



Case study

Topic 04: ESIF Legislation

Germany



EUROPEAN UNION
Cohesion Fund
Operational Programme Technical Assistance



MINISTRY
OF REGIONAL
DEVELOPMENT CZ



Building a better
working world



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List of abbreviations

AA	Audit Authority
BAFzA	Federal Agency for Family and Civil Affairs
BMAS	Federal Ministry of Labor and Social Affairs
BMBF	Federal Ministry of Education and Research
BMF	Federal Ministry of Finance
BMWi	Federal Ministry of Economic Affairs and Energy
CA	Certification Authority
CF	Cohesion Fund
EAFRD	European Agricultural Fund for Rural Development
EMFF	European Maritime and Fisheries Fund
ERDF	European Regional Development Fund
ESF	European Social Fund
ESIF	European Social and Investment Funds
EC	European Commission
EU	European Union
EUR	Euro
EY	Ernst & Young
IB	Intermediate Body
IT	Information Technology
MA	Managing Authority
NCA	National Coordination Authority
NRW	Northern Westphalia
OLAF	European Anti-Fraud Office (Office de Lutte Anti-Fraud)
OP	Operational Program
PA	Paying Authority
ROP	Regional Operational Program
SAB	Development Bank of the free state of Saxony
SCO	Simplified cost option

Germany

Legislation

Germany's ESIF-related legislation is largely based directly on the EC Regulation. The complete structure of the applicable legislation is as follows: 1) EC Regulation; 2) Federal laws; 3) State level laws; 4) ESIF specific legislation at the level of some states; 5) Methodological environment of individual implementing bodies; 6) Subordinate administrative decisions of the implementing bodies. In majority of states there was no need to adopt an ESIF specific legislation. In the case of the ESIF specific directive in Saxony, the preparations took a long time and included intensive discussions.



Positive aspects

- ▶ Clear structure of legislation between federal and state level
- ▶ Easier direct application of the EU regulations
- ▶ In terms of competences, the contracts governing cooperation between implementing institutions do not significantly differ from the Regulation
- ▶ Low incidence of irregularities

Negative aspects

- ▶ Difficulties in implementing simplified cost options (SCO) on federal level

Key aspects of the legislation

1

Approach towards irregularities

Irregularities are based directly on the Regulation. In general, the respondents understood the irregularity being closer to fraud, rather than administrative discrepancy. The resolution stands with Implementing Bodies, unduly paid funds are recovered through administrative decisions.

2

Methodological environment

Germany is trying to unify the ESIF and national funding methodologies. In terms of detail, they do not usually deviate too much from the Regulation and rather deal with procedural anchoring of duties. The implementation manuals are usually made by the MAs, the most specific methodology is made by the Implementing Bodies.

3

Direct application of the EU Regulation

Germany is able to apply the EU Regulation directly without the need to adopt duplicate national legislation. Hence, there are no discrepancies between the European and national regulations; compliance with the Regulation is thus ensured.



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1. Basic characteristics of the ESIF system

Number of operational programs (OP/ROP)	Number of territorial units (NUTS1/NUTS2/NUTS3)
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47 (3/44)

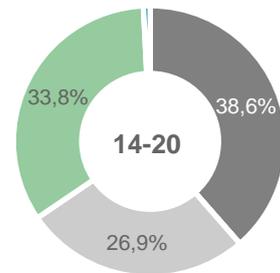
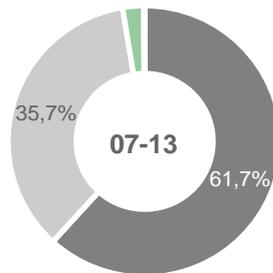
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Total allocation planned (according to the programming period and according to the fund)

Total allocation
(mil. EUR)

14-20: 27 913

07-13: 24 733

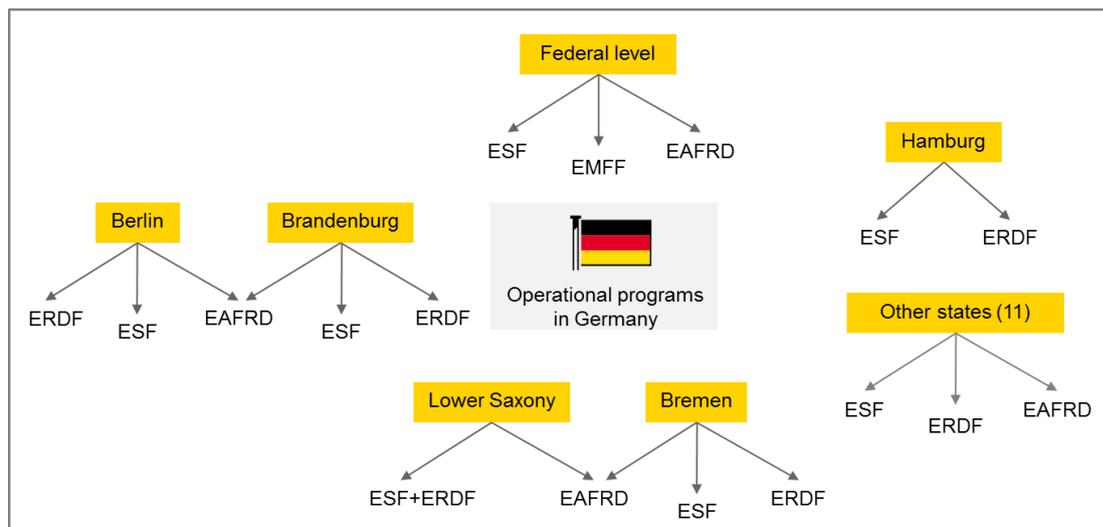


Overview of operational programs

The ESIF implementation architecture is strongly decentralized and consists of:

- ▶ 1 federal ESF program;
- ▶ 1 federal EAFRD program;
- ▶ 1 federal EMFF program
- ▶ 15 state ERDF programs;
- ▶ 15 state ESF programs;
- ▶ 1 joint state ESF/ERDF program in Lower Saxony;
- ▶ 13 state EAFRD programs.

The following scheme illustrates the distribution of operational programs per fund in particular states in Germany:





2. Introduction

Topic number 04 ESIF legislation in Germany was prepared together with topics **01 ESIF architecture and 03 Territorial dimension and integrated approach**. Thus, for more information about the implementation structure, roles of relevant institutions and relations between them please refer to those case studies, as well as to the Country fact sheet – Germany.

The content of the case study is affected by a specific situation in Germany, i.e. **strong independence of individual states and little coordination** in the sense that we can observe in the Czech Republic. Thus, the ESIF set-up can vary between the state and federal level and between individual states as well. For the purposes of this study the tendency was to describe the situation on federal level and on the example of two particular states, in which respondents were primarily contacted, i.e. **Saxony and Bavaria**. Nevertheless, certain aspects mentioned below can refer also to legal arrangements in other states in case we have considered them relevant for the study.

3. Answers to the evaluation questions

3.1 Description of ESIF related legal system

The granting system in Germany is based on diversified legislation which partly regulates its implementation. The German law enables direct and easy application of the Regulation only through links in the national budgetary, public procurement, subsidy/allowance and administrative law. The written rules are flexible and less detailed which allows individual discretion.

The structure of the legislation in Germany related to ESIF can be in general described as follows:

- ▶ European Regulation and implementing acts from EC,
- ▶ Federal budgetary, public procurement, subsidy/allowance and administrative law,
- ▶ State budgetary, public procurement, subsidy/allowance and administrative law.
- ▶ Public treaty on responsibilities' delegation between the institutions of implementation structure,
- ▶ ESIF-specific directive or law (if applicable),
- ▶ Guidelines and manuals of MA,
- ▶ Guidelines and manuals of Intermediate Body,
- ▶ Guidelines and manuals of Implementing Body,
- ▶ Granting and other individual administrative decisions by Implementing Body (i.e. Bescheid)¹.

¹ Bescheid is a legal title similar to an administrative decision in the Czech law. It obligatorily defines the rights and obligations of the entities to which it is addressed. It contains, like the Czech decisions, a statement and a justification with remedies. This legal institute is generally enshrined in Section 35 of the Code of Administrative Procedure of the Federation and individual States, and its use is further specified by special administrative regulations such as the Budgetary Rules and terminated by the Administrative Procedure according to Section 9 of the Code of Administrative Procedure. According to Section 58 par.1 of the Administrative Procedure Code, the instruction must contain:

- ▶ Type of appeal,
- ▶ The administrative authority or court to which the appeal is to be lodged,
- ▶ The period within which it must be lodged,
- ▶ Optional other formal conditions.

Any appeal may be brought against any administrative decision in accordance with the Administrative Procedure Code and the Administrative Court Procedure Code (see the Complaints section). A *Widerspruchsverfahren* due to Section 69 of the Code of Administrative Procedure is then led by the decision-making body or by its superior body to re-examine the decision which is the precursor of the judicial administrative proceedings under Section 68 of the Administrative Procedure Code (e.g., annulment or nullity of an administrative act).



The hierarchy of documentation described above is only illustrative and in certain states the situation can be different, i.e. certain levels may not be applicable for some states/operational programs. Details about different levels and relations between them are described below.

The provision of grants as specified in § 23 and § 44 of the federal, as well as the state, budgetary acts (the content of these acts is exactly the same, the difference occurs on the level of administrative provisions specifying each act²) are applicable for both, the national and European funds. The legislation is supported and interpreted by the ESIF specific guidelines and manuals issued by the institutions of implementation structure. Moreover, the ESIF key requirements for the beneficiary are stipulated in the ancillary provisions in individual granting decisions (having form of a *Bescheid* – administrative decision of an authority) issued by the Implementing Bodies.



The grants regulated in the federal and state budgetary acts (*own translation)

§ 23

Grants

The expenditure and payments entitlement to non-governmental subjects for fulfilling of certain purposes (grants) may be only approved when the state has a significant interest in meeting such purposes by these entities, which cannot be met or satisfied to the necessary extent without the grants.

§ 44

Grants, management of funding or assets

(1) Grants may only be granted under the conditions of § 23. It must be determined how the appropriate use of the grant is proven. In addition, a right of audit of the responsible service or its delegate must be established. Administrative provisions relating to the system of proof of use and the audit by the Court of Auditors (§ 91) shall be adopted in agreement with the Court of Auditors.

(2) If funds or assets of the state are to be managed by entities outside the public administration, paragraph 1 shall apply appropriately.

(3) Legal persons of the private law may be empowered by public treaty or by an administrative act to exercise administrative tasks under state supervision in the field of grants in their own name and in the forms of action under public law, if the grant is in the public interest and the subject guarantees the proper performance of the tasks entrusted to it. The granting and removal of power as well as the leadership of the technical supervision are the responsibilities of the responsible line ministry, which can delegate the leadership of the technical supervision to subordinate authorities. The grant requires the consent of the Ministry of Finance. The power of the special supervisory authorities is unlimited.

3.1.1 ESIF specific directives/acts

There was no need for any other ESIF-specific legislation with the exceptions of Nordrhein-Westfalen, Brandenburg and Saxony. In case of Saxony, the Regulation plays the primary role but the stricter and specific European rules are incorporated and interpreted by the ESIF-specific directive *EFRE/ESF-Rahmenrichtlinie* of the Saxon State Ministry of Economic Affairs, Labor and Transport (MA of ERDF and ESF) into the Saxon budgetary law. The main driver for adopting a specific legislation was to avoid mistakes and problems with the implementation of ESIF. Secondary motivation can be the fact that ESIF funding plays generally more important role in the states of the former Eastern bloc, than in the Western

² The relation between federal and state laws can be illustrated on the example of federal budgetary act (<https://www.gesetze-im-internet.de/bho/>) and Saxon budgetary act (<https://www.revosax.sachsen.de/vorschrift/1548#p44>). The content on the level of individual articles is exactly the same, while the administrative regulation ("Verwaltungsvorschriften") provide much more detail.



part of Germany. However, it is each state's discretion to decide whether to adopt ESIF specific legislation or not.



EFRE/ESF-Rahmenrichtlinie from 27. 10. 2017

The Saxon ESIF-specific directive is a part of the Saxon budgetary law and regulates the form of grants provided from ESIF, applied procedure and the rights and duties of beneficiaries and specifies the role of the Implementing Body, *Development Bank of the free state of Saxony (SAB)*, the relation to the Managing Authority is mentioned rather marginally. It consists of the following seven parts and three attachments specifying the content:

- ▶ The granting purpose and legal basis,
- ▶ Object of the granting,
- ▶ Beneficiary, granting preconditions, fields of funding,
- ▶ Art and scope, extent of funding,
- ▶ Special granting provisions,
- ▶ Procedure;
- ▶ Effectiveness.

In the other states (such as Bavaria) and on the federal level the European funds are provided on the basis of the same legislation as the grants from national sources while taking the ESIF specifics stipulated in the Regulation into account. The reasons mentioned by respondents were that ESIF does not play such an important role in funding as the national funds for the development of Germany (especially on the federal level and in the Western states) and the institutions of the implementation structure are able to apply the Regulation directly without necessity for duplicating the topics in national laws.

„There is no need to create a special legislation for ESIF because the ESIF funding makes only a small percentage of the total funding in Germany.“

Representative

Bavarian State Ministry of Economic Affairs and Media, Energy and Technology (AA)



The legislation governing the national granting schemes is generally less detailed and open to direct use of the European law compared to the Regulation governing ESIF. For example, there is no regulation of FI in national laws compared to a very detailed provisions in the Regulation. Higher complexity of ESIF legislation compared to the national one was frequently mentioned by majority of respondents. Higher complexity is especially perceived in:

- ▶ Volume of provisions, numbers of paragraphs and guidelines governing the use of funds,
- ▶ Reporting requirements both for the beneficiaries and relevant authorities,
- ▶ Audit and control mechanisms.

„The national legislation is simpler and allows more discretion than EU law.“

Representative

Bavarian State Ministry of Labor and Social Affairs, Family and Integration (MA)



3.1.2 Responsibility for ESIF legislation

The states (state cabinets) are responsible for creation of the state budgetary, public procurement, subsidy/allowance and administrative laws. Similarly on the federal level, appropriate ministries are

involved in adoption and adaption of general legislation governing provision of subsidies. Nevertheless, the content is the same among all states and the federal level because the approval process is coordinated among Germany.

„The level responsible for the funding is also responsible for the subsidy law, it means the federal government for federal grants and the states for funding in their own area of responsibility.”

Representative

Bavarian State Ministry of Labor and Social Affairs, Family and Integration (MA)



The Saxon *EFRE/ESF Rahmenrichtlinie* has been created by the State Ministry of Economic Affairs, Labor and Transport (MA of the ERDF Operational program) after discussions with other stakeholders in a legislation procedure.

„The development of the directive took five years because it needed an agreement of the Saxon cabinet, ministries and the Court of Auditors.”

Representative

Saxon State Ministry of Economic Affairs, Labor and Transport (MA)



3.1.3 Guidelines and other rules governing ESIF

Additional guidelines governing ESIF are created by the Managing Authorities (this is applicable also for states with ESIF specific legislation – see above). The guidelines are relevant for the institutions of the implementation structure (i.e. intermediate and/or implementing bodies), follow the Regulation and related implementing acts from the EC and explain the ESIF specifics. Guidelines on the level of the Managing Authorities are centrally coordinated by the responsible authorities (see case study 01 Architecture for further detail) and thus their form and content among the states is very similar. However, they are also very general (see also for example description of guideline for irregularities below).

„The content of the guidelines is in most states similar or even the same (e.g. irregularities have exactly the same guidelines in all countries).”

Representative

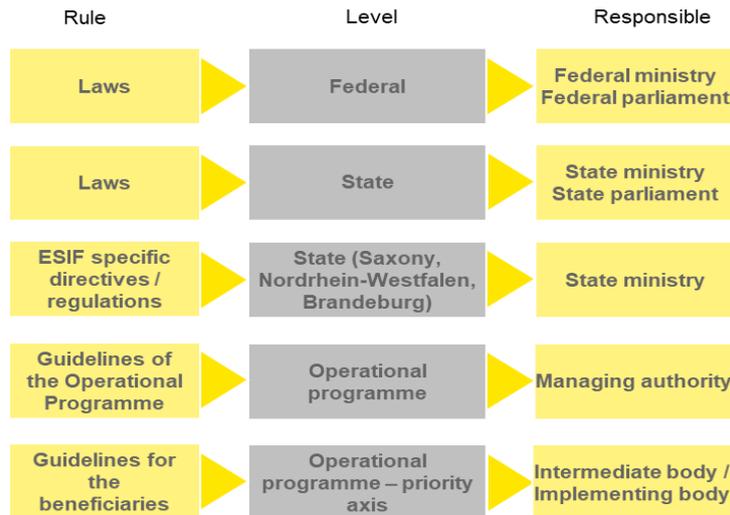
Bavarian State Ministry of Labor and Social Affairs, Family and Integration (MA)



The guidelines for the beneficiaries are based on the guidelines of the MA and are usually issued by the Intermediate Body responsible for particular priority axis (i.e. line ministry on the federal level or state ministry) or state level (e.g. local government) according to the national funding law. Additional guidelines for the beneficiaries can be also prepared by the Implementing Bodies, in case they do not take over the guidelines from the Intermediate Bodies. Particular set-up differs significantly among the states and even priority axes of a single operational program – in case of intermediate body with very small allocation only the guidelines of the MA can be used for ESIF.

The Intermediate Bodies usually create joint subject-specific rules for the national and European funds. Therefore, a similar rule is mostly applicable for national funds and ESIF. In some cases, there are also ESIF-specific guidelines in order to unify the interpretation and support the Implementing Bodies.

The responsibility for ESIF relevant legislation and rules is illustrated on the picture below:



3.1.4 Enforcement of ESIF legislation

The guidelines released by the MA are binding for the Intermediate and Implementing Bodies on the basis of public treaties on delegation of MA's power. Such treaties stipulate the scope of delegated activities and rights and duties of involved institutions. If the Intermediate or Implementing Body does not comply with the ESIF rules leading to the financial suspensions or corrections by the EC, it will be liable for such failure and the suspended amount will be charged to these institutions.

The beneficiaries' compliance with ESIF legislation is enforced by the Implementing Bodies in form of individual granting decision where the beneficiaries' rights and duties are stipulated. If the beneficiaries breach their obligations, another individual decision may be issued by the Implementing Body to recall the funding or in an extreme case, a recovery judgement may be given by a court according to the national law (see Complaints below). Anyway, the beneficiaries are motivated to be compliant as there are usually (see some exceptions described below) no advance payments from ESIF and they receive the money only after proper fulfilling all the conditions and presenting the bills and invoices.

3.1.5 Tendency to align ESIF and national legislation

A tendency to alignment of regulation for national and European granting schemes is perceived as one of the key factors of a successful and efficient ESIF implementation in Germany. As there are usually not any specific laws regarding ESIF, the major differences are stipulated in the Regulation itself and applied directly according to the rule "*lex specialis derogat generali*" which means that the special or stricter rule must prevail. As described above, specific adjustments of the national legislation because of ESIF are rather rare.

In case of Saxony, the alignment was achieved within the approval procedure³ of EFRE/ESF frame directive and long previous discussions during which most of the contradictions were resolved. If there was any remaining discrepancy between the national and ESIF rules, the national rule would not be

³ The approval procedure respected the rules of the subordinate legislation procedure. The first draft was proposed by the State Ministry of Economic Affairs, Labour and Transport (the MA of Saxon ESF and ERDF) and all the involved stakeholders such as intermediate bodies, SAB and also the Saxon court of auditors brought their opinions and counterproposals. Because of many parties involved, the procedure took longer than expected (almost five years) and the final directive had come into effect shortly before the new period started. However, Germany stands for the stability and continuity of law and most of the standards and rules were already described in the guidelines. No big issues caused by the directive approved in the last minute have been mentioned by the respondents.

used in such case. Such settlement does not bring any issues in implementation and makes the legislation clearer for the beneficiaries.

„The best practice in the alignment of European Regulation and the national legislation for ESIF implementation has been reached.”

Representative

Saxon State Ministry of Economic Affairs, Labor and Transport (MA)



3.1.6 Long-lasting experience with ESIF

The national law is very stable. There is a strong tendency to keep the constancy and consistency of rules, not to change them often in order to maintain the high level of legal certainty for beneficiaries and the institutions of implementation structure. They have to know the rules well, they can rely on them and behave accordingly when the legislation remains consistent.

As mentioned above, the ESIF-specific rules are mostly enforced through the guidelines, which are adapted for the new programming period or according to the changes in the European legislation. It means the specifics are implemented by the rules with lower legal power and with easier approval procedure.

In case of Saxony, where the *EFRE/ESF-Rahmenrichtlinie* exists, the changes of the European Regulation always have to be reflected in the directive accordingly. It has already been changed few times in the past so there are no more issues left today.

Summarizing the facts mentioned above, Germany does not face any substantial discrepancies in legislation regarding ESIF, after the years of their implementation. There is no need to handle legal discrepancies as the ESIF specifics are described in the Regulation which is usually applied directly without any other specific national laws.

„In the past, the European regulation was less strict and there was more space to apply the national law than today. The less European Regulation exists, the better the implementation is.”

Representative

Federal Ministry of Labor and Social Affairs (MA)



According to the respondents' opinion, it is too early to think about modifications in the legislation planned towards the upcoming period. Basically, they will try to further develop the already functioning system maintaining the consistency in the national law and reaching the alignment only through changes in the guidelines.

„Too early to say, it depends on the content of final Regulation which will be reflected in the EFRE-ESF Rahmenrichtlinie.”

Representative

Saxon State Ministry of Economic Affairs, Labor and Transport (MA)



3.1.7 Simplified cost options

Although there are not any substantial contradictions between the EU and national law, different institutions of the implementation structure (such as MA and AA) may have different opinion towards interpretation of particular terms. Frequently mentioned problem by the authorities representing federal ESF programme (both by the managing and intermediate bodies) was the use of simplified cost options (SCO) as allowed by the Regulation. According to some interpretation (by the federal Audit Authority) the use of SCO as described in the Regulation is against the national legislation and these forms of reporting were not supported in federal ESF projects.

„At the beginning, implementing simplified cost option seemed attractive but it turned out that it would not fit the program. The idea is good but the way how it is implemented is difficult because there is a contradiction with the national rules.”

Representative

Federal Ministry of the Environment, Nature Conservation and Nuclear Safety (IB)



On the other hand, in the states that were subject of this study the use of SCO was not perceived as an issue, this interpretation was encountered repeatedly and might raise in importance considering the EC plans to increase the use of SCO by making them (partly) obligatory. Thus, the whole contradiction appears to be limited to different interpretation of one authority.

3.2 Irregularities

3.2.1 Definition and understanding of irregularity

According to the administration and budgetary law, the money which was wrongly assigned, is to be withdrawn or not provided at all. **There are not any contradictions in the procedure** and the implications between the corrections in national and ESIF funding. However, there might be differences in the material legal basis, material conditions and the monetary limits indicating an irregularity according to the Regulation or a mistake in the national funding.

The money is always automatically recovered to the account of the relevant paying authority based on the national law. There is just more room for discretionary decisions in the national legislation which is not as strict as the Regulation. Moreover, the irregularities do not have to be only recovered, but also declared to the EC (see below).

„The irregularities are treated the same way as national mistakes (only the reporting obligation is additional).”

Representative

Federal office of Family and Civil Affairs (implementing body)



An irregularity may be discovered by any institution of the implementation structure during audit or control. Their frequency is limited, based on the opinions of most respondents, which may be caused by the fact that the beneficiaries in Germany do not receive advance payments (with a few very limited exceptions as described in the case study Germany - 01 Architecture). Thus, the irregularity may occur only after final control and cost certification when the project is over, or when the audit authority carries out audit of operations. This situation in reality does not happen very often,

In case a mistake is identified during the project implementation, the forthcoming payment is usually corrected by the previous incorrectly paid amount without declaring it as an irregularity). It means that not each administrative mistake must be an irregularity in German ESIF, in case it is identified before the final settlement of the project.

Furthermore, the respondents in general perceived the irregularity (as defined in the Regulation) to be more similar to act of fraud, rather than any administrative mistake of the beneficiaries or ESIF authorities. They are perceived of higher level of relevance than a simple administrative mistake because the implicated reporting duty to the EC is more significant than simple recovery of money.

„Irregularities are codified only in the EU Regulations (German law recognizes only the crime of fraud). Misuse of funds is handled according to standard administrative or penal acts.”

Representative

Bavarian State Ministry of Labor and Social Affairs, Family and Integration (MA)



The analogy to the fraud (perceived by the respondents) results also from similar factual basis of an irregularity and fraud. Similar terms mean each mistake / each breach against EU law according to the Regulation but also a deceit according to the German penal law, though the European interpretation is wider in this case.

Fraud in ESIF itself is also very rare in Germany as there are not such a big projects and if there were, they would not be funded in advance so the factual basis of fraud would not be fulfilled.

3.2.2 Handling of irregularities

The irregularities are handled based on the directly applicable rules in the Regulation in combination with national rules of funds recovery. The MAs issue specific guidelines for dealing with irregularities. As already described above, they should not differ significantly among all operational programs in different states. The guidelines are not exhaustive, mainly repeat and interpret the Regulation and set-up procedure for reporting. For more details about the content of the guidelines see the box below.

Guidelines for the treatment of irregularities for the ESF in the Federal Republic of Germany in the funding period 2014-2020

The guideline was issued by the Federal ministry for labor and social affairs, the Managing Authority for the federal ESF Operational Program and responsible coordinator for ESF in the whole Germany. The guideline is very brief (only 21 pages incl. attachments) and covers the following topics:

- ▶ **Introduction:** purpose of the guideline, its author and applicability (i.e. the federal ESF program and all authorities involved in its implementation)
- ▶ **Legal basis:** reference to EU legislation (EU only, no national law is mentioned) relevant for irregularities
- ▶ **Definition:** irregularity (individual or systematic) as defined by the Regulation and also interpretation of three main elements which define it:
 - ▶ **Breach of EU law:** including national financial management and control provisions which are perceived as part of the EU law
 - ▶ **Act or omission of an economic operator:** economic operator, not a Member State within the execution of its power
 - ▶ **Financial damage on the EU budget:** including a potential damage that could occur should the irregularity not be identified
- ▶ **Reporting procedures**
- ▶ **Financial corrections**

The authority responsible for handling violations of federal/state grant rules and identified irregularities is the Implementing Body, which issued a granting administrative decision, and is issuing another administration decision based on:

- ▶ The national administrative procedural law,
- ▶ The national budgetary law (and relevant subordinate regulation) and
- ▶ The Regulation.

The misuse of funds from national sources is not handled specifically and the related funds are automatically recovered to the account of the relevant paying authority following the national law, i.e. administrative and budget acts – for example the administrative act of the Saxon Ministry of Finance.⁴

The individual decision issued by the Implementing Body after discovery of a mistake may withdraw the previous granting decision (in the usual case when the funds have not been forwarded to the beneficiary yet) or force the funds recovery (in the rare cases when the money was awarded in advance). The

⁴ Available at <https://www.revosax.sachsen.de/vorschrift/1548#p44> (see specification of § 44 budgetary law, section 8).



Implementing Body only informs the Intermediate Body and MA before the money is recovered but does not need their permission for action. The MA intervenes only in extreme cases to enforce the decision. The CA monitors the collecting of the funds. There is a universal irregularity management system for declaring irregularities to the EC managed by the federal institutions. The qualified irregularities are transferred over the AA to BMF and BMF reports it in an irregularity report to the OLAF. The MA report all irregularities also to the CA and the CA reports it to the EC as part of payment application or accounting procedure.

If the beneficiary fails to fulfill the obligations imposed by the administrative decision, these obligations are enforced by the authority that issued the administrative decision (i.e. the implementing body) in accordance with the federal law on the enforcement of administrative decisions. In the enforcement of the decision, the provisions of the Tax Code (i.e. possible execution of mobile and immobile property) are applied in matters of effective enforcement.

Pursuant to Section 3 of the Act on the Execution of Administrative Decisions, the execution of an administrative decision imposing a financial obligation has a prerequisite of:

- ▶ Notification of over-endowment,
- ▶ Maturity of the duty,
- ▶ The deadline of one week has elapsed since the notice of performance or one week after the due date.

Together with the due amount, interest at the rate of 5% above the basic interest rate is also collected annually (Section 49a of the Code of Administrative Procedure).

3.3 Complaints

Formal, codified procedures are established and publically available for all OPs of the Member State. The general complaints-handling procedure is the same for the federal program and for the ESIF programs established on the basis of the national law (federal law and law of particular states of Germany). According to the national laws (Constitution, Administrative Procedure Act of a particular state and Code of Administrative Court Procedure) complaints against any administrative act can be lodged.

In general, based on the OP documents, there are two types of complaints:

- ▶ **Simple complaints** which are not directly related to a specific decision of the authority, but more generally relate to the implementation of the particular OP (e.g. complaints that the application procedure is too complicated). There are usually MAs or IBs in charge.
- ▶ **Formal remedies** which concern complaints against the administration acts (e.g. complaints against the granting decision of the Implementing Body). There are Implementing Bodies in charge (possibly with a help of a superior Intermediate Body).

„There is an informal stage for complaints when a beneficiary can call or send an e-mail with his opinion to BAFzA (Federal Agency for Family and Civil Affairs – Implementing Body of the federal ESF programme). Formal complaints procedure takes place after the project ends, is finally examined and the beneficiary receives the final notice. The beneficiary can complain to BAFzA in contradictory procedure according to the national administration law and then appeal to the court.”

Representative

Federal office of Family and Civil Affairs (IB)



Prior to lodging the complaint, the lawfulness and expedience of the administrative decision shall be reviewed in preliminary proceedings. The applicants/beneficiaries may present their arguments against the decision of the authority which issued the administrative act. In some exceptional cases, a

preliminary proceedings are not required and the legal protection is ensured by the possibility of a direct legal action.

If the authority considers the objection to be well-founded, it shall provide remedy and rule on the costs accordingly. Most often, the only remedy provided is a correction of the decision (and if the prior application was dismissed, enabling the resubmission of an application). If the authority does not accept the objection, a ruling can be handed down to the next higher authority. This authority can also cancel, modify or confirm the administrative act with a notice of opposition.

The matter of complaints may be submitted to a court as an ordinary legal action. These ordinary legal remedies are not classified as complaints but rather as appeals (e.g. the AA in Saxony has never experienced such legal action).

3.4 Key factors, Best practice & Shortcomings

The respondents agreed on that the legislation regarding ESIF is not an issue in Germany. According to the majority of the respondents, there are many key factor for success, such as:

- ▶ Direct application of the Regulation and its reflection in national administration law
- ▶ Lack of formal federal and state law and the implementation based on relative flexible mechanisms,
- ▶ Consistency, constancy and alignment of rules,
- ▶ Negative consequences for beneficiary after a breach of the rules in terms of not receiving the money from ESIF,
- ▶ Transparency in granting,
- ▶ Professional public management and good planning.

„The key factor is unified, clear and simple legislation and administrative regulations administrative regulations through all levels (national & state) and lack of unnecessary changes and adoption of the Regulation well before the programming period begins.”

Representative

Federal Ministry of Labor and Social Affairs (MA)



As already mentioned above, the institutions of implementation structure in Saxony see the best practice in their *ERDF/ESF directive* which is aligned with the Regulation and makes the implementation and enforcement easier to the beneficiaries and involved institutions. This statement is also supported by the opinion of a German consultancies which mentioned that there is usually quite high volume and levels of laws and guidelines in another states (even though the different laws and regulations are mainly aligned) where the grant-related rules can be found. Such legal system may not be very transparent to the beneficiary.

The very few shortcomings may occur in the interpretation of rules. All changes in the interpretation of the Regulation by EC which have to be reflected by member states and the meaning sometimes does not always comply with the national interpretation of terms (e.g. simplified cost options, irregularity).



4. Project activity review

Total number of institutions approached

- ▶ 41

Total number of persons approached

- ▶ 59

Total number of interviews conducted (by institution)

- ▶ Implementation structure (NCA/MA/AA/CA/PA/IB1/IB2): 12.
- ▶ Academic staff: 0.
- ▶ Consulting companies: 3.
- ▶ Beneficiaries: 0.
- ▶ Local EY office: 1.

List of studies, analyses, evaluations, and other relevant materials used

- ▶ Partnership agreement between Germany and the EC on the implementation of ESI-funds in the programming period 2014 – 2020 (https://ec.europa.eu/info/publications/partnership-agreement-germany_en).
- ▶ Relevant federal and state operational programs.
- ▶ GEFRA. Strategic progress report 2017. 31. 8. 2017.
- ▶ BMAS. Implementation report 2014/2015. 18. 8. 2016.
- ▶ BMBF. Guidelines on grants based on expenditure.
- ▶ SMAS (Bavaria), BMAS: Guidelines on the process of handling with irregularities in ESF projects in Bavaria.
- ▶ SMWi (Saxony): Annual report on ERDF progress in Saxony 2015 and 2016.
- ▶ Metis. Ex-ante evaluation of the ERDF program in Saxony in the programming period 2014 – 2020.
- ▶ isw. Ex-ante evaluation of the micro for the ERDF program in Saxony in the programming period 2014 – 2020.
- ▶ EFRE/ESF frame directive of the Saxon State Ministry of Economic Affairs, Labor and Transport from 27. 10. 2017 <https://www.revosax.sachsen.de/vorschrift/17457/33314#vww5>.
- ▶ Federal budgetary act from 19. 8. 1969 <https://www.gesetze-im-internet.de/bho/>.
- ▶ Saxon Court of Auditors. Advisory statement on delegation of responsibilities to SAB. 2015.
- ▶ Granting manual of the state Saxony-Anhalt on ERDF and ESF. 30.6.2017.
- ▶ Public treaties on responsibilities' delegation between BMAS, IBs and Implementing Bodies.