

Legal Foundations for the Protection of Biodiversity in Agricultural Activity in European and Norwegian Law

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Abstract: Agriculture is a vital sector of the economy in most European Union countries, not only because of its productive functions but also its non-productive roles. It is a unique sector of the economy, and its importance manifests on many levels: primarily, it meets the basic nutritional needs of people. Additionally, modern agriculture impacts economic growth and development, the living conditions of rural populations, and plays a significant role in providing environmental services. Over the last two decades, the environmental effects of agriculture have become an important issue in environmental policy both in the European Union and in Norway. The aim of the paper is to overview and compare the main legislation concerning conducting agriculture in protected areas, genetic biodiversity protection, less use of chemical fertilizers and pesticides and protection of the agricultural landscape.

Key words: biodiversity protection, agriculture, European law, Norwegian law

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1. Introduction

Agriculture is a vital sector of the economy in most European Union countries, not only because of its productive functions but also its non-productive roles. It is a unique sector of the economy, and its importance manifests on many levels: primarily, it meets the basic nutritional needs of people. Additionally, modern agriculture impacts economic growth and development, the living conditions of rural populations, and plays a significant role in providing environmental services (A. Nowak, P. Marczak, 2021, pp. 85-86). The cultivated agricultural land in European Union includes almost 175 mln of hectares, which constitutes about 40% of the total agricultural land¹. On the other hand, in Norway only 3% of the land is cultivated agricultural land. Of this only one third is suitable for cultivation of food grain. Agricultural land is found mostly around the main cities, in narrow valleys in the southern part of the country and along the fjords in the western and northern parts. Everywhere, agricultural land is scarce and it is seen as important to protect it against urban sprawl and development, such as new housing and industrial zones and roads (H. C. Bugge, 2018, p. 136).

Over the last two decades, the environmental effects of agriculture have become an important issue in

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¹ Eurostat, "Statistic explained, Dane statystyczne dotyczące struktury gospodarstw rolnych (Statistical data on the structure of agricultural holdings)", available online at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=farm_structure_statistics/pl&oldid=370127.

environmental policy both in the European Union and in Norway. The aim of the paper is to overview and compare the main legislation concerning conducting agriculture in protected areas, genetic biodiversity protection, less use of chemical fertilizers and pesticides and protection of the agricultural landscape. The research methodology involves a formal-dogmatic analysis of selected legal acts from European Union law and Norwegian law concerning the abovementioned issues.

2. Biodiversity Protection in Agricultural Activity in Protected Areas

The important legal acts concerning biodiversity protection in European Union law are Directive 2009/147/EC² and Directive 92/43/EEC³. These directives establish Special Protection Areas for Birds and Special Areas of Conservation for Habitats, which together form the Natura 2000 network. Agricultural activities are permitted in these areas; however, specific restrictions may be imposed depending on the particular site. The overarching goal is to ensure that such activities do not negatively impact protected species and habitats. In practice, this means that all agricultural practices must align with the conservation objectives established for each site.

Agricultural activities that could significantly affect the conservation objectives of a Natura 2000 site must undergo an environmental impact assessment (EIA). The EIA aims to identify and assess potential negative effects on protected habitats and species. Each Natura 2000 site should have a management plan that outlines the rules for conducting agricultural activities in a way that supports nature conservation. These plans may include detailed guidelines on practices such as livestock grazing, hay mowing, pesticide use, fertilization, and water management. Farmers operating within Natura 2000 sites can apply for financial support under Regulation 2021/2115 and the corresponding national strategic plan⁴. These programs offer agri-environmental and climate payments for implementing environmentally beneficial agricultural practices, such as maintaining traditional farming techniques, protecting habitats, or preserving field margins and hedgerows. If conducting agricultural activities in compliance with conservation requirements on Natura 2000 sites leads to economic losses, farmers may receive financial compensation. This is intended to offset additional costs and lost income.

In Norway the main legal act concerning biodiversity protection in special areas is Nature Diversity Act from 2009 (further: NDA)⁵. The main purpose of the NDA as laid down in its Article 1 is to protect biological, geological and landscape diversity and ecological processes that through conservation and sustainable use and in such a way that environment provides a basis for human activity, culture health and well-being, now and in the future. Article 14 paragraph 1 of NDA states that measures under that act should be weighed against other important public interests. The NDA provides the legal framework for the different types of protected areas: its purpose, its quality and the legal effects of the protection, as well as the procedure to follow, however it does not in itself protect anything. It provides the government with the discretionary power to protect particular areas and

² Directive 2009/147/EC of the European Parliament and of the of 30 November 2009 on the conservation of wild birds, O.J. 26.1.2010, L 20/7.

³ Council directive 92 /43 /EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J., 22.7.92, L 206/7.

⁴ 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, O.J. 6.12.2021, L. 435/1.

⁵ Act of 19. June 2009 No 10 relating to the management of biological, geological and landscape diversity (Nature Diversity Act).

species (H. C. Bugge, 2018, pp. 119-121). Article 6 of the NDA lays down the general duty of care. It means that any person who conduct an activity in the protected areas should act with care and take all reasonable steps to avoid causing damage to biological, geological and landscape diversity. Such duty applies both to individuals in their private capacity and in their professional work. It also applies to companies, organizations and public bodies. The landowner or a holder of rights in property that is wholly or partially protected as national park, protected landscape, nature reserve, habitat management area or marine protected area is entitled to compensation from the State for financial losses incurred when protection makes current use of the property more difficult. The government decides which activity is allowed in each particular protected area, however generally extensive traditional agriculture is permitted within the areas of protected landscapes, and habitat management areas. When it comes to selected habitat types, agricultural projects should be notified in advance to municipal authorities. The project may not be carried out before a reply has been received from the municipal authorities. If the municipal authorities find that the project may result in reduction of the range of habitat type or deterioration of its ecological status, the authorities may refuse to permit the project or make further orders on how the project should be implemented (H. C. Bugge, 2018, pp. 128-129).

3. The Use of Plant Protection Products

The use of plant protection products helps maintain plants in good health and prevents damage from diseases and pests. However, due to leaching and runoff, pesticides used in crops can enter the soil and surface waters, as well as groundwater, which carries the risk of negative impacts on non-target species in both terrestrial and aquatic ecosystems. This affects habitat functions and contributes to biodiversity loss, including a significant reduction in insect populations. It also impacts soil formation processes, soil composition, and the provision of clean drinking water. Pesticide residues in food can pose health risks to humans, and residues in animal feed can pose risks to animal health and potentially enter the food chain. Despite this, pesticide use in Europe has steadily increased since 1996, and despite many debates on sustainable agriculture and the introduction of low-dose pesticides, the average amount of pesticides used in recent years has not decreased. In 2015, the total annual pesticide sales in the EU amounted to 400,000 tons, with the vast majority used in the agricultural sector.

The main legal act regulating the use of plant protection products in the EU is Regulation (EC) No 1107/2009⁶. It sets out the conditions and procedures for the approval, marketing, and use of plant protection products (further: PPPs). PPPs must undergo a detailed risk assessment before being approved for use. The European Food Safety Authority (EFSA) evaluates the health and environmental impacts of PPPs and sets conditions for their safe use. PPPs must be properly labeled and packaged to ensure user safety and minimize the risk of adverse health and environmental effects. Member states are responsible for monitoring and controlling the use of PPPs on their territory to ensure compliance with legal requirements and user safety.

The primary act concerning the use of PPPs in EU law is the Pesticide Directive. The use of PPPs is generally permitted when no alternative methods for controlling pests or plant diseases exist. There are restrictions on the use of certain active substances in PPPs, especially those recognized as harmful to human health or the environment. The use of PPPs must comply with sustainable development principles, which include minimizing risks to health and the environment and promoting the integration of biological and non-chemical methods in plant

⁶ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, O.J. 24.11.2009, L 309/1.

protection.

Recently, the European Commission has initiated legislative action to introduce regulations on the sustainable use of plant protection products⁷. The proposal included a suggestion to reduce pesticide use by 50% and a complete ban on their use in sensitive areas. The proposal constituted an ambitious plan for agricultural sector. However, the project has sparked numerous protests from farmers in the EU. The President of European Commission Ursula von der Leyen announced at the beginning of 2024 during a debate in the European Parliament that the Commission is withdrawing the proposal to limit the use of pesticides in EU agriculture.

When it comes to Norwegian law, for a number of years, Norwegian agrifood authorities have been actively trying to reduce the use of pesticides and the risks associated with their use. The first action plan related to pesticide use was implemented in 1990. Norwegian agriculture aims to become less dependent on chemical pesticides and to further reduce the risk of negative effects on human health and the environment. The Ministry of Agriculture and Food will evaluate the current action plan. Based on this evaluation, the need for a new action plan will be assessed. Regulations regarding the marketing of pesticides are included in the EEA agreement, but Norway and the other EFTA/EEA countries are exempted from these provisions. The reason for wanting to keep national regulations was that Norway had an effective pesticide approval scheme that enabled having more stringent health and environmental standards than required by EU regulations. Our restrictive regulations imply, e.g., that in order to approve a new pesticide, an overall assessment must show that the formulation has to better than, be equally suited as or have certain advantages over pesticides currently approved for the same use (substitution principle). Furthermore, Norway has a 5-year approval period. In this way, Norway has been able to make continuous improvements by withdrawing many old substances with harmful effects from use⁸.

4. Protection of the Genetic Diversity of Crops and Livestock

In the EU Biodiversity Strategy for 2030, the EU legislator highlighted the need to reverse the declining trend in genetic diversity, among other measures, by facilitating the use of traditional crop varieties and breeds. This was to be achieved through a review and potential modification of the rules governing the marketing of traditional crop varieties to enhance their protection and sustainable use, streamline the registration process, and improve access to traditional varieties and those adapted to local conditions⁹.

However, there is no comprehensive EU regulation addressing the indicated issue. Encouragement for engaging in agricultural activities related to the breeding of rare, traditional, or local animal breeds or plant varieties is provided in regulation 2021/2115 through the possibility of obtaining funding for such activities under eco-schemes or agri-environmental commitments. Nevertheless, such activities are listed as one of the objectives of regulation 2018/848 concerning organic production. Participation in these activities is voluntary.

Moreover, the issue of trade and registration of seeds are subject to various directives: directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species¹⁰, directive of 14 June 1966 on

⁷ Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115, Brussels, 22.6.2022 COM(2022) 305 final.

⁸ Ministry of Agriculture and Food of Norway, Environmental Strategy 2008-2015, pp. 51-52.

⁹ 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, Brussels 20.5.2020, COM(2020) 380 final, p. 11.

¹⁰ Council directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species, O.J. 20.7.2002, L. 193/1.

the marketing of fodder plant seed¹¹, directive of 14 June 1966 on the marketing of cereal seed (66/402/EEC)¹², directive 2002/57/EC of 13 June 2002 on the marketing of seed of oil and fibre plants¹³, directive 2002/56/EC of 13 June 2002 on the marketing of seed potatoes¹⁴, directive 2002/54/EC of 13 June 2002 on the marketing of beet seed¹⁵. Directive 2002/53/EC establishes the rules for the inclusion of crop plant species in the EU Common Catalogue. The Common Catalogue, which is created based on notifications of changes to national catalogues from EU member states, contains a list of varieties that can be sold in the EU. This catalogue is published in the Official Journal of the European Union (OJEU). EU member states include a variety in their national catalogue only if it meets the following criteria: distinctness — the variety is clearly distinguishable from any other variety known in the EU, and its characteristics can be precisely recognized and defined, uniformity — despite very few deviations, the plants are similar or genetically identical, stability - after further propagation, the description of the plant's essential characteristics remains true. The variety must also have appropriate value to justify its cultivation and use. Registration of a variety remains valid for 10 years but can be revoked if it is found that the variety no longer meets these criteria.

Regional varieties differ from conventional varieties primarily in their purpose, which is to preserve the unique genetic traits that characterize them. Under this designation, primarily old varieties of agricultural and vegetable plants that are no longer present in official national and EU variety registers and are not available on the market are registered. This category also includes local populations developed and cultivated by farmers. Although these varieties may have somewhat poorer “breeding parameters” compared to conventional varieties — such as uniformity and economic value — they can still be registered and introduced into legal circulation due to their fundamental purpose: preserving valuable plant genetic resources. To promote the protection and sustainable use of genetic resources, their registration and maintenance are exempt from fees. Such varieties, after registration and obtaining the status of a regional variety, may be introduced into the market.

Norway is obliged to protect genetic resources under international law. However, similar to EU law, there is no specific regulation in this area. Declarations concerning protection of genetic variety of crops are included in the Environmental Strategy. The document indicates the need to strengthen the Norwegian Genetic Resource Centre and follow up action plans for the conservation and sustainable use of genetic resources of crops, livestock and forest trees, strengthen and maintain sustainable plant and animal breeding in agriculture, increase diversity of cultivated species and varieties, enhance the conservation and sustainable use of wild relatives and other variants of useful plants and implement operative national rules for marketing conservation varieties and non-registered varieties, include genetic resource considerations in the management of cultural landscapes and in management plans for nature protected areas, consider subsidy programmes for old livestock breeds with regional ties under the auspices of regional environmental programmes, enhance the knowledge base for sustainable use, management and improvement of genetic resources.¹⁶ However, it should be noted that most of Norway's farmers are satisfied with the available assortment of seeds and propagating material. On the other hand, many organic and most of the biodynamic farmers find that their needs are not met by supplies available from authorized seed shops, and seek out other channels. These farmers comprise the majority of biodiversity farmers in Norway today, but there are not

¹¹ Council directive of 14 June 1966 on the marketing of fodder plant seed (66/401/EEC), O.J. 11.7.66, 2298/66.

¹² Council directive of 14 June 1966 on the marketing of cereal seed (66/402/EEC), O.J. 11.7.66, 2309/66.

¹³ Council directive 2002/57/EC of 13 June 2002 on the marketing of seed of oil and fiber plants, O.J. 20.7.2002, L. 193/74.

¹⁴ Council directive 2002/56/EC of 13 June 2002 on the marketing of seed potatoes, O.J. 20.7.2002, L 193/60.

¹⁵ Council directive 2002/54/EC of 13 June 2002 on the marketing of beet seed, O.J. 20.7.2002, L. 193/12.

¹⁶ Ministry of Agriculture and Food Environmental Strategy 2008-2015, pp. 37-40.

many of them, perhaps no more than a few hundred. In this perspective, farmers' rights becomes particularly important, as they are about enabling these relatively few farmers to continue their work, perhaps also to encourage others to join the cause (R. Andersen, 2012, p. 106).

5. Protection of the Natural Rural Landscape

In EU law the issue of protection of the natural rural landscape is included in Regulation no 2021/2115. The regulation provides for financing environmental objectives through three solutions that create the so-called "green infrastructure" of the CAP: the conditionality system covering basic management requirements and good agricultural and environmental condition standards, eco-schemes, and commitments related to the environment, climate, and other management obligations. The protection of the natural rural landscape is generally obligatory under the conditionality system.

The basic management requirements include obligations arising from widely applicable legal acts related to, among other things, water management, pollution control, protection of certain animal species and natural habitats, food and feed law, animal health and welfare, and the use of plant protection products. Good agricultural and environmental condition (GAEC) standards include: maintaining permanent grassland (GAEC 1); protecting peatlands and wetlands (GAEC 2); prohibition of burning stubble (GAEC 3); establishing buffer zones along watercourses (GAEC 4); managing ploughing to reduce soil degradation and erosion risk (GAEC 5); maintaining a minimum soil cover (GAEC 6); crop rotation (GAEC 7); leaving part of the land as non-productive areas, including natural landscape elements (GAEC 8); and prohibiting the conversion or ploughing of permanent grasslands designated as environmentally sensitive permanent grasslands in Natura 2000 areas (GAEC 9). Both the basic management requirements and the good agricultural and environmental condition standards are mandatory. Failure to comply results in a reduction of the granted payments (Krawczyk W., Paraponiak P., Szewczyk A., 2021, p. 45).

In Norway there is no specific regulation that addresses the protection of elements of the rural landscape. Norwegian Agricultural Land Act (further: ALA) states that the management of the land resources shall be environmentally sound and take into consideration the protection of the soil as a factor of production and the need to take proper care of the land and the cultural landscape as a basis for life, health and well-being of humans, animals and plants (Article 1 of ALA)¹⁷. Due to the fact that cultivated agricultural land constitutes only 3% of the whole land, it is particularly important for the Norwegian legislator to establish regulations that protect rural areas from changes in their designated use. Therefore, article 8 of the ALA provides that all cultivated land should remain cultivated. It means that if the landowner personally cannot carry out the necessary work on the land, he or she must allow other farmers to use it. That is why the large part of agricultural land in Norway is rented out and cultivated by other farmers (H. C. Bugge, 2018, pp. 136-137). Moreover, cultivated agricultural land cannot be used for the goals other than agriculture or in a way that agriculture could become impossible the future (Article 9 of ALA). However, the protection of particularly valuable elements of the landscape in rural areas is also regulated by the previously discussed NDA.

¹⁷ Agricultural Land Act of 12 May 1995, No. 23.

6. Conclusion

European and Norwegian policy and law concerning the protection of biodiversity in agricultural areas are similar to each other. It seems that they both draw from each other. The differences between these two systems emerge mainly from the fact that agriculture in the European Union is vastly different from the situation in Norway, where agriculture occupies a small percentage of the land. Additionally, the European Union, as an organization of states, does not have the authority to regulate in detail matters that should be governed at the member state level.

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