</p> <ul style="list-style-type: none"> - The length of contract is limited to a duration of 5-7 years. - Participation remains voluntary for farmers, even though their offer is mandatory for Member States. 	<p>the law of the Member States to implement creative combinations.</p>	<p>hamper efficient implementation by farmers.</p> <ul style="list-style-type: none"> - There is potential for overlapping regimes which can cause a deadweight-effect and the risk of double funding even if Article 28(6) of Regulation (EU) 1305/2013 is directed to precluding this (and see now Article 36 of Regulation (EU) 2021/2116). - Implementation by farmers is optional. <p>The method of calculating payment by ministries may render participation by farmers in AECMs financially uninviting.</p>
Eco-Schemes	<ul style="list-style-type: none"> - Eco-schemes are voluntary for farmers and mandatory for Member States 	<ul style="list-style-type: none"> - The length of agreements (one year) is short and, for the scheme to be effective, it would require annual renewal. 	<ul style="list-style-type: none"> - Payments are based on an annual payment per eligible hectare and can be offered as a "top-up" to farmers' basic income support for sustainability or as stand-alone schemes with payments based on 	<ul style="list-style-type: none"> - Could add additional administrative burden for the farmer which might act as a disincentive to concluding such an agreement.

			<p>income foregone and extra costs incurred by farmers.</p> <ul style="list-style-type: none"> - The regime could also include "entry-level" schemes, which might then be expanded and enhanced through more ambitious rural development measures. - Member States design eco-schemes to respond to national needs. 	<ul style="list-style-type: none"> - Payment level may not cover the cost of implementing eco-scheme measure
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Although this SWOT table takes into account such features as funding, implementation of the contract, the length of the contractual solution and the location/presence of environmental goods and services, it is not comprehensive. The main objective is to achieve, through these contractual solutions, two important requirements for the lasting supply of environmental goods and services: long duration and appropriate incentive and/or financial guarantee.

2.3.2.2 Legal analysis of the main contractual synergies from the SWOT analysis

In order to ensure a lasting delivery of environmental goods and services, several parameters are key to the design of contractual solutions. First of all, it is necessary to consolidate the maintenance of environmental practices over the long term. The owner of the agricultural land can play an essential role here (2.2.2.2.1). Secondly, it is necessary to think about the financial cost of the environmental efforts made by the farmer to set up and maintain environmental practices. (2.2.2.2.2). **Both of these aspects generate potentially a source of conflict between the owner and the tenant of the farmland.**

The role of the landowner in ensuring environmental practices over time

Above and beyond, in particular, leases with environmental clauses, the owner of agricultural land can mobilise several legal instruments to ensure that his or her property is managed in an environmentally friendly manner. These reflect to differing degrees the ecological function of the property; and, in this context, mention may be made of the “fiducie environnementale” (which it has been seen are called in English the “environmental trust”) and the “obligation réelles environnementales” (ORE) (which it has been seen are called in English “conservation easements”/“conservation covenants”¹²².

- The environmental trust

In English law a “trust” and in French law a “fiducie” operate through the transfer of ownership of one's property to a third party. This third party, the trustee, will manage the property according to the terms of the trust, for a period depending upon the terms of the trust and the law of the country concerned¹²³. Management arrangements can be environmental, but these are as yet not common. In France they tend to function within the framework of environmental compensation, which could be a limiting factor. And another limiting factor is that the landowners must, in effect, be willing to give up their land, a difficulty shared with ORE.

¹²² C. Rodgers and D. Grinlinton, ‘Covenanting for nature: a comparative study of the utility and potential of conservation covenants’, (2020) 83 Modern Law Review 373.

¹²³ In English law, a trust can last in perpetuity if one transfers the land to, for example, an environmental charity.

- The ORE or conservation easements/conservation covenants

The ORE is defined in Article L.132-3 of the French Environmental Code¹²⁴. In the case of public authorities, public establishments or legal persons under private law acting for the protection of the environment, it operates through the creation of obligations for the purpose of maintaining, conserving, managing or restoring elements of biodiversity or ecological functions (Article L.132-2 paragraph 1 of the Environmental Code). **What is special about this contract is that the obligations are binding not only on the owner initiating the ORE and the other original parties, but also on the future owners of this land. This confers a perpetual character to the obligations and is therefore conducive to the maintenance of environmental practices on agricultural land.** Indeed, such an arrangement can be combined with a rural lease contract, and even more beneficially with a rural lease incorporating environmental clauses. Nevertheless, it is not widely used, this being partly attributable to the level of financial incentive which is not very attractive for landowners: in particular, it takes the form of an exemption from property tax (Article L.132-3 paragraph 4 of the French Environmental Code).

In the United Kingdom there has likewise been interest in the use of “conservation covenants” to “lock in” environmental value. Impetus in this direction was provided by the report of the Law Commission, *Conservation Covenants*, published in 2014;¹²⁵ and legal measures to implement such covenants in England and Wales have been introduced under Part 7 of the Environment Act 2021. Under this Act a “conservation covenant agreement” would be entered into between a landowner and a responsible body, which could be either the Secretary of State or a body designated by the Secretary of State (for example, a charity where at least some of its main purposes or functions relate to conservation). Unless the covenant provided for a shorter period, an obligation would last indefinitely if the landowner had a freehold estate and as long as the remainder of the lease if the landowner had a leasehold estate. And, importantly, a conservation covenant has the capacity to bind both the original landowner and successors in title.¹²⁶

¹²⁴ Article L.132-3 of the French Environmental Code: “Owners of real estate may enter into a contract with a public authority, a public institution or a private legal entity acting for the protection of the environment to create any real obligations for them and for subsequent owners of the property, provided that the purpose of such obligations is the maintenance, conservation, management or restoration of elements of biodiversity or ecological functions”. The ORE can be used for offsetting purposes; and the duration of the obligations, the mutual commitments and the possibilities of revision and termination must be included in the contract. Translated by us.

¹²⁵ LAW COM No 349.

¹²⁶ For full discussion of conservation covenants in United Kingdom law, see C.P. Rodgers and D. Grinlinton, ‘Covenanting for nature: a comparative study of the utility and potential of conservation covenants’, (2020) 83(2) *Modern Law Review* 373.

Financial incentives for the implementation and maintenance of environmental practices by the tenant

In order to enhance the implementation and maintenance of environmental practices on their agricultural land, farmers can combine any contractual payments agreed under the rural lease itself with financial support under the CAP, i.e. at present, AECM under the second pillar of the CAP (including in respect of climate change). And there is the further prospect of funding under Eco-schemes. Whether payment is received under the rural lease itself or the CAP, there is the potential for conflict between the parties.

- The link between the rural lease and Common Agricultural Policy payments

This linkage between the rural lease and contractualised subsidies under the Common Agricultural Policy is not recent. However, we are at a turning point since there is a new budget and CAP reform will instigate new programming to revise AECMs, with also new national framing modalities through the implementation of national strategic plans.

Each of the AECMs in the current rural development programmes of the Member States lays down a range of commitments to be observed, as a general rule, for between 5 and 7 years, with annual payments for participating farmers. These commitments are tailored to the environmental characteristics of each territory (protection of a drinking water catchment areas, biodiversity in Natura 2000 areas, maintenance of grazing practices, ecological continuity, etc.). **Rural leases with environmental clauses can easily be based on or refer to the AECM commitments. This compatibility ensures that the lessees can claim AECM aid from the CAP.** Yet there may also be divergence or even potential incompatibility between the environmental practices contracted under the rural lease and AECM commitments. Such may arise as soon as the lease is concluded or may develop during its course: for example, because of the different duration between, on the one hand, rural leases with environmental clauses (9 years in French law) and, on the other hand, AECM payments (5-7 years). **So, the content and length of the environmental clauses may not be well-suited to AECM payments.**

In addition, it will be necessary to establish the interaction between rural leases and payments under Eco-schemes under the first pillar of the CAP, whose outline is becoming clearer. The European Commission has issued non-binding general recommendations¹²⁷, which may nonetheless serve as a reference document, concerning the implementation of national strategic plans; and these general

¹²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Recommendations to the Member States as regards their strategic plan for the Common Agricultural Policy* (COM (2020) 846 final).

recommendations are supplemented by specific ones for each Member State. Notably, the European Commission stresses that these recommendations “are a first step in the process of integrating the European Green Deal in the future CAP Strategic Plans”; and it adds that it is a matter for Member States “to explain how they plan to contribute to the EU ambition set by Green Deal, thus indicating a clear direction of the efforts to be made at national level”¹²⁸. The development of national strategic plans is likely to reconfigure how rural leases with environmental clauses interact with contractualised CAP payments, these latter being projected to take on a greener colour in line with the European Union's ambition as set out in the Green Deal. Consequently, the environmental practices eligible for these subsidies are likely to evolve so as to become more demanding and be subject to stricter monitoring. The question therefore arises whether these practices and their implementation will be consistent with the provisions of rural leases with an environmental clause?

- The link between the rural lease and new national contractual and financial measures to meet global challenges

Meeting global challenges generates opportunities for farmers to enter into carbon sequestration contracts to combat climate change or “offset” contracts to reduce biodiversity loss.

- “Offset” contracts and their interaction with the rural lease

“Offset” measures may be mandatory where damage to biodiversity is inevitable during the course of a development project, with different compensation measures being realised in the various laws of the Member States.

According to the French legislation, these compensation measures are based on an ecological equivalence between the damage and its “repair” and aim to achieve: “an objective of no net loss or even gain of biodiversity. (These measures) must lead to results and be effective for the same length of time as the damage”¹²⁹ (Article L. 163-1-I of the French Environmental Code). Furthermore, it is stipulated that: “any person subject to an obligation to implement measures to compensate for damage to biodiversity must fulfill this obligation either directly or by contracting out the implementation of these measures to a compensation operator (...), or by acquiring compensation units within the framework of a natural compensation site (...)”¹³⁰ (Article L. 163-1-I of the French Environment Code). Thus, farmers may contract to carry out compensation measures on behalf of the person subject to the obligation to implement compensation measures; and the involvement of farmers should

¹²⁸ *Ibid*, p. 17.

¹²⁹ Translated by us.

¹³⁰ Translated by us. See also Part 6 of the Environment Act 2021 (in respect of England and Wales).

increase insofar as implementation necessarily relies on available land. However, in general, environmental laws orchestrating compensation measures do not include specific provisions for rural leases.

If, in absolute terms, an “offset” contract can be linked to a rural lease with environmental clauses, we must not lose sight of the fact that it requires the farmer to achieve a **result**¹³¹. We are not therefore dealing with an action-based regime. In particular, when a rural lease with an environmental clause is used to implement an “offset”, the lease should specify the works to be undertaken as compensatory measures¹³². And this implies agreement between landowners and farmers of the land.

- Low-carbon contracts and their interaction with the rural lease

Several national schemes aim to develop initiatives for the sequestration of CO₂ in carbon sinks, these extending to the protection of not only existing carbon stocks in forests and soils, but also the encouragement of their increase, which would require a change in agricultural practices¹³³.

The French Low-carbon Labelling Scheme¹³⁴ is one of these national schemes¹³⁵, which works on the following basis: *“a farmer holding one or more rural leases enters into a carbon sequestration contract, which may be part of a collective approach, under which he undertakes to ‘reduce anthropogenic greenhouse gas emissions’ on his farm, in accordance with ‘a method approved by the Minister for the Environment’. Through this service contract, he may receive remuneration paid directly or indirectly by the beneficiary of the carbon reduction rights with whom he has contracted”*¹³⁶ (see the diagram below).

¹³¹ It should be recalled that the compensatory measures remain the responsibility of the project owner. Consequently, the farmer who carries out these measures on behalf of the project owner will not be directly responsible if the objectives are not achieved. It will always be the project owner.

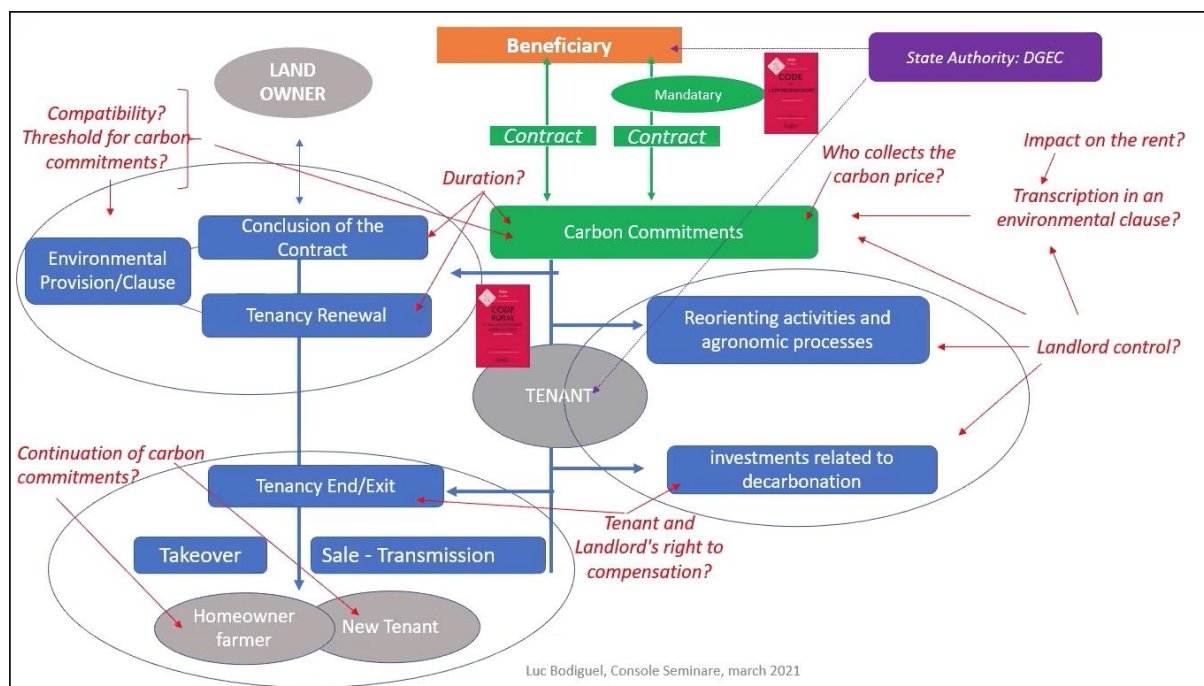
¹³² Cerema (Direction territoriale méditerranéenne), ‘Le bail rural à clauses environnementales et le paysage “agro-environnemental”’, June 2015 (Translated title: The rural lease with environmental clauses and the “agri-environmental” landscape)

¹³³ COWI, Ecologic Institute and IEEP, *Technical Guidance Handbook - setting up and implementing result-based carbon farming mechanisms in the EU* - Report to the European Commission, DG Climate Action, under Contract No. CLIMA/C.3/ETU/2018/007 (COWI, Kongens Lyngby, 2021).

¹³⁴ Decree No. 2018-1043 of 28 November 2018 creating a “Low-Carbon” label NOR: TRER1818757D; Order of 28 November 2018 defining the “Low-Carbon” label reference system.

¹³⁵ For a detailed presentation of the scheme, see L. Bodiguel, ‘CO₂ vert et bail rural: les interactions entre le contrat de séquestration de carbone et le bail rural’, in J.-B. Millard and H. Bosse-Platière (Ed.), *Le CO₂ Vert ‘Capturé’ par le Droit, Le carbone en agriculture et en sylviculture*, Lexis Nexis, Paris, 2022, pp. 132-143. (Translated title: Green CO₂ and the rural lease: the interactions between the carbon sequestration contract and the rural lease) See also, Annex No.2 Workshop Report.

¹³⁶ *Ibid.*



Source: L. Bodiguel, 9 March 2021, Presentation given at the CONSOLE 2nd Workshop on legal aspects.

A difficulty is presented by the different length in duration of, on the one hand, "offset" and low-carbon contracts (which must respectively last for the entire time of the environmental damage and the minimum stipulated time for carbon sequestration) and, on the other hand, rural leases with environmental clauses which can be exercised over a relatively long period of time - but which remain partly dependent on the lessor. If the lessor does not allow a lease of sufficient length to accommodate other environmental commitments made by the lessee, it will prevent those commitments being carried out on the farmland. Therefore, even though it is the lessee under a rural lease who enter into "offsets" and/or low-carbon contracts, only the lessor can guarantee the necessary continuity. It is for this reason that Luc Bodiguel advises involving the owner in the negotiation of these contracts.

The emergence of these contracts, which are still largely at an exploratory stage, highlights how new ecological and economic value has been created, which in turn raises the question of how the value of these new "fruits of the land" will be distributed between the owner and the lessee. As indicated, this complex issue is all the more important as the lessor is a key player in guaranteeing the commitments made by the lessee.

Key points of Land tenure contracts

- It has been shown that land tenure contracts can have a positive effect on environmental preservation (for example, species preservation and soil/water quality). Central to this is the rural lease with environmental clauses.
 - The rural lease with environmental clauses appears to be a form of contract that operates as an exception to the "classic" rural lease, orchestrating the relationship between an owner and a tenant of agricultural land.
 - Rural leases with environmental clauses, taken in isolation, have shortcomings in ensuring the sustainable provision of environmental goods and services. Some of these shortcomings relate to the duration of the contract and limitations inherent within the environmental clauses, while others relate to the level of funding available as an incentive to enter into and then continue with the requisite commitments. These gaps can be partly filled by combining such contracts with other contractual formulas that are also linked to the land: for example, "offset" contracts, AECM under the CAP or even "conservation covenants". However, the fact remains that the environmental orientation of land tenure contracts with environmental clauses provides a ready means of ensuring compliance with enhanced agri-environmental objectives.
 - Furthermore, it is clear that land tenure contracts are a category of contract that is not hermetically sealed from the other categories identified within the CONSOLE framework.
- 1) By linking land tenure contracts to collective contractual solutions, the impact of environmental measures can be expanded to landscape scale.
 - 2) By focusing on outcome-based contractual solutions, which may require a longer timeframe to implement, greater motivation may be generated among landowners and tenant farmers to implement measures which realise a more comprehensive and more significant positive environmental impact.

3 Result-based contracts

3.1 Introduction

The delivery of agri-environment-climate public goods (AECPG) through contractual result-based schemes continues to attract increased attention from policy-makers, stakeholders and the academic community. As affirmed by the European Court of Auditors, such schemes have the capacity to see the achievement of specific and measurable objectives which are directly observable on the ground¹³⁷; and, importantly, a clear benefit may be seen by civil society in return for the public financial support which is provided to farmers and land managers¹³⁸. In addition, there is now a growing body of evidence of the efficacy of schemes which have already been implemented, for example: the BurrenLife Project (IRL1);¹³⁹ and the result-based agri-environment scheme for permanent grasslands in Baden-Württemberg¹⁴⁰.

This direction of travel is being more broadly maintained during the process of the current CAP reform. In *The Future of Food and Farming*, it was stated that there should be “a greater focus on high standards and actual results” and, more specifically, that there should be “a result-oriented delivery of environmental and climate public goods”¹⁴¹. Similarly, the *Impact Assessment* of 2018 looked to a new delivery model which would “bring a fundamental shift in the CAP, moving away from compliance with detailed EU-level rules towards placing more emphasis on achieving results against the policy's common objectives, defined

¹³⁷ European Court of Auditors, Special Report No. 7/2011, *Is Agri-environment Support Well Designed and Managed*, paras. 26 and 27 (available at https://www.eca.europa.eu/Lists/ECADocuments/SR11_07/SR11_07_EN.PDF).

¹³⁸ It may be noted, however, that evidence of citizen preference for result-based schemes is not unequivocal: see, for example, A. Vainio *et al.*, ‘The legitimacy of result-oriented and action-oriented agri-environmental schemes: A comparison of farmers’ and citizens’ perceptions’, (2021) 107 Land Use Policy 104358 (which found in Finland a preference on the part of citizens and farmers for action-oriented schemes, together with a reluctance for change, this being associated with the perception that Finnish agriculture had a track record of successfully producing ecosystem services).

¹³⁹ B. Dunford and S. Parr, ‘Farming for Conservation in the Burren’, in E. O’Rourke and J.A. Finn (Ed.), *Farming for Nature: the Role of Results-based Payments*, Teagasc, Wexford, and National Parks and Wildlife Service, Dublin, 2020, pp. 56-103; and J. Moran *et al.*, ‘Management of high nature value farmland in the Republic of Ireland: 25 years evolving toward locally adapted results-orientated solutions and payments’, (2021) 26(1) Ecology and Society 20.

¹⁴⁰ Available at https://enrd.ec.europa.eu/projects-practice/fakt-results-based-agri-environment-scheme-permanent-grasslands_en. See also generally B. Matzdorf and J. Lorenz, ‘How cost-effective are result-oriented agri-environmental measures? - An empirical analysis in Germany’, (2010) 27(2) Land Use Policy 535; and D. Russi *et al.*, ‘Result-based agri-environment measures: market-based instruments, incentives or rewards? The case of Baden-Württemberg’, (2016) 54 Land Use Policy 69.

¹⁴¹ European Commission, *The Future of Food and Farming* (COM(2017) 713 final), pp. 9 and 20. See also generally K. Heyl *et al.*, ‘The Common Agricultural Policy beyond 2020: A critical review in light of global environmental goals’, (2021) 30(1) Review of European, Comparative & International Environmental Law 95.

and agreed at EU level"¹⁴². And in the agreed CAP Strategic Plans Regulation the same ongoing policy shift is again reiterated, it being confirmed that:

The result-orientation triggered by the delivery model requires a strong performance framework, particularly since CAP Strategic Plans would contribute to broad general objectives for other policies under shared management¹⁴³.

Further, and importantly, the same Regulation expressly provides that "Member States may promote and support collective schemes and result-based payment schemes to encourage farmers or other beneficiaries to deliver a significant enhancement of the quality of the environment at a larger scale or in a measurable way"¹⁴⁴.

In the context of the delivery of AECPG, however, payment by results would seem to present specific governance challenges¹⁴⁵, four of which may be considered:

- the setting of targets;
- the consequences of failure to meet targets;
- the creation of mechanisms for the monitoring of compliance; and
- World Trade Organization (WTO) compatibility.

The extent of these challenges is becoming more evident as research is conducted into the more detailed operation of result-based schemes¹⁴⁶. For example, fear of failure to meet targets may cause more risk-averse farmers and land managers to refrain from participation, while payment on the basis of results would not seem to sit easily with the criteria for securing WTO exemption as "payments under environmental programmes", which are limited to extra costs or loss of income.

¹⁴² European Commission, *Impact Assessment* (SWD(2018) 301 final), Part 1, 21.

¹⁴³ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Recital (117). See also European Parliament resolution of 30 May 2018 on the future of food and farming (2018/2037(INI)), paras. 14, 55 and 117.

¹⁴⁴ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Article 70(5).

¹⁴⁵ See, for example, A. Moxey and B. White, 'Result-oriented agri-environmental schemes in Europe: a comment', (2014) 39 *Land Use Policy* 397; A. Saba, 'Results-based Agri-environmental Schemes for Delivering Ecosystem Services in the EU: Emerging Issues and Emerging Trends', in M. Alabrese et al (Ed.) *Agricultural Law: Current Issues from a Global Perspective*, Springer, Cham, Switzerland, 2017, pp. 83-122; and E. O'Rourke and J.A. Finn (Ed.), *Farming for Nature: the Role of Results-based Payments*, Teagasc, Wexford, and National Parks and Wildlife Service, Dublin, 2020, *passim*.

¹⁴⁶ See, for example, S. Chaplin et al., *Pilot Results-based Payment Approaches for Agri-environment Schemes in Arable and Upland Grassland Systems in England: Final Report to the European Commission*, Natural England and Yorkshire Dales National Park Authority, 2019.

3.2 The Setting of Targets

3.2.1 The Integration of targets into the CAP

For the purposes of implementing any system of payment for results, the setting of targets must inevitably form an integral part of scheme design. And such setting of targets is becoming increasingly central to the evolving CAP. Thus, in the case of agreed CAP Strategic Plans Regulation, achievement of both the general and specific objectives of CAP support should “be assessed on the basis of common indicators related to output, result, impact and context”¹⁴⁷; and, in addition, the Green Deal targets must also be met¹⁴⁸. Accordingly, Member States must draft an intervention strategy for each of the nine specific objectives of the CAP which “include the **targets** (at the level of result indicators) and the **most appropriate interventions**”; and they are also “requested to **set explicit national values for the different Green Deal targets**”¹⁴⁹.

3.2.2 Targets and the delivery of AECPG

With more specific reference to AECPG schemes, although the majority of work in the developing of targets has been undertaken outside the legal arena¹⁵⁰, for example by ecologists, a number of governance issues have nonetheless been revealed, of which two may be highlighted.

3.2.2.1 Fixing the floor

First, an important consideration is to fix the floor which must be exceeded in order to unlock payment. In the words of Schwarz *et al*, “[a]ny workable [payment-by-results] scheme has to be based on sound measurement of environmental baselines and the monitoring of changes in these baselines”¹⁵¹. This floor has as a general rule been fixed by reference to the level of “good agricultural practice”¹⁵², which has often being articulated in terms of

¹⁴⁷ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Article 7(1).

¹⁴⁸ European Commission, *The European Green Deal* (COM(2019) 640 final). See also European Commission, *Analysis of Links between CAP Reform and Green Deal* (SWD(2020) 93 final).

¹⁴⁹ European Commission, *Recommendations to the Member States as regards their Strategic Plan for the Common Agricultural Policy* (COM(2020) 846 final) p. 17 (emphasis in original); T. Bonvillain *et al*, ‘Will the Obligation of Environmental Results Green the CAP? A Comparison of the Costs and Effectiveness of Six Instruments for the Transition to Sustainable Agriculture’, 14CE, Paris, 2020; and K. Heyl *et al*, ‘The Common Agricultural Policy beyond 2020: A critical review in light of global environmental goals’, (2021) 30(1) *Review of European, Comparative & International Environmental Law* 95.

¹⁵⁰ See, for example, P. McGurn and J. Moran, *A National, Outcome-based Agri-environment Programme Under Ireland’s Rural Development Programme 2014-2020. Report Produced for the Heritage Council* (2013).

¹⁵¹ G. Schwarz *et al*, *An Analysis of the Potential Effectiveness of a Payment-by-Results Approach to the Delivery of Environmental Public Goods and Services Supplied by Agri-Environment Schemes: Final Report Project No: 23192*, Land Use Policy Group, 2008, p. 47.

¹⁵² See, for example, European Commission, *Directions Towards Sustainable Agriculture* (COM(1999) 22 final), para. 3.2.5.

compliance with the polluter-pays-principle¹⁵³. Farmers and other land managers should not therefore receive support for activities which they would be obliged to undertake by virtue of existing legislative frameworks - and, in any event, they should not be “paid to pollute”. As has been seen, this approach currently finds concrete expression in Article 28(3) of Regulation (EU) 1305/2013 of the European Parliament and of the Council¹⁵⁴, this approach to be continued under Article 70(3) of the CAP Strategic Plans Regulation¹⁵⁵. And it may be highlighted that the level of statutory management requirements (SMRs) and standards for good agricultural and environmental condition of land (GAECs) can be moved upwards or downwards through amendment to the regime by which they are implemented, with any such amendment having real financial consequences for the agricultural sector. Not least, the higher the floor, the less will be the scope to earn remuneration for achieving targets which exceed it¹⁵⁶. In this light, it may also be highlighted that, during the recent CAP reform process, there has been consistent advocacy of the need to increase environmental ambition¹⁵⁷, leading to the bolstering of the cross-compliance conditions/conditionality which farmers must observe in order to receive payment. Thus, in the case of the CAP Strategic Plans Regulation, GAEC 7 mandates the introduction of crop rotation, while SMRs require compliance with certain provisions of the Water Framework Directive and Sustainable Use of Pesticides Directive¹⁵⁸. Accordingly, these would all now *prima facie* be excluded from remuneration under any result-based scheme. Similarly, outside the EU, there are proposals in Wales for the enactment of statutory National Minimum Standards to provide the floor for a new publicly-funded Sustainable Farming Scheme which would have heavy focus on outcomes; and again the extent of ambition of those standards will affect the extent of result-based payments¹⁵⁹.

3.2.2.2 Maintaining and improving

In the context of setting targets for result-based schemes, a governance issue which has already attracted considerable attention is the degree to which

¹⁵³ See, for example, M.N. Cardwell, ‘The polluter pays principle in European Community law and its impact on United Kingdom farmers’, (2006) 59 Oklahoma Law Review 89.

¹⁵⁴ OJ L 347/487, 20.12.2013.

¹⁵⁵ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

¹⁵⁶ On this aspect, see generally, for example, H. Silvis, R. Jongeneel, and V. Linderhof, ‘Environment and Agriculture’, in L. Dries et al (Ed.), *EU Bioeconomy - Economics and Policies: Volume I*, Palgrave Macmillan, 2019, pp. 187-205.

¹⁵⁷ See, for example, European Commission, *The Future of Food and Farming* (COM(2017) 713 final): “[t]his is why a modernised CAP should enhance its EU added value by reflecting a higher level of environmental and climate ambition, and address citizens’ concerns regarding sustainable agricultural production” (at p. 7) (emphasis in original).

¹⁵⁸ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Annex III.

¹⁵⁹ Welsh Government, *Consultation Document: Agriculture (Wales) White Paper*, WG41711 (16 December 2020).

farmers and other land managers must demonstrate improvement in the environmental condition of the land in order to receive remuneration¹⁶⁰. Where the environmental condition is poor at the inception of the commitment, targets which require improvement would seem uncontroversial. The position, however, would seem more complex where the land is already in good environmental condition, perhaps through participation in an earlier agri-environmental scheme. In this case, there is an argument that the targets should simply be fixed at the level of maintaining the existing condition of the land, but this may present challenges in terms of the justification of expenditure from the public purse. What would nevertheless appear beyond dispute is that scheme design should not create for farmers an incentive to degrade their land prior to entering into commitments with a view to maximising the opportunity for improvement and, thereby, remuneration. Such circumstances were encountered in relation to a silvopastoral project in Nicaragua, where landowners reacted to the absence of compensation for existing trees by threats to cut them down – a state of affairs which was addressed by providing an up-front payment for baseline points¹⁶¹.

3.3 The consequences of failure to meet targets

A significant distinction between payment for actions and payment for results is that in the latter case the farmer or land manager is exposed to the risk that, notwithstanding having managed the land appropriately, the environmental outcome may not be achieved through reasons beyond their control. A classic illustration would be woodland creation where the trees subsequently failed to reach maturity through drought. The importance of the distinction is exacerbated by the widespread understanding that risk-averse farmers and land managers may decide through such fear of failure not to participate in result-based schemes¹⁶². Indeed, a pilot study in England expressly recommended that perceptions of risk should be accommodated in scheme design¹⁶³; and the *Technical Guidance Handbook - setting up and implementing result-based carbon farming mechanisms in the EU* concluded that “[t]he risk of non-delivery may be a major factor limiting the uptake of a result-based scheme”, while also

¹⁶⁰ R.J.F. Burton and G. Schwarz, 'Result-oriented agri-environment schemes in Europe and their potential for promoting behavioural change', (2013) 30(1) Land Use Policy 628.

¹⁶¹ S. Pagiola et al., 'Paying for the environmental services of silvopastoral practices in Nicaragua', (2007) 64 Ecological Economics 374; and see also R.J.F. Burton and G. Schwarz, 'Result-oriented agri-environment schemes in Europe and their potential for promoting behavioural change', (2013) 30(1) Land Use Policy 628.

¹⁶² See, for example, C. Keenleyside et al., *Results-based Payments for Biodiversity Guidance Handbook: Designing and Implementing Results-based Agri-environment Schemes 2014-20* (prepared for the European Commission, DG Environment, Contract No ENV.B.2/ETU/2013/0046, Institute for European Environmental Policy, London, 2014) p. 18; and S.P. Chaplin et al., 'Developing payment-by-results approaches for agri-environment schemes: experience from an arable trial in England', (2021) 109 Land Use Policy 105698.

¹⁶³ S. Chaplin et al., *Pilot Results-based Payment Approaches for Agri-environment Schemes in Arable and Upland Grassland Systems in England: Final Report to the European Commission*, Natural England and Yorkshire Dales National Park Authority, 2019, p. 120.

suggesting that “[w]here the risk is high it may be worth considering either an action-based or a hybrid scheme as an alternative”¹⁶⁴. An additional level of concern for farmers and land managers may be present in the case of collaborative schemes, since the failure of one participant to meet targets may jeopardise the receipt of result-based payments by the others¹⁶⁵. That said, there is also some indication that this form of risk aversion is not universal: for example, the prospect of failure did not weigh heavily on those participating in the result-based agri-environment scheme for permanent grasslands in Baden-Württemberg¹⁶⁶.

With a view to addressing such apprehension over meeting targets, a range of alternatives has been suggested.

- First, as highlighted by Keenleyside *et al*, much can be gained by careful choice of result indicators combined with appropriate information and advice¹⁶⁷. Setting targets which are demonstrably achievable and which do not involve great financial outlay are likely to reduce risk aversion; and it may be no coincidence that the more relaxed approach of the farmers participating in the result-based agri-environment scheme for permanent grasslands in Baden-Württemberg was found present in relation to a scheme where there was a realistic chance of being able to deliver the required target of four indicator species of wildflowers. On the other hand, this approach would not appear so well suited to more ambitious and complex projects and, in particular, those operating at landscape scale, such as the proposed Landscape Recovery component of the Environmental Land Management

¹⁶⁴ COWI, Ecologic Institute and IEEP, *Technical Guidance Handbook - setting up and implementing result-based carbon farming mechanisms in the EU* - Report to the European Commission, DG Climate Action, under Contract No. CLIMA/C.3/ETU/2018/007 (COWI, Kongens Lyngby, 2021) p. 24.

¹⁶⁵ See, for example, S.B. Emery and J.R. Franks, 'The potential for collaborative agri-environment schemes in England: can a well-designed collaborative approach address farmers' concerns with current schemes?', (2012) 28(3) *Journal of Rural Studies* 218. In this context, agglomeration payments may play a beneficial role: see, for example, A. Bell *et al*, 'Scaling up pro-environmental agricultural practice using agglomeration payments: proof of concept from an agent-based model', (2016) 126 *Ecological Economics* 32 (such agglomeration payments relating to bonus payments for adoption by neighbouring farms).

¹⁶⁶ D. Russi *et al*, 'Result-based agri-environment measures: market-based instruments, incentives or rewards? The case of Baden-Württemberg', (2016) 54 *Land Use Policy* 69.

¹⁶⁷ C. Keenleyside *et al*, *Results-based Payments for Biodiversity Guidance Handbook: Designing and Implementing Results-based Agri-environment Schemes 2014-20* (prepared for the European Commission, DG Environment, Contract No ENV.B.2/ETU/2013/0046 (Institute for European Environmental Policy, London, 2014)) p. 38. See also, for example, P. Cullen *et al*, 'Agri-environment scheme design: past lessons and future suggestions', (2021) 17(3) *Eurochoices* 26.

Scheme, to be implemented in England post-Brexit¹⁶⁸; or in the case of environmental co-operatives in the Netherlands¹⁶⁹.

- Second, as noted above, it may prove possible to implement a hybrid scheme (under which action-based payments are topped up by a result-based element to reward higher-level achievement). This option is being seriously entertained in the case of result-based carbon farming mechanisms in the EU, including the alternative structure of up-front payments, with the conclusion being reached that: “[i]n most circumstances, result-based carbon farming schemes without some form of ex-ante payments to farmers seem unlikely to attract sufficient uptake”¹⁷⁰.
- Third, and similarly, the result-based scheme could operate through a points system or a range of payments so as to reduce the financial risk from poor performance, a model applicable under the BurrenLife Project (IRL1) and the Results-based Agri-Environment Payment Scheme (RBAPS) Pilot in Ireland (IRL2)¹⁷¹. Importantly, this prevents farmers being confronted with the possibility of facing “all or nothing” in the calculation of their remuneration, partial performance generating proportionate payment¹⁷².
- Fourth, the public purse might effectively underwrite the result-based scheme, an alternative which has been advanced by the Welsh Government for the proposed Sustainable Farming Scheme post-Brexit. In the interests of fairness, there was acceptance that government “should bear the risk if agreed

¹⁶⁸ Department for Environment, Food and Rural Affairs, *The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024* (November 2020) p. 32 (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954283/agricultural-transition-plan.pdf).

¹⁶⁹ J.R. Franks, ‘The collective provision of environmental goods: a discussion of contractual issues’, (2011) 54(3) *Journal of Environmental Planning and Management* 637.

¹⁷⁰ COWI, Ecologic Institute and IEEP, *Technical Guidance Handbook - setting up and implementing result-based carbon farming mechanisms in the EU*- Report to the European Commission, DG Climate Action, under Contract No. CLIMA/C.3/ETU/2018/007 (COWI, Kongens Lyngby, 2021) pp. 19-20 and 93.

¹⁷¹ See also P. McGurn and J. Moran, *A National Outcome-based Agri-environment Programme Under Ireland’s Rural Development Programme 2014-2020. Report Produced for the Heritage Council* (2013).

¹⁷² It may be observed that, during the course of the result-based agri-environment scheme pilot study in England, exceptional dry weather and high temperatures were experienced in 2018 and, in the case of the winter bird food option, farmers therefore became concerned that even reseeded and the carry out of further costly operations would still result in failure and no payment. Following discussion between the researchers and the European Commission, the decision taken was that the fairest solution would be to base payment for 2018 on average performance over 2018 and the preceding year when performance levels had been high: S. Chaplin *et al.*, *Pilot Results-based Payment Approaches for Agri-environment Schemes in Arable and Upland Grassland Systems in England: Final Report to the European Commission*, Natural England and Yorkshire Dales National Park Authority, 2019, pp. 91-92.

actions do not lead to outcomes", but only if the farmer had implemented the appropriate actions¹⁷³.

- Fifth, *force majeure* provisions may be employed within individual contracts, these being already familiar in EU law, including the agricultural context¹⁷⁴. Currently, Regulation (EU) 1306/2013 of the European Parliament and of the Council on the financing, management and monitoring of the CAP provides that no administrative penalties should be imposed where the non-compliance is due to *force majeure* which encompasses, *inter alia*, a severe natural disaster gravely affecting the holding or an epizootic or a plant disease affecting part or all of the livestock or crops of the beneficiary¹⁷⁵. It may also be observed that *force majeure* provisions have already found their way into AECPG contracts at national level. By way of illustration, since 2008 they have been included as standard in contracts under the English Woodland Grant Scheme, with ash dieback providing an illustration of their operation being triggered¹⁷⁶.
- Sixth, there may be opportunities to engage the private sector. In this context, the more travelled route would be the provision of insurance – and it may also be noted that, under the agreed text of the CAP Strategic Plans Regulation Member States can grant financial contributions to premiums for insurance schemes, although they must also ensure that intervention under the relevant Article does not lead to overcompensation when combined with other public or private risk management schemes¹⁷⁷. As things stand, however, insurance of this kind would be a novel step in the context of result-based AECPG schemes – and the appetite of the market is yet to be tested. Other indications of private sector willingness to provide funding may nonetheless be detected, an example with relevance to the value chain being the piloting by Rabobank

¹⁷³ Welsh Government, *Consultation: Sustainable Farming and Our Land*, Welsh Government, Cardiff, 2019 (available at <https://gov.wales/sites/default/files/consultations/2019-07/brexit-consultation-document.pdf>) para. 1.31.

¹⁷⁴ For an early iteration, see Commission notice C (88) 1696 concerning 'force majeure in European agricultural law', [1988] OJ C 259/10.

¹⁷⁵ Regulation (EU) 1306/2013 of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy, [2013] OJ L347/549 20.12.2013, Article 2(2) and Article 64. See also Commission Delegated Regulation (EU) 640/2014, [2014] OJ L181/48 20.6.2014, Article 4.

¹⁷⁶ See, for example, Forestry Commission, Operations Note 030 (Updated: 5 September 2019) *How ash dieback (Hymenoscyphus fraxineus) may affect your legacy grant scheme or felling licence application* (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/829710/ON030_How_ash_dieback_may_affect_your_grant_application_v2.0_issued_050919.pdf).

¹⁷⁷ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1 6.12.2021, Article 76; and see generally, for example, J. Antón, 'Risk Management in Agriculture: What Role for Policy in the New Common Agricultural Policy?', in J.A. McMahon and M.N. Cardwell (Ed.), *Research Handbook on EU Agriculture Law*, Edward Elgar, Cheltenham, 2015, pp. 86-110; and A. Matthews, 'Which is the Best Risk Management Tool?' (22 August 2017) (available at <http://capreform.eu/which-is-the-best-risk-management-tool/>).

of green finance to reward dairy farmers through a loan interest discount where they meet higher environmental criteria (NL3). And an even more novel mechanism would be to employ environmental impact bonds to spread the risk to private investors¹⁷⁸.

3.4 The creation of mechanisms for the monitoring of compliance

3.4.1 A General challenge

As highlighted above, any workable scheme of payment by results must not only be based on sound measurement of environmental baselines, but also be underpinned by the monitoring of changes in these baselines. And, in this regard, a challenge is presented by the fact that the monitoring of outcomes is inherently more complex than monitoring compliance with prescribed actions, consequently giving rise to, *inter alia*, cost implications. As again observed by Schwarz *et al*, “[i]t may be difficult and costly to measure environmental outputs to a standard that would satisfy the requirements of an enforceable contract”¹⁷⁹. A clear example of this complexity may be provided by a pilot study in England, which accepted that the presence/absence of the target species of breeding waders on the land should be discounted as a results indicator in that many external factors affected the numbers of birds returning each year and even their presence was not a reliable indication of breeding success unless there were repeated observations¹⁸⁰.

3.4.2 The governance challenge

A significant governance challenge therefore is to put in place a mechanism for the monitoring of compliance which meets criteria of good practice in terms of both rigour and cost-effectiveness, while also receiving sufficient “buy-in” from stakeholders. In the case of a number of results indicators, the difficulties may not prove insuperable. For example, air-photography should work well for measuring forest edges (although it would have less efficacy in determining many qualitative factors, including the level of maintenance)¹⁸¹. Likewise, in the case

¹⁷⁸ D. Hall, S. Lindsay and S. Judd, *Permanent Forest Bonds: A Pioneering Environmental Impact Bond for Aotearoa New Zealand*, Working Paper 17/01 (2017) (available at <https://apo.org.au/sites/default/files/resource-files/2017-02/apo-nid72539.pdf>).

¹⁷⁹ G. Schwarz *et al*, *An Analysis of the Potential Effectiveness of a Payment-by-Results Approach to the Delivery of Environmental Public Goods and Services Supplied by Agri-Environment Schemes: Final Report* Project No: 23192, Land Use Policy Group, 2008, p. 13.

¹⁸⁰ S. Chaplin *et al.*, *Pilot Results-based Payment Approaches for Agri-environment Schemes in Arable and Upland Grassland Systems in England: Final Report to the European Commission, Natural England and Yorkshire Dales National Park Authority*, 2019, pp. 49-50.

¹⁸¹ K. P. Hasund, ‘Indicator-based agri-environmental payments: a payment-by-result model for public goods with a Swedish application’, (2013) 30 Land Use Policy 223.

of schemes to promote wildflower meadows, it should be possible to calculate the intensity of indicator species. On the other hand, where schemes are to promote wildlife, there may need to be reliance on proxy measures rather than direct counting of the bird or pollinator population, since these are not readily calculable at the farm or field level¹⁸². Notably, in the case of the Results-based Agri-Environment Payment Scheme (RBAPS) Pilot in Ireland (IRL2), proxies were employed in respect of biodiversity targets.

In the context of result-based payments, monitoring is frequently carried out by a national control body (for example, the AMA in the case of the Result-based Nature Conservation Plan in Austria (AT3)) or with available input from an expert ecologist (for example, in the case of BRIDE - Biodiversity Regeneration in a Dairying Environment in Ireland (IRL3)), but there is also evidence which would suggest that self-assessment by farmers and land managers may prove a viable way forward, so long as there is expert oversight. Indeed, this approach was at the heart of the pilot study in England, which foresaw considerable cost advantages, while also highlighting the importance of extensive training and advice for farmers until such time as their confidence had grown¹⁸³. On the other hand, self-assessment continues to be regarded as generating greater risk of error, together with the potential for some inflation of outcomes, thereby prompting the need further to buttress governance through robust and extensive auditing¹⁸⁴.

3.5 WTO compatibility

As has been already explored in the General Part of this Report, legislators would hope to secure WTO compatibility of AECM payments through their qualifying for Green Box exemption as “payments under environmental programmes” within Paragraph 12 of Annex 2 to the Agreement on Agriculture. A particular hurdle to be cleared in the case of result-based schemes, however, is that Paragraph 12(b) stipulates that “[t]he amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme”, wording which is not apt to capture receipts on the basis of outcomes achieved.¹⁸⁵ And it may be noted that the Finnish Nature Value Bargaining

¹⁸² S. Chaplin et al., *Pilot Results-based Payment Approaches for Agri-environment Schemes in Arable and Upland Grassland Systems in England: Final Report to the European Commission*, Natural England and Yorkshire Dales National Park Authority, 2019, Executive Summary.

¹⁸³ *Ibid.*, pp. 121-122.

¹⁸⁴ COWI, Ecologic Institute and IEEP, *Technical Guidance Handbook - setting up and implementing result-based carbon farming mechanisms in the EU - Report to the European Commission*, DG Climate Action, under Contract No. CLIMA/C.3/ETU/2018/007 (COWI, Kongens Lyngby, 2021) p. 35.

¹⁸⁵ See, for example, G. Schwarz et al., *An Analysis of the Potential Effectiveness of a Payment-by-Results Approach to the Delivery of Environmental Public Goods and Services Supplied by Agri-Environment Schemes: Final Report* Project No: 23192, Land Use Policy Group, 2008, pp. 31-33; K.

Scheme (Luonnonarvokauppa) (FI6) was discontinued for the reason that it was not possible under EU law to pay subsidies based on production of natural values. In this light, an interesting development during the recent reform process is that Member States are expressly to take into account the targets set when determining the level of payment for AECMs, an amendment which will provide greater scope to meet policy objectives through result-based schemes, but at the expense of potential departure from the strict requirements of Paragraph 12¹⁸⁶.

As again noted above, this should not mean that all aspects of result-based schemes are inevitably WTO non-compatible, since other categories of exemption may be available. In particular, the Green Box extends also to a number of general services under Paragraph 2 of Annex 2, among which three may be highlighted: research (there being express reference to "research in connection with environmental programmes"); training services; and extension and advisory services. All of these would seem well-suited to result-based initiatives in light of the extensive research which is being undertaken, and also the great emphasis already placed by pilot studies on the importance of training and advice to farmers (including in the context of the Results-based Agri-Environment Payment Scheme (RBAPS) Pilot in Ireland (IRL2)). Moreover, the EU has historically shown a willingness to provide such support: for example, in 2017/18 its notification of domestic support expenditure to the WTO in the agricultural sector included 1,233.5 million Euros on research and 1,175.5 million Euros on the provision of extension and advisory services¹⁸⁷. And, looking forward, it may be highlighted that the CAP Strategic Plans Regulation provides, with specific reference to AECM schemes, that "Member States shall ensure that persons carrying out operations under this type of interventions have access to the relevant knowledge and information required to implement such operations, and that, in order to assist farmers who commit to change their production systems, appropriate training is made available for those who require it, as well as access to expertise".¹⁸⁸ In addition, there may be the opportunity to craft a bespoke result-based scheme in such a way as to secure exemption under Paragraph 5 of Annex 2, but a material problem would be meeting the condition that "[n]o production shall be required in order to receive such payments",¹⁸⁹

P. Hasund, 'Indicator-based agri-environmental payments: a payment-by-result model for public goods with a Swedish application', (2013) 30 Land Use Policy 223; and P. Berkhout *et al*, 'Targeted payments for services delivered by farmers: Possible approaches', Wageningen Economic Research, Report 2018-052 (2018) pp. 13-16.

¹⁸⁶ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Article 70(4).

¹⁸⁷ WTO, G/AG/N/EU/61 (30 April 2020).

¹⁸⁸ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Article 70(9).

¹⁸⁹ As observed above, direct payments under Paragraph 5 must meet the criteria set out in Paragraph 6(b)-(e), these being as follows:

since the result indicators might require, for example, the presence of specific crops which could only be achieved through a form of production.

Key Elements of Result-based Schemes:

- Result-based payments include targets to be achieved, which depend on the agreement of the parties to the contract and/or the area concerned.
- Result-based payment systems involve a specific mechanism to monitor whether or not the targets are being achieved.
- Advice for farmers is generally considered to be beneficial.
- There may be scope to combine result-based contracts with action-based contracts under a hybrid system.
- Scale is also generally considered important to achieve real impact, which reinforces combining result-based contracts with collective implementation.
- There should be no incentive to degrade the land prior to entering into commitments.

"(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.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.

(e) No production shall be required in order to receive such payments".

4 Collective implementation: delivery at landscape scale

4.1 Introduction

Thinking through the prism of the collective offers opportunities for the delivery of environmental goods and services, with contract having a role to play in the development of this organizational architecture. As a preliminary point, however, it may be recalled that a willingness to embrace the collective may be culturally nuanced. In the words of Sauquais *et al*, "*traditionally, analyses highlight the 'individual orientation' of Anglo-Saxon and Northern European populations (United States, Great Britain, Australia, the Netherlands, etc.) and the more communitarian tendency of Latin American countries and Asian cultures (China, Singapore, India, etc.)*"¹⁹⁰. That said, as the same authors point out, "[b]eyond these analyses, the supposed degree of individuality or adherence to the collective of a society can be the object of all sorts of clichés: in the face of the supposed archaism of the collective logic, individualism would be the source of the development of a society. However, the danger today is to oppose, on the one hand, a community logic based on values of harmony and reciprocity but constraining freedom, innovation and economic development; and, on the other, an individual logic based on freedom, the individual's capacity for innovation and allowing development"¹⁹¹.

Agriculture has also been marked by these cultural considerations, but it has always been a field that favours collective expression. Mutual aid in French law¹⁹² and commons¹⁹³ have long been among a range of agricultural policy options, even if in Europe they have been losing momentum in recent years¹⁹⁴. Environmental issues, and more specifically the provision of environmental goods and services, have the capacity to renew this collective approach around a **common environmental interest which must be protected**.

The **legal form** in which environmental goods and services are collectively delivered may be either **horizontal** or **vertical collective action**. On the one hand, the **horizontal approach** aims to enhance **spatial scale**, i.e. collective and

¹⁹⁰ M. Sauquais and M. Vielajus, *L'Intelligence Interculturelle: 15 Thèmes à Explorer pour Travailler au Contact d'Autres Cultures*, Chapter 6 'L'individuel et le collectif', Ed. Charles Léopold Mayer, Paris, 2014 (Translated title: *Intercultural Intelligence: 15 Themes to Explore for Working with Other Cultures*, Chapter 6 'The individual and the collective') (available at http://docs.ecim.fr/pdf_annexe/Intelligence%20interculturelle_chapitre%206.pdf).

¹⁹¹ *Ibid.*

¹⁹² See Part 1.

¹⁹³ See below on the commons, but also Part 2 on land tenure contracts.

¹⁹⁴ In this sense, the CAP has tended to favour individual over collective approaches: J. Leventon *et al*, 'Collaboration or fragmentation? Biodiversity management through the common agricultural policy', (2017) 64 Land Use Policy 1

coordinated actions at the scale of an environmentally cohesive territory – such as a landscape. AECM are employed, with the involvement of a number of different actors in the development and support of the specific agricultural practices which will generate environmental goods and services. On the other hand, the **vertical approach** aims to enhance the environmental value of agricultural production along the supply chain; and this will be considered in a subsequent Workshop. A key distinction is that the former operates at territorial level, whereas the latter is directed to the production process and deals with the transformation of agricultural products. Nevertheless, both approaches ultimately reveal a new focus on collective delivery of environmental goods and services in a way which concerns farmers.

Main distinctions between horizontal and vertical collective action

Collective action can be initiated from the bottom up, from the top down or through a combination of both. With regard to scale of action, collective approaches can be initiated at the territorial scale (horizontally, for example across a watershed, a landscape or an administrative region) or can engage actors and activities along a supply chain (vertically)¹⁹⁵.

Horizontal collective action focuses mainly on cooperation between farmers in order to offer their services locally in response to local issues, with the farmers themselves often at the heart of governance. This differs from the **vertical approach** which aims to bring together a group of farmers to promote a “product” or “process”. They organize themselves in such a way as to create a collective offer, which constitutes a series of links in a chain which brings the products or processes to market.

Very frequently, an environmental action will have greater impact if carried out not at the scale of individual plots of land, but rather at the scale of a relevant ecological territory¹⁹⁶. Both the size of area and strategic choice of the precise location are important factors in delivering environmental goods and services. An illustration of this would be a scheme operating at the scale of a catchment area¹⁹⁷, such as case study UK5, which concerns the Esk Valley catchment area

¹⁹⁵ Working Document of the Thematic Group on sustainable management of water and soils of the European network for rural development, “Background briefing: Collective approaches” (available at https://enrd.ec.europa.eu/sites/default/files/tg2_water-soil_briefing_collective-approaches.pdf).

¹⁹⁶ For example, C. Carmona-Torres, C. Parra-López, J.C.J. Groot and W.A.H. Rossing, ‘Collective action for multi-scale environmental management: achieving landscape policy objectives through cooperation of local resource managers’, (2011) 103(1) *Landscape and Urban Planning* 24.

¹⁹⁷ For example, T. Uetake, *Managing Agri-environmental Commons through Collective Action: Lessons from OECD Countries*, OECD, Paris, 2013 (available at

where a CSFF (Countrywide Stewardship Facilitation Fund) group operates with a view to improving water quality. At the current time, 59 farmers are members of the group, with their also being the involvement of a network facilitator and Natural England, a funding body. Moreover, several papers show that transaction costs can be more easily faced when borne collectively rather than individually¹⁹⁸.

However, three difficulties immediately arise:

- **The first difficulty lies in the contractual approach itself.** If implementation of the environmentally friendly methods is contractual, the extent of the territory covered depends on willingness of farmers to become party to these contracts. For example, where the quantity and quality of the environmental goods and services provided depends on the size of the area covered and/or its location, refusal by a farmer whose land is in a strategic position can jeopardise successful delivery. It is therefore necessary to provide specific information to farmers to understand the spatial implications of contracting and, more generally, to provide an institutional framework so as to build trust (see below).
- **The second difficulty concerns the delimitation of the relevant territory.** This depends on the environmental objectives that are to be achieved: different parameters will be applicable where the focus is water quality, the preservation of a protected species or carbon sequestration. Further, ecological boundaries are not always immediately obvious, since the effects of particular environmental action may go far beyond the place or parcel of land where it takes place. Importantly, ecological boundaries do not always align with field/farm boundaries.
- **The third difficulty concerns the most appropriate method of governance** to encourage and translate into concrete form the common interest. In this context, methods of governance are particularly diverse, with it also being not easy to understand what motivates farmers to become involved in collective action¹⁹⁹. Nevertheless, it is the analysis of these forms of

https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8988/UETAKE_0791.pdf?sequence=; and J.R. Franks, 'An assessment of the landscape-scale dimensions of land based environmental management schemes offered to farmers in England', (2019) 83 Land Use Policy 147.

¹⁹⁸ For example, B. Swallow and R. Meinzen-Dick, 'Payment for environmental services: interactions with property rights and collective action', in V. Beckmann and M. Padmanabhan (Ed.), *Institutions and Sustainability*, Springer, Dordrecht, 2009, pp. 243-265 (available at https://doi.org/10.1007/978-1-4020-9690-7_12); and D. Kaczan, A. Pfaff, L. Rodriguez and E. Shapiro-Garza E., 'Increasing the impact of collective incentives in payments for ecosystem services', (2017) 86(C) Journal of Environmental Economics and Management 48.

¹⁹⁹ See, for example, K. Prager, M. Reed and A. Scott, 'Encouraging collaboration for the provision of ecosystem services at a landscape scale - rethinking agri-environmental payments', (2012) 29(1) Land Use Policy 244; and J.M., Kerr, M. Vardhan and R. Jindal, 'Incentives, conditionality and collective action in payment for environmental services', (2014) 8(2) International Journal of the Commons 595 (these latter authors stating that "as payment for environmental services (PES) initiatives spread to collectively managed natural resources, questions arise because the incentive

governance that makes it possible to determine how this collective is constructed and to identify the successes and failures of the choices made.

As preliminary points, however, it is important to emphasize that a range of factors determine the chosen form of governance (4.1.1); and that, in this context, focus should remain on the role of contract in meeting the environmental objectives (4.1.2).

4.2 The range of factors which influence the building of a collective for the provision of environmental goods and services

A typology of collective actions reveals a great diversity of governance methods (4.1.1.), with several factor explaining their different form (4.1.2).

4.2.1 Typology of collective actions revealing a great diversity of governance methods

Collective action is typically defined as: *"the action taken by a group (either directly or on its behalf through an organisation) in pursuit of members' perceived shared interests"*²⁰⁰. The key points are that the action is undertaken to pursue "shared interests" and involves multiple actors. Other terms may also be used in this context, such as "cooperation" or "collaboration"²⁰¹. More specifically, in the case of AECM, the OECD describes collective action as *"[a] set of actions taken by a group of farmers, often in conjunction with other people and organisations, acting together in order to tackle local agri-environmental issues"*²⁰².

Different forms of collective action are characterized by divergence in the actors involved. Not least, much depends on local institutional settings, including the scope to implement participatory strategies and innovative and institutional

structures that might be appropriate for individually managed resources will not necessarily promote the collective action required to manage the commons. Theory suggests challenges for cash payments to promote collective action, and for alternative payment types to facilitate conditionality. Possible ways to reconcile this disconnect involve conceiving of PES more broadly through the use of multiple forms of payment including non-cash incentives and placing greater focus on building institutions for collective action than on strict conditionality". See also G. Lindberg and E. Fahlbeck, 'New forms of local collective governance linked to the agricultural landscape: identifying the scope and possibilities for hybrid institutions', (2011) 9(1-2) *International Journal of Agricultural Resources, Governance and Ecology* 31.

²⁰⁰ G. Marshall, *A Dictionary of Sociology*, available at Oxford University Press, New York, 1998, <https://www.oxfordreference.com/view/10.1093/acref/9780199533008.001.0001/acref-9780199533008-e-312>

²⁰¹ Working Document of the Thematic Group on sustainable management of water and soils of the European network for rural development, "Background briefing: Collective approaches" (available at https://enrd.ec.europa.eu/sites/default/files/tg2_water-soil_briefing_collective-approaches.pdf).

²⁰² OECD, *Providing Agri-environmental Public Goods Through Collective Action*, OECD, Paris, 2013, p. 11.


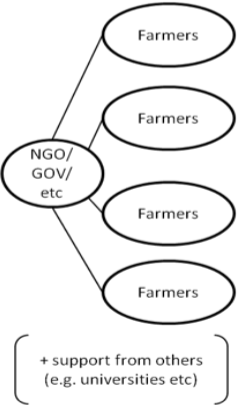
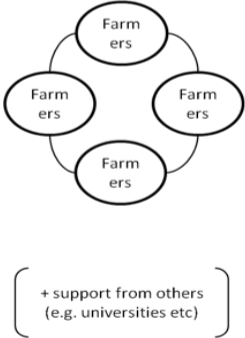
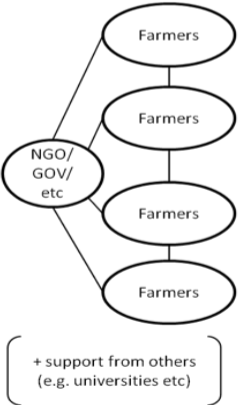
arrangements at the local level. Indeed, the concept of collective action itself implies something more than top-down management (which in the agricultural sector is usually based on state intervention), looking also to public/private partnerships and other institutional innovation. Such multi-stakeholders arrangements are usually characterized by strong **horizontal linkages**, although there may also be vertical linkages, for example between local stakeholders and central governmental agencies²⁰³. This horizontal emphasis finds perhaps greatest expression in the spatial scale at which farmers deliver environmental goods and services, where they remain the main actors (although others may be involved). And it may be reiterated that such action is therefore different from the vertical approach, which, as has been seen, is mainly focused on the production of agricultural products, with farmers as the first link in a longer food chain.

The OECD study identifies 4 types of collective action:²⁰⁴

- Type 1 is a collective action in which farmers and other participants form organisations and act collectively as members.
- Type 2 is a collective action in which external agencies (NGOs, governments, etc.) organise farmers (usually in the same geographical area) to act collectively for a common purpose.
- Type 3 is a collective action in which farmers collaborate with other farmers (and non-farmers), but do not form an independent organisation.
- Type 4 is a collective action in which external agencies (NGOs, governments, etc.) take strong initiatives, but co-operation between farmers is an essential feature of collective action cases. This type is a combination of Type 2 and Type 3.

²⁰³ C.S. Seixas and F. Berkes, 'Community-based enterprises: the significance of partnerships and institutional linkages', (2009) 4(1) *International Journal of the Commons*, 4(1) 183; and F. Vanni, "The provision of agri-environmental public goods through collective action: evidence from case studies in Italy", 2013 (available at <http://hdl.handle.net/10535/8992>).

²⁰⁴ T. Uetake, *Managing Agri-environmental Commons through Collective action: Lessons from OECD Countries*, OECD, Paris, 2013 (available at https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8988/UETAKE_0791.pdf?sequence=) p. 4.

Type 1: Organisation-style collective action	Type 2: External agency-led collective action	Type 3: Non-organisation-style collective action	Type 4: Co-operation between external agency and farmers
Farmers and other participants form organisations and act collectively as members. To manage organisations, rules and governance are very important.	External agencies organise farmers (usually in the same geographical area) and act collectively. Co-operation between farmers is not necessarily a feature.	Farmers collaborate with other farmers (and non-farmers), but do not form independent organisations.	Combination of Type 2 and Type 3. Although external agencies take strong initiatives, Co-operation between farmers is an essential part of the action.
			

OECD Figure: Typology of collective action

The typology raises two specific questions:

Who initiates collective action?

The forms that collective approaches take can be many and varied, depending on the issue to be addressed and the situation locally. They can be instigated from the bottom up (the initiative coming from farmers or other local actors), top down (the initiative coming from public authorities) or a combination of both (where actions are coordinated between practitioners and authorities).

Formalised or less formalised collective approaches

Collective approaches can be implemented via:

- Collectives as formal entities: farmers / land managers coming together to jointly deliver agreed objectives through an organised and formal "collective" or "cooperative" (for example, the current Dutch approach to AECM delivery as found in case study NL1);
- Less formal approaches: activities taken by a group of farmers/land managers, with potential involvement of other local stakeholders, so as to meet commonly agreed goals, these being more loosely facilitated by a key person in the local area without formal establishment of a collective entity²⁰⁵.

²⁰⁵ See, for example, Working Document of the Thematic Group on sustainable management of water and soils of the European network for rural development, "Background briefing: Collective approaches" (available at https://enrd.ec.europa.eu/sites/default/files/tg2_water-

The literature with regard to collective action for the provision of environmental public goods has historically been quite limited. As Vanni stated in 2014: “few studies are focused on general collective action theory or on collective action for agri-environmental public goods in developed countries. At the EU level, for example, it is not clear to what extent collective action could be taken into consideration as a valuable alternative to market or state regulation in contributing to the provision of environmental public goods associated with agriculture, and to what extent it is possible to design and implement agricultural policies that incorporate a collective and collaborative approach between different stakeholders in rural areas”²⁰⁶. But now it is a fast-developing field²⁰⁷.

4.2.2 Factors that explain the diversity of these different forms of governance

It is possible to identify two main factors that influence the structure of collective action. The first factor is **external in nature**. Farmers are encouraged to work together by, generally, the State, with AEEM under the CAP being part of this approach. And the English CSFF framework found in the case studies provides a useful illustration²⁰⁸.

The second factor is **internal**: farmers organise their own collective system for the provision of environmental goods and services. This internal factor could include joint management or “commons”²⁰⁹, which can be analysed as a collective form of management - but one that falls outside the scope of this Report. Communal rights long predate AEEM and have been classified as a kind of land tenure²¹⁰: in essence, common land is land owned by one or more persons where other persons, known as “commoners”, are entitled to use the land or take resources from it (such as a right to graze sheep). It can be a source of environmental benefits, but they are not its main purpose. Accordingly, **discussion of common**

soil_briefing_collective-approaches.pdf). In addition, the English case studies all display **similar** structure, being based on CSFF groups where farmers are brought together by a network facilitator. Two illustrations are the Wharfedale CSFF group (UK2) and the Wensleydale CSFF (UK3), both relating to natural flood management.

²⁰⁶ F. Vanni, *Agriculture and Public Goods*, Springer, Dordrecht, 2014, p. viii.

²⁰⁷ For example, M. Riley *et al*, 'Will farmers work together for conservation? The potential limits of farmers' cooperation in agri-environment measures', (2018) 70 Land Use Policy 635; J. Franks, 'An assessment of the landscape-scale dimensions of land based environmental management schemes offered to farmers in England', (2019) 83 Land Use Policy 147; K. Kusnander *et al*, 'Empowering change for sustainable agriculture: the need for participation', (2019) 17 International Journal of Agricultural Sustainability 271; and A. Fröh-Müller *et al*, 'The use of agri-environmental measures to address environmental pressures in Germany: Spatial mismatches and options for improvement', (2019) 84 Land Use Policy 347.

²⁰⁸ See Countryside Stewardship Facilitation Fund (available at <https://www.gov.uk/government/collections/countryside-stewardship-facilitation-funding>).

²⁰⁹ E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, New York, 1990.

²¹⁰ See Part 2 on land tenure contracts.

rights in respect of agricultural land will not be developed here, the focus instead being on collective actions by individuals to generate environmental services.

Factors to explain different forms of governance in collective implementation might include:

- A long tradition of state intervention in the agricultural sector
- A re-appropriation by farmers of environmental issues
- A strong territorial anchorage

The combination of these three factors implies a mix of actors and a hybridization between public and private interests.

4.3 State intervention in the agricultural sector - The place of AECM in a collective approach

In its current iteration, the CAP encourages the use of a collective dimension for AECM²¹¹. Recital (22) of Regulation (EU) 1305/2013 of the European Parliament and of the Council states that: *"[i]n many situations the synergies resulting from commitments undertaken jointly by a group of farmers multiply the environmental and climate benefit. However, joint actions involve additional transaction costs which should be compensated adequately. In addition, in order to ensure that farmers and other land managers are in a position to correctly implement the commitments they have undertaken, Member States should endeavour to provide them with the required skills and knowledge"*²¹². And Article 28(2) of the same Regulation provides that: *"[a]gri-environment-climate payments shall be granted to farmers, groups of farmers or groups of farmers and other land-managers who undertake, on a voluntary basis, to carry out operations consisting of one or more agri-environment-climate commitments on agricultural land to be defined by Member States, including but not limited to the agricultural area defined under Article 2 of this Regulation"*. Moreover, under Article 28(6), higher transaction costs are permitted for collective action: *"[w]here commitments are undertaken by groups of farmers or groups of farmers and other land managers, the maximum level shall be 30 %"*.

Although the same Regulation provides for aid to facilitate the setting up of farmers' groups (Article 27), the environment is not expressly mentioned as an

²¹¹ See, for example, F. Cisilino, F. Marangon and S. Troiano, *Conservation and efficient use of natural resources through Payments for Ecosystem Services: the role of CAP in supporting a collective approach* (Paper prepared for presentation at the 147th EAAE Seminar 'CAP Impact on Economic Growth and Sustainability of Agriculture and Rural Areas', Sofia, Bulgaria, 2015).

²¹² OJ L347/487, 20.12.2013.

eligible purpose. On the other hand, Article 35(1) on cooperation provides that:

*"1. Support under this measure shall be granted in order to promote forms of co-operation involving at least two entities and in particular: (a) cooperation approaches among **different actors in the Union agriculture sector, forestry sector and food chain and other actors that contribute to achieving the objectives and priorities of rural development policy, including producer groups, cooperatives and inter-branch organisations**; (b) the **creation of clusters and networks**; (c) **the establishment and operation of operational groups of the EIP for agricultural productivity and sustainability** as referred to in Article 56".*

Further, Article 35(2) specifically stipulates that: "2. Co-operation under paragraph 1 shall relate, in particular, to the following:

*(f) **joint action undertaken with a view to mitigating or adapting to climate change**;*

*(g) joint approaches to **environmental projects and ongoing environmental practices**, including efficient water management, the use of renewable energy and the preservation of agricultural landscapes ;*

*(h) **horizontal and vertical co-operation among supply chain actors** in the sustainable provision of biomass for use in food and energy production and industrial processes;"*

Mobilizing collective action within the framework of the CAP 2014-2020

2014-2020 rural development policy puts far greater emphasis on the importance of collective and co-operative approaches for environmental purposes by making available a range of tools aimed at encouraging the spread of good practices in the management of natural resources. M16 (Article 35) of Regulation (EU) 1305/2013 (the cooperation measure) is most commonly associated with funding collective or cooperative approaches within RDPs. However, collective action is not restricted to this measure. **For example, the agri-environment-climate measure (M10) and the organic farming measure (M11) allow for a higher proportion of transaction costs within the payment calculation where agreements involve groups of farmers.** In addition, other RDP measures could be used to provide support for advice, investments, processing, marketing etc. within the context of a collective approach, either at the territorial scale or throughout the supply chain.

Nonetheless, M16 is important as it provides funding that focuses on the bringing together of stakeholders, supporting various forms of cooperation (including partnerships, clusters and networks) for a range of different areas of activity, including water and soil. These partnerships can then develop proposals and identify the types of actions to be funded using sub-measures: for example, M16.5

addresses support for joint action undertaken with a view to mitigating or adapting to climate change and for joint approaches to environmental projects and ongoing environmental practices²¹³.

However, the current CAP has been criticised as not conducive to collaboration between farmers in the implementation of AECM favourable to the conservation of biodiversity. In particular, Leventon *et al* have highlighted the absence of a cohesive approach, stating as follows: *"CAP may not initiate patterns of fragmentation, but it strengthens such pat-terns and fails to counter them. Entrenchment initially takes place through a focus on individual farms for implementing agri-environment schemes and for rewards on this basis (type 1). Entrenchment of fragmentation also occurs through the proliferation of coordination-type actors that work to the farm scale (type 2). Finally, CAP reinforces fragmentation by not addressing drivers that provide a disincentive to collaborate (type 3), such as land tenure arrangement"*²¹⁴.

More recently, CAP reform has also clearly encouraged a move towards collective implementation of AECM. Thus, according to Article 70 (5) of the CAP Strategic Plans Regulation: *"Member States may promote and support collective schemes and result-based payments schemes to encourage farmers or other beneficiaries to deliver a significant enhancement of the quality of the environment at a larger scale or in a measurable way"*²¹⁵. The text of the CAP Strategic Plans Regulation as enacted did not, however, go so far as the European Parliament's proposed Amendment 444 which emphasized more fully the importance of collective schemes and the territorial dimension, providing as follows: *"Member States may promote and support **voluntary** collective schemes, **and a combination of management commitments in the form of locally-led schemes**, and result-based payments schemes, **including through a territorial approach**, to encourage **farmers and groups of farmers** to deliver a significant enhancement of the quality of the environment at a larger scale and in a measurable way. **They shall put in place all the means necessary in terms of advice, training and knowledge transfer to assist farmers who change their production systems"***²¹⁶.

²¹³ Working Document of the Thematic Group on sustainable management of water and soils of the European network for rural development, "Background briefing: Collective approaches" (available at https://enrd.ec.europa.eu/sites/default/files/tg2_water-soil_briefing_collective-approaches.pdf).

²¹⁴ J. Leventon *et al*, 'Collaboration or fragmentation? Biodiversity management through the common agricultural policy', (2017) 64 Land Use Policy 1, at 7.

²¹⁵ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

²¹⁶ Report on the 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

Even now, however, Member States have already taken advantage of the option of group applications in the case of AECM under Article 28 of Regulation (EU) 1305/2013. For example, as of 2016, the Dutch Government introduced a scheme under which individual applications were not possible, this approach fitting well with a long Dutch tradition of environmental cooperatives.

Case study - NL1- Kromme Rijn Collective management

In the Netherlands, the implementation of agri-environmental measures and nature conservation measures in farmland is arranged collectively through local cooperatives. The Kromme Rijn is a region in the Dutch province of Utrecht, where such a cooperative is active in agri-environmental management. Land owners become members and the cooperative: (i) organises payment for specific nature management actions performed by farmers; (ii) monitors compliance; and (iii) acts as broker between landowners and organizations/companies that implement specific nature management actions. All is based on a common regional management plan and the cooperative is certified by the national certification institute for agri-environmental management and has its own quality assurance controllers.

There are several potential legal benefits of this approach. First, for the individual farmers a major advantage is the *reduction of paperwork*, which is taken over by the cooperative, with one contract between it and the public authorities. Importantly, there is general acceptance that the amount of paperwork is an important barrier to participation²¹⁷. Secondly, certification acts as a *guarantee of internal governance*: in the Netherlands, certification as a professional conservation organisation is "*meant to provide adequate proof of establishing a set of 'internal rules' by the group applying for agri-environment support*"²¹⁸. Individual contracting by farmers takes place within the cooperatives (the intermediary), following prioritisation and coordination of specific measures at landscape scale. The idea is that the best outcomes can be delivered by using local knowledge instead of an approach driven by a central authority. The cooperatives have some flexibility in choosing the measures according to pre-defined ecological priorities for their region and also in their internal organisation, so enabling direct involvement of farmers in decision making.

Regulation (EU) No 1307/2013 of the European Parliament and of the Council (COM(2018)0392 – C8-0248/2018 – 2018/0216(COD)), 23 May 2019 (available at https://www.europarl.europa.eu/doceo/document/A-8-2019-0200_EN.html).

²¹⁷ S. Simkins *et al.*, 'Stress in farmers: a survey of farmers in England and Wales', (1998) 55(11) Occupational and Environmental Medicine 729.

²¹⁸ P. Terwan *et al.*, *The Cooperative Approach under the New Dutch Agri-environment-climate scheme. Background, Procedures and Legal and Institutional Implications*, Ministry of Economic Affairs, Netherlands, 2016, p.8.

4.4 Reclaiming of environmental initiative by farmers

More recently, farmers seem to have realised the potential of their environmental actions to generate income and are organising themselves to respond collectively so as to increase their voice and, thereby, their bargaining power. Underpinning this new thinking is also a desire not to be completely dependent on public funding. In concrete terms, this generally operates through the establishment of a “single point of contact” acting on behalf of the farmers, who no longer need to contract individually. This also means that the beneficiaries of the environmental goods and services provided by the farmers do not have to contract with each farmer in order to benefit from a particular environmental service.

But the development of these collective actions may be slowed by two main factors:

- The absence of a local “champion”, “facilitator” or “animator” to kick start the process; and
- the fact that collective action is often seen as more complicated to organise and facilitate, with some doubt as to who is the correct party to apply for payments under the RDP.

Further, success of collective action also depends on implementation at scale, with the landscape approach²¹⁹ being seen as one which is archetypal of the need for greater collaboration. Indeed, it is central to the proposed Environmental Land Management Scheme, to be implemented in England post-Brexit, which includes Local Nature Recovery and Landscape Recovery components²²⁰. And such an approach has led to stronger involvement of farmers in governance tasks, including the spatial coordination of activities in land management and nature conservation. Further, the farmer groups involved appear to have developed into professional organisations, reflecting the enhanced complexity of governance at this scale, it also having been highlighted that there is a need to train those participating²²¹.

²¹⁹ The landscape approach is understood as “one that matches agri-environmental management to the spatial scale of priority habitats, water systems and landscape features, such as stone wall and hedges” and “requires governance arrangements that are able to deliver cross-holding spatial coordination of environmental management”: J. Westerink et al, ‘Collaborative governance arrangements to deliver spatially coordinated agri-environmental management’, (2017) 69 Land Use Policy 176, at 176.

²²⁰ Department for Environment, Food and Affairs, *The Path to Sustainable Farming: an Agricultural Transition Plan 2021 to 2024* (2020) (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954283/agricultural-transition-plan.pdf).

²²¹ J. Westerink et al, ‘Collaborative governance arrangements to deliver spatially coordinated agri-environmental management’, (2017) 69 Land Use Policy 176; and see also Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Article 70(5) and (9).

Prager *et al* have mapped out the different steps needed to implement agri-environmental payment systems that will encourage collaboration and coordinated action at the landscape level²²².

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K. Prager et al. / Land Use Policy 29 (2012) 244–249

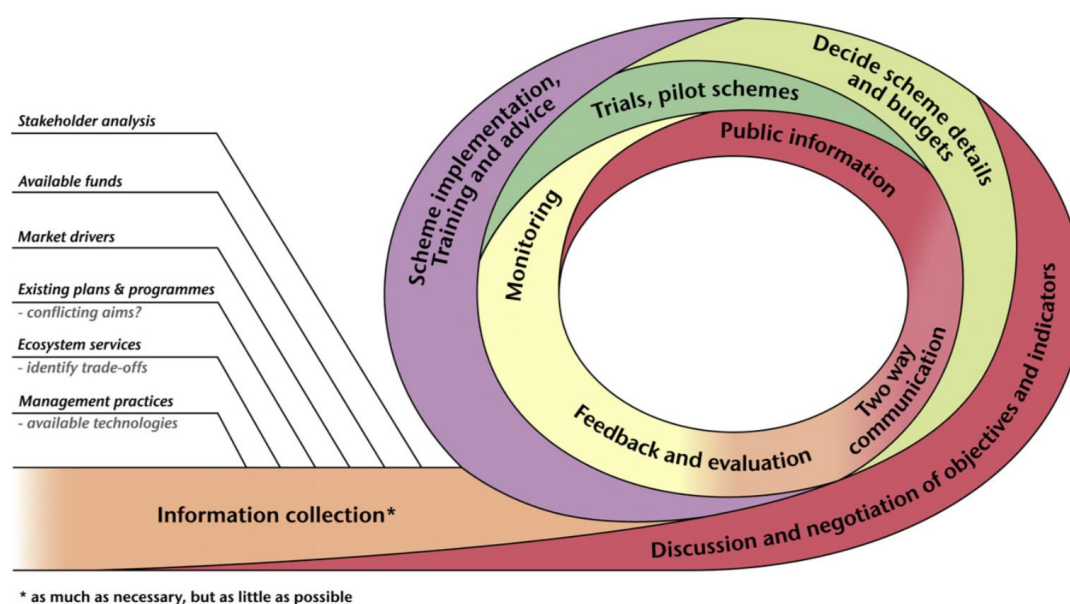


Fig. 1. Design and implementation of a scheme for collaborative provision of ecosystem services (Figure by K.Prager).

4.5 A strong territorial anchorage

This strong territorial anchorage also goes hand in hand with the role of farmers as “indispensable managers of ecosystems, habitats and landscapes”, as attributed to them by the European Commission in its 2017 Communication on *The Future of Food and Farming*²²³. Similarly, a 2014 study found that farmers have the capacity to become privileged partners of local authorities involved in territorial planning²²⁴.

Undoubtedly, offering action adapted to the local context encourages collaborative processes. Such territorial anchoring is, however, dependent upon wide acceptance (particularly with regard to local environmental issues), there

²²² K. Prager, M. Reed and A. Scott, ‘Encouraging collaborations for the provision of ecosystem services at a landscape scale - Rethink agri-environmental payments’, (2012) 29 Land Use Policy 244.

²²³ European Commission, *The Future of Food and Farming* (COM (2017) 713 final), p. 21.

²²⁴ U. Ovaska and K. Granholm, ‘More from agriculture – testing the concept and practice of locally driven environmental initiatives’, MTT Report, Number 178 (2014) (available at <http://jukuri.luke.fi/handle/10024/485149>).

being scope to promote such acceptance through financial incentives in the form of “agglomeration payments”²²⁵. Yet one of the difficulties is how to balance individual group/territorial priorities versus regional, national and wider EU priorities so as to ensure that objectives agreed locally help to contribute to, and do not undermine, these broader objectives; the reverse is also true in the sense that the broader objectives should help to achieve local ones.

In this search for balance, Benton has discussed the possibility of implementing measures to promote local adaptation of environmental activities, concluding that, while such measures would be costlier to implement than uniform ones on a wider scale, the investment could be worthwhile in terms of the gain for ecosystem services²²⁶. At the EU level, arguably this is achieved this through the operation of the subsidiarity principle within Pillar II.

4.5.1 Blended finance

Blended finance

A question at the heart of blended finance is the extent to which private investment can operate alongside public investment in future agri-environmental policies. An illustration of this novel form of finance in practice is supplied by “Landscape Enterprise Networks” (LENS) as found in the United Kingdom, which include “demand aggregators” (such as water companies or food manufacturers) who are willing to pay for required environmental services and “supply aggregators” who bring together land enterprises to meet this demand²²⁷. And such networks have potential resonance across all EU Member States.

The public/private interface:

LENS are dependent upon the establishment of a high degree of transparency between those requesting services (for example, a food company) and those providing them (for example, a farmer), since payments is generally based upon supply and demand. Importantly, this is not a characteristic shared by public funding under the second pillar of the CAP, which is generally allocated to

²²⁵ See A. Bell et al, ‘Scaling up pro-environmental agricultural practice using agglomeration payments: Proof of concept from an agent-based model’, (2016) 126 Ecological Economics 32. They are defined as “bonus payments given to farmers adopting conservation practice proportional to the numbers of neighbouring farms also adopting conservation practices”: at 33. See also L. Kuhfuss, R. Préget and S. Thoyer,, ‘Collective incentives: what design for agri-environmental contracts?’, *International Workshop Mechanism Design and Environment*, May 2013, Edinburgh, United Kingdom (available at [hal-02750190](#)): their collective dimension relies on a monetary “bonus” paid on a hectare basis to each farmer who enters into a contract, “provided that 50% of the area of interest is enrolled at the end of the contract”.

²²⁶ T.G. Benton, ‘Managing agricultural landscapes for production of multiple services: the policy challenge’, 1/2012 PAGRI 7 (available at <http://ageconsearch.umn.edu/bitstream/130373/2/Benton.pdf>).

²²⁷ <https://landscapeenterprisenetworks.com/>

achieve specific actions or results identified at the level of the EU and, importantly, the Member State.

As blended finance as a means of generating investment is liable to increase, **its demarcation from public funding will need to be clarified**. And **the issue of “additionality”** has also been significant in that there is no logic in making payment for actions that are already legally mandated²²⁸ - in which context, it may be noted that in relation to public funding Article 28(3) of Regulation (EU) 1305/2013²²⁹ provides that “[a]gri-environment-climate payments cover only those commitments going beyond the relevant mandatory standards...”.

Identification of the host structure for blended finance:

As seen earlier, farmer-to-farmer collaboration can be more or less formal, but blended finance requires more robust structures than exist in general.

In the example of LENS, a difficulty lies in reconciling commercial needs of an environmental nature (in the private sphere) with more general environmental needs (in the public sphere). In particular, it is not easy to see how the public interest is to be taken into account and how strategic choices can be made as to which services should be given priority.

4.5.2 Addressing environmental issues collectively and contractual consequences

The value of collective action to achieve environmental impact must also be considered with reference to its contractual consequences. As has been seen, collective action can realise efficiency gains in **attaining environmental results**: more specifically, it helps to overcome the limitations of implementing agri-environmental measures at the individual farm level, with attendant fragmentation. And this is especially the case for public goods that necessitate delivery at a large scale (such as water quality), which have been referred to as *threshold public goods* or *non-linear public goods*. With particular regard to agricultural landscape, an OECD report affirms as follows: “[a]lthough a small amount of landscape provision can be valuable in a micro-location, the value of the landscape provision significantly increases if the supply exceeds a certain amount and has a certain geographic scale. Collective action can play an important role in ensuring that public good provision exceeds this threshold

²²⁸ Second Legal Workshop: Presentation No. 4 (Christopher Rodgers).

²²⁹ Regulation (EU) N° 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, OJ L347/487 20.12.2013. See also now Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021, Article 70(3).

point"²³⁰. In the same OECD report, there is also focus on the scope for collective action in the case of not just landscape, but also: biodiversity; water quality; common pool resources (such as natural habitat and catchments); and club goods (such as irrigation systems). And it concludes that: "[m]ost of them have characteristics of threshold/non-linear public goods... For example, catchment management cannot be done by a single farmer, but if a number of farmers and non-farmers collaborate, it is possible to manage the catchment and provide associated agri-environmental public goods such as biodiversity and water quality improvement"²³¹.

Case study - LVI NUTRIFLOW

This case study illustrates well the necessity for collective action in order to achieve efficiency gain in realising environmental results. The project NUTRINFLOW aims to reduce nutrient losses from agriculture into the immediate watershed and the Baltic Sea, for which purpose being guided by a collective approach. All 72 landowners along the Ailes stream participate and local authorities are also engaged. Co-ordination takes place across property boundaries through a holistic mechanism, to produce an appropriate level of action so as to reduce effectively such nutrient losses from agriculture.

However, as explored already, a significant factor is that there is greater risk for the farmer if a collective contract is result-based, since participants may receive no payment through no fault of their own, which may act as a material disincentive to participation.²³²

A hybrid solution to facilitate collective commitment?

A hybrid solution may facilitate collective commitment through **(i) respecting individual environmental efforts by guarantee of payment and (ii) offering a financial bonus to reward collective effects**. Such a scheme would increase the interest of the contracting parties in committing themselves collectively, while limiting the contractual risk²³³.

Further, this hybrid solution may also address, to a certain extent, **the difficulty which flows from the length of time which it takes to realise environmentally**

²³⁰ T. Uetake, *Managing Agri-environmental Commons through Collective Action: Lessons from OECD Countries*, OECD, Paris, 2013 (available at https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8988/UETAKE_0791.pdf?sequence=1), p.7

²³¹ *Ibid.* For a partnership approach to flood alleviation, see the "Slow the Flow" project at Pickering: <https://www.northyorkmoors.org.uk/looking-after/our-projects-and-partnerships/previous-projects/slowing-the-flow>.

²³² See Part 3 on result-based contracts.

²³³ This approach can also be found in the notion of **"agglomeration payments"**, mentioned above.

friendly practices, in that farmers would be encouraged to participate in the long-term so as to obtain the collective financial bonus.

Other Hurdles for Collective Contracts?

First, collective contracts require constructive dialogue **between the individual farmers and/or the collective which is not always easy to put in place**. Such dialogue must also take place between the private and public spheres. In the case of LENS, as has been seen, recourse is had to “demand aggregators” and “supply aggregators”; and, in the case of AECM, “facilitators” may also be made available, an example being the English CSFF. Such “facilitation” generally operates upstream of contractual commitments and is part of a social learning process where the aim is for the participants not only to learn from each other, but also to make progress in contracting and to avoid the conflicts that could otherwise arise from these forms of arrangement²³⁴.

Secondly, collective strength lies in the standardisation of individual actions to realise a genuinely collaborative project at an ecologically relevant geographical scale - and for a similar duration. Yet, **this standardisation may be difficult to achieve, especially if the farmers who are entering into the commitments are tenants of agricultural land: as has been seen already, the level of their participation is dependent upon the terms of the lease and, in particular, its length**²³⁵.

Key points on the collective implementation of environmental goods and services:

The effective implementation of a collective contractual solution requires careful thinking about how to develop a structure based on:

- efficient communication between the different actors
- knowledge of the area on the part of its farmers and other actors
- trust between the different actors (and not just between farmers)

Collective implementation of contracts to provide environmental goods and services can take many forms (see the OECD typology).

The power of collective action is generated by its greater environmental impact, especially at a landscape scale.

Collective implementation offers opportunities for blended finance and for hybrid approaches, both of which may be particularly relevant for preserving the environment.

²³⁴ On this point, see the presentation by Beth Dooley at the Second Workshop.

²³⁵ On this point, see Part 2 on land tenure contracts. See also, J. Leventon *et al*, ‘Collaboration or fragmentation? Biodiversity management through the common agricultural policy’, (2017) 64 Land Use Policy 1.

5 Value chain contracts

5.1 Introduction

This final chapter is devoted to the legal issues generated when environmental prescriptions are attached to a contract for the provision of a private good. More precisely, in the case of this contractual solution, the production of environmental public goods is achieved through specific obligations included in contracts for agricultural or forestry between primary producers and processors or retailers. Primary producers are **rewarded by the market**, receiving a premium price (on the assumption that consumers are willing to pay for the public good when purchasing the private one). This implies that consumers have clear information about the connection of the product with the environmental public good. Often these products have bespoke labels to identify the environmental added value. With particular reference to the CONSOLE project, in this contract type farmers commit to deliver **environmental or climate benefits connected to the production of selected products**, e.g. by carrying out management measures which contribute to water protection, landscape improvement, biodiversity or carbon sequestration.

Strengthening the place of farmers in the value chain is one of the specific objectives set out in the CAP Strategic Plans Regulation, Article 6(1)(c) including as a specific objective *“to improve the farmers’ position in the value chain”*²³⁶. The potential role which primary producers may play within the value chain in the production of environmental goods and services, and its valorisation, has been repeatedly highlighted in the *Farm to Fork Strategy*²³⁷. Most importantly, this Strategy makes explicit how primary producers are central to sustainable food systems, frequently advocating that there should be better recognition of the environmental efforts made by farmers. In order to secure sustainable livelihoods for primary producers, it aims at achieving an economic balance between the actors involved in the production of sustainable food that is climate and environmentally friendly. To pursue this economic equity, the Commission plans to present a legislative proposal setting the framework for a sustainable food system²³⁸ before the end of 2023, the Farm to Fork Strategy stating as follows:

This will promote policy coherence at EU and national level, mainstream sustainability in all food-related policies and strengthen the resilience of food

²³⁶ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021, OJ L 435/1, 6.12.2021.

²³⁷ European Commission COM (2020) 381 final.

²³⁸ See also Bock, A., Bontoux, L. and Rudkin, J., Concepts for a sustainable EU food system, EUR 30894 EN, Publications Office of the European Union, Luxembourg, 2022, ISBN 978-92-76-43727-7, doi:10.2760/381319, JRC126575

systems. Following broad consultation and impact assessment, the Commission will work on common definitions and general principles and requirements for sustainable food systems and foods. The framework will also address the responsibilities of all actors in the food system. Combined with certification and labelling on the sustainability performance of food products and with targeted incentives, the framework will allow operators to benefit from sustainable practices and progressively raise sustainability standards so as to become the norm for all food products placed on the EU market²³⁹.

The Commission is also of the view that "[a]ll actors of the food chain must play their part in achieving the sustainability of food chain", but particular attention is to be paid to primary producers: "[f]armers, fishers and aquaculture producers need to transform their production methods more quickly, and make the best use of nature-based, technological, digital, and space-based solutions to deliver better climate and environmental results, increase climate resilience and reduce and optimise the use of inputs (e.g. pesticides, fertilisers)"²⁴⁰.

In the same vein, it is foreseen that the "Commission will monitor the implementation of the Unfair Trading Practices Directive by Member States. It will also work with co-legislators to improve agricultural rules that strengthen the position of farmers (e.g. producers of products with geographical indications), their cooperatives and producer organisations in the food supply chain"²⁴¹. Finally, the Commission has a particular interest in engaging companies involved in the supply chain in the promotion of sustainable practices at the processing, wholesale and retail stages. Thus, it is stressed that these companies "shape the market and influence consumers' dietary choices through the types and nutritional composition of the food they produce, their choice of suppliers, production methods and packaging, transport, merchandising and marketing practices"²⁴². And, in order to establish the link with consumers, the Commission recalls the usefulness of providing clear information to enable consumers to make "informed, healthy and sustainable food choice"; and, for this reason, it will propose "harmonised mandatory front-of-pack nutrition labelling and will consider to propose the extension of mandatory origin or provenance indications to certain products, while fully taking into account impacts on the single market. The Commission will also examine ways to harmonise voluntary green claims and to create a sustainable labelling framework that covers, in synergy with

²³⁹ Ibid, p. 5

²⁴⁰ Ibid.

²⁴¹ Ibid, p. 10

²⁴² Ibid, p. 11

other relevant initiatives, the nutritional, climate, environmental and social aspects of food products"²⁴³.

More specifically, the strengthening of the position of farmers cannot be achieved without improving their negotiating power with other actors in the value chain. At the same time, competition law issues arise where farmers band together with a view to strengthening their position or where there are concerted initiatives between agricultural producers and operators in the value chain who are already committed to applying more stringent sustainability requirements than those which are mandatory.

If the wish to offer a more extensive place to farmers in the agri-food supply chain is clearly stated, in order to allow them to capture a fair share of the added value of sustainable production, it must be recognised that this policy trajectory is not yet mature. In particular, it calls for new legal clarifications and for legal knowledge beyond agricultural law, such as competition law and consumer law. Further, there must also be recognition that it is the demand for environmental good and services within the value chain which has the capacity to enhance the role of farmers – and this demand comes from consumers. Accordingly, the provision of information to such consumers and their willingness to pay become important factors.

In order to shed light on the developing, yet fragmentary, framework which is being taken forward to establish an improved position for farmers in a fairer and sustainable agri-food supply chain, assistance was sought from three experts. Part I on negotiating power is based on the contribution by Paulo Gouveia, Chief Policy Advisor - Copa and Cogeca; Part II on competition law is based on the contribution of Luigi Russo, Full Professor of Agricultural Law, Department of Environmental Sciences and Prevention, University of Ferrara, Italy; and Part III on consumer aspects is based on the contribution of Pamela Lattanzi, Full Professor of Agricultural Law, Department of Law, University of Macerata, Italy. This chapter is therefore the expression of their analysis of the legal challenges to be met in order for value chain contracts to provide proper reward for their environmental efforts as advocated in the *Farm to Fork Strategy*.

5.2 How to ensure a fair share for farmers in value chain contracts with specific environmental requirements?

Paulo Gouveia: Chief Policy Advisor – Copa and Cogeca

To enable individual farmers to gain a stronger voice in the value chain, and thus receive a fairer share of that value, several potential avenues for improvement were suggested.

²⁴³ Ibid, p. 13

5.2.1 Combating Unfair Trading Practices

The EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain²⁴⁴ is now applicable in all EU Member States. After a two-year transposition period ending on 1 May 2021, it became obligatory to apply the measures no later than 1 November 2021. This Directive is the result of several years of work and aims to address unbalanced negotiating power in the agri-food chain, where farmers are considered as price-takers who often face practices regarded as unfair. It provides a clear legal basis for controlling such practices, dividing them into 'black practices' which are prohibited and 'grey practices' which are also prohibited unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer. Accordingly, it sets up a minimum baseline for Member States, while also giving them the possibility to go beyond that minimum baseline to meet their specific national circumstances.

One aspect to highlight is below cost selling, which is not listed among the unfair trading practices included in the Directive. However, in the process of transposition, two Member States have regulated this, namely France and Spain, as a reaction to farmers receiving under their contracts, whether written or not, farm-gate prices which do not even cover the production cost. A hurdle to be cleared in this regard is that it is challenging to implement detailed measures: for example, there is no easy definition of 'below cost selling'. And the decision whether or not to address this aspect also depends on national discretion and legislation, which can have both advantages and disadvantages.

A further initiative stemming from the *Farm to Fork Strategy* is the EU Code of Conduct on Responsible Food Business and Marketing Practices²⁴⁵ that entered into force on 5 July 2021. It is of voluntary nature and several EU and national organisations along the food chain decided to join. This code of conduct comprises two components, a general framework of aspirational objectives and targets and a framework for ambitious commitments for companies. Importantly, it is not all-encompassing and, in particular, there is little among the aspirational objectives and targets which is directly related to inequality of bargaining power, with scope to provide more favourable treatment for primary producers.

5.2.2 The essential role of farmers in the inevitable development of sustainability

For Copa-Cogeca sustainability is key, and not only in the context of the CAP reform, where Member States are currently finalising their national strategic plans for approval. Farmers and their cooperatives are only able to deliver sustainability if fairly remunerated. And sustainability should be seen in not only economic terms, but also environmental and social. With specific regard to such social aspects, it should not be forgotten that agriculture is carried out in rural areas

²⁴⁴ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111/59, 25.4.2019.

²⁴⁵ https://ec.europa.eu/food/horizontal-topics/farm-fork-strategy/sustainable-food-processing/code-conduct_en.

and that the activity of farmers and cooperatives is at the centre of the social fabric. Accordingly, in the absence of proper remuneration, there is the prospect of farmers leaving the land and desertification. Although this problem definitely has multiple angles and drivers, economics and, not least, contractual negotiations between the different actors in the food value chain are extremely important.

5.2.3 The need for advice and incentives for farmers to engage

To build better value chain contracts, good relations along the chain are required, especially if there is to be an extra effort or requirement to foster environmental protection. There is benefit in farmers engaging in the process on a voluntary basis, so generating the need to provide the necessary information and to explain to them the purpose and the potential benefits.

Besides securing the engagement of farmers, another basic condition is a clear dialogue with farmers whereby the requirements that are to be put in the contract are clearly spelt out and explained. For optimal effect, bespoke contracts are preferable, a one size fits all approach not working well. The baseline should have a clear set of rights and obligations that everyone in the food chain needs to respect. This needs to be framed as a collaborative approach, rather than an imposition on those that are to make the effort through their activities. It also needs to be a continuous process, with not only ongoing evaluation and monitoring, but also feedback given to the farmers. For this purpose, it is important to establish a network of farmers and other stakeholders, including advisory services, with the AKIS (Agricultural Knowledge and Innovation System) playing a major role in the new CAP.

5.3 Antitrust law and agro-environmental sustainability

Luigi Russo, Full Professor of Agricultural Law, Department of Environmental Sciences and Prevention, University of Ferrara

5.3.1 Introduction

The EU is seeking to find an accommodation between agricultural production and environmental sustainability, with the Green Deal in this context adopting an holistic approach. Such an approach has also found expression in both the *Farm to Fork Strategy* and the *Biodiversity Strategy for 2030*. However, the regulations which implement reform of the CAP were based on the original proposals which pre-date the two Strategies and do not fully capture their direction of travel. At the same time, the *Farm to Fork Strategy* does not lay great emphasis on food security, which is addressed in the relatively brief Paragraph 2.2 and also by a few words in Paragraph 2.1 (which is primarily concerned with economic sustainability).²⁴⁶

²⁴⁶ European Commission, COM(2020) 381 final, pp. 10-11.

Importantly, in the arena of economic sustainability, Paragraph 2.1 expressly raises competition law implications, stating as follows:

Finally, to support primary producers in the transition, the Commission envisages clarifying the **competition rules** for collective initiatives that promote sustainability in supply chains. It will also help farmers and fishers to strengthen their position in the supply chain and to capture a fair share of the added value of sustainable production by encouraging the possibilities for cooperation within the common market organisations for agricultural products and fishery and aquaculture products.²⁴⁷

Yet, the proposed initiative would not seem very significant in that there is to be 'clarification' of the rules, as opposed to the introduction of substantive new measures. Subsequently, Regulation (EU) 2021/2117²⁴⁸ effected amendment to Regulation (EU) 1308/2013 establishing a common organisation of the markets in agricultural products²⁴⁹; and the key question is how far this has enacted the 'clarifications' which had earlier been heralded. To seek to answer this question, two provisions may be considered: first, amendments to broaden the objectives of producer organisations and interbranch organisations; and, secondly, the new Article 210a on vertical and horizontal initiatives for sustainability.

5.3.2 Amendments to Broaden the Objectives of Producer Organisations and Interbranch Organisations

With regard to these amendments, the key element of the Preamble is Recital (50), which runs as follows:

To help achieve the environmental objectives of the Union, Member States should be able to recognise producer organisations that pursue specific aims relating to the management and valorisation of by-products, residual flows and waste, in particular to protect the environment and boost circularity....It is therefore appropriate to extend the existing list of objectives of producer organisations set out in Article 152 of Regulation (EU) No 1308/2013.

And, in terms of concrete provisions, amendment to Articles 152 and 157 may be highlighted.

5.3.2.1 Article 152 on Producer Organisations

The objective for such organisations as set out in Article 152(1)(vii) was changed from 'the management of by-products and of waste in particular to protect the quality of water, soil and landscape and preserving or encouraging biodiversity' to 'the management and valorisation of by-products, of residual flows and of waste, in particular to protect the quality of water, soil and landscape, preserving or encouraging biodiversity, and boosting circularity' (a change of only a few words).

²⁴⁷ Ibid, p. 10.

²⁴⁸ OJ L 435/262, 6.12.2021.

²⁴⁹ OJ L 347/671, 20.12.2013.

5.3.2.2 Article 157 on Interbranch Organisations

The objectives for such organisations as set out in Article 157(1)(vii) and (xiv) were amended. In the case of Article 157(1)(vii), climate action, animal health and animal welfare were added as specific aims (Article 157(1)(vii) covering the provision of information and carrying out of research to direct production and, where applicable, processing and marketing, towards products more suited to market requirements and consumer tastes and expectation). And, in the case of Article 157(1)(xiv) (on by-products and waste), the objective was changed from 'contributing to the management of by-products and the reduction and management of waste' to 'contributing to the management and developing initiatives for the valorisation of by-products and the reduction and management of waste'. As with Article 152, the amendments were not therefore substantial.

5.3.2.3 The New Article 210a on Vertical and Horizontal Initiatives for Sustainability

Recital (62) of Regulation (EU) 2021/2117 runs as follows:

Certain vertical and horizontal initiatives concerning agricultural and food products, which aim to apply requirements that are more stringent than the mandatory requirements, can have positive effects on sustainability objectives. The conclusion of such agreements, decisions and concerted practices between producers and operators at different levels of the production, processing and trade could also strengthen the position of producers in the supply chain and increase their bargaining power. Therefore, under specific circumstances, such initiatives should not be subject to the application of Article 101(1) TFEU.... As this is a new derogation, it is appropriate to provide that the Commission should produce guidelines for operators concerning the application of the derogation within two years of the entry into force of this Regulation.

Turning to the operative provision, Article 210a(1) provides that:

Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard.

What constitutes a 'sustainability standard' is then defined in Article 210a(3), the definition being as follows:

3. For the purposes of paragraph 1, "sustainability standard" means a standard which aims to contribute to one or more of the following objectives:
 - (a) environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems;

- (b) the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that reduce the danger of antimicrobial resistance in agricultural production; and
- (c) animal health and animal welfare.

Accordingly, the new Article allows anti-competitive agreements only if aimed at implementing stricter environmental standards – which presents an opportunity for farmers. Yet the broader issue remains as to how far Regulation (EU) 2021/2117 supplies the ‘clarifications’ to competition rules as foreseen in the *Farm to Fork Strategy*. The amendments to Article 152 and Article 157 are not substantial – and debate may legitimately centre around whether Article 210a does indeed introduce a ‘new derogation’ or merely constitute a ‘clarification’. Definitely, it seems to have its own structure and to be separate from the other provisions in the Chapter on rules applying to undertakings.

With regard to horizontal agreements, decisions and concerted practices of farmers, farmers’ associations, or associations of such associations, or producer organisations recognised under Article 152, or associations of producer organisations recognised under Article 156, exemption is already conferred by Article 209(1) – and, in their case, Article 210a would be a mere ‘clarification’. If, however, Article 210a exempts also agreements between different producer organisations or associations of producer organisations, then it would be a ‘new derogation’ (as such agreements were not found to be in accordance with EU law in the *Endives* decision²⁵⁰). In addition, it may be noted that Article 210a does not exclude from its ambit agreements, decisions and concerted practices which ‘entail an obligation to charge an identical price’ (an exclusion found in Article 209(1)) – which is again arguably a ‘new derogation’, to the extent that one interprets Art. 210a as an independent case from that governed by Art. 209.

With regard to vertical agreements, Article 210a(2) stipulates that ‘[p]aragraph 1 applies to agreements, decisions and concerted practices of producers of agricultural products to which several producers are party or to which one or more producers and one or more operators at different levels of the production, processing, and trade in the food supply chain, including distribution, are party’. And reference to ‘different levels’ expressly confirms vertical effect. Again the question arises as to whether this is a mere ‘clarification’ (in that there is already exemption under Article 209 on the basis that the agreements, decisions and practices are necessary for the attainment of the objectives set out in Article 39 TFEU) or whether it is a ‘new derogation’ (since the agreements, decisions and practices are for the purposes of Article 210a, namely initiatives for sustainability, which are not covered by Article 210, which deals with agreements and concerted practices of recognised interbranch organisations).

5.3.3 Concluding remarks

Accordingly, more substantial ‘clarification’ is required so as to ensure a better understanding of what is and is not possible for farmers – and, indeed, for operators across the whole food supply chain. At present, there are too many doubts as to the extent that competition rules permit pursuit of environmental

²⁵⁰ Case C-671/15, *Association des Producteurs Vendeurs d’Endives*, ECLI:EU:C:2017:860.

goals in the agricultural sector. The amendments effected by Regulation (EU) 2021/2117 may therefore be regarded as just a first step.

5.4 Sustainability labelling for more sustainable agri-food-supply chains: risks and opportunities

Pamela Lattanzi, Full Professor of agricultural Law, Department of Law, University of Macerata

5.4.1 The state of the art

Because of the increasing consumer interest in the effect of food production on the environment and society in general, many food labels which address sustainability have emerged to help consumers make more informed food purchasing decisions in line with their environmental and societal preferences. Sustainability labelling aims to reduce the information asymmetry between consumers and producers along the food chain. Because the sustainability impact of a product is a credence attribute for consumers (sustainability characteristics being not necessarily embodied in the foodstuffs themselves), they cannot identify which products are more sustainable than others without adequate labels. In the same way, producers of more sustainable foodstuffs cannot credibly place them on the market without the relevant information.

Frequently, sustainability-related food labels rely on production standards and certification schemes that can be public or private. Over the years, some of these have gained considerable importance, especially in global agri-food supply chains, where private standards mostly prevail (e.g., Fairtrade, Rainforest Alliance, Roundtable on Sustainable Palm Oil, etc.), and even if these standards are voluntary, they have become *de facto* necessary to access some markets.

Most labels have focused exclusively on one aspect of sustainability, whether environmental, ethical or social. Thus, environmental food labels (also called ecolabels) indicate that the labelled product has been produced with particular attention to the environment (e.g. organic labelling, carbon footprint or water footprint). By contrast, social or ethical food labels focus on concerns such as animal welfare, fair trade or nutrition (Nutri-Score, NutriInform Battery, etc.) Food products also sometimes bear a combination of sustainability labels: by way of illustration, the Fairtrade label is often combined with an organic logo, especially for bananas and coffee.

Recently a new type of scheme has gained attention, with the term 'sustainability labelling' increasingly used as a 'superordinate category' for labels certifying that the product complies simultaneously with various environmental, ethical and social standards. The *Farm to Fork Strategy* not only mentions this superordinate category²⁵¹ (in the literature also referred to as a multi-dimensional

²⁵¹ European Commission COM (2020) 381 final, p. 13

label or, according to Lang, as an 'omni-label'²⁵²), but has also announced a proposal for a sustainability labelling framework. This proposal will cover the provision of consumer information relating to the nutritional, climate, environmental and social aspects of food products, while ensuring consistency with other relevant EU labels (e.g. organic) and in synergy with other ongoing EU labelling initiatives (front-of-pack nutrition labelling and animal welfare and green claims). More specifically, the sustainability labelling framework is part of the *Sustainable Food System Framework initiative*, an initiative for a horizontal framework law intended to boost the transition in the food system and ensure that foods placed on the EU market become increasingly sustainable²⁵³. The inception impact assessment for this initiative was published for public consultation from 28 September 2021 until 26 October 2021. Two hundred thirty contributions were received, among which 98 targeted sustainability labelling. On 28 April 2022, the Commission launched a broad consultation process to gather views and input from all stakeholders, including on labelling issues²⁵⁴.

5.4.2 Toward an EU sustainability multi-dimensional label

It is generally recognised that consumers can play a crucial role in the transition toward sustainable food systems. More robust demand for sustainable food products can influence the food offer and push the supply-side towards greater sustainability. In this perspective, sustainability-related food labels can promote sustainable food consumption and incentivise producers to adopt more sustainable production practices.

However, the proliferation of sustainability-related food labels has raised many concerns. Several reviews have concluded that at present consumers do not adequately understand sustainability labelling schemes due to the multitude of different labels. For example, according to ecolabelindex.com, approximately 456 ecolabeling schemes are available in 199 countries²⁵⁵. This also generates inflationary use of the term 'sustainable' and leads potentially to a 'race to the bottom', so undermining standards as operators choose less costly, but also less demanding, certification systems. Private schemes tend to be perceived as less trusted than public ones by consumers and that the lack of harmonisation requires operators to comply with different labelling requirements in different markets, with negative consequences in terms of transaction costs, barriers to market entry and loss of bargaining power. Further, a labelling strategy relying on a single, simple, multi-level, front-of-pack label, whether mandatory or voluntary, used across a broad range of food products and retailers, can be more effective in stimulating consumers to make informed food choices and in driving suppliers to improve their performance.

²⁵² See, e.g., T. Lang, Tim Lang's Field Notes: It's Time for an Omni-label (10 August 2021) (Food Research Collaboration) (available at <https://foodresearch.org.uk/blogs/tim-langs-field-notes-its-time-for-an-omni-label/>).

²⁵³ See, e.g., European Commission, Legislative Framework for Sustainable Food Systems (available at https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework_en).

²⁵⁴ For the consultation process, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13174-Sustainable-EU-food-system-new-initiative_en.

²⁵⁵ See <https://www.ecolabelindex.com/>.

Against this background, the proposed EU sustainability labelling framework has the potential to overcome such criticisms: introducing a harmonised, holistic and more straightforward label can contribute to the transition towards a more sustainable food system. Yet its design is a challenging task. Some helpful steers are contained in the *UN Guidelines for Providing Product Sustainability Information*²⁵⁶, which recommend that sustainability claims be based on the following principles: reliability, transparency, relevance, accessibility and clarity. These principles must also be considered in the light of Regulation (EU) 1169/2011 on the provision of food information to consumers (FIR)²⁵⁷, which is applicable in this context. According to FIR, information must not mislead consumers and must be understandable, clear and science-based. As for the last-mentioned aspect, a relevant issue is identifying the methodology for substantiating the EU sustainability scheme. In this connection, the concerns expressed by several stakeholders about the Product Environmental Footprint (PEF) method to substantiate green claims made for foods shows how challenging is the development of an appropriate methodology which covers all food items and all sustainability aspects. Moreover, as for other labelling initiatives, it should be carefully assessed if this sustainability information is to be voluntary or mandatory and whether a scoring system could be helpful.

In addition, the role of such sustainability labelling must not be overestimated. Education and communication initiatives for improving consumer awareness are also necessary. The World Health Organization has observed that: '[f]or [Front of Pack Labelling] to support consumers to make informed food purchases and healthier eating choices, consumers must be aware of, recognise the [Front of Pack Label], understand what the symbol means, be able to use it correctly and be motivated to use it'²⁵⁸. Similarly, it is essential to provide technical support to farmers and to prevent the new labelling scheme (especially if it is to be mandatory) from being detrimental to small farms. And it is also important to work to ensure that the price of sustainable foodstuffs becomes more affordable, but in a way that does not undermine the efforts of farmers and other food business operators. Further, and more generally, the new labelling scheme must be part of a mix of policy tools to achieve food sustainability. It is therefore necessary that the *Sustainable Food System Framework Initiative* considers all the pieces of the food sustainability puzzle.

5.4.3 Concluding remarks

Several lessons can be drawn from the analyses made by our speakers. Firstly, while it is important above all to give farmers real negotiating power in the agri-food value chain, there is still some resistance from other players in the chain, as Paulo Gouveia points out by reference to the EU Code of Conduct on Responsible Food Business and Marketing Practices. This Code could have filled

²⁵⁶ See <https://wedocs.unep.org/handle/20.500.11822/22395>.

²⁵⁷ OJ L 304/18, 22.11.2011.

²⁵⁸ World Health Organization, Guiding Principles and Framework Manual for Front-of-pack Labelling for Promoting Healthy Diet (World Health Organization, Geneva) para. 3.2 (available at https://cdn.who.int/media/docs/default-source/healthy-diet/guidingprinciples-labelling-promoting-healthydiet.pdf?sfvrsn=65e3a8c1_7&download=true).

the gaps in existing legislation by extending the list of unfair commercial practices on a voluntary basis, yet this did not command the support of the other players in the agri-food chain. He also recalls the imperative of training and informing farmers to enable them not only to negotiate as equals, but also to have the incentive to do so.

Secondly, Professor Luigi Russo's analysis concludes that there are still many uncertainties as to the extent that farmer organisations may pursue environmental objectives in a manner that is consistent with the competition rules. These uncertainties may prove to be a brake on efforts by farmers to obtain a fair share in the value chain, as initiatives which they taken may be vulnerable under the competition law regime. Furthermore, Professor Russo underlines that the new European regulations to implement the CAP do not fully align with the orientation of the *Farm to Fork Strategy*, being based on the original proposals which pre-date the Strategy. He also notes that the Strategy explicitly refers to 'clarifying the **competition rules** for collective initiatives that promote sustainability in supply chains', as opposed to the introduction of substantive new provisions. And, although the Article 210a is expressed in terms of a new derogation, there still does not seem to be a transformative change in competition law insofar as it affects such collective initiatives. Besides, this is indicative of tension between laws with different focus, namely agricultural law and competition law.

Finally, Professor Lattanzi highlights the ambition of the *Farm to Fork Strategy* in moving towards a more holistic sustainability labelling regime, which would not only address one sustainability criterion (whether environmental, ethical or social), but several simultaneously. In support of this approach, she advances the merits of sustainability labelling in terms of reducing the information asymmetry between consumers and producers along the food chain. And she also warns against the proliferation of labels, which tends to blur the message for consumers and lower the thresholds for standards. More broadly, as Professor Lattanzi emphasises, questions in relation to the sustainability labelling framework are part of a wider issue: that of the sustainable food system, in respect of which the *Farm to Fork Strategy* has launched an initiative, whose aim is to integrate sustainability into all food-related policies.

5.5 CONSOLE value chain initiatives

Two examples of value chain initiatives considered during the CONSOLE project may be highlighted. One is classic in the sense that it is based on an already established contractual regime whose requirements have evolved (Box 1) and the other is more innovative, with a but concerning a legal framework that has yet to be confirmed (Box 2).

Case study – IT 4 - "Carta del Mulino" – Barilla

Under the "Carta del Mulino" programme, a value chain contract solution has been introduced for the farmers supplying Barilla's bakery brand, Mulino Bianco, with soft wheat. In this contract, farmers have to respect ten rules, (defined together with WWF, UNITUSCIA and UNIBO) that affect their way of

production. The contracts are signed by the mills, farmers and any trader, Barilla purchasing only products so certified for their specific production line. The main originality of the contract lies in the fact that the rules included in the contract were co-defined by all actors together.

Case study - DE 5 - Water Protection Bread

Actors across the whole value chain, from the wheat producing farmers to the consumers, are engaging in this initiative for ground- and drinking water protection. The farmers renounce late fertilisation of their wheat and by doing so avoid nitrate leaching into the groundwater. The initiative encompasses a communication strategy targeted towards consumers. The initiative is led by the government of Lower Franconia and started with one water supplier, one farmer, one mill, and one bakery. The farmers deliver the wheat to the mills that are processing it to make flour for regional bakeries, keeping it separated from other wheat. The bakeries sell the bakery product labelled with a special label. Eligible farmers are those in areas where drinking water is abstracted for public use and/or in water sensitive areas. The wheat produced is labeled "water protection wheat". This initiative is less classical because the production methods are aimed at improving the quality of the water and not at the quality of the bread produced. On the contrary, the bread produced has a lower protein content and requires baking craftsmanship. The initiative fully relies on business-to-business contracts complemented by a voluntary commitment declaration to be signed by all participants.

5.6 Final remarks

As highlighted by the Food and Agriculture Organization, a food system is only sustainable in terms of its social dimension 'when there is equity in the distribution of the economic value'²⁵⁹; and value chain contracts can play a major role in this, supported by an appropriate regulatory framework (for example, in the case of competition law). With particular reference to the AECPG dimension, they allow a response to consumer demands by farmers and other actors along the food chain, farmers being able to showcase their environmental efforts and agri-food companies being able to demonstrate corporate social responsibility by their environmental and social actions. Importantly, there is also the possibility of adding value. This environmentally virtuous interdependence is therefore a powerful lever for mobilising innovative AECPG contracts not only within the value chain, but also more widely. Thus, the environmental dimension of land

²⁵⁹ Food and Agriculture Organization, Sustainable Food Systems: Concept and Framework (2018) (available at <https://www.fao.org/3/ca2079en/CA2079EN.pdf>) p. 8.

tenure contracts is potentially stimulated as farmers seek to meet the demanding criteria of agri-food contracts made with their purchasers; and collective initiatives may also prove more suited to meeting the same criteria. Further, where contracts are results-based, there is heightened incentive for raising the bar both in terms of land management and the quality of the food produced. And all of this contributes materially to the functioning of sustainable food systems where value is appropriately shared and all actors are fully engaged.

6 Conclusions

Contractual solutions are likely to play a far larger role in meeting AECPG objectives over the years ahead. Agricultural policies in not just the EU, but also a wide range of other countries are moving away from uniform legislative regimes that reward actions in favour of bespoke individual contracts that reward outcomes. At the same time, contractual solutions are likely to underpin collective initiatives which cannot readily be operated by state engagement with a single farmer, while the promotion of AECPG commitments in the value chain will necessarily operate in a legal arena where contract is the norm. Against this background, a difficulty to be faced by EU legislators is that the law of contract differs from Member State to Member State, albeit with similar basic principles; and, in particular, the EU has shown itself reluctant to interfere with contractual rights relating to land, including not least landlord and tenant relationships.

In respect of land, a major consideration is whether the property is farmed by an absolute owner or by a tenant. An absolute owner is well placed to enter into contracts which lock in environmental gain, whether that be, for example, a conservation covenant or a management plan for an extended period of twenty years or more. By contrast, a tenant does not enjoy the same latitude and a concern which is attracting growing concern is the potential inability of tenants to participate in AECPG schemes by reason of restrictive clauses in their agreements or the short duration of their tenancies.

Results-based schemes offer a way to utilise contract to facilitate the deliver AECPG goals, with farmers entering into individual (or even collective) arrangements which are designed to go beyond the performance of stipulated actions so as to generate the desired outcomes. Importantly, under the reformed CAP they are now more fully accommodated within the legislative framework for both eco-schemes and AECPG schemes, account in the future to be taken of targets when determining payment levels. At the same time, however, they present considerable challenges, of which three may be highlighted: first, the risk of failure to meet the targets may cause many farmers to opt not to participate; second, establishing both the baselines and targets may prove an onerous task; and third, monitoring and enforcement may also prove complex in comparison with existing action-based schemes. That said, promising avenues are opening: by way of illustration, hybrid schemes may allay the fears of many risk averse farmers, with the security of payment for stipulated actions being accompanied by incentives for 'raising the bar'; and there is also growing evidence that extension and advisory services may have a very positive effect.

The use of collective schemes offers the substantial advantage of being able to engage farmers on a landscape scale, while 'agglomeration payments' within their individual contracts may act as a material incentive. Yet, the contractual nexus can prove complex, as when the funding body contracts with an organising body and then the organising body further contracts with individual farmers. What would also seem increasingly clear is that such collective schemes

are far more likely to succeed where there is a pre-existing relationship and/or bond of trust between the participants.

Value chain contracts operate within an arena where the law of contract has long been the norm, but it will still require some ingenuity to craft agreements which successfully create added value across the food chain to reward farmers for undertaking higher environmental and social commitments. Competition law, although recently amended so as to foster such initiatives, may nevertheless prove a hurdle and questions may also be raised as to how far public support should be provided in circumstances where the market might be expected to provide proper remuneration. Further, the bargaining power of the farmer as the first link in the food chain is necessarily circumscribed through their contracting, as a rule, with larger business organisations; and it will be of interest to see how far 'grey practices' become standard, though their express incorporation, for the purposes of the EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

Contracts can provide solutions where state interventions may struggle, granting flexibility as to the parties (whether individuals or groups) and also as to the terms of each agreement. Nonetheless, even if greater reliance is placed on contracts, there would still seem to remain a role for the State in setting an enabling environment, more especially where public money is involved, for example in the setting of objectives/incentives, overall monitoring and redressing power imbalances.

7 Annexes

7.1 Annex No.1

Structure of the First Workshop on legal aspects – 30th October 2020 (held online)

Introduction

1. Presentation No. 1: Short introduction to the CONSOLE project - Prof. Davide Viaggi
2. Presentation No. 2: Presentation of the different contract categories used in CONSOLE and the information generated by the case studies - Lena Schaller
3. Presentation No 3: Presentation of the legal framework and first analysis of individual contracts - Alexandra Langlais and Clara Conrad
4. Presentation No. 4: "Brexit and the delivery of agri-environmental-climate public goods" - Prof. Michael Cardwell

Sharing Experiences:

- Property Aspects

5. Forestry - Salomé Gorel (Néosylva) and Anne Seltzer (advisor to forest climate fund AGDW)
6. Agricultural land - Alain Retière (farmer, chief agronomist and an associate of LDN Advisory) and Ludivine Campbell (representative of an agricultural union)

- Collective Approaches

7. Matt Taylor (Forest and Land Ltd and facilitator of collective actions among farmers)
8. Sophie Ménard (CDC Biodiversité)

9. The Opportunity for a Result-based Approach: a View from the European Commission - Emmanuel Pétel (DG Agri)

General Discussion

Concluding Remarks - Prof. Michael Cardwell

7.2 Annex No.2

Structure of the Second Workshop on Legal Aspects - 10th of March 2021

On 10th March 2021, the CONSOLE project partners organized a Second Workshop on legal aspects (held online), concentrating on two contractual forms: land tenure contracts and collective and collaborative contracts. This Workshop was also intended to provide feedback on the first results emanating from the research conducted for Task 1.5.

A total of 22 participants attended the meeting, including the panelists and organizers.

The programme went as follows:

- 14:45 - 14:55 Alexandra Langlais (CNRS) introduced briefly the Workshop and Prof. Davide Viaggi (UNIBO) presented the CONSOLE project to the participants
- 14:55 - 15:15 Alexandra Langlais and Clara Conrad (CNRS) presented the legal framework and the first results of the work on legal aspects and perspectives relating to CONSOLE
- 15:15 - 16:15 Each of the three leading specialists (Luc Bodiguel, Prof. Christopher Rodgers, Beth Dooley) made their presentations
- 16:15 - 16:45 A discussion and questions and answer session took place
- 16:45 - 16:55 Prof. Michael Cardwell (Univ. Leeds) ended the Workshop with concluding remarks

Publications from the speakers:

L. Bodiguel, 'Les interactions entre le contrat de séquestration de carbone et le bail rural', Communication aux 19^{èmes} Rencontres de Droit Rural « Le CO2 vert « capturé » par le droit », 28 January 2021

L. Bodiguel, 'CO2 vert et bail rural: les interactions entre le contrat de séquestration de carbone et le bail rural', in J.-B. Millard and H. Bosse-Platière (Ed.), *Le CO2 Vert 'Capturé' par le Droit*, Le carbone en agriculture et en sylviculture, Lexis Nexis, Paris, 2022, pp. 132-143.

M.S. Reed *et al*, 'Integrating ecosystem markets to co-ordinate landscape-scale public benefits from nature', (2022) PLoS ONE 17(1): e0258334.

<https://doi.org/10.1371/journal.pone.0258334>

E. Dooley, 'An ethnographic look into farmer discussion groups through the lens of social learning theory', (2020) 12(18) Sustainability 7808

<https://doi.org/10.3390/su12187808>

8 Acknowledgment

