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Capping as a new mandatory legal instrument for degressive area-based income support in the proposed Common Agricultural Policy 2028–2034

Il *capping* come nuovo strumento giuridico obbligatorio
di sostegno al reddito per superficie decrescente
nella prossima Politica agricola comune 2028–2034

This article undertakes a legal analysis of the capping mechanism – the proposed mandatory upper limit on area-based income support for farmers – as a new element of the proposed DABIS (degressive area-based income support) instrument within the framework of the reform of the Common Agricultural Policy for the period 2028–2034. The aim of the article is to assess the compliance of the proposed mechanism with the principles of European Union (EU) law, in particular the principle of proportionality (Article 5(4) TFEU) and the prohibition of discrimination (Article 40(2) TFEU). The article analyses the case law of the Court of Justice of the European Union concerning the artificial conditions clause. The results of the analysis indicate that in principle, capping is consistent with the Treaty objective of ensuring a fair standard of living for the agricultural community; however, its effectiveness depends on the quality of secondary legislation preventing the artificial division of entities. Furthermore, it is pointed out that capping largely favours small and medium-sized farms which are eligible for aid from EU funds.

Keywords: capping, agriculture, Common Agricultural Policy, agricultural law, European agricultural law, Agriculture 2034

Il presente contributo si propone di eseguire un'analisi dello strumento giuridico del *capping* – inteso come limite massimo obbligatorio del sostegno al reddito basato sulla superficie a favore degli operatori agricoli – quale nuovo elemento del proposto strumento DABIS (*degressive area-based income support*) nel quadro della riforma della Politica agricola co-

mune per il periodo 2028–2034. Il contributo si propone di accertare la conformità del meccanismo proposto con i principi del diritto dell’Unione europea, in particolare il principio di proporzionalità (art. 5, par. 4 TFUE) e con il divieto di discriminazione (art. 40, par. 2 TFUE). Nel contributo si esamina altresì la giurisprudenza della Corte di giustizia dell’Unione europea relativa alla clausola sulle condizioni artificiali. L’analisi porta alla conclusione che il *capping* è, in linea di principio, conforme all’obiettivo del Trattato di garantire alla comunità agricola un tenore di vita equo. Tuttavia, la sua efficacia è subordinata alla qualità del diritto derivato volto a prevenire la suddivisione artificiale degli operatori. Inoltre, si rileva che il *capping* favorisce in larga misura le aziende agricole di piccole e medie dimensioni, beneficiari degli aiuti provenienti dai fondi dell’Unione europea.

Parole chiave: capping, agricoltura, Politica agricola comune, diritto agrario, diritto agrario europeo, Agricoltura 2034

Introduction

Debate and legislative work on the future shape of the Common Agricultural Policy after 2027 are currently underway in the European Union. The choice of appropriate legal instruments has always been dictated by two factors. One is the experience gained during previous programming periods. This has influenced the formulation of new proposals and the shaping of future challenges. The other factor is the size of the European budget. In the new financial framework, the share allocated to agriculture is set to decrease.¹ The budget for the Common Agricultural Policy (CAP) for the period 2021–2027 amounts to approximately 387 billion EUR. In the upcoming financial framework for 2028–2034, however, these funds will be significantly reduced and are estimated at around 300 billion EUR (representing a decline of between 10% and 25% in real terms) in favour of new EU priorities.² Furthermore, part of the funding is to be incorporated into other policies, such as the cohesion policy.³ These two factors necess-

¹ European Commission (2025). A dynamic EU Budget for the priorities of the future – The Multiannual Financial Framework 2028–2034, Brussels, 16 July 2025, COM(2025) 570 final/2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025DC0570> [accessed on 2.06.2026].

² https://commission.europa.eu/topics/budget/eu-budget-2028-2034-explained_en [accessed on 30.05.2026].

³ R. Hansum, *Breaking the traps – Smarter regional allocation of EU cohesion spending 2028–2034*, Policy Brief, Hertie School, Jacques Delors Centre, 2025, <https://www.delorscentre.eu/en/publications/detail/publication/breaking-the-traps> [accessed on 3.06.2026].

itate the search for new solutions that will not only fulfil the CAP's treaty objectives but, above all, strengthen the potential and competitiveness of EU agriculture. Therefore, a large part of the proposed solutions aims to support small and medium-sized farms run by active farmers.⁴

One of the fundamental legal mechanisms is degressive area-based income support (DABIS)⁵ under the direct support scheme.⁶ Historically, the fundamental legal basis of the direct support system was the principle of proportionality between the level of support and the area under agricultural use, without nominal quantitative limits. This principle, although not explicitly stated anywhere, stems from the logic of area-based payments shaped following the MacSharry reform (1992) and Commissioner F. Fischler's decoupling (2003). The new proposed system, however, envisages improving the existing degressivity system with elements of measures that will limit support for large farmers further.

The CAP reform⁷ proposed by the European Commission in its communication of 16 July 2025 breaks with this paradigm by introducing into the existing income support instrument – DABIS – a mandatory degression and capping mechanism.⁸ The latter is a new mandatory legal mechanism set out in Article 6(4) of the draft Regulation of the European Parliament and of the Council laying down the conditions for the implementation of Union support under the common agricultural policy for the period 2028–2034. It states that “The total amount of area-based income support shall not exceed 100,000 EUR per farmer per year. In the case of a legal person or a group of legal persons, the limit shall cover all holdings under the control of a single legal or natural person.” The introduction of an upper limit on area-based

⁴ P. Czechowski, A. Niewiadomski, *Conditions for the implementation of the Union support under the Common Agricultural Policy for 2028–2034*, “Przegląd Prawa Rolnego” 2025, no. 2, pp. 135–139.

⁵ N. Röder, *What Future for Agri-environmental Sustainability in the Next CAP?*, “Euro-Choices” 2025, vol. 24(3), pp. 4–10.

⁶ H.H. van Zanten, J. Duncan, H. van Meijl, S. Heimovaara, *Scientific reflection on the European Commission's vision for agriculture and food*, “Nature Food” 2025, no. 6(7), pp. 653–656.

⁷ D. Carloni, *La “nuova” politica agricola commune sotto accusa: le ragioni degli agricoltori in rivolta*, “Diritto e giurisprudenza agraria, alimentare e dell'ambiente” 2024, no. 1, p. 1 ff.

⁸ Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for the implementation of the Union support to the Common Agricultural Policy for the period from 2028 to 2034, COM(2025) 560 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52025PC0560> [accessed on 30.05.2026].

support is intended to promote small and medium-sized farms at the expense of larger ones. At the same time, “capping” has no legal definition. It can be defined as an upper limit on the total amount of area-based support under the new CAP.

It should be noted that for the 2014–2020 financial framework, Regulation (EU) No 1307/2013 of the European Parliament and of the Council introduced, in Article 11, a mechanism for the mandatory reduction of direct payments by at least 5% for amounts exceeding 150,000 EUR. However, Member States were able to implement full capping, i.e. a complete cut in payments above 150,000 EUR, whilst taking into account deductions for employment costs (so-called “salaries deduction” mechanism). The 2023–2027 financial framework in Regulation (EU) 2021/2115 of the European Parliament and of the Council (Article 17) maintained the optional nature of deep capping. Member States were granted the power to reduce payments by up to 100% for amounts exceeding 100,000 EUR; however, the structure of the provision allowed for such extensive deductions for labour costs (including the farmer’s own work and that of their family members) that the actual effectiveness of this mechanism was negligible. Many countries, including Poland, opted for an alternative and more effective means of achieving the redistributive objective through the CRISS mechanism (Complementary Redistributive Income Support), which allowed for an exemption from Article 17.

The aim of this article is to provide a legal analysis of the “capping” mechanism from the perspective of its compliance with the Treaty principles of EU law and the applicable case law of the Court of Justice of the European Union (CJEU). The analysis was conducted on the basis of the Treaty grounds for the admissibility of capping. Undoubtedly, this provision will also encourage the creation of artificial conditions in order to obtain aid. Therefore, the article analyses the legal possibilities for preventing this phenomenon. Furthermore, an analysis was carried out of potential legal conflicts in the course of future implementation by Member States.

As a new legal instrument, capping has not yet been the subject of detailed doctrinal analysis, let alone case law. However, its structure is similar to that setting upper limits on aid.

1. European and Treaty regulations in the context of capping

An important aspect of the assessment of capping is the principle of proportionality set out in Article 5(4) of the Treaty on the Functioning of

the European Union⁹ (TFEU). As established in the settled case-law of the CJEU, this principle requires an EU measure to be: (i) suitable for achieving the intended objective, (ii) necessary, i.e. the least onerous of several possible measures to be chosen from, and (iii) proportionate in the strict sense, i.e. the burdens imposed must not be grossly disproportionate to the public objective pursued. The question arises as to whether the introduction of an upper limit on the amount of aid that may be obtained for area-based income support is proportionate. It should be noted that the *de minimis* aid criterion has existed for many years, setting for various entities an upper limit on public aid from European funds. The capping rule being introduced is structurally similar to these solutions.

With regard to capping, the principle of proportionality appears to be met. As for the requirement of adequacy – the objective of redistributing support to smaller farms and legitimising EU expenditure is a treaty-permissible objective. In a sense, the preferential treatment of small and medium-sized farms is consistent with the principle of proportionality set out in the TFEU. The requirement of necessity raises the question of whether this objective could not be achieved by less restrictive means (e.g. through progressive land taxes applied by Member States) or other legal instruments. In its legislative proposal, the European Commission stated that “The economic, environmental and social challenges facing the EU’s agricultural sector and its rural areas require a decisive response and long-term measures that reflect the EU dimension of these challenges. The CAP policy framework is accompanied by a robust and proportionate budget for the EAFRD. The greater freedom of choice offered to Member States in selecting and adapting the policy tools available under the CAP, that enable the achievement of common EU objectives, is proportionate to the level of action required in the face of needs and challenges.” The solution presented in this regard appears to be proportionate in terms of the intended potential effects.

As for proportionality in the strict sense – the threshold of 100,000 EUR per year appears to have been adopted with a significant margin of discretion on the part of the EU legislator, leaving room above average agricultural incomes. The only legal risk is the so-called “edge effect” – a sharp reduction in the rate for entities hovering just above the threshold, which may require a technical adjustment during negotiations.¹⁰

⁹ Judgment of the CJEU of 16 June 2015 in Case C-62/14, *Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400, paras. 66–67.

¹⁰ <https://wiescirolnicze.pl/polityka-rolna/beda-zmiany-w-platnosciach-bezposrednich-bruksela-wprowadzi-limity-doplac-dla-rolnikow,25253/> [accessed on 1.06.2026].

Currently, the degressivity mechanism in the proposed Article 6(3) of the submitted regulation provides that "the total amount of payments per farmer determined in accordance with paragraph 2 shall be degressive in accordance with the following rules: (a) Member States shall reduce the annual amount of area-based income support granted to a farmer exceeding 20,000 EUR by 25% if the amount of such support granted to the farmer falls within the range of 20,000 EUR to 50,000 EUR; (b) Member States shall reduce the annual amount of area-based income support granted to a farmer exceeding 50,000 EUR by 50% if the amount of that support granted to the farmer exceeds 50,000 EUR but does not exceed 75,000 EUR; (c) Member States shall reduce the annual amount of area-based income support granted to a farmer exceeding 75,000 EUR by 75% if the amount of such support granted to the farmer exceeds 75,000 EUR. This system already provides for a preference¹¹ for small and medium-sized farms."¹² At the same time, the proposed provision strengthens this mechanism by introducing an upper limit on payments.

Another subject of analysis is Article 40(2) TFEU, which prohibits discrimination against Union producers or consumers within the framework of the common organisation of the agricultural market.¹³ The new capping mechanism raises the question of whether its uneven regional impact, which strongly affects large-scale operators from Central and Eastern Europe, constitutes indirect discrimination. However, EU legal doctrine distinguishes between direct discrimination (on grounds of nationality or place of establishment) and indirect discrimination (resulting in an unequal impact). In its judgment in Case C-273/04 (*Poland v. Council*),¹⁴ the Court dismissed a similar complaint regarding phasing-in, noting that structural differences arising from history are objectively justified and do not constitute discrim-

¹¹ B. Bartkowski et al., *Payments by Modelled Results: A Novel Design for Agri-environmental Schemes*, "Land Use Policy" 2021, vol. 102, <https://doi.org/10.1016/j.landusepol.2020.105230>.

¹² E. Erjavec, I. Rac, D. Bertolozzi-Caredio, *Common Agricultural Policy Strategic Plans: smokescreens or instruments for evidence-based policymaking?*, "Italian Review of Agricultural Economics" 2025, vol. 80, no. 3, <https://doi.org/10.36253/rea-16856>.

¹³ Article 40(2) TFEU: "The common organisation of the agricultural market [...] shall not include any measures which discriminate against Union producers or consumers. The common price policy must be based on common criteria and uniform methods of calculation."

¹⁴ Judgment of the Court of Justice of 23 October 2007 in Case C-273/04, Republic of Poland v Council of the European Union, ECLI:EU:C:2007:622. The Court dismissed Poland's action against the mechanism for the gradual introduction of direct payments (phasing-in) for new Member States, finding that it constitutes a necessary adaptation of the Act of Accession and does not infringe the principle of non-discrimination.

ination in the legal sense. Poland alleged that the Council had infringed the principle of non-discrimination in agriculture. The issue concerned the transitional provisions in the Accession Treaty, which provided for the payment of full direct payments to farmers in the new Member States on a gradual basis, starting at a level of 25% in 2004. In this regard, the differences in the agricultural structure of Central and Western Europe do not alter the objective nature of the quota threshold, which is applied equally to all entities within the EU. The Court ruled that the new Member States and the “old” Fifteen were not in an identical situation; therefore, the differentiation in the level of subsidies was objectively justified and did not constitute discrimination. However, this principle is not defined with sufficient precision, a point which has also been raised in agricultural law doctrine.¹⁵

A uniform cap in this regard for all EU Member States would not constitute discrimination and can be introduced in light of the established case law referred to above. A different economic outcome resulting from the application of a uniform legal criterion does not constitute discrimination; rather, it justifies the call to take labour costs or derogations into account, which is a matter of *de lege ferenda*, not an assessment of the validity of the proposed instrument. Undoubtedly, however, there is a lively debate in Europe as to whether large farms can manage without aid from European funds and whether this constitutes a breach of the principles of competition in the EU market. The question also remains as to whether the money saved in this way will actually be returned to agriculture for other purposes, or whether it will be allocated to other budgetary expenditure.

The most serious legislative obstacle is political, not legal: Germany’s opposition¹⁶ to capping and degression,¹⁷ supported by other countries with a strong large-scale agricultural sector, may block the achievement of the required qualified majority in the Council. The opinion of the European

¹⁵ R. Budzinowski, *Współczesne tendencje rozwoju prawa rolnego*, “Studia Iuridica Agraria” 2009, vol. VII, pp. 17–29.

¹⁶ A. Matthews, *Negotiating the Member State Allocations in the Next MFF. CAP REFORM. Europe’s Common Agricultural Policy is Broken – Let’s Fix it!*, <https://capreform.eu/negotiating-the-member-state-allocations-in-the-next-mff/> [accessed on 3.06.2026].

¹⁷ A. Katana, *Dopłaty z WPR bez limitów dla dużych gospodarstw? Niemieccy ministrowie rolnictwa odrzucają cięcia w budżecie*, 12.10.2025, <https://www.topagrar.pl/articles/polityka-rolna/doplaty-z-wpr-bez-limitow-dla-duzych-gospodarstw-niemieccy-ministrowie-rolnictwa-odrzucaja-ciecica-w-budzecie-2539333> [accessed on: 3.06.2026]. The authors of the article quote a comment by M. Häusling (Greens, MEP): “Commissioner Hansen was unable to explain how much money will actually go to farmers under the new CAP.”

Court of Auditors (ECA),¹⁸ which warned of the destabilisation of the payment system resulting from the abolition of a separate agricultural fund, provides a further argument for maintaining clear, predictable rules. This speaks in favour of mandatory, uniform capping. The Opinion states that “The proposal also provides for a simplification of the budgetary framework. However, the extent to which the final beneficiaries of the funds will benefit from this simplification will depend on how the implementing rules and control arrangements are designed and implemented in practice.”¹⁹ The capping mechanism should be viewed within the broader context of the EU’s economic relations with third countries, including in the context of the agreement with Mercosur.

2. Artificial conditions vs. capping

The question arises as to whether the influx of new agricultural products from outside the EU, coupled with increased degressivity and capping for EU farmers, will be a good solution for European agriculture. Statements by German state ministers for agriculture, for example, indicate that the political success of these measures is by no means certain, and indeed changes to them should be expected. Therefore, a structurally sound capping mechanism may not gain political approval, as it is seen as interfering too much with the competitiveness of European agriculture.

Another challenge will be preventing the creation of artificial conditions to obtain payments and the abuse of law.²⁰ This could be achieved by splitting farms to obtain payments in order to circumvent the introduced capping mechanism. The CJEU provided the most comprehensive interpretation of the artificial conditions clause in its judgment in Case C-434/12 (*Slyncheva Sila EOOD v. Executive Director of the State Fund ‘Zemedelie’*). The Court indicated that a finding of artificial conditions requires the joint demonstration of: an objective element – the transaction or division does not bring

¹⁸ European Court of Auditors, Opinion No 03/2026 of February 2026 on the EC’s legislative proposals concerning the MFF 2028–2034 and the new CAP, <https://eca.europa.eu> [accessed on 3.06.2026]. The ECA warned, among other things, of the risk of destabilisation of payments resulting from the abolition of a separate agricultural fund.

¹⁹ *Ibid.*, p. 6.

²⁰ J. Jagielski, *Kilka uwag o konstrukcji nadużycia prawa i jej zastosowania w zakresie pozyskiwania i wykorzystywania środków z programów UE dotyczących wspierania rolnictwa*, in: P. Litwiniuk (ed.), *Nadużycie prawa przez beneficjenta Wspólnej Polityki Rolnej Unii Europejskiej*, Warszawa 2020, p. 35; P. Litwiniuk, *Z problematyki nadużycia prawa przez beneficjenta Wspólnej Polityki Rolnej*, “Przegląd Prawa Rolnego” 2014, no. 2, p. 52.

about any real economic changes or benefits other than the EU subsidy; and a subjective element – the intention to circumvent the objectives of the Regulation.²¹ As regards the subjective element, the Court held that the mere aim of obtaining higher support is insufficient; it must be accompanied by an intention to act contrary to the objectives of agricultural law, understood in a functional sense.²² Proving the existence of artificial conditions will undoubtedly be difficult given the need to demonstrate both elements.²³ The consequence of creating artificial conditions is the provision set out in Article 4(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, which provides that actions aimed at obtaining an advantage in a manner contrary to the relevant objectives of Community law applicable in the case in question, by artificially creating conditions to obtain that advantage, lead to the non-granting or withdrawal of the advantage.

As is apparent from paras. 39 and 40 of the *Emsland-Stärke* judgment, this constitutes the essence of the interpretation of European Union law relating to the concept of “artificial conditions” as defined in EU legislation.

“39. The Commission contends that the concept of an abuse of rights comprises three elements:

- an objective element, that is to say, evidence that the conditions for the grant of a benefit were created artificially, that is to say, that a commercial operation was not carried out for an economic purpose but solely to obtain from the Community budget the financial aid which accompanies that operation. This requires analysis, on a case-by-case basis, both of the meaning and the purpose of the Community rules at issue and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices in the sector in question.

- a subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rules.

²¹ P. Litwiniuk, *O prawnej kategorii „stworzenia sztucznych warunków” z perspektywy zadań organu administracji publicznej właściwego w sprawach instrumentów WPR*, in: P. Litwiniuk (ed.), *Nadużycie prawa...*, p. 159 ff.

²² D. Łobos-Kotowska, *„Sztuczne tworzenie warunków” w celu uzyskania płatności w ramach systemów wsparcia bezpośredniego jako kategoria prawna w regulacjach unijnych i krajowych*, in: P. Litwiniuk (ed.), *Nadużycie prawa...*, pp. 39–54.

²³ See, similarly, the judgment of 21 July 2005 in Case C-515/03 *Eichsfelder Schlachtbetrieb v. Hauptzollamt Hamburg-Jonas*, ECR 2005 I-7355, para. 39 and the case-law cited therein.

– a procedural law element relating to the burden of proof. That burden falls on the relevant national administration. However, in the case of the most serious abuses, even *prima facie* evidence which might reverse the burden of proof is admissible.

40. It falls to the national court to determine whether all three elements exist.”²⁴

Demonstrating all three of these elements in order to establish the existence of artificial conditions may prove not only advantageous for potential beneficiaries, enabling them to create complex ownership structures that also involve third parties in order to circumvent the capping mechanism and obtain aid. Such a system should be opposed as it gives rise to interpretative doubts from the outset.

Summary

The analysis of one of the key new legal mechanisms proposed in the new CAP presented here allows for making several concluding observations. By explicitly introducing this mechanism, the European Union emphasises the importance of small and medium-sized farms. Large farms, not to say agricultural enterprises, must limit themselves to aid of up to 100,000 EUR. This is the amount that will constitute the main aid ceiling, i.e. the so-called capping.

The mechanism being introduced is consistent with the principles of European Union law, including the principles of proportionality and non-discrimination. In light of the CJEU’s case law to date in similar cases, and upon analysing the explanatory memorandum to the submitted draft, it can be concluded that the adopted solution appears to be sound. This conclusion is also supported by the economic effect, whereby large farms are increasingly able to compete without public aid. However, a rather significant question arises as to whether, by not utilising this aid, they will comply with other rules and obligations of CAP beneficiaries. This poses a major challenge for European decision-makers: when introducing the capping mechanism, they must ensure that large farms do not cease to use European aid whilst simultaneously failing to comply with other rules, for example regarding production quality or climate protection.²⁵

²⁴ Judgment of the Court of 14 December 2000 in Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, ECR 2000 I-11569.

²⁵ L. Russo, *La politica agricola comune tra esigenze di sostenibilità economica e l’attuazione del Green Deal a tutela della biodiversità*, “Diritto agroalimentare” 2025, no. 2, p. 329 ff.

The regulations being introduced will also encourage the creation of artificial conditions²⁶ to circumvent the capping rule. Splitting up farms in order to obtain financial aid may prove too great a temptation. It must be acknowledged that the second sentence of the proposed provision, stating that “In the case of a legal person or a group of legal persons, the restriction applies to all farms under the control of a single legal or natural person,” signals explicitly the impossibility of creating artificial conditions. At the same time, based on previous experience and the extensive case law of the CJEU, it cannot be ruled out that the new capping mechanism will be used to carry out artificial divisions of farms.

Capping is a legal instrument with a dual nature: financial and political. From a financial perspective, the funds saved as a result of applying the cap are to remain within the national support plan and be redistributed – in line with the Commission’s proposal – towards small and medium-sized farms, support for young farmers or the strengthening of eco-schemes.

From a political perspective, capping serves to legitimise the scheme in the eyes of the public and EU taxpayers. In the context of the debate on the justification for maintaining billions in support for the agricultural sector, the ability to demonstrate that no single enterprise receives more than 100,000 EUR per year from public funds constitutes a politically clear and convincing argument

The new measure of introducing an upper limit on area-based aid should be viewed positively from the perspective of small and medium-sized farms. However, whether the slogan “Europe of equal opportunities” will be fulfilled as a result remains to be seen. Only *ex-post* economic data will be able to provide a clear answer as to whether the capping mechanism has proved beneficial or has led to a decline for large farms, particularly those just above the 100,000 EUR threshold. Furthermore, the decision to introduce this instrument will be a political one. And the views and positions presented, for example by Germany, do not favour the introduction of this mechanism, not least in the context of the EU’s trade agreements.

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