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Territorial cooperation, Belgium, France, Ireland, Luxembourg, United Kingdom

Territorial cooperation

Head of Unit

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**SUBJECT: IPA ADRIATIC PROGRAMME – CCI N° 2007CB16IPO001
INTERPRETATION OF ARTICLE 121 OF COMMISSION REGULATION EC
N°718/2007**

Dear Ms Andreola,

Further to your request, I confirm the interpretation of Article 121 of the IPA Implementing Regulation (EC) No. 718/2007 (hereinafter 'IPA IR') given by the services of the Commission to the Hungarian authorities in a letter of 19 December 2008. This letter (of which a copy was e-mailed to your services) clarified the position of the Commission regarding the opinion of Hungarian authorities to apply national procurement rules in the implementation of IPA CBC programmes. This position was already explained in a previous correspondence of the Commission to the Hungarian Authorities (letter of 28 May 2008).

In addition on 7 July 2007, the Commission services had a technical meeting to discuss Article 121. Representatives of Hungary, Bulgaria, Greece and Italy were present. The Italian Ministry of Sviluppo Economico was represented by Ms Monica Lai who explicitly said that the Italians were happy with the provisions of Article 121 and that they were against any change in that respect.

I remind hereafter the position of the Commission as regards this issue.

Legal background

The formulation of Article 121 IPA IR is the result of a series of inter-services discussions within the Commission and meetings with the Member States, including Italy, dating back since 2005-06¹.

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- ¹ - Brussels, February and June 2005: technical meetings with Member States to discuss the envisaged implementing modalities of the new IPA and ENPI CBC instruments:
- Rome, March 2006: international conference with Member States and beneficiary countries to present the implementing rules of IPA and ENPI CBC

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Article 121 IPA IR reflects the conclusion of such discussions and establishes that one single set of procurement rules should be applicable, on both sides of the border, for all IPA CBC programmes implemented in shared management with Member States and that such rules would be those applicable to external actions, as set out in the Financial Regulation (EC, Euratom) No. 1605/2002 and its Implementing Rules (EC, Euratom) No. 2342/2002.

One of the main reasons behind the choice of the single set of rules was the dissatisfaction of the Member States with the system applicable in the past to CBC programmes between beneficiary third countries and Member States, for which different instruments (e.g. Interreg/Phare), thus different set of rules, were applicable on each side of the border. IPA CBC represents a radical improvement compared to the sub-standard situation of previous cross-border cooperation at EU external borders. A single set of rules – including in terms of procurements – applicable on both sides of the borders and to all beneficiaries is the cornerstone of the IPA CBC approach, which can ensure genuinely joint cross-border cooperation activities. Putting into question this essential aspect would result in falling back to the previous unsatisfactory situation where each side was implementing its own part of the programme/projects under different, unrelated rules. Furthermore, the application of one single set of rules presents several advantages such as increased transparency and fair competition between bidders, harmonized rules with same principles and thresholds applying to all of the geographical areas and programmes operating under the instrument, with clear improvements in terms of facilitating controls and certifying expenditures.

As your programme is implemented in shared management, according to Article 118 IPA IR the participating countries shall conclude a written agreement providing, *inter alia*, for the application of the above mentioned rules and procedures for external actions, as referred to in Article 121 IPA IR. Such written agreement between the participating countries shall be annexed to the description of the management and control systems referred to in Article 115 IPA IR, which you will be submitting to the Commission soon.

On the basis of Article 128 IPA IR, the payment of any pre-financing of the EC budgetary commitments to the CBC programmes depends, among others, upon the acceptance by the Commission of the "compliance report" accompanying the description of the management and control system, as stipulated by Article 116 IPA IR.

Interpretation of Article 121 IPA IR

The purpose of Article 121 IPA IR, as identified in the second sub-paragraph of its paragraph (1), is that one single set of procurement rules applies across the whole area of the programme, i.e. both on the Member States side and on the beneficiary countries' side. The choice in favour of Community external aid rules, as set out in the Financial Regulation (EC, Euratom) No. 1605/2002 and its Implementing Rules (EC, Euratom) No. 2342/2002, was deemed necessary by the legislator in view of the specific characteristics and objectives of IPA CBC programmes.

Indeed, Article 121 IPA IR provides also for the application of Commission Decision C(2007)2034. Part II of such Decision sets out the principles and rules for procurement to be applied by 'grant beneficiaries' in the context of Community external aid. However, Article 121 IPA IR cannot be interpreted in the sense that any 'grant beneficiary' who is a

Member States public body would be entitled, by virtue of the application of section II.8.2 of Part II of Commission Decision C(007) 2034, to apply the national procurement legislation. Indeed in such case, different rules would then apply under the same CBC programme to grant beneficiaries who are Member States public bodies as compared to all other grant beneficiaries, being from Member States or from beneficiary countries. The consequence of such interpretation would therefore be that even on the Member States' side, other grant beneficiaries not falling under the same category described at section II.8.2 of Decision C(2007)2034 (e.g. NGOs) would have to apply the external aid rules. Furthermore, in the case of the IPA CBC Adriatic programme, a project lead partner (grant beneficiary), which is a public body, would impose its national procurement rules in the implementation of a joint project involving also other Member States.

Moreover it should be noted that letter (e) of Article 108(2) of the Financial Regulation (EC, Euratom) No 1605/2002 clearly excludes from the meaning of 'grants' the expenditure implemented as part of shared management. Hence, the Managing Authority of the CBC programme would not fall under the meaning of 'grant beneficiary' in the sense of Part II of Commission Decision C(2007)2034, with regard to the management of the EC funds committed under the CBC programme. Therefore, even if one would accept that section II.8.2 of Commission Decision C(2007)2034 should apply, this would only result in the possibility for public authorities in the Member States who are 'grants beneficiaries' to use national procurement rules, with the paradoxical consequence that the Managing Authority which is not a 'grant beneficiary' would have to use external aid rules.

Hence, it is clear that the application of section II.8.2 to the present context would run contrary to the same purpose of Article 121 IPA IR, as identified above, which is that one single set of procurement rules, i.e. those applicable for the purpose of cooperation with third countries, shall apply across the whole area of the programme, in Member States and beneficiary countries, regardless the activities in question or the statute of the beneficiary.

I trust that all aspects linked to the application of Article 121 IPA IR are now clarified. Should you have any further questions, do not hesitate to contact the desk officer responsible for the programme (Fausta Corda – Fausta.corda@ec.europa.eu).

Yours sincerely,

Colin Wolfe (signed)

Cc: Ms R. Rusca (Ministero dello Sviluppo Economico – Italy)

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