

EXPLANATORY FICHE NO 2

ADMISSIBILITY OF APPLICATIONS BY BENEFICIARIES

EMFF Expert Group of 21 April 2021

RELEVANT PROVISIONS IN THE DRAFT LEGISLATION

Regulation	Provisions
CFP Regulation	Article 42 on conditions for financial assistance to operators
EMFAF Compromise	Article 11 on admissibility of applications Article 44 on financial corrections by Member States
CPR text	Article 103 on financial correction by Member States

This document is based on the text of the political agreement reached on the European Maritime Fisheries and Aquaculture Fund (EMFAF) on 4 December 2020, currently under legal revision, as well as on the latest version of the CPR proposal. It is a provisional text, without prejudice to on-going discussions or revisions. This fiche is intended to guide Member States, explaining and elaborating the text of the proposal.

OBJECTIVE OF THIS FICHE

Article 11 of the EMFAF Regulation lays down the rules on the admissibility of operators' applications for financial support, and empowers the Commission to adopt a delegated act defining:

1. the identification of the threshold triggering the inadmissibility of operators who committed serious infringements, environmental offences or fraud,
2. the length of the period of time of inadmissibility, and
3. the relevant starting or ending dates of that period and the conditions for a reduced time of inadmissibility.

This fiche provides an overview of the approach for the next delegated act, in order to have a first discussion with Member States.

BACKGROUND

The principle of conditioning financial assistance to beneficiaries with compliance to CFP rules is enshrined in the CFP Regulation 1380/2013¹, which lays down in its Article 42 "*Union financial assistance to operators shall be conditional upon compliance with the CFP rules by operators*".

The Impact Assessment accompanying the Commission's proposal for the EMFAF highlighted a widespread concern expressed by stakeholders that the achievement of CFP objectives should continue to be a priority for the future². The Impact Assessment also examined the compliance mechanism introduced through the EMFF in 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.

With regard 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

In application of Article 42 of the CFP Regulation, admissibility rules for operators applying for support under the EMFAF are laid down in Article 11 of the EMFAF, while rules regarding financial corrections by Member States are spelled out in its Article 44.

Article 42 of the CFP Regulation on conditions for financial assistance to operators

1. *Subject to the conditions to be specified in the applicable Union legal acts, Union financial assistance to operators shall be conditional upon compliance with the CFP rules by operators.*
2. *Subject to specific rules to be adopted, serious infringements by operators of the CFP rules shall result in temporary or permanent bans on access to the Union financial assistance and/or the application of financial reductions. Such measures, taken by the Member State, shall be dissuasive, effective and proportionate to the nature, gravity, duration and repetition of serious infringements.*
3. *Member States shall ensure that Union financial assistance is granted only if no penalties for serious infringements have been imposed on the operator concerned **within a period of one year prior to the date of application for Union financial assistance.***

¹ See OJ L 354, 28.12.2013, p.22

² See SWD(2018)295

Article 11 of EMFAF on Admissibility of applications

1. *An application submitted by an operator shall be inadmissible for an identified period of time laid down pursuant to paragraph 4 of this Article, if it has been determined by the competent authority that the operator concerned:*
 - (a) *has committed serious infringements under Article 42 of Council Regulation (EC) No 1005/2008³ or Article 90 of Regulation (EC) No 1224/2009⁴ or under other legislation adopted by the European Parliament and by the Council within the framework of the CFP;*
 - (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 flying the flag of 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/EC⁵ of the European Parliament and of the Council, where the application for support is submitted under Article 27 of this Regulation.*
2. *If any of the situations referred to in paragraph 1 of this Article occurs throughout the period between submitting the application for support and five years after the final payment, the support paid from EMFAF and related to that application shall be recovered from the operator, in accordance with Article 103 of the Common Provisions Regulation.*
3. *Without prejudice to more far-reaching national rules as agreed on in the Partnership Agreement with the Member State concerned, an application for support submitted by an operator shall be inadmissible for an identified period of time laid down pursuant to paragraph 4 of this Article, if it has been determined through a final decision by the competent authority concerned that the operator has committed fraud, as defined in Article 3 of Directive 2017/1371/EU⁶, in the context of the EMFF or the EMFAF.*
4. *The Commission is empowered to adopt delegated acts, in accordance with Article 52, supplementing this Regulation concerning:*
 - (a) *the identification of the threshold triggering, and the period of time of, the inadmissibility referred to in paragraphs 1 and 3 of this Article, which shall be proportionate to the nature, gravity, duration and repetition of the serious infringements, offences or fraud committed, **and shall be of at least one year's duration;***
 - (b) *in accordance with Article 103 of the Common Provisions Regulation, the arrangements for recovering the support granted pursuant to paragraph 2 of this Article, which shall be proportionate to the nature, gravity, duration and repetition of the serious infringements, offences committed;*
 - (c) *the relevant starting or ending dates of the periods of time referred to in paragraphs 1 and 3 and the conditions for a reduced period of inadmissibility.*
5. *Member States may apply, in accordance with national rules, a longer inadmissibility period than that laid down pursuant to paragraph 4. Member States may apply an inadmissibility period also to applications submitted by operators engaged in inland fishing who have committed serious infringements, as defined by national rules.*
6. *Member States shall require that operators submitting an application under the EMFAF provide to the managing authority a signed statement confirming that they do not fall under any of the situations listed in paragraphs 1 and 3 of this Article. Member States shall verify the veracity of that statement before approving the application, based on the information available in the national registers of infringements referred to in Article 93 of Regulation (EC) 1224/2009, or any other available data.*

³ IUU Regulation 1005/2008 (OJ L 286, 29.10.2008, p. 1)

⁴ Control Regulation 1224/2009 (OJ L 343, 22.12.2009, p. 21)

⁵ Directive on the protection of the environment through criminal law (OJ L 328, 06.12.2008, p. 28)

⁶ 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)

For the purposes of the verification referred to in the first subparagraph of this paragraph, 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) 1224/2009

Article 44 of EMFAF on Financial corrections by Member States

1. In accordance with Article 103(4) of the Common Provisions Regulation, Member States shall apply financial corrections in the case of non-compliance with the obligations as referred to in Article 11(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 to the nature, gravity, duration and repetition of the serious infringements or offences by the beneficiary concerned and the importance of the EMFAF contribution to the economic activity of that beneficiary.

Article 103 of new CPR on 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.

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 EMFAF 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 instruments 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.

Admissibility under the EMFF – the rules as currently in place

In line with article 42(3) CFP, Article 10 (1) (a) of the EMFF provides that one serious infringement implies inadmissibility for funds. In view of proportionality, a derogation from this rule applies for 3 categories of serious infringements subject to the point system:

- misreporting of catches (3 points)
- use of prohibited or non-compliant gears (4 points),
- non-fulfilment of the landing obligation (5 points).

For these infringements the inadmissibility is triggered when the accumulated points reach 9.

This was decided in view of proportionality considerations and in view of the novelty of the admissibility system, the fact that the point system had just been introduced and the landing obligation still to be gradually phased in.

CONTENT OF THE NEXT DELEGATED ACT AND COMPARISON WITH THE EMFF DELEGATED ACT

The provisions related to the admissibility under the EMFAF will be similar to those included in the EMFF⁷, though adapted to the current reality and aiming at ensuring a simpler implementation and a stronger level playing field.

The experience gained in the application of the point system and its consequences under the EMFF have demonstrated that the link of admissibility with the point system is most suitable for ensuring proportionality and level playing field. Aligning with the point system also ensures full coherence between the Control Regulation and the EMFAF and a system that is focused on considerations linked to the nature of the infringement committed. Finally, this approach allows for more flexibility when points are reduced.

What will be the threshold triggering the inadmissibility for EU financing?

Similarly to the EMFF, and in accordance with Article 42 CFP, the starting principle should remain in the EMFAF that certain categories of serious infringements are of such nature, that committing one such infringement should lead to an inadmissibility of 12 months. At the same time, the new wording in the EMFAF Regulation allows better to ensure coherence with the proportionality principle, and to continue providing for derogations for cases which are of a less serious nature.

Concretely, the delegated act will provide that the inadmissibility is triggered when the operator has:

- (a) accumulated a **level of 5 points** in the case of serious infringements subject to the point system. This level is chosen in view of the nature of the infringements for which at least 5 points are allocated according to Annex XXX of Regulation 404/2011. Concretely, this level (a) ensures no access to EU financing if the applicant has committed 1 infringement whose nature and gravity justifies automatic inadmissibility (e.g. falsification, tampering etc) and (b) at the same time still provides for a margin for those categories of infringements subject to 4 or 3 points, where the automatic inadmissibility in case of a single infringement would be disproportionate (e.g. catch

⁷ See Commission Delegated Regulation 2015/288 on the period of time and dates for the inadmissibility of applications (OJ L 51, 24.2.2015, p.1)

recording, non-compliant fishing gear).

- (b) committed 1 serious infringement in the case of the serious infringements that are not subject to the point system (the conduct of business connected to IUU fishing, the falsification of documents referred to in the IUU Regulation or the use of such documents and the manipulation of engine power).

Where it concerns serious infringements subject to the point system, the total of points accumulated by the operator at the moment of his application for the financing should be taken into account for determining the inadmissibility, i.e. once the operator gets points and the overall level comes to 5 or above, he becomes inadmissible.

Duration of the inadmissibility period

As under the EMFF, committing one serious infringement without points, or reaching 5 points or more in case of serious infringements subject to the point system, will lead to the inadmissibility of applications under the EMFAF for 12 months. Any additional serious infringement, with or without points, committed during the inadmissibility period will lead to an extra 12 months.

Reduction of the inadmissibility period in relation to points

The inadmissibility period would be reduced by two months when two points are deleted from the fishing licence pursuant to Article 133(3) of Implementing Regulation 404/2011. This flexibility also applies under the EMFF, but only for the 3 cases for which the 9 point derogation applies. Now the system is fully aligned with the point system, and this flexibility is open for all cases linked to serious infringements to the point system.

Case of transfer of ownership

Under the EMFF, a transfer of vessel ownership cannot affect the duration of the inadmissibility period. Points are transferred to the new holder of the fishing licence for the fishing vessel concerned. However, it is only when the new licence holder commits one of the 3 serious infringements subject to the 9 points threshold that the points transferred from these 3 serious infringements are taken into account to calculate his/her inadmissibility period.

The same approach will be followed for the EMFAF: a transfer of ownership cannot affect the EMFAF inadmissibility period for an operator. However, points transferred to the new owner will be taken into account as soon as he commits any new serious infringement.

IUU

As in the EMFF, operators involved in the operation, management or ownership of fishing vessels included in the Union IUU vessel list would be inadmissible for the period where the vessel is included in the IUU vessels list (but at least 24 months as in the EMFF).

Those whose vessels are flagged to countries identified as non-cooperating third countries in accordance with the IUU Regulation would be inadmissible for the whole period where the flag country is included in the list of non-cooperative third countries (but at least 12 months).

Environmental offences

For environmental offences by aquaculture producers, rules will remain unchanged: the inadmissibility period of aquaculture producers would be of 12 months if the offence is committed with serious negligence; and of 24 months, if the offence is committed intentionally.

Fraud

As in the EMFF, in case of fraud, the inadmissibility period will last from the date of the first official decision establishing the fraud until the end of the eligibility period of the EMFAF (31

December 2029).

Which place for rules at national level?

- Member States may apply a longer inadmissibility period than in the delegated act, or more far-reaching national rules in case of fraud in their Partnership Agreement.
- Member States may apply also an inadmissibility period for operators having committed serious infringements in the context of inland fishing.

WHAT DOES THE EMFAF IMPLY FOR BENEFICIARIES?

The EMFAF will lead to no change for beneficiaries. As in the EMFF,

- an operator applying for EMFAF support will have to provide a signed statement stating that he/she complies with admissibility rules. Member States shall verify the veracity of the statement, in particular via the national register of infringements.
- any EMFAF beneficiary will have to comply with compliance rules for the whole period of implementation as well as 5 years after the last payment. Should a case of inadmissibility occur during this period, the EMFAF support shall be recovered by the Member State in accordance with CPR rules. If the Member States does not proceed with this correction, it is up to the Commission to do it.

QUESTIONS

- Given your experience on compliance with CFP rules by operators in the EMFF, do you have good experience to share?
- What is your experience regarding the use of points as a basis for the assessment of the eligibility of operators? Was it easy to implement? Which difficulties did you encounter? Could you provide us with some concrete examples?
- Are there some aspects of the next delegated act presented in the fiche that you would like to modify? If so why?
- Do you have concrete proposals to improve or facilitate the implementation of the system proposed?

ANNEX I: Overview of Serious Infringements

	Description	Link with Annex XXX of Implementing rules	Number of points
IUU Reg. Art. 3 (1)			
Art 3(1)(a)	fishing without a valid licence, authorisation or permit issued by the flag State or the relevant coastal State;	SI n° 7	7
Art 3(1)(b)	not fulfilling of obligations to record and report catch or catch-related data, including data to be transmitted by satellite vessel monitoring system	SI n° 1	3
Art 3(1)(c)	fished in a closed area, during a closed season, without or after attainment of a quota or beyond a closed depth;	SI n° 8	6
Art 3(1)(d)	engaged in directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;	SI n° 9	7
Art 3(1)(e)	used prohibited or non-compliant fishing gear	SI n° 2	4
Art 3(1)(f)	falsification or concealing of markings, identity or registration	SI n° 3	5
Art 3(1)(g)	concealing, tampering or disposal of evidence relating to an investigation;	SI n° 4	5
Art 3(1)(h)	Obstruction of work of officials in the exercise of their duties in inspecting for compliance with the applicable conservation and management measures; or the work of observers in the exercise of their duties of observing compliance with the applicable Union rules	SI n°10	7

Art 3(1)(i)	taken on board, transhipped or landed undersized fish in contravention of the legislation in force	SI n° 5	5
Art 3(1)(j)	Transhipping to or participating in joint fishing operations with, support or re-supply of fishing vessels identified as having engaged in IUU fishing under this Regulation, in particular those included in the Union IUU vessel list or in the IUU vessel list of a regional fisheries management organisation;	SI n°11	7
Art 3(1)(k)	carrying out fishing activities in the area of a regional fisheries management organisation in a manner inconsistent with or in contravention of the conservation and management measures of that organisation	SI n° 6	5
Art 3(1)(l)	Use of a fishing vessel with no nationality and that is therefore a stateless vessel, in accordance with international law.	SI n° 12	7
IUU Reg. Art 42 (1)			
Art 42(1)(b)	the conduct of business directly connected to IUU fishing, including the trade in/or the importation of fishery products;	No	No points to be assigned by MS
Art 42(1)(c)	the falsification of documents referred to in this Regulation or the use of such false or invalid documents.	No	No points to be assigned by MS
Control Regulation Art. 90 (1)			
Art 90(1)(a)	the non-transmission of a landing declaration or a sales note when the	No	Points to be assigned by the MS

	landing of the catch has taken place in the port of a third country;		
Art 90(1)(b)	the manipulation of an engine with the aim of increasing its power beyond the maximum continuous engine power according to the engine certificate;	No	No points to be assigned by the MS
Art 90(1)(c)	the failure to bring and retain on board the fishing vessel and to land any catches of species subject to the landing obligation set out in Article 15 of Regulation (EU) No 1380/2013, unless the bringing and retention on board and the landing of such catches would be contrary to obligations or subject to exemptions provided for in the rules of the common fisheries policy in fisheries or fishing zones where such rules apply.	No	Points to be assigned by the MS