

16.12.11

**Decision**Of the Bundesrat

---

**Proposal for a Regulation of the European Parliament and of the Council 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 covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1083/2006**

**COM(2011) 615 final; Council doc. 15243/11**

In its 891st session on 16th December 2011 the Bundesrat adopted the following Resolution pursuant to §§ 3 and 5, Act on Cooperation between the Federation and the Federal States in European Union Affairs (EUZBLG):

General comments

1. Confirming the joint Federation-Federal States Opinion on the Fifth Cohesion Report and the comments on cohesion policy in the Bundesrat Opinion on the Commission Communication: The EU Budget Review (BR Official Document 667/10 (Decision) of 17th December 2010) and on the Commission's proposal for a Regulation laying down the multi-annual financial framework for the years 2014 to 2020 (BR Official Document 399/11 (Decision) of 14th October 2011), the Bundesrat draws attention to the fact that European cohesion policy makes a significant contribution to reducing economic, social and territorial disparities in the European Union as stipulated in Article 174 TFEU. In the process cohesion policy is pursuing its objective as stipulated in the Treaty, namely reducing the development shortcomings in the least favoured regions,

strengthening growth and employment in structurally weak regions and supporting social integration. At the same time, cohesion policy can make a significant contribution to supporting the Europe 2020 Strategy to foster intelligent, sustainable and integrative growth. This challenge must be tackled both in less developed and in economically stronger regions of Europe. The Bundesrat is therefore pleased to note that implementation of cohesion policy is to continue in all regions of Europe.

2. The Bundesrat views the proposal for a joint Regulation as a basis for discussions between the Commission and the Member States.
3. The Bundesrat notes that the funding spectrum including the thematic goals proposed by the Commission is however to be focused exclusively on the Europe 2020 Strategy. However the Bundesrat takes the view that the regions should not face any limitations in launching integrated regional development strategies that take their respective regional strengths and needs into account and can make a significant contribution to boosting economic growth and employment.
4. The Bundesrat would have welcomed the tabling by the Commission of a genuine General Regulation for all the funds to which the Common Strategic Framework applies. The numerous overlaps between the section with general provisions for all funds and the general provisions for the ERDF, ESF and CF mean that the provisions are confusing. In the interests of clarity, a decision should be taken either to address these points in separate Regulations or to combine both parts within the General Structural Funds Regulation. Clear, readily comprehensible provisions on management and financial control are needed to keep errors in implementation of the funding programmes to a minimum.
5. The Bundesrat calls for genuine simplifications in management of the funds. The requirements on submitting and implementing the development plan or the Operational Programmes are however much more demanding than in the current funding period. For example, a partnership contract is to be concluded between the Commission and the Member States; this approach was previously not foreseen and would place constraints on programme implementation for Member States and the federal states (*Länder*) involved in co-financing and

management.

6. The Bundesrat draws attention to the fact that considerable improvements must be made to the draft Regulation in the forthcoming negotiations to take due account in all parts of the Regulation of the fundamental principles of subsidiarity and proportionality, and of the need for administrative simplification and to reduce bureaucracy. The Bundesrat is concerned that the complexity and scope of provisions, as well as the administrative effort these will entail, will constitute a greater burden on the Member States and regions – and also for beneficiaries - inter alia due to the introduction of accreditation procedures, annual clearance of accounts and the extended scope of reporting obligations. This would run counter to Germany's pressing wish to simplify management of the Operational Programmes.

7. The Bundesrat takes the view that in particular the following aspects of the draft Regulation should be thoroughly revised in a dialogue with the Member States and regions:

Delegated acts: the procedure for delegation of acts must correspond to the primary law provisions laid out in Article 290 TFEU. In keeping with this, it is necessary to ensure in each specific instance of a transfer of powers that only non-essential competences are transferred.

Partnership contract: The Bundesrat advocates a fundamental reworking of the provisions on the partnership contract. These contracts should contain only strategic priorities and goals. It would otherwise not be feasible to work with this instrument given the varying approaches to division of competences and responsibilities in the various Member States.

New obligations to comply with conditionalities, with penalties for non-compliance: programme planning and implementation would be made much more complex due to the introduction of extensive additional ex-ante conditionalities and the linking of programming and programme implementation with the National Reform Programmes, particularly in conjunction with options for penalties to be applied by the Commission; this approach would also cause incalculable budgetary risks for the federal states. The Bundesrat is very concerned that the additional options for the Commission to impose penalties would undermine the acceptance of European cohesion policy that has been achieved and is rooted above all in long-term planning

security for all involved.

Possibility of suspending payments as a result of performance reviews: the Bundesrat advocates maintaining the established system of oversight of programme performance by means of implementation reports and evaluations. Conversely, the Bundesrat is not in favour of imposing penalties for non-attainment of interim goals on the basis of performance reviews. This system would create incentives for under-ambitious programme design and would make it more difficult to plan and monitor the Operational Programmes. At the same time it would give rise to incalculable financial risks for the federal states' budgets.

### I. Goals, categories of regions and financial framework

#### Goals

8. The Bundesrat supports the Commission proposal to implement future cohesion policy in the context of the goals of “Investment in growth and employment” and “European territorial cooperation” and to draw distinctions based on categories of regions for the first goal.

#### Categories of regions

##### Less developed regions

9. The Bundesrat supports the idea that cohesion policy should concentrate on the structurally weakest regions and Member States, as has been the case so far. The existing threshold values for the funding areas for the Cohesion Fund (90 per cent of EU-27 average per capita gross national income) and for the “Convergence” objective (75 per cent of EU-27 average per capita regional gross domestic product) have proved their worth.

## Transition regions

10. The Bundesrat welcomes the establishment of a safety net for regions currently eligible for funding under the Convergence Objective to the tune of at least two-thirds of current funding allocations. The co-financing rates for these regions of up to 75 per cent also correspond to the capacities of these regions. These provisions included by the Commission respond to significant requests raised by the Federal Government and the federal states.
11. In order to ensure enduring mobilisation of existing potential, these regions also need support from reliable, comprehensive funding instruments which meet the needs arising from the specific situation in these regions. Despite visible progress, considerable efforts are still needed to attain the goal of achieving self-sustaining economies. Development shortcomings, such as scant R+D capacities, a lack of integration into international economic cycles, insufficient corporate equity and continuing high unemployment, will not be overcome by 2013. The situation in the current phasing-out regions is comparable. Reducing funding to the level available for Competitiveness Regions whilst simultaneously making funding conditions less generous would therefore also jeopardise positive moves towards the development of self-sustaining economies in phasing-out regions.
12. For that reason all regions currently funded under the Convergence Objective in which per capita GDP is more than 75 per cent of EU-27 average per capita GDP should be covered by this safety net and by the co-financing rates cited.  
  
These transitional provisions for regions that will in future no longer fall within the Convergence Objective, including the phasing-out regions, should apply for all CSF funds.
13. However, the Bundesrat takes the view that there is no need for the introduction of the new regional category - "transition region" - for regions with per capita GDP between 75 and 90 per cent of EU-27 average per capita GDP. This would run counter to the principle of concentrating funding. All funding should be limited in duration and disbursed on a degressive basis. The aforementioned funding could also be made available within the framework of transitional

provisions.

#### More developed regions

14. The Bundesrat supports funding from the Structural Funds in more developed regions. By introducing this proposal the Commission recognises that these regions make an important contribution to realising the Europe 2020 goals.
15. The integrative approach adopted in cohesion policy, which takes the needs of the regions in question into account, is of great importance for a sustainable innovation and growth policy and constitutes the requisite complement to the purely sectoral focus of other European policies. In addition, it is also important to overcome structural weaknesses and disparities in the more developed regions too, with a view to ensuring harmonious development of the EU as a whole. This also involves the issue of securing an adequate supply of skilled labour, which is increasingly important in the light of demographic change.

#### Territorial cooperation

16. The Bundesrat welcomes the inclusion in the Commission proposals of continued funding and reinforcement of territorial cooperation. Cooperation in projects and structures that cut across national borders makes an effective contribution to European integration. Funding of cross-border cooperation at all the EU's internal borders continues to be necessary, despite all the successes attained to date, due to continuing shortcomings and new challenges facing regions that lie on the periphery of their own countries. The Bundesrat therefore takes the view that the three focuses of cross-border, transnational and interregional cooperation should be maintained.
17. The Bundesrat proposes extending the geographical coverage for cross-border cooperation (sub-programme A) to allow functional cross-border links to be taken into account in assessing eligibility for inclusion in the programme area. The tried-and-tested cooperation areas for transnational cooperation (sub-programme B) should be maintained and be made more flexible to allow for supra-regional projects.

18. The Bundesrat proposes granting a co-financing rate of up to 85 per cent in the new funding period too if at least one participant in the programme is from a Member State in which average per capita GDP is less than 85 per cent of EU-27 average per capita GDP to take the particular European added value of territorial cooperation into account.

#### Financial framework

19. The Bundesrat welcomes the envisaged budgetary framework to the tune of 336 billion Euro in 2011 prices foreseen for economic, social and territorial cohesion; this will make it possible to continue to finance cohesion policy in all regions of the EU to promote economic, social and territorial cohesion.
20. The Bundesrat draws attention to the fact that the new “Connecting Europe” facility proposed by the Commission de facto signifies a considerable reduction (40 billion Euro) in Cohesion Fund monies in the strict sense of the term.
21. The Bundesrat notes that the new “Connecting Europe” facility proposed by the Commission does not fall within the remit of cohesion policy in the strict sense of the term. Categorising the infrastructure facility as forming part of cohesion policy must not have a detrimental effect on the funding allocated to actual cohesion policy instruments, which serve to promote cohesion within the EU, in keeping with the tasks assigned to these instruments by the Treaty of Lisbon. The proposed central administration of this facility would signify moving away from the system of shared responsibility.
22. The Bundesrat underscores that the ESF plays a significant role in strengthening Europe’s social cohesion and competitiveness. The ESF is deployed to address three of the five core goals of the Europe 2020 Strategy. The Bundesrat supports the fundamentally important role accorded to the ESF in the framework of European cohesion policy and the Europe 2020 Strategy.
23. The Bundesrat affirms the role of the ESF as an important instrument to support Europe-wide employment and labour market policy, to deal with the challenges involved in processes of social integration and migration, as well as addressing

the impact of demographic change, processes relating to life-long learning and moves to improve equal opportunities for women and men.

24. However, the Bundesrat rejects centralised determination of the share of the funds to be allocated as a proportion of cohesion policy expenditure on the basis of the different categories of region. Instead the allocation of Structural Funds monies on a percentage-wise basis to the ERDF and ESF must result from the strategy devised in the framework of the programming process on the basis of the socio-economic conditions in the regions.

#### Additionality

25. The Bundesrat affirms its support for the principle that support from the Fund for the goal of “Investment in growth and employment” should not be a substitute for public or equivalent structural expenditure by the Member States. In determining the reference value as a function of public or equivalent structural expenditure by the Member States, efforts to consolidate national and regional public budgets should be taken into account. The Bundesrat is opposed to separate verification at the regional level, as the decisive consideration when appraising the additionality of support from the Fund is the total volume of national funding efforts.
26. The Bundesrat welcomes the decision to refrain from verification of the additionality principle in Member States in which only a small percentage of the population lives in less developed regions and/or transition regions. In order to reflect the proportionality principle, the threshold value should be increased to 20 per cent with a view to simplifying administration.



## II. Strategic programme planning

### Common Strategic Framework (CSF)

27. The Bundesrat supports the Commission's approach of improving coordination between the funds involved in cohesion policy by means of a CSF. Joint rules must make programme implementation simpler and more transparent. When putting this approach into practice, structures and procedures that have proved their worth in the current funding period should be maintained. The Cohesion Fund, the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Maritime and Fisheries Fund (EMFF) and the European Agricultural Fund for Rural Development (EAFRD) should therefore be involved. However, the CSF's exclusive focus on the goals and intentions of the EU strategy for intelligent, sustainable and integrative growth stands in contradiction to the tasks and objectives of the funds as defined in primary law.
28. The Bundesrat takes the view that there is no need to introduce more demanding requirements than those found in the current instrument of integrated strategic guidelines. Experience to date with implementation of cohesion policy demonstrates that thematic goals and territorial challenges are not distinct issues. For that reason, territorial challenges should not be addressed separately. Instead it is important to bear in mind that thematic aspects always have a territorial/regional/local aspect. The particular importance of thematic goals for urban or rural areas can be emphasised in the regional development strategies to be devised within the framework of the Operational Programmes.
29. The Bundesrat points out that the thematic goals and fields in which the Fund is deployed as envisaged in the draft Regulation must not be restricted by the "central actions" determined in the CSF.

30. The Bundesrat takes the view that it is not permissible for the CSF to be adopted by the Commission as a delegated act as stipulated in Article 142 of the proposal. Instead, the CSF should be adopted by the Council and the European Parliament pursuant to Article 177 TFEU through the normal legislative procedure, as has been the case to date.
31. The Bundesrat draws attention to the fact that the procedure envisaged for strategic planning with sequential planning steps running from the adoption of the Regulation via the Joint Strategic Framework and the Partnership Agreement to approval of the Operational Programmes would be particularly time-consuming. The Bundesrat therefore requests that the planning process be streamlined to prevent significant delays in starting the programme, and to thus avoid all the problems that would arise from such delays.

#### Partnership contract

32. The Bundesrat is on the whole open to the notion of partnership contracts. However, the Bundesrat takes the view that partnership contracts are not the correct policy instrument to enforce general economic and employment policy reforms from the country-specific recommendations and/or the National Reform programmes, or to attain general improvements in the legal provisions in the Member States and in transposition of European law into national law.
33. The Bundesrat takes the view that it is incumbent on the Member States to ensure that programme planning is consistent with the country-specific economic and employment policy recommendations pursuant to Article 121 Sub-section 2 and Article 148 Sub-section 4 TFEU, in consultation with the funding areas and taking account of the relevant national provisions on division of competences. The Commission intends to penalise possible failure to comply with these recommendations by suspending payment of all or part of the Structural Funds funding and by applying further conditions. The Bundesrat is opposed to this approach, as it would de facto be tantamount to making the recommendations binding.

34. The Bundesrat takes the view that the proposed partnership contract in the form proposed by the Commission

- is much broader than required and leads to a worrying increase in complexity, which runs counter to the promised endeavours to simplify the system;
- in substance and de facto is not a bilateral contract but instead to a large extent constitutes a unilateral declaration of obligations by the Member States and federal states (Länder) vis-à-vis the Commission;
- encroaches on the federal structures of the Member States, as the general responsibilities called for are questionable in terms of the legal provisions governing competences and liabilities;
- creates unacceptable and almost incalculable financial budgetary risks for the Member States and federal states (Länder);
- in terms of general practical considerations, would give rise to lengthy fine-tuning and coordination processes, which could jeopardise a timely start of the programme and hinder efficient and effective implementation of the programmes;
- needs to be structured to comply with the actual division of responsibilities concerning the process of drawing up these contracts and participation in these contracts; the German version of Article 5 of the draft General Regulation, correctly, makes reference to involving partners in preparation, whereas Article 13 Point 2 of the draft General Regulation refers to the partners jointly drawing up the contract. This broad approach of multi-level governance stands in contradiction to the national tiers of liability and responsibility, and is also not compatible with budgetary law, as only the Member States and the federal states (Länder) are liable for the contents of the partnership contract.

The Bundesrat therefore takes the view that only strategic priorities and goals should be agreed in the partnership contracts to be concluded at the national level. Regional Operational Programmes must continue to be the main instrument of programme planning and implementation.

35. The Bundesrat draws attention to the fact that the partnership contracts should be drawn up at national level with due respect for internal divisions of

competences in the Member States. Involvement of the competent authorities, the economic and social partners and, as appropriate, other bodies representing civil society is determined by internal structures and divisions of competence in each Member State and not by the “multi-level governance approach”. The Bundesrat is opposed to empowering the Commission to issue delegated acts on drawing up a code of conduct on implementation of the partnership.

36. Due to its multilateral nature European territorial cooperation (ETC) cannot be managed by means of the instrument of the partnership contracts. It should therefore be explicitly excluded from the scope of application of these contracts.

37. The Bundesrat advocates a thorough reworking of the provisions on the partnership contract in the light of these objections.

#### Operational Programmes

38. The Bundesrat welcomes the fact that the Operational Programmes will remain the most important instrument for implementing cohesion policy, as has been the case to date.

39. The Bundesrat notes that the requirements for the Operational Programmes have also been made considerably more demanding. The Bundesrat is opposed to linking these Operational Programmes with the National Reform Programmes and the country-specific recommendations and also disagrees with the introduction of additional ex-ante conditionalities.

40. The Bundesrat points out that, in keeping with the remit of cohesion policy, the programmes must above all comprise a strategy to overcome regional development disparities and to strengthen economic, social and territorial cohesion, contributing on this basis to an EU strategy for intelligent, sustainable and integrative growth. For that reason, European guidelines and priorities must not impose excessive constraints on flexibility on the spot. The funding areas must continue to have scope to set their own priorities in keeping with specific regional needs on the basis of a broad spectrum of measures and using a broad range of different funding instruments.

41. The Bundesrat calls for the challenges of demographic change to be taken into account to a greater extent than is currently the case in the Commission proposal in respect of possibilities to deploy all CSF Funds. Thematic concentration and investment priorities should offer sufficient room for manoeuvre in designing measures to enable efficient approaches to devising solutions to be developed and implemented.
42. The Bundesrat calls for the regions to be accorded continuing room for manoeuvre in implementing measures to foster social and economic stabilisation of cities and problem urban areas in the context of integrated approaches.
43. The Bundesrat considers that when supporting integrated approaches on territorial development, for example promoting sustainable urban development, there must be an opportunity to choose to provide support either as integrated territorial investment (ITI), working with various Operational Programmes and various priority axes, or to concentrate funding in one single programme priority axis.
44. The Bundesrat welcomes the maintenance of the option of funding part of expenditure within a programme priority axis on the basis of the eligibility rules of the other fund involved (“cross-financing”). The maximum percentage for this approach should however not be reduced to 5 per cent from the current level of maximum 10 per cent (or 15 per cent for urban development measures) as envisaged in the draft Regulation, but should instead be increased. In order to guarantee sufficient flexibility, this percentage should be at least 20 per cent. In this context it should not be imperative for the connection between the ERDF and the ESF to be established on the level of the individual projects.
45. The Bundesrat calls for the proposed elements to be involved in an integrated approach to territorial development – such as the delegation of responsibilities for implementation and funding decisions to the local level, the enumeration of cities to which funds will be transferred, the determination of areas in which measures for local development are envisaged, as well as the provisions on interregional and transnational measures – to be considered only as options for the Member States and regions.

46. The Bundesrat welcomes the fact that promoting equal opportunities for men and women as well as avoiding and preventing discrimination will remain an important principle for the CSF Funds. The Bundesrat expects the Commission to implement equal opportunities for men and women consistently in further steps adopted and to focus particular attention on increasing the proportion of women in employment and reducing gender-specific distinctions in employment, unemployment and remuneration.
47. The Bundesrat considers that it is not effective to conduct an appraisal of administrative effort for beneficiaries of funding when programmes are being established; this is also not the appropriate point at which to stipulate measures to reduce bureaucracy. Administrative effort is determined to a large extent by demands made by the Commission, particularly as the draft Regulation in question gives rise to additional bureaucratic costs for beneficiaries. In addition, political decisions taken outside the framework of cohesion policy (public procurement law, state aid law, environmental law, budgetary law) generate a particularly high level of bureaucracy but provisions stipulated in these areas do not lie within the responsibility of the authorities managing the programmes.
48. The Bundesrat calls for the Commission to avoid using poorly defined legal terms. These place a burden of interpretation and justification on the Member States and/or regions. Unequal treatment of regions in the approval process arising from such poorly defined terms must be avoided.
49. The Bundesrat welcomes the Commission's stated intention of avoiding delays in launching the Operational Programmes. However, the procedure for drawing up and approving the programmes does not take sufficient account of the wishes of Member States organised along federal lines and makes it more difficult to ensure an early start for funding. The proposals envisage that the programmes shall be submitted to the Commission at the same time as the partnership contract.

The Bundesrat draws attention to the fact that simultaneous submission and approval of the federal states' (*Länder*) programmes and the partnership contract, which must correspond in key points, would not be possible.

Furthermore, the Bundesrat points out that simultaneous submission of the programmes and the partnership contract may in some cases be made more difficult due to domestic procedures or the need to coordinate with the Commission. The proposed procedure would mean that it would only be possible to start the programme in all regions of a Member State for all funds once the process of drawing up the last Operational Programme had been concluded. Approval of the partnership contract and the Operational Programmes must not be made dependent on submission of all programmes from a Member State.

The Bundesrat calls for more flexible arrangements for submission of programmes and hence for the start of the programmes.

In this context the Bundesrat urges that scope be made available to allow the draft partnership contract submitted to the Commission to be amended in the course of approval of the partnership contract using the so-called bottom-up principle should new needs on the part of the federal states (*Länder*) become apparent in the course of drawing up the federal states' (*Länder*) programmes.

### III. Conditionalities

50. The Bundesrat understands that future allocation and disbursement of funds is to be linked to conditionalities. In this context ex-ante-conditions in particular must be satisfied before concluding the contract with the Commission (partnership contract), as well as additional conditions, which must be met before disbursement of further payments. In addition macroeconomic conditionalities are to be introduced. The Bundesrat supports the goal of improving the performance and efficiency of utilization of funding.

51. However, the Bundesrat is opposed to additional conditionalities that might give rise to additional administrative burdens and counterproductive incentives, or are not directly related to the issues addressed.

The Bundesrat takes the view that conditionalities that extend the scope of application to goals outside the logic underlying the funding strategy of specific funding programmes are not a suitable and appropriate instrument for target-based control of the programmes.

In this connection the Bundesrat draws attention to a series of fundamental problems in the Commission proposals. These pertain in particular to safeguarding the division of competences between and within the European, national and regional levels as well as respect for the subsidiarity principle.

52. The Bundesrat therefore emphasises that the scope of macroeconomic and ex-ante conditionalities must be thoroughly examined and revised. The thematic and general conditionalities listed in Annex IV are often accorded the status of delegated acts and are not clearly defined, making it difficult to assess their specific impact. In many cases it is not possible to comprehend how these conditionalities relate to the actual policy goal in question. In substantive terms these conditionalities frequently extend the scope of the themes addressed in the interventions rather than making the implementing structures or procedures clearer. Due to the incorporation of these conditionalities as penalty-linked constitutive elements in partnership contracts, the conditionalities are not calculable and may impede implementation of the funds. Thematic ex-ante conditionalities should be avoided. The requirements for implementing general ex-ante conditionalities are also broader than the provisions envisaged in the existing system and should be reduced. In general terms conditionalities should be restricted to areas that can be influenced within the framework of programme implementation.
  
53. Linking the planned conditionalities with a differentiated penalty mechanism (suspension of payments, financial corrections and repayment of monies already disbursed) undermines essential advantages of European cohesion policy, in particular long-term planning security and decentralised implementation based on regional policy with a strategic orientation, and the Bundesrat is therefore not in favour of this approach. In particular the risk of non-calculable payment flows would jeopardise smooth implementation of the programmes in the regions. In addition, experience shows that this kind of excessively complex system creates the wrong incentives for selection of thematic priorities and ultimately for the specific projects. This approach would therefore mean that the policy goals pursued would not be achieved.



54. Furthermore it can be assumed that administrative capacity will be displaced to focus on meeting conditionalities as a prerequisite for implementation of regional funding. The ensuing monitoring procedures would lead to excessive bureaucracy and would therefore blatantly contradict the general goal of greater simplification. This approach is also likely to lead to delays in starting programmes and to a lack of continuity during implementation.
55. The Bundesrat supports the Commission's goal of ensuring that the use of Structural Funds funding is as targeted and results-focused as possible. However, the Bundesrat is of the opinion that it is worth reconsidering the issue of the proposed reintroduction of a binding "performance-related reserve" particularly as there is no clear indication of the basis – in terms of specific indicators and specific penalty mechanisms – for fair and readily comprehensible allocation of the sums in question, which in some cases are considerable. This is even more valid in the light of the tensions between programmes specific to the federal states (Länder) and the "milestones" established at the national level in the partnership contracts. There is thus a risk that the valid approach of a greater focus on results would be discredited by shortcomings in implementation.

#### IV. Thematic concentration and setting priorities

56. The Bundesrat is fundamentally in support of concentrating funding on clear priorities. The investment and/or policy areas for each of the thematic goals vary in scope. Weighting these thematic goals and translating them into fund-specific areas of intervention must therefore reflect regional socio-economic conditions and should not be determined by the Commission. The Bundesrat is therefore opposed to establishing quotas for individual thematic goals and investment priorities.
57. The Bundesrat takes the view that authorising priority axes to address only one thematic goal from the list enumerated in Article 9, as stipulated in Article 87 of the draft Regulation, is not a helpful approach. The Bundesrat is therefore opposed to the principle laid out in Article 87 Sub-section 1 of the draft Regulation whereby each priority axis of a future Operational Programme must correspond to only one thematic goal. To the extent that an integrated approach

fostering business, innovation and sustainable development is needed, this should accordingly draw on several priority axes. As a large number of priority axes would have to be established due to the diversity of problems and opportunities in a region, this would give rise to unnecessary bureaucracy and would make funding even more rigid. In this connection the Bundesrat considers that difficulties would arise in determining in advance during programme planning how much funding would be required from the various priority axes for each “integrated territorial investment”. The Bundesrat underscores the need for simplification, flexibility and competition.

#### V. Territorial development

58. The Bundesrat welcomes the fact that it will be possible to support community-led development measures from all funds within the framework of local development strategies, in line with the LEADER approach. The Bundesrat draws attention to the fact that allocating fixed funding contingents from the Operational Programmes to community groups should however only be optional and calls for a corresponding clarification in the text of the Regulation. Experience has demonstrated that establishing quotas for expenditure for particular target groups, sub-regions or experimental approaches leads to fragmentation of funding and to sub-critical masses, and above all causes a lack of flexibility should adjustments be required during the programming period. This approach would run counter to endeavours to deploy funds more efficiently and would also not be compatible with thematic concentration.

This also holds true for “integrated territorial investments”. Here again selection and allocation of funds in the Operational Programmes should be envisaged solely as an option.

59. From the perspective of the federal states (*Länder*), it appears problematic to transfer responsibilities for implementation or decisions on funding to the local level whereas liability for correct management of funds would remain with the federal states. Irrespective of this point, it will not be possible to present the planned “measures for local development” and the “integrated territorial investments” including allocation of funding when the Operational Programmes are submitted.

## VI. Monitoring, programme support and evaluation

60. The Bundesrat affirms its stance that functioning monitoring systems are required for effective programme implementation, to provide programme support for the programmes by means of appropriate financial, output and outcome indicators as well as through appropriate reporting on all levels (regions, Member State, EU). In this context it is important to clarify that it is only possible to provide Europe-wide uniform definitions of financial and output indicators. A set of core indicators identified on this basis are the only way to provide data that can be aggregated and is compatible across regions and Member States. As the outcome indicators always refer to a programme-specific programme axis, which may ultimately assume a different form from region to region, these indicators are only helpful in respect of the specific programme in question. In this respect outcome indicators are not suited to comparing the performance of different programmes.
61. The Bundesrat draws attention to the fact that attaining stipulated target values is also dependent on other factors that may influence outcomes (e.g. the economic situation, legislation in other policy areas). Furthermore, it is also important to take into account that the funding is seeking largely to attain medium to long-term impacts. Penalising insufficient attainment of goals by reducing funds made available or suspending payments entirely should therefore not be envisaged.
62. The Bundesrat notes that according to the Commission's proposal the scope and frequency of reporting obligations is to be increased. These obligations should however be kept to the necessary minimum.
63. The Bundesrat supports the view that high-quality evaluations accompanying the process of drawing up the programme, implementation and clearance of accounts are of great importance in ensuring a strategic and result-oriented approach in cohesion policy. The procedures applied to date have proved their worth. Experience has shown that it is not necessary for evaluations to be carried out exclusively by experts functionally independent from the authorities entrusted with programme implementation.

64. The Bundesrat draws attention to the fact that the monitoring committee (committee accompanying the programmes) is not the appropriate forum in which to review evaluations. It is however useful to involve this committee. Integrating the monitoring committee into the process of drawing up evaluation plans and conducting evaluations would mean that it would not be possible to adopt an evaluation plan in the first meeting of the committee. An appropriate deadline should be selected.
65. The Bundesrat is in favour of continuing the established method of performance review by means of implementation reports and evaluations. However the Bundesrat is opposed to the proposed procedure for performance review and for distribution of a performance reserve to the tune of 5 per cent of programme funds. The proposed procedure envisages distributing this reserve on the basis of proposals from the Member States but ultimately at the Commission's discretion, at the earliest in 2019. This would be too late for continuous programme implementation. There would be no planning security for the regions in respect of the availability of programme funds until the end of the programming period.
66. The Bundesrat proposes instead that an option for a performance reserve be introduced at the level of the Operational Programmes. With this approach it would be possible to strike a balance between creating an incentive for effective deployment of funds and ensuring planning security in respect of the volume of programme funds actually available.

## VII. Administration and financial controls

### On the Structural Funds

67. The Bundesrat is concerned that the new structures will not give rise to improvements and simplification. In addition, introduction of these structures would trigger start-up problems and delays at the start of the funding period. The Bundesrat is therefore opposed to the new structures.

The Bundesrat calls for maintenance of the tried-and-tested management and control systems used for Structural Funds funding, which are now running smoothly. The agricultural management and control system is entirely different

in nature to Structural Funds funding and this system would therefore not be suited to utilisation for this purpose.

In this context the Bundesrat draws attention to the following provisions, which would generate additional bureaucracy:

- the establishment of an additional (cross-fund) national accrediting body;
- submission of an additional annual management declaration;
- additional annual clearance of accounts, including the possibility of imposing penalties.

#### Management and control system

68. The Bundesrat welcomes the fact that the administrative structures which have proved their worth during the 2007 to 2013 funding period, namely the managing authority, certifying authority and audit authority, are to be maintained for implementation of the Operational Programmes.
69. The Bundesrat is however opposed to separating responsibility for funding with EU funds and the corresponding decision-making competences. The Bundesrat draws attention to the fact that the envisaged “community-led local development”, the “Joint Action Plans” and the “integrated territorial investments” may jeopardise transparency as to competences and responsibility within the management and control systems for the Structural Funds. The regions should therefore not be obliged to use these instruments.
70. The Bundesrat insists that provisions on the management and control system for Structural Funds funding must not encroach upon the organisational sovereignty of the Member States. In keeping with this principle it is incumbent on the Member States to establish management and control systems and also to stipulate the requisite authorities. The Bundesrat is opposed to the provision stipulating that the managing, certification and audit authority may not fall under the aegis of a public authority even if the principle of functional independence is respected, as this constitutes interference with the organisational sovereignty of the Member States and also violates the proportionality principle. Furthermore, this provision also jeopardises the established organisational structures recognised by the Commission and would

give rise to additional bureaucracy, which would not be counterbalanced by any added value or utility. The provision that functional independence must be respected is sufficient.

71. The Bundesrat draws attention to the fact that possibilities to conduct independent review of administrative decisions already exist in German administrative law and that no additional administrative structures need to be created.
72. The Bundesrat takes the view that the two-month period stipulated for a hearing prior to the application of financial corrections is extremely short and would be disadvantageous to Member States seeking to present well-substantiated counter-arguments. A period of at least three months appears more appropriate, in particular in the light of the federal structure in Germany and in other Member States.

#### Accreditation procedure

73. The Bundesrat is emphatically opposed to the envisaged accreditation of management and control bodies. Implementation of cohesion policy by the Member States is in keeping with the subsidiarity principle in the EU. The fact that Structural Funds funding falls within the remit of shared management in the sense of Article 53 Sub-section 1 Letter b of the currently valid EU Financial Regulation (EU FR) is a principle of cohesion policy enshrined in Article 4 Sub-section 7. This is derived directly from the subsidiarity principle enshrined in Article 5 EUV. Article 53 Sub-section 2 of the currently valid EU FR stipulates that management shall be conducted according to the provisions of Article 54 to 57 EU FR only if funds from the EU budget are managed centrally and indirectly by the Commission. However, the cross-reference to Article 56 Sub-section 3 of the currently valid EU FR in Article 64 Sub-section 1 equates cohesion policy, where management is based on the shared management method, with policy areas in which the Commission manages the budgetary funds centrally. The Bundesrat is strictly opposed to the centralisation of cohesion policy in the EU that this would entail.

Should the reference in Article 64 not refer to the currently valid EU FR, but rather to the Commission proposal for a new EU Financial Regulation (initial

draft: COMM (2010) 260 final; current version: COMM (2010) 815 final), the Bundesrat wishes to make clear that it is opposed to the accreditation procedure envisaged therein (BR Official Document 347/10 (Decision)).

74. In this context the Bundesrat draws attention to the fact that there is no basis in German administrative law for an accreditation of public authorities by other public authorities and that this should also generally be rejected because it encroaches on the organisational sovereignty of the Member States. If public authorities are conducting management and control tasks, any form of accreditation must be considered unnecessary for this reason alone.
75. The Bundesrat considers that it is advisable to maintain the procedure of compliance testing with approval of the systems by the Commission, which was introduced in the 2007 to 2013 funding period. Continuing to work with the established management and control systems, which have already been subject to reviews in the current funding period and which have been optimised where appropriate as a result of such reviews, would mean there would be no delays in the start of funding occasioned by compliance testing at the start of the 2014 to 2020 funding period. Furthermore this would also provide a certain degree of legal security for the authorities in respect of the management systems they have established.

#### Tasks of the authorities

76. The Bundesrat draws attention to the fact that the managing authorities will probably only be able to submit the envisaged management declarations of assurance in connection with the annual clearance of accounts introduced as a new requirement if the underlying transactions have actually been checked and hence also checked on the spot. The Bundesrat draws attention to the fact that corresponding annual audits in each individual project constitute a considerable burden for beneficiaries. These additional costs of bureaucracy affecting both beneficiaries and the Member States, would have a long-lasting negative impact on the reputation of the Structural Funds funding of the EU as well as leading to a less positive perception of the EU on the part of the companies, research institutions and other beneficiaries directly involved, as well as more generally on the part of citizens throughout the European Union.

77. The Bundesrat underscores that error analysis by the European Court of Auditors and the Commission has demonstrated that the gravest errors identified were concentrated in a limited number of programmes in some Member States.

If the results of past audits have demonstrated that there is a need to optimise the management and control systems in certain programmes or Member States, improvements of this type could be called for in the framework of a compliance audit in the Member States in question. The Bundesrat is opposed to the idea of making the requirements for the management and control systems in all Member States more stringent across the board inter alia by introducing annual clearance of accounts, as it considers this to be disproportionate.

78. The Bundesrat welcomes the possibility now accorded to aggregate expenditure from the management and certification authorities for an Operational Programme. However this would not lead to savings and would not simplify the tasks to be carried out. At the same time, the Bundesrat points out, against the backdrop of this paradigm shift, that unnecessary requirements have clearly been introduced for the management and control systems of the Member States in the past. In this context the Bundesrat advocates greater attention to the proportionality of control and penalty systems on the one hand and fraud prevention and the potential damage/losses on the other hand.

#### Financial management/financial flows

79. The Bundesrat welcomes the simplified programme implementation that would be brought about by the approaches laid out in the draft Regulations thanks to the possibility of lump sum settlements.

80. The Bundesrat is strictly opposed to the envisaged procedure of obligatory annual clearance of accounts. Annual clearance of accounts does not do justice to the particular nature of the projects funded from the Structural Funds, particularly from the ERDF, which are generally multi-annual projects. The Bundesrat draws attention to the fact that obligatory annual clearance of accounts as envisaged in the draft Regulation from the Commission would mean that Member States would be required to extend their audit activities, which would give rise to considerable costs arising from bureaucracy for both



beneficiaries and the Member States. The introduction of annual clearance of accounts would thus run counter to the goal of introducing simplifications for beneficiaries. As there is no guarantee that annual accounts would be approved by the Commission at a pre-determined point in time, clearance of annual accounts would also not reduce the time period for which supporting documents must be retained.

The Bundesrat is in particular categorically opposed to the financial risks for the Member States and the federal states (Länder) that this would occasion due to financial corrections by the Commission and it is also opposed to the idea of moving towards a system closer to that deployed in the agricultural sector. In addition, annual clearance of accounts in the envisaged form would lead to a considerable additional workload as well as increased administration and bureaucracy. This holds true both for the amendment to the EU Financial Regulation and for the sector-specific Regulations (General Regulation). The Bundesrat recommends an option for partial clearance of accounts analogous to the approach deployed in the current 2007 to 2013 funding period.

81. The Bundesrat is also opposed to submission of the summary of the results of all audits and controls including an analysis of these as stipulated in Article 75 Sub-section 1 Letter c. The results of audits are already transmitted to the Commission in the annual control report by the audit authority pursuant to Article 116 Sub-section 5 Letter ii. Providing reports with the same content, to be made available in compliance with the same deadline, gives rise to extra effort without additional added value and is thus contrary to the goal of deregulating financial control provisions.
82. For these reasons the Bundesrat is also opposed to the audit opinion on compliance with the principle of sound financial management from an independent audit body as envisaged in Article 75 Sub-section 1 Letter d. Scrutiny of sound, economic and effective utilisation of funds is incumbent on the European Court of Auditors, as well as on the Federal and Regional Courts of Auditors in the context of special audits/reports. Further audits of sound financial management within the context of EU financial controls conducted by a further audit body would give rise to a clear increase in the costs of control of the system for the Member States.

83. The Bundesrat takes the view that allocation of the monies from the Funds to particular yearly tranches of the funding period should focus more than has been the case to date on the expected course of the programme and on the particularities of the individual funds.

#### Data exchange systems

84. The Bundesrat agrees with the stated intention of enhancing the efficiency of implementation of European cohesion, structural and employment policy. This also includes efficient data processing systems. The Bundesrat draws attention to the fact that it will not be possible to meet the Commission's demand that all exchanges of information between beneficiaries and the management authorities, certification bodies, the audit authorities and intermediate bodies should be conducted exclusively via electronic data exchange systems from 31st. December 2014. The Bundesrat considers it excessive to call for all exchanges of information between beneficiaries and the authorities responsible for management and control of the programmes to be conducted exclusively via electronic channels from 31st. December 2014, particularly as non-compliance with these requirements would be subject to financial penalties. The Bundesrat therefore requests the Commission to explain the proposed steps and penalties to be involved in e-cohesion and to provide concrete information on these steps and penalties. The Bundesrat takes the precaution of advising that the intended obligation to introduce this approach would be hampered by a series of unresolved issues, such as data security and data protection, seamless respect for national security standards by all those involved in the system including partners that do not form part of the public administration, compatibility with existing systems, electronic signatures as well as the reliability and authenticity of supporting documentation for expenditure and payments. The Bundesrat takes the view that the obligation to switch to completely electronic administration must not lead to delays in programme implementation or to inappropriate utilisation of funds.
85. The Bundesrat points out that it is important to remember that transferring fund administration to electronic media would not automatically lead to a reduction in the burden of bureaucracy for beneficiaries. Simple management and audit

priorities must take priority to attain this aim. The Commission proposals would however not lead to a simplification of the procedures.

### VIII. Eligibility rules

86. The Bundesrat welcomes the fact that eligibility of expenditure is to be based strictly on national provisions for all the funds that underpin the Joint Strategic Framework. This avoids a situation in which expenditure of the same type is treated differently in terms of national and European funding.
87. This principle is however undermined by some of the Commission's proposals. The Bundesrat is particularly opposed to the proposal that in the future non-reimbursable value-added tax in infrastructure projects is no longer to be recognised as eligible expenditure. As non-reimbursable value-added tax does constitute expenditure for the public or private project bodies involved, this provision would mean that the funding rate would de facto be considerably reduced for infrastructure projects as compared with funding practice to date. This would have severe negative consequences for the feasibility of infrastructure projects. This provision would have a particularly pronounced impact on municipalities but would also affect all other project organisers involved in infrastructure projects.
88. The Bundesrat is opposed to limiting the co-financing rate in terms of each individual priority axis. As in the current funding period, compliance with the maximum limit for Structural Funds participation should be ensured at the level of the Operational Programmes.
89. The Bundesrat welcomes the clarification that funding may be provided with various forms of support and that this shall encompass not only direct financial assistance in the form of grants and support via solutions made available through the funds, i.e. through the financial instruments, but should also include the re-payable support granted directly from the programmes for individual projects; the latter method has already been deployed successfully in several countries since the 2000 to 2006 funding period. The Bundesrat welcomes the fact that pursuant to the draft Regulation the Commission Decision on approval of an Operational Programme may stipulate whether the co-financing rate shall apply either to total eligible expenditure or to eligible public expenditure

(Article 110). In the spirit of harmonisation this should also apply for the EAFRD.

90. The Bundesrat also supports the idea of further relaxing provisions on utilisation of flat-rate rules, including the possibility of adopting flat-rate rules from other EU funding areas. To ensure that this genuinely facilitates implementation, there is a need for clarification that the various bases for calculations that may be used substantiate a flat-rate rule pursuant to Article 57 Sub-section 4 are to be seen as alternatives and not as cumulative. It also seems that the draft Regulation's proposals on a flat-rate of 15 per cent for overhead costs, applied without demonstrating the basis of computation, and the maximum flat rate of 20 per cent for overhead costs where the basis of computation is demonstrated, set the flat rate at too low a level and are too far removed from practical realities for these flat rates to constitute a genuinely attractive option that would lead to simplification of the system. Furthermore scope should be afforded to utilize flat rate rules for all forms of support and not simply in the case of financial assistance in the form of repayable grants.
91. The Bundesrat proposes that the exemption for income-generating projects should apply not only to projects that fall under the rules on state aid but also to all forms of aid repayable by final beneficiaries. These provisions should also apply to assistance granted for infrastructure measures directly as repayable support rather than applying merely – as proposed by the Commission – in the case of assistance provided through financial instruments. The support modus of direct repayable support would otherwise remain unattractive for profit-generating infrastructures and would de facto not constitute a viable option.
92. The Bundesrat welcomes the clarification in the draft Regulation on the eligibility of operations as a function of the location (Article 60). However, the Bundesrat calls for measures to be taken to ensure that funding strategies in functional areas do not end at administrative borders. Funding of structures involving several federal states and several Operational Programmes should be made possible in the future. It should therefore be clarified that operations that produce benefits that cut across funds or programmes can be proportionally funded from several Operational Programmes simultaneously. This novel possibility of cooperation should be made broader than currently envisaged in

Article 60 Sub-section 2 Letter b, which stipulates that 10 per cent of programme activities outside the programme area may be financed.

#### IX. Financial instruments

93. The Bundesrat welcomes the Commission proposals on making greater use of revolving instruments with a view to provide ongoing funding extending beyond the funding periods. The Bundesrat supports opening up this instrument for all topics and activity areas of the Structural Funds and for the Fund for Entrepreneurship for all phases of corporate development. The Bundesrat welcomes the fact that assistance granted directly (by the management authorities or intermediate bodies) as repayable aid, as well as combinations of financial instruments and other funding measures will continue to be an option in the future, in addition to the various fund variants envisaged (financial instruments in the strict sense of the term). However, clearer terminological distinctions need to be drawn between financial instruments and (other) repayable forms of support.
94. The Bundesrat insists that in the future the regions must continue to be able to select, develop or opt for precisely the right blend of instruments in determining the appropriate financial instrument or the appropriate form of support, in keeping with regional needs and the priority system of the Operational Programmes. Individual instruments should not be accorded privileged treatment in this process. There should not be greater obstacles for individual solutions at the regional level compared with standard instruments at the EU level.
95. No objective grounds can be found for according privileged treatment to funds at the EU level by increasing the level of funding participation up to 100 per cent. If the idea of increasing the level of funding participation by 10 percentage points is envisaged, this should also occur irrespective of whether these instruments constitute a distinct priority axis.
96. Likewise, it is not acceptable to exclude audits by the designated programme of the programmes with the financial instruments administered by the Commission, whereas the provisions on management and control for financial instruments within the realm of competence of the regions is in future to be

regulated by the Commission by means of a delegated act. The Bundesrat is also opposed to limiting funding applications for nationally or regionally administered funds to the sum required for a two-year period, whereas the total sum of the ERDF contribution paid to the financing instrument will continue to be refundable for financial instruments managed directly or indirectly by the Commission.

97. The Bundesrat agrees with the Commission that legal security has been fundamentally improved by the terminological clarifications, the envisaged provisions on eligibility, interest and other profits and on reutilisation of resources paid back, as well as the provisions on exceptions pertaining to financial instruments. This satisfies important requests tabled by the German federal states.
98. The Bundesrat notes that delegated acts are envisaged for management of financial instruments. As a consequence there would be no legal security for those participating. Legal security is however a fundamental prerequisite to ensure successful utilisation of financial instruments and to ensure greater private-sector involvement. There is an urgent need for a binding and definitive set of rules in force from the outset, covering the entire funding period and the full duration of the financial instruments; reliable agreements concerning the interpretation and practical implementation of these rules must be reached by those participating in the programmes.

#### On technical assistance

99. In the draft Regulation as tabled the Bundesrat considers that there is a displacement of additional cumbersome bureaucratic tasks from the Commission to the Member States. In addition the procedures have grown considerably more complex. Against this backdrop, allocating 4 per cent of the funding budget for technical assistance is by no means sufficient. A considerably higher proportion is necessary, particularly for small programmes but should not be made available at the cost of introducing funding constraints for other programmes.

## X. Delegated acts

100. The Bundesrat takes a critical view of the fact the draft Regulation comprises c. 40 empowerments stipulating that the Commission may enact delegated acts (essentially to make certain points more precise or to introduce restrictions) pursuant to Articles 142 and 143 of the draft tabled. This would on the one hand stand in contradiction to the principles of simplification and the broadest possible application of national law (subsidiarity principle). Furthermore there are grounds to fear that these acts would not all be adopted before the start of the funding period, but would instead be enacted later and applied retroactively. The Bundesrat calls for a clear reduction and limitation of such delegated acts, as well as a prohibition on retroactivity.
101. The Bundesrat notes that in a striking number of cases competences are transferred to the Commission by means of delegated acts without a deadline for adoption being stipulated. As a consequence, there is no legal security on key issues for the federal states (*Länder*) and ultimately for beneficiaries. A binding and definitive set of rules right from the outset is however a key pre-requisite for successful, error-free funding
102. The Bundesrat insists that the delegation of acts (Article 142, 143 of the draft Regulation) must correspond to the primary law provisions of the TFEU. It is stipulated therein that empowerments of the Commission to adopt delegated acts shall be limited to clearly pre-defined issues of substance (Article 290 TFEU) or implementation issues (Article 291 TFEU). In each individual instance of an empowerment, guarantees must be provided that only non-essential competences or competences related exclusively to implementation are transferred. The wide-ranging empowerments envisaged in many provisions of the draft Regulation to adopt acts with broader consequences (governance, Joint Strategic Framework, financial corrections in the case of a shortfall in achievement of milestones or targets, financial instruments, lump sums, tasks of the audit authority) stand in flagrant contradiction to this legal principle, both when considered as individual empowerments and to an even greater extent when considered in their entirety.

### XI. Transitional provisions

103. The 2014 to 2020 funding period will overlap by several years with the winding-up of the previous funding period. The Bundesrat therefore calls for a clarification in Article 145 Sub-section 1 that winding-up of the 2007 to 2013 funding period will be conducted according to the legal provisions applicable to this funding period (particularly Regulation (EC) 1083/2006).

### XII. Account to be taken of the Opinion and direct transmission to the Commission

104. The Bundesrat calls on the Federal Government to take account of the above comments and requests in the course of the Federal Government's participation in devising European cohesion, structural and employment policy and in determining the priorities for these policies, as well as during further deliberations on the draft Regulation at the EU level.

105. The Bundesrat shall transmit this Opinion directly to the Commission.