

4th WORKING GROUP ON PREPARATION OF ENI CBC IMPLEMENTING RULES (IR)

Meeting of 21 March 2013

Location: DG Development and Cooperation – EuropeAid, Rue de la Science 15, 1000 – Brussels

Belgium, Ground floor, meeting room Nyerere

MINUTES

Introduction and general framework:

The meeting was chaired by Ms Bodil Persson (DEVCO F3). She explained that this was the 4th informal working group session aiming at discussing the draft articles of the Implementing Rules (IR) for the new generation of ENI CBC Programmes.

At the beginning of the meeting two presentations were given. Agata Kotkowska (DG REGIO) gave a presentation on 'Financial Instruments in Cohesion Policy – State of play, lessons learned and outlook 2014-2020'. Also, a presentation on 'Neighbourhood Investment Facility' was given by Maria Barbara Chojnacka (DG DEVCO).

In her introductory remarks, Ms Persson clarified that the ENI CBC Programming Document (PD) and the ENI CBC IR are two separate documents that are subject to different adoption procedures.¹

The Member States agreed on the presented structure of the ENI CBC Implementing rules. Also, the Minutes from the 3rd Working group on preparation of ENI CBC Implementing Rules were approved.

The Working Group (WG) started discussing the draft IR chapter by chapter.

The subsequent discussion can be summarised as follows:

¹ For this reason, the discussions on the Programming Document have not been reported in this document.

Part One - Subject matter and definition

Estonia is of the opinion that the given definition of 'Large scale project (LSP)' is too wide. It also questioned the requirement that more than 50 % of the LSP budget must be allocated to infrastructure as this would encompass a high number of projects. DEVCO clarified that the purpose of the definition is precisely to cover the infrastructure projects awarded both via Direct award and Call of proposals.

Part Two - Common Provisions

TITLE I – General Framework for implementation

Chapter 1 - Programmes

Finland stressed that the wording of Article 4e (VII) is unclear since it implies that the communication strategy and indicative information and communication plan shall be prepared only for the first year but not for the whole programme period. **DEVCO** will re-draft the Article to clarify that the communication strategy shall cover the whole programme period. In addition, the indicative information and communication plan for the first year shall also be provided in the JOP (for the second year onwards, the communication plans will be submitted together with the annual reports).

Italy asked whether Art 4a (IV) on the socio-economic analysis of the programme's eligible area shouldn't refer to the SWOT analysis. Italy also requested clarification on the wording 'national authorities of all participating countries and, where relevant, support structures'.

DEVCO answered that the model of SWOT analysis is not imposed by the Implementing rules. If ever this model was to be used, this would have to be decided at programme level.

As for the 'national support structures', DEVCO explained that, when the national authority appointed is a Ministry that can hardly be involved on a daily basis in programme management, these support structures could be the participating country's contact point to which applicants, the MA or any other programme stakeholder could turn to, whenever the said participating country's intervention would be needed. Given the increased role and responsibilities of partner countries in the daily management of future programmes, these support structures are considered as all the more necessary.

France proposed that the exact role of control contact points mentioned in Art. 4d (VI) is described in the IR.

DEVCO mentioned that Article 4a, will be re-drafted. As for the role of control contact points, DEVCO explained that it is already explained in Art. 30 and should not be repeated. Furthermore the exact functions and responsibilities of these control contact points shall be specified by the participating countries in the Description of Management and Control Systems (DMCS).

Italy requested a clarification on how detailed the eligibility criteria for projects selection shall be. **DEVCO** explained that the minimum eligibility criteria are set in the Implementing rules but emphasised that each programme should set up its own detailed procedures in the DMCS.

Finland asked for a clarification of the wording 'any other substantial change' in the Article 6, 2d that covers cases in which the programmes may be revised. **DEVCO** responded that all changes are considered as substantial changes but the changes listed in the Article 6, 1a, 1b, 1c.

Italy asked whether Art 7.1 prevents from using non-EU languages in the programmes (ex: Arabic)

DEVCO clarified that Art 7.1 imposes the use of at least one EU language as programme working language and confirmed that other languages may also be used.

France asked whether costs for translation of the documents submitted by the project beneficiaries in their national languages are eligible. **DEVCO** clarified that translation costs for all languages shall be covered by either technical assistance (programme level) or by each individual project (project level). It was emphasised that all reports and other communication with the COM shall be in English or French.

Italy asked about the need for the programmes to describe the 'rules on eligibility of expenditures' (see Art. 4e (X)) as these rules are already set in Art. 48.

DEVCO clarified that the rules on eligibility of costs set in Art. 48 may be complemented by additional rules if programmes wish so.

Chapter 2 - Financing Agreements

Malta asked whether co-financing amount of at least 10% of the EU contribution to the programme shall be provided by the projects beneficiaries or by countries (Article 5). Furthermore, it expressed its opinion that the wording of Article that refers to Financing Agreements is confusing. **DEVCO** stressed out that each country and each programme decide on the source of co-financing. Moreover,

it was explained that the Russian Federation is so far the only participating country providing co-financing pooled at programmes level.

Portugal asked for clarification about where the responsibilities of partner countries and the Russian Federation shall be stated. **DEVCO** explained that the responsibilities of the participating countries shall be established in the JOP, in the DMCS and in the Financing Agreement (FA). These responsibilities can be further specified in the Memoranda of Understanding (MoUs) that the EC encourages the Managing Authorities to sign with the participating countries. These MoUs are meant to specify programme provisions not included in FAs (e.g. financial responsibilities, national co-financing etc.).

TITLE II – Co-financing

Poland asked why co-financing shall be min. 10% of the EU contribution and not of the total programme budget.

DEVCO explained that co-financing is calculated as a share of the EU contribution - and not of the total programme budget - in order not to make it too high for programmes where substantial co-financing is provided by participating countries (e.g. Russia).

Italy asked when co-financing at programme level (as opposed to project level) should be provided.

DEVCO explained that the min 10% co-financing of the EU contribution is set as a minimum contribution at project or programme level and has to be fulfilled at the end of the programme. A table with examples of co-financing calculations is attached.

TITLE III – Period of execution

Regarding the period of execution of each programme, **DEVCO** underlined that an indicative timetable will be enclosed to these Minutes (based on the current indicative calendar for the adoption of the ENI CBC legal framework).

TITLE IV – Programme structures

Malta pointed out that according to the wording of Article 23.5, the participating countries have no say in amending the Minutes of the Joint Monitoring Committee (JMC) meetings and that the Minutes are only foreseen to be circulated to the participating countries. **DEVCO** clarified that the procedure of amending the minutes shall be solved at the level of the JMC's rules of procedures and it will not be part of the Implementing rules.

Finland requested more information of the submission of the DMCS to be included in the IR.

DEVCO explained that the information provided in the IR is limited to defining the role of the Commission in the designation procedure that is to be established by the concerned Member State. The full DMCS is not going for approval of the EC but is a responsibility of the MS – as part of the designation process. In CPR the Commission can intervene in case of programmes exceeding EUR 250 million. In ENI CBC it has been considered that due to the non-obligation to apply PRAG in future for contract award procedures, the Commission might intervene in that regard.

Latvia pointed out that Art. 27.1 implies that the JTS is set up only after JOP submission.

DEVCO recognised that it is a mistake and promised to change the formulation so as to make clear that the JTS should be set up in the JOP.

Finland asked whether more responsibilities could be given to the branch offices of the Joint Technical Secretariat (JTS) in the Implementing rules of the 2nd generation of CBC ENI programmes since their current role is limited to communication/information tasks. Finland also asked for clarification of the wording 'The Joint Technical Secretariat shall assist the Managing Authority, The Joint Monitoring Committee, and where relevant the Audit Authority, in carrying out their respective functions'.

Estonia asked for clarification whether the branch offices have mandate to approve reports of projects.

DEVCO explained that the word 'assist' can be read in a broader view but underlined that no contracting and payment responsibilities can be delegated to the branch offices. Moreover, the branch offices duties could be reviewing reports and giving recommendations to the Managing

Authorities without having any mandate to approve reports. Branch offices cannot make EU budget implementation decisions.

France expressed its reservations of viability to perform on-the-spot verifications in proportion to the amount of support to a project and on a sample basis (see Art. 28.1). **DEVCO** explained that the principles of 'proportionality' and 'sampling' promote the link between different levels of control of projects. Also, it was explained that 'sampling' is done based on a risk analysis of projects.

TITLE V – Management and Control Systems

Italy requested clarification of Art. 30.2 providing that the MA "shall ensure that management and control systems of the programme function effectively". It also requested clarification about the responsibilities of participating countries in supporting the work of the MA in this regard (see ART. 31.1). **DEVCO** explained that it is up to the participating countries to establish the kind of support that they will provide to the MA and to describe it in the DMCS. The provision by participating countries of "good conditions for the MA to conduct controls on their respective territories" could be the "support" we refer to in Art. 31.1. Besides, this will need to be aligned with the designation criteria that are still to be drafted by COM (DEVCO is waiting for these criteria to be developed by DG REGIO). Furthermore, DEVCO added that participating countries are strongly encouraged to establish their responsibilities in Memoranda of Understandings.

Italy requested that 'should' would be replaced with 'shall' in the Article 32. 4 'Control structures'. **DEVCO** agreed with the suggestion.

Portugal requested a clarification whether the expenditure declared by public bodies could also be examined by an auditor or if public bodies could only be examined by an independent public officer (see Art. 32).

DEVCO clarified that 'auditor' shall be read as 'private auditor' and that both options, 'private auditor' and 'independent public officer' are acceptable for examination of the expenditure declared by public bodies.

TITLE VI – Technical assistance

Bulgaria suggested that a minimum share of the EU's total contribution to technical assistance (TA) should also be specified in the Implementing rules. **DEVCO** explained that there is no need to set any minimum threshold of the EU's contribution to TA.

TITLE VII – Projects

Chapter 1 – Projects

Estonia requested a clarification why the total budget which can be allocated to large scale projects (LSPs), is limited to a maximum of 30% of the Union's contribution to the overall programme budget (see Art. 38.4).

DEVCO explained that, by setting the maximum of 30% of the Union contribution that can be allocated to LSPs, the IR set the limit of the Union's contribution to the LSPs.

Estonia asked for clarification whether a project of 100, 000 EUR of which 50% are spent on investment is considered as a LSP project. In addition, it inquired whether a list of LSPs can be included in the Joint Operational Programme (JOP) after the JOP's approval since it normally takes more than one year to agree with the Russian Federation (RF) on a LSPs list. This lengthy process of agreeing the LSPs list with the RF could delay the process of approving the JOP.

DEVCO explained that infrastructure is considered as 'complex construction works' but it shall be clarified, on which threshold basis, these particular LSPs should be distinguished from smaller infrastructure projects. Furthermore, DEVCO pointed out that the list of LSPs must be prepared before submission of the JOP for EC approval. It was also emphasised that only a list of identified LSPs should be included in the JOP. The LSPs' summaries and full LSPs' application shall be submitted at a later stage.

Latvia expressed its concerns that the programme budget to be allocated to the LSPs could be lost if the list of LSPs is not approved by the EC. **DEVCO** explained that this budget will not be lost in such cases as the budget can be used to finance standard projects through Call of proposals. Besides, the JOP may also include a reserve list of large infrastructure projects in case some projects from the main list would have to be dropped.

Finland suggested that format 'CSV' or 'XML' of a list of awarded projects should not be mentioned in the Implementing rules since the format can change (see Art. 44.1). DEVCO agreed on this proposal.

Finland requested a clarification whether the maximum of 20%, that can be used for financing projects outside the eligible area, refers to 20% of total programme budget (the EU contribution, national contribution and the Russian co-financing) or to 20% of the EU contribution to total programme budget (see Art. 39.2). **DEVCO** responded that the maximum of 20% for financing projects outside the eligible area refers only to the Union contribution to total programme budget.

Chapter 3 - Forms of grants

Portugal stressed that reference 'to reimbursement of a specified proportion of the eligible costs actually incurred' should also include 'and paid'. It was also emphasized that stating both tax and social legislation as one of the criteria for eligible costs incurred by beneficiary, might lead to confusion. **DEVCO** clarified that the wording 'reimbursement of a specified proportion of the eligible costs actually incurred' refers to an accrual accounting mode which has its legal basis in the Article 123 of the Financial Regulation. Therefore it cannot be changed. In any case, auditors should in principle also look at whether incurred costs have already been paid and, if not, they should check if it's due to normal payment procedure (payment to occur within 30 or 45 days).

Portugal underlined that eligible costs incurred by the beneficiary should not only be checked in the final report. **DEVCO** explained that eligible costs incurred during the implementation period of the project should be paid before the submission of the final report, with the exception of costs related to the final report, including expenditure verification, audit and final evaluation of the project which may be incurred and paid after the implementation period. It was also explained that preparatory costs limited to travel and subsistence costs for the beneficiary staff, are eligible provided that they do not exceed those 'normally' borne by the beneficiary. Upon **Portugal's** request for clarification of the terminology 'borne', **DEVCO** explained that 'borne' means 'supported by organization and not necessarily paid by person'. **DEVCO** agreed that the terminology 'born' could be changed and that the word 'normally' could be deleted.

Finland asked for clarification on the paragraph stating that taxes may be considered eligible where these are not recoverable under the applicable national VAT legislation but that such VAT amounts may however not be incurred in relation to the provision of infrastructure (see Art. 49.1(f)). Finland asked why there is a special treatment for infrastructure projects. **DEVCO** responded that this part of the paragraph related to infrastructure derives from an instruction from the Secretariat General (in the frame of the CPR) and is still under negotiation between the Council and the Parliament. It may therefore still change.

Bulgaria requested a clarification whether criteria for eligible costs are considered at the stage of expenditure verification or at the stage of technical evaluation. Bulgaria suggested deletion of item 2. (c) of article 48, because it is considered at the stage of the technical evaluation. **DEVCO** explained that, in accordance with the Financial Regulation, criteria for eligible costs are verified at both stages. The eligibility criteria in article 48 are extracted from the Financial Regulation (article 126) and are not subject to modification.

Upon a **Hungarian** proposal supported by **Finland**, **DEVCO** agreed to change the wording of Article 50.1 stipulating that lumps sum may not exceed EUR 60 000 “per each beneficiary per project”.

Chapter 4 – Procurement and financial support to third parties

Upon **Malta’s** inquiry, **DEVCO** explained that the last sentence of Article 54 providing that ‘where different rules than those set out in paragraph 1 apply, Article 53(2) to (5) shall not apply’ cannot be changed since the wording is stipulated in the Financial Regulation. DEVCO also pointed out that, in that specific case, rules of origin and nationality are still applicable. Malta also asked if there is a mistake in the Articles being mentioned: should they be from Articles 55 to 58, instead of Articles 56 to 59? DEVCO replied that the reference to the articles will be corrected.

Malta asked for clarification on which procedure will be applied for service contracts with a value of EUR 300 000 or more, in case of international restricted tender, if the number of candidates which comply with the requirements of the procurement notice exceeds eight candidates. **DEVCO** explained that, in this case, additional criteria can be applied to reduce the number of candidates who will be invited to submit offers. These additional criteria should be specified in the contract notice. **Malta** also asked for a clarification on what is being meant by ‘beyond the programme area’ i.e. does this mean worldwide or in the EU territories? **DEVCO** answered that the procurement notice shall be published in such ways that the potential applicants in the eligible countries shall be informed.

TITLE VIII – Payments, presentation and acceptance of accounts and financial corrections

Chapter 1 – Payments

Finland requested a clarification on the relation between the annual financial report and the annual summary of controls, both prepared by the Managing Authority (MA). **DEVCO** clarified that the annual summary of controls is part of the annual financial report.

Chapter 3 – Financial corrections

Portugal has requested a clarification about “contractors”, point 2 and 3 of article 73 – *apportionment of liabilities*, defending that member states and partner countries cannot be responsible for recover amounts awarded to contractors based in their countries. The member states and partner countries can only be responsible (in the terms define by the regulation) by the beneficiaries that are carrying out the projects, they cannot be responsible by contractors of whom the member states and partners countries have no kind of control or authority in the award procedure.

DEVCO informed the MSs that the document 'Financial liability of the Participating countries under the ENI CBC Programmes', laying down the participating countries' responsibilities has been distributed.

Italy asked whether the terminology 'beneficiary' refers only to the lead beneficiary or to its partners as well. **DEVCO** clarified that the used terminology refers to the lead beneficiary. In addition, **REGIO** explained that financial correction of irregularities is envisaged to secure recovery of ineligible costs. **DEVCO** added that, due to the high pre-financing level, most recoveries will be the result of project under-spending. It was also stipulated that negligence and fraud cover both the payment and the recovery process. Moreover, **DEVCO** pointed out that, in a case of negligence from the participating countries, the EC must be informed in order to explore offset possibilities. If no possibilities are found, the funds will be considered lost.

Estonia asked **DEVCO** to clarify who is responsible in case there is a need to recover from a NGO in a partner country. **DEVCO** responded that the MA will be responsible to recover the amount. In case the amount cannot be recovered, the responsibility shall pass from the MA to the partner country concerned but only in case of negligence or fraud on the side of the Partner Country.

Portugal has requested a clarification about amounts unduly paid (to public and private entities) which don't result from a fault or negligence on the part of a partner country or the Russia Federation.

TITLE IX – Reporting, monitoring and evaluation

Finland requested a clarification on who is responsible to carry out results-oriented monitoring. **DEVCO** clarified that the MA is responsible to carry out results-oriented monitoring (ROM). The methodology used by the experts contracted by the COM may be used by the MA where relevant.

In addition, external experts may be contracted by COM for performing ROM of the programmes and projects. In that case, the external experts shall take into account the results of the ROM mission performed by the MA. The EC requires that equal ROM methodology is to be applied on both the programmes and the projects.

TITLE X – Visibility

Italy asked whether an annual information and communication plan, as a part of an annual report, shall be subject of the EC approval. **DEVCO** confirmed that an annual information and communication plan shall be approved by the EC.

CONCLUSIONS

Ms Bodil Persson concluded the informal working group session. She informed the participants that the Interact Conference on future perspective of ENI CBC 2014-2020 will take place on 24 April 2013 in Antwerp. The Conference will gather the representatives from participating countries, programme bodies, the EEAS and the EC representatives. The aim of the Conference is to give an overview of the current state of play of the ENI 2014-2020 regulatory framework that covers the ENI regulation, Strategic Programming Document and ENI CBC Implementing rules.

Next meeting of the informal working group will take place in autumn 2013.