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# **Guidance on Ex Ante Conditionalities**

## **for the European Structural and Investment Funds (ESI)**

### **PART I**

**(This is a provisional text, based on the current outcome of the CPR trilogues, without prejudice to the on-going negotiations. The document will be reviewed once there is an agreement between the three institutions on the legislative package).**

This guidance is addressed to geographical units for ESI Funds. Its purpose is to provide a 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. It will also be made available to Member States.

**24 July 2013**

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## 1 INTRODUCTION

The Commission proposals for a Multi-Annual financial Framework<sup>1</sup> called for "new conditionality provisions [...] to ensure that EU funding is focused on results and creates strong incentives for Member States to ensure the effective delivery of Europe 2020 objectives and targets through Cohesion policy".

The 2010 Budget Review<sup>2</sup> emphasized the need to "improve the quality of public expenditure" in times of fiscal constraints. In response, the Fifth Cohesion Report<sup>3</sup> suggested that conditionality provisions be introduced into cohesion policy 2014-2020.

The Fifth Cohesion Report identified the main purpose of ex-ante conditionalities (EAC) as helping "countries and regions to tackle the problems that past experience has shown to be particularly relevant to policy implementation. These principles could be linked to, for example, transposition of specific EU legislation, the financing of strategic EU projects, or administrative, evaluation and institutional capacity."

Ex-post evaluations show that unsound policy frameworks and regulatory as well as administrative and institutional bottlenecks can undermine the effectiveness of any investment. The proposed ex-ante conditionalities are key to ensure that all institutional and strategic policy arrangements are in place for effective investment. These conditions are a combination of an appropriate regulatory framework, effective policies with clear objectives and a sufficient administrative or institutional capacity.

### **Characteristics of ex-ante conditionalities:**

- they are directly linked to factors which determine the effectiveness of investment;
- they are limited in number, focusing on the framework conditions that are perceived as most relevant;
- they are built on already existing obligations for MS and avoiding multiplication of obligations or going beyond already existing requirements;
- they take into account the division of competences between the European Union and Member States as well as the distribution of policy competences within Member States.

### **1.1 The approach to ex-ante conditionalities**

The proposal for a Common Provisions Regulation<sup>4</sup> (hereafter 'CPR') includes three different types of conditionalities, namely:

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<sup>1</sup> COM(2011)500 final of 29.06.2011.

<sup>2</sup> COM(2010)700 final of 19.10.2010.

<sup>3</sup> COM(2010)642 final of 9.11.2010.

- Ex-ante conditionalities (Article 17 CPR) discussed further in this guidance. There are thematic ex-ante conditionalities, which are related to a sector or policy (e.g. R&D, active inclusion) and general ex-ante conditionalities, which by their nature can apply to all sectors and policies (e.g. public procurement, anti-discrimination rules);
- Ex-post conditionalities (Article 20(4) CPR) related to the achievement of the targets set out in the performance framework;
- Macroeconomic conditionalities (Article 21 CPR) to ensure that macroeconomic preconditions and country specific recommendations, as established in the European Semester, are taken into account during the implementation of programmes.

Ex-ante conditionalities are established in the Fund-specific rules. The ex-ante conditionalities which apply to cohesion policy (ERDF, ESF and Cohesion Fund) are included in Part III CPR and set out in Annex V (section 1) General ex ante conditionalities set out in Section 2 of Annex V apply to all ESI funds. The ex-ante conditionalities which are subject of this guidance do not apply to programmes under the European territorial cooperation goal (Art. 17(6) CPR).

The ex-ante conditionalities set out in the Fund-specific rules reflect existing commitments or obligations that should be fulfilled as a general rule by the end of 2013, or by programme adoption at the latest. They are directly linked to ensuring the effective and efficient implementation of the five ESI funds and relate to one of three types of framework conditions:

- regulatory framework,
- policies/strategies with clear policy objectives,
- administrative/institutional capacity.

The proposal for a regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) sets out in Article 10 the ex-ante conditionalities which will apply to the EAFRD. This includes part of the ex-ante conditionalities defined in Annex V sections 1 and 2 of the CPR and introduces further EAFRD specific ex-ante conditionalities in Annex IV of the EAFRD

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<sup>4</sup> The proposal for a regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Council Regulation (EC) No 1083/2006 - COM(2011) 615 final/2 amended by COM(2012)496 final of 11.09.2012.

regulation.<sup>5</sup> Article 11 of the proposed European Maritime and Fisheries Fund (EMFF) regulation sets out the EMFF for the EMFF specific ex-ante conditionalities in its Annex III<sup>6</sup>.

## 1.2 Steps of the assessment and suspension process

The Commission services' intention is to exchange views with Member States on the identification of the applicable ex-ante conditionalities and the determination of their degree of fulfilment<sup>7</sup> during the informal dialogue prior to the start of the formal negotiations. The aim is, as far as possible, to reach a common understanding and shared view on applicability and fulfilment of ex-ante conditionalities before the formal submission of programming documents. This will help the formal negotiation process and facilitate the definition of appropriate actions, including the use of technical assistance (from the programming periods 2007-2013 and 2014-2020) and in the case of the ESF, even support under an investment priority<sup>8</sup>, to address non-fulfilled ex-ante conditionalities.

During the informal dialogue, Commission services can draw attention to areas where the experience of the current programming period and the Commission's analysis has revealed most problems, for example with regard to the areas covered by the relevant country-specific recommendations ex Art. 121(2) and Art. 148(4) TFEU<sup>9</sup> adopted by the Council at the end of the European Semester as they identify challenges and weaknesses, to be addressed by Member States.

The steps of the formal assessment of applicability and fulfilment of ex-ante conditionalities are:

- (1) **Self-assessment by Member State** of applicability and fulfilment of ex-ante conditionality: its results are indicated in the Partnership Agreement and the programmes<sup>10</sup>. Preparation of an action plan in case applicable ex-ante conditionalities are not fulfilled.

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<sup>5</sup> This is without prejudice to the outcome of the trilogue negotiations which will not be finalised before the third quarter 2013..

<sup>6</sup> For draft guidance on the EMFF specific EACs see [http://ec.europa.eu/fisheries/reform/emff/draft-guidance-on-emff-specific-ex-ante-conditionalities\\_en.pdf](http://ec.europa.eu/fisheries/reform/emff/draft-guidance-on-emff-specific-ex-ante-conditionalities_en.pdf)

<sup>7</sup> However, this process is without prejudice to the possible evolution of the criteria due to amendments of the legislative proposal by the Council and the European Parliament, which will not be finalised until first quarter of 2013.

<sup>8</sup> This would e.g. be the case for active labour market policies, where the ESF can support the delivery of Active Labour Market Policies (ALMPs), but also reforms of ALMPs or the creation of formal or informal cooperation arrangements with relevant stakeholders.

<sup>9</sup> Treaty on the Functioning of the European Union.

<sup>10</sup> The Partnership Agreement has to contain a summary of the assessment of fulfilment of applicable ex ante conditionalities where national level authorities are responsible for their fulfilment (Art. 14(1)(b)(iii) CPR). A programme has to contain an assessment of the fulfilment of ex ante conditionalities applicable to the

- (2) **Commission assessment** of the adequacy and consistency of the information provided as regards applicability and fulfilment of ex-ante conditionalities and of the actions to be taken in case of non-fulfilment.
- (3) **Resolution of disagreements between the Commission and Member State** concerning applicability, fulfilment and actions to be taken to fulfil applicable ex-ante conditionalities.
- (4) Commission assessment of **significant prejudice** to the effectiveness and efficiency for achieving the specific objectives<sup>11</sup> in case of non-fulfilment of applicable ex-ante conditionalities. **Possible suspension of interim payments at the time of programme adoption.**

Once the programmes have been the adopted, the CPR provides for:

- (5) **Reporting** on the implementation of agreed actions to fulfil applicable ex-ante conditionalities.
- (6) **Suspension of interim payments** as a result of failure to complete in due time the implementation of agreed actions
- (7) **Lifting of suspension of interim payments.**

## 2 SELF-ASSESSMENT BY MEMBER STATE

### Recital 17 CPR

Member States should concentrate support to ensure a significant contribution to the achievement of Union objectives in line with their specific national and regional development needs. (...) The fulfilment of the applicable ex ante conditionalities should be assessed by the Member State in the framework of its establishment of the Partnership Contract or programmes, {taking account of the principle of proportionality}.<sup>12</sup>

### Article 17 CPR

1. 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, the Partnership Agreement, whether the ex ante conditionalities laid down in the respective fund-specific rules and the general ex ante conditionalities set out in Section 2 of Annex V are applicable to the specific objectives pursued within the priorities of their programmes and whether the applicable ex ante conditionalities are fulfilled. Ex ante conditionalities shall apply only to the extent and provided that the definition laid down in Article 2 is complied with regarding the specific objectives pursued under the priorities of the programme. The assessment of applicability shall, without prejudice to the afore-mentioned definition, take account of the principle of proportionality in accordance with Article 4(5) having regard to the level of support allocated, where appropriate. The assessment of fulfilment shall be limited to the criteria laid down in the fund-specific rules and the criteria laid down in Section 2 of Annex V.

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programme (see Art. 87(6)(b) CPR as regards cohesion policy). All EAFRD programmes have to contain an assessment of ex-ante conditionalities (Art. 9 EAFRD).

<sup>11</sup> Under the focus areas in case of EAFRD.

<sup>12</sup> To be adapted to Article 17.

2. The Partnership Agreement shall set out a summary of the assessment of the fulfilment of the applicable ex ante conditionalities at national level and for those which, pursuant to the assessment referred to in paragraph 1, are not fulfilled at the date of submission of the Partnership Agreement, the actions to be taken, the responsible bodies and the timetable for their implementation. Each programme shall identify which of the ex ante conditionalities laid down in the respective fund-specific rules and the general ex ante conditionalities set out in Section 2 of Annex V are applicable to the programme and, which of them, pursuant to the assessment referred to in paragraph 1, are fulfilled at the date of submission of the Partnership Agreement and programmes. Where the applicable ex ante conditionalities are not fulfilled, the programme shall contain a description of the actions to be taken, the responsible bodies and the timetable for their implementation. Member States shall [...] fulfil these ex ante conditionalities not later than 31 December 2016 and report on their fulfilment not later than in the annual implementation report in 2017 or the progress report in 2017 in accordance with Article 44 (5) [...].

#### Article 2 CPR

"Applicable ex ante conditionality" means a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a direct and genuine link to and direct impact on the effective and efficient achievement of the specific objective for an investment priority or a Union priority."

"A specific objective is the result to which an investment priority or Union priority shall contribute in a specific national or regional context through actions or measures undertaken within a priority."

## 2.1 Assessment of applicability

The CPR recognises that ex-ante conditionalities are only applicable in certain conditions; Article 17 CPR introduces the notion of applicability of an ex-ante conditionality. Applicability is limited to factors which have a direct and genuine link to and a direct impact on the efficient and effective achievement of the specific objective for an investment priority or a Union priority. In order to ensure this linkage, the Member State shall identify for each specific objective<sup>13</sup> under an investment priority or Union priority, whether the ex-ante conditionality is a prerequisite for efficient and effective implementation.

In the case of the ERDF, ESF and Cohesion Fund, specific objectives are set in agreement between the Member States and the Commission during the process of programming. They correspond to the results to be achieved with the funds via the actions within a priority. It is thus important that specific objectives are correctly defined. In the case of the EAFRD, focus areas are defined in the regulation and they correspond to specific objectives. Member States can develop additional focus areas where deemed necessary in a certain national context. Concerning the EMFF, a list of specific objectives for different Union priorities has been defined by the Commission; however Member States can develop additional specific objectives in their operational programmes.

### The importance of correct definition of specific objectives

Before starting discussing the applicability of ex-ante conditionalities for the Cohesion Policy<sup>14</sup> (and the EMFF<sup>15</sup>), the Commission and the Member State should agree on specific objectives for the investment priorities and on their wording.

<sup>13</sup> This corresponds to "focus areas" for the EAFRD.

<sup>14</sup> For EAFRD, these specific objectives are generally already defined in the regulations.

<sup>15</sup> For EMFF a list of specific objectives has been pre-defined by the Commission, however MS can develop additional specific objectives.

If the specific objectives are not adequately defined by a Member State, it may seem that ex-ante conditionalities are not applicable, even if they have a direct impact on the effectiveness and efficiency of EU support. It is therefore **essential that the specific objectives (linked to the selected investment or Union priorities) are correctly defined and support the achievement of the objective of the investment priority and of the thematic objective.** During the informal dialogue, the Commission services position paper may provide the basis for discussions with a Member State on the specific objectives linked to the selected investment priorities.

For example, a Member State may wish to deliver on its energy efficiency target and therefore to invest in energy efficiency in public infrastructure, and could propose to define the corresponding specific objective as increasing employment in the construction sector. However, such a specific objective should not be accepted as it is not in line with the objective of this investment priority (for ERDF and CF: supporting energy efficiency and renewable energy use in public infrastructures...). In this case, the conditionality related to energy efficiency appears not to be applicable, as there is no direct link between the specific objective and the ex-ante conditionality, despite the fact that there is an obvious link between investing in energy efficiency and the corresponding ex-ante conditionalities. The Member State should therefore be requested to amend the specific objective and to review its self- assessment.

As mentioned in section 1.2, the process of assessment of applicability of ex-ante conditionalities needs to be undertaken before the formal submission of the Partnership Agreement and programmes. This is a one-off exercise and there no assessment of applicability in case of an amendment to the programming documents whereby new investment/union priorities are included.

As set out in Article 17(1) CPR, the assessment of applicability shall take account of the principle of proportionality, having regard to the level of support allocated, where appropriate, without prejudice to the definition of “applicable ex-ante conditionality” set out in Art. 2 CPR. Accordingly, if it can be demonstrated that an EAC has a relatively small direct impact on the effective and efficient achievement of the specific objective of an investment priority or Union priority, it will not apply (see examples in the sections below).

This does not mean however that a relatively small allocation to a priority axis/Union priority containing a specific objective linked to an ex ante conditionality, automatically triggers a possibility of non-applicability of this EAC, as in these cases there may be a strong link between the fulfilment of an EAC and the effective and efficient achievement of the specific objective concerned.

### *2.1.1 Applicability of thematic ex-ante conditionalities<sup>16</sup>*

The first step should be to check whether a link is established between an ex-ante conditionality and an investment priority/Union priority in the fund-specific rules. For thematic ex-ante conditionalities covered by Cohesion policy, this check should be done against Annex V, section 1 CPR as the second column identifies the investment priorities to which the ex-ante conditionality is linked. For priority related ex-ante conditionalities covered by EAFRD, this link is set out in Annex IV of the EAFRD Regulation proposal. For the EMFF specific ex-ante conditionalities, this link is established in Annex III of the proposed EMFF regulation.

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<sup>16</sup> Priority related EAC for EAFRD

If an ex-ante conditionality is considered by a Member State to be applicable on the basis of the fund-specific rules, then it is deemed that there is link between the specific objective/focus area and the ex-ante conditionality. Where an ex-ante conditionality is not considered to be applicable by a Member State on the basis of the fund-specific rules, applicability of thematic ex-ante conditionalities should be assessed at the level of the specific objective/focus area<sup>[2]</sup>. The following conditions, in line with Article 2 CPR, need to be met for an ex-ante conditionality to be applicable:

- The ex-ante conditionality must be a prerequisite: that is to say, it is possible to demonstrate that with the ex-ante conditionality, the achievement of the specific objective would be more effective and efficient than without the ex-ante conditionality.
- There must be a direct and genuine link between an ex-ante conditionality and a specific objective: that is to say, it is possible to demonstrate a link between the non-fulfilment of an ex-ante conditionality and prejudice to the effective and efficient delivery of the specific objective.
- The conditionality must have a direct impact: that is to say, it is possible to demonstrate that non-respect of the ex-ante conditionality will lead to a potential risk of not achieving results or less result (effectiveness) or high costs/administrative burden/delays to implementation (efficiency).

To facilitate this assessment, it is recommended to start by checking the direct impact of the ex-ante conditionality on the effective and efficient achievement of a specific objective. If there is no impact, the conditionality will not be applicable and the other criteria do not need to be assessed.

Furthermore, taking into account the principle of proportionality, where there is little demonstrable impact on the effective and efficient implementation of a specific objective of an investment priority/Union priority, the ex-ante conditionality would not apply. For example, in case of an ERDF investment priority containing a specific objective linked to upgrading IT education infrastructure for secondary school education in view of providing better quality curriculum, the EAC linked to “Early school leaving” (existence of strategy to reduce early school leaving), would not be applicable if it can be demonstrated that the existence of a strategy to reduce early school leaving has only a little impact on the achievement of the specific objective.

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<sup>[2]</sup> And/or measures thereunder for the EAFRD

The Commission services would expect that thematic ex-ante conditionalities **are always applicable** in case the investment priority/Union priority (to which the ex-ante conditionality is linked, see: Annex V, section 1 CPR) is selected in the programme<sup>17</sup>. In case a Member State concludes in its self-assessment that a thematic ex-ante conditionality is not applicable, the Commission services expect the Member State to set out the reasons why it has come to this conclusion based on the above points.

This information is particularly important as the Commission has the burden of proof in case of disagreement (see section 5 below).

As mentioned above, geographical units are advised to discuss applicability with Member States during the informal dialogue. The guidance included in the draft template on the operational programmes under cohesion policy recalls the need to submit information on applicability of ex-ante conditionalities (as required by Art. 17(3) CPR). Member States can do so in separate documents submitted with the operational programme or this information may be included within the operational programme (see Annex 7.5 and also section 2.4 below). For the EAFRD the working paper on strategic programming recalls in section 4 the requirement to include information on the assessment of ex-ante conditionalities as a follow-up of the legal requirements of Art. 9 of the EAFRD Regulation.

### *2.1.2 Applicability of general ex-ante conditionalities*

For general ex-ante conditionalities – which are of a horizontal nature – the fund specific rules do not set out a linkage to investment priorities/Union priorities. Therefore, it will always be necessary to verify their applicability in relation to the specific objectives of all investment and Union priorities of the programme, as explained in the section 2.1.1 above.

As a general rule, the general ex-ante conditionalities on the effective application of Union law (e.g. the ex-ante conditionalities on public procurement, state aid, anti-discrimination, disability) will be applicable in case the relevant provisions of Union law are applicable to the interventions planned to be supported by the ESI Fund under a priority/Union priority and when it is estimated that their non-fulfilment would lead to a clearly identified risk to the effective and efficient achievement of a specific objective/focus area.

From an operational point of view, the applicability assessment can in these cases be limited to checking whether the relevant provisions of Union law constitute applicable Union law for the interventions which will be supported by the ESI Funds within a priority/programme, in particular by verifying whether those provisions would be relevant for establishing the selection criteria for operations in accordance with Article 114(3) CPR

As a general rule, general ex-ante conditionalities will be applicable at the level of programmes or priorities as these will have similar types of interventions, beneficiaries and target groups. Certain types of programmes and priorities are likely to be subject to several applicable general ex-ante conditionalities. These include for the ERDF, the ESF and the CF, the following thematic objectives and investment types:

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<sup>17</sup>This does not apply to the EAFRD, where the applicability assessment would also have to be carried out at focus area/measure level in order to confirm applicability.

Examples:

- All programmes: statistical systems and result indicators, public procurement, state aid (in case of support to companies)
- Infrastructure programmes: public procurement, EIA, SEA, state aid, accessibility for persons with disability
- Innovation and SME support: public procurement, state aid, gender equality (SME support)
- Employment, social inclusion: gender equality, anti-discrimination, accessibility for persons with disability, public procurement, state aid (e.g. in case of support to companies e.g. under the IPs on active and healthy ageing, adaptation)
- Technical assistance: gender equality, anti-discrimination, accessibility for persons with disability, public procurement

See below further guidance for the assessment of applicability of general ex-ante conditionalities:

General ex-ante conditionalities	Key questions for effective and efficient achievement of the specific objective
Anti discrimination	<p>The question to assess applicability is: do the anti-discrimination directives constitute applicable Union law for the interventions which will be supported under the relevant priority of a programme co-financed by the ESI Funds?</p> <p>Furthermore, in order to achieve the specific objectives for all or part of the investment or Union priority:</p> <ul style="list-style-type: none"> <li>• Does the achievement of the specific objective require the effective implementation and application of anti-discrimination directives?</li> <li>• Is there a link between the effective implementation and application of anti-discrimination directives and the achievement of the specific objective?</li> <li>• Will ineffective implementation and application of anti-discrimination directives lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?</li> </ul> <p>Examples: risk of financial corrections and thus non-achievement of the results, risk of non-achievement for certain target groups.</p>
Gender	<p>In order to achieve the specific objectives for all or part of the investment or Union priority</p> <ul style="list-style-type: none"> <li>• Does the achievement of the specific objective require the effective implementation of EU gender equality law ?</li> <li>• Is there a link between the effective implementation of EU gender equality law and policy and the achievement of the specific objectives?</li> <li>• Will ineffective implementation of gender equality law and policy lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?</li> </ul> <p>Examples: risk of non-achievement for certain target groups.</p>
Disability	<p>The question to assess applicability is: Does the UN Convention constitute applicable Union law for the interventions to be supported under the relevant priority of a programme co-financed by the ESI Funds?</p> <p>Furthermore, in order to achieve the specific objectives for all or part of the investment or Union priority:</p> <ul style="list-style-type: none"> <li>• Does the achievement of the specific objective require the effective implementation and application of the UN convention on the rights of persons with disability?</li> </ul>

	<ul style="list-style-type: none"> <li>• Is there a link between the effective implementation and application of the UN convention and achievement of the specific objective?</li> <li>• Will ineffective implementation and application of the UN convention lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?</li> </ul> <p>Examples: risk of financial corrections and thus non-achievement of the results risk of non-achievement for certain target groups.</p>
Public procurement	<p>The question to assess applicability is: Do the EU public procurement rules constitute applicable Union law for the interventions to be supported under the relevant priority of a programme co-financed by the ESI Funds?</p> <p>Furthermore, in order to achieve the specific objectives for all or part of the investment or Union priority:</p> <ul style="list-style-type: none"> <li>• Does the achievement of the specific objective require the effective application of EU public procurement law?</li> <li>• Is there a link between the effective application of EU public procurement law and achievement of the specific objectives?</li> <li>• Will ineffective application of EU public procurement law lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency) based on current experience?</li> </ul> <p>Examples: risk of financial corrections and thus non-achievement of the results, risk of non-achievement for certain types of investment or beneficiary.</p>
State aid	<p>The question to assess applicability is: Do the EU state aid rules constitute applicable Union law for the interventions to be supported under the relevant priority of a programme co-financed by the ESI Funds?</p> <p>Furthermore, in order to achieve the specific objectives for all or part of the investment or Union priority:</p> <ul style="list-style-type: none"> <li>• Does the specific objective involve support for operations which will be subject to state aid assessment?</li> <li>• Is there a link between the effective application of EU state aid law and achievement of the specific objectives?</li> <li>• Will ineffective application of EU state aid law lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency) based on current experience?</li> </ul> <p>Examples: risk of financial corrections and thus non-achievement of the results, risk of non-achievement for certain types of investment or beneficiary.</p>
Environmental legislation relating to EIA and SEA	<p>The question to assess applicability is: Does the Union environmental legislation related to EIA and SEA constitute applicable Union law for the interventions to be supported under the relevant priority of a programme co-financed by the ESI Funds?</p> <p>Furthermore, in order to achieve the specific objectives for all or part of the investment or Union priority:</p> <ul style="list-style-type: none"> <li>• Does the specific objective require support for operations for which the effective application of Union environmental legislation related to the EIA and SEA will need to be assessed?</li> <li>• Is there a link between the effective application of Union environmental legislation related to the EIA and SEA and achievement of the specific objectives?</li> <li>• Will ineffective application of Union environmental legislation related to the EIA and SEA lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?</li> </ul> <p>Examples: risk of financial corrections and thus non-achievement of the results risk</p>

	of non-achievement for certain types of investment or beneficiary.
Statistical systems and result indicators	<p>This ex-ante conditionality applies to all programmes.</p> <p>In order to achieve the specific objectives for all or part of the investment or Union priority</p> <ul style="list-style-type: none"> <li>• Does the specific objective require the existence of a statistical basis and system of result indicators?</li> <li>• Is there a link between the existence of a statistical basis and system of result indicators and achievement of the specific objectives?</li> <li>• Will in the inexistence of a statistical basis and system of result indicators lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?</li> </ul> <p>Examples: risk of non-achievement for certain investments, beneficiaries or target groups.</p>

Similarly to the assessment of applicability of thematic ex ante conditionalities, a principle of proportionality applies for the assessment of applicability of general EACs, without prejudice to the definition of an "applicable EAC".

Examples:

#### (1) Anti-discrimination EAC

In case of an ERDF co-financed investment priority containing a specific objective linked to protecting biodiversity, the "Anti-discrimination" EAC would not apply since it can be demonstrated that there is only a little direct impact of the application of EU anti-discrimination law on the efficient and effective achievement of the specific objective.

#### (2) Gender EAC

For an investment priority under the Cohesion Fund containing a specific objective linked to meeting the requirements of the EU environmental acquis in waste sector, "Gender equality" EAC will not apply since the application of EU gender equality law has only a little impact on the achievement of the specific objective.

#### (3) Public procurement EAC

Under an ERDF investment priority containing a specific objective linked to enhancement of productivity of SMEs, the "Public procurement" ex ante conditionality will not apply if it can be demonstrated that prevailing support allocated under this investment priority targets beneficiaries that are not required to follow EU public procurement rules and thus it is possible to demonstrate that non-respect of the ex-ante conditionality will not lead to a potential risk of not achieving results or less result (effectiveness) or high costs/administrative burden/delays to implementation (efficiency), this ex ante conditionality will not apply.

#### (4) State aid ex-ante conditionality

In case of ERDF investment priority linked to investment in cultural heritage, if it can be demonstrated, on the basis of the specific objective, that only relatively little support will be allocated to actions where there is an obligation to follow the state aid law, (for example the majority of investments planned are in renovation of historical buildings), this ex-ante conditionality will not apply.

## **2.2 Assessment of fulfilment**

Once Member States have come to the conclusion that the ex-ante conditionality applies, they have to assess whether the criteria for fulfilment are met. The fulfilment of an ex ante conditionality requires that all the corresponding criteria are fulfilled. It will thus be important that the self-assessment clearly covers each and every criterion as set out in the fund specific rules (Annex V, section 1 CPR- for the thematic ex-ante conditionalities- Annex IV EAFRD, Annex III EMFF) and the criteria in Section 2 of Annex V (for general ex ante conditionalities), and assesses the fulfilment of each criterion of applicable ex-ante conditionality.

In case of non-fulfilled criteria by the date of the submission of the Partnership Agreement linked directly to legislative requirements (such as EU directives), the reference point is the legislation in force by end 2013. Part II of this Guidance contains for all ex-ante conditionalities of Annex V CPR an assessment grid which includes all the elements which the assessment should cover<sup>18</sup>. The Member States are encouraged to complete those grids in the framework of the self-assessment of the fulfilment of ex-ante conditionalities. This will facilitate the Commission's assessment.

The self-assessment of fulfilment may take place at national and/or regional level (it should take place at the appropriate level depending on the Member State's institutional arrangements). A summary of the results has to be set out in the Partnership Agreement for the ex-ante conditionalities where the responsibility for fulfilment lies at national level. Whether the responsibility for fulfilment lies at national or regional level, the results of the assessment of fulfilment need to be set out in the programme for the ex-ante conditionalities that apply to the programme's investment priorities/Union priorities (see: section 2.4 for further details).

It is up to Member States to decide which Ministry or authority will carry out the self-assessment for each applicable ex-ante conditionality. It is important that these bodies are well-informed on how to do the self-assessment and that they start early.

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<sup>18</sup> For the EAFRD, those priority related ex-ante conditionalities which correspond to the thematic objectives under Annex V of the CPR are considered to be covered by the guidance provided in part II of this document. The remaining EAFRD specific ex-ante conditionalities will be covered by a separate guidance document. Depending on the outcome of the trilogue negotiations, both documents would have to be adapted. Concerning the EMFF specific ex-ante conditionalities DG MARE has developed a separate guidance document.

## 2.3 Establishment of actions

In case applicable ex-ante conditionalities are not fulfilled (either completely or partially not-fulfilled), Member States should indicate in their programmes and Partnership Agreement, **the actions to be taken**, the responsible bodies and a timetable to ensure that they will be fulfilled at the latest by the end of 2016. Member States thus have to prepare an action plan.

The action plans must always be set out in the programmes notwithstanding that their summary should be included in the Partnership Agreement where the responsibility for fulfilment lies at national level (see: section 2.4 below).

There should be a direct correspondence between the weaknesses identified in the assessment of the criteria giving rise to non-fulfilment and the actions to be undertaken, since the goal is to achieve complete fulfilment. The action plan should:

- Describe in detail the actions (i.e. implementation steps) to be taken;
- Identify the responsible bodies at national and/or regional level, whether in the managing authority or in other public organisations;
- contain a timetable setting deadlines for the actions.

It is not necessary to set-up actions in case of non-fulfilment of those criteria which are not relevant for the achievement of specific objectives.

**Example:** A specific objective of an investment priority is linked to the support for existing SMEs. In this case, the SME ex-ante conditionality applies (ANNEX V, section 1, 3.1), but the criterion: “measures have been put in place with the objective of reducing the time and cost to set-up business taking account of the targets of the SBA” is not relevant for the achievement of this specific objective. However, other criteria remain relevant.

The deadline of 31 December 2016 is the final deadline for all actions but earlier deadlines can be established.

## 2.4 Presentation in Partnership Agreement and programmes

### Article 14 CPR

1. The Partnership Agreement shall set out:
  - (b) arrangements to ensure effective implementation, including:
    - (iii) a summary of the assessment of the fulfilment of applicable ex ante conditionalities in accordance with Article 17 and Annex (xx) at national level and of the actions to be taken, the responsible bodies and the timetable for their implementation, where ex ante conditionalities are not fulfilled;

### Article 87 CPR

6. The Operational Programme shall also set out the following, having regard to the content of the Partnership Agreement and taking into account the Institutional Framework of the Member States:

(b) for each ex ante conditionality, established in accordance with Article 17 and Annex (xx), which is applicable to the operational programme an assessment of whether the ex-ante conditionality is fulfilled at the date of submission of the Partnership Agreement and operational programme, and where the ex-ante conditionalities are not fulfilled, a description of the actions to fulfil the ex ante conditionality, the responsible bodies and a timetable for such actions in accordance with the summary submitted in the Partnership Agreement;

#### Article 9 EAFRD Regulation

(d) for each ex ante conditionality, established in accordance with Article 17 and Annex (...) Section 2 of Regulation [CSF/2013] for the general ex-ante conditionalities, and in accordance with Annex IV of this regulation, an assessment of which of the ex-ante conditionalities are applicable to the programme and which of them are fulfilled at the date of submission of the Partnership Agreement and the programme. Where the applicable ex-ante conditionalities are not fulfilled, the programme shall contain a description of the actions to be taken, the responsible bodies and the timetable for their implementation in accordance with the summary submitted in the Partnership Agreement.

The requirements for presenting the assessment of fulfilment of the applicable ex-ante conditionalities and the actions to be taken (in case of non-fulfilment) take into account that commitments to fulfil them and to implement the respective action plans can only be made by the competent (national and/or regional) level.

- The Partnership Agreement should contain a summary of all applicable general and thematic/fund-specific ex-ante conditionalities at national level. This will be the ex-ante conditionalities that fall within the remit of the national level, as determined by the Member State taking also into account cases of shared-competences. It is necessary to identify, for each of these applicable ex-ante conditionalities, whether they are fulfilled (see draft Partnership Agreement template<sup>19</sup>).
- Each programme should identify **all** ex-ante conditionalities applicable to that programme (also those that have already been included in the Partnership Agreement and provide an assessment of their fulfilment. This is necessary to ensure that programme managers and the Monitoring Committee are, where relevant, informed of the action plans and deadlines to which the national level has committed as regards the ex-ante conditionalities affecting the programme they are responsible for (for cohesion policy: see the draft Operational programme template ).
- Where the Member State has concluded that an ex-ante conditionality is fulfilled, the assessment has to include references and preferably addresses of relevant websites (or other access) to the full text of relevant documents (e.g. strategies, legal acts) including references to relevant sections, articles or paragraphs which confirm the assessment of the Member State. If this is not the case, the Commission will need to ask Member States to provide additional information as the Commission must be in a position to assess the adequacy and consistency of the information provided by

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<sup>19</sup> The template of the Partnership Agreement clarifies that the applicability of ex-ante conditionalities to individual programmes is set out in those programmes and therefore does not need to be included in the Partnership Agreement.

Member States and regions as well as whether the criteria of the ex-ante conditionality are fulfilled.

- Where the Member State concludes that an ex-ante conditionality has not been fulfilled, the programmes have to set out an action plan, including deadlines, to ensure the fulfilment of all criteria at the latest by 31 December 2016, and identify the (national or regional) bodies responsible for the implementation of the actions set out. The Partnership Agreement shall contain a summary of the action plans for those non-fulfilled ex-ante conditionalities where the responsibility for fulfilment lies at national level.

For cohesion policy programmes, in case a Member State prepares a maximum of one programme for each Fund (ERDF, ESF, Cohesion Fund), it may make use of the possibility offered by Art. 87(8) CPR and include the elements on ex-ante conditionality which should be provided in the operational programme, under the relevant provisions of the Partnership Agreement.

### 3 COMMISSION ASSESSMENT OF ADEQUACY AND CONSISTENCY OF THE INFORMATION PROVIDED BY MEMBER STATES

Recital 17 CPR

The Commission shall verify the consistency of this assessment in accordance with the principles of {proportionality and}\* subsidiarity and respecting national and regional competences to decide on the specific and adequate policy measures, including the content of strategies<sup>20</sup>.

Article 17 CPR

3. The Commission shall assess the consistency and the adequacy of the information provided by the Member State on the applicability of ex ante conditionalities and on the fulfilment of applicable ex ante conditionalities in the framework of its assessment of the programmes and, where appropriate, the Partnership Agreement. This assessment of applicability shall, in accordance with Article 4(5), take account of the principle of proportionality, having regard to the level of support allocated, where appropriate. The assessment of fulfilment shall be limited to the criteria laid down in the fund-specific rules and the criteria in Section 2 of Annex V, and shall respect national and regional competences to decide on the specific and adequate policy measures including the content of strategies.

The Commission shall assess the consistency and the adequacy of the information provided by the Member State on<sup>21</sup>:

- the **applicability** of ex-ante conditionalities to the specific objectives pursued within the priorities in each programme
- the **fulfilment** of applicable ex ante conditionalities: the Commission's assessment needs to be limited to the criteria laid down in the fund-specific rules and respect national and regional competences to decide on the specific and adequate policy measures including the content of strategies.
- the **adequacy of actions** proposed by a Member State to fulfil the ex-ante conditionalities

The basis for the above Commission assessment is the self-assessment by the Member State contained in their Partnership Agreements (summary) and programmes and the documents referred to. This process will be facilitated for the Commission by completion by Member States of grids for assessment presented in part II of this guidance. The geographical units should also rely on information from the relevant Commission services and draw on additional information<sup>22</sup>, where appropriate.

As regards the Commission's assessment of fulfilment and of the adequacy of the actions, it is important to underline that the Commission's obligation is to assess whether the criteria in the fund-specific rules are fulfilled: the Commission services will need to make use of the assessment grid (see Part II on the specific guidance for each ex-ante conditionality) to assess fulfilment of each criterion. Actions should be set-up for all the non-fulfilled criteria which

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<sup>20</sup>To be adapted to Art. 17 CPR.

<sup>21</sup> Is the information provided: complete, reliable and verifiable?

<sup>22</sup> E.g. obtained in the course of the expert and peer-reviews of strategies undertaken by the Commission services, country-specific Council recommendations on the basis of Art. 121(2) TFEU and/or Art. 148(4) TFEU, Commission Staff Working Documents on the National Reform Programmes and the Stability and Convergence programmes.

are relevant to the achievement of a specific objective of an investment priority/Union priority.

The assessment of the ex-ante conditionalities relating to **strategies** should not include an assessment of the content of the strategies beyond the criteria set out in the CPR. This assessment should be limited to the criteria for fulfilment. In practical terms this means that the Commission should assess whether the basic quality requirements have been fulfilled without going into detail as regards specific policy choices or objectives. Whilst it is up to Member States to determine the content and policy choices of strategies, the Commission will assess whether these specific policy choices/measures are sufficient to fulfil the criteria. Where the criteria are not fulfilled the Member State should prepare the necessary actions in a form of policy measures in order to fulfil the criteria.

The content of strategies and strategic choices made as such can be discussed during the informal dialogue and negotiation process with Member States in the context of negotiations of the Partnership Agreement and the programmes, notably to ensure consistency between the strategies and the specific objectives and indicators in the programmes. This process should be clearly distinguished from the process of assessment of ex-ante conditionalities.

The detailed assessment by the Commission should normally take place before the formal submission of the Partnership Agreement and programmes in course of informal exchanges, as mentioned in the section 1.2.

#### **4 RESOLUTION OF DISAGREEMENTS BETWEEN THE COMMISSION AND MEMBER STATE CONCERNING APPLICABILITY, FULFILMENT, ACTIONS TO BE TAKEN AND SUSPENSION OF INTERIM PAYMENTS.**

##### Article 17 CPR

4 In case of disagreement between the Commission and a Member State on the applicability of an ex ante conditionality to the specific objective of the priorities of a programme or its fulfilment, both the applicability in accordance with Article 2 and a the non-fulfilment shall be proven by the Commission.

While the aim is to ensure that the Commission and the Member State share as much as possible their assessment of applicability and fulfilment, there may be cases where they disagree. If the Commission disagrees with the Member State on the applicability or the fulfilment of an-ex-ante conditionality, the burden of proof is on the Commission.

It will thus be important for the Commission to be able to justify to the Member State why an ex-ante conditionality is applicable to a specific objective of an investment priority/Union priority selected by the Member State or for which reasons the Commission considers that an applicable ex ante conditionality is not fulfilled. The Commission may therefore request additional information from the Member State in order to carry out an assessment.

It is recommended to carry out the resolution of any disagreements during the informal dialogue between the Commission and the Member States.

## 5 COMMISSION ASSESSMENT OF SIGNIFICANT PREJUDICE IN CASE OF NON-FULFILMENT OF APPLICABLE EX-ANTE CONDITIONALITIES; SUSPENSION OF INTERIM PAYMENTS UPON PROGRAMME ADOPTION

### Article 17 CPR

5. The Commission may decide, when adopting a programme, to suspend all or part of interim payments to the relevant priority of this programme pending the [...] completion of actions [...] referred to in paragraph 2 where necessary to avoid significant prejudice to the effectiveness and efficiency of the achievement of the specific objectives of the priority concerned. ... the scope of suspension shall be proportionate, taking into account the actions to be taken and the funds at risk.

Suspension of all or part of interim payments at the start of the programming is only possible in case the Commission can demonstrate a significant prejudice (Art. 17(5) CPR). It is an option and not an obligation for the Commission to suspend interim payments.

### 5.1 Significant prejudice

In case an ex-ante conditionality is not completely fulfilled at the date of transmission of the programme, the Commission needs to examine whether this non-fulfilment would lead to a significant prejudice to the effectiveness and the efficiency of the achievement of the specific objective concerned. For this the Commission will consider:

- the **degree of non-fulfilment** of the applicable ex-ante conditionality concerned: i.e. whether one or more of the criteria for the ex-ante conditionality had not been respected to a substantial degree.
- the **level of risk** that through the non-respect of the criteria concerned, there will be a **negative impact on the effective and efficient achievement of the specific objective** of the priority or priorities concerned.
- The Commission also needs to assess the adequacy of the proposed action plan and its impact on leading to the fulfilment of ex-ante conditionality.

### 5.2 Suspension of interim payments at programme adoption

There is ground for suspension of interim payments at the adoption of a programme, where (i) the degree of non-fulfilment is substantial (for example all the relevant criteria are not fulfilled) and (ii) it can be foreseen that this will have a significant impact on the effective and efficient achievement of the specific objective of an investment priority or Union priority.

The suspension would target only that part of the interim payments which is related to the investment priority affected by a non-fulfilled ex-ante conditionality for which there is a significant prejudice and bodies which are considered most at risk.

It needs to be noted that it will no longer be possible subsequently to suspend interim payments in case of agreement between the Commission and the Member State on the non-applicability of an ex-ante conditionality or on the fact that an applicable ex-ante

conditionality has been fulfilled as indicated by the approval of the Partnership Agreement and programmes.

### 5.3 Scope of the suspension

The scope of interim payments suspended shall take into account the actions to be taken to ensure fulfilment and the funds at risk, in line with Article 17(5) CPR. The scope of the suspension should take into consideration the effects of the non-fulfilment of the different criteria in terms of impact on the effective and efficient achievement of the specific objective of an investment priority/Union priority.

The suspension should target the expenditure related to certain types of support provided and the functioning of managing authority/intermediary bodies at risk.

The scope of the suspension cannot be wider/higher than the amount allocated to the investment priority/Union priority/measure/operation for which the ex-ante conditionality is not fulfilled.

The Member State should be informed of the Commission's intention to suspend and will have the possibility to present its observations. The procedure on suspension of payments will apply<sup>23</sup> set out in Art. 134 CPR, Art. 43 of the Horizontal Regulation for the CAP – for EAFRD<sup>24</sup>, as well as in EMFF Art. 119. The Commission will need to examine the observations submitted by Member States and consider whether they have an impact on its assessment (e.g. as regards the non-fulfilment of applicable ex-ante conditionalities, the scope of the suspension, the actions to be taken, the funds at risk). Observations of Member States can provide important information, which may have a bearing on the decision by the Commission, and should therefore be considered to the degree that they provide reliable, new and relevant information.

#### **SCOPE OF SUSPENSION, EXAMPLES:**

##### *ERDF Research and innovation (investment priority 1)*

100% suspension of interim payments should be applied for a priority axis devoted to R&I under a national/regional OP, already at the time of OP adoption, in a case where there is no documented national/regional research and innovation strategic policy framework for smart specialisation (since this constitutes a significant prejudice as regards the effectiveness of EU intervention).

##### *ERDF Road transport (investment priority 7)*

Suspension of a part of an interim payment could be applied for a priority axis devoted to road transport under the ERDF investment priority: 7(a) “supporting a multimodal Single European Transport Area by investing in

<sup>23</sup> See guidance on suspension procedures- forthcoming

<sup>24</sup> COM(2011)628 final/2

TEN-T network”, in a case where there is no evidence of measures to ensure the capacity of intermediary bodies to deliver the project pipe-line. In this case, the suspension should target only those intermediate bodies which do not have capacity to deliver the project pipe-line.

*ERDF Energy efficiency (investment priority 4)*

For a priority axis under the thematic objective (4) "Supporting the shift towards a low carbon economy in all sectors", where part (for example 50%) of the budget is allocated to the support for the investment priority 4c: "Supporting energy efficiency and renewable energy use in public infrastructures, including in public buildings and in the housing sector", in a case of non-fulfilment of the relevant criteria set up in CPR ANNEX V (under ex-ante conditionality 4.1), a suspension of interim payment could be applied. It would target only the funds under the 4c investment priority (meaning in this case a partial suspension of interim payments: up to 50% of the ERDF certified expenditure under this priority axis).

*EAFRD (Union priority 5)*

Suspension of an interim payment could be applied under Union priority 5: "promoting resource efficiency and supporting the shift towards a low carbon and climate resilient economy in agriculture, food and forestry sectors", where part of the funds are allocated for measures promoting energy efficiency under focus area 5 (b) "increasing efficiency in energy use in agriculture and food processing", in a case where the relevant criteria are not fulfilled. The suspension in this case (similarly to the previous example) would only target the 5(b) focus area and the relevant measures thereunder.

## **6 ASSESSMENT OF COMPLETION OF ACTIONS BY 31 DECEMBER 2016**

Recital 17 CPR

In cases where there is a failure to fulfil an applicable ex ante conditionality within the defined deadline, the Commission should have the power to suspend interim payments to the affected parts of the programme under precisely pre-defined conditions.

Article 17 CPR

5. (...) The failure to complete actions to fulfil an applicable ex ante conditionality which has not been fulfilled at the date of submission of the Partnership Agreement and respective programmes, by the deadline set out in paragraph 2, shall constitute a basis for suspending interim payments by the Commission to the affected priorities of the programme concerned. ... the scope of suspension shall be proportionate taking into account the actions to be taken and the funds at risk.
5. a The provisions of paragraph 5 shall not be applicable in case of agreement between the Commission and the Member State on the non-applicability of an ex ante conditionality or on the fact that an applicable ex ante conditionality has been fulfilled, as indicated by the approval of the programme and the Partnership Agreement, or in the absence of Commission observations within 60 days of the submission of the report referred to in paragraph 2. [...]

Member States shall fulfil applicable ex ante conditionalities which were not fulfilled at the time of adoption of the programmes not later than 31 December 2016 and report on their fulfilment not later than in the annual implementation report in 2017 (i.e. the AIR of 2016) or the progress report in 2017 in accordance with Article 44 (5) CPR. The Commission shall therefore assess in 2017 progress towards completion of the actions.

If the Commission concludes that the applicable ex-ante conditionalities have not been fulfilled (i.e. actions which the Member State had indicated it would take to ensure fulfilment have not been taken), then interim payments may be suspended in accordance with Art. 134 CPR by Commission decision<sup>25</sup> and Art. 43 of the CAP Horizontal Regulation for the EAFRD. If the Commission fails to make observations within 60 days of receipt of the relevant report, interim payments cannot be suspended on the basis of Art. 17(5) CPR.

Article 17 CPR

5. b The Commission shall without delay lift the suspension of interim payments for a priority where a Member State has completed actions relating to the fulfilment of ex ante conditionalities applicable to that programme and which had not been fulfilled at the time of the decision of the Commission on the suspension. It shall also without delay lift the suspension where following an amendment of the programme related to the priority concerned the ex ante conditionality concerned is no longer applicable.

The Commission shall without delay lift the suspension where a Member State has demonstrated that it has completed the actions necessary to fulfil the applicable ex-ante conditionality. It can be done by a Member State as a part of the annual implementation report or a progress report (not later than in 2017) or by a formal letter sent to the Commission by the Member State.

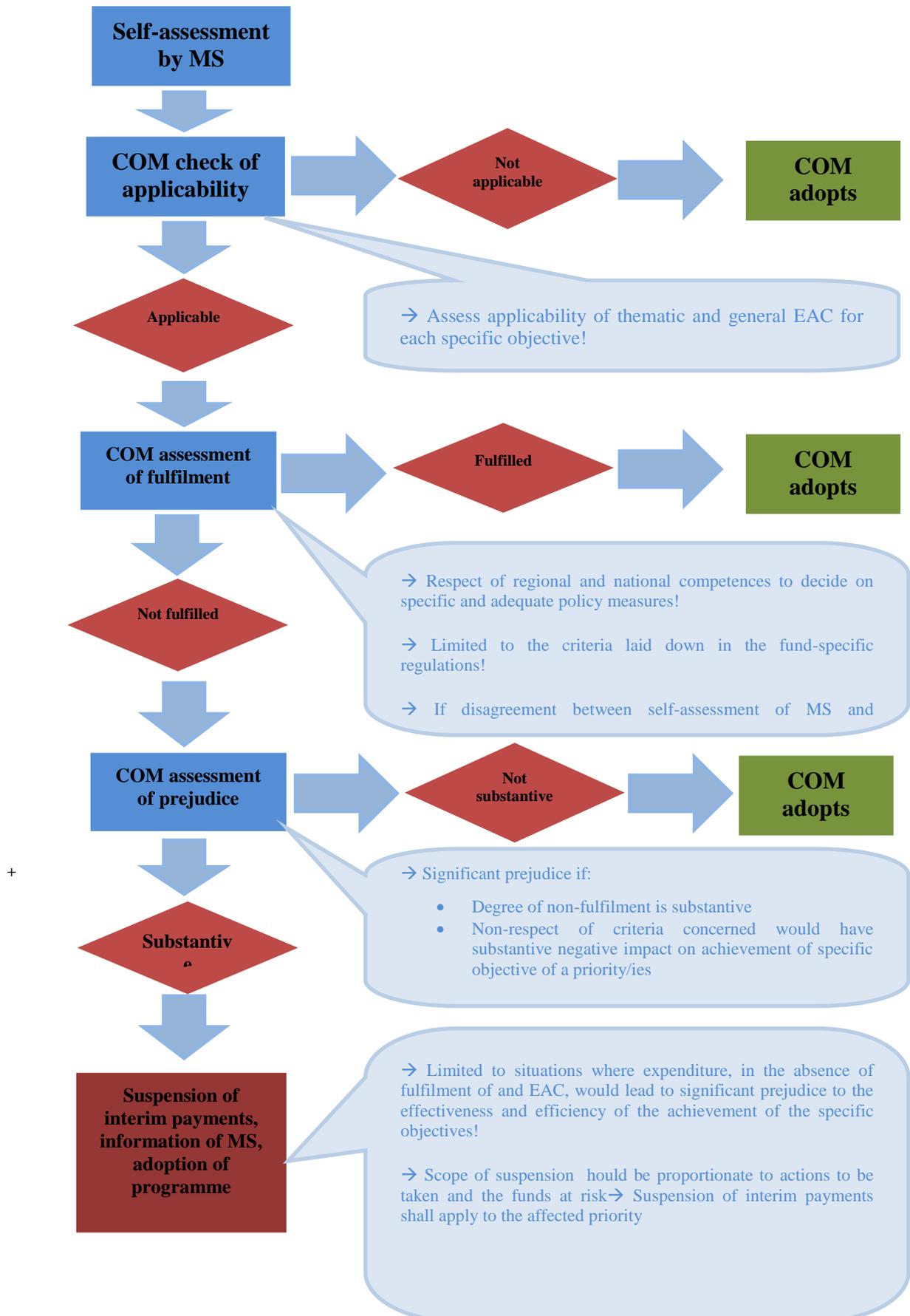
Alternatively, the Commission shall also lift the suspension where programmes have been amended in accordance with Art. 21 or 26 CPR and an ex-ante conditionality is no longer applicable (as the investment/Union priority to which the ex-ante conditionality is related is no longer part of the programme).

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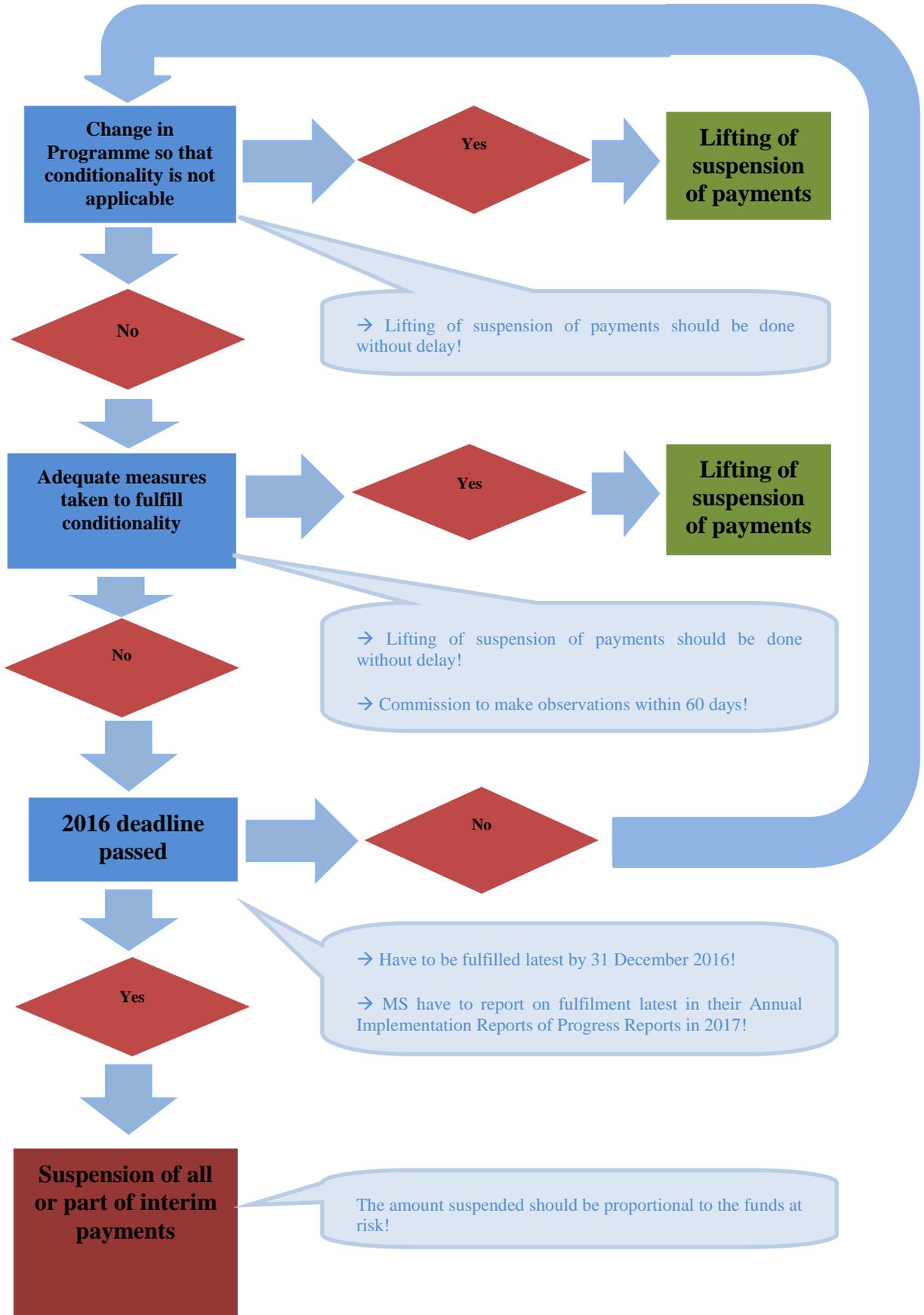
<sup>25</sup> For ERDF, ESF and CF.

7 ANNEXES

7.1 Procedure for assessment of the fulfilment of ex-ante conditionalities



## 7.2 Procedure for lifting of suspension of interim payments



### 7.3 Definitions and clarifications

#### Investment priority/Union priority

Investment priorities for the ERDF are listed in Article 5 of the ERDF Regulation<sup>26</sup>, investment priorities for the Cohesion Fund<sup>27</sup> are listed in Article 3 of the Cohesion Fund regulation. Investment priorities for the ESF are listed in Article 3 of the ESF Regulation<sup>28</sup>. For each priority axis Member States have to set out in their operational programmes the investment priorities and corresponding specific objectives, in accordance with Article 87(2) (b) (i) of the Common Provisions Regulation.

The regulatory proposals for the EAFRD<sup>29</sup> and the EMFF<sup>30</sup> use an equivalent notion of 'Union priority'.

For rural development, Union priorities are listed in Article 5 of the proposal for the EAFRD regulation. In accordance with Article 7, Member States have to draw up rural development programmes which implement a strategy to meet the Union priorities for rural development through a set of measures further defined in Title III of the EAFRD regulation proposal.

The EMFF's Union priorities are set out in Article 6 of the EMFF regulation. The Commission has defined a set of specific objectives for the different Union priorities. Member States can develop additional specific objectives. In their operational programmes Member States will explain which measures they intend to use to achieve the specific objectives of the Union Priorities.

#### Specific objective/focus area

The term 'specific objective' is defined in Article 2 CPR as 'the result to which an investment priority or Union priority shall contribute in a specific national or regional context through actions or measures undertaken within a priority'. According to Article 87 (2)(b)(i) CPR, the priority axis of an operational programme has to contain investment priorities and corresponding specific objectives.

The EAFRD regulation introduces the corresponding notion of a 'focus area' in Art. 5 of the EAFRD Regulation. However, focus areas are generally predetermined by the regulation, unlike specific objectives which are set-up by Member States in agreement with the Commission. Member States can however develop additional focus areas if required by a specific national context.

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<sup>26</sup> COM(2011)614 final.

<sup>27</sup> COM(2011)612 final.

<sup>28</sup> COM(2011)607 final.

<sup>29</sup> COM(2011)627 final.

<sup>30</sup> COM(2011)804 final.

Concerning the EMFF a list of specific objectives for the different Union priorities has been defined by the Commission. Member States can develop additional specific objectives in the operational programme.

### **Applicable ex-ante conditionality**

According to Article 2 CPR, an applicable ex-ante conditionality is 'a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a direct and genuine link to and a direct impact on the effective and efficient achievement of the specific objective for an investment priority or a Union priority'.

### **Criteria for fulfilment**

For most ex-ante conditionalities there are several criteria for fulfilment which are – as regards cohesion policy - set out in Annex V CPR. For the EAFRD the criteria for fulfilment of the fund specific ex-ante conditionalities are set out in Annex IV of the EAFRD regulation. For the EMFF the criteria for the fulfilment of the EMFF specific ex ante conditionalities are set out in annex III of the EMFF regulation. The criteria for fulfilment serve as an assessment grid to determine whether an ex-ante conditionality is fulfilled. The assessment of fulfilment has to be limited to the criteria set out in the applicable regulations. Guidance on the assessment of each criterion for Cohesion Policy is provided in the Annexes to this document.

### **Fulfilment of an ex-ante conditionality**

An ex-ante conditionality is considered to be fulfilled if *all* criteria for fulfilment are *entirely* satisfied. However, different degrees of non-fulfilment are possible:

- at the level of the *number of criteria which are not fulfilled*: it may be small or large. The larger the number of criteria which are not fulfilled, the more likely it is that there will be a significant prejudice to the effectiveness and efficiency of the achievement of the specific objective of the priority concerned. However, if only one criterion remains un-fulfilled, but this is judged as essential to effectiveness and efficiency, there may also be significant prejudice.
- at the level of *each criterion*: Fulfilment at the level of the criterion can vary from non-fulfilment to partial fulfilment and to entire fulfilment.

The degree of non-fulfilment of an ex-ante conditionality will play a role to determine whether there is a *significant prejudice* to the effectiveness and efficiency of the achievement of the specific objective of the priority concerned, but also to determine the content and scope of the action plan leading to the entire fulfilment of the ex-ante conditionality.

### **Proportionality of assessment**

The assessment of applicability of ex-ante conditionalities has – without prejudice to the definition in Art. 2 CPR - to take account of the principle of proportionality having regard to the level of support allocated (Art. 17(1) CPR). If it can be demonstrated that an ex ante conditionality has a relatively small direct impact on the effective and efficient achievement of the specific objective of an investment priority or Union priority, it will not apply. This does not mean however that a relatively small allocation to a priority axis/Union priority containing a specific objective linked to an ex ante conditionality, automatically triggers a possibility of non-applicability of this EAC (see more details in 2.1 of the guidance).

### **Priority**

'Priority' is defined in Article 2 CPR as "priority axis" for the ERDF, ESF and Cohesion Fund. The priority axis generally corresponds to a thematic objective, in line with Article 87(1) CPR. A priority axis will generally comprise more than one investment priority.

For the EAFRD and the EMFF 'priority' is defined in Article 2 of the CPR as 'Union priority'. Article 5 of the EAFRD regulation identifies the six Union priorities for rural development and Article 6 of the EMFF regulation lists the Union priorities for the EMFF.

### **Affected /relevant priority**

For the purpose of a specific ex-ante conditionality, the issue of the relevance of a priority (priority axis for ERDF, ESF and CF and Union priority for EAFRD and EMFF) emerges when there is a question of suspension of interim payments as suspension will take place at the level of a priority/measure under an effected Union priority.

A relevant priority is the one to which an ex-ante conditionality is linked and which can be subject to a suspension of interim payments if the ex-ante conditionality - which is linked to an investment priority within the priority axis under ERDF, ESF and CF - is not entirely fulfilled. In the event of suspension of interim payments, suspension of funds can apply only to the relevant priority, and cannot be applied to other, non-relevant priorities.

### **Significant prejudice – suspension of interim payments when a programme is adopted (Art. 17(5) CPR)**

A significant prejudice to the effectiveness and efficiency of the achievement of the specific objective/ focus area of the priority concerned can be assumed if it is established that there is a significant degree of non-fulfilment and a substantive negative impact on the effective and efficient achievement of a specific objective/focus area of an investment priority/Union priority, as a result of non-fulfilment of the ex-ante conditionality.

### **Proportionality of the suspension**

When the Commission decides to suspend all or part of interim payments - linked to the relevant priority axis/Union priority of a programme - either at the time of the adoption of a programme (in case of non-fulfilment of an applicable ex-ante conditionality) or in case of non-respect of the deadline for implementing the actions to fulfil an applicable ex-ante conditionality, the scope of the suspension must be *proportional* taking into account the *actions to be taken* and the *funds at risk* (Art. 17(5) CPR).

*Funds at risk* are not necessarily all the funds supporting investments/operations under the relevant priority, but only funds related to the investment priority (for Cohesion policy)<sup>31</sup> to which the conditionality is applicable.

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<sup>31</sup> specific objective for EMFF and focus area for EAFRD

