

**RESPUESTAS DE LA COMISIÓN EUROPEA A LAS PREGUNTAS MÁS
COMUNES ANTE LA CRISIS DEL CORONAVIRUS PARA LAS ACTUACIONES
EN FSE**

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1. STRUCTURAL FUNDS – HORIZONTAL QUESTIONS

COVID-19 and Force Majeure

The COVID-19 outbreak has affected Member States in a sudden and dramatic manner and will have implications on the implementation of EU programmes. The Commission has proposed a Coronavirus Response Investment Initiative (CRII) to flexibly respond to the rapidly emerging needs. Furthermore, the Commission is open to discuss with Member States the best possible ways to use the European Structural and Investment Funds to mitigate the impact of the coronavirus crisis and intends to assign top priority to adopting all decisions needed for the fast deployment of funds.

Several Member States have raised the question whether the outbreak can be regarded as an instance of force majeure. That concept is of restricted scope and describes a situation in which a person is completely prevented from complying with an obligation. In Union law, the notion of force majeure¹ generally presupposes circumstances which a) are abnormal and unforeseeable, b) are beyond the control of the one claiming ‘force majeure’, and c) could not have been avoided despite the exercise of all due care. Where Union law refers to reasons of force majeure, all three conditions set out by the Court of Justice have to be fulfilled and properly demonstrated on a case-by-case basis. Force majeure may be conceived even more restrictively under national law.

There may be instances in which circumstances resulting from the COVID-19 outbreak qualify as a force majeure event and thus constitute a valid justification for the incapacity to comply with an obligation. However, it is not clear that the outbreak is necessarily to be regarded as a force majeure event in all cases. Instead, the Commission considers that careful analysis and flexibility should be given to all cases where there is failure by beneficiaries to fulfil obligations in a timely manner for reasons related to the COVID-19 outbreak (for example, the unavailability of staff due to quarantine in a country because of the outbreak). Equally, the Commission will follow the same principles in assessing the compliance of Member States with their obligations.

In any case, all due care must be taken to avoid, mitigate and minimise the consequences of the event.

It is underlined that the legislative framework for the implementation of the European Structural and Investment Funds programmes remains fully applicable even under the current exceptional circumstances. This concerns in particular rules on the management and control system, which remain an important safeguard for the

¹ [1] *Case C-99/12 Eurofit SA v Bureau d'intervention et de restitution belge (BIRB) [2013], paragraph 31; Case 145/85 Denkavit België [1987] ECR 565, paragraph 11; Case C-377/03 Commission v Belgium [2006] ECR I-9733, paragraph 95; and Case C-218/09 SGS Belgium and Others [2010] ECR I-2373, paragraph 44*

regularity of operations. It should be noted that for EAFRD also the provisions on force majeure laid down in Regulation 1306/2013 apply.

Please also note that for EU spending programmes under direct/indirect management, the Commission has issued guidance with regard to the implications of the COVID-19 outbreak. For example, according to that guidance, where individuals who were to take part in meetings or events are prevented from doing so because of COVID-19, expenses of travel or accommodation that could not be cancelled and which are not reimbursed from other sources should be regarded as eligible costs. Furthermore, where the execution of contracts is impeded because of COVID-19, substitute performance or delayed performance could be permitted if requested and justified by the beneficiary/contractor. Finally, due to the COVID-19 outbreak, an extension of the deadlines for submission of proposals or tenders under on-going Union award procedures may be considered.

Ongoing implementation - eligibility & flexibility

Eligibility of expenditure affected in operations – General:

As an introductory remark regarding eligibility of cost of operations impacted by the COVID-19 outbreak, it should be recalled that according to Article 65(1) Regulation (EU) No 1303/2013 (CPR), “[t]he eligibility of expenditure shall be determined on the basis of national rules, except where specific rules are laid down in, or on the basis of, this Regulation or the Fund-specific rules.”

It is up to the national authorities to check and assess on a case-by-case basis the eligibility of expenditure linked to operations impacted by the COVID-19 outbreak. As set out above, this assessment will have to be carried out mainly in the light of national eligibility rules, also taking into account EU rules, including fund-specific rules, where they determine the eligibility of expenditure.

While the Commission does not have detailed knowledge of the specific national rules, it is recommended to take into account the following general remarks, and specific considerations based on them.

- The legislative framework for the implementation of European Structural and Investment Funds programmes remains fully applicable. This concerns in particular rules on the management and control system (including e.g. the requirement to set up procedures to ensure an adequate audit trail). These rules remain an important safeguard for the regularity of operations. For the EAFRD, the rules for the CAP laid down in Regulation 1306/2013 equally apply.
- It must be checked whether the operations were impacted by the COVID-19 outbreak.
- Any new contract and/or modifications of the existing contract(s) under the operations at stake have to be in line with public procurement rules, where applicable. In line with Article 32(2) Directive 2014/24/EU (the public procurement

Directive) the negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: [...]

“(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”

Taking into account the fact that the Coronavirus crisis may qualify as unforeseeable, contracting authorities may make use of the negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts insofar as it is strictly necessary because of extreme urgency. Such circumstances require a case-by-case analysis.

The purchase of medicines or sanitary equipment relating to the Corona virus crisis could be considered as necessary for reasons of extreme urgency within the meaning of Article 32(2)(c) of the 2014/24/EU Directive.

In addition, Art 72(1)(e) of Directive 2014/24/EU allows for non substantial modifications, as defined in Article 72(4) of said directive, of contracts during their terms. Article 72(1)(c) of the same Directive also allows for contract modifications without a new procurement procedure in case of a need for modification brought about by circumstances which a diligent contracting authority could not foresee, when the modification does not alter the overall nature of the contract and within a limit of increase in price of 50 % of the value of the original contract or framework agreement.

- Additionally, the beneficiary should exercise due care to claim any amounts/compensation from insurance or any other sources. The amounts constituting a genuine cost (including, e.g., costs incurred as a result of the necessary changes in work methods such as a purchase of digital equipment or capacities) for the beneficiary can be considered eligible. Any amounts received by insurance or compensation from other sources (e.g. liability insurance coverage compensating for the nonfulfillment of a contract, travel insurance compensating for travel expenses of a cancelled event, reimbursable travel and accommodation costs, etc.) must therefore be deducted from eligible expenditure.

Based on these general remarks, regarding expenditure affected in ongoing operations by the COVID-19 outbreak, the following considerations can be made.

National authorities must analyse whether the expenditure at stake (e.g. expenses of travel or accommodation that could not be cancelled and which are not reimbursed from other sources in cases where participation in meetings or events had to be cancelled due to circumstances related to the COVID-19 outbreak – whether personal or organisational), should be regarded as eligible costs in the light of national rules

(also taking into account EU rules, including fund-specific rules, where they determine the eligibility of expenditure).

In their actions related to addressing the specific circumstances due to the COVID-19 outbreak, national authorities should take into account the principles of proportionality, equal treatment, as well as transparency (i.e. necessary communication measures should be taken to properly inform beneficiaries).

Flexibility to adjust affected operations – General:

Where the execution of contracts is impeded because of COVID-19, for example, due to unavailability of key staff or products or subcontracted works or services because of the impact of the COVID-19, which may be regarded as force majeure, national authorities should exercise their discretion in permitting substitute performance or delayed performance.

National authorities may thus consider adjusting operations (e.g. deliverables, **time limit for execution, etc.**) in accordance with their national rules where necessary and justified, in a way to minimise the impact of the force majeure on the programmes.

National authorities could also consider the possibility to select new operations (e.g. if, as a result of the impact of the COVID-19 outbreak, there is a need to interrupt or stop the implementation of operations or when it is expected that the beneficiaries will not achieve the outputs intended) in order to effectively use available resources and to achieve the targets set for the programme. New or additional calls for proposals could be launched if necessary.

The same conditions for assessing eligibility under Union and national rules as those described in section 'eligibility of expenditure affected in operations' above apply to expenditure in relation to projects the implementation of which had started but will no longer be carried out. For example, under a possible force majeure claim, it would be necessary to demonstrate not only that rescheduling or substitute performance was impossible but also that an event was organized in a period when the cancellation due to COVID-19 was not foreseeable.

Furthermore, it should be recalled that any new contract and/or modifications of the existing contract(s) under the operations at stake have to be in line with public procurement rules, where applicable.

In line with Article 32(2) Directive 2014/24/EU (the public procurement Directive) the negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: [...]

“(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”

Taking into account the fact that the Coronavirus crisis may qualify as unforeseeable contracting authorities may make use of the negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts insofar as it is strictly necessary because of extreme urgency. Such circumstances require a case-by-case analysis.

The purchase of medicines or sanitary equipment relating to the Corona virus crisis could be considered as necessary for reasons of extreme urgency within the meaning of Article 32(2)(c) of the 2014/24/EU Directive. In addition, Art 72(1)(e) of Directive 2014/24/EU allows for non substantial modifications, as defined in Article 72(4) of said directive, of contracts during their terms. Article 72(1)(c) of the same Directive also allows for contract modifications without a new procurement procedure in case of a need for modification brought about by circumstances which a diligent contracting authority could not foresee, when the modification does not alter the overall nature of the contract and within a limit of increase in price of 50 % of the value of the original contract or framework agreement. In their actions related to addressing the specific circumstances due to the COVID-19 outbreak, national authorities should take into account the principles of proportionality, equal treatment, as well as transparency (i.e. necessary communication measures should be taken to properly inform beneficiaries).

Finally, regarding indicators, it should be recalled that according to paragraph 5 of Annex II of the CPR, *"[i]n duly justified cases, such as a significant change in the economic, environmental and labour market conditions in a Member State or region, and in addition to amendments resulting from changes in allocations for a given priority, that Member State may propose the revision of milestones and targets in accordance with Article 30."*

Amendments to existing projects - extension of scope to include COVID-19-related activities:

National authorities may consider to adjust operations in accordance with their national rules if necessary and justified, taking into account the need to ensure the compliance with relevant EU rules, including provisions on selection of operations as laid down in Article 125(3) of CPR and the scope of support from the ERDF as laid down in Article 3 of ERDF Regulation (as modified by proposal COM (2020) 113).

In particular, if the specific contractual obligations in the relevant grant agreements allow so, managing authorities may consider to adjust the scope of the existing operations falling within the health specialisation area identified by the S3 strategy, together with the increase of the available budget and the adjustment of their implementation timetable. Such modifications would not impair the research activities already initiated and would avoid the need to launch new calls for proposals.

If nevertheless contractual obligations do not allow for such modifications, it may be necessary to launch new calls for proposals. It should be recalled notably that any new contract and/or modifications of the existing contract(s) under the operations at stake have to be in line with public procurement rules, where applicable.

Extension of programming period:

The legislative framework for the implementation of operational programmes remains fully applicable even under the current exceptional circumstances. Consequently, the programming period laid down in Article 26(1) CPR and eligibility rules set out in Article 65(2) CPR apply and **no extension of the programming period is planned**.

Lighter selection of operations and procurement?

First, it should be recalled that **the legislative framework for the implementation of operational programmes remains fully applicable even under the current exceptional circumstances**. Based on the above, national authorities may select new operations in accordance with their national rules, taking into account the need to ensure compliance with relevant EU rules, including provisions on selection of operations as laid down in Articles 65(6) and 125(3) of CPR.

These two Articles already provide for flexibility. For instance in line with national rules, selection criteria can be fixed by written consultation of the monitoring committee, it is possible to allow for a non-competitive selection procedure, **it is possible to select an operation that has started before the submission of an application for funding to the Managing Authority, but is not physically completed or fully implemented (provided that the applicable law relevant for the operation has been complied with)**, and the beneficiary can be provided with an electronic version of the document fixing the conditions of support.

Concerning the public procurement rules, in line with Article 32(2) Directive 2014/24/EU (the public procurement Directive) the negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

“(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”

Taking into account the fact that the Coronavirus crisis qualifies as unforeseeable/unpredictable, contracting authorities may make use of the negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts insofar as it is strictly necessary because of extreme urgency. Such circumstances require a case-by-case analysis. The purchase of medicines or sanitary equipment relating to the Coronavirus crisis could be considered as necessary for reasons of extreme urgency within the meaning of Article 32(2)(c) of the 2014/24/EU Directive. In 2015, the Commission adopted a Communication “On Public Procurement rules in connection with the asylum crisis”. Even if this Communication was targeting the specific situation related to the asylum crisis, it explains the full set of different possibilities available to the contracting authorities under the EU law to tackle efficiently the different urgency situations. For example, it explains in detail when swiftest negotiated procedure without publication can be used.

Beyond this, the Commission’s services are ready to provide help and assistance to the Member States’ authorities. **The Commission has at present no plans to propose**

further changes to the EU Regulations relevant for the implementation of operational programmes or the public procurement directives.

Application of Article 70 CPR:

Conditions set under Article 70 CPR have to be fully respected: operations supported by the ESI Funds shall be located in the programme area. Only operations concerning the provision of services to citizens or businesses which cover the whole territory of a Member State are considered as being located in all programme areas within a Member State. In such cases, expenditure shall be allocated to the concerned programme areas on a pro-rata basis, based on objective criteria.

Moreover, as far as operations implemented outside the programme area are concerned, all 4 conditions set under Article 70(2) must be respected: the operation is for the benefit of the programme area; the total amount from the ERDF, Cohesion Fund, EAFRD or EMFF allocated under the programme to operations located outside the programme area does not exceed 15 % of the support from the funds at the level of the priority at the time of adoption of the programme; the monitoring committee has given its agreement; the obligations of the authorities for the programme in relation to management, control and audit concerning the operation are fulfilled.

In accordance with Article 70(1) CPR that allows for Fund-specific rules, the ESF Regulation at Article 13(2) contains a specific rule setting out that the ESF may support operations which take place outside the programme area, but within the Union, if 2 conditions are met: i.e. the operation has to be for the benefit of the programme area and the obligations related to management, control and audit have to be fulfilled. When the operation also has a benefit for the programme area in which it is implemented, the expenditure has to be allocated to those programme areas on a pro rata basis based on objective criteria.

Furthermore, specifically for the EAFRD, fund specific rules require support to be directed to rural areas. However, Member States may also finance operations in other types of area (i.e. urban) if they are clearly for the benefit of rural areas and when they are eligible under the respective Rural Development Programme.

Use of equipment from other operations:

Equipment that was purchased as part of the operations supported by the ESI Funds, may be used to foster crisis response capacities in the context of the COVID-19 outbreak. In addition, expenditure related to the use of such equipment would be eligible as of 1 February 2020, in accordance with the derogation in Article 65(10) CPR introduced by the Regulation (EU) 2020/460. The treatment of such cases depends on whether the relevant operation is on-going or finalized and in the latter case, if it falls within the scope of the durability rules under Article 71 CPR or not.

When it concerns on-going operations, such use of the equipment may require adjusting the document setting out the conditions for support to the operation. National authorities may consider to adjust operations in accordance with their national rules if necessary and justified, taking into account the need to ensure the compliance with relevant EU rules, including provisions on selection of operations as

laid down in Article 125(3) of CPR and, for the EAFRD, in Article 49 of Regulation 1305/2013, and, for the ERDF, the scope of support as laid down in Article 3 of ERDF Regulation (as modified by the Regulation (EU) 2020/460).

When it concerns operations that are finalized and the equipment is a productive investment (i.e. an investment in fixed capital or immaterial assets of the enterprise benefiting from the grant, which are to be used for the production of goods and services thereby contributing to gross capital formation and employment), the managing authority should satisfy itself that such use of the equipment does not result in an incompliance with the durability requirements, as set out in Article 71(1) CPR. Mainly it could be the case falling under point (c) of Article 71(1) CPR, concerning a substantial change in the nature, objectives or implementing conditions of an operation. It should be decided at the national level, whether the change is substantial². This should be checked against the conditions set out in the document setting out the conditions for support to the operation. If the new intended use of equipment does not undermine the original objective of the operation, the conditions may be satisfied.

When it concerns operations that were finalized but do not fall under the scope of Article 71 CPR, the equipment may be used to foster crisis response capacities in the context of the COVID-19 outbreak in accordance with national eligibility rules, also taking into account specific rules that are laid down in, or on the basis of, the CPR or the Fund-specific rules.

Use of simplified costs options:

All simplified costs options provided by the CPR could be used to provide support in the form of grants and repayable assistance to beneficiaries and the Commission strongly encourages Member States to make good use of them whenever possible.

In particular, for SME support operations under *de minimis* rules, which are not implemented exclusively through the public procurement of works, goods or services, in line with Article 67(4) CPR, as a general rule, any operation which receives support from the ERDF and the ESF, grants and repayable assistance for which the public support does not exceed EUR 100 000 should take the form of standard scales of unit costs, lump sums or flat rates.

In the context of the ESF, the Commission has already requested managing authorities to put in place specific measures, more specifically in the area of distance learning and health measures to combat the COVID-19 crisis. The managing authorities are recommended to make maximum use of the simplified cost options in place under Article 14(1) of the ESF Regulation ([Commission Delegated Regulation \(EU\) No 2015/2195](#)), but it may occur that additional unit costs or lump sums need to be established, for instance in the area of setting up provisional (mobile or fixed) health

² Judgement of the Court of 14 November 2013 in case C-388/12

care facilities. This could be done on the basis of a draft budget (Art. 67(5) (aa) CPR) established on a case-by-case basis and agreed ex ante by the managing authority if the public support does not exceed EUR 100 000. Managing authorities are encouraged to start implementing these measures without delay. The Commission would also welcome a collaborative approach from the audit authorities and support to the Managing authority by assessing these SCO-schemes ex-ante. As usual, DG EMPL audit teams stand ready to assist you should it be needed.

Monitoring, reporting, performance framework (ongoing implementation and CRII)

Performance Framework and Force Majeure:

In accordance with the procedure laid down in Article 22(7) CPR, where the Commission, based on the final implementation report of the programme, establishes a serious failure to achieve some targets due to clearly identified implementations weakness, it may consider whether to apply financial corrections in respect of the priorities concerned.

The third subparagraph of Article 22(7) CPR sets out that “financial corrections shall not be applied where the failure to achieve targets is due to the impact of socio-economic or environmental factors, significant changes in the economic or environmental conditions in the Member State concerned *or because of reasons of force majeure seriously affecting implementation of the priorities concerned.*”

Consequently, the Commission will consider in its assessment of whether financial correction is to be applied or, based on the above-referred provision, shall not be applied.

Nevertheless, all efforts should be made (e.g. by making use of the possibilities provided by the Commission’s amendment proposals; adjustments to operations; reprogramming if necessary and possible, etc.) to ensure that programme targets are met. The Commission will cooperate with Member States to that end.

Transfers to priorities that did not achieve their milestones:

In order not to undermine the performance review exercise which took place based on Article 21 and 22 CPR in 2019, transfers of main allocations to underperforming priorities in the subsequent programme amendments was considered by the Commission as not recommendable for cohesion policy. In addition, and in the logic of rewarding performance, transfers of the performance reserve to the priorities that did not achieve their milestones is not allowed at all, due to the restriction laid down in Article 22(3)

CPR that establishes that the performance reserve is allocated the reserve only to programmes and priorities which achieved their milestones³.

In view of the current crisis following the COVID-19 outbreak, some new needs might be identified by the Member States, which could be covered by priorities underperforming at the time of the performance review. In that respect, in duly justified cases, where the priorities at stake have picked up the implementation pace in the last year and have sufficient potential to implement more resources than currently allocated to them, the Commission can accept a transfer of main allocation amounts to previously underperforming priorities. This is of course without prejudice to the applicable CPR requirements such as thematic concentration, limited transferability between categories of regions (Article 93(2) CPR), etc.

A possible reason for such transfer might be the Commission proposal COM(2020)113 to modify Regulation (EU) No 1301/2013 so that the ERDF investment priority to strengthen research, technological development and innovation can cover investment in products and services necessary for fostering the crisis response capacities in health services.

Indicators' targets in the context of crisis response:

In accordance with the procedure laid down in Article 22(7) CPR, where the Commission, based on the final implementation report of the programme, establishes a serious failure to achieve some targets due to clearly identified implementations weakness, it may consider whether to apply financial corrections in respect of the priorities concerned.

The third subparagraph of Article 22(7) CPR sets out that “financial corrections shall not be applied where the failure to achieve targets is due to the impact of socio-economic or environmental factors, significant changes in the economic or environmental conditions in the Member State concerned or because of reasons of force majeure seriously affecting implementation of the priorities concerned.”

Consequently, the Commission will consider in its assessment whether financial correction is to be applied or, based on the above referred provision, shall not be applied. The data or evidence used to estimate the value of the target will be essential in that assessment as it will show the impact of socio-economic or environmental factors, significant changes in the economic or environmental conditions or force majeure.

The Commission considers that the situation arising from the COVID-19 outbreak may give grounds to invoke ‘force majeure’, depending on how the situation has affected the implementation of the programme and priorities. Nevertheless, all efforts should be made (e.g. by making use of the possibilities provided by the Commission’s

³ This does not apply to the EAFRD, where the financing plan does not distinguish between amounts stemming from the performance reserve and main allocation.

amendment proposals, adjustments to operations, reprogramming if necessary and possible, etc.) to ensure that programme targets are met. The Commission will cooperate with Member States to that end.

In case of modifications to indicator values resulting from measures taken to address the current COVID-19 outbreak, Member States will need to provide the rationale for the adjustment in indicator targets, including the new indicator targets necessary to be established as a result of the measures taken, in line with Article 27(4) of the CPR and fund-specific rules.

Annual implementation report (AIR) 2019:

From 2020 until 2023 (included), the managing authorities shall submit to the Commission only so called “light” annual implementation report, i.e. only Part A of AIR template (data required every year) should be filled in (see Article 50(2) of Regulation (EU) No 1303/2013). An optional Section 14.4 of Part B on the OP contribution to macro-regional strategies and sea basin can be filled in, where appropriate.

Achievement of programme targets, values of indicators, co-financing rate:

In accordance with point 5 of Annex II CPR on the method for establishing the performance framework, Member States may, in duly justified cases, such as a significant change in the economic, environmental and labour market conditions in a Member State or region and in addition to amendments resulting from changes in allocations for a given priority, propose the revision of milestones and targets for the indicators in the performance framework in accordance with Article 30 CPR.

There are therefore 2 situations in which the values for indicators in the performance framework can be reviewed:

- in duly justified cases: including if the significant change made it impossible to achieve a target, the Member State may propose the revision of targets. Based on the first estimations of the impact of the Coronavirus crisis on the European economy, it is expected that the condition for amending the targets in the performance framework will be met. However, if the revision aims only to align targets with actual performance, this would not be regarded as a due justification.
- In case there are changes in the budgetary allocation to a priority: programme amendments changing the financial resources in a priority to address the current crisis will therefore also justify an amendment of the values for the targets.

For all indicators both in the PF and outside, in case of modifications to the target values for indicators or selection of new indicators resulting from measures taken to address the current COVID-19 outbreak, including within the context of the CPR amendment proposal, the Member State will need to provide the rationale (e.g.

referring to the COVID-19 related crisis) for the adjustment of the target values for indicators or for the selection of new indicators and their related targets.

In accordance with Article 4(3) and (4) of Regulation (EU) No 215/2014, the information on the methodologies and criteria applied to select indicators for the performance framework and to fix corresponding milestones and targets recorded by the bodies preparing programmes has to be made available at the request of the Commission.

Concerning EU co-financing, the rates set out in Article 120(3) CPR apply. The Commission did not propose a change to the cofinancing rates to avoid lowering the overall investment potential of the programmes.

Application of Article 87 CPR:

Article 87 (1) (b) CPR provides for the exception to decommitment: it is a derogation to the general rule of decommitment expressed in Art. 86 (1) CPR. In this respect it should not be considered as a flexibility provision but should be interpreted strictly. In line with this Article, if the Member State has not been able to make a payment application due to force majeure which seriously affected the implementation of the programmes, such amount will be deducted from the amount concerned by decommitment.

Direct impact of force majeure on programme implementation has to be established.

In Union law, the notion of ‘force majeure’⁴ generally presupposes circumstances which a) are abnormal and unforeseeable, b) are beyond the control of the one claiming ‘force majeure’, and c) could not have been avoided despite the exercise of all due care.

For a case of ‘force majeure’, all three conditions set out by the Court of Justice have to be fulfilled and properly demonstrated. Force majeure is a term of rather restricted scope.

Article 87 (1)(b) is a regulatory provision which applies to all amounts equivalent to the part of budget commitments for which it has not been possible to make a payment application and does not only concern specific amounts relating to investments targeting COVID outbreak.

Regarding 2020 commitments, in line with Article 136(2) CPR, the part of commitments still open on 31 December 2023 will be decommitted if any of the

⁴ Case C-99/12 Eurofit SA v Bureau d’intervention et de restitution belge (BIRB) [2013], paragraph 31; Case [145/85 Denkvit België \[1987\] ECR 565](#) , paragraph 11; Case [C-377/03 Commission v Belgium \[2006\] ECR I-9733](#) , paragraph 95; and Case [C-218/09 SGS Belgium and Others \[2010\] ECR I-2373](#) , paragraph 44

closure documents referred to in Article 141(1) CPR has not been submitted to the Commission by the regulatory deadline.

Article 87 (1) CPR does not allow for an extension of the end date for eligibility period stated in Article 65 (2) CPR: this means that expenditure may not be incurred by beneficiaries beyond 2023 and until submission of closure documents based on Article 87(1) CPR. Only a reduction of amounts from decommitment for which no payment application was made due to circumstances of force majeure may be applied in the specific conditions stated in Art. 87 (1) CPR.

Article 87 (1) (b) CPR provides for the exception to decommitment: in line with this Article, If the Member State has not been able to make a payment application due to force majeure which seriously affected the implementation of the programmes, such amount will be reduced from the amount concerned by decommitment. Direct impact of force majeure to programme implementation must be established.

At the end of a year N+3 (and outside the decommitment at closure), a reduction of amounts concerned by decommitment for which no payment application was made could be applied provided that the conditions of Art. 87 (1)(b) CPR are fulfilled. The fact that no payment application could be made due to the specific corona virus outbreak could be regarded as circumstances of force majeure. As this depends on the specifics of the cases at stake it would require an analysis on a case by case basis. The procedure is the one provided in Article 88 CPR.

Audit

COVID-19 and management verifications; implication of force majeure on audits:

Article 125(5)(a) of the CPR provides for administrative verifications in respect of each application for reimbursement by beneficiaries (desk-based verifications). Member States are encouraged to perform desk-based verifications where possible until such time as it is safe for staff to perform on-the-spot visits again since in the current emergency situation, the Commission understands that on-the-spot verifications are not possible.

Article 125(5)(b) of the CPR provides for the managing authority to carry out on the spot verifications of operations. As far as management verifications are concerned, certifying authorities can already now declare in interim payment applications expenditure which has undergone only administrative verifications (desk checks). On-spot checks by the managing authorities or intermediate bodies under article 125(5)b) of the CPR are done only for a risk-basis sample. Their extent and timing depends on the characteristics of the operation. The Guidance note on management verifications recommends that they should be completed before certification in the accounts (i.e. 15 February 2021). Therefore managing authorities have flexibility also under the current rules to carry out the on-spot verifications they deem necessary after declaring the expenditure to the Commission and before submitting the accounts, e.g. in the 2nd half of 2020.

Audits by the audit authorities under article 127(1) CPR are done on a statistical sample of operations drawn from the expenditure of the accounting year (i.e. up to 30 June 2020) after this expenditure has been declared to the Commission. As regards current audit work, the Italian audit authorities have received yesterday a letter through SFC2014 (reference Ares (2020)1641010 of 18/3 /2020) from the audit directors of EMPL and REGIO. It is recommended that those audit authorities that have adopted remote working arrangements carry out the audit activities as far as possible through review of documents, including those available via information systems and those that can be submitted electronically by the auditees. Once the emergency is over, the audit authority will be able to assess whether it is necessary to complete the work by visiting the operation on the spot to verify the physical implementation of the project or obtain further clarifications. At that moment, audit authorities should also assess the scope of the activities to be carried out, so that the priorities can be reviewed, in line with the resources and time available, to ensure submission of the annual control report by 15 February 2021.

COVID-19 and audit compliance:

The crisis does not alter the compliance with applicable rules. Therefore management verifications and audits should continue to verify compliance with applicable rules.

An issue which occurs is the impossibility of doing more than desk verifications and audits at this point in time, and possibly for some time after the crisis until authorities have given the green light for social contacts.

This is not a problem: the regulation sets out that certifying authorities can already now declare in interim payment applications expenditure which has undergone only administrative management verifications (desk checks) and the guidance on management verifications confirms that on-spot checks can be done after the declaration of expenditure and up to the submission of the accounts. Therefore managing authorities have flexibility also under the current rules to carry out the on-spot verifications they deem necessary after declaring the expenditure to the Commission and before submitting the accounts, e.g. in the 2nd half of 2020. In the meantime, desk verifications should be carried out as much as possible remotely, making maximum use of E-cohesion: through review of documents available in programmes' information systems or submitted electronically by auditees.

As regards audits by the audit authorities, the CRII measures fall under normal audit work, carried out after this expenditure has been declared to the Commission. Audit authorities will draw some of these operations as part of their normal random sampling exercise (which most probably could fall in the 2nd or 3rd sampling period). Similar to management verifications, audits can be done desk-based and using electronically available documents as much as possible. The regulation provides that audits can be desk based and need to include on-the-spot verification of the physical implementation only where necessary (article 27(3) of Commission Delegated Regulation 480/2014). Whenever on-the-spot visits are required, these can be postponed. Once the emergency is over, the audit authority will be able to assess the scope of the activities to be carried out and review the priorities, in line with the

resources and time available, to ensure submission of the annual control report by 15 February 2021.

2. EUROPEAN SOCIAL FUND

Short-time work schemes

(STW) are public programmes that allow firms experiencing economic difficulties to temporarily reduce the working hours of their employees, who in turn receive income support from the State for the hours not worked.

The main purpose of these schemes is to avoid dismissals, protecting employees and limiting the consequences of a shock.

Also, the use of short-time work allows the burden of the adjustment to be shared more equally across employees, and preserves the human capital of the concerned firms.

A key characteristic is that the employment relationships are maintained during the period of short-time work, even in cases when working hours are reduced to zero (i.e. a full suspension of work).

The ESF can play an important role, in particular in Member States with large national allocations, to support the Member States' efforts to delay the spread of the virus, including mitigating measures such as the reduction of hours worked, the organisation of flexible work arrangements such as shifts, etc.

In particular, the ESF can support, short-time work schemes for workers, as follows:

- Under Thematic Objective 9, investment priority on “access to services”: Priority to workers in sectors directly affected by the public health ban to congregate (notably the hospitality sector - bars, restaurants, shops, schools, etc. closed as closure was imposed to halt the spreading of the Coronavirus, but also for staff in aviation given the numerous restrictions to travel for the same reason). In this case, there is no need to combine these schemes with active measures (e.g. training) as these STW measures are driven by the need to ensure access to healthcare services by delaying the spread of the virus.
- Under Thematic Objective 8, in particular the investment priority on “adaptation of workers and enterprises to change”: STW measures to maintain employment in sectors not directly at the forefront of combating the spread of the virus, but undergoing side-effects: e.g. suffering delays in delivery of supplies or facing a drop in demand, for those sectors and companies; **STW arrangements supported by the ESF should be more consistently accompanied by active measures: requirements to ensure access to training for staff (which can take place through distance learning or at a later stage), or a commitment of companies to maintain these workers in employment for a certain duration (e.g. at least equal to the duration of the time the worker was benefitting from**

the STW). This is due to the fact that these STW measures are driven by the aim to maintain employment and therefore require an active component. However, in light of the urgency of the current Coronavirus crisis, this is not a requirement, rather a recommendation in how to design ESF support.

It should be underlined that in case a scheme pursues two objectives (containing the spread of the virus and maintaining employment), Member States have flexibility and they can, if they so wish, also programme these STW schemes under the employment thematic objective (TO 8) in particular the investment priority on “adaptation of workers to change”. This is justified by the fact that these STW measures - whilst driven by the need to ensure access to healthcare services by delaying the spread of the virus – also aim at maintaining employment. As these schemes pursue two objectives, it is up to Member States to decide to programme them either under thematic objective 8 or 9.

The following general conditions apply:

- the time duration of the exceptional STW arrangements supported by the ESF should be clearly stipulated in relevant national legislation and ESF eligibility rules.
- Member States should make sure that national law allows such schemes.
- The national eligibility rules need to comply with the very limited set of eligibility rules at EU level (in the Common Provisions Regulation and the ESF Regulation). The national eligibility rules on the ESF should determine what is eligible. Member States have ample flexibility in defining the eligible costs.
- Member States also have the competence to determine how they will check whether the eligibility rules are complied with. It will be useful to also discuss these with the national audit authority as this will determine what will have to be checked at the different levels (by the managing authority, by the national Audit Authority and by the Commission auditors). This also ensures audit certainty with regard to such expenditure under the European Social Fund. It is therefore of utmost importance to keep it simple and avoid gold-plating.

Short-time work schemes generally do not apply to the self-employed (who can organise their work freely, and assume the business risks associated with their entrepreneurial activity. However, the ESF can also support specific schemes for the self employed. As it is the case for STW, depending on the intervention logic, support for self-employed can be programmed under the investment priority on adaptation of workers and enterprises to change (Article 3(1)(a)(v) of the ESF Regulation) in case these measures are aimed at ensuring that workers and companies can adapt to the new crisis and maintain their job or business.

This support can also be programmed under the investment priority on “access to services” (Article 3(1)(b)(iv) ESF Regulation) in case closure of businesses was imposed by the government to contain the spread of the virus.

It should be underlined that in case a scheme supports both objectives (i.e. containing the spread of the virus and maintaining employment), Member States have flexibility and they can, if they so wish, also programme these support schemes under the employment thematic objective (TO 8), in particular the investment priority on “adaptation of workers and enterprises to change”. This is justified by the fact that these measures - whilst driven by the need to ensure access to healthcare services by delaying the spread of the virus – also aim at maintaining employment. As these schemes pursue two objectives, it is up to Member States to decide to programme them either under thematic objective 8 or 9.

Eligibility of expenditure for Coronacrisis response operations supported by the ESF

ESF eligibility rules are national⁵: The national eligibility rules on the ESF should determine what is eligible. Member States have ample flexibility in defining the eligible costs of the actions. These national eligibility rules need to comply with the very limited set of eligibility rules at EU level (in the Common Provisions Regulation and the ESF Regulation).

ESF Simplified Cost Options

We would like to highlight that there are three sets of questions and answers, which have been published on the “1. Structural Funds – horizontal questions” page on the CRII platform, which are also applicable to the operations utilising SCOs.

These are the following:

- COVID-19 and Force Majeure
 - o ‘COVID-19 and Force Majeure – General
- Eligibility & Flexibility

Use of unit costs set out in the Art. 14(1) delegated act in case of distance learning: The Commission Delegated Regulation (EU) 2015/2195 / the Delegated Act Art. 14(1) does not establish a condition that the training has to take place in a classroom and that it cannot take place via distance learning. This is only specified in the ‘fiches’ which MS submit in view of the inclusion of an SCO in the Delegated Act.

There is therefore no need to amend the Delegated Act to reflect that trainings can also take place via distance learning/e-learning. However, the fiches would need to be updated (to provide for this possibility following the COVID-19 outbreak and to set out the audit trail as the MA would need to be able to provide proof that the training occurred and that the employees took part in it).

⁵ Article 65(1) CPR.

EU-level SCOs for training of unemployed people: The situation is similar as described above, but there is one condition (footnote 6): “The training courses can be primarily either institutional or workplace-based, but must be delivered at least partly in an institutional setting.” In our view, this is the case for trainings that have already started in a classroom and are now changed into e-learning/distance learning. The measurement unit for the indicator triggering reimbursement by the Commission remains unchanged, i.e. the “Number of participants who have successfully completed a training course”.

EU-level SCOs for training of employees: The Commission Delegated Regulation does not specify that the training needs to take place in a classroom. For ongoing operations, switching to e-learning is possible and the measurement unit for the indicator triggering reimbursement remains unchanged.

1. Number of completed hours of training to employed persons per participant.
2. Number of hours of salary paid to employees while on a training course.

Footnote: As demonstrated by a verifiable time management system.