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from :            Presidency  
to:                Permanent Representatives Committee (part 2)/Council

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Subject:        Cohesion Policy legislative package  
                    - Presidency compromise on Pending Articles

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Delegations will find attached a compromise text on the pending articles of the proposals for the Common Provisions Regulation, the ERDF Regulation, the Cohesion Fund Regulation, the ESF Regulation and the ETC Regulation.

For the Common Provisions Regulation, the modifications highlighted in bold are compromise proposals that have been made to the original Commission text that was presented by the Commission on 6 October 2011, corrected by the Commission on 14 March 2012 and as amended by the Commission on 11 September 2012. Similarly, compromise modifications are also highlighted in bold for the Cohesion Fund Regulation, the ESF Regulation and the ETC Regulation, since the version presented by the Commission on 14 March 2012. For the ERDF Regulation the modifications highlighted in bold are those in comparison to the proposal presented by the Commission on 6 October 2011.

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## PENDING ARTICLES BLOCK

### Common Provisions Regulation

#### PART ONE

#### SUBJECT-MATTER AND DEFINITIONS

##### *Article 2*

##### **Definitions**

For the purposes of this Regulation, the definitions on financial instruments as laid down in the Financial Regulation shall apply to financial instruments supported by the **European Structural and Investment Funds**, except where otherwise provided in this Regulation<sup>1</sup>.

In addition, the following definitions shall apply:

- (1) 'Union strategy for smart, sustainable and inclusive growth' means the targets and shared objectives guiding the action of Member States and the Union set out in [...] the Conclusions adopted by the European Council of 17 June 2010 as Annex I (New European Strategy for Jobs and Growth, EU Headline Targets), Council Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and the Union<sup>2</sup> and Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States<sup>3</sup>, and any revision of such targets and shared objectives.
- (2) 'Common Strategic Framework' [...];

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<sup>1</sup> Note: the agreed compromise on the CPR programming block provides that this paragraph is to be deleted, to be replaced by a new definition of financial instruments to be discussed in the context of trilogues on the Financial Instruments block.

<sup>2</sup> OJ L 191, 23.7.2010, p.28.

<sup>3</sup> OJ L 308, 24.11.2010, p.46.

- (3) 'action' [...];
- (4) 'indicative action of high European added value' [...];
- (5) 'Fund-specific rules' means the provisions laid down in or established on the basis of Part Three of this Regulation or a specific or generic regulation governing one or more of the **European Structural and Investment Fund(s)** referred to or listed in the third subparagraph of Article 1;
- (6) 'programming' means the process of organisation, decision-making and allocation of financial resources in several stages, **with the involvement of partners in accordance with Article 5**, intended to implement, on a multi-annual basis, the joint action by the Union and the Member States to achieve **the objectives of the** Union strategy for smart, sustainable and inclusive growth;
- (7) 'programme' means 'operational programme' referred to in Part Three of this Regulation and in the EMFF Regulation, and 'rural development programme' referred to in the EAFRD Regulation;
- (8) 'priority' means the 'priority axis' referred to in Part Three of this Regulation and the 'Union priority' referred to in the EMFF Regulation and in the EAFRD Regulation;
- (9) 'operation' means a project, contract, action or group of projects selected by the managing authorities of the programmes concerned, or under their responsibility, contributing to the objectives of the priority or priorities to which it relates; in the context of financial instruments, the operation is constituted by the financial contributions from a programme to financial instruments and the subsequent financial support provided by these financial instruments;

- (10) 'beneficiary' means a public or private body **as well as, only for the purposes of the EAFRD and EMFF Regulations, a natural person**, responsible for initiating or initiating and implementing operations; in the context of State aid **schemes (as defined in article 2 (12) of this regulation)**, the term 'beneficiary' means the body which receives the aid; in the context of financial instruments **under Title IV of Part II of this Regulation**, the term 'beneficiary' means the body that implements the financial instrument **or the fund of funds as applicable**;
- (11) 'final recipient' means a legal or natural person that receives financial support from a financial instrument;
- (12) 'State aid' means aid falling under Article 107(1) of the Treaty which shall be deemed for the purposes of this Regulation also to include *de minimis* aid within the meaning of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid<sup>1</sup>, Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production<sup>2</sup> and Commission Regulation (EC) No 875/2007 of 24 July 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the fisheries sector and amending Regulation (EC) No 1860/2004<sup>3</sup>;
- (13) 'completed operation' means an operation that has been physically completed or fully implemented and in respect of which all related payments have been made by beneficiaries and the corresponding public contribution has been paid to the beneficiaries;
- (14) 'public **expenditure**' means any **public contribution** to the financing of operations **whose** origin [...] is the budget of national, regional or local public authorities, the budget of the Union related to the **European Structural and Investment Funds**, the budget of public law bodies or the budget of associations of public authorities or public law bodies;

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<sup>1</sup> OJ L 379, 28.12.2006, p. 5.

<sup>2</sup> OJ L 337, 21.12.2007, p. 35.

<sup>3</sup> OJ L 193, 25.7.2007, p. 6.

- (15) 'public law body' means any body governed by public law in the meaning of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council<sup>1</sup> and any European grouping of territorial cooperation (EGTC) established in accordance with Regulation (EC) No 1082/2006 of the European Parliament and of the Council<sup>2</sup>, regardless of whether the relevant national implementing provisions consider the EGTC a public law body or a private law body;
- (16) 'document' means a paper or an electronic medium bearing information relevant in the framework of this Regulation;
- (17) 'intermediate body' means any public or private body which acts under the responsibility of a managing or certifying authority, or which carries out duties on behalf of such an authority vis-à-vis beneficiaries' implementing operations;
- (18) 'local development strategy' means a coherent set of operations to meet local objectives and needs, which contributes to meeting the **objectives of the relevant programme(s)** [...] and which is implemented in partnership at the appropriate level;
- (19) 'rolling closure' [...];
- (20) 'Partnership **Agreement**' means the document prepared by the Member State with the involvement of partners in line with the multi-level governance approach, which sets out the Member State's strategy, priorities and arrangements for using the **European Structural and Investment Funds** in an effective and efficient way to pursue the Union strategy for smart, sustainable and inclusive growth, and which is approved by the Commission following assessment and dialogue with the Member State;
- (21) 'category of regions' means the categorisation of regions as 'less developed regions', 'transition regions' or 'more developed regions' according to Article 82(2);

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<sup>1</sup> OJ L 134, 30.4.2004, p. 114.

<sup>2</sup> OJ L 210, 31.7.2006, p. 19.

- (22) 'request for payment' means a payment application or declaration of expenditure submitted by the Member State to the Commission;
- (23) 'EIB' means the European Investment Bank, the European Investment Fund or any subsidiary of the European Investment Bank;
- (24) 'SME' means a micro, small or medium sized enterprise in the meaning of Commission Recommendation 2003/361/EC, or subsequent amendments thereof;
- (25) 'accounting year', means, for the purposes of Part Three, the period from 1 July to 30 June, except for the first accounting year, in respect of which it means the period from the start date for eligibility of expenditure until 30 June 2015. The final accounting year shall be from 1 July 2022 to 30 June 2023;
- (26) 'financial year', means, for the purposes of Part Three, the period from 1 January to 31 December.
- (27) 'applicable ex ante conditionality' means a precisely pre-defined critical factor, which is a necessary prerequisite for and has a direct and genuine link to and direct impact on the effective and efficient achievement of the specific objective for an investment priority or a Union priority.**
- (28) 'specific objective' is the result to which an investment priority or Union priority shall contribute in a specific national or regional context through actions or measures undertaken within a priority.**
- (29) 'escrow account' means a bank account covered by a written agreement between the managing authority (or an intermediate body) and the entity implementing a financial instrument, or in the case of a PPP operation a written agreement between the public body beneficiary and the private partner approved by the managing authority (or an intermediate body), set up specifically to hold funds to be paid out after the eligibility period, exclusively for the purposes foreseen in Article 36(1)(c), Article 36(2), Article 36(2) bis and Article 54/C of this Regulation, or a bank account set up on terms providing equivalent guarantees on the payments out of the fund.**

- (30) 'fund of funds' means a fund set up with the objective to contribute support from programmes to several bodies implementing financial instruments. Where financial instruments are implemented through a fund of funds, the body implementing the fund of funds shall be considered the only beneficiary in the meaning of Article 2(31).**
- (31) 'irregularity' means any breach of a provision of Union law resulting from an act or omission by an economic operator involved in the implementation of the European Structural and Investment Funds, which has, or would have, the effect of prejudicing the general budget of the Union by charging an unjustified item of expenditure to the general budget. Economic operator means any natural or legal person or other entity taking part in the implementation of assistance from the European Structural and Investment Funds, with the exception of a Member State exercising its prerogatives as a public authority.**
- (31bis) 'systemic irregularity' means any irregularity that may be of a recurring nature, with a high probability of occurrence in similar types of operations, which results from a serious deficiency in the effective functioning of the management and control systems, including a failure to establish appropriate procedures in accordance with this regulation and the Fund-specific rules.**
- (32) 'relevant country-specific recommendations adopted in accordance with Article 121(2) of the Treaty on the Functioning of the European Union' and 'relevant Council recommendations adopted in accordance with article 148(4) of the Treaty on the Functioning of the European Union' mean recommendations relating to structural challenges which it is appropriate to address through multiannual investments that fall directly within the scope of the European Structural and Investment Funds as set out in the Fund-specific regulations.**
- (33) 'macroregional strategy' is an integrated framework endorsed by the European Council, which may be supported by the European Structural and Investment Funds among others, to address common challenges faced by a defined geographical area relating to Member States and third countries located in the same geographical area which thereby benefit from strengthened cooperation contributing to achievement of economic, social and territorial cohesion;**



**(34) 'sea basin strategy' means a structured framework of cooperation in respect to a given geographical area, developed by European Institutions, Member States, their regions and where appropriate third countries sharing a sea basin; the strategy takes into account the geographic, climatic, economic and political specificities of the sea basin;**

*Article 6*

**Compliance with [...] applicable law**

Operations financed by the **European Structural and Investment Funds** shall comply with **the** applicable Union **law** and **the** national law **relating to its application (hereinafter: applicable law)**.

**TITLE III**

**PROGRAMMING**

**CHAPTER I**

**General provisions on the European Structural and Investment Funds**

*Article 27*

**Participation of the European Investment Bank**

1. The EIB may, at the request of Member States, participate in the preparation of the Partnership **Agreement**, as well as in activities relating to the preparation of operations, in particular major projects, financial instruments and public-private partnerships.

2. The Commission may consult the EIB before the adoption of the Partnership **Agreement** or the programmes.
3. The Commission may request the EIB to examine the technical quality and economic and financial viability of major projects and to assist it as regards the financial instruments to be implemented or developed.
4. The Commission, in implementing the provisions of this Regulation, may award grants or service contracts to the EIB covering initiatives implemented on a multi-annual basis. The commitment of the Union budget contributions in respect of these grants or service contracts shall be effected annually.

#### *Article 77<sup>1</sup>*

#### **Financial corrections by the Commission**

1. The Commission shall make financial corrections by cancelling all or part of the Union contribution to a programme and effecting recovery from the Member State in order to exclude from Union financing expenditure which is in breach of applicable [...] law, including in relation to **serious** deficiencies in the management and control systems of Member States which have been detected by the Commission or the European Court of Auditors.
2. A breach of applicable [...] law shall lead to a financial correction only **in relation to expenditure which has been declared to the Commission and** where one of the following conditions is met:
  - (a) the breach has [...] affected the selection of an operation by the responsible body for support by the CSF Funds **or in cases where due to the nature of the breach it is not possible to establish this impact there is a substantiated risk that the breach has had such an effect;**

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<sup>1</sup> Note: to change references from 'applicable Union and national law' to 'applicable law.' in line with Article 6.

- (b) [...] the breach has [...] affected the amount of expenditure declared for reimbursement by the Union budget **or in cases where due to the nature of the breach it is not possible to quantify its financial impact there is a substantiated risk that the breach has had such an effect.**
3. When deciding on the **application and the** amount of a financial correction under paragraph 1, the Commission shall **respect the principle of proportionality by taking** account of the nature and gravity of the breach of applicable [...] law and its financial implications for the Union budget.
4. The criteria and the procedures for applying financial corrections shall be laid down in the Fund-specific rules.

#### **Article 92bis**

##### **Decision on a major project subject to phased implementation**

- 1. By derogation from Article 91 (1) third subparagraph and Article 92 (1) and (2), the procedures set out in this Article shall apply to an operation which complies with the following conditions:**
- (a) **the operation consists of the second or subsequent phase of a major project under the previous programming period for which the preceding phase or phases were approved by the Commission not later than 31 December 2015 pursuant to Council Regulation (EC) No 1083/2006; or in the case of Member States which acceded to the Union after 1 January 2013, 31 December 2016;**
- (b) **the sum of the total eligible costs of all phases of the major project exceed the respective levels set out in Article 90;**

- (c) the major project application and assessment by the Commission under the previous programming period covered all the planned phases;**
- (d) there are no substantial changes in the information referred to in Article 91(1) for the major project compared to the information provided for the major project application submitted under Council Regulation (EC) No 1083/2006, in particular as regards the total eligible cost.**
- (e) the phase of the major project to be implemented under the previous programming period is or will be ready to be used for its intended purpose as specified in the Commission decision by the deadline of the submission of the closure documents for the relevant operational programme or programmes.**
- 2. The Member State may proceed with the selection of the major project in accordance with Article 114 paragraph 3 and submit the notification containing all the elements set out in Article 92 (1) (a) together with its confirmation that the condition under paragraph (1) point (d) is fulfilled. No quality review of the information by independent experts is required.**
- 3. The major project shall be deemed to be approved by the Commission in the absence of a decision by implementing act refusing the major project within two months of the date of notification. The Commission shall refuse the major project only on the grounds that there have been substantial changes in the information referred to in paragraph (1)(d) or that the major project is not consistent with the relevant priority axis of the operational programme or programmes concerned.**
- 4. The provisions of Article 92 (3) to (6) shall apply.**

*Article 137<sup>1</sup>*

**Procedure**

1. Before taking a decision on a financial correction, the Commission shall launch the procedure by informing the Member State of the provisional conclusions of its examination and requesting the Member State to submit its comments within two months.
2. Where the Commission proposes a financial correction on the basis of extrapolation or a flat rate, the Member State shall be given the opportunity to demonstrate, through an examination of the documentation concerned, that the actual extent of irregularity is less than the Commission's assessment. In agreement with the Commission, the Member State may limit the scope of this examination to an appropriate proportion or sample of the documentation concerned. Except in duly justified cases, the time allowed for this examination shall not exceed a further period of two months after the two-month period referred to in paragraph 1.
3. The Commission shall take account of any evidence supplied by the Member State within the time limits set out in paragraphs 1 and 2.
4. Where the Member State does not accept the provisional conclusions of the Commission, the Member State shall be invited to a hearing by the Commission, in order to ensure that all relevant information and observations are available as a basis for conclusions by the Commission on the application of the financial correction.

**4bis. In case of an agreement and without prejudice to paragraph 6, the Member State may reuse the Funds concerned in conformity with Article 135(3).**

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<sup>1</sup> **Note: to change references from 'applicable Union and national law' to 'applicable law' in line with Article 6.**

5. In order to apply financial corrections the Commission shall take a decision, by means of implementing acts, within six months of the date of the hearing, or of the date of receipt of additional information where the Member State agrees to submit such additional information following the hearing. The Commission shall take account of all information and observations submitted during the course of the procedure. If no hearing takes place, the six month period shall begin to run two months after the date of the letter of invitation to the hearing sent by the Commission.
6. Where [...] the Commission **in carrying out its responsibilities under Article 65** or [...] the European Court of Auditors detects irregularities **demonstrating serious deficiencies in the effective functioning of the management and control systems and which, prior to the date of such detection, were neither identified in the management declaration, annual control report and the audit opinion submitted to the Commission in accordance with Article 59(5) of the Financial Regulation nor in other audit reports of the audit authority submitted to the Commission, nor were the subject of appropriate remedial measures by the Member State, the resulting financial corrections** shall reduce support from the Funds to the operational programme. **For the purposes of this paragraph, serious deficiencies in the effective functioning of management and control systems means deficiencies for which substantial improvements in the systems are required, which expose the Funds to a significant risk of systemic irregularities, and whose existence is not compatible with an unqualified audit opinion on the proper functioning of the management and control system. The assessment of the serious deficiencies shall be based on the applicable law when the relevant management declarations, annual control reports and audit opinions were submitted. The Commission shall be empowered to adopt delegated acts in accordance with Article 142 establishing further detailed rules on the criteria to be used for the assessment of serious deficiencies that might lead to net corrections together with the main types of such serious deficiencies.**

**When deciding on the application and the amount of a financial correction the Commission shall:**

- (a) respect the principle of proportionality by taking account of the nature and gravity of the serious deficiency and its financial implications for the Union budget;**
- (b) for the purpose of applying a flat rate or extrapolated correction, exclude irregular expenditure previously detected by the Member State which has been subject of an adjustment in the accounts in accordance with Article 130(10), and expenditure subject to an ongoing assessment of its legality and regularity under Article 128(2);**
- (c) take into account flat rate or extrapolated corrections applied to the expenditure by the Member State for other serious deficiencies detected by the Member State when determining the residual risk for the Union budget.**
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# **European Regional Development Fund Regulation**

## **Chapter I**

### **Common provisions**

#### *Article 1*

##### **Subject-matter**

This Regulation establishes the tasks of the European Regional Development Fund (ERDF), the scope of its support with regard to the Investment for growth and jobs and the European territorial cooperation goals and specific provisions concerning ERDF support for the Investment for growth and jobs goal.

#### *Article 2*

##### **Tasks of the ERDF**

The ERDF shall contribute to the financing of support which aims to reinforce economic, social and territorial cohesion by redressing the main regional imbalances through support for the development and structural adjustment of regional economies, including the conversion of declining industrial regions and regions lagging behind.

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## **Cohesion Fund Regulation**

### *Article 1*

#### **Subject-matter**

This Regulation establishes the tasks of the Cohesion Fund and the scope of its support with regard to the Investment for growth and jobs goal referred to in Article 81 of Regulation (EU) No [ ]/2012 [CPR].

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# **European Social Fund Regulation**

## **Chapter I**

### **General provisions**

#### *Article 1*

##### **Subject matter**

This Regulation establishes the mission of the European Social Fund (ESF), the scope of its **support**, specific provisions and the types of expenditure eligible for assistance.

#### *Article 2*

##### **Mission**

1. The ESF shall promote high levels of employment and job quality, support the geographical and occupational mobility of workers, facilitate their adaptation to change, encourage a high level of education and training, promote gender equality, equal opportunities and non-discrimination, enhance social inclusion and combat poverty **primarily through improved access to the labour market**, thereby contributing to the priorities of the European Union as regards strengthening economic, social and territorial cohesion.
2. It shall do so by supporting Member States in pursuing the priorities and headline targets of the Europe 2020 strategy for smart, sustainable and inclusive growth. The ESF shall support the design and implementation of policies and actions, taking account of the **relevant Integrated Guidelines and the relevant country-specific recommendations adopted in accordance with Article 121(2) of the Treaty on the Functioning of the European Union and relevant Council recommendations adopted in accordance with Article 148(4) of the Treaty on the Functioning of the European Union and where appropriate at national level, the** national reform programme.

3. The ESF shall benefit people, including disadvantaged groups such as the long-term unemployed, people with disabilities, migrants, ethnic minorities, marginalised communities and people facing social exclusion. The ESF shall also provide support to enterprises, systems and structures with a view to facilitating their adaptation to new challenges and promoting good governance and the implementation of reforms, in particular in the fields of employment, education and social policies.

### **Chapter III**

#### **Specific provisions for financial management**

##### *Article 15*

##### **Financial instruments**

[...]

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# European Territorial Cooperation Regulation

## Chapter I

### GENERAL PROVISIONS

#### *Article 4*

#### **Resources for European territorial cooperation**

4. The **contribution** from the ERDF to cross-border and sea-basin programmes under ENI and to the cross-border programmes under IPA shall be established by the Commission and the Member States concerned. **The ERDF contribution established for each Member State shall not subsequently be reallocated between the Member States concerned.**
5. Support from the ERDF to each cross-border and sea-basin programme under ENI and IPA shall be granted provided that at least equivalent amounts are provided by ENI and IPA. This equivalence shall be subject to a maximum amount set out in the ENI Regulation or the IPA Regulation.
6. The annual appropriations corresponding to the support from the ERDF to programmes under ENI and IPA shall be entered in the relevant budget lines of those instruments with the 2014 budgetary exercise.
7. In 2015 and 2016, the annual contribution from the ERDF to the programmes under ENI and IPA for which no programme has been submitted to the Commission by 30 June under the cross-border and sea-basin programmes under ENI and IPA, **and which has not been re-allocated to another programme submitted under the same category of external cooperation programmes,** shall be allocated to the internal cross-border cooperation programmes under paragraph 1(a) in which the Member State(s) concerned participate.

If by 30 June 2017, there are still programmes under the cross-border and sea-basin programmes under ENI and IPA which have not been submitted to the Commission, the entire support from the ERDF mentioned in paragraph 4 for the remaining years up to 2020, **which has not been re-allocated to another adopted programme under the same category of external cooperation programmes**, shall be allocated to the internal cross-border cooperation programmes under paragraph 1(a) in which the Member State concerned participates.

8. Cross-border and sea basin programmes referred to in paragraph 4 that have been adopted by the Commission shall be discontinued, **or the allocation to the programme shall be reduced, in accordance with the applicable rules and procedures, in particular**, if:
- (a) none of the partner countries covered by the programme have signed the relevant financing agreement by the deadline established in Regulation (EU) No./2012 [the ENI regulation] or Regulation (EU) No. /2012 [IPA]; or
  - (b) the programme cannot be implemented **as planned** owing to problems arising in relations between the participating countries.

In such event, the support from the ERDF mentioned in paragraph 4 corresponding to annual instalments not yet committed, **or annual instalments committed and de-committed totally or partially during the same budgetary year, which have not been re-allocated to another programme of the same category of external cooperation programmes**, shall be allocated to the internal cross-border cooperation programmes under paragraph 1(a) in which the Member State concerned participates, at its request.

- 9. The Commission shall provide an annual summary of the financial implementation of cross-border and sea-basin programmes under ENI and of cross-border programmes under IPA to which the ERDF contributes in accordance with this Article to the Committee established under Article 143 of Regulation No. ... [CPR].**

## TER III

### PROGRAMMING

#### *Article 7*

#### **Content of cooperation programmes**

- (2)(c)(i) the mechanisms that ensure coordination between the Funds, the EAFRD, the EMFF and other Union and national funding instruments, **including ENI, EDF, and IPA**, and with the European Investment Bank (EIB); **where Member States and third countries or territories participate in cooperation programmes that include the use of ERDF appropriations involving outermost regions with resources from the EDF, coordination mechanisms at the appropriate level to facilitate effective coordination in the use of these resources;**

## CHAPTER VIII

### PARTICIPATION OF THIRD COUNTRIES IN TRANSNATIONAL AND INTERREGIONAL COOPERATION PROGRAMMES

#### *Article 24bis*

#### Implementation Conditions

The applicable programme implementation conditions governing the financial management as well as programming, monitoring, evaluation and control of the participation of third countries through a contribution of IPA or ENI resources to transnational and interregional cooperation programmes shall be established in the relevant cooperation programme and also, where necessary, in the financing agreement between the Commission, each of the Governments of third countries concerned and the Member State hosting the managing authority of the relevant cooperation programme. The programme implementation conditions shall be consistent with applicable Union law and with those provisions of the national law of the participating Member States relating to its application.