

LEGAL FRAMEWORK APPLICABLE TO PUBLICATION OF DIRECT FARM SUBSIDIES IN FRANCE

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- Whereas for a long time Member States had full freedom to make farm subsidies data available, European law now aims at imposing more precise obligations.
- The disclosure of data is not clearly settled by French law.
- The doctrine of the French Committee of Access to Administrative Documents (CADA) is hardly convincing.
- Both for legal and political reasons, nominative and exhaustive divulcation of farm subsidies data seems inescapable.

Introduction

For the 2007-2013 period, European Union's budget holds that European farmers should be allocated about 293 billion euros in market expenditure and direct payments. For the sole year 2005, more than 12 billion euros in European and French subsidies have been paid to French farmers. As we can see, neither the European Union (EU), nor the French State skimp on the means dedicated to farming.

In theory, the rule of law should impose that such a sizeable financial outlay had as a consequence a minimum of transparency in the allocation of subsidies. Yet, in fact, in France, as in many other EU Member States, it is just the opposite: allocation of subsidies remains obscure. We should point out that neither the applicable law, nor the CADA's opinions set clear rules in this matter.

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The applicable law.

European law.

In accordance with article 274 of the Treaty establishing the European Community (TEC), the European Commission shall implement the European budget passed by the Council and the Parliament. However, contrary to what article 274 could mean at first sight, the European Commission is far from being in full possession of European funds.

Indeed, there are two modes to implement the European budget: either the Commission manages itself directly European funds, or the Commission shares the management of these funds with Member States, which is called, in EU law jargon, "shared management".

When European funds come under direct management, EU law provides that the Commission has full freedom to disclose or not information on the management of these funds. In this matter, the Commission has opted for transparency and has chosen to disclose its information².

On the other hand, when European funds come under shared management, which is the most frequent case³, EU law used to give the Member States full freedom to disclose or not information on the management of these funds, and used to forbid expressly the Commission to disclose any information without the consent of the Member States concerned. Publication was therefore a sovereign decision made by Member States. As a result, situations were very heterogeneous.

European farm subsidies, which just come under shared management, are a caricatured illustration of this heterogeneousness. Indeed, because no common legal framework is effective, Member States publish their information on European subsidies in almost total anarchy.

Thus, some Member States apply full transparency. Denmark was a pioneer in this field and has officially published the names of beneficiaries and the amounts of European subsidies allocated during the 2000-2005 period⁴. Latvia, the Netherlands, Slovenia, Slovakia and Sweden have published similar information for variable periods. Conversely, Austria, Germany, Greece, Ireland and Poland show noteworthy unwillingness and ostracism. As for the other States, they are not really hasty to move towards transparency. France clearly belongs to this last category: thus, it is only in March 2006 that the French government resigned itself to communicate a meagre list showing the top 10 beneficiaries of crop and livestock subsidies for the 2004 year (*infra*).

The lack of European rules about publication of agricultural data leads to heterogeneous situations, which is not satisfactory as regards transparency and legitimacy principles. Hence the will of the Commission to pass a new legal framework compelling Member States to disclose subsidies coming under shared management⁵.

Now, and this is a considerable change, the Commission's efforts have just succeeded. Indeed, in December 2006, at the suggestion of the Commission, the Council deeply amended the rules applicable to disclosure of European funds management data: henceforth, Member States are legally compelled to ensure

² European Commission, European Transparency Initiative, Green Paper, 3 may 2006, COM (2006) 194.

³ About 75% of the EU budget come under shared management.

⁴ www.farmsubsidy.org.

⁵ European Commission, Green Paper, *op. cit.*, p.14.

« *adequate annual ex post publication of beneficiaries of funds deriving from the [European] budget* »⁶.

As regards subsidies paid by the European Agricultural Guarantee Fund (EAGF), the European Commission will be compelled to disclose data only as of 2009. Indeed, if the amended financial regulation provides that the Commission shall make available « *information on the beneficiaries of funds as provided by [Member States to which] budget implementation tasks are delegated under [shared management]* »⁷, this obligation shall be effective, as regards subsidies paid by the EAGF, only for « *the payments charged to the 2008 budget* »⁸.

This obligation to disclose data being settled, its precise modes of enforcement have to be defined. To this end, the Commission has recently submitted to the Council a draft regulation regarding specifically farm subsidies. This draft provides that, on the one hand, the names of the beneficiaries and the amounts received by each beneficiary shall be disclosed, and that, on the other hand, the Member States obligation to disclose shall apply « *to EAFRD expenditure incurred from 16 October 2007 and to EAGF expenditure from 1 January 2007* »⁹.

French law.

In French law, no constitutional, legislative or regulatory provision **explicitly** rules the disclosure of farm data. On the other hand, several provisions could **indirectly** rule this matter, either to impose disclosure, or to forbid it.

Thus, two articles of the 1789 Declaration of Human and Civic Rights, which is a constitutional rule, could impose to French administration to disclose farm data. Indeed, article 14 of the Declaration provides that « *all the citizens have the right to ascertain by themselves, or through their representatives, the need for a public tax, to consent to it freely, **to watch over its use**, and to determine its proportion, basis, collection and duration* ». As for article 15, it provides that « *society has the right to ask a public official for a public accounting of his administration* ».

Next, the law n°78-753 of 17 July 1978 on different measures improving relations between administration and citizens gives everyone the right to access to administrative documents. In concrete terms, this right implies that any administration is legally compelled to communicate administrative documents in its possession to any person requesting for them (article 2 of the law of 17 July 1978), although there exist a few conditions and exclusions. If an administration denies, the petitioner may submit the case to the *Commission d'accès aux documents administratifs* (CADA), an independent administrative authority in charge of ensuring the implementation of the right of access to administrative documents. The CADA gives opinions on the communicable character of litigious documents¹⁰.

Lastly, article 10 of the law n°2000-321 of 12 April 2000 on the rights of citizens in their relations with administrations specifies that any administration paying subsidies to « *private bodies* » shall communicate to any requesting person the budgets and accounts of these bodies, the subsidy agreement, and the subsidy financial report.

Conversely, other rules could forbid the disclosure of farm subsidies data. It could be the case, of course, of trade secret: would not the divulgation of the amount of subsidies received by this farm give information on sales figures or commercial

⁶ New article 53 ter, d) of the Council Regulation n°1605/2002 of 25 June 2002 on the financial regulation applicable to the general budget of the European Communities, amended by the Council Regulation n°1995/2006 of 13 December 2006.

⁷ New article 30, §3 of the above-mentioned Council Regulation n°1605/2002.

⁸ New article 181, §4 of the above-mentioned Council Regulation n°1605/2002.

⁹ COM (2007) 122 final, 20 March 2007.

¹⁰ When the CADA gives a opinion favourable to communication, the administration concerned hardly ever refuses to follow this opinion, although it is not legally binded by the opinions given by the CADA. When the CADA gives an unfavourable opinion, the petitioner may bring the concerned administration before an administrative court in order to have the litigious document communicated.

policy to this competitor? But the right to private life could also forbid disclosure: indeed, farm data could be treated as personal data¹¹, which disclosure in principle is forbidden by the law n°78-17 of 6 January 1978 on data processing, files, and liberties.

Thus, the issue is to determine how these *a priori* conflicting rules can be linked together. Several opinions given by the CADA have brought about the beginnings of an answer.

Opinions given by the CADA.

After several procedures launched by GEM and the French magazine "Capital", it is now clear that coherence is not the strong point of the CADA's doctrine on farm subsidies disclosure.

The availability of global amounts of direct subsidies per farm.

First of all, GEM requested to the 30 main *Directions départementales de l'Agriculture et de la Forêt* (DDAF) the communication of the amounts of European and French farm subsidies received by each farm in each *département* for the latest available year. After having received the first 8 negative replies with very similar argumentation, GEM launched a procedure to CADA.

In 8 opinions given on 1 December 2005, the CADA settled two tricky points raised by the GEM's request: on the one hand, could the amounts of European and French farm subsidies paid to each farm in the eight previous *départements* for the latest available year have been made available? On the other hand, could the "historical references" communicated by the DDAF to each farm in order to implement the Single Farm Payments (SFP) have been made available?

The meaning of these two questions must be clarified. The first one aimed at knowing the global amount of subsidies paid to each farm in eight *départements* for the latest year, in the case in point the year 2005. The second one aimed at computing the total of decoupled subsidies received by each farm for the year 2006. Indeed, the amount of SFP in force since 2006, after the 2003 reform of the CAP, is computed on the basis of historical references, which correspond to the amount of subsidies received by each farm during the 2000, 2001 and 2002 period, called period of reference. As we can see, the two points raised before the CADA had a similar goal: to obtain the communication of the **total** of subsidies allocated to each farm in the 8 *départements* for the year 2005 (coupled subsidies) and the year 2006 (decoupled subsidies¹²).

However, these two points have led to different answers. Indeed, the CADA has considered that the addition per farm of subsidies received the latest year was a non communicable data, on the ground that, according to French administration, such lists of beneficiaries did not exist and that creation of these lists required more than a common data processing. On the other hand, the CADA has considered that the addition of subsidies received in the years 2000, 2001 and 2002 was a communicable data. This rather incoherent situation deserves two remarks.

¹¹ Article 2 of the law of 6 January 1978 specifies a personal data as « any information regarding a natural person, who is identified or can be identified directly or indirectly, in reference to an identification number or to one or several elements of its own ».

¹² Unlike other Member States, France applies partial decoupling.

First, it must be noted that neither trade secret, nor the right to private life have been considered by the CADA as justifying a refusal to communicate data. Indeed, the CADA did not refer to these two grounds for justifying the refusal to communicate data for the latest available year; as for historical references, we know they have been considered as fully communicable. Thus, the CADA has implicitly dismissed the grounds of the French administration, which just used to refer to trade secret and the right to private life...

Secondly, this incoherent situation must not be imputed to the CADA but rather to the Ministry of Agriculture. Indeed, from a strict legal point of view, the CADA's stance is hardly disputable: since no administrative document totalled subsidies for the latest available year and since creation of such a document came up against serious technical difficulties, the CADA had to conclude, according to its constant doctrine, that this document could not be made available.

It is rather advisable to question about the French administration's selective zeal. Indeed, the latter argued that the technical difficulties were due to the fact that several agencies were in charge of paying subsidies allocated to different produce; hence a difficulty in totaling, per farm, the amounts of different subsidies for each category of produce. In fact, this argument is hardly acceptable. Indeed, how to explain that what is technically possible for the years 2000, 2001 and 2002 is impossible for the years 2004 and 2005? This argument is all the less convincing that a single body called *Agence unique de paiement* is henceforth in charge of paying the direct subsidies from the CAP...

It is all the more tempting to conclude that this selective zeal reveals the French government lack of political will that other arguments put forward by some DDAF were completely groundless: these latter referred to technical difficulties due to the fact that historical references were managed by an external provider, which is an argument the CADA had to dismiss, since its constant doctrine asserts that this kind of difficulty is non-invocable to petitioners.

The availability of the names of the beneficiaries of direct subsidies.

After these eight opinions, the issue of disclosing the names of the beneficiaries still remains unsolved, since the petitioner restricted itself to request the communication of the sole global amounts per farm.

In an opinion given on 19 January 2006, the CADA has revealed some interesting points to this issue. In the case in point, the petitioner, who was the magazine "Capital", had requested to the Ministry of Agriculture the communication of the nominative list of the top 100 beneficiaries of the European subsidies for the latest available accounting period. The Ministry of Agriculture had given incomplete satisfaction to the petitioner, since it had communicated an **anonymous** list of the top 35 beneficiaries of **crop** subsidies and a second **anonymous** list of the top 10 beneficiaries of **livestock** subsidies.

The petitioner thus launched a procedure to CADA in order to obtain the missing data. According to its eight previous opinions, the CADA had to note the lack of a list of the top 100 beneficiaries of European subsidies for the latest available year and had to reply negatively to the request. However, since it had noted the presence of two lists of the top beneficiaries of crop and livestock subsidies, the CADA had to settle the issue of disclosure of the **names** of beneficiaries.

The CADA made a distinction between public subsidies paid because of a natural person's situation and public subsidies paid because of the business concerned. According to the CADA, the names of the beneficiaries of the former must not be made available, because they are within the scope of the right to private life;

conversely, the names of the beneficiaries of the latter may be made available, without neither right to private life, nor trade secret should be invocable to petitioner.

Logically, the CADA considered that European farm subsidies were paid because of the business concerned and inferred from this that the names of the 45 beneficiaries concerned may be made available.

Once again, this stance deserves two remarks. First, it is clear that since this opinion was given the names of the beneficiaries of farm subsidies may be made available. Secondly, for lack of lists of beneficiaries of **all subsidies**, we know that French administration has lists of beneficiaries for each **category of subsidies**. It seemed that a step towards further transparency had been made...

The availability of amounts per disbursement agencies.

Having noted the presence, within the French administration, of a list of the top 35 beneficiaries of crop subsidies and a list of the top 10 beneficiaries of livestock subsidies, GEM tried to obtain from seven French disbursement agencies the communication of exhaustive and nominative lists of beneficiaries of direct subsidies **for each disbursement agency**, once again for the latest available year. In four opinions given on 15 June 2006, the CADA has considered that these documents could not be made available, on the ground that the requested lists did not exist and required more than a common data processing. To say the least, this decision is hardly convincing, at least for two reasons.

Firstly, the assertion that there are no exhaustive lists of beneficiaries of direct subsidies for each category of subsidies is surprising: does it not mean that the seven disbursement agencies (about to be gathered in a single body) are unable to tell to whom they pay the direct subsidies manna? (*sic*).

Secondly, it seems that in their argumentation before the CADA, disbursement agencies have implicitly admitted the presence of these lists. Indeed, they specified that the requested documents required more than a common data processing, on the ground that there were about 400 000 (ONIC, ONIOL, FIRS), 240 000 (OFIVAL, ONILAIT) and 60 000 (ONIFLHOR, ONIVINS) beneficiaries. This argumentation gives rise to confusion: once they had specified the number of beneficiaries, did not these agencies implicitly admit the presence of these famous lists of beneficiaries?

The availability of the names of the beneficiaries of export subsidies.

Firstly, GEM requested the communication of exhaustive and nominative lists of beneficiaries of all subsidies including export subsidies to the same seven disbursement agencies. In the four previous opinions given on 15 June 2006, the CADA has considered that these documents could not be made available, on the ground that the requested lists did not exist and required more than a common data processing.

This stance is downright difficult to understand. Indeed, it must be specified that since November 2005, GEM was in possession of an exhaustive but anonymous list of beneficiaries of export subsidies paid for the year 2004 by ONILAIT (now merged into the *Office de l'élevage*). The French administration's argumentation, admitted by the CADA, that lists of beneficiaries of export subsidies would not exist and would be technically difficult to compiled was thus biting denied...

A last point had to be clarified: could the names of the beneficiaries of export subsidies be made available? To this end, GEM, which was in possession of an

exhaustive but anonymous list of beneficiaries of export subsidies for dairy products, has launched a new procedure to CADA in order to obtain the disclosing of the name of the beneficiaries.

The CADA considered that such data must not be made available, on the ground that their disclosure would infringe trade secret. Indeed, the CADA considered that the disclosure of the amount of export subsidies gave information about the beneficiary's sales figures, export policy and commercial policy to competitors.

Judicious though it may *a priori* seem, this argumentation is hardly convincing. Indeed, beneficiaries' sales figures and their export policy appear on documents published by these companies, in particular in their business reports. Moreover, in the case in point, neither the subsidized produce, nor the concerned markets were required. Lastly, other Member States have published such data, without penalizing their farmers in the European and world competition...

Towards an exhaustive publication of data...

Let's sum up. The CADA's doctrine has revealed an interesting point: the names of beneficiaries of direct subsidies may be made available, without neither right to private life, nor trade secret should be invocable to petitioner, contrary to what French administration used to assert.

Conversely, this same doctrine provides strange contradictions: there would not be, within French administration, a list of the global amounts of direct subsidies per farm for the latest year, whereas such a list exists for the years 2000, 2001 and 2002... ; there would not be a list of beneficiaries for each category of subsidies, even though an anonymous list of main beneficiaries of crop subsidies and an anonymous list of the main beneficiaries of livestock subsidies had been provided by French government... ; there would not neither be lists of beneficiaries of export subsidies, even though an exhaustive and anonymous list of beneficiaries of export subsidies paid by ONILAIT in 2004 had been communicated to GEM by French administration ; lastly, the names of beneficiaries of export subsidies would be within the scope of trade secret, whereas other Member States have already published these data...

As we can see, coherence is not the strong point of CADA's doctrine, which deserves two remarks. Firstly, one cannot help but think that this procrastination betrays the French government's obvious embarrassment and carelessness. Secondly, the issue of disclosing farm data could be amounted to the following question: how long will the French government be able to refuse what it is legally and politically compelled to do? Indeed, transparency gains new followers every day: farmers, who are the first concerned, are progressively converted to the virtues of transparency¹³ ; taxpayers detect a far from brilliant management of public coffers; political leaders realize that without transparency, CAP legitimacy will be more and more disputed ; economists wonder how to appraise seriously the efficiency and the impact of this financial manna without a minimum of transparency ; lawyers wish for the development of a precise legal framework ruling the publication of farm data ; some Member States have set an example of transparency; the European Commission's efforts have at least succeeded. In these conditions, it must be assumed that, as regards the disclosure of farm data,

¹³ The FNSEA and the *Confédération paysanne* both agree on this point. Thus, the former seems to have calculated that only more transparency will spare it a drastic PAC reform when the European Union budget is reviewed in 2009 ; the latter declaims against an opacity which favours the preservation of the farm subsidies distribution to the detriment of more « social equity » for farmers.

giving up practices falling within the province of a banana republic rather than the rule of law is inescapable.