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ECOSCHEMES AS A NEW LEGAL INSTRUMENT OF THE COMMON AGRICULTURAL POLICY

Abstract

The article presents the issue of ecoschemes as a legal instrument of the Common Agricultural Policy. Its legal construction in European and Polish law is discussed. The effectiveness of the proposed solutions in legal and economic terms is assessed *ex ante*. At the same time, the article presents possibilities of changes in the Common Agricultural Policy in the scope of such ecoschemes as voluntary payments after 2027. The effectiveness of the proposed mechanism is also assessed in the context of the existing legal instruments, such as the greening policy, which does not achieve the objectives of the CAP. *De lege ferenda* postulates for selected ecoschemes are included.

KEYWORDS

ecoscheme, financial assistance for farmers, national strategic plan, agricultural law, sustainable development, rural development, Common Agricultural Policy

SŁOWA KLUCZOWE

ekoschemat, pomoc finansowa dla rolników, krajowy plan strategiczny, prawo rolne, zrównoważony rozwój, rozwój obszarów wiejskich, Wspólna Polityka Rolna

INTRODUCTION

Ecoschemes are one of the new legal instruments of the Common Agricultural Policy for 2023-2027.¹ They are intended to serve as a voluntary legal instrument for farmers to increase the subsidy in return for additional commitments made. As the name suggests, these additional commitments are supposed to correspond to climate and environmentally-friendly measures.

In the common agricultural policy, similar legal instruments are not new. In each funding period, farmers have been offered either compulsory legal mechanisms, such as cross-compliance or greening policy, or voluntary ones, such as agri-environmental-climate payments to encourage farmers to implement sometimes above-standard measures. The problem, however, is that for the most part, these instruments have not achieved the purpose for which they were created. For example, the aforementioned greening policy has had virtually no effect. There are several reasons for this. Firstly, the inadequate level of subsidies (too low) in relation to the obligations imposed. It was simply not worthwhile for farmers to implement new practices because of the risk of losing their existing profits. Secondly, complicated regulations stood in the way. Even if farmers decided to opt for the aid, the level of requirements imposed, the procedural ones in particular, but also the material ones, simply discouraged them from taking advantage of this measure.

The article will assess the mechanism of ecoschemes as a new instrument of the Common Agricultural Policy. The competitiveness of Polish agriculture,² as well as the profitability of farms, will largely depend on the proper definition of ecoschemes. As the above examples show, an inadequate definition of the legal and, above all, financial framework of the proposed assistance may contribute to the ineffectiveness of a given legal instrument. Therefore, an *ex-ante* evaluation of the prepared solutions seems necessary with a view to possible changes and adjustments.

At the same time, the article is intended to be a contribution to the scientific discussion on the effectiveness of the Common Agricultural Policy as a whole by assessing the individual financial mechanisms and the volume of funds allocated. This already calls for a discussion of what legal solutions can be proposed to Member States and farmers after 2027, i.e. after the end of the current funding period.

¹ A. Niewiadomska, *Prawne aspekty rozwoju obszarów wiejskich w nowej perspektywie finansowej Wspólnej Polityki Rolnej*, "Studia Iuridica" 2021, Vol. 89, pp. 257-268.

² A.Z. Nowak, A. Niewiadomska, *Wpływ funduszy strukturalnych na wzrost konkurencyjności polskiego rolnictwa – wybrane aspekty ekonomiczne*, "Studia Iuridica Agraria", Białystok 2012, Vol. X; I. Lipińska, *Poprawa konkurencyjności działalności rolniczej w reformowanej Wspólnej Polityce Rolnej – wybrane zagadnienia prawne*, "Przegląd Prawa Rolnego", No. 2 (29), 2021, pp. 277-291.

THE ESSENCE OF THE RIGHT ECOSCHEMES

Ecoschemes do not have a uniform definition.³ They are usually defined as nationally adapted practices implemented on an annual basis and accounted for as such. They are assessed by the European Commission in terms of achieving the environmental and climate objectives of the new CAP – protection of soil resources, water, climate, animal welfare, and biodiversity in agricultural production. In the case of Poland, they are approved in the National Strategic Plan.

Ecoschemes are voluntary commitments that increase the amount of direct payments. This makes them similar in this context to, for example, the greening policy mechanism⁴ (admittedly, for most farmers, this was not a voluntary practice, it was even mandatory, but there were numerous exceptions such as organic farms⁵). In that legislation, the farmer was also able to undertake appropriate climate-beneficial practices. The commitments made, however, did not gain much interest among farmers because of the rather low subsidies in comparison to the extent of the commitments made. The following analysis of ecoschemes raises the concern that this scenario could be repeated. The rather complicated system of ecoschemes may deter farmers from using this aid instrument.

The regulation of ecoschemes derives from European law. According to Article 16(2)(d) of Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 laying down the rules for support for strategic plans drawn up by Member States under the common agricultural policy (CAP strategic plans), which is financed by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), as well as repealing Regulations (EU) No. 1305/2013 and (EU) No. 1307/2013,⁶ climate, environment and animal welfare schemes⁷ are one of the four legal instruments

³ M. Szymańska, *Ekoschematy-nowa płatność bezpośrednia*, “Tygodnik Poradnik Rolniczy” 2020, No. 23 (837).

⁴ European Court of Auditors, *Greening - a more complex income support system that is not yet environmentally effective*, Special Report 2017, No. 21. It can be read, *inter alia*, “The Court’s estimates show that greening has only led to changes in farming practices on around 5% of all agricultural land in the EU. The recommendations made by the Court concern how to develop more effective environmental instruments that could be used in the framework of the Common Agricultural Policy after 2020”.

⁵ W. Ziętara, Z. Mirkowska, *Zielony Ład – w kierunku rolnictwa ekologicznego czy ekologizacji rolnictwa?*, “Zagadnienia Ekonomiki Rolnej” 2021, No. 368.3, pp. 29-54.

⁶ OJ EU L 435, 6 December 2021, p. 1, as amended. This Regulation should be analysed together with Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No. 1306/2013 (OJ L 435, 6 December 2021).

⁷ I. Lipińska, *Z prawnej problematyki dobrostanu zwierząt gospodarskich*, “Przegląd Prawa Rolnego” 2015, No. 1, pp. 63-77.

for public intervention through direct payments.⁸ The fine-tuning of specific ecoschemes takes place in strategic plans issued by the Member States. This is a result of the reform of the Common Agricultural Policy, where it is left up to the Member States to choose the specific legal mechanisms.

According to Article 31 para. 4 of the cited Regulation, each ecoscheme should in principle cover at least the two following areas of action on climate, environment, animal welfare and AMR: climate change mitigation, including reducing greenhouse gas emissions from agricultural practices and maintaining existing carbon pools and increasing carbon sequestration;⁹ climate change adaptation, including actions to increase the resilience of food production systems and animal and plant diversity to increase resistance to disease and climate change; protection or improvement of water quality and reduction of pressure on water resources; prevention of soil degradation, soil restoration, improvement of soil fertility and nutrient management [and soil biota]; biodiversity, preservation or restoration of habitats or species, including the conservation and creation of landscape elements or non-productive areas; actions for the sustainable and reduced use of pesticides, in particular pesticides that pose a risk to human health or the environment; actions to improve animal welfare or combat antimicrobial resistance.

When formulating their strategic plans, Member States were able to choose which legal mechanism to apply in their territory.¹⁰ This is dictated by the different specificities of agriculture in each country, and thus the different needs in terms of implementing practices beneficial to the climate and animal welfare.¹¹ In Poland, the budget allocated to ecoschemes is a minimum of 25% of the amount of direct payments per year (on average, between 2023 and 2026, approximately EUR 884 million per year).¹² It is the largest pro-environmental payment allocated to farmers under the CAP. According to the regulations, the rates of payments under ecoschemes are determined in EUR and will be converted into PLN according to the PLN/EUR exchange rate established on the last working day of September of a given year.

⁸ The other 3 interventions under this provision are basic income support for sustainability, complementary redistributive income support for sustainability and complementary income support for young farmers. These interventions, like ecoschemes, are not linked to production. In Article 16(3), production-related direct payment interventions include production-related income support; cotton-specific payment.

⁹ S. von. Hoof, *Climate Change Mitigation in Agriculture: Barriers to the Adoption of Carbon Farming Policies in the EU*, "Sustainability" 2023, Vol. 15, Issue 13, DOI 10.3390/su151310452.

¹⁰ L.J. Cole, D. Kleijn, L.V. Dicks, J.C. Stout, S.G. Potts, M. Albrecht, J. Scheper, *A critical analysis of the potential for EU Common Agricultural Policy measures to support wild pollinators on farmland*, *Journal of Applied Ecology* 2020, No. 57(4), pp. 681-694.

¹¹ T. Pietrzykowski, *Prawo ochrony zwierząt. Pojęcia, zasady, dylematy*, Warsaw 2022.

¹² <https://www.gov.pl/web/rolnictwo/ekoschematy3> (accessed 1 July 2023).

According to the above-mentioned provisions and recital 63 of the cited Regulation, “in order to be effective, ecoschemes should, in principle, cover at least two areas of action on climate, environment, animal welfare and the fight against antimicrobial resistance. To the same end, while compensation should be based on costs incurred, income foregone and transaction costs resulting from the farming practices undertaken, taking into account the objectives set out in ecoschemes, payments additional to basic income support must reflect the level of ambition of the practices undertaken. Member States should have the possibility to establish ecoschemes for farming practices undertaken by farmers in agricultural areas, in particular, farming activities, but also some practices beyond these activities. Such practices may include improved management of permanent pastures and landscape features, irrigation, use of peatlands and organic farming”. This recital clearly emphasises what was behind the introduction of direct payments, namely the compensatory nature of the payment. Similarly, the ecoschemes payment is intended to compensate for the additional burden incurred in implementing appropriate climate beneficial practices.¹³

ECOSCHEMES IN POLISH REGULATIONS

In the National Strategic Plan for the Common Agricultural Policy for 2023-2027, 5 area ecoschemes and one related to animal welfare have been selected in Poland.¹⁴ They are regulated in the Act of 8 February 2023 on the Strategic Plan for the Common Agricultural Policy for 2023-2027,¹⁵ as well as in the Ordinance of the Minister of Agriculture and Rural Development of 13 March 2023 on the detailed conditions and detailed procedure for granting and paying payments under the climate and environment schemes under the Strategic Plan for the Common Agricultural Policy for 2023-2027.¹⁶

The area ecoschemes according to these regulations include Ecoscheme: Carbon farming and nutrient management; Ecoscheme: Biological crop protection; Ecoscheme: Areas with melliferous plants; Ecoscheme: Conducting crop production under the system of Integrated Plant Production; and Ecoscheme: Water retention in permanent grassland.¹⁷ As far as animal welfare is concerned,

¹³ H. Guyomard, C. Détang-Dessendre, P. Dupraz, L. Delaby, C. Huyghe, J.-L. Peyraud, X. Reboud, C. Sirami, *How the Green Architecture of the 2023-2027 Common Agricultural Policy could have been greener*, “Ambio” 2023, Vol. 52 (8), pp. 1327 - 1338.

¹⁴ Strategic Plan for the Common Agricultural Policy 2023-2027, pp. 442-541.

¹⁵ Journal of Laws of 2023, item 412.

¹⁶ Journal of Laws of 2023, item 493.

¹⁷ D. Puślecki, *Ochrona wód w procesie produkcji rolnej w świetle nowych wyzwań*, “Przełęcz Prawa Rolnego” 2023, Vol. 1 (32), pp. 41-60.

there is an Ecoscheme on Animal Welfare in Poland. A detailed discussion of all ecoschemes is well beyond the scope of an academic paper. Therefore, the construction of this legal instrument will be presented using the example of the Ecoscheme with which the greatest hopes are pinned, i.e. the one on carbon farming.¹⁸ All ecoschemes are covered by a system of points which are then converted into subsidies.¹⁹

According to Section 4(1) of the Ministerial Order cited above, payments for carbon farming and nutrient management are granted for the implementation of one or more of eight practices to increase soil carbon sequestration and improve nutrient management. These eight practices include: Extensive use of permanent grassland with stocking rates; Winter intercropping or mid-cropping; Development and adherence to a fertilisation plan (either the baseline option or the liming option); Diversified cropping structure; Mixing of manure on arable land within 12 hours of application; Application of liquid manures by other methods than splash; Simplified cropping systems; and Straw-soil mixing. In extreme cases, the selection of one of these practices and another ecoscheme is sufficient to receive the corresponding payment, although usually, according to the following formula for calculating points: *Utilised agricultural area x 25% x 5 points = Minimum number of points*, it will not be possible to select just one practice taking into account the corresponding number of points in the Ministerial Decree. In order to receive financial support under this ecoscheme, it is necessary to obtain the minimum number of points for the farm in relation to the agricultural land on the farm and to implement it.²⁰ This approach and the points awarded for individual practices indicate the need to implement more than one practice. This implies an increase in obligations for the farmer. At the same time, these practices may exclude some land from production, such as through differentiated cropping patterns. This may discourage farmers from taking advantage of this form of aid due to the change in existing income, which is predictable for farmers. In return, they

¹⁸ A. Sadowski, *Znaczenie środowiskowych efektów zewnętrznych we Wspólnej Polityce Rolnej Unii Europejskiej*, "Zagadnienia Doradztwa Rolniczego" 2022, No. 110.4, pp. 5-20.

¹⁹ According to the government, "the points system means that a corresponding number of points are assigned to each practice, with 1 point being the equivalent of €22.47 (≈£100). The points are based on calculated payment rates that compensate for additional costs incurred and income lost as a result of the practice. To apply for these payments, a minimum number of points must be obtained which is the product of: 25% of the agricultural area of the farm and 5 points awarded per hectare".

²⁰ <https://www.cdr.gov.pl/images/wydawnictwa/2023/2023-EKOSCHEMATY.pdf>, p. 18 (accessed 1 July 2023). It also provides an example illustrating the scoring calculations to help farmers prepare to benefit from this ecoscheme "Example: 15 ha GO farm. 15 ha GO x 25% x 5 points = 18,75 points. The minimum number of points to realise an ecoscheme to which practices must be selected to obtain 18.75 points. This means, the farm can realise the practice of its choice on the corresponding area, e.g: for 2 pts. practice with manure: 18.75 pts. : 2 points = 9.375 ha or for 3 pts. practice differentiated structure 18.75 pts. : 3 pts. = 6.25 ha or more practices of their choice on the same surface, if they can be combined with each other or on additional surfaces".

are supposed to receive aid (quite low) and be subject to numerous inspections, which in effect may lead to the necessity of returning this aid. It must be stressed that this is quite risky for the farmers.

The problems associated with this key ecoscheme are also noted by the government in Poland. It indicates that the simplification of this scheme is to consist in dropping the condition relating to the need for a minimum number of points. The change will make it easier for farmers to join the ecoscheme. The Polish government is proposing to allow the following practices to be combined on a single plot: Winter intercrops/intercrops with practices and Mixing manure on arable land within 12 hours of application, and other such proposals.²¹ As already highlighted, the question arises as to why such measures were not included in the National Strategic Plan from the very beginning. Having the experience of similar measures in the previous programming period, the ecoschemes should be as clear as possible for the beneficiary not only so that he/she can simply apply for them, but also so that he/she does not have problems with their settlement later on.

A fairly new ecoscheme is Animal Welfare. The subsidy will be awarded to those who apply increased practices relative to what is required at a minimum level, such as in cross-compliance practices. These practices must comply with the Regulation of the Minister of Agriculture and Rural Development of 20 April 2023 on the detailed conditions and detailed procedure for granting and paying financial aid under the animal welfare schemes under the Strategic Plan for the Common Agricultural Policy 2023-2027.²² Caring for animals in this dimension is not only intended to ensure food security, but is also intended to be a practice that benefits the climate. At the same time, the details of the regulations associated with the 129-page regulation are not only conducive to the comprehensibility of the law, but above all to the success of this ecoscheme.

According to the regulation, requirements common to all eligible animals have been formulated.²³ The first is to have a suitable herd establishment registered in accordance with the provisions of the animal identification and registration system and, in the case of poultry, a poultry establishment number. As a general rule, the animals covered by the requirements shall be tagged and registered in accordance with the provisions of the animal identification and registration system (if applicable). In this respect, it is proposed to introduce an important simplification by changing the way in which the implementation of grazing practices

²¹ <https://www.gov.pl/web/rolnictwo/upraszczamy-ekoschematy> (accessed 1 July 2023).

²² Journal of Laws of 2023, item 797.

²³ Section 3(1) of the regulation lists 13 options. These include: 1) Sow welfare option; 2) Porker welfare option; 3) Dairy cow welfare option; 4) Welfare of suckler cows kept indoors or in buildings; 5) Welfare of suckler cows kept in an open system; 6) Welfare of fattening animals; 7) Sheep welfare option; 8) Welfare of laying hens option; 9) Broiler chicken welfare option; 10) Variant Welfare of turkeys kept for meat production; 11) Variant Welfare of horses kept indoors or in buildings; 12) Variant Welfare of horses kept in an open system; 13) Goat welfare option.

or the provision of paddocks for suckler cows and fattening cows is documented, the requirement for the farmer to keep appropriate records on an ongoing basis will be replaced by a declaration. This is intended to reduce the administrative burden and thus make it easier for farmers to participate in the Animal Welfare ecoscheme.

Secondly, the requirements relating to a particular group of animals apply to all animals of that group kept on the farm. In addition, a farmer implementing an animal welfare intervention is required to undergo training in methods reducing the use of antibiotics. This is intended to ensure professional conduct among the farmers. This requirement should be considered as the most positive one also in the context of preserving public health and access to safe food. However, education related to the reduction of antibiotics use must translate into tangible results and willingness to change. These changes are bound to increase production costs and therefore final prices for the consumer. Therefore, the objectives set in this ecoscheme must be considered multifaceted – not only through the lens of animal welfare.

One of the most important requirements is that the farmer must have an animal welfare improvement plan (in case of cattle, it does not apply to the practices of providing grazing, paddock, bedding and subsequent weaning of calves for dairy cows).

In addition, for individual animals, the farmer must comply with specific animal welfare practices. For example, in the case of cows only, the regulation stipulates, among other things, that dairy cows should be able to graze for at least 120 days during the grazing period, without tethering (at least 6 hours a day); that group-housed non-tethered dairy cows should have at least 20% of their living space increased by at least 20%. According to the regulation, the dairy cows must be able to use straw or similar bedding or have a separate area with straw or similar bedding that allows the cows to rest at the same time. These are just some of the rather restrictive requirements. However, it can be noted that, in principle, they are intended to improve farming and keeping conditions for livestock. At the same time, concern must be expressed as to whether farmers will be able to meet such requirements, bearing in mind that this is one of the ecoschemes they have to fulfil. The number of requirements imposed may prove to be an effective obstacle to the success of this legal instrument.

CONCLUSION

The considerations outlined above lead to several conclusions. The voluntariness of ecoschemes carries the risk that the resources allocated to them will not be fully used. It may not be worthwhile for farmers to implement climate-friendly

practices in exchange for additional funding. They will undoubtedly recalculate whether it is worthwhile for them to carry out their current intensive agriculture or to implement the above-mentioned schemes in exchange for subsidies. It is a challenge for the Member States to convince farmers to participate in these voluntary commitments. It should be emphasised that this is not only in the interests of farmers,²⁴ but above all of the rest of society in terms of climate and environmental protection.

A certain risk, as in the case of greening payments, is posed by the level of complexity of the requirements. On the one hand, the requirements set out in Polish law are justified because they secure the public interest, which is climate protection, and if implemented correctly they can achieve the intended objectives. On the other hand, however, the multiplicity of these requirements and their complicated system may discourage the farmers. This problem is also noticed by the Polish government, which in June 2023 announced demands related to the simplification of ecoschemes.²⁵ This applies only to small farms up to 5 ha and involves implementing a lump sum of 225 EUR/ha (it replaces all types of payments). At the same time, it should be stressed that these and other postulated changes to the ecoschemes require approval by the European Commission. Far-reaching concerns must be expressed about the effectiveness of the ecoschemes, which are being amended in the first six months of their operation under the banner of simplification. This simplification not only differentiates between farmers with small and large farms, but creates different conditions for them to receive aid and does not ensure equality before the law. The postulate of simplification of the Common Agricultural Policy in the science of agricultural law is, by the way, not new.²⁶ It is, therefore, necessary to call for a maximum simplification of the CAP so that as many farmers as possible can benefit from the aid directed at them.

While supporting the need to change the proposed ecoschemes on the grounds that their level of complexity will result in farmers not using them, I would argue that this simplification should be comprehensive and reasonably permanent. If in one year the rules for public aid are changed to such a large extent, rightly reacting to the previously self-created requirements that are too large, the question arises as to the effectiveness of the state authorities. Furthermore, how can farmers, who are faced with such changes, plan investments and other activities in the long term? Writing an effective business plan covering at least the time until the end of the funding period, i.e. until 2027, seems impossible given the rapidly

²⁴ B. Włodarczyk, *Prawne instrumenty ochrony środowiska i przeciwdziałania zmianom klimatu we Wspólnej Polityce Rolnej na lata 2023–2027*, “Przegląd Prawa Rolnego” 2022, Vol. 2 (31), pp. 11-26.

²⁵ <https://www.gov.pl/web/rolnictwo/upraszczamy-ekoschematy> (accessed 1 July 2023).

²⁶ P. Litwiniuk, *Uproszczenia Wspólnej Polityki Rolnej – nośny slogan czy absolutna konieczność?*, “Studia Iuridica Agraria”, Vol. 13, 2015, pp. 101-116; S. Balcerak, *Z problematyki uproszczenia wspólnotowego prawa rolnego*, “Przegląd Prawa Rolnego” 2007, No. 2, pp. 153-176.

changing rules for obtaining aid. In the long term, this neither serves agriculture nor the objectives set by European law on ecoschemes.

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