MEMORANDUM

COMMUNICATION TO THE COMMISSION FROM MR. BARNIER in agreement with Mrs SCHREYER, Mrs DIAMANTOPOULOU and Mr. FISCHLER

Subject: Application of the "n+2" rule under article 31.2 of Regulation 1260/1999 - amendment

The attached Communication to the Commission from Mr Barnier in agreement with Mrs Shreyer, Mrs Diamantopoulou and Mr Fischler amends the communication on the application of Article31 §2 of Regulation (EC) n° 1260/1999. Two kind of amendments are introduced, one on the substance and the other on the form.

On one hand, the initial application of the n+2 rule revealed a problem linked to the implementation of the rules as set out in the annex to the Communication. These rules provided for the suspension of payments until the Commission receives and approves a revised financing plan after the decommitment in accordance with the n+2 rule. The implementation of this provision leads to the interruption of the treatment of payments.

In order not to delay the treatment of new payment claims during the time necessary for the establishment of the new revised financing plan, the amended communication cancels the suspension of payments. The part of the commitment of which the automatic de-commitment is being discussed is blocked. If the Member State provides the Commission with justification which leads it to reduce the blocked amount, the amounts not yet de-committed are unblocked and made available again for payment against subsequent payment claims, in accordance with article 31 §2 of Regulation (EC) 1260/1999.

On the other hand, the amended communication includes several clarifications. Firstly, the references to the financial regulation are updated in order to take into account the entry into force of the new financial regulation. Secondly, the definition of force majeure is made precise in order to take into account a definition agreed between the Directorates General in charge of the structural funds. Thirdly, the use of "31st December of the year n+2" is preferred to the use of "the date of automatic de-commitment". Finally, it is made clear that payment claims may be transmitted to the Commission up until 31st of December inclusive.
Application of the “n+2” rule under article 31.2 of Regulation 1260/1999- amendment

I. Article 31.2 of Regulation 1260/1999 reads as follows:

“The Commission shall automatically de-commit any part of a commitment which has not been settled by the payment on account or for which it has not received an acceptable payment application, as defined in Article 32(3), by the end of the second year following the year of commitment or, where appropriate and for the amounts concerned,

- following the date of a subsequent Commission decision necessary in order to authorize a measure or an operation or

- by the end of the deadline for the transmission of the final report referred to in Article 37(1)

The contribution from the Funds to that assistance shall be reduced by that amount.

The period for automatic de-commitment referred to in the second subparagraph shall cease to run for the part of the commitment corresponding to operations which, at the specified date of de-commitment, are the subject of a judicial procedure, or an administrative appeal having suspensory effects, subject to the Commission receiving prior information giving reasons from the Member State concerned and to information being issued by the Commission.

In any case, the Commission shall in good time inform the Member State and the paying authority whenever there is a risk of application of the automatic de-commitment provided for in the second subparagraph.”

This rule will apply on the 31.12.2002 for the first time. It is therefore necessary to issue instructions and clarifications on how the Commission services are to proceed. This Communication is to serve that purpose. It is also envisaged to inform the Member States in due course of its contents through the appropriate channels, for example the four committees under article 47 of Regulation 1260/1999.

II. Comments and clarifications

1. Date of application of the n+2 rule

The end of the second year after commitment means 31 December of the second year following the date of the acceptance of the commitment in the Commission’s accounts. For multi-fund programmes, there is a specific commitment for each fund. After the end of each budget year, the Commission will inform the Member States of the dates of the commitments made under each fund during that budget year.

If, for multi-fund programmes, the dates of commitment under each fund for the same decision are different, then the date of the last commitment is taken to establish the date of automatic de-commitment.

Applications for payment sent by Member States to the Commission by 31 October of each year will normally be paid by 31 December of that year. Any acceptable payment
applications\(^1\) received on or before 31 December, and not yet paid, will be taken into account when calculating the amount to be de-committed. Member States may submit applications for expenditure actually paid out up to the latest date in the year which permits them to be certified by the paying authority and received by the Commission by 31 December.

In practice, to take account of weekends and of the end-of-year holidays, the Commission will treat as received on time the applications for which the original documents have been sent by 31 December, as attested by the postal stamp, or submitted to the Commission electronically by 31 December.

2. **Subsequent Commission decisions**

If a further Commission decision is needed to authorise a certain measure or operation (an aid regime, or major project for example), then the commitment is made for the full annual tranche of the programme, including the amounts which cannot be reimbursed and related to the operation or measure which still needs further approval.

The part of the commitment corresponding to these measures or operations is treated separately under the ‘n+2’ rule: the amount concerned is left open and is not subject to de-commitment until the end of the second year after the subsequent decision is taken. The Member State must provide the information on the total cost and the planned implementing period for this purpose.

3. **Transfers between funds or between programmes**

(i) Commitments effected in earlier years

For each programme, there is one commitment each year under each fund. This means that there can be no transfers after the end of the year of commitment between commitments for different funds within a programme, nor between commitments for different programmes\(^2\). There is however no legal obstacle to payments under any priority charged to a commitment from exceeding the funds allocated to that priority within the relevant annual tranche of a fund, provided that the amount allocated to each priority for the full duration of the programme is not exceeded.

Article 157\(^3\) of the Financial Regulation\(^3\) provides for only exceptional reuse of decommitted amounts regarding earlier years’ commitments\(^4\). When considering requests for re-use of de-

\(^1\) As defined in article 32.3 of Regulation 1260/1999

\(^2\) This follows from Article 8§4 in combination with Article 11 of the Financial Regulation


\(^4\) Article 157 of financial Regulation provides that "The Commission shall automatically decommit appropriations that have been committed as provided for in the regulations referred to in Article 155. The decommitted appropriations may be made available again in the event of a manifest error attributable solely to the Commission or in the case of force majeure which has serious repercussions for the implementation of operations supported by the Structural Funds. To this end, the Commission shall examine decommitments made during the previous financial year and decide, by 15 February of the current year, on the basis of requirements, whether it is necessary to make the corresponding appropriations available again"
committed amounts, the Commission will examine the existence of force majeure defined as circumstances beyond the control of the person claiming force majeure, which are abnormal and unforeseeable and of which the consequences could not have been avoided despite the exercise of all due care. Furthermore, force majeure will only be admitted in case of serious repercussions on the implementation of the intervention with the proof of a direct link between force majeure and its repercussions.

(ii) Commitments in the current and future budgetary years

The current and future annual tranches of each fund can be modified during any budgetary year, under the conditions laid down in articles 14.2 of Regulation 1260/1999. Any increase in one year’s tranche must be compensated by a reduction in another programme’s tranche for the same year, as the annual ceiling for expenditure cannot be exceeded.

Any request for the modification of a decision which implies a modification of the current year’s commitment must be received by the Commission before 30 September of that year, as otherwise there will be insufficient time to effect the modification before the end of the budgetary year, in particular if the modification requires a transfer of appropriations between chapters of the EU General Budget.

4. Information to Member States

The Commission will inform the Member States either in the consultative committees or during the annual review provided for in article 34.2 of the Regulation 1260/1999 of the risk of application of the n + 2 rule after having received an updated payment forecast under article 32.7 of this regulation (as from the year 2002, and provided these forecasts are received for each programme), and again after 31 October of each year.

On this occasion, the Commission will also inform Member States of its criteria and procedures for the application of article 31.2, and give any clarifications which are required.

5. Judicial procedures and administrative appeals

The automatic decommitment will not be applied for the part of the commitment accepted as corresponding to operations which are the subject of a judicial procedure, or an administrative appeal having suspensory effects (termed “proceedings” in this note).

Prior to each ‘n + 2’ decommitment date, the Member State must, for each project concerned, provide an evaluation of the amount of the delayed payments which would otherwise have been paid by 31 December, and sufficient information and supporting documents on the proceedings. The supporting documents should in particular provide information on the suspensory effect, and its expected duration.

The cases normally accepted include proceedings which:

(i) delay the implementation of projects

Such claims will normally be accepted if the proceedings took the form of a formal court or administrative order, issued at the latest by 31 December of the n + 2 year, the effect of which was (and/or still is) to delay or suspend the works.

(ii) delay payments on projects

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5 Article 7.1 and Annex of Regulation 1260/1999
Delays to payments are usually the result of contractual disputes. The contested payments must relate to work carried out and invoiced at the latest by 31 December of the n + 2 year. The proceedings must have a suspensory effect on payments.

(iii) Delay the recognition of payments as eligible for EU co-financing

Such delays may be caused by cases of disputes between the Member State’s authorities and the final beneficiary which prevent expenditure incurred by the latter being recognised by the former as eligible. The contested payments must relate to work carried out and invoiced at the latest by 31 December of the n + 2 year.

6. Cases where irregularities are involved

If a payment claim contains amounts relating to irregularities, there will be no effect on the n + 2 de-commitment if the Member State includes the expenditure in the interim payment claims and ensures that it is declared under article 3 of Regulation 1681/94. Once the proceedings are completed, the EU co-finance of any amount found ineligible or otherwise irregular must be recovered and treated in accordance with the provisions of article 8 of Regulation 438/2001. Any amount not recovered will be treated as provided under article 5.2 of Regulation 1681/94, and any financial consequences decided under article 32 of Regulation 1260/1999.

7. Procedures undertaken by the Commission

(i) Suspended payments

The Commission may suspend all or part of payments claimed by a Member State. Such suspensions are made under articles 38.5 and 39.2 of Regulation 1260/1999, or when a decision is taken to embark on legal proceedings under Article 226 of the Treaty\(^6\). The automatic de-commitment will not be applied for the part of the commitment corresponding to payments which are the subject of such suspension, and for which applications which are otherwise acceptable, are submitted by 31 December of the year n+2. The amount of the commitment concerned will remain open until the suspension is lifted, and the applications paid, and/or a correction is decided. The funding of the programme will be reduced when any ensuing financial correction is decided under article 39.3.

(ii) Interrupted or reduced payment applications

When the Commission has refused a payment claim, or reduced the amount claimed, the Member State should provide a response to the Commission’s queries within the dead-line given for reply. To the extent that this response can be considered satisfactory, the initial claim will then be regarded as an acceptable application.

Where an otherwise acceptable payment claim\(^7\) is reduced by applying the cofinancing rate specified for measures or priorities, the amount of the reduction will not be decommitted. As this may be a temporary situation, compensated by later payments at a lower rate, the corresponding amount of the commitment will be left open, and used if and as soon as the average co-financing rate of payments rejoins the rate initially specified.

\(^6\) Joint declaration by the Commission and the Council no 173/99

\(^7\) As defined in article 32.3 of Regulation 1260/1999
8. **Accounting procedures**

The advance of 7% will be charged to the first commitment. This advance does not have to be justified by payments effected by final beneficiaries until the final balance of the assistance is claimed. If all or part of the advance is recovered by the Commission, the advance paid will be treated as having been reduced by the recovered amount.

Each interim payment will be charged to the earliest open commitment. This will be the case even if the earliest commitment is one which remains open after the ‘n+2’ dead-line because of judicial procedures.

At each ‘n + 2’ de-commitment date, the Commission will take the total charged to the commitment concerned, and add the acceptable payment applications communicated by that dead-line and the accepted effect of legal proceedings. The Commission will block any remaining part of that commitment in order to allow for the de-commitment to be carried out and inform the Member State consequently. The Member State will have two months in which to contest the Commission’s position and to supply the necessary justifications if it disagrees. Payment claims transmitted from the first of January of the n+3 year will be charged to the oldest valid commitment. The part of the commitment the de-commitment of which is being contested remains blocked. If the Member State provides the Commission with justification which leads it to reduce the blocked amount, the amounts not yet de-committed will be unblocked and made available again in accordance with article 31.2 of regulation 1260/1999 for the imputation of subsequent payment claims.

9. **Commission decision to reduce the allocated funds**

De-commitment implies the reduction of the funds allocated to the programme concerned, and the amount of the reduction is permanently lost to the programme, with the exception mentioned under point 3 (i). Consequently, the financing plan must be modified by a new Commission decision. The Member State will have to produce a revised financing plan, in which the tranche of the year concerned is reduced. In the absence of such a revised plan, the Commission will reduce the amounts allocated to each priority and each measure pro-rata for the tranche of the year concerned.

**III. Proposal to the Commission**

It is proposed that the Commission endorses these comments and clarifications as instructions to all the services concerned with the application of Regulation 1260/1999.

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8 Article 32.2 states that “throughout the lifetime of assistance, the paying authority shall use the payment on account to pay the Community contribution to this assistance”. Article 32.3 states that the combined total of the payment on account and the interim payments shall not exceed 95% of the contribution of the Funds to that assistance.

9 Article 32.2 third sub-paragraph
ANNEXE  The n+2 decommitment procedure

Without prejudice to the Commission’s proposal for recasting the Financial Regulation, the expected steps in the procedure are as follows:

- 30 April n+2: Deadline for submission of payment forecasts under article 32.7 of Regulation 1260/1999
- May n+2: On the basis of the forecasts received, the Commission will inform Member States of programmes which risk an automatic decommitment.
- 31 October n+2: Last date for submitting payment applications if they are to be paid at the latest on 31 December n+2
- Early November n+2: On the basis of the payment applications received, the Commission will inform Member States of the programmes which risk an automatic de-commitment
- 31 December n+2: Last date for the Member States to send applications by post, and introduction in SFC or in the case of flat files, by E-mail, and to inform the Commission of operations for which the automatic de-commitment would not apply, together with the relevant reasons and indications (see points II-1 and II-5 above).
- End February n+3: The Commission will inform the Member States concerned of all commitments of the year n which have not been fully covered by payments made or supported by acceptable applications by 31 December n+2 or for which the reasons for an exception under article 31.2.3 have not been accepted. The Commission will allow two months for the Member State to contest the Commission’s figures, and to supply the necessary justifications. The corresponding commitments are blocked until a revised financing plan is received and agreed.
- End-April n+3: Deadline for the Member States’ replies and the submission of a revised financial plan.
- End-May n+3: The Commission informs the Member State of the amount concerned, giving its reasons for refusing any part of the Member State’s reply. It will also modify the programme decision to take account of the funds to be de-committed, according to the proposal of the Member State, or, in the absence of such, on the basis of a pro-rata reduction on all priorities for the year concerned, and starts the corresponding de-commitment.