

**FAQ ON EX ANTE CONDITIONALITIES
RELATING TO PUBLIC PROCUREMENT AND STATE AID**

This list of frequently asked questions is based on comments received from Member States (MS) on Part II of the Guidance on *ex ante* conditionalities as regards public procurement and state aid.

General comment on training and dissemination of information (applying to all Gen. EAC)

- "Could you please clarify if it was an intention of EC to train staff implementing ESI funds concerning different EAC on different levels?"

Commission's reply: Arrangements for training for relevant staff involved in the implementation of ESI funds in the field of the general EAC is the criterion of fulfilment for all the general EAC as agreed by co-legislators.

This is a prerequisite to ensure the effective and efficient achievement of ESI Funds investments on the ground.

- "Which amount/arrangements of training, planned trainings, quality of staff of the authorities involved has to be proved by MS, especially when there is a lot of competence in these fields existing already?"

Commission's reply: It is up to Member State to decide on the necessary amount / arrangements of training to be developed, and the level of staff of the authorities to be involved. Member States will need to ensure that all staff of the authorities involved in the implementation of the ESI Funds has access to these trainings in order to be kept updated on new developments in these policy domains (e.g. the new block exemption regulation on state aid, new public procurement directive, new case-law in these policy areas, etc.)

The Commission will not assess the content of the training strategies developed in each Member State but will check whether these strategies are based on an analysis of recurrent weaknesses in the implementation of the ESI Funds and lack of compliance with applicable law, thus illustrating needs for all the staff involved in this implementation. However, in order to avoid that information provided in this context might be window dressing, quantitative indications should be given to the Commission, where possible.

- "Across general EAC, existence of a system of dissemination of the relevant guidance towards managing authorities, intermediate bodies, etc., is required. We are creating a Monitoring system 2014+ which will capture most of the relevant data on programmes and PA, for different users within implementation system. There are several websites which contain also public and specific data on programmes and PA. Requirements in mentioned criterion include also the exchange of information for all staff involved in defined area for the implementation of ESI Funds, which is sometimes managed for staff needs only.

What type of data/information needs to be provided and what extent is meant to satisfy particular subjects in implementation system (taking into account also staff versus public view)?"

Commission's reply: It is up to Member States to decide on the type of data/information to be provided and to which extent this should be made publicly available as long as this type of dissemination and exchange of information achieves its goal, i.e. ensuring that the staff involved in the management of the ESI Funds is aware of the applicable law which has to be respected and effectively complies with it at all stages of the implementation of the programme.

Whatever the chosen system (network of staff involved in the implementation of the ESI Funds, websites, newsletters, etc.), it should take into account the needs for information on applicable law at national / regional level in order to develop exchange of experience and to ensure consistency on the ground on the implementation of Union rules. In order to fulfil this requirement, the Member States will need to demonstrate that this system of dissemination and exchange of information is operational, addresses all the relevant issues and reaches all staff involved in the implementation of the ESI Funds.

General comments on the last updates of the Guidance

- “On the up-dated guidance on *ex ante* conditionalities, and with particular reference to the conditionalities concerning state aid and public procurement, we firmly oppose the proposed changes, by considering that the document widely rewrites the text of the above mentioned conditionalities and introduces further new and burdensome criteria for compliance.

This in turn vanishes the long process aimed at reaching a common understanding on those conditionalities with all the national Authorities involved and does not allow the self-assessment with reference to these new conditionalities. While expressing disappointment for the continuous evolution of the texts, Italy asks to restore the text on conditionalities concerning state aid and public procurement in the previous version, while not excluding further comments with reference to other conditionalities".

Commission's reply: This guidance on *ex ante* conditionalities is addressed to ESI Funds desk officers. Its purpose is to provide a common framework for the assessment by the Commission of the consistency and adequacy of the information provided by Member States on the applicability and fulfilment of *ex-ante* conditionalities upon the formal submission of Partnership Agreements and programmes, as well as during the informal dialogue that takes place before the formal submission of programmes and partnership agreements. Sub-criteria identified in the assessment grids aim at describing the Commission's expectations for each criterion and should ensure consistency between Member States.

The Guidance was made available for Member States to inform them how the Commission will assess the requirements set out in Annex XI of the Common Provisions Regulation. However, there is no regulatory obligation for Member States to make use of it.

PUBLIC PROCUREMENT **(GENERAL EAC 4)**

General comments on the fiche

- "The definition of public sector provided in this fiche should be reviewed; it is loosely translated from the definition given in Directive 2004/18."

Commission's reply: The drafting of this definition has been improved in the guidance fiche.

- Some sub-criteria go beyond the Regulation

Commission's reply: Sub-criteria identified in the assessment grids aim at describing the Commission's expectations for each criterion and at ensuring consistency across Member States through a common framework.

The Guidance was made available for Member States to inform them how the Commission will assess the requirements set out in Annex XI of the CPR. However, there is no regulatory obligation for Member States to make use of it.

Source of information for assessment

- "Need to clarify what are the "*relevant studies and evaluation reports on public procurement*" that will be used to assess the fulfilment of this general ex ante conditionality? Who will be their author, to what extent and at what level of detail and in what periods they will be processed?"

It is also not clear whether we will have the opportunity to comment the wording of such studies and reports and at what times. In this context, we would ask for clarification or explanation on this issue."

Commission's reply: According to Article 19(3) of the CPR, the Commission will base its assessment of the fulfilment of applicable EACs on information provided by the Member State. This assessment will be exclusively checked against the criteria laid down in Annex XI Part I of the CPR.

Therefore, information included in part II of the guidance under section 3 called "Sources of information for assessment" should be considered as background information for geographical units.

In the present case, the relevant studies and evaluation reports on public procurement mentioned in the grid cover for instance:

- the *Annual Public Procurement Implementation Review* that was adopted by the Commission on 9 October 2012

http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf

The sources of information of the Review include data collected by Commission staff from the available databases, such as TED/MAPPS for general figures and economic data or

Commission databases on infringements of Union law. This was supplemented by information gathered by the Commission from the Member States. The Commission received feedback from 23 MS.

- the available and useful reports from the Member States on the implementation of the procurement rules that were mentioned in the Annex of this 1st Annual Public Procurement Implementation Review.

"At the same time, it is not clear either to what extent the evaluation of fulfilment of the EAC for public procurement will affect the content of relevant audit reports and to what extent they will affect the evaluation of relevant studies or evaluation reports. We would like to ask for clarification regarding the use of these information sources."

Commission's reply: Member States that will not fulfil this EAC by the time of adoption of the programme will have to submit an action plan to the Commission to ensure its fulfilment by the end of 2016. Those actions (where relevant and completed) might in the end have a positive impact on the content of future audit reports, studies or evaluation report.

However, there is no direct link on the assessment of EAC and the elaboration of those reports.

Criteria for fulfilment

- "If the Directive on Public Procurement has been transposed at national level by law, and this law is legally binding for all the regions, the Commission should not insist on asking for further information at regional level."

Commission's reply: As you know, the rationale of *ex ante* conditionalities is to ensure that all institutional and strategic policy arrangements should be in place for the effective and efficient achievement of ESI Funds investments.

In order to assess the fulfilment of the *ex ante* conditionality relating to Union public procurement rules, the Commission will therefore not only check whether Member States have correctly transposed Union Directives on public procurement, but also whether all the legal, institutional and procedural arrangements are in place in order to ensure legal certainty and coherent and uniform interpretation of Union public procurement legislation. This should involve all contracting authorities (including regional authorities). Taking account of the institutional framework within Member States, the PA/programme should demonstrate how those national and regions authorities have put in place all the necessary arrangements to ensure legal certainty and coherent and uniform interpretation of Union public procurement legislation on the ground.

- "What does the Commission mean through the following sub-criterion "*Legal, institutional and procedural arrangements in place allow to address in an effective way the most serious and recurrent types of failures in the application of public procurement rules*". Which type or types of failure will the EC consider the most serious and recurrent - what level of frequency is acceptable, and what is decisive for the degree of seriousness?"

Commission's reply: There is no common answer to this question and no 'one size fits all approach' that applies to all Member States.

Each Member State should in fact analyse for which type of irregularities they were subject to major and recurrent financial corrections in the previous programming periods for irregularities in the application of the Union rules on public procurement to contracts co-financed by the Structural Funds or the Cohesion Fund. This would give them an orientation of where they need to make an effort to improve the situation through legal, institutional and/or procedural means.

"In addition, we would like to inquire, what is the difference between the word "error" and the word " failure" ? It is believed that the "error" is used in relation to a particular case (contract, project) and the word "failure" is understood to mean failure set a national system for public procurement?"

"Overall, we consider the definition of criteria for the evaluation of the fulfilment of EAC vague, uncertain of interpretation, which has the potential of leading to non-transparent assessment of the fulfilment of this EAC."

Commission's reply: Sub-criteria identified in the assessment grids aim at describing the Commission's expectations for each criterion and at ensuring consistency between Member States through a common framework. The Guidance was made available for Member States to inform them how the Commission will assess the requirements set out in Annex XI of the CPR. However, there is no regulatory obligation for Member States to make use of it.

The wording "failure" is used in the Common Provisions Regulation, for example in the context of applying financial corrections in case of irregularities.

Background information

- Need to update the references to the Guidance note on financial corrections

Commission's reply: New guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement have been annexed to Commission Decision C(2013)9527 (extracts of this decision are annexed to the fiche relating to public procurement in Part II of the Guidance on ex ante conditionalities).

Therefore, the guidance on ex ante conditionalities has been updated accordingly.

STATE AID (GENERAL EAC 5)

General comments on the fiche

- "Is this chapter applicable for agriculture, fishery and forestry?"

Commission's reply: According to Article 19(1) of the CPR which applies also to the EAFRD and the EMFF, Member States shall assess in accordance with their institutional and legal framework and in the context of the establishment of the programmes and, where appropriate, of the Partnership Agreement, whether the general ex-ante conditionalities laid down in Part II of Annex XI of the CPR [section dedicated to General EAC] are applicable to the specific objectives pursued within the priorities of their programmes and whether the applicable *ex ante* conditionalities are fulfilled.

EAC shall apply only to the extent and provided that the definition laid down in Article 2 CPR is complied with regarding the specific objectives pursued under the priorities of the programmes. The assessment of applicability shall, without prejudice to the above-mentioned definition, take account of the principle of proportionality in accordance with Article 4(5) CPR having regard to the level of support allocated, where appropriate.

Member States will therefore have to check whether Gen EAC 5 on State Aid applies accordingly to their EARDF and EMFF programmes. NB: In case of the EAFRD, the state aid related EAC can only apply for operations outside the scope of Art. 42 TFEU.

- MS suggest adapting some definitions (need for references to services of general interest, aid *de minimis*, GBER, Deggendorf case, etc.)

Commission's reply: See the up-dated fiche included in Part II of the Guidance, taking account your suggestions.

Criteria for fulfilment

- "We consider that it is not entirely possible to meet the first criterion ("*Arrangements for the effective application of Union State aid rules*") prior to approval of programmes and respective documentation (programming manual, aid schemes, management and control systems, etc.) since these documents will contain detailed description of system ensuring compliance with state aid legislation."

Commission's reply: All the criteria for fulfilment including the arrangements for the effective application Union State aid rules in the field of ESI Funds, need to be fulfilled at the submission of the programming documents. If they are not fulfilled, an action plan is needed.

Arrangements to effectively prevent, detect and correct granting of illegal and incompatible state aid should be in place prior the adoption of the programmes, to ensure the effective and efficient use of ESI Funds.

- "Why should a case of repayable assistance provided through financial instruments need a special treatment ?"

Commission's reply: In case of financial instruments State aid compliance needs to be assessed not only at the level of the final beneficiary, but also at the level of the holding fund manager and the financial intermediary.

- "Concrete measures mentioned in the assessment grid to provide reports on granted aids are not mandatory (central registry for aid granted, a *de minimis* registry); they are still under negotiations in the context of the State aid modernization process. Thus, it should be up to Member States to decide on the most proper form of the monitoring of the state aid granted".

Commission's reply: We have adapted the drafting of the assessment grid relating to this point.

- "Concerning the new EU Regulation on block exemptions, will it also cover MS' central website? Will the EC define which data MS shall store in central register for other types of state aid (horizontal aid)?"

Commission's reply: New GBER is still under discussion, as well as the sector specific block exemption for agriculture and forestry (the new ABER).

- "What is the difference between the following sub-criterion? "*Existence of a system of exchange of information for all staff applying State aid rules linked to the implementation of ESI Funds*" and "*Possibility for the use of technical assistance (e.g. technical guidance documents) is ensured for all bodies involved in applying State aid rules*"."

Commission's reply: The requirement linked to the system of dissemination and exchange of information refers to the existence of a platform/mechanism for exchange of knowledge and practices between all staff involved in applying State aid rules linked to the implementation of ESI Funds and for ensuring consistency of the implementation of the rules.

The requirement linked to technical assistance refers to availability of appropriate technical assistance for all bodies applying state aid rules in the context of ESI Funds.

The updated guidance fiche should help to better understand this requirement.

- "It is not clear why this reference to the Regional Aid Guidelines is mentioned in the annex (section regarding further reading) since the above reference contains the new RAG. Should the old RAG remain part of this paper, the other presently applicable rules are also to be mentioned."

Commission's reply: In the guidance fiche there is a link to a webpage on applicable rules for regional aid. Under that link the new rules as well as the current rules can be found. As explained in the new regional aid guidelines, the Commission will apply the new rules to aid granted after 30 June 2014. The current regional aid guidelines are prolonged and will be applied to aid granted before 1 July 2014.