



Guidance for Member States on Article 37(2) CPR– Ex-ante assessment



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Guidance for Member States on
Article 37(2) CPR– Ex-ante assessment

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1. BACKGROUND

1.1. Regulatory references

Regulation	Articles
Reg. (EU) N° 1303/2013 Common Provisions Regulation (<i>hereafter CPR</i>)	Article 37 - Financial instruments

1.2. Purpose of the guidance

Financial instruments (FIs) are a special form of support and their successful design and implementation hinges on a correct assessment of market gaps, needs and investment strategy.

Experience of the 2007-2013 period showed that decisions to set up FIs were not always made on this basis, leading, in some cases, to problems with disbursements, 'parking of funds' and over allocation of resources to FIs.

Article 37(2) CPR was thus included in the CPR to ensure that, in the context of a programme, FIs are designed on the basis of an ex-ante assessment which has identified market failures or sub-optimal investment situations, respective investment needs, possible private sector participation and resulting value added of the FI in question. Decisions to set up FIs should be therefore demand driven and not supply driven.

Finally, it has to be underlined that some of the requirements of Article 37(2) CPR are not entirely new¹, but for 2014-2020 they are reorganised and completed in the CPR.

2. CONSIDERATIONS AND SPECIFIC POINTS TO LOOK OUT FOR

The overall objective of the ex-ante assessment is to assess the rationale for an FI against prevalent market failure and to ensure that the FI will contribute to the achievement of the programmes and European Structural and Investment (ESI) Funds objectives.

The ex-ante assessment will assist managing authorities (MA) in having a sound basis for their decision-making in using FIs and in setting up an effective FI. It will also help to avoid overlaps and inconsistencies between instruments implemented by different actors at different levels and to avoid some of the problems identified in the current period.

¹ Legal provisions for 2007-2013 foresee that the funding agreement needs to include investment strategy and planning (article 43(3)(a) Regulation N° 1828/2006)

The business plan (Article 43(2) Regulation No 1828/2006 until the amendment by Regulation No 846/2009) would have to include at least (a) the targeted market of enterprises or urban projects and the criteria, terms and conditions for financing them; (b) the operational budget of the financial engineering instrument; (c) the ownership of the financial engineering instrument; (d) the co-financing partners or shareholders; (g) the justification for, and intended use of, the contribution from the Structural Funds;

Evaluation of gaps between demand and supply – Article 44(1)(a) Regulation No 1828/2006: *as regards financial engineering instruments supporting enterprises, primarily SMEs, including micro-enterprises, the conclusions of an evaluation of gaps between supply of such instruments, and demand for such instruments;*

Therefore, the ex-ante assessment requirement in the CPR should not be looked at only as a mere legal obligation but also as a tool to support implementation from a sound financial management perspective.

In the assessment of the market failure, of the investment needs and required ESIF programme contribution to an FI, special attention is needed to the proper assessment of the revolving capacity of existing FIs. This should concern both the revolving funds from 2007-2013 period and their capacity to fill in part of the identified market gap for the period 2014-2020 as well as the potential of ESI funds to revolve within the same period and to fill in the identified gap over the period.

The ex-ante assessment needs to be completed before any programme contribution is **made (i) for the setting up of a new FI or (ii) for an existing FI**² and it is also applicable regardless of the implementation option chosen [EU-level instruments, national/regional level instruments (tailor made instruments, off the shelf instruments)], being the only exception the contribution to the SME Initiative³.

It is also noted that the ex-ante assessment under Article 37(2) CPR:

- Is not part of the formal programme preparation, content and approval process;
- Is not the same as the ex-ante evaluation of the programme as provided for in Article 55 CPR (even though some language versions of the CPR refer to both using the same terminology). However, the ex-ante assessment should build on the findings of the ex-ante evaluation;
- Is not the same as JEREMIE gap analyses or JESSICA evaluations (but the MA should judge its relevance as a source of information to perform the ex-ante assessment);
- Is not the same as the ex-ante evaluation of the EU-level FIs which shall be carried out by the Commission but which does not provide the same level of detail that is expected from the ex-ante assessment under Article 37(2) CPR justifying the setting up of FIs to operate within the eligibility area of the programme (national or regional level). This is the reason why contributions to EU-level FIs are not exempted from the requirements of Article 37(2) CPR, with the exception of the SME Initiative under Article 39 CPR;
- Can be carried out by the MA or be outsourced. Administrative capacity, expertise and independence are key factors for the MAs to consider before deciding;
- Can be funded by the Technical Assistance allocation, including the allocation from the 2007-2013 period;
- Can be used to justify contributions from more than one ESI Fund or from more than one programme to the same FI. However, the ex-ante assessment should provide specific conclusions at the level of each regional or national programme contributing to the FI;
- Needs to justify the contribution of programme resources to each new or existing FI (including EU-level FIs). Nonetheless, if more than one FI is to be launched at the same time, the work can be combined in one ex-ante assessment as long as it includes different bundles of assessments taking into account the specificities of the programme in question (e.g. investment

² It is highlighted that even if the decision is to make a programme contribution to an existing FI (as provided for in Article 38(3)(b) CPR), which would receive additional programme resources from 2014-2020, compliance with public procurement and state aid rules needs to be ensured.

³ See Article 39(4)(a) CPR.

priorities). If the MA wishes to launch at a later stage a new FI, it must be based on a new or updated ex-ante assessment;

- Can be performed in stages but must be completed before decision to make a programme contribution to an FI;
- Shall be submitted to the monitoring committee of the programme for information and its summary findings and conclusions must be published within 3 months of their date of finalisation.

3. PRACTICE AND EXAMPLES FROM 2007-2013 EXPERIENCE

Under the JEREMIE Initiative, in the years 2006-2008, the EIF conducted JEREMIE evaluation studies (paid by the Commission and the EIF) aimed at identifying possibilities for the implementation of FIs for SMEs. Evaluation studies were offered free of charge to Member States and regions interested in launching JEREMIE operations and were co-financed at 75% to 85% by the Commission and at 15% to 25% by the EIF. All together 55 evaluation studies were completed at national and/or regional level in 18 Member States.

Under the JESSICA Initiative, in the period 2007-2013, more than 70 JESSICA studies were offered to Member States and regions (paid by the Commission and the EIB) to support MAs in the implementation of FIs for urban development and regeneration and energy efficiency.

It has to be underlined that the JEREMIE and JESSICA studies are not the same as the ex-ante assessment to be carried out under Article 37(2) CPR; however, MAs can judge their relevance as a source of information for the performance of the ex-ante assessment.

4. REFERENCE, LINKS

Article 37(2)(a) CPR provides that the work undertaken for the ex-ante assessment (on what concerns the assessment of market failures) shall be based on available good practice methodologies.

During the preparation of the legal framework it became clear that it would be useful for MAs if the Commission could make available such good practice methodology – both general and also sector-specific, as relevant. Accordingly, a set of ex-ante assessment methodologies was developed under a joint initiative of the Commission and the EIB.

These methodologies are to be seen as a toolbox offered by the Commission and benefiting from the experience of the EIB/EIF in implementing FIs, encompassing good practices and providing practical tools to support MAs in the preparation of the ex-ante assessment.

The Methodologies⁴ are organised in a Quick reference guide for MAs plus 5 volumes, as follows:

- Quick reference guide, including checklist on completeness;
- Volume I – the General Methodology to carry out the ex-ante assessment for financial instruments;
- Volume II - dedicated to TO1 ‘Strengthening research, technological development and innovation’;

⁴ http://ec.europa.eu/regional_policy/thefunds/fin_inst/index_en.cfm

- Volume III - dedicated to TO3 ‘Enhancing the competitiveness of SME, including microcredit and agriculture and fisheries’;
- Volume IV - dedicated to TO4 ‘Supporting the shift to low-carbon economy’;
- Volume V - dedicated to ‘Financial instruments for urban and territorial development’.

The thematic objectives or areas of the specific methodologies were chosen based on their higher potential for the use of FIs as identified by MAs in an internet survey launched by the Commission in the beginning of 2013.

The specific methodologies are to be read together with the general one. Their value added is, as the name refers, to present the specificities of the corresponding Thematic Objectives/areas and how these impact on the ex-ante assessment.

The methodology is to be looked at as a good practice methodology, not **the** methodology. The Commission does not aim at imposing a single methodology, but rather at providing a tool with a view to support MAs’ work.

The formal status of this methodology has no legal value and it is not binding for MAs which are therefore free to use the proposed methodology as it best suits their needs.

Other methodologies available in each Member State may equally be relevant provided that the requirements of the CPR, namely Article 37(2) and other applicable EU rules (such as state aid rules) are taken into account.

It is expected that the entire process of ex-ante assessment (preparation - discussion in monitoring committee - decision by MAs) will raise awareness and ensure better and stronger ownership of the FIs operation by MAs. It has to be borne in mind that the body implementing the fund of funds or the FI, as appropriate, is only a beneficiary⁵ in the logic of the programme and that all the relevant management tasks and the final responsibility stay with the MA. Therefore, it is important that MAs understand well the findings and conclusions of the ex-ante assessment.

As for all ESI Funds policy operations, the active involvement of relevant stakeholders in the programming and implementation of interventions to be delivered through FIs will be vital for their success.

⁵ See Article 2(10) CPR.

ANNEX: Questions and Answers

a) Why an ex-ante assessment for FIs but not for grants?

As a general principle, any public intervention under ESIF rules needs to be justified by market failure, independent of its form (be it by grants, be it by FIs). The ex-ante evaluation set out in Article 55 CPR accompanying the programme needs thus to prove that, in a certain area, public intervention is justified. To that end, Article 55(3)(h) CPR provides that the ex-ante evaluation should appraise "the rationale for the form of support proposed" which points to the need for the use of grants and/or FIs. Article 96(2)(b)(iii) CPR requires that the programme sets out for each priority axis a description of the type of actions to be supported and "(...) the planned used of FIs".

Article 37(1) CPR states explicitly that FIs shall be implemented to support investments which are expected to be financially viable and do not give rise to sufficient funding from market sources. The ex-ante assessment according to Article 37(2) CPR aims at identifying the market failure and at justifying the decision to set-up a specific FI (which form, for which amounts, with which implementation structures, etc.). The overarching objective of the ex-ante assessment is to help the MA set up an effective FI, responding to the respective intervention need and policy objectives.

The following reasons justify the need for a thorough ex-ante assessment for FIs, to be carried out by a competent specialist:

- FIs offer a variety of intervention possibilities which can be adapted to the intervention need and thus are more complex in their design than traditional grants.
- Their implementation requires a relatively higher initial investment in a delivery infrastructure involving, e.g. fund of funds, financial intermediaries.
- They support economic activities closer to the market, where a possible distortion by inappropriate public intervention would especially be undesirable. Moreover, because of their leverage effect, their distortion potential can be multiplied.
- They require specific know-how about financial markets and products which may not be one of the core competencies of the public administration.
- The experience from the period 2007-2013 shows that in several cases, over-dimensioned FIs were set up which now leads to absorption issues.

It has to be underlined that in the case of FIs, the beneficiary⁶ is the body that implements the funds of funds or the FI, as appropriate, whereas for grants, in the context of state aid schemes, the beneficiary is the body that receives the aid. In any case, grant award decisions should also be based on a thorough assessment of the relevant project application according to the programme's established project selection procedures and taking into account factors such as the need for the project, the assessment of its added value, lessons learnt from similar projects and expected results.

b) To what extent does the ex-ante assessment need to be included in the programme?

The ex-ante assessment of the FI is a legal requirement for the decision to make programme contributions to the FI. However, the ex-ante assessment of the FI is **not** part of the programme.

⁶ See Article 2(10) CPR.

The ex-ante assessment of the FI should be discussed in the context of the monitoring committee and must be completed before the MA decides to make programme contributions to an FI. If it takes place in parallel to the preparation of the programme, then it can be expected that the content of the programme will be directly impacted by the ex-ante assessment(s).

However, as regards the European Agricultural Fund for Rural Development (EAFRD), the major structure of the FI that is proposed alongside its major fields of intervention, scope of activities, etc. should be included in the Rural Development Programme (RDP), in the section on general description that applies to more than one measure (see the guide on programming under the EAFRD).

c) Does the ex-ante assessment have to be a separate document or can it be part of the overall ex-ante evaluation of the programme?

Since FI is a means to deliver programme support, the ex-ante assessment should take place only when the thematic objectives, target beneficiaries and key delivery structures are defined in the programme (i.e. programming and its ex-ante evaluation process should be advanced). The ex-ante assessment of the FI may follow closely the programming exercise if this is already well advanced (including its ex-ante evaluation).

d) What is the difference between the ex-ante evaluation (Article 55 CPR) and the ex-ante assessment?

The ex-ante assessment for FIs should not be confused with the ex-ante evaluation (Article 55(3)(h) CPR – rationale for form of support proposed) carried out in parallel with the preparation of the programmes.

The ex-ante evaluation of the programme should consider the form of interventions to be used at programme level (i.e. be a high-level gap analysis/feasibility study carried out in parallel with the programming exercise), leading to determine whether FIs should or not be included in the programme. The ex-ante assessment has a different purpose. It aims to identify the market failure and to justify the decision to set-up a specific FI (in which form, for which amounts, with which structures, etc.).

There is also a difference of timing. While the ex-ante evaluation of the programme must be carried out at the beginning of the period, the ex-ante assessment of FIs may be carried out within the period as long as it is completed before the decision by the MA to make a programme contribution to an FI. In addition, it can be potentially subject to any audit carried out by any EU or national/regional level audit bodies, given its legally binding content.

e) Is the ex-ante assessment necessary for all FIs? (e.g. where there is no state aid element or where there are measures in the national area)?

Yes, the ex-ante assessment needs to cover each FI (new or existing and including EU-level FIs) where the programme contribution is to be made. However, separate ex-ante assessments are not necessary (see question (j)).

f) Is an ex-ante assessment required when the MA decides to make a contribution to an FI implemented at EU-level?

Yes, the ex-ante assessment must include an examination of the options for implementation arrangements within the meaning of Article 38 CPR, one of these options being to make a contribution to an EU-level instrument (Article 38(1)(b) CPR).

The only exception is the contribution to the SME Initiative which, in accordance with Article 39(4)(a) CPR, shall be based on one ex-ante assessment at EU-level carried out by the EIB and the Commission.

g) Is an ex-ante assessment required when there is an FI already established?

Yes, the ex-ante assessment is also required for an existing FI (as provided for in Article 38(3)(b) CPR) funded by previous programme contributions.

Topping up an existing FI with the programme contribution 2014-2020 is not possible if evidence of the market failure or suboptimal investment situations is not established. In the assessment of the market failure, of the investment needs and required programme contribution to an FI, special attention is needed to the proper assessment of the revolving capacity of existing FIs. This should concern both the revolving funds from the 2007-2013 period and their capacity to fill in part of the identified market gap for the period 2014-2020 as well as the potential of ESI Funds to revolve within the same period and to fill in the identified gap after the period 2014-2020.

In addition, it is also highlighted that even if the decision is to make a programme contribution to an existing FI (as provided for in Article 38(3)(b) CPR), which would receive additional programme resources from 2014-2020, compliance with public procurement and state aid rules needs to be ensured.

h) Is it enough to prove the market weakness in ex-ante assessment?

No, as Article 37(2) CPR sets out the seven main requirements of the ex-ante assessment which encompass themselves additional sub-requirements. The assessment of the market is only one of those requirements.

i) Is a separate ex-ante assessment required for each FI or can the work be combined e.g. at national or programme level?

If it is envisaged that more than one FI will be launched at the same time, the work can be combined in one ex-ante assessment as long as it includes different bundles of assessments taking into account the specificities of each of the programme(s) in question (for e.g. investment priorities, geographical area), therefore providing specific conclusions at the level of each programme contributing to the FI(s).

However, if the MA wishes to launch at a later stage a new FI, it must be based on a new or updated ex-ante assessment.

j) Is a separate ex-ante assessment required for each FI under each of the ESI Funds or could it be done for all ESI Funds together?

In accordance with Article 37(3) CPR, the ex-ante assessment needs to be completed before the MA decides to make programme contributions to an FI. It is the decision of the MAs how and when the ex-ante assessments for FIs under the ESI Funds are to be carried out. If it proves efficient, these could be carried out together in one go (and potentially by the same body), but as different bundles of assessments that take into account the specificities of each of the ESI Funds in question, therefore providing specific conclusions at the level of each regional or national programme contributing to the FI.

k) Is the ex-ante assessment considered eligible expenditure under the Technical Assistance budget?

Yes, the ex-ante assessment for FIs is part of the preparation and/or management of the programmes and thus, can be financed by the technical assistance allocation at the initiative of the Member States as provided for in Article 59 CPR and Fund-specific rules.

l) Can the ex-ante assessment be done by the MA?

The MA has the choice to carry out the work itself or outsource it to a consultancy firm, the EIB/EIF or other international development banks (i.e. World Bank or ERBD), etc. Administrative capacity, expertise and independence are key factors for the MAs to consider before deciding whom to entrust with the ex-ante assessment.

m) Can the ex-ante assessment and fund management be carried out by the same body (e.g. EIB group, other International Financial Institutions, national bank)?

Yes, the ex-ante assessment can be carried out by any competent body possessing the necessary professional expertise.

However, as with any other study leading to decisions to carry out certain public actions, there should be a rigorous professional neutrality between the findings and recommendations provided in the ex-ante assessment and the free choice by the MA to select the bodies that will implement the recommended options with full respect of EU and national laws, namely regarding state aid, public procurement and full transparency in the allocation of public resources.

n) Is this ex-ante assessment the same as the JEREMIE gap analyses and the JESSICA evaluations carried out under the 2007-2013 period? Can it take the form of an updated gap analysis? What is the difference?

No. Although there are certain similarities, the ex-ante assessment is not the same, for the following reasons:

- It is compulsory and the legal requirements are established in the regulation from the outset;
- It will be paid for by programme technical assistance (either from 2007-2013 or 2014-2020) or Member State own resources, not by the Commission as it was the case for the 2007-2013 period (JEREMIE/JESSICA gap analysis/evaluation studies).

Therefore, the ex-ante assessment is not just a simple update (e.g. of the underlying figures only) of the gap analysis carried out within the programme in 2007-2013, because the ex-ante assessment will have to fulfil the requirements set out in Article 37(2) CPR.

The MA should judge the relevance of JEREMIE/JESSICA gap analysis/evaluation studies as a source of information to perform the ex-ante assessment.

o) Will there be a quality control of the ex-ante assessment by the Commission? Will the Commission approve the ex-ante assessment? What is the role of the monitoring committee?

No, the quality control and approval of the ex-ante assessment is the responsibility of the MA. Therefore, it is not subject to the Commission's approval.

Article 37(3) CPR provides that the ex-ante assessment shall be submitted to the monitoring committee for information and the MA is encouraged to ask the monitoring committee members for input and feedback. In this context, it is recommended that the monitoring committee includes private sector representatives, for instance, in SMEs access to finance (e.g. banking sector, microfinance, venture & risk capital representatives, as well as business angels or business associations, etc.).

The monitoring committee should stimulate the discussion on the ex-ante assessment with the main organisations involved, with the purpose of reaching a common vision. The summary, findings and conclusions of the ex-ante assessment should also be published within three months of their date of finalisation.

The MA could also consider setting up a governance structure for the ex-ante assessment whereby relevant members could participate in a steering group for the preparation of ex-ante assessment. In the end it is the responsibility of the MA to take an informed decision whether or not to implement a given FI after analysing all the elements listed in Article 37(2) CPR.

p) What is the 'available good practice methodology' referred to in Article 37(2)(a) CPR?

The Commission, together with the EIB, have developed a methodology to carry out the ex-ante assessment. This methodology is to be looked at as **A** good practice methodology, not **THE** methodology, since the Commission does not aim at imposing a single methodology, but rather at providing a tool with a view to support the MA's work.

The formal status of this methodology prepared by the Commission together with the EIB has no legal value and it is not binding for MAs which are therefore free to use the proposed methodology as it best suits their needs.

Other methodologies available in each Member State may equally be relevant provided that the requirements of the CPR, namely Article 37(2) and other applicable EU rules (such as state aid rules) are taken into account.

Additional detailed information is available in the ex-ante assessment methodologies for FIs listed in point 4 of this document.

q) What is meant by the 'added value' in point (b) of Article 37(2) CPR?

There is no legal definition of "added value" in the CPR. This concept may include, for example, the following elements:

(i) The relevance, effectiveness, efficiency of the FIs:

- Advantages of recycling funds over the long-term;
- Capacity to attract additional funding from the financial sector and other private investors;
- Attracting additional sources of expertise and know-how;
- Provision of enhanced incentives to better performance on the part of beneficiaries and final recipients (i.e. greater financial discipline at the level of supported projects);
- The advantage for the final recipients supported (risk margin reduction, collateral reduction, catalyst effect).

(ii) How the FIs could support the implementation of thematic objectives or could contribute to focus areas, priorities and benefit the implementation of the RDPs.

Additional detailed information is available in the ex-ante assessment methodologies for FIs listed in point 4 of this document.

r) Does the ex-ante assessment need to examine the proposed instrument only, or also the loan, guarantee or equity product(s) proposed?

Article 37(2)(e) CPR provides that the ex-ante assessment also needs to look at the financial products which will be the most appropriate to fill the market failure or the suboptimal investment situations.

Additional detailed information is available in the ex-ante assessment methodologies for FIs listed in point 4 of this document.

s) Is an ex-ante assessment obligatory only for planned FIs? If the MA is not planning to implement any FI, is it necessary or not to carry out the ex-ante assessment?

The ex-ante assessment should be carried out only when the MA considers using FIs as a form of support. The analysis of the most appropriate form of support should have been done at the level of ex-ante evaluation as provided for in Article 55(3)(h) CPR. If the MA, based on the findings of the ex-ante evaluation, wants to explore the idea of using FIs and intends to use this form of support, it should launch the ex-ante assessment under Article 37(2) CPR.

Even if the ex-ante evaluation concludes that support should be provided only through grants, this does not mean that later it will not be possible to use FIs. On the contrary, it may be perfectly justified to revert to the idea of using FIs once a suitable type of activity (project) emerges during the period.

t) What is the Commission's view on the need to perform an ex-ante assessment in the situation where the programme contribution to an FI is reduced?

The reduction of the programme contribution to an FI can be the result of changes in the market conditions which are no longer accurately reflected in the existing ex-ante assessment. This is one of the reasons why Article 37(2)(g) CPR determines the inclusion of provisions in the ex-ante assessment so as to allow for its revision and update during the implementation of the FI (e.g. by modifying the investment needs/the target/the results, etc.).

If the reduction is due to conflicts between the MA and the body implementing the fund of funds of the FI, or due to the incapacity of the FI to carry out investments or other situations where the conclusions of the ex-ante assessment remain valid but cannot be implemented by the selected body, there is a need to modify/terminate the funding agreement but not necessarily the ex-ante assessment.

The Commission recommends that both cases are brought to the attention of the monitoring committee.

