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Periodical Part — Published Version

Administrative simplification of the EU Common Agricultural Policy - possibilities, approaches and constraints

Berichte über Landwirtschaft

Suggested Citation: Martinéz, José et al. (2020) : Administrative simplification of the EU Common Agricultural Policy - possibilities, approaches and constraints, Berichte über Landwirtschaft, ISSN 2196-5099, Bundesministerium für Ernährung und Landwirtschaft (BMEL), Berlin, Iss. Special issue 226,
https://doi.org/10.12767/buel.v0i226.295 ,
https://buel.bmel.de/index.php/buel/article/view/295

This Version is available at:
https://hdl.handle.net/10419/296238

Berichte über Landwirtschaft
Zeitschrift für Agrarpolitik und Landwirtschaft

Special issue 226

May 2020

Agricultural Science Research

Agricultural Practice

Administrative simplification of the EU Common Agricultural Policy – possibilities, approaches and constraints

Published by the Federal Ministry of Food and Agriculture

http://buel.bmel.de

ISSN 2196-5099

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Cite as:

Martínez J., Weingarten P., Balmann A., Birner R., Christen O., Gauly M., Grethe H., Latacz-Lohmann U., Nieberg H., Pischetsrieder M., Renner B., Schmid JC., Spiller A., Taube F., Voget-Kleschin L. (2019): Administrative simplification of the EU Common Agricultural Policy – possibilities, approaches and constraints. Berichte über Landwirtschaft. Sonderheft 226, 2019.

Summary

Hardly any other call on the Common Agricultural Policy (CAP) has found such a broad consensus among stakeholders since the 1990s as that for administrative simplification of the CAP. Simplification is urgently needed, especially for both pillars of the CAP and for all levels of actors (EU, Member State, which in Germany means the German federal government and federal states, and beneficiaries). Against the background of the impending reform of the CAP post 2020, this report by the Board discusses the possibilities, approaches and constraints on administrative simplification. It thus amplifies the recommendation to "reduce the administrative burden to an appropriate level" which was made in the Board's report entitled "For an EU Common Agricultural Policy serving the public good beyond 2020: Fundamental questions and recommendations" (WBAE 2018: 71).

Administrative simplification is not, however, an objective in itself. It must reflect the constitutional requirements concerning the legality of administrative governance and the democratic need to protect the financial interests of the EU and the respective Member State. Properly executed, administrative simplification will proceed in a manner which does not interfere with the objectives of the CAP measures and which secures appropriate utilisation of public funds. A further objective is both to allay mistrust and fear on the part of the implementing authorities in the Member States about risks of financial corrections and to regain scope for design.

The call for administrative simplification is addressed to the organizers of the implementation, i.e. the legislators and administrative authorities at European and Member State level generally. In Germany, we have to add the federal states.

There are diverse reasons for the administrative complexity of the CAP. These are largely the outcome of the basic structure of the CAP and their administrative controls being created in the 1960s and 1970s and gradually built up over the years. Some of the administrative burden can be attributed to the EU legal framework and some to specific implementation in Germany.

The current CAP deploys a highly differentiated range of instruments to pursue a large number of objectives, which are achieved jointly via indirect enforcement and administrative cooperation between the EU and the Member States. It is therefore necessarily normative and procedurally complex and onerous. Furthermore, the necessary degree of complexity and administrative burden has been overlaid with structures which have rightly prompted all stakeholders to call for simplification. The main reasons for the existing administrative complexity are an unclear legal situation – which fundamentally changes with every new support period and which can continue to change during the support period – and an unduly strict stance of the EU Parliament and the EU Court of Auditors on the proper allocation of resources (maximum tolerable error rate of 2 %). This strict approach to budgetary discipline causes a comprehensive, redundant monitoring system that imposes disproportionately high penalties on the Member States (demands for financial correction) and the beneficiaries.

The EU Commission's legislative proposals for the CAP post 2020 have the potential to effect a paradigm change for the CAP. The "new delivery model" is designed to basically change the CAP's governance structure. Whether the legislative proposals will lead to administrative simplification can only be assessed to a limited extent at the moment. However, the Board is sceptical about whether the scope for design granted initially to the Member States will remain after the final decision. The Board fears that the new delivery model, unless it is radically amended, will merely shift the administrative burden from the EU to the Member States.

The Board makes the following recommendations for reducing the administrative burden to an appropriate level:

1. **Replace the existing culture of mistrust over the long term with a shared administrative culture between the EU and the Member States:** Administrative cooperation between EU and Member States requires a shared administrative culture among stakeholders. Only then can the existing complexity of the control instruments be reduced. The system of penalties for infringements should be graded by severity (duration and scope) and intent (deliberate as opposed to negligent).
2. **Delimitation of the general procedural provisions of the CAP:** Creating procedural provisions for the CAP which are maintained beyond the funding periods will foster administrative, judicial, and scientific practice, enhance legal certainty and simplify existing procedures.
3. **Reduce, codify and timely submit EU implementing provisions on the CAP:** A reduction in the implementing provisions to the necessary EU minimum and the systematic summary of implementing provisions relevant for the whole CAP into a single codified law would lead to the emergence of an administrative, judicial and scientific practice and, thus, to greater certainty in action. All legal provisions should be enacted some time ahead the new funding period.
4. **Implement EU law in a more complex administrative manner at national level in justified cases only:** National funding implementation, including controls, should, where possible, not be undertaken in a more complex administrative manner than stipulated in EU law. Should the German federal government or the federal states wish to be more ambitious in their programming of support measures in order to achieve greater accuracy and delivery of objectives, such considerations must be weighed against the greater administrative burden.
5. **Use suitable indicators as a basis for performance statements and checks instead of the requirement to prove regularity of expenditure:** The Member States should no longer have to prove regularity of expenditure to the EU but should instead submit performance statements and checks based on suitable indicators. Should the EU wish to retain the requirement for proof of regularity of expenditure, the maximum admissible error rate should be raised by an appropriate amount from the current level of 2 %.
6. **Take into account and reduce Member States' administrative costs:** When checking the efficiency of the control instruments, the EU should make a rough allowance for the control and penalty costs incurred by the Member States' administrative authorities.

The German federal government and federal states should review the existing national rules specifically governing agricultural administrative procedures, as well as the need for the general rules of funding legislation and the financial regulation, particularly with a view to avoiding redundancy during controls.

7. **Introduce a single-audit system:** From the organisational legal angle, a single-audit system should be introduced to simplify administrative procedures. The related reduction in control density is realistic even without compromising the basic principles of budgetary discipline in the EU and is possible within the constitutionally defined limits.
8. **Reduce the administrative burden by setting appropriate minimum thresholds:** Minor legal infringements that have a comparatively slight financial impact and minor area variations relating to eligible land should be deemed minor breaches. It should be left to the Member States to define, within a pan-European determined framework, what constitutes the minimum threshold or a negligible variation.
9. **Increased use of digital technologies:** Existing data and digital technologies should be used far more than in the past for area-related measures as the basis for the design, application, evaluation and control of measures.
10. **Emphasise the principle of trust more than the principle of legality:** The hitherto subordination of the principle of trust to the principle of legality should be modified by rebalancing both principles.

The decisions on the CAP after 2020 that will be taken shortly at EU level, and their implementation in Germany, should be seen as an opportunity to reduce the administrative burden of the CAP to an appropriate level. This calls for a CAP reform which does more than merely tackle the individual symptoms of the administrative complexity.

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List of abbreviations

TFEU	Treaty on the Functioning of the European Union
BMEL	Federal German Ministry of Food and Agriculture
ERDF	European Regional Development Fund
EAGF	European Agricultural Guarantee Fund
EAFRD	European Agricultural Fund for Rural Development
EU	European Union
CJEU	Court of Justice of the European Union
ECA	European Court of Auditors
TEU	Treaty on European Union
CAP	Common Agricultural Policy
ICs	Implementation Costs
IT	Information Technology
FTEs	Full-Time Equivalents
WBAE	Scientific Advisory Board on Agricultural Policy, Food and Consumer Health Protection

1 Introduction

1. Hardly any other call on the Common Agricultural Policy (CAP) has elicited such a broad consensus among stakeholders as the demand for administrative simplification. Outside the meetings aimed at reforming the CAP, this call has long been exercising the minds of beneficiaries, such as farmers and other applicants, agricultural interest groups, the Member States (Roza and Selnes 2012: The farmers' organisations in Germany, Finland, Sweden, UK, the Netherlands and Denmark 2015, DBV 2015, SMUL 2016, Saxony Anhalt 2016), and the EU organs themselves (EU Commission: High Level Group of Independent Stakeholders on Administrative Burden 2014, COM 2017a, 2012, 2011, 2009, 2005, REFIT Platform 2015, Council of the European Union 2015, Beke et al. 2016).

2. Many sides stress the urgent need for simplification, especially of both pillars of the CAP and at all actor levels (EU, Member State – which in Germany means the German federal government and federal states – and beneficiaries). For instance, the European Court of Auditors (ECA 2017a) called its special report 16/2017 "Rural Development Programming: Less complexity and more focus on results needed." Back in 2011, Bavaria developed 44 proposals for cutting red tape in the CAP (StMELF 2011). And, in its "EAFRD Reset Paper", the Saxony State Ministry of the Environment and Agriculture describes the second pillar of the CAP as follows: "Over many funding periods, it has developed into such a complex and complicated system that it has become a symbol of a European funding bureaucracy remote from reality for many applicants and administrative authorities in Europe" (SMUL 2016: 3). For its part, the Court of Auditors in Baden-Württemberg talks of "cascades of documentation, control and reporting obligations" (Court of Auditors Baden-Württemberg 2015: 13), where the administrative burden is grossly disproportionate to the control result, i.e. the correction of erroneous expenditure. In a joint paper of the federal government and the federal states on the new direction for implementing EU policy on rural development (Anon. 2017) it is noted that, as a consequence of the growing formal requirements, specialised goals are becoming less important.

3. The Austrian EU Council presidency (2nd half of 2018) made the "Simplification of the Common Agricultural Policy (CAP) after 2020" the focus of its agenda.[1] In summer 2018, the German Federal Ministry of Food and Agriculture (BMEL) and the Ministers for Agriculture from the federal states emphasized their call for substantial simplification of the CAP. A federal government-federal states working group, called "Common Agricultural Policy" has been tasked – headed by the North-Rhine Westphalian Conference of Ministers for European Affairs – with devising proposals for cutting red tape and bringing in simplification that will feed into the European discussion on the Common Agricultural Policy.

[1] See item 10 in the Progress Report of the Austrian Council Presidency of the CAP, published in Agra-Europe, Special Supplement 1/2/19 dated 07.01.2019.

4. It should be noted that the previous discussions dating from the 1990s have engendered hardly any noticeable results.[2] True, the EU and the German federal government and federal states have repeatedly enacted measures aimed at simplifying the administrative burden. Yet, by their nature, these measures were either normative (such as the group opt-out for agri-sector aid under Regulation EU No. 1408/2013, dating back to 2003), or economic (elimination of numerous market intervention instruments in the early 1990s) or technical (such as the use of digital media for the application processes). These reductions in the administrative burden were, however, largely offset again by additional control requirements, e.g. through Greening (German Bundestag 2017). This development was caused by a stronger differentiation of the political objectives and measures within the CAP since the 1990s, which should be welcomed in view of greater targeting in the governance of the CAP.

5. Administrative simplification or a reduction of the administrative burden is not an objective in itself. The fundamental assumption has to be that, in a democratic state governed by the rule of law, every rule and every procedure made sense at the time it was enacted or introduced. Rules and procedures can become inconsistent due to new objectives and rules issued by legislators, or when target priorities are changed, or it may turn out that the basis underpinning the enactment of a rule or procedure has changed otherwise. Often, the CAP has the peculiarity that the accumulation of–in isolation – insignificant compliances or control steps causes a considerable burden for farmers or other beneficiaries and the implementing institutions.

6. It is important for the administrative burden to be proportional to the target contributions which are to be achieved by implementing a measure. First, this implies that a given measure does in fact contribute to the attainment of one (or more) relevant targets. Second, it should moreover not be possible to conceive of any measure that employs fewer resources and delivers the same level of target achievement. The European Court of Auditors (ECA 2018: 22) states in this context: “Simplification needed, but not at the cost of effectiveness”. The European Court of Auditors thus does not allow any compromises on effectiveness when it comes to the given objective system and the sphere of activity of the various actors.

7. This report presents an in-depth discussion of the possibilities, approaches and constraints on administrative simplification, and provides policy recommendations in this regard. It addresses all those administrative procedures and underlying rules which have been developed by the Member States and the EU in the course of, or as a consequence of, the EU’s CAP competence.[3] It thus amplifies the recommendation to “reduce the administrative burden to an appropriate level” which was made in the Board’s report

[2] A small example of an administrative simplification achieved during the current support period was the opt-out for active farmers under the omnibus regulation 2018.

[3] Left out of this consideration, therefore, will be support-specific, general rules; especially the Administrative Procedure Act and the Federal Budget Code and the federal state budgets.

entitled “For an EU Common Agricultural Policy serving the public good beyond 2020: Fundamental questions and recommendations” (WBAE 2018: 71). The present report does not focus the legislative proposals on the CAP after 2020 and their impact on the administrative burden which the EU Commission published in June 2018. These will therefore only be mentioned in passing.[4] As for the CAP beyond 2020, the Board refers to its own report mentioned earlier (WBAE 2018) and its report entitled “Designing an effective agri-environment-climate policy as part of the post-2020 EU Common Agricultural Policy Effectively shaping the agricultural, environmental and climate protection policy as part of the EU’s Common Agricultural Policy beyond 2020” (WBAE, in print).

8. This report is structured as follows. Since administrative simplification is not an objective in itself, Chapter 2 lays out the objectives of administrative simplification and the scale of the current administrative burden and explains what the subject-matter of administrative simplification of the CAP should be and which legal constraints there exist in respect of simplification. Chapter 3 then discusses why each reform of the CAP, despite the declared objective of simplification, has so far tended to increase the administrative burden, and explores the administrative complexity caused by the CAP. The most important elements of the EU Commission’s legislative proposals on the CAP after 2020 are then outlined from an administrative simplification angle in Chapter 4. Finally, Chapter 5 makes some general recommendations for the administrative simplification of the CAP.

[4] A detailed discussion and evaluation of the legislative proposals with a focus on the CAP implementation and the pillars of the CAP can be found in Fährmann et al. (2018b).

2 Objectives, subject-matter and legal constraints on administrative simplification and the extent of the administrative burden

2.1 Objectives of administrative simplification

9. Since the MacSharry reform, more and more procedural and substantive preconditions have been attached to the financial benefits of the CAP.[5] This growth in the procedural preconditions attached to the CAP's financial benefits, under both the first and the second pillar, was regularly tied to finely honed requirements concerning checks of the legality of funding utilisation. The rise in substantive preconditions was the outcome of a increasing linking of financial benefits to objectives beyond the provision of mere income support for the applicant, which had originally dominated the CAP-objectives. These objectives included viable food production, sustainable management of natural resources and balanced territorial development in rural areas (see WBAE 2018 for a more detailed discussion of the agricultural policy objectives). The consequence has been a substantial increase in both the volume of regulatory activity by European legislators and administrative formalities. At the same time, the rules and procedures have grown ever more complex due to new forms of legislative acts, such as delegated legislation, and new monitoring techniques.

10. Administrative simplification is not, however, an objective in itself. If reasonably implemented, it reduces the administrative burden on the EU Commission, the administrative authorities in the Member States and/or at the level of the beneficiary, without adversely affecting the objectives of the measures and at the same time assuring a proper use of public funds. If such administrative simplification means that the implementing authorities require fewer resources for processing support measures, more resources can be utilized for the development of urgently needed strategies, e.g. for achieving environmental objectives or for the development of rural areas. Administrative simplification of this kind could also help specialised goals during programming of support measures to gain traction over administrative arguments and, from an administrative angle, to prevent simple "standard measures" from inappropriately disadvantaging specifically targeted area- and regional-based measures. Administrative simplification of this kind could also counteract a development observed, at least in Germany, by which certain stakeholders are not interested in participating in rural development support measures (a fact which negatively impacts attainment of the envisaged objectives) because they consider the administrative burden, and the risk of unintended infringements and ensuing penalties to be

[5] The term substantive preconditions or substantive law describes the legislative norms containing rules on the content and preconditions for claims (civil law) or public law. These stand in contrast to formal law/preconditions, i.e. procedural law.

too great.[6] Simplifying the regulatory and administrative requirements imposed on the administrative process will simultaneously boost the transparency of the enforcement system and hence its acceptance among stakeholders and so is also important for societal acceptance of the CAP over the long term.

11. Administrative simplification in the CAP therefore targets a reduction in that portion of the administrative burden at the level of the EU, Member States and beneficiaries which has no bearing on the attainment of the CAP objectives. It also seeks to reduce mistrust and fear harboured by implementing authorities within the Member States on the risk of a financial correction imposed by the EU Commission, and to provide renewed scope for design.[7] Lastly, administrative simplification should also provide for more efficient structures which ensure that public funds are used in compliance with the objectives and the law.

12. In summary, it can be said: There are many arguments for administrative simplification, but they essentially revolve around two corresponding aspects. Applicants perceive the administrative burden to be disproportionate, very onerous and redundant. For their part, the EU Commission and the administrative authorities of the Member States have set their sights on the increased administrative formalities and are seeking to reduce the burden and/or the public administration costs of CAP implementation and support funds disbursement.

2.2 Extent of the administrative burden imposed by the CAP

13. It is the costs of the procedures for implementing the CAP that concern both the administrative authorities and the addressees of the support measures under both pillars of the CAP. The administrative authorities require substantial personnel and physical resources. And the addressees incur opportunity costs in the terms of time (applications, documentation obligations) and physical resources (computer hardware and software, fees for support with applications, etc). As submitting an application for participation in a CAP support measure under the first or second pillar is always voluntary, it can be assumed that the aid ultimately covers the participants' opportunity costs. However, a reduction in the administrative burden would ceteris paribus make participation more attractive (including to those who have not yet participated) and even perhaps make it possible to reduce the aid.

14. Aside from the administrative costs incurred by administrative authorities and participants, the current system has also spawned some unwelcome developments that need to be taken into account such as a systematic preference to programme measures that

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[6] One example is the high risk of penalties in EU support for non-compliance with procurement law. If the grant recipients are associations, the associations' chair-persons are even personally liable (Fährmann et al. 2018a: 125). This lowers the acceptance of measures directed at associations.

[7] By financial correction is meant exclusions from EU funding which the EU Commission imposes on Member States following errors in administrative enforcement. Financial corrections are imposed irrespective of damage and fault and do not require any specific norm to be infringed (Deimel 2006).

incur low administration costs, even when the expected target contribution turns out to be slight. No reliable, up-to-date studies of the administrative costs incurred by the addressees are available.[8] In 2007 and 2011, secondary studies were conducted as part of two studies commissioned by the EU Commission.[9] The 2007 study primarily compared the administrative burden on farmers in selected Member States in 2006. The administrative burden was found to be strikingly high in Germany (at 1,300 EUR per farmer), relative to that in other Member States (e.g. 110 EUR in Italy), although this was attributed to differences in farm sizes. In general, the calculated administrative burden on farmers applying for direct CAP payments was found to vary across Member States from 3.0 % to 9.3 % of the overall direct payments. The 2011 study calculated that the total administrative burden on the beneficiaries in the EU-27 for certain support measures under the second pillar came to 240 million EUR. This represented 4.7 % of total public spending on these measures in the base year (5.1 billion EUR).

15. Studies have also been conducted of the administrative authorities entrusted with implementation. These are discussed briefly below. Every two years, the EU Commission, pursuant to the Financial Regulation, surveys the monitoring and administrative costs of the CAP across the Member States. However, the definitions of what is to be covered by the surveys are vague and the very rough methodology employed means that the results from across the Member States are limited in their reliability and usefulness.

16. In Germany, concrete estimates have been produced for some of the federal states. Specifically, these are the Court of Auditors in Baden-Württemberg (Court of Auditors Baden-Württemberg 2015) for the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), and those cited in evaluations of individual rural development programmes (e.g. Fährmann et al. 2018a, 2016, 2014, Fährmann and Grajewski 2013, 2008; see www.eler-evaluierung.de).

17. The Court of Auditors in Baden-Württemberg (2015) concluded that it took a total of 798 full-time equivalents (FTEs) to process supports under EAGF and EAFRD in Baden-Württemberg in 2013. In this study, the administrative costs accounted for 76 million EUR, or 13 % of support paid out. The Court of Auditors calculated that some 45 % of the 798 FTEs

[8] For older studies based on data from 1999, see Mann (2000, 2001).

[9] See the two final study reports: "Study to assess the administrative burden on farms arising from the CAP", October 2007 (https://ec.europa.eu/agriculture/external-studies/burdenen) und "Study on administrative burden reduction associated with the implementation of certain Rural Development measures", August 2011 (https://ec.europa.eu/agriculture/external-studies/rd-simplificationen).

went towards meeting the additional burden of EU obligations on top of the procedure employed in Baden-Württemberg.[10] Were the simplifications proposed by the Court of Auditors to be implemented, annual savings of 21.5 million EUR or almost 30 % could be made, expressed in terms of total expenditure (personnel expenditure plus physical equipment). The bulk of the savings would accrue to the cities and districts as authorising agencies (Court of Auditors Baden-Württemberg 2015: 98). The "cascades of documentation, control and reporting duties" (Court of Auditors Baden-Württemberg 2015; 13) criticised by the Court of Auditors created an administrative burden that was severely disproportionate to the objective of the controls, namely the safeguarding of the financial interests of the Union and the Member State. For instance, the cases examined by the Court of Auditors Baden-Württemberg (Rechnungshof Baden-Württemberg 2015) generated administrative and control costs that were 21 times higher than the financial error which it corrected as a result of illegal payments. At the same time, it found an error in just 0.6 % of all funds paid out. "In the case of pure area payments (EAFRD), 37 percent of all cases had an error of less than 0.2 ha, equivalent to an average support value of 80 EUR." (Court of Auditors Baden-Württemberg 2015: 14). This low error rate cannot be justified solely through the dissuasive impact of EU penalties for non-compliance with EU rules (WBAE 2018: 23).

18. This mismatch between the administrative burden and the protection objective is amplified by the on-site checks which are mandatory in approx. 5 % of applications. The Court of Auditors in Baden-Württemberg (2015) illustrated this with the following example: An on-site check of a farm of 70 block parcels with an application for 88 ha found mostly minor variations in area or landscape features in a total of 50 parcels. When everything was all netted out, the support was cut by 23 EUR. The administrative costs of all the time and effort expended in the on-site check amounted to some 8,900 EUR.

19. Comprehensive surveys of administrative costs (implementation costs or ICs) are available for individual German federal states. Unlike the surveys conducted by the EU and the Court of Auditors in Baden-Württemberg, the implementation costs are formulated in more detail. They comprise all expenditure/outlays that are necessarily incurred in the deployment, approval and payment of public support funds (not just controls, but also, e.g.,

[10] The additional burden of 379 FTEs involved in meeting EU obligations is incurred especially in the area of on-site (168 FTEs), administrative (122 FTEs) and cross-compliance controls (40 FTEs).

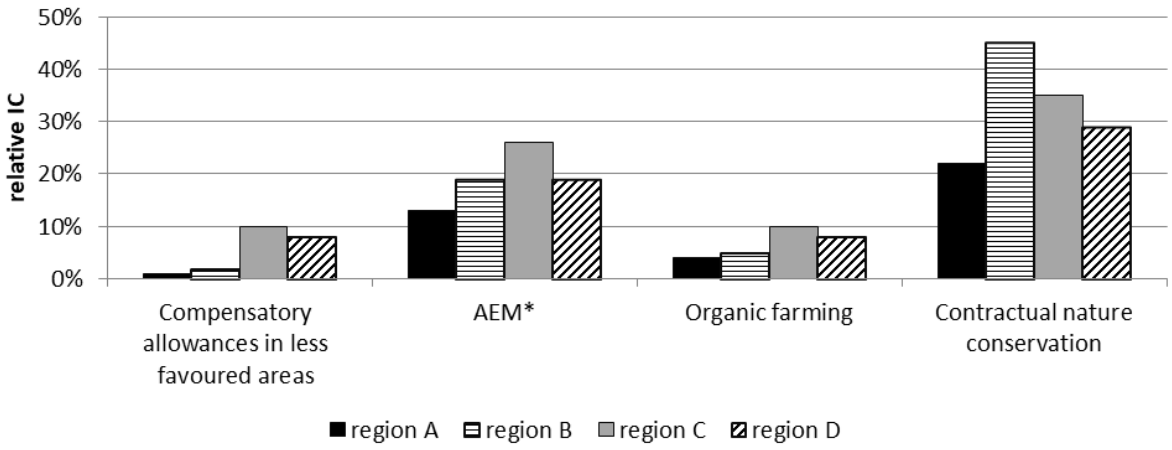
financial governance, monitoring, acquis). The results of implementation cost analyses[11] by Fährmann et al. (2016, 2014) of measures under the second pillar show:

a) The implementation costs reach an order of magnitude that impacts on the economics of administration. Expressed in terms of the four 2011 rural development programmes studied, they ranged from 10 % to 28 %, without allowance for IT costs.[12] They vary substantially from one type of measure to another and also among the federal states studied: For instance, the implementation costs of the participating federal states, expressed in terms of the support funds disbursed in 2011 under the four rural development programmes studied, varied from 1 % to 10 % for the Compensatory Allowance, from 4 % to 18 % for Investment Funding for Individual Agricultural Holdings and from 22 % to 45 % for Contractual Nature Conservation.

[11] "Quantitative data were generated by a full survey of the implementation costs in full-time equivalents for a previously defined catalogue of tasks (conception, governance, claim settlement, authorisation and control). All participating administrative entities in the selected base year were included: ministries, state and administrative bodies, as well as local administrations and commissioned third-parties. The values, based on self-assessment, were converted into the costs associated with the respective salary grade/compensation group. These comprise both direct and indirect personnel costs. IT costs specific to the support programme were also included. The resulting ICs were expressed absolute terms (absolute ICs) or in terms of the funds spent in the base year and/or the output achieved (e.g. hectares of supported land under a given measure (relative ICs). Qualitative data were gathered by conducting structured interviews with authorising agencies, paying agencies, administrative authorities etc. and group discussions. These focused on identifying the reasons for the cost structures that were identified for the measures. Apart from these measure characteristics, the functionality and appropriateness of the implementation systems in relation to organisation structures, personnel situation and IT landscape were discussed. In a further step , the costs of the support were compared with the achieved effects. The basis for this was a classification of measures by ordinal impact (ranking of measures). The relationship between intensity of effect and IC level was also examined by means of model-based regression analyses (Fährmann and Grajewski 2013)." (Fährmann et al. 2016: 36).

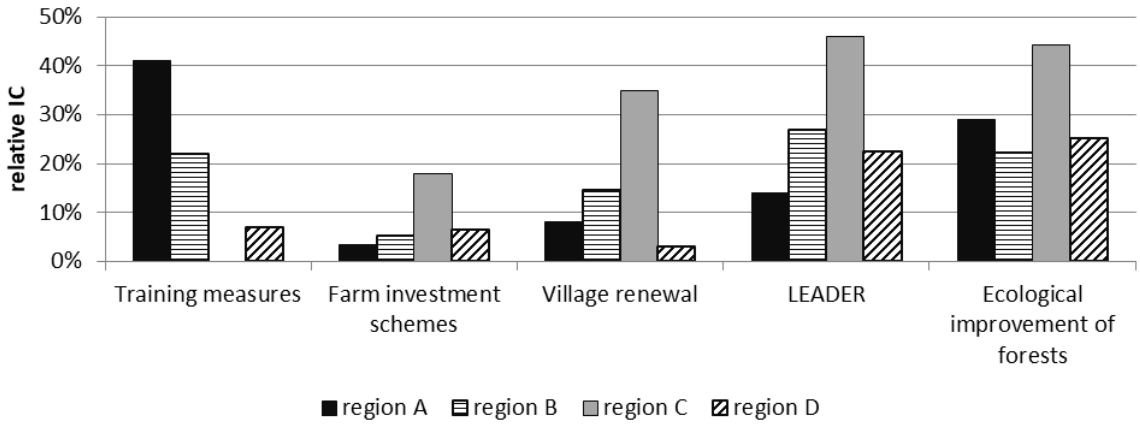
[12] In any comparison of programmes, the IT costs must be stripped out because IT architecture and cost assessment vary so much that their incluson would lead to substantial distortion.

Figure 1: Implementation costs of selected area-based support measures relative to the support funds disbursed in four programme regions in 2011



Source: Fährmann and Grajewski (2018b: 5) after Fährmann et al. (2014: 49).

Figure 2: Implementation costs of selected investment support measures relative to the support funds disbursed in four programme regions in 2011



Source: Fährmann and Grajewski (2018b: 5) after Fährmann et al. (2014: 49).

Even if the support programmes have high fixed costs, Fährmann et al. (2016) believe that there is no pronounced relationship between the overall programme volume and the level of the relative implementation costs. “Rather, the differences in the relative ICs are better explained in terms of the support strategy pursued or the composition of the Rural Development Plan, the organisational setting of the authorising structure, the functionality and intercompatibility of the IT systems, and the design of the financial management.” (Fährmann et al. 2016: 36). At the measures level, the authors attribute the bulk of the observed cost differences to specific features of the measures which, under the rigid EU provisions, are particularly effective at increasing costs: “The relative ICs are ceteris paribus much higher for, e.g., measures that have a low volume of funds, that provide small-scale

support or have a highly heterogeneous project portfolio. These factors have a particular impact in measures that lie outside the core business of the administrative authorities concerned and that are tied to complex legislative matters (procurement, tax law, etc).” (Fährmann et al. 2016: 36).

b) According to Fährmann et al. (2016), there is a relationship between the level of the ICs and the impact of the measures. “An ambitious ‘accurate’ support which targets specific problems and attempts to minimise deadweight effects and to boost the effectiveness of measures by imposing a high level of conditions or through a highly individual project design is costly to implement. With area-based measures, there is a positive correlation between the level of the ICs and the intensity of the measure' impact.” (Fährmann et al. 2016: 36, see also Fährmann and Grajewski 2013).

c) A comparison by Fährmann et al. (2016) of substantively similar targeted measures taken by German federal states reveals the impacts of the chosen implementation structure, coordination mechanisms and inadequacies of the IT systems employed. It turns out that the authorisation structure is especially important. “A plethora of implementing authorities causes ICs to rise. Large numbers of implementing authorities are found wherever tasks requiring authorisation are transferred to municipal entities. Added to which, where support enforcement is shifted to municipalities, it takes a great deal of effort to safeguard that uniformity of support which the EU relies on.” (Fährmann et al. 2016: 36).

d) It is not possible, on the basis of the empirical analyses, to definitively state whether the EU implementation requirements are the principal cost drivers. Fährmann et al. (2016) believe that the EU legal framework is structurally onerous and that continual refinements to provisions and in some cases retroactive legal interpretations issued by the EU Commission in the form of interpretation guidelines engender high learning costs and IT adjustment costs. Moreover, the EU legal framework requires that additional types of monitoring and control instances be implemented, and it creates a high burden of documentation marked by numerous reporting obligations due in quick succession. Added to which, according to Fährmann et al. (2016), it contains “crafting errors”, such as the absence of a minimum threshold for repayments in the 2007-13 financial period, which have added greatly to the outlay on the part of administrations. However, Fährmann et al. (2016) also point out, that a sharp dividing line cannot be drawn between what would be necessary or meaningful under the national Administrative Procedure Act and the national budgetary law on one hand and the additional efforts for the EU on the other. When Fährmann et al. (2016) interviewed the authorising agencies about how much of the measured burden stemmed from EU requirements, they received heterogenous responses fluctuating from 10 to 30 % of the implementation costs for the measures. Moreover, “several problems arise in the course of implementation, not as a result of enforcement of EU requirements, but as a result of the integration of complex budgetary laws of the federal states, and national procurement and tax laws into the EU support procedure. Consequently, national rules, some of which are incompatible with European regulations (e.g. interest calculations), then become the subject of

(additional) checks by the control bodies. The parallel application of EU and national law can additionally potentiate the burden" (Fährmann et. al 2016: 37).

20. In summary, it can be said: The CAP causes administrative burdens of non-negligible magnitude. The various measures differ significantly in their implementation costs (relative to disbursed support funds). However, the implementation costs should always be viewed in conjunction with the target contributions of the measures. A part of the administrative burden (which cannot be quantified precisely) can be attributed to the legal framework of the EU and another part to specific implementation in Germany. The regional differences in the relative implementation costs of identical rural development measures show that there is scope for administrative simplification at German federal state level, too.

2.3 Subject-matter of administrative simplification

21. The concept of administrative simplification has lost some of its focus in the course of political debate over the last decade, having been widened to include considerations of deregulation and liberalisation of state regulatory systems. Insofar, the discourse on administrative simplification is mutating into abstract calls for a redefining of the constitutional relationship between citizen and state.

22. Administrative simplification is a tool for process-driven organisational design aimed at optimising human and physical resources and at reorganising, simplifying, avoiding redundancy and progressively automating administrative procedures (OECD 2010: 9, Molitor 1996, Buchner 1996: 183). It requires the broadest-possible participation of all those involved in administration. The process of administrative simplification starts with an analysis of existing organisational structures, administrative procedures and administrative processes. The second step consists in defining the objective criteria for measuring the need for simplification. The last step is incremental implementation of the necessary measures (Ellwein 1989: 7).

23. The concept of administrative simplification will be restricted here to formal organisational and procedural aspects. Basically, the debate surrounding administrative simplification is tied up with the general debate surrounding the substantive preconditions for support measures. There is no doubt that such a relationship exists between formal law and substantive law.[13] The more preconditions that are attached to the support measures, the greater is the administrative burden on the applicant(s) or the administrative burden on the implementing and control authorities, and often the more targeted is the support measure and thus the greater is the expected target contribution. Reducing the substantive preconditions can thus effect an immediately noticeable simplification of existing procedures without any change to formal law. However, administrative simplification must not be restricted to reducing the substantive preconditions while masking the procedural

[13] See footnote 5 on page 3 of this report.

challenges which it entails, i.e. the identification of existing procedural deficiencies. Moreover, it especially circumvents the necessary check as to whether, for a given case, the formal preconditions are needed for the effectiveness of a specific support measure. The substantive content can therefore be just as much the subject-matter of administrative simplification as a check of whether administrative simplification can be implemented at reasonable outlay. The way the CAP is designed means that this must be checked case by case. The following considerations address the procedure only, as distinct from the specific scope of the substantive preconditions. The premises of the underlying substantive legislative intent, such as agricultural structural support, security of income, climate protection, vibrant rural areas, will therefore not be questioned here (for a critical discussion of the goals of the CAP, see WBAE 2018: 7-16).

24. Administrative simplification has to be treated separately from legislative simplification. The purpose of legislative simplification is to reduce the normative requirements of the administrative process, and to some extent serves as a synonym for deregulation. Legislative simplification, however, is merely one aspect of administrative simplification. A quantitative reduction in normative requirements can contribute to administrative simplification if it evolves from the determination that the rules are inappropriate. However, legislative simplification only gives rise to superficial administrative simplification. The deeper-lying reasons for the complexity of responsibility structures, administrative procedures, and high control depths, are not accessible by purely quantitative measures. Foremost among the reasons are constitutional requirements (e.g. federal structures, especially basic rights provisions under the rule of law), along with an administrative culture within the EU and the Member States that has failed to develop properly (and is especially founded on mistrust). Signs of this unwelcome development are, for instance, the stringent penalties and the compulsory prefinancing of environmental protection projects under the second pillar.

25. The subject-matter of administrative simplification of the CAP is thus all the administrative procedures and underlying rules which have been developed by the Member States and the EU in the course of, or as a consequence of, the EU's CAP competence. The discussion revolves primarily around the procedures for granting and monitoring support funds. The call for administrative simplification here addresses the first and second pillars equally. The direct payments under the first pillar and the rural development programmes of the second pillar are, in terms of administrative theory, two distinct support systems. Direct payments under the first pillar are legally anchored conditional programmes under which, if certain conditions are satisfied, a legal claim to payment ensues (IF-THEN condition). The rural development programmes and their support measures, however, are special purpose programmes. Their focus is on the purpose and objective of the support, with the support intended to implement diverse specialised and regional policy objectives and to shape developments (Fährmann and Grajewski 2018b).

26. The discussion of administrative simplification of the second pillar may be usefully broken down into three levels, namely

a) The level of governance (programme creation and control, including amendments and financial management),

b) the level of specialised design of the individual support measures, and

c) the level of support-related processing (authorisation of support applications, management and control systems).

Administrative simplification of the CAP should focus more on the governance and support-related processing and less on the design of measures. The design of a support measure is a manifestation of the specialised creative will of the legislature. Support prerequisites and conditions are key to the effectiveness of support funds deployment. Administration-intensive support measures should be changed if the burden is not matched by a target contribution, but not for the reason that they are per se more intensive, e.g. because they are tailored to local conditions to a greater extent than other measures and require more expert advice (as is typically the case for Contractual Nature Conservation Measures, see Fig. 1).

For the sake of completeness, it should be pointed out that the call for administrative simplification also extends to all regulatory procedures concerning the organisation of the common market. These include laws on plants governing commercial viniculture or the registration of protected indications of origin, protected geographical information and traditional terms.

27. The call for administrative simplification is addressed to the process designers, i.e. the legislators and the administrative authorities at European and Member State levels. In Germany, as specific challenge of federalism one has to add the federal states.

2.4 Legal constraints on administrative simplification

28. The agricultural policy, including the one of rural development, is complex due to the diverse objectives of the CAP and the horizontal objectives defined in the treaty on the functioning of the European Union, the plethora of sophisticated instruments, the stakeholders and the underlying legal relationships.

29. The call for administrative simplification, like the call for administrative transparency, may be politically attractive. However, administrative simplification is caught between the constitutional requirements concerning the legality of administrative governance and the democratic need to protect the financial interests of the EU[14] and, in cases of Member State cofinancing (second pillar), of the respective Member State (plus, in Germany, the federal state). The legality of administrative governance particularly includes monitoring observance of the factual prerequisites and the principle of equality of treatment before the law. Thus, the German Federal Constitutional Court stresses that considerations of administrative simplification and practicability do not justify the ongoing suspension of a legal objective,

[14] https://ec.europa.eu/agriculture/cap-overview/simplificationde

even if the relief effect achieved is deemed to be particularly high.[15] Transgression of the equality principle can only be justified if the exceptions that make the rule are negligible both quantitatively and qualitatively.[16] If, for instance, the consequence of administrative simplification is a reduction in the number of checks, this must not engender a permanent exemption from checks for certain forms of farming. This would constitute inconsistent application of the law and an infringement of the principle of equality. A reduction in checks would be allowed only if it were quantitatively and qualitatively negligible, i.e. applied only in isolated exceptions and this suspension only had a subordinate impact on the legal interest to be protected by the control.

30. This is the benchmark for evaluating all those proposals which seek to reduce the current very high control density that ensues from an overly low error tolerance. Whether, and to what extent, the degree of error-free support measure implementation would decline if the obligations to control and provide proof, which essentially constitute the administrative burden, were to be reduced has not been studied. Within the Member States, the fundamental assumption must be that the administrative authorities largely implement the principle of legality, i.e. administration is compliant with the law (even though, in Germany, e.g., a deficit in the enforcement of environmental law on cross-compliance has often been noted (COM 2014, WBAE 2018)). International indicators reports by European and international institutions and the statistics produced by the European courts also reveal phenomena in the EU that may qualify as systemic deficiencies in the rule of law (Bogdandy 2015). There is thus sufficient probability that the degree of error-free implementation would decline, if the depth of controls would be reduced. The consequence thereof would be that the Member States would not be enforcing the law with equal rigour. Thus, the addressees of the law, the beneficiaries, would not be treated equally. That would, in light of the principle of equality which also applies in the EU, impinge on this constraint developed by the German Constitutional Court in respect of administrative simplification. This also applies insofar as the current proposals allow the flexible application of the law at Member State level (see Chapter 4) leading to differences in the application of European law. In this respect, the principle of equality is not already infringed where Member States implement the objectives differently, as this after all is the intention behind shifting the programming level onto the Member States. Discrimination would exist, however, if the Member States were to abuse the scope for design in an attempt to avoid efficient targeting and controls. Politically, this could lead to a loss of acceptance with respect to the CAP.

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[15] German Consitutional Court, Judgement of the First Senate, dated 10 April 2018 - 1 BvL 11/14 - Margin No. (132), http://www. bverfg.de/e/ls201804101bvl001114.htm

[16] See also the Higher Admnistrative Court Berlin-Brandenburg, OVG 9 A 72.05, Judgement dated 10.10.2007

3 Reasons for the administrative complexity of the CAP

31. The ongoing debates since the 1990s on administrative simplification of the CAP have not led to any appreciable changes. Quite the opposite observation has been made, that many procedures have become substantially more complex since then (German Bundestag 2017). It should be remembered that the MacSharry reform of the CAP in 1992 set out a pathway to reform that can be characterised by "dismantling the market- and competition-distorting system of protection of the internal market and by establishing a policy with a stronger orientation towards meeting the diverse challenges of the CAP and allowing for more regional differences – including within the framework of the rural development programmes" (WBAE 2018: 1).

32. The result is that all stakeholders acknowledge the failure of all discussions aimed thus far at administrative simplification. A renewed debate can be successful only if it identifies and corrects the reasons that have hitherto prevented administrative simplification of the CAP. The Board attributes the failure of the debates on administrative simplification to the following:

a) Low political prioritisation of this procedural objective compared to modification of the substantive support objectives of the CAP, which have been the focus of further development of the CAP thus far,

b) Little willingness of the EU Parliament and net-contributing Member States to accept administrative simplification, if this should prove likely to lead to reduce the degree of error-free implementation, and

c) the administrative complexity of the CAP.

33. The Board deems the following structures to be the cause of the administrative complexity of the CAP:

(1) **Indirect enforcement of EU legislation:** The enforcement of the CAP as part of the EU-typical indirect enforcement of EU-legislation (shared management) is entrusted to the Member States[17]. Linked to this is a wide range of regulations, because, although the EU lays down requirements in the form of direct EU regulations, these often have to be supplemented by national acts. In some cases, this gives rise to contradictory, unharmonized and additional provisions in national budgetary law and funding legislation. Furthermore, it should be taken into account that also national funds (cofinancing under the second pillar) are disbursed within the CAP-framework.

The problem of double legislation is exacerbated in a federal system such as Germany's when it comes to administering the second pillar of the CAP. Here, legislation and differences in federal laws and the administrative practices of the federal states must be taken into account.

[17] Enforcement and application of EU law by the Member States as opposed to direct enforcement by EU organs.

Quantitative approaches for reducing the number of applicable rules are set out in the EAFRD Reset paper developed by Saxony (SMUL 2016) proposing the exclusive application of European provisions while suspension of the federal state budget code (Saxony is already practising this in the current funding period). An alternative would be on the one hand the exclusive enforcement by the EU, which however, would be problematic given substantial national cofinancing under the second pillar. Moreover, this approach would require a substantial build-up of administrative structures in Brussels. On the other hand, another alternative would be a comprehensive regulation of the administrative procedures by the EU. Both proposals, however, would contradict the principle of subsidiarity. Administrative simplification would in this case be reduced to a purely quantitative reduction in the number of laws. The indirect enforcement of EU law has therefore to be regarded as mandatory requirement for the administrative process and so necessarily justifies a basic complexity of the process.

(2) **Financial responsibility:** The financial resources of the whole first-pillar, building the largest part of the CAP funding instruments and thus of the regulatory tools in this policy field, and parts of the second pillar originate both from the EU budget. Thus, the EU in both cases has to exercise a democratic financial responsibility. This, in turn, has implications for the administrative structures: The implementation of the first and the second pillar are subject to the principle of shared management. Due to the financial responsibility, the EU is obligated to create efficient control instruments to safeguard the proper management of funds by administrative bodies in the Member State. These control instruments cause complex organisational and procedural structures, because the EU avails itself of both its own control structures and those of Member States, which are largely not coordinated with each other. This leads to duplication within the controls.

Within the framework of the second pillar, the complexity of the various competences and thus of the organisational structures are growing due to the breadth of its programmes. The rural development programmes are support programmes with a wide range of contents that touch on issues of a) state aid rules, funding legislation, procurement legislation etc which, b) owing to their contextual breadth, affect a large number of specialised administrative bodies, which c) also affect the regional administrative level and d) are cofinanced at national level. For this reason, both the Member States and the EU, by virtue of their own respective budgetary responsibilities, are both at the same time acting as party in the proceedings and as control authorities. This increases the number of authorities involved and the number of procedures which, again, are not coordinated.[18]

[18] For information about multi-level interconnections in the second pillar, see Weingarten et al. (2015). For an overview of the stakeholders involved in implementing the rural development programmes as exemplified by the federal states of Lower Saxony and Bremen, see Fig. A.1 in the annex to this report.

(3) **Too low error tolerance:** The higher the required degree of an error-free implementation, the more complex these structures and thus the administrative burden become. The EU, and specifically the European Parliament and the European Court of Auditors, as well as the net-payer Member States, such as Germany, currently define the effectiveness of CAP enforcement[19] exclusively along the lines of European financial control using the benchmark of the error rate in the application of funding instruments. The materiality threshold, i.e. the accepted error rate, is currently 2 % (European Commission 2017b). According estimates of the European Court of Auditors the European Commission achieved a rate of 3.1 % in 2016 for all EU expenditure using relatively strict control mechanisms (ECA 2017b: 11). The expenditure of the EAGF (first pillar of the CAP) are far below this threshold with an error rate of 1.7 %, whereas that of the EAFRD (second pillar) is substantially higher at 4.9 % (ECA 2017b: Annex 7.1). The 2 % materiality threshold is not defined in primary law but is based on a political consensus (European Commission 2017b, 19). At the same time, this threshold is very low compared with the error rate of 20 to 30 % which the courts of auditors in German federal states identified in the administrative bodies there.[20] Compliance with this threshold necessitates that the support system provides for low tolerance values, intensive control and reporting obligations, a risk to the Member States of financial correction, and comprehensive competences of the Commission to uniformly change, also retrospectively, the interpretation of the CAP through interpretation guidelines. At the same time, these hinder the introduction of flat rates for project support provided under the second pillar. These preconditions for the most tax-efficient CAP stand, however, against effective actions of the Member State authorities: The administrations act reactively in the attempt to do everything as precisely as possible and for fear of financial corrections, the administrations are holding back decisions as long as the EU Commission has agreed on a uniform interpretation and has communicated them to the Member States by an interpretation guideline. As a result, the indirect enforcement of the CAP by Member State administrations that act autonomously is conducted ad absurdum. At the same time, the burden for programming, monitoring and evaluation at the applicant, e.g. for environmental projects under the second pillar, is increased substantially.

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[19] From an administrative point of view, the efficiency of CAP enforcement (implementation efficiency) only looks at whether implementation is being conducted with the least-possible administrative burden. It therefore does not look at the impact (and the unintended impact) of the implemented measures on the objectives which they pursue (support efficiency). Implementation efficiency can therefore not be used to draw conclusions about whether or not a measure / programme is efficient from a societal point of view.

[20] Brandenburg 29.5 % (2015) (Court of Auditors Brandenburg 2017: 58); Schleswig-Holstein 21 % (2016) (Court of Auditors Schleswig-Holstein 2017: 15); Bavaria 34 % in financial management (Supreme Court of Auditors Bavaria 2017: 108).

(4) **Disregard for the administrative burden which the Member States incur for control and repayment decisions:** In the eyes of the EU institutions, even an abstract risk to the EU budget requires the control authorities to take action. Yet the bulk of identified infringements can be deemed as minor breaches. Thus, in the case of area-based support measures under the second pillar, 60 % of the errors involved account for less than 20 EUR (Rechnungshof Baden-Württemberg 2015: 75). The administrative burden incurred by the Member State for identifying, demanding repayment, and penalising is a lot more costly, however. The inclusion of minor breaches in the system of controls and penalties is thus based on a misguided ideal separation of the financial interests of the EU from those of the Member States. The EU makes no allowance for the administrative burden costs incurred by the Member States, even though it avails itself of the services of the Member State administrative authorities.

(5) **Nested legal framework:** The CAP avails itself of all legal resources and in so doing creates a complex, nested legal framework. Thus, a given issue is covered by one or more regulations, delegated acts, implementing regulations and interpretation guidelines which are enacted in such isolation from each other that even administrative bodies have difficulty composing the legal framework for a specific support measure and it is practically impossible for an applicant to do so without recourse to professional advice.[21] Furthermore, these legal sources are not released simultaneously, resulting t in considerable uncertainty concerning the legal situation, especially at the start of a funding period. This legal uncertainty is exacerbated by the interpretation guidelines which are issued by the Commission with some delay and which only addresses some specific points. Although these guidelines are not binding, they are de facto mandatory because of the demands for financial correction should they be ignored. A further consequence is that the Member State authorities forgo their own interpretations of the rules, thereby substantially delaying procedures and obscuring the logic behind the decisions.

(6) **Sunset legislation:** The complexity of the CAP administration ultimately also has its roots in sunset legislation. Almost all European regulations on administrative procedures are restricted to the validity of the support programmes. This has the following effects:

a) All legislative acts which are related to funding instruments are newly released. In the current support period, about 400 pages of new regulations were released in the Official Gazette L 347 dated from the 11.12.2013.

b) As a consequence of lagging behind the schedules of negotiations on the content of the new funding period, European legislators have but little time to devise new legal foundations. At the time of the last “reform”, only a few

[21] The authorisation notice specifies in detail what the applicant must or must not do.

weeks were available. It has become standard practice to adopt existing legal foundations and then supplement them. There is thus no time available for a quantitative reduction or analysis of the necessity of the rules. Over time, the regulations have become so voluminous that some of them defy reading. One example is Regulation 1308/2013, establishing a common organisation of the markets in agricultural products which runs to 186 pages of double column text in the Official Gazette. Implementation into national law and programming of the pillar then come under similar time pressure.

c) As a result, at the start of every funding period, each user of the law – from applicant through to authorising agency – has very little time to deal with this package of regulations. A particular difficulty in this regard is that the user of the law is more or less unable to draw either on his own experience in the application of the law or on any administrative or court practice. Court practice consists in referring back to previous legislation and so, simply on the basis of methodology, is hardly readily transferable. The same applies to administrative practice. Added to this is the reluctance of Member State administrations to apply the principle of proportionality in analogy of national administrative and procurement legislation and to exercise due discretion. This is a result of the comprehensive demands for financial correction through which the EU has conditioned the administrative authorities to apply the law without any room for exercising discretion. The Member State authorities shy away from interpreting the rules for themselves, preferring to leave this to the EU Commission which accordingly develops new guidelines on the subject. The outcome is a further layer of rules. Unlike any other area of EU law, barely any court dogma or administrative practice that could have brought continuity and thus legal certainty to administrative procedures has evolved under the CAP.

(7) **Accumulation of administrative tasks in uncoordinated regulations and procedures:** Formal laws are made, and procedures introduced without any proper assessment of the burden already imposed by existing tasks on both the parties concerned and the administrative authorities. Also, not enough is being done to exploit possible synergies under the bounds of constitutional law.

(8) **Over-emphasis of the principle of legality at the expense of the principle of trust:** As a consequence of a very narrow interpretation by the European Court of Auditors (ECA), the principle of trust is regularly subordinate to the principle of legality (established case-law since ECA C-348/93, Collection 1995, I-00673 Margin No. 27 - Commission/Italy). This ECA case-law prevents Member State authorities from exercising their discretion about demanding repayment of ineligible support payments, even if the beneficiaries had expected that the payments would be continued as the beneficiaries have not caused the error. A further consequence of this case-law is that, contrary to our legal system, a time-limit cannot be imposed on recovery of the support; that would have brought legal certainty to the applicants on one hand and reduced the administrative burden on the other. This case-law also

facilitates the retroactive application of new legal interpretations of matters that are already closed.

34. To summarise: There are many diverse reasons for the administrative complexity of the CAP and they largely arise from the basic structure of the CAP and from administrative controls that were laid down in the 1960s and 1970s and have cumulatively grown. Major further advances in the understanding of the relationship between the EU and its Member States (e.g. the principle of subsidiarity) and of the relationship between the EU and its citizens (e.g. coordination instead of subordination) could not yet be implemented. Reform proposals aiming to simplify the administrative side must necessarily take account of these structural deficiencies. Any change to the basic structures of the CAP presupposes a radical overhaul of the system at primary law level, e.g. basic EU treaty level (TEU, TFEU), and of the understanding of budgetary discipline. It entails a readiness on the part of the EU to implicitly trust that the Member States will abide by the principle of legality. Any lack of willingness to make these radical legal and cultural changes will mean that the existing complexity of the procedures will have to be tolerated further.

4 Implications of the EU Commission's legislative proposals for the CAP beyond 2020 for administrative bodies

35. In June 2018, the EU Commission presented three draft regulations for the CAP beyond 2020:

i) Proposal for a regulation on the CAP strategy plan which is to be drawn up by the Member States and requires approval by the EU Commission (COM 2018a),
ii) Proposal for a regulation on the financing, management and monitoring of the CAP (COM 2018b)
iii) Proposal on the regulation on the Single Common Market Organisation to change the relevant regulations of the current support period (COM 2018c).

36. From a wider perspective, the legislative proposals provide the potential to effect a paradigm change in the CAP. For one thing, the governance structure of the CAP will be substantially changed by a "new delivery model" and, for another the legislative proposals contain new objectives and provisions in relation to new interventions. The two most important changes in the governance structure consist of "decentralisation" and of greater "results orientation" of the CAP. "Decentralisation" means that the Member States within the framework of "guiding principles" laid down by the EU are receiving a more prominent role in the design of CAP measures and control and monitoring. A relocation of design and funding competences to the level of the Member States and regions corresponds in many areas to the subsidiarity principle and is logical given the heterogeneous problems and preferences of the EU Member States. Central elements of the new governance structure are:

- the CAP strategic plan, an administrative and coordination system to be designed by the Member States, and
- a thoroughly reformed system of reporting by the Member States to the EU Commission.

37. "Results orientation" implies a shift away from the system of an action-oriented CAP with detailed instructions on interventions, support approaches and controls towards a system in which the results obtained (in the form of attainment of the set objectives) will play the key role. The accentuation of the new "results orientation" of the CAP by the EU Commission is, however, somewhat misleading: For one thing, according to the legislative proposal, the "results" are measured essentially via output indicators (see WBAE, in print) and, for another, the accentuation of the term suggests that hitherto CAP support did not involve any alignment with results (Fährmann and Grajewski 2018a). [22]

[22] The term "results-oriented support" was forged in Germany in connection with agri-environment and animal welfare measures: "reward results instead of behaviours." However, the EU Commission is not concerned in this case about a "re-"alignment of support. At its core, the existing monitoring system in the rural development programmes will be continued, with the objectives, indicators and regular reporting on finances and outputs, such as hectare, projects, beneficiaries. The "new" results indicators, for their part, are also primarily output

38. The EU Commission envisions that, in the future, the Member States will be responsible for stating the CAP objectives to be achieved in their national strategic plans, for backing these up with quantitative targets and for choosing a suitable mix of instruments for attaining the objectives. In this connection, the EU Commission will merely set framework conditions concerning targeting and the choice of tools, instead of prescribing as before a detailed catalogue of measures. In future, the substantive and financial design of the support and the definition of implementation conditions will be the responsibility of the Member States. The fact that the CAP strategic plan build up the common planning basis for direct payments, for sectorial interventions and for rural development interventions may lead to more consistency in the implementation of the first and second pillars (Fährmann et al. 2018b), a fact which, given the greater interconnectedness of the two pillars in the environmental area, is crucial to the design of the "green architecture"[23] (for more details, see WBAE, in print).

39. Whether the legislative proposals will lead to administrative simplification can only be assessed to a limited extent at the moment. With regard to "administrative simplification", the Board would like to draw attention to the following points concerning the legislative proposals:

a) **Uncertainty about the concrete implementation:** The administrative burden depends heavily on concrete implementation. For a number of reasons, only tentative predictions can be made at the moment.

   At EU level, it is uncertain
   - to what extent and how the EU Commission would avail itself of the comprehensive scope for further regulation via delegated acts;[24]
   - which concrete requirements the EU Commission will impose on the management and control system and on reporting.

   At the level of the federal Member State of Germany, it is particularly uncertain
   - how the federal government, which has competence for the first pillar, will interact in the future with the federal states, which are responsible for the second

indicators. (…) The monitoring therefore essentially measures which outputs have been achieved. The term "results-oriented support" therefore promises more than it can deliver. Additionally, this system sets the same (wrong) incentives as in the current support period: Do not make the objectives too ambitious and avoid measures where participation rates are hard to calculate ex ante, even if they could be highly effective. The system could therefore prove to be a hindrance to ambitiously formulated programmes." (Fährmann und Grajewski 2018a: 48f.).

[23] The "green architecture" comprises in particular the conditionality (basic requirements which all beneficiaries of area-related payments must observe), the eco schemes (especially direct payments under the first pillar) and the environment and climate-related support measures in the second pillar.

[24] Thus, according to the draft CAP strategic plan regulation, the EU Commission is empowered to adopt delegated legislative acts in relation to articles.

pillar, because the legislative proposals provide for only one CAP strategic plan to be drawn up by each Member State (with possible sharing at regional level).

b) **CAP strategic plan – a smaller administrative burden for the EU, but a larger one for Germany:**

- For the EU Commission, the administrative burden reduces if in the future there will only be one national strategic plan per Member State under the CAP instead of a total of 118 EAFRD programmes, 26 notifications of direct payments and 65 sector strategies (Fährmann et al. 2018b: 6).
- In Germany, there will be an increased need for coordination and governance owing to the necessary level of consultation between federal government and federal states. Itis problematic that the draft CAP strategic plan regulation is not tailored to federal Member States (for details, see Fährmann et al. 2018b). "There is a risk that the strategic plan will create a further, 14th administrative structure at government level on top of the 13 federal state administrative structures." (Fährmann et al. 2018b: 37).

c) **Management and control systems – simplification through the introduction of the single audit:** The EU is largely limiting itself to laying down framework conditions while largely leaving concrete design of the management and control system to the Member States. The description of the management and control systems in the CAP strategic plans will not have to be approved either. The EU will generally forgo controls at the beneficiary and limit itself ex ante and ex post to fundamental evaluations of the national management and control system (*Single Audit*[25]).

d) **Checks of performance instead of legality – Elimination of the 2 % error rate:** Under the legislative proposals, the EU will no longer require Member States to prove regularity of expenditure for the individual beneficiaries, but instead they will have to provide performance statements for the funds deployed (Fährmann et al. 2018b). This would eliminate the basis for the 2 % error rate (see chapter 3), which has so far contributed substantially to the administrative complexity of the CAP. The European Court of Auditors (ECA 2018) has severely criticised this and other aspects in its report on the legislative proposals.[26]

[25] The European Court of Auditors has defined the single-audit system as an internal control and audit system that is based on the idea that every control level builds on the previous one (ECA 2013: margin no. 12). The single-audit system is already applied under the cohesion policy (see Art. 148 of regulation (EC) No. 1303/2013). It seeks to avoid duplication of work and to reduce the overall costs of the control and audit activities at the level of the Member States and the Commission.

[26] The European Court of Auditors (ECA 2018) criticises the absence of the necessary elements for designing an effective system and of adequately specified objectives, which are achieved by clearly ex ante defined outputs. Furthermore, the Court of Auditors criticises the fact that the shift in competences will lead to a loss of status and will undermine the application of EU law if verifying the legality and correctness of expenditure is abandoned. It does not propose any loosening of the strict error rate of 2 % which was defined by the Court of Auditors. Rather, the absence of an external control system, it believes, will lead to a weakening of the obligation for accountability of the EU Commission to the EU Parliament and the Court of Auditors. Without control statistics (e.g. on farm

e) **Decisions in the last resort to remain with the EU – Impact on administrative burden?** From a subsidiarity perspective, the Board fundamentally welcomes the desired increase in the level of decentralisation. At first sight, this will reduce the complexity of the regulations, because European law will be concentrated more on setting the general objectives of the CAP and further framework conditions. Accordingly, the legislative proposals neither define the instruments for implementing the objectives to such an extent that they can be operationalised, nor do they quantify the requirements, nor do they contain any clear plans for auditing compliance with the objectives. In light of the path taken by the EU Commission towards greater simplification and subsidiarity, the fact that this concretisation will be placed in the hands of the Member States after the legislative proposals have undergone initial reviews is to be welcomed. However, the Board assumes, in view of the previous practice of the EU Commission, the European Court of Auditors and the established case-law at the European Court of Justice, that operationalisation of objectives will not proceed exclusively at Member State level. Rather, it is to be expected that the Member States will be given initial decision-making powers concerning concretisation of the objectives, which, however, the EU Commission and the ECA will review in full. The outcome is that the EU organs will continue to take the ultimate decision. The proposed system could therefore further increase the complexity and the lack of transparency of CAP decision-making processes (ECA 2018).

f) **Time pressure is hampering well thought-out reforms and implementation by 01.01.2021:** Under the draft strategic plan regulation, Member States must submit their CAP strategic plan to the EU Commission by 01.01.2020. Accordingly, the German federal government and federal states have been working on this since 2018, even though neither the CAP budget for 2021-2027 nor the pertinent CAP regulations have been adopted. For this reason, there can be no delegated acts by the EU Commission or necessary adjustments to the legal framework at German federal government and federal state level either. The immense time pressure under which direct legislative processes operate is conducive to crafting errors and forms of implementation that may be feasible in the short term but might not make any sense in the medium and long terms.[27] Consequently, "a longer transition period ahead of the start of the next support period would be a sign not of an inability to act, but

incomes) from the paying agencies, it will not be possible, in the view of the Court of Auditors, for the EU Commission to verify the legality of the payments to individual farmers.

[27] This is shown by the experience gained under the current funding period 2014-2020. Just three months separated the concluding political agreement at EU level in September 2013 and the adoption of the EU regulations in December 2013. The direct payments implementation law applicable to the implementation of direct payments in Germany was done in July 2014 and the direct payments implementation regulation in November 2014. Although the new funding period commenced on 01.01.2014, the greening requirements for direct payments did not have to be met until 2015 onwards. The new rural development programmes were also adopted late, coming into force between December 2014 and May 2015.

rather of taking responsibility" (Fährmann et al. 2018b: 39). It is clear that the 01.01.2020 date set out in the draft regulation for submitting the CAP strategic plan to the EU Commission cannot be met. Currently under discussion are 01.01.2021 and 01.01.2022 (European Parliament 2018). It remains to be seen if such a new date will ease the pressure of time sufficiently.

40. In summary, the Board sees potential for administrative simplification in the legislative proposals on the CAP beyond 2020 and more especially in the new delivery model. However, given the huge uncertainty surrounding what form the EU legal framework, yet to be enacted, will take in practice and how it will be implemented, the Board is sceptical that any administrative simplification will in fact transpire. A central element of the new delivery model is the national CAP strategic plan. It is clear that this will prove especially challenging for a federal Member State like Germany.

5 Reducing the administrative burden to an appropriate level: what the German federal government should advocate

41. The current CAP is characterised by a high degree of complexity and administrative formalities. This excessive red tape should be cut in the course of the reorientation of the CAP post 2020. The main reasons for the existing administrative complexity are an unclear legal situation which fundamentally changes with every new funding period and which can continue to change during the funding period, in some cases retrospectively, and an unduly strict stance of the EU on the proper allocation of resources. Besides an inappropriately heavy administrative burden, this creates other negative consequences such that, when member states implement the CAP, substantive objectives increasingly step back behind minimising the risk of financial corrections.

42. As the deliberations above show, the causes of the complexity and administrative burden of the CAP are various, and by an exclusively CAP-oriented reform and simplification measures at individual levels (EU, German federal government, federal states) they can only be modified to a limited extent. Consequently, the Board advocates towards addressing the key causes of the administrative burdens on the Member State administrative authorities, farmers and other beneficiaries of the CAP and not to just treat their symptoms in the short term. The Board is aware that some of its basic recommendations will be difficult to implement politically and, occasionally will contradict other political objectives, such as strict budgetary discipline. These difficulties, therefore, necessitate a change in the narrative within the discourse on administrative simplification: Until now, it has been all about “simplification”, a term which implies scope for reducing complexity. However, this complexity also stems from the diverse functions of the instruments and the plethora of stakeholders and can be reduced only to a limited extent in the medium term. Consequently, the term “simplification” raises expectations which are unlikely to be met in the end, and that will lead to a loss of acceptance by the parties concerned. This negative effect can be partly prevented by replacing the objective of “administrative simplification” with the objective of a “reduction in administrative burden to an appropriate level”.

5.1 Replace the existing culture of mistrust over the long term with a shared administrative culture between the EU and the Member States

43. A key cause of the current complexity and the administrative burden is a lack of trust on the parts of both the European organs and the net-payer Member States in the proper enforcement of European law in the other Member States. The current basic structure for administrative cooperation between EU and Member States requires a shared administrative culture among the stakeholders, similar to the relationship in Germany between the federal government and the federal states. Only an administrative culture established on such a basis can lay the foundations for building trust that will facilitate a reduction in the existing complexity of the control instruments. However, given the current political situation in various Member States, whether this type of trust-based cooperation can be developed is a

question that can only be answered on a case-by-case basis. In that respect the EU Commission's legislative proposals on the CAP beyond 2020 which provide for greater transfer of responsibility for CAP implementation to Member States is a right step forward, as it represents to some extent a vote of confidence, which rightly needs to be backed in the initial stages by a safety net of ongoing control instruments on the part of the EU Commission. The EU Commission should be accorded the opportunity to deploy these control instruments on a phased basis commensurate with the development of the legality of the administrative authority in the respective Member State. Fundamentally, the lack of trust in the legality of the Member State administrative authorities should not be projected onto the beneficiaries. The EU should therefore make greater use of flat rates and exemptions for support in the agricultural sector above and beyond the current framework. At the same time, direct payments should be made before the authority has completed its audit of the preconditions (contrary to Art. 75 Section 2 in conjunction with Art. 74 of Regulation (EU) 1306/2023). Finally, in light of the principle of proportionality, the entire system of penalties should be graded on the basis of the severity (duration and extent) and intent (deliberate as opposed to negligent) of the infringement.

5.2 Delimitation of the general procedural provisions of the CAP

44. CAP rules of procedure are fixed to the funding period, which generally lasts seven years. Time limits on the regulations governing funding measures are a necessary consequence of the tie-in with the multiannual financial framework (MFF) of the EU, which is laid down in EU primary law. Fixed-term legislation also makes it necessary to periodically establish if there is an ongoing need for these regulations and whether they should be continued in the same form or else be modified.

45. However, this time-limiting element is a major contributor to administrative inefficiency. It regularly happens that the regulations which lapse upon expiry of the term are simply incorporated verbatim into the regulation for the new support period. One such example is the roughly 180 provisions that were adopted from Regulation (EC) No. 73/2009 into Regulation (EC) 1306/2013 and are contained in Annex XI to Regulation (EC) 1306/2013. Even though in these cases it appears from a non-legal perspective that the rule continues to apply, this is not actually the case from a legal methodology's perspective. From a formal point of view, this is a new rule with wide-ranging consequences. For instance, neither previous administrative practice on the part of the EU Commission nor case-law of the European Court of Justice on the prior rules are transferable to the current rules. Added to which, a scientific evaluation never takes place because the fixed term of the rule means that there is no permanent subject-matter to investigate.

46. The Board therefore recommends reducing fixed-term rules to the extent necessary and combining the ongoing European rules of procedure in a non-fixed-term legislative act (see Chapter 5.3). As the example of competition law shows, this would lead in the medium term to the emergence of administrative and legal practice and thus to greater certainty in action. Moreover, a critical scientific evaluation of these rules and the related development of own European administrative law dogmatics would be facilitated. The Member State

authorities and the parties concerned would no longer face the problem of having to reinterpret the old substantive rules in the new legal texts at the beginning of each support period. This would boost legal certainty and simplify existing procedures.

5.3 Reduce, codify and timely submit EU implementing provisions on the CAP

47. EU implementing provisions in the form of implementing acts and delegated acts contain instructions for the Member State administrations mainly on fact-finding measures, the process of weighing up various interests, and follow-up control of completed procedures. These implementing provisions are part of all market regulations (including direct payments) of the CAP and in the instrument- or measures-related provisions in the second pillar. Specific rules on individual instruments or measures are needed. However, a reduction in the implementing provisions to the necessary EU minimum and a codification of generally valid rules of procedure, i.e. the systematic compiling of all implementing provisions relevant for the CAP into a single codified law, would lead to the emergence of administrative and legal practice and, thus, to certainty in action and other advantages (see Chapter 5.2). The reduced – relative to the current support period – and codified administrative law provisions would basically render superfluous the sub-statutory rules of the European Commission. Such a codified European implementing legislation promotes the principle of legality by creating, in a transparent manner, systematic, clear and coherent rules for the actions of the public authorities. If codification is restricted to administrative procedural provisions, it would not obstruct the periodic review of the substantive regulations of the funding instruments. Codification of implementing provisions can lead in the long term to a simplification of administrative procedures. But this does not remove the need for prior critical appraisal about the soundness of the underlying provisions or the need to coordinate national law (at German federal government and federal states level) with EU legal requirements as soundly as possible.

48. All legal provisions should be enacted in good time before a new support period commences. As a consequence of decentralised enforcement of the CAP, the European provisions on the CAP, in turn, will largely require Member States to adopt implementation rules. This need for implementation will increase when those drafts of the EU Commission for the future funding period are implemented which grant greater scope for interpretation to the Member State. For this, timely enactment of the legal provisions at European level is needed so that the Member States have sufficient time for programming and the EU Commission has sufficient time for auditing.

5.4 Implement EU law in a more complex administrative manner at national level in justified cases only

49. A codified European implementing legislation facilitates implementation of the CAP on the Member State level. As the CAP must be enacted indirectly, i.e. by the Member

States, implementation in Germany must also take into account federal government and federal state law. National funding implementation, including controls, should, where possible, not be undertaken in a more complex administrative manner than stipulated in EU law. If the federal government or the federal states wish to programme more sophisticated specific support measures – e.g. as regards the definition of beneficiary, the eligibility criteria – and thus to achieve higher accuracy and objectives delivery, the extent to which this justifies the greater administrative burden needs to be weighed up.

5.5 Use suitable indicators as a basis for performance statements and checks instead of the requirement to prove regularity of expenditure

50. The Board recommends that the EU Member States should no longer have to prove the regularity of expenditure but provide performance statements and checks on the basis of suitable indicators (see WBAE, in print).

51. If the regularity of expenditure is also to be proved in future, then maximum admissible error rates should be established for each specific policy field that will enable the administrative formalities to be carried out at an appropriate level of effort. Simplified administration – in addition to the approaches listed under Chapters 5.1 to 5.4 – can only be reasonably achieved if the European Court of Auditors and the EU Parliament move away from the purely fiscal evaluation of the efficiency of the CAP by using the benchmark of an error rate of 2 %. Here the maximum admissible error rate should be laid down in an appropriate manner for the respective policy area as suggested by the European Commission in its proposal on “tolerable risk of errors” presented in 2008 (COM 2008). There, it had proposed a tolerable error rate of 5% under both the first and second pillars. The direct payments under today’s first pillar and the rural development programmes of the second pillar are, in terms of administrative theory, two distinct support systems. Given the fundamentally different policy design, the admissible error rate for the second pillar should be larger than for direct payments in the first pillar. For both pillars, higher materiality thresholds and definitive statutory and understandable criteria should be used in the financial correction procedure and they should supersede the EU Commission’s interpretation guidelines.

5.6 Take into account and reduce Member States’ administrative costs

52. When checking whether the administrative burden is proportionate to the legal interest to be protected, i.e. the financial interests of the EU, neither the EU Commission nor the EU Parliament nor the European Court of Auditors takes the administrative costs of the Member States into account. This stands contrary to the concept of administrative cooperation among the EU and the Member States. The EU should therefore take rough account of the control and penalty costs incurred by the Member States’ administrative bodies when checking the efficiency of the control instruments. The disproportionate

administrative burden in the area of direct payments is exacerbated by the system of payment entitlements, which the Board recommends to be abolished.

53. At the same time, the German federal government and federal states are encouraged to review the existing national stipulations specifically governing agricultural administrative procedures, as well as to review the need for general stipulations of German national funding legislation and the financial regulation, and especially to avoid any redundancy during checks. The creation of a unified model procedure for all German federal states that is based on efficiency and proportionality would create synergies and increase legal certainty. The Board is aware of the difficulty of creating such a unified model procedure. If the new governance structure proposed by the EU Commission in its CAP legislative proposals will be enacted, greater coordination between the federal states under the leadership of the German federal government responsible to the EU will be necessary.

5.7 Introduce a single-audit system

54. From the perspective of organisational law, a single-audit system should be introduced to simplify administrative procedures. The related reduction in control density is realistic even without compromising the basic principles of budgetary discipline in the EU and is possible within the constitutionally defined limits.

5.8 Reduce the administrative burden by setting appropriate minimum thresholds

55. Minor legal infringements which have only comparatively minor financial consequences (hitherto 100 EUR under Art. 54 Section 3 Horizontal Regulation 1306/2013), and minor area deviations should be deemed minor breaches. At the same time, they should be subject to the opportunity principle whereby it is left to the due discretion of the authority whether or not to pursue and penalise them. On account of the different financial consequences in the various Member States, the determination of the minimum threshold or the minor variations should be left to the Member States, within a pan-European framework.

5.9 Increased use of digital technologies

56. Existing data and also digital technologies should be used far more than in the past for area-related measures as the basis for the design, application, evaluation and control of measures in order to keep the administrative costs as low as possible despite the pronounced regional heterogeneity of the design of agricultural policy measures. The administrative costs should, however, always be viewed together with the target contributions of the measures. For this reason, administrative-intensive measures, such as e.g. site-specific contractual nature conservation measures, where digital technologies such as remote sensing can make little or no contribution to their control, may be very useful.

5.10 Emphasise the principle of trust more than the principle of legality

57. The consequence of the decision by the European Court of Justice (see text number 33 (8)), namely that the principle of trust is subordinate to the principle of legality, is that the recovery of ineligible support is not discretionary and can occur without any time limit. The Board recommends that this subordinate status be modified by an explicit normative determination proposing a considered balance between both principles. This would – as is the case in Germany – enhance the trust placed by the applicants into the validity of a given support decision. Time limits on recovery would additionally enforce legal certainty and lower administrative costs. In a broader sense, enhancing the trust principle would remove the need for applicants to pre-fund those projects under the second pillar which are performed on a voluntary basis.

6 Summary

58. The current CAP deploys a highly sophisticated set of instruments in its pursuit of a variety of objectives, which are implemented jointly by the EU and the Member States by way of the principles, laid down in primary law, of indirect enforcement and administrative cooperation. It is therefore necessarily normative, procedurally complex and onerous. Beyond the necessary degree of complexity and administrative burden, the CAP has been further overlaid with structures which have rightly prompted all stakeholders to call for simplification. The main reasons for the existing administrative complexity are an unclear legal situation which fundamentally changes with every new funding period and which can continue to change during the funding period, and an unduly strict stance of the EU on the proper allocation of resources. The pending decisions on the CAP after 2020 that will be taken shortly at EU level, and their implementation in Germany, should be seen as an opportunity to reduce the administrative burden of the CAP to an appropriate level. This calls for a CAP reform which does more than merely tackle the individual symptoms of the administrative complexity. The current culture of mistrust must instead be replaced over the long term by a shared administrative culture among EU and Member States, the time limits on the general procedural provisions of the CAP must be removed, and the hitherto numerous EU implementing provisions for the CAP need to be reduced and codified. Moreover, creating the legal framework in good time ahead the commencement of a new funding period will help bring about an appropriate level of administrative burden. Irrespective of the EU legal framework, it is also important during implementation in Germany to work towards an appropriate administrative burden at federal government and federal state level.

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