

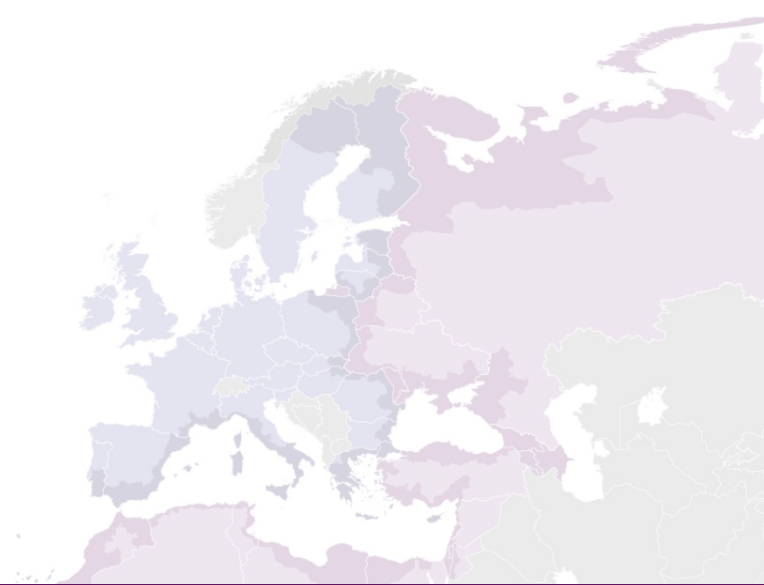


# TESIM

Technical support to the implementation and management of ENI CBC programmes

## **ENI CBC: Questions & answers on financial matters**

June 2018



## TOPIC 1: Eligibility criteria for staff of the programme bodies

### 1.1. Supporting documents for the justification of staff costs

#### Background:

*Article 48(5) of the ENI CBC Implementing Rules on eligibility of costs at project level foresees that staff costs are eligible and that, in order to be eligible, they should inter alia relate to the costs of activities which the beneficiary would not carry out if the project was not undertaken.*

*In the case of Estonia, a person can work for EST-RUS programme and also for the EST-LAT programme (the division is 50:50). The separate tasks and the part-time logic is also indicated/fixed in the job contract. As the ENI CBC Implementing Rules do not set explicitly the requirement to have timesheets in such situations, the programme intends to refer to the specific clause in the job contract and pay half of the salary from the programme's technical assistance (as 50% is dedicated to the EST-RUS programme) to ensure that 'they relate to the costs of activities which the beneficiary would not carry out if the project was not undertaken' as required by the article 48. Moreover, the majority of the ENI CBC MAs also serve a similar role in an INTERREG programme. The question at stake stems from their experience in INTERREG, where a delegated act (regulation No 481/2014) lays down the principles of cost eligibility.*

#### Question:

**Is it compulsory to fill out timesheets by the staff of the programme bodies devoting a fixed percentage of their work to programme tasks, in accordance with their job contract?**

#### Answer:

Even though specific supporting documents are not required by the ENI CBC Implementing Rules (hereinafter – ENI CBC IR), the Managing Authority should apply to technical assistance costs the same eligibility rules as for the projects, as stated in article 36 of the ENI CBC IR. Therefore, the programme bodies should provide the same supporting documents and use the same calculation methods requested by the programme to the project beneficiaries. They should be sufficient to satisfy the eligibility conditions set by the ENI CBC IR and the programme relevant documents (JOP, call for proposals, guidelines for applicants and grant contract).

The article 16 of the template for the General Conditions of the Grant Contract in PraG 2016 can serve as a general guidance to prepare justifications of the costs in the projects under instruments managed by DG NEAR. Based on the above, this article can be used as guidance for programme bodies as well.



The Managing Authorities are advised that the provisions for justification of staff costs stipulated in article 3 of Commission Delegated Regulation (EU) No 481/2014 are only applicable to European Territorial Cooperation programmes.

## 1.2. Eligibility of bonuses as part of the staff costs

### Background:

*The article 36(1) of the ENI CBC IR states: Eligibility requirements set out in article 48 apply mutatis mutandis to technical assistance costs. Costs concerning officials of the participating countries assigned to the programme may be considered eligible as technical assistance costs. Parallel remuneration systems and topping ups shall be avoided. Costs referred to in the article 49 shall not be considered eligible as technical assistance costs.*

### Question:

**The meaning of “topping ups” is not defined or explained in the ENI CBC IR. Do we understand correctly that the standard practices of the organization to pay bonuses (after development talks, after fulfilling the set objectives or after fulfilling extra tasks) to an employee or official is not a topping up in this context and the bonuses can still be paid to employees/officials from the TA budget and be considered as eligible?**

### Answer:

The provision of ENI CBC IR is very clear. Parallel remuneration systems and topping ups shall be avoided. Technical assistance should not be used to pay for the topping up and bonuses of officials of participating countries. However, in case payment of bonuses forms a part of the legislation of the participating country, these bonuses should be covered by the technical assistance. In case of an official from the participating country, the source of salary payment must be either the participating country budget or technical assistance budget.



## TOPIC 2: Waiver procedure and thresholds

### Background:

Taking into account that article 75 of the ENI CBC IR allows waiving the recovery of an established debt, during the financial seminar held in Budapest in September 2017 the programmes raised the question of whether any thresholds are foreseen for such waiver procedure (similarly to funds managed by DG REGIO, where a threshold of 250 EUR for waivers is applied). Additionally, as a potential simplification measure, the programmes proposed to allow waiving irregularities below a certain threshold without requiring a specific recovery decision from the Joint Monitoring Committee. The management of waivers was addressed in a number of previous TESIM events, attended by DG NEAR representatives, such as the event on closure of ENPI CBC programmes (Brussels, 10 May 2017).

### Question:

**Are there specific thresholds for waiver procedures concerning ENI CBC programmes?**

### Answer:

The EC note to the Joint Managing Authorities in charge of the ENPI CBC programmes on the notification of debt waivers (Ref. Ares(2017)5796224 - 27/11/2017), stipulates an indicative threshold of EUR 30.000 to determine whether the prior approval of the Commission needs to be granted or not. The note refers to the period 2007-2013, however it shall be used *mutatis mutandis* for the period 2014-2020.

For amounts lower than this threshold, in line with the principles of sound financial management and proportionality (and assuming that the due diligence was fully exercised) the Managing Authority shall establish waivers without consulting the Commission. The justifications for the waiver shall be properly documented and filed to allow for a proper audit trail. Whatever the case, no threshold for applying an automatic waiver of recoverable amounts, as the one used in Interreg programmes managed by DG REGIO, exists for ENI CBC programmes. A prior approval from the Joint Monitoring Committee is compulsory regardless the amount to be waived.

## TOPIC 3: Recoveries

### 3.1. Recoveries from beneficiaries located in Member States (not lead beneficiaries)

#### Background:

*In case of recovery the Managing Authority addresses the recovery notice/letter to the lead beneficiary. If it is not successful, then the Managing Authority addresses the letter to the beneficiary, and then finally to the concerned Member State. At the same time, the Grant Contract is concluded between the Managing Authority and the lead beneficiary, and therefore some Managing Authorities are unsure of the legal basis for requesting/ordering anything directly from a beneficiary.*

#### Question:

***In case of unsuccessful recovery from a beneficiary located in a Member State after the initial request via the lead beneficiary, does the Managing Authority need to address a letter directly to the beneficiary? May the recovery simply be ensured by the Member States' liability via the conclusion of separate agreements (e.g., MoU)?***

#### Answer:

The recovery chain presented in the article 75 of the ENI CBC IR requires that after unsuccessful recovery procedure at partnership level (beneficiary-lead beneficiary) the Managing Authority directly addresses the concerned beneficiary to repay the amount due. Therefore the notification foreseen in the above-mentioned article ("*the Managing Authority shall formally notify the latter to repay to the lead beneficiary*") is obligatory. This procedure may be regarded as a useful tool at the final stage of the process. If the recovery remains unsuccessful, the Managing Authority shall request the Member State in which the concerned beneficiary is established to reimburse the amounts unduly paid.

## 3.2. Direct recovery from the beneficiaries to the Managing Authority

### Background:

*In the case of repayment of the amount unduly paid, participants of the financial seminar held in Budapest in September 2017 raised an issue related to article 75 of the ENI CBC IR. This article foresees that the concerned beneficiaries shall repay the lead beneficiary the amounts unduly paid. However, the programmes confirmed that, in practice, beneficiaries might pay the amount due directly to the Managing Authority, especially in cases where the lead beneficiary is in a situation of unrecoverable amount itself, in bankruptcy or impossible to contact (all these situations happened in ENPI CBC). While formally such approach would not be in line with article 75, the protection of financial interest of the EU and the programme would be ensured. Additionally, such approach would alleviate the risk of payments to the Managing Authority being withheld by the lead beneficiaries. Participants expressed the opinion that an elaboration by DG NEAR on the practical application of this article could be helpful.*

### Question:

**Would it be possible, in duly justified cases (e.g., bankruptcy or impossibility of contact with the lead beneficiary), to have a direct recovery from the beneficiaries and not through the lead beneficiaries, despite the literality of article 75 of ENI CBC IR?**

### Answer:

Article 80 of the Financial Regulation (Regulation 966/2012) stipulates that “The accounting officer shall exercise due diligence to ensure that the Union receives its revenue and shall ensure that the Union’s rights are safeguarded”. A direct voluntary payment of the recovery from a beneficiary to the Managing Authority should be understood as an exercise of “due diligence” in the duly justified cases where the recovery is not possible following the procedure as described in article 75 of the ENI CBC IR (i.e., bankruptcy of the lead beneficiary, lead beneficiary in a situation of unsuccessful recovery or impossibility to contact the lead beneficiary).

### 3.3. Information to the European Commission on recoveries

**Question:**

**What is the procedure that the Managing Authority shall follow for informing the European Commission on recoveries? (frequency of providing information, concrete processes which shall be carried out).**

**Answer:**

See EC note Ref. Ref. Ares(2017)4429026 - 11/09/2017

### 3.4. Legal procedures in unsuccessful recoveries

**Background:**

Article 75 of the ENI CBC IR sets the rules for the repayments to the MA. In addition, the EC has issued a note on the 23<sup>rd</sup> May 2016, which also explains the steps concerning the recoveries in case the beneficiary is a private entity from a CBC Partner Country.

**Question:**

**The last paragraph of the EC's note contains the following sentence: "In an exceptional situation where the MA or the Commission, despite all possible measures taken, cannot recover the unduly paid funds, neither from the lead beneficiary nor from the concerned beneficiary, the unrecovered funds will unfortunately be lost from the programme". Could the EC specify what is meant as "all possible measures" that the Managing Authority shall take in order to try to recover the unduly paid funds? For example, is going to court against the beneficiary considered as the measure that must be taken?**

**Answer:**

As an overarching principle, the MAs shall demonstrate the effort taken in every step of the recovery process. The documents saved as the recovery file will serve as an evidence when submitted to the EC. According to the article 31.3 of the ENI CBC IR, in case of pending legal proceedings (initiated by any relevant body – national, anti-fraud body, OLAF, etc.) the EC shall be informed. In principle, undertaking legal action is not a condition sine qua non in order to demonstrate the due diligence of the Managing Authority. Nevertheless, Managing Authorities are expected to undertake actions which are in line with the amounts involved. In this context, legal action may be a need in case the amounts are high. More details in this respect will be provided to the programmes as early as possible.

## TOPIC 4: Irregularities

### 4.1. Definition of irregularity

#### Background:

A difference between ineligible expenses and irregularities was discussed during the TESIM financial seminar held in Budapest in September 2017. Two approaches concerning when ineligible expenditure could be classified as irregularity were identified:

- a) after they are included in the statement of expenditure that is submitted to the European Commission;
- b) all ineligible expenditure are irregularities irrespectively at which stage they are detected and corrected.

This question has been already sent to DG NEAR by the Latvia – Russia CBC Programme.

#### Question:

**Should all detected ineligible expenses be considered as an irregularity? Which of the following approaches concerning when ineligible expenditure could be classified as irregularity is correct?**

- a) after they are included in the statement of expenditure that is submitted to the European Commission;
- b) after they are accepted by the Managing Authority and the related payment claim has reimbursed?
- c) all ineligible expenditure are irregularities irrespectively at which stage they are detected and corrected.

#### Answer:

According to the ENI CBC IR, irregularity is “any infringement of a financing agreement, a contract or of applicable law resulting from an act or omission by an economic operator involved in the implementation of the programme, which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union”. Therefore, ineligible expenses will constitute an irregularity only if this infringement has or would have effect of prejudicing the EU budget.

Irregularities are possible even before the costs are included in the statement of expenditure that is submitted to the European Commission, i.e., if detected by any programme body when costs are already approved by the Managing Authority, the



related payment claim has been reimbursed, even if the expenses have not yet been declared to the European Commission. According to Article 71 of the ENI CBC IR, at that stage the MA should be responsible for taking the appropriate measures in order to prevent any possible irregularity.

On the contrary, if the ineligible expenses are detected during the expenditure verification or the administrative verification during the reporting process and before they are accepted by the Managing Authority, such ineligible expenses cannot be classified as irregularities, as at that stage there is no possibility of the effect of prejudicing the budget of the Union.

In conclusion, the effect of prejudicing the EU budget is only possible when the expenses in the payment claim are received and accepted by the programme bodies and the claimed amount has been reimbursed to the lead beneficiary, that is, OPTION b) in the question.

## **4.2. Investigation of irregularities by the Managing Authority concerning expenditure by beneficiaries from participating countries other than the one hosting it**

### **Background:**

*According to the article 71 of ENI CBC IR, the Managing Authority shall in the first instance be responsible for preventing and investigating irregularities and for making the financial corrections required and pursuing recoveries.*

### **Question:**

**How can the Managing Authority investigate the irregularities when it does not dispose of the sufficient knowledge of the national legislation concerning all the participating countries (e.g., tax law, labour code, acts on public procurement)?**

### **Answer:**

The Managing Authority "shall in the first instance be responsible for preventing and investigating irregularities and for making the financial corrections required and pursuing recoveries". At the same time, participating countries shall prevent, detect and correct irregularities, including fraud and the recovery of amounts unduly paid, together with any interest [...] on their territories, according to article 31 of the ENI CBC IR. Such obligation shall include the support to the Managing Authority on this matter whenever needed or required, in particular for those cases where the Managing Authority shall not dispose of the sufficient knowledge to investigate a specific issue.

In practical terms, when the Managing Authority performs its control tasks, such as administrative verifications of payment claims, on-the-spot missions or any investigation of irregularity, assistance may be sought from the Control Contact Points. The Managing Authority may also request assistance directly from the National Authorities of the participating countries.

### 4.3. Error rate and exception rate

#### Question:

**Is there a possibility to differentiate between “error rate” and “exception rate”, that is, between the amount of irregularities found by the Audit Authority during the audit process and the amount of irregularities identified by the project auditors/public officers during expenditure verification? If yes, and taking into account that the threshold for error rate is usually set at 2%, which should be the level of tolerance with exceptions found by auditors/public officers?**

#### Answer:

The auditors/public officers must report any error found, regardless of its amount. There is no tolerance with the exceptions found by auditors/public officers when carrying out the expenditure verification of the financial reports prepared by the beneficiaries. Any error identified by the auditors/public officers, the programme bodies and the participating countries needs to lead to financial corrections (if applicable) without any level of tolerance.

The concept of “exception rate” is not included either in the ENI CBC IR or in the Financial Regulation. Setting a so-called “exception rate” is an internal decision of the MAs and its level cannot be considered as a level of tolerance.

The European Commission and the European Court of Auditors define “a materiality threshold” for considering that the programme accounts give a true and fair view, which is set at 2%. This is the threshold for the Audit Authority for an unqualified audit opinion of the accounts. Therefore, the concepts of “exception rate” and “a materiality threshold” shall be regarded separately.

## TOPIC 5: Financial corrections

### 5.1. Financial corrections by Member States

#### Background:

*Financial corrections can be carried out by the Managing Authority, the European Commission and the Member States. In case of the latter, it was emphasized in the financial seminar held in Budapest in September 2017 that the Member States can directly recover amounts due only to State aid.*

#### Question:

**May a Member State directly apply financial corrections to any irregularity and not only in the case of State aid?**

#### Answer:

The Managing Authority shall in the first instance be responsible for preventing and investigating irregularities and for making the financial corrections required and pursuing recoveries. At the same time, participating countries shall prevent, detect and correct irregularities, including fraud and the recovery of amounts unduly paid, together with any interest [...] on their territories, according to the article 31 of the ENI CBC IR. It is necessary to make sure that this is correctly reflected in the financial report of the programme.

Therefore, a participating country (including Member States) can initiate a financial correction, based on the irregularities detected and according to the procedure of the programme. However, the final decision-making body on the amount of the correction is the Managing Authority, according to article 71 of the ENI CBC IR.

On the other hand, in the case of State aid, article 31.5 of the ENI CBC IR mentions the obligation of the recovery by Member States. The recovery order should be issued following a decision on the correction in accordance with the procedure indicated in the paragraphs above, that is, the Member State will only pursue the recovery when the financial correction is decided by the Managing Authority, even if the procedure was initiated by the Member State.

## 5.2. Financial corrections in case of breach of public procurement in Russia

### Background:

*At the moment, neither the ENI CBC IR nor other guidelines have dealt with the issue of financial corrections in case of breach of the public procurement in the Russian Federation (how much to deduct, how to agree on the rates, based on what etc.)*

### Question:

**As this is a horizontal issue, will any guidelines be issued by DG Near or TESIM for use in such situations (breach of the Russian Federation procurement law)? At the moment we have the information that Russia does not have any similar guidelines as are adopted on the EU level to protect the financial interests:**

[http://ec.europa.eu/regional\\_policy/sources/docoffic/cocof/2013/cocof\\_13\\_9527\\_a\\_nexe\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2013/cocof_13_9527_a_nexe_en.pdf).

### Answer:

Article 72.7 of the ENI CBC IR is applicable to the EU funding received by the beneficiaries; whereas for the funding of other parties (such as Russian Federation) the relevant Financing Agreement applies. In any case, article 72 regulates the financial corrections applied by the EC. The responsibilities of the MA are described in the article 71 - *"The Managing Authority shall take into account the nature and gravity of the irregularities and the financial loss and shall apply a proportionate financial correction"* and does not have direct reference to the COCOF guidance (no mention of flat rates or extrapolated financial correction). Therefore the specific criteria to be used in the case of breach of the public procurement in Russia should be jointly agreed between the concerned Managing Authorities and the National Authority.

## TOPIC 6: Expenditure outside the programme area

### Question 1:

***Do the amounts allocated to activities outside the programme area have to be calculated only for projects or also for technical assistance? If the Managing Authority attends seminars/trainings in Brussels, does it have to count the resources (flights, accommodation, local transport etc) allocated to this kind of business trips as resources allocated to activities outside the programme area? According to article 35(3) of the ENI CBC IR, should the Managing Authorities also check the costs of the technical assistance in this context?***

### Answer:

The threshold in article 39.2 applies to projects, as well as to activities of a promotional and capacity-building character paid by the technical assistance. Like any other activity co-financed from EU funds, activities that concern technical assistance, promotion and capacity building must be anyway of added value for the programme area.

### Question 2:

***In programmes with LIPs selected through direct award, which amount has to be taken into account when calculating the 20% of expenditure outside the programme area: the EC's overall contribution to the programme or the specific EC contribution to LIPs?***

### Answer:

The overall amount of EC contribution at programme level should be taken into account for this calculation. The threshold should not be considered separately in regards to the type of selection procedure for projects.

### Question 3:

***How to understand the meaning of "activities outside the programme" area? For example, if a project partner from outside the programme area conducts activities inside the programme area, then should the activities of this partner be counted as activities in the programme area or activities outside the programme area?***

**Answer:**

"Programme area" refers to "eligible area" (as defined in the Joint Operational Programme) in regard to the 20% threshold indicated in articles 39.2 and 45.4 of the ENI CBC IR.

The amount of EU contribution allocated to the beneficiaries located outside the programme area shall not exceed 20% of the programme total EU contribution, as stipulated in article 45.4.

The EU contribution corresponding to the cost of any activity located outside the programme area by whichever partner (located inside or outside the programme area) shall not exceed the 20% of the programme total EU contribution, as stipulated in article 39.2.

Even if the percentage of each threshold is the same, they have to be calculated separately. Consequently, the amounts allocated to activities inside the programme area by a partner located outside it do not count for the 20% threshold in article 39.2, but do count for the 20% of the threshold in article 45.4.

Therefore, the budget annexed to the grant contract and the financial reports must clearly indicate the amount allocated to activities outside the programme area for all partners and must clearly stipulate the total amount allocated to each beneficiary.



## TOPIC 7: Administrative verifications by the Managing Authority

### Question:

***Which should be the interpretation of articles 32.2 and 26.6 of the ENI CBC IR? Should the Managing Authority verify each payment claim by re-performing the work of the external auditors? Or is it possible that such re-performance may be done on the sample of projects selected for the on-the-spot checks?***

### Answer:

The ENI CBC IR do not give any detail on the scope of the “administrative verifications”. The Managing Authority should make a compliance check of each payment request, such as:

- verifying that all requested documents are present, complete and compliant with the requirements in the grant contract, both content-wise and format-wise (financial report, technical report and expenditure verification report),
- checking that the key amounts are in conformity with the grant contract (total budget, amount of pre-financing received, etc.),
- checking that the documents are signed by the legal representative.

The Managing Authority should perform this type of administrative verifications for each payment request, so that the requirement in article 26(6) is followed. A check-list for the verification of each payment request carried out should be filled-in by the Managing Authority and shall serve as evidence of the work done.

In addition, further controls can be carried out when receiving the payment request, aiming at ensuring the reliability of the expenditure verification reports. This is particularly important when the document review raises doubts about the eligibility of part or all of the declared expenditure. Further controls can be done as part of the quality control of a sample of documents, an on-the-spot check and/or at any other moment (e.g., due to an alert by the National Authority or Control Contact Point) and may imply requesting the submission by beneficiaries of supporting documents for the expenses in question.

The ENI CBC IR do not require the Managing Authority or the Joint Technical Secretariat to re-perform the expenditure verification of all supporting documents for all expenses declared in each payment request; otherwise, the work of the auditors would be void. However, the Managing Authority and the Joint Technical Secretariat must obtain an assurance that the expenditure verification is done in the required quality, and, in general, that all required elements are in place before a payment is done.

## TOPIC 8: Thresholds for procurement by beneficiaries

### Question:

**The thresholds in Annex II of the Financing Agreement, e.g 60 000 EUR, are they to be considered with or without value added tax?**

### Answer:

Thresholds are VAT-free in the public procurement procedures. If needed, more information could be found on this site:

[https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en)

Information on the public procurement legislation can also be found in PRAG. Article 4 of the Directive 2014/24/EU on public procurement stipulates that *"This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:"*. Article 5 on the methods for calculating the estimated value of procurement indicates that *"the calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents."*

Additionally, it has to be taken into account that certain public bodies in EU Member States, which are not able to recover the VAT, will have this amount as an eligible cost. The same occurs with some public bodies in certain CBC partner countries, in accordance with the text of their Financing Agreements. If the thresholds are considered VAT included, it would be lower for those beneficiaries able to recover it or exempted.

For these reasons, the thresholds in the ENI CBC IR, mentioned in the Financing Agreements, have to be considered as VAT-free.



## Supplementary questions:

**Question no 1) What is the interpretation by the EC of the “MA commitments” for interim payments stated in Article 60 of the ENI CBC Implementing Rules? Is commitment considered when the MA contracts projects or when the projects are selected by the JMC (or in case of LIPs - approved by the EC)? In addition, what is the format and timeline for interim payments?**

### Answer no 1)

- a) The sentence “MA commitments” is referring to signed contracts.
- b) Commitment is considered after the signature of a contract between the MA and a contractor or supplier.
- c) In conformity with the article 60.2 the MA can request additional pre-financing provided that the expenditure incurred or likely to be incurred before the end of the FY exceeds the amount of prefinancing.

**Question no 2) Which is the general procedure of the annual commitments from the EC (e.g., rules of payment, rules of calculating pre-financing, format of the communication)?**

**Answer no 2)** As indicated in the article 58 of IR the EC has the obligation to make annual commitment for the current financial year no later than 1 May. The amount of annual commitment is determined accordingly with the financial plan taking into account the programme`s progress and the availability of funds. The EC shall inform the MA when the annual commitment is made.

**Question no 3) In what format should interim financial report be prepared (perhaps using the same template as for financial part of the annual implementation report, supported by the MA request letter)**

**Answer no 3)** The interim financial report has to be prepared following the same template as for the annual financial report. Article 60.2 mentions that the interim report does not have to be supported by an audit opinion referred to in article 68 of the IR.

**Question no 4) What period of time will be needed for the Commission to appraise such interim request and in case of the positive opinion how much time will be needed for transfer of the additional funds to the MA?**

**Answer no 4)** Article 60.1 stipulates that Commission shall proceed with the payment of all or part of the prefinancing no later than 60 days after the date on which the payment request is registered with the Commission. Any payment will depend of the availability of credits for the financial year when the request is submitted.

