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BETWEEN RESTRICTIONS AND INCENTIVES: LEGAL ANALYSIS OF THE REASONED AGRICULTURE QUALIFICATION

What is referred to in France as reasoned agriculture appeared in the 1990s as a professional response from intensive-agriculture farmers to the awareness of farming pollutions. Since 2002 it has been the object of a self-qualification procedure covering farms and products. A legal analysis shows that the mechanism corresponds to the setting up of an incentive policy in a field already covered by regulations defining legal obligations. Public authorities, combining restrictions and incentives, institute a hybrid policy the legal validity of which may possibly be questioned.

Reasoned agriculture terms call to mind the Forum of reasoned agriculture respectful of the environment (FARRE) (see LEAF in the United Kingdom), an association created in February 1993. Reasoned agriculture was then defined as a "state of mind" leading farmers to "reason" their practices in order to limit the impacts on the environment, but without their membership of the association involving specific restrictions. Since 2002, reasoned agriculture has given way to a specific qualification of farms and products (see frame) and has added to numerous existing guarantees and labels.

Reasoned agriculture is presented by the Ministry of Agriculture as "a global farm management reasoning that, beyond compliance with regulations, aims at reinforcing the positive impacts of agricultural practices on the environment and at reducing their negative effects". (http://www.agriculture.gouv.fr).

The choice was thus made in this presentation to study reasoned agriculture (RA) as a measure to apply an environmental policy aiming at favouring agricultural practices that go beyond "compliance with regulations". This approach connects two main types of environmental policies with their legal implementation tools. From restrictions to incentives, the intervention means of public authorities are varied and their differentiation is a condition of their legality (I). But an RA qualification provides confirmation of a "hybrid" policy: by implementing an incentive system in a field that is already subject to a restrictive regulation, its legal value is likely to be questioned (II).

I – From restrictions to incentives: environmental policies and legal implementation tools

Among different types of interventions by the Public Authorities, restrictions and incentives are commonly distinguished and legally transposed into agreed policy rules and obligations.

Public policies

- Restrictions

Public authorities have the power but also the obligation to ensure the protection of public order. Whatever the considered legal system, domestic law or international law - WTO texts refer, for example, to the notion of "legitimate concerns"- this notion, in particular, includes the health and safety of the population. Environmental protection is, indeed, a matter for public authorities, especially when there are human health risks. This is the case, for instance, of prevention of water pollution by nitrates. The constraints imposed to farmers regarding environmental protection are those resulting from the exercise by public authorities of their power to enforce the law, defined as public order maintenance. In other words, restrictions here are firstly placed on public agents or communities, who pass them onto

citizens who must comply with them under penalty of punishment.

- *Incentives*

Here, the purpose is more ambitious: the idea is for economic agents to accept more restrictions than those resulting solely from the prevention of serious offences against natural resources or health. These restrictions may be seen in a greater reduction of pollutions and nuisances or even in the provision of an "ecological service" (maintenance of natural areas and wild species, for instance). If these restrictions do not result from the necessity to protect public interests they are not imperative to all, but only to those who have accepted them. This policy of implementation is fundamentally different because it is not a matter of forbidding deviant behaviour from standards but of rewarding economic agents for accepting more obligations with the object of satisfying the public interest. The benefit may be the payment of public aid or the granting of a more advantageous tax system. In the case of qualification as RA, the benefit is competitive since products from qualified farms are differentiated from others.
The nature of the policy, restrictive or incentive, determines the choice of the legal tools used for its implementation.

Legal tools
- *Obligations imposed*

There is a wide range of legal tools for the protection of public order: prohibition, permission to carry out dangerous operations under certain conditions or rules. In a general way, whatever its legal form, it concerns every standard that does not necessitate the agreement of the persons who are subjected to it. In principle compliance does not bring any bonus, but violation will result in administrative actions and/or penalties.

The content of these measures is strictly controlled, as much in the States' domestic judicial order as in the supra-state orders (EC and international). Because these measures lead to deprivations of freedom and individual rights (property, freedom of trade), their legality is conditioned by their very finality, the maintenance of public order as specified by the political or judicial powers. As such, they must obey a double condition.

First, the legality of these measures is subject to their necessity: there must be a risk of offence (which can reside in an uncertainty, in accordance with the precautionary principle) to a public interest to justify this type of intervention.

Second, they must be adapted and proportioned to the risks they are to prevent. Under penalty of being found illegal and then cancelled by the competent judge, they should not impose constraints disproportionate to the intended purpose or justify discriminatory treatment in case of persons placed in equivalent situations. Lastly, there must not be any other measures less prejudicial to freedom allowing the fulfilment of the same purpose.

It should be added that, in the field of environmental protection, the economic agents' interests must be taken into account. The "acceptable economic cost", a notion existing in French law, has the effect of obliging public authorities to look for a balance between protection of public interests and the profitability of companies. In other words, if environmental protection is to be assured, it cannot be at all costs.

The obligations agreed

There are numerous legal tools involved in incentive policy: any rule, whatever its form, to which people agree voluntarily. In this case the restriction exists because it was accepted beforehand by the person subjected to it. Although penalties are provided for in case of violation, they do not belong to criminal law but consist in removing the expected gain from the commitment if it is not respected: suspension, even disqualification in case of RA, or repayment of public subsidies already paid in case of a French reasoned agriculture contract (CAD), the successor of the French farm territorial contract (CTE).

As legal tools, these agreed obligations are designed to produce legal effects: obtaining the label protects farmers from fraudulent use. For instance, a public subsidy contract entitles a farmer to receive grants if he has honoured his own commitments.

But these legal tools are also subject to certain conditions of validity in order to ensure the correct use of public funds or the protection of a third party. Since they allow an advantage to be granted in exchange for additional constraints on top of the ones imposed on everyone, the legal validity of these tools depends on their differentiation from existing rules.

This condition is generally set by European Community law which forbids public aid for environmental protection actions in different fields - and therefore, the accompanying contracts - based only on compliance with regulations. Agricultural activities are an exception to this condition because aids are given within the frame of the CAP which has a system of exemption from common competition law.

European Community law also stipulates that environmental measures be different from "good farming practices" defined as including, as a

minimum, compliance with the regulations. As such, the contractual obligations defined in the CAD set stricter standards than the existing rules (in the case of plant-care products for example) or create new constraints (planting and up-keep of hedges, for instance).

If there is no European Community law relating to the use of RA qualification, the differentiation between the restrictions defined for this label and the existing regulations is imposed by competition and consumption law. Indeed, this label must indicate a genuinely specific feature of the farm or product, different from non-qualified farms or products, so that the consumers' right to information as well as the rules governing fair competition and commercial techniques are respected. But the obligations to which farmers agree in order to obtain the RA label do not meet this condition, thereby leading to a hybridization of public policies.

II –RA: hybridization of public policies and mixing of legal genres

The RA label highlights the quasi identical nature of policy rules and the reference system, thus confirming the failure of a restrictive policy, which the public authorities have tried to substitute with an incentive policy.

Confusion between legal tools

A study of laws relating to the RA label unquestionably shows that the tools employed cannot be comparable to policy rules. Implementation is voluntary: the farmer asks a certification organisation for the label and this will only be delivered if the "requirements" meet those of the reference system. If certain "requirements" involve deadlines, the farmer commits himself explicitly to respecting them, (for example, replacing storage tanks). The penalties provided for non-compliance with the system of reference are suspension and withdrawal of the qualification. They consist in withdrawing, definitively or not, the compensation granted.

However, the distinction between obligations resulting from the system of reference and the applicable regulation is only formal. In fact, as far as environmental protection is concerned, it can be observed that farmers' commitments are not so different from mere compliance with regulations: legislation relating to classified installations for environmental protection, laws relating to action programs in vulnerable areas, the decree of June 12th 1996 concerning the dumping and spreading of effluents from non-classified farms, or even local health regulations.

Several items in the system of reference repeat existing constraints, such as all the requirements concerning the storage and selection of plant-care products, health conditions and animal well-being.

Furthermore, most of the requirements presented as new ones already exist in applicable laws under different wording. Cattle-breeders must know "how much effluent is produced on the farm". But the regulation applicable to classified cattle-breeding and local health regulations, as well as laws concerning vulnerable areas make it compulsory for farmers to have a spreading scheme indicating how much nitrogen has been spread; farmers, then, must already know how much they produce. The same goes for point 20 in the system of reference requiring knowledge of the fertilizing values of different products spread, given that for the same farms, the regulation makes it compulsory for farmers to produce a record of nitrogen fertilization. Other requirements, not indicated as already existing, can be surprising; farmers must spread effluents over the widest possible spreading surface, when one of the major problems is the lack of spreading surfaces (Agreste Primeur, n°143, June 2004). We could also note that the system of reference "makes it compulsory" for the farmer "to have suitable spreading equipment"…

The Ministry of Agriculture itself recognizes the quasi-identical nature of the RA system of reference to the existing regulations since, in order to distinguish this label from CAD, it noted that only CAD "go beyond the regulation requirements". The FARRE presents the label as an educational tool intended to familiarize farmers with respect of the environment and remarks that half the requirements of the system of reference repeat "some essential and sometimes unknown points of the regulation". According to this approach, we can see that standards were not set too high and that the label was designed to "cast the net wide". The CSO (French Superior Council for the orientation and coordination of the agricultural and food economy), aware of the weakness of the "requirements" in the system of reference has pronounced in favour of "a logical progression of the level of requirements in the long run".

Legally, the quasi-identical nature of the RA system of reference to the regulation, however, shows a shift in policy. From a restraining policy, justified by this existing risk of harm to the environment and leading to the enactment of a regulation corpus, the action of public authorities has moved towards an incentive policy, in order to help respect these restrictions.

Incentive, a substitute for restrictions

The idea is not new; it is at the origin of the agricultural pollution control program (APCP), and consists in granting public aid in exchange for investment and implementation of practices leading to compliance with the regulation applicable to classified breeding installations.

The novelty resides in the fact that recourse to legal tools encouraging farmers to comply with regulations becomes systematic. Thus, although at the beginning APCP was unlawful with regard to European Community law governing public aids, it is significant to observe that, not only was it legalised by the European Commission – including retroactively - but also new aids "in respect of standards" were legalised in 2003, contrarily to the common law governing public aids. RA, which consists in giving an advantage to those who commit themselves to respecting regulations, falls within the same logic. Moreover, it goes further since it is no longer a question of helping farmers temporarily to bring their business into compliance with standards but of offering them a reasoned competitive advantage.

The mixing of legal genres, incentive and statutory, has led to the establishment of a hybrid policy designed to be an answer to the failure of farmers to apply environmental regulations. La Cour des Comptes (French governmental accountancy control body) observed that "the different programmes were replaced by incentives to do better, in the hope that a progressive modification of practices would avoid enforcement of a regulation which goes unheeded" (rep. Cour des Comptes, *the preservation of water resources faced with farming pollutants: the case of Brittany*, synthesis attach to the report of 2001, Feb. 2002). Beyond pure technical difficulties – such as the recording of offences regarding diffuse pollutions – the reasons for this setback probably lie in the fact that regulation constraints entail an "unacceptable economical cost" for farmers.

Nevertheless, the mixing of legal genres has encountered certain limits. The French Supreme Court of Appeal considered that the signature by a farmer of an APCP contract "proving regularization" would not be an obstacle to punishment for operating without authorisation. In the same way, an RA label which does not appear to be in accordance with the law on consumer information, as well as with the rules concerning fair trading, is likely to be contested before a judge referred to the case by a consumer association or a producers' group committed to another environmental standardization process.

The questionable validity of the RA label, like that of the APCP, before the modification of European Community law should encourage public authorities to further thinking, in that the validity of a public policy itself depends on its implementation tools. Experience shows that an environmental policy should not be based solely on technical restraints and that a legally unquestionable combination must be found allowing work on both levels. In consideration of this, the "conditionality" of direct farming aids which consists in subjecting the granting of public funds to compliance with the "rule requirements" in the fields of public health and the environment (European Community rule 1782 of September 29th 2003) is interesting. Indeed, direct aids do not have an environmental purpose, but the respect of minimal rules in this area do condition them. If they cannot prove conformity, farmers simply do not receive this financial support. The effect of this measure is limited to productions that can apply for these aids but the example could be followed for other advantages granted to farmers or for the application of laws specific to them (tax law, labour law, farm leases etc.).

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Further information

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Principal Laws

Decree 2002-631 of April 25th 2002 relating to farm qualification as Reasoned Agriculture with reference to article L 640-3 of the Rural Code and arising from law 2001-420 of May 15th 2001 relating to new economic regulations).

Decree 2004-293 of March 26th 2004 relating to the conditions of use of the Reasoned Agriculture label.

Interdepartmental Ruling of April 30th 2002 relating to the reference system for Reasoned Agriculture.

Glossary

Qualification: act by which a certifying body attests the conformity of a farm to the requirements of the system of reference. Qualification allows farmers to use the term "reasoned agriculture" in their advertisements and all trading documents referring to their farm as well as in advertising, labelling and presentation of products of origin. Penalties are provided in case of fraudulent use of the "qualification" term.

System of reference: law on reasoned agriculture drawn up by Ministerial ruling (Ministries of Agriculture and Consumption) on April 30th 2002 and on recommendation of the French Superior Council for the orientation and coordination of the agricultural and food economy (CSO). Includes 98 "national requirements" concerning environmental respect, control of health risk, occupational health and safety and animal well-being. The provisions relating to the environment must be completed by a local chapter taking into account the local issues such as water pollution by nitrates and/or plant-care products, olfactory nuisances, biological diversity, etc.

Institutions: The French national committee for reasoned agriculture and farm qualification (CNAR) is commissioned to give its opinion to the ministers concerned and to make any suggestions. Composition: two sections ("analysis of the system of reference" and "agreement") and six colleagues (certifying bodies, farming producers, farming and food sections, nature protection and consumers' associations, farming unions, as well as six qualified personalities proposed by the French APCA federation.

The regional committees **(CRAR)** have the responsibility of making proposals concerning the local chapter in the system of reference which is the object of an order by the ministers concerned and assessment by the CNAR.

Certifying bodies: approved by interdepartmental rulings, they deliver qualifications and control farms according to CNAR established procedures. They may pronounce the sanctions provided for in article 9 of the decree of April 25th 2002: suspension and withdrawal of the qualification.

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