

Paper explaining how the Articles related to FI provide flexibilities to facilitate delivering support through Financial Instruments in tackling the economic impact of the COVID crisis

This working document is based on the replies provided to Member States on the CRII platform. Its aim is to provide explanations on the application of the referred rules to facilitate implementation and to encourage good practices. It is provided without prejudice to the interpretation of the Court of Justice and the General Court or subsequent decisions at the level of the College.

The document reflects the current state of play in relation to the application of the referred rules.

Introduction

On 13 March 2020, the Commission adopted the crisis response package to mitigate the economic impact of COVID-19. As part of the “Coronavirus Response Investment Initiative” (CRII) the Commission proposed measures, including changes in the CPR and ERDF regulations to extend the scope of working capital support, in particular through grants, to provide an effective response to a public health crisis. These steps concentrated on what was immediately necessary, available on short notice and what could be delivered promptly. The co-legislators gave strong support to this approach and on 1 April 2020, Regulation (EU) 2020/460 (Coronavirus Response Investment Initiative) came into force¹.

It became though necessary to provide additional flexibility to respond to the current unprecedented situation. Therefore, on 2 April², the CRII was complemented by a second set of measures (CRII Plus), and on 24 April, Regulation (EU) 2020/558 came into force³. In the context of financial instruments, in order to reduce administrative burdens and delays in implementation where changes in financial instruments are necessary to provide an effective response to a public health crisis, the review and update of the ex-ante assessment and updated business plans or equivalent documents as part of the supporting documents demonstrating that support provided was used for its intended purpose should no longer be required until the end of the programming period.

The document presents an overview on the main flexibilities envisaged for FIs in order to help in addressing the impact of the crisis.

¹ Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative), Official Journal of the European Union, L99, 31.3.2020, p.5

² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:099:FULL&from=FR>

³ https://ec.europa.eu/info/sites/info/files/european_structural_and_investments_funds.pdf

Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, Official Journal of the European Union, L130, 24.4.2020, p.1

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R0558&from=EN>

1. CRII Plus changes in relation to ex-ante assessment

1.1. Existing FI

To accelerate the response and to minimise the disruption of support provided through financial instruments, CRII Plus further amends the CPR, derogating from Article 37(2)(g) so as to no longer require to review or update the ex-ante assessments where changes in financial instruments are necessary to provide an effective response to a public health crisis.

1.2. New FI

Where the managing authority decides to set up a new FI as a crisis response, a *simplified* ex ante assessment in line with Article 37(2) CPR is needed to estimate the level and scope of public investment before the managing authority takes the formal decision to make programme contributions to the financial instrument.

However, this requirement should not delay deployment: such an ex ante assessment should be very focused and short and it does not need to be outsourced. The following table includes a short description of how the requirements could be fulfilled for every element required under Article 37(2) CPR. As in the case of existing financial instruments, the focus should be on the proposed investment strategy referred to in Article 37(2)(e).

Element of ex ante assessment required under Article 37(2)		How to address
a)	an analysis of market failures, suboptimal investment situations, and investment needs for policy areas and thematic objectives or investment priorities to be addressed with a view to contributing to the achievement of specific objectives set out under a priority and to be supported through financial instruments. That analysis shall be based on available good practices methodology	It is sufficient to refer to Commission's communication ' <i>Coordinated economic response to the COVID-19 Outbreak</i> ' COM(2020) 112 final
b)	an assessment of the added value of the financial instruments that are being considered for support from the ESI Funds, consistency with other forms of public intervention addressing the same market, possible State aid implications, the proportionality of the envisaged intervention and measures to minimise market distortion	It is sufficient to refer to Commission's communication ' <i>Coordinated economic response to the COVID-19 Outbreak</i> ' COM(2020) 112 final
c)	an estimate of additional public and private resources to be potentially raised by the financial instrument down to the level of the final recipient (expected leverage effect), including as appropriate an assessment of the need for, and the extent of, differentiated treatment as referred to in Article 43a to attract counterpart resources from investors operating under the market economy principle and/or a description of the mechanisms which will be used to establish the need for, and extent of, such differentiated treatment, such as a competitive or appropriately independent assessment process	Unless differentiated treatment of investors is needed, a conservative own estimate is sufficient; given the current constantly changing situation and uncertain overall economic outlook accurate estimates are not possible. This element is non-binding and could be later updated in line with market developments.
d)	an assessment of lessons learnt from similar instruments and ex ante assessments carried out by the Member State	It is sufficient to invoke exceptional nature of the

Element of ex ante assessment required under Article 37(2)	How to address
	in the past, and how such lessons will be applied in the future
e)	<p>current crisis to justify lessons learned might not be applicable</p> <p>This should be the focus of the analysis and could be prepared with the fund of funds or by public body. The document should avoid unnecessary details, given uncertain situation and the investment strategy may be updated later anyway, without the need to change the <i>ex ante</i> assessment</p>
f)	<p>a specification of the expected results and how the financial instrument concerned is expected to contribute to the achievement of the specific objectives set out under the relevant priority including indicators for that contribution;</p> <p>It is sufficient to specify that the expected result is ensuring sufficient liquidity for SMEs to address the losses due to the crisis (where applicable: with special attention on sectors which are particularly hard hit). Number of enterprises supported through financial instruments could be used as the required indicator.</p>
g)	<p>provisions allowing for the ex ante assessment to be reviewed and updated as required during the implementation of any financial instrument which has been implemented based upon such assessment, where during the implementation phase, the managing authority considers that the ex ante assessment may no longer accurately represent the market conditions existing at the time of implementation</p> <p>Appropriate arrangements as decided by MA. Given the dynamically changing situation, the remaining part of the assessment should not include too many details to avoid too frequent revisions.</p>

The managing authority would still need to verify though, in each specific case, whether programme-specific conditions require extending the scope of support in order to cover such new actions. Working capital does not have to be mentioned explicitly to be eligible, but should fit into the scope of priority axes and types of projects.

In case the programme needs to be amended to extend eligibility to cover the new scope, expenditure for operations fostering crisis response capacities in the context of the COVID-19 outbreak is eligible as of 1 February 2020. However, in case of financial instruments, if such

changes were needed, the expenditure is eligible as of 1 February 2020 provided that the adequate changes have been also introduced in the funding agreements, if needed.⁴

For new FI, programme contribution to FI in line with Article 41 CPR can be made only based on the amount committed in the funding agreement.

2. CRII and CRII Plus amendments in Article 37(4) CPR in relation to support for working capital

Support to financing of working capital for SMEs through financial instruments has been eligible from the beginning of the 2014-2020 period as set out in Article 37(4) CPR.

The CRII introduces a new sub-paragraph in Article 37(4) CPR providing that: *'Financial instruments may also provide support in the form of working capital to SMEs if necessary as a temporary measure to provide an effective response to a public health crisis.'*

The new sub-paragraph of Article 37(4) CPR is designed to clarify that existing financial instruments can provide working capital easily and quickly to SMEs that need to respond to the public health crisis.

If FIs already provide support for working capital with no restriction in relation to their scope and targeted final recipients, their implementation can continue with no need to change the funding agreement and other agreements.

Where support for working capital is already provided to enterprises within existing FIs, a change of their objectives may be necessary if there are restrictions as to the purpose for which such working capital is provided or to which types of enterprises it can be provided to. For existing instruments, funding agreements might already include provisions that would trigger revisions of investment strategies in case of crisis.

For the existing FI, which were set up to provide support for investments, other than working capital, and where managing authorities and the bodies implementing FI consider that there is room for change in the objective of the FI to include support for working capital as an effective response to the public health crisis, the respective funding agreements may have to be modified (if needed).

Changes consequential to the new sub-paragraph in Article 37(4) CPR are to be introduced in the funding agreement and subsequently the agreements with the specific funds where appropriate.

In case of increase of amounts in the funding agreements and the change in the subject matter of the contract, please refer to Section 6 on Public Procurement.

⁴ Questions and answers about the modifications to the operational programmes to address the new measures are available at the following website:
<https://webgate.ec.europa.eu/fpfi/wikis/pages/viewpage.action?spaceKey=CORONAVIRUSRRII&title=Coronavirus+Response+Investment+Initiative>

The implementation options following the amendments in Articles 37(2)(g) and 37(4) CPR are presented in Annex II of this paper.

3. Notion of working capital, categories of eligible expenditure and length of working capital

Support to working capital is a flexible facility to honour the current cash flow needs of the enterprises. Working capital is a difference between current assets and current liabilities. It can be delivered through grants and financial instruments or a combination of both. Managing authorities should choose the most appropriate delivery mechanism for the circumstances of their programmes.

3.1. Categories of expenditure

Support for working capital of the SME may cover for, amongst others, the financing of payables for raw materials and other manufacturing inputs, labour, taxes; inventories and overheads; rent, utilities; funding to finance trade receivables and non-consumer sales receivables.

3.2. Length of working capital

The CPR does not prescribe the length for support of working capital. In the current COVID-19 circumstances, we recognise that working capital facilities with shorter duration may be necessary. Member States should accommodate the necessary length of the working capital to the needs of final recipients paying attention to the latter's level of indebtedness.

4. Verification of supporting documents

For financial instruments, under the current regulatory framework (Article 9(2)(e)(vii) CDR 480/2014) there is a need (for financial instruments only) for a document from a final recipient which can be considered as a business plan or of equivalent probative value which is part of an application for support.

For the situations where the existing loans are redirected to support working capital as the crisis response, the revision and update of the business plans or other documents of probative value both on the side of the final recipients and on the side of the financial institution will create additional administrative burden and extended decision making process. Therefore, to facilitate a faster crisis response and where financial instruments provide support in the form of working capital to SMEs pursuant to Article 37(4) 2nd sub-paragraph of the CPR, the CRII Plus regulation derogates from the requirement for supporting documents, including new or updated business plans or equivalent documents and evidence allowing verification that the support provided through the financial instruments was used for its intended purpose.

5. Management verifications and audits in case of working capital

For the support in the form of financial instruments, working capital has been eligible already from the beginning of the 2014-2020 period. Hence, when the proposed measures support both working capital needed to provide such effective response to the public health crisis and other eligible working capital, there might be no need to include any specific checks concerning the crisis. When the financial instruments are already in place, there might be even no need to change the underlying funding agreements.

For financial instruments, verification of financial statements for a company at the moment of investment selection for funding should usually be sufficient, without any need to provide specific prove of expenditure incurred. The loan is given based on an analysis of the balance sheet and the foreseen evolution of short term financing needs. Requesting invoices to justify the use of the working capital financing would already not be normal banking practice.

The management verifications should check if the selection is in line with the applicable EU and national rules. In the context of working capital, they should focus on:

- whether the company indeed had been affected by the public health crisis, as defined in national rules, when a given measure targets exclusively such expenditure in line with the amended Article 3(1) of the ERDF Regulation; (as described above, this might not be needed for financial instruments which support working capital also outside of the coronavirus crisis); and
- ensuring that no double financing is provided in case the SMEs are or have been supported also by other EU-funded operations.

6. Public procurement

a) Direct award to public financial institutions or EIB/EIF/IFI

Managing authorities already have the possibility to award contracts directly to a body implementing financial instruments supported through the ESI Funds either if such body is the EIB/EIF/IFI (and thus falls outside public procurement rules) or based on the exceptions of the Public Procurement Directive 2014/24/EU - PPD (Article 12), including the clarification provided in the Omnibus Regulation and subject to several detailed conditions as set out in the Article 38(4)(b) CPR. In such situations, the increase of the existing contract value (if there is a need to top-up the existing financial instrument) can be made according to the conditions of the contract and no further restrictions would apply.

b) Possibility to modify the contract under Article 72 PPD

It is important to note from the outset that modifications of contract are meant to ensure the proper execution pertaining to the original subject matter, and not to answer to new needs. For that, new contracts need to be used.

Where the existing contract needs to be modified the following basic principles should be recalled:

- 1) if the modifications would concern adding a new subject matter, then such modifications are not possible, but a new procurement must take place, and the different possibilities outlined in the [Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis](#), most notably accelerated procedure and negotiated procedure without publication, are possible.
- 2) If the subject matter/overall nature of the contract remains the same, then:
 - a) Article 72(1)(a) could be used provided that such an option to “top-up”, irrespective of its monetary value, was included in the initial procurement documents (this means already from the publication, in the procurement documents and not just in the contract) defined specifically in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses must state the scope and nature of possible modifications or options as well as the conditions under which they may be used, or
 - b) Article 72(1)(c) could be used, which requires that the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee and the increase in price related to such extension, must not be higher than 50% of the value of the original contract. Where several successive modifications are made, that limitation should apply to the value of each modification. Such consecutive modifications should not be aimed at circumventing this Directive.
 - c) In the view of the Commission, in the case that **if the original contract covered only support in the form of working capital**, then an increase in the value would not change the subject matter. If the contract covered both the subjects of working capital and another subject matter such as economic activities, then the conditions for the modification must not change which element would be the main subject.

On the contrary, as explained above, if the original contract did not cover support in the form of working capital at all, then the subject matter would be considered as new and therefore cannot be introduced in the contract by way of modification.

However, all such possibilities need to be examined on a case-by-case basis.

7. State aid

As a temporary measure in the context of the COVID-19 outbreak, the European Commission adopted on 19 March 2020⁵ and further amended on 3 April 2020⁶ a Temporary Framework

⁵ Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1)

⁶ First Amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 112I, 4.4.2020, p. 1). The second amendment of the Temporary Framework is underway: on 9

to enable Member States to use the full flexibility foreseen under State aid rules. Member States must notify to the Commission aid to be granted under the Temporary Framework, which will be in place until the end of December 2020. The European Commission will assess before that date if the Temporary Framework needs to be extended. Two important points are to be highlighted:

- The Temporary Framework makes it possible for Member States to grant aid to undertakings in difficulty (within the meaning of the General Block Exemption Regulation) provided they were not in difficulty on 31 December 2019 but faced difficulties or entered in difficulty thereafter as a result of the COVID-19 outbreak. The ERDF Regulation has to apply the same date to analyse if the enterprise is in difficulty as envisaged by the temporary State Aid measures and such an amendment was introduced in the ERDF regulation.
- The aid under the Temporary Framework can be cumulated notably with *de minimis* aid. Provided the rules under the GBER and under the different *de minimis* Regulations are respected, the temporary aid measures covered by this Communication may be cumulated in line with the cumulation rules set out in the GBER and in the different *de minimis* Regulations, including Regulation (EU) No 1407/2013⁷. This means that the EUR 800 000 direct grant may be cumulated with the EUR 200 000 *de minimis* support, to provide a total of EUR 1 million of support per undertaking, provided that both set of State aid rules are respected. The cumulation of aid applies for a limited period since the Temporary Framework is only in place until the end of 2020.

CRII Plus Regulation in force as of 24 April 2020, amended the ERDF Regulation to allow for support to be provided to undertakings in difficulties in these specific circumstances, thus ensuring consistency with the approach taken under the Temporary Framework and *de minimis* aid rules.

8. Reporting procedures

Reporting requirements for financial instruments relate to key financial information that financial intermediaries would collect anyway and should not have impact on final recipient beyond what is already normal market practice.

CRII Plus Regulation of 24 April 2020 postpones the deadline for submission of annual implementation report for the year 2019, including specific reporting on FI, to 30 September 2020.

April 2020, the Commission sent to Member States the draft proposal to further extend the scope of the Temporary Framework to recapitalization measures (see the official statement: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_610).

⁷ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013).

Annex I: Amendments to the CPR and ERDF regulation in relation to financial instruments

Regulation (EU) 2020/460 on CRII, adopted on 30 March with entry into force on 1 April amended regulation (EU) No 1303/2013 (the Common Provisions Regulation) as follows:

In Article 37(4) on financial instruments, it is added that financial instruments may also provide support in the form of working capital to SMEs if necessary as a temporary measure to provide an effective response to a public health crisis.

Regulation (EU) 2020/558 CRII Plus, adopted on 23 April with entry into force on 24 April amended regulation (EU) No 1303/2013 (the Common Provisions Regulation) as follows:

- In Article 37(2)(g) it is added that by way of derogation from Article 37(2)(g), no review or update of the ex-ante assessments is required where changes in financial instruments are necessary to provide an effective response to the COVID-19 outbreak.
- In Article 37(4) it is added that where financial instruments provide support in the form of working capital to SMEs pursuant to the second subparagraph of Article 37(4) [inserted by the CRII amendment], new or updated business plans or equivalent documents and evidence allowing verification that the support provided through the financial instruments was used for its intended purpose as part of the supporting documents are not required.

By way of derogation from Regulation (EU) No 1305/2013, such support may also be provided by the EAFRD under measures referred to in Regulation (EU) No 1305/2013 and relevant to the implementation of financial instruments. Such eligible expenditure shall not exceed EUR 200 000.

- In article 111(1) it is added that by way of derogation from Article 111(1), the deadline for the submission of the annual implementation report for the year 2019 is 30 September 2020.

Amendment to Regulation (EU) No 1301/2013 Point (d) of Article 3(3) Regulation (EU) No 1301/2013 is replaced by the following:

“Undertakings in difficulty as defined in Union State aid rules; undertakings receiving support complying with the State aid Temporary Framework³ or Commission Regulations (EU) No 1407/2013⁸, (EU) No 1408/2013⁹ and (EU) No 717/2014¹⁰ shall not be regarded as undertakings in difficulty for the purposes of this point.”

⁸ OJ C 91 I, 20.3.2020, p. 1. 4 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1).

⁹ Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9).

¹⁰ Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45)

Annex II: Implementation options as the result of CRII and CRII Plus Amendments in Article 37(2)(g) CPR and Article 37(4) CPR

