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LEGAL SERVICE

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*Opinion of the Legal Service**

**NOTE TO MR. JEAN-CHARLES LEYGUES, DEPUTY
DIRECTOR GENERAL, DG REGIO**

Subject: Eligibility to the European territorial cooperation objective under cohesion policy 2007-2013

Your ref: 4840 (D(2006)220291) of 12.6.2006

Our réf.: CONS(2006)5385 of 13.6.2006

The Legal Service has been consulted by the note under reference on the eligibility of certain regions for inclusion within the European territorial co-operation objective under the General Regulation which is scheduled to be adopted on 21 July next.

Background

Under Article 21(1) of the General Regulation, some 7.75 billion euros are available for European territorial cooperation between 2007 and 2013. On the basis of Article 21(1)(a), the greater part of this money will go to cross-border co-operation, which is defined in Article 7(1) of the General Regulation. That last provision states that the regions eligible for cross-border co-operation will be all those on internal borders of the Community and some of those on the Community's external borders. The Commission is given implementing powers to establish a list of these regions.

The few regions on external borders which will appear on this Article 7(1) list are essentially those adjoining Switzerland, Norway, Lichtenstein and Andorra. For all other regions adjoining third countries, cross-border co-operation occurs through the ENPI and the IPAA.

The Structural Funds' contribution to the ENPI and the IPAA is assured by Article 21(2), which ring-fences some 814 million euros of Structural Funds financial assistance for ENPI and IPAA programmes.

* Commission document protected pursuant to Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council (OJ L 145, 31.5.2001, p. 43).

However, in the event that one or more of the programmes to be set up under the ENPI or IPAA is either never signed or stalls, paragraphs 5 and 6 of Article 21 envisage that these ring-fenced funds will return to the Member State concerned "for the financing of cross-border co-operation under [Article 21(1)(a)], including co-operation on external borders".

The issue

Here a problem arises. If co-operation between a region of the Community and a neighbouring third country under ENPI or IPAA never gets off the ground so that the ring-fencing of Structural Funds comes to an end, can the Member State to which that region belongs continue to use any liberated Structural Funds' contribution in that region for cross-border co-operation with partners in the third country even if the said region does not feature on the list of regions drawn up by the Commission using its implementing powers under Article 7(1)?

Response

The Legal Service considers that the absence of such a region from the list drawn up under Article 7(1) does not preclude the liberated funds being used for external cross-border co-operation in that region. It takes that view that even though that region would not feature in the Article 7(1) list, the legislator cannot have intended to compel Member State to channel such ring-fenced money away from regions that would have been covered under ENPI or IPAA but do not feature on that list. That result would be against both the wording and the structure of the provisions in question.

First of all, Article 21(5) (on the fate of "liberated funds") refers to "the financing of cross-border co-operation under [Article 21(1)(a)], including co-operation on external borders", without any qualification of that phrase, while Article 21(1)(a) (on mainstream cross-border co-operation) refers to Article 7(1), which speaks of, *inter alia*, regions "along [...] certain external land borders". Given that Article 7(1) covers a subset of external frontiers, the reference in Article 21(5) to "co-operation on external borders" in an unqualified way expressed a broader intent. In addition, if the reference to "co-operation on external borders" were limited to those regions on external borders which are covered by Article 7(1) that phrase in Article 21(5) would be redundant.

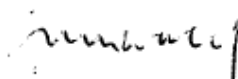
Second, as to the structure/intent of Article 21, it is clear that in the event that ENPI or IPAA programmes are still-born or cut off, the legislator wants to give the Member State concerned the choice either to carry on with the goals of the ENPI and the IPAA, through other means, or, should it so wish, to put the money into other regions on the Community's internal borders. Unless the reference to "co-operation on external borders" in Article 21(5) is read expansively, the Member State is denied that choice and can only use the money in regions on the Article 7(1) list.


This analysis also applies *mutatis mutandis* to Article 21(6).

Conclusion

Given that, in the scenario above, the correct interpretation of the General Regulation seems to require that such an Article 21(2) region can receive unfrozen ENPI or IPAA funds notwithstanding its absence from the Article 7(1) list, then that region would also be an eligible region directly on the basis of paragraph 5 or 6 of Article 21.

Accordingly, the Commission does not need a list of regions that might fall within the scope of those provisions nor does it need to modify the Article 7(1) list at a later date so as to add such a region to it, in order to establish at a later stage co-operation programmes under the conditions referred to under paragraphs 5 and 6 of Article 21 for regions not included in the list drawn up by the Commission under Article 7(1).


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