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WORKING PAPER

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From:	General Secretariat of the Council
To:	Working Party on Financial Agricultural Questions
Subject:	Proposal for a Regulation on the financing, management and monitoring of the CAP - Non-paper on 'serious deficiencies'

With a view to the meeting of the Working Party AGRIFIN on 9 April, delegations find attached a non-paper from the Commission services on "Serious deficiencies in the functioning of the Member States' governance systems".



NON-PAPER

This non-paper addresses the request by MS in the Council WP on Financial Agricultural Questions for further clarifications on serious deficiencies in the functioning of the Member States' governance systems. It is based on the text of the Commission Proposals COM(2018)392 final and COM(2018)393 final.

Serious deficiencies in the functioning of the Member States' governance systems

1. AIM

This non-paper aims to clarify the Commission's intentions in relation to serious deficiencies in the functioning of the Member States' governance systems and their financial implications as referred to in Art. 53 of HZR¹. It explains some terminology used in the legislative proposals and gives some examples on what a serious and non-serious deficiency could be. Finally, it touches upon what financial impact is to be considered in the conformity procedure, if a serious deficiency is detected.

2. WHAT ARE DEFICIENCIES IN THE FUNCTIONING OF THE MEMBER STATES' GOVERNANCE SYSTEMS?

In general terms, a deficiency is defined as any instance where the management and control system implemented would not operate properly in accordance with the applicable EU legal requirements.

In the new delivery model, expenditure linked to interventions (as detailed in the CAP Strategic Plan²) has to be effected in accordance with the applicable governance systems³ to render it eligible for Union financing. From this, it follows that all management and control measures applicable to the relevant individual intervention are considered part of the management and control system. However, compliance is strictly limited to what is

¹ Commission proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013

² Commission proposal for a Regulation of the European Parliament and of the Council establishing rules on support for CAP Strategic Plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council

³ As referred to in Art.2 of HZR, the governance systems are the "governance bodies" and the "basic Union requirements" laid down in SPR and HZR including the reporting system put in place for the purposes of the annual performance report.

legally required under the new delivery model and thus does not include the compliance with eligibility criteria for the individual beneficiary.

Thus, a deficiency in the governance system is described as a situation whereby the governance bodies are not functioning appropriately, the basic Union requirements are not respected, or there are deficiencies with the correct reporting of outputs and results. A deficiency, therefore, would have to be assessed at a higher level than the current regime i.e. eligibility at system's level and not at the level of eligibility criteria for the individual beneficiary.

3. WHAT CONSTITUTES A SERIOUS DEFICIENCY?

Regarding the nature of the deficiency, a distinction needs to be made between those that are “serious” and “non-serious”. However, it needs to be considered that non-serious but persisting deficiencies may become serious over time.

A serious deficiency occurs where the proper functioning of the governance systems is impeded by a serious system weakness. This may also have an impact on the correct reporting of individual interventions. Furthermore, a serious deficiency would have a systemic impact in terms of its occurrence and its gravity to be considered as such. This would also be the case where a management and control element is absent, or its quality is inadequate to such an extent that it impairs proper reporting of the outputs and respecting the basic requirements resulting from the EU legislation.

A deficiency can be detected when assessing the functioning of the governance systems i.e. the governance bodies and the basic Union requirements including the reporting systems. This can be done by a review of the internal control system, including compliance testing. The purpose of this is to establish whether a system (or a control element thereof) works well or is not working (i.e. the gradation of the occurrence and level of errors and misstatements). – cf. *Non-paper on Certification Bodies' annual certification audit in the framework of the new delivery model (ref. WK 3049/2019)*.

4. EXAMPLES OF DEFICIENCIES

The notion of **serious deficiency** would therefore manifest itself e.g. in the following situations (list not exhaustive):

- Where a certification body has not been appointed or a paying agency has not been accredited.
- Where the accreditation criteria were severely not respected. For example where the appropriate technical skills of the staff as required at different operational levels are absent or clearly dysfunctional.
- Absent or insufficient remedial actions taken when the quality assessments of the LPIS, geo-spatial application and area monitoring systems revealed deficiencies. This may have an impact on the correct reporting.
- Non-respect of the public procurement rules. This means that the reported output can be considered as such. However, since clear basic Union requirements were not respected the expenditure cannot be considered eligible.

- Where the payment calculation IT system does not cater for the application of penalties as defined by MS in the Strategic Plan or as defined at EU level in the HZR since there is, therefore, no deterrent effect and the management and control system is not functioning properly.
- Where it is found that the body certifying that land has been managed according to the organic practices is not operating to an appropriate standard. This also means that the output was not correctly reported, in this case, “area managed organically”.
- Where capping is not applied to the level as per clear legal Union requirements.
- Where the EU requirements are correctly set out in the CAP strategic plan, but they are not correctly implemented. For example when the maximum age limit (according to article 4 of SPR) defined by the Member State is 38 years, however payments are allowed by the system implemented to beneficiaries up to 45 years.

Conversely, a **non-serious deficiency** could constitute e.g. a situation (list not exhaustive):

- Where, temporarily, there is insufficient staff in the paying agency without adverse impact on the proper functioning of the management and control systems.
- Where there is an issue with the functioning of the IT systems, but without an impact on the reporting system.
- Where the certification body was appointed late, but delivers an acceptable opinion on time.
- Where the LPIS-QA, GSA-QA or AMS-QA is submitted late but since the results show an acceptable quality, no remedial action had to be taken.
- Where reconciliation anomalies are found by the certification body, but they relate exclusively to reporting mistakes (possibly even corrected before the submission of the annual performance report) and do not relate to weaknesses in the management and control system.

Furthermore, as per third subparagraph of Art.53(1) of HZR⁴, financial corrections shall not apply to cases of non-compliance that go beyond the legislative requirements under the new delivery model. In other words, where national rules are not complied with and where this has no impact on complying with the EU legislative requirements under the new delivery model, this would not constitute a serious deficiency. Hence, contrary to what is currently the case the following situations, which today **would constitute a serious deficiency**, will as such **not fall** under this category:

- Where the claims are not timely administered but without an effect on the payment deadlines.
- Where there are problems with the management of the payment entitlements but without a financial impact on the final payments.

⁴ Third subparagraph of Art.53(1) of HZR stipulates that amounts to be excluded from Union financing. “[...] shall not apply to cases of non-compliance with the eligibility conditions for individual beneficiaries laid down in the national CAP Strategic Plans and national rules.”

- Where in an AECM intervention there are result-based payments to beneficiaries, in the meaning that the amount that the individual beneficiary receives may vary on the basis of different scores, but the planned average unit amount of this intervention is respected.
- When an operational programme was approved (by the Member State) with some interventions that have started being implemented prior to its submission, provided that these interventions are in line with the eligibility criteria established by the Member State.

5. WHAT AMOUNT WOULD BE EXCLUDED FROM UNION FINANCING FOLLOWING THE CONFORMITY PROCEDURE?

Where serious deficiencies are established, the amount to be excluded would be the expenditure that was paid for an intervention or the expenditure part thereof for which there is a risk of financial damage. It is however pointed out that such exclusions would not apply to cases of non-compliance with the eligibility conditions for individual beneficiaries laid down in the national CAP Strategic Plans and national rules.

Since a serious deficiency would constitute a system's error without a link to eligibility conditions applicable to individual beneficiaries, in principle, flat rate corrections would be applied.

For this, the level of correction could be established in analogy to what is applicable under the current regime when establishing the flat rate corrections for non-compliances in the accreditation criteria. Following this, the calculation of the financial correction needs to take account of the scale of the serious deficiency detected in the part of the governance system that is affected by it; and the risk of irregular expenditure linked to this. This ensures that the principle of proportionality is respected and that the financial corrections are kept at such a level that it represents an incentive for the Member State to correct the situation.

As is the case under the current regime, different rates could be considered. This would be determined based on the part of the governance system that is seriously deficient, since some may present a higher financial risk than others. As is also the case under the current regime, the Commission will issue guidelines on the calculation of the financial corrections.

Finally, in the context of the conformity procedure, Member States will continue to have the right to demonstrate that the deficiency was not as serious as it appeared, or that the risk of financial damage was lower than the proposed flat rate correction.