

The compatibility of the new CAP legislative proposal with existing EU law requirements

An analysis of selected arguments developed by the EP Legal Service

In a nutshell

On 15 March 2024, the European Commission ('the Commission') presented a legislative proposal to revise two CAP regulations.¹ On 15 April 2024, at the request of the European Parliament ('EP')'s Environmental Committee ('ENVI Committee'), the EP Legal Service issued a *Legal opinion on the compatibility of the new Proposal amending certain parts of existing CAP regulations (2024/0073 (COD)) with existing legal requirements and obligations*.²

The present analysis dissects selected arguments developed in the Legal Opinion, in relation to several questions that were apparently raised by the ENVI Committee:

¹ [COM\(2024\) 139 final](#), Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2021/2115 and (EU) 2021/2116 as regards good agricultural and environmental condition standards, schemes for climate, environment and animal welfare, amendments to CAP Strategic Plans, review of CAP Strategic Plans and exemptions from controls and penalties.

² <https://x.com/BenoitBiteau/status/1780641630829097471>

- A. On the compatibility of the presented amendments with certain provisions of the CAP Strategic Plans Regulation³ ('CAP SPR') “*with the obligations linked to the achievement of the specific objectives in Article 6 (1), points (d), (e) and (f)*”, with “*particular consideration to be given to Article 105(1) of the Regulation, which requires Member States to make, through their strategic plans, “a greater overall contribution” to the achievement of these specific objectives in comparison to the environmental objective contained in the previous CAP regulatory framework (2014-2020).*” (p. 2 of the Legal Opinion);
- B. On “*the legal implications in the absence of impact assessment in the Proposal*” (p. 9);
- C. On the compatibility of the legislative proposal with Article 6(4) of the European Climate Law⁴ (p. 5).

Our findings, which at times contradict those of the EP Legal Service, and in other occasions refine its argumentation, lead to the following conclusions:

- **The adoption by the co-legislators of the legislative proposal without substantial modifications would be in breach of several provisions of the CAP regulations, and in particular Article 5, 6 and 105 of the CAP SPR;**
- **The absence of an impact assessment or sufficient justifications to underpin the legislative proposal is in breach of several provisions of the Treaty on European Union, and the case-law of the Court of Justice of the EU ('CJEU');**
- **The absence of a climate consistency assessment to underpin the legislative proposal is in breach of Article 6(4) of the European Climate Law.**

Our analysis

A. On the compatibility of the proposal with the environmental provisions of the CAP Strategic Plans Regulation

In its Opinion, the Legal Service argues that the legislative proposal “*envisages different degrees of flexibility for farmers to carry out their agricultural activities. This could lead, in turn, to a different balance between the various objectives contained in Articles 5 and 6 of the Regulation, i.e. the balancing of the environmental objectives in the large sense with the other objectives contained in those Articles.*” It also states: “[c]onsidering these possibilities for flexibility, it is reasonable to expect that certain elements of the Proposal could, as they currently stand, affect the overall balance between the various objectives of the CAP Strategic Plans Regulation, albeit to varying degrees. Yet such a shift, while possibly going beyond the stated ambition of the Proposal to bring about “limited adjustments of the Union legal framework for the CAP” (Recital 2), in particular with regard to the proposed modifications to GEAC 8, does not raise in

³ [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.

⁴ [Regulation \(EU\) 2021/1119](#) of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

itself an issue of validity. Rather, it would merely be the expression of a policy decision to give precedence to objectives related to flexibility and reduction of administrative burden over environmental/climate objectives, with respect to the specific elements contained in the Proposal.” (p. 4)

This analysis disregards essential requirements of the CAP SPR, and precisely of Articles 5, 6 and 105 which the ENVI Committee inquired about. Article 5 defines general objectives, which are further detailed in Article 6 laying down nine specific and one cross-cutting objective. The CAP SPR states clearly that each CAP Strategic Plan (‘SP’) must make an “*effective contribution to the achievement of the specific objectives*” (Article 118), and that the intervention strategy of the plans must address *each* specific objective of the CAP SPR (Article 109(1)). In defining the elements that the intervention strategy must set out, the co-legislators have placed a strong emphasis on the compatibility of the plans with the three environmental objectives. In particular, Member States must provide “*an overview of the environmental and climate architecture of the CAP Strategic Plans*” (Article 109(2)(a)), which notably include demonstrations relative to the GAEC standards of Annex III and to the alignment of the plans with national targets stemming from other legislative acts, as laid down in Annex XIII. These are two sets of requirements that the Commission’s proposal weakens considerably.

The mandatory nature of these specific environmental objectives is confirmed by Article 11 of the Treaty on the Functioning of the EU (‘TFEU’). The Legal Opinion itself cites case-law confirming that Article 11 TFEU is violated “*where ecological interests manifestly have not been taken into account or where they have been completely disregarded.*” However, the Opinion fails to actually assess this point and merely states that Article 11 TFEU cannot be invoked as a stand-alone standard. For one, this is in complete contradiction with the case-law that the Opinion itself cites. Moreover, rather than “standing alone”, Article 11 TFEU reinforces the clear obligations surrounding Article 6 CAP SPR, preventing the proposed deletion of meaningful environmental standards under the CAP.

Yet, in the light of the aforementioned provisions, the CAP SPR does not allow the co-legislators to “*affect the overall balance*” between the law’s objectives, and to “*give precedence to objectives related to flexibility and reduction of administrative burden over environmental/climate objectives*”, as argued by the EP Legal Service. On the contrary, **the CAP SPs must at all times demonstrate their effective contribution to each of the specific objectives. The compatibility of the plans with the three environmental objectives is not given as an option, and can therefore not be undermined. Moreover, the contribution to the specific objectives of Article 6(1), points (d), (e) and (f) was granted a special attention by the co-legislators, who established the obligation in Article 105 for Member States to increase their ambition with regard to these objectives.**

The EP Legal Service argues that when adopted, the proposal will occupy the same position in the hierarchy of norms as the CAP regulations it amends, and therefore that “*from a formal point of view, no issue of legal “compatibility” appears to arise as regards the relationship between the Proposal and the acts it seeks to amend.*” (p. 5) However, it totally ignores the fact that the proposal does not amend Articles 5, 6 and 105, and therefore creates an issue of incompatibility were the modifications to be enacted, as demonstrated above.

The conclusion of the EP Legal Service on Article 105 to the effect that “[a]ny possible non-compliance with that increased ambition should be considered in the context of the CAP Strategic Plans (and their possible amendments), rather than in the context of the Proposal” (p. 5) contradicts the imperatives to guarantee legal certainty and the commonality of the CAP at the Union’s level. It also disregards the fact that the weakening of the CAP’s conditionality will inevitably expose Member States to breaching Article 105 and Article 6 (1), points (d), (e) and (f):

- 1) The legislative proposal (Article 1(1)(b) and (7)(c)) deletes the requirement under GAEC standard 8 to devote a minimum share of the agricultural area to non-productive areas or features, such as

land lying fallow (4% as a general rule, with several alternatives available to Member States) for all holdings: this suppression entails a backtracking of the CAP baseline conditions compared to previous CAP periods, including compared to the 2024-2020 period, when a similar obligation required holdings covering more than 15ha to dedicate at least 5% of arable land to ecological focus areas (e.g. land lying fallow).

- 2) The proposal (Article 1(2)) allows Member States to establish exemptions to GAEC standards 5, 6, 7 and/or 9. Since the obligations laid down in these GAECs long preceded the current CAP reform and notably found equivalents under the 2014-2020 CAP period, the proposed possibility for Member States to exempt farmers from implementing these GAECs opens the door to backtracking of national contributions to the environmental objectives, compared to the previous CAP period.

This backtracking inevitably exposes Member States to breaching Article 105. On the other hand, Member States will not be able to show that eco-schemes compensate for the ambition lost to the deletion of GAEC 8 and the exemptions to GAEC 5, 6, 7 and/or 9: farmers voluntarily choose whether or not to subscribe to these schemes, meaning Member States cannot guarantee a number of subscriptions to eco-schemes sufficient to compensate the reduced ambition under GAECs.

Considering the inevitable breaches to Article 105, **the Commission will not be able to accept the changes made to the CAP SPs or, if it does, will do so in breach of its duties pursuant to Article 119(3) and (4).** The EP Legal Service is therefore wrong to assume that the issue of the legal compatibility of the proposal with Article 105 is irrelevant in the context of the CAP SPR and only concerns the actual amendments to the plans: on the one hand, because the modifications envisaged in the legislative proposal encourage Member States to breach core obligations of this law. On the other, because they contravene the role of the Commission to guarantee that amendments to the plans are consistent with the CAP SPR and make an effective contribution to the specific objectives (see Article 119(3) and (4)).

The EP Legal Service subtly confirms these conclusions, when it writes that *“the Proposal is not a legally binding text. To the contrary, it is under possible evolution for as long as the ordinary legislative procedure lasts. It is thus up to the Union legislator to confirm any potential shift in the balance between the various objectives as it deems most appropriate, while ensuring respect for the Treaty and general principles of EU law.”* (pp. 4-5) It draws a similar conclusion regarding Annex XIII. **Could this be a call to the co-legislators to consider concretely whether the amendments respect Article 5, 6, 105 and Annex XIII, and to rectify all issues of legal compatibility before the text is adopted?**

B. On the requirement to conduct an impact assessment

To the question of the ENVI Committee regarding the legal implications of the absence of an impact assessment to underpin the legislative proposal, the EP Legal Service provides a mixed answer, which relies on the Inter-institutional Agreement on Better Law-Making (‘Inter-Institutional Agreement’) and several findings of the CJEU’s case-law. On the one hand, it underlines that *“the existence of an impact assessment is not a self-standing procedural obligation or objective in itself”* (p. 9) and that *“not carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the Union legislator is in a particular situation requiring such an assessment to be dispensed with and has sufficient information enabling it to assess the proportionality of the adopted measure.”* (p. 10)

Nevertheless, it also points at the importance for the co-legislators to be able to demonstrate the “basic facts” that were considered, which can be found either in an impact assessment or in any other source of information (such as the public domain). The EP Legal Service concludes that *“[i]n the case at hand, given the intensity of the recent farmers’ protests, “the political urgency” of tabling the Proposal, “which aims to*

respond to a crisis situation in EU agriculture” (see explanatory memorandum) could be understood as an urgent situation in the sense of the case-law. It is up to the legislator, however, to assess whether the available basic facts (...) are sufficient to allow it to take an informed decision on the Proposal. In any case, nothing prevents the Union legislator from requesting the Commission to carry out a complementary impact assessment, or to carry out its own such assessment.” (p. 10)

As the EP Legal Service itself essentially confirms, an impact assessment is **evidence** that the legislators have complied with the principle of proportionality. The Court of Justice has confirmed that there are situations where an impact assessment can be dispensed with provided the EU legislature “*has sufficient information enabling it to assess the proportionality of the measure.*”⁵ As the Court further confirmed, but the EP Legal Service fails to cite, “*in order to exercise their discretion properly, co-legislators must take into account, during the legislative procedure, the **available scientific data and other findings that became available.***”⁶

This condition is not met in the present case: the Commission merely relies on an argument of “*political urgency of tabling this proposal, which aims to respond to a crisis situation in EU agriculture*”⁷, but does not provide evidence nor valid arguments that demonstrate the need to immediately remove basic environmental requirements from the CAP as a way to meet farmers’ demands. Nor was sufficient information collected from stakeholders. The Commission itself reported that it only briefly consulted four EU farming unions and, out of these four, two “*insist not to reduce the environmental ambition*”.⁸

Moreover, the scientific data that is available in the public domain confirms that the proposal is misguided, rather than backing up the measures proposed. The most recent evidence available in the public domain clearly indicates the urgent need for a transition of farming towards real environmental sustainability, that should be seen as a priority for EU efforts on tackling climate change. In its legislative proposal, the Commission ignored the advice it received in January from the EU’s Scientific Advisory Board on Climate Change,⁹ and from the European Environment Agency.¹⁰ Both scientific bodies stressed that the EU must change course on agricultural emissions, which have remained largely unchanged for the past 20 years, and that the CAP does not currently contribute to climate mitigation.

Based on the above, **the co-legislators have the responsibility to delay the adoption of the amendments presented in the legislative proposal, until a satisfactory impact assessment or sufficient other information has been collected. In the absence thereof, the legislative act will fail to comply with the principle of proportionality.**

C. On the compatibility of the proposal with the European Climate law

On this point, the EP Legal Service argues that “*Article 6(4) of the European Climate Law does not oblige the Commission to give precedence to environmental objectives in any given legislative proposal. The 2030 and 2040 climate targets are to be achieved by all sectors of the economy. As such, it has to be verified whether giving precedence to other objectives in a specific case is compensated for by other measures, in the same or in different policy sectors. In any case, the Climate Law provides that the Commission must ensure consistency of incoming legislative proposals with the climate-neutrality*

⁵ Judgment of 3 December 2019, *Czech Republic v Parliament and Council*, C 482/17, EU:C:2019:1035, para. 85, also cited by the Legal Service Opinion (recital 31).

⁶ *Ibid*, para. 86. See also paras 87-92 where the Court looks concretely at whether there were sufficient scientific studies or reports available.

⁷ COM(2024) 139 final, *supra*.

⁸ Commission non-paper, *Reducing the administrative burden for farmers: next steps*, p. 2.

⁹ ESABCC, *Towards EU Climate neutrality: progress, policy gaps and opportunities*, 18 January 2024.

¹⁰ EEA, *European Climate Risk Assessment*, 11 March 2024.

objectives, or identify the lack of such consistency and, in that case, give the reasons thereof as part of the assessment. In the absence of an impact assessment and “consistency assessment” within the meaning of the Climate Law, it is not possible for the Legal Service to give any further details on the matter.” (p. 5)

Yet, Article 6(4) of the European Climate Law explicitly provides for several legally-binding obligations for the Commission:

1. To assess the consistency of **any** draft measure of legislative proposal with the climate-neutrality objective and the Union 2030 (and 2040) targets, as well as with ensuring process on adaptation of the act;
2. To endeavour to align any draft measures and legislative proposals with the climate objectives of the European Climate Law;
3. To provide reasons, in case of the non-alignment of the legislative proposal with such objectives,
4. To make the result of the climate consistency assessment publicly available at the time of presenting the legislative proposal. This can be done either in the impact assessment, in the legislative proposal or separately.

In the case in point, **the Commission infringed every single essential procedural requirements stemming from Article 6(4) of the European Climate Law**, as there is no evidence that a climate consistency assessment was undertaken and published.

It is startling that the EP Legal Service relied on the absence of an impact assessment and of climate consistency to refuse pronouncing itself on the illegality of the approach taken by the Commission: blatantly, the very absence of such assessments constitutes the breach of EU law.

We also note that, **even in the absence of an impact assessment (be it lawful or not), the Commission is bound by the essential procedural requirements of Article 6(4) European Climate Law: nothing in that provision indicates that these obligations would be a precondition to the preparation of an impact assessment. As stated above, impact assessments can be dispensed with under certain limited circumstances but no such exception is included in Art. 6(4) of the Climate Law.** Instead it applies to **any** draft measure.

Finally, whereas all sectors of the economy must be mobilised to reach the 2050 and 2030 climate, there is well-established evidence that the targets will not be achieved without the adequate contribution of the agriculture sector (see above). It follows that, not only the Commission failed to the procedural requirements of the EU Climate Law, but its legislative proposal also departs from the best available evidence. **The co-legislators must therefore ensure that the Commission provides both the climate consistency assessment and the relevant evidence in support of the presented amendments, before those are voted into law.**

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