

**DG COMMUNICATIONS NETWORKS,
CONTENT & TECHNOLOGY**

ICT Policy Support Programme

Competitiveness and Innovation Framework Programme



Guide for legal and financial viability checking

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1. INTRODUCTION

This document defines the rules the Commission service will apply in the verification of the existence and the legal status of participants as well as their operational and financial capacity. It is based on the Financial Regulation¹ (FR) and its Implementing Rules² (IR).

These rules concern all projects funded within the Information and Communications Technologies Policy Support Programme (ICT PSP) as established under the Competitiveness and Innovation Framework Programme³.

For any subsequent versions of this document a change history and a comparison to the previous version(s) will be provided in order to identify the modifications/updates and for ease of understanding.

This document therefore describes in detail the rules for verification of:

- The existence;
- The legal status;
- The operational capacity; and
- The financial capacity

of a beneficiary in an ICT PSP grant⁴.

The following general guiding principles have been adopted:

- Only information that is strictly required by the FR and/or its IR or for the provision of essential statistics will be requested from the applicants/beneficiaries.

⁴ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.09.2002, p. 1), as amended by Regulation No 1995/2006 of 13 December 2006 (OJ L 390, 30.12.2006, p. 1).

² Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as last amended by Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ L 111, 28.04.2007, p. 13)

³ Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Competitiveness and Innovation Framework Programme (2007 to 2013), OJ L 310, 9.11.2006, p. 15.

⁴ Model grant agreement to be used in the implementation of the ICT Policy Support Programme (adopted by Commission decision PE/2007/1541).

- Any information will be requested at the time when verification/validation can be/has to be done. This implies that information requested at proposal stage will not be asked again during negotiations or that information that e.g. needs to be verified at grant agreement stage is not requested at proposal stage.
- The verification/validation will as much as possible rely on the self-declaration and auto-verification by participants.
- Standard procedures in place within the Commission – see e.g. for the validation of legal entities – will, as far as possible, be used.

In defining these rules due consideration has been given to:

- Ensure the proper implementation of the work to be carried out under the project. It is essential that project partners individually and collectively have the means to carry out the project that is agreed as part of the selection and negotiation process;
- Protect the financial interests of the Community by negotiating protective measures that are proportionate to the financial risks that have been identified;
- Take account of the specificity of the ICT PSP and its instruments; and
- The appreciation of management risks based on the implementation of similar programmes such as eTEN⁵.

The document is structured as follows. In Section 2 the verification of the existence and the legal status of participants is described. Section 3 outlines the way the operational capacity of each participant and the consortium as a whole is verified. The verification of the financial capacity is described in Section 4. Both the financial viability and the co-financing capacity will be assessed. This section also provides an overview of the financial protective measures the Commission may want to implement through the introduction of special clauses in the grant agreement. The guide is complemented by annexes that either provide relevant references or additional details.

⁵ The eTEN Programme expired at the end of 2006. Its legal base are Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the granting of Community financial aid in the field of trans-European networks (OJ L 228, 23.09.1995, p. 1), as amended; and Decision No 1336/1997/EC of the European Parliament and the Council of 17 June 1997 on a series of guidelines for trans-European telecommunications networks (OJ L 183, 11.07.1997, p. 12), as amended.

2. VERIFICATION OF THE EXISTENCE AND THE LEGAL STATUS OF PARTICIPANTS

2.1. Existence and legal status

2.1.1. Principles

Grant applications may be submitted by the following:

- Legal persons; and
- Natural persons - in so far as this is required by the nature or characteristics of the action.

Exceptionally, entities which do not have legal personality under the applicable national law may participate, provided that their representatives have the capacity to undertake legal obligations on their behalf and assume financial liability. Subject to these conditions, such entities will be considered as legal entities for the purpose of participation in an ICT PSP project.

2.1.2. Implementation

2.1.2.1. At proposal stage

In the Proposal Submission Form (PSF), any legal entity shall provide its administrative and legal data (such as organisation's legal name, legal address, legal registration number, VAT number, etc). At this stage no supporting documents (see below) will be requested and no verification of the data - other than for checking of the eligibility of the proposal - will be carried out by the Commission.

2.1.2.2. At negotiation stage

The co-ordinator will be provided with pre-filled Negotiation Forms (through NEF – negotiation facility). In this, the data on a legal entity will be taken either from a database of legal entities (as held by the Commission), in which case it will be indicated that the legal data are validated, or from the PSF (as provided by the legal entity at proposal stage), in which case it will be indicated that the legal data are non-validated. At the end of the negotiations the legal data of all participants will need to be correct and validated.

In case the legal data on one of the participant are either not correct or non-validated the organisation concerned will have to provide through the co-ordinator the so-called 'Legal Entity Fiche' and relevant supporting documents⁶. The Commission will only validate a legal entity if these documents have been properly completed and submitted.

2.2. Legal status

The FR and its IR define certain categories of legal entities. Depending on the category of legal entities to which it belongs, a legal entity has different rights and obligations, in particular with respect to whether or not a financial capacity check will be mandatory

⁶ See http://ec.europa.eu/budget/execution/legal_entities_fr.htm

and whether or not a competent public officer is allowed to certify the financial statement(s). Furthermore in order to allow the Commission to collect statistical data (e.g. on the participation of SME's), to ensure compatibility with Framework Programme 7 and to ease participation of certain types of organisations further legal statuses are introduced (see below).

The Commission services will classify each legal entity participating in an ICT PSP project as follows:

Natural person			
Legal person	Public body		
		<i>Profit</i>	<i>Non profit public body</i>
			<i>Profit public body</i>
		<i>International organisation</i>	<i>Of European interest</i>
			<i>Other</i>
	Secondary and higher education establishment		
	Research organisation		
	Enterprises	SME	
		Non-SME	
	Other		

A natural person refers to a physical person. A public body means any legal entity established as such by national law and international organisations. An international organisation is an international organisation of European interest if the majority of its members are Member States or Associated Countries and whose principal objective is to promote scientific and technological cooperation in Europe. International organisation 'other' means an intergovernmental organisation other than the Community which has legal personality under international public law, as well as any specialised agency set up by such an international organisation. Secondary and higher education establishments are organisations that deliver diplomas recognised by a country (typically universities). Research organisations are legal entities established as a non-profit organisation that carries out research or technological development as one of its main objectives. An entity is an enterprise if it is engaged in an economic activity, irrespective of its legal form.

An SME means micro, small and medium sized enterprise within the meaning of Recommendation 2003/361/EC in the version of 6 May 2003. An enterprise is considered as an SME, taking into account its partner enterprises and/or linked enterprises, if it:

- employs fewer than 250 persons
- has an annual turnover not exceeding EUR 50 million, and/or
- an annual balance sheet total not exceeding EUR 43 million.

For more details please refer to

http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/index_en.htm.

The definition of the various legal statuses can also be found on-line in NEF. An organisation can have several legal statuses. The legal status of a legal entity is determined based on the declaration made by the authorised representative of the organisation. Before the grant agreement is signed all participants must have provided a declaration by an authorised representative indicating on his/her honour that all the information in NEF regarding the organisation – including its classification - is correct.

For applicants without legal personality Article 174a of the IR states that their representatives shall prove that they have the capacity to undertake legal obligations on behalf of the applicant, and shall offer financial guarantees equivalent to those provided by legal persons. A declaration to this effect by the persons concerned will suffice.

2.3. Exclusion

Grants may not be awarded to applicants who are, at the time of a grant award procedure, in one of the situations referred to in Articles 93(1), 94 and 96(2)(a) of the FR. All applicants must certify that they are not in one of those situations. The coordinator must submit these signed declarations (signed by an authorised representative), collected from all participants, to the Commission at negotiation stage.

3. VERIFICATION OF THE OPERATIONAL CAPACITY

3.1. Principles

All applicants must have stable and sufficient sources of funding to maintain their activities throughout the period during which the action is being carried out, and they must have or will have in due time the professional competencies and qualifications required to complete the proposed action.

The operational capacity is to be distinguished from the financial capacity for which a specific verification will be carried out (see below). The term "operational capacity" relates to the professional, (technical, scientific, technological, managerial, administrative ...) skills, qualifications, tools and/or knowledge necessary to achieve the objectives and expected results.

Since projects are implemented by a consortium of several legal entities, two levels of operational capacity are assessed:

- The consortium's operational capacity; and
- Each participant's operational capacity.

3.2. Implementation

3.2.1. At proposal stage

The operational capacity of the consortium is addressed at the evaluation stage by the independent external evaluators when assessing the evaluation criterion "Implementation".

In order to allow the independent external evaluators to perform this task, the participants were required to provide within their proposal *inter alia* for each applicant a brief description of the organisation and a short profile of staff members who will undertake the work and at consortium level, the participants will describe how they collectively constitute a consortium capable of achieving the project objectives (see Guide for Applicants).

An above-threshold score will indicate a positive assessment.

The independent external evaluators will provide in the Evaluation Summary Report comments to the Commission for any legal entity for which they consider that the necessary operational capacity to perform its foreseen tasks is insufficient or not enough demonstrated.

3.2.2. *At negotiation stage*

At this stage the operational capacity is checked by the project officer based on the project description and in particular Section 'B2.3 Consortium and key personnel'. As a general rule, the Commission services will follow the recommendations of the independent external evaluators – see above, except if the Commission services are aware of any additional information that may impinge on the judgement of the independent external evaluators. Such additional information may be provided from different sources such as the findings of previous audits, management of previous (or on-going) projects, the consultation of external databases, etc. As a rule of thumb an organisation should have at least two times the number of personnel than the persons that will participate in the project. The Commission services may decide to exclude a legal entity and/or not to select a proposal for Community financial contribution if it considers that the legal entity does not have a sufficient operational capacity.

Moreover, before the grant agreement is signed each participant shall provide to the Commission services a declaration on its honour that it has, or will have in the time required, the necessary resources for the implementation of their work in the project under negotiation. This declaration is part of NEF and needs to be signed by a person authorised to sign the grant agreement and to legally commit the organisation⁷.

In the particular case of a legal entity joining the consortium during the negotiation or during the implementation of the project, the assessment of its operational capacity will be carried out as indicated above by the Commission services on the basis of similar information requested from applicants at proposal stage.

4. VERIFICATION OF THE FINANCIAL CAPACITY: IMPLEMENTATION RULES

4.1. Principles

The verification of the financial capacity is an integral part of the negotiation stage and needs to be completed before the signature of the grant agreement. The following

⁷ The various self-declarations referred to in these guidelines are grouped and a single document will need to be signed by an authorised representative.

describes how the financial checks the authorising officer will do in accordance with Article 173, 176 and 182 of the IR are carried out.

The verification of the financial capacity of a participant essentially proceeds in four steps:

- The legal entities subject to a mandatory verification of their financial capacity are identified;
- Legal entities that are subject to a financial capacity check provide – if not already available – their financial information and relevant supporting documents. The documents that need to be provided are specified in this document;
- On the basis of the above, the Commission services proceed with a financial analysis; and
- If necessary appropriate protective measures are negotiated and agreed.

4.2. Decision tree to decide whether a legal entity is subject to financial verification

In defining the decision tree two main issues have been taken into account, notably the rules as given in the IR and the assessment of the management risk related to the implementation of the ICT PSP.

In accordance with Article 173 and Article 176 of the IR and based on the assessment of the management risks related to the implementation of the ICT PSP it is decided that the following types of legal entities shall not be subject to a financial viability check:

- Public bodies;
- International organisations referred to in Article 43(2) of the IR: These are International public sector organisations set up by intergovernmental agreements, and specialised agencies set up by such organisations;
 - The International Committee of the Red Cross (ICRC);
 - The International Federation of National Red Cross and Red Crescent Societies; and
- Other international organisations, if their requested Community contribution does not exceed EUR 500.000
- Secondary and higher education establishments; and
- Legal entities that request a Community contribution of less than EUR 25.000 per year.

The latter implies that for any of the participants in Thematic Networks⁸ except for the coordinator⁹ a financial viability check does not need to be performed.

4.3. Requested data and documents

At the negotiation stage, each legal entity subject to a verification of its financial capacity (see above) shall provide to the Commission services for the last financial year for which the accounts are closed the following:

- Balance sheets;
- Profit and loss accounts; and
- Statutory audit report on these financial statements - if available.

A legal entity subject to a verification of its financial capacity requesting an estimated Community financial contribution exceeding EUR 500.000 must in any case provide to the Commission services an audit report certifying the accounts of the last available financial year. The requirement of an audit report applies only to the first application made by a beneficiary to an authorising officer in any one budgetary year.

As a general rule, no prospective financial data will be used, except in the case of "young" legal entities (such as start up companies) which do not have closed accounts. For these legal entities a business plan will be required.

The financial data needs to be provided at the beginning of negotiations and in some cases additional information may be required during the implementation of the project. A legal entity that does not provide its requested data and documents in due time will be excluded from the ICT PSP action in question.

4.4. Financial capacity verification

The financial capacity verification involves a check of the financial viability and the co-financing capacity – as explained below.

In order to be financially viable, a legal entity must be:

- Liquid: capable of covering its short-term commitments;
- Solvent: capable of covering its medium and long-term commitments; and
- Profitable: generating profits, or at least with self-financing capacity.

⁸ According to the grant agreement, participants in thematic networks receive a lump sum of 8.000 EUR per year. The contribution is thus below the threshold of 25.000 EUR per year.

⁹ The coordinator receives a contribution based on scale-of-unit costs of EUR 3.000 per year per beneficiary participating in the network (including itself) for the first 10 beneficiaries, EUR 2.000 per year and beneficiary for the 11th to 20th beneficiary and a lump sum of EUR 5.000 per year for participation in meetings and events. Taking into account the minimum requirement of 7 participants for a Thematic Network, the coordinator will receive a contribution of more than EUR 25.000 per year.

As the Commission is funding up to 50% of the costs participants must have the co-financing capacity to sustain their contribution. The co-financing capacity of a participant must consider the ICT PSP action and all other on-going co-financed actions. Therefore, a participant may be requested to provide the list of all projects supported by the Community budget in which it is involved.

In order to assess the risk, a two dimensional matrix is built, based on the appreciation of the financial viability plotted against the vertical axes and on the co-financing capacity plotted against the horizontal axes (see Figure 1).

Financial viability				
Good				
Acceptable				
Weak				
		Weak	Acceptable	Good

Co-financing capacity

The horizontal and vertical axes are divided in three areas: weak, acceptable or good (see below).

If the financial viability and the co-financing capacity are both acceptable and/or good (see below), no further analysis will be needed and no financial protective measures will be requested. The fact that either the financial viability or the co-financing capacity is weak does not automatically exclude an organisation from participating. The decision on whether or not to exclude a legal entity will depend on the necessity of the participant for the project, the technical contribution the participant would bring, the financial prospects and the financial protective measures that can be put in place.

4.4.1. Used ratios and thresholds for financial viability

The financial viability is based on the 5 financial ratios¹⁰ as follows:

1. Liquidity (Quick ratio) =
$$\frac{\text{Current assets} - \text{Stocks} - (\text{Debtors} > 1 \text{ year})}{\text{Short-term debt (bank and non-bank)}}$$
2. Financial autonomy (Gross Operating Profit Ratio) =
$$\frac{\text{Interest}}{\text{GOP}}$$
3. Profitability (1) =
$$\frac{\text{GOP}}{\text{Turnover}}$$
4. Profitability (2) =
$$\frac{\text{NOP}}{\text{Turnover}}$$
5. Solvency =
$$\frac{\text{Total debt}}{\text{Equity}}$$

According to the results obtained for each of the abovementioned ratios, the following scoring is given:

¹⁰ GOP stands for Gross Operating Profit and NOP stands for Net Operating Profit.

Grade	0	1	2
Quick ratio	$i < 0,5$	$0,5 \leq i \leq 1$	$i > 1$
Gross Operating Profit ratio	$i > 0,40$ or < 0	$0,40 \geq i \geq 0,30$	$0 \leq i < 0,30$
Profitability (1)	$i < 0,05$	$0,05 \geq i \geq 0,15$	$i > 0,15$
Profitability (2)	$i < 0,02$	$0,02 \geq i \geq 0,04$	$i > 0,04$
Solvency	$i > 6,00$ or < 0	$6,00 \geq i \geq 4,00$	$0 \leq i < 4,00$

4.4.2. Used ratios and thresholds for co-financing capacity

The co-financing capacity check is based on the financial ratios¹¹ as follows:

1. Cash Flow Indicator =
$$\frac{\text{Cash Flow} \times \text{Project duration (years)}}{\text{Project costs} - \text{EC contribution}}$$
2. Net Operating Profit Indicator =
$$\frac{\text{NOP} \times \text{Project duration (years)}}{\text{Project costs} - \text{EC contribution}}$$

According to the results obtained for each of the abovementioned ratios, the following scoring is given:

Grade	0	1
Cash Flow Indicator	$i < 1$	$i \geq 1$
Net Operating Profit Indicator	$i < 1$	$i \geq 1$

4.4.3. Thresholds – financially weak participation

Combining the above any legal entity subject to a verification of its financial capacity who obtains under the financial analysis a minimum of 4 on financial viability or a minimum of 1 on co-financing is considered to be acceptable or good as can be seen from the tables below:

Financial Evaluation	Weak	Acceptable	Good
Grade	0 - 3	4 - 5	6 - 10

¹¹ For the calculation of the co-financing capacity the denominator 'projects costs – EC contributions' refers to the co-financing of all projects that will be running in parallel with the project under negotiation during the same period

Co-financing Capability	Weak	Acceptable	Good
Grade	0	1	2

Despite of the above mentioned results the financial capacity of a legal entity will in any case be considered as weak if

- An audit report of the accounts has been issued with serious qualifications;
- The legal entity has been subject to substantial financial findings relating to its financial capacity following a financial audit carried out by the Commission (including OLAF), the European Court of Auditors on their duly authorised representatives within the last two years;
- The legal entity is subject to a warning code W2, W3 or W4 in the Commission's EWS database (see Annex IV).

4.5. Special case of net worth and equity flag

The net worth and equity test are used in case an organisation has a weak co-financing capability. At first the net worth is compared to the organisation's share in projects/proposals. If the net worth is significantly higher than the resources needed, no further check needs to be performed as one can assume that the organisation has sufficient resources at its disposal. If the net worth is comparable or lower, the equity is looked at. The calculation of the equity is the same as for the net worth, but includes a correction of 50% of the value of intangible assets. The equity therefore makes an adjustment for the intangible assets, as its value is difficult to estimate. In case the equity is low or negative, the participation of the organisation should be severely questioned and there should be strong arguments to allow a limited participation (mainly special expertise, which is vital to the success of the project). Such organisation normally cannot assume the role of financial co-ordinator and in principle pre-financing must be secured.

4.6. Financial protective measures

Financial protective measures are necessary if the financial viability and/or co-financing viability are weak. Depending on whether the financial viability or co-financing are weak and depending on whether the legal entity is the coordinator or not different protective measures may need to be implemented in the grant agreement. Possible protective measures – including the decision to exclude a legal entity from participating - are described below. The decision on which protective measures to implement is with the Commission.

4.6.1. Weak financial viability – all participants

For participants with a weak financial evaluation there is a specific risk that participants will not be in a position to work under 'the going concern principle'. This implies an increased risk for the Commission that pre-financing may at a later stage not be covered

through incurred expenditure. As a result, financial protective measures may need to be included as follows:

- securing the pre-financing payment for the financially weak participant through a financial guarantee (provided by an approved bank or financial institution or a financial viable 'third party' – see below);
- including joint financial responsibility at the level of the consortium– see below; and
- providing no pre-financing payment to the financial weak participant.

Of these options the last option is the least preferred – the option of joint financial responsibility is the preferred option if it would happen that the consortium provides a mixture of a limited number of financially weak partners and some financially strong partners.

4.6.2. Weak co-financing capacity – all participants

Participants with a weak co-financing capacity will be requested to show that they have additional financial resources sufficient to finance their share of the project costs. Such resources can stem from e.g. the recent increase in capital or firm indication that capital will be increased or planned future sources of financing that can be demonstrated through a credible business plan. In this case guarantees from a parent company or a third party, (i.e. a firm commitment from the parent company or a third party to provide the necessary resources to the participant in case the latter would fail to comply with its contractual obligation to finance its share of the project) could be considered. Alternatively the participation of organisations who fail to provide justifications acceptable to the Commission may be reduced in line with their estimated financial co-financing capacity and, in extreme cases, these organisations may not be allowable to participate.

4.6.3. Special case of the co-ordinator

A participant with a weak financial viability should in general not be accepted as a co-ordinator by the Commission services. In exceptional circumstances however, motivated by technical characteristics of the project which rely on the specific expertise and involvement of such a coordinator, the Commission may accept a coordinator with a weak financial situation however on condition that appropriate protective measures are put in place or a financial guarantee is provided (for the total amount of pre-financing) or it is evident from the financial assessment that the negative financial assessment is exceptional because of temporary circumstances in the organisation.

Following measures may be implemented for a financially weak coordinator:

A **trust account** can be accepted in place of a guarantee as long as it provides a similar level of security as a financial guarantee. This type of account however has different conditions in different countries and does not exist in all countries. Therefore each case will need to be examined separately to ensure that the conditions provide adequate security. The basic requirements for the account are that:

- It should not be included in the assets of the coordinator in case of bankruptcy; and

- Sufficient controls for payment from that account can be established.

Payments from a trust account could be organised in two ways. Either any payment will have to be approved by the Commission by a written approval to the bank or a few beneficiaries can, by collectively signing the payment, request to make payments from the account.

A blocked account can be accepted in place of a guarantee as long as it provides a similar level of security as a financial guarantee. This type of account however has different conditions in different countries and does not exist in all countries. Therefore each case will need to be examined separately to ensure that the conditions provide adequate security.

4.6.4. Special case of start-up organisations

Start-up companies (SMEs with maximum two years of business history) are often for objective reasons unable to provide evidence about their financial resources during the project period. This can be due to the fact that financial statements are not yet available, or are only available for the start-up period in which low financial resources are not uncommon. In these cases, the start-up company is requested to submit a business plan indicating the financial resources it intends to use for financing its share of the project(s) costs. The business plan should be supported by any evidence (up-to-date business reports, management reports, intermediary financial statements, etc.). On this basis, it will be decided whether the company has resources to participate and whether protective measures have to be taken.

4.6.5. Guarantees – explanatory note

Guarantees are defined as the main instruments to be used to reduce financial risk. Whenever a financial guarantee is requested, it will be specified in the grant agreement with special conditions.

Model letters of financial guarantees are attached. The text of these guarantees should not be altered as it presents the minimum requirements of an acceptable guarantee.

4.6.5.1. Guarantee from a bank or a financial institution

These guarantees must be issued by an approved (well known and with good reputation) bank or financial institution in one of the Member States and are to be nominated in Euro.

A guarantee for a beneficiary must cover the initial pre-financing, enter into force at the latest at the payment of the pre-financing and needs to be maintained up to the final payment.

A guarantee for a financially weak coordinator needs to cover two aspects, i.e. its own pre-financing (as above) and the payment for the beneficiaries. For the latter the amount of the payment needs to be guaranteed up to the moment the pre-financing is distributed to the participants and this guarantee should be renewed at every payment. The optimal solution is to have the guaranteed amount always to equal the undistributed amount of pre-financing. This would mean that the amount of the guarantee is always reduced when the coordinator distributes funds to other participants and always increased (or a new

guarantee issued) when an additional amount is paid to the coordinator. This procedure will reduce the fees paid to banks up to 90 % compared to the option of having a guarantee valid for almost the total duration of the project for the full amount of pre-financing.

4.6.5.2. Guarantee from parent company or third party

A guarantee from a parent company or third party is generally a good alternative if the guarantor is financially strong enough. The guarantor has to provide its financial information for assessment in order to let the Commission screen the suitability of the suggested guarantor. The assessment of a possible guarantor is performed in the same way as for the coordinator and the financial data required consists of the audited balance sheet and profit and loss accounts for the last year along with the auditor reports (when applicable). The guarantor has to be clearly able to fulfil its financial duty as a guarantor.

The benefits of parent company/third party guarantee compared to a guarantee from a financial institution is that it is (almost) free and addresses weak co-financing capability.

4.6.6. *Joint financial responsibility – explanatory note*

This protective measure is the preferred option in case the consortium consists of a few financially weak participants and some financially strong participants. This measure is taken at consortium level – all participants should agree – and can be implemented if the the Community contribution of the financially strong participants is at least equal to the share of the financially weak participants.

ANNEX 1: EXCERPTS FROM THE FINANCIAL REGULATION (FR) AND IMPLEMENTING RULES (IR)

Financial Regulation

Article 114(3)

"3. Grants may not be awarded to applicants who are, at the time of a grant award procedure, in one of the situations referred to in Articles 93 (1), 94 and 96(2)(a).

Applicants must certify that they are not in one of the situations referred to in the first subparagraph. However, the authorising officer may refrain from requiring such certification for very low valued grants, as specified in the implementing rules."

Article 115

"1. The selection criteria shall be such as to make it possible to assess the applicant's ability to complete the proposed action or work programme.

2. The award criteria announced in advance in the call for proposals shall be such as to make it possible to assess the quality of the proposals submitted in the light of the objectives and priorities set."

Article 118

"1. The authorising officer responsible may, if he deems it appropriate and proportionate, require the beneficiary to lodge a guarantee in advance in order to limit the financial risks connected with the payment of pre-financing.

2. The authorising officer shall require the beneficiary to lodge such a guarantee in advance in the cases specified in the implementing rules."

Implementing Rules

Article 173 (linked to FR – Article 114)

"2. The application shall show the legal status of the applicant and his financial and operational capacity to carry out the proposed action or work programme, subject to Article 176(4).

For that purpose the applicant shall submit a declaration on his honour and, for applications for a grant exceeding EUR 25,000, any supporting documents requested, on the basis of his risks assessment, by the authorising officer responsible. The request for such documents shall be indicated in the call for proposals.

The supporting documents may consist in particular in the profit and loss account, the balance sheet for the last financial year for which the accounts were closed.

3. ...

4. Where the application concerns grants for an action for which amount exceeds EUR 500,000 or operating grants of which exceed EUR 100,000, an audit report produced by

an approved external auditor shall be submitted. That report shall certify the accounts for the last financial year available.

The provisions of the first subparagraph shall apply only to the first application made by a beneficiary to an authorising officer in any one budget year.

In the case of agreements linking the Commission and a number of beneficiaries, those thresholds shall apply to each beneficiary.

In case of partnerships as referred to in Article 163, the audit referred to in the first subparagraph, covering the last two financial years available must be produced before the framework agreement is concluded.

The authorising officer responsible may, depending on his risk assessment, waive the obligation of audit referred to in the first subparagraph for, secondary and higher education establishments and beneficiaries who have accepted joint and several liabilities in the case of agreements with a number of beneficiaries.

The first subparagraph shall not apply to public bodies and the international organisations referred to in Article 43 (2)."

Article 174 (linked to FR – Article 114)

"Applicants shall declare on their honour that they are not in one of the situations listed in Articles 93(1) and 94 of the Financial Regulation. The authorising officer responsible may, depending on his risk analysis, request the evidence referred to in Article 134. Applicants shall be required to supply such proof, unless there is a material impossibility recognised by the authorising officer responsible."

Article 174a (linked to FR – Article 114)

"When an application for a grant is submitted by an applicant not having legal personality, in accordance with the second subparagraph of Article 114(2) of the Financial Regulation, the representatives of that applicant shall prove that they have the capacity to undertake legal obligations on behalf of the applicant, and shall offer financial guarantees equivalent to those provided by legal persons."

Article 182 (linked to FR – Article 118)

1. In order to limit the financial risks connected with the payment of pre-financing, the authorising officer responsible may, on the basis of his risks assessment either require the beneficiary to lodge a guarantee in advance, for up to the same amount as the pre-financing, or split the payment into several instalments.

However, for grants with a value of less than or equal to EUR 10 000, the authorising officer responsible may require the beneficiary to lodge a guarantee in advance only in duly substantiated cases.

Such a guarantee may also be required by the authorising officer responsible, depending on his risks assessment, in the light of the method of funding laid down in the grant agreement.

Whenever a guarantee is required, it is subject to the assessment and acceptance of the authorising officer responsible.

2. Where pre-financing represents over 80 % of the total amount of the grant and provided it exceeds EUR 60 000, a guarantee shall be required.

For NGOs operating in the field of external action, that guarantee shall be demanded in respect of pre-financing exceeding EUR 1 000 000 or representing over 90 % of the total amount of the grant.

The guarantee shall be valid for a period sufficiently long to allow it to be activated.

3. The guarantee shall be provided by an approved bank or financial institution established in one of the Member States. When the beneficiary is established in a third country, the authorising officer responsible may agree that a bank or financial institution established in that third country may provide the guarantee if he considers that the bank or financial institution offers equivalent security and characteristics as those offered by a bank or financial institution established in a Member State.

At the request of the beneficiary, that guarantee may be replaced by a joint and several guarantee by a third party or by the irrevocable and unconditional joint guarantee of the beneficiaries of an action who are parties to the same grant agreement, after acceptance by the authorising officer responsible.

The guarantee shall be denominated in euro.

It shall have the effect of making the bank or financial institution, third party or the other beneficiaries stand as irrevocable collateral security, or first-call guarantor of the grant beneficiary's obligations.

4. The guarantee shall be released as the pre-financing is gradually cleared against interim payments or payments of balances to the beneficiary in accordance with the conditions laid down in the grant agreement.

In the cases referred to in the second subparagraph of paragraph 1, it shall be released only upon payment of the balance.

5. The authorising officer responsible may waive the obligation laid down in paragraph 2 for public-sector bodies and the international organisations referred to in Article 43.

The authorising officer responsible may also exempt from that obligation beneficiaries who have concluded a framework partnership agreement under Article 163. "

ANNEX II: MODEL LETTERS FOR FINANCIAL GUARANTEES

Guarantee from a bank or financial institution

(TO BE SIGNED BY AN AUTHORISED REPRESENTATIVE OF THE BANK/ OR FINANCIAL INSTITUTION)

The European Community, represented by the European Commission (hereinafter “the Commission”), is planning to conclude a grant agreement (reference no.) (hereinafter “the Grant Agreement”) with (name of the beneficiary concerned) (hereinafter “the Beneficiary”) (and with other beneficiaries in the Project) under the ICT Policy Support Programme (ICT PSP) for a Project entitled (title of the Project) (hereinafter “the Project”).

Under the terms of the Grant Agreement:

- the beneficiary will participate in a cost-sharing project. The total amount of the eligible project costs for the beneficiary have been estimated at EUR (insert the amounts in figures and words), of which the Beneficiary will contribute (**) %, up to a maximum amount of EUR (insert the amounts and figures and words);
- the agreement is governed by its terms, the relevant Community acts related to the Competitiveness and Innovation Framework Programme, the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules, other Community law and, on a subsidiary basis, the law of [Belgium/Luxemburg]. Notwithstanding the Commission's right to directly adopt enforceable recovery decisions in accordance with Article 256 of the EC Treaty, the Court of First Instance or, on appeal, the Court of Justice of the European Communities has sole jurisdiction to hear disputes between the Community and a beneficiary concerning the interpretation, application or validity of the grant agreement.

(Name of bank or financial institution) (hereinafter “the Guarantor”) hereby irrevocably undertakes to pay to the Commission, upon its first demand, all amounts owed to the Commission by the Beneficiary up to a maximum of EUR (insert the amount in figures and in words) if the latter fails to fulfil its contractual obligations in accordance with the terms specified in the Grant Agreement and any subsequent amendments, as the case may be. This amount may be decreased on request of the Beneficiary with the written agreement of the Commission but, after such a decrease, the Guarantor undertakes to increase this guarantee, upon request of the Commission by registered letter, with the amount indicated therein, up to the maximum amount specified above.

This guarantee may be relied on at any time during the period specified herein by registered letter stating that the Beneficiary has failed to fulfil its contractual obligations and specifying the amount being claimed. If the amount claimed by the Commission is less than the amount of this guarantee at the moment of the receipt by the Guarantor of the registered letter, the Commission will indicate, in the aforementioned letter or in any subsequent letter addressed to the Guarantor, whether the balance must remain guaranteed. In the absence of any express written instructions of the Commission with

respect to such balance, the Guarantor undertakes to guarantee the balance under the terms and conditions set out in this guarantee.

The Guarantor will execute the guarantee only on presentation of a registered letter from the Commission, in which the Commission specifies the amount to be repaid, or on presentation of a certified copy of a court judgement ordering the Beneficiary to make repayment to the Commission in full or in part..

This guarantee is valid from the date of its constitution [up to and including the 60th day after the last payment made by the Commission pursuant to the Grant Agreement] [or up to (specify date)] [or up the day after the last payment of the pre-financing to the other beneficiaries]

In the case of a financial audit initiated by the Commission before the date specified herein, the guarantee will be extended, upon request of the Commission, until the Beneficiary has reimbursed any amount as determined by the Grant Agreement or until the Commission has informed the Beneficiary that the audit does not require any reimbursement by the Beneficiary.

This guarantee and the effect given to it are governed exclusively by (****)[preferably the law of the Grand Duchy of Luxembourg or Belgian law depending]

Any dispute between the Commission and the Guarantor relating to this guarantee or to any payment made under it will be brought before the Courts in (****)[*insert country (same as law in paragraph above) or a specific court in that country*].

Done at (*****), on (*****)(named and signature of the authorised representative of the Guarantor)

(official stamp of the Guarantor)

ANNEX II: MODEL LETTERS FOR FINANCIAL GUARANTEES

Guarantee from a parent company

(TO BE SIGNED BY AN AUTHORISED REPRESENTATIVE OF THE BANK/ OR FINANCIAL INSTITUTION)

1. The European Community, represented by the European Commission (hereinafter “the Commission”), is planning to conclude a grant agreement (reference no.) (hereinafter “the Grant Agreement”) with (name of the beneficiary concerned) (hereinafter “the Beneficiary”) (and with other participants in the Project) under the ICT Policy Support Programme (ICT PSP) for a Project entitled (title of the Project) (hereinafter “the Project”).

2. Under the terms of the Grant Agreement:

- the Beneficiary will participate in a cost-sharing project. The total amount of the eligible project costs for the Beneficiary have been estimated at EUR (insert the amounts in figures and words), of which the Beneficiary will contribute (**) %, up to a maximum amount of EUR (insert the amounts and figures and words);
- the agreement is governed by its terms, the relevant Community acts related to the Competitiveness and Innovation Framework Programme, the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules, other Community law and, on a subsidiary basis, the law of [Belgium/Luxemburg]. Notwithstanding the Commission's right to directly adopt enforceable recovery decisions in accordance with Article 256 of the EC Treaty, the Court of First Instance or, on appeal, the Court of Justice of the European Communities has sole jurisdiction to hear disputes between the Community and a beneficiary concerning the interpretation, application or validity of the grant agreement

3. The Commission has determined that the Beneficiary does not presently have the financial resources needed to finance its share of the costs, as required in the relevant legal acts on the ICT PSP and the Financial Regulation applicable to the general budget of the European Communities. Therefore, (Name of the parent company) (hereinafter “the Guarantor”) hereby irrevocably undertakes to provide the Beneficiary, if necessary, with the financial resources needed to finance its share of costs.

4. The Guarantor hereby irrevocably undertakes to pay to the Commission, upon its first demand, all amounts owed to the Commission by the Beneficiary up to a maximum of EUR (insert the amount in figures and words), if the latter fails to fulfil its contractual obligations in accordance with the terms specified in the Grant Agreement and any subsequent amendments, as the case may be.

5. This guarantee may be relied on at any time during the period specified under point (7) by registered letter stating that the Beneficiary has failed to fulfil its contractual obligations and specifying the amount being claimed. If the amount claimed by the Commission is less than the amount of this guarantee at the moment of the receipt by the Guarantor of the registered letter, the Commission will indicate, in the aforementioned letter or in any subsequent letter addressed to the Guarantor, whether the balance must

remain guaranteed. In the absence of any express written instructions of the Commission with respect to such balance, the Guarantor undertakes to guarantee the balance under the terms and conditions set out in this guarantee.

6. The Guarantor will execute the guarantee only on presentation of a registered letter from the Commission, in which the Commission specifies the amount to be repaid, or on presentation of a certified copy of a court judgement ordering the Beneficiary to make repayment to the Commission in full or in part.

7. This guarantee is valid from the date of its constitution [up to and including the 60th day after the last payment made by the Commission pursuant to the Grant Agreement] [or up to (specify date)] [or up the day after the last payment of the pre-financing to the other beneficiaries].

8. In the case of a financial audit initiated by the Commission before the date specified under point (7), the guarantee will be extended until the Beneficiary has reimbursed any amount due as a result of this financial audit, or until the Commission has informed the Beneficiary that the audit does not result in any reimbursement by the Beneficiary.

This guarantee and the effect given to it are governed exclusively by [law preferably Belgian law or the law of the Grand Duchy of Luxembourg].

Any dispute between the Commission and the Guarantor relating to this guarantee or to any payment made under it will be brought before the Courts in (****)[insert country (same as law in paragraph above) or a specific court in that country].

Done at (*****), on (*****)(named and signature of the authorised representative of the Guarantor)

(official stamp of the Guarantor)

ANNEX III: SPECIAL CONDITIONS

[Joint financial responsibility]

1. If any beneficiary is liable to reimburse any amount to the Commission by virtue of Article II.30 of this grant agreement, and does not honour that reimbursement, the consortium shall reimburse the amount due to the Commission.
2. The amount due to the Commission may not exceed the value of the maximum Community financial contribution in accordance with Article 5(1) of this grant agreement, as increased where applicable by interest on late payment.
3. The amount to be recovered shall be allocated between the other beneficiaries. This allocation shall be based on the relative weight of these beneficiaries, taking into account their share of the Community financial contribution as indicated in the indicative breakdown of the budget and the Community financial contribution between beneficiaries in Annex I where pre-financing is to be recovered or taking into account their share of accepted costs when an interim or final payment is to be recovered.

Any amount claimed from a beneficiary shall however not exceed the contribution it is entitled to receive according to applicable reimbursement rates. The amount a beneficiary is entitled to receive is based on its provisional costs as indicated in Annex I where pre-financing is to be recovered or is based on its costs accepted by the Commission when an interim or final payment is to be recovered.

5. Paragraphs 1 to 4 do not apply where the defaulting beneficiary is a public body.
6. The consortium is not jointly responsible for penalties imposed on a defaulting beneficiary as referred to in Article II.31.

[

[Payments subject to the establishment of a blocked account or equivalent by the coordinator]

Payments referred to in Article 6 shall be made by the Commission only after the coordinator provides the Commission with its bank's prior written confirmation of the establishment of a dedicated bank account denominated in euros with the following attributes:

- the account is established for the purpose of receiving monies from the Commission specifically for the purpose of carrying out this grant agreement, and
- on the basis of a prior irrevocable authority provided by the coordinator (as account holder) to its bank with a list of dedicated beneficiaries and schedule of transfers approved by the Commission.

The coordinator undertakes to immediately transfer the appropriate funds to the participants of the consortium identified in the list of beneficiaries, in the amounts established in the schedule.

[Trust account]

The bank account referred to in Article 6(2) of this grant agreement, to which all payments of the Community financial contribution shall be made, shall be opened as a trust account to be used exclusively for the purpose of the project.

[Payment of the consortium's pre-financing subject to obtaining a financial guarantee from a beneficiary]

The coordinator shall not distribute to the beneficiary [name] any pre-financing until a financial guarantee of a value of [amount] is provided to the Commission by the consortium or the beneficiary.

[The beneficiary agrees that in lieu of a financial guarantee no pre-financing shall be provided]

The coordinator shall not distribute to the beneficiary [name] any pre-financing. Only interim payments based on approved reports and deliverables shall be made to this beneficiary.

[Payment of the consortium subject to obtaining a financial guarantee from the coordinator]

Notwithstanding the provisions of Article 6, any payment for this project shall not be made by the Commission until a financial guarantee of a value of [amount] is provided by the coordinator to the Commission. The guarantee may be lifted once proof is provided that all the other beneficiaries have received their share of the payment.

ANNEX IV – EARLY WARNING SYSTEM: A SHORT OVERVIEW

The Early Warning System (EWS) was set up on 22 July 1997. The system has been adapted and consolidated by [Commission Decision \(C\(2004\)193/3 of 03.02.2004\)](#) on the Early Warning System (EWS), as last modified by the 2006 internal rules.

The principal purpose of the Early Warning System is to circulate information among all EC departments about recipients of Community funds (beneficiaries) who could represent a threat to Communities' financial interests or have committed "administrative errors or fraud". At departments' request, a flag is entered against these recipients in the Commission's central third-party file, indicating the category of alert and the originating department.

Depending on the nature of the information and the author of the warning, information in the EWS is divided into five categories of warning of ever increasing risk, hereafter designated as W1 to W5, in accordance with Articles 3 to 7 of Decision (C(2004)193/3 of 03.02.2004):

- W1, Suspicion related to third party : where information gives sufficient reason to believe that findings of fraud, serious administrative errors or other irregularities will be recorded, shall be notified by:
 - the Office for the Fight Against Fraud (hereafter referred to as "OLAF") at an early stage of an investigation, after having informed the relevant Authorising Officer(s) by delegation, hereafter referred to as "the AOD(s)", responsible in accordance with the internal rules on the implementation of the budget;
 - OLAF or the Internal Audit Service (hereafter called "IAS") during an investigation, after having informed the responsible Authorising Officer(s) by delegation
 - the responsible Authorising Officer(s) by delegation on the basis of reports from the Court of Auditors, his/her/their Internal Audit Capacity ("IAC") or other audits or investigations.
- W2, Third party subject to findings of serious administrative errors or fraud: where a third party is subject to findings of serious administrative errors or fraud, shall be notified by OLAF or the IAS on the basis of their investigations or by the AOD on the basis of reports from the Court of Auditors, his/her/their IAC or other audits or investigations.
- W3, Third party subject to pending juridical proceedings: where a third party is subject to pending legal proceedings, shall be notified by the Accounting Officer upon receiving notification of attachment orders (W3a) or by the Authorising Officer upon information that the third party is subject to judicial proceedings for serious administrative errors or fraud (W3b).
- W4 Third party subject to recovery orders, exceeding certain thresholds, issued by the Commission: shall be activated by the Accounting Officer against third parties subject

to recovery orders issued by the Commission exceeding a certain amount and on which payment is significantly overdue.

- W5, Third party who can be excluded according to Commission/Council regulations: where a third party is excluded in accordance with regulatory provisions (FR or Regulation 881/2002), shall be notified by the Authorising Officer by delegation

The consequences of EWS warnings range from reinforced monitoring to exclusion from award of contract and participation. For warnings W2, W3 and W4, payments are suspended. For some W5 warnings¹², payments are blocked automatically. For warnings W2, W3, W4 and W5 a formal note has to be sent by authorising officer to the accounting officer substantiating the reasons for making the payment despite the EWS flag.

¹² Two EWS warnings are blocking: W5a (concerning articles 93, 94, 96 and 114(3) in the Financial Regulations) and W5b (concerning certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban) for commitments and W5b for payments.