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B.1. External communication and promotion policy

Guidance on suspension and termination of simple promotion programmes¹ in case of *force majeure*

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¹ Regulation (EU) No 1144/2014 of the European Parliament and of the Council of 22 October 2014 on information provision and promotion measures concerning agricultural products implemented in the internal market and in third countries and repealing Council Regulation (EC) No 3/2008 (OJ L 317, 4.11.2014, p. 56)

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1 Introduction

The aim of this note is to provide guidelines on how to deal with the difficulties that some of the beneficiaries are encountering to properly implement their simple programmes due to the recent outbreak of coronavirus in EU and elsewhere. The note provides guidance for the application of the provisions for suspension and termination in the grant agreements, with special focus on force majeure cases.

Please note that Member States' competent authorities (MS) should analyse the circumstances on a case-by-case basis. Therefore, the following guidelines are to be applied without prejudice of the individual analysis of each case.

2 Suspension of programme

2.1 Legal basis

Section 3, Article 33 of the Grant Agreement (GA).

2.2 Suspension of the implementation of the programme

The implementation of the action may become temporarily impossible due to the impact of some unforeseeable factors.

A **definition of *force majeure*** is provided in the GA (see Art 35).

The event/situation of *force majeure* is one that:

- could not have been foreseen by the concerned party;
- is beyond its control;
- is not attributable to error or negligence on its part or on the part of subcontractors, affiliated entities or third parties involved in the implementation;
- could not have been avoided even with all due diligence by the concerned party.

The above mentioned exceptional circumstances need to **have had an impact on the implementation** of the promotion programme **by preventing the beneficiary from fulfilling its obligations as initially envisaged**, at least for a given period of time, during which the exceptional event/ situation produces its effects.

Force majeure can NOT be used to justify situations caused by a beneficiary's negligence or by events that could reasonably have been anticipated. Personal reasons (*e.g. sickness*) or internal instructions are in general NOT considered as cases of force majeure.

2.3 Suspension of the implementation by the beneficiary

According to the GA, the beneficiary may suspend the implementation of the programme when "exceptional circumstances" make this implementation "impossible or excessively difficult". Thus, situations of force majeure are specifically mentioned in this category.

2.3.1 Procedure for suspension of the implementation by the beneficiary

Provided there is an exceptional circumstance, the beneficiary is entitled to suspend the implementation unilaterally. It has to inform the MS as soon as possible, without unjustified delays.

Such information should include:

- the reasons for and all necessary details about the said circumstances (e.g. the date on which it occurred, the territory that it impacted, etc.) and
- the foreseeable date of resumption of the implementation.

Depending on the circumstances, the beneficiary may suspend the implementation of **the whole programme or only part thereof**. The latter case may occur where only part of the activities supported by the programme are impacted by the unforeseeable and inevitable circumstances, while the implementation of the rest of the programme does not depend on the impacted activities and may continue.

The suspension is a unilateral act of the beneficiary. **If exceptional circumstances indeed occurred, the MS does not have the power to approve or reject the suspension itself.** However, it may verify whether the circumstances invoked as a ground for suspension are of an exceptional nature. For this purpose, if a MS has a doubt it is entitled to request any proof thereof.

If the exceptional nature of the circumstances is confirmed, **the suspension will still take effect from the moment the MS was informed about the suspension and not after the verification has been completed.**

2.3.2 Changes to the implementation of the action without suspension

Not all modifications related to the action implementation must necessarily lead to the suspension of the programme. There are situations where the timing of implementation and delivery of deliverables will not require neither suspension nor amendment of the grant. It is highly recommended that before initiating the procedure for suspension, the beneficiary informally discuss with the MS if there is a need to suspend (part of) the programme, or if the changes can be accommodated without a grant amendment.

The specific case of budget transfers/changes

Modifications in the description of the programme may have an impact on the budget. Whatever the accepted change in the initial budget, the **maximum amount of the grant stated in the grant agreement may not be increased under any circumstances and the budget must remain in balance.**

The grant agreement provides for some flexibility in case of budget transfers. Pursuant to Article 4.2, the estimated budget breakdown may be adjusted by transfers of amounts between beneficiaries or between budget categories (or both). This does not require an amendment if the programme is implemented as described in Annex 1. However, additional costs related subcontracting must be carefully assessed, as in some cases will require an amendment (see Article 10 of the GA).

2.4 Suspension of the programme implementation by the MS

Suspension of the implementation by MS aims at protecting the financial interests of the Union and/or at forcing the beneficiary to comply with important requirements relevant to the grant implementation.

The period of suspension is to be used either to verify whether financial interests of the Union are protected or whether the requirements relevant to the grant implementation are satisfied; and/or to ensure that the beneficiary takes remedial measures in order to ensure a proper implementation of the programme following its resumption.

There are two grounds that can be invoked by the MS for suspending the implementation of a programme:

- where the award procedure or the implementation of the programme proves to have been subject to substantial error, irregularity, fraud or breach of obligations or
- where the MS suspects substantial errors, irregularities, fraud or breach of obligations committed by the beneficiary in the award procedure and/or in the implementation of the programme and needs to verify whether they have actually occurred.

Contrary to the suspension by the beneficiary, the MS authority cannot appeal to circumstances of force majeure as ground for suspending the grant.

2.5 Period of suspension & resumption of the implementation

The suspension produces its effects from the date it takes effect until the date it is lifted. The suspension can be lifted if and when the resumption of the implementation has again become possible.

When the exceptional circumstances/*force majeure* stop producing their negative effects, the beneficiary should immediately inform the MS that the implementation can be resumed.

2.5.1 Amendment request

The beneficiary must launch a **request for amendment of the grant agreement**, proposing the date on which the amendment should take effect and other necessary adaptations.

The amendment shall establish the date on which the implementation shall be resumed. It may take effect before its entry into force in order to ensure that costs will be considered eligible from the moment the suspension is no longer needed, irrespective of possible delays in the amendment procedure.

The amendment also has to provide for any other modifications that may be necessary to adapt the programme to the new implementation conditions. The possibility to adapt the programme (its description, budget, etc.) to the new implementing conditions would need to be explored in every specific case. This amendment will be only possible if such an amendment does not question the award decision or the equality of treatment

Please note that an amendment with regard to programme suspension **cannot** extend the implementation period laid down in Article 3 of the GA. The period for which the programme implementations is suspended shall not be considered as implementation period of the programme.

For more information on grant amendments please consult FAQs 2.3.13 - 2.3.15 on Chafea's portal <https://ec.europa.eu/chafea/agri/faq.html>

2.5.2 Impossibility to resume the implementation of the action

The exceptional circumstances/*force majeure* may result in a full impossibility to continue the implementation of the programme. Such a situation could be established after the implementation was suspended or even immediately after the exceptional event occurred. In the latter case, a suspension will be irrelevant, but the beneficiary should still inform the MS without delay about such an event stating its nature, likely duration and foreseeable effects.

If the implementation cannot be continued, the only option will be to **terminate the agreement** on the ground of *force majeure* or exceptional circumstances.

For more info, see point 3.3 below.

2.5.3 Effects of the suspension of the implementation

The main effect of the suspension of the implementation is **the suspension of the period of eligibility of costs**. During the suspension period the beneficiary is not entitled to incur eligible costs for the implementation of the action or the suspended part thereof.

If force majeure entails extra costs for the implementation of the programme, in principle, the beneficiaries must bear them (since they were not budgeted and the maximum grant amount cannot be increased). However, if a task could not be executed due to a situation of force majeure but certain **costs were incurred for that task and could not have been avoided, those costs may still be eligible.**

If the implementation was resumed, the eligibility of costs will have to be decided on the basis of the agreed/adopted amendment taking into account whether the whole programme or only part of it has been suspended.

In addition, as long as the MS has not suspended the payments as well, **the beneficiary is entitled to receive payments during the period of suspension of the implementation**, e.g. on the basis of approved reports including eligible costs incurred before the suspension period.

An exceptional event/force majeure has by definition an impact on the fulfilment of the obligations of the concerned party.

In this regard, the grant agreement contains a number of clarifications:

- (i) The party faced with force majeure shall not be held to be in breach of its obligations under the agreement if it has been prevented from fulfilling them by force majeure. The MS may not adopt any act with adverse effect on the beneficiary (e.g. terminate the agreement) using as a justification the breach of the obligation of the beneficiary to implement the action during the period of *force majeure*.
- (ii) The parties must take the necessary measures to limit any damage due to force majeure. They must do their best to resume the implementation as soon as possible. The fact that unforeseeable circumstances make the implementation temporarily impossible does not exonerate the parties from the obligation to take any measures to limit the negative consequences from the situation of *force majeure* (including measures to limit related costs) and to resume the implementation as soon as it becomes possible.

Finally, it should be noted that neither of the parties is entitled to claim any compensation for damages on account of a suspension by the other party (whatever the ground for suspension).

3 Grants termination

3.1 Legal basis

Art 34 of the GA.

3.2 Termination of the grant agreement (mono and multi-beneficiary agreements) by the beneficiary

The beneficiary has the right to terminate the grant agreement unilaterally by sending to the MS a formal notification in line with the requirements of the grant agreement. In case of multi-beneficiary agreements, the notification is submitted by the coordinator acting on behalf of all beneficiaries.

In case of impossibility to carry out the action due to force majeure, the beneficiary shall notify termination specifying the concrete reasons why and the date on which the termination takes effect. As the notification must be sent before the termination is due to take effect, a **retroactive termination of the GA is impossible**. The date on which the termination takes effect is the day specified in the notification, which must be a date after the receipt of notification by the MS (notably to be able to comply with the obligations and deadlines after termination – please see Art 34.2.2).

3.3 Termination of the grant agreement (mono and multi-beneficiary agreements) by the MS

After suspension, the impact of the force majeure/exceptional circumstances may make it impossible to resume the implementation of the action. Also, if the necessary amendments to the agreement would call into question the award decision or the equality of applicants, the grant agreement needs to be terminated. In such cases termination is either the only logical consequence (impossible resumption) or a required follow-up by the MS (impossible amendment) to preserve the equality of treatment of applicants.

Terminating the GA by MS is a unilateral act having an adverse effect on the rights of the beneficiaries. Therefore, MS must initiate a contradictory procedure allowing the beneficiary to submit observations before the MS can terminate the agreement.

3.4 Procedure

The termination procedure follows three steps (GA 34.3.2):

I. MS notifies the beneficiary of its intention to terminate.

MS must notify the beneficiary formally, according to the grant agreement. The notification should clearly explain the intention to terminate the GA laying down the reasons for termination: the facts and their qualification as grounds for termination.

With this first notification, the MS should launch a contradictory/adversarial procedure: it should invite the beneficiary to submit observations within 30 days from the receipt of the notification.

The notification of the intention of the MS is a preparatory act only.

II. Submission of observations (optional)

The beneficiary has the right, but not the obligation, to submit observations. Therefore, it may decide not to do so. It may also decide to submit additional supporting documents.

Where observations are submitted, they need to be assessed before the MS proceeds with the next step. The MS may accept only part or none of the arguments of the beneficiary. The MS may renounce the initial intention to terminate or to adapt the arguments intended to invoke when terminating.

In the absence of observations, the MS may not proceed with the termination before the expiry of the deadline for their submission.

III. Notification of the termination or stopping the termination procedure

Following the assessment of the observations or following the expiry of the deadline for their submission, and depending on the outcome of such assessment, the MS may decide:

(i) to stop the termination procedure

MS stops the procedure when it accepts the arguments/explanations provided by the beneficiary. The MS informs the beneficiary of the decision not to pursue the termination procedure. This act of the MS does not have an adverse effect on the rights of the beneficiary. The decision to stop the procedure has to be formally notified to the beneficiary.

(ii) to terminate the GA

This could be the decision of the MS if no observations are submitted by the beneficiary or if the submitted observations did not provide reasonable explanations that could justify a change in the MS's position.

The notification terminating the agreement should be well motivated. It should also provide feedback on the submitted observations (if any), including an explanation why observations could not be accepted.

The decision to terminate has to be formally notified to the beneficiary. The termination adversely affects the rights of the beneficiaries and should, therefore, include information on the means of redress against the decision to terminate.

In the case of force majeure, the termination shall take effect immediately, i.e. on the day after the coordinator receives the notification of the confirmation of the force majeure.

3.5 Effects of the termination

Costs may be incurred before the situation of force majeure. However, due to the effects of the force majeure, one might not be able to match those costs with concrete results/outcomes/deliverables (e.g. materials were bought for a seminar, but the seminar could not be carried out). The action is implemented only partially.

In general, when defining the final amount of the grant, **MS may decide to take into account costs actually incurred even if related to undelivered results**, considering that the event having rendered the implementation impossible is beyond the control of the beneficiary.

Neither party may claim damages on the grounds that the other party terminated the grant agreement. This means that the termination itself may not trigger an action for compensation of damages (e.g. losses) caused by one party to the other through the termination.