

Additional questions to commissioner Ferreira:

In answer to question 2, you write that the European data protection officer has found ARACHNE to be GDPR-compliant. A further review of the new data protection regulation, including a data protection impact assessment, is currently still in progress.

- **Why is this additional check necessary, despite the fact that the European Data Protection Supervisor had no objections to ARACHNE?**
- **When will these additional reviews and impact assessments be completed?**
- **Do you expect that this will dispel all of the objections raised by Member States?**

Reply

The Commission ensures that its data-mining tool (Arachne) is compliant with data protection requirements and periodically verifies this with the European Data Protection Supervisor (EDPS). The EDPS confirmed compliance with requirements in 2014 and 2017.

Taking into account the sensitive data that Arachne processes, regulatory developments in this field and in order to further dispel concerns raised by some Member States, the Commission considered necessary to prepare a data protection impact assessment on the processing of large amounts of personal data, especially where this involves automated processing with potential legal effect. This is in line with the requirements of Articles 11, 26 and 39(3) of the General Data Protection Regulation 2018 (EU) 2018/1725 (GDPR);

Therefore, the Commission is currently drafting a data protection impact assessment of Arachne and will submit it to the European Commission Data Protection Officer in early 2022. Following the outcome of this assessment, and if deemed necessary, the Commission may be asked by the Data Protection Officer to seek further confirmation of the compliance of Arachne with the GDPR rules from the EDSP.

The Commission considers that this review will further address concerns expressed by some Member States about data protection as a prerequisite to using Arachne.

While this may have a positive impact on the voluntary use of Arachne, the Commission notes that further improvements as regards data interoperability, use of data-mining tools or any other digitised systems for audit and control purposes require the adoption of the requisite legal provisions by the co-legislators. The Commission is ready to make the necessary proposals to this end in the context of the upcoming Financial Regulation revision, following the recent improvements as regards the collection of data on beneficial owners and recipients of EU funding introduced in the Common Provisions Regulation and other sector specific legislation.

CONT hearing 30.11.2021

As an example of measures against fraud and corruption, you refer to the "Integrity Pacts - Civil Control Mechanism for Safeguarding EU Funds" (Question 16)

- **Could you please explain how this mechanism works?**
- **You write that this mechanism should be streamlined in the future - how exactly should this be done and what success do you expect in relation to the fight against fraud and corruption?**

Reply

Integrity Pacts are an additional tool for preventing corruption and mismanagement in public contracting. They aim at increasing transparency and accountability, improving competition and compliance with public procurement rules, enhancing citizen engagement and trust in public institutions.

An integrity pact is a contract between parties to a public tender, i.e. the contracting authority and bidders, that they will abstain from bribery, collusion, extortion and other corrupt practices and will conduct a transparent procurement process. Civil society representatives, such as Transparency International, monitor the whole process to ensure that all parties comply with their commitments.

The Commission started integrity pacts with Transparency International in 2015 as a pilot project. The project covered 18 public contracts co-funded by Cohesion policy in 11 Member States. The project "Integrity Pacts – Civil Control Mechanism for Safeguarding EU Funds" received the European Ombudsman's Award for Good Administration 2019 in the category "Excellence in open administration."

Integrity pacts are particularly relevant in enhancing transparency and accountability for EU-funded projects of high public interest: large and complex projects, highly visible operations, big infrastructures, operations of strategic importance in the meaning of the Common Provision Regulation. For such projects, the costs associated with integrity pacts remain proportionate to the total project cost, while the benefits entail mitigating corruption and fraud risks, potential cost-savings, improved project implementation, and more generally improved transparency and citizens' trust. This was clearly evidenced by the Commission's analysis of the experience with its pilot project.

The Commission therefore considers that integrity pacts should be more widely concluded for the large, strategic projects of high public interest financed under the 2021-2027 Cohesion policy programmes. In the system of shared management, it remains up to the Member States to finance such contracts on a voluntary basis, but the Commission will promote such practices on a wider scale in the programming discussions with Member States leading to the adoption of programmes based on the good results with the pilot.

CONT hearing 30.11.2021

According to the CPR, the durability period for EU co-financed infrastructure projects is 5 years (3 years for SMEs) - unless a Member State extends this durability period through national law. Then this longer durability period and possibly conditions for premature repurposing apply. (Questions 22, 23)

- **Does this not lead to unfair treatment of beneficiaries if, in some Member States, they are allowed to repurpose EU co-financed buildings (e.g. for entirely private use) after 5 years - without any financial consequences - while stricter rules apply in other Member States (e.g. repayment of part of the value of the property in the event of early repurposing or conditions for its use, e.g. for charitable purposes)?**
- **Could you please elaborate on which weaknesses in the control systems were identified during the audits in Poland and Romania? What measures are being taken there now?**

Reply

Durability rules are set up to ensure that public investments serve their intended purpose for a minimum period of time. The durability rules are set in the EU regulation but may be complemented in the national legislation, in which Member States or programmes may set stricter rules than the minimum requirements established at European level. The rules are established so as to take into account changing economic conditions as well as other variables impacting the feasibility of maintaining the intended purpose of the investment, for example the risk of bankruptcy (for private beneficiaries) or changing in the main activities of the entity. Controls and audits are accordingly performed against the applicable rules.

The Commission is currently collecting information from all Member States on national durability rules, as a follow-up to the discharge recommendation issued by the European Parliament in 2019 to do a thorough analysis on the different national rules on durability of infrastructure investments and premature repurposing. This will allow the Commission to obtain a clear picture and to reflect about the European rules to be proposed for Cohesion policy in the future. The Commission will report to the EP CONT Committee on the results of this analysis.

Where relevant, the Commission services follow-up on specific issues, such as the case concerning repurposing of investments financed by the European Regional Development Fund in Czechia raised by the CONT Committee. DG REGIO has conducted an audit on this issue in October and intends to make available its conclusions to the CONT Committee by the end of this year, under the conditions of the Inter-institutional agreement.

Apart from targeted thematic audits in case specific issues are raised (such as in the case of Czechia), the audit check-list of the Commission services systematically includes the durability issue as part of compliance or system audits. So far, apart from the Czech issue (see above), findings linked to durability issues have been raised only in another two countries: Romania and Poland.

Romania:

In Romania, DG REGIO system audits covering two programmes, the Large Infrastructure and the Competitiveness Operational Programmes financed under the European Regional and Development Fund pointed at insufficient procedures for the verification of the requirements linked to durability and quality of investments. The recommendations made by DG REGIO to the two programme authorities were to improve procedures to check the quality of co-funded infrastructures over time during on the spot visits of the managing authority and to put stronger procedures in place to exclude illegal modification of the ownership structure during the durability period. As a result, the programme authorities improved their verification procedures to ensure effective verifications and reported the improved procedures to the Commission. DG REGIO could therefore close the audit findings for both programmes.

CONT hearing 30.11.2021

More specifically:

As concerns the Large Infrastructure OP, in October 2017 DG REGIO auditors found that the programme authorities had no procedures in place to monitor and check the respect of rules on the durability of operations. Auditors recommended setting up such procedures, paying particular attention, in line with the CPR requirements, in case of changes in the ownership of the infrastructure during the durability period, that such changes would not give to a private firm or a public body an undue advantage. Another recommendation was also to improve the verification of the quality of deliverables for co-financed operations (ensuring the original objectives of the operation are not undermined). Following appropriate actions put in place by the programme managing authority to ensure more effective control systems, the finding was closed in January 2020.

As concerns the Competitiveness OP, in November 2018, as a result of their audit, DG REGIO auditors recommended to the programme authorities to update their procedures regarding the monitoring / checks of Information Technology projects in order to allow more timely visits to the beneficiaries. The purpose was to ensure that all commitments taken by the beneficiaries when their projects were selected and contracted are duly checked. Indeed such beneficiaries' commitments are expected to be implemented either during the implementation phase or in the durability period. In addition, auditors recommended revising the durability checklist used by the managing authority in order to address each specific action related to the beneficiaries' commitments. DG REGIO satisfied itself based on the programme managing authority's follow up and reporting that appropriate actions were put in place to reinforce the programme controls and to effectively carry out verifications on these aspects for IT projects. The finding was therefore closed in September 2021.

Poland:

In Poland, a finding on the lack of information on the applicable procedures for durability checks concerning one programme, the Dolnośląskie Regional Operational Programme, is still open, pending further information from the concerned authorities.

DG EMPL auditors identified issues related to the verification of durability of operations by one specific intermediate body of the Dolnośląskie Regional Operational Programme. The intermediate body did not consider the ESF operations as subject to durability requirement and did not carry out durability controls. However, some of these operations were cross-financed by the ERDF, so DG EMPL expressed the view that the operations should have respected ERDF durability rules. As a result, the programme authorities were requested to ensure that:

- All operations concerned by ERDF cross-financing which include investments in infrastructure respect the provisions of Articles 71(1) and (2) and 98(2) of the CPR.
- The intermediate body duly informs the beneficiaries of completed and ongoing ESF operations of their obligations with regard to the durability requirements.
- Durability requirement is included in future calls concerned by the ERDF cross-financing of infrastructure investments.
- Adequate procedures are put in place so that the operations subject to ERDF cross-financing, including elements of investments in infrastructure, are subject to durability controls, in line with provisions of Article 125(4)(a), (5)(b) and (6) of the CPR.

Moreover, the managing authority/intermediate body was requested to identify the population and verify, based on a representative sample of operations, if the durability requirements were fulfilled for the operations concerned by ERDF cross-financing investments in infrastructure.

The Member State authorities disagreed with the Commission observations; however, the justification provided concerning durability checks was not supported by evidence. The Commission services issued the final audit report in October 2021 maintaining the finding and asked for additional evidence from the programme authorities to complete its assessment and to come to a definitive position.

CONT hearing 30.11.2021

Pending receipt of the documents listed in the final audit report, the audit finding remains open and the verification procedure under the programme management and control system is not considered fully compliant with the durability requirements set in the CPR.

1 percentage point of the error rate recorded by the ECA (3.9%) is made up of errors related to State aid, most of which had no incentive effect.

- **What is the COM doing to combat this type of error?**

Reply

In its 2020 annual report, the ECA identified five errors linked to EU State aid rules, only two of which have a quantitative effect the error rate: one in Latvia and one in Portugal.

In Latvia, the issue identified was an isolated one, as described in detail in the ECA annual report, and the programme authorities were reminded of the applicable rules to avoid recurrence of such errors in the future.

In Portugal, the issue was due to an incorrect transposition of EU rules in the national legislation, as previously reported by the Commission (annual activity report 2019) and ECA (annual report 2019). In 2017, following Commission and ECA audits, the national law was modified and important financial corrections were made to address the issue. Some remaining cases continue to generate expenditure and should have been corrected by the national authorities. The case reported by ECA in the 2020 report constitutes a tail end of cases before the law changed in 2017. The Commission audit services reiterated their request to the Portuguese authorities to review the reported expenditures and to exclude any similar remaining cases.

As the case in Portugal shows, errors do not necessarily demonstrate deficient control systems. Incorrect transposition of EU rules into national legislation is an important source of error, which the audits carried out by the Commission identify and help correct. Similar cases concerning incorrect transposition of requirements for public procurement in Germany, Hungary, Latvia, Italy and Spain were recently identified and addressed, as reported in DG REGIO's 2019 annual activity report.

In general, the Commission does not consider that error rates related to State aid are of systemic nature or concentrated in certain Member States. State aid rules are complex in nature and require a good understanding and application of the legal basis. To facilitate authorities in building capacity and improving compliance with State aid rules, the Commission continues to implement the measures designed under its State Aid Action Plan, identifying and disseminating good practices and offering training to ESIF stakeholders. In its 2020 annual report, the ECA also referred to this Commission State Aid action plan, which it considers helped increase the awareness and knowledge of programme authorities in this area. This Commission action plan, together with the one on public procurement, is implemented with the express purpose of improving Member States' capacity to detect and prevent errors in two areas more particularly prone to errors in the past years.

As public procurement, State aid remains one of the areas that is audited during the Commission's audits given its inherent risk. Such Commission audits allowed to identify system weaknesses in the controls and audits carried out by the programme authorities (including the State aid systemic issue in Portugal mentioned above) or individual irregularities concerning non-compliance with State aid rules at the level of individual operations.

ECA gives an example of a flawed transaction that was examined in 2020 (Box 5.6), an early preventive system audit by the Commission in Hungary in 2017 on public procurement, which led to a 10% flat rate corrections for 4 years, following which Hungary withdrew EUR 149 million from European funding.

- Does the Commission know whether Hungary has since reclaimed this money from the beneficiaries or whether it has been transferred to a national support program - meaning that the financial burden is shouldered by the Hungarian taxpayer?

Reply

The Commission has an obligation to protect the financial interests of the European Union. Financial corrections of expenditure affecting the EU budget and other corrective actions are effected to that end. When Member States withdraw irregular expenditure from the EU budget, national authorities are to ensure the requisite protection of the national budget in line with the national legislation, including where applicable by recovering the funds from beneficiaries in case of established irregularities for which the beneficiaries are liable. The Commission has no jurisdiction over such proceedings at the national level.

As regards the specific case in question, the Commission carried out 4 preventive system audits covering the 7 Hungarian Cohesion programmes in 2016-2017, which led to total estimated financial corrections of around EUR 1.3 billion, of which EUR 770 million due to horizontal, systemic public procurement deficiencies in all of these programmes. The Commission imposed a 10% flat-rate financial correction on all contracts signed and all public procurement procedures launched from the beginning of the programming period until 29/11/2019, when the Hungarian Public Procurement Act was modified. Based on information received from the Hungarian authorities, they did not recover the corresponding amounts from beneficiaries since the correction imposed by the Commission was due to a systemic deficiency by the public administration. Following these audits, the Commission has noted that the Hungarian authorities have taken actions to improve their management and control systems, including as regards public procurement, increased ex-ante verification capacities, monitoring and targeted review of risky areas. In particular, template documents, guidance notes, operational manuals in the area of public procurement were prepared or improved. Bad practices, such as framework agreements covering very large parts of programmes implementation, were discontinued.

The Commission services remain vigilant and a horizontal public procurement audit is planned in 2022 to verify the improvements made after the previous horizontal public procurement audit of 2017.

Until the end of the programming period, all priority axes of the Hungarian programmes will have been covered by Commission audits through targeted thematic system audits and compliance audits. In 2019-2020, the 4 audits of the Commission performed did not identify any longer serious horizontal shortcomings with the exception of one issue in project selection and related management verifications (ineligible projects, ineligible staff costs) in priority axis 2 of the Economic Development and Innovation OP. In 2021, a fact-finding on the work of the audit authority and 2 thematic system audits (on managing authorities and their intermediate bodies) were carried out. For 2022, a fact-finding compliance audit and 3 thematic audits are planned (of which one on the monitoring and follow-up to horizontal public procurement improvements, as mentioned above).