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Underperformance Policy

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Underperformance Policy

A: Background

1. Performance against contracted targets will be monitored closely at Programme level in the 2014/2020 operating period. Auditors at the European Commission and European Court of Auditors, English Audit Authorities, Certifying Authorities and Managing Authorities will audit achievement throughout the Programme period. Failure to achieve milestones agreed in the Operational Programme will result in a range of possible sanctions including non-payment of performance reserve sums, interruption and suspension of the Programme and, ultimately, de-commitment.
2. In order for Programme level targets to be achieved, the delivery of project (or operation) targets is *critical*.
3. Underperformance against project targets will initially be managed via day to day contract and performance management activity. This may initially result in e.g. project change requests.
4. In circumstances where a project is underperforming, where all normal contract and performance management actions have been undertaken but have not led to the improvements required, the Managing Authority (MA) will consider the application of a financial penalty. This is in line with Funding Agreement paragraphs 11.10 a to f (Reduction in grant for underperformance) and Schedule 3A Underperformance Methodology.
5. In exceptional cases ESF grant may be de-committed on the basis of such unsatisfactory performance. *This course of action would be considered the last resort.*
6. In cases where a financial penalty is not made, the principles below still apply and measures such as contract variation, early closure etc. will be used to appropriately manage performance issues.

B: Principles

7. The Policy is based on the following principles:
 - a. All operations part funded by ESF are expected to have in place arrangements to ensure effective capacity and capability to deliver the ESF funded operation on time and on budget in line with their ESF funding agreement.
 - b. Where operations fail to deliver the required outputs or spend or where it is considered unlikely that the operation can get back on target in order to meet the terms of its funding agreement, ESF resource may be reduced or clawed back.
 - c. It is recognised that for some operations, performance may be slower than expected with underperformance against the contracted targets. This may be identified by the Managing Authority or identified by the Grant Recipient. In such cases steps will be taken to bring the operation back on target prior to identifying the operation as being at risk of ESF being reduced or clawed back.

- d. Through management and monitoring of the ESF Programme, Managing Authorities will regularly review operations to ensure delivery in line with funding agreement conditions. This will identify operations that are likely to be unable to deliver on contractual commitments, and allow appropriate action to be taken.

C: Approach to operation review

8. The Policy is intended to be used in circumstances where normal contract and performance management actions have been undertaken (including contract variations, early closure etc) but not led to the improvements required.
9. Where this is the case a three stage approach will be adopted as follows:

Stage 1	Identification and notification of operations at risk of ESF being reduced or clawed back.
Stage 2	Development and implementation of an appropriate Recovery Plan.
Stage 3	Initiation of action to reduce or claw back ESF awarded.

Stage 1: Identification and notification of operations at risk of ESIF being reduced or clawed back

10. Using evidence generated by e.g. operation claims, monitoring and audit visits, irregularities etc., operations failing to deliver contracted outputs and spend to the required levels and timescales will be identified by the Managing Authority.
11. A tolerance of c15% underperformance against outputs and expenditure will normally be used in this determination. Where the 15% tolerance is breached on any single output, Local Teams should carefully consider, using their knowledge of the project and seeing the variance in the context of the project's performance as a whole, the most appropriate course of action. Projects showing a variance of up to 15% would normally be dealt with via the Project Change Request process.
12. In projects where the variance is 16% or over, in deciding whether there may be a case for reducing or clawing back grant the ESF Contract Officer¹ will consider and discuss the project specific issues with the ESF Manager². These will normally include:
- a) whether the reason for underperformance has been fully established and whether there are any mitigating or extenuating circumstances to be considered;
 - b) whether agreed delivery profiles (both end and period totals) remain appropriate;

¹ i.e. the Local Team staff member with day to day responsibility for the contract management of the project.

² i.e. a more senior member of the Local Team who can advise the Contract Officer and make decisions on appropriate next steps. This could be the Officer's line manager, another Local Team manager, or the G7 for the Local Area.

- c) whether output targets in the funding agreement are consistent with what has been required for similar projects;
 - d) whether audit findings, irregularities and information in paid and pending claims to date is satisfactory or not;
 - e) any provisional proposals made by the Grant Recipient for rectifying under performance;
 - f) any other issues that have arisen through normal contract management activities.
13. The ESF Manager will review the case, consulting as necessary. Where it is determined that an operation is underperforming, the MA will write to inform the Grant Recipient that there is a risk of ESF being reduced or withdrawn should improvements not be made to a specified level and by a given date.
14. Operations notified as being at risk of an underperformance penalty in Stage 1 will be monitored via normal contract management processes up until the date for evidence of improvement given in the letter issued.
15. Where improvements are made and performance becomes satisfactory no further action need be taken. Normal contract and performance management activity will continue.

Stage 2: Development and implementation of an appropriate Recovery Plan

16. Operations failing to show the required improvement will then be provided with formal notification of a potential reduction or claw back of ESF. This will give a clear and unequivocal notice of potential de-commitment, and offer an appropriate opportunity to redress underperformance.
17. Such operations will be required to develop a Recovery Plan.
18. This should clearly identify how the operation will improve its performance within an agreed timescale and how this will be reviewed and measured. This may include a change request (which would be considered under the normal Project Change Request process).
19. The Recovery Plan should not be an onerous or complicated document. It should be a short concise summary of the position, required action and required results. It will normally cover 3- 6 months duration and will clearly set out:
- a) Current performance levels against current contracted targets;
 - b) Target performance improvement within plan period by each target;
 - c) The variance between (in % and actual / £ values);
 - d) Specific agreed actions to recover underperformance with proposed timescales and milestones;
 - e) A proposed timescale and process for the review of the Recovery Plan and it's results;
 - f) Details of the implications for the operation should it fail to recover;

20. The Plan will be developed by the Grant Recipient. This will be considered and, where necessary amendments and clarification sought, prior to being agreed by the MA.
21. In considering the Recovery Plan, ESF Contract Officer will consider and discuss the project specific issues with the ESF Manager. These will normally include:
- a) whether the reason for underperformance has been properly acknowledged and what mitigating or extenuating circumstances have been presented;
 - b) whether amended delivery profiles (both end and period totals) are appropriate;
 - c) if the Recovery Plan addresses all of the issues previously identified in a realistic and complete manner;
 - d) if the actions proposed are likely to bring about the improvements required;
 - e) if the timescales proposed are acceptable;
 - f) if the consequences of failure to improve performance have been acknowledged and appear to have been understood;
 - g) any other pertinent issues (e.g. performance on other projects etc).
22. Performance against the Plan will be closely monitored by the ESF Contract Officer and will result in either the operation's performance improving, or a recommendation for ESF being reduced or clawed back in full or in part.

Stage 3: Initiation of action to reduce or withdraw ESF awarded

23. Where an operation fails to deliver on an agreed Recovery Plan, the Local team Head (or other MA senior manager as agreed) will make a final decision on whether the ESF awarded should be de-committed i.e. reduced or withdrawn.
24. Projects in such circumstances will be fully aware of the situation, and action being taken, through discussions at / following consideration of their Recovery Plan. The application of a penalty will be no surprise.
25. Levels of penalty and de-commitment will be determined on a case by case basis and will be commensurate with the level of underperformance. The penalty figure will be proportionate having regard to mitigating circumstances.
26. Where a penalty is to be applied for underperformance against outputs the methodology at [Appendix 2](#) will be applied as a starting point.
27. Where underperformance is identified as part of project closure, reference will be made to the methodology at Appendix 2 to determine whether there should be any reduction to the final payment due. These assessments will be in line with the process outlined above, recognising that there will be limited scope for Recovery due to the proximity to operation end date.
28. The methodology at [Appendix 2](#) allows Local teams to identify up to 4 outputs to be included in any underperformance penalty calculation. This allows flexibility

depending upon the individual project's contracted targets and circumstances. These are entirely at the Local Team's discretion, however, it is expected that the outputs selected would normally :

- a. Include any that relate to the Programme performance reserve;
- b. Present a good range of those contracted ensuring that different output types are covered e.g. number of unemployed / inactive participants etc;
- c. Acknowledge any over achieved outputs;
- d. Link back to the appropriate Priority Axis / Call / ESIF Area priorities.

29. Decisions to reduce or claw back ESF will not be taken lightly. Having quantified the level of underperformance the following will be taken into account before making a final decision:

- a) the potential impact on the project and organisation delivering the project if ESF was to be reduced or withdrawn;
- b) whether a shortfall in outputs would be likely to have an adverse impact on achievement of outputs in the ESF Operational Programme;
- c) whether any outputs have been achieved that are in excess of those set out in their funding agreement;
- d) the impact that any shortfall or delay in expenditure would be likely to have on achievement of annual commitment and / or spend targets; and
- e) the potential impact on both the MA's reputation in relation to the ESF Operational Programme in England, and EU's wider reputation for ESF, should there be a reduction or claw back of grant.

30. The MA's decision will be based on consideration of a recommendation based on the facts of the case, to include the points above, and authorised by the Local Team's Head of Team. Outcomes may be e.g. a formal variation to the operation, a decision to close the operation early, a reduced level of ESF available commensurate with revised achievement expectations or an offset / demand note for claw back of some or all of the ESF paid to date or due.

31. A formal letter will be sent by the MA to notify the operation of the decision, penalty value and action to be taken.

32. Once the letter has been sent an irregularity will be raised on E-Claims to reduce the total project pot by the amount agreed, clawing back this value x the project's intervention rate.

D: Re-allocation of returned funds

33. ESF reduced or withdrawn will be available for re-allocation within the Programme. Re-distribution arrangements will be in line with the "normal" process used for all other returned monies (e.g. irregularities etc). Initially the following will be in place :

- a) For ESF operations this will, in the first instance, normally be available to the LEP Area ESF Allocation from which the original operation was funded.

- b) .For ESF CFO and Opt In operations the OIO / CFO will initially endeavour to re-allocate funds elsewhere within their portfolio of operations. Where this is not possible funds will be made available to the LEP Area ESF Allocation
- c) For ESF direct bid operations funds will be made available to the LEP Area ESF Allocation from which the original operation was funded.

E: Role of the LEP Area ESIF Sub - Committee

- 34. The LEP Area ESIF Sub - Committee will be informed of all cases reaching Stage 2 – Recovery Plan development, for information. Updates on progress will be given in Programme delivery papers prepared for meetings and/or by written procedure.

ESF Managing Authorities

September 2016 (VERSION AS AT 29/09/2016)

Appendix 1 – Additional ESF Specific Issues

1. The principles outlined within this Policy are applicable to all ESF operations. This includes both European Social Fund (ESF) Co-Financing / Opt In *and* direct bid operations.
2. For ESF operations, the inherent differences in the two delivery models, however, lead to the need to apply the policy slightly differently, that is:
 - a) ESF direct bid operations – the policy will be applied to all operations above a minimum total ESF threshold of £500,000. The *principles* can be applied to all operations regardless of their value.
 - b) Co – Financing / Opt In Organisation operations – it is recognised that performance management processes are set out in contracts and agreements, however the *principles* detailed below can be applied to all operations via :
 - i) the MA / Opt In or Co Financing Organisation contract management relationship and
 - ii) the CFO / Opt In Organisation / operation contract management relationship.
3. For ESF operations the following is assumed :
 - a) Direct bid agreements in the 2014/2020 Programme will include specific deliverables to manage performance against.
 - b) MA / Opt In and Co Financing Organisation relationship – the ESF MA performance manages the OIO /CFOs in line with procured contracts. The principles in the underperformance policy are applicable to this relationship and will be referenced in agreements.
 - c) CFO and Opt In Organisation / operation relationship – OIO / CFOs performance manage their operations via quarterly reviews of actual delivery against profile. Where there is underperformance over a period that cannot be rectified the OIO / CFO has the ability to re-allocate funds elsewhere within their portfolio of operations – this arrangement is well established, in line with the principles in the policy (which will be referenced in agreements between the parties) and will continue in the 14/20 Programme.