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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

on *force majeure* and exceptional circumstances in Regulation (EU) 2021/2116 of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy

1. INTRODUCTION

The purpose of this Communication is to provide clarity regarding the use of the concept of *force majeure* and exceptional circumstances in Regulation (EU) 2021/2116 of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy ⁽¹⁾.

This Communication builds upon the principles outlined in Commission notice C(88) 1696 concerning '*force majeure* in European agricultural law' ⁽²⁾, taking into account pertinent developments since its publication.

Specifically, this Communication provides clarifications on Article 3(2) of Regulation (EU) 2021/2116 which allows for the application of *force majeure* and exceptional circumstances on an area basis instead of on the basis of a case-by-case assessment.

This Communication is intended to assist national administrations in effectively implementing the said provision, thereby ensuring its uniform application across the Union and providing certainty for farmers as regards their CAP support.

2. FORCE MAJEURE AS A GENERAL PRINCIPLE OF UNION LAW

2.1. What is *force majeure*?

The concept of *force majeure* ⁽³⁾ in Union law shares similar principles, conditions and requirements with the corresponding concept in the national laws of Member States, but it has an independent character in Union law ⁽⁴⁾. While the concept of *force majeure* was originally considered a concretisation of the principle of proportionality used to facilitate sound administration, the case law has gradually acknowledged that *force majeure* is a general principle of Union law ⁽⁵⁾.

The case law of the Court of Justice defines the notion of *force majeure* as follows: “*It is apparent from settled case-law, established in various spheres of EU law, that the concept of force majeure must be understood as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the*

⁽¹⁾ 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, 6.12.2021, p. 187).

⁽²⁾ C(88) 1696, OJ [1988] C 259/10.

⁽³⁾ References in the Communication to *force majeure* are to be understood as references to *force majeure* and exceptional circumstances. The consequences of *force majeure* and exceptional circumstances are the same, and therefore it is not necessary to distinguish them.

⁽⁴⁾ Case C-314/06 *Pipeline Méditerranée et Rhône*, EU:C:2007:817, paragraph 22.

⁽⁵⁾ Case T-251/04 *Greece v Commission*, EU:T:2006:165, paragraph 46; Case T-220/04 *Spain v Commission*, EU:T:2007:97, paragraphs 164-165; Case T-352/05 *Greece v Commission*, EU:T:2011:540, paragraph 199; Case C-509/11 *ÖBB-Personenverkehr*, EU:C:2013:613, paragraphs 49-51; Case C-203/12 *Billerud Karlsborg et Billerud Skärblacka*, :EU:C:2013:664, paragraph 31; Case T-614/13 *Romonta v Commission*, EU:T:2014:835, paragraph 48; Case T-629/13 *Molda v Commission*, EU:T:2014:834, paragraph 46; Case T-631/13 *Raffinerie Heide v Commission*, EU:T:2014:830, paragraph 45; Case C-113/19 *Luxaviation*, EU:C:2020:228, paragraph 55.

consequences of which could not have been avoided in spite of the exercise of all due care”.⁽⁶⁾

Force majeure may excuse an operator from certain legal consequences which, under the applicable rules, would normally flow from non-compliance with an obligation.

2.2. *Elements of force majeure*

The notion of *force majeure* contains two elements: (i) an objective element relating to abnormal circumstances unconnected with the operator in question and beyond its control; and (ii) a subjective element involving the obligation to guard against the consequences of the abnormal event by taking all appropriate steps without making unreasonable sacrifices⁽⁷⁾.

Regarding the objective element, abnormal circumstances are those that are unpredictable or, at the very least, of such a degree of improbability that a normal, diligent operator would consider such a risk of it to be negligible. For instance, theft, fluctuations in market trends and fraudulent or negligent acts of co-contractants and third parties do not constitute abnormal circumstances⁽⁸⁾.

Regarding the subjective element, it involves the obligation of an operator to protect against the consequences of an abnormal event by taking all the appropriate measures, with the exception of those involving excessive sacrifices. In particular, operators must carefully survey the development of their operations and react quickly when they notice any anomalies⁽⁹⁾. Sufficient diligence requires continuous action aimed at identifying and assessing potential risks and the ability to take appropriate and effective steps in order to avoid them⁽¹⁰⁾.

3. **FORCE MAJEURE AND EXCEPTIONAL CIRCUMSTANCES IN REGULATION (EU) 2021/2116**

The concept of *force majeure* does not have the same scope in the various spheres of application of Union law; rather, its meaning must be determined by reference to the legal context in which it is to operate⁽¹¹⁾. The concept of *force majeure* adopted by the agricultural regulations takes into account the particular nature of the public-law relationships between operators and the national administration, as well as the objectives of those regulations⁽¹²⁾.

⁽⁶⁾ Case C-640/15, *Vilkas*, EU:C:2017:39, paragraph 53.

⁽⁷⁾ Case C-660/17 P *RF v Commission*, EU:C:2019:509, paragraph 37.

⁽⁸⁾ Case 296/86 *McNicholl*, EU:C:1988:125, paragraphs 11-15; Case C-334/13 *Nordex Food*, EU:C:2014:2294, paragraph 57; Joined Cases T-61/00 and T-62/00 *APOL and AIPO v Commission*, EU:T:2003:60, paragraphs 74-75, 77 and 79-81.

⁽⁹⁾ Case C-660/17 P *RF v Commission*, EU:C:2019:509, paragraph 38.

⁽¹⁰⁾ Case C-602/15 P *Monster Energy v EUIPO*, EU:C:2016:331, paragraph 35.

⁽¹¹⁾ Case C-640/15, *Vilkas*, EU:C:2017:39, paragraph 30.

⁽¹²⁾ Case C-208/01 *Parras Medina*, EU:C:2002:593, paragraph 18.

Force majeure, as a general principle of Union law, may be pleaded even in the absence of express provisions providing for such a possibility in the applicable Union legislation, albeit provided this would not be in conflict with the essential objectives of that legislation. Certain provisions of Union agricultural law make reference to possible cases of *force majeure* and exceptional circumstances to be recognised by the national competent authorities (e.g., Article 3 of Regulation (EU) 2021/2116), others contain explicit exemptions in cases of *force majeure* and exceptional circumstances (e.g., Article 59 and 84 of Regulation (EU) 2021/2116).

3.1. Non-exhaustive list of cases

Article 3 of Regulation (EU) 2021/2116 lays down a non-exhaustive list of situations which can be considered by national authorities as circumstances of *force majeure* or exceptional circumstances.

The list in Article 3(1) of Regulation (EU) 2021/2116 is not exhaustive. The examples given provide a valuable reference to other situations which may be considered to qualify as *force majeure* or exceptional circumstances. It should be noted that the list of examples refers to unforeseeable events of an objective and non-economic nature and, moreover, that occur at the level of the individual holding (and only exceptionally, in the cases of paragraph 2, at the level of a whole area).

3.2. Application of force majeure

3.2.1. General

The application of the *force majeure* provision is the responsibility of Member States. Member States should take the decision to apply *force majeure* in the light of the relevant circumstances, based on relevant evidence and in the light of Union agricultural law, including the case law of the Court of Justice. *Force majeure* is an exception to the general rule of strict respect of obligations. Therefore, it is to be interpreted and applied in a restrictive manner. It is normally to be applied on a case-by-case basis.

Recital 6 of Regulation (EU) 2021/2116 refers to the need for national competent authorities to take decisions on *force majeure* or exceptional circumstances on a case-by-case basis, on the basis of relevant evidence. In the absence of specific requirements in Union law on the procedure, the evidence to be presented and the time limits⁽¹³⁾, it is for the Member States to decide on these parameters, provided that the procedural rules they adopt for this purpose are not less favourable than those governing similar domestic situations (principle of equivalence)⁽¹⁴⁾ and, second, that they do not render in practice

⁽¹³⁾ In contrast to Article 4 of Commission Delegated Regulation (EU) No 640/2014 that laid down certain general rules on the procedure and time limits for the application of *force majeure*, Commission Delegated Regulation 2022/127 and Commission Implementing Regulation (EU) 2022/128 do not lay down any general rules on *force majeure*.

Article 23 of Delegated Regulation (EU) 2022/127 and Article 51 of Implementing Regulation (EU) 2022/128 lay down rules on the application of *force majeure* for securities, which are not concerned by the content of this Communication.

⁽¹⁴⁾ Case C-33/76, *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, paragraph 5.

impossible or excessively difficult the exercise of the rights conferred on farmers by Union law (principle of effectiveness) ⁽¹⁵⁾.

3.2.2. Article 3(2) of Regulation (EU) 2021/2116

While Member States would apply *force majeure* normally on a case-by-case basis and upon request of the concerned farmer, the co-legislator has provided in Article 3(2) of Regulation (EU) 2021/2116 that in the case of severe natural disasters or severe meteorological events that gravely affect a well-determined area, the Member State concerned may consider that whole area to be gravely affected by that disaster or event.

Member States making use of this possibility may decide that, where it is clear that the farmers in the area are affected by an abnormal event whose consequences could not be prevented with all due care, those farmers are covered by *force majeure*, without a need for individual requests or verification that the conditions for *force majeure* are individually fulfilled. Member States need, however, to determine the area at stake and the population affected by the event in the area in a manner that reasonably allows the presumption that the conditions of *force majeure* are individually met by the farmers concerned.

To this end, Member States must first confirm the occurrence of a severe natural disaster or a severe meteorological event and delimit the geographical area that has been gravely affected by the event. For this delimitation, Member States could rely, for instance, on satellite data or data of equivalent value of the area concerned, without the need for satellite data at the level of the individual holdings.

Certain severe natural disasters or severe meteorological events, such as flooding, may uniformly affect farmers in a delimited area and therefore it could be not necessary for Member States to take into account other considerations to presume that all the farmers in the delimited area are covered by *force majeure*. However, other types of disasters or events may require considering additional factors, such as the slope gradient, soil type, or type of crops grown, to define the population affected by it without the need for individual verification. This could be the case, for instance, for frost which may not affect all crops in the same manner, or continuous rainfall, that may have different effects on areas with a slope or soils with different water retention capacities.

Furthermore, it is important to note that such events may not uniformly affect the different farming practices and/or obligations that farmers have to comply with in order to receive CAP payments. Certain obligations may still be viable within the affected area and population considered to be covered by *force majeure* by the Member State.

Finally, in line with the concept of *force majeure*, in the determination of the population affected, Member States should also consider the subjective element of *force majeure*, that is, whether farmers affected by the severe natural disaster or severe meteorological event could have reasonably taken effective measures to avoid the situation of non-compliance caused by the event, excluding those involving excessive sacrifices. However, it is important to recognise that in most instances of severe natural disasters or severe meteorological events, farmers are unlikely to have had the possibility to take such effective measures. Therefore, only in situations where it would have been feasible

⁽¹⁵⁾ Case C-8/81, *Becker v Finanzamt München II*, ECLI:EU:C:1982:7, paragraph 23.

for farmers, without unreasonable sacrifices, to mitigate the consequences of the event should they be excluded from *force majeure*.

The streamlined option under Article 3(2) of Regulation (EU) 2021/2116 therefore reduces the administrative burden for farmers and national authorities by eliminating the need for a case-by-case assessment or individual requests, thus facilitating a swift response by Member States.

This approach enables Member States to *presume* that the conditions of *force majeure* are individually met by the farmers in the determined population in the delimited area, thereby exempting the authorities from the need for a case-by-case assessment. Nonetheless, this approach should not be misconstrued as implying that farmers who have not been prevented from respecting their obligations by the event can abusively rely on the *force majeure* exception to be exempted from penalties or to be eligible for aid.

3.2.3. *Legal effect of the application of force majeure*

As explained above, *force majeure* may excuse an operator from certain legal consequences that would result from non-compliance with an obligation. It is important to note that *force majeure* can only apply to non-compliance with obligation(s) or a part thereof due to the event, and only during the timeframe where the event (or its consequences) prevents from compliance with the said obligation.

In particular, in accordance with Articles 59 and 84 of Regulation (EU) 2021/2116, no penalties are to be imposed and the beneficiary is to retain the right to receive aid where the non-compliance is due to *force majeure* or exceptional circumstances in accordance with Article 3 of the same Regulation.

However, *force majeure* may not be used to authorise operators not to comply with obligations for a determined period of time. This is to say, Member States may not, on the basis of the principle of *force majeure* as such, authorise derogations from obligations laid down in Regulation (EU) 2021/2115 of the European Parliament and of the Council⁽¹⁶⁾, nor provide that no penalties would apply for future non-compliances with obligations laid down in that Regulation. Likewise, *force majeure* may also not be used to provide adjustments to obligations and commitments laid down in the respective CAP Strategic Plan as approved, for example as regards the requirements linked to environmental protection and climate change.

4. CONCLUSION

The foregoing considerations can be summarised as follows:

- The concept of *force majeure* refers to abnormal circumstances, outside the control of an operator, the consequences of which could not have been avoided in spite of the exercise of all due care.

⁽¹⁶⁾ 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 (OJ L 435, 6.12.2021, p. 1).

- *Force majeure* excuses an operator from certain legal consequences which, under the applicable rules, would normally result from non-compliance with an obligation.
- The application of *force majeure* is a Member State's decision. The decision should be taken by the competent authorities, based on relevant evidence and applying the concept of *force majeure* in the light of Union agricultural law, including the case law of the Court of Justice. *Force majeure*, as an exception, must be interpreted and applied restrictively.
- The decision on whether a situation is recognised as a case of *force majeure* is normally to be taken on a case-by-case basis. However, in the case of severe natural disasters or severe meteorological events affecting an area, Member States may presume that the farmers in that area are covered by the concept of *force majeure* provided that the determination of the area, the determination of the population of farmers therein and, where relevant, the determination of the affected obligations, are undertaken in such a way as to permit the conclusion that the conditions of *force majeure* are individually met by the farmers concerned.

This Communication contains a Commission's interpretation aimed at assisting Member States in the application of Union law. Under the Treaty on the Functioning of the European Union, it is only for the European Court of Justice to provide a definitive interpretation of the applicable Union law.