Comments received on the guidance note EGESIF_15-0031-01 on Article 43 CPR after the EGESIF meeting on 21 October 2015

	MS	Comment	COM reply
1	**CZ**	Could you specify what is the implication for various implementation options? When e.g. FoF is about to select final intermediaries, we suppose it has to temporarily invest the programme contribution in line with Art. 43 before it selects them and transfers them the relevant programme contribution. Could you further specify the Art. 43 rules in for FoF structure?	The provisions of Art 43 are applicable to the ESIF contribution before it is invested in final recipients. Therefore, depending on the option chosen (with or without FoF), the treasury management operations are applicable to the entity which is 'in possession' of the ESIF resources before they are transferred to financial intermediary (in case of FoF) or used for investments in final recipients (in case of financial intermediary). The relevant provisions will need to be reflected in the Funding Agreements between the MA/ FoF (if any)/financial intermediaries.
2	**CZ**	Could you further specify what are the consequences for the thresholds of eligible MCFs not paid from programme resources? MCFs not paid from programme resources, but from the generated interests/gains may then be paid to body implementing FIs completely regardless of their total amount and the CDR thresholds?	Article 43 CPR resources, i.e. interests and other gains attributable to support from the ESI Funds paid to financial instruments and resulting from "treasury management" do not formally constitute ESIF programme resources, and as such are not eligible for ESIF reimbursement and are not subject to the thresholds in Article 13 CDR either (as these thresholds are applied to programme resources). The goal of a financial instrument is to provide investments to final recipients. It is therefore expected that, should it be decided that MCF are to be paid from the gains, their amount is proportionate to the additional amount resulting from such gains that is invested/managed, 'mirroring' the use of initial ESIF resources, in line with the requirements of Article 43 that the gains are used 'for the same purpose'.

3	**CZ**	Could the example be taken as a general guidance that the period for which the programme resources have to be managed in compliance with SFM principles and paid into an interest bearing account could stem from a business plan of the FI (in general any document indicating ex-ante estimates when the programme resources might be invested in final recipients)? Alternatively is the deciding factor the date of the actual investment in the final recipient? If so, it could be more complicated to calculate the amounts of programme resources that have to be used in accordance with Art. 43 (actual disbursements to various final recipients may vary in time, amounts disbursed etc.) Could you provide more specific example when some of the generated interests/gains are used to cover proportionate share of MCFs? Could you provide more specific guidance on the situations as suggested in our comment about ex-ante estimates vs. actual investments? For example respecting specifics of individual financial products, guarantees especially	The example in the GN is further developed with a MCF option. In order to decide on the maturity of the investment, there should be an ex-ante projection what would be the possible gap between placing the ESIF resources into the FoF/financial intermediaries, and the actual disbursement to final recipients. This will, inter alia, prevent a liquidity problem in the FI if amounts are placed on longer maturity than the immediate payment needs. As regards the specific case of guarantees, money for the guarantees that may need to be paid to the financial institution disbursing loans to final recipients, needs to be set aside to cover the default of the underlying loans. During this set aside period they may generate gains. However after the underlying loans are already disbursed to final recipients, these gains do not fall under the provisions of Article 43 CPR and are not covered by the Guidance note. They should be treated in line with the provisions of Article 44 CPR.

4	**CZ**	Reporting on the gains between the MS and the Commission - Too general wording, we would appreciate guidance on what should be actually reported via the related data field.	Article 46 (2)(g) CPR requires that MS provide information on the interest and other gains generated from the ESIF support to the FIs, as part of the specific FI report which is annexed to MS Annual Implementation Reports. Annex I to Commission Implementing Regulation (EC) 821/2015 further specifies that in this respect, MS need to indicate the EUR amount of the interest and other gains generated for the reporting period. A separate guidance on reporting is planned to be prepared in 2016.
5	**UK**	Funds generated by interest payments can cover a share of management costs and fees which is proportionate to the additional capital. However, the next paragraph states that they are not eligible management costs and should not be claimed for ESIF reimbursement. This drafting is confusing and requires clarification	Both statements are true. The gains can cover a proportionate share of MCF to be paid to the manager of the additional capital. These however, since they are not considered programme resources, do not count against the thresholds indicated in Article 13 CDR for MCF eligible for reimbursement. See also the reply to pt. 2.
6	**UK**	The paper states that any gains / interest cannot be used to repay loans (including the EIB), but this is not the case with the current JEREMIEs. There may be a negative cashflow impact in the new programme if this is strictly enforced. The Commission stated when asked about this at the meeting that 'the detailed modalities are a matter for the fund manager and the MA'. Could you please clarify what flexibility exists for the fund manager and the MA on this issue?	Article 43(2) CPR requires that the interest and other gains are used for the same purpose as the initial support from the ESIF (i.e. investments in final recipients and MCF), thus excluding the possibility for a loan repayment from the gains
7	**PL**	It the tittle of guidance it should be added (in bold): *Guidance for Member States on Article 43 CPR – interest* ***and other gains*** *generated by ESIF support paid to FI"* to stay in line with art. 43 CPR which refers also to "other gains"	The title has been modified

8	**PL**	In point 2.1 the last sentence should be reworded as follows (for better understanding): *"„Gains and other earnings attributable to support form ESI Funds which are generated on the investments made by FI (for example: interest on loans or guarantee fees) or on temporary investments of the resources paid back to FI are not the subject of this note as they are covered by art. 44 and 45 CPR".*	Text in the note has been modified
9	**PL**	In point 3.1 it should be clarified what should be understood under the term *"(…) in other financial instruments or forms of support, in line with the OP/RDP priority objective(s)"*, whether: - "*other financial instrument*" means only fund supported by ESIF (does it also include FI set up in 2007-2013?) or any fund providing loans, guarantee of equity for eligible final recipient and in line with the OP/RDP? - "*other forms of support*" means only forms of support from art. 66 CPR?	The legal text specifies that following winding up of the originating FI, the gains shall be used in 'other financial instruments' or 'forms of support' in line with the priority objectives and within the eligibility period. In line with the 'financial instruments' and 'forms of support' terminology used in the CPR, this means that the interest and other gains shall be used for investments (1) either within other financial instruments set up under the CPR, or (2) through other forms of support, such as grants, prizes or repayable assistance as referred to in Article 66 CPR. Text of the note has been expanded accordingly.
10	**PL**	In an example in point 3.1 it should be added in 5th paragraph (in bold for further clarification): *„For the sake of this example, it is assumed that until the end of the programming period no other gains were earned **by support from ERDF to FI** and that the MA decided not to pay a proportionate share of management costs/fees from gains"*	Text in the example has been modified

11	**PL**	Further clarification is needed on the treatment of *negative return* (loss of capital paid to FI from operational programme) which may occur because of possible economic or financial crisis. According to the point 3.2.2: *"negative returns that could have been accumulated at present and for which it has been demonstrated that no other reasonable alternatives were available, should be covered by other gains generated by the treasury management over the programme lifecycle".* However according to point 2.1 *„the interest and other gains used in line with Article 43 cannot be used for eligible expenditure declared at closure".* It means that in any case the *negative returns* occur it would lead de facto to the correction of declaration of expenditure because the loss on capital cannot be replaced by any future gains which can be used for eligible expenditure declared at closure. It should be noted that it is art. 43 CPR that oblige, with no exceptions, the bodies implementing FI to invest on a temporary bases any free programme resources. In cases of possible economic or financial crises there is a risk of possible *negative returns.* If the *negative returns* occur only as a result of economic and financial crisis and the body implementing FI can prove that it made its best efforts to avoid any negative returns then there should be possibility to use some future gains for eligible expenditure which can be declared at closure (to top up the incurred losses on programme contribution).	During the programme lifecycle and before closure, in case of negative returns, these could potentially be offset by any future gains generated from the treasury management. In both cases (negative/positive returns) there is no possibility to claim them to ESIF at closure, as they are not considered programme resources. The provisions of Article 43 requiring that interest is used for particular purpose apply on a cumulative basis for the entire programing period. At closure MA has to prove that net gains were used in compliance with Article 43. The legal base does not require use on annual basis of the gains for the investment in final recipient – as indeed it could lead to the situation that some of the expenditure will be declared as eligible at closure if there are certain years with negative interests.

12	**EL**	a) How could we cover the loss that may result from negative interest rates (especially at closure)? b) How we treat interest income if there are no eligible costs? With regard to the above questions and taking into consideration our experience, we do not fully share EC's view that: a) negative interest is a rather temporary fact that could be remedied in the course of the FI's life cycle, and b) it is rather unlikely that there will be not any eligible expense We would therefore ask the Commission to contemplate related provisions for these issues, even if it considers them "rare or exceptional" cases. Furthermore, to our opinion, negative returns (as of para 3.2.2) leading to losses, form an inherent part of treasury management costs and expenses and as such they may be covered, sometime during the programming period, <u>either</u> by gains from treasury management which <u>may</u> be available, <u>or</u> by resources returned from the investments. Therefore, we suggest rephrasing the last sentence of paragraph 3.2.2 as follows: "Therefore, negative returns that ~~could~~ have been accumulated ~~at present~~ and for which it has been demonstrated that no other reasonable alternatives were available, ~~should~~ may be covered by other gains generated by the treasury management over the ~~programme lifecycle~~ <u>programming period or by resources paid back to financial instruments from investments or from the release of resources committed for guarantee contracts, in accordance to Article 44 (1)(c) of CPR.</u>"	On question a) please see the reply to pt.11. On question b), a situation of no eligible expenditure could exist, for example, when the financial instrument is not implemented at all, and the whole ESIF contribution is withdrawn from the FI and no management costs and fees are generated. In such situation, and if due to treasury management still some gains have been generated, these should be treated in line with Article 43(2) provisions referring to use in other financial instruments or forms of support. See also pt. 9 above.

		Finally, with regard to section 3, first sentence, case (2), we consider that the interest generated by the Fund resources (which are under the monitoring of the Commission) should be counted from (have starting point) the date of payment from the Commission and not from the date the Managing Authority declares the resources to the Commission.	The obligation for a temporary investment of the ESIF resources starts from the moment they are paid to the financial instrument. This payment to the FI can happen from two sources: (1) either the MS uses the advance paid in relation to the ESIF programme, or (2) the Managing Authority puts national resources in the FI first and then declares them for reimbursement to the Commission as part of the application for interim payments referred to in Art 41 CPR. The interest or other gains generated should therefore be counted from the moment when the resources are paid to the FI, and not from date of MS declaration to the Commission, nor from the reimbursement, as they happen later in time.
13	**LT**	As throughout the document an expression "FI, incl. the Fund of Funds" is used we suggest to make technical corrections in 3.1 after words "financial instrument" adding „incl. the Fund of Funds".	Text has been modified where appropriate.

14	**LT**	We suggest changing the word "irregular" with the word "not eligible" because this expenditure is not eligible for the declaration but not related to irregularities. Please indicate the legal basis (provision) for this deduction of the interest rate not used until the end of the programme from the eligible expenditure (resources exceeding the initial contribution will not be declared anyway but deduction of this amount from the eligible expenditure is an additional action. Please note that as the interest rate is not declared as eligible expenditure, failure to use it for the final beneficiaries is not related to "charging an unjustified item of expenditure to the budget of the Union" - therefore according to the definition of "irregularity" it can not be treated as irregularity).	Comment taken into account and 'irregular expenditure' replaced by 'deducted from the eligible expenditure at closure'. Art 43 (2) CPR stipulates that the interest and other gains attributable to the ESIF support *'shall be used for the same purpose……as the initial contribution from the ESI Funds'*, thus imposing a legal obligation. The deduction from eligible expenditure at closure of any part of the interest or other gains that were used not for the same purpose, follows the approach agreed by Member States in the closure guidelines 2007-2013.
15	**LT**	We suggest considering additional option of dealing with negative interest rate - placing the funds in the interest generating accounts however making an agreement with the bank that if the interest rate decreases below 0 rate, a 0 rate interest will be used.	The option has been added in the note.