



Council of the European Union
General Secretariat

**Interinstitutional files:
2018/0217(COD)**

Brussels, 04 February 2019

WK 1658/2019 INIT

LIMITE

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WORKING PAPER

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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Financial Agricultural Questions
N° Cion doc.:	9634/18 + COR 1 + ADD 1
Subject:	Proposal for a Regulation on Financing, management and monitoring of the CAP - Non-paper from the Commission services on Articles 38-40

Delegations find attached a non-paper from the Commission services as regards the application of Articles 38-40 of the proposed Horizontal Regulation, in particular the modalities of application, timelines and justifications of suspensions.



Brussels,

NON-PAPER

Subject: Suspensions – modalities of application, timelines and justifications

1. INTRODUCTION

This non-paper aims to provide details as regards the application of Articles 38-40 of the legislative proposal for the Horizontal Regulation (HZR) and the proposal for the Strategic Plan Regulation (SPR) and in particular aims to cover:

- timelines of the suspensions of payments and their lifting;
- justifications for suspensions;
- proportionality of suspensions.

This non-paper should be read together with the Non-paper on suspensions, reductions and financial corrections WK 11877 2018 INIT that gives details on when suspensions and reductions may be applied.

2. APPLICATION OF SUSPENSIONS OF PAYMENTS

Suspensions are used in cases when the Commission does not have ex-ante assurance that the EU expenditure will be duly spent in the future. This **may** be done in the four following cases:

- (1) Article 38(1) – **late submission of the clearance package** (accounts, Annual Performance Report (APR), Management Declaration (MD), Article 8(3) HZR and Certification Body (CB) opinion Article 11(1) HZR by the deadline of 15 February, exceptionally extendable to 1 March – also Article 8(3) HZR) – see Annex I
- (2) Article 38(2) – in the framework of annual performance clearance, in case of divergences in the APR between the reported expenditure and the reported **output**, exceeding 50% - see Annex II
- (3) Article 39 – in case of **insufficient progress towards the milestones for result** indicators, which is not remedied by an action plan (where the plan is not submitted, not implemented or it is manifestly insufficient to remedy the situation) or other remedial actions as requested by the Commission - see Annex III

- (4) Article 40 - in case of **serious deficiencies in the functioning of the governance systems**, which is not remedied by an action plan or other remedial actions as requested by the Commission - see Annex IV

3. GENERAL COMMENTS

Suspensions may be applied by the Commission in case the latter does no longer have the assurance as regards the expenditure declared by the MS.

They are designed to have a dissuasive and preventive character and they should lead to remedying the situation leading to the divergences or deficiencies noted.

Suspension may be applied only as an action of last resort, if all the other attempts to remedy the situation in question fail.

**ANNEX I - SUSPENSIONS FOR LATE SUBMISSION OF THE CLEARANCE PACKAGE -
ARTICLE 38(1)**

The Member States are required to present the clearance package by 15 February year n+1 (in case of fully justified exceptional cases can be postponed to 1 March).

In case it is not submitted, the Commission may suspend the total amounts of monthly payments for the expenditure declarations for EAGF and treat as inadmissible declarations for EAFRD in accordance with Article 30(6). So in conclusion in case of late submission, the reimbursement of payments is postponed until the MS delivers the clearance package.

1. TIMELINE FOR EAGF

As of the date of the deadline for the submission of the clearance package (15 February or by 1 March if prolonged) the Commission

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments within 30 days are not received and/or reasons for delay are found unjustified, Commission may proceed with suspension, following the advisory procedure in the Agricultural Funds Committee (AFC).

Given the calendar, the above would mean that in practice the earliest suspension decision may be implemented in June.

In FY2017 all the Member States have delivered the clearance package on time and in the last 4 years by end of April at the latest.

2. JUSTIFICATIONS

It is recalled that the Member States have the possibility to ask for an extension of deadline to submit the clearance package until 1 March due to exceptional circumstances.

If this is not the case, the delay in submission must be due to exceptional circumstances, which could not have been foreseen before the deadline. These possible events cannot be defined in advance and would have to be seen on a case-by-case basis.

3. LEVEL OF SUSPENSION

As stipulated in the legislative proposal, for EAGF the payment of the relevant expenditure would be postponed by a suspension and for the EAFRD the declaration of expenditure would be considered inadmissible. This is proportional to the level of the ex-ante assurance that the Commission 'is losing' in view of the non-submission of the clearance package.

4. ENDING THE SUSPENSION AND REIMBURSEMENT

As stipulated in the legislative proposal, once the missing documents are received, the Commission shall reimburse the suspended amount. The amounts suspended

shall be reimbursed, if the clearance package is received within 6 months from the deadline.



ANNEX II - SUSPENSIONS IN THE FRAMEWORK OF THE ANNUAL PERFORMANCE CLEARANCE - ARTICLE 38(2)

The APR must contain information on expenditure and corresponding outputs for the financial year N (from 16 October year N-1 to 15 October year N).

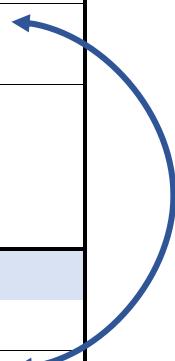
When the information presented in the APR on 15 February N+1 suggests that expenditure is not matched by a corresponding output, and the divergence exceeds 50%, a suspension can be applied for the expenditure of financial year N+1 and N+2 (until the receipt of the APR for year N+1 on 15 February N+2).

A divergence is only considered as an issue for ex-ante assurance when expenditure effected matched by reported output exceeds by more than 50% the expenditure planned compared to planned output (so planned unit amount)¹.

In the example below, which for the sake of completeness refers to animal related measure, MS has planned a unit amount with a variation. However the reported expenditure compared to reported output exceed the set maximum by more than 50%.

$(\text{EUR } 451.6 - \text{EUR } 300) / \text{EUR } 300 = 50.5\% > 50\%$, which in the absence of justifications would result in a reduction of 50.5% for the FY N, which could trigger the suspension procedure for 50.5% of the future expenditure.

CAP Plan	
Planned unit amount(s) (EUR/head)	280
Maximum variation of unit amount %	7%
Maximum unit amount(s) (EUR/head)	300
Annual planned outputs (No of animals)	20 000
Annual indicative financial allocation	5 600 000
APR year N	
Realised outputs	12 400
Declared expenditure	5 600 000
Ratio Expenditure / outputs	451.6



1. TIMELINE

The application of suspension is done in the context of an exchange between the Member State and the Commission. Before suspension decision, the Commission shall ask MS for comments to assess the need for suspension.

As of the date of the deadline for the submission of the clearance package (15 February or by 1 March if prolonged) the Commission may suspend the payments and if it decides to do so it

¹ In case of area and animal-related interventions the maximum unit amount

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments within 30 days are not received and/or reasons for divergence are found unjustified, Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

The above means that in practice the suspension decision can be implemented as of 1 April N+1 and apply until at least 15 February N+2, when the APR for the year N+1 is received, which could potentially bring new information that the divergence is no longer there.

2. JUSTIFICATIONS

MS will have the opportunity to present justifications at several points before any suspension or reduction decision is taken:

- already with the submission of the Annual Performance Report (APR) the Member States shall, for interventions not subject to Article 89 HZR where the deviations are higher than 50%, present information that can be used in the Annual Performance Clearance by the Commission (Art 121(4) of SPR) and may do so for all other deviations
- if following the receipt of the APR, the Commission finds that further information is needed the MS will be given an opportunity to respond and provide additional justification in a period no less than 30 days

Due to the complexity and diversity of the interventions in the CAP Strategic Plans it is not possible to list in detail all of the justifications that could be appropriate, though they would have some main common characteristics:

- they are directly related to the expenditure not covered by outputs (not general and broad statements)
- they are objective (based on verifiable numbers (e.g. sizes of projects in the calls for application published in that year)
- they take into account and clearly describe the extent and effects of the possible corrective actions already taken by the MSs
- they refer to the period for which issues have been found.

Example: An acceptable justification e.g. would be that the MS provides the information on the calls that have been published for this intervention that would indicate that the projects selected were of a larger size than initially planned and this leads to a higher unit amount.

3. LEVEL OF SUSPENSION

As stipulated in the legislative proposal, the suspension would be:

- applied to the **relevant expenditure** in respect of the interventions which have been subject to the reduction

- the amount to be suspended shall **not exceed the percentage** corresponding to the reduction applied.

So in the current example, a suspension of 50.5% of the corresponding amount for animal related interventions could follow.

4. LIFTING THE SUSPENSION AND POSSIBLE REIMBURSEMENT OR REDUCTION

The follow up of suspension shall take place as soon as the Member State can give evidence that this divergence no longer exists and at the latest upon the receipt of the APR of the year N+1 in February year N+2. Once the evidence is received the Commission will, without delay, assess the matching of the expenditure for a previously divergent intervention under suspension.

4.1. Situation remedied fully – suspension lifted, amounts reimbursed

If the Commission assessment shows that the expenditure for the intervention in year N+1 were matched by the corresponding outputs or due justification are provided for outputs not matching the level of expenditure (which indicates that no reduction in the context of annual performance clearance need to be applied), the Commission will:

- lift the suspension and
- reimburse the suspended amounts

4.2. Situation remedied partially – suspension lifted, reduction, amounts partially reimbursed

If the Commission assessment shows that the expenditure for the intervention in year N+1 were not matched by the corresponding outputs and that due justification were not provided, but the distance between expenditure and output would be smaller than 50% the Commission will:

- lift the suspension,
- make a reduction of expenditure for year N+1 proportionate to the unjustified distance between outputs and expenditure
- reimburse the remained of the suspended amounts

CAP Plan	
Planned unit amount(s) (EUR/head)	280
Maximum variation of unit amount %	7%
Maximum unit amount(s) (EUR/head)	300
Annual planned outputs (No of animals)	20 000
Annual indicative financial allocation	5 600 000
APR year N+1	
Realised outputs	18 000
Declared expenditure	5 600 000
Ratio Expenditure / outputs	311.1

In the example above, divergence is down to 3.7%.

Suspension applied was 50.5% as of April payment which is February expenditure for EAGF so during 9 months of year N+1. To make the example simple, the amount suspended was

$$5\,600\,000 \times 9/12 \times 50.5\% = 2\,121\,000$$

Reduction to be applied for year N+1 expenditure would be

$$5\,600\,000 \times 3.7\% = 207\,200$$

So the Commission would reimburse 1 913 800 of expenditure suspended in year N+1 and the entire expenditure suspended to date in year N+2.

ANNEX III - SUSPENSIONS IN THE FRAMEWORK OF THE MULTI-ANNUAL PERFORMANCE MONITORING - ARTICLE 39

The APR must contain information on the progress towards targets for the financial year N (from 16 October year N-1 to 15 October year N).

When the information presented in the APR on 15 February N+1 suggests that there is insufficient progress towards targets (i.e. a deviation higher than 25% from the year N milestone, as stipulated in the Art 121(9) of SPR), the Commission may ask the MS to implement remedial actions in line with an agreed action plan. If this plan is not submitted, not implemented or it is manifestly insufficient to remedy the situation, the Commission may proportionally suspend the payments to the MS.

1. TIMELINE

The application of an action plan/suspension is done in the context of an exchange between the Member State and the Commission. Before the agreement on the action plan/suspension decision, the Commission shall ask MS for comments to assess the needs for remedial actions/suspension.

As of the date of the deadline for the submission of the annual performance report (15 February or by 1 March if prolonged) the Commission

- may inform the MS of the observed gaps between the reported value of the result indicators and the respective milestones by 15 March (or 1 April if received by 1 March),
- if appropriate justifications for the observed gaps between results reported and milestone are not provided by the MS before the Annual Review Meeting, the Commission may ask the MS to devise an action plan and implement the necessary remedial action in accordance with it.

The action plan shall clearly identify the interventions related to the result indicators for which further action is needed.

There can be various events following the request by the Commission to implement the action plan:

1.1. Action plan is not submitted

If action plan is not submitted within the requested deadline, the Commission may suspend the payments and if it decides to do so it

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments (justified explanations why the action plan is not submitted) are not received within 30 days, the Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

The above means that in practice the suspension decision will rather only be implemented towards the end of the year N+1.

1.2. Action plan is submitted but is manifestly insufficient

If action plan is submitted and if, however upon its review, the Commission concludes the action plan is manifestly insufficient (e.g. an action plan that does not have any content and simply says situation will be remedied), the Commission may suspend the payments and if it intends to do so:

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments that would give assurance that the action plan would be modified in order to remedy the issues are not received within 30 days, the Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

The above means that in practice the suspension decision will rather only be implemented towards the end of the year N+1.

1.3. Action plan is submitted but not implemented

If action plan is submitted, but via its continuous monitoring² the Commission concludes that the action plan is not implemented, the Commission:

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments that would give assurance that the action plan would be implemented as agreed are not received within 30 days, the Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

The above means that in practice the suspension decision will rather only be made once it is established that the action plan is not implemented, most likely in year N+2.

2. JUSTIFICATIONS

MS will have the opportunity to present justifications at several points before any suspension decision is taken:

- already with the submission of the Annual Performance Report (APR) the Member States can present information that can be used in the Annual Performance Review by the Commission (Art 121(4) of SPR)
- if following the receipt of the APR, the Commission finds that further information is needed, the Commission shall address an observation letter to the MS and it will be given an opportunity to provide additional justification in written in the context of the Annual Review Meeting (Art 122 of SPR).

² In particular by the regular checking of the agreed implementation steps of the action plan and, where applicable, of the respective progress indicators.

Similar to annual performance clearance, due to the complexity and diversity of the interventions in the CAP Strategic Plans it is not possible to list in detail all the justifications that could be appropriate, though they would have some main common characteristics:

- they are directly related to the result indicators for which milestones are not achieved (not general and broad statements)
- they are objective (based on verifiable evidence as compared to what was planned)
- they are proportioned to the observed degree of non-fulfilment
- they take into account and clearly describe the extent and effects of the possible corrective actions already taken by the MSs
- they refer to the period for which issues have been found.

3. LEVEL OF SUSPENSION

As stipulated in the legislative proposal, the suspension would be:

- applied only to the **relevant expenditure** in respect of the interventions which were affected,
- the rate of suspension should be **proportionate** to the gap between the result attained and respective milestone, as well as taking into account the interventions contributing to the specific result indicator and their contribution in causing the delay.

4. LIFTING THE SUSPENSION AND POSSIBLE REIMBURSEMENT OR REDUCTION

The follow up of suspension shall take place upon the receipt and implementation of an action plan, agreed by the Commission in accordance with article 39(1) HZ Regulation. The implementation of such action plan is considered as a necessary condition to achieve satisfactory progress towards the targets.

Then, as provided by the legislative proposal, if upon the receipt of the APR the Commission concludes that the situation was remedied meaning that a satisfactory progress towards targets is achieved, the Commission will lift the suspension and reimburse previously suspended amounts. As general rule, “satisfactory progress” means that, in addition to the implementation of an action plan, the reported values of the result indicators concerned reach a gap from the milestones of the reporting year of less than 25% (also considering possible adjustments of the milestones, where applicable). Further consideration has to be given to the handling of other situations where Member States achieve progress that may be considered satisfactory (e.g. distance from milestone higher than 25%, but lower than what observed in the previous reporting year).

If the situation is not remedied by the closure, the Commission may permanently reduce the previously suspended amounts.

ANNEX IV- SUSPENSIONS IN RELATION TO DEFICIENCIES IN THE GOVERNANCE SYSTEMS - ARTICLE 40

The clearance package and in particular the management declaration and the CB opinion could contain information that could lead to the conclusion that serious deficiencies exist in the functioning of the governance systems. The same can be a conclusion of the Commission checks.

Following from such a finding, the Commission would ask the MS to implement remedial actions in line with the agreed action plan. If this fails to remedy the situation, i.e. a serious deficiency in the governance system would persist (plan is not submitted, not implemented or insufficient), the Commission may suspend the payments to the MS.

1. TIMELINE

The application of an action plan is done in the context of an exchange between the Member State and the Commission. Before the agreement on the action plan decision, the Commission shall ask MS for comments to assess the needs for remedial actions.

The timing of the event potentially triggering the need to apply an action plan cannot be easily determined as the Commission checks can be done throughout the year. However, in line with the current practice the deadline for delivery of the reply to the Commission findings could be envisioned to be within two months of the communication of the finding.

There can be various events following the request by the Commission to implement the action plan:

1.1. Action plan is not submitted

If action plan is not submitted within the requested deadline, the Commission

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments within 30 days are not received or explanations concerning possible remedial actions taken/to be taken are found insufficient, the Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

The above means that in practice that the suspension decision can be realistically implemented swiftly after the Commission concludes on the existence of the deficiency.

1.2. Action plan is submitted but is manifestly insufficient

If action plan is submitted and if, however upon its review, the Commission concludes the action plan is manifestly insufficient (e.g. an action plan that does not have any content and simply says situation will be remedied), the Commission may suspend the payments and if it intends to do so:

- shall inform the MS of the intention to suspend

- shall give at least 30 days to comment
- if comments within 30 days are not received that would give assurance that the action plan would be modified in order to remedy the issues, the Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

In all cases, the suspension can be decided for a period of up to 12 months, and could be prolonged for the following 12 months if the deficiency continues.

1.3. Action plan is submitted but not implemented

If action plan is submitted however, via its continuous monitoring³ the Commission concludes the action plan is not implemented, the Commission may suspend the payments, and if it intends to do so:

- shall inform the MS of the intention to suspend
- shall give at least 30 days to comment
- if comments within 30 days are not received that would give assurance that the action plan would be implemented as agreed, the Commission may proceed with suspensions, following the advisory procedure in the Agricultural Funds Committee (AFC).

2. LEVEL OF SUSPENSION

As stipulated in the legislative proposal, the suspension would be:

- applied to the **relevant expenditure** affected by the existing deficiency,
- the rate of suspension should be **proportionate to the risk** to the Fund caused by the deficiency.

As it is currently the case, the rate of suspension could be proportional to the (flat rate) corrections that would be applied for a given deficiency in conformity clearance procedure. Further information of the (flat rate) corrections may be provided by the Commission.

3. LIFTING THE SUSPENSION AND POSSIBLE REIMBURSEMENT

The follow up of suspension shall take place regularly: upon the receipt of the subsequent clearance packages, in the progress reports from the implementation of the action plans, during the Commission audits.

As currently in Art 41 of Regulation 1306/2013 a suspension can be only applied for a period of up to 12 months and then prolonged for a further period of up to 12 months.

An existence of the serious deficiency in the governance system also covered by Art 53 on performance clearance may lead to a financial correction in the context of the conformity procedure. A correction decided in that context shall take into account

³ Subsequent checks by the Commission, reporting from the CB, regular progress reports

the amounts previously suspended. In case a level of correction finally decided is lower than the level of suspension applied, the remaining amounts shall be reimbursed to the MS upon the decision determining the financial correction is adopted.

