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#### 'I/A' ITEM NOTE

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)/Council
No. prev. doc.:	14859/17 and 14860/17
Subject:	Draft Council conclusions on Special Report No 15/2017 by the European Court of Auditors on "Ex ante conditionalities and performance reserve in Cohesion: innovative but not yet effective instruments" - Adoption

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1. On 23 November 2017, the General Secretariat of the Council received Special Report No 15/2017 of the Court of Auditors on "Ex ante conditionalities and performance reserve in Cohesion: innovative but not yet effective instruments".
2. Pursuant to the rules laid down in the Council conclusions on improving the examination of special reports drawn up by the Court of Auditors<sup>1</sup>, the Permanent Representatives Committee (Part II), at its meeting on 29 November 2017, instructed the Working Party on Structural Measures to examine this report according to the rules laid down in the above-mentioned conclusions.

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<sup>1</sup> Doc. 7515/00 FIN 127 + COR 1.

3. The Working Party on Structural Measures examined the Special Report on 11 and 22 January and 7 and 20 February 2018. All delegations agreed on the draft Council conclusions annexed to this note on 27 February 2018 following a silence procedure.
  4. The Permanent Representatives Committee is therefore invited to recommend to the Council to adopt, as an "A" item, these draft Council conclusions as set out in the Annex to this document.
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**DRAFT**

**Council conclusions on Special Report No 15/2017  
by the European Court of Auditors' on "Ex ante conditionalities and performance reserve  
in Cohesion: innovative but not yet effective instruments"**

THE COUNCIL OF THE EUROPEAN UNION:

- (1) WELCOMES the Special Report No 15/2017 by the European Court of Auditors (hereafter referred to as "the Court") and the Commission's observations to the Report;
- (2) TAKES NOTE that the Report covers the period from December 2013 to February 2017;
- (3) TAKES NOTE of the main findings of the Report, in particular that:
  - a) Ex ante conditionalities
    - Ex ante conditionalities provided a consistent framework for assessing the readiness of the Member States to implement the European Structural and Investment (ESI) Funds at the start of the 2014-2020 programme period; however, for the Court it was not clear during the period covered by the audit to which extent ex ante conditionalities had led to effective changes on the ground;
    - The Commission did not use the possibility to suspend payments at programme adoption of unfulfilled conditionalities or in the case of non-completion of the action plans;
    - Around half of Member States' Action Plans to fulfil ex ante conditionalities were not reported completed by Member States by the end of 2016;

b) Performance reserve

- The performance framework and reserve are unlikely to trigger a significant reallocation of cohesion spending during the 2014-2020 period to better performing programmes, and the performance reserve provided little incentive for a better result-orientation of the Operational Programmes as it was mostly spending and output based;
- The existing suspensions and financial corrections for underperformance are subject to restrictive conditions and therefore unlikely to be applied in practice;

(4) REFERS to the Commission Staff Working Document of April 2017 on the Value Added of Ex ante Conditionalities<sup>2</sup>, the Commission's Strategic report 2017 on the implementation of the ESI Funds<sup>3</sup>, and NOTES that these more recent documents and data show a rather positive picture regarding the fulfilment and effectiveness of ex ante conditionalities;

(5) NOTES that in its replies to the findings of the Court's Report, the Commission gives explanations of the rationale of the ex ante conditionality, performance framework and reserve mechanisms; in particular, the Commission

- a) draws attention to the scope of the performance framework and reserve as tools supporting result orientation within a solid intervention logic of the programmes<sup>4</sup>, and
- b) recalls that ex ante conditionalities introduced minimum requirements and conditions to improve the investment framework and the effectiveness and efficiency of spending of ESI Funds<sup>5</sup>;

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<sup>2</sup> Doc. 7956/17.

<sup>3</sup> Doc. 15788/17 + ADD 1.

<sup>4</sup> Cf. Replies of the Commission under points V., 72 and 104 of the Report of the Court.

<sup>5</sup> Cf. Replies of the Commission under point 39 of the Report of the Court.

- (6) RECALLS its positions expressed in previous Council conclusions on the instruments of ex ante conditionalities and the performance framework, introduced for the first time in cohesion policy Funds for the period 2014-2020<sup>6</sup>;
- (7) REITERATES its call on the Commission from November 2016<sup>7</sup> to consider using new elements of the ESI Funds as an example for other EU policies financed from the EU budget;

#### Ex ante conditionalities

- (8) TAKES NOTE that according to the Strategic report 2017 of the Commission<sup>8</sup>, in November 2017, 97 % of ex ante conditionalities had been fulfilled by Member States, leaving very few to still be fulfilled;
- (9) RECALLS that the fulfilment of ex ante conditionalities at the start of the programme period 2014-2020 was a time and resources consuming exercise for some Member States;
- (10) UNDERLINES that according to Art. 19(2) of the Common Provisions Regulation<sup>9</sup>, Member States were obliged to report on the fulfilment of ex ante conditionalities only in their annual implementation report or progress report in 2017, and not by the end of 2016;
- (11) DEEMS, based on recent experiences of Member States and findings of the Commission that ex ante conditionalities have so far proven their added value in effectively stimulating reforms and improving the investment environment for cohesion policy;

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<sup>6</sup> Council conclusions on Results and New Elements of Cohesion Policy and the European Structural and Investment Funds of 16 November 2016 (doc. 14542/16, p. 8-9); Council conclusions on Making Cohesion Policy more effective, relevant and visible to our citizens (doc. 8463/17, p. 4); Council conclusions on Synergies and Simplification for Cohesion Policy post-2020 of 15 November 2017 (doc. 14263/17, p. 6).

<sup>7</sup> Cf. Council conclusions on Results and New Elements of Cohesion Policy and the European Structural and Investment Funds of 16 November 2016 (doc.14542/16, p. 7).

<sup>8</sup> Doc. 15788/17, p. 12.

<sup>9</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

- (12) CONSIDERS that the instrument of ex ante conditionalities should be maintained post-2020, but should be further streamlined;
- (13) STRESSES, against the background of recommendation 1a) of the Court, that the Commission should, in preparing the legislation for cohesion policy post-2020, re-assess the relevance, proportionality and usefulness of each of the ex ante conditionalities, eliminate overlaps and keep only those conditionalities which can genuinely impact the effective achievement of cohesion policy objectives;
- (14) STRESSES, against the background of recommendation 1b) of the Court, that the Commission should explore how the role of ex-ante conditionality in implementing relevant reforms could be enhanced for the period post-2020; RECALLS its position set out in Council conclusions of November 2016<sup>10</sup> that more consistency should be sought for in the future between various measures linking the effectiveness of the ESI Funds to economic governance, building on the lessons learned from the introduction of ex-ante conditionalities;
- (15) CALLS on the Member States concerned and the Commission to make best efforts to ensure that the few remaining unfulfilled ex ante conditionalities are fulfilled without delay;

#### Performance reserve

- (16) REGRETS that the Court focused solely on the management of the performance reserve and did not cover the effects of and the lessons learned from the establishment of the performance framework;
- (17) NOTES that the performance reserve as a mandatory instrument was introduced for the period 2014-2020 as one of the elements of the result orientation mainly in order to stimulate progress in implementation and thus contribute to the delivery of programmes' objectives;

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<sup>10</sup> Doc. 14542/16, p. 9.

- (18) RECALLS that in line with Art. 21 and 22 of the Common Provisions Regulation, the performance review and the allocation of the performance reserve shall be made on the basis of the information and assessments presented in the annual implementation report submitted by the Member States in the year 2019;
- (19) CONSIDERS therefore that a comprehensive assessment of the performance reserve should take place after its enforcement in 2019, as at the current stage of implementation, the effectiveness of this instrument is still difficult to assess and any final conclusion in this respect would be premature;
- (20) CONSIDERS however, pending such a comprehensive assessment of the performance reserve, that any future development of the performance framework and reserve mechanisms in the period post-2020, should lead to them being designed as more incentive based mechanisms and sanctioning elements should be applied only as last resort;
- (21) CONSIDERS, in the light of recommendation 2) of the Court, that any performance instrument post-2020 should take into consideration proportionality, the existence of a time-lag between interventions and the materialisation of results.
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