



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL AND URBAN POLICY
Inclusive Growth, Urban and Territorial Development and Northern Europe
Estonia, Finland and Latvia
Head of Unit

Brussels,
H3/LF/ib D(2015) 5564874

Subject: Clarification on the suspensory effect

Ref: E-mail of 29 July 2015, Ares(2015)3298844

Dear Ms Rancāne

By the e-mail of the 29 July 2015 (our ref: Ares(2015)3298844), Ms Kulakova requested the Commission services to provide additional clarification on several questions regarding the closure process for the programming period 2007-2013.

In view of the length of the questions and to ensure a greater clarity on the issues raised, the reply is structured in the way that the questions received are reduplicated and the Commission views are provided after each of the section/sub-question.

Question (1, 1.1, 1.2):

In accordance with the point 8 of the Closure guidelines “For each operation that is the subject of a legal proceedings or an administrative appeal having suspensory effects, the Member State must decide, before the deadline for submission of the closure documents for the programme, whether the operation should be (wholly or partly):

- withdrawn from the programme and/or replaced by another eligible operation before the deadline;
- retained in the programme.

For those retained operations (Article 95 of the General Regulation), the Member State should inform the Commission of the amount that could not be declared in the final statement of expenditure, so as to keep a commitment open”.

1. Question on “suspensory effect”: please explain what is meant under “legal proceeding or the administrative appeal has suspensory effect” and your elaboration in your answer below “If on the other hand no suspensory effect is granted by the court, the project is not benefiting from the application of Article 95 and it may be considered as non-functioning project if it is not completed and in use”.

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1.1 Does it mean that “suspense” should be granted by the court in order to consider this requirement of suspensory effect fulfilled?

1.2 Do the Latvian authorities understand correctly that “suspensory effect” means that a project or activity is temporarily stopped?

Response (1, 1.1, 1.2):

For the application of Article 95 of the General Regulation, the Member State should demonstrate that the following three cumulative conditions are fulfilled:

i) There must be administrative appeals or judicial proceedings with regard to an operation co-financed under implementation.

ii) These appeals or proceedings have suspensory effect under national law or the Member State's judicial system.

iii) They prevent / have prevented the certifying authority from declaring expenditure.

On the basis of the above Article, suspensory effect may be granted not only by the court but on the basis of an administrative appeal. Further, it is for the national administrative or judicial system of the Member State to determine if, and the conditions on which, suspensory effect is granted by law or at administrative level.

The suspensory effect of a legal proceeding or administrative appeal means that the implementation of an operation is suspended until a legal or administrative decision is taken following the introduction of an appeal at either level.

However, an appeal without suspensory effect, but where the managing authority has decided itself that the operation should not proceed or a beneficiary deciding to continue the activities taking place under the operation at his own risks is not sufficient. In addition, internal administrative delays cannot be considered as having suspensory effect.

Only the amounts that cannot be declared to the Commission because of the suspension can be considered. This means that, if only part of the operation is affected, i.e. a contract within an operation subject to a suspension, only the value of that part (the contract) can be considered. The Member State should make an assessment of the amount that could not be declared, taking into account factors such as the duration of the suspension and the total duration of the implementation of the operation.

Question (2, 2.1):

2. To better illustrate and understand practical cases of the question above, the Latvian authorities have provided some examples. Please confirm or clarify whether the cases below or any elements of them can be qualified as operation that is the subject of a legal proceedings or an administrative appeal having suspensory effects:

2.1 Irregular expenditure: when the beneficiary does not agree with the decision of the intermediate body on the irregularity and imposed financial correction and appeals:

i) to the court;

ii) or to the managing authority;

iii) or to the same intermediate body (IB) or hierarchically higher institution.

Response (2, 2.1):

This depends on the national system of the Member State. There is a suspensory effect if the legal (in the case of an appeal to the Court) or administrative appeal (in the case of an appeal to the managing authority, IB or the hierarchically higher institution) introduced by the beneficiary has the effect of suspending the implementation of the operation until

the conflict is resolved. This would need to be justified by a decision on the basis of a legal or an administrative provision providing for suspensory effect in such cases.

Question (2.2):

2.2 Irregularity: when the intermediate body and the beneficiary do not agree with the opinion of the audit authority regarding the finding/irregularity, therefore the recovery procedure is not initiated by the intermediate body. There follows a lengthy contradictory procedure when the beneficiary and the intermediate body provide additional information and clarifications to the audit authority.

Response (2.2):

Disagreements between an intermediate body and the audit authority would normally not have suspensory effect. It would depend if the disagreement is pursued before the courts or administratively and such proceedings have a suspensory effect.

Question (2.3):

2.3 Investigation on suspected fraud by the Corruption Prevention and Combating Bureau.

Response (2.3):

Whether an investigation on suspected fraud by the Corruption Prevention and Combating Bureau has suspensory effect depends on the national system of the Member State.

Question (2.4):

2.4 Lengthy dispute between the beneficiary and the contractor, i.e. when the beneficiary does not agree with the contractor on the issues regarding the contract implementation and thus project cannot be fully completed (either not all payments done, some payments withheld until resolution of dispute or no possibility to ensure functionality of the project due to the contractor's activities), e.g. within the road construction project there is a dispute between the beneficiary and the contractor on the penalty which has been applied for non-compliance with the period of the validity of the contract. Currently the construction of the road is completed and the road is continuously in use, but because of dispute between the beneficiary and the contractor the certificate of acceptance of the road has not been issued and the road has not been put into service officially yet. The case had been taken to the court.

Response (2.4):

Simple disputes taking place between a beneficiary and a contractor would not qualify as administrative appeal or legal proceedings unless there is an appeal procedure having suspensory effect on the implementation of the operation and this suspensory effect results from a legal or administrative provision or decision foreseeing such suspensory effect.

Operations suspended due to an administrative appeal or legal proceedings are not granted an extension to the final date of eligibility of expenditure which means that any expenditure incurred and paid by the beneficiary after 31 December 2015 is not eligible. Operations not completed or not functioning by 31 March 2017 may be granted a two year extension for their completion by national funds if they comply with the conditions under section 3.5 of the Closure Guidelines.

Question (3, 3.1):

3. If a beneficiary has suspended payments to a contractor due to the dispute on the terms of agreement even though otherwise the expenditure under the payment fulfils the eligibility requirements (legal, for actual works done). According to Commission's explanation, in case if the final payment is transferred to the contractor after 31 December 2015 the expenditure of the final payment cannot be declared as eligible expenditure at closure.

3.1 Does it mean that the beneficiary has to pay the contractor all invoices/expenditures till 31 December 2015 taking the risk in order to be able to declare expenditures in the final payment claim?

Response (3, 3.1):

As stated above, if there is disagreement between the beneficiary and the contractor and an appeal having suspensory effect is introduced, the amounts that could not be declared to the Commission are protected from de-commitment (Article 95).

However, operations suspended due to administrative appeal or legal proceedings are not granted an extension to the final date of eligibility of expenditure: any expenditure declared to the managing authority must have been incurred and paid by the beneficiary before 31 December 2015. Expenditure incurred and paid by the beneficiary after the final date of eligibility of expenditure – 31 December 2015 – cannot be certified to the Commission and should be borne by the beneficiary or by the national budget.

Question (3.2):

3.2 What is the benefit for the Member State of the list of such suspended "projects/payments" practically if there will be no possibility to include the payments withheld into the declared expenditure later and have the EU co-financing?

Response (3.2):

Managing authorities should include eligible expenditure paid by the beneficiaries relating to operations subject to an administrative appeal or judicial proceedings in their final report using the template in Annex VII of the Closure Guidelines. At closure, if a managing authority cannot replace an operation suspended due to legal proceedings or an administrative appeal by another eligible operation, it can ask the Commission to keep a commitment open for the amounts that they might eventually have to pay to beneficiaries.

Question (3.3):

3.3 Does it mean that this option is not applicable if Beneficiary does not take the risk and does not pay at all (zero expenditure, excluding advance to the contractor) prior 31 December 2015? If there are only some part of payments done (excluding advances), then the project may be included in the list (Annex VII of the Closure guidelines) and only for these payments there may be EU co-financing open when the case resolved?

Response (3.3):

Yes. If the beneficiary does not pay before 31 December 2015, the expenditure is not eligible, even if the disagreement is resolved between 31 December 2015 and 31 March 2017 and it will not be possible to declare it at closure. If the beneficiary pays the amounts within the eligibility period but they cannot be certified to the Commission by 31 March 2017 then these amounts should be indicated in the Annex VII template.

Question (4, 4.1, 4.2):

4. Do the Latvian authorities understand right that if they want to retain in the programme (so as to keep a commitment open) the operations (expenditures on operations) that are the subject of a legal proceedings or an administrative appeal having suspensory effects, then:

4.1 they should inform the Commission of such expenditure amount providing the information according to the Annex VII of the Closure guidelines and

4.2 they should exclude from the whole declared amount in the final statement of expenditure the expenditures which will be indicated according to the Annex VII of the Closure guidelines (both - expenditure which are made after the last payment claim submitted to the Commission and expenditure which were declared in previous claims? Or they can retain this expenditure in the statement of expenditure, indicating the projects and the amounts according to the Annex VII of the Closure guidelines. (It is not clear enough from previous replies)?

Response (4, 4.1, 4.2):

Yes. Amounts indicated in the Annex VII template are eligible expenditure that the certifying authority has not been able to declare to the Commission due to on-going administrative appeal or legal proceedings. These amounts are therefore not included in the final statement of expenditure. A commitment will remain open for these amounts. Expenditure previously certified, declared and paid by the Commission should not be mentioned in the Annex VII template. Depending on the outcome of the legal proceedings, further payments will be made, the recovery of amounts already paid will be carried out or payments already made will be confirmed. Should an administrative appeal or legal proceeding conclude for instance that a beneficiary must reimburse the full grant it will be the responsibility of the managing authority to recover the unduly paid amount and to reimburse the EU contribution to the Commission.

Question (5):

5. Please elaborate the Commission's answer "For instance the Commission, the European Court of Auditors or OLAF could launch an investigation and propose financial corrections in principle any time. The Commission cannot give any final date as the timing and scope of its audit work is based on a risk assessment and the implementation of an audit strategy". Do the Latvian authorities understand correctly that the Commission, European Court of Auditors or OLAF may conduct an audit, launch an investigation and propose financial corrections also after 5 year monitoring period of the project and after 3 years post closure?

Please note that there is neither EU nor national legal requirements for keeping documents related to project or programme after expiration of the periods mentioned above. How practically these verifications may be facilitated if there will be no obligation to store the files or else simply there will be no file maintained?

Response (5):

The "five-year monitoring period" mentioned in the Member State question presumably refers to the period set out in Article 57(1) of the General Regulation on durability of operations. Articles 57 and 90 serve two different purposes: Article 57 relates to the obligation to ensure through sufficient monitoring that the investment made in an operation is durable whereas the purpose of Article 90 is to ensure the availability of documents should the Commission or the Court of Auditors need access to the related documents for audit purposes.

If the three-year period for retention of documents under Article 90 ends before the five-year period mentioned in Article 57, it does not affect the regulatory obligation to duly monitor the durability of the operation. The Member State should be capable of proving the compliance with the legal requirement at any time during the five year period. If the Member State fails to prove such compliance, a financial correction could be applied.

A financial correction for non-respect of the durability period is still possible after the three-year period for document retention or in the absence of Member State documentation on the project (e.g. through alternative sources like on-the-spot physical verification of the project and/or documentation provided by a third party) if auditors have evidence that Article 57 has been breached.

Question (6):

6. According to the point 3.5 of the Closure guidelines the Member State should monitor non-functioning projects closely and report to the Commission on a six-monthly basis on projects already completed, as well as on the measures taken including milestones in order to complete the remaining projects.

Please provide us with clarifications whether there is a form of such report on the non-functioning projects which should be submitted to the Commission on a six-monthly basis. Should be the report submitted to the Commission in paper form (as a letter) or in another form, e.g. via SFC system? What information should be provided in this report?

Response (6):

There is no standard template for reporting of non-functioning projects, but there are essential elements to be included in the reports which will allow assessing the progress every six months. The report should provide information on projects already completed and on the measures (and milestones) taken to achieve projects completion. It is recommended that it includes an extended table (Annex V) where additional columns are provided to report on the progress for each of the six month periods. Where relevant, a brief description of the projects and their progress to the completion could be added. The report does not need to be provided through SFC but can be sent through regular mail (letter) or in electronic copy.

Yours sincerely



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Copy: Ms Natalija Kulakova, EU Funds Monitoring Department, Ministry of Finance of the Republic of Latvia