

New regulation on the use of grassland in a dual system for agriculture and renewable energy



On 18 July 2024, the Ministry of Agriculture and Rural Development (“**MADR**”) published for public consultation, in effect until 17 August 2024, the *Draft Decision for amending and supplementing the Methodological Norms for the application of Government Emergency Ordinance no. 34/2013 on the organization, administration and operation of permanent grassland and for amending and supplementing Land fund law No. 18/1991 approved by Government Decision No. 1064/2013, as well as for establishing certain measures for their implementation* (“**Draft Decision**”).

Being subject to public consultation, the Draft Decision is likely to be subject to further amendments, but we have summarized below the main changes envisaged at this stage by the current form of the Draft Decision and some relevant contextual aspects.

1. Context and purpose of the Draft Decision

The possibility of using permanent grassland in a dual system, both for livestock grazing and fodder production as well as for producing electricity from renewable sources was initially regulated under Law No. 254/2022 for the amendment and supplementation of Land Fund Law No. 18/1991 (“**Law 18/1991**”) and of other regulatory acts, which amended both (i) Law 18/1991 and (ii) Emergency Ordinance No. 34/2013 on the organization, administration and operation of permanent grassland and for the amendment and supplementation of Land Fund Law No. 18/1991 (“**GEO 34/2013**”).

The Draft Decision aims to create a more detailed regulatory framework for the implementation of the provisions of GEO 34/2013 regarding the dual use of permanent grassland for both livestock grazing and fodder production, as well as for electricity production from renewable sources, which does not affect the proper agricultural exploitation of grassland.

Thus, the Draft Decision introduces a new regulation on the dual use of agricultural land located outside the built-up areas, in addition to the provisions of *Order No. 83/2018 for the approval of the Procedure for the permanent or temporary removal from the agricultural use of land located outside the built-up areas of localities, as well as for the approval of the Procedure for the refund of the tariff paid to the Land improvement fund* (“

Order 83/2018”) which reflected the provisions of Law 18/1991 on the dual use of agricultural land.

It would be advisable that the provisions of these two regulatory acts (*i.e.*, Order 83/2018 and the Draft Decision) regarding dual use should be correlated in the future.

2. Amendments brought by the Draft Decision

The Draft Decision includes the following main new provisions on the dual use system:

2.1 Definition of certain key terms

The Draft Decision defines certain major concepts in the context of the dual use, such as:

(i) “*proper agricultural use of grassland in the case of dual use*”, which emphasizes the fact that the area will be predominantly dedicated to agricultural activities, and that the establishment of specific objectives for the production of electricity from renewable sources will not affect the production of grass and other herbaceous forage plants, whether cultivated or wild, as well as the nutritional value of the area on which the agricultural activity is carried out, the grazing capacity, the measures for the administration of the permanent grassland established under pastoral or grazing arrangements or regulations, throughout the existence of such investment objectives. It is also specified that the height of the objectives and the distance between rows will ensure the animals’ movement, their physical safety and shelter.

According to the Draft Decision, renewable energy investments on grasslands must not affect the proper agricultural use of grasslands. Also, for the grasslands included in the public or private domain of local or central authorities, dual use is possible only with the consent of the animal breeders and farmer organizations that have ongoing contracts for such grasslands and only if the proper agricultural use, grazing capacity and access to the agricultural surface of the grassland is not affected.

This conditionality is rather restrictive and vague, and it is not clear how compliance therewith will be ascertained.

(ii) “*total area of permanent grassland used in a dual system*”, which consists of **(a)** the area on which agricultural activities are carried out; and **(b)** the grassland area occupied by the poles of the assembly structure, inverters, transformer stations, electricity storage units, independent earthing, protection and lightning protection systems, access roads, fencing, and other constructions/subassemblies necessary for the operation of these objectives as set out in the technical project.

The surface described in point **(b)** above is the one permitted to be removed from the agricultural use, being defined in the same manner under Order 83/2018.

2.2 Contracts on dual use

According to the Draft Decision, two activities (agriculture and energy production) can be carried out in a dual system on permanent grassland, as follows:

- (i) *by a single holder, both for agricultural activities and for producing electricity from renewable energy sources;*
- (ii) *by two holders, one of which for agricultural activities and the other one for the production of electricity from renewable energy sources, in which case the following documents need to be concluded: (a) a legal document for the use of the land area, if one of the holders is the owner of the grassland, or (b) two legal documents regarding the use of these areas for each of these activities.*

According to scenario (b) above, which most likely refers to a land agricultural lease, it is not clear, however, between which parties the two legal acts will be concluded (since there are three parties concerned in this scenario, i.e., the landowner and the two activity holders).

The Draft Decision also regulates the type of clauses to be included in such contracts, as follows: (i) the agricultural area for carrying out agricultural activities according to the bovine, ovine, caprine and equine species, (ii) grazing capacity, (iii) grazing period, (iv) the implementation of measures for the management of permanent grassland established under pastoral management plans, (v) the area covered by the specific investment objectives for the production of energy from renewable sources and (vi) measures to ensure animal welfare conditions,

2.3 Limitations on grassland use for energy production

Similarly to Order 83/2018, the Draft Decision sets forth that for the use of grassland in a dual system, the areas occupied by specific investment objectives for the production of energy from renewable sources will be partially removed from agricultural use, while the remaining grassland area will be used for agricultural purposes.

Thus, the area to be actually removed from agricultural use will consist of the area referred to in point (b) of the definition of "*total area of permanent grassland used in a dual system*" (see paragraph (ii) of Section 2.1 above), as also provided for in Order 83/2018.

The major novelty is *the maximum limit imposed on the area occupied by the investment objectives that can be removed from agricultural use, i.e., 20% of the total area of 50 hectares/objective used in dual system*. Such 20% limit seems rather low from the perspective of renewable energy investors.

Furthermore, for the purpose of removing it from agricultural use, *this area shall be identified at the level of each plot/parcel within a hectare*, both in written documents and in topographical plans. This peculiar provision raises the question of whether the legislator's intention is to impose the 20% limit on that granular level rather than on the whole project land. If this is the case, the dual use projects could become more expensive, as they would need to be less compacted (and to probably be developed in clusters) and, thus, more land would need to be secured by

investors.

2.4 Implementation and monitoring

The Draft Decision imposes obligations both on:

- (i) renewable energy investors, who must ensure that during the entire period of the grassland use in a dual system, the area remaining to be used for agricultural purposes will be used for the works provided for in the pastoral management plans, as well as for the agricultural activities specific to grassland (*i.e.*, grazing and/or fodder production); and
- (ii) the county agriculture directorates, which shall annually verify, throughout the existence of the investment objectives starting from the date of the decision approving the removal of grassland from agricultural use, specifying the dual use, the fulfillment of the conditions for the use of grassland in a dual system, further to which reports will be prepared and signed by the grassland owners.

While the obligations imposed on the county agriculture directorates in point (ii) may be useful monitoring tools, the obligation imposed on the renewable energy investors in point (i) seems too cumbersome, as they are practically required to ensure the proper agricultural use of the grassland by the farmers.

2.5 Recovery of unproductive land

Pursuant to the Draft Decision, the recovery of unproductive land is possible not only with respect to lands in the same locality where the project is to be developed but also in other localities within the same county, if there are no available unproductive lands in the original locality.

Last but not least, the Draft Decision expressly specifies that renewable energy investors must, upon completion of the recovery of unproductive land, introduce these areas into agricultural use as permanent grassland (*i.e.*, change their legal use category accordingly).

3. Conclusions

The Draft Decision has been long expected by the investors willing to develop projects on grasslands, who have so far been *de facto* refused by MADR to endorse the removal of such lands from agricultural use, although Law 18/1991 and GEO 34/2013 allowed it.

However, the final form in which the Draft Decision will be approved is of paramount importance for the renewable energy investors. Although it contains some reasonable provisions on protecting the agricultural use of land stock, the current form of the Draft Decision should be improved, as it contains some excessive obligations imposed on the renewable energy producers and some restrictive limitations for the use of grasslands for energy production. Also, it is not quite clear how these limitations should apply.

Also, as a result of the Draft Decision adoption, two different MADR regulations would be provided for dual use,

and their correlation would be required for ensuring predictability and equal treatment.