



## Case study

### Topic 04: ESIF Legislation

# Poland



EUROPEAN UNION  
Cohesion Fund  
Operational Programme Technical Assistance



MINISTRY  
OF REGIONAL  
DEVELOPMENT CZ





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## List of abbreviations

<b>AA</b>	Audit Authority
<b>CA</b>	Certification Authority
<b>CF</b>	Cohesion Fund
<b>EAFRD</b>	European Agricultural Fund for Rural Development
<b>EMFF</b>	European Maritime and Fisheries Fund
<b>ERDF</b>	European Regional Development Fund
<b>ESF</b>	European Social Fund
<b>ESIF</b>	European Social and Investment Funds
<b>EC</b>	European Commission
<b>EU</b>	European Union
<b>EUR</b>	Euro
<b>EY</b>	Ernst & Young
<b>IB</b>	Intermediate Body
<b>IT</b>	Information Technology
<b>MA</b>	Managing Authority
<b>MIR</b>	Ministry of Investment and Development
<b>NCA</b>	National Coordination Authority
<b>NGOs</b>	Non-governmental organizations
<b>OLAF</b>	European Anti-Fraud Office (Office de Lutte Anti-Fraud)
<b>OP</b>	Operational Program
<b>PA</b>	Paying Authority
<b>ROP</b>	Regional Operational Program
<b>VAT</b>	Value Added Tax



# Poland

## Legislation

In Poland, there were no major differences between the rules contained in European and national legislation. The complete structure of the applicable legislation is as follows: 1) ESIF Act, 2) Horizontal Guidelines of the Ministry of Development (MIR), 3) detailed description of the OP priority axes and detailed description of the management and control systems issued by the MA, 4) other documents (instructions, manuals). The absence of legal force in most of the documents mentioned above and their binding force set only by contracts allow more flexibly adaptation to possible changes, although their enforcement may be more difficult in practice.



### Positive aspects

- ▶ Absence of fundamental contradictions with EU principles and rules
- ▶ Regulations transparency and availability of ESIF documents to applicants and beneficiaries
- ▶ Manuals for specific procedures for applicants / beneficiaries issued by the MA
- ▶ Cooperation between MIR, MA ROP and partners during the preparation of rules

### Negative aspects

- ▶ Large volumes of ESIF-related documentation
- ▶ Many rules contained only in documents without proper legal force
- ▶ Restrictive interpretation of discrepancies (especially for public procurement) and financial instruments
- ▶ Disputes related to VAT as (non)eligible expenditure

## Key aspects of the legislation

1

### Methodological environment

MIR, as NCA, issues horizontal guidelines binding especially for other IS institutions. MAs issue their own documents, with a main goal of making the rules for applicants or recipients more transparent. These documents are binding for the beneficiary under the grant agreement.

2

### Access to the ESIF documents

All legal and non-legal documents (including their changes) regarding ESIF are available on the MIR and Regional MA's websites. Often the fragmented rules are explained in the accompanying manuals and instructions of the MA.

3

### Decentralization with an effort of unification

Decentralization in the ESIF implementation across ROPs is reflected in the adoption of different forms of supporting documents across the regions. This is being balanced by the effort of the MIR to unify the system through the ESIF and horizontal directives.

4

### Resolution of discrepancies

The adjustment of discrepancies is based on the ESIF Act and the Public Finance Act. By discrepancy is understood any violation of the EU law. The resolution lies with the Managing Authorities, the unjustifiably paid funds are recovered through administrative decisions.



## 1. Basic characteristics of the ESIF system

Number of operational programs (OP/ROP)

Number of territorial units (NUTS1/NUTS2/NUTS3)

24 (7/17) including OP TP

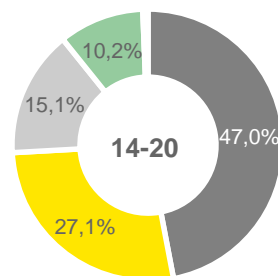
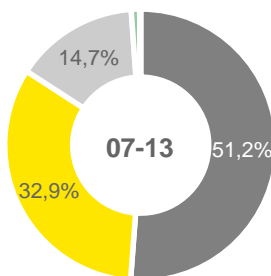
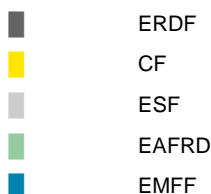
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Total allocation planned (according to the programming period and according to the fund)

Total allocation (mil. EUR)

14-20: 85 5734

07-13: 64 553



### Overview of operational programmes<sup>1</sup>

The ESIF implementation architecture is semi-decentralized and consists of:

- ▶ 7 thematic Operational Programs, with one exception mono-fund, managed by Ministry of Investment and Economic Development or Ministry of Agriculture and Rural Development
- ▶ 16 regional Operational Programs, multi-funds ERDF+ESF, managed by particular Marshall's offices of each of 16 regions
- ▶ 1 regional ERDF Operational Program for the development of Eastern Poland

		Allocation	Absorption	Managing Authority
National	Digital Poland (ERDF)	2 566 836	6%	Ministry of Investment and Economic Development
	Knowledge Education Growth (ESF/YEI)	5 451 980 109	21 %	Ministry of Investment and Economic Development
	Infrastructure and Environment (ERDF/CF)	32 266 939 058	22 %	Ministry of Investment and Economic Development
	Technical Assistance (CF)	823 674 547	28 %	Ministry of Investment and Economic Development
	Smart Growth (ERDF)	10 189 869 703	14 %	Ministry of Investment and Economic Development
	National Rural Development (EAFRD)	13 612 211 430	24 %	Ministry of Agriculture and Rural Development
	Maritime and fisheries (EMFF)	710 509 513	4 %	Ministry of Agriculture and Rural Development
Regional	Development of Eastern Poland (ERDF)	2 352 941 179	15 %	Ministry of Investment and Economic Development
	16 ROPs			Marshall's office

<sup>1</sup> Data gathered on 18.10.2018 from <https://cohesiondata.ec.europa.eu/>. Allocation is in EUR. Absorption means actual expenditure declared by the projects to the programs.



## 2. Introduction

The case study for Poland, topic 04 ESIF legislation was prepared together with topic number **03 ESIF territorial dimension and integrated approach**. Thus, for more information about the ESIF implementation Poland please refer to that case study, as well as to the Country fact sheet – Poland, where more details about ESIF in this particular country can be found.

The ESIF architecture in Poland is mainly affected by the fact that **the operational programs are semi-decentralised**. The operational programs on the federal level are differentiated by their topics and are managed by the Ministry of investment and economic development which also plays the role of NCA and is responsible for the legislation related to ESIF implementation. The regional programs are decentralised due to the Polish state system and ESIF implementation may vary between regions. Each ROP has been established for the particular voivodship whose government is responsible for its management.

For the purpose of this study, all council of voivodships were approached outside MIR, but the information is only obtained from some of them where communication has been established.

## 3. Answers to the evaluation questions

### 3.1 Description of ESIF related legal system

The granting system in Poland is mainly based on the Act of 11 July 2014 on the Principles of Implementation of Programs in the field of Cohesion Policy financed in the financial perspective 2014-2020, Dec. 2014, Item 1146 (also referred to as the “Implementation Act”). The Implementation Act regulates the basic mechanism for ESIF coordination and implementation.

Referred to Article 6, the ESIF specific rules consist of the conditions and procedures related to the institutions participating in the implementation of operational programs, including management, monitoring, reporting, control and evaluation of ESIF, and coordination of activities undertaken by these institutions. The basis of the ESIF legal system is given by the exemplary list of legislation in paragraph 2 which explicitly indicates:

- ▶ The generally applicable law;
- ▶ Horizontal guidelines;
- ▶ Detailed description of priority axes of the operational program;
- ▶ Description of the management and control system and implementing instructions including the operational procedures for the relevant institutions.

The overall **hierarchy of Polish legislation** governing ESIF implementation (including not only documents given by the Act) looks as follows:

- ▶ European Regulation and implementing acts from EC;
- ▶ Partnership Agreement and Operational Programs;
- ▶ ESIF Implementation Act - The Act of 11 July 2014 on the Principles of Implementation of Programmed in the field of Cohesion Policy financed in the financial perspective 2014-2020;
- ▶ The Act of 6 December 2006 on the principles of conducting development policy;
- ▶ Public finance Act – The Act of 27 August 2009 on public finance;
- ▶ Regulations on state aid provision in various areas of Minister of Development stated on the basis of delegation in the acts of Parliament;
- ▶ Agreements/contracts on delegation of Managing authority's tasks to the Intermediate and Implementing Bodies;



- ▶ Territorial agreements / contracts between MIR and the regional MAs where is the obligation to use the horizontal guidelines of MIR mentioned;
- ▶ Horizontal guidelines of MIR;
- ▶ Detailed description of priority axes of the operational program of MA;
- ▶ Description of the management and control system and implementing instructions including the operational procedures of MA;
- ▶ Other non-legal documents issued by the relevant MA (e.g. regulations of competition, manuals).

Beyond the regulation mentioned above, also the general administrative (incl. public procurement, state aid) and procedural law will apply when the ESIF regulation lacks a specific rule for such case.

*„The acts of EU law, so-called “hard law” - are used directly and are a part of the national legal system. In hierarchy of normative acts they stay over the acts of Parliament. So-called “soft law”, as communications, guidelines, binding methodologies, etc. are incorporated into polish legal system while being a part of contracts between beneficiaries and institutions.”*

Representative

The Marshal Office of Podlasie Voivodship (MA)



Ministry of Investment and Development – (MIR) is responsible for creating a law regulating the implementation of programs in the field of cohesion policy. The ultimately responsible body for the enforcement of the ESIF rules is the MA though it may delegate its competencies (such as contracting, paying, controlling, assessing duties) to the Intermediate Bodies (and Intermediate Bodies may delegate them to Implementing Bodies).

### 3.1.1. ESIF Implementation Act

In Poland, there is an Implementation Act on ESIF, which establishes the rules of implementation of the Cohesion Policy mechanisms for coordination of operational programs co-financed from ESIF. It also further defines the basic documentation and institutions involved in the process including their responsibilities and rules of cooperation, as well as the rights and duties of beneficiaries.



#### ESIF Implementation Act of 11 July 2014<sup>2</sup>

The Implementation Act deals with the transfer of competences in the area of management and control systems from the European level to the Member state based on the requirements due to the ESIF Regulations. It introduces new terms and instruments for the implementation of cohesion politics and fulfilment of e-cohesion principle.

The Act consists of 20 paragraphs as follows:

- ▶ General regulation (legal background and general definitions)
- ▶ Coordination of the implementation of operational programs (competences of NCA)
- ▶ Implementation system of the operational program (regulation of ESIF)
- ▶ Institutional system (institutions involved in ESIF implementation)
- ▶ Designation
- ▶ Financial flows and project settlement system
- ▶ Control and audit
- ▶ Monitoring of program progress
- ▶ Public aid
- ▶ Financial instruments
- ▶ Repayable assistance

<sup>2</sup> Source: <http://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/ustawa-o-zasadach-realizacji-programow-w-zakresie-polityki-spojnosci-finansowanych-w-perspektywie-finansowej-2014-2020-tzw-ustawa-wdrozeniowa/>



- ▶ Special instruments for the implementation of operational programs
- ▶ Projects
- ▶ Projects selection
- ▶ Contract and decision on project co-financing
- ▶ Appeal procedure
- ▶ Experts
- ▶ Central information system
- ▶ Amendments to the existing regulations
- ▶ Transitional and final provisions

The Act comprehensively states the roles of the institutions of the implementation structure as well as the rights and obligations of the applicants and beneficiaries. It is binding as a whole for the institutions and the beneficiaries and is enforced by the relevant institutions of the implementation structure.

The current Act follows the experience from the previous programming period which was regulated by ESIF specific act as well. Moreover, additional rules regarding the other programs had to be created because the previous act was simpler and dealt only with ERDF. The process of its creation took about half year, according to the respondents' experience.

The Act has been created by MIR and was finalized at the beginning of the programming period. Its draft has been proposed by the Council of Ministers to the Polish Parliament (*Sejm*) on 2<sup>nd</sup> June 2014 and three readings and involvement of specialized committees took place from 6<sup>th</sup> June and was approved on 11<sup>th</sup> July 2014. The Senate did not propose any changes to the Act and it was signed on 7<sup>th</sup> August 2014 by the Polish president and came into effect on 13<sup>th</sup> September 2014. The legal basis for the legislative initiative is the Constitution of the Republic of Poland.

*„The Implementing Act has been prepared by MIR taking into account the previous experience with ESIF and was finalized and approved by the Parliament at the beginning of the programming period (before the discussions with European Commission were finished).”*

Representative

The Marshal Office of Pomorskie Voivodship (MA)



### 3.1.2. Horizontal guidelines

The uniform method of operation within the scope of particular operational programs is provided by horizontal guidelines issued due to Article 5 of the Implementation Act by the MIR, which is responsible for the unified implementation of European Funds through all the OPs and ROPs. The guidelines do not constitute a universally binding law but the relevant institutions have to follow them according to the Implementation Act.



#### Horizontal ESIF guidelines<sup>3</sup>

The horizontal ESIF guidelines are stipulated in Article 2 paragraph 32 of the Implementation Act accordingly: *“Legal instrument defining unified conditions and procedures for the implementation of structural funds and the Cohesion Fund addressed to institutions participating in the implementation of operational programs and applicable by these institutions on the basis of an appropriate agreement, territorial contract and by the beneficiaries on the basis of a contract or a decision on project co-financing.”*

They may further specify The Implementation Act in the following topics (Article 5 paragraph 1):

<sup>3</sup> Source: <http://www.funduszeuropejskie.gov.pl/strony/ofunduszach/dokumenty/#/domysln=1/10515=3147>





- ▶ Evaluation of operational programs;
- ▶ The mode and scope of reporting and monitoring of material progress of OPs implementation;
- ▶ Control of the implementation of operational programs;
- ▶ The project selection procedure;
- ▶ Eligibility of expenditure under operational programs;
- ▶ Certification conditions and preparation of forecasts for payment applications to EC;
- ▶ Financial corrections as a part of operational programs;
- ▶ The conditions for collecting and submitting data in electronic form;
- ▶ Information and promotion system in the scope of operational programs;
- ▶ Use of technical assistance resources;
- ▶ Other issues related to the implementation and closure of operational programs.

Due to the Article 5 paragraph 2 of the Implementation Act, the guidelines may apply to all OPs or only to the particular OPs.

The draft of the guidelines and their changes is prepared by MIR and based on the Article 5 paragraph 3 of the Implementation Act and is sent for opinion to:

- ▶ Managing Authorities;
- ▶ National organization of local governmental units;
- ▶ Trade unions and employer's organizations;
- ▶ Non-governmental organizations.

According to the Article 5 paragraph 4, the entities submit their opinions in time frame set by the MIR (which is not shorter than 14 days), otherwise they lose their right to express them.

After finalizing the guidelines, the MIR publishes them on its websites and announces news on publishing the guideline on the website in the official Gazette of Poland "Monitor Polski".

The guidelines are addressed especially to the institutions of the implementation structure which elaborate complex manuals to selected topics and communicated to the beneficiaries in a form of comprehensive manuals on selected topics (e.g. eligibility of expenditure, IT system, personal data protection, information and promotion etc.). They are binding to the beneficiary based on the contract, decision on the project co-financing or another internal documents of MA such as Regulations on competitions (see below). Due to the fact, that they may constitute an autonomous basis of rights and obligations for applicants or beneficiaries, they are being treated in the jurisprudence of administrative courts as sources of law in a broad sense, which bind parties of the agreement or addressee of the decision.

For instance, according to the art. 65 sec. 1 of the Regulation, the issue of the eligibility of expenditure shall be determined on the basis of national rules. Nonetheless, no generally binding law is envisaged in Poland in this respect. The matter is regulated in the guidelines that indicate eligible and ineligible expenditure. Another example concerns the preparation of investment projects and operations which generate net revenue. The guidelines on this issues stipulates special provisions which do not result from the generally applicable provisions of law. Likewise, the payment guidelines lay down specific provisions regarding deadlines or formal requirements for the request for payment, which do not result from the generally applicable provisions of law. It should be also noted, that specific requirements in the field of implementation of the principle of equal opportunities and non-discrimination as well as the principle of equal opportunities for women and men are provided for in the norms of the guidelines on this matter. The requirements stemming from these guidelines are more restrictive than those resulting from generally applicable provisions of law.



*„EU legislation on European funds on the one hand requires the definition of rules for the implementation of programs in the field of cohesion policy, and on the other hand, the specification of some provisions regulating funding in individual support areas. In the case of the rules, a general law was created at the level of the Act. In case of doubts or lack of possibility to specify implementation rules at the level of legal acts, guidelines (which may include methodologies or calculations) apply.”*

Representative

The Marshal Office of Slaskie Voivodship (MA)



*„It is problematic that the guidelines often contain restrictions that are not based on any legal provisions. The guidelines are binding for the beneficiary due to the agreement between MA and the beneficiary. They are non-legal documents specifying the conditions of enforcement by the MA.”*

Representative

The Marshal Office of Malopolska Voivodship (MA)



*„In polish system the main legal obligations are incorporated in contract between beneficiary and institution, so the contract has many provisions (circa 30 sites of provisions). It is also completed if we talk about all of main rights and obligations of the beneficiary and the institution.”*

Representative

The Marshal Office of Podlasie Voivodship (MA)



Previously, there have been a region-specific programming guidelines of each MA apart from the horizontal guidelines, especially on assessment and enforcement of ESIF in voivodships which were replaced by unified horizontal guidelines of MIR applicable for all programs in 2017 (based on changes of the Implementation Act from 2 September 2017).

*„Horizontal guidelines represent a centralized framework of implementation. The whole system is getting more centralized, MIR plays more significant role and the regional MAs do not set the rules for implementation. The regions are losing their previous flexibility but the system is based on less documents and is more unified.”*

Representative

The Marshal Office of Pomorskie Voivodship (MA)



### 3.1.3. Detailed descriptions

Both types of detailed descriptions, i.e. detailed descriptions of priority axes of the operational program and detailed description of the management and control system and implementation instructions, do not constitute a universally binding law. They specify the operational programs in the field of its focus suitable for the topics of OPs and regions of ROPs within which the priority axis were defined. They are issued by the MAs within the framework given by the Implementation act and the horizontal guidelines after general consultation or simple notification to the MIR. They are directly binding only to the institutions of the particular operational program, not to the beneficiary.



#### Detailed descriptions of priority axes of the operational program<sup>4</sup>

The Detailed description of priority axes of the operational program is issued based on Operational programs and Article 2 paragraph 25 of the Implementation Act: *“a document prepared and adopted by the MA of regional operational program and approved in respect to the project selection criteria by the monitoring committee referred to in art. 47 of the Regulation, specifying in particular the scope of activities or sub-measures implemented under individual priority axes of the operational program.”* It includes also formal criteria for project selection defined in the annex of these documents. The content of this type of description is unified based on the [horizontal guideline for a detailed description of the priority axes of national and regional operational programs for 2014-2020 from 30 January 2015](#) and the selection criteria are defined due to the [horizontal guideline on project selection procedure from 13 March 2018](#).



#### Detailed description of the management and control system and implementation instructions<sup>5</sup>

The Description of the management and control system and implementation instructions include the operational procedures of institutions involved in the relevant OP and are issued by national or regional MAs.

According to the Article 8 of the Implementation Act the Detailed descriptions and their changes are published by the MA on its website.

### 3.2 Other non-legal documents

Other documents regulating ESIF are also a part of the soft law, nevertheless fulfil the criteria of the sources of law in the broad sense of its meaning. They are usually indented for the support of beneficiaries.

*„Due to the lack of statutory regulation, many detailed issues, such as the evaluation and selection of projects for co-financing, and the implementation and control of projects, are regulated in files that are (non) legal documents, such as regulations of competitions, instructions on how to fill in grant applications, and textbooks – which are not universally binding law, they support the institutions and beneficiary in ESIF implementation.”*

Representative

The Marshal Office of the Malopolska Region (MA)



In Malopolska voivodship, the provisions of the guidelines and detailed descriptions (issued by MA) are reflected in the competition documentation adopted by the MA such as **Regulations of competitions**. It is an act that creates a system of implementing relevant programs, adopted on the basis of appropriate statutory authorization granted to MAs. There might be a regulation for more competitions standardizing the information on special priority axes. It specifies how to apply for the grant subsidy, what documents to prepare, how the agreement between beneficiaries and institutions looks like. They are binding in the meaning that who wants to apply, needs to respect the criteria and has to sign a contract with the MA, whose draft is a part of the Regulations of competitions. The regulations are available on the website of the ROP.

<sup>4</sup> Source: <http://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/#/domyslne=1/10515=3143>

<sup>5</sup> Source: <http://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/opis-funkcji-i-procedur-obowiazujacych-w-instytucji-zarzadzajacej-i-certyfikujacej-regionalny-program-operacyjny-wojewodztwa-lodzkiego-na-lata-2014-2020/>



In Pomorskie voivodship, the MA issued **manuals** before the programming period started which summarize the rules for the beneficiary (topics: state aid, public procurement, environmental issues, irregularities etc.). The manuals are not binding, they have explanatory and supportive function for the beneficiary; MIR did not include them into the mandatory ESIF implementing documents.

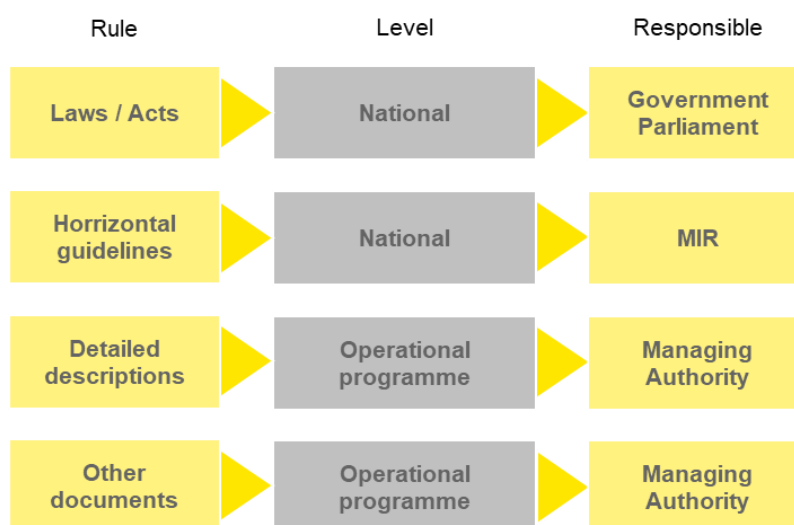
*The manual for beneficiaries proved to be the best practice in Poland because Pomorskie has the best performance in ESIF in the whole Poland due to the MIR's evaluation. The manual makes the complicated legal system more transparent and supports the beneficiary in the selection and also realization procedure so they usually do not need much more guidance from any consultancies."*

Representative

The Marshal Office of Pomorskie Voivodship (MA)



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



### 3.3 Comparison of ESIF legislation and the legislation on national funds

So far no substantial contradictions and problems in the field of ESIF implementation have been detected. ESIF legislation (The Implementation Act) has been drafted based on EU legislation so it takes into account rules set in different EU Regulations as well as considers the experience from previous programming period.

The legal basis for funding from national sources is strongly diversified. The national funds have been usually set up based on The Public finance act and some special law, such as the Railway transport act for the National Railway Program to 2023 or The Act on the financing principles of education for LIDER program.



Act on Public Finance – provisions on granting

#### Sec. 126:

*Subsidies are subject to special accounting rules from the state budget, the local budgets and state-owned means designated pursuant to this Act, separate acts or international agreements to finance or co-finance the performance of public tasks.*

#### Sec. 127, point 2:

Targeted grants are also intended for:



- (1) Implementation of programs financed by the Funds referred to in Article 5 (1) (3) and par. 3 (6) (EU resources) incurred by bodies implementing these programs which are not part of the national budget units;
- (2) The implementation of technical assistance projects financed by the European Funds and Funds referred to in Article 5 (3) (5);
- (3) Financing or co-financing of the tasks carried out by local government units and other entities from the funds transferred by the units referred to in points 5, 7 and 14 of Article 9;
- (4) The implementation of the programs financed by the Funds referred to in Article 5 (3) (5) shall be letter. c and d;
- 5) Co-financing the implementation of programs funded by European funds.

#### **Sec. 130:**

1. Subsidies are means for subsidies to specific types of products or services calculated by unit rates.
2. Subsidies specific to a given entity may be granted on the basis of separate European Union legislation:
  - (1) For entrepreneurs who produce specific types of products or provide certain types of services,
  - (2) For bodies which carry out tasks in the field of agriculture - in accordance with the principle of equality.
3. The Budgetary Act shall specify the amount and subject of the grants referred to in paragraphs 1 and 2.

The regulation of national programs is less detailed because there is a lack of specific rules and the national funds also play less important role for Polish development. There is no unified act on funding from the national funds. They are managed separately from ESIF on the governmental level.

*„It is beyond our competence to answer this question as we don't deal with grants financed from national funds. National co-financing regarding projects financed within cohesion policy is, by large, treated in the same way as EU co-financing.”*

Representative

Ministry of Investment and Development (NCA, MA)



*„In my opinion, there is no relevant difference between the legal basis for grant financing from ESIF and national funds in Polish legal system. Generally, the system for grants financed from ESIF is much more elaborated and complicated than national system, but it is also more transparent and contains more effective legal measures to control legal accuracy of decisions.”*

Representative

The Marshal Office of Podlasie Voivodship (MA)



### 3.4 Tendency to align ESIF and national legislation

There is the principle of the EU law primacy over the national law and its direct application, which is to be a solution of possible problems of contradictions between two legal orders. Most of the processes are based on the Regulation accordingly incorporated into the Polish legal system by the documents mentioned above. Basically the Polish regulation is compliant. Just some current contradiction in the selection procedure has been identified by the respondent from Malopolska when comparing the Implementation Act and the General Regulation, such as:

- ▶ An applicant can freely supplement a formal condition for submitting an application for co-financing a project so the assessment of fulfilment of given condition takes place outside the



assessment criteria approved by the Monitoring Committee (compare with Article 125 par. 3 letter a) of the Regulation).

- ▶ Negative evaluation of formal conditions is not entitled to any appeal/complaints. However, the MA shall provide procedures and criteria that are non-discriminatory and transparent, so the lack of any appeal is contrary to these principles. In Malopolska Voivodeship, the lack of appeal against the formal conditions has not been questioned yet, in other regions it has been questioned without success. All complaints were dismissed after a judicial review.
- ▶ In accordance with the EU regulation, the MA shall manage the operational program in accordance with the principle of sound financial management, and local development shall be community-led. Under these assumptions, the national legislation weakens the role of the MA in the region by for example introducing provisions in the amended Implementation Act on liquidation of the programming guidelines issued by the MA.

Additionally, frequently mentioned problem in ESIF implementation was the issue with VAT treatment as an eligible or ineligible expenditure. It was often discussed also in the previous programming period when the Court of Justice of the European Union drew attention to the complex way in which the value added tax (VAT) is recognized as eligible expenditure. It is in principle eligible for co-financing only if it is not recoverable under national VAT legislation. This means that if the beneficiaries can recover VAT, it is not an eligible cost, regardless of whether VAT was actually recovered or not. In the case of beneficiaries who are not VAT payers and cannot apply for the recovery of the amounts paid, VAT will be an eligible cost. In the Polish legal system, the taxpayer has under some conditions the right of resigning from VAT recovery. However, the Court of Justice stated that a formal examination of the tax status of the beneficiary is not a sufficient and if the Beneficiary had the legal possibility of recovering the tax, VAT should be considered ineligible.

The Polish ESIF legislation has not remained unchanged. The MAs adapt the legislation due to the current needs and changes on the European level. The Implementation Act has been changed once in the programming period by the Act from 2 September 2017 when project selection procedure has been specified and the programming guidelines of regional MAs have been abolished and replaced by the horizontal guidelines which have been updated that time as well. On the other hand the descriptions and other documents of MAs change more often in order to reflect the current situation in programming.

*„MIR intends to set a stable system plus the discussions about changing the Act take quite long because of many meetings with all the regions (it took more than half a year to change the Act last time).”*

Representative

The Marshal Office of the Malopolska Region (MA)



According to the respondents' opinion, it is too early to think about modifications in the legislation planned towards the upcoming period. Poland is preparing for a new perspective, negotiations between EU level and member states are taking place now. It is planned to prepare a draft of partnership agreement for 2021-2027 in the first half of 2019 therefore a concrete plan of change can be expected in the second half of 2020. Basically, they will adapt the national legislation (a brand new Implementation Act and guidelines) following the rules agreed on the European level.

*„It will depend on the content of the EU legislative package for the upcoming programming period.”*

Representative

Ministry of Investment and Development (NCA, MA)



### 3.5 Irregularities

#### 3.5.1. Definition and understanding of an irregularity

Irregularities regarding ESIF and their resolution are governed by the Implementation Act and their definitions are based on the general definitions in the Regulation. The term of an individual irregularity



is defined as an irregularity based on the Article 2, Point 36 of the Regulation and systemic irregularity is an irregularity according to the Article 2, Point 38 of the Regulation. An irregularity is a premise to determine a correction, and consequently, to issue a decision requesting the return of EU funds by the beneficiary.

The legal qualification and analysis of the factual basis is in hands of the relevant Managing Authority, Intermediate or Implementing Body. It is based on its own information or the information from other controlling institutions of the implementation structure incl. European ones (e.g. European Court of Auditors, OLAF) or other subjects (e.g. regional audit chambers, tax control authorities, police) which have to be reviewed by own procedures.

*„The Interpretation of irregularities is very strict, e.g. there might be issues connected to using the wrong bracket, public procurement procedures. The overall application of the European public procurement law is not perfect, the Polish Public Procurement Act has been only amended many times and become complicated and confusing. It changes so often that the users of the public procurement law are confused (it is difficult for them to follow those changes).”*

Representative

The Marshal Office of Slaskie Voivodship (MA)



*„In my opinion the crucial issue, which is connected with using the general regulation in national legal system is the issue of “irregularities” on basis of breaching the EU law in aspect of “violation of proceeding rules”. The difficulties especially involve the directives of the European Parliament and of the Council on public procurement (2014/24/UE, 2014/25/UE)... Many irregularities on basis of using the directives on public procurement are so specific, that financial consequences of that irregularities are very difficult to recognize.”*

Representative

The Marshal Office of Podlasie Voivodship (MA)



As mentioned by the respondents above, the public procurement law brings the most difficulties in ESIF implementation and also the most irregularities occur in this field. The biggest problem in this field seems to be the element of the irregularity's definition “unjustified item of expenditure to the budget of the Union”. The breach of procedure rules may have real or potential effect to the European budget while the potential one may, but does not need to, occur. In many cases when breaching the procedure rules in public procurement, this condition is only potential and therefore difficult to adjudicate. Because of this fact, the Regulation of financial corrections in public procurement has been adopted by MIR. The new regulation on financial corrections in the field of public procurement specifies the conditions and enables easier determination of irregularities and financial corrections. The regulation was issued on the basis of Article 24 section 13 of the Implementation Act and is based on the COCOF guideline. Other irregularities are solved in accordance with that provision on the basis of proportionality and analogy with the irregularities identified in the regulation. Administrative courts decide, in the case of non-use of the principle of proportionality that such a procedure may lead to the annulment of the administrative decision.



#### Regulation on financial corrections and incorrect expenses in public procurement<sup>6</sup>

The Regulation on financial corrections and incorrect expenses in public procurement came into force on 4 March 2016. The regulation specifies the conditions for reducing the value of financial corrections and reducing the value of eligible expenses in the event of finding an individual irregularity in the field of contracts implemented in projects co-financed from European Funds. Its annex explicitly

<sup>6</sup> Source: <http://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/rozporzadzenie-w-sprawie-warunkow-obnizania-wartosci-korekt-finansowych-oraz-wydatkow-poniesionych-nieprawidlowo-zwiazanych-z-udzielaniem-zamowien/>



includes a **Table of Tariffs** of financial corrections which states 32 categories of individual irregularities in public procurement, its characteristics (legal qualification) and the calculation of financial implications. It also states the percent method of fixing the financial corrections in case of “violation of proceeding rules” on public procurement. The document is aimed at standardizing and coordinating the procedure in case of detection of breaches of the Public Procurement Act and violations of the requirements set out in contracts for co-financing projects. Previously, they were not issued by a legal act but only as guidelines, which was a problem for determining financial corrections.

*„It (i.e. Table of Tariffs) is acceptable method on domestic administrative courts, but very controversial for beneficiaries. It generates many beneficiaries’ legal actions, because they do not accept this method. In their opinion such financial corrections are too high. In some specific cases I agree with that attitude. The Regulation of MIR does not predict the possibility of reduction of financial corrections due to glaring disparity between percent sum of corrections and influence of the violation of proceeding rules on result of public procurement in individual case. Because Table of Tariffs is the generally binding act, institution have no possibility to reduce the sum of corrections. In my opinion that act is not flexible enough. In that issue EU law states the possibility to reduce financial corrections, which seem to be too high.”*

Representative

The Marshal Office of Podlasie Voivodship (MA)



The mistakes in national funding are regulated solely by the general Public finance act in Article 152 paragraph 3. It has not any explicit legal definition, but it has the same consequences and effects as an irregularity due to EU Regulation. The main difference between a mistake and an irregularity is, that polish law does not include “violation of proceeding rules” into substantial prerequisites for a negative consequences for beneficiaries in the national granting schemes. Whilst an irregularity with “any breach of Union law, or of national law relating to its application” includes also the proceedings rules, the national granting schemes deal only with a material misuse of the funds.



Article 152 section 3 of The Public Finance Act

*“If it is found on the basis of the settlement referred to in paragraph 2 that the subsidy was misused in part or in all of its intended use or charged in excessive amounts, the holder of a budgetary part or a disposition of the funds referred to in Article 127 para. 2, determines in an administrative decision the amount to be repaid to the state budget.”*

*„The system is overregulated and the institutions are careful after the experience from previous programming period where many irregularities (incl. the systemic ones) occurred. Generally, there has not been so many irregularities in this programming period.”*

Representative

The Marshal Office of Pomorskie Voivodship (MA)



### 3.5.2. Handling of irregularities

There are basically not any contradictions in the procedure of handling irregularities compared to the mistakes in national funding apart from the special rules following the Regulation and the Implementation Act (e.g. material legal basis, material conditions and the monetary limits indicating an irregularity according to the Regulation). The procedure is regulated based on the Article 24 of The Implementing



Act, Article 207 of the Public finance Act and the Guideline on irregularities enforcement and reporting of 20 December 2018 (see their translation in the end of this section).

The authority responsible for handling violations of federal/state grant rules and identified irregularities is the Managing Authority which can delegate its powers to the Intermediate Body (which can delegate its powers to the Implementing Body). MA is always ultimately responsible for managing the irregularity following the procedure in the Regulation.

There might be three situations in which a mistake in funding may be detected.

If a mistake occurs before the request for payment is approved (ex-post financing, after presenting all documents), the institution approving the request for payment directly reduces the value of eligible expenditure included in the request submitted by the beneficiary by the amount of expenditure incurred incorrectly. There is no financial correction and reduction of the total project co-financing and the funds can be used again in the project for another task. If the beneficiary cannot present other eligible expenditure to co-financing, then the EU co-financing for the project is reduced. In this case, **it is not considered as an irregularity in the sense of the Regulation** and it is not reported to the EC. Such situation is typical for public procurement where there is a formal extended evaluation procedure on all mistakes before signing a contract with a beneficiary so there should not be any contradictions from the beginning.

*„In ERDF of Podkarpackie voivodship, we are not so brave to use advanced payments (they are only available for public institutions up to 50% of the received grants, no advanced payment for private subjects). In ESF, there are the advanced payments more usual (e.g. for some NGOs).”*

Representative

The Marshal Office of Podkarpackie Voivodship (MA)



If an irregularity is found by the institution responsible for managing ESIF after the request for payment application has been approved, the Managing Authority / Intermediate Body / Implementing Body issues an administration decision specifying the amount to be recovered and the date on which interest is accrued, and the method of reimbursement, based on:

- ▶ The Implementing Act;
- ▶ The Public Finance Act;
- ▶ The national administrative procedural law;
- ▶ The contract or decision on project co-financing.

In such case the beneficiary's request for payment financial correction is imposed, and as a consequence, the total co-financing on the project is reduced by the value of the financial correction. Financial correction measures cannot be re-used in the same project.

If an irregularity is detected by the Audit Authority, the MA have to conduct own control and assessment taking AA's findings into account and the mutual discussion of AA with MA may start in order to find an agreement. Sometimes the MA is convinced, sometimes not while MA's opinion is the only one which is binding to the beneficiary (audit finding is not directly binding, it just serve as a basis for the MA's decision). When the MA does not agree with the AA, the MA has the right to raise objections / submit an explanation in the context of the AA's findings, however the AA does not have to take them into account. The final position of the AA cannot be cancelled by the Managing Authority. However, the MA can take the risk and decrease the amount of payment according to its own opinion. In the case there is still a disagreement, final or annual audit report mentions the amount they have not agreed on.



*„After finding an irregularity the amount is blocked by MA and CA (if it is not an irregularity, the money is released so the beneficiary can use the amount again). An irregularity may appear always after the final confirmation of payment and its certification.”*

Representative

The Marshal Office of the Malopolska Region (MA)



The Managing Authority / Intermediate Body / Implementing Body is responsible for the procedure of recovering the amount of EU co-financing corresponding to the value of the financial correction (always incl. interest). The refund may be made by reducing the next payment to the beneficiary or forced following the general administration procedures. In the latter case, the beneficiary is asked to return the funds due to the recovery administration decision. If the beneficiary does not give the money back voluntarily, there is ultimately a special administrative court procedure connected with the general execution (without an involvement of tax office). If the unduly paid money is not recovered after taking all possible actions, Poland would have deal with the EC if the funds are remitted or must be paid from state budget.

*„In the last programming period in case that the unduly paid funds were not possible to recover from a beneficiary, Poland managed to convince EC that they took all possible procedure to recover the money and they did not manage and EC agreed that Poland does not have to pay the money from state budget back.”*

Representative

The Marshal Office of Podkarpackie Voivodship (MA)



The irregularities after exceeding certain financial limit (individually) are reported to OLAF each 3 months. The responsibility for such reporting have all the institutions of the implementation structure and it goes through the Polish Ministry of Finance (PA)<sup>7</sup>. If the value is lower, the information is only collected but not reported to any other institution as the CA is in the same institution as MA (in the previous programming period it was reported to the regional governmental institution which used to be the CA).



#### Article 24 of The Implementing Act

*“Paragraph 1. The identification of an individual irregularity or systemic irregularity, hereinafter referred to as "irregularities", results in the obligation of the competent institution to take appropriate actions, referred to in paragraph 9 or 11.*

*Paragraph 2. Failure to confirm the occurrence of irregularities in the course of a previous inspection carried out by the competent institution does not constitute a prerequisite for withdrawing from the relevant activities referred to in paragraph 9 or 11, in the case of a later confirmation of its occurrence.*

*Paragraph 3. The identification of irregularities and the imposition of a financial correction is preceded by explanatory actions carried out by the competent institution, during which the institution **may take into account the results of controls carried out by other authorized entities.***

*Paragraph 4. To find irregularities, to reduce the value of eligible expenses included in the payment application submitted by the beneficiary referred to in paragraph 9 point 1, and imposing a financial correction and in the case referred to in paragraph 11, the provisions of the Act of June 14, 1960 - Code of Administrative Procedure will apply.*

<sup>7</sup> The ministry of Finance plays supporting, financial and accounting role regarding ESIF (i.e. the irregularities are reported to the Ministry which takes them into account and includes into its evaluations), it is not involved in program development, nor discuss the findings with the other institutions.





*Paragraph 5. The value of the financial correction resulting from the individual irregularity shall be equal to the amount of expenditure incurred incorrectly in the part corresponding to the amount of EU co-financing.*

*Paragraph 6. The value of the financial correction referred to in paragraph 5, or the value of expenses incurred incorrectly, being the deduction referred to in paragraph 9 point 1, may be lowered if the European Commission determines the possibility of lowering these values.*

*Paragraph 7. If the amount of incorrectly incurred expenses cannot be determined, the value of the financial correction shall be determined taking into account paragraph 6 and regulations issued on the basis of paragraph 13, in accordance with art. 143 par. 2 of the general regulation.*

*Paragraph 8. The provision of par. 5 does not violate the principles of recovering funds related to the identified individual irregularity, coming from other sources.*

*Paragraph 9. If an individual irregularity is found:*

- 1) before the payment application is approved - the institution approving the payment application reduces the value of eligible expenditure included in the payment application submitted by the beneficiary by the amount of expenditure incurred incorrectly;*
- 2) in a previously approved payment application - the competent institution imposes a financial correction and initiates the procedure of recovering from the beneficiary the amount of EU co-financing in the amount corresponding to the value of the financial correction, in **accordance with art. 207 of the Act of August 27, 2009 on public finance**, and in the case of the ETC program - in accordance with the contract for co-financing of the project or the decision on co-financing of the project.*

*Paragraph 10. In the case referred to in paragraph 9 point 1, if the beneficiary does not agree with the statement of individual irregularity and deducting the value of eligible expenses included in the payment application, **he may submit justified written objections**. The provisions of art. 25 sec. 2-12 shall apply accordingly.*

*Paragraph 11. Where an individual irregularity results directly from an act or omission of:*

- 1) the competent institution or*
- 2) the state bodies*

*- the expenditure is adjusted by reducing the expenditure included in the declaration of expenditure and in the request for payment, forwarded to the European Commission, by the amount corresponding to the estimated value of the financial correction resulting from this irregularity.*

*Paragraph 12. The occurrence of circumstances referred to in par. 11, states:*

- 1) the minister competent for regional development performing tasks of the Member State - in relation to the managing authority and the national controller;*
- 2) managing authority - in relation to institutions entrusted with tasks in accordance with art. 10 paragraph 1 and 2 and art. 12 paragraph. 3.*

*Paragraph 12a. If the managing authority finds the circumstances referred to in paragraph 11 point 1, this institution shall initiate the control referred to in art. 22 par. 2 point 1.*

*Paragraph 13. The minister competent for regional development may specify, by the Regulation, the **conditions for reducing the value of financial corrections** referred to in paragraph 5, and the value of expenses incurred incorrectly, representing the deduction referred to in paragraph 9 point 1, as well as their percentage rates, taking into account the nature and importance of irregularities, their financial effects, as well as the position of the European Commission, referred to in paragraph 6."*



## Article 207 of The Public Finance Act

*“Paragraph 1. Where the resources allocated for the implementation of programs financed with the participation of European funds are:*

- 1) used contrary to the intended purpose,*
- 2) used in violation of the procedures referred to art. 184,*
- 3) collected unduly or in excessive amounts*

*- they are returned by the beneficiary together with interest in the amount determined as for tax arrears, counted from the day the funds are transferred, within 14 days from the date of delivery of the decision referred to in paragraph. 9, to the bank account indicated in the decision, subject to the provisions of subparagraph 8 and 10.*

*Paragraph 2. The refund may be made by reducing the next payment to the beneficiary by the amount to be refunded. The institution referred to in Art. 188 paragraph 1, includes this amount in the payment order addressed to Bank Gospodarstwa Krajowego. In this case, the provision of paragraph 4 point 3 shall not apply.*

*Paragraph 3. The provision of par. 2 shall apply accordingly to the interest referred to in par. 1 and in art. 189 par. 3.*

*Paragraph 4. In the case referred to paragraph 1, the beneficiary is excluded from the possibility of receiving the funds referred to paragraph 1 if:*

- 1) received payment on the basis of genuine counterfeit or falsified documents or documents confirming untruth, or*
- 2) as a result of circumstances on the part of the beneficiary, did not complete the full material scope of the project in the case of infrastructure projects or failed to achieve the project's objective, or*
- 3) did not return the funds within the time limit referred to in paragraph 1, or*
- 4) the circumstances referred to in paragraph 1, occurred as a result of an offense committed by the beneficiary, partner, entity authorized to make expenses, and in the case where these entities are not natural persons - a person authorized to carry out activities under the project on behalf of the beneficiary, the fact that the above-mentioned entities were found to have committed the crime valid court judgment.*

*Paragraph 5. The period of exclusion referred to in paragraph 4, starts from the day when the decision referred to in par. 9, has become final and ends three years after the return of these funds. If the circumstances referred to in paragraph 4 points 1 and 4, were determined after the date on which the decision referred to in par. 9, has become final, the period of exclusion starts from the day of determination of these circumstances, subject to paragraph 6.*

*Paragraph 6. If the reimbursement by the beneficiary referred to in paragraph 4 points 1, 2 and 4, was made in the manner specified in paragraph 8 or before the decision referred to in par. 9, the exclusion period referred to in paragraph 4 starts from the day of stating the circumstances referred to in paragraph 4 points 1, 2 and 4, and ends with the expiration of three years counted from the day the beneficiary returns the funds.*

*Paragraph 7. The provision of paragraph 4 shall not apply to entities which, on the basis of separate provisions, perform public-interest tasks, if this results in the inability to implement an action under the program or a significant part of it, and to local self-government entities.*

*Paragraph 8. In the event of determining the circumstances referred to in paragraph 1, the institution that has signed the contract with the beneficiary, calls on it to:*



1) refund of funds or

2) agree to the recovery of subsequent payments referred to in par. 2, within 14 days from the delivery of the summons.

*Paragraph 9. After the expiry of the period referred to in paragraph 8, a body performing the function of a managing authority or intermediate body within the meaning of the act on the principles of conducting development policy or the act of 3 April 2009 on supporting the sustainable development of the fisheries sector with the participation of The European Fisheries Fund shall issue a decision specifying the amount to be recovered and the date on which interest is accrued, and the method of reimbursement, taking into account paragraph 2.*

*Paragraph 10. The decision referred to in paragraph 9, does not appear if the funds have been returned before it was issued.*

*Paragraph 11. The managing authority or intermediate body may, on the basis of an agreement or contract, referred to in Art. 27 and art. 32 of the Act on the principles of conducting development policy, authorize the implementing institution that is a unit of the public finance sector to issue the decision referred to in par. 9.*

*Paragraph 12. The decision referred to in par. 9, issued by an intermediary institution or implementing institution referred to in par. 11, the beneficiary may appeal to the competent managing authority; in the event of a first instance decision by the managing authority, the beneficiary may ask the institution to reconsider the case.*

*Paragraph 13. The provisions of paragraphs 1-9 does not apply to state budgetary units."*



#### *Guideline on irregularities enforcement and reporting*

The related guideline is a horizontal document presenting the procedure for the correction of expenditure, including in particular the determination and imposition of financial corrections, as well as the recovery of funds improperly spent in the process of project implementation and implementation of operational programs co-financed from the funds of the European Union's cohesion policy funds.

### 3.6 Complaints

The appeal institution can always correct the administrative decision after recheck of the material and procedural conditions and if not, the complaint may be handed over to a court.

The national laws providing a general description of complaints-handling (against all administration decisions) are applicable for both ESIF and national programs. Formal, codified procedures are established and publicly available for all OPs in Poland.

The Polish legal framework provides effective solutions in the field of the examination of complaints concerning the ESI Funds are provided for in the following national laws:

- ▶ The Implementing Act contains regulations concerning the appeal and the adversarial procedures;
- ▶ The Act on public finance gives a beneficiary a right to lodge an appeal or to apply for his case to be re-examined if a formal decision to pay back the funds according to Article 207 of this Act has been issued;



- ▶ The Code of Administrative Procedure regulates proceedings before public administration bodies related to individual rulings by administrative decisions, as well as to complaints and motions addressed to state bodies, local government bodies, and social organizations bodies;
- ▶ The Act on proceedings before administrative courts regulates proceedings before court in cases of public administration performance, and in other cases in which its regulations are applicable on the basis of specific legal acts (i.e. administrative court cases).

Complaints can be lodged in the following phases at a minimum:

- ▶ In the selection process: Art. 53 et seq. of the Implementation Act
- ▶ When processing the claims: Art. 24 and 25 of the Implementation Act
- ▶ After receiving the outcome of random checks: Art. 25 of the Implementation Act
- ▶ After receiving the outcomes of audits: Art. 25 of the Implementation Act

This distinction needs to be made at the very beginning, due to the differences concerning the scope of legal protection and measures available. In general, lodging complaints is restricted to an applicant and a beneficiary, with a third party entitled to make claims only with the explicit authorization of the eligible complainant.

### 3.6.1. Applying for co-financing from European Funds – Applicants

The Implementation Act, in chapter 15 'Appeal procedure', provides a complex regulation of legal measures available for applicants in order to re-check the submitted application in respect of fulfil the project selection criteria. According to these provisions, this legal protection framework is applicable for all cohesion policy operational programs implemented in Poland, both on national and regional level.

The Implementation Act stipulates that appeal procedure may be started by the applicant if a project was submitted in competitive procedure and was appraised negatively. In such case, the applicant is allowed to lodge an appeal (so called 'protestation') in writing within 14 days from the day he receives information about the negative assessment of the project. The applicant must indicate specific shortcomings in the assessment carried out by referring to the relevant criteria.

The Implementation Act sets out that the institution competent to examine the appeal is the Managing Authority which was involved in the original procedure (though in a different personal representation to secure an independency of a review procedure). However, the tasks concerning the examination of the appeal may be entrusted by the Managing Authority to Intermediate Body (on the basis of an agreement).

The information on means of appeal available to the applicant and institutions that are competent to examine them is provided to the applicant under the rules of the contest. It is also explained in the instruction for the applicant, which is a part of the information on the result of project appraisal.

When the examination of the appeal is completed, the competent institution is obliged to notify the applicant in writing about the result of the examination of its appeal. If the appeal is granted, the project is either submitted to the next stage of the project appraisal, or it is placed on the list of projects selected for co-financing.

The project may also be referred to the institution which carries out the project selection procedure for re-appraisal. This may happen if the institution examining the appeal finds that applicable procedures have been violated and the issues to be clarified have a significant impact on the result of the appraisal. Within the re-appraisal procedure, the institution that carries out the project selection procedure verifies not only whether the project fulfils all the applicable criteria, but also all allegations made by the applicant in the appeal.

The applicant has a right to file a complaint to the administrative court if the appeal was rejected or if the result of project re-appraisal was negative. The complaint shall be filed, along with the complete documentation, to the administrative court. The Implementation Act provides the types of decisions that



may be taken by the court as a result of the complaint examination, and also rules concerning the cassation complaint and it is examination by the Supreme Administrative Court.

### 3.6.2. Project implementation stage – Beneficiaries

The Implementation Act, in Chapter 7 'Control and audit', regulates – inter alia – issues related to the control of projects implemented by the beneficiaries. If the appropriate Authority detects irregularities in project's implementations or beneficiary has derogated/breached a contract agreements, the appropriate Authority issues an administrative decision regarding the recovery of incorrectly disbursement of a grant by the beneficiary. A beneficiary has a right to submit substantiated written objections concerning the post-control information (Article 25 paragraph 2). Having examined the objections, the controlling institution shall draw up the final post-control information with corrected control findings or a written position on the objections along with the justification for refusal to correct the findings. The final post-control information shall be provided to the beneficiary.

After the above contradictory procedure is finished, the beneficiary has the right to apply to the court based on Law on proceedings before administrative courts. This procedure is based on the national law Code of Administrative Procedure, which allows the party/Beneficiary to participate in the proceedings.

Similar right is granted to the beneficiary if an individual irregularity is found before the payment application has been approved and the amount of eligible expenditures in the payment application has been reduced (Article 23 item 10).

The control of the activities of institutions participating in the implementation of operational programs is also performed by administrative courts based on Article 3 paragraph 2 of the Law on proceedings before administrative courts and includes adjudicating on complaints, inter alia, on:

- ▶ Administrative decisions;
- ▶ Decisions issued in administrative proceedings;
- ▶ Provisions issued in enforcement and security proceedings;
- ▶ Other acts or activities in the field of public administration, other than those specified above, regarding rights or obligations under the law;
- ▶ Acts of local law of bodies of local government units;
- ▶ Inactivity or lengthy proceedings.

As part of this proceeding, the second instance authority examines the decision again, refers to the beneficiary's allegations and issues a new decision in which it upholds the decision of the first instance authority or repeals it and returns it to the first instance authority for reconsideration. According to the MAs, correction of a decision is the most common remedy provided. In some cases, specific remedies such as a change of content in the agreement may be provided as well. If the second instance authority considers that the beneficiary's claims do not deserve to be reconsidered, it upholds the decision of the first instance authority and obliges to return the unduly used funds. In this situation, the beneficiary may submit a complaint to the Administrative Court. If the complaint is dismissed - the beneficiary may file a cassation complaint to the Supreme Administrative Court. Also, the MA can complain to the Supreme Administrative Court if the complaint is due to the MA incorrectly handled by the provincial administrative court.

### 3.6.3. European Funds Ombudsman

In addition, to strengthen the mechanisms for implementing the provisions of Article 74 par. 3 of the Regulation, on the basis of Article 14a of the Implementation Act, the Managing Authority is obliged, and other institutions participating in the implementation structure may appoint a European Funds Ombudsman from among their employees.

The Ombudsman is responsible for monitoring and signalling to the institutions of the implementation system, proposals for improvements in the process of implementing tasks related to the spending of EU funds. The Ombudsman's competences include accepting notifications regarding difficulties and





suggestions for improvements in the implementation of the OP, periodic reviews of procedures under the operational program, formulation of improvement proposals for the competent institution.

In accordance with the ESIF Act, the Ombudsman's conclusions are not legally binding, so it is not necessary to submit or consult them with any other institution, but the Ombudsman can only address the MA with a request for clarification. Exchange of correspondence / explanations / information between the Ombudsman and the MA is carried out on generally accepted principles. In accordance with the Manual of the MA, the MA is obliged to cooperate with the Ombudsman.

The Ombudsman's conclusions represent only certain recommendations or suggestions to the improvement the implementation of the operational program for the MA, which may or may not use them. The National Ombudsman for European Funds organizes Ombudsmen meetings of operational programs. Ombudsmen of operational programs sometimes consult each other with proposals for planned improvements.

The Ombudsman's conclusions are publicly available here: <http://www.rpo.malopolska.pl/o-programie/rzecznik-funduszy-europejsk> The Ombudsman is obliged to report annually on his activities, the MA publishes a report on his website.

*„Since the beginning of December 2017 the Managing Authority has appointed the European Funds Ombudsman whom complaints can be submitted. The European Funds Ombudsman investigates complaints about obstacles in the implementation of a regional operational program.”*

Representative

The Marshal Office of the Malopolska Region (MA)



### 3.7 Key factors, Best practice & Shortcomings

According to the respondents and information found during desk research, the **best practice** of ESIF implementation in Poland should be seen in:

- ▶ Adherence to general principles and legal provisions regarding the implementation of EU legislation, including in particular timely performance of the implementation obligation;
- ▶ Permanent cooperation between the Ministry of Development and the Regions in the field of alignment of national with EU law regarding ESIF;
- ▶ Communication and close cooperation between public authorities, social partners and bodies representing civil society at national, regional and local levels in the whole program cycle;
- ▶ Working groups coordinated by the Ministry (for example for specific objectives in the policy areas of employment, education, social inclusion and health), in which the MA from individual Regions participates, where implementation details for particular areas of Program implementation are developed together;
- ▶ Transparent process, the Ministry of Development enables direct contacts between the European Commission and the Regions on issues regarding new directions of support or detailed arrangements;
- ▶ Transparent and visible legislation to the applicants and beneficiaries.

*„As a key factor for efficient implementation of ESIF with respect to national legislation and other (non-)legal framework is perceived quality, clarity, transparency, compliance of regulations, the possibility of complaints, compatibility between the legal basis for grant financing from ESIF and national funds, avoidance administrative burden and over-regulations.”*

Representative

The Marshal Office of the Malopolska Region (MA)



Often mentioned aspect is the **transparency** of the legislation to the applicants and beneficiaries. The respondents see a good practice in supportive non-legal documents such as manuals and regulations



of competitions which enable smoother application of the rules which are contained in many various legislations. Moreover, all the legal and non-legal documents are **visible** as all the Laws, Regulations, Guidelines and other related documents are permanently available online, on the MIR's website: <http://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/#/domysln=1>. The regulations on competitions and other regional supportive documents are announced on the particular MA's websites as well.

The respondents mentioned also some **shortcomings** regarding the implementation of ESIF in Poland and such as:

- ▶ The use of inadequate form, methods or measures in the process of implementing EU law into the Polish legal order (see the quote below);
- ▶ Too many documents and acts to be observed and followed by the beneficiary;
- ▶ A long-lasting process of implementing EU law into the Polish legal order;
- ▶ Discrepancies regarding VAT compliance in operations related to the Labour Fund and financed from the ESF;
- ▶ Restrictive interpretation and application of the European rules and terms in the field of irregularities and financial instruments.

*„The shortcomings of the existing implementation of legislation are the obligation to comply with the guidelines that do not constitute a universally binding law in accordance with the Constitution, but according to the implementation act law, the appropriate institutions need to comply with them. It is problematic that some guidelines contain restrictions that do not stem from any legal provisions. Some aspects would be more applicable in the Act which is universally binding.”*

Representative

The Marshal Office of the Malopolska Region (MA)



To summarize the facts mentioned above, the ESIF non-legal system is perceived as transparent to its users and beneficiaries and flexible to change or adapt. In contrary, the rules are stipulated in non-binding documents which are more difficult to enforce.



## 4. Project activity review

### Total number of institutions approached

- ▶ 20

### Total number of persons approached

- ▶ 23

### Total number of interviews conducted (by institution)

- ▶ Implementation structure (NCA/MA/AA/CA/PA/IB1/IB2): 6.
- ▶ Academic staff: 0.
- ▶ Consulting companies: 0.
- ▶ Beneficiaries: 0.
- ▶ Local EY office: 1.

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

- ▶ Partnership agreement
- ▶ Relevant regional and national operational programs.
- ▶ The Act of 11 July 2014, on the principles of implementation of the cohesion policy programs. financed under the 2014-2020 financial perspective.
- ▶ The Act of 27 August 2009 on public finance.
- ▶ Horizontal guidelines of MIR.
- ▶ Detailed description of priority axes of the operational program.
- ▶ European Commission (2016): "2016 Synthesis of Evaluation Results and Plans under the ESIF Programmes 2014-2020." SWD (2016).
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