



European Commission
Directorate-General for Agriculture and Rural Development
Directorate D. Direct support
D. 1. Direct support regulatory aspects

Brussels,

**GUIDANCE DOCUMENT ON THE IMPLEMENTATION OF ARTICLE 9 OF
REGULATION (EU) NO 1307/2013**

This interpretation does not prejudice any decision by the European Court of Justice. In the event of a dispute involving Union law it is, under the Treaty on the Functioning of the European Union, ultimately for the European Court of Justice to provide a definitive interpretation of the applicable Union law.

Sector: Direct payments

Subject: Questions related to the scope of the active farmer provisions

Provision concerned: Article 9 of Regulation (EU) No 1307/2013

As laid down in recital 10 of Regulation (EU) No 1307/2013, the purpose of the active farmer provisions is to better target direct support by excluding those natural or legal persons who have no (or only marginal) agricultural activities.

For that purpose, the first subparagraph of Article 9(2) (the so-called ‘negative list’) establishes a presumption that the entities listed in that provision have no or only marginal agricultural activities. These entities can however rebut that presumption by demonstrating that one of the criteria set out in the third subparagraph of Article 9(2) is met.

Question 1: *How to determine if an entity falls under one of the businesses listed in Article 9(2)?*

The businesses listed in the first subparagraph of Article 9(2) are not further defined in Regulation (EU) No 1307/2013 or in Commission acts.

According to settled case-law, the terms of a provision of EU law which makes no express reference to national law for the purpose of determining its meaning and scope is

normally to be given an independent and uniform interpretation throughout the EU. That interpretation must take into account the context and the objective of Article 9(2), i.e. to establish a negative presumption for those businesses which have land at their disposal but whose activities are typically not (or only to a marginal extent) agricultural.

It is for the Member States to further implement that provision in compliance with the purpose of the active farmer provisions and the general principles of EU law. Furthermore, the implementation of Article 9(2) should be consistent with other policy choices made by Member States such as those made pursuant to Article 32(3)(b) of the same Regulation.

In addition, the assessment whether or not a natural or legal person is covered by the ‘negative list’ should not be based on criteria such as:

- whether it is a private or a public entity,
- the ownership status (e.g. owner or manager of the business/activity),
- its size (expressed in turnover, number of employees, etc.).

The main issues raised so far with respect to the implementation of the negative list concern the terms “real estate services” and “permanent sports and recreational grounds”.

As far as “real estate services” are concerned, the Commission services understand that the co-legislators intended to target professional property developers, real estate agencies and natural/legal persons managing real estate on a fee or contract basis. In this context, the activity of renting accommodation facilities on a farm should not be considered as operating a real estate service. Renting out apartments or homes that are in a farmer’s private property for housing purposes, part of the buildings or surfaces on the holding’s premises, and/or agricultural land to third parties should not be, as such, considered as operating a real estate service.

As far as “permanent sport and recreational grounds” are concerned, the negative list aims at targeting specialised operators of permanently existing areas of land with permanent fixtures and/or permanent artificial structures for spectators that are being used for a purpose of sport and recreational activities, e.g. golf courses, race courses, or permanent football pitches. In this context, renting out a horse stable is not, as such, a sufficient condition for being considered as operating a “permanent sport and recreational ground”.

Question 2: Which entities can be added to the negative list in Article 9(2)?

The second subparagraph of Article 9(2) allows Member States to add other similar non-agricultural businesses or activities to the negative list, on the basis of objective and non-discriminatory criteria.

Other businesses/activities can therefore be added to the negative list only if they are “similar” in nature to the activities of entities already included in the negative list. In this regard, it should be recalled that the active farmer provisions intend to address certain cases highlighted as critical by the Court of Auditors. More specifically, Special Report

No 16/2012¹ refers to real estate companies, airports, forestry enterprises, hunting associations, fishing clubs, ski clubs, public entities managing land owned by the State and landowners who had no own agricultural activity. Special Report No 5/2011² refers to recreational and sports clubs, railway companies, nature reserves, airports, city councils, hunting and sporting estates, government bodies, schools, camping sites and investors”.

The common feature of all these entities is that they have potentially agricultural land at their disposal but whose activities are typically not (or only to a marginal extent) agricultural.

Furthermore, any additions to the list should be justified on the basis of the “business” purpose of the entities concerned. By contrast, it would not be justified to enlarge the negative list solely on the basis of criteria that relate to farmers’ individual circumstances (e.g. being on retirement) or formal status (e.g. non-profit making organisations).

Question 3: *What is the rationale of Article 9(2) of Regulation (EU) No 1307/2013 as compared to Article 9(3) of the same Regulation?*

The purpose of the third subparagraph of Article 9(2) is confined to rebutting the presumption laid down in the first subparagraph of that provision. Therefore, where a Member State decides to apply Article 9(3), an entity able to demonstrate one of the criteria in the third subparagraph of Article 9(2) might still be excluded from support on the basis of Article 9(3).

When applying Article 9(3), Member States need to comply with general principles of EU law, including the principle of non-discrimination. This would as a general rule exclude that only specific types of businesses are targeted under that provision, all the more as such a possibility is already foreseen in the second subparagraph of Article 9(2).

Question 4: *If a Member State chooses to apply Article 9(3) of Regulation (EU) No 1307/2013, can it choose to apply only point (a) of that provision but not point (b)?*

Article 9(3) allows a Member State to apply either both points of that provision or only one of these points.

Question 5: *Could a Member State distinguish between regions when setting the amount referred to in Article 9(4) of Regulation (EU) No 1307/2013?*

Article 9(4) is a “de minimis” rule for farmers who only received direct payments not exceeding a certain amount for the previous year, exempting them from the application of

¹ “The effectiveness of the single area payment scheme as a transitional system for supporting farmers in the new Member States” (OJ C 392, 19.12.2012, p. 10).

² “Single Payment Scheme (SPS): Issues to be addressed to improve its sound financial management” (OJ C 191, 1.7.2011, p. 11).

paragraphs 2 and 3 of Article 9. Such amount shall be decided by Member States on the basis of objective criteria such as their national or regional characteristics, and shall not be higher than EUR 5 000.

This provision is justified in view of the contribution made by smaller part-time farmers to the vitality of rural areas (see recital 10 of the Regulation). As indicated by the reference to “regional characteristics” in the provision, Member States may also take into account differences between regions when setting this amount.

On the basis of this rationale, it is also possible to treat farmers from certain regions differently from farmers in other regions provided such a difference in treatment is objectively justified and respects the principles of de-coupling.