

EXPLANATORY FICHE NO 7

ADMISSIBILITY OF APPLICATIONS BY BENEFICIARIES

28 MARCH 2019

RELEVANT PROVISIONS IN THE DRAFT LEGISLATION

| Regulation | Provisions |
|----------------------|---|
| EMFF Proposal | Article 12 on admissibility of applications Article 35 on financial corrections by Member States |
| CPR proposal | Article 97 on financial correction by Member States |

This document is based on the text of the adopted EMFF and CPR proposal. It is a provisional text, without prejudice to on-going discussions. This series of fiches is intended to guide Member States, explaining and elaborating the text of the proposal.

OBJECTIVE OF THIS FICHE

This fiche provides an explanation on the provisions on the admissibility of applications by beneficiaries contained in the Commission’s proposal for the post 2020 EMFF.

BACKGROUND

The Impact Assessment accompanying the Commission’s proposal for the EMFF highlighted a widespread concern expressed by stakeholders that the achievement of CFP objectives should continue to be a priority for the future¹. The Impact Assessment also examined the compliance mechanism introduced through the EMFF 2014-2020 and according to which operators have to comply with the CFP rules to be able to get support through the EMFF, and concluded that this should be continued.

The principle of conditioning financial assistance to beneficiaries with compliance to CFP rules is already enshrined in the CFP Regulation 1380/2013, which lays down in its Art. 42 “*Union financial assistance to operators shall be conditional upon compliance with the CFP rules by operators*”. This principle is also enshrined in the provisions on compliance with CFP rules by Member States which is outlined in Article 41 of the CFP regulation.

With regards to the inadmissibility of applications in case of fraud, this is enshrined in Directive 2017/1371, which requires Member States to ensure that fraud affecting the Union’s financial interests constitutes a criminal offence when committed intentionally.

LEGAL BASIS

Rules regarding eligibility rules for beneficiaries are laid down in Article 12 of the EMFF proposal, while rules regarding financial corrections by Member States are spelled out in Article 35 of the EMFF proposal.

Article 12

Admissibility of applications

1. *An application submitted by a beneficiary for support from the EMFF shall be inadmissible for an identified period of time laid down pursuant to paragraph 4, if it has been determined by the competent authority that the beneficiary concerned:*
 - (a) *has committed serious infringements under Article 42 of Council Regulation (EC) No 1005/2008² or Article 90 of Council Regulation (EC) No 1224/2009³ or under other legislation adopted by the European Parliament and by the Council;*
 - (b) *has been involved in the operation, management or ownership of fishing vessels included in the Union IUU vessel list as set out in Article 40(3) of Regulation (EC) No 1005/2008, or of a vessel flagged to countries identified as non-cooperating third countries as set out in Article 33 of that Regulation; or*
 - (c) *has committed any of the environmental offences set out in Articles 3 and 4 of Directive 2008/99/EC⁴ of the European Parliament and of the Council, where the application is made for support under Article 23*

¹ See SWD(2018)295

² IUU Regulation 1005/2008 (OJ L 286, 29.10.2008, p.1)

³ Control Regulation 1224/2009 (OJ L 343, 22.12.2009, p. 21)

⁴ Directive on the protection of the environment through criminal law (OJ L 328, 06.12.2008, p. 28)

2. *The beneficiary, after submitting the application, shall continue to comply with the admissibility conditions referred to in paragraph 1 throughout the period of implementation of the operation and for a period of five years after the final payment to that beneficiary.*
3. *Without prejudice to more far-reaching national rules as agreed on in the Partnership Agreement with the Member State concerned, an application submitted by a beneficiary shall be inadmissible for an identified period of time laid down pursuant to paragraph 4, if it has been determined by the competent authority that the beneficiary has committed a fraud, as defined in Article 3 of Directive 2017/1371/EU⁵ of the European Parliament and of the Council.*
4. *The Commission shall be empowered to adopt delegated acts in accordance with Article 52 concerning:*
 - (a) *the identification of the threshold triggering and the length of period of time of inadmissibility referred to in paragraphs 1 and 3, which shall be proportionate to the nature, gravity, duration and repetition of the serious infringements, offences or fraud, and shall be of at least one year's duration;*
 - (b) *the relevant starting or ending dates of the period of time referred to in paragraphs 1 and 3.*
5. *Member States shall require that beneficiaries submitting an application under the EMFF provide to the managing authority a signed statement confirming that they respect the criteria listed in paragraphs 1 and 3. Member States shall verify the veracity of that statement before approving the operation, based on the information available in the national registers of infringements referred to in Article 93 of Regulation (EC) No 1224/2009, or any other available data.*

For the purposes of the verification referred to in the first subparagraph, a Member State shall provide, on request from another Member State, the information contained in its national register of infringements referred to in Article 93 of Regulation (EC) No 1224/2009.

EMFF

Article 35

Financial corrections by Member States

1. *In accordance with Article 97(4) of Regulation (EU) No [Regulation laying down Common Provisions], Member States shall apply financial corrections in case of the non-respect of the obligations referred to in Article 12(2) of this Regulation.*
2. *In the cases of the financial corrections referred to in paragraph 1, Member States shall determine the amount of the correction, which shall be proportionate, having regard to the nature, gravity, duration and repetition of the infringement or offence by the beneficiary and the importance of the EMFF contribution to the economic activity of the beneficiary.*

Article 35 should be read and applied together with Article 97 of the CPR proposal:

CPR

Article 97

Financial corrections by Member States

1. *Member States shall protect the Union budget and apply financial corrections by cancelling all or part of the support from the Funds to an operation or programme when expenditure declared to the Commission is found to be irregular.*
2. *Financial corrections shall be recorded in the accounts for the accounting year in which the cancellation is decided.*

⁵ Directive on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28.07.2017, p ; 29)

3. *The support from the Funds cancelled may be reused by the Member State within the programme concerned except for an operation that was subject of that correction or, where a financial correction is made for a systemic irregularity, for any operation affected by the systemic irregularity.*
4. *The Fund-specific rules for the EMFF may lay down specific bases for financial corrections by the Member States linked to non-compliance with rules applicable under the Common Fisheries Policy.*
5. *By way of derogation from paragraphs 1 to 3, in operations comprising financial instruments, a contribution cancelled in accordance with this Article, as a result of an individual irregularity, may be re-used within the same operation under the following conditions:*
- (a) where the irregularity that gives rise to the cancellation of the contribution is detected at the level of the final recipient: only for other final recipients within the same financial instrument;*
 - (b) where the irregularity that gives rise to the cancellation of the contribution is detected at the level of the body implementing the specific fund, where a financial instrument is implemented through a structure with a holding fund, only for other bodies implementing specific funds.*
- Where that irregularity that gives rise to the cancellation of the contribution is detected at the level of the body implementing the holding fund, or at the level of the body implementing the specific fund where a financial instrument is implemented through a structure without a holding fund, the contribution cancelled shall not be reused within the same operation.*
- Where a financial correction is made for a systemic irregularity, the contribution cancelled shall not be reused for any operation affected by the systemic irregularity.*
6. *The bodies implementing financial instrument shall reimburse to Member States programme contributions affected by irregularities, together with interest and any other gains generated by those contributions.*
- The bodies implementing financial instruments shall not reimburse to Member States the amounts referred to in the first subparagraph provided that those bodies demonstrate for a given irregularity that the following cumulative conditions are fulfilled:*
- (a) the irregularity occurred at the level of final recipients or, in the case of a holding fund, at the level of bodies implementing specific funds or final recipients;*
 - (b) the bodies implementing financial instruments performed their obligations, in relation to the programme contributions affected by the irregularity, in accordance with applicable law and acted with the degree of professional care, transparency and diligence expected from a professional body experienced in implementing financial instruments;*
 - (c) the amounts affected by the irregularity could not be recovered notwithstanding that the bodies implementing financial instruments pursued all applicable contractual and legal measures with due diligence.*

CONTENT AND COMPARISON WITH THE CURRENT EMFF

To ensure continuity across different programming periods, the provisions related to conditionality of beneficiaries contained in the EMFF proposal are the same as in the current EMFF.

The content of Article 12 is the same as Article 10 of the current EMFF, with the exception of the following changes which were introduced for sake of simplification and clarity:

- the entire Article 12 refers to “beneficiaries” instead of operators ensuring that the terminology is consistent with that of the CPR;
- §1(a) refers now to serious infringements and no longer to one single serious infringement. This has been introduced to ensure proportionality in order to prevent a situation in which

a single infringement (such as for instance of the misreporting of catches), may automatically trigger the ineligibility of EMFF support.

- §3 related to fraud to Union's financial interests refers now also to national rules which might be stricter.

In accordance with this eligibility rule, any potential beneficiary applying for the EMFF must not have committed serious infringements, environmental offences (for support granted under Article 23 on aquaculture) or fraud to Union's financial interests for a certain period. This period will be determined in a delegated act, together with the threshold triggering the inadmissibility as in the current programming period.

This principle continues to be applicable for the whole implementation period and 5 years after the final payment. This period of 5 years is determined in line with Article 59 of the Commission Proposal on the CPR⁶ on durability of operations as well as Article 76 on availability of documents. This period remains the same as in the current EMFF.

The revision of the Fisheries Control system that is currently under discussion⁷ should not have an impact on admissibility rules for beneficiaries as the Commission proposal on the revision of EU Fisheries Control system was drafted with a view to ensure continuity. The major change regarding serious infringements in the Commission proposal is that all serious infringements are now included in Article 90 of the Control Regulation of the control proposal. A cross reference is provided for in Article 42 of the IUU Regulation No 1005/2008 while Articles 33 and 40(3) of the IUU Regulation No 1005/2008 are unchanged.

WHAT DOES THE CURRENT EMFF PROPOSAL IMPLY FOR BENEFICIARIES?

The current EMFF proposal does not imply any change for beneficiaries.

As in the current programming period,

- A potential beneficiary applying to the EMFF would have to provide a signed statement stated that he/she complies with admissibility rules.
- The beneficiary of EMFF support would have to comply with these rules for the whole period of implementation as well as 5 years after the last payment.

WHICH CHANGES DOES THE NEW EMFF PROPOSAL IMPLY FOR MEMBER STATES?

The current proposal does not imply changes for Member States in comparison to the current programming period.

As in the current programming period,

- 1) It is up to the fisheries control authorities in Member States to determine when an operator (potential beneficiary of the EMFF) :
 - has committed a serious infringement,
 - has been involved with operations concerning the IUU vessel list.
- 2) Managing Authorities in Member States should check the veracity of the statement by the applicant.

⁶ See COM(2018)375 dated 29.5.2018

⁷ See COM(2018)368 dated 30.5.2018

- 3) It is up to the Managing Authority in Member States to apply financial corrections if a beneficiary fails to comply with CFP rules. This correction should be proportionate, having regard to the nature, gravity, duration and repetition of the infringement or offence by the beneficiary and the importance of the EMFF contribution to the economic activity of the beneficiary.

In case of recipients of financial instruments, as in the current programming period, it is up to the bodies implementing the financial instruments concerned, or in the context of guarantees, the body providing the underlying loans to select final recipients⁸. As these bodies shall perform their obligations in accordance with applicable law⁹, they shall also check the eligibility of financial instruments' recipients to the EMFF.

The way this check will be done may vary from one Member State to another, depending on the system put in place in the Member State. Such a check might be done either directly by these bodies or by the Managing Authority. These details will have to be provided in the strategy document related to financial instruments and prepared by the Managing Authority, as set out in Annex IX of the CPR Proposal.

WHAT WILL BE THE ROLE OF THE COMMISSION?

As in the current programming period, the EMFF proposal foresees that the Commission will have to prepare a new delegated act regarding the threshold triggering the inadmissibility, the length of period of time of inadmissibility (but at least one year)¹⁰ and the relevant starting and ending dates. The proposals makes clear that the principle of proportionality should be taken on board. As far as possible, the Commission intends to propose a rollover of existing rules in order to ensure stability and continuity with the systems currently in place in Member States.

QUESTIONS

- Given your experience in the current programming period and the continuity in applicable rules, do you have good experience to share?
- In the current programming period, the Commission adopted the delegated Regulation 2015/288¹¹ regarding the period of time and the dates for the inadmissibility of applications by operators. What elements of this Delegated Act should be retained? Is there scope for improvement?

⁸ See Art. 53 on implementation of financial instruments in the CPR Proposal COM (2018)375.

⁹ See Art. 97 (6) (b) of CPR Proposal.

¹⁰ See Art. 12(4) of the EMFF COM Proposal

¹¹ See recital (45) of the CPR Proposal COM(2018)375 : “Since Member States should have the primary responsibility for such management and control and should ensure that operations supported by the Funds comply with applicable law,…”