



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
REGIONAL POLICY

## REVISED

# GUIDANCE NOTE ON THE AMENDMENT OF DECISIONS TAKEN BY THE COMMISSION FOR COHESION FUND PROJECTS ON THE BASIS OF REGULATION (EC) N°1164/1994 AS AMENDED<sup>1</sup>

### **DISCLAIMER:**

*This is a document prepared by the Commission services. On the basis of the applicable EU Law, it provides technical guidance to the attention of public authorities, practitioners, beneficiaries or potential beneficiaries, and other bodies involved in the monitoring, control or implementation of the Cohesion policy on how to interpret and apply the EU rules in this area. The aim of this document is to provide Commission's services explanations and interpretations of the said rules in order to facilitate the implementation of operational programmes and to encourage good practice(s). However this guidance note is without prejudice to the interpretation of the Court of Justice and the General Court or evolving Commission decision making practice.*

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<sup>1</sup> The guidance note also concerns the measures adopted by the Commission on the basis of Regulation (EC) n°1267/1999 (hereinafter "ex-ISPA" projects").

1. Article 13(1) of Regulation (EC) No 1164/1994 establishing a Cohesion Fund provides that “projects must be adjusted on the basis of the results of monitoring and evaluation.” Article F(5) of Annex II to Regulation (EC) No 1164/1994 provides that: "On the basis of the results of monitoring, and taking account of the comments of the monitoring committee, the Commission shall adjust the amounts and conditions for granting assistance as initially approved, as well as the financing plan envisaged, if necessary on a proposal by the Member State. The decision granting assistance shall include appropriate arrangements for making the modifications, differentiating between them on the basis of their nature and importance.”
2. For the purposes of smooth implementation, sound financial management and, in particular, of timely reduction of the RAL (“reste à liquider”), in the case of projects approved from 1 January 2000 onwards, **the Commission initially took the view in 2002 that it would in principle authorise only one amendment on a case-by-case basis**<sup>2</sup>. The problems encountered during the implementation of such projects justify modifying this approach.
3. As regards the possibility of modifying grant decisions, it has to be recalled that since 31 December 2006 **commitments made under Regulation (EC) No 1164/1994 (or under Regulation (EC) No 1267/1999 for "ex-ISPA" projects) can no longer be modified**. In consequence, the Commission cannot adopt new grant decisions or modifying decisions resulting in an increase of the Community assistance allocated to a given project, stage or group of projects.
4. In the case of a **group of projects**, when a modification relates to one or more projects of the group of projects, further duly justified modifications may in exceptional circumstances be considered by the Commission concerning projects of that group which were not part of the previous modification.
5. With regard to **"ex-ISPA" projects**, the Commission will consider to making one further modification<sup>3</sup>. This allows projects adopted under ISPA to benefit from two possible modifications, while being brought into line with the guidelines in force for the Cohesion Fund.
6. In all cases (applications for minor or major amendments, Cohesion Fund/"ex-ISPA" projects) situations of ***force majeure* and/or error by the Commission** may justify further amendments to grant decisions.

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<sup>2</sup> As presented at the Cohesion Fund information meeting with the Member States on 27 June 2002.

<sup>3</sup> Letter sent to the Member States on 9 March 2005 with Guidance documents – See Guidance document n°5 "Transition from ISPA to Cohesion Fund", point 9 "Amendment of projects".

7. In addition, in order to take into account problems encountered during the implementation of projects a **second amendment** (or third in the case of "ex-ISPA" projects) of grant decisions **may be approved by the Commission** in the following cases:

**7.1 Extension of the final date of eligibility<sup>4</sup>**, provided that the following conditions are met:

- ü The extension of completion date must be duly justified.
- ü The extension requested is proportionate to the delays encountered by the project and, in any event, does not go beyond 31 December 2010 for projects approved by Commission decision before 1 January 2004. For projects first approved by Commission decision after 1 January 2004<sup>5</sup> the Commission may decide, on the basis of a duly justified request, to extend the final date of eligibility to 31 December 2011. Moreover, if it concerns a project with a Cohesion Fund contribution of at least EUR 100 million, the final date of eligibility may be extended to 31 December 2012<sup>6</sup>. In addition, a flexible interpretation is possible on a case-by-case basis for "ex-ISPA" projects, where a Financing Memorandum was signed by the candidate country in 2004 on the basis of a Commission decision adopted at the end of 2003. In order to optimise projects' execution, a specific provision of one year extension of eligibility of expenditure, i.e. to 31 December 2011 or to 31 December 2012 if it concerns a project with a Cohesion Fund contribution of at least EUR 100 million, may be granted in case the works of the project are well advanced and can be finished under the extended deadline.
- ü The request for all such extensions is based on a realistic updated work schedule which confirms that with the extended deadline it is feasible to complete the project and render it operational.
- ü If eventually and in spite of such confirmation there would be any costs to complete or render operational the project after the extended deadline, such costs would have to be covered exclusively by the national budget<sup>7</sup>.
- ü Requests to extend the final date of eligibility to 31 December 2012 have to include also a clear timetable with quarterly milestones for monitoring the actual progress of the project and correcting any deviations of its implementation as soon as they occur.

The Commission may decide to extend the final date of eligibility beyond the dates mentioned in the preceding paragraphs only under exceptional and duly justified circumstances (i.e. administrative or legal proceedings having suspensory effects, cases of force majeure which have serious repercussions for the implementation of the project supported by the Cohesion Fund, or manifest errors attributable to the Commission).

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<sup>4</sup> In case an extension of the final date of eligibility has been granted in view of the previous COCOF note 08/007/01 adopted on 23 April 2008, an additional extension of the final date of eligibility may be accepted by the Commission if the Member State can justify a further extension as necessary due to the particular circumstances which motivated the Commission to extend the final date of eligibility as outlined in the Communication SEC (2010) 405 of 19 April 2010.

<sup>5</sup> The final dates of eligibility are in line to the Amendment of the Guidelines on the closure of Cohesion Fund and ex-ISPA projects 2000-2006, SEC (2010) 0405, adopted on 19 April 2010.

<sup>6</sup> This provision also concerns pairs of cross-border projects which represent an inseparable physical investment and whose Cohesion Fund allocation totals at least EUR 100 million (such as the pair of projects 'Construction of Cross-border, Road/Rail Bridge over the Danube River at Vidin-Calafat located in Bulgaria' CCI: 2004BG16PPT005 and 'Construction of the road and rail adjoining infrastructure to the second bridge over Danube at Calafat-Vidin (Romanian Side) located in Romania' CCI: 2004RO16PPT009).

<sup>7</sup> An additional flexibility is provided for 2000-2006 projects partially advanced in order to optimise their execution. In such cases, the possibility to separate a project in two distinguished and operational sub-components is introduced. Then a partial transfer of a sub-component of a specific project to the Operational Programme co-financed in 2007-13 period is possible (bridge project principle).

As with any other modification request, requests for the extension of the final date of eligibility must be submitted before the currently valid final date of eligibility and must be accompanied by information justifying the extension.

The Commission will examine each request on a case-by-case basis and decide whether to amend the decision approving the project.

**7.2 Modification of the physical object due to cost savings** provided that the following conditions are met:

- ü Completion of the components related to the original (or modified, if applicable) decision is ensured. This is a pre-requisite: The Member State has to assess whether the request really corresponds to "cost savings". The reduction of the initial (or modified, if applicable) physical object in order to introduce new components cannot be regarded as "cost savings".
- ü It does not invalidate the main results of the initial Cost Benefit Analysis;
- ü Compliance with the Directives on environmental impact assessment and public procurement is ensured;
- ü The expenditures added as a result of the new works are eligible for a contribution from the Cohesion Fund (in accordance with Article 7(3) of Regulation 16/2003, expenditure for newly added components is eligible only from the date on which the Commission receives the request for amendment of the decision granting assistance to the project);
- ü The project will be executed within the timeframe planned in the original (or modified, if applicable) decision or the extension is realistic and proportionate, enabling completion of the new works while remaining achievable before the applicable final date of eligibility (see point 7.1 above).

**7.3 Modification of the physical object in order to co-finance cost overruns due to inflation (where real inflation had been higher than forecast inflation)<sup>8</sup>** provided that the following conditions are met:

- ü The situation can not be solved differently, i.e. within the current contractual relationship with the companies in charge of the works (contingency, price variation clauses, etc.);
- ü The modified project remains operational / functional in itself;
- ü The modified project fulfils the main overall objectives of the initial (or modified, if applicable) decision;
- ü The main results of the Cost Benefit Analysis remain valid, or the CBA must show that even with increased costs the project is still financially sound and socio-economically viable;
- ü Compliance with the Directive on environmental impact assessment is ensured;
- ü The explanation of why the Commission should consider the cost increases acceptable must be included by the Member State, on the basis of a comprehensive analysis of the situation concerning the extent of cost increase and the reasons underlying them;
- ü A commitment to execute (as phase 2) the uncompleted part of the project as originally planned, either with national financing or with ERDF/CF co-financing under the 2007-2013 period on the basis of a deadline agreed with the Commission.

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<sup>8</sup> Inflation rates at national level concerning specific sectors of relevance for the projects concerned (like energy, building materials, etc.) may be taken into account.

The operation shall be divided into at least two distinct, identifiable, financial and physical or development stages corresponding to the two "forms of assistance" concerned. This division is required to ensure transparent implementation, monitoring and cancellation of the "old" Cohesion Fund projects and to avoid the same works being financed twice from Community funds.

#### **7.4 Modification of the physical object in case of detected irregular expenditure**

##### 7.4.1 Irregularities detected by the Member State

- ü Where the control systems in a Member State detect irregularities and the Member State has corrected them itself, the Member State can replace the ineligible expenditure by other eligible expenditure from the same project, or another project in the same group of projects covered by a single decision.
- ü If the "gap" created by the withdrawal of the ineligible expenditure cannot be fully or partially replaced by other eligible expenditure from the same project, the Member State may reduce the loss resulting from the corrections it has made by seeking a modification of the grant decision. The Commission, taking into account the effective functioning of the national control system, could agree to modify the grant decision provided that the proposed modification of the physical object is duly justified on the basis of Article F (5) of Annex II to Regulation (EC) No 1164/1994 and that the objectives of the initial (or modified, if applicable) grant decision remain unchanged. If a previous modification has previously been approved by the Commission for any other reason, a second modification (or third in the case of "ex-ISPA" projects) could be considered by the Commission on the basis of the above conditions.

##### 7.4.2 Irregularities detected by the Commission services or the European Court of Auditors

- ü Where the irregularity has been detected by an audit of the Commission services or by the European Court of Auditors and the Member State accepts the audit findings and proposed correction and withdraws the expenditure, the question which arises is whether the "gap" created by this withdrawal can be replaced by other eligible expenditure from the same project, or another project in the same group of projects covered by a single decision.
- ü The Member State can replace the ineligible expenditure by other eligible expenditure from the same project, or another project in the same group of projects covered by a single decision, where this does not require an amendment of the grant decision as the physical object of the project(s) remain the same.
- ü Where the Member State seeks to modify the physical object by amending the grant decision, which would as a consequence also reduce the loss resulting from the withdrawn irregular expenditure, the Commission will, in exercising its discretion in accordance with Article F(5) of Annex II to Regulation (EC) N°1164/1994, agree to an amendment only if the modification of the physical object is in conformity with principle of sound financial management and essential for the completion of the project and its successful operation. Where therefore an amendment will have such consequence, the Commission will require reliable supporting evidence providing an objective justification of the technical necessity of the modification of the physical object.

8. Modifying decisions taken by the Commission for the following reasons constitute an exception to the principles set out in the present guidelines, in the sense that they will not be taken into account when determining the number of modifications that the Commission will consider adopting for a given project, stage or group of projects:
  - 8.1 Extension of the period concerned for the implementation of the "M+24" rule: when the modification concerns solely the extension of the "M+24" period;
  - 8.2 Cases of cost savings until 31 December 2006: solely to allow the reduction of grant (and facilitate the reallocation of freed credits);
  - 8.3 Change of the body responsible for implementation or of the paying authority or of the intermediate body mentioned in Annex I of the grant decision provided that this change has no impact on the implementation of the project under the conditions defined in the decision.