

FAQ ON EX ANTE CONDITIONALITIES RELATING TO SUSTAINABLE DEVELOPMENT

This list of frequently asked questions is based on comments received from Member States (MS) on Part II of the Guidance on ex ante conditionalities as regards sustainable growth (EAC 5.1, 6.1, 6.2, Gen EAC 6). It is also based on questions raised by REGIO's geographical units.

EAC 5. Risk prevention and risk management

Scope of the risk assessment to fulfil this EAC

- "If a MS plans to develop only single types of risks assessments (e.g. flood protection) and to allocate funding only to areas which are covered by such risk assessments, would, in that case, the risk assessment have to cover all relevant risk types or those that are essential to the interventions to be financed would suffice? Is it possible to conduct risk assessment thematically or a complex strategy is needed?"

Commission's reply: As soon as Member States envisage allocating funding to disaster management systems under the investment priority: *promoting investment to address specific risks, ensuring disaster resilience and developing disaster management systems*, they need to fulfil the requirements mentioned in Annex XI of the CPR (This also applies for the EAFRD when MS plan to allocate funds under the risk management related priority 3 and more precisely the focus area 3 (b) "supporting arm risk prevention and management). They shall especially describe why they have decided to focus on specific areas and what the criteria for the prioritisation of investment were. They shall also make available their single-risk scenarios, based on a thematic approach (e.g. flood prevention), but multi-risk scenarios, based on a more complete approach (e.g. flood prevention + power cut following major storms or supply blackout), are also mandatory.

The ex-ante conditionality for thematic priority 5 (and for the EAFRD priority 3) will be fully complied only when the Member States have developed a risk assessment that compares the risks in terms of their impact and likelihood and as such can help identify the most significant risks that must be addressed – this should provide the basic criteria for the prioritisation of the investments under priority 5 and justify the development needs in terms of also existing gaps in capacities to deal with these risks and proposed concrete measures. Member States are developing such risk assessment at national level as part of the EU cooperation on disaster management (by February 2014, 17 MS had submitted their risk assessments and others are working on this. Cooperation in the EU on risk assessment is to be enhanced and developed following adoption of the new Civil Protection Mechanism¹. Member States are required to complete risk assessments at national or appropriate sub-national level and make available to the Commission a summary of the relevant elements by 22 December 2015 and every three years thereafter).

¹ Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, *Official Journal of the European Union*, L(347), 20.12.2013

- "Would a document assessing the most typical risk of natural disasters for a geographical area and determining the sectors most vulnerable to the climate change based on climate models and scenarios be sufficient for the fulfilment of ex-ante conditionality 5?"

Commission's reply: The ex-ante conditionality will be fulfilled if the MS submits a comprehensive risk assessment of the natural and man-made risks faced by the country that could be complemented also with local/regional assessments. The MS should include in the ex-ante conditionality analysis information on the main risk faced by the country (earthquakes, floods, storms, drought, forest fires, industrial accidents, biological risks, nuclear risks). Such concrete information is necessary to have the full risk landscape overview that should be the basis for justifying and defining the priorities for actions and investments. Such risk assessment should also take into account, where appropriate, existing climate change adaptation strategies and the related climate vulnerability assessment if such exist.

- "In our country, the risk prevention plans are developed by different Administrations, depending on the distribution of competences. Therefore, it has no sense to demand a single plan including a multi-risk approach at national level that, in our country is difficult to configure."

Commission's reply: Depending on the distribution of competences within each Member States, a national or regional risk assessment should be in place. Whatever the level, single and multi-risk scenarios have to be elaborated.

- "Is it necessary to elaborate the assessment on the basis of ISO 31010 or the risk assessment process referred to in the self-assessment tool in the country report would suffice?"

Commission's reply: For the national risk assessment, the Commission has issued specific guidance that Member States are following and which is based on ISO 31010. The key information from the risk assessment should be included in the section on development needs and be used for the prioritization of the investments under priority 5.

- "How can a MS provide the evaluation mechanism?"

Commission's reply: Member States planning to allocate funding to address specific risks, ensure disaster resilience and develop disaster management systems need to go through a national or regional risk assessment. They shall indicate in their self-assessment where it is published (in form of a link).

- "The purpose of including elements of the Directive 2007/60/EC among references is not clear, as it is not reflected in the assessment grid."

Commission's reply: Since several Member States have mentioned flood protection as one the areas where they intend to allocate funding, we thought it could be useful to complete the guidance with references to Directive 2007/60/EC of 23 October 2007 on the assessment and management of flood risks.

However, in order to fulfill the requirements set in Annex XI of the CPR, Member States should not only provide the Commission with a description of their flood prevention scenario

but should also consider and make available multi-risk scenarios at regional and/or national level (as mentioned in previous answers).

- "Do political and social impacts have to be taken into account when assessing flood risks?"

Flood risk assessments and flood risk maps do not include the information on political and social impacts. In addition, the evaluation of political and social impacts (apart from information on impacts on residents, environment and economic situation) are not required by the Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks."

Commission's reply: The fulfilment of ex ante conditionalities will be checked against the criteria for fulfilment mentioned in Annex XI Part I of the CPR (for the EAFRD against the same criteria as mentioned in Annex V of the EAFRD Regulation). Member States need therefore to demonstrate that national or regional risk assessment contains a description of the description of the process, methodology, methods and non-sensitive data used for risk assessment as well as of the risk-based criteria for the prioritisation of investment.

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 the present case, the Commission has suggested that these national or regional risk assessment should fulfil the requirements of a risk assessment process as set by ISO 31010 standard (including political and social impacts). This would indeed ensure consistency between Member States. However, there is no regulatory obligation to make use of it.

Notwithstanding, assessment of political and social impacts is in fact covered by the requirements set by Article 6.5 of Directive 2007/60/EC. Risk maps shall indeed show the potential adverse consequences associated with flood scenarios and expressed for example in terms of indicative number of inhabitants potentially affected or protected areas (e.g. for human consumption) affected by pollution.

Climate change requirements

- "What does „where appropriate” mean when it comes to taking into account the national climate change adaptation strategy? If, for instance, for flood prevention measures this climate change adaptation strategy should be taken into account then on which legal basis should MS adopt climate change adaptation strategies for which guidelines have only just been adopted? Then, should the climate change adaptation be part of the risk prevention and risk management plan? Or should it be two separate documents? In the latter case how should they be linked to one another?"

Commission's reply: The two documents (risk assessment, adaptation strategy) are different documents with a certain overlap in scope (in terms of risks addressed) as well as synergies between the adaptation and risk management actions. The risk assessment may cover both climate and non-climate disasters (e.g. earthquakes, industrial accidents, pandemics), while the adaptation strategy focuses only on climate risks and may cover climate impacts that are not necessarily related to disasters (e.g. change to land use and more drought resistant crops).

When national adaptation strategies exist, Member States should take them into account to prioritise the foreseen investments to address specific risks, ensuring climate and disaster resilience and developing disaster management systems in order to fulfil the requirement of this ex ante conditionality.

When national climate change adaptation strategies have not been adopted yet, Member States are encouraged to develop a national adaptation strategy on the basis of the recently adopted Guidelines mentioned above. The climate change risk assessment that they will undertake in this framework should then be connected to the overall risk assessment. This approach is consistent with the recently adopted Environment Council Conclusions on the EU Strategy on adaptation to climate change².

For most Member States there is a need to further develop the national adaptation strategy (closely linked to disaster risk prevention and management plans), expand the coverage to regional and local level, and accompany it with adaptation action plans for ensuring effective implementation of adaptation priority measures.

The absence of national climate change adaptation strategies at the time of submission of Partnership Agreement and Operational Programmes or the need to improve it will not prevent a favourable assessment of the fulfilment of the criterion requiring national or regional risk assessment to 'take into account, where appropriate, national climate change adaptation strategies'. However, those Member States which, at the time of submission of their Partnership Agreement and Operational Programmes, have adopted a national adaptation strategy, must take it into account in the design of their partnership agreement and operational programmes.

The process of assessing the fulfilment of *ex ante* conditionalities should be distinguished from the discussion between the Commission and Member States on the content of the Ops/RDPs. In the latter case, the urgent need and expected benefits from adaptation strategies adopted in all Member States, as highlighted in the Commission Communication "an EU Strategy on adaptation to climate change" and recalled in the Council Conclusions mentioned above, will be an essential element considered by the Commission in its dialogue with Member States as well as in the assessment and approval of Partnership Agreements and the concerned programmes, in particular for countries with the highest possibility of severe impacts. The cohesion policy can provide funding for such adaptation and disaster risk management strategies, plans and investments and measures, as part of thematic objective 5.

- "What is the difference between "strategy for adaptation to climate change" in EAC 5 and "national and sub-national adaptation strategies" (with reference to Commission Position paper on Programming of CSF Funds 2014-2020 in Bulgaria (dated 26/10/12))?"

Commission's reply: The European Commission adopted on 16 April 2013 'An EU Strategy on adaptation to climate change' (see link below), which, among other, encourages all Member States to adopt comprehensive adaptation strategies. Among the accompanying actions foreseen, the Commission will develop by 2014 an adaptation preparedness scoreboard, identifying key indicators for measuring Member States' level of readiness.

² <http://register.consilium.europa.eu/pdf/en/13/st11/st11151.en13.pdf> : The Council of the European Union [...] CALLS UPON all Member States to continue to develop, implement and review their adaptation policies in the light of guidelines prepared by the European Commission addressing issues such as cross-border aspects and coherence with national disaster risk management plans'

The Council Conclusions of 18 June 2013 on the EU Adaptation Strategy (http://ec.europa.eu/clima/policies/adaptation/what/documentation_en.htm) acknowledges, among other, that one of the greatest challenges for cost effective adaptation measures is to achieve coordination and coherence at the various levels of planning and management and that national adaptation strategies, including risk and vulnerability assessments, are key instruments designed to inform and prioritise action and investment; underlines that most adaptation measures would need to be taken at national, regional and local level, as well as at cross-border level, and should be based on the best available knowledge and practices and the specific circumstances of the Member States; and calls upon all Member States to continue to develop, implement and review their adaptation policies in the light of guidelines prepared by the European Commission addressing issues such as cross-border aspects and coherence with national disaster risk management plans; etc.

Hence, the EU Adaptation Strategy provides a framework for the development of national adaptation strategies as well as adaptation strategies at regional and local (including urban) levels, which can be supported by e.g. cohesion policy through thematic objective 5.

Further information is available through the following link:
(<http://register.consilium.europa.eu/pdf/en/13/st11/st11151.en13.pdf>).

- "Is the preparation of sub-national adaptation strategies a compulsory prerequisite for the fulfilment of ex-ante conditionality 5?"

Commission's reply: No, it is not a compulsory prerequisite. The fulfilment of *ex ante* conditionalities will be assessed against the criteria for fulfilment indicated in Annex XI of the CPR (Annex V of the EAFRD).

Linkage between EAC 5 on risk prevention and management and the water EAC

- "In which thematic objective "Protecting the Environment and resource-efficient economy" – Water or "Promoting climate change adaptation and risk prevention" do the flood risk management measures (structural and non-structural measures respectively) belong to? In which thematic objective are structural and non-structural measures for flood protection included by other member states?"

Commission's reply: MS usually include measures for flood protection in TO5 "Promoting climate change adaptation and risk prevention"

- "Is the fulfilment ex-ante conditionality on RBMP and cost recovery necessary for the investments for Risk prevention and management (such as flood risk management measures) same as for the investments in water sector?"

Commission's reply: The water ex-ante conditionality (6.1) is applicable, if a MS is planning to allocate ERDF/ CF funding to the following investment priority: *investing in the water sector to meet the requirements of the Union's environmental acquis and to address needs identified by Member States for investment going beyond those requirements.* (Art. 5(6)(b) of the ERDF Regulation and Art.3 (c) (ii) of the CF Regulation).

However, investments in risk prevention and management (such as flood risk management measures) are covered by another ERDF / CF investment priority: "*Promoting investment to address specific risks, ensuring disaster resilience and developing disaster management systems*", under Thematic Objective (TO) 5 "Promoting climate change adaptation, risk prevention and management. In this context, MS do not have to apply the requirements set out in the water *ex ante* conditionality, but they need to demonstrate the existence of a comprehensive risk assessment of the natural and man-made risks they face. This should cover climate related disaster risks (floods), but also other natural hazards such as earthquakes, forest fires and other man-made disasters (industrial and nuclear accidents, pandemics etc.). For floods, particularly relevant is the development of Flood Hazard and Risk Maps and the adoption of Flood Risk Management Plans as required by the Floods Directive.

In order to prepare their self-assessment, MSs are encouraged to look at the Commission Staff Working Paper on "Risk assessment and Mapping Guidelines for Disaster Management" (21 December 2010), which provides useful guidance on how to establish this comprehensive risk assessment.

http://ec.europa.eu/echo/files/about/COMM_PDF_SEC_2010_1626_F_staff_working_document_en.pdf

NB: These guidelines take full account of existing EU legislation including the directive on flood risks (2007/60/EC).

- "Is the *ex-ante* conditionality for flood risk management measures under thematic objective "Promoting climate change adaptation and risk prevention" fulfilled with the existence of national preliminary flood risk assessment according to the Article 4 of the Floods Directive?"

Commission's reply: There is no *ex ante* conditionality dedicated to flood risk management. EAC 5 relating to risk prevention and risk management covers a broader scope than floods.

This EAC will be considered as fulfilled if the MS is able to demonstrate that it has in place a comprehensive risk assessment of all the natural or man-made risks affecting its territory.

EAC 6.1 on Water

- "The definitions given should be fully in line with the Water Framework Directive, which is currently not the case (e.g. additional definition of *water pricing policy*)."

Commission's reply: The definition of water pricing policy that is given in the Guidance is based on the drafting of the *ex ante* conditionality "*a water pricing policy which provides adequate incentives for users to use water resources efficiently*" and on the Water Framework Directive; there is no contradiction with WFD Art. 9, paragraph 1, 1st indent.

- "What are the "programmes" mentioned in the drafting of the *ex ante* conditionality? We suppose these are operational programmes referred as OP in the document."

Commission's reply: Yes, indeed. The water *ex-ante* conditionality applies if a Member State is planning to allocate ERDF/CF funding in the water sector to meet the requirements of the Union's environmental *acquis* and to address needs identified by Member States for investments going beyond those requirements. These investments will be traced out in the operational programmes (= "*supported by the programmes*").

NB: A water *ex-ante* conditionality is applicable also if a Member State is planning to allocate EARDF funding in the water sector for rural development priority 5 and more precisely under the focus area 5 (a) "increasing efficiency in water use by agriculture". Support for such investments will be traced out in the rural development programmes.

Assessment of the applicability of this EAC

- "To which investment priorities does the water *ex ante* conditionality apply?"

Commission's reply: This conditionality is applicable, if a MS is planning to allocate ERDF/CF funding to *meet the requirements of the Union's environmental acquis and to address needs identified by Member States for investment going beyond those requirements*. (Art. 5(6)(b) of the ERDF Regulation and Art.3 (c) (ii) of the CF Regulation).

NB: A water *ex-ante* conditionality is applicable also if a Member State is planning to allocate EARDF funding in the water sector for rural development priority 5 and more precisely under the focus area 5 (a) "increasing efficiency in water use by agriculture".

- "To which of the 5 funds does this *ex ante* conditionality apply – i.e. only to CF and ERDF, or also to EAFRD and EMFF?"

Commission's reply: EAC 6.1 is applicable to the investment priorities of the Cohesion Fund and the European Regional Development Fund. A water *ex ante* conditionality also applies to the rural development priority n°5 *promoting resource efficiency and supporting the shift towards a low carbon and climate resilient economy in the agriculture and food sectors and*

the forestry sector and more precisely if funding under a rural development programme is allocated under the focus area 5 (a) "increasing efficiency in water use by agriculture". Therefore, in that context Member States should demonstrate the existence of an adequate water pricing policy in sectors supported by the EARDF. However, the criterion for fulfilment related to river basin management plan has not been taken up for the EAFRD, as the existence of such plans is one of the eligibility criteria for support for investments in irrigation, which will be by far the largest category of water-related investment supported through the EAFRD.

Assessment of the 1st criterion relating to the water pricing policy

- "What is exactly meant by the water sector?"

Commission's reply: The water sector should be understood as the sector covering wide range of water services, in line with the definition stated in Art 2 point 38 of WFD.

Water services means 'all services which provide, for households, public institutions or any economic activity:

- (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater,
- (b) waste-water collection and treatment facilities which subsequently discharge into surface water.'

- "EAC 6.1 is applicable to the investment priorities of the Cohesion Fund and the European Regional Development Fund. These two funds only finance activities in the water sector related to the construction and completion of the water supply infrastructure. Will you consider the conditionality to be fulfilled if only the assessment of the costs recovery in the area of the public supply of drinking water and sewerage and wastewater treatment is available? "

Commission's reply: In accordance with Art 9 of the Water Framework Directive (WFD), Member States have to assess within the economic analysis undertaken in accordance with Annex III WFD whether water uses (disaggregated into at least households, agriculture and industry) contribute adequately to the recovery of the costs of water services. Without this overall analysis, it is indeed not possible to assess the contribution to cost-recovery in the household sector (water supply and sewerage sector) and other water uses.

In the assessment of the fulfilment of this ex-ante conditionality the Commission will look closely at the inter-linkages between sectors and will consider that the conditionality is not fulfilled where it can be demonstrated that a sector covered by the ERDF/CF investments is cross-subsidising a sector which is not covered by those investments, and that this has led to distorted pricing in the sectors which are covered by ERDF/CF.

- "The newly added request for an analysis according to Annex III of Directive 2000/60/EC for all three mentioned sectors, including cross-subsidisation goes against the logic of limiting the ex-ante conditionality to sectors supported by the ERDF and CF."

Commission's reply: The assessment of adequate water-pricing mechanisms will focus on those sectors directly affected by investments foreseen under a programme.

However, as mentioned above, without an overall analysis (covering cost recovery disaggregated into households, agriculture and industry), it is indeed not possible to assess the contribution to cost-recovery in the household sector (water supply and sewerage sector) and other water uses.

Therefore, on the basis of the analysis required under Article 9 of the WFD, Member States should provide sufficient information in their self-assessment for the Commission to check that there is no cross-subsidising and no distorted pricing in the sectors covered by ERDF/CF.

Where the Member States' analysis and self-assessments are incomplete or where the Commission demonstrates that a sector covered by the ERDF/CF is cross subsidising a sector which is not covered and that this has distorted pricing in the sectors which are covered by the ERDF/CF, the criterion for fulfilment will be considered as non-fulfilled.

- "The option given by article 9.4 of the Water Framework Directive is not reflected in the assessment grid."

Commission's reply: The fulfilment of ex ante conditionalities has to be checked against the criteria for fulfilment mentioned in Annex XI Part I of the CPR, which does not refer to Article 9.4 of the Water Framework Directive.

Thus, there is no reason for the assessment grid to reflect this provision of the WFD. In their self-assessment, Member States are free to provide the relevant information in case they opt for the use of Art. 9.4 which is in any event targeted at very rare cases.

Moreover, the criteria for fulfilment already provide for a "flexibility" provision: "having regard, where appropriate, to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected", which is taken into account in the assessment.

- "The criteria of recovery of the costs of water services may lead to an endless debate between the Commission and the Member States, which would generate delays and condition the programming works, still with evident challenges to address."

Commission's reply: While the aim of the informal dialogue between Member States and the Commission is to ensure that they share as much as possible their assessment of applicability and fulfillment, there may be cases where they disagree. Water pricing policy might be indeed one of them.

It is therefore important that MS self-assessment provides sufficient and targeted information on all elements to be assessed by the Commission. If, the Commission considers that the water ex ante conditionality is not fulfilled, it will set out the reasons why it is not fulfilled and propose actions expected from MS in order to achieve the fulfillment. It may request for this purpose additional information from the Member States in order to carry out its assessment.

It is therefore up to Member States to provide the Commission with this expected information. A cooperation climate between the Commission and Member States should avoid deploring delays in the programming works.

- "We suggest that the economic analysis to be provided on the contribution of the three sectors should be in accordance with Art. 5 of the Directive (i.e. updated in 2013)."

Commission's reply: This approach is welcome.

- "Would the lack of reference to a rate of costs of water services in the approved river basin management plan trigger the need for an action plan?"

Commission's reply: As mentioned before, the economic analysis that Member States have to undertake as a basis for the application of Art. 9(1), first indent, of the Water Framework Directive should establish the contribution of the three sectors (households, agriculture and industry) to the recovery of the costs of water services, taking into account potential cross-subsidisation leading to distorted pricing in the sectors which are covered by ERDF/CF and the EAFRD, respectively.

In order to avoid that this economic analysis might be window dressing, it should be based on quantitative information. Member States should therefore ensure that the economic analysis includes concrete rates providing the contribution of the three sectors to the recovery of the costs of water services. An economic analysis that would not rely on quantitative rates would trigger the need for an action plan.

Economic analyses responding to these requirements should underpin the river basin management plans. However, the lack of reference to the above-mentioned rates of costs of water services in the approved river basin management plan would not trigger the need for an action plan.

- "What costs should be included in the environmental and resource costs calculations (diffuse pollution, hydro-morphological changes)?"

Commission's reply: According to the Regulation, Member States need to ensure in sectors supported by ERDF/CF and the EAFRD, respectively, a contribution of the different water uses to the recovery of the costs of water services by sector. This has to be consistent with the first indent of Article 9(1) of Directive 2000/60/EC which refers to recovery of the costs of water services, including environmental and resource costs.

Diffuse pollution and hydro-morphological changes constitute a part of environmental costs. As such, they have to be considered in the economic analysis which should establish the contribution of the three sectors (households, agriculture and industry) to the recovery of the costs of water service. The cost relating to diffuse pollution would be especially relevant for programmes supported by the EARDF. The costs relating to hydro-morphological changes that can be caused by a variety of activities undertaken in sectors covered by the ERDF/CF (such as flood protection for instance) would be relevant for programmes supported by the ERDF/CF and the EARDF. In any case MS are free to choose the method for calculating environmental and resource costs (ERC) such as diffuse pollution and hydro morphology. Furthermore, after carrying out the economic analysis, in setting their actual approach to recovering the costs of water services MS may have regard to the various factors set out in the final paragraph of Art. 9(1) of Directive 2000/60/EC.

The Commission will not request an action plan for Member States that do not recover the costs of diffusion pollution from the agricultural sector in the water pricing policy applying to sectors supported by the ERDF and the CF unless the Commission demonstrates that a sector covered by the ERDF/CF is cross subsidising the agricultural sector and that this has distorted pricing in the sectors which are covered by the ERDF/CF. However the Commission will request calculation and inclusion of these costs in the above mentioned economic analysis.

- "Are cost-based evaluation methods described in "Wateco guidance" (based on costs of basic and supplementary measures form RBMP) sufficient or should other methodologies for the assessment of environmental and resource costs be used? According to the complexity of the assessments (gaps in that area were mentioned in the Blueprint as well) there should be some common activities on EU level for establishment of the specific definitions and methods for environmental and resource costs assessments. Do we understand correctly, that the guidance on cost recovery/cost-benefits with more specifics on methods of environmental and resource costs assessments will be prepared till the end of 2013?"

Commission's reply: MS are free to choose the method for environmental and resource costs (ERC) calculation. For this purpose methods stated in WATECO guidance can be used for the time being. As WATECO guidance are quite general the EC committed in the Blueprint to produce within CIS process guidance on environmental and resource costs as a part of the guidance on costs and benefits. The guidance will have the form of best practice resource document and should be ready in 2014.

- "Some hydromorphological pressures are caused by activities, which fulfil public interest, such as flood risk management. For such pressures a MS might consider the application of the article 9 of the WFD (taking into account the »social, environmental and economic effects of the recovery as well as the geographic and climatic conditions« and application of 9(4)), in the next RBMP 2015-2021. We ask for the EC response on suggested way of dealing with the mentioned pressures."

Commission's reply: Flood protection is a water service and there is no reason why cost recovery should not apply to it. Of course MS can take into account, in fixing the level of the recovery, its social, environmental and economic effects as well as the geographic and climatic conditions. This does not prevent MS from calculating the costs of these services and, , when flood protection infrastructure serves different purposes, such as irrigation, drinking water, navigation; the contribution to cost recovery of these different uses should be established. Art 9(4) is an exception and should be interpreted narrowly. It can only be applied when all the conditions therein are fulfilled. Moreover, whenever possible, in order to ensure flood protection, green infrastructures should be given priority over dams and dykes. This will reduce pressures on the aquatic environment.

Assessment of the 2nd criterion relating to River Basin Management Plans

- "RBMP 2009-2015 includes data on investments that were available when preparing the RBMP. That means, that basic measures, which were in force in 2009 were included. Now the operational programmes for new financial framework 2014-2020

are being prepared (operational programmes for water supply, Flood risk management plans and others). These programs will be in force in 2014 or later and they might include investments, which are not included in the RBMP 2009-2015. How will these investments be handled? Is ex-ante conditionality (The adoption of a river basin management plan for the river basin district with a justified concentration of investments consistent with Article 13 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy) not applicable until the new RBMP 2015-2021 will come into force? Should that be included in Partnership Agreement?"

Commission's reply: There is a clear distinction between the exercise relating to ex ante conditionalities and the negotiations between the Commission and the MS on what will be supported by the ESI Funds.

As foreseen in Art. 19 of the CPR, the fulfilment of applicable ex ante conditionalities will be checked in the framework of the assessment of PA and / or programmes, as a one-off exercise. For this, the Commission will take into account legislative requirements in force by end of 2013.

With regard to EAC 6.1, the Commission will therefore verify whether existing RBMPs (2009-2015) do fulfil the requirements set out in Article 13 of Directive 2000/60/EC (as laid down in Annex V of the CPR). In case of non-fulfilment of these requirements by the time of the submission of the relevant OPs, MS will have to provide the Commission with an action plan in order to ensure the fulfilment of this criterion by end of 2016.

The Commission will assess in 2017 progress towards completion of the actions. In this context, the adoption of the 2nd river basin management plans will be taken into account in this assessment.

- 2nd sub-criterion (first and second bullet): "Are the requirements contained in these bullets (map of monitoring networks and list of environmental objectives) applicable when the planned measures are only for construction of water infrastructure and are *basic RBMP measures* under the Water Framework Directive, hence the rationale for inclusion in the RBMP is not tied directly to the specific status and environmental objectives for the relevant water bodies? (In some cases even the condition of the water bodies is good and does not require planning measures)."

Commission's reply: As long as a Member State / managing authority intends to invest in water infrastructures, it has to adopt a river basin management plan for the river basin district, including the following minimum requirements (as foreseen in Annex VII of the WFD): a map of the monitoring networks and a list of environmental objectives for surface waters, groundwater and protected areas. Indeed, investment in water infrastructures should not be undertaken without a clear view on how to manage the river basin district.

- 2nd sub-criterion (last bullet): "Summary of the measures taken under Article 11, paragraph 5, to water bodies, which cannot achieve the objectives set out in Article 4 indeed, if the project is in an area where it is unlikely targets for water objects to be achieved it is necessary to check whether the project is suitable for the planning of the Member states to solve the problem":

- "What should be provided for the assessment of this sub-component – the measures under Article 11 (5) included in the plan or only measures under Article 11 (5) that are on-going/completed at that time?"

Commission's reply: According to Annex VII of the WFD (point A.7.9), the RBMP should contain a summary of the following elements, as requested in Art. 11.5: investigation of the causes of possible failure of the objectives set under Art.4 for the body of water, examination (and where appropriate review) of the relevant permits and examinations, review and adjustment of the monitoring programmes; any additional measures in order to achieve those objectives (except where those measures are not practicable taking into account exceptional circumstances).

In its assessment of EAC 6.1, the Commission will check whether the RBMP does contain a summary of those measures. Information of on the on-going/completed measures would also be welcome (including the precise timescale of the measures' entry into force and implementation). This requirement should help the Member States/ managing authorities to prioritise investments where the conditions are fulfilled to ensure a better achievement of the objectives pursued under ERDF investments.

- "Which projects should be analysed in terms of how they fit with the "planning of MS to solve the problem" – i.e. do we need to analyse all projects envisaged in the RBMP or we need to analyse only those projects that are envisaged to be funded by the OPE (e.g. water supply and sanitation, flood protection)? We plan to finance under the OPE mainly "basic measures" within the meaning of the WFD, i.e. mandatory measures as per the requirements of the directives and which are not justified and linked directly to the status of water bodies' status. In some cases, these measures are carried to water bodies in good status."

Commission's reply: In general, Member States/ Managing authorities should establish a prioritisation of all their projects, and especially those covered by ERDF and CF investments, taking into account the measures planned in their RBMP to ensure a better management of the river basin district.

However, in the context of this ex ante conditionality, the focus should be on the projects to be funded by the relevant ESIF funds. Basic measures are defined under the WFD in very broad terms and not all basic measures are relevant in all water bodies. Hence there is a need to explain how they will contribute to achieve (or maintain) good status.

EAC 6.2 on Waste

- "What is the status of "Roadmaps on how to implement the waste legislation" mentioned among sources of information for assessment should be clarified – how will the recommendations included in the roadmaps be monitored by the EC and will this be linked to assessment of any of the criteria of the ex-ante conditionality?"

Commission's reply: According to Article 19(3) of the CPR, the Commission will base its assessment of the fulfilment of applicable ex ante conditionalities on information provided by the Member State. This assessment will be exclusively checked against the criteria laid down in Annex XI Part I of the CPR.

Therefore, information included in part II of the guidance under section 3 called "Sources of information for assessment" should be considered as background information for geographical units.

In view of this and in order to avoid any misunderstanding, the final version of the guidance has been adapted accordingly. Section 3 of each of the fiches is now entitled: "Source of information (to assist assessing the consistency and adequacy of Member States' self-assessment)".

In the present case, one of the criteria for fulfilment relating to the waste EAC refers to the concerned Member States having adopted necessary measures to achieve the targets on preparation for re-use and recycling by 2020 consistent with Article 11(2) of Directive 2008/98/EC. Some of the recommendations set out in the roadmaps issued by the Commission aim at helping to achieve such targets and hence their appropriate implementation by the concerned Member States would help fulfilling this criterion for fulfilment. While assessing the adequacy of the potential actions relating to this criterion, the Commission would therefore consider as adequate an action plan intending to put in place the relevant recommendations of the roadmaps. Whether those recommendations have started to produce the sought effects would then be taken into account in the assessment of the fulfilment of those actions by the end of 2016 at the latest.

National or regional waste management plans

- " If the national legislation does not require preparation of regional plans and the new national waste management plan for the period 2014-2020 will define targets also at sub-national level within the waste management regions, is it necessary to develop regional waste management plans in order to consider the *ex-ante* conditionality fulfilled?"

Commission's reply: According to Article 28 of the Waste Framework Directive (and to *ex ante* conditionality), the waste management plan(s) have to cover the entire geographical territory of the Member State. There is no obligation to have several waste management plans as long as the national plan meets the requirements of the Directive (see Article 28 paragraph 2, 3, 5 and 4 if relevant). If some of these elements are not covered by the national plan but left to competence of regional authorities, then regional plans in place will then have to fulfil the ex-ante conditionality.

Necessary measures to be adopted to achieve the targets on preparation for re-use and recycling by 2020 consistent with Article 11.2 of Directive 2008/98/EC (last criterion for fulfilment).

The assessment grid gives examples of measures that could be undertaken for this purpose.

- "These proposed measures are not required by the WFD and the absence of some of them should not be treated as lack of measures necessary to achieve the 2020 targets. In particular, pay-as-you-throw schemes are not the optimal solution for all member states, depending on circumstances."

Commission's reply: As mentioned before, and according to Article 19(3) of the CPR, the Commission will assess the fulfilment of applicable ex ante conditionalities against the criteria laid down 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 order to fulfil the requirements set out in EAC 6.2 relating to Waste, Member States need to describe which measures they have undertaken to achieve the target on preparation for re-use and recycling by 2020 laid down in Article 11.2 of Directive 2008/98/EC. The assessment grid gives examples of key economic instruments that could be used to achieve these targets. However, there is no regulatory obligation to make use of them. A Member State can choose any other adequate instruments provided that they achieve the sought results.

- "Need for more precise formulation of the first sub-point ("*Appropriate landfill taxes*"), clarifying the concept "appropriate"."

Commission's reply: As mentioned in the last versions of the Guidance, "appropriate" should be understood as "in line with Member State specific taxation framework".

- "Is the incineration tariff policy mandatory?"

Commission's reply: As explained before, the incineration tariff policy is one example of key economic instruments that could be used to achieve these targets. However, a MS can choose other instruments to tackle this challenge.

- "Another example of measures mentioned in the assessment grid is "Pay-as-you-throw (PAYT) schemes (or equivalent systems) at local level covering a progressive increasing part of the population". What does "covering a progressive increasing part of the population" mean exactly? How can it be objectively assessed? Indeed, as this concept is not legally defined, there is a variety of PAYT systems across the EU, depending on the regions and municipalities."

Commission's reply: PAYT schemes are decided and implemented at the local (municipal) level, and as such a legal framework may be useful to promote the more widespread use of PAYT. Regional cooperation in waste management may enhance the effectiveness of PAYT, e.g. by optimising the planning of collection routes, easing the implementation of separate waste collection services and economising overall waste processing.

Greater importance should be placed on increasing consumer awareness through public campaigns, harmonising waste rules and regulations to avoid confusion, and also taking steps to combat the illegal dumping, littering or burning of waste.

- "The last two instruments mentioned in the grid are the following ones: "Producer Responsibility schemes (ensuring the funding of separate collection and recycling of relevant waste streams) or equivalent systems (such as deposit systems)" and "Strategy, policies or rules to incentivize competent authorities for municipal waste management (municipalities/Regions) to move up towards the waste hierarchy and adopt ad-hoc instruments (such as PAYT schemes)." What kind of strategies, policies or rules are needed. Is door-to-door separate collection a proper measure at the level of municipalities?"

Commission's reply:

- Providing a clear policy framework for the foreseeable future within which the waste management industry can operate. MS should consider the need to announce rates for instruments such as landfill and incineration taxes for several years ahead. If the rates change from one year to the next, industry is likely to hold back from investing.
- Enduring an appropriate balance between regulatory instruments (e.g. targets, technical standards, bans) and economic instruments (EIs). Whilst EIs are intended to incentivise an improvement in waste management behaviour, they can equally generate additional stimulus for illegal activity, so regulatory approaches need to be developed in parallel.
- Considering carefully what should be done with revenues generated from EIs. It is advised the use of revenue from EIs, preferably for a fixed time period, to support development of infrastructure, environmental protection measures, and communication and awareness-raising activities;
- Fully taking into account the economics of the waste management sector. The development of EIs must rest on rational analysis of the problem in hand, including the costs for collection of different waste streams, and the costs of recycling, treatment and disposal.
- Door-to-door separate collection together with PAYT pricing can be regarded as an appropriate system at municipality level so as to contribute to the 2015 separate collection obligation as set out in Article 11 of Directive 2008/98/EC.

General EAC 6 on Environmental Legislation

General comments

- Some sub-criteria go beyond the Regulation

Commission's reply: Sub-criteria identified in the assessment grids aim at describing the Commission's expectations for each criterion and at ensuring consistency between Member States through a common framework.

The Guidance was made available for Member States to let them know how the Commission will assess the requirements set out in Annex XI of the Regulation. However, there is no regulatory obligation to make use of it.

- "Shall the EC require annual plans for fulfilment of this ex-ante conditionality (on EIA and SEA), and its criteria? Does the EC approve JASPERS proposal to elaborate a Strategy for the implementation of these conditions? We believe that such a strategy is not necessary and we have never expressed will to elaborate such a strategy."

Commission's reply: According to Art. 19.2 of the CPR, *Member States shall fulfil (...) ex ante conditionalities not later than 31 December 2016 and report on their fulfilment not later than in the annual implementation report in 2017 in accordance with Article 50(4) or the progress report in 2017 in accordance with point (c) of Article 52(2)*, but there is no obligation to require annual plans for fulfilment of the general EAC on EAI and SEA.

In case of non-fulfilment of this EAC, Member States should indicate in their programmes, the actions to be taken, the responsible bodies and a timetable to ensure that they will be fulfilled at the latest by the end of 2016. The action plans must always be set out in the programmes notwithstanding that their summary should be included in the Partnership Agreement where the responsibility for fulfilment lies at national level. The deadline of 31 December 2016 is the final deadline for all actions but earlier deadlines can be established. The Commission will assess in 2017 progress towards completion of the actions.

A possible strategy developed by JASPERS would be of non-binding character and would be intended to facilitate the fulfilment of this ex-ante conditionality.

If there are already existing arrangements that contribute to its fulfilment (for example, training system, established system for dissemination/exchange of information, arrangements of regular assistance to all authorities' levels involved in EIA/SEA implementation), these could be considered as satisfactory as regards the fulfilment of this conditionality. The Commission would expect that the Member State authorities describe the existing arrangements for this conditionality as part of their self-assessment. Taking the opportunity of this assessment, it would be recommended that they identify any remaining weaknesses in this respect and commit themselves to address them even if it is concluded that no action plan is needed.

- "Considering the EC requirement to MS to present draft OPs, accompanied by a non-technical summary of the SEA, the results of public consultations and information on art. 9 (1) b of Directive 2001/42/EC, shall we consider that EC will not require that

SEA procedures, respectively the national approval of the OP, to be completed? Shall EC not expect to receive the opinion of the environmental authority at the national level and the act of approval at national level under the Directive?

Provided the public consultations at national level on the draft OP and respectively the SEA are completed, in case of significant EC comments on the OP or on the SEAs that would require considerable changes. In such cases what procedure shall be applied and on what legal basis? Shall the significant EC comments on OP or SEA be considered as a new alternative that requires new public consultation, etc.?"

Commission's reply: Member States need to make a clear distinction between this requirement to present draft OPs accompanied by a non-technical summary of the SEA and the exercise relating to *ex ante* conditionalities (General EAC 6 requesting *the existence of arrangements for the effective application of Union environmental legislation related to EIA and SEA*).

As regards the requirement to present draft OPs accompanied by a non-technical summary of the SEA report, the SEA report has to be subject to consultations with the public and relevant authorities and it has to be completed (together with the OP) before its submission to the Commission. The SEA process will have to be carried out during the preparation of the programmes and before their adoption; it is up to the individual MSs to decide how best to meet the requirements of the SEA Directive in relation to the draft OPs depending on their national legislative arrangements.

The Commission has to receive a non-technical summary of the information provided in the SEA report; the opinion(s) of the environmental authority(ies) and of the public; the description of the measures decided concerning monitoring; and ideally the act of approval of the OP at national level/Article 9(1) statement required by the SEA Directive. (However, if the latter is not adopted yet, the Commission should receive a draft of the proposed act/draft Article 9(1) statement).

The *ex ante* evaluation should summarise the SEA process and outline how it was taken into account in the programme design. For more details, please consult the Guidance document on ex-ante evaluation (the Programming Period 2014-2020)³.

However, in case where, as a result of the Commission's observations, the draft programme requires substantive revision, an updated/revised SEA process should be also considered (e.g. update of the environmental report, additional consultations etc.).

Arrangements for the effective application of the EAI and SEA Directives (1st criterion)

- "In case of infringement proceedings against one country, at which stage of this infringement procedure a criterion shall be considered not fulfilled - the beginning of the infringement procedure, the date of the decision of the European Court or a different stage?"

Commission's reply: An infringement procedure under Article 258 TFEU begins with a Letter of Formal Notice, which is adopted and sent on the basis of a Commission decision. Hence,

³ http://ec.europa.eu/regional_policy/sources/docoffic/2014/working/ex_ante_en.pdf

this is the relevant stage. However, the existence of an infringement procedure for the incorrect/incomplete transposition of EIA/SEA should not automatically lead to non-fulfilment of the conditionality. Such case will be analysed individually (taking also into account the stage of the infringement and the steps taken by MS to comply with EU law) in order to verify whether the infringement procedure affects the implementation of the ESI funds. If it does affect the implementation, this criterion will be considered as not fulfilled at the beginning of the infringement procedure.

- "Some of the sub-criteria are linked to the Commission's proposal to amend the Directive on EIA, which is at early stage negotiations and is likely to undergo significant changes. Is it necessary to bind the fulfilment of such a horizontal and "risky" for all OPs criterion with the provisions of draft EU legislation?"

Commission's reply: The criteria reflect the current legislation. The possible links of sub-criteria to the EIA proposal reflect best practices across the EU, identified by the implementation experience of assessing Major Projects in the previous years. In any case, the currently applicable legislation is Directive 2011/92/EU.

- "The sub-criterion on public participation in the process of decision-making and access to justice are very general and therefore the understanding of their implementation or failure is debatable and subjective. In particular, what is implied by "early and effective opportunities offered to the public to participate ..." or "arrangements in force that provide access to justice ...". Should we assume as satisfactory "arrangement" the existence of legal documents and implementing acts, guidelines, manuals, case law, or anything else?"

Commission's reply: The sub-criterion on "early and effective opportunities" derives directly from Art. 6 of Directive 2011/92/EU and Art. 6 of Directive 2001/42/EC. In so far, each Member State should have already taken the necessary steps to ensure the proper implementation of these requirements (also on the basis of the Aarhus Convention). The concrete implementation of such requirements is subject to discretion to the MS based on the subsidiarity principle. The second sub-criterion mentioned in the question above ("arrangements ... for access to justice") again derives directly from the existing *acquis* (e.g. Directive 2011/92/EU and the Aarhus Convention). Therefore, the existence of transposing/ implementing legislation, as well as existing procedures and structures to ensure proper implementation of the relevant national legislation (e.g. any national guidance/manuals or national case-law) will be taken into account when assessing the fulfilment of this criterion.

Arrangements for training and dissemination of information for staff involved in the implementation of the EIA and SEA Directives (2nd criterion)

- "We propose adapting the 1st sub-criterion for fulfilment describing Commission 's expectations towards MS as regards arrangements for training and dissemination of information, as follows: *Appropriate training for all staff involved in the implementation of EIA and SEA Directives at all relevant levels has been provided or has been planned. There is an effective training strategy ~~developed~~ (training sessions, online training, etc.), with quantitative indications, where possible.*"

Commission's reply: Sub-criteria identified in the assessment grids aim at describing the Commission's expectations for each criterion and at ensuring consistency between Member States through a common framework.

In the present case, requesting that "there is an effective training strategy developed" means that the strategy in place should result from a reflection on the needs of the staff involved in the implementation of the EIA and SEA Directives. Therefore, it seems appropriate to keep this drafting.

- Need for explanation of the term "*quantitative indications*".

Commission's reply: Where possible, Member States should precise the number, frequency, timing, targets and resources (human, IT, budget) mobilised to ensure the implementation of their training strategy.

Arrangements to ensure sufficient administrative capacity (3rd criterion)

- "We propose adapting the 1st sub-criterion for fulfilment describing what Commission's expectations towards MS as regards arrangements to ensure sufficient administrative capacity, as follows: *Existence of specialised authorities having the administrative capacity (sufficient number and qualified staff) to give **substantive practical and legal** advice on applicability of the EIA/SEA Directives ~~in the programmes and on compliance with the EIA/SEA Directives, to staff dealing with ESI funds.~~*"

Commission's reply: As you know, the rationale of ex ante conditionalities is to ensure that all institutional and strategic policy arrangements should be in place for the effective and efficient achievement of EU investments.

In view of this, guidance was therefore drafted to ensure that Member States would develop a specific administrative capacity on the applicability of the EIA/SEA Directives for the needs of the ESI Funds. It is therefore appropriate to keep the current drafting of this sub-criterion.

- "We propose adapting the 2nd sub-criterion as follows: „*Appropriate technical assistance (e.g. guidelines, guidance documents, external experts) is **provided ensured** to all the authorities applying EIA/SEA Directives in the context of ESI funds.*” "

Commission's reply: In order to ensure that operational programmes fully comply with the EIA/SEA Directives, Member States should not only prepare and make available guidelines and guidance documents on EIA/SEA requirements but should also make sure that those documents do reach Managing authorities.

That is why the Commission had suggested that "appropriate technical assistance should be provided (and not only ensured) to all the authorities applying EIA/SEA Directives in the context of ESI Funds."