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DRAFT OPINION

Simplification of ESIF from the perspective of Local and Regional Authorities

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Deadline for tabling amendments:

3 p.m. (Brussels time) **on Friday, 23 September 2016**. Amendments must be submitted using the online tool for tabling amendments (available through the Members' Portal at <http://cor.europa.eu/members>).

Number of signatures required: 6

Reference document

Draft opinion of the European Committee of the Regions – Simplification of ESIF from the perspective of Local and Regional Authorities

I. POLICY RECOMMENDATIONS

THE EUROPEAN COMMITTEE OF THE REGIONS

1. stresses that ESIF is one of the few EU instruments to have a direct, concrete and tangible impact on citizens' quality of life through hundreds of thousands of projects implemented all over Europe and so be capable of improving their overall opinion of the EU. at a time when its popularity is declining. Therefore, this instrument should be further maintained and developed in accordance with its key objectives and principles. On the contrary, ESIF – and cohesion policy in particular – should undergo a process to increase its effectiveness and added value, with the aim not only of achieving the EU's targets and the Europe 2020 strategy, but also benefiting the citizens and thus improving their perception of the EU. Perhaps one of the most important ways of achieving this is by simplifying the overall ESIF implementation system and increasing its flexibility;
2. warns that the procedure for using ESIF is getting more complicated not just with every programming period, but virtually every year. The Committee therefore very much welcomes the initiative of Corina Crețu, the current regional development commissioner, which underpinned the European Commission's efforts to seriously address simplification by not only setting up a high level group, but also inviting other partners to debate the issue. The CoR also points out that not only ESIF, but all EU policies, should undergo a process of simplification;
3. notes that part of the simplification process has to be to focus on making the fundamental idea and spirit of cohesion policy a reality – and this is regional policy. It observes that cohesion policy in its current form is gradually moving away from regional policy and increasingly dealing with issues at national level. This is apparent, for example, from the fact that individual partnership agreements are based on the National Reform Programmes. Moreover, cohesion policy is subject to a large number of conditionalities at national level, which cannot be influenced by local and regional authorities and other beneficiaries, who are effectively "held hostage". Cohesion policy is becoming increasingly complex and complicated, mostly due to the lack of trust among different political and administrative levels. This complexity, in turn, contributes to growing disparities in regions' development;
4. points out that the CoR represents local and regional authorities, which tend to be the final beneficiaries or the last links in the chain in the management of ESIF's implementation procedure. It is clear from this role played by local and regional authorities that their insights and suggestions should be prioritised as part of the simplification process;
5. emphasises that for simplification to really work, it needs the active involvement not just of DG REGIO and DG EMPL, but other Commission services and EU bodies as well (such as DG COMP and audit authorities). The system must be simplified for both, the beneficiaries as well as administrative authorities;

6. recommends that the simplification process focus on reducing the red tape that is a burden to implementing bodies and on making the audit, reporting and certification of expenditure process less complex;
7. recommends that simplification should be approached systematically, and therefore feels that it would make sense to come up with a methodology for it, along with indicators to measure implementation and success. A distinction needs to be made, therefore, between two kinds of results: those where the insights and proposed solutions can be implemented immediately, and those that will be used in the next programming period. For the current programming period, given the ongoing implementation of operational programmes, far-reaching legislative changes are not realistic in the interest of legal certainty. Nevertheless, immediate actions should be envisaged through changes in implementation practices and non-legal requirements, better cooperation and more effective guidance as well as minor adjustments to the legislative framework of cohesion policy and related legislation. The simplification process should also be structured – according to fields (transport, environment, etc.), funds and the target areas within them (ERDF, ESF, etc.), level (national, regional, urban, local and borough), and the stakeholders involved (public, private, NGOs, etc.) – and the emphasis should be on seeking links inside and outside this structure and simplifying inter-institutional relations between the different levels of government involved in implementation;

Basic questions and factors to determine what simplification is for:

8. emphasises that it is important for the success of the whole simplification process to answer these basic questions:
 - Who are we simplifying for?

The CoR considers the target group to be final beneficiaries first and foremost and only then other bodies involved in implementing ESIF from the grass roots upwards, starting from local authorities which are delegated to act as implementing and/or intermediary bodies in the operational programmes.
 - Why are we simplifying – what is the purpose?

The CoR takes the view that the main purpose of simplification is to facilitate the launch and implementation of creative projects that help to further territorial development, a sense of belonging in the EU, competitiveness and quality of life, and that therefore ultimately contribute to the development of the EU as a whole and the fulfilment of the Europe 2020 strategy. The aim of simplification is not to increase or facilitate spending of ESIF resources, but to increase the effectiveness and creativity of projects, while at the same time making them easier to develop and implement and less risky for beneficiaries.
 - Why has the system become so complicated?

The CoR believes that the increased complexity of the system is essentially due to the effort to incorporate particular findings and observations into the general guidelines and templates, in an effort to unify the system. Spotlighting the fight against corruption and achieving greater transparency at all costs also play a part. The CoR feels that insufficient emphasis is placed on examining the adverse effects of specific measures and (albeit well-intentioned)

interventions into the system on other measures. Lessons from one case cannot necessarily be transferred and extrapolated to others.

9. does not consider as simplification:

- Reducing the number of pages of regulations and guidelines.
In some cases simplification actually involves developing more detailed regulations that clearly define the issue.
- Reducing the powers of the Commission and, in particular, DG REGIO.
In many cases it makes sense, in the interests of a uniform approach and interpretation throughout Europe, for the European Commission to have increased powers so that other implementation levels do not adopt divergent and uncoordinated interpretations and approaches. Moreover, DG REGIO should have greater authority than the rest of the European Commission and other EU institutions in matters related to ESIF. This is because a certain number of difficulties have resulted precisely from a lack of coordination between the different directorates-general and the other EU institutions (DG COMP, audit authorities, and so on).
- Designing more harmonising documents and templates.
We need to gauge whether steps taken in the given area in previous years really have made for greater efficacy, and to evaluate these steps. If we want to achieve simplification, it will be imperative delete and abolish guidelines and general models and relax the implementation process instead of hampering it.

10. does consider as simplification:

- Setting rules that make it possible to fulfil general targets by using different and more creative projects and approaches.
- Instituting and applying a principle of mutual trust between institutions and individual stakeholders taking part in the implementation process.
- Reintroducing greater flexibility for beneficiaries and more scope for implementation at regional level while facilitating a direct working relationship and greater communication between the European Commission and beneficiaries, where the situation cannot be solved at national level;
- Ensuring that relationships between managing authorities (national or regional) and local authorities (beneficiaries or implementing bodies) are more flexible and simplifying audit rules and the process for monitoring, reporting and certifying expenditure;
- Adopting a regulatory framework that can be adjusted to the level of governance and the scale of the project on the one hand, and on the other to how well the implementation system works in the Member States;

11. emphasises that simplification is the means and not the end and that it should therefore not finish with implementing a few measures or with a report or an opinion, but ought to be a continuous process;
12. warns that many beneficiaries feel that using ESIF at the present time is a "risky business", since they have no guarantee they will not fall victim to a "force majeure" – that is to say, that funding for their project will not be scrapped or held up because of some dispute between their country and the Commission, perhaps about not meeting conditionality requirements, for example, or errors in the implementation system. And even when the beneficiaries' project has achieved its aim and effect, support could still be reduced or postponed for a variety of minor errors or because there have been objective grounds for changing the project in the course of implementation. They also face the danger, among a raft of other risks, that the findings of the audit authority on some other project will also be applied retrospectively to them. These elements all influence their willingness to use ESIF funds effectively;
13. believes that it would be a major simplification if all EU funds applied the same eligibility rules;
14. suggests creating an ombudsman-type institution for ESIF, which beneficiaries could turn to as a last resort; due to the complex nature of the system, many beneficiaries, despite making an effort to deliver projects so they have the greatest possible impact, find themselves, paradoxically, in difficult situations that are not only devastating for them in economical and non-material terms, but also do much to foster the dim view the public has of ESIF and of the EU as such. This institution should not be geared solely to communications with DG REGIO, but particularly on addressing ESIF matters across the whole of the European Commission and other EU bodies. Such an institution is missing at EU level, although a raft of other DGs and other bodies get involved in the ESIF issue. It would also make sense for similar institutions to be established nationally;
15. considers it essential to avoid retroactive findings. Current rulings and changes to procedures or guidelines should not be applied retroactively to other projects, even incomplete projects that are at an advanced stage of implementation. The prevention of retroactivity is a measure that can be applied quickly and that will reinforce legal security for beneficiaries;
16. advises that the simplification process include reforms to facilitate greater flexibility because the growing complexity of the processes is mostly caused by decisions that are specific to certain projects being incorporated into the general guidelines and directives. To this end, the CoR advises that a working group should be set up made up of specialists in the practical implementation of ESIF to put forward proposals on changes and discuss them with the European Commission and other bodies;
17. warns of frequent cases of discrepancies between the EU's legal framework for ESIF and national legislation in apparently unrelated areas, such as flaws on financial control or public procurement, which causes fragmentation and different approaches in various Member States; recommends therefore that EU legislation and guidelines should take precedence over national

legislation because ESIF uses EU and not national funds, even though co-financing is provided from national or sub-national resources;

18. proposes that examples of good practice be transferred from countries and programmes that in the past had negligible or low error rates. At the same time, care needs to be taken that the conditions are the same for all countries (even though national legislations differ). At present, different territorial units often have diametrically opposing approaches. Situations arise, in fact, where what is considered a correct and routine approach in one country is seen in another as seriously flawed;
19. points out that if the simplification process is to succeed, the task we face is to reconcile measures combating corruption and reducing error, on the one hand, and cutting the administrative burden of ESIF on the other. Individual measures that are introduced over time to guarantee transparency and fight against corruption significantly complicate the entire system. We need to verify *a posteriori* which of these measures really work and which merely complicate the system and criminalise honest beneficiaries for trivial errors. The fight against corruption should not mean that we treat every beneficiary *a priori* with mistrust. It should be based on trust, cooperation and clear accountability. The fight against corruption should be underpinned by basic moral principles and accountability for achieving what the beneficiary has undertaken, and not on using errors detected to design an inflexible template that – on the contrary and often ineffectively – will bind other beneficiaries. Concentrating just on meeting formal requirements and schedules could in fact itself lead in some cases to funding being taken up expediently or improperly – and with impunity;

What the issue involves:

20. following discussions held internally and with other partners, identifies these key elements of the issue that need to be resolved.

Procurement:

21. There should be clear EU-wide rules for public procurement under ESIF which would take precedence over national legislation in this area. These are mostly EU and not national resources and therefore calls for tender should be governed by EU-wide and not national rules. In addition to this, the procedures for public tenders should help to deliver the most effective end product and, to achieve this, provide the various types of tender with an element of flexibility, instead of hamstringing the contracting authority and the applicant in a purely formal way in various binding, standardised procedures and processes. Among other things, the value threshold for publication on the public procurement portal and in the Official Journal of the EU should be raised.
22. The current system is so complicated and risky that smaller contracting authorities are not in a position to draft public tenders themselves and have to use the services of external specialist companies, though this does not exonerate them from responsibility for possible errors. This has created a whole new industry. The paradox is that in some instances selecting a company to draft the call for tenders itself requires a call for tender.

23. Most errors in public procurement are genuine mistakes resulting from complex rules. As a result project promoters are frustrated by ex-post audits, which often arrive at a late stage in proceedings, when fixing mistakes is no longer possible and when they do not even have the possibility to ask for a provisional binding ruling. The CoR therefore suggests that audit opinions and other control procedures for public procurement should be performed primarily ex-ante in order to anticipate errors, which are very frequent in this area in particular, and thus reduce the number of financial corrections.
24. It should also be noted that the legislation for the process of assigning contracts focuses on the contracting authority, who is also sanctioned and persecuted for the slightest error, whereas most harmful interference in the results of public procurement takes place on the basis of agreements between tenderers. In areas and segments in which the market is overwhelmingly monopolised, the current public procurement system does not work and is even counter-productive. This is why it would be wise to completely reassess the philosophy of the entire system.

State aid:

25. The question of state aid has become much more complicated over the years and, despite a partial improvement in some programmes recently, the situation remains very complicated for beneficiaries and managing authorities. As we speak, there is no clear, comprehensible interpretation of state aid, with judgements everywhere being based solely on applications and findings. The national authorities tasked with interpretation often have diametrically opposed views and are usually unwilling to issue clear-cut and binding opinions. In a number of countries these authorities are not part of the ESIF implementation system and no clear accountability attaches to their opinions. Moreover, in some cases, paradoxically, operators in the private sector tend to be in a better position than those in the public sector, with a number of guidelines, regulations and measures they are not required to follow.
26. It is important that the recently released Guidance for Procurement for ESIF (Guide on public procurement) is urgently reviewed as it refers to the old directives and not to the new Procurement Directives that were approved in 2014 and which entered into force earlier this year. In that respect it is essential that input into the new Guidelines is subject to a proper Territorial Impact Assessment that enables direct input from local and regional experts. This is foreseen in the Better Regulation Package, which recognises the role of the CoR as key partner in better scoping local and regional impacts of EU proposals.
27. There is also another important inconsistency in the application of state aid rules. While programmes managed centrally by the European Commission (such as Horizon 2020, CEF and the European Fund for Strategic Investment) are exempt from state aid procedures, funding under the EU's cohesion policy is not exempt. In terms of state aid, then, projects are not in practice judged on their merits but according to the source of their funding.
28. In this context, the CoR wishes to point out that the basic purpose of cohesion policy is to ensure equal conditions for less developed regions – by providing more funding and a higher

rate of co-financing from the EU. It is therefore possible to view cohesion policy as deliberate market distortion. This is why the CoR believes that the procedures that apply to state aid should not in any way apply to ESIF.

29. Particular attention should be paid to the application of state aid under European Territorial Cooperation programmes. Generally speaking, the effort needed to comply with state aid rules is disproportionate to the risk of distortion of competition. Moreover, state aid is often subject to different interpretations in different Member States and it is therefore not possible to apply these rules with adequate legal certainty, which often makes it quite impossible to carry out high-quality projects. One measure that could be implemented quickly in order to simplify ESIF would be to remove European Territorial Cooperation from the area of application of state aid rules, as is the case for the Horizon 2020 programme, for example.
30. There is also an issue of clarity and proportionality. Given the small scale of some projects, particularly at local level, it is important that the framework of exemptions from state aid rules is made clearer for practitioners. At the moment there is often confusion over when and how the de Minimis, Service of General Interest, General Block Exemption and Regional State Aid Guidelines operate. The European Committee of the Regions calls for a better, user-friendly consolidated guidance to be developed already during this programming period and calls for the forthcoming revision of the State Aid rules to improve and simplify the existing framework.
31. Given the revised approach to defining an enterprise, supporting jobs, innovation and business in the regions also requires raising the aid ceiling in line with the de minimis rule.

Monitoring and audits:

32. Lack of consistency in audit methodologies at national and European level is perhaps the biggest challenge for the ESIF implementation process. Managing authorities and different European and national audit authorities frequently arrive at different interpretations of the same rules, while at the same time they are not in any way liable for the audits that are carried out. ESIF projects should be subject to a single audit system (a one-stop shop) at Member State and EU level that will issue a binding opinion - including on public procurement and be accountable for it. The final beneficiary himself should also have the right to request audits so that he can be sure that implementation has been carried out properly and no danger looms in the future – or so that he can make corrections. This also requires a more flexible approach to data sharing and integrated IT solutions such as electronic forms and databases as a precondition to developing a one-stop shop that reduces the form filling burden for beneficiaries and managing authorities. However, this requires a prior risk assessment on what and which data can be shared and also requires the involvement of the Commission, national and regional audit bodies as well as the European Court of Auditors from the outset, perhaps developing a common Audit Vademecum, to avoid audit issues further down the line. As things stand, auditing is seen as a punitive enforcement measure. As a rule, audits only address the administration of the project and compliance with the procedures laid down and any deviation is severely punished, even if carried out to improve the effectiveness of the project, due to unforeseeable circumstances, or to save money. The CoR therefore proposes that auditors focus on the real cost efficiency and take into consideration the financial seriousness of the mistake and the particular situation (more

proportionality in controls and audits). Proportionality should be added to the inspections and compliance rules by enabling higher tolerance levels to minor infractions. We should move towards a more proportionate (with less on-the-spot checks for better performing programmes or delivery bodies) and an outcome-based approach to inspections (so that more than one type of inspection can be carried out on a single visit, something which is particularly important for multi-fund programmes and operations), as well as a more proportionate audit focusing less on penalties and more on improvement and in ensuring the broader outcomes of Cohesion Policy. The auditor should be looked upon as a partner in solving problems and searching for the most effective way to identify and rectify mistakes. This requires a very different attitude from auditors.

33. Administrative and audit authorities should work hand in hand from the programming phase until the conclusion of programmes, as this is the only way to prevent different interpretations of the same rules. A common control system or a common understanding of the control system we should be aiming at should prevent the same operation being audited several times, since different audit authorities should, as a rule, build on and complement each other's opinions.
34. Where projects involve several partners, it is unacceptable that, because of irregularities discovered in connection with one of the partners, the whole partnership or, in an extreme case, the whole programme should be penalised with a financial correction.
35. A single, understandable and rapid appeal system should also be put in place both at Member State level (where this does not exist) and at EU level. This system should apply not only to audit findings, but to decisions at all levels and in all areas (such as state aid).

Increasing regulatory burdens (gold-plating):

36. The practice whereby Member States go beyond the minimum requirements when transposing EU legislation into national law is supposedly a problem of the Member States and not the European Commission. Nevertheless, the reason it happens is because the Commission's regulations and implementation guidelines allow for it. If the intention is to reduce the practice to a minimum, the Commission must be given a stronger role in this area. It must clearly stipulate in its regulations and implementing guidelines clear absolute requirements that can be neither tightened nor loosened. This applies to public procurement and auditing, among other fields. ESIF resources are EU funds, so the rules should be set by the EU and not the Member States.
37. Additional regulatory burdens also occur because in many cases the implementation guidelines are not drafted at European Commission level until the programmes are being carried out. Member States and managing authorities are therefore forced to develop their own guidelines, which are different from those that the Commission publishes ex-post. As a result, regulations regarding ESIF must be drafted at the same time as the guidelines, and not afterwards as a means of clarifying and interpreting the way that each of the different articles of the regulation should be interpreted. This approach often results in a delay of more than a year in taking up operational programmes and in additional revisions that again adversely affect the level of ESIF take-up. There must not be too many guidelines and methods so that the system does not

become more complex and ineffective. They should be unambiguous and should not be changed in the course of implementation. On no account should guidelines be retroactive.

Programming and thematic concentration:

38. It would be expedient to examine to what level programming and thematic concentration should be carried out. Currently, programming impacts on every level of implementation right down to the grass roots. For this reason general goals should be set, as part of a thematic focus, together with the main indicator for how well each of them is being met. Managing authorities should be given leeway as to what activities will enable them to achieve this goal in this or that region. If the goal is to create more jobs, some degree of latitude should be made possible regarding what resources are used to meet it. In some regions, depending on their level, work in areas such as research can help meet the goal; in others it might be tourism. Support for cross-border cooperation, in particular, which aims to integrate regions across borders, should take into account the specific needs of the cross-border region in question and so enable support for important activities beyond the thematic objectives of the EU2020 strategy. An example here could be the Small Projects Funds that support people-to-people projects, tourism and missing transport links. It would generally be worthwhile considering whether EISF conditions should apply to European territorial cooperation or should not in future again be managed as an initiative (similarly to Horizon 2000), as was previously the case with Interreg. It should be ensured that there is no decrease in financial allocations.
39. Programmes should be made more flexible so that they can react flexibly to new situations and to rapid technological development. This flexibility should be genuine, however. In other words, it should be possible to limit and simplify the whole process for amending a programme. The need, for example, to carry out a new SEA assessment should not be considered as genuine programme flexibility.
40. Regulation (EU) 1303/2013 has introduced two instruments that would provide an integrated territorial approach, i.e. Integrated Territorial Investments and JAPs (joint action plans), which would make integrated development of a particular area or region possible. However, the Member States have received very little encouragement from the Commission to use the instruments, not least in that they were defined by the Commission in its delegated and implementing acts in a somewhat vague and complex way. Greater implementation of the two instruments would result in:
- a partnership approach to framing development policy for individual areas,
 - effective implementation of measures according to the bottom-up principle, along with synergies that are easier to achieve in a smaller subnational area,
 - an additional basis for direct approval of an integrated project as well as direct allocation of funds, thanks to clearer definition of the aim and rationale behind individual elements of the integrated approach, and
 - more effective and efficient achievement of cohesion policy objectives;
41. In the case of integrated territorial investments (ITI), management systems are required that are totally out of proportion to the amount of financial resources this instrument dispenses. Equally,

as highlighted by the Committee opinion on Community Led Local Development (CLLD), the number of separate rules that are required to comply for each fund, which are also often run by separate Managing Authorities, act as a disincentive to develop a CLLD beyond EAFRD. This results that these very innovative integrated local development tools have seen so far a limited deployment on the ground. The need to create these systems not only makes managing the instrument disproportionately more expensive and weighs heavily on those involved, it also significantly complicates and delays the implementation of the projects.

42. notes that the fact that cohesion policy rules are changed on a seven year basis or even more frequently has not helped to simplify cohesion policy but rather had the opposite effect. Smaller, beneficial changes in the cohesion policy implementation system are always possible and desirable, but more substantial changes should be introduced less frequently and prepared well in advance. The impact of these changes should be analysed in advance and, respecting the partnership principle, be discussed in advance with the relevant partners, who are not just the Member States, but also the local and regional bodies represented by the Committee of the Regions.

Concluding recommendations:

43. proposes that for the purposes of simplification a file of projects showcasing the complexity of the delivery system should be opened and constantly updated. This file would serve to illustrate the need to simplify and adapt the approach and would complement the exchange of best practice regarding the implementation of ESIF;
44. notes that pursuing the principle of partnership with local and regional authorities more readily in the design and throughout the implementation of ESIF would enable the European Commission to obtain feedback that would contribute in a decisive way to simplifying and increasing the effectiveness of the implementation process.

Brussels,

II. PROCEDURE

Title	Simplification of ESIF from the perspective of Local and Regional Authorities
Reference(s)	N/A
Legal basis	Article 307 TFEU
Procedural basis	Own-initiative (under 41 b) i) – Netherlands Presidency referral)
Date of Council/EP referral/Date of Commission letter	22 February 2016 (Presidency referral letter)
Date of Bureau/President's decision	9 February 2016 (Bureau decision)
Commission responsible	Commission for Territorial Cohesion Policy and EU Budget (COTER)
Rapporteur	Petr Osvald (CZ/PES) Councillor of the City of Plzeň
Analysis	1 June 2016
Discussed in commission	2 March 2016
Date adopted by commission	4 July 2016
Result of the vote in commission (majority, unanimity)	Majority
Date adopted in plenary	scheduled for 10-12 October 2016
Previous Committee opinions	<ul style="list-style-type: none"> - Opinion on the execution of the EU Budget (COR-2013-8129¹) - Opinion on the Sixth Cohesion Report (COR-2014-4896²) - Opinion on the outcome of negotiations on the Partnership Agreements and Operational Programmes (COR-2014-6248³) - Opinion on Financial Instruments in support of territorial development (COR-2015-1772⁴) - Opinion on Indicators for territorial development - GDP and beyond (COR-2015-4287⁵)
Date of subsidiarity monitoring consultation	

1 [OJ C 271, 19.8.2014, p. 53](#)

2 [OJ C 19, 21.1.2015, p. 9](#)

3 [OJ C 313, 22.9.2015, p. 31](#)

4 [OJ C 423, 17.12.2015, p. 35](#)

5 [OJ C 120, 5.4.2016, p.16](#)