

FAQ ON EX ANTE CONDITIONALITY 3.1 RELATING TO SMES

This list of frequently asked questions is based on comments received from Member States (MS) on Part II of the Guidance on ex ante conditionality 3.1 as regards Small and Medium Enterprises (SMEs).

- "Reference to SBA targets should be removed from the assessment grid since Member States has agreed to remove them from the Regulation."

Commission's reply: The fulfilment of EAC 3 regarding SMEs will be checked against the criteria for fulfilment mentioned in Annex XI Part I of the CPR. Sub-criteria identified in the assessment grid aim at describing the Commission's expectations for each criterion and at ensuring consistency between Member States through a common framework.

In practice, Member States need to demonstrate that they have put in place *measures to reduce the time and cost involved in setting up a business, as well as the time needed to get licences and permits to take up and perform the specific activity of an enterprise, taking account of the targets of the SBA.*

These targets are mentioned in brackets in the assessment grid in order to provide Member States with concrete guidance.

"In this case, it is unclear what is being expected from Member States – is it measures moving towards these targets or to reach the actual targets?"

Commission's reply: As requested in the criteria for fulfilment, Member States should demonstrate how they have taken account of the targets of the SBA in setting up the requested measures to reduce time and cost involved in setting up a business and the time needed to get licences and permits to take up and perform the specific activity of an enterprise. Therefore, the Commission will check the existence of measures moving towards these targets (instead of focusing on the fulfilment of these concrete targets). Of course, where those targets have been already achieved, the considered criteria will be deemed as fulfilled. However, in case of non-fulfilment of these targets, the Commission will base its assessment of the fulfilment of these criteria by looking at the scope of the gap to reach them, the distance already covered to fill it in and the measures taken to achieve the targets.

- Need for concrete and detailed guidance on time, costs, methodology used and the types of the companies concerned.

"How to determine which kind of companies falls under the "small and medium - sized enterprises" relevant concerning this EAC?"

"According to the Working Document Assessing Business Start-up Procedures in the context of the Renewed Lisbon Strategy for growth and jobs (WD), sent by the European Commission in response to our questions, this recommendation (reduction of time and costs to set up business) applies only to a limited liability company."

Commission's reply: According to Article 2(28) of the CPR, 'SME' means a micro, small or medium sized enterprise as defined in the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Annex I, Article 2).

Therefore, this EAC should apply when Member States are planning to allocate ERDF funding to promote entrepreneurship, in particular by facilitating the economic exploitation of new ideas and fostering the creation of new firms, including through business incubators (Art. 5(3)(a) of the ERDF Regulation) or to support the capacity of SMEs to engage in growth in regional, national and international markets, and in innovation processes (Art.5(3)(d) of the ERDF Regulation) for "*enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million*" (EU recommendation 2003/361, Article 2.1).

"The question relates to in particular to joint stock companies, as these companies are not the typical small and medium sized business. Does EAC apply to the cost relating to the joint stock company as well? If the request of 100 EUR for setting up of the company is relevant as well for JSC, how to establish criteria for determining that a particular company is in the category of small and medium-sized enterprise? It will depend on the share capital or on the number of issued shares?"

Commission's reply: According to the European SME Definition, "the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million" (EU recommendation 2003/361, Article 2.1). These ceilings apply to the figures for individual firms. A firm which is part of a larger grouping may need to include employee/turnover/balance sheet data from that grouping too in order to establish their status under the SME Definition.

Further details and guidance can be found on the European SME Definition website at http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm

"Which methodology should we use for calculating the amount of EUR 100 for setting up a business?"

Commission's reply: As suggested in the Commission Staff Working Document of 26 January 2007 assessing Business Start-up Procedures in the context of the renewed Lisbon strategy for growth and jobs, "*the cost of setting up a company must include all the fees and costs associated with the procedures enunciated in the previous point (all steps necessary from the entrepreneur's submission of the official application to start the registration procedure until the company is in possession of all the legal permits, certifications and documentation to be fully operational) plus certificates from third parties that are required for the registration process. It will not include any form of capital that the company may be required to set aside as long as these funds remain in the possession of the future firm*" (p. 4, 2.1 and 2.2)

For more information of the methodology to assess business Start-up procedures, please consult the following link:

http://ec.europa.eu/enterprise/policies/sme/files/support_measures/start-ups/sec_2007_129_en.pdf

"To what level or how the EC will be tolerating limit exceeds 100 EUR? As our country has its own currency and legislative changes cannot be done in the short term, it is necessary to specify the rate at which the condition of 100 EUR will be converted, where appropriate, to define the extent to which the EC will consider the condition to be fulfilled even in case of over EUR 100 EUR due to the exchange rate."

Commission's reply: As mentioned before, the Commission will check the existence of measures moving towards the SBA targets (instead of focusing on the fulfilment of these concrete targets). Concerning the target of €100 to set up a business, the Commission will not base its assessment of the fulfilment of this criterion on a strict number (taking into consideration exchange rate issues), but will look at the scope of the gap to reach it, the distance already covered to fill it in and the measures taken to achieve this target.

"Is it possible to take into account the national level set court fees? Each state has somehow set above the level of court fees and charges to reflect the economic situation in the state. The exact requirement of EUR 100 may represent a significant imbalance in the case of court fee in relation to other court fees."

Commission's reply: The rationale of SBA targets (as defined by the Council of the European Union) is precisely to reduce imbalances affecting SMEs throughout the EU.

National court fees are administrative fees and must therefore be taken into account when calculating the cost to set up a business.

- Electronic procedure to set a business

"The methodology used to count the days to set up a business does not take into account electronic procedures to set a business. With the help of electronic procedures a business can literally be set up in a matter of minutes in our country, but using "traditional" means it takes around five days. "

Commission's reply: The Commission welcomes electronic procedures to set up a business. As mentioned before, the Commission will base its assessment of the fulfilment of the EAC regarding SMEs by looking at the scope of the gap to reach SBA targets, the distance already covered to fill it in and the measures taken to achieve these targets.

In this view, the Commission will consider the effectiveness of electronic and traditional procedures to set up a business in terms of time needed and enabling a one-stop-shop functionality in order to make its judgement.

- "Inconsistency between the criteria and the Directive 2009/101/EC of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent)."

"According to the directive (Article 2a – introduced by Directive 2012/17/EU), the "*Member States shall take the measures required to ensure that any changes in the documents and particulars referred to in Article 2 are entered in the competent register referred to in the first*

*subparagraph of Article 3(1) and are disclosed, in accordance with Article 3(3) and (5), normally **within 21 days** from receipt of the complete documentation (...)*" The deadline for the implementation is July 7th, 2014."

Commission's reply: According to Article 19 of the CPR, the fulfilment of EAC 3 regarding SMEs will be checked against the criteria for fulfilment mentioned in Annex XI Part I of the CPR, which are now binding for Member States.

Therefore, Member States need to demonstrate that they have put in place *measures to reduce the time and cost involved in setting up a business, as well as the time needed to get licences and permits to take up and perform the specific activity of an enterprise, taking account of the targets of the SBA.*

Besides, there is no inconsistency between those criteria and the Directive 2009/101/EC of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent.

Both requirements do not have the same scope of application. Whereas the *ex ante* conditionality focuses on the set up of SMEs, Directive 2009/101/EC focuses on disclosure procedures relating to the life of a broader scope of companies (as mentioned in Art. 1 of the Directive), going from their constitution to their liquidation. In practice, the Directive enjoins that Member States shall take the measures required to ensure compulsory disclosure by companies (...) of (...) (a) the instrument of constitution, and the statutes if they are contained in a separate instrument (Article 2). Article 2a (introduced by Directive 2012/17/EU) completes this requirement by asking that *Member States shall take the measures required to ensure that any changes in the documents and particulars referred to in Article 2 are entered in the competent register referred to in the first subparagraph of Article 3(1) and are disclosed, in accordance with Article 3(3) and (5), normally within 21 days from receipt of the complete documentation.*

- "Regarding the "SMEs test", what are the possibilities for MS to start implementing the agreed OP from the 1 of January of 2014 if this test appears not ready for that date? Will MS be able to make investments by the agreed OP activities?"

Commission's reply: According to Article 19 of the CPR, the fulfilment of EAC 3 regarding SMEs will be checked against the criteria for fulfilment mentioned in Annex XI Part I of the CPR. Therefore, the Commission will verify whether Member States have put in place *a mechanism to monitor the implementation of the measures of the SBA which have been put in place and assess the impact on SMEs.* For this purpose, the Commission suggests deploying a SME test for example, but this is not mandatory. Thus a MS can implement measures under a given priority axis of an agreed OP even when "the SME test" is not ready from 1 January 2014.

In case where no mechanism would be in place at the time of programmes 'adoption, Member State shall indicate in their programmes and PA the actions to be taken, the responsible bodies and a timetable for their implementation to ensure that this mechanism will be in place at the latest by the end of 2016.

The Commission will assess in 2017 progress towards completion of the actions. In case of failure to complete these actions, the Commission may decide to suspend interim payments relating to the concerned priorities.