

## III

*(Preparatory acts)*

## COURT OF AUDITORS

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**OPINION No 3/2020***(pursuant to Articles 287(4) and 322(1)(a), TFEU)*

**on the proposal 2020/0054(COD) for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 and Regulation (EU) No 1301/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak**

*(2020/C 159/01)*

## CONTENTS

	<i>Paragraph</i>	<i>Page</i>
INTRODUCTION	1-5	2
OUR ASSESSMENT	6-13	3
Possibility of 100 % co-financing	7-8	3
Greater flexibility for Member States to target EU support where they choose	9-10	3
Keeping track of the use of the special measures	11	4
Timing of the measures	12	4
Impact on auditors' work	13	4
CONCLUDING COMMENT	14	4

## INTRODUCTION

1. The COVID-19 outbreak is having an unprecedented effect across all EU Member States on the health of citizens and the resilience of their economies. Against this background, the Commission is proposing to mobilise European Structural Investment (ESI) funding to mitigate these effects, 'as a temporary and exceptional measure, without prejudice to the rules that should apply under regular circumstances' <sup>(1)</sup>. The Commission recognises <sup>(2)</sup> that the main response will have to come from the Member States' budgets. The Commission's proposals are set out in an amendment to two of the regulations governing the use of funds for 2014-2020: the Common Provisions Regulation (CPR) covering the rules relating to range of funds <sup>(3)</sup>; and the regulation specific to the European Regional Development Fund (ERDF) <sup>(4)</sup>. Additional measures have been taken already by the Commission in recent weeks <sup>(5)</sup>. These are not formally the subject of this Opinion, but have been taken into account, whenever relevant.

2. The legal basis of the Commission's proposal means that consultation with the European Court of Auditors is mandatory <sup>(6)</sup>. We received a formal request from the legislators on 3 April 2020 (European Parliament) and 8 April 2020 (Council). This Opinion fulfils this consultation requirement.

3. The role of the Court of Auditors, under the Treaty, is to 'examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound' <sup>(7)</sup>. As a principle, we look for a rule-based administrative framework designed to deliver beneficial results and impact for citizens, through compliance with the relevant rules.

4. However, these are not normal circumstances. As an EU institution, we understand that the EU should take extraordinary measures in order to assist Member States in the fight against COVID-19 and its effects on the lives of European citizens. The current situation requires the urgent mobilisation of all available financial means to address the effects, to health, businesses and citizens: EU support needs to be available to Member States as soon as possible.

5. Lightening the procedures that the Commission, with the legislative authorities, put in place for 2014-2020, entails risks. The challenge for the Commission in its proposal is to strike the right balance between the need to provide the required flexibility to ensure the funds are made available to Member States without delay, and the need to minimise the risks to compliance and sound financial management. We take the view that offering this extended flexibility is essentially matter of political judgement for the EU's legislative authorities, the Parliament and Council.

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<sup>(1)</sup> Explanatory Memorandum, accompanying the Commission's proposal COM(2020) 138 final (procedure 2020/0054 (COD)) for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 and Regulation (EU) No 1301/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak.

<sup>(2)</sup> Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01), point 9.

<sup>(3)</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (OJ L 347, 20.12.2013, p. 320).

<sup>(4)</sup> Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 (OJ L 347, 20.12.2013, p. 289).

<sup>(5)</sup> In particular, Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020, amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) (OJ L 99, 31.3.2020, p. 5); and Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency (OJ L 99, 31.3.2020, p. 9).

<sup>(6)</sup> Treaty on the Functioning of the European Union (TFEU), Article 322(1)(a).

<sup>(7)</sup> TFEU, Article 287.

## OUR ASSESSMENT

6. Against this background, our aim with this Opinion is to facilitate the consideration of the Commission's proposal by the legislators. We have not provided detailed comments on the proposed amendments of the legislation; instead, we highlight the main issues and set out some of the risks involved.

### Possibility of 100 % co-financing

7. The proposal does not involve additional EU funding to the Member States. However, it provides for the faster transfer of EU funding, by giving a Member State the possibility to request that the EU provides a funding rate of 100 %, with no obligation on the part of the Member State to provide any of its own co-financing <sup>(8)</sup>. This measure would improve the availability of resources of Member States in the short term. Its impact would vary from Member State to Member State, depending on a range of factors, including the co-financing rates currently in operation and the relative progress of Member States in executing their programmes. In general, Member States which will benefit most from this measure are: those with a higher amount of funding from the current operational programmes available to them; those that will submit the highest amounts of expenditure during the next accounting year, and those generally with lower co-financing rates.

8. The resulting acceleration of programme implementation, together with the eligibility of expenditure allowed for completed operations, will put pressure on the payment appropriations available to the EU budget. We note that the Commission intends to 'carefully monitor the impact of the proposed modification on payment appropriations in 2020 taking into account both the implementation of the budget and revised Member State forecasts' <sup>(9)</sup>.

### Greater flexibility for Member States to target EU support where they choose

9. Under the proposal, Member States would have greater flexibility to respond to the COVID-19 outbreak by redirecting EU-funds to where they are most needed. In particular, it waives the requirements to devote a fixed proportion of ESI fund spending on key themes <sup>(10)</sup> (such as research and development, or climate and energy), and provides for easier transfers between funds, programmes and regions within a Member State <sup>(11)</sup>. Under this proposal, deciding exactly where to target the funding would, in practice, be at the discretion of the Member State. Furthermore, the flexibility offered in the proposal may affect the EU's capacity to achieve the objectives originally set in the operational programmes and the Commission's ability to report on performance.

10. While some administrative requirements have been removed under the proposal (such as the need to amend partnership agreements), many of the new measures would require the modification of operational programmes, and subsequent approval by the Commission. This may represent a significant administrative burden, particularly for the Commission which would have to process a large number of modifications in a short space of time. In order to mitigate this risk, and to maximise the impact of the funds, Member States and the Commission should limit amendments to operational programmes to the reallocation of funds to activities relating to the COVID-19 outbreak, so as to minimise any delays in funds reaching beneficiaries.

<sup>(8)</sup> Proposed new Article 25(a)2 of Regulation (EU) No 1303/2013, modifying Articles 60(1) and 120(3) of the same regulation. Transfers may not reduce the minimum resources allocated to the Youth Employment Initiative (YEI) and to the aid for the most deprived, as per Article 92(5) and (7) of the regulation, respectively.

<sup>(9)</sup> Explanatory Memorandum, accompanying the Commission's proposal COM(2020) 138 final (procedure 2020/0054 (COD)) for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 and Regulation (EU) No 1301/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak.

<sup>(10)</sup> Proposed new Article 25(a)5 of Regulation (EU) No 1303/2013, modifying Article 18 of the same regulation.

<sup>(11)</sup> Proposed new Articles 25(a)2 and 25(a)3 of Regulation (EU) No 1303/2013, modifying Articles 92(1)(a) to (d), 92(4) and 93 of the same regulation.

### Keeping track of the use of the special measures

11. The proposal would allow 'operations for fostering crisis response capacities' to be selected and funded retrospectively <sup>(12)</sup>. We note that the proposal provides no details on which kind of operations are meant, nor how Member States and the Commission might keep track of them. Nor does it set out any monitoring requirements relating to investments (such as the definition of a dedicated priority axis, the creation of an intervention code grouping for these activities or flagging the COVID-19 response expenditure in their IT systems). As a result, reliable information about ESI fund spending in response to the COVID-19 outbreak would not be readily available to the Commission or the legislators, potentially affecting accountability to EU citizens for the use of funds.

### Timing of the measures

12. Some measures would be available for a fixed period of time (100 % co-financing rates, postponed deadlines for annual implementation reports, modified audit sampling arrangements, financing of undertakings in difficulties), while others would potentially be in force until the end of 2023, when payments under the current programme period must cease (waiver of thematic concentration requirements and of amendments to partnership agreements). Given the uncertainties in how long the different aspects of the crisis will last, flexibility in timing is appropriate. However, for those measures where the current end date is the end of the programme period, it is important that the Commission monitors the situation carefully as it develops, with a view to ensuring that they are in place only as long as needed for the 'temporary and exceptional' aspiration referred to above.

### Impact on auditors' work

13. The proposal would allow audit authorities to cite the COVID-19 outbreak as a justification for using non-statistical sampling methods in their work for one accounting year <sup>(13)</sup>. This measure would have the potential to reduce the amount of work required of the audit authorities that make use of this option <sup>(14)</sup>. However, it raises the risk that the resulting samples for the programmes affected would not be representative, leading potentially to unreliable error rates and audit opinions for the year in question. This may weaken scrutiny over ESI fund spending, at the time when expenditure is likely to be more exposed to the risk of error and/or fraud. This proposal could therefore affect the Commission's ability to provide assurance for the legal use of funds, with potential further implications for the accountability process and our audit.

### CONCLUDING COMMENT

14. The Commission is proposing changes in the CPR and the ERDF-specific regulation which would relax a number of the rules governing 2014-2020 ESI fund expenditure. This short-term reaction is necessary to support Member States in mitigating the effects of the COVID-19 crisis. But this should not lead to substantial compromises in terms of accountability for spending, as this would have a detrimental effect on the trust of EU citizens in their institutions in the longer term. The Commission has worked under political pressure and with very tight deadlines to come forward with its proposal, which increases the risk of unforeseen problems relating to the design and implementation of these measures. The Commission should therefore keep a close eye on how they are used as the situation unfolds, with a view to making changes as necessary based on practical experience. The proposed amended rules are temporary only, due to the exceptional situation. It will be important to revert to the normal rules as soon as possible.

This Opinion was adopted by the Court of Auditors in Luxembourg on 14 April 2020.

*For the Court of Auditors*  
Klaus-Heiner LEHNE  
*President*

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<sup>(12)</sup> New Article 25(a)7 of Regulation (EU) No 1303/2013, modifying Article 65(6) in relation to the new eligible operations introduced as of 1 February 2020 in Article 65(10) by Regulation (EU) 2020/460.

<sup>(13)</sup> New Article 25(a)12 of Regulation (EU) No 1303/2013, modifying Article 127(1) of the same regulation.

<sup>(14)</sup> This measure in practice would be useful for populations under 600 operations.