

**4th MEETING of the High Level Expert Group
on Monitoring Simplification for Beneficiaries of ESI Funds**

Gold-plating

1. The members of the High Level Group agree that gold-plating practices are one of the main sources of administrative burden overarching the full spectrum of implementation fuelled by an atmosphere of distrust across the system of ESIF management and by a fear of non-compliance due to legal uncertainty.
2. The members of the High Level Group call on the Commission to address the following issues identified as the root causes of gold-plating:
 - a. delayed adoption of the legal framework along with excessive regulation and guidance with retroactive and universal (applicable to all Member States) effect;
 - b. State aid and public procurement compliance (different treatment of similar projects under shared management compared to those under direct management); and
 - c. audit practices (multiple and disproportionate controls, indifference to specificities, inconsistent interpretation of rules across all levels of authorities).
3. The members of the High Level Group consider it a shared responsibility thus call on the Commission and the Member States to mobilise relevant authorities at all levels for intensifying simplification efforts making better use of the existing regulatory framework and recommend that the Commission prepares a more coherent and harmonised future legislative package that better reflects the principles of subsidiarity, proportionality, results orientation and single audit, provides equal State aid treatment for shared and direct management programmes and ensures a timely launch of implementation.

Interim Report on Gold-Plating

from the High Level Expert Group on Monitoring Simplification for Beneficiaries of ESI Funds

Gold-plating is a widely used term in the context of the implementation of ESI Funds to describe the extra requirements and administrative burden imposed on Beneficiaries by national and sub-national authorities beyond those deriving from provisions at EU or national level. The report looks at gold-plating mainly as a safeguarding/self-protecting reaction by authorities to the complex articulation of national and EU provisions regulating ESIF.

Having acknowledged, based on the principle of subsidiarity and the system of shared management, the evident need for additional rules and requirements at Member State level to embed the rules governing the implementation of ESI Funds in national legal frameworks, the members of the HLG distinguish from the above the practice of “gold-plating” and consider it a significant obstacle with regard to the access to and efficient implementation of ESI Funds.

On the basis of the report on gold-plating presented at the 4th Meeting of the High Level Group (HLG) on 21 June 2016 the members of the HLG have drawn conclusions and formulated recommendations to mitigate the negative impact of additional burden placed on Beneficiaries of ESI Funds

Conclusions:

Members of the High Level Group recognise the efforts demonstrated by a number of Member States to make best use of the existing provisions (e.g. simplified designation and e-cohesion) in reducing administrative burden and preventing delays in the launch of implementation. They underline the importance of identifying and disseminating replicable best practices and call on the Commission to strongly encourage such exchange among Members States to remove barriers and improve the uptake of existing simplification measures.

The members of the High Level Group agree that the most effective way to tackle gold-plating is to address the main factors leading to such practices. They identified the following factors as the driving forces behind gold-plating practices:

- general lack of trust across the system of ESIF implementation precluding preventive collaboration;
- risk-averse approach deriving from experience with previous audit findings;
- lack of coherence across interpretation answers from different DGs of the Commission and across different levels of audit authorities (ECA, the Commission, national and subnational level); applying this interpretation in practice is made even more difficult by the fact that sometimes even the same regulations use different terms for the same issues;
- persisting gaps in the harmonisation of rules across all ESI Funds that are relevant for their coherent administration;
- fear of non-compliance with State aid rules;

- different approaches between the EU and national level on public procurement policy with EU requirements focusing on transparency but national rules focusing on value for money; and
- divergent national administrative cultures in the context of ETC programmes.

Recommendations to the Commission for the 2014-20 period:

The members of the High Level Group agree that the negative impact of additional burden placed on Beneficiaries in the area of **management and control** could be addressed by the following actions:

- Auditors at EU and national levels, including the Court of Auditors, should detect redundant processes and procedures as part of their audits and suggest more effective solutions based on good practices.
- The knowledge of the Commission's auditors about different procedures in different countries should be used in a more effective way to indicate gold-plating in each Member State and provide examples of good practice to those Member States.
- The members of the High Level Group encourage Member States to self-review their management and control systems with a view to detect and eliminate gold-plating.
- The Commission's and the ECA auditors should take into account specificities of different implementation modes and mechanisms (grants, financial instruments, simplified costs, etc.) when formulating audit findings and recommendations.
- With regard to ETC programmes, auditors should contribute to a systematic comparative analysis of rules and procedures applied in each Member State involved. The synthesis of findings should on one hand be incorporated in the recommendations from the Commission towards Member States pointing out unnecessary regulatory or administrative burden. On the other hand the Commission should ensure the dissemination of identified good practices among Member States.

Regarding application of **State aid** rules, the members of the High Level Group recommend that the Commission considers proposing amending the applicable rules where necessary for ESI Funds so that similar projects are treated in the same way as those funded from EFSI and from programmes directly managed by the Commission such as Horizon 2020.

Concerning the relevance of interpretation and guidance notes as well as questions & answers documents, the members recommend that these should be limited, so they do not become another layer of de facto **legislation**, and replaced by a wide dissemination of good practices. The Commission should refrain from preparing guidelines which are valid for all Member States on the basis of a request or problems in one or a few Member States. In addition, they recall their recommendation in the context of access to EU funds for SMEs that any clarifications on the implementation of regulations or interpretation guidance by the Commission during the programming period must not be retro-actively applied for all operations and beneficiaries.

Concerning the coherent/consistent **interpretation**, the members recommend that:

- the auditors and other officials from the Commission (all DGs) as well as national auditors apply the same interpretation of rules and the same approach to all MSs and share regularly the information during EGESIF meetings or annual meetings with the Member States to bring preventive effects.

- Amending Article 28(2) of the Commission Delegated Regulation 480/2014. At this moment the provision requires that any operation should respect the rules applicable as of the day of the audit which generates uncertainty about possible changes of rules. The HLG members propose to amend this provision so that the operations are required to respect the rules applicable as of the date of signing of the contract with the managing authority.

To address the different approaches to dealing with **public procurement** rules the members of the High Level Group recommend that:

- The Commission should further support the Member States by creating a joint group consisting of DG Grow/DG COMP and the DGs of the ESI Funds on the interpretation of public procurement and State aid rules to ensure consistent advice and the uniform approach concerning application of financial corrections.
- The Commission should ensure that the requirements for projects funded by ESI Funds do not go beyond what is required for the projects supported from other sources.
- The Commission should ensure legal consistency between State aid rules applying to ESI Funds and public procurement rules.

In order to ensure that **monitoring and evaluation** requirements are focused on the information really needed to determine the performance and results of the programmes, and to avoid adding extra reporting burdens on the beneficiaries, the members of the High Level Group consider that the Commission should review the reporting requirements and the indicators in the fund-specific regulations. Those elements that do not reflect a result-driven approach should be deleted or frequency of collection of such data should be reduced to avoid double reporting. Reporting mechanisms between ERDF and ESF should be aligned. The number of common indicators required for ESF operations implemented under specific thematic objectives and investment priorities should also be reduced as a step forward in reducing administrative burden at project level.

Recommendations for the common action of the Commission and the Member States for 2014-2020 period:

- The scope of the different levels and threshold of audits should be clearly defined and clarified in order to avoid multiple and disproportional controls on the same operation (extension of the proportional control with a single audit principle: for example, expanding the scope of Art. 148 CPR to all types of controls, including those conducted by the managing authorities, the certifying authorities, the Court of Auditors and raising the thresholds below which an operation is subject to only one audit). Amounts and risks should be the actual rationale behind multiple controls.
- Auditors at all levels should, where possible, apply more preventive, ex-ante and proportional approach to audit with the main objective to improve the implementation and not to punish. The representatives of the Commission / auditors should prepare and on regular basis update a database of questions and answers of Member States, applicants or other bodies (Q/A) concerning the most problematic areas, e.g. public procurement, State aid, financial instruments and integrated approach etc. and share a summary of the main findings from audit missions among the Member States.

- Linked to the issue of proportionality, a clear definition of "contracting authority" should be provided by the relevant authorities to safeguard proportionality and ensure that heavy public procurement processes to organizations are not imposed on those organisations that would not fit in the definition of public authority.
- Further capacity building and training for public authorities should be planned on the new public procurement rules.
- The Commission and Member States should not impose additional reporting requirements on beneficiaries but should make the reporting easier with the use of IT systems. For ESF projects, national authorities should make the most of national administrative data (especially national registers) to collect the same type of information from the participants for different purposes (inter-institutional cooperation to exchange data on participants).
- The Commission should help the Member States simplify the application procedures/forms for beneficiaries by identifying and promoting good examples of efficient application procedures.

Suggestions for further reflection for post 2020:

The members of the High Level Group consider that the Commission should take the opportunity to reflect on the shared management system and examine how subsidiarity and proportionality could be strengthened and where best practices from the directly managed system could be used in order to simplify implementation.

Subsidiarity should be better applied in the implementation of ESI Funds leaving it to programme authorities to verify the respect of national rules. In the new setting, Member States should make full use of the simplification options provided in the new period and refrain from gold-plating in the national context. Apart from a few areas (e.g. areas with a high error rate, new and innovative mechanisms and instruments) where the responsibility could remain at EU level, national rules and systems (i.e. national auditing authorities) should be used. If the latter prove they can fulfil this role (e.g. through the designation process or proved compliance with the European and international audit requirements, or some kind of another "quality check" by the Commission) EU auditors could refrain from controlling individual projects and could concentrate on auditing the existing national frameworks and systems and on performance of the programmes.

If subsidiarity is respected the interpretation of the regulations would not generate legal uncertainty as it does today. They should consist of common rules applicable to all levels of the audit pyramid defining how, but mainly on what issues and when projects would be audited. In order to increase the level of legal certainty for beneficiaries and predictability of rules, some of the recently proposed ideas of "joint audit framework" or "joint interpretation compacts" between managing authorities and audit authorities (with the participation of the Commission) should be examined further. 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 addition, the members of the High Level Group recommend that the Commission consider the following recommendations when preparing the framework for post 2020 period:

- The EU institutions should ensure they agree on the regulations for post 2020 well in advance of the start of the next period and ideally by the end of 2018. The proposals should take into account also the results of the ex-post and mid-term evaluations.

- ESIF legislation package should be streamlined to a coherent package of regulations and further harmonised to ensure one set of clear rules for all funds. Where they support similar projects, and without prejudice to different goals of cohesion policy and directly managed programmes, the requirements applicable to ESIF should be aligned as far as possible with other funds and centrally managed programmes so they do not compete with each other exploiting regulatory advantages.
- Secondary legislation should be prepared in parallel to the legislative co-decision process on the regulations and when necessary adjusted later according to the final versions. This should concern both Commission's delegated and implementing acts as well as other documents of a guidance nature. The legal requirements and the interpretation guidance should be tailor-made to the size of the financial support (in the case of ETC the management and control requirements should be adapted to the complexity of these programs but also to the small amounts of the funds available).
- The Commission should consider the translation into all the EU languages of all relevant texts, including guidelines.
- There should be a strict deadline for the completion of programme negotiations between the Commission and Member States as well as a fixed deadline for ex-post controls on closed programmes.
- The Commission should consider proposing specific State aid rules for ESI Funds that would see projects treated in the same way as those funded by EFSI and by programmes directly managed by the Commission such as Horizon 2020.
- Notwithstanding the above recommendation the Commission should allow for the following:
 - ✓ The exercise to ensure compliance of ESIF-programmes with the State aid regime should become lighter. It could be envisaged to create a fast track procedure where compliance with ESIF rules through the Commission decision on operational programmes could imply a certain degree of State aid compliance as well. Exemption of ETC from State aid rules, which would reflect current treatment which cross-border projects already enjoy in Horizon 2020, is unlikely to have negative impacts on the trade between Member States;
 - ✓ The requirements for State aid and ESI Funds should be aligned to ensure that two separate systems are not required for example concerning the retention of documents, simplified costs, revenues, financial instruments, etc.; potentially a single document could be developed to define common obligations in terms of selection, management, justification and reporting procedures.