REPORT ON GOLDPLATING

HLG ON SIMPLIFICATION OF ESIF

Introduction

Goldplating is a term used in the context of the implementation of the European Structural and Investment Funds (ESIFs) often to describe the administrative extra requirements and burden imposed on beneficiaries by the ESIF national and sub-national authorities.

In this report goldplating is analysed mainly as a safeguarding/self protecting reaction by such authorities to the complex articulation of national and EU provisions regulating and impacting on ESIF. These in fact include:

- primary ESIF regulation - CPR, the specific funds regulations,
- secondary regulation - delegated and implementing acts and the guidance/interpretation notes by the European Commission
- state aid and public procurement regulation.

The volume but mainly the complex articulation between EU and national regulations often generate different interpretations and contribute to create an environment of legal insecurity and risks of errors for the beneficiaries. (which could be called COMplating, leading to beneficiaries' COMplaining)

The main goal of this report is therefore to identify areas in which such complex articulation has proved to generate bottlenecks for the access and use of ESIF by beneficiaries and propose ideas for simplification.

However, gold-plating is being created not only as a response by national and sub-national authorities to EU level procedures, but also as burden coming from their own national administrative traditions and customs. This report will thus also look at cases in which Member States' institutions introduce or do not eliminate unnecessary and burdensome practices stemming from their own administrative systems and that often generate practices that miss what burdened beneficiaries would call "common sense".

Areas of concerns and sources of complexity for beneficiaries with ideas for discussion

Management and control system (audit)

One of the main areas of concern expressed by beneficiaries directly or through managing authorities relates to auditing and to a general lack of trust within the overall ESIF implementation system. Along the years a strict administrative and financial control of ESIF has prevailed on a result and objective-led approach. Its zero-error and zero-fraud management rationale has been the main driver of all ESIF authorities and has had a big

impact on beneficiaries in terms of an increasing complexity of the procedures and regulations to access and manage them.

The impact on both managing authorities and beneficiaries has therefore reached such high levels that it has become a real source of discouragement in the use of ESIF by these. The main aim of a simplification agenda in auditing field should therefore work at improving the trust levels within the system and reduce the administrative burden on beneficiaries coming from auditing and control. This should also help cohesion policy achieve its EU objectives of supporting innovation, the green economy, inclusion etc..

Possible ideas and questions for discussion

- Rethinking the shared management and control system by strengthening **subsidiarity** and **proportionality** should be the main way forward.

  Subsidiarity should be better applied in the implementation of ESIF thus leaving Member States (MS) and Managing Authorities (MAs) the responsibility to verify the respect of national regulations. Beside a few areas (areas with a high error rate for example, new and innovative mechanisms and instruments) where the responsibility could be left to the EU level, national rules and systems - thus national auditing authorities - should be sufficient. Once the latter prove they can ensure this role (for example through the designation process or proved compliance with the European and international audit requirements, some kind of "quality check" by the Commission) then EU auditors would refrain from controlling single projects, and would concentrate their auditing effort on the existing national frameworks and systems and on performance of the OPs.

  If subsidiarity is respected the interpretation of the regulations would not generate insecurity like it is the case today. In order to increase the security of beneficiaries and predictability of rules, some of the recently proposed ideas of "joint audit framework"[1] or "joint interpretation compacts"[2] between Mas and AAs (with the participation of the Commission) could be looked at. They should consist of rules defining what, when and how projects would be audited and they would be binding for all levels of the audit pyramid.

  In this case, the control by the European Commission would then concentrate on the respect of the ESIF regulations and move its priority from a control of the regularity of expenses to a **result oriented type of audit**. It would look at system audits (BTW on this point systemic recommendations should be suggested only on the basis of a larger sample of proved irregularities in a particular area or of a particular nature).

  In terms of **proportionality,** the number of audits related to individual projects is still too high, which is a sign of not adequate implementation of the single-audit principle. So the number of audits should be decreased. The scope of the different levels and

[1] Submission by the House of Dutch Provinces for better regulation.

[2] EPRC.

threshold of audits should be clearly defined and clarified in order to avoid multiple and disproportional controls on the same operation. Amounts and risks should be the real rationale behind multiple controls. Proportionality could be also strengthened by establishing an independent "audit committee" as a mediating body between the Member State or the controlled institution and the auditors. This could also help in building trust between institutions when the audit findings are being prepared, and later on during their faster introduction into the implementation practices.

- As regard the **lack of trust**, it would be important to review the current approach for implementing and managing cohesion policy that puts fraud and administrative errors on the same level. The latter are unintentional and often result from gaps such as a limited understanding of the rules – often too complex and evolving to be fully mastered by beneficiaries, or insufficient and unprofessional HR in charge of managing the funds. Fraud is another issue. Again, subsidiarity should be better applied in the implementation of ESIF thus leaving MS and MA the responsibility to establish, according to their own national rules and organizations, the necessary procedures to prevent and fight fraud.

- Finally, **auditors from all levels** – from the ECA and the Commission to the member States authorities – should take full part of the simplification agenda. They should not only indicate deficiencies but also the unnecessary regulations/procedures introduced in the system (goldplating) as well as propose adequate solutions to avoid extra administrative requirements. This approach would be similar to the REFIT process. Their recommendations should also to a greater extent follow a logic of helping in the management of programs and not only checking if the management is financially sound.

  With regard to ETC projects, the auditors should compare the rules and procedures applied in each country involved in the ETC program/project and indicate which country introduces additional and unnecessary ones which hinder the implementation of the whole program/project and create additional red tape for beneficiaries and institutions. Such comparison should lead to an elimination of too complicated rules and procedures and would lead to the dissemination of good practices between the Member States.

Link between Cohesion policy and State aid policy

The application of EU competition policy and state aid rules on ESIF has proved to generate important bottlenecks to their use by many beneficiaries and to discourage their access to potential ones.

In the name of safeguarding competition, EU state aid policy seems to have a deterrent effect for ESIF actions particularly in the field of innovation as it makes the financing of projects that support research, innovation, development of infrastructures and businesses, etc. too complicated for both managing authorities and beneficiaries. These are in fact asked to master an enormous and complex set of regulations (eg small entities are not always equipped with sufficient and specialized legal expertise on this) and the risk of

different interpretations of the rules by different authorities (with the consequence of having to pay back the grant) has been refraining them to use ESIF.

Beneficiaries find themselves therefore not only having to fit their project proposals within the eligibility framework of the chosen OP but also having to adapt them to the complexity of the 800 pages of state aids rules applying to ESIF.

Despite efforts have been made by the European Commission (DG REGIO and DG COMP) to simplify the application of state aids in ESIF (GBER, simplified costs, cooperation/coordination COMP-REGIO, efforts made a project level, openness of COMP colleagues to provide advice and guidance to REGIO and to project promoters, etc), the compliance with state aid policy seems to remain one of the main deterrent for beneficiaries to access and use ESIF.

Possible ideas and questions for discussion

- **How far should the ESI funds be subject to EU state aid policy**. If the Commission could propose a derogation with regards to the Investment Plan for Europe and EFSI, and to funding directly managed by the Commission such as through Horizon 2020 programme, this should be possible also for ESI funds, at least for the similar projects.

- Member States should align state aid rules for ESIF to a much less demanding framework. In this respect a process of **harmonization of the rules** should be ensured, namely concerning the recording of the documents, SCOs, revenues, financial instruments, etc.. and potentially a single text developed to propose common obligations in terms of selection, management, justification and reporting procedures.

  Today thanks to de minimis and GBER, more ESIF projects can be implemented without notification. However there are still many projects where notification is needed and it is still a huge burden to identify if de minimis or GBER rules apply. So there is a need for clarifications.

  DG Competition should be more formally and directly involved in developing such harmonization and in determining common notions among the different types of regulations (ESIF, state aid, etc..), for example related to 'innovation' or different types of costs, with the view to encourage more innovative and more risky projects.

  It should also be involved in the drafting of the post 2020 ESIF regulations as well as in the delivery of the policy, for example in **the drafting of the OPs**. DG COMP should help MAs to clarify the regimes to be complied with already when they draft their OPs and assess the compliance only of those regimes on the basis of clear rules. In this way, the decision approving the OP will approve the relevant State aid regimes. This would make both DGs – COMPETITION and REGIO work together more efficiently.

Primary and secondary regulations (timetable, size/detail, real need)

ESIF beneficiaries have been expressing concern about two issues that would need to be tackled to simplify the management and access to the funds: the first relates to the implementation timetable of both primary and secondary regulations, while the second

concerns the volume and relevance of secondary regulations (delegated and implementing acts and guidance/interpretation documents).

The 2014-2020 primary regulations (co-decision process of the common and the single funds regulations) were approved end of 2013. This delayed the approval of both the secondary regulations and the OPs. At the moment, such delayed timetable means that between the approval of the regulations and the funding arriving to beneficiaries, more than two years will have passed. In 2016 some managing authorities are still in the process of being appointed, the majority of OPs have only been started spending, some interpretation notes eg on financial instruments are still pending. Such delay definitely jeopardizes the achievement of the overall objectives of cohesion policy and therefore its continuation for the future.

It should also be noted that part of the delays can be attributed again to the genuine national level of gold-plating. One of the best examples is the designation process: there is some evidence that Audit Authorities demand too much from the national and sub-national institutions which make the whole process much longer than necessary. MSs did not use the possibility of Article 124.2 underling that no additional audit work should be carried out if the management and control system is essentially the same as for the previous programming period and it is functioning effectively.

Timing is not the only issue. The relevance and the actual need for such an extensive volume of secondary regulations seem to be as well key sources of complexity and legal uncertainty for the beneficiaries. The practice of member states to require clarifications on primary regulation thus generating many interpretation notes by the Commission has proved to create goldplating. Quite often member states feel the need to ask for more clarification and/or interpretation of the ESIF related regulations because they want to make sure they comply with the rules and avoid finding themselves in error. This programming period has a much higher volume of secondary regulation than the previous ones, and has therefore created many bottlenecks for the MAs and the beneficiaries. This is often linked to a tendency to interpret provisions of the ESIF primary regulations in a restrictive way and not consider that these provisions, constituting the cohesion policy legal framework, have been discussed during the trilogues and are already the result of a consensus among Member States. The paradox is that often guidance notes do not bring the expected effect because their provisions go beyond the content of the regulations or they interpret the regulations in a way that limits the application of the primary regulations or do not give clear answers for the questions posed. That is why the result is often the establishment of additional and complex procedures at the member states level in the parallel hope for a positive understanding of the auditors.

Possible ideas and questions for discussion

- ESIF legislation for post 2020 should be streamlined to a coherent package of regulations – now it is both difficult to read and understand the CPR alone and the specific regulations in addition.
- EU institutions should ensure they agree on the regulations to use for post 2020 by the end of 2018. This means that the European Commission should prepare a draft of the

ESIF legislative package by the end of 2016. The Council and the Parliament should make sure they will approve the package by mid or end of 2018.

- At the same time, secondary regulation should be prepared in parallel to the legislative co-decision process on the regulations and only adjusted later according to the final versions. This should concern both Commission's delegated and implementing acts as well as other documents of guidance nature. Audit authorities on EU and national levels should be involved, together with the EU institutions, in this process from the very beginning. If post 2020 cohesion policy will maintain a similar architecture to the current one, then secondary regulation should be consolidated and not replaced.

- There should be a strict deadline for the completion of OPs negotiation between OPs and member states as well as a fixed deadline for ex post controls on closed OPs.

- Concerning the relevance of interpretation and guidance notes, these should in general be heavily limited and should be replaced by a wide dissemination of good practices implemented in member states. The Commission should refrain from preparing guidelines which are valid for all 28 MSs on the basis of a request of o or few MSs who identified some problems with the implementation practice. And of course, each MS should refrain from asking for additional guidelines where it is possible to deal with an issue on a bilateral basis.

- It would also be important to introduce a non retroactive effect in the implementation of regulations or of interpretation guidance by the Commission, member states and audit authorities.

Public procurement

Implementation of public procurement's (PP) regulations belongs to another complex and very error-prone area within the implementation of ESI funds. The level of gold-plating here is therefore substantial - see report by ECA that shows that 48% of ESIF are spent through public procurement and shows high levels of errors in this field, and see CoR survey results on simplification.

Frequent changes to the national public procurement laws; inappropriate set up of the selection criteria in tenders; superficial assessment of the real needs and priorities, of the available budgetary resources and of the implementation risks; lack of planning regarding the acquisitions necessary for project implementation; difficulties in selecting the procedure (the most used procedure is open tender, regardless of the scope or complexity of the acquisition); incomplete, poor quality of tender documents; errors in the evaluation processes; incomplete award communication; paper justifications of expenses to be kept and for how long. These are amongst the most common errors (but also the most common fields of genuine national and sub-national gold-plating) in ESIF implementation as far as PP is concerned.

All Member States have now been in the process of transposing a new directive on public procurement. There is some potential in a renewed legal framework to make the PP more efficient and less error-prone but only time will say if the changes in the national public procurement laws will bring long-awaited simplification.

Nevertheless this report aims at looking at the existing bottlenecks and the gold-plating practices related to PP in ESIF.

It is important to remind that institutions and beneficiaries have to know and respect many regulations when using ESIF: beside the provisions stemming from the CPR, the specific funds regulations, the delegated and implementing acts and the guidance notes, there are also a few directives related to public procurement . These add up to the national regulations on public procurement that every state uses to precise the European regulatory framework. Their volume but mainly the complex articulation between European and national regulations often generate different interpretations namely in the framework of auditing procedures and have a negative impact on the work of managing authorities and finally on beneficiaries which are not always equipped with sufficient legal expertise. Not to forget that the ESIF regulations and the PP related regulations also add up to the state aids regulations. All this contributes to create an environment of legal insecurity and risks of errors.

Again the most visible driver of gold-plating is a **lack of proportionality** in application of corrections

which often is used as justification for excessive procedures intended to prevent small technical mistakes which have no or very little financial or economic impact.

Different interpretations of procurement rules provided by different levels (e.g. by the Commission or by national authorities like Public Procurement Offices, Audit authorities) lead to financial corrections that can financially harm particular types of beneficiaries (e.g. schools, municipalities etc.).

The disproportionality means also that the PP rules are enforced unequally – much stricter (and often not commensurate with the financial impact) for the EU-co-financed projects than for the projects financed though other sources. It is mirrored in the auditor's approach towards the implementation of the PP procedures in cohesion policy.

Possible ideas and questions for discussion

- The texts regulating PP should be directly applicable by member states (regulations instead of directives) in order to **avoid national transposition processes** and an overproduction of national regulations. The eligibility of expenses should for instance be established at the European level and not at the national level as it has proved to be an important source for delays and divergent interpretations.

  Still linked to proportionality, clear notions related to the definition of "procuring authority" should be clarified to safeguard proportionality and do not impose heavy PP related procedures and processes to organizations that would not fit in the definition of public authority.

- **Audits**: with regard to the auditor's approach, the following ideas could be discussed: 1) limiting requirements concerning expenditure of smaller values (less formalized procedures); 2) not duplicating public procurement assessments made by other institutions; 3) more ex-ante, preventive audits than ex-post in order to reduce the level of the financial corrections and to provide input for future procedures to be

launched. The auditors at all levels should apply more preventive, ex-ante and proportional audit whose main objective would be to improve the implementation and not to punish.

- **Retroactive effects**: any new decision by the European Commission that identifies applicable sanctions should not have a retroactive effect but should only concern those projects starting from the date of the decision. By the way it would be important to remind that interpretation/orientation notes by the Commission are not legally binding but cannot be the basis to justify/correct/sanction operations.

- **Capacity and training**: Introducing new national laws on public procurement is just the first step on the way to improve and simplify implementation of the PP rules. Nothing will work well if adequate resources are not planned for training of public officials and other people involved in the PP. Creating a joint DG Grow and DG Regio group on interpretation of rules could be very helpful.

- The Commission should assure that the requirements from the side of the PP procedures for the EU-funded projects are not more extensive than for the projects supported from different sources. This should be done for the sake of the general European interest since it concerns the opinion on the EU funds in general and not only cohesion policy in particular.

Monitoring and evaluation

The current programming period has introduced a result-led approach, which is a good innovation as it aims at improving the effectiveness of cohesion policy and helping to make the case for it to be continued after 2020. It is possibly the only EU policy with a very advanced monitoring and evaluation framework.

However, several bottlenecks are already being experienced by beneficiaries and managing authorities in their tasks of programme monitoring:

- There is a strong tendency to look at inputs instead of results and rather the logic of expense justification than the result led approach is applied by all counterparts.

- The different individual fund regulations foresee different provisions in monitoring, which generates complexity in the development of indicators, a frequent risk of errors, inconsistency between reality and the reporting result and above all objectives that are not reached within the performance framework. This divergence is particularly visible between the use of different types of indicators according to the funds and types of indicators (a result indicator in ERDF has a different objective in ESF).

- The volume of provisions as regards programme monitoring coming from both primary and secondary sources is massive, and guidance documents in particular seem to create more confusion (e.g. provisions on performance framework).

- Each operation is linked to a very high number of indicators. This has an impact on the complexity of the operation reporting for the beneficiary. Especially the set of indicators needed to be collected from each ESF projects' participant is burdensome and of very little informative nature (there are 28 output and immediate result indicators in

Annex I of the ESF Regulation and additional 9 immediate result indicators for each YEI operation). Therefore, regardless of the total value and the investment priority, each ESF project needs to collect 28 different pieces of data from each participant (in case of YEI – 37) in order to fulfill the EU obligations.

- Concerning the impact evaluations it is requested that they cover all the specific objectives of the OP. This means that the number of impact evaluations is disproportional.

Possible ideas and questions for discussion

- **Result led approach**: Those elements that do not reflect a result led approach (e.g. accounts and financial data) should be deleted or their number should be decreased to avoid double reporting. Also reporting mechanisms between ERDF and ESF should be aligned – this will need a regulation revision.

  Post 2020: simplify the allocation of the performance reserve.

- **OP monitoring**: There is a need for reducing the number of indicators. For common indicators - this will need a revision of ERDF and ESF regulations. Moreover, in case of ESF common indicators, adjusting the list of common indicators required to operations implemented under specific TO/IP could be a step forward in reducing administrative burden at project level.

  For specific programme indicators – this will not need a revision of regulations as Member States could revise their programmes in order to limit the number of indicators to the most indispensable ones.

  Moreover, Member States should not impose additional reporting requirements on beneficiaries. They should make the reporting easier with the use of IT systems. In case of ESF projects, national authorities should make the most of national administrative data (especially national registers) not to collect the same type of information from the participants for different purposes (inter-institutional cooperation to exchange the data on participants).

  Post 2020: harmonize the dates for sending out the annual reports amongst the different ESI funds, reduce the number of indicators and harmonize the indicators among ESIF.

- **Evaluation**: extend the principle of proportionality by reducing the number of impact evaluation reports.

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