



Brussels
ENV.B.1/FD

NOTE TO THE EMAS COMMITTEE MEMBERS

Concerns: **Derogation from the requirement of on-site visits according to Article 25(4) of Regulation (EC) No 1221/2009 under *force majeure* in the context of the Covid-19 crisis**

Two outstanding qualities of the EMAS scheme are enhanced credibility and transparency, which are ensured through high standards of independently validated reporting and verified performance. Article 25(4) of Regulation (EC) No 1221/2009 (EMAS Regulation) requires that, as part of the verification and validation activities, the environmental verifier should visit the organisation, carry out spot-checks and conduct interviews with personnel.

The Commission has been made aware of difficulties encountered by some environmental verifiers to meet this legal obligation. This is especially due to travel restrictions or hygiene restrictions to enter the organisation's buildings because of the ongoing Covid-19 crisis. Some verifiers are not only carrying out their verification and validation activities in the countries where they are accredited, but also in other Member States or even third countries.¹

Pursuant to Article 14(1)(c) of the EMAS Regulation, the Competent Bodies shall renew the registration of an organisation, if they have “no evidence that the verification and validation have not been carried out in accordance with Articles 25, 26 and 27”.

The visit of the site by the environmental verifier is an obligation under the verification and validation exercise. Nevertheless, in the course of the renewal in accordance with Art. 14(1)(c) of the EMAS Regulation, it may be necessary to take into account the exceptional circumstances of the Covid-19 crisis in the assessment of this obligation, where those circumstances create situations where the compliance with the obligation to carry out site visits is temporarily not possible, or excessively difficult.

Because of its links with the principle of proportionality², *force majeure* can be considered a general principle of EU law, which can be invoked even in the absence of

¹ Ireland for example, which currently imposes very strict travel restrictions, does not have any verifier and therefore has to rely on external verifiers

² See already, to that effect, the Commission notice of 1988 concerning *force majeure* in European agricultural law, C(88) 1696 (OJ C 259, 6.10.1988, p. 10).

explicit provisions.³ Concerning the content of the notion of *force majeure*, the case law of the Court of Justice defined the notion as follows:

*“It is apparent from settled case-law, established in various spheres of EU law, that the concept of force majeure must be understood as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care”.*⁴

However, in the particular case of the assessment of the site visit obligation under Article 25(4) of the EMAS Regulation within the renewal exercise in line with Article 14, no automatic recourse to the notion of force majeure can be made.

In this context, in case there is evidence that the verification and validation have not been carried out in accordance with Article 25(4), for the purposes of deciding on the renewal of the registration of an organisation pursuant to Article 14(1)(c) of the EMAS Regulation, the Competent Bodies are invited to carefully assess the specific circumstances of each verification and validation activity and the degree to which this case-law might apply. In their assessment, the Competent Bodies are also invited to consider to what extent environmental verifiers could have carried out site visits during periods when they were not subject to travel restrictions or restrictions to enter the organisation’s buildings because of the Covid-19 crisis and to what extent the inability to carry out site visits is really due to the Covid-19 crisis.

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³ See Case 71/87, Inter-Kom, EU:C:1988:186, paragraphs 10 to 17 and Case C-12/92, Huygen and Others, EU:C:1993:914, paragraph 31, repeatedly followed by the General Court in particular in Case T-220/04, Spain v Commission, EU:T:2007:97, paragraphs 165 to 172. See also Opinion of AG Trstenjak, in Case C-101/08, Audilux, EU:C:2009:410, paragraph 71.

⁴ Case C- 640/15, Vilkas, EU:C:2017:39, paragraph 53.