

AGRICULTURAL CRISES – SELECTED LEGAL ASPECTS OF DROUGHT

KRÍZA V POĽNOHOSPODÁRSTVE – VYBRANÉ PRÁVNE ASPEKTY SUCHA

Izabela LIPÍŃSKA

I. Introduction

Agricultural activity, which is identified with a particular type of economic activity, is subject to the impact of many peculiar factors. These are largely alien to classic profit-oriented economic activities. Both plant and animal production take place outdoors, which means that they cannot be protected from weather or climatic instabilities. These affect its efficiency and profitability. The specific nature of agricultural activity means that the scale of risk in agriculture is much greater than in other sectors of the economy. Thus, the livelihood of agricultural producers is less predictable and secure. There is a risk

of not achieving the planned income, or not achieving any income, or incurring losses.

The subject of the article is the problem of the occurrence of crisis situations in agriculture, which cause that agricultural producers are not able to cope on their own with worsening production conditions and, as a result, living conditions. In particular, this concerns the increasingly frequent phenomenon of drought, both locally, regionally and globally. It is largely regarded as the result of progressive climate change due to human degradation of the environment⁽¹⁾.

1 European Environment Agency (2017).

Abstract (EN)

The specific nature of agriculture, and in particular its natural conditions, imply the occurrence of specific risks leading increasingly to crisis situations. These result in agricultural producers being unable to cope on their own with worsening production and consequently living conditions, and in extreme cases abandoning agricultural activity. A recurrent negative phenomenon in recent years that causes many losses is drought. Its occurrence is a certain challenge for the legislator, who, by means of specific legal norms, at least to a limited extent, can shape the existence of agricultural producers and protect them from abandoning agricultural activity. The aim of this article is to assess the legal norms adopted at EU and national level which affect agricultural producers in the context of the occurrence of drought. Furthermore, it aims to answer the question of whether and to what extent the legislator protects their livelihoods. The approach of the national and EU legislator with regard to the forms of support provided should be assessed positively. The national legislator, on the basis of the dispositions contained in the EU law, supports agricultural producers in the face of the occurrence of crisis situations, however, it should take into account the necessity of adopting additional, special solutions in this respect strengthening the livelihood of producers.

Keywords (EN)

crisis, crisis situation, drought, natural risks, state aid

Abstrakt (SK)

Špecifický charakter poľnohospodárstva a najmä previazanosť s prírodnými podmienkami predstavujú výskyt špecifických rizík, ktoré čoraz častejšie vedú ku krízovým situáciám. Následkom je, že poľnohospodárski výrobcovia sa nedokážu sami vyrovnávať so zhoršujúcimi sa výrobnými a následne životnými podmienkami a v extrémnych prípadoch zanechávajú poľnohospodársku činnosť. Opakujúcim sa negatívnym javom posledných rokov, ktorý spôsobuje mnohé straty, je sucho. Jeho výskyt je určitou výzvou pre zákonodarcu, ktorý môže prostredníctvom konkrétnych právnych noriem aspoň v obmedzenej miere formovať existenciu poľnohospodárskych výrobcov a chrániť ich pred zanechaním poľnohospodárskej činnosti. Cieľom tohto článku je zhodnotiť právne normy prijaté na úrovni EÚ a na národnej úrovni, ktoré sa dotýkajú poľnohospodárskych výrobcov v súvislosti s výskytom sucha. Príspevok si tiež kladie za cieľ odpovedať na otázku, či a do akej miery zákonodarcu chráni ich živobytie. Prístup vnútroštátneho a európskeho zákonodarcu k formám poskytovanej podpory treba hodnotiť pozitívne. Vnútroštátny zákonodarcu na základe ustanovení obsiahnutých v práve EÚ podporuje poľnohospodárskych výrobcov pri vzniku krízových situácií, mal by však brať do úvahy potrebu prijatia dodatočných, osobitných riešení v tomto smere posilňujúcich živobytie výrobcov.

Kľúčové slová (SK)

kríza, krízová situácia, sucho, prírodné riziká, štátna pomoc

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The entire European Union is vulnerable to the effects of climate change, according to the EEA report. Many regions are experiencing large increases in maximum temperatures as well as decreases in precipitation totals and falling river levels, increasing the risk of droughts, reduced crop yields and consequent loss of biodiversity. In turn, the European Parliament, in its 2022 Resolution, estimates that the losses caused by this phenomenon could reach €9 billion per year and, according to an analysis by the Joint Research Centre, the impact of droughts on the European economy could exceed €65 billion per year by 2100⁽²⁾. Thus, there is no doubt that the occurrence of drought is of considerable importance in economic and social terms and, at the same time, is a certain challenge for the legislator, who, by means of certain legal norms, at least to a limited extent, can shape the existence of agricultural producers and protect them from abandoning their agricultural activities.

1 Objectives and Methods

The aim of this article is to assess the legal norms adopted at EU and national level that affect agricultural producers in the context of the occurrence of drought, as a negative climatic phenomenon, in the course of their agricultural activities. Furthermore, it aims to answer the question of whether and to what extent the legislator protects their existence.

The basic method used in the study is a dogmatic analysis of the legal text. It refers to the specific conditions occurring in agriculture, in which these regulations operate. Due to its nature, the article also uses a descriptive method, as well as foreign and Polish literature on the subject.

2 Risks in Agricultural Activities and Crisis Situations in the Context of Normative Acts

The causes of uncertainty in agricultural activity can be traced to emerging crises. A crisis can be understood as an event of a shock nature (disaster, catastrophe) that threatens the existence of an entity due to the extent of the damage to its production potential and the shaking of its long-term liquidity. It implies an unforeseeable situation that may have a negative

impact on the ability of agricultural holdings to cope with competition at local level or in the production sector as a whole.

EU legislation does not directly define the concept of an agricultural crisis. However, some formulation of it appeared in 2005 in the Commission staff working document on risk and crisis management in agriculture⁽³⁾. The Commission noted that, just as risk can be associated with a positive or negative outcome, a crisis is always assumed to have serious negative consequences. It is understood as an unforeseen situation that threatens the viability of farms, either at local level, in the production sector as a whole or at a wider geographical level. In agriculture, crisis can be caused by natural disasters (droughts, floods, excessive rain, frost, hail, storms, earthquakes), diseases and pests, contamination of the food chain (by, for example, dioxins), cyclical factors with a short-term but significant impact on farm income, and unforeseen disruptions in market access caused, for example, by the unexpected closure of important export markets. Such events can severely disrupt the functioning of the agricultural market, which in turn can result in economic difficulties for individual production units⁽⁴⁾.

A crisis is characterised by rapid change with negative consequences. However, a short-term crisis can also result in long-term structural problems. In the guidelines for State aid in the agricultural and forestry sector 2007–2013, the Commission distinguishes between the concept of ‘natural disaster’ and ‘exceptional occurrence’⁽⁵⁾. In the first case, it only mentions examples of situations that can be considered disasters, which include earthquakes, avalanches, landslides and floods⁽⁶⁾. Their official list has not yet been formulated. On the other hand, extraordinary events include: war, internal disturbances or strikes and, under certain conditions and depending on their extent, major nuclear or industrial accidents and fires causing widespread damage⁽⁷⁾.

In turn, the Treaty on the Functioning of the European Union in Article 107(2)(b) (ex Article

3 EC SEC (2005) 320.

4 Lipińska (2020).

5 Guidelines on State aid in the agriculture and forestry sector for 2007–2013, OJ C 319, 27.12.2006.

6 In turn, the European Union Solidarity Fund (EUSF), which was set up to respond to major disasters, was used following 63 different types of natural disaster, such as floods, forest fires, earthquakes, storms and droughts.

7 See point 12 a of the Commission Guidelines 2007–2013.

2 Joint Research Centre news (2021).

87 of the Treaty) provides that aid to remedy damage caused by natural disasters or other exceptional occurrences is compatible with the internal market. However, the interpretation of this provision indicates that events that could not have been foreseen or prevented and that have the character of force majeure are to be regarded as natural disasters⁽⁸⁾. However, due to the damage that the listed atmospheric phenomena can cause to agricultural production or agricultural inputs, they can be compared to natural disasters when the level of damage reaches a certain threshold.

Comparing the Commission's guidelines on State aid in the agricultural and forestry sectors and in rural areas from the three periods, i.e. 2007–2013, 2014–2020 and 2022–2027, it can be seen that the scope of the definitions in question is unitary⁽⁹⁾. In addition, the 2014–2020 applicable guidelines also include the concepts of an adverse climatic event comparable to a natural disaster and an environmental incident⁽¹⁰⁾. The first refers to adverse weather conditions such as frost, storm, hail, ice, heavy or prolonged rain or severe drought. The second term, on the other hand, defines an incident of pollution, contamination or environmental degradation related to a specific event and limited in geographical scope. However, this concept does not include general environmental hazards unrelated to the incident, such as climate change or atmospheric pollution. The effect of the two incidents in question must involve the destruction of more than 30% of the average annual production of the farmer concerned, calculated on the basis of production in the preceding three years or a three-year average calculated on the basis of the preceding five years, excluding the highest and lowest values. As such, they have been retained for the period 2022–2027⁽¹¹⁾.

As a result of ongoing analyses of the agricultural situation, the legal definitions in question were introduced into EU legislation for the implementation

of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005⁽¹²⁾. The legislator has defined in Article 2 para. 2(k) the concept of natural disaster. It considered a naturally occurring event of a biotic or abiotic nature that leads to a serious disruption of agricultural production systems or forestry structures, ultimately causing serious economic damage to the agricultural or forestry sectors, as a natural disaster. However, it also included as crisis situations an unforeseen event of a biotic or abiotic nature caused by human activity, i.e. disasters, insofar as they lead to serious disruptions of agricultural production systems or forestry structures, ultimately causing serious economic damage to both sectors. In both cases, the legislator has not specified at what level of production losses their 'serious' nature can be clearly indicated, which must be considered a certain shortcoming. It can therefore be assumed that they are relevant to agricultural production.

Commission Regulation No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union may be applicable when assessing the degree of damage that natural disasters entail⁽¹³⁾. The legislator has assumed that crisis situations are caused by natural disasters, by which it means earthquakes, avalanches, landslides and floods, tornadoes, hurricanes, volcanic eruptions and naturally occurring fires (Recital 35). The aid for risk and crisis management provided for in this regulation is used, inter alia, to compensate for losses caused by adverse climatic events comparable to natural disasters. It includes frost, storm and hail, ice, heavy or prolonged rain or severe drought, which destroy more than 30% of average production. The degree of damage is determined on the basis of the amount of production calculated on the basis of the previous three years or a three-year average based on the previous five years, excluding the highest and lowest values (Article 2(16) of Regulation 702/2014). The calculation of the level of income loss itself is based on the content of Article 25(6)

8 Kurcz (2012).

9 OJ C 204, 1.07.2014.

10 Cf. Art. 2 par. 1 h and j of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EU) nr 1698/2005, OJ UE L 347, 20.12.2013, p. 487.

11 Communication from the Commission. Guidelines for State aid in the agricultural and forestry sectors and in rural areas, 2022/C 485/01, OJ C 485, 21.12.2022.

12 OJ L 347, 20.12.2013, p. 487.

13 OJ L 193/1, 1.7.2014, pp. 1–75.

of Regulation 702/2014 and should in practice be done separately at the level of each crop⁽¹⁴⁾.

Under Polish law, the concept in question is defined in the Act on the State of Natural Disaster⁽¹⁵⁾. On the basis of Article 3 para. 1 of the Act, it is understood to mean a natural disaster or technical accident, the consequences of which endanger the life or health of a large number of people, property of great magnitude or the environment over large areas, and whose assistance and protection can only be effectively undertaken with extraordinary measures, in cooperation between various bodies and institutions and specialised services and formations acting under unified direction. This definition does not refer directly to agricultural production, but indicates its potential size. In turn, Article 3(1)(2) of the same Act defines a natural disaster as an event associated with natural forces, in particular lightning, seismic shocks, strong winds, intense precipitation, prolonged occurrence of extreme temperatures, landslides, fires, droughts, floods, ice phenomena on rivers and the sea as well as on lakes and reservoirs, mass occurrence of pests, plant or animal diseases or infectious human diseases or the action of another element.

The definition of a crisis situation is set out in the Act of 26 April 2007 on crisis management⁽¹⁶⁾. It should be understood as a situation adversely affecting the level of safety of people, property of significant size or the environment, causing significant limitations in the operation of the competent public administration bodies due to the inadequacy of the forces and resources at their disposal (art. 3 item 1 of the Act). Due to the competence nature of the Act, again it does not directly refer to the agricultural situation.

Instead, the concept of a natural disaster appeared on the occasion of the formulation of the rules for determining the amount of agricultural tax and relief under Article 13c of the Act of 15 November 1984 on agricultural tax⁽¹⁷⁾. The legislator refers to the occurrence of a natural disaster as an event that has caused significant damage to buildings, crops, livestock or dead stock or trees. It does not indicate the cause of the disaster, but refers only to its negative consequences in the form of loss of the farmer's property.

As practice shows, there is no uniform legal definition of an agricultural emergency. This is due to the fact that there is a very wide range of factors affecting it of a political, economic or social nature. It is worth adding that its recognition at the level of the Member State determines the granting of aid to an agricultural producer in relation to damage resulting from the occurrence of a negative event. This is done by the competent authority of the Member State, classifying the condition as a natural disaster or exceptional occurrence.

In essence, a crisis differs from a risk in terms of the legal and economic instruments used and the timing of their activation. The former is most often preventive (*ex ante*). The farmer makes decisions on how to protect the production process even before or during the production process. This refers, for example, to taking out insurance for crops and animals against diseases and pests, income insurance or participation in mutual funds. Secondary measures, on the other hand, are only taken on an *ad hoc* basis, i.e. when a negative, unexpected crisis situation arises. These are most often caused by natural disasters or other unpredictable events.

3 Normative Concept of Drought

Drought in Polish legislation is defined in Article 3(1)(2) of the Act of 18 April 2002 on the state of natural disaster⁽¹⁸⁾. It is defined as a natural disaster understood as an event related to natural forces. It is characterised by a prolonged deficit of precipitation resulting from the characteristics of the climate. It most often occurs in summer. The phenomenon of drought can result in the drying up of the soil, the reduction or complete destruction of plant crops, as well as an increased likelihood of fires. Drought is defined not only by the occurrence of extreme phenomena, but all situations that occur when water is less available to an area. Drought is a slow-developing phenomenon, so its onset and termination are difficult to identify (unlike floods, which are usually dynamic and the result of increased rainfall), as is its clear spatial impact area⁽¹⁹⁾.

Technically 4 types of drought can be distinguished, i.e. atmospheric (meteorological), agricultural, hydrological and hydrogeological⁽²⁰⁾.

14 Sentence of WSA in Opole, II SA/Op 98/16.

15 Law of 18 April 2002 on the state of natural disasters, Polish Journal of Law 2002, No 62, item 558 with amendments.

16 Polish Journal of Law 2017, item 209 with amendments.

17 Polish Journal of Law 2017, item 1892.

18 Polish Journal of Law 2017, item 1897.

19 Ministerstwo Rolnictwa i Rozwoju Wsi.

20 Tokarczyk (2008).

The first of these occurs when there is a deficit in rainfall. This is the first stage in the development of the drought phenomenon. It occurs when precipitation is below the multi-year average or completely absent. The direct result of a precipitation deficit is a moisture deficit that builds up over time, particularly in the warm season, increasing evaporation and evapotranspiration. This leads to a violation of soil and surface water resources. Depending on the conditions of the natural environment, its spatial variability and its land use and water demand, atmospheric drought can activate agricultural, hydrological and hydrogeological drought in turn. As far as agricultural drought is concerned, it occurs when soil moisture is insufficient to meet the water needs of plants and to carry out normal agricultural management. However, not every rainless period and concomitant drop in soil moisture is an agricultural drought. The prerequisite for agricultural drought is the occurrence of changes in the state of the vegetation, i.e. symptoms of water stress, a decrease in biomass and yield limitations. Agricultural drought leads to the generation of direct losses in natural ecosystems, but primarily results in losses in agricultural and forestry production⁽²¹⁾.

Some clarification of the legal definition of drought is contained in the Act of 7 July 2005 on insurance of agricultural crops and livestock⁽²²⁾. Namely, according to Article 3(1)(10), drought means damage caused by the occurrence, in any six-day period from 21 March to 30 September, of a decrease in the climatic water balance below the value specified for particular crop species and soils. As can be seen from the cited provision, it is not conceived as a certain condition, but is linked to the negative effects of a lack of water in the production intake. It is noteworthy that it was formulated in this way in connection with the need to adopt legislative solutions for risk management in agricultural activities. The national legislator considered that solutions to offset the risk-induced losses in the form of crop and livestock insurance would be most appropriate. In any case, one of the three main objectives of the Act is to provide a targeted subsidy to cover part of the compensation for damage caused by drought (Article 1 of the Act). State budget funds are used to subsidise premiums for concluding insurance contracts for crops of cereals, maize, canola, rapeseed, hops, tobacco, ground vegetables, fruit trees and bushes, strawberries,

potatoes, sugar beet or legumes, from sowing or planting to their harvest, against the risk of damage caused, inter alia, by drought. The insurance covers damage caused by events falling within the scope of the insurance cover, occurring on agricultural holdings in the national territory, at the place indicated in the insurance contract, with the company being liable for damage caused by drought if it amounts to at least 25% in the main crop (Article 6). In other words, the risk of drought includes an integral deductible, i.e. the limit of liability from which the company is liable in the context of the damage.

Correspondingly, what matters in this case is the scale of the adverse event. As mentioned above, the legislator has provided for a targeted subsidy to cover part of the compensation paid to agricultural producers for damage caused by drought. It is available to insurance companies that have concluded subsidy agreements with the Minister of Agriculture and Rural Development and to other companies that have concluded mandatory crop insurance agreements and at the same time joined the co-insurance agreement. Pursuant to Article 10a(2), the subsidy is entitled to 60% of the difference between the total amount of compensation paid in a given calendar year for damage caused by drought, under crop insurance agreements and compulsory insurance agreements for these crops, and the amount representing 90% of the sum of premiums paid in a given calendar year under both types of agreements, including subsidies for these premiums paid to the insurance company in a given calendar year. The subsidy is granted by administrative decision at the request of the insurance company (Article 10b(1)).

It is worth mentioning that drought is one of the risks that must mandatorily be covered by an insurance contract by any farmer receiving direct payments under the direct support scheme, in addition to the risk of damage caused by flood, hail, negative effects of overwintering or spring frost (Article 10c(1)).

On the practical side, it should be noted that insurance companies are not keen to insure drought as a single risk. Namely, it can occur over a significant area of the country, so there must be ample financial security and reinsurer approvals. This is due to the fact that crops are currently exposed to drought to a significant extent and are quite damaging. At the same time, it is worth stressing that the loss in the main crop in case of drought must be min. 25%. and the drought must be declared by the Institute

21 Tokarczyk et al. (2017).

22 Polish Journal of Law 2019, item 417.

of Fertilisation and Soil Science (IUNG). A certain solution in this respect is for companies to offer insurance packages that cover other negative events that are less likely to occur.

4 State aid in a Drought Crisis

In addition to the above-mentioned support resulting from the conclusion of an insurance contract, agricultural producers who have suffered damage due to the occurrence of drought may apply for the so-called drought aid. It is granted only to those entities whose average annual income from agricultural activity, due to the occurrence of drought and other unfavourable weather phenomena, has decreased by more than 30%. The aid takes different forms.

The first of these allows applying for a preferential loan, both a revolving loan for the resumption of production on farms and special divisions of agricultural production and for the reconstruction of fixed assets, in accordance with the Regulation of the Council of Ministers of 27 January 2015 on the detailed scope and methods of implementation of certain tasks of the Agency for the Restructuring and Modernisation of Agriculture⁽²³⁾.

Some modifications in this respect for 2023 and 2024 were introduced by the Ordinance of the Council of Ministers of 13 July 2023 amending the Ordinance on the detailed scope and methods of implementation of certain tasks of the Agency for the Restructuring and Modernisation of Agriculture⁽²⁴⁾. Accordingly, the interest due to the bank is paid by: the borrower – in the amount of 0.5% – in the case of bank loans to finance the costs of resumption of production, if in the agricultural holding, in the year in which the damage occurred, at least 50% of the agricultural area cultivated in the main crop, excluding perennial grassland, was insured against the risk of drought, hail, torrential rain, negative effects of overwintering, spring frost, flood or hurricane, as defined in the provisions on insurance of agricultural crops and farm animals; and the Agency – in the remaining part. The aid is granted for a period of no longer than 4 years, counting from the date when the voivode has affixed the trusted signature to the damage assessment protocol.

Further changes concern the estimation of drought losses in crops. The regulation introduces

the possibility of estimating them on the basis of 3 sources of data on the amount of crop damage, i.e.: data provided in the application by the farmer; data from the report of the damage estimation commission on the spot, and IUNG data.

The second form involves the provision of assistance by the President of the Agricultural Social Insurance Fund (Kasa Rolniczego Ubezpieczenia Społecznego) in the payment of current social insurance contributions and the settlement of arrears in this respect in the form of a deferment of the deadline for payment of contributions and their division into convenient instalments, as well as the remission in whole or in part of current contributions. This support is granted at the individual request of a farmer who has suffered damage caused by adverse weather conditions on the basis of the Act of 20 December 1990 on social insurance for farmers⁽²⁵⁾. In addition, an agricultural producer running an agricultural holding or a special section on land belonging to the State Treasury Agricultural Property Stock who has suffered damage to production may apply for deferment and payment in instalments of payments under contracts of sale and lease of property of the State Treasury Agricultural Property Stock, as well as for relief from payment of rent and write-off of instalments of rent under lease contracts. Decisions in this respect are taken by the National Support Centre for Agriculture pursuant to the Act of 19 October 1991 on the Management of Agricultural Property of the Treasury⁽²⁶⁾. The last form of aid is the granting, on the basis of the Act of 29 August 1997 – Tax Ordinance, by heads of villages, mayors or city presidents, agricultural tax relief at the individual request of an agricultural producer⁽²⁷⁾.

II. Conclusions

Undoubtedly, drought represents a very significant risk in agricultural activity, leading to emergencies. At the same time, the agricultural producer has no way of protecting himself against its negative effects. The essence of the problem lies in the fact that a crisis situation may have a significant scope, covering entire regions or even the country. Thus, it may lead to an undermining of food security.

23 Polish Journal of Law 2015, item 187 with amendments.

24 Polish Journal of Law 2023, item 1350.

25 Polish Journal of Law 2021, item 266.

26 Polish Journal of Law 2022, item 514 with amendments.

27 Polish Journal of Law 2021, item 1540 with amendments.

On the one hand, the approach of the national legislator regarding the forms of support provided should be assessed positively. On the other hand, the inclusion of drought in the scope of compulsory insurance does not meet expectations, due to the high harmfulness and even reluctance of insurance companies to conclude contracts only covering it.

It is worth emphasising that the national legislator, on the basis of the dispositions included in the EU law, supports agricultural producers in the face of occurring crisis situations, however, it should take into account the necessity of adopting additional, special solutions in this scope strengthening the existence of producers⁽²⁸⁾. For example, one can point to the fact that the receipt of support is conditional on the demonstration of the correctness of preparatory activities in the field of water melioration (i.e. proper retention, maintenance of water devices) and cultivation of drought-resistant plants, taking into account local soil conditions.

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28 See: I. Lipińska, M. J. Cazorla González, Sustainable water use for agricultural production – selected legal aspects, *“Revista Internacional de Doctrina y Jurisprudencia”* 2023, Vol. 29, pp. 51-64.