



Council of the European Union
General Secretariat

**Interinstitutional files:
2018/0250(COD)**

Brussels, 10 October 2018

WK 12061/2018 INIT

LIMITE

**JAI
FRONT
ENFOPOL
CT
CODEC**

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	Commission Services
To:	Ad Hoc Working Party on JHA Financial instruments
Subject:	Fiche 4 - Follow-up to summary questions raised by Member States on the Internal Security Fund in the 2021-2027 Multiannual Financial Framework

In view of the meeting of the Ad Hoc Working Party on JHA Financial Instruments on 15 October 2018, delegations will find attached a fiche from the Commission on the Internal Security Fund.



WORKING DOCUMENT OF THE COMMISSION SERVICES

Subject: Follow-up to summary questions raised by Member States on the Internal Security Fund in the 2021-2027 Multiannual Financial Framework

This document presents the answers to the summary of Member States' questions submitted to the Commission by the Austrian Presidency on 21 September (Council document ref WK10983/2018).

This document summarises and complements information already provided in the context of the Ad-Hoc Working Group on the JHA Financial Instruments in its meeting on Monday 24 September, without prevailing over such information.

Article 2

- Several MS ask the COM for clarification of the terms:
 - 'emergency situation',
 - 'blending operations' – when can they be applied, is it mandatory to apply such operations in the programme?
 - 'serious crime'
 - 'tackling corruption'
 - general definition of 'external borders'
 - thematic facility
 - Specific Action

COM reply

Emergency situation is defined in Article 22 of the proposal for the Internal Security Fund¹. A more precise definition of an emergency situation under the Internal Security Fund would hinder the flexibility to support Member States in emergency situations as it is practically impossible to foresee all types of security related incidents or threats for which a Member State might need assistance.

¹ An emergency situation results from a security-related incident or newly emerging threat which has or may have significant adverse impact on the security of people in one of more Member States.

On blending operations, on 8 October, the Commission sent an information note to Parliament and Council.

‘Serious crime’ is included in the Treaty on the Functioning of the EU (Articles 83 and 85) and further defined in the context of the Europol’s Serious and Organised Crime Threat Assessment (SOCTA). Serious and organised crime is considered as an increasingly dynamic and complex phenomenon that requires robust, intelligence-led response by EU law enforcement. Europol’s current SOCTA, published in 2017, identifies the following eight priority crime threats: 1) cybercrime, 2) drug production, trafficking and distribution, 3) migrant smuggling, 4) organised property crime, 5) trafficking in human beings, 6) criminal finances and money laundering, 7) document fraud and 8) online trade in illicit goods and services.

Tackling corruption is envisaged to cover all areas outlined in the United Nations Convention against corruption, including prevention, criminalisation and law enforcement measures, international cooperation, asset recovery, technical assistance and information exchange, while taking into account provisions of the proposal for the ISF Regulation – when it comes to objectives, scope of support etc.

External borders - definitions in Article 2 of the ISF are limited to those that are repeatedly used in the text of the Regulation. External borders is a concept used in the Treaty on the Functioning of the EU and thus considered a clearly understood concept.²

Thematic facility is further clarified in the Ad-Hoc Working Group on the JHA Financial Instruments Fiche No 1.

Specific Actions are defined in Article 14 as transnational or national projects in line with the objectives of the Regulation establishing the Internal Security Fund for which one, several or all Member States may receive an additional allocation to their programmes.

- Can information about the calls (e.g. open call, registered call, or direct award) be added to the text?

COM reply

The project selection is regulated in Article 67 of the Commission's proposal on the Common Provisions Regulation³.

- Can preventive surveillance be considered 'crime prevention'?

COM reply

Yes, if it is in line with the objectives of the Fund.

² In the proposal for a Regulation, establishing as part of the Integrated Border Management Fund, the instrument for financial support for border management and visa ‘external borders’ is defined as the borders of the Member States: land borders, including river and lake borders, sea borders as well as their airports, river ports, sea ports and lake ports to which the provisions of Union law on the crossing of external borders apply.

³ COM(2018) 375 final

- Maritime aspects also play a major role in an increasingly uncertain context. Do Maritime Rescue Coordination Centres (MRCCs) qualify as 'critical infrastructure' within the meaning of point (c)?

COM reply

The definition of critical infrastructure is set out in Article 2 of Directive 114/2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection. The identification of critical infrastructures is a responsibility of the Member States.⁴

- The proposal stipulates that in case of cyber-dependent crimes, the devices and systems are either tools for committing the crime or the primary targets of the crime. Cyber-enabled crimes, which involve devices and systems (are tools and targets at the same time) are not included in the definition. MS asks the COM to clarify the definition as it should be uniform EU-wide.

COM reply

There is no unique definition of cybercrime. In particular, some Member States use the term in the wider sense (and thus include cyber-enabled crime), some Member States do not. Therefore, the Commission proposed in the Regulation a definition to clarify this issue (Article 2(d)) which defines 'cybercrime' as cyber-dependent crimes, that is to say crimes that can be committed only through the use of information and communications technology (ICT) devices and systems, where the devices and systems are either tools for committing the crime or the primary targets of the crime; and cyber-enabled crimes, that is to say traditional crimes, such as child sexual exploitation, which can be increased in scale or reach by the use of computers, computer networks or other forms of ICT. In line with the proposed objectives of the Fund, activities which support the fight against cyber-enabled crimes will be supported.

- Can relevant activities (*as it is mentioned in Art. 6.2*) be included here?

COM reply

Article 6(2) of the proposal says 'The Commission and the Member States shall ensure that the support provided under this Regulation and by the Member States is consistent with the relevant activities, policies and priorities of the Union and is complementary to other Union instruments'. The paragraph is taken on from Regulation 514/2014⁵. Member States need to ensure when drafting the Partnership Agreement and in the programming exercises that complementarities are ensured and the right policy priorities are addressed.

⁴ In the Council Directive 2008/114/EC 'critical infrastructure' is defined as an asset, system or part thereof located in Member States which is essential for the maintenance of vital societal functions, health, safety, security, economic or social well-being of people, and the disruption or destruction of which would have a significant impact in a Member State as a result of the failure to maintain those functions; and 'European critical infrastructure' or 'ECI' as critical infrastructure located in Member States the disruption or destruction of which would have a significant impact on at least two Member States. The significance of the impact shall be assessed in terms of cross-cutting criteria. This includes effects resulting from cross-sector dependencies on other types of infrastructure.

⁵ Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management.

Article 3

- Can sub-paragraph 1 be more specific about the inclusion of all different aspects of dealing with crimes: including prevention, preparedness, resilience and consequence management?

COM reply

The word 'tackling' in Article 3(1) is understood in the broadest possible sense, addressing the whole range of actions from prevention to dealing with an event and the consequences thereof. Therefore it is not considered necessary to include additional wording into the policy objective.

- Are counter-terrorism exercises at sea defined as objectives of the fund?

COM reply

The policy objective of the Fund as set out in Article 3(1) includes tackling terrorism.

- Several MS mention the inclusion of 'prevention' in general and 'prevention of terrorism and radicalisation' into the wording of the text.

COM reply

Please see the reply to the first question under Article 3.

- MS advise the COM to include 'hybrid threats'; 'assisting' and 'protecting' victims of crime in the wording.

COM reply

Hybrid threats, as far as in line with the objectives of the Fund, as well as assisting and protecting victims of crime are covered by the Regulation. Assisting and protecting victims of crime are foreseen already in the policy objective of the Fund and as far as hybrid threads are concerned, they are meant to be covered by the actions listed in Annex III.

- Taking into account that natural- and human-made disasters are a security aspect within every European country, could the COM consider amending the wording to include 'natural- and human-made disasters' into the text?

COM reply

Disaster management is covered by the EU programme rescEU⁶.

- Will the implementation of the so called 'hard projects' be possible under the mandate of this fund? If yes, under which specific objective would it be possible?

COM reply

⁶ Decision No 1313/2013/EU on a Union Civil Protection Mechanism

The implementation of so-called “hard projects” will be possible under specific objective (c) of Article 3 (2) which are further focused through the implementation measures set out in Annex II ‘to acquire relevant equipment and to set up or upgrade specialised training facilities and other essential security relevant infrastructure to increase preparedness, resilience and public awareness and adequate response to security threats’. This need to be read in-line with the limitation set out in Article 4(3)(b) that the actions covering the purchase or maintenance of standard equipment, standard means of transport, or standard facilities of the law-enforcement and other competent authorities are not eligible under the Fund.

- Considering that small crimes, such as burglary or identity theft, may as well be the origin of criminal activities, could the wording of Art. 3.2.(b) be adapted accordingly?

COM reply

The objectives of the Fund as set out in Article 3 shall contribute to ensuring a high level of security in the Union particular by tackling (amongst others) serious and organised crime. The intention is not to cover all forms of crime.

Article 4

- Could the support of purchasing innovative, more humane coercive equipment (in the spirit of the EU Charter of Fundamental Rights) be eligible for funding?

COM reply

Coercive equipment is defined as non-eligible under the Fund regardless of whether it is innovative and more humane coercive equipment; to draw the line between different degrees of coercive equipment would be impossible in practice.

- Several MS ask the COM for clarification of the terms:
 - ‘standard equipment’,
 - ‘standard means of transport’,
 - ‘standard facilities of law enforcement’
 - ‘emergency situation’

COM reply

The Commission has provided further clarifications on standard equipment, standard means of transport and standard facilities of law enforcement in the Ad-Hoc Working Group on the JHA Financial Instruments Fiche No 2.

For emergency situation, please see reply above under Article 2.

- Subparagraph (d) sets out that any equipment with a customs function cannot be financed under ISF but must come from the Customs Instrument. Given that many items of law enforcement equipment for checking materials (e.g. sniffer dogs) can also have a customs function, MS recommend a more flexible wording in the text.
- Could the COM demonstrate the reasons for not accepting the inclusion of dual use equipment as, for instance, is the case of the equipment for customs control, which may result of clear advantage for the prevention and fight against illegal migration and human trafficking in cargo ships?

COM reply

The aim is to draw a demarcation line between the different funding instruments in order to simplify implementation by the Member States and to ensure a clear audit trail.

The purpose of the new Instrument for Customs Control Equipment⁷ is to procure equipment for Member States' customs control authorities. The foreseen budget is EUR 1.3 billion.

- With reference to Article 12(4) MS would like to request an elaborate explanation on the 15% calculation principle for the purchase of equipment, means of transport or construction of security related facilities. Is the 15% ceiling calculated from the total programme allocation or only from Specific Actions?

COM reply

The 15% share is calculated from the total allocation of a Member State programme. The reasoning for the 15% is based on the practice in the current programming period taking into account that in the next period, standard equipment, means of transport and security relevant facilities are not eligible. This limit has to be seen against the background that the purchase of equipment is expected to be a major component in Border management and Visa Instrument. In addition, Member States can use operating support to maintain technical equipment and means of transport for specific purposes. Member States may use up to 10% of their programme allocation to operating support.

- MS needed clarification from the COM regarding the rationale behind the inclusion of 'actions limited to the maintenance of public order at national level' as non-eligible actions.

COM reply

Funding from the Union budget should concentrate on activities where Union intervention can bring added value compared to action by Member States alone. The Fund should not support operating costs and activities related to the essential functions of the Member States concerning the maintenance of law and order and the safeguarding of internal and national security as referred to in Article 72 of the TFEU.

Article 7

- MS would like to request the Commission to reconsider the percentage of the financial envelope allocated for technical assistance for the Fund. The financial envelope which can be allocated for technical assistance at the initiative of the MS should be indicated in the regulation.

COM reply

The rules governing technical assistance at the initiative of the Member States are set out in the Commission's proposal on the Common Provisions Regulation (CPR). Article 30(1) CPR defines the scope of technical assistance as "actions [...] necessary for the effective administration and use of [the] Funds". Notwithstanding the shorter and clearer formulation, the scope of technical assistance is not changed in substance compared to the 2014-2020

⁷ COM(2018) 474 final

period. Technical assistance will be implemented through a flat rate financing based on progress in programme implementation. By extending this simplified cost option to technical assistance, the Commission follows a key recommendation from the High Level Group for simplification and the European Court of Auditors.

In the period 2014-2020, for AMIF and ISF, the technical assistance of Member States is composed of two elements i.e a fixed amount and percentage of the Member State allocation to the programme. For the post 2020 period, it is proposed to simplify the structure of the technical assistance and calculate it as a percentage of Member States allocation to the programme. This modification facilitates the application of the major simplification i.e. the reimbursement of the technical assistance on a flat rate basis which may contribute to the reduction of the administrative costs. The proposed percentage of the technical assistance is comparable with the current figure at the Fund level.

In addition, further to Article 89 of CPR, Member States may also submit a technical assistance project.

- MS advise the COM to reconsider reducing the financial resources for the thematic facility and allocate more funding for the national programmes under shared management.

COM reply

The Thematic Facility is a mechanism that offers flexibility in the management of the Fund/Instrument by allowing allocating funds to various priorities through the different components of the Facility. It will enhance responsiveness, contribute to better planned and targeted activities to cater to the specific needs of Member States, including through top-ups of national programmes. Thus the Union will be better equipped to react to urgent needs, unforeseen challenges, new legislative developments and innovative solutions that are likely to come up in the course of period of the next Multiannual Financial Framework. Therefore, the Commission considers the level of funding allocated to the thematic facility adequate.

Please also see fiche on Thematic Facility prepared by the Commission. The allocation to the thematic facility is based on the current programming period and broadly reflects the level of top-ups which the Commission had requested for the ISF.

Article 8

- Several MS need clarification of how the thematic facility is managed. The criteria on which the allocation of the financial resources is based, and in particular the resources for the national programmes, as well as the role of the Member States in the decision-making process should be elaborated in more detail. Who decides about the amendment and revision of national programmes?
- It would be desirable for thematic targets for the specific actions under the thematic facility to be set at the beginning of the funding period, with the involvement of the Member States. Otherwise if there are still large sums from the thematic facility to be spent at the end of the funding period, experience shows that it will be difficult to find suitable project partners. MS therefore need clarification from the COM in that matter. Do MS participate in the financing decision from the thematic facility?

COM reply

Please see Fiche No 1 on Thematic Facility prepared by the Commission for the Ad-hoc Working Group on JHA Financial Instruments.

- Does the COM unilaterally amend national programmes? MS advise the COM for more transparency and predictability of the mechanism, and need the COM to consider the increased administrative burden that the MS might have through the mechanism of the thematic facility.

COM reply

Commission does not intend to unilaterally amend Member States' programmes. The allocation of the thematic facility consists in two steps (first, adoption of a work programme and secondly amendment of MS programmes).

Article 10

- MS advise the COM to revise the minimum threshold imposed of 10% on payment requests until 2024.
- MS advise the COM to reconsider that unused allocated amounts should be redistributed to the MS.

COM reply

The top up amounts of the mid-term review in 2024 will be available in 2025 and allocated to national programmes through Commission implementing decisions amending the programmes of the Member States based on the statistical data covering the proceeding calendar year available at the time of the mid-term review. The amounts counted for Member States not fulfilling the 10% condition in Article 13(2), will flow back to the Thematic Facility, since the updated distribution key updates sufficiently the needs of Member States reporting sufficient absorption and the unallocated amounts will be used to targeted EU priorities and needs through the Thematic Facility.

Based on the implementation experience in the current MFF 2014-2020, the Commission does not expect delays in the implementation of the national programmes in the MFF 2021-2027. The Commission considers that the 10% absorption (of the initial allocation, i.e. 50%) after 4 years of implementation is reasonable and attainable. In addition, the 10% threshold aims to incentivise Member States to start implementation without delay.

Article 11

- MS suggest the COM changing the wording of this article to be in line with article 16 of the Horizontal Regulation 514/2014. MS opinion is that current mechanism will increase the administrative burden caused by reporting to the COM.

COM reply

Article 11 on the co-financing rates is drafting similarly to the Article 16 of the Horizontal Regulation 514/2014. Paragraphs 1, 2 and 5 of Article 16 are covered by the proposal for the Common Provision Regulation: Title V and Article 87(6).

The Commission does not share the view that the provisions in Article 11 will increase administrative burden. The question is not clear because Article 11 does not set out the rules

governing of Member States reporting to the Commission. Article 11 sets out the rules governing co-financing.

Currently Member States report on EU contribution received, whereas in the CPR is expected the Member States need to report on the total contribution.

- MS ask the possibility to include PNR for 90% eligible expenditure in ANNEX IV.

COM reply

By the time the Regulation comes into force all Member States should have a Passenger Information Unit (PIU) in place, so costs would be limited to running and maintaining the systems. Intervention aimed at interconnecting PIUs could fall under annex IV point 2.

- MS suggest adding 'projects which aim to counter cybercrime' and 'projects which aim to counter particularly harmful organized crime structures in accordance with EMPACT' to ANNEX IV.

COM reply

Although cybercrime and EMPACT actions are very important, the Commission believes that Member States will be able to implement them with the standard co-financing rates.

- MS need confirmation if it is possible to have 90% union contribution within the NP related to the priorities which are listed in ANNEX IV.

COM reply

Yes, actions listed in Annex IV are eligible for 90% co-financing.

- MS ask the COM for reconsidering a more simplified and flexible approach to lay down co-financing rates.

COM reply

The provisions determining the co-financing rate in Article 11(7) are aligned to the text of the draft CPR (Article 106.2) and also based on the current Horizontal Regulation 514/2014 Article 16.

Annex II

- MS want to clarify if the support of SIS II within ISF is not going to influence the support of SIS II within BMVI. MS would like to clarify and explicitly mention in the text, that this support does by no means prevent the BMVI support for the same type of actions. In order to avoid overlapping of the funds, there is a more elaborated method is needed to separate the components of SIS II financing.

COM reply

All IT systems are mentioned by way of examples and the Member States have the flexibility to decide which Fund will be used to support the SIS II. In principle, major investments into SISII should come from the BMVI, which also has a larger budget. Parts, which are solely security-specific, could be supported from the ISF. By putting an exact delineation into the Regulation, the legal text might not be fit-for-purpose any longer in the decade to come.

Instead this would limit flexibility and thus the capacity to address needs assessed and objectives pursued.

- MS want to clarify if only Union IT Systems and Communication Networks are eligible for funding? MS advice the COM to include national IT Systems, Communication Systems and National Security Relevant Information Exchange Tools in the wording.

COM reply

The Union IT systems concern only the common EU IT systems. EU Communication networks/ systems are for example SIENA, Prüm etc. Annex II is to provide a focus of the Fund that all IT systems contributing to the objectives of the Regulation could in principle be supported (see annex III first bullet point). National measures are not explicitly mentioned, nor are they excluded, but they are not the main focus of the Fund. They could still be eligible based on their EU added value.

- MS ask the COM to consider the inclusion of fight against terrorism in the ANNEX II since it is a high priority of the Union.

COM reply

Annex II is to provide focus to the specific objectives defined in Article 3(2), which fall under the overall policy objective, which itself already clearly mentions terrorism.

- MS need clarification patrol activity. Since it is typically a law enforcement service performed by uniformed officers, would “joint controls” include patrol activity as eligible actions of the fund?

COM reply

COM understand that by "joint controls", the MS is referring to "joint patrols" in Annex II of the ISF. In this context, joint patrols are understood as patrolling activities with a cross-border dimension, regardless of whether they are performed by investigators or other law enforcement agents.

- Why are listed actions (e.g. investigations teams) are entailed exclusively to EMPACTs where is other areas, e.g. an anti-terror field operation could also be immensely important?

COM reply

The implementation measures of Annex II are there to provide focus for the Fund. Listed actions under referring to Article 3(2)(b) could also be performed outside the scope of EMPACT actions.

- MS advice the COM to add the word “potential” in regard of “victim protection” and include prevention in the text.

COM reply

Potential victims of crime would cover the whole population and the intention of the Fund is to focus support to actual victims of crime.

- MS advise the COM to include 3rd neighbouring countries and other relevant actors in ANNEX II.

COM reply

The intention is to allow cooperation with and in 3rd countries under all specific objectives without specifying it throughout the Regulation. However, it is important to note that support to 3rd countries should in the first place be provided from the external Funds.

- MS would welcome more information about the inclusion of ‘risk and crisis management’ within the fund, since it is included neither in the implementation measures nor in the list of actions supported by the fund.

COM reply

The experience of ISF-Police so far has shown that there is no clear added value in separating ‘risk and crisis management’ as a separate objective. It is however a cross cutting activity that can be addressed under all specific objectives. .

ANNEX III

- Is the understanding of the MS correct that in the next financial period the ISF can only support trainings which are based on LETS and which are implemented in cooperation with CEPOL or EJTN?
- MS suggest that NGOs, international organizations, and actors from private sector are included in the wording regarding the list of potential actors of cooperation.
- MS ask if actions listed under Annex III are considered as guidelines, or is there a possibility to amend those in the course of political dialogue?

COM reply

The list of actions in annex III are not considered as exhaustive, but actions have to be in line with the objectives of the Fund. Annex III gives Member States an illustration of the types of actions that the Commission is expecting to see in the Programmes.

For example training is not limited to the European Law Enforcement Training Scheme (LETS) courses only, but the intention is to ensure that training activities are coordinated with CEPOL and European Judicial Training Network (EJTN).

- MS ask for clarification whether IT-equipment and communication systems are considered under the umbrella term of “equipment” within the meaning of this regulation. In other words, are IT-equipment and communication systems included in the 15% limitation? Are registers and databases eligible for funding too?

COM reply

As a general rule, IT equipment falls within the scope of the standard equipment and is as such not eligible in line with Article 4(3). However, the Commission will assess on a case-by-cases basis what is to be understood as standard equipment in each specific case. Non-standard IT equipment would be capped at 15%. Registers and databases as far as equipment fall into the above limits.

- MS require the COM to clearly explain the meaning of ‘essential security relevant facilities’. It would be important for the MS to ensure a more flexible application of their national programmes.

COM reply

The list in Annex III is not exhaustive. Infrastructure/facilities are limited by the 15% threshold on equipment, means of transport and security relevant facilities since they are not considered to be a core objective of the Fund. However if considered essential in order to reach an objective of the Fund, it could be financed.