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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 291 final
Subject:	COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of 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 Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy

Delegations will find attached document COM(2021) 291 final.

Encl.: COM(2021) 291 final



EUROPEAN
COMMISSION

Brussels, 3.6.2021
COM(2021) 291 final

2018/0196 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning the

position of the Council on the adoption of 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 Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy

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1. BACKGROUND

Date of transmission of the proposal to the European Parliament and to the Council (document COM(2018) 375 final – 2018/0196 (COD)):	29 May 2018
Date of the opinion of the European Economic and Social Committee:	17 October 2018
Date of the opinion of the European Court of Auditors:	31 October 2018
Date of the opinion of the Committee of the Regions:	6 December 2018
Date of the position of the European Parliament, first reading:	27 March 2019
Date of transmission of the amended proposals (document COM(2020) 23 final – 2018/0196 (COD)) (document COM(2020) 450 final – 2018/0196 (COD)):	14 January 2020 28 May 2020
Date of the opinion of the European Court of Auditors:	14 June 2020
The European Economic and Social Committee was consulted and decided not to issue an opinion	/
The Committee of the Regions was consulted and decided not to issue an opinion	/
Date of adoption of the position of the Council:	27 May 2021

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

The proposal for a Common Provisions Regulation (CPR) aims at setting out common provisions for eight shared management funds. The proposal reduces fragmentation of rules, delivering a common set of basic rules for the following funds:

- ERDF: European Regional Development Fund
- CF: Cohesion Fund
- ESF+: European Social Fund Plus
- JTF: Just Transition Fund
- EMFAF: European Maritime, Fisheries and Aquaculture Fund
- AMIF: Asylum, Migration and Integration Fund
- BMVI: Instrument for Financial Support for Border Management and Visa Policy
- ISF: Internal Security Fund

The main objectives of the architecture and provisions of the proposed CPR are to:

1. Substantially reduce unnecessary administrative burden for beneficiaries and managing bodies while maintaining a high level of assurance of legality and regularity. This is the key guiding principle of the approach for 2021-2027, and includes a large number of simplifications and alignments across the regulations – but especially in terms of:
 - i. There is no requirement to designation process for the authorities' part of the management and control systems (and other measures which facilitate programme launch). Greater use of “proportionate arrangements”, where lower risk programmes can rely more on national systems;
 - ii. The further promotion of simplified cost options and the use of payments based on fulfilment of conditions or achievement of results;
 - iii. Financial instruments.
2. Increase flexibility to adjust programme objectives and resources in the light of changing circumstances and also in terms of voluntary contributions to EU-level instruments managed directly or indirectly.
3. Align the programmes more closely with EU priorities and increase their effectiveness. This includes:
 - i. Aligning the intervention logic and reporting with the MFF headings and increasing concentration requirements for cohesion policy funds on five policy objectives: 1) a more competitive and smarter Europe, 2) a greener, low-carbon transitioning towards a net zero-carbon economy and resilient Europe; 3) a more connected Europe; 4) a more social and inclusive Europe; 5) a Europe closer to citizens;
 - ii. Fostering a closer link with the European Semester process and for HOME funds with other EU recommendations (e.g. Schengen evaluation recommendations);
 - iii. Setting meaningful enabling conditions that need to be fulfilled throughout the implementation period.

It also confirms the overall financial allocation and balance between cohesion policy funds, categories of regions and goals.

3. COMMENTS ON THE POSITION OF THE COUNCIL

The Council's position fully reflects the agreement reached in the trilogues. The most important changes introduced compared to the Commission's proposal include:

Programming, transfers, mid-term review and enabling conditions

- A new article including the climate contribution targets for the ERDF and the Cohesion Fund (30% and 37%) was added, together with the climate adjustment mechanism in case monitoring shows insufficient progress towards reaching the target. Climate coefficients are established for each of the intervention fields in Annex I.
- Provisions on partnership are strengthened by including the possibility to allocate an appropriate percentage of resources coming from the Funds for the administrative capacity building of social partners and civil society organisations, and underpinning the role of the Code of conduct on partnership (Delegated Regulation (EU) No 240/2014) in all stages of programming and implementation. The Council has accepted adding the article on Horizontal principles, as requested by the Parliament and fully aligned with Treaty wording. The objectives of the Funds should take into account among others the “do no significant harm” principle.
- The Partnership Agreement remains the main document setting out the strategic orientation for programming and the arrangements for the implementation of the Funds. The AMIF, ISF and BMVI were excluded from the Partnership Agreement. However, the Partnership Agreement will still cover coordination between the eight CPR Funds, including between AMIF, ISF and BMVI, as well as on complementarities with other Union instruments. The Partnership Agreement can only be amended once, following the mid-term review.
- More flexibility in transferring resources is enabled, as for instance:
 - The ceilings for contributions to InvestEU from the ERDF, the ESF+, the Cohesion Fund and the EMFAF have been differentiated in two stages (up to 2% of each Fund at the beginning of the programming period and further up to 3% after 1 January 2023);
 - Introduction of a provision on transfers back, in case of unused resources, for transfers among the CPR Funds - up to 5% (exception made for the transfers among the three cohesion policy funds – see below) and for transfers from CPR Funds to any instrument under direct or indirect management – up to 5%;
 - The ceilings for transfers among cohesion policy funds have been increased – up to 20% (25% for Czechia);
 - Transfers from the ERDF and the ESF+ to the JTF have become voluntary;
 - Possibility to transfer resources between categories of regions has been modulated according to the level of development of Member States (5%, up to 15% for countries whose GNI per capita (in PPS for 2015- 2017), is less than 90% of the EU average).
- On enabling conditions, Member States will be allowed to submit payment applications corresponding to specific objectives for which the conditions are not fulfilled. The Commission will not make payments before their fulfilment.

- Performance framework and mid-term review of cohesion policy programmes – a flexibility amount has been introduced, corresponding to 50% of the allocations for the last two years of the programming period, which will be definitively allocated in the programmes only after the mid-term review in 2025.
- The period during which temporary measures as a response to exceptional and unusual circumstances can be proposed by the Commission has been limited to 18 months. The new provisions on structured dialogue raised concerns and the Commission has issued a declaration accordingly.
- Some limitations have been introduced on the application in time and scope regarding measures linked to sound economic governance and some changes have been introduced in the corresponding procedure (macroeconomic conditionality). All ESF+ programmes have been excluded from the application of these provisions.
- The possibility to implement policy objective 5 has been made conditional on the use of one of the three types of territorial instruments: integrated territorial investments, community-led local development (CLLD) and other territorial tools. The role of the Lead-fund option has been clarified in the case of CLLD, with a possible involvement of support from the European Agricultural Fund for Rural Development (EAFRD).
- The possibility to program technical assistance, as an alternative to flat-rate approach has been introduced, with the exception of HOME Funds and Interreg, using the different percentages established for each of the Funds.

Monitoring, evaluation, communication and visibility

- The voting rights for each member of the Monitoring Committees have been confirmed.
- The role of the monitoring committee under the EMFAF has been reduced to consultation regarding the approval of programme amendments.
- The Annual performance report will no longer be required for the EMFAF.
- The frequency of electronic transmission of financial data has been reduced from six to five times and to twice per year for indicator data, which is still an increase from the current 2-3 times a year for the cohesion policy Funds and once a year for AMIF, ISF and BMVI (data to be transmitted is established in Annex VII).
- The frequency of publishing updated lists of selected operations has been reduced from the proposed every three months to every four months – but more frequently than the current situation.
- The obligations to publicise EU support by natural persons and final recipients sustained, have been further detailed. In addition, the level of financial correction has been decreased from 5% to 3% in cases of beneficiaries not complying with the obligation to publicise the received EU support.
- A new provision has been introduced that requires Member States to publish information, except where Union law or national law excludes such publication for reasons of security, public order, criminal investigations or protection of personal data.

Financial support from the Funds, including the provisions for financial instruments and eligibility rules

- Provisions on grants under conditions have been introduced, with additional safeguards regarding the re-use of the amounts paid back compared to 2014-2020.
- Direct award of financial instrument management to the EIB, international financial institutions and publicly owned banks has been introduced.
- Additional provisions have been introduced on financial instruments implemented across consecutive programming periods – with a view to ensuring legal clarity.
- The possibility for VAT to be eligible for operations the total cost of which is at least EUR 5 000 000 (including VAT) has been introduced, in case it is non-recoverable under national VAT legislation. Specific rules are also included regarding operations combining financial instruments with a form of grant.
- Management costs and fees under financial instruments under direct award have been increased and differentiated, with respectively 5% and 7% for the holding fund, and 7% and 15% for specific funds.

Management and control system

- The actions needed for Member States to prevent, detect, correct and report on irregularities, including fraud, have been extended to include the collection of information on beneficial owners of the recipients of funding in accordance with new Annex XVII. Using a single data-mining tool remains voluntary in spite of the inter-institutional agreement. The Commission has issued a declaration accordingly.
- Whereas Member States shall ensure that all exchanges of information between beneficiaries and the programme authorities are carried out by means of electronic data exchange systems (required for the HOME Funds and the EMFAF from 1 January 2023), an exception has been introduced, enabling, upon explicit request of a beneficiary, the managing authority to exceptionally accept exchanges of information in paper format.
- The format of report by Member States on irregularities in accordance with the criteria for determining the cases of irregularity to be reported, has been set out in a new Annex XII, instead of the initially proposed implementing act.
- Some rules on selection of operations have been clarified, regarding in particular the link with smart specialisation strategies for some specific objectives under PO1 and the role of the Commission regarding the rules for selection of operations has been amended (no consultation, only for information, 15 days before the monitoring committee).
- An 80-day deadline has been introduced for payment by the managing authority from the date of submission of the payment claim by the beneficiary (against 90 days as proposed by the Commission).
- On management verifications, the required risk management strategy has been substituted by a simpler written description of the risks. Furthermore, the possibility for AMIF, ISF and BMVI to establish specific rules on management verifications, in case an international organisation is a beneficiary, has been introduced.

Financial management

- Retention rate from interim payment applications has been lowered from 10% to 5%, raising concerns and the Commission has issued a declaration accordingly.

- The number of payment applications sent per year has been increased from the proposed four to six.
- The possibility to include in payment applications advances paid to beneficiaries of State aid has been introduced.
- The amount allowed to be included in first payment for financial instruments has been increased from 25% to 30%.
- Decommitment rules: the N+3 rule has been introduced for 2021-2026, while maintaining the final date of eligibility at end-2029.
- Pre-financing rules: annual clearance of pre-financing has been introduced for 2021 and 2022 (the first accounting year ends on 30 June 2022), maintaining clearance in the final accounting year for the other years. For the AMIF, ISF and BMVI funds, a derogation has been included for pre-financing rates to be set in the Fund-specific regulations and clearance no later than with the final accounting year. The limited use of annual clearance is raising concerns and the Commission has issued a declaration accordingly.

Financial framework, including provisions on resources, co-financing rates (cohesion policy only)

- The volume and distribution of resources have been slightly adjusted, in accordance with the MFF.
- The reference to the common classification of territorial units for statistics ('NUTS level 2 regions') has been updated, with a reference to Commission Regulation (EU) 2016/2066. The calculation basis for the allocations has been updated, with the reference to the basis of Union figures for the period 2015-2017.
- The co-financing rates have been increased and further differentiated: less developed regions – 85%, transition regions – 60%, more developed regions – 40%, transition regions that were classified as less developed regions in the 2014-2020 programming period – 70%; more developed regions that were transition regions or had a GDP per capita below 100% for the period 2014-2020 – 50%; Cohesion Fund – 85%; Interreg – 80%; outermost regions – 85%. For the JTF, the rates will be higher for transition and more developed regions: (a) 85% for less developed regions; (b) 70% for transition regions; (c) 50% for more developed regions.
- The transfer from the Cohesion Fund to CEF of EUR 10 billion has been confirmed, as well as the split 70% / 30% for the national allocation until 1 January 2024 and competitive calls but specific rules have been established for the Member States whose gross national income (GNI) per capita measured in purchasing power standards and calculated on the basis of Union figures for the period 2015-2017 is less than 60% of the average GNI per capita of the EU-27 - 70% of 70% of the amount they have transferred to the CEF will be guaranteed until 1 January 2025.

Subject matter/definitions: delegation of power, implementing, transitional and final provisions

- Processing and protection of personal data – a new article has been introduced with a legal ground for the processing of personal data in form of an obligation when it comes to the use of personal data by the programme authorities.
- Revised or new definitions of economic operator, beneficiary, enabling condition, EMFAF priority, residual error rates have been established.

- A new provision has been introduced to confirm that the CPR will be reviewed by the Parliament and the Council by 31 December 2027, in accordance with Article 177 TFEU.

4. CONCLUSION

The Commission supports the results of the inter-institutional negotiations and therefore accepts the position taken by the Council.

On the other hand, with regard to some amendments considered more problematic, the Commission has issued four declarations on the following issues:

- 1) “Clearance of pre-financing”,
- 2) “Structured dialogue under Temporary measures for the use of the Funds in response to exceptional and unusual circumstances”,
- 3) “Further measures to protect the EU budget and Next Generation EU resources (NGEU) against fraud and irregularities by requiring an obligatory use of a single data-mining tool provided by the Commission”, and
- 4) “Protection of the EU budget through the use of a percentage retention of payments to shared management programmes”.

The statements will be published in the C series of the *Official Journal of the European Union*.

1. Clearance of pre-financing

Statement by the Commission on clearance of pre-financing

The payment ceilings in the MFF regulation took into account the assumption that all pre-financing would be cleared annually. The Commission considers that the agreement reached by the co-legislators on the CPR might result in going beyond the applicable MFF ceilings for payment appropriations, taking into account the expected payment profiles. This might result in a payment backlog in the second half of the next period.

2. Structured dialogue under Temporary measures for the use of the Funds in response to exceptional and unusual circumstances.

Statement by the Commission on Structured dialogue under Temporary measures for the use of the Funds in response to exceptional and unusual circumstances

The provisions adopted by the co-legislators require the Commission to immediately inform the Parliament and the Council about the assessment of the situation regarding the exceptional and unusual circumstances. The co-legislators also require the Commission to inform them immediately about the envisaged follow-up through temporary measures for the use of the Funds and to take due consideration of the positions taken and views expressed through the structured dialogue to which the Commission may be invited by the Parliament or the Council.

Those requirements are not in accordance with Article 291(2) and (3) TFEU and with Comitology Regulation No 182/2011, which do not provide for any involvement of the Parliament and the Council in the control of the exercise of the implementing powers conferred on the Commission. They may result in situations where the Commission's implementing powers would be constrained. Therefore, the Commission can only satisfy these requirements in so far as these do not impinge on its implementing powers as they are regulated under Article 291 TFEU and Comitology Regulation No 182/2011.

These provisions cannot in any event be replicated in a different legal framework where no exceptional and unusual circumstances are provided for.

3. Further measures to protect the EU budget and the Next Generation EU resources (NGEU) against fraud and irregularities by requiring an obligatory use of a single data-mining tool provided by the Commission

Statement by the Commission on further measures to protect the EU budget and the Next Generation EU against fraud and irregularities by requiring an obligatory use of a single data-mining tool provided by the Commission

In the Inter-institutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap for the introduction of new own resources, Points 30 to 33 require the Commission to make available an integrated and interoperable information and monitoring system including a single data-mining and risk-scoring tool to access and analyse the required data with a view to a generalised application by Member States. In addition, the three institutions agreed to sincerely cooperate, in the course of the legislative procedure relating to the relevant basic acts, to ensure the follow up to the European Council conclusions of July 2020 regarding this element.

The Commission considers that the agreement reached by the co-legislators under Article 69(2) (responsibilities of Member States) on the obligatory use of a single data-mining tool and the collection and analysis of data on the beneficial owners of the recipients of funding is not sufficient to enhance the protection of the Union budget and Next Generation EU against fraud and irregularities and to ensure efficient checks on conflicts of interests, irregularities, issues of double funding, and criminal misuse of the funds. Therefore, the approach agreed by the co-legislators in the Common Provisions Regulation does not appropriately reflect the desired ambition and spirit of the Inter-institutional Agreement.

4. Protection of the EU budget through the use of a percentage retention of payments to shared management programmes

Statement by the Commission on the protection of the EU budget through the use of a percentage retention of payments to shared management programmes

The Commission considers that the agreement by the co-legislators to reduce the retention rate on shared management payments from 10% to 5% creates an increased risk of the EU budget paying amounts that are affected by irregularities.

To minimise this risk, the Commission will make an appropriate use of interruptions and suspensions of payments to programmes whenever it considers that the 5% retention rate is insufficient to cover the amount of any potential irregularities.